NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. ONZORA FITZGERALD JOHNSON AND JERRY WAYNE WHISONANT, JR., DEFENDANTS

No. COA03-686

(Filed 4 May 2004)

1. Criminal Law— joinder of trials—motion to sever

The trial court did not abuse its discretion in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by denying a defendant's motion to sever his trial from his codefendant, because: (1) although the codefendant objected to testimony that it was the codefendant's idea to commit the robbery, a witness was permitted to testify that it was not defendant's idea to commit the robbery; (2) although the codefendant objected to testimony that defendant was cooperative during the interview, a detective was permitted to testify that defendant was upset and crying during the interview and that he was neither combative nor under the influence of alcohol; (3) the defenses presented were not so antagonistic and irreconcilable that defendant was denied a fair trial; (4) although defendant contends joinder likely confused the jury about evidence presented against each defendant, defendant cites no instance in the record where evidence applicable only to the codefendant was admitted and defendant failed to assign error to jury instructions

that he contends were confusing; and (5) although a witness was not permitted to testify that defendant asked immediately after the robbery why the codefendant pulled out a gun, the exclusion of the testimony was due to the State's objection and was not caused by defendant being tried jointly with his codefendant.

2. Evidence— cross-examination—defendant unaware gun was to be used during robbery

The trial court did not err in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by limiting a witness's cross-examination by excluding defendant's statement immediately after the robbery inquiring why his codefendant pulled out a gun, because: (1) the omitted statement was not so exculpatory that it was likely that its omission improperly influenced the jury's verdict; (2) whether defendant was aware that a gun was going to be used during the robbery was immaterial to whether he intended to participate in the robbery; and (3) the witness was permitted to testify that defendant was very angry after the robbery and that there was hostility between defendant and the codefendant.

3. Robbery— dangerous weapon—instructions—acting in concert

The trial court did not err in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by failing to instruct the jury in accordance with defendant's request concerning the theory of acting in concert, because: (1) the jurors were instructed that they need not find that defendant had intent to use a dangerous weapon in order to be convicted of robbery with a dangerous weapon, but that they need only find that defendant acted in concert to commit robbery and that his codefendant used the dangerous weapon in pursuance of that common purpose to commit robbery; and (2) the instruction was a correct statement of law.

4. Appeal and Error— preservation of issues—failure to make assignment of error

Although defendant contends the trial court erred by failing to instruct the jury to consider each defendant separately when determining their guilt or innocence as to the crimes charged, this assignment of error is dismissed because: (1) defendant failed to

preserve this issue for review by failing to set out this argument as an assignment of error in the record; and (2) assuming arguendo that this argument was properly preserved, there was no prejudicial error.

5. Robbery— dangerous weapon—sufficiency of evidence—danger or threat to life of victim

The trial court did not commit plain error when it submitted to the jury the issue of defendant's guilt of robbery with a firearm or other dangerous weapon instead of the lesser-included offense of common law robbery as to one of the victims even though defendant contends there was insufficient evidence to prove danger or threat to the life of the victim by the possession, use, or threatened use of a dangerous weapon based on the fact that the victim did not see or know about a gun during the robbery, because: (1) the question is whether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of a dangerous weapon, and not whether the victim was scared or in fear of his life; and (2) evidence was presented showing that a gun was pointed toward the victim during the robbery, thus putting his life in danger.

6. Appeal and Error— preservation of issues—assignment of error—raising a number of different legal issues

While defendant's assignments of error purporting to raise a number of different legal issues plainly violated the requirements of N.C. R. App. P. 10(c)(1), the interests of justice require the Court of Appeals to exercise its discretion under N.C. R. App. P. 2 and address the merits of defendant's appeal.

7. Evidence— exhibit—supplemental report—statement by nontestifying codefendant—no *Bruton* violation

The trial court did not violate defendant's right to confrontation in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by admitting State's Exhibit #8 into evidence which was a supplemental report prepared by a detective regarding his interrogation of a coparticipant, because: (1) the exhibit was redacted to eliminate any statements made by a nontestifying codefendant; and (2) defendant's argument that there was a clear implication from the exhibit and other evidence presented at trial that the codefendant told the detective that a person named "Bomber Clock," who was identified as defendant,

participated in the robbery is speculative and insufficient to constitute the introduction of a nontestifying codefendant's statement within the confines of *Bruton v. United States*, 391 U.S. 123 (1968).

8. Robbery— dangerous weapon—instruction—lesser-included offense of common law robbery

The trial court did not err by concluding that defendant was not entitled to a jury instruction regarding the lesser-included offense of common law robbery of one of the victims, because: (1) when a defendant is charged with robbery with a dangerous weapon and the uncontradicted evidence indicates the robbery was accomplished by the use of what appeared to be a dangerous weapon, the trial court is not required to submit an instruction on the lesser-included offense of common law robbery; and (2) the testimony of two witnesses that a gun was used to perpetrate the robbery was uncontradicted.

9. Conspiracy— robbery with a dangerous weapon—sufficiency of evidence

The trial court did not err by concluding that the State presented sufficient evidence of conspiracy to commit robbery with a dangerous weapon, because: (1) it was not essential for the parties to expressly agree to use a dangerous weapon prior to the robbery in order to submit a charge of conspiracy to commit robbery with a dangerous weapon to the jury, but instead it was essential that the parties had a mutual implied understanding to commit robbery with a dangerous weapon; and (2) the facts were sufficient to support a prima facie case that defendant conspired with others to commit robbery with a dangerous weapon at the moment he pointed a gun at the victims.

10. Conspiracy— armed robbery—failure to instruct on lesser-included offense

The trial court did not err by failing to instruct the jury on conspiracy to commit common law robbery, because: (1) the trial court is not obligated to submit a charge on a lesser-included offense unless there is evidence from which the jury could find that the included crime of lesser degree was committed; and (2) the State's conspiracy charge against defendant was based on an inference that defendant formed a mutual implied understanding with his coconspirators to commit robbery with a dangerous weapon at the moment defendant pointed a gun at the victims,

and there was no evidence from which a jury could find that defendant's actions during the robbery created an inference that defendant conspired to commit common law robbery.

11. Criminal Law— judge's pretrial comments—unavailability of transcript

Although the trial court erred in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by failing to affirmatively exercise its discretion under N.C.G.S. § 15A-1233(a) based on its pretrial comments telling the jurors to remember the evidence because "we don't have anything that can bring it back there to you" even though there was no request by the jury to review any testimony or transcripts, the error was not prejudicial since defendant did not argue any circumstances indicating that there was any testimony or evidence in this case involving issues of some confusion and contradiction that would make it likely that the jury would have wanted to review it.

12. Jury— voir dire—automatic disregard of testimony in light of plea bargain

The trial court did not abuse its discretion in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by permitting the State to ask potential jurors during voir dire if there was anyone who would automatically disregard any and all testimony of a coparticipant even in light of other believable evidence if the jury found out that the coparticipant actually received a plea bargain, because: (1) the question was not directed at discerning whether the potential jurors would believe the coparticipant in spite of his having agreed to a plea bargain, but whether jurors would be able to consider his testimony notwithstanding his having agreed to a plea bargain; and (2) the question properly was directed at the potential juror's ability to be fair and impartial.

13. Appeal and Error— preservation of issues—failure to object

Although defendant contends the trial court erred in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by excusing a potential juror for cause, this assignment of error is dismissed because: (1) defendant did not pre-

serve this error for appellate review based on his failure to object at trial; and (2) defendant is not entitled to plain error review.

14. Sentencing— prior record level—stipulation

Defendant is not entitled to a new sentencing hearing in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case based on the State's alleged failure to meet its burden of proving by a preponderance of the evidence defendant's prior record level, because the trial court's exchange with defense counsel regarding the worksheet submitted by the State in this case constituted a stipulation by defendant to the prior convictions listed on the worksheet when: (1) defendant did not object to the convictions on the worksheet upon the trial court's inquiry regarding whether he had any questions or concerns about it; and (2) in fact defense counsel answered in the affirmative when the trial court stated that defendant, at the very least, had seven prior record level points which would constitute a level three offender.

Appeal by defendants from judgments entered 22 July 2002 by Judge Larry G. Ford in Rowan County Superior Court. Heard in the Court of Appeals 3 March 2004.

Roy A. Cooper, III, Attorney General, by Elizabeth N. Strickland, Assistant Attorney General, and James M. Stanley, Jr., Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant Johnson.

Bryan Gates, for defendant-appellant Whisonant.

MARTIN, Chief Judge.

Defendants appeal from judgments imposing active sentences entered upon their convictions by a jury of robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. The evidence presented at trial tended to show the following: at around noon on 19 March 2001, Roger Storey, Anne Corriher, and D.G. Wong were standing beside Mr. Storey's automotive repair shop in Salisbury, North Carolina. As the group was talking, a white Pontiac Grand Am occupied by several individuals drove by slowly as if they were looking at

something. About five minutes later, the same vehicle returned and pulled over in front of the group. A man sitting in the passenger seat of the car asked for directions to the bus station. As Mr. Storey attempted to give the individuals directions, the man in the passenger seat started cursing and stated, "We don't want directions, give me your wallet." Mr. Storey began to back up, and the passenger said, "No, this is not a joke, give me your wallet." The passenger got out of the vehicle and Mr. Storey gave him his wallet. At this point, Mr. Storey noticed that a man in the back seat was pointing a sawed off shotgun out the window towards him. The passenger then approached Mr. Wong and Ms. Corriher. Mr. Wong gave him his pocketbook and Ms. Corriher told the man that she did not have a wallet. The passenger then returned to the vehicle and the individuals drove away. As the car drove away, the group noticed a pink rag partially obscuring the license plate, but were able to make out the first two letters, "NT," of the plate.

Mr. Storey testified that there were three black males in the vehicle, but he could not clearly see any of them except for the man in the front passenger seat, whom he later identified in a photo lineup as Elliot Wilds. Ms. Corriher testified that the person in the back seat was pointing a sawed off shotgun at the group; however, she was not able to identify any of the individuals. Mr. Wong testified that he did not see any guns during the robbery and that he remembered seeing a black man who asked for his wallet, and the driver of the car, but that he didn't see anyone else. The following morning, Officer Todd Sides of the Salisbury Police Department saw a white Pontiac Grand Am that had a license plate beginning with the letters "NT." He stopped the automobile, which was occupied by defendant Jerry Whisonant and Elliot Wilds. Both men were arrested and questioned. The police recovered a loaded shotgun, a pink rag, and shotgun shells from the vehicle. During questioning, Wilds gave a statement admitting his involvement in the crimes.

At trial, Wilds testified that defendant Johnson was his first cousin and that defendant Whisonant was a friend of Johnson's that he had met approximately two or three months before the armed robbery. Wilds stated that on the day of the crime, the group was traveling in a white Pontiac Grand Am which belonged to defendant Whisonant's girlfriend. Defendant Whisonant was driving, Wilds was sitting in the passenger seat, and defendant Johnson was sitting in the back seat.

After riding around for two or three hours looking for jobs, the three men began talking about robbing someone. Wilds testified that there was no discussion about the use of a weapon during the robbery; rather, the plan was for Wilds to jump out of the car, scare people, and then grab their wallets. When they saw Mr. Story, Mr. Wong, and Ms. Corriher standing on a corner, they drove by and then went to a nearby Salvation Army building where defendant Whisonant got out of the car and covered the license plate with a pink rag. The men then went back to the place where they had seen the three people standing and Wilds asked the group for directions to the bus station. As Mr. Storey walked up to the car, Wilds jumped out of the car and demanded his wallet and the wallets of the other two people. After collecting wallets from Mr. Storey and Mr. Wong, Wilds jumped back in the car and the men drove away.

Wilds testified that he did not see a gun before the robbery and did not know that a gun was present in the vehicle or during the robbery until he got back into the car and saw the sawed-off shotgun sitting beside defendant Johnson in the backseat. He stated that the men split the money equally and that he threw the wallets into the river.

Prior to trial, defendants' motions to sever were denied. The motions to sever were renewed at the close of the State's evidence and were again denied. In addition, defendants moved to dismiss all charges; the trial court allowed the motions as to charges of possession of a weapon of mass destruction, but denied the motions as to the remaining charges.

Defendant Johnson presented two witnesses in his defense. His girlfriend, Candace Collette Brown, testified that defendant was at home with her at the time of the alleged armed robbery. Landrum Hamm, Mr. Johnson's supervisor for two years at Stokes County Yarn, also testified on his behalf. Defendant Whisonant presented no evidence and neither of the defendants testified.

At the close of all the evidence, defendants' motions to dismiss and to sever were renewed and denied. The jury returned verdicts finding each defendant guilty of two counts of robbery with a dangerous weapon, one count of attempted robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a dangerous weapon. The trial court entered identical judgments as to each defendant, consolidating the two counts of robbery with a dangerous weapon and sentencing each defendant in the presumptive range to a

minimum term of 103 months and a maximum term of 133 months imprisonment, and consolidating the convictions of attempted robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon and sentencing each defendant to a consecutive sentence in the presumptive range for a minimum term of 103 months and a maximum term of 133 months. Defendants appeal.

Defendant Whisonant's Appeal

Defendant Whisonant sets forth eight assignments of error in the record, four of which are argued in his brief. The remaining assignments of error are deemed abandoned. N.C. R. App. P. 28(a).

Initially we consider the State's argument that defendant Whisonant's appeal must be dismissed because he fails to set forth in the record, in accordance with Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure, a legal basis to support his assignments of error. N.C. R. App. P. 10(c)(1). Compliance with the Rules of Appellate Procedure are mandatory and a failure to comply with them subjects an appeal to dismissal. *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999). Nevertheless, we conclude that the interests of justice require that we exercise our discretion and address the merits of defendant's appeal. N.C. R. App. P. 2.

[1] In his first argument, defendant Whisonant contends he was deprived of a fair trial by the denial of his motions to sever his trial from that of defendant Johnson. A trial court is required to grant a motion to sever whenever severance is necessary to achieve or promote "a fair determination of the guilt or innocence of one or more defendants." N.C. Gen. Stat. § 15A-927(c)(2)(a) (2003). "The question of whether defendants should be tried jointly or separately is within the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed on appeal absent a showing that joinder has deprived a defendant of a fair trial." *State v. Evans*, 346 N.C. 221, 232, 485 S.E.2d 271, 277 (1997), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998).

Defendant first contends he was denied a fair trial when Wilds was not permitted to testify on cross-examination, based on an objection by co-defendant Johnson, that it was Johnson's idea to commit the robbery. However, Wilds was permitted to testify that it was not defendant Whisonant's idea to commit the robbery. Thus, defendant Whisonant was not unduly prejudiced because the potentially exculpatory testimony was admitted into evidence.

Defendant Whisonant also contends he was denied a fair trial when the detective who interviewed him was not permitted to testify, due to an objection by co-defendant Johnson, that defendant Whisonant was cooperative during the interview. However, the detective was permitted to testify that defendant was upset and crying during the interview and that he was neither combative nor under the influence of alcohol. Although the specific evidence that Whisonant was cooperative could possibly have been favorably considered by the jury, the substance of the proffered evidence was made clear by the testimony which was admitted. Therefore, after considering all of the other evidence in the case, we do not find its exclusion so prejudicial as to entitle defendant Whisonant to a new trial.

Defendant Whisonant next argues his defense was antagonistic to that of co-defendant Johnson, and that the defenses were so conflicting and irreconcilable as to result in an unfair trial. Defendant Whisonant admitted he was driving the vehicle during the robbery, but claimed he was unaware that a crime was going to occur. Defendant Johnson's defense was that he was not present during the robbery. "The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *State v. Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986) (internal quotation omitted).

After considering all of the evidence, we do not believe the defenses presented in this case were so antagonistic and irreconcilable that defendant was denied a fair trial. Defendant's defense, that he was driving the vehicle but was unaware that a robbery was going to take place, never directly implicated co-defendant Johnson as a perpetrator of the crime. Likewise, Johnson's defense, that he was not present at the robbery, in no way implicated defendant Whisonant as a willing participant during the crime. Thus, we cannot say the "codefendants' defenses are so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *State v. Nelson*, 298 N.C. 573, 587, 260 S.E.2d 629, 640 (1979) (internal quotation omitted), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980).

Defendant Whisonant also argues that he was denied a fair trial because the joinder likely confused the jury about evidence presented against each defendant. Prejudice can result where evidence applicable to only one defendant is admitted but no limiting instruction is given to instruct the jury not to consider that evidence against a co-defendant. *See State v. Wilson*, 108 N.C. App. 575, 583, 424 S.E.2d

454, 458, *disc. review denied*, 333 N.C. 541, 429 S.E.2d 562 (1993). Specifically, defendant Whisonant argues that he may have been convicted based on evidence applicable only to Johnson. Defendant Whisonant cites no instance in the record where evidence applicable only to Johnson was admitted; rather, he cites only jury instructions given by the trial court which he contends were confusing. However, defendant failed to assign error to these instructions. We, therefore, find no merit in defendant's argument.

Defendant next contends he was denied a fair trial when Wilds was not permitted to testify about a potentially exculpatory statement made by him. Specifically, Wilds was not permitted to testify on cross-examination that Whisonant said immediately after the robbery, "Why did he pull out the gun?" Wilds was permitted to testify, however, that Whisonant was "very angry" after the robbery and that there was hostility between Johnson and Whisonant. The testimony as to Whisonant's statement was excluded based on an objection by the State that the testimony was self-serving hearsay. Co-defendant Johnson objected only after the trial court had sustained the State's objection. Since the exclusion of the testimony was due to the State's objection, any prejudice occasioned to defendant Whisonant thereby was not caused by his being tried jointly with Johnson and we reject his argument to the contrary.

[2] In a related assignment of error, defendant Whisonant argues the trial court's exclusion of the statement was error. Defendant argued at trial, and in his brief to this Court, that the statement, "Why did he pull out the gun?", qualified as an excited utterance and therefore, should have been admitted as an exception to the hearsay rule.

A trial court "has broad discretion over the scope of cross-examination" and its "rulings regarding the scope of cross examination will not be held in error in the absence of a showing that the verdict was improperly influenced by the limited scope of the cross-examination." *State v. Yearwood*, 147 N.C. App. 662, 665, 556 S.E. 672, 675 (2001) (internal quotation omitted). Thus, even if we were to hold that the trial court erroneously omitted the testimony, to afford defendant relief, we would also have to determine that such error improperly influenced the jury's verdict.

After careful review, we conclude that the omitted statement in this case is not so exculpatory that it is likely that its omission improperly influenced the jury's verdict. The statement goes to defendant's knowledge that a gun was going to be used during the

robbery, not to his knowledge that a robbery was going to take place. Under the theory of acting in concert, upon which the jury was instructed, if two or more persons join in a purpose to commit a crime, each person is responsible for all unlawful acts committed by the other persons as long as those acts are committed in furtherance of the crime's common purpose. *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991). Whether or not defendant was aware that a gun was going to be used during the robbery is immaterial to whether he intended to participate in the robbery and thus, the exclusion of the statement did not unreasonably prejudice defendant's case. Additionally, while Wilds was not permitted to testify as to the statement itself, he was permitted to testify that defendant Whisonant was "very angry" after the robbery and that there was hostility between Whisonant and Johnson. Accordingly, we conclude the trial court's limitation of the cross-examination of Wilds did not improperly influence the jury's verdict.

[3] In his next assignment of error, defendant argues the trial court erred when it declined to instruct the jury in accordance with his request concerning the theory of acting on concert. Defendant requested that the trial court instruct the jury:

> 2. ACTING IN CONCERT.
>
> For a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons join in a purpose to commit Robbery with a Dangerous Weapon, each of them, if actually or constructively present, is guilty of that crime if the other commits the crime, if they shared a common plan to commit that offense.

The trial court, instead, gave the following instruction:

> Now, for a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons join in a purpose to commit robbery, each of them, if actually or constructively present, is not only guilty of that crime if the other commits the crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose to commit armed robbery, or as a natural or probable consequence thereof.

In essence, the jurors were instructed that they need not find that defendant had intent to use a dangerous weapon in order to be convicted of robbery with a dangerous weapon. Instead, they need only

find that defendant acted in concert to commit robbery and that his co-defendant used the dangerous weapon in pursuance of that common purpose to commit robbery. As explained by our Supreme Court in *State v. Barnes*, 345 N.C. 184, 230-33, 481 S.E.2d 44, 69-71 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998), this is a correct statement of law and therefore, defendant's assignment of error is overruled.

[4] Defendant also argues the trial court erred by not properly instructing the jury to consider each defendant separately when determining their guilt or innocence as to the crimes charged. *See State v. Waddell*, 11 N.C. App. 577, 579, 181 S.E.2d 737, 738 (1971) ("[E]ach defendant [is] entitled to have his individual guilt or innocence considered and determined by the jury separate and apart from how the jury should find as to the other defendant."). However, this argument is not set out as an assignment of error in the record, and thus, defendant fails to preserve it for our review. N.C. R. App. P. 10(a). Assuming, *arguendo*, that the issue had been properly preserved by an assignment of error, we find, after careful review, no prejudicial error in the trial court's instructions.

[5] In his final argument, defendant contends the trial court committed plain error when it submitted to the jury the issue of defendant's guilt of robbery with a firearm or other dangerous weapon, instead of the lesser included offense of common law robbery, as to D.G. Wong. The Court will reverse for plain error "only in exceptional cases where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Davis*, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998) (internal quotations omitted), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

The elements of robbery with a firearm or other dangerous weapon are set forth in N.C. Gen. Stat. § 14-87 (2003). Our Supreme Court stated in *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978):

> [T]he essentials of the offense set forth in G.S. 14-87 are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of 'firearms or other dangerous weapon, implement or means'; and (3) danger or threat to the life of the victim.

Id. at 63, 243 S.E.2d at 373.

Defendant contends there was insufficient evidence to prove danger or threat to the life of D.G. Wong by the possession, use, or threatened use of a dangerous weapon because Mr. Wong did not see or know about a gun during the robbery. However, "[t]he question in a [robbery with a firearm or other dangerous weapon] case is whether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of a dangerous weapon, not whether the victim was scared or in fear of his life." *Id.* Evidence was presented at trial showing that a gun was pointed toward Mr. Wong during the robbery, thus, putting his life in danger. Accordingly, there was substantial evidence to support the trial court's instruction on robbery with a firearm or other dangerous weapon as to D.G. Wong. Defendant's final assignment of error is overruled.

Defendant Johnson's Appeal.

Defendant Johnson sets forth thirty-eight assignments of error in the record, eight of which are argued in his brief. The remaining assignments of error are deemed abandoned. N.C. R. App. P. 28(a).

[6] As an initial matter, the State argues that defendant Johnson's appeal should be dismissed due to his violation of Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure in failing to confine, so far as practicable, the legal basis for his assignments of error in the record to a single issue of law. N.C. R. App. P. 10(c)(1).

Defendant sets forth the following purported legal basis for each of his thirty-eight assignments of error:

> . . . on the ground that the Court's action violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, Article I, §§ 18, 19, 20, 23, 24, 27 and 35 of the North Carolina Constitution, and the North Carolina common and statutory law. Defendant asserts constitutional error, trial error, structural error, or in the alternative, plain error.

Our Supreme Court has stated that an assignment of error "purporting to raise a number of different legal issues[] is insufficient under our Rules of Appellate Procedure to raise any of them." *State v. McCoy*, 303 N.C. 1, 19, 277 S.E.2d 515, 529 (1981). While defendant's assignments of error plainly violate the requirements of Rule 10(c)(1), we conclude, as we did with respect to defendant Whisonant, that the interests of justice require us to exercise our discretion and address the merits of defendant's appeal. N.C. R. App. P. 2.

[7] Defendant first contends the trial court erred when it admitted State's Exhibit #8 into evidence. State's Exhibit #8 is a supplemental report prepared by Detective R. K. Harris of the Salisbury Police Department regarding his interrogation of Wilds. The report was redacted in parts to omit any statements allegedly made by co-defendant Whisonant and states, in pertinent part:

> After about forty-five minutes of interviewing [Wilds], I left him in the polygraph/interview room while I went to talk to Det. Colvin about what [Wilds] had told me. **[REDACTED].** I then went back into the polygraph/interview room with [Wilds] to discuss what I had found out. [Wilds] continued to deny any involvement with the robbery. I advised him to set [sic] in the room and think about what he had told me. A short time later, I went back in and asked [Wilds] to get his heart right and tell me about the robbery. [Wilds] then looked at me and stated that he had robbed the people. . . . I then advised Det. Colvin what had transpired. **[REDACTED].** I went back into the room and asked [Wilds] who "Bomber-Clock" was. [Wilds] stated that it was Onzoro Johnson. He also stated that he was the third suspect with them at the time of the robbery.

Later at trial, evidence was presented to show that at the same time Wilds was being interviewed by Detective Harris, Detective Colvin was interviewing defendant Whisonant. Defendant Johnson argues his confrontation rights were violated when State's Exhibit #8 was admitted into evidence because it implies that defendant Whisonant told Detective Colvin that a person named "Bomber Clock" was present during the robbery.

It is a violation of a criminal defendant's confrontation rights to introduce into evidence the statement of a non-testifying co-defendant implicating the defendant. *Bruton v. United States*, 391 U.S. 123, 126, 20 L. Ed. 2d 476, 479 (1968). In this case, State's Exhibit #8 was redacted to eliminate any reference to statements made by Defendant Whisonant. Thus, defendant's reliance on *Bruton* is without merit.

Nonetheless, defendant Johnson argues that while there are no direct statements by defendant Whisonant contained in State's Exhibit #8, there is a "clear implication" from the exhibit and other evidence presented at trial that Defendant Whisonant told Detective Colvin that a person named "Bomber Clock" participated in the robbery. We find this argument to be speculative at best, and not suffi-

cient to constitute the introduction of a non-testifying co-defendant's statement within the confines of *Bruton*. Defendant's assignment of error is overruled.

In the next two assignments of error argued in his brief, defendant Johnson contends the State presented insufficient evidence that he committed a robbery with a dangerous weapon of Mr. Wong, or alternatively, the trial court erred by failing to instruct the jury on the lesser included offense of common law robbery as to Mr. Wong. We find no error in either respect.

We have addressed the sufficiency of the evidence in our consideration of defendant Whisonant's appeal and there is no reason to repeat our discussion. For the reasons set forth therein, we overrule defendant Johnson's similar assignment of error.

[8] In his alternative argument, defendant Johnson contends that he was entitled to a jury instruction regarding the lesser included offense of common law robbery of Mr. Wong. "As a general rule, when there is evidence of a defendant's guilt of a crime which is a lesser included offense of the crime stated in the bill of indictment, the defendant is entitled to have the trial judge submit an instruction on the lesser included offense to the jury." *State v. Tarrant*, 70 N.C. App. 449, 451, 320 S.E.2d 291, 293 (1984). It has been held that when the defendant is charged with robbery with a dangerous weapon and "the uncontradicted evidence indicates that the robbery, if perpetrated, was accomplished by the use of what appeared to be a dangerous weapon," the trial judge is not required to submit an instruction on the lesser included offense of common law robbery. *Id.* at 451-52, 320 S.E.2d at 294. In this case, the testimony of two witnesses that a gun was used to perpetrate the robbery was uncontradicted. Therefore, the trial court was not required to submit an instruction for the lesser included offense of common law robbery as to Mr. Wong.

[9] Defendant next argues the State presented insufficient evidence that he committed conspiracy to commit robbery with a dangerous weapon, or alternatively, the trial court erred by failing to instruct the jury on conspiracy to commit common law robbery. We disagree.

Defendant first argues there was insufficient evidence to support a conviction of conspiracy to commit robbery with a dangerous weapon because there is no evidence that the parties discussed using a weapon prior to the robbery. Indeed, the State's own witness, Wilds, testified that he was not aware there was a weapon in the vehicle

prior to the robbery and there was no mention of a weapon during the parties' discussions prior to the robbery.

Our Supreme Court stated in *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975):

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. To constitute a conspiracy it is not necessary that the parties should have come together and agreed in *express* terms to unite for a common object: A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.

Id. at 615-16, 220 S.E.2d at 526 (internal quotations and citations omitted). Thus, it was not essential for the parties to expressly agree to use a dangerous weapon prior to the robbery in order to submit a charge of conspiracy to commit robbery with a dangerous weapon to the jury. *See State v. Goldberg*, 261 N.C. 181, 202, 134 S.E.2d 334, 348 (1964) ("It is not essential that each conspirator have knowledge of the details of the conspiracy or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan."), *overruled on other grounds by*, *News & Observer Pub. Co. v. State*, 312 N.C. 276, 283, 322 S.E.2d 133, 138 (1984). Rather, it was only essential that there be evidence that the parties had a mutual, implied understanding to commit robbery with a dangerous weapon.

In this case, the evidence presented at trial tended to show that Wilds, Whisonant, and defendant expressly agreed to rob the three victims when they saw them standing on the corner; however, there was no discussion of using a weapon at this time. As the robbery began, defendant Johnson pointed a sawed-off shotgun out the window at the victims while Wilds took their wallets and Whisonant waited in the driver's seat. The men then drove away, split the money equally, and threw the wallets into the river. These facts are sufficient to support a *prima facie* case that defendant conspired with others to commit robbery with a dangerous weapon at the moment he pointed the gun at the victims. To be sure, our Supreme Court stated in *State v. Carey*, 285 N.C. 497, 206 S.E.2d 213 (1974):

> A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely

> passive attitude toward an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with the other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

Id. at 502-03, 206 S.E.2d at 218 (internal quotation omitted). We, accordingly, overrule defendant's assignment of error.

[10] Defendant argues in the alternative that he was entitled to have the trial judge submit an instruction to the jury on conspiracy to commit common law robbery. As previously discussed, the trial court is not obligated to submit a charge on a lesser included offense unless there is evidence "from which the jury could find that the included crime of lesser degree was committed." *State v. Tarrant*, 70 N.C. App. 449, 452, 320 S.E.2d 291, 294 (1984). In this case, the State's conspiracy charge against defendant was based on an inference that defendant formed a mutual, implied understanding with his co-conspirators to commit robbery with a dangerous weapon at the moment he pointed the gun at the victims. Since it is uncontradicted that the defendant, if present, pointed a gun at the victims, there is no evidence from which a jury could find that the defendant's actions during the robbery created an inference that defendant conspired to commit common law robbery. Accordingly, the trial court did not err when it failed to submit an instruction to the jury on conspiracy to commit common law robbery.

[11] Defendant next argues the trial court committed prejudicial error by failing to affirmatively exercise its discretion under G.S. § 15A-1233(a). N.C. Gen. Stat. § 15A-1233(a) (2003) states:

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

Our Supreme Court has held that it is error for the trial court to refuse to exercise its discretion pursuant to this statute "upon the ground

that the trial court has no power to grant the motion in its discretion." *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999) (internal quotation omitted). Where error is prejudicial, the defendant is entitled to a new trial. *Id.*

In this case, the trial court made the following comments to the jury after it was empaneled, but prior to opening arguments:

> I'm going to impose upon you in just a moment one of the most important things you are going to find when I charge you as to the law in this case. I'm going to tell you that it is your duty to remember the evidence. ***There is no transcript to bring back there.*** She might get one typed in a month. You see what I mean, we don't have the fancy equipment that you might see on TV. I don't even think its out there, but if it was, I can assure you the State of North Carolina won't spend the money for it. I don't mind putting that in the record because higher Judges agree with me on that. ***So, we don't have anything that can bring it back there to you.*** So, listen carefully, pay close attention. You are the triers of fact and it is up to you collectively, the twelve of you to go back there to remember the evidence and that is why we have twelve. Surely one of you can remember the evidence on everything that come in.

(Emphasis added).

In *Barrow*, the trial court made similar comments in response to a request by the jury for transcripts of testimony:

> Ladies and gentlemen of the jury, although the Court Reporter obviously was taking down and continues to take down everything that's in fact been said during the trial, what she's taking down has not yet been transcribed. And ***the Court doesn't have the ability to now present to you the transcription of what was said during the course of the trial.***

Id. at 646-47, 517 S.E.2d at 378 (emphasis added). The *Barrow* Court held that "the trial court's statement that it 'doesn't have the ability to now present to you the transcription of what was said during the course of the trial' suggests a failure to exercise discretion." *Id.* at 647, 517 S.E.2d at 378. Likewise, we find a failure to exercise discretion in this case where the trial court stated, "we don't have anything that can bring it back there to you."

The State argues this case is distinguishable from *Barrow* in that there was no request by the jury to review any testimony or tran-

scripts. While the statute refers solely to requests made by the jury for review of certain testimony or evidence, we nonetheless find that the purpose and intent of the statute are violated in this case since the trial court's pretrial comments could have foreclosed the jury from making a request for such testimony or evidence. Thus, we find error even without a request by the jury.

The State also argues that defendant waived any alleged error by failing to object to the trial court's comments. However, pursuant to *State v. Ashe*, 314 N.C. 28, 40, 331 S.E.2d 652, 659 (1985), defendant's error was automatically preserved for review notwithstanding his failure to object at trial.

Having found error, we must next determine whether such error was prejudicial. The burden is on the defendant to prove that a trial error not arising from rights vested under the Constitution of the United States is prejudicial. N.C. Gen. Stat. § 15A-1443(a) (2003). Prejudice is shown "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." *Id.*

In this case, a primary factor linking defendant to the crimes was Wilds' testimony. Defendant argues that where a conviction hinges in large part on the credibility of an alleged accomplice who testifies at trial, it is prejudicial error to deny the jury an opportunity to ask to review that testimony. We disagree.

It is only prejudicial error to deny the jury an opportunity to ask to review certain testimony or evidence where the defendant can show that (1) such testimony or evidence "involved issues of some confusion and contradiction," and (2) it is likely that a jury would want to review such testimony. *See State v. Johnson*, 346 N.C. 119, 126, 484 S.E.2d 372, 377 (1997) (finding prejudicial error where the trial court refused to exercise its discretion to determine whether the jury may be permitted to review certain testimony that involved issues of some confusion and contradiction).

Defendant argues no circumstances indicating there was any testimony or evidence in this case involving issues of some confusion and contradiction that would make it likely that the jury would have wanted to review it. Thus, we find no prejudicial error resulting from the trial court's pretrial comments in this case.

[12] In his next assignment of error, defendant argues the trial court erred when it permitted the State to ask potential jurors during *voir*

dire, "is there anyone who . . . will automatically disregard any and all testimony of Elliot Wil[ds] even in light of the other believable evidence if you find out that he actually received a plea bargain?" We discern no abuse of the trial court's discretion in permitting this question to be asked.

"The nature and extent of the inquiry made of prospective jurors on *voir dire* ordinarily rests within the sound discretion of the trial court." *State v. Bond*, 345 N.C. 1, 17, 478 S.E.2d 163, 171 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). It is generally considered an abuse of discretion to permit counsel "to 'stake out' a prospective juror in advance regarding what his decision might be under certain specific factual scenarios . . . ." *State v. Jaynes*, 353 N.C. 534, 549, 549 S.E.2d 179, 192 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 220 (2002).

The question presented to the potential jurors in this case was not directed at discerning whether the potential jurors would believe Wilds in spite of his having agreed to a plea bargain, but whether the jurors *would be able to consider* his testimony notwithstanding his having agreed to a plea bargain. This question is proper as it is directed at the potential juror's ability to be fair and impartial. *See State v. Conner*, 335 N.C. 618, 644, 440 S.E.2d 826, 841 (1994) (holding that questions by defense counsel as to whether prospective jurors would be able to consider a life sentence in a particular case or would automatically vote for death upon conviction were proper to discern impartiality and fairness).

[13] Next, defendant argues the trial court erred by excusing juror Melanie Jordan for cause. Juror Jordan raised her hand in response to the above quoted inquiry of the jurors. Upon further questioning, Juror Jordan stated, "I don't feel like I could believe him a hundred percent." Despite an effort by defendant to rehabilitate, the trial court allowed the State's motion to dismiss Juror Jordan for cause.

Defendant concedes that he did not object at trial to the excusal of Juror Jordan for cause. Thus, defendant has failed to preserve this error for appellate review. *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 ("This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court."), *cert. denied*, 157 L. Ed. 2d 382, 124 S. Ct. 475 (2003). In addition, defendant is not entitled to plain error review. *Id.* ("This Court has not applied the plain error rule to issues which fall within the realm of the trial

court's discretion, and we decline to do so now.") (internal quotation omitted). Therefore, defendant's argument is procedurally barred and we decline to address it.

[14] Finally, defendant contends he is entitled to a new sentencing hearing because the State failed to meet its burden of proving, by a preponderance of the evidence, his prior record level. At sentencing, the State presented a worksheet to the trial court alleging that defendant was a level three prior offender in that he had eight prior record points based on three felony convictions in New York, a conviction for DWI in North Carolina, and for being on probation at the time of his commission of the offenses charged in this case. Upon receiving the worksheet, the trial court directed the following questions to defendant's counsel:

> THE COURT: Mr. Gray, would you stand with your client and let's talk about this worksheet. Do you have any questions about the worksheet or any other concerns about it, sir?
>
> [DEFENDANT'S COUNSEL]: Your Honor, we have seen the worksheet and the record. We understand the State has treated it as a Class I felony, and realized that under the rules, they have not established that the offense, or identical offenses, is [sic] offenses in the State of North Carolina; however, we would like to bring that to the Court and show that for the record.
>
> THE COURT: That is on the—
>
> [DEFENDANT'S COUNSEL]: On all the three charges for the State of New York, Your Honor.
>
> THE COURT: Each one of them a Class I?
>
> [DEFENDANT'S COUNSEL]: They are treating them as a Class I felony.
>
> THE COURT: Well, that, of course, is the lowest level, we understand.
>
> [DEFENDANT'S COUNSEL]: Yes, sir.
>
> THE COURT: I guess that's why we're going the lowest level because if they're felonies, they have to be at least that much.
>
> [DEFENDANT'S COUNSEL]: I understand.
>
> THE COURT: And do you agree that he's on pretrial release?

[DEFENDANT'S COUNSEL]: I'm not sure whether he was on pretrial release or not, Your Honor. It doesn't matter, Your Honor, for the one point, won't make any difference.

THE COURT: One point would still keep it in the level three.

[DEFENDANT'S COUNSEL]: Yes, sir.

THE COURT: So, even if you disagree with that, certainly, it would be seven—seven points, which would still make him a level three. You would have to get down below five points to make it a level two.

[DEFENDANT'S COUNSEL]: Yes, Your Honor.

THE COURT: All right, you may have a seat.

Sometime after this exchange, the trial court sentenced defendant as a level three prior offender in the presumptive range.

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2003). A prior conviction may be proved by any of the following methods:

(1) Stipulation of the parties.

(2) An original or copy of the court record of the prior conviction.

(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.

(4) Any other method found by the court to be reliable.

Id. It has been repeatedly held that the submission of a worksheet by the State is insufficient to satisfy the State's burden under this statute; therefore, we must determine whether the trial court's exchange with the defendant's counsel regarding the worksheet submitted by the State in this case constituted a stipulation by the defendant to the prior convictions listed on the worksheet. *See State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002).

In *Eubanks*, this Court found that the defendant had stipulated to the prior convictions listed on a worksheet submitted by the State where the defendant stated that he had no objections to the worksheet. *Id.* at 505-06, S.E.2d at 742-43. Similarly, in this case, defendant

Johnson's counsel did not object to the convictions on the worksheet upon the trial court's inquiry regarding whether he had any questions or concerns about it. In fact, defendant Johnson's counsel answered in the affirmative when the trial court stated that the defendant, at the very least, had seven prior record level points which would constitute him a level three offender. We interpret this exchange between the trial court and defendant Johnson's counsel to be a stipulation by the defendant of the prior convictions listed on the worksheet submitted by the State. Accordingly, we overrule defendant Johnson's final assignment of error.

Defendant Whisonant's appeal: No Error.

Defendant Johnson's appeal: No Error.

Judges HUDSON and GEER concur.

CLARK STONE COMPANY, INC., PETITIONER v. N.C. DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, DIV. OF LAND RESOURCES AND NORTH CAROLINA MINING COMMISSION, RESPONDENTS, APPALACHIAN TRAIL CONFERENCE NATIONAL PARKS CONSERVATION ASSOCIATION; UNINCORPORATED ASSOCIATION OF CITIZENS TO PROTECT BELVIEW MOUNTAIN; OLLIE COX; AND FAYE WILLIAMS, RESPONDENT/INTERVENORS

No. COA03-526

(Filed 4 May 2004)

1. Administrative Law— judicial review—standard of review

The trial court appropriately used the whole record test for assertions that the revocation of a mining permit was unsupported by the evidence and de novo review for assertions that the decision was in excess of authority and made upon unlawful procedure. The contested case petition in this case was filed before the effective date of N.C.G.S. § 150B-51(c).

2. Mining and Minerals— revocation of mining permit—application of whole record test—evidence supporting findings

The trial court erred in its application of the whole record test when reversing an agency decision to revoke a mining permit. Contrary to the trial court's conclusion, the findings made by the agency in revoking the permit were supported by substantial,

uncontroverted evidence that the mining operation had a significant adverse impact on the Appalachian Trail, a publically owned and federally designated National Scenic Trail.

3. Mining and Minerals— revocation of mining permit—authority

The trial court erred by determining that the Department of Environment and Natural Resources lacked authority to revoke a mining permit based on a finding that the mine operation had a significant impact on the Appalachian Trail, a publically owned and federally designated National Scenic Trail. An operation violates the Mining Act when it adversely affects the purposes of a publicly owned park, forest, or recreation area to a significant degree. N.C.G.S. §§ 74-51(d)(7), 74-58.

4. Mining and Minerals— revocation of mining permit—procedure

The trial court erred by concluding that a mining permit was revoked upon improper procedure; DENR could have modified the permit had it so chosen, but there was no obligation to do so. N.C.G.S. §§ 74-57, 74-58(a).

5. Mining and Minerals— revocation of mining permit—violation of permit terms—willful

The trial court erred by concluding that a mining permit could not be revoked because any violation of the Mining Act was not willful. Petitioner took inadequate steps to properly and effectively address the violation after being put on notice and despite guidance from DENR. That failure cannot be deemed anything other than willful.

6. Mining and Minerals— vested rights—revocation of mining permit—permit mistakenly granted

The doctrine of vested rights did not protect a mining permit where the permit was mistakenly issued in violation of an existing statute. Permits mistakenly issued do not create a vested right; moreover, the vested rights doctrine arises from a validly issued permit, while this permit's validity has been specifically and consistently challenged.

Appeal by respondents and respondent/intervenors from order entered 31 December 2002 by Judge Stafford G. Bullock in Superior Court, Wake County. Heard in the Court of Appeals 24 February 2004.

Hatch, Little & Bunn, L.L.P., by Harold W. Berry, Jr., A. Bartlett White, and Tina L. Frazier, for petitioner appellee.

Attorney General Roy Cooper, by Senior Deputy Attorney General James C. Gulick and Assistant Attorney General Jennie Wilhelm Mau, for respondent appellants.

Southern Environmental Law Center, by Donnell Van Noppen, III, and Sierra B. Weaver, for respondent/intervenor appellants Appalachian Trail Conference and National Parks Conservation Association, and Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Forrest A. Ferrell, for respondent/intervenor appellants Association of Unincorporated Citizens to Protect Belview Mountain, Ollie Cox, and Faye Williams.

WYNN, Judge.

The North Carolina Department of Environment and Natural Resources ("DENR") and the North Carolina Mining Commission (collectively hereinafter "Respondents"), together with the Appalachian Trail Conference, the National Parks Conservation Association, the Unincorporated Association of Citizens to Protect Belview Mountain, Ollie Cox and Faye Williams (collectively hereinafter "Respondent-Intervenors") appeal from an order of the trial court reversing a final agency decision by the North Carolina Mining Commission ("the Commission"). In its final agency decision, the Commission upheld the revocation of a mining permit issued by DENR to Clark Stone Company, Inc. ("Petitioner"). Thereafter, the trial court reversed the decision of the Commission.

On appeal to this Court, Respondents and Respondent-Intervenors contend the trial court erred by (I) reversing the decision of the Commission upholding the revocation of Petitioner's permit; (II) concluding that the revocation was not made upon proper procedure; (III) concluding that revocation was improper because it was not willful; and (IV) concluding that the doctrine of vested rights prohibited revocation of Petitioner's permit. For the reasons stated herein, we reverse the decision of the trial court.

The pertinent procedural and factual history of the instant appeal is as follows: Petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings on 10 October 2000. The administrative law judge reviewing the matter thereafter allowed two private, non-profit groups, the Appalachian Trail Conference and the

National Parks Conservation Association, together with the Unincorporated Association of Citizens to Protect Belview Mountain, and neighboring land owners Ollie Cox and Faye Williams to intervene in the case. Petitioner filed a motion for summary judgment, contending there were no genuine issues of material fact and that it was entitled to judgment as a matter of law.

On 9 April 2001, the administrative law judge held a hearing pursuant to Petitioner's motion for summary judgment. The evidence presented at the hearing tended to show the following: In February of 1999, Petitioner applied to DENR for a mining permit to conduct mining operations on land in Avery County, North Carolina. DENR reviewed Petitioner's application and issued a mining permit on 13 May 1999. Petitioner subsequently began preparing the land for mining operations. At the time DENR issued the mining permit, neither DENR nor Petitioner were aware that the mining operation was within visual and audible range of the Appalachian Trail, a publicly owned and federally designated "National Scenic Trail."

On 10 February 2000, Jay Leutze, a resident of the area near the mining site and a member of the Unincorporated Association of Citizens to Protect Belview Mountain, contacted Charles Gardner, the Director of the Division of Land Resources within DENR. Leutze informed Gardner of his concerns about Petitioner's mining operation and its potential impact on the Appalachian Trail. After learning of the mining operation's proximity to the Appalachian Trail, DENR initiated an investigation. Gardner traveled to the area on several occasions to view the mining site from the Appalachian Trail. Gardner testified that the mining operation was "clearly visible in good weather from [the Appalachian Trail] and particularly the portion of the [T]rail that goes down Hump Mountain toward the quarry." DENR also hired landscape and acoustical consultants to assess the situation. The site analysis submitted by the landscape architect reported that "[t]he Mine Site is visible from a substantial section of the [T]rail along Hump Mountain for a duration of approximately 20-25 minutes walking time. . . . The distance between the [T]rail at Hump Mountain and the mine site is approximately 2 miles." The analysis further found that "the visual prominence of the mine site as viewed from Little Hump Mountain appears almost equal in magnitude to that viewed from Hump Mountain." The distance between the Trail on Little Hump Mountain and the mining site is three miles. The analysis report noted that "[b]ased on the relationship of the Appalachian Trail to the Mine and the magnitude of the Phase I quarry operations, it would be diffi-

cult to meet" federal land management plan criteria for national forest properties.

Kathy Ludlow, a landscape architect and recreation analyst for the U.S. Forest Service, also prepared a scenery analysis of the mining operation. Ludlow testified that "the view from [that portion of the Trail on] Hump Mountain is an outstanding 360-degree panorama" with a "very natural-appearing landscape." Ludlow characterized the Hump Mountain site as an "important viewing location" given the large number of persons using that portion of the Appalachian Trail who have "high expectations for viewing natural-appearing scenery and attractive scenery." Further findings by Ludlow in her analysis included the following: (1) the proximity of the mining operation to the Appalachian Trail is less than three miles; (2) the duration of the direct view of the mining operation while walking along the Appalachian Trail on Hump Mountain is approximately twenty-five minutes; (3) the high quality of the view from Hump Mountain increases the duration of time spent by visitors at that particular portion of the Trail; and (4) the view of the mining site from the Appalachian Trail is "very clear" in good weather.

Dr. Noral D. Stewart, an acoustical consultant, provided an acoustical assessment of the impact of the mining operation on the Appalachian Trail. In his report, Dr. Stewart noted that "[t]he [T]rail location of primary concern is particularly unique. It is one of the few locations where there is a long unobstructed view from the [T]rail for a long walking distance along the [T]rail." Further, "the quiet mountain environment makes control of noise particularly difficult" and "means it is easier to hear a distant source." The report concluded that the mining site's "primary jaw-crusher is the major noise problem" and "would be noticed by and would likely be a major irritant to any hearing person walking the [T]rail."

On 28 February 2000, Gardner informed Paul Brown, president and stockholder of Petitioner company, that DENR would hold a public meeting concerning the mine. Approximately one hundred and fifty people attended the public hearing held on 16 March 2000. Petitioner presented information on its mining site and its effects on the Trail. Approximately thirty-one persons spoke on the subject of the mine, most in opposition thereto.

Over the next several weeks, DENR and Petitioner discussed proposed modifications to the mining permit conditions to mitigate the impact of the mine on the Appalachian Trail. On 19 April 2000, DENR

sent Petitioner a notice of its intent to revoke the mining permit unless an appropriate resolution of the problem could be found. DENR also advised Petitioner of its statutory right to an informal conference to discuss the matter. The informal conference was held 22 May 2000. During the conference, DENR requested that Petitioner submit a modification proposal, including a landscaping plan addressing the visual and acoustical impact of the mining operation on the Appalachian Trail.

Petitioner thereafter submitted proposed permit modifications and a landscape plan. Landscape architects in DENR's Division of Parks and Recreation reviewed the proposed landscape plan and determined that "little professional work [had] gone into [its] preparation." According to the architects, the proposed plan lacked the "requisites of [a] comprehensive planting plan" in that there was "no mention of soil preparation, species identification, design details, planting techniques, irrigation or general plant maintenance." Although the plan showed a "protective/visual screening buffer," it contained no "descriptive engineering or landscape data." Finally, the plan failed to develop "line-of-sight profiling between the quarry and surrounding viewpoints . . . to determine effective locations and heights of visual screens." They recommended that Petitioner "submit a plan that has been prepared by a professional landscape architectural firm which would have the expertise to do a comprehensive assessment of the visual impacts of [the mine] and determine what, if any, plantings or other landscape techniques would effectively mitigate those impacts."

Gardner informed Petitioner that its proposed landscape plan was inadequate and invited Petitioner to propose additional modifications by 4 August 2000. Gardner gave Petitioner a copy of the concerns and recommendations articulated by DENR's landscape architects. Petitioner requested an extension of time to submit a revised plan, stating that the landscape architect engaged by it was unable to do the work. DENR extended the deadline to 25 August 2000, at which time Petitioner submitted a one-page document entitled Supplemental Proposed Permit Modifications. The document was not prepared by a professional landscape architect and did not address the concerns raised by DENR's landscape architects. Four days later, DENR held a second public meeting to receive public comment on Petitioner's proposed modifications.

On 6 September 2000, DENR revoked Petitioner's permit on the grounds that the operation had a significantly adverse effect on the

Appalachian Trail in violation of the Mining Act. In its notice of revocation, DENR concluded that Petitioner's violation was willful, in that the mine was "so located and its operation . . . so designed that its ordinary operation as intended has had and would continue to have significant adverse effects, both visual and acoustical, on the purposes of the [Appalachian] Trail."

After reviewing the evidence submitted by the parties, the administrative law judge issued a recommended decision in favor of Petitioner's motion for summary judgment, concluding that DENR improperly revoked Petitioner's permit. The administrative law judge determined that, although DENR could properly *deny* an application for a mining permit if it found that the proposed operation would have a significantly adverse effect on a publicly owned park, forest or recreation area, it had no authority under the applicable statutes to *revoke* a permit on such grounds.

The matter came before the Mining Commission on 17 October 2001 for final agency decision. The Commission rejected the recommended decision of the administrative law judge, concluding that

> [i]n order to satisfy the agency's duty to uphold the Mining Act and the intent behind that statute, it is necessary for [DENR] to have the power to revoke the permit even after it was initially granted where the significant adverse effect created by the Mine did not become apparent to [DENR] until after the permit had been granted. To decide otherwise would render the permitting system contemplated by the Mining Act impotent, and would allow a permittee to escape regulation under the Act where new facts are discovered or conditions are changed.

Petitioner filed a petition for judicial review, which came before the trial court on 30 October 2002. The trial court reversed the Commission on the grounds that the decision upholding revocation of Petitioner's permit (1) violated Petitioner's constitutional rights; (2) exceeded DENR's statutory authority; (3) was made pursuant to unlawful procedure; (4) was affected by error of law; (5) was unsupported by substantial evidence in the whole record; and (6) was arbitrary and capricious. Respondents and Respondent-Intervenors appealed.

Respondents and Respondent-Intervenors contend the trial court erred in (I) applying the whole record test and determining that the Mining Commission's decision was unsupported by substantial evi-

dence; (II) concluding that DENR lacked authority under the General Statutes to revoke Petitioner's permit; (III) concluding that the revocation was made upon improper procedure; (IV) concluding that revocation was improper because it was not willful; and (V) concluding that the doctrine of vested rights prohibited revocation of Petitioner's permit. We determine first whether the trial court applied the appropriate standard of review; thereafter, we address these arguments in turn.

Standard of Review

[1] We review the trial court's reversal of a final agency decision to determine (1) whether the trial court exercised the appropriate standard of review; and (2) whether the trial court properly applied the standard of review. *Town of Wallace v. N.C. Dep't of Env't & Natural Res.*, 160 N.C. App. 49, 52, 584 S.E.2d 809, 812-13 (2003). Our scope of review is the same as that employed by the trial court. *Id.* at 52, 584 S.E.2d at 812. Under the General Statutes, the trial court may reverse or modify an agency's final decision if the substantial rights of the petitioners have been prejudiced because the agency's findings, inferences, conclusions, or decisions are: (1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary, capricious, or an abuse of discretion. *See* N.C. Gen. Stat. § 150B-51(b) (2001); *County of Wake v. N.C. Dep't of Env't & Natural Res.*, 155 N.C. App. 225, 233, 573 S.E.2d 572, 579 (2002), *disc. review denied*, 357 N.C. 62, 579 S.E.2d 387 (2003). Alleged errors of law, including questions of statutory interpretation by the agency, are reviewed *de novo* by the trial court. *See* N.C. Gen. Stat. § 150B-51(c) (2001); *Friends of Hatteras Island v. Coastal Resources Comm.*, 117 N.C. App. 556, 567, 452 S.E.2d 337, 344 (1995). Where an allegation is made that a final agency decision is not supported by competent evidence or is arbitrary and capricious, the trial court must review the decision under the whole record test. *See* N.C. Gen. Stat. § 150B-51(b)(5) (2001); *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). The whole record test requires the trial court to examine all of the evidence before the agency in order to determine whether the decision has a rational basis in the evidence. *Town of Wallace*, 160 N.C. App. at 54, 584 S.E.2d at 813. If the trial court concludes there is substantial competent evidence in the record to support the findings, the agency deci-

sion must stand. *Little v. Board of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983). The trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency. *King v. N.C. Environmental Mgmt. Comm.*, 112 N.C. App. 813, 817-18, 436 S.E.2d 865, 868 (1993).[1]

According to the trial court in the instant case, it reviewed *de novo* Petitioner's assertions that the final agency decision was in excess of statutory authority and made upon unlawful procedure, erroneous, and in excess of constitutional protections. The trial court applied the whole record test to Petitioner's assertions that the final agency decision was unsupported by substantial evidence and was arbitrary and capricious. These being the appropriate standards of review, we now must determine whether the trial court properly applied the standards.

I. *Whole Record Test*

[2] Respondents and Respondent-Intervenors first argue the trial court erred in applying the whole record test and determining that the Commission's decision was unsupported by substantial evidence on the grounds that "there was no evidence heard on the issue of 'adverse effect' and no finding was made that [the mine] would constitute an 'adverse effect' on the Appalachian Trail." We agree that the trial court erred in applying the whole record test.

In the instant case, most of the findings made by the Commission were based on facts agreed upon and stipulated to by the parties. Contrary to the trial court's conclusion, Respondents presented substantial evidence that Petitioner's mining operations had a significant adverse impact on the Appalachian Trail. Gardner testified that the visibility of the mining site from that portion of the Trail on Hump Mountain had a "significant adverse impact on the [T]rail." The three analyses submitted by the consultants hired by DENR reported in detail the negative visual and acoustical impact of the mining site on the Appalachian Trail. The evidence submitted consistently demonstrated that the mining operation has a significantly adverse impact on the purposes of the Appalachian Trail. Petitioner submitted no evidence to the contrary; indeed, whether the mine has an adverse

1. Subsection (c) of N.C. Gen. Stat. § 150B-51 requires the reviewing court to engage in a *de novo* review of a final agency decision where the agency did not adopt the ALJ recommendation. This subsection was enacted in 2000 and is applicable to contested cases commenced on or after 1 January 2001. Because the contested case petition in the instant case was filed 10 October 2000, the standard of review articulated in subsection (c) does not apply.

impact on the Appalachian Trail does not appear to have been an issue of true dispute between the parties. In its motion for summary judgment, Petitioner contended DENR lacked authority to revoke the permit under the Mining Act, but made no argument concerning adverse impact. Because the findings by the agency were supported by substantial, uncontroverted evidence, the trial court erred in reversing the decision on the ground that it was unsupported by the evidence.

II. *Authority to Revoke a Permit Under the Mining Act*

[3] Respondents contend the trial court erred in concluding that DENR lacked authority under the General Statutes to revoke Petitioner's permit. DENR revoked Petitioner's mining permit pursuant to the Mining Act of 1971, N.C. Gen. Stat. §§ 74-46 *et seq.* We therefore examine the relevant language and stated purpose of the Mining Act to determine DENR's authority under its provisions.

No mining may occur in the State unless pursuant to a valid operating permit issued by DENR. *See* N.C. Gen. Stat. § 74-50(a) (2003).

> The Mining Act clearly declares that [DENR] is vested with the authority to decide who will be granted mining permits in North Carolina. [DENR] also has the authority to condition a party's ability to mine on compliance with various requirements, and in doing so must attempt to protect the surrounding environment from potential hazards caused by specific projects.

Martin Marietta Technologies v. Brunswick County, 126 N.C. App. 806, 810, 487 S.E.2d 145, 147 (1997), *reversed on other grounds*, 348 N.C. 688, 500 S.E.2d 665 (1998).

DENR is authorized to deny an application for a mining operation permit upon finding:

> (1) That any requirement of [the Mining Act] or any rule promulgated hereunder will be violated by the proposed operation;
>
> (2) That the operation will have unduly adverse effects on potable groundwater supplies, wildlife, or fresh water, estuarine, or marine fisheries;
>
> (3) That the operation will violate standards of air quality, surface water quality, or groundwater quality that have been promulgated by [DENR];

(4) That the operation will constitute a direct and substantial physical hazard to public health and safety or to a neighboring dwelling house, school, church, hospital, commercial or industrial building, public road or other public property, excluding matters relating to use of a public road;

(5) That the operation will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area;

(6) That previous experience with similar operations indicates a substantial possibility that the operation will result in substantial deposits of sediment in stream beds or lakes, landslides, or acid water pollution; or

(7) That the applicant or any parent, subsidiary, or other affiliate of the applicant or parent has not been in substantial compliance with [the Mining Act], rules adopted under [the Mining Act], or other laws or rules of this State for the protection of the environment or has not corrected all violations that the applicant or any parent, subsidiary, or other affiliate of the applicant or parent may have committed under [the Mining Act] or rules adopted under [the Mining Act] and that resulted in:

a. Revocation of a permit,

b. Forfeiture of part or all of a bond or other security,

c. Conviction of a misdemeanor under G.S. 74-64,

d. Any other court order issued under G.S. 74-64, or

e. Final assessment of a civil penalty under G.S. 74-64.

N.C. Gen. Stat. § 74-51(d) (2003). Once issued, all permits are "expressly conditioned upon . . . any . . . reasonable and appropriate requirements and safeguards that [DENR] determines are necessary to assure that the operation will comply fully with the requirements and objectives of [the Mining Act]." N.C. Gen. Stat. § 74-51(f) (2003). For example, DENR may require an operator to install "visual screening, vegetative or otherwise, so as to screen the view of the operation from public highways, public parks, or residential areas, where [DENR] finds screening to be feasible and desirable." *Id.* If at any time after issuance of a permit, DENR determines that the mining activities under the permit "are failing to achieve the purposes and requirements of [the Mining Act]," DENR may modify the terms and conditions of the permit "as it deems appropriate." N.C. Gen. Stat.

§ 74-57 (2003). In doing so, DENR must give written notice to the operator of its intent to modify the permit, and inform the operator of the right to a hearing on the proposed modification. *See id.*

Whenever DENR has reason to believe that a mining operation violates (1) the Mining Act, (2) any rules adopted under the Mining Act, or (3) the terms and conditions of a permit, "it shall serve written notice of the apparent violation upon the operator, specifying the facts constituting the apparent violation and informing the operator of the operator's right to an informal conference with [DENR]." N.C. Gen. Stat. § 74-58(a) (2003). If the operator fails to appear at the informal conference, or if DENR following the informal conference finds there has been a violation, DENR "may suspend the permit until the violation is corrected or may revoke the permit where the violation appears to be willful." *Id.*

In the instant case, after issuing a mining permit to Petitioner, DENR determined that Petitioner's mining operation violated the Mining Act, in that it had a significant adverse effect on the purposes of the Appalachian Trail.[2] The trial court determined DENR lacked authority to revoke Petitioner's permit. The trial court reasoned that the grounds for denying a permit listed in section 74-51 of the General Statutes did not constitute violations of the Mining Act, and so concluded that, although DENR found the mining operation to have a significantly adverse effect on the Appalachian Trail, such a finding only supported initial denial of a permit and could not serve as a basis for revocation. We disagree with the trial court's interpretation of the Mining Act.

It is the function of the judiciary to construe a statute when the meaning of a statute is in doubt. *Sunscript Pharmacy Corp. v. N.C. Bd. of Pharmacy*, 147 N.C. App. 446, 452, 555 S.E.2d 629, 633 (2001), *disc. review denied*, 355 N.C. 292, 561 S.E.2d 506 (2002).

> In construing the laws creating and empowering administrative agencies, as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished. The best indicia of that legislative purpose are "the lan-

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2. In addition to its responsibilities in enforcing the Mining Act, DENR is statutorily required to "give due consideration to the conservation of the environment of the Appalachian Trail." N.C. Gen. Stat. § 113A-75(b) (2001); *see also* N.C. Gen. Stat. § 113A-73(a) (2001) (stating that the Appalachian Trail "should be protected in North Carolina as a segment of the National Scenic Trails System").

guage of the statute, the spirit of the act, and what the act seeks to accomplish."

Comr. of Insurance v. Rate Bureau, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980) (citations omitted) (quoting *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972)); *In re Declaratory Ruling by N.C. Comm'r of Ins.*, 134 N.C. App. 22, 27, 517 S.E.2d 134, 139, *disc. review denied*, 351 N.C. 105, 540 S.E.2d 356 (1999). The court "should be guided by the rules of construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other." *Comr. of Insurance*, 300 N.C. at 400, 269 S.E.2d at 561; *Redevelopment Commission v. Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960). Thus, the court must reconcile such statutes with each other when possible, and resolve any irreconcilable ambiguity so as to effectuate the true legislative intent. *Comr. of Insurance*, 300 N.C. at 400, 269 S.E.2d at 561; *In re Declaratory Ruling*, 134 N.C. App. at 27, 517 S.E.2d at 139. Where, however, the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning. *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999).

Under section 74-58 of the North Carolina General Statutes, DENR must initiate suspension or revocation proceedings whenever it has reason to believe that a mining operation violates (1) the Mining Act, (2) any rules adopted under the Mining Act, or (3) the terms and conditions of a permit. *See* N.C. Gen. Stat. § 74-58(a) (stating that DENR "shall" serve written notice of the apparent violation). According to the plain language of section 74-58, a violation of the terms and conditions of a permit is separate and distinct from a violation of any rules adopted under the Mining Act or from a violation of the Mining Act itself. *See id.*; *see also* N.C. Gen. Stat. § 74-64(b) (2003) (distinguishing between violations of (1) the provisions of the Mining Act; (2) its rules; and (3) the terms and conditions of a permit). The question presented by the instant case is whether the grounds for denial of a permit as listed in section 74-51(d) may also serve as grounds for violation of the Mining Act. The Mining Act does not expressly define the term "violation" or specify what actions constitute a violation of the Mining Act. Such ambiguity requires this Court to examine the spirit of the Mining Act and what the legislation seeks to accomplish to determine the meaning of section 74-58. *See Sunscript Pharmacy Corp.*, 147 N.C. App. at 452-53, 555 S.E.2d at 633

(where the statutory language is ambiguous, the Court must look to the spirit and purpose of the legislation).

The Mining Act was enacted to ensure (1) "[t]hat the usefulness, productivity, and scenic values of all lands and waters involved in mining within the State will receive the greatest practical degree of protection and restoration" and (2) to prevent any mining "in the State unless plans for such mining include reasonable provisions for protection of the surrounding environment and for reclamation of the area of land affected by mining." N.C. Gen. Stat. § 74-48 (2003). In order to fulfill these purposes, the General Assembly charged DENR with the responsibility for enforcing the provisions of the Mining Act. *See* N.C. Gen. Stat. § 74-64 (2003). DENR may issue, condition, suspend, modify, renew, and revoke permits in its capacity as enforcer of the Mining Act. *See* N.C. Gen. Stat. § 74-51 *et seq.* DENR may deny a permit upon finding that the proposed operation "will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area." N.C. Gen. Stat. § 74-51(d)(5).

The language and stated purposes of the Mining Act indicate that the General Assembly was concerned with the effect of mining on the State's environment. Section 74-51(d)(5) expresses the General Assembly's specific concern over the potential adverse effects of mining on the State's publicly owned parks, forests, and recreation areas. In light of the purpose of the Mining Act to provide "the greatest practical degree of protection and restoration" to the "scenic values of all lands and waters involved in mining with the State" in benefit of the "general welfare, health, safety, beauty, and property rights of the citizens," *see* N.C. Gen. Stat. § 74-47, we conclude, contrary to the decision of the trial court, that where a mining operation adversely affects the purposes of a publicly owned park, forest, or recreation area to a significant degree, such operation violates the Mining Act.

A contrary decision renders the protections of the Mining Act meaningless and contravenes the stated purposes of the legislation. As the Commission concluded, it is "inconceivable that the General Assembly would authorize [DENR] to deny a permit for a harm that was *predicted*, but provide no remedy where the harm was *actually found to occur.*" According to the reasoning set forth by the trial court, any mistake by DENR in its initial permitting process, irrespective of due diligence by the agency, is simply not correctable, even where significant harm to the environment occurs. For example, if DENR issued a permit but later discovered that the operation of a

mine constituted "a direct and substantial physical hazard to public health and safety" under section 74-51(d)(4), DENR would have no authority, under the trial court's reasoning, to revoke the permit, even where modification of the permit was not possible and a substantial physical hazard to public health definitely proven. Following this reasoning, the illogical conclusion is that DENR would lack even the authority to deny *renewal* of such a permit. *See* N.C. Gen. Stat. § 74-52(b) (2003) (noting that the sole basis for denial of a renewal permit "shall be an uncorrected violation of the type listed in G.S. 74-51[(d)](7), or failure to submit an adequate reclamation plan"). Thus, under the trial court's narrow reading of section 74-58, a mining operation could pose a substantial physical hazard to public health and safety but continue to operate under a permit indefinitely. We reject such a narrow interpretation of section 74-58 and conclude the trial court erred in determining that DENR lacked authority to revoke Petitioner's permit on the basis of its finding that the operation had a significant adverse effect on the Appalachian Trail.

III. *Proper Procedure for Revocation*

[4] Respondents further argue the trial court erred in concluding that revocation of Petitioner's permit was not made upon proper procedure. We agree. DENR notified Petitioner of the violation by letter dated 19 April 2000, and of its intent to revoke the permit unless sufficient modifications to mitigate the adverse effects could be taken. DENR also advised Petitioner of its statutory right to an informal conference to discuss the matter, which was held 22 May 2000. During the conference, DENR requested that Petitioner submit a modification proposal, including a landscaping plan addressing the visual and acoustical impact of the mining operation on the Appalachian Trail. Petitioner subsequently submitted two modification proposals, but DENR rejected both proposals because they did not adequately address the specific concerns raised by DENR. By letter dated 6 September 2000, DENR informed Petitioner that it was revoking the mining permit. The uncontroverted evidence shows that, once it determined that Petitioner's mining operation violated the Mining Act, DENR complied with the procedure set forth in section 74-58(a) of the General Statutes by (1) serving Petitioner with written notice of the violation; (2) informing Petitioner of its right to an informal conference; (3) holding an informal conference with Petitioner; (4) allowing Petitioner the opportunity to correct the violation; and (5) revoking Petitioner's permit after Petitioner failed to correct the violation. In so doing, DENR fulfilled its statu-

tory duties to both Petitioner and the people of North Carolina in revoking the permit.

Petitioner argues DENR should have proceeded under section 74-57 of the General Statutes, which allows DENR to modify the terms and conditions of a permit "as it deems appropriate." N.C. Gen. Stat. § 74-57. By failing to act pursuant to section 74-57, Petitioner asserts and the trial court concluded, that DENR's revocation was made upon improper procedure. We disagree. Certainly, DENR could have modified Petitioner's permit pursuant to section 74-57 had it so chosen, but it was under no statutory obligation to do so. Nothing in the Mining Act requires DENR to first modify a permit before initiating revocation proceedings. The trial court therefore erred in concluding that revocation of Petitioner's permit was made upon improper procedure.

IV. *Willful Violation*

[5] By further assignment of error, Respondents contend the trial court erred in concluding that Petitioner's permit could not be revoked because any violation of the Mining Act was not "willful." The trial court concluded that there was "no deliberate act of Petitioner that has resulted in a violation of the permit[,]" and that there was "nothing 'willful' about the fact that the [mining operation] is visible from the Appalachian Trail." According to the trial court, there was "nothing correctable" about the violation, and thus no willful action on Petitioner's part. Again, we must disagree with the trial court.

Under section 74-58, DENR "may suspend the permit until the violation is corrected or may revoke the permit where the violation appears to be willful." N.C. Gen. Stat. § 74-58. After being put on notice that its operation violated the Mining Act, Petitioner took inadequate steps to properly and effectively address the violation, despite specific guidance by DENR on the issue. Contrary to the trial court's unsupported conclusion that there was "nothing correctable" about the violation, DENR twice advised Petitioner to employ a landscape architect in order to develop an effective modification proposal and landscaping plan. DENR related its specific concerns to Petitioner, and shared with Petitioner the results and proposals of the various consultants hired by DENR to review the effects of the mining site on the Appalachian Trail. All three of the reports submitted by the consultants contained concrete, detailed suggestions for mitigation of the visual and auditory impact of the mining site on the Trail.

Petitioner declined to employ a professional landscape architect, and its modification proposals did not significantly address the problems articulated by DENR. Had there indeed been "nothing correctable" about the violation, there would have been no reason for DENR to twice give Petitioner the opportunity to correct the violation by developing a professional landscaping plan to effectively address the adverse effects of the mining operation on the Appalachian Trail. DENR put Petitioner on notice of its violation and gave Petitioner the opportunity to correct the situation. Petitioner failed to act. Such failure cannot be described as anything other than willful. The trial court erred in concluding otherwise.

V. *Vested Rights Doctrine*

[6] Finally, Respondent argues the trial court erred in concluding the doctrine of vested rights prohibited revocation of Petitioner's mining permit. Respondents contend the doctrine of vested rights does not protect Petitioner in the present case. We agree.

The doctrine of vested rights provides that

> one who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building for the proposed use authorized by the permit, may not be deprived of his right to continue such construction and use by the revocation of such permit, whether the revocation be by the enactment of an otherwise valid zoning ordinance or by other means, and this is true irrespective of the fact that such expenditures and actions by the holder of the permit do not result in any visible change in the condition of the land.

Town of Hillsborough v. Smith, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969). Here, the trial court concluded that, because Petitioner invested substantial expenditures in reliance upon the permit issued by DENR, it had acquired a "vested right to conduct mining operations at the site[.]" "One does not acquire a right to violate an otherwise valid zoning ordinance, already in existence," however, by "making expenditures or incurring obligations merely because when he made them he did not know the ordinance had been adopted." *Id.* at 58, 170 S.E.2d at 912. Here, no new law was enacted to alter the requirements of a mining permit. Rather, the permit was mistakenly issued in violation of the existing requirements of section 74-51(d)(5). Permits unlawfully or mistakenly issued do not create a vested right.

See Raleigh v. Fisher, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950); *Mecklenburg County v. Westbery*, 32 N.C. App. 630, 635, 233 S.E.2d 658, 660-61 (1977).

We also note that the issue of the permit's validity has been specifically and consistently challenged by Respondent-Intervenors, who argue Petitioner failed to give notice of its application for the permit to neighboring landowners, as required under section 74-50(b1) of the General Statutes. Without such notice, Respondent-Intervenors contend the permit was not valid. The trial court declined to address the issue, as it was not considered by the administrative law judge or the Commission. However, because the vested rights doctrine arises from a validly-issued permit only, it was error for the trial court to conclude that the doctrine protected Petitioner, where material issues of fact remained outstanding on the issue of notice. We conclude the trial court erred in determining that Petitioner had a vested right to operate its mine.

For the reasons stated herein, we conclude the trial court improperly applied the whole record test and erred in its interpretation of the Mining Act. The order of the trial court is therefore,

Reversed.

Judges McGEE and STEELMAN concur.

BENEFICIAL MORTGAGE CO. OF NORTH CAROLINA, INC., PLAINTIFF v. THE BARRINGTON AND JONES LAW FIRM, P.A., F/K/A THE BARRINGTON JONES AND PIKUL LAW FIRM, P.A., CARL A. BARRINGTON, JR., AND BENNER JONES, III, DOUGLAS M. HORNE, COUNTY OF CUMBERLAND, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA, WHITE MOUNTAINS SERVICES CORPORATION, F/K/A SOURCE ONE MORTGAGE SERVICES CORPORATION, FREDDIE McLEAN, KANICE DEE McLEAN AND FIRST-CITIZENS BANK & TRUST COMPANY, DEFENDANTS

No. COA03-512

(Filed 4 May 2004)

Mortgages and Deeds of Trust— action to quiet title—tax foreclosure sale—judicial estoppel

The trial court did not err by granting summary judgment in favor of plaintiff in an action to quiet title and set aside a tax foreclosure sale where the debtors defaulted on their deed of trust, a

foreclosure sale was held, the debtors filed Chapter 13 bankruptcy relief prior to the expiration of the 10-day upset bid period triggering an automatic stay of the foreclosure sale, and the bankruptcy judge denied the foreclosure trustee's motion to annul the stay conditioned on the fact that debtors must sell by 15 January 1996 or else the movant would be deemed the owner of the real property, because: (1) the recordation of a deed in the county registry on 23 June 1995 by the last and highest bidder at the foreclosure sale was in violation of the stay while the debtors were in the midst of a bankruptcy proceeding and the state law 10-day upset period had not run; (2) although defendants contend the 15 January 1996 deadline from the bankruptcy judge's order came and went, it did not give retroactive legal validity to the 23 June 1995 recorded deed when no parties' rights were ever fixed as to the subject real property and nothing could be legally recorded; (3) upon lifting the stay as of 15 January 1996, the foreclosing trustee was to pursue foreclosure by again advertising and selling the property in accordance with the provisions of N.C.G.S. §§ 45-21.16A, 45-21.17, and 45-21.17A, and the foreclosure trustee did not take the necessary steps to finalize foreclosure proceedings in light of the stay being lifted; (4) the burden falls on the party conducting a title search to check a county's special proceeding file when determining the validity of a trustee's deed issued pursuant to a power of sale foreclosure; and (5) plaintiff's claim is not judicially estopped when there was no evidence of plaintiff intentionally misleading the court even though this action was initially brought as a malpractice suit against plaintiff's attorney, the record reflected negligence by both parties as to their title searches, and a party may state as many separate claims or defenses as he has regardless of consistency.

Appeal by defendants Freddie McLean, Kanice Dee McLean and First-Citizens Bank & Trust Co., from summary judgment entered by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 28 January 2004.

Roberson, Haworth & Reese, P.L.L.C., by Robert A. Brinson, Alan B. Powell and Christopher C. Finan, for plaintiff appellee.

The Yarborough Law Firm, by Garrison Neil Yarborough, for Freddie McLean, Kanice Dee McLean and First-Citizen Bank & Trust Company defendant appellants.

McCULLOUGH, Judge.

Before this Court is an appeal from summary judgment granted in favor of Beneficial Mortgage Co. of North Carolina, Inc. ("Beneficial"), on an action to quiet title and set aside a tax foreclosure sale. Issues on appeal relate only to the remaining named defendants Freddie and Kanice Dee McLean and First-Citizens Bank and Trust Company (collectively "defendants").

Mr. Douglas L. Horne and Mrs. Captola E. Horne ("the Hornes") acquired by deed real property in Cumberland County, North Carolina ("the Subject Real Property"), duly recorded on 14 July 1978 in the Cumberland County Registry. On or about 23 August 1990, the Hornes executed and delivered to First Union Mortgage Corporation a deed of trust encumbering the Subject Real Property in the principal amount of $57,050. The deed, also recorded in the Cumberland County Registry, was then assigned and duly recorded to Source One Mortgage Services Corporation ("Source One").

Upon default by the Hornes as to the above-mentioned deed of trust, a substitute trustee ("foreclosure trustee") commenced a foreclosure action in Cumberland County on 20 March 1995. On 15 May 1995, a Report of Foreclosure Sale was filed in the above foreclosure action indicating that the Subject Real Property was exposed to public sale. Source One, being the last and highest bidder at $60,115, purchased the property at the public sale. The sale was conducted in accordance with North Carolina law. On 25 May 1995, prior to the expiration of the 10-day upset bid period, the Hornes filed for Chapter 13 bankruptcy relief under Title 11, triggering, pursuant to 11 U.S.C. § 362 (2003), an automatic stay of the foreclosure sale. On 19 June 1995, while the Chapter 13 proceeding was still pending, a Trustee's Deed purporting to convey the Subject Real Property to Source One was executed by the foreclosure trustee of the Source One deed of trust and then recorded on 23 June 1995.

A recall of a Writ of Possession referencing the filing of a bankruptcy proceeding was entered into the Cumberland County Special Proceeding file on 13 July 1995. On 2 August 1995, after learning of the Hornes' Chapter 13 filing, the foreclosure trustee filed a motion in the Bankruptcy Court of the Eastern District of North Carolina to annul the automatic stay triggered by 11 U.S.C. 362 so that the foreclosure sale could be completed. In response to this motion, the Honorable A. Thomas Small, United States Bankruptcy Judge for the Eastern District of North Carolina, while denying an immediate

annulment, ordered that: "Should Debtors [Hornes] fail to sell the Real Property and distribute the proceeds on or before January 15, 1996, the automatic stay shall be annulled and Movant will be deemed the owner of the Real Property and entitled *to pursue* any and all non-bankruptcy remedies to obtaining possession of the Real Property." (Emphasis added.)

At this point, it is easiest to distinguish the competing interests of the Subject Real Property by individually following the two alleged chains of title.

I. Beneficial's Chain of Title

Beneficial alleges, and the trial court agreed, the following represent their legal chain of title: On 18 March 1996, over two months after the 15 January 1996 deadline for annulling the stay as ordered by Judge Small, Doug Horne ("Douglas"), the son of Mr. and Mrs. Horne, entered into a line of credit with Beneficial for the principle amount of $50,000. A general warranty deed recorded on 25 March 1996 conveyed the Subject Real Property from the Hornes to Douglas. In exchange for and in security of this line of credit, a deed of trust was granted in favor of Beneficial for the Subject Real Property, with the deed of trust also being recorded on 25 March 1996. The deed of trust was drawn by David Pikul of the then existing law firm Barrington, Jones, and Pikul Law Firm, P.A ("Barrington Law Firm"). On 16 May 1996, a Certificate of Satisfaction issued in Cumberland County, showed the Hornes had satisfied their debt with Source One. The Barrington Law Firm later drew a second deed of trust in favor of Beneficial for an increased principal amount of $73,600. This second line of credit was drawn in part to pay off the first line of credit and deed of trust. This second deed of trust was duly recorded on 11 April 1997.

Pursuant to this alleged chain of title, Beneficial was granted summary judgment by Judge Weeks' finding, as a matter of law, that Douglas remains the record owner of the Subject Real Property and that his property is subject to the lien of the second deed of trust benefiting Beneficial.

II. Defendants' Chain of Title

The remaining defendants in this appeal argue that the following represents their chain of title: Judge Small's ordered deadline that the Hornes sell their property by 15 January 1996 or else the automatic stay would be annulled pursuant to 11 U.S.C. § 362(d), was not met by

the Hornes. By violating Judge Small's order, the foreclosure sale, commenced by the foreclosure trustee without the knowledge that the Hornes had filed for Chapter 13 bankruptcy, was revived; and as of 15 January 1996, Source One was the fee simple owner of the Subject Real Property without any re-advertising or resale.

On 28 September 1999, the County of Cumberland filed a complaint for property tax foreclosure on the Subject Real Property, naming as the only defendant Source One. Cumberland County's title search stopped at the original trustee's deed to Source One. Source One did not respond to the complaint and the Clerk of the Superior Court of Cumberland County made an entry of default on 31 March 2000. The Subject Real Property was sold at a public auction on 31 August 2000, to the last highest bidder, Freddie McLean. A commissioner's deed, conveying this interest in the property to Mr. McLean, as grantee, was recorded on 20 September 2000, in the Cumberland County Registry. First-Citizen holds a deed of trust dated 5 December 2000, recorded 7 December 2000, in the Cumberland County Registry securing a loan of $70,000 to Mr. McLean.

Pursuant to this second alleged chain of title, remaining defendants now appeal the summary judgment order in favor of plaintiff. The gravamen of defendant's argument is based on their reading of the effect of Judge Small's order pursuant to 11 U.S.C. § 362, annulling the stay over the foreclosing trustee's ability to foreclose when the Hornes did not meet the deadline in his order.

On appeal, defendants contend the following: it was error for the trial court not to grant their motion for judgment on the pleadings; the trial court erred by denying the three remaining defendants'—the McLeans and First-Citizens—motion for summary judgment; and the trial court erred in granting summary judgment in favor of Beneficial.

The key issue in this case concerns the relationship between North Carolina foreclosure law and federal bankruptcy law as implicated by the undisputed facts. In the first section of our opinion we examine the requirements of North Carolina law on the lifting of the stay. The second portion of the opinion examines the validity of Beneficial's alleged chain of title. Lastly, we consider defendants' argument that this action, seeking both to quiet title and relief from a tax foreclosure sale, is barred by judicial estoppel. Pursuant to our analysis of these issues, we find the trial court correctly ordered summary judgment in favor of Beneficial.

North Carolina Power of Sale Foreclosure as Affected by the Federal Bankruptcy Code

I. Fixed Rights from a Foreclosure

After a foreclosure sale conducted under a power of sale clause has been completed and reported to the clerk of the superior court, North Carolina law allows the equivalent of an equity court's power to decree a resale upon the filing of a substantially raised bid. From the date the sale is reported to the superior court clerk, a 10-day upset bid period is triggered allowing a bid meeting statutory requirements to upset the last highest bid and sale. N.C. Gen. Stat. § 45-21.21 (2003). Therefore, it has long been held in North Carolina that under the state's foreclosure statutes, the final and highest bidder at a foreclosure sale is merely a proposed purchaser who has no rights, or entirely voidable rights, to the property until the upset bid period terminates. *Cherry v. Gilliam*, 195 N.C. 233, 234, 141 S.E. 594, 594 (1928). Our Supreme Court has also held that a foreclosure sale "cannot be consummated" to fix rights until the expiration of the upset bid period. *Building & Loan Assn. v. Black*, 215 N.C. 400, 402, 2 S.E.2d 6, 6 (1939). Accordingly, Judge Small of the Eastern District of North Carolina U.S. Bankruptcy Court has determined that, for bankruptcy purposes, "in North Carolina, a property has not been 'sold at foreclosure sale' under 11 U.S.C. § 1322(c)(1) until all of the state procedural requirements for completion of the sale, including the expiration of the upset bid period, have been met." *In re Barham*, 193 B.R. 229, 232 (Bankr. E.D.N.C. 1996).

The automatic stay provision of 11 U.S.C. § 362 of the Bankruptcy Code has the effect of preventing the expiration of the 10-day upset bid period when the debtor files for bankruptcy within that period. *In re Di Cello*, 80 B.R. 769, 773 (Bankr. E.D.N.C. 1987), *questioned on other grounds*, *Barham*, 193 B.R. 229. Thus, the automatic stay prevents the fixing of any rights as to any Subject Real Property protected by a stay as the upset bid period has not run.

II. "Lifting" the Automatic Stay

The automatic stay of 11 U.S.C. § 362(d) (2003) states: "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by *terminating, annulling, modifying, or conditioning* such stay. *Id.* (emphasis added). This subsection of the statute allows relief from the stay on grounds set out in the same subsection.

In 1993, North Carolina law governing the sale of real property held under a power of sale, specifically N.C. Gen. Stat. § 45-21.22 (2003), was amended to include the following provision:

> When, after the entry of any authorization or order by the clerk of superior court pursuant to G.S. § 45-21.16 and before the expiration of the 10-day upset bid period, the foreclosure is stayed by the debtor filing a bankruptcy petition and thereafter the stay is *lifted*, the trustee or mortgagee shall not be required to comply with the provisions of G.S. 45-21.16, but *shall* advertise and hold the sale in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A.

N.C. Gen. Stat. § 45-21.22(c) (emphasis added). Judge Small explained this amendment as having the following effect:

> [I]f a bankruptcy petition is filed (1) after the notice and hearing provided for in § 45-21.16 has been completed and (2) after the Clerk of Superior Court has authorized the foreclosure and (3) prior to the expiration of the upset bid period, then if the automatic stay of 11 U.S.C. § 362 is subsequently *lifted* with respect to the foreclosure, the foreclosing trustee need not comply with the notice and hearing procedure again, but may proceed to readvertise the property and sell it. N.C. Gen. Stat. § 45-21.22(c) (Supp. 1995).

Barham, 193 B.R. at 232 (emphasis added). At issue in this case is determining the statute's meaning as to the term "lifted."

The "terminating . . . conditioning" language of 11 U.S.C. § 362(d) was in place when the 1993 addition to N.C. Gen. Stat. § 45-21.22 was made. As the amended statute refers directly to the protection of an automatic stay upon filing for bankruptcy, we read the term "lifted" in the North Carolina statute to incorporate "terminating, annulling, modifying, or conditioning," words all used to reference creditors' relief from the automatic stay. *Verba relata inesse videntur* (words to which reference is made are considered incorporated). *Black's Law Dictionary* 1699 (7th ed. 1999).

Our reading is consistent with that of Judge Small's and the Bankruptcy Court of the Eastern District of North Carolina, which though not controlling, assists us in making our interpretation. In an order entered 7 March 2003, Judge Smalls stated:

> Although § 45-21.22(c) uses the term "lifted" in its text with respect to the automatic stay provision 11 U.S.C. § 362, "lifted" is

> not defined in the Bankruptcy Code and is a slang term *loosely* used by bankruptcy practitioners and bankruptcy courts to mean that *the stay no longer is applicable.* Usually this occurs when the court enters an order stating that the stay is terminated. The stay is also terminated or "lifted" when a case is dismissed. 11 U.S.C. § 362(c)(2)(B). North Carolina General Statute § 45-21.22(c) should be strictly construed in favor of preserving redemption rights. A foreclosing trustee must comply with the procedural requirements of readvertising and reselling the property set forth in North Carolina General Statute § 45-21.22(c) when a stay is "lifted" whether by order of the court or dismissal of the underlying bankruptcy case.

In Re Price, 03-00374-5-ATS, pg. 5, (Bankr. E.D.N.C. 2003) (emphasis added). While in this case Judge Small is incorporating "terminated" into the North Carolina statute's "lifted," he states that "terminating" is "usually" how a stay is lifted, implying that there are other means to lift a stay. An annulment is another means by which "a stay is no longer applicable," just one that is used in exceptional circumstances. *See Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989), *reh'g denied by en banc*, 888 F.2d 1388 (5th Cir. 1989) (in response to a Motion to *Lift* Stay, the court *annulled* the stay as to a complaint filed in violation of the stay, deeming it voidable, not void). We hold "annul" fits within the umbrella term of "lifted," referring in general to relief from a stay, as intended by N.C. Gen. Stat. § 45-21.22.

We do not believe our broader reading of "lifted" moots or makes superfluous the express language of 11 U.S.C. § 362(d), specifically as to the effect of an "annulment" of a bankruptcy stay. Defendant cites cases from the Third, Fifth, Sixth, Ninth, and Eleventh Federal Circuit Court of Appeals which have all agreed that an order annulling a stay under § 362(d) grants retroactive relief from the stay, validating actions taken after the stay was in place that would otherwise be void as in violation of the stay. *See In Re Siciliano*, 13 F.3d 748, 751 (3d Cir. 1994) (a foreclosure sale); *Sikes*, 881 F.2d at 178-79 (filing a personal injury claim); *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 909-11 (6th Cir. 1993) (filing a products liability suit); *In Re Schwartz*, 954 F.2d 569, 572-73 (9th Cir. 1992) (a tax assessment was not in violation of a stay if the stay is deemed annulled); and *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984) (foreclosure sale). Though not bound by this precedent, we acknowledge the points in law set out therein as to the effect of a bankruptcy court annulling a stay. However, we do not see them on point with the issue of this case as

they deal with the void/voidable issue of an action taken in violation of the automatic stay. *See Winters by & through McMahon v. George Mason Bank*, 94 F.3d 130, 136 (4th Cir. 1996) (the Fourth Circuit declined on deciding the void/voidable issue, finding the plaintiff in the case lacked standing). The case at bar deals with an act taken in violation of North Carolina law governing a power of sale foreclosure upon the lifting of an automatic stay.

N.C. Gen. Stat. § 45-21.22(c) provides extra protection to a mortgagor against a power of sale foreclosure, even upon an annulment of a bankruptcy stay. The imposition of the federal stay triggers the protection of this provision. The extra protection afforded upon the lifting of the stay comports with the long-held principle in North Carolina to give the mortgagor the full statutory benefit under the procedures of a power of sale foreclosure. *See Clayton Banking Co. v. Green*, 197 N.C. 534, 538, 149 S.E. 689, 691 (1929); *Turner v. Blackburn*, 389 F. Supp. 1250, 1256-57 (W.D.N.C. 1975). It further strikes a balance so as not to be overly burdensome on a foreclosing trustee by abridging the necessary steps needed to be taken after their foreclosure sale has been upset by an automatic stay. Specifically, the foreclosing trustee is not required to comply with the notice and hearing procedure again, but need only re-advertise and resell in accordance "with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A." N.C. Gen. Stat. § 45-21.22(c).

The additional procedural protection against the power of sale foreclosure under state law is in line with the intent behind the federal automatic stay:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his [or her] creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97. Both the automatic stay provision, and the requirement for re-advertisement and resale of a power of sale foreclosure upon relief from that stay, serve to protect the mortgagor/debtor. North Carolina is within its right to extend that protection in the case of foreclosure proceedings. A search of North Carolina law has revealed no similar debtor protections triggered by

the lifting of an automatic stay that would frustrate giving retroactive effect to action taken in violation of a stay (such as filing a civil complaint). And due to the harsh remedy of a power of sale foreclosure, a remedy of last resort, North Carolina's limited provision qualifying the effect on an annulment of a stay in this context is not preempted by the federal statutory language. *See Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 344 S.E.2d 555, *disc. review denied*, 318 N.C. 284, 348 S.E.2d 344 (1986) (North Carolina foreclosure procedures should be resolved in favor of preserving the equitable power of the mortgagor).

III. Application of the law

The crux of defendant's claims in this case is their reliance on the trustee's deed entered in the Cumberland County registry in June of 1995 after Source One had foreclosed on the Subject Real Property. Because we conclude this deed invalid both on the date of recordation, 23 June 1995, and also anytime after 15 January 1996, we hold that defendant's reliance is misplaced and that at no point did this recorded trustee's deed afford Source One, Cumberland County, or the McLeans a link to legal title in the Subject Real Property.

A. 23 June 1995 Recordation

On 15 May 1995, Source One was the last and highest bidder of the foreclosure trustee's public sale of the Hornes' property. However, acting within their 10-day upset bid period, the Hornes filed for Chapter Thirteen bankruptcy and stayed the foreclosure. *See* 11 U.S.C. § 362 (2003). At that point the sale could not be completed and no parties' rights as to the property under the foreclosure action were yet "fixed." *See* N.C. Gen. Stat. § 45-21.27 (2003). It is undisputed that when the foreclosure trustee filed the trustee's deed on 23 June 1995, albeit without notice of the automatic stay, that the deed at that time was in violation of the stay while the Hornes were in the midst of a bankruptcy proceeding and the state law 10-day upset period had not yet run.

B. On or after 15 January 1996

The more difficult issue as to the validity of the 23 June 1995 deed lies within defendant's contention that, when the 15 January 1996 deadline from Judge Small's order came and went, the federal stay frustrating the ability of the foreclosing trustee to go forward with the state foreclosure action was annulled. Defendant claims this annulment gave retroactive legal validity to the 23 June 1995 recorded deed

in the name of Source One, and therefore validated the subsequent chain of title linked to this deed. We do not agree.

The 23 June 1995 deed was procured from a sale made before the expiration of the ten-day upset bid period, and thus no parties' rights were ever "fixed" as to the Subject Real Property and nothing could be legally recorded. For that reason, Judge Small's order denying the motion to annul the stay, conditioned on the fact that debtors must sell by 15 January 1996, states: "The automatic stay shall continue in full force and effect so as to prevent finalization of the foreclosure proceeding by the Movant." Upon lifting the stay as of 15 January 1996, the foreclosing trustee was still required to comply with N.C. Gen. Stat. § 45-21.22(c).

When Judge Small's condition ripened to annul the stay, we believe the annulment's retroactive effect applied only to the foreclosure proceeding as long as it otherwise complied with state law. This would put title back into the hands of the party who moved to annul the stay, the foreclosing trustee. This trustee would have the ability to later conclude the sale and properly record the deed in accord with applicable state law. The clear language of Judge Small's order did just this. The order allowed that the "movant," the foreclosing trustee, "be deemed the owner of the Real Property and entitled *to pursue* any and all nonbankruptcy remedies to obtaining possession of the Real Property" upon lifting of the stay. (Emphasis added.) We read "pursue" to mean the trustee was then able to re-institute a sale with the parties to the original foreclosure sale of 15 May 1995. Had Judge Small intended to give title to Source One pursuant to their highest bid at the original foreclosure sale, his order would have stated so. Instead he stated, "Adequate protection of Source One's interests has been provided by the terms of the Amended Chapter 13 Plan and by reason of an equity cushion."

Upon the "lifting" of the stay, the foreclosing trustee was to pursue foreclosure by again advertising and selling the property in accordance with the provisions of N.C. Gen. Stat. §§ 45-21.16A, 45-21.17, and 45-21.17A. *See* N.C. Gen. Stat. § 45-21.22(c). The foreclosing trustee properly conducted the notice and hearing procedure for the 15 May 1995 foreclosure sale, and was given the benefit of this in Judge Small's order which seems to mirror the state law. Both N.C. Gen. Stat. § 45-21.22(c) and Judge Small's order required defendant to take some action (*i.e.*,"pursue") upon the dissolution of the stay. The foreclosing trustee did not take the necessary steps to finalize foreclosure proceedings in light of the stay being lifted.

Beneficial's Chain of Title

I. Satisfaction of the Deed of Trust

Based on our analysis of a North Carolina power of sale foreclosure as affected by the federal bankruptcy code, we now examine the validity of Beneficial's alleged chain of title.

When a mortgage or deed of trust secures the payment of a specific debt, the determinable estate of the mortgagee or trustee terminates the very instant the debt is paid. *Barbee v. Edwards*, 238 N.C. 215, 218, 77 S.E.2d 646, 649 (1953). "The debt secured is for the life of the mortgage and gives it vigor and efficacy. The essential effect and consequence of the discharge of the mortgage debt is the discharge of the mortgage itself." *Manufacturing Co. v. Malloy*, 217 N.C. 666, 668, 9 S.E.2d 403, 404 (1940). " '[O]rdinarily a sale conducted under the power after full payment of the debt is invalid and ineffectual to convey title to the purchaser.' " *Kyles v. Holding Corp.*, 5 N.C. App. 465, 467, 168 S.E.2d 502, 503 (1969) (citations omitted).

From 15 January 1996 to 25 March 1996 no party to this suit took requisite steps in attaining record title to the Subject Real Property. On 25 March 1996, the Hornes' son, Douglas, made the payment due and owing on the specific debt underlying the deed of trust to Source One. On this same day, a general warranty deed was recorded conveying the Hornes' Subject Real Property to Douglas. Also on 25 March 1996, Douglas recorded a deed of trust in favor of Beneficial to secure the $50,000 line of credit. Pursuant thereto, on 24 June 1996, Source One filed a Certificate of Satisfaction cancelling the deed of trust it held for the Hornes on the debt of $57,050 and provided record notice that Source One no longer had any legal interest in the Subject Real Property. At that point Douglas had equitable title in the Subject Real Property, and Beneficial had a valid $50,000 lien on the property pursuant to a deed of trust. This first deed of trust was satisfied when a second deed of trust issued on the Subject Real Property benefiting Beneficial in the amount of $73,600.

II. Cumberland County Tax Foreclosure Sale

When a county conducts a tax foreclosure sale, the property is to be "sold in fee simple, free and clear of all interests, rights, claims, and liens." N.C. Gen. Stat. § 105-374(k) (2003). Therefore, the effect of a judgment foreclosing a tax lien on real property extinguishes all rights, title and interests in the property subject to the foreclosure, including a claim based on adverse possession. *Overstreet v. City of*

Raleigh, 75 N.C. App. 351, 353-54, 330 S.E.2d 643, 645 (1985). However, N.C. Gen. Stat. § 105-374(c) requires:

> The listing taxpayer . . . , the current owner, all other taxing units having tax liens, all other lienholders of record, and all persons who would be entitled to be made parties to a court action . . . to foreclose a mortgage on such property, shall be made parties and served with summonses in the manner provided by [Rule 4].

Id. In an action to foreclose a tax lien, all persons having an interest in the equity of redemption should be made parties by name, and judgment rendered in such proceeding is void as to any person having such interest who are not made parties. *Wilmington v. Merrick*, 231 N.C. 297, 299, 56 S.E.2d 643, 645 (1949) (*Wilmington I*). "Foreclosure is an equitable proceeding and the law as interpreted and applied in this State, has uniformly commanded a day in Court for parties in interest." *Guy v. Harmon*, 204 N.C. 226, 227, 167 S.E. 796, 797 (1933). Furthermore, "[o]ne who purchases at a tax sale does so without warranty[.] He is chargeable with knowledge that a commissioner's deed is no more than a quitclaim deed. . . . It is the duty of one who would purchase a tax title to investigate, or cause to be investigated, all sources of title[.]" *Wilmington v. Merrick*, 234 N.C. 46, 47-48, 65 S.E.2d 373, 375 (1951) (*Wilmington II*).

As set out above, Source One recorded a Certificate of Satisfaction on the deed of trust held for the Subject Real Property. At that point they no longer held a record interest in the property. However, in Cumberland County's complaint for a tax lien foreclosure, Source One was the only named party. And, as Source One held no interest in the Subject Real Property, they did not respond to the complaint. Cumberland County received a default judgment.

Pursuant to N.C. Gen. Stat. § 105-374(c), we hold that the Cumberland County foreclosure action was void as to Douglas and Beneficial, both being the only record interest holders at the time the action was commenced. Their interest remains unaffected by said foreclosure action, and these parties must be named in any future attempt by the County to foreclose pursuant to their valid tax lien.

Furthermore, because Douglas and Beneficial were of record interest in the Subject Real Property the day the tax foreclosure was filed, the McLeans are charged with constructive notice of these recorded interests, and are unable to avail themselves to any argument as being a good faith purchaser for value. As to their commis-

sioner's deed, we find *Wilmington II* controlling. As the Supreme Court did in *Wilmington II*, we also apply with rigor the principle of *caveat emptor* to the purchaser of real estate at a tax sale. *Wilmington II*, 234 N.C. at 47, 65 S.E.2d at 374. It was the duty of the McLeans to investigate the tax title which they purchased, a duty which would have revealed the same competing chain of title in Beneficial and Douglas that Cumberland County should have discovered when determining who required notice to the foreclosure sale. As was aptly stated by our Supreme Court in a prior decision which was also based on *Wilmington II*: "The defendant purchased a 'pig in the poke,' but when he opened the bag he found no pig. For him the situation is unfortunate. It is nonetheless a situation for which the law affords no relief." *Quevedo v. Deans*, 234 N.C. 618, 622, 68 S.E.2d 275, 278 (1951).

We do not believe, as defendants contend, that this holding places an unreasonable burden on title searches in North Carolina. Beneficial, in their opposition to defendants' Motion for Summary Judgment, filed the persuasive and unrebutted affidavit of Robert S. Thompson. Mr. Thompson, being a board certified specialist in real property law with nearly 20 years' experience and familiar with searching title in Cumberland County, testified to the following:

> A reasonably prudent attorney exercising the standard of care for attorneys in Cumberland County while performing a title search of the subject property between June 19, 1995 and September 28, 1999 would have examined the Cumberland County special proceedings file 95 SP 311 upon seeing the Source One Trustee's Deed of record. This attorney would then have seen a Recall Writ of Possession referencing the filing of a bankruptcy proceeding by the Hornes that interrupted the foreclosure proceeding. The notation of bankruptcy puts the title searcher on notice of the questionable validity of the Source One Trustee's Deed. This attorney should then have proceeded to check the bankruptcy records and would have determined that the mortgagor filed a Chapter 13 bankruptcy proceeding within ten days of the report of the foreclosure sale and that an automatic stay pursuant to 11 U.S.C. § 362 prohibited the completion of the foreclosure sale and that Source One Trustee's Deed was invalid. In addition the file in 95 SP 311 would have put the attorney on notice of other interests in the subject property.

If the automatic stay is to be given any credence and provide protection to debtors and creditors alike, we are compelled to con-

clude this to be within the reasonable diligence of a title examiner. To conclude otherwise is to put the burden on the debtor, in the midst of a bankruptcy proceeding, to keep their title clear from such invalid or premature deeds, when it is their understanding that a filing for bankruptcy within the upset bid period will already provide such protection. Until the legislature decides a better way to give a title examiner notice of a bankruptcy stay, we agree with Mr. Thompson that the burden falls on the party conducting the title search to check a county's special proceeding file when determining the validity of a trustee's deed issued pursuant to a power of sale foreclosure.

Judicial Estoppel

Defendants contend that Beneficial's claim to quiet title and relief from the Cumberland County tax foreclosure should be judicially estopped. This contention is based on the argument that Beneficial's claims against defendants are inconsistent with the malpractice claim against the Barrington Law Firm which has since been dismissed with prejudice. We disagree.

The test for judicial estoppel in North Carolina is stated as "a harsh doctrine and requires at a *minimum* that the party against whom the doctrine is asserted [(1)] intentionally have [(2)] changed its position in order to gain an advantage." *Medicare Rentals, Inc. v. Advanced Services*, 119 N.C. App. 767, 771, 460 S.E.2d 361, 364, *disc. review denied*, 342 N.C. 415, 467 S.E.2d 700 (1995) (emphasis added). In *Medicare Rental* we framed these two elements as (1) changing position, and (2) intentionally misleading.

The record before us shows no evidence of Beneficial intentionally misleading the court by seeking to quiet title and obtaining relief from a tax foreclosure sale. This action was initially brought as a malpractice suit against Beneficial's attorney, the Barrington Law Firm. These parties were brought in under the separate and distinct action for quieting title and relief from the tax foreclosure sale. At a minimum, the record reflects negligence by both parties as to their title searches, attested to in Mr. Thompson's affidavit. We do not find that Beneficial's malpractice claim against the Barrington Law Firm as to its negligent representation of title is inconsistent with the claims at bar against a competing interest in that same title. These are alternative claims: "A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on

legal or on equitable grounds or on both." N.C. Gen. Stat. § 1A-1, Rule 8(e)(2) (2003). By dismissing the malpractice claim, Beneficial merely limited their potential avenue of relief.

After a thorough review of the applicable state and federal law, the record, exhibits, and briefs, we affirm the trial court's grant of summary judgment in favor of Beneficial.

Affirmed.

Judges HUNTER and LEVINSON concur.

STATE OF NORTH CAROLINA v. ROBERT CHARLES SINAPI, DEFENDANT

No. COA03-821

(Filed 4 May 2004)

Search and Seizure— basis for warrant—trash pick-up—insufficient connection to house

The trial court correctly suppressed evidence of marijuana seized from defendant's residence where the seizure was based on a search warrant supported by an affidavit stating that marijuana had been found in a trash bag near the curb in defendant's front yard. The affidavit did not contain sufficient facts and circumstances linking the bag to defendant's residence and failed to establish probable cause for a warrant to search the house.

Judge McCULLOUGH dissenting.

Appeal by the State from order entered 13 March 2003 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 31 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

John T. Hall for defendant-appellee.

ELMORE, Judge.

In this appeal, the State contends the trial court erred by allowing defendant Robert Charles Sinapi's pretrial motion to suppress evi-

dence obtained from a search of defendant's home pursuant to a search warrant. The sole issue for our determination is whether the affidavit presented to the magistrate as part of the search warrant application provided a sufficient showing of probable cause to support the magistrate's finding of probable cause and issuance of the warrant. For the reasons stated herein, we conclude that it did not and therefore affirm the trial court's order allowing defendant's motion to suppress.

The record reveals that on 30 September 2002, during the course of investigating defendant for possible violations of the North Carolina Controlled Substances Act, Detective J.G. Hobby (Detective Hobby) of the Raleigh Police Department applied to a Wake County magistrate for a warrant to search a residence located at 3300 Pinecrest Drive in Raleigh, North Carolina for controlled substances and other evidence of illegal drug activities. As part of the search warrant application pursuant to N.C. Gen. Stat. § 15A-244(3), Detective Hobby prepared an affidavit setting forth the facts which he contended established probable cause to believe that these items would be found on the premises. Detective Hobby's affidavit recounted his extensive training and experience in conducting narcotics investigations and further provided as follows:

> On 9-05-02, I was assigned to follow-up on a drug case investigated by Raleigh Police Officer V.R. Debonis involving a heroin overdose. The investigation advised that the heroin was purchased from [defendant]. I was able to identify [defendant] through [the] NC Division of Motor Vehicles records and learned that he resides at 3300 Pinecrest Drive, Raleigh, NC 27609. A criminal records check reveals that [defendant] has had prior arrests for possession of marijuana and methaqualone. On 9-26-02 at approximately [8 a.m.], Detective J.D. Cherry and I performed a trash pick-up at 3300 Pinecrest Drive. This trash pick-up was made during the normal trash day and time. A single, white plastic garbage bag was recovered from the front yard/curb line area at 3300 Pinecrest Drive, beside of [sic] the driveway. Inside of [sic] the garbage bag I located eight marijuana plants. The plants appeared to be somewhat dried up and wilted. The marijuana weighed approximately 5½ ounces. The marijuana was field tested with a positive result for marijuana. Based on my training and experience, this activity is consistent with a possible marijuana grow [sic] operation and illegal drug sales.

> Wake County Real Estate records indicate that [defendant] owns the residence at 3300 Pinecrest Drive. NC DMV records indicate that [defendant] resides at this address.
>
> This investigation has included a recent drug investigation where [defendant] is believed to be involved in the sell/delivery [sic] of an illicit drug, heroin. Criminal records indicate that he has prior arrests for possession of marijuana and methaqualone. An abundance of marijuana was recovered as a result of the trash pick-up at the residence. Based on the facts described above and my training and experience, I believe that there is probable cause to believe that the items to be seized, controlled substances in violation of G.S. 90-95 and other items herein, are in the premises and on the person to be searched, as described herein. I hereby request that a search warrant be issued directing a search for and seizure of the items in question.

The magistrate thereafter issued a search warrant for the premises at 3300 Pinecrest Drive, which was executed by Detective Hobby and other police officers on 1 October 2002. Defendant was present when the officers entered the residence. During the search, controlled substances, including heroin, cocaine, and marijuana, and drug paraphernalia were found in the residence. Defendant was arrested following the search and thereafter indicted on 6 January 2003 on one count each of manufacturing marijuana, trafficking in marijuana by possession, trafficking in heroin by possession, trafficking in cocaine by possession, and maintaining a dwelling for keeping and selling controlled substances.

On or about 27 January 2003, defendant filed a pretrial motion to suppress all evidence seized during the search of the residence. Defendant's motion was heard on 5 February 2003 by the Honorable Howard E. Manning, Jr. At the suppression hearing, the State introduced the search warrant and application for the warrant, including Detective Hobby's accompanying affidavit, into evidence. The State also offered additional evidence through the testimony of Detective Hobby. Defendant offered no evidence at the hearing.

Detective Hobby's testimony was consistent with the affidavit he prepared as part of the search warrant application for 3300 Pinecrest Drive, although his hearing testimony contained additional details regarding the trash bag pick-up he and Detective Cherry executed in front of the residence. Detective Hobby testified that the trash bag was situated in the yard at 3300 Pinecrest Drive near the curb,

"approximately three to four feet from the driveway at the corner of the lot, . . . approximately four to five feet off the roadway." Detective Hobby testified that at the time he picked up the trash bag, the garbage collection truck was in the neighborhood but had not yet reached Pinecrest Drive. On cross examination, Detective Hobby acknowledged that Raleigh has backyard garbage pick-up and that neither he nor Detective Cherry spoke to any of the sanitation workers who were then in the area or otherwise determined how the trash bag came to be situated where it was found. Detective Hobby testified that in addition to the marijuana, the trash bag contained "normal kitchen garbage" and that no documents connecting the trash bag to any person or address were found therein.

After hearing argument from the assistant district attorney and from defendant's counsel, Judge Manning orally granted defendant's motion to suppress all evidence obtained as a result of the search of the residence at 3300 Pinecrest Drive. On 13 March 2003, Judge Manning entered a written order allowing the motion to suppress, which contained extensive findings of fact and the following conclusions of law:

1. The discovery of marijuana in a garbage bag located near the curb of the street and adjacent to the driveway at 3300 Pinecrest Drive on a normal garbage pick up day without any documentation linking the bag to the residence or the defendant and without any showing as to how, when and by whom it was placed along the curb, does not implicate the residence located at 3300 Pinecrest Drive and provides no reasonable basis to believe that controlled substances would be found therein or on the defendant.

2. The affidavit portion of the search warrant herein did not provide sufficient facts and circumstances to establish probable cause to believe that the items sought were located upon the premises of 3300 Pinecrest Drive.

3. The resulting search violated the rights of the defendant afforded him under Chapter 15A of the North Carolina General Statutes, the Constitution of North Carolina and the Constitution of the United States.

4. The evidence obtained as a result of the search conducted on September 30, 2002 at 3300 Pinecrest Drive, together with the fruits of that search, are inadmissible in the trial of the defendant.

From this order granting defendant's motion to suppress, the State appeals, asserting that the trial court erred by concluding that Detective Hobby's affidavit supporting his search warrant application failed to establish probable cause.

"Our review of a ruling on a motion to suppress is limited to whether the trial court's findings are supported by competent evidence and whether those findings support its ultimate conclusions." *State v. McHone*, 158 N.C. App. 117, 120, 580 S.E.2d 80, 83 (2003). In the present case, the State has not challenged any of the trial court's findings of fact; as such, they are binding on appeal. *State v. Pendleton*, 339 N.C. 379, 389, 451 S.E.2d 274, 280 (1994), *cert. denied*, 515 U.S. 1121, 132 L. Ed. 2d 280 (1995). Accordingly, the sole issue for our determination is whether the trial court's conclusions of law are supported by these findings.

In *McHone*, this Court discussed the requirement that a search warrant application be supported by an affidavit establishing probable cause, stating in pertinent part as follows:

> A valid search warrant application must contain "[a]llegations of fact supporting the statement. The statements must be supported by one or more affidavits *particularly setting forth the facts and circumstances establishing probable cause* to believe that the items are in the places or in the possession of the individuals to be searched." N.C. Gen. Stat. § 15A-244(2) (2001) (emphasis added). Although the affidavit is not required to contain all evidentiary details, it should contain those facts material and essential to the case to support the finding of probable cause. *State v. Flowers*, 12 N.C. App. 487, 183 S.E.2d 820, *cert. denied*, 279 N.C. 728, 184 S.E.2d 885 (1971). . . . The clear purpose of these requirements for affidavits supporting search warrants is to allow a magistrate or other judicial official to make an independent determination as to whether probable cause exists for the issuance of the warrant under N.C. Gen. Stat. § 15A-245(b) (2001). N.C. Gen. Stat. § 15A-245(a) requires that a judicial official may consider only information contained in the affidavit, unless such information appears in the record or upon the face of the warrant.

McHone, at 120, 580 S.E.2d at 83. The supporting affidavit is sufficient "if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *State v. Ledbetter*, 120

N.C. App. 117, 121, 461 S.E.2d 341, 344 (1995) (quoting *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984)).

Our Supreme Court has adopted the "totality-of-the-circumstances" test established by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548, *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983), for determining whether information properly before the magistrate as part of a search warrant application provides a sufficient basis for finding probable cause. *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984). On review, this Court must pay great deference to and sustain the magistrate's determination of probable cause "if there existed a substantial basis for the magistrate to conclude that articles searched for were probably present." *State v. Hunt*, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002).

In the present case, we first note and reject the State's assertion that the trial court's review of the magistrate's decision to issue the search warrant was not properly limited to a determination of whether the magistrate had a substantial basis to find probable cause, but instead constituted a *de novo* review of the evidence. Because we conclude that Detective Hobby's affidavit fails to set forth a sufficient connection between the trash bag at issue and either the residence at 3300 Pinecrest Drive or defendant such that the magistrate could properly find the "substantial basis" necessary for probable cause, we fail to discern any error in the standard of review employed by the trial court.

Our review of the transcript indicates that the bulk of the argument at the suppression hearing focused on whether the facts set forth in Detective Hobby's affidavit sufficiently linked the trash bag to defendant or his residence, such that a substantial basis existed under North Carolina law for the magistrate to find probable cause and issue the search warrant. It was undisputed that defendant had drug convictions which were several years old, that defendant was the subject of a current drug investigation, and that defendant was the record owner of the residence located at 3300 Pinecrest Drive. The State essentially argued that these facts, combined with the presence of a single trash bag containing eight marijuana plants in the front yard of 3300 Pinecrest Drive near the curb on a normal garbage collection day, provided the requisite "substantial basis" upon which the magistrate could properly find probable cause and issue the search warrant. Defendant, however, maintained that because Detective Hobby's affidavit failed to allege (1) that any documents

were found inside the trash bag linking it with either 3300 Pinecrest Drive or defendant, or (2) that Detective Hobby observed defendant, sanitation workers, or anyone else place the trash bag where it was ultimately found, or otherwise determined how it came to be there, the affidavit was insufficient to connect the trash bag to defendant or his residence in a manner which would allow the magistrate to properly find probable cause under existing North Carolina law.[1]

At the conclusion of the suppression hearing, Judge Manning framed the issue as follows:

> The test is very simple. The test is, is that having a garbage bag out in somebody's yard, in your yard on the day in question without . . . asking the garbage men to go get it, or even seeing the garbage man come out or seeing the Defendant or seeing somebody in that house put that garbage bag out there, is the garbage bag standing alone enough?

Judge Manning then ruled as follows from the bench:

> . . . . I've thought about it. And I do not believe that that is enough.
>
> So the motion to suppress is allowed. . . . I don't believe that it is enough, standing alone, without any—anything else, that the garbage bag in the yard on garbage day without the officers seeing some contact between somebody in the house and the garbage come out, or the garbage man going and getting it and giving it to him. If that was there, there would be probable cause, but without that link, I don't think you have probable cause . . . .

On appeal, the State asserts that despite this lack of any evidence directly linking the trash bag to either 3300 Pinecrest Drive or defendant, the totality of the circumstances as set forth in Detective Hobby's affidavit allowed the magistrate to reasonably infer that the marijuana found therein came from inside the residence, and this inference in turn provided a substantial basis for the magistrate to find probable cause that further contraband would be found on the premises. We disagree.

North Carolina appellate courts have previously upheld the validity of search warrants issued where, as here, part of the totality of the

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1. The order allowing defendant's motion to suppress contained extensive findings of fact which were consistent with the facts as argued by the parties at the suppression hearing and set forth herein. As noted above, the State has not excepted to any of the trial court's findings of fact.

circumstances implicating the premises to be searched included illegal drug residue found in garbage collected from on or near the premises. *See State v. Hauser*, 342 N.C. 382, 464 S.E.2d 443 (1995); *State v. Washington*, 134 N.C. App. 479, 518 S.E.2d 14 (1999). We recognize that in both *Hauser* and *Washington*, the only issue decided on the merits was whether the warrantless search of the garbage *itself* violated the Fourth Amendment; in each case, the appellate court held that it did not, and declined for technical reasons to address the specific issue of whether the drug residue found therein provided the substantial basis for probable cause necessary to support the search warrants subsequently issued for each *premises*. However, given the fact-intensive nature of the issue presented by the instant appeal, we find the circumstances under which the police retrieved the garbage in *Hauser* and *Washington* instructive in our analysis of the present case.

We find it significant that in both *Hauser* and *Washington*, the circumstances surrounding each garbage retrieval provided a much more substantial link between the garbage collected and the premises for which a search warrant was sought than is present in the case *sub judice*. For example, in *Hauser*, the police obtained a search warrant for the defendant's residence based on the presence of cocaine residue in garbage which, by pre-arrangement between the police and the local sanitation department, was collected from the defendant's back yard in the usual fashion by a sanitation worker who regularly serviced the neighborhood, separated from other garbage, and turned over to police. *Hauser*, 342 N.C. at 384, 464 S.E.2d at 445. In *Washington*, where the police obtained a search warrant for the defendant's apartment based on drug residue found inside two garbage bags removed from the apartment community dumpster, the garbage bags were retrieved from the dumpster by a police officer conducting surveillance on the defendant's apartment immediately after he observed a man matching the defendant's description emerge from the defendant's apartment carrying two white plastic garbage bags tied closed with yellow strips, deposit them in the dumpster, and return to the defendant's apartment. *Washington*, 134 N.C. App. at 481, 518 S.E.2d at 15.

In contrast to the scenarios described in *Hauser* and *Washington*, we hold in the present case that because Detective Hobby's affidavit in support of his search warrant application does not contain sufficient facts and circumstances linking the trash bag retrieved by Detective Hobby to 3300 Pinecrest Drive, it fails to establish a "sub-

stantial basis for the magistrate to conclude that articles searched for were probably present." *Hunt*, 150 N.C. App. at 105, 562 S.E.2d at 600. The only circumstances stated in the affidavit connecting the trash bag to the premises are that the trash bag was retrieved "during the normal trash day and time[]" and "from the front yard/curb line area at 3300 Pinecrest Drive, beside of [sic] the driveway." The affidavit does not state that any written documents were found in the trash bag connecting it with either defendant or his residence. The affidavit contains no assertions that Detective Hobby observed defendant or anyone else connected to the residence at 3300 Pinecrest Drive place the bag where it was found. The affidavit likewise fails to assert that Detective Hobby spoke with any of the sanitation workers he observed in the area on the morning of the trash pick-up to determine whether any of them had removed the trash bag from the back yard of 3300 Pinecrest Drive, or any of the surrounding residences, and placed it near the curb for later retrieval by the garbage truck, in keeping with the City of Raleigh's back-yard garbage pick-up service. In fact, Detective Hobby testified at the suppression hearing that none of these circumstances existed.

It is clear, both from our review of the suppression hearing transcript and from the findings of fact contained in the order allowing defendant's motion to suppress, that Judge Manning noted each of these circumstances in carefully considering the totality of the circumstances presented on these facts. Given the dearth of facts and circumstances connecting the trash bag containing contraband to the premises for which the search warrant was sought, we agree with the trial court's conclusion that Detective Hobby's search warrant application failed to provide the requisite "substantial basis" upon which the magistrate could properly find probable cause and issue the search warrant. Accordingly, we affirm the trial court's order allowing defendant's motion to suppress.

Affirmed.

Judge BRYANT concurs.

Judge McCULLOUGH dissents by separate opinion.

Judge McCULLOUGH dissenting:

The majority has concluded that the affidavit filed in support of a search warrant issued by a magistrate for the search of defendant's

residence lacked probable cause and therefore should not have been issued. From this conclusion, I respectfully dissent.

Evidence seized in violation of the United States Constitution or the North Carolina Constitution shall be suppressed. N.C. Gen. Stat. § 15A-974(1) (2003). Section 20 of Article I of the North Carolina Constitution should not be read to enlarge or expand such rights beyond those afforded by the Fourth Amendment. *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992).

Probable cause is required for the issuance of a search warrant. The totality of the circumstances test has been adopted for determining probable cause. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984).

In the case *sub judice* a detective with the Raleigh Police Department documented that defendant resided at a single-family residence, 3300 Pinecrest Drive in Raleigh. The detective reported that defendant had prior arrests for the possession of drugs (marijuana and methaqualone). The detective further stated that on the normal trash day and at the normal time he recovered a single, white plastic bag of trash from defendant's front yard at the curbline next to the driveway leading to defendant's house. Inside the bag were dried up marijuana plants. No documents with defendant's name were found in the trash nor did the detective see who placed the bag at this spot. Based on the discovery of marijuana in the trash pickup, the warrant in question was issued.

The trial court and the majority refused to find that this search warrant affidavit was adequate as there were no documents inside the trash bearing defendant's name nor did surveillance establish who placed the bag curbside. At the suppression hearing the trial court noted that in Raleigh the garbage collectors go behind the houses and place the trash curbside for later pickup. While the trial court noted that "[t]here were other garbage bags in front of other houses along Pinecrest Drive," the court refused to draw the inference that the bag in front of 3300 Pinecrest Drive implicated that residence without evidence along the lines set forth above. While it would have been the better practice for the police to determine from the garbage collectors where the target bag came from, operational security may on some occasions make that impractical.

In any event, I believe the trial court erred in not allowing the inference to be drawn that the trash bag implicates the residence

where it was located. I believe the magistrate was entitled to draw the inference that a single bag in front of a residence more likely than not emanated from that residence.

In *State v. Arrington*, our Supreme Court stated a search warrant affidavit is sufficient when it

> supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty. The facts set forth in an affidavit for a search warrant must be such that a reasonably discreet and prudent person would rely upon them before they will be held to provide probable cause justifying the issuance of a search warrant. A determination of probable cause is grounded in practical considerations.

Arrington, 311 N.C. at 636, 319 S.E.2d at 256-57 (citations omitted).

I believe the trial court improperly applied a *de novo* review to the warrant in question and did not give proper deference to the magistrate's determination of probable cause. *State v. Ledbetter*, 120 N.C. App. 117, 121-22, 461 S.E.2d 341, 344 (1995) (Great deference should be paid to determination of probable cause and the reviewing court is not to conduct *de novo* review of evidence.).

Numerous decisions note that "probable cause" is a common sense, practical determination and that reviewing courts should not take a grudging, negative attitude toward warrants. *See, e.g.*, *State v. Riggs*, 328 N.C. 213, 400 S.E.2d 429 (1991). The issuing official is allowed to draw every reasonable inference from the information supplied by the affiant. *Id.*

Numerous cases can be found where search warrants were upheld when the affidavit was similar to the one here with there being no documents linking the defendant by name to the trash recovered nor was the property owner surveilled placing the trash curbside nor were the collectors interviewed.

In *Perkins v. State*, 197 Ga. App. 577, 398 S.E.2d 702 (1990), the Georgia Court of Appeals upheld a search warrant predicated on a tip from a concerned citizen, the defendant's prior criminal history and several trash seizures where drugs, drug records and paraphernalia were found. The trash was located curbside in front of the defend-

ant's residence, although the defendant was not observed placing the trash there, nor were any records bearing the defendant's name found in the trash. The defendant moved to suppress arguing that no one personally observed the defendant place the trash nor did the affidavit contain enough facts to establish an ownership connection between appellant and the trash searched.

In rejecting his arguments the Georgia Court stated:

> "In determining whether probable cause supported issuance of a search warrant, a 'totality of the circumstances' test is employed. 'The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him . . ., there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis . . . for conclud(ing)' that probable cause existed.' [Cit]" *Butler v. State*, 192 Ga. App. 710 (1) (386 S.E.2d 371) (1989). . . .
>
> Reviewing all the circumstances set forth in the affidavits, we conclude that there was a substantial basis for the magistrate's determination of probable cause. The information provided by Craft, [the affiant] arising out of his official investigation, was sufficient to establish probable cause. *Caffo v. State*, 247 Ga. 751 (2)(b) (279 S.E.2d 678 (1981). In addition, the magistrate was entitled to rely on the officer's knowledge of appellant's past criminal conduct. *Id.* at 755. The affidavit indicated the existence of an ongoing scheme to sell drugs, consequently, we cannot say that the statements in the affidavit were so stale as to make it unlikely that illegal drugs would be found on the premises at the time of the issuance of the warrant. See *id.* at 755. Although not all of the recitations in the affidavits were entirely accurate and despite the lack of statements regarding personal observations of appellant and his criminal activity, on the whole the affidavits supported the finding of probable cause. See *Ayers*, supra at 248.
>
> As to the connection between appellant and the trash, Craft stated that the trash was located at the curbside or at the roadway of the residences observed, and further stated the bases for connecting appellant to each of these residences, such as appellant's name on the lease of one residence, and the other residence being listed by appellant in connection with an auto accident together with a car registered to appellant located at that resi-

> dence. The Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection at the curb outside the home. *California v. Greenwood*, 486 U.S. 35 (108 S. Ct. 1625, 100 L. Ed. 2d 30) (1988). Utilizing the deferential standard of review appropriate for searches conducted pursuant to a search warrant, *State v. Morrow*, 175 Ga. App. 743(4) (334 S.E.2d 344) (1985), we conclude that appellant's first enumeration of error is without merit and the trial court did not err in denying appellant's motion to suppress.

Perkins, 197 Ga. App. at 578-79, 398 S.E.2d at 703-04.

The Georgia court applied the same legal standards that we utilize in North Carolina as noted herein and found that the affidavit was sufficient to establish probable cause.

Many decisions from other jurisdictions reach the same result. *See, e.g.*, *United States v. Colonna*, 360 F.3d 1169 (10th Cir. 2004) (affidavit upheld that recounted defendant's criminal record and results of a trash cover of container placed in front of defendant's home where drugs and paraphernalia were found); *United States v. Shanks*, 97 F.3d 977 (7th Cir. 1996), *cert. denied*, 519 U.S. 1135, 136 L. Ed. 2d 881 (1997) (garbage containers seized from land between alley and defendant's garage where drugs were found held to establish probable cause to search defendant's house); *United States v. Scull*, 321 F.3d 1270 (10th Cir. 2003), *Bono v. United States*, *cert. denied*, — U.S. —, 157 L. Ed. 2d 116 (2003) (evidence of a "trash pull" of trash in front of defendant's residence properly admitted at defendant's trial); *United States v. Crowell*, 586 F.2d 1020 (4th Cir. 1978), *cert. denied*, 440 U.S. 959, 59 L. Ed. 2d 772 (1979) (trash in front of defendant's residence with drugs inside justified issuance of search warrant); *State v. Duchene*, 624 N.W.2d 668 (N.D. 2001) (garbage search along with defendant's prior record justified issuance of search warrant); *United States v. Wilkinson*, 926 F.2d 22 (1st Cir. 1991), *cert. denied*, 501 U.S. 1211, 115 L. Ed. 2d 985 (1991) (trash curbside); *United States v. Reicherter*, 647 F.2d 397 (3d Cir. 1981) (three searches of curbside trash upheld); *United States v. Biondich*, 652 F.2d 743 (8th Cir. 1981), *cert. denied*, 454 U.S. 975, 70 L. Ed. 2d 395 (1981) (garbage left curbside with drug trash and other incriminating numerical notations justified issuance of search warrant); *United States v. Williams*, 75 Fed. Appx. 480 (2003) (curbside trash seizure); *United States v. Harris*, 6 Fed. Appx. 304 (2001) (curbside trash seizure upheld).

In its brief the State cites *State v. Bordner*, 53 S.W.3d 179 (Mo. Ct. App. 2001), *cert. denied*, 535 U.S. 1019, 152 L. Ed. 2d 624 (2002) which has facts similar to those cases listed above and where the search warrant was upheld.

The important lesson from the cases cited above is that the courts normally do infer that garbage on the property normally implicates that property. The evidence of record shows the other neighborhood homes had trash bags in front also. There was no evidence of a communal pickup point. The only evidence that the target bag did not originate with defendant's residence is the trial court's own speculation. By refusing to allow the magistrate to infer that trash in defendant's front yard came from his house, the trial court evinces a grudging review and would require absolute certainty before upholding this warrant. As noted in *Arrington*, probable cause is grounded in practical considerations. The fact that so many jurisdictions have upheld warrants with similar facts set forth in their affidavits demonstrates the logic behind the inference.

In all of the cases set forth above, the only evidence implicating the defendant's residence was the location of the trash. No garbage collectors were interviewed; surveillance did not establish who placed the trash curbside, nor was any documentary evidence bearing the defendant's name discovered. Yet all of these reviewing courts concluded that it was reasonable to draw the inference that trash located in front of the target residence implicated that residence. I do not believe that merely because Raleigh sanitation workers go behind houses to collect garbage the inference that a solitary bag of trash in front of a residence originated from that location is thereby destroyed.

Many other reported cases have held that the location of trash in front of or near the defendant's residence justifies a search warrant once incriminating evidence is found in the trash. *See United States v. Briscoe*, 317 F.3d 906 (8th Cir. 2003); *United States v. Gonzalez-Rodriguez*, 239 F.3d 948 (8th Cir. 2001); *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); *United States v. Shelby*, 573 F.2d 971 (7th Cir. 1978), *cert. denied*, 439 U.S. 841, 58 L. Ed. 2d 139 (1978); *State v. Jacobs*, 437 So. 2d 166 (Fla. App. 1983), *pet. dismissed*, 441 So. 2d 632 (1983); *State v. Kyles*, 513 So. 2d 265 (La. 1987), *cert. denied*, 486 U.S. 1027, 100 L. Ed. 2d 236, *reh'g denied*, 487 U.S. 1246, 101 L. Ed. 2d 955 (1988).

Many of these courts, in applying the totality of the circumstances test also noted the defendant's prior criminal history whereas the trial court here ignored defendant's criminal record even though it is described by the affiant. It was error to fail to credit the inference that this factor made it more likely to be defendant's trash. While a subject's criminal record can never be the central factor, it is error to simply ignore this issue. *See State v. Watson*, 119 N.C. App. 395, 458 S.E.2d 519 (1995). In *United States v. Bynum*, 293 F.3d 192 (4th Cir. 2002) the Fourth Circuit stated:

> An officer's report in his affidavit of "the target's prior criminal activity or record is clearly material to the probable cause determination," *United States v. Taylor*, 985 F.2d 3, 6 (lst Cir. 1993) (citation omitted), *see also United States v. Sumpter*, 669 F.2d 1215, 1222 (8th Cir. 1982) ("An individual's prior criminal activities and record [cited in a search warrant application] have a bearing on the probable cause determination.")[.]

Id. at 197-98.

In summary, I believe the trial court and this Court have failed to give proper deference to the magistrate's determination of probable cause. The fact that garbage collectors go behind houses and place bags on the street does not destroy the inference that a bag in front of a residence most likely came from that residence, particularly when other trash bags are observed in front of other residences in the neighborhood. I further believe the trial court, and this Court, failed to properly apply the totality of the circumstances test and give proper weight to the fact that defendant's prior record makes it more likely that the trash is his rather than that of someone else. Accordingly, I would reverse the trial court and deny the motion to suppress.

STATE OF NORTH CAROLINA v. PAUL EMMANUEL PELHAM

No. COA03-636

(Filed 4 May 2004)

1. Assault— defense of habitation—instruction—assault with firearm on law enforcement officer

Although the trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury, assault with a firearm on a law enforcement officer, and drug case by failing to

give defendant's requested instruction on the defense of habitation in a situation where officers possessed a search warrant, defendant was awakened by the officers' distraction device, and defendant as well as other witnesses maintained that they never heard the officers' warning that they were from the sheriff's department and had a search warrant, this assignment of error is dismissed as harmless error because: (1) by finding defendant guilty of assault with a firearm on a law enforcement officer, the jury necessarily concluded that defendant was aware or had reasonable grounds to be aware of the officers' identity and further concluded that they were acting within the scope of their authority; and (2) the defense of habitation has no applicability to the facts as found by the jury since the defense does not apply unless the entry is unlawful.

2. Assault— assault on law enforcement officer—motion to dismiss—sufficiency of evidence

The trial court did not err by failing to dismiss the assault on a law enforcement officer indictments even though defendant contends there was a variance regarding the evidence for the phrase "by shooting at him," because: (1) allegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage and disregarded when testing the sufficiency of the indictment; and (2) the Court of Appeals has previously held that the phase "to wit: by shooting him with said pistol" in an indictment for this charge was surplusage and should be disregarded, and the present indictment is so similar that a similar outcome is dictated.

3. Search and Seizure— validity of warrant—failure to show false statements

Defendant failed to show that a search warrant was invalid on the ground that the affiant knowingly or recklessly made a false statement in the affidavit where defendant merely denied what the confidential informant and the officer-affiant asserted.

4. Search and Seizure— execution of warrant—knock and announce—failure to object—not ineffective assistance of counsel

While officers may not have knocked on defendant's door before they used a battering ram to open the door while executing a search warrant, they had announced their presence and pur-

pose and thus complied with the requirements of the "knock and announce" statute, N.C.G.S. § 15A-249. Therefore, the failure of defendant's counsel to contest the method of execution of the warrant did not constitute the ineffective assistance of counsel.

5. Sentencing— mitigating factors—offense committed under strong provocation

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury, assault with a firearm on a law enforcement officer, and drug case by failing to find that defendant acted under extreme provocation, because: (1) defendant's argument assumes that his version of the facts supports a finding of provocation; and (2) the jury, in finding defendant guilty, credits the officers' version of the facts and necessarily rejects defendant's allegations.

Appeal by defendant from judgments entered 29 October 2002 by Judge James Floyd Ammons, Jr., in Brunswick County Superior Court. Heard in the Court of Appeals 1 March 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley, for the State.

Miles & Montgomery, by Mark Montgomery, for defendant appellant.

McCULLOUGH, Judge.

The defendant was tried at the 14 October 2002 Criminal Term of Brunswick County Superior Court on indictments which charged assault with a deadly weapon with intent to kill inflicting serious injury; three counts of assault with a firearm on a law enforcement officer; possession with intent to manufacture, sell or deliver cocaine and marijuana; maintaining a place for keeping controlled substances; and possession of drug paraphernalia. Having been found guilty, he was sentenced to a term of 125 to 159 months on the assault with intent to kill indictment, followed by 35-53 months on each of the assault with a firearm on a law enforcement officer charges, all being consecutive to one another, and one concurrent term of 6 to 8 months on the consolidated drug convictions.

The evidence at trial tended to show that Brunswick County Deputy Sheriff Clint Simpson was investigating the use and sale of drugs at 326 Van Galloway Trail near Winnabow, defendant's resi-

dence, in September 2001. Deputy Simpson used a reliable confidential informant who had purchased drugs from defendant in the past to make a controlled purchase of a gram of crack cocaine from defendant for $60 on 3 October 2001. On Friday, 5 October 2001, Deputy Simpson obtained a search warrant for defendant's residence, a single-wide trailer. The warrant was executed that night. Having been warned that defendant was normally armed, the Sheriff's Department Emergency Response Team was used to enter the trailer. The officers were deployed to the front and rear of the trailer.

Deputy Simpson's team, dressed in camouflage or subdued clothing, displaying badges and "SHERIFF" printed on their outer clothing, lay in the woods behind defendant's trailer from approximately 9:30 p.m. until around 10:30 p.m. when the other half of the team arrived in a van which proceeded up defendant's driveway, stopping near the front door. These officers were dressed in black tactical gear with "SHERIFF" printed in bright yellow or white lettering, front and back.

The two teams simultaneously approached the trailer, deploying a distraction device sometimes called a "flash/bang." Both groups then began yelling, "Sheriff's Department, search warrant." Simpson unsuccessfully attempted to enter through the rear door, which was locked. At that point, one of the occupants, Atari Thomas, jumped out of a rear window, firing three shots at the officers while running away. The officers approaching the front door had seen Mr. Thomas peering out the front window at them as they approached. Finding the front door locked, these officers used the battering ram to effect entry after around three blows to the door. The kitchen and living room lights were on and two officers went to the right and another two went left. Deputies Lanier and Smith went left to check out the rear master bedroom. As Deputy Lanier reached the bedroom he heard gunfire outside. He then moved the sheet covering the doorway and with his gun drawn made a sweep across the room. At that point Deputy Lanier saw a large silver gun and the silhouette of a black male, defendant, who then shot Deputy Lanier in the neck and hand. Lanier returned fire toward the gun. Deputy Smith saw the revolver held by defendant and observed defendant fire twice at his partner from near the bathroom door at which time he fired his shotgun.

Deputy Smith provided covering fire as Deputy Lanier crawled to safety. Deputies Cain and Evans both saw defendant point his weapon at them as they joined Smith. Defendant refused to obey orders from the officers to come out, and defendant continued to hide in the bath-

room, occasionally peeking out at the deputies. Eventually he did come out and surrender after the officers fired at him severely wounding him. Deputy Smith seized marijuana from defendant's pants pocket. Deputy Simpson then executed the search warrant and recovered marijuana, cocaine, cutting agents, scales and money as well as defendant's pistol. Two marijuana plants were found growing in the backyard.

Deputy Lanier was taken to the hospital in Wilmington where he was treated for his gunshot wounds. The shot to his neck injured his spinal nerves, punctured his lungs and exited his back. The gunshot wound to his right hand fractured a finger and caused nerve damage. Despite two surgeries, Deputy Lanier still suffers a permanent disability due to the loss of nerve functions.

Defendant, a convicted felon who is prohibited from possessing firearms, testified at trial that he did not know who had entered his trailer, having been asleep at the beginning of the raid. He claimed to have been awakened by the shots fired in the backyard and the distraction device. Fearing that he was being robbed, he admitted firing at the first white face he saw, whereupon he hid in the bathroom yelling, "who y'all," until the officers' return fire caused him to surrender. He denied he heard anyone yelling "Sheriff's Department, search warrant" or any similar words. He claimed that he first realized the intruders were police officers when he heard one of them say, "You shot my partner." He further denied meeting the confidential informant the day before (even though the confidential informant testified at trial as to the controlled delivery). Defendant also called some relatives and neighbors as witnesses who testified that they heard the gunfire but never heard anyone yelling, "Sheriff's Department, search warrant" prior to the shooting.

On appeal defendant raises the following issues: (I) the trial court erred by failing to give defendant's requested instruction on the defense of habitation; (II) the trial court erred by failing to dismiss the assault on law enforcement officer indictments due to a variance; (III) defendant's motion to suppress should have been granted; and (IV) the trial court should have found that defendant acted under extreme provocation and sentenced him in the mitigated range.

For the reasons which follow, we reject defendant's arguments and believe he had a fair trial, free from prejudicial error.

I. DEFENSE OF HABITATION

[1] At the conclusion of the trial the court and counsel engaged in an extensive charge conference during which counsel for defendant requested a jury instruction on both self-defense and defense of habitation. The trial court agreed to give the self-defense instruction but refused the defense of habitation instruction.

The defense of habitation is codified at N.C. Gen. Stat. § 14-51.1 (2003) which provides:

> (a) A lawful occupant within a home or other place of residence is justified in using any degree of force that the occupant reasonably believes is necessary, including deadly force, against an intruder to prevent a forcible entry into the home or residence or to terminate the intruder's unlawful entry (i) if the occupant reasonably apprehends that the intruder may kill or inflict serious bodily harm to the occupant or others in the home or residence, or (ii) if the occupant reasonably believes that the intruder intends to commit a felony in the home or residence.
>
> (b) A lawful occupant within a home or other place of residence does not have a duty to retreat from an intruder in the circumstances described in this section.

The statute had the effect of broadening the defense of habitation by allowing deadly force to be used to prevent unlawful entry into the home or to terminate an unlawful entry by an intruder. *State v. Blue*, 356 N.C. 79, 82, 565 S.E.2d 133, 135 (2002). In determining whether the defense has been raised by the evidence, competent evidence in the record must be evaluated in the light most favorable to defendant. *State v. Morgan*, 315 N.C. 626, 636, 340 S.E.2d 84, 91 (1986).

Defendant argues that his testimony wherein he claimed that he did not hear the warning "Sheriff's Department, search warrant," buttressed by his other witnesses who maintained that they never heard these warnings, coupled with the officers' description of the events surrounding the search sufficiently raised the defense so that the instruction should have been given. It was uncontested that the officers possessed a search warrant and the evidence was uncontradicted that defendant was awakened by the distraction device.

Given defendant's testimony, and its evaluation in the light most favorable to defendant as required, we agree that the evidence justified the giving of the instruction.

Having concluded that the defense of habitation instruction should have been given, might, in the ordinary case, end our analysis. However, in the case *sub judice* defendant was also charged with assault with a firearm on a law enforcement officer in violation of N.C. Gen. Stat. § 14-34.5(a) (2003) which provides:

> Any person who commits an assault with a firearm upon a law enforcement officer, probation officer, or parole officer while the officer is in the performance of his or her duties is guilty of a Class E felony.

The elements of the offense are: (1) an assault, (2) with a firearm, (3) on a law enforcement officer, (4) while the officer is engaged in the performance of his or her duties. *State v. Haynesworth*, 146 N.C. App. 523, 553 S.E.2d 103 (2001). Furthermore, our Courts have determined that this charge also requires that the State prove that defendant knew or should have known that the victim was an officer performing his official duties. *See State v. Avery*, 315 N.C. 1, 30-31, 337 S.E.2d 786, 803 (1985); *State v. Page*, 346 N.C. 689, 699, 488 S.E.2d 225, 232 (1997), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651 (1998). The knowledge requirement has been imposed although the underlying statute is silent on the issue. In the case at bar the jury was properly instructed regarding all of the above elements, including knowledge, before making a finding of guilty on the assault with a firearm on a law enforcement officer indictments.

Here, there was ample evidence to sustain such a finding. It is uncontradicted that the officers set off a distraction device or "flash/bang" at the outset of the raid. The officers testified that they then yelled "Sheriff's Department, search warrant" prior to their approach to the door. While defendant denied he heard them, the jury is not required to credit his denial and evidently assessed his credibility as lacking on this point. It is also uncontested that the officers were dressed in tactical clothing which plainly marked them as members of the Sheriff's Department.

The trial court instructed the jury as follows:

> Now, as to each of these three charges, you will have the following choices. To find the defendant guilty of assault with a firearm on a law enforcement officer, and then the named officer; or, assault—I'm sorry—guilt of assault by pointing a gun; or, not guilty.

The defendant has been accused of assault with a firearm on a law enforcement officer, three counts. Now, I charge that for you to find the defendant guilty of any of these three counts, the State must prove five things beyond a reasonable doubt. As I said before, they must prove those five things in each of those separate three counts which you will consider separately.

First, that the defendant assaulted the victim intentionally and without justification or excuse, by pointing a firearm at him, or by discharging a firearm at him, or both.

Second, that the assault was committed with a firearm.

Third, that the victim was a law enforcement officer.

Fourth, that the defendant knew or had reasonable grounds to know that the victim was a law enforcement officer.

And fifth, that the victim was in the performance of his duties. Executing or serving a search warrant is a duty.

Now, the defendant's actions are excused and he is not guilty if he acted in self-defense. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant's action was not in self-defense. If you find from the evidence beyond a reasonable doubt that the defendant assaulted the victim with deadly force, that is, force likely to cause death or great bodily harm, and that the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or apparently necessary to protect himself from death or great bodily harm, and the circumstances did create such a belief in the defendant's mind at the time he acted, such an assault would be justified by self-defense.

You, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to him at the time. A defendant does not have the right to use excessive force. He had the right to use only such force as reasonably appeared necessary to him under the circumstances, to protect himself from death or great bodily harm. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size of the defendant as compared to the victim, the fierceness of the assault, if any, upon the defendant, whether or not the victim had a weapon in his possession. Again, you, the jury, determine the reasonable-

ness of the defendant's belief from the circumstances appearing to him at the time.

So, I charge that in regard to these three charges of assault with a firearm on a law enforcement officer which you will consider separately, if you find from the evidence beyond a reasonable doubt that on or about the alleged date of October the 5th, the defendant intentionally assaulted with a firearm the victim, who was a law enforcement officer, in the performance of his duties, and the defendant knew or had reasonable grounds to know that the victim was a law enforcement officer, it would be your duty to return a verdict of guilty.

However, if you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of assault on a law enforcement officer with a firearm. If you do not find the defendant guilty of assault with a firearm on a law enforcement officer, you must determine whether he is guilty of assault by pointing a gun in any of the three charges. If in any of those three charges you do not find the defendant guilty of assault with a firearm on a law enforcement officer, you will then determine whether he is guilty of the lesser included offense of assault by pointing a gun.

By finding defendant guilty of these offenses the jury necessarily concluded that defendant was aware, or had reasonable grounds to be aware, of the officers' identity and further concluded that they were acting within the scope of their authority. As the defense of habitation does not apply unless the entry is unlawful it had no applicability to the facts as found by the jury. We therefore find that the failure to give the instruction under the circumstances of this case was harmless. Defendant's assignment of error is thus overruled.

II. FAILURE TO DISMISS ASSAULT WITH A FIREARM ON LAW ENFORCEMENT OFFICER INDICTMENTS

[2] As noted earlier, defendant was charged in three separate indictments with the offense of Assault With a Firearm On A Law Enforcement Officer in violation of N.C. Gen. Stat. § 14-34.5 which is set forth above.

Each indictment read as follows with the only difference being the name of the victim:

THE JURORS for the State upon their oath present that on or about the 5th day of October 2001, and in the county named

above the defendant named above unlawfully, willfully, and feloniously did assault Mickey Smith, a law enforcement officer of the Brunswick County Sheriff's Department, with a firearm, by shooting at him. At the time of this offense the officer was performing a duty of investigating illegal use of narcotics at the residence of 326 Van Galloway Trail, Winnabow, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Defendant argues that the phrase "by shooting at him" was not borne out by the evidence. Instead, the evidence at trial established that after shooting Deputy Lanier, defendant did not shoot at any other officer. Thus, defendant argues a fatal variance occurred which requires dismissal as the evidence did not conform to the allegations in the indictment. *State v. Wall*, 96 N.C. App. 45, 49, 384 S.E.2d 581, 583 (1989).

An indictment must set forth each of the essential elements of the offense. *State v. Poole*, 154 N.C. App. 419, 422, 572 S.E.2d 433, 436 (2002), *cert. denied*, 356 N.C. 689, 578 S.E.2d 589 (2003). Allegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage and disregarded when testing the sufficiency of the indictment. *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). To require dismissal any variance must be material and substantial and involve an essential element. *State v. Pickens*, 346 N.C. 628, 488 S.E.2d 162 (1997).

In the case of *State v. Muskelly*, 6 N.C. App. 174, 177, 169 S.E.2d 530, 532 (1969), this Court held that the phrase "to wit: by shooting him with said pistol" was surplusage and should be disregarded. The indictment, being otherwise proper, was upheld. We find the present indictment is so similar to *Muskelly*, that a similar outcome is dictated. Accordingly, this assignment of error is also overruled.

III. MOTION TO SUPPRESS

[3] Defendant contended in a pretrial motion that the search warrant affidavit lacked probable cause to support the issuance of a warrant. The pertinent portion of the affidavit stated:

ON AUGUST 5, 2001 AFFIANT MET WITH A CONFIDENTIAL SOURCE OF INFORMATION, HEREAFTER REFERRED TO AS CS1. CS1 STATED THAT THEY KNEW OF A BLACK MALE NAMED PAUL PELHAM WHO LIVED ON VAN GALLOWAY TRAIL IN WINNABOW OFF OF HIGHWAY 87. CS1 STATED TO AFFIANT

THAT THEY KNEW OF PELHAM TO SELL CRACK COCAINE FROM HIS RESIDENCE. CS1 ALSO STATED THAT THEY KNEW OF ANOTHER BLACK MALE NAMED ATARI THOMAS WHO APPARENTLY STAYED WITH PELHAM. CS1 STATED THAT THOMAS WILL SELL CRACK COCAINE OR MARIJUANA FROM THE RESIDENCE. CS1 FURTHER MENTIONED THAT ANOTHER BLACK MALE CALLED J.R. SEEMED TO BE AT THE RESIDENCE ALL THE TIME AND THAT HE TOO SOLD CRACK COCAINE VERY FREQUENTLY. CS1 STATED THAT THEY HAVE ENGAGED IN DRUG TRANSACTIONS WITH ALL THREE OF THE SUBJECTS MENTIONED. CS1 HAS KNOWN OF THE THREE SUBJECTS FOR A WHILE AND STATED THAT PELHAM HAS A GOLDISH COLORED, OLDER CADILLAC WITH MAG RIMS WHILE THOMAS HAS A BLACK NEW LOOKING SMALL CAR WITH MAG RIMS. CS1 STATED THAT J.R. HAS A BICYCLE. CS1 STATED THAT THE RESIDENCE THAT THE SUBJECTS SELL DRUGS FROM IS AN OLDER SINGLE WIDE MOBILE HOME THAT IS TAN IN COLOR WITH A LARGE FRONT PORCH LEADING TO THE FRONT DOOR. CS1 STATED THAT THEY THINK THE ADDRESS IS 326 VAN GALLOWAY TRAIL. CS1 STATED THAT THERE ARE APPROXIMATELY SIX (6) PIT BULL TYPE DOGS IN THE YARD AND THAT THEY ARE USUALLY TIED UP SECURELY. CS1 STATED THAT THE VEHICULAR TRAFFIC TO AND FROM THE RESIDENCE IS HEAVY TO SAY THE LEAST. CS1 STATED THAT THE DRUG SALES ARE ALL HOURS OF THE DAY AND NIGHT.

ON AUGUST 5, 2001 AFFIANT ISSUED CASH TO CS1 FOR THE PURPOSE OF MAKING A CONTROLLED PURCHASE OF COCAINE FROM THE RESIDENCE MENTIONED. AFFIANT THEN SEARCHED CS1 AS WELL AS THE CONVEYANCE USED. AFFIANT THEN DISPATCHED CS1 TO THE MENTIONED RESIDENCE. CS1 WAS OBSERVED GOING TO THE RESIDENCE BY AFFIANT. AFTER A BRIEF TIME AT THE RESIDENCE, CS1 LEFT AND AFFIANT FOLLOWED THEM BACK TO THE STAGING AREA. CS1 THEN GAVE TO AFFIANT A QUANTITY OF COCAINE. AFFIANT THEN SEARCHED CS1 AND THE CONVEYANCE USED.

AFFIANT THEN DEBREIFED [sic] CS1 AND WAS INFORMED THAT THEY HAD MADE THE TRANSACTION WITH PELHAM AT THE RESIDENCE. CS1 WAS THEN RELEASED.

WITHIN THE LAST 48 HOURS, AFFIANT AGAIN MET WITH CS1. CS1 WAS AGAIN ISSUED CASH FROM AFFIANT, SEARCHED AND DISPATCHED TO THE RESIDENCE MENTIONED. CS1 WAS AGAIN OBSERVED GOING TO THE RESIDENCE AND LEAVING AFTER A SHORT TIME. CS1 WAS THEN MET BY AFFIANT AT THE STAGING AREA WHERE A QUANTITY OF COCAINE WAS TURNED OVER TO AFFIANT BY CS1. ONCE AGAIN CS1 STATED THAT THEY RECEIVED THE COCAINE AT THE RESIDENCE. CS1 WAS THEN SEARCHED AGAIN AND RELEASED.

ALONG WITH THE TWO SEPARATE [sic] CONTROLLED BUYS OF COCAINE FROM THE RESIDENCE, AFFIANT AND OTHER MEMBERS OF THE DRUG ENFORCEMENT UNIT HAVE RECEIVED NUMEROUS PHONE-IN COMPLAINTS REGARDING THE DRUG ACTIVITY AT THE MENTIONED LOCATION. SOME OF THE COMPLAINTS WERE FROM ANGERED EYE WITNESSES [sic] TO THE TRANSACTIONS. AGENTS FROM THE DRUG UNIT ALSO HAVE WORKED THE VAN GALLOWAY ROAD AREA ON NUMEROUS OCCASIONS AND HAVE PERFORMED VEHICLE STOPS RESULTING IN THE ARRESTS OF SEVERAL PEOPLE WITH ILLEGAL DRUGS THAT THEY STATED WERE OBTAINED FROM PAUL PELHAM'S TRAILER.

Defendant's own affidavit constituted a mere denial that the confidential informant had gone to defendant's residence prior to the search in order to purchase cocaine.

To be entitled to a hearing on the truth of the factual allegations contained in the search warrant, defendant must preliminarily show that the affiant knowingly or recklessly made a false statement in the affidavit. *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997). *See also* N.C. Gen. Stat. § 15A-978 (2003). Contradicting evidence does not support the motion and it can accordingly be denied summarily, *State v. Langdon*, 94 N.C. App. 354, 357, 380 S.E.2d 388, 390 (1989), as was done in this case. We note that the confidential informant also testified at trial to the same events set forth in the affidavit. While defendant denies what the confidential informant and the officer assert, his denial is insufficient to make a showing of falsity or recklessness requiring suppression. It is also clear from the record before us that the court properly denied the motion summarily.

[4] At trial the defense counsel did not contest the method of the execution of the warrant. Accordingly, the issue is not directly preserved

for appellate review. *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). The appellant then argues that this failure to attack the execution of the warrant demonstrates that trial counsel was ineffective.

We review ineffective assistance of counsel claims under the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 692, 80 L. Ed. 2d 674, 696 (1984), and adopted by our Supreme Court. To prevail, a defendant must show that counsel's performance fell below an objective standard of reasonableness given a strong presumption that the assistance was within professional norms and that counsel's errors were so serious that there exists a reasonable probability that the result would have been different absent the error. *State v. Mason*, 337 N.C. 165, 177, 446 S.E.2d 58, 65 (1994). Obviously, the failure to object to admissible evidence cannot constitute ineffective assistance of counsel.

The State argues that the officers had probable cause to believe that giving notice would endanger those serving the warrant and their failure is thus excused pursuant to N.C. Gen. Stat. § 15A-251. Here, it is clear that the officers set off a distraction device prior to attempting entry. Although defendant denies hearing them, all of the participants in the raid stated that they approached the trailer yelling "Sheriff's Department, search warrant" prior to breaking down the door. While they may not have knocked on the door, the officers certainly had announced their presence and purpose, thus complying with the requirements of the "knock and announce statute." N.C. Gen. Stat. § 15A-249 (2003).

The record establishes sufficient facts to show that any motion to suppress would have been unlikely to succeed and the failure to object could not have constituted ineffective assistance of counsel. *See State v. Lyons*, 340 N.C. 646, 670, 459 S.E.2d 770, 783 (1995).

This assignment of error is therefore overruled.

IV. FAILURE TO SENTENCE IN THE MITIGATED RANGE

[5] Finally, defendant argues that the trial court was obligated to find as a mitigating factor that the offense was committed under "strong provocation" as defined in N.C. Gen. Stat. § 15A-1340.16(e)(8) (2003), where this is defined as follows: "The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating." An extenuating relationship would exist when the victim was in part responsible for the offense. *State v.*

Mixion, 110 N.C. App. 138, 152-53, 429 S.E.2d 363, 391, *disc. review denied*, 334 N.C. 437, 433 S.E.2d 183 (1993). Strong provocation means the defendant did not act in a state of "cool [] blood." *State v. Deese*, 127 N.C. App. 536, 538-39, 491 S.E.2d 682, 685 (1997).

The trial court's failure to find a mitigating factor will not be overturned unless the evidence at sentencing is uncontradicted, substantial, and there is no reason to doubt its credibility. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983).

Defendant's argument assumes that his version of the facts supports a finding of provocation. The facts, as established by the jury, however, contradict the very underpinnings of his argument. For this finding to be mandated, it must have been established that the officers were somehow responsible for the incident or that defendant acted under provocation. However, the jury, in finding defendant guilty, credits the officers' version of the facts and necessarily rejects defendant's allegations. As these issues were resolved against defendant at trial, he cannot maintain his entitlement to this mitigating factor.

Accordingly this assignment of error is likewise overruled. For the reasons set forth we find defendant's trial was conducted free of prejudicial error.

No error.

Judges WYNN and LEVINSON concur.

STATE OF NORTH CAROLINA v. TABATHA JOYCE BELL, DEFENDANT

No. COA03-392

(Filed 4 May 2004)

1. Evidence— acquittal of related offense—chain of circumstances—admissible

Events leading to a charge of assaulting an officer (upon which defendant was acquitted in district court) were admissible in defendant's trial for obstructing an officer because the events formed a chain of circumstances.

2. Constitutional Law— double jeopardy—evidence from prior trial

Admission of evidence from a prior district court trial for assaulting an officer, in which defendant was acquitted, did not violate double jeopardy in defendant's trial for obstructing an officer. Evidence is inadmissible under double jeopardy when it falls within the collateral estoppel rule; a defendant who can only speculate about the basis for her prior acquittal does not meet that burden.

3. Constitutional Law— double jeopardy—same facts as basis of two offenses—separate offenses

The trial court did not err in a prosecution for obstructing an officer by not giving defendant's requested instruction that a subsequent incident which led to an assault charge was separate and not probative of obstruction. Although defendant contended that the instruction was required under double jeopardy, the limitation on the same facts forming the basis for two convictions applies only if the two offenses are actually one. These two offense are separate and distinct and a jury could find that evidence of one is not supportive of the other.

4. Police Officers— obstructing charge—assault on an officer acquittal—not relevant

Acquittal of assault on an officer is not relevant to guilt of obstructing an officer and was properly excluded from a prosecution for obstructing an officer.

5. Police Officers— obstructing—sufficiency of evidence

Defendant's motion to dismiss a charge of obstructing an officer for insufficient evidence was correctly dismissed. The evidence was that defendant did not merely remonstrate with an officer on behalf of another and was sufficient to allow a jury to find that defendant had obstructed and delayed an officer in the performance of his duties.

6. Appeal and Error— preservation of issues—constitutional issues—not raised at trial—no plain error assertion

A constitutional argument not raised at trial was not before the Court of Appeals where there was no plain error assertion.

7. Constitutional Law— vagueness—obstructing an officer

The contention that N.C.G.S. § 14-223, a magistrate's order finding probable cause, and the trial court's instructions in a prosecution for obstructing an officer were all so vague as to violate due process was without merit.

Appeal by defendant from judgment entered 7 August 2002 by Judge Steve A. Balog in Forsyth County Superior Court. Heard in the Court of Appeals 28 January 2004.

Attorney General Roy Cooper, by Assistant Attorney General Ann Stone, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

GEER, Judge.

Defendant Tabatha Joyce Bell appeals from her conviction for delaying and obstructing a public officer, arguing primarily that her acquittal in district court of assault on a public officer precluded the admission of evidence of assault in a subsequent trial in superior court for obstruction and delay of a public officer. Because defendant has failed to demonstrate that the admission of the challenged evidence was barred by collateral estoppel and the Double Jeopardy Clause and because the evidence was admissible under the Rules of Evidence, we conclude that there was no error in defendant's trial.

Facts

The State's evidence tended to show the following. On 5 September 2001, Corporal Charles Crosby, a deputy with the Forsyth County Sheriff's Office, was on duty as the school resource officer for Hanes Middle School. A fight broke out at Hanes among five students. When Crosby arrived, two teachers were separating the students although one student remained combative. Crosby took the combative student, a 14-year-old eighth grader, to his patrol car.

As Crosby was putting the student into the rear of his patrol car, defendant parked her car immediately in front of the patrol car and rushed to its rear door. Crosby was having difficulty handcuffing the student because the student was struggling to get out of the car. Defendant began screaming, "He didn't do anything wrong. Let him go." Crosby advised defendant that he was conducting an investigation and asked her to step back. Defendant instead shouted to the stu-

dent, "I am going to call your mother. What is your phone number?" Approximately twenty to thirty students gathered around as defendant continued to shout.

Crosby, who was still struggling with the student, again asked defendant to step back. Defendant ignored Crosby, leaned inside the patrol car between Crosby and the student, and prevented Crosby from closing the door. After calling for backup officers, Crosby threatened to arrest defendant if she did not step back. Defendant then returned to her car.

Crosby locked the student in the car, approached defendant, and asked her to exit her car and give him her driver's license. After first refusing, defendant then threw an identification card out the window (because her license had been revoked), opened her car door, and pushed Crosby. The two began to struggle with Crosby throwing defendant to the ground and trying to handcuff her. Defendant screamed to bystanders to help her. While Crosby was calling for help on his walkie-talkie, defendant was able to escape and run across the street where Crosby then caught her.

Backup officers arrived and the assistant sheriff instructed Crosby to remove defendant from the area because she was creating a disturbance. Another police officer assisted Crosby in handcuffing defendant. Crosby then transported defendant to the magistrate's office.

During Crosby's encounter with defendant, the student remained locked in the patrol car alone for three to five minutes. After Crosby left, two other officers continued the investigation with the student, who was released to the custody of his parents. Crosby was unable to continue his investigation until the following day.

Defendant was charged with two misdemeanors: assaulting a government officer under N.C. Gen. Stat. § 14-33(c)(4) (2003) and delaying and obstructing a public officer under N.C. Gen. Stat. § 14-223 (2003). After trial in Forsyth County District Court, defendant was acquitted of the assault charge, but found guilty of the delaying and obstructing charge. Defendant appealed to superior court as to the delaying and obstructing charge. In superior court, after a trial *de novo*, the jury found defendant guilty. The trial judge sentenced defendant to 30 days in jail, but suspended the sentence for a period of 12 months probation with defendant to complete 25 hours of community service.

I

Defendant first argues that the superior court erred in allowing the prosecution to introduce evidence of the events that occurred after defendant left the patrol car because that evidence was also the basis for the assault charge. Defendant contends that because she was acquitted of the assault charge in district court, the admission of this evidence violated the Double Jeopardy Clause of the Fifth Amendment and Rules 403 and 404(b) of the Rules of Evidence.

Rules of Evidence

[1] We first address defendant's contention that the evidence of events occurring after she left the patrol car was inadmissible under Rules 403 and 404(b) because "[i]f the evidence was inadmissible on evidentiary grounds, we need not address the constitutional question raised by defendant." *State v. Agee*, 326 N.C. 542, 546, 391 S.E.2d 171, 173 (1990). We hold that the trial court did not err, under the Rules of Evidence, in admitting the evidence challenged by defendant.

Defendant argues, citing *State v. Scott*, 331 N.C. 39, 43, 413 S.E.2d 787, 789 (1992), that evidence of a crime of which a defendant was previously acquitted is inadmissible under Rule 403 as a matter of law. *Scott*, however, acknowledges that "[t]he use of evidence of conduct underlying a prior charge of a crime for which the defendant has been tried and acquitted has been permitted in the exceptional case in which the conduct occurred in the same 'chain of circumstances' as the crime for which the defendant is being tried." *Id.* at 45, 413 S.E.2d at 790.

Our Supreme Court applied this principle in *Agee*, 326 N.C. at 547-48, 391 S.E.2d at 174, holding that evidence resulting in an acquittal as to one charge is admissible in a second trial on a different charge if it is part of the "chain of circumstances[,]" forms part of the history of the event, or serves to enhance the natural development of the facts.[1] This Court has held such evidence admissible when it "was linked in time and circumstances with the chain of events leading to defendant's arrest and formed an integral and natural part of an account of the crime . . . ." *State v. Solomon*, 117 N.C. App. 701, 706, 453 S.E.2d 201, 205, *disc. review denied*, 340 N.C. 117, 456 S.E.2d 325 (1995).

1. In *Agee*, the Court held that evidence that an officer discovered marijuana on the defendant's person was admissible in a trial in superior court for possession of LSD (found at the same time as the marijuana) even though the defendant had been acquitted in district court of possession of marijuana. *Id.* at 548, 391 S.E.2d at 174.

Here, the evidence challenged by defendant was part of a single, continuing transaction beginning with defendant's insertion of herself into the events at Hanes Middle School and continuing through her arrest. Evidence of what occurred after she left the patrol car was part of the chain of events leading to defendant's arrest and, therefore, admissible under *Agee* and *Solomon*. Indeed, as explained below, the evidence of events occurring after defendant left the patrol car provided added evidentiary support for the charge of obstructing and delaying an officer.

Defendant also asserts in passing that the evidence was barred by Rule 404(b). In *Agee*, however, the Supreme Court held that when the evidence "served the purpose of establishing the chain of circumstances leading up to [defendant's] arrest . . ., Rule 404(b) did not require its exclusion as evidence probative *only* of defendant's propensity to [engage in illegal conduct]." 326 N.C. at 550, 391 S.E.2d at 175-76 (emphasis original). Because they were part of the chain of circumstances, the admission of events away from the patrol car did not violate Rule 404(b).

Since we have concluded that the evidence was not inadmissible as a matter of law, the question " '[w]hether to exclude evidence under Rule 403 [was] a matter left to the sound discretion of the trial court.' " *Agee*, 326 N.C. at 550, 391 S.E.2d at 176 (quoting *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990)). Defendant has not made any showing, apart from her argument under *Scott*, that the trial court abused its discretion and we have discerned none.

Double Jeopardy

[2] As we have concluded that the evidence was admissible under the Rules of Evidence, we must address defendant's double jeopardy argument. The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65, 89 S. Ct. 2072, 2076 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989). The first two categories of cases involve successive prosecutions while the third involves a single prosecution. *See State v. Gardner*, 315 N.C.

444, 451, 340 S.E.2d 701, 707 (1986) ("When analyzing the precise issue now before us as one of double jeopardy, courts across the nation have often tended to confuse rather than clarify the legal principles involved because of the failure to recognize and differentiate between single-prosecution and successive-prosecution situations.").

This appeal involves the first category of cases, a successive prosecution following an acquittal. With respect to this assignment of error, defendant does not challenge the State's ability to prosecute her, but rather questions whether the evidence of events after defendant left the patrol car could, consistent with the Double Jeopardy Clause, be admitted in light of defendant's prior acquittal on the charge of assaulting an officer. *See Agee*, 326 N.C. at 551, 391 S.E.2d at 176 ("The constitutional issue here is not whether the State could prosecute defendant, but whether evidence of defendant's marijuana possession was admitted properly in light of defendant's previous acquittal of that charge."). Defendant contends that her district court acquittal of the assault charges precluded admission in superior court of any of the evidence relied upon by the State in district court to prove assault.

As the Supreme Court stated in *Agee*, *id.*, this issue is governed by *Dowling v. United States*, 493 U.S. 342, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990). In *Dowling*, the United States Supreme Court noted: "There is no claim here that the acquittal in the case involving [defendant] barred further prosecution in the present case. The issue is the inadmissibility of [evidence relating to an alleged crime that the defendant had previously been acquitted of committing]." *Id.* at 347, 107 L. Ed. 2d at 717, 110 S. Ct. at 671. In holding that the evidence was admissible, the Court rejected a rule that would "exclude in all circumstances, . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.* at 348, 107 L. Ed. 2d at 717, 110 S. Ct. at 671.

Instead, the Court held that evidence is inadmissible under the Double Jeopardy Clause only when it falls within the scope of the collateral estoppel doctrine. *Id.* That doctrine provides that " 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' " *Id.* at 347, 107 L. Ed. 2d at 717, 110 S. Ct. at 672 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 25 L. Ed. 2d 469, 475, 90 S. Ct. 1189, 1194 (1970)). *See also id.* at 350, 107 L. Ed. 2d at 718-19, 110 S. Ct. at 673 ("[W]e find no merit in the Third Circuit's

holding that the common-law doctrine of collateral estoppel in all circumstances bars the later use of evidence relating to prior conduct [which] the Government failed to prove violated a criminal law.").

The question raised by defendant's appeal is, therefore, whether the State was precluded by collateral estoppel from relying upon evidence of events occurring after defendant left the patrol car. As our Supreme Court has explained:

> Under the doctrine of collateral estoppel, an *issue* of ultimate fact, once determined by a valid and final judgment, cannot again be litigated between the same parties in any future lawsuit. Subsequent prosecution is barred only if the jury could not rationally have based its verdict on an *issue* other than the one the defendant seeks to foreclose.

State v. Edwards, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984) (emphasis original). The *Edwards* Court stressed that the identity of the evidence is not controlling:

> [W]e must emphasize that the "same evidence" test is not the measure of collateral estoppel in effect here. The determinative factor is not the introduction of the same evidence [as offered in the first trial,] but rather whether it is absolutely necessary to defendant's conviction [in the second trial] that the second jury find against defendant on an *issue* upon which the first jury found in his favor.

Id. (emphasis original). As a result, the Court observed, " '[t]he "same evidence" could, in an appropriate case, conceivably be introduced at the second trial for an entirely different purpose than that which it served at the earlier trial.' " *Id.* at 146, 310 S.E.2d at 613 (quoting *United States ex rel. Triano v. Superior Court of New Jersey*, 393 F. Supp. 1061, 1070, n.8 (D.N.J. 1975), *aff'd without opinion*, 523 F.2d 1052 (3rd Cir. 1975), *cert. denied*, 423 U.S. 1056, 46 L. Ed. 2d 645, 96 S. Ct. 787 (1976)).

In light of the principles set out in *Dowling* and *Edwards*, the double jeopardy issue here does not hinge on whether the same evidence used in defendant's prosecution for assault in district court was admitted in her prosecution for delaying and obstructing an officer in superior court. Instead, the question before this Court is whether it was necessary to defendant's delaying and obstructing conviction that the jury find against her on an issue on which the district court found in her favor when it acquitted her of assault.

Defendant bears the burden of "demonstrat[ing] that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling*, 493 U.S. at 350, 107 L. Ed. 2d at 719, 110 S. Ct. at 673. *See also Edwards*, 310 N.C. at 145, 310 S.E.2d at 613 ("In advancing a collateral estoppel double jeopardy defense, the defendant has the burden of persuasion.").

Defendant was acquitted in district court of assault on an officer in violation of N.C. Gen. Stat. § 14-33(c)(4). Because the district court acquittal apparently was a general verdict, we must determine whether the district court could rationally have based its verdict upon an issue other than that which the defendant sought to foreclose from consideration in the second trial. *Solomon*, 117 N.C. App. at 704, 453 S.E.2d at 203.

N.C. Gen. Stat. § 14-33(c) provides: "[A]ny person who commits any assault . . . is guilty of a Class A1 misdemeanor if, in the course of the assault . . . , he or she: . . . (4) [a]ssaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties[.]" "Assault" is defined as " 'an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.' " *State v. Lineberger*, 115 N.C. App. 687, 692, 446 S.E.2d 375, 378-79 (1994) (quoting *State v. McDaniel*, 111 N.C. App. 888, 890, 433 S.E.2d 795, 797 (1993)).

In support of her collateral estoppel argument, defendant claims that the district court, in order to reach its verdict, must necessarily have rejected the State's evidence of what happened at defendant's car as not credible. In light of the elements of the offense, however, the verdict could just as likely have resulted from findings that defendant did not attempt to do immediate physical injury to Crosby or did not use sufficient force to put a reasonable person in fear of immediate bodily harm. As to the struggling between defendant and Crosby, the district court also could have decided that defendant was defending herself from the excessive use of force. *See State v. Anderson*, 40 N.C. App. 318, 322, 253 S.E.2d 48, 50 (1979) (jury must be instructed that the force used against a law enforcement officer is excused if the assault was limited to the use of reasonable force by defendant in defense against excessive force).

When there is more than one possible explanation for an acquittal and defendant can only speculate as to the basis for the acquittal, defendant has failed to meet her burden of establishing collateral estoppel. *Dowling*, 493 U.S. at 352, 107 L. Ed. 2d at 720, 110 S. Ct. at 674 ("There are any number of possible explanations for the jury's acquittal verdict at [defendant's] first trial. . . . As a result, . . . we would conclude that petitioner has failed to satisfy his burden of demonstrating [collateral estoppel]."). As this Court has previously held, "[t]he application of collateral estoppel in a criminal case cannot be predicated on mere speculation." *Solomon*, 117 N.C. App. at 705, 453 S.E.2d at 204. Without a showing that the district court necessarily decided an issue adversely to the State that was also at issue in the superior court trial, defendant has failed to demonstrate that the trial court erred under the Double Jeopardy Clause in admitting the evidence.

II

[3] Defendant argues, in a related assignment of error, that the trial court erred, under the Double Jeopardy Clause, in refusing her request for a jury instruction that the incident that occurred at the patrol car was separate from that occurring at defendant's car and that evidence of the latter was not proof that defendant obstructed and delayed Crosby. This argument is premised on defendant's mistaken assumption that evidence of the same facts cannot form the basis for two separate convictions.

The jury would be precluded from considering the evidence relating to the assault on an officer as evidence of obstruction and delay only if the two offenses are actually only one offense: "If what purports to be two offenses actually is one under the *Blockburger* test, double jeopardy prohibits successive prosecutions . . . ." *Gardner*, 315 N.C. at 454, 340 S.E.2d at 709. The *Blockburger* test provides: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309, 52 S. Ct. 180, 182 (1932).

The crime of delaying and obstructing an officer is defined by N.C. Gen. Stat. § 14-223, which provides: "If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a

Class 2 misdemeanor." This Court has already held that "the charge of resisting an officer [under N.C. Gen. Stat. § 14-223] and the charge of assaulting a public officer while discharging or attempting to discharge a duty of his office are separate and distinct offenses" because "[n]o actual assault or force or violence is necessary to complete the offense described by G.S. 14-223." *State v. Kirby*, 15 N.C. App. 480, 489, 190 S.E.2d 320, 326, *appeal dismissed*, 281 N.C. 761, 191 S.E.2d 363 (1972) (in single-prosecution context, trial court's failure to "merge" the two offenses did not subject the defendant to double jeopardy). The same is equally true for a charge of obstructing or delaying an officer.

Since the two offenses were separate and distinct, a jury could, without doing violence to the Double Jeopardy Clause, find that the evidence of defendant's conduct that occurred after she left the patrol car was supportive of a charge of obstructing and delaying, even though the district court had found the same conduct was insufficient to constitute assault. The trial court did not, therefore, err in declining to give defendant's requested instruction. *See also State v. Hooker*, 145 N.C. 581, 582-83, 59 S.E. 866, 866 (1907) ("The previous acquittal protects him from being tried again for the same offense, but it is not an estoppel on the State to show the same facts if, in connection with other facts, they are part of the proof of another and distinct offense.").

[4] For the same reasons, defendant's contention that the trial court erred in refusing to allow her to introduce evidence of her acquittal has no merit. Since the acts after defendant left the patrol car may also form a basis for an obstruction and delay charge, defendant's assertion that she should have been able to show the jury that all of the acts after the patrol car were resolved in her favor is incorrect. Defendant's acquittal of assault on a public officer has no relevance to the question whether defendant was guilty of obstructing and delaying a public officer and the trial court therefore did not err in excluding evidence of the acquittal.

III

[5] Defendant next assigns error to the trial court's denial of her motion to dismiss, arguing that the State's evidence was insufficient to prove that she delayed and obstructed Crosby in the performance of his duties. In considering a motion to dismiss in a criminal case, the trial judge must decide whether there is substantial evidence of each element of the offense charged. *State v. Brown*, 310 N.C. 563,

566, 313 S.E.2d 585, 587 (1984). "Evidence is 'substantial' if a reasonable person would consider it sufficient to support the conclusion that the essential element in question exists." *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981).

In reviewing a trial court's denial of a motion to dismiss, the appellate court views the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence, and resolving any contradictions in the evidence in favor of the State. *State v. Taylor*, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994). The appellate court must then determine, based on that evidence, if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Barnette*, 304 N.C. at 458, 284 S.E.2d at 305.

To prove the offense of obstruction or delay of an officer, the State must establish that the defendant willfully and unlawfully resisted, delayed, or obstructed a public officer, whom the defendant knew or had reasonable grounds to believe was a public officer, in discharging or attempting to discharge a duty of his office. *State v. Dammons*, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612, *disc. review denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, — U.S. ___, 158 L. Ed. 2d 382, 124 S. Ct. 1691 (2004). There is no dispute that defendant knew that Crosby was a public officer and that he was attempting to discharge a duty of his office. Defendant, however, contends that the State offered insufficient evidence that she willfully and unlawfully obstructed or delayed Crosby.

Defendant relies largely on *State v. Allen*, 14 N.C. App. 485, 491, 188 S.E.2d 568, 573 (1972) (quoting 58 Am. Jur. 2d, *Obstructing Justice*, §§ 12 and 13), in which this Court observed that " 'merely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer . . . .' " The evidence in this case showed that defendant's conduct amounted to more than "merely remonstrating" with Crosby on behalf of the student.

When viewed in the light most favorable to the State, the evidence suggested that defendant inserted herself into an investigation of a school fight, she interfered with the school safety officer's attempts to secure a student in his patrol car, she physically blocked him from closing his car door, she repeatedly ignored his instructions to step away, and she attempted to incite the gathering crowd to interfere. At her own car, she again refused to cooperate with Crosby to the point

of running across the street, with the result that the student was left alone in the patrol car, Crosby was unable to continue with his investigation of the fight, and he was required to seek back-up.

This evidence more closely resembles that of *State v. Singletary*, 73 N.C. App. 612, 327 S.E.2d 11, *disc. review denied*, 314 N.C. 335, 333 S.E.2d 495 (1985). In *Singletary*, the evidence showed that "both defendants advanced to within six feet of the police officers after they had been told to halt. One of the defendants had his fists balled in the air and yelled, 'no, no, no, he ain't going nowhere.' [T]he other defendant yelled, 'stop it, he ain't going.' " *Id.* at 616, 327 S.E.2d at 14. This Court held that the defendants were not "merely remonstrating" with the officer on behalf of another and, accordingly, the trial judge did not err in denying the defendants' motion to dismiss. *Id.* at 616-17, 327 S.E.2d at 14.

Likewise, we believe the evidence in this case was sufficient to allow a jury to find that defendant obstructed and delayed Crosby in the performance of his duties. The trial court properly denied the motion to dismiss.

IV

[6, 7] Defendant also argues that (1) N.C. Gen. Stat. § 14-223, (2) the magistrate's order finding probable cause, and (3) the trial court's jury instructions were all so vague as to violate defendant's right to due process of law. Because defendant did not raise these constitutional issues at trial and has not asserted plain error on appeal, they are not properly before us. *See State v. Truesdale*, 340 N.C. 229, 233, 456 S.E.2d 299, 301 (1995) (when a defendant fails to "specifically and distinctly" assert that a trial court's act constitutes plain error, he waives appellate review of the issue); *State v. Holmes*, 149 N.C. App. 572, 574, 562 S.E.2d 26, 28 (2002) ("It is well established that a constitutional question must be raised and decided at trial before this Court will usually consider the question on appeal."). Nevertheless, we have reviewed defendant's arguments and conclude that they are without merit.

No error.

Chief Judge MARTIN and Judge STEELMAN concur.

IN RE J.C.S.

[164 N.C. App. 96 (2004)]

IN THE MATTER OF: J.C.S.; AND R.D.S., TWO MINOR CHILDREN

No. COA03-390

(Filed 4 May 2004)

1. Child Abuse and Neglect— appeal from order—further trial court action

The Court of Appeals denied a motion to dismiss an appeal from a permanency planning order as moot following the issuance of a trial court order terminating parental rights during the pendency of the appeal of the planning order. The Juvenile Code provides that the trial court's jurisdiction is limited to a temporary order affecting custody or placement during the pendency of appeal, and an order terminating parental rights is a permanent order. Cases dismissing similar appeals as moot did not address the trial court's jurisdiction.

2. Child Abuse and Neglect— permanency planning hearing—timely

A permanency planning hearing was held within 12 months of the initial order as required by statute, despite subsequent hearings.

3. Appeal and Error— notice of appeal—different issue argued

The Court of Appeals did not review an issue concerning a permanency planning order (one of several orders in this case) where defendant's notice of appeal concerned only a permanent adoption plan entered on a different date.

4. Child Abuse and Neglect— permanency planning order—findings—sufficient

There were sufficient findings of fact in a permanency planning order which would allow DSS to cease reunification efforts, and those findings were supported by the evidence. While the order does not contain a formal, specifically identified list of statutory factors, the court considered and made written findings about the relevant factors and did not simply recite allegations.

Appeal by respondent from order entered 3 December 2002 by Judge L. Suzanne Owsley in Catawba County District Court. Heard in the Court of Appeals 19 November 2003.

J. David Abernethy for petitioner-appellee Catawba County Department of Social Services.

M. Victoria Jayne for respondent-appellant.

Crowe & Davis, P.A., by H. Kent Crowe as Guardian Ad Litem for the minor children.

ELMORE, Judge.

Penny S. (respondent) appeals from a permanency planning order (permanency planning order), entered in open court 3 December 2002 and filed 28 February 2003, setting a permanent plan of adoption for her minor children J.C.S., born 13 May 1987, and R.D.S., born 19 August 1991. For the reasons set forth herein, we affirm.

The record on appeal reveals that on 16 September 1999, the Catawba County Department of Social Services (DSS) filed a juvenile petition alleging that J.C.S. and R.D.S. were dependent and neglected juveniles within the meaning of N.C. Gen. Stat. §§7B-101(9) and (15). On 12 October 1999, respondent stipulated that she periodically left J.C.S. and R.D.S. home alone and unsupervised while she was at work, and respondent consented to the adjudication of the children as neglected and dependent on these grounds. Thereafter, on 7 December 1999 a dispositional order was entered in open court placing legal custody of J.C.S. and R.D.S. with DSS and specifically approving placement in respondent's home, conditioned upon respondent's compliance with the Family Services Case Plan/Service Agreement and the trial court's orders that respondent continue treatment with Mental Health Services, maintain stable housing and employment, and make appropriate child care arrangements. Shortly thereafter, in December 1999, respondent was charged with driving while impaired while R.D.S. and another child were with her in the car.

At some point prior to a review hearing held 1 February 2000, J.C.S. and R.D.S. began to reside with their maternal grandmother, where they remained until being placed in foster care on 7 June 2000. At the 7 November 2000 permanency planning review hearing, the trial court continued placement in foster care and set a permanent plan of reunification with respondent for both children. At the 27 February 2001 permanency planning review hearing, the trial court found that respondent was taking prescription medication for nerves, insomnia, headaches, and manic-depressive symptoms, and that "a

slow transition of the minor children back into [respondent's] home is in the children's best interest," and again continued the children's foster care placement.

Following a permanency planning review hearing on 22 May 2001, physical custody of J.C.S. and R.D.S. was returned to respondent on a trial basis, despite the trial court's finding that respondent "continues to struggle with appropriate decisions affecting the lives of the minor children and her life[.]" This trial placement was continued through permanency planning review hearings held on 17 July 2001, 6 November 2001, and 26 February 2002. During this period of time, respondent completed a substance abuse assessment, Intensive Outpatient Treatment Services and the After Care Program, a DWI assessment, the Nurturing Program, and the Women at Risk Program, and continued in family therapy. Evidence was presented at the 26 February 2002 review hearing that J.C.S., then 14, had an older boyfriend who helped respondent pay the family's bills, and that respondent encouraged this relationship. Following the 26 February 2002 review hearing, respondent revealed that J.C.S. was pregnant. J.C.S. subsequently gave birth to twins prematurely in March 2002. Following the 23 April 2002 review hearing, the trial court found that J.C.S.'s babies were fathered by a 21-year-old illegal immigrant whom respondent had allowed to spend the night in her home with J.C.S., and ordered that the trial placement with respondent end immediately and that J.C.S. and R.D.S. be returned to foster care.

Following the 16 July 2002 permanency planning review hearing, the trial court found that J.C.S. and R.D.S. were doing very well in their foster home placements; that J.C.S. was doing a very good job caring for her twin sons; and that respondent had expressed a desire to move to Michigan, and ordered DSS to cease reunification efforts between respondent and her children. Thereafter, following the 3 December 2003 permanency planning review hearing, the trial court made the following pertinent findings of fact:

> 2. That the minor children continue to be placed in the G. [F]oster home and are doing very well in this placement.
>
> . . .
>
> 6. That the minor child, [J.C.S.], is currently in the ninth (9th) grade at Hickory High School. Because she missed so many days of school last year, she will spend her first semester as a

freshman. She is working to complete her schoolwork and is passing her classes this year.

7. That the minor child, [R.D.S.], is currently in the fifth (5th) grade at a local elementary school. While his grades are better, the minor child is having some academic difficulty and will require some after-school assistance.

. . .

10. That both of the minor children continue to have supervised visitation with the mother for two hours each week at the Department of Social Services. During such visitation, the minor child [R.D.S.] appears to be distancing himself from the mother.

11. That the minor child, [R.D.S.], disclosed in a therapy session on October 24, 2002, that, although he loves the mother very much, he want[s] to be adopted by his foster mother.

12. That the mother has maintained housing through Section 8 in the Catawba Ridge Apartments.

13. That the mother is currently unemployed. She has reported that she has applied for disability and Medicaid.

14. That the mother is currently not paying child support for the minor children due to her unemployment.

15. That the mother has completed the Nurturing Program, but has been unable to consistently demonstrate appropriate parenting skills. When the minor child [R.D.S.] disclosed his wish to be adopted by the foster mother, the mother became upset and was unable to empathize with him or to display appropriate, supportive parenting responses, even with coaching from the therapist.

16. That the mother has completed a substance abuse assessment, Intensive Outpatient Treatment and After Care sessions. She has completed a DWI assessment which was required by DMV.

17. That the mother has completed the Women at Risk Program, but has been unable to consistently demonstrate improved problem-solving and decision-making capabilities.

18. That the mother continues to participate in family therapy through Mental Health.

19. That, although Court order [sic] to do so, the mother has not completed Parenting classes.

20. That, while she brings gifts, cards and food to the visits, the mother focuses the majority of her attention during visitation on the twin sons of [J.C.S.], rather than on the minor children, [J.C.S.] and [R.D.S.]. Despite being redirected to pay attention to the minor child, [R.D.S.], the mother has continued to do this. As a result, the minor child [R.D.S.] often plays by himself during visits because the mother does not pay much attention to him.

21. That the mother loves the minor children very much, but continues to believe that both of the minor children being placed in foster care was the fault of the minor child [J.C.S.] in becoming pregnant.

. . .

24. That the permanent plan for the minor children of adoption is appropriate and is in the best interest of the minor children.

25. That the Department of Social Services has exercised reasonable efforts to prevent or eliminate the need for continued placement out of the mother's home.

26. That return to the home of the mother is not in the best interest of the minor children, and is contrary to the health, safety and welfare of the minor children.

27. That the Department of Social Services has exercised reasonable efforts to assist the minor children in obtaining permanency and to serve the needs of the minor children.

The trial court then concluded, in pertinent part, as follows:

2. That [DSS] has exercised reasonable efforts toward reunification of the minor children with their mother, but reunification is not in the best interest of the minor children at this time.

. . .

5. That return to the home of the mother is not in the best interest of the minor children, and is contrary to the health, safety and welfare of the minor children.

Based on the foregoing, the trial court ordered that the permanent plan for both J.C.S. and R.D.S. be changed to adoption. From this permanency planning order, respondent appeals.

I. Motion to Dismiss

[1] At the outset, we note that on 3 November 2003, during the pendency of the instant appeal, the trial court entered an order purporting to terminate respondent's parental rights (TPR order) with respect to J.C.S. and R.D.S.. In considering the instant appeal, this Court is entitled to take judicial notice of this subsequent TPR order. *In re Stratton*, 159 N.C. App. 461, 462, 583 S.E.2d 323, 324, *appeal dismissed,* 357 N.C. 506, 588 S.E.2d 472-73, (2003). After ten days passed without respondent appealing the TPR order, *see* N.C. Gen. Stat. § 7B-1113 (2003), DSS subsequently moved this Court pursuant to N.C.R. App. P. 37(a) to dismiss the instant appeal, citing *Stratton* for the proposition that the TPR order rendered the instant appeal moot. This Court carefully considered the motion and by order entered 19 December 2003 denied DSS's motion to dismiss this appeal.

In considering DSS's motion to dismiss the instant appeal, this Court was presented with the important question of whether the trial court may properly exercise its jurisdiction and enter a subsequent order terminating parental rights during the pendency of an appeal, by the parent whose rights have purportedly been terminated by the subsequent TPR order, from an earlier order in the same case. This Court has recently considered precisely this question and answered in the negative, holding that the trial court exceeded its authority under N.C. Gen. Stat. § 7B-1003 by entering an order terminating the respondent's parental rights during the pendency of the respondent's appeal from an earlier permanency planning review order. *In re Hopkins*, 163 N.C. App. 38, 42-43, 592 S.E.2d 22, 24 (17 February 2004).

We note that in vacating the TPR order at issue in *Hopkins*, this Court employed an analysis identical to the analysis by which we concluded that DSS's motion to dismiss the present appeal should be denied. In the present case, as in *Hopkins*, respondent first appealed from a permanency planning order, which order set adoption as the permanent plan for the subject juveniles. In the present case, as in *Hopkins*, during the pendency of this earlier appeal, DSS filed a petition seeking termination of respondent's parental rights to the subject juveniles. In the present case, as in *Hopkins*, while the earlier appeal was still pending, the trial court considered DSS's petition and entered a TPR order, which purported to terminate respondent's parental rights to the subject juveniles. On these facts, this Court vacated the TPR order in *Hopkins*, holding that "by entering the TPR

order while respondent-father's appeal from the earlier permanency planning review order was still pending, the trial court exceeded the authority expressly granted to it under N.C. Gen. Stat. § 7B-1003 to 'enter a *temporary* order affecting the custody or placement of the juvenile' during the pendency of the earlier appeal." *Hopkins*, 163 N.C. App. at 42, 592 S.E.2d at 25 (emphasis supplied and retained).

Our Juvenile Code provides that during the pendency of an appeal from an earlier order, the trial court's authority over the subject juvenile is limited to entry of "a *temporary* order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State." N.C. Gen. Stat. § 7B-1003 (2003) (emphasis added). Because we conclude, as did this Court in *Hopkins*, that "[a]n order terminating parental rights to a juvenile is, by its very nature, a *permanent* rather than a *temporary* order affecting the juvenile's custody or placement[,]" *id.* at 42, 592 S.E.2d at 25, we rejected DSS' argument that entry of the TPR order rendered the present appeal moot, reasoning that the trial court lacked jurisdiction pursuant to N.C. Gen. Stat. § 7B-1003 to enter the subsequent TPR order during the pendency of respondent's instant appeal of the earlier permanency planning order.[1]

We are mindful that in *Stratton* and in the recent decision *In re N.B.*, 163 N.C. App. 182, 592 S.E.2d 597 (2 March 2004), two different panels of this Court have dismissed as moot the respondents' appeal from an order adjudicating the subject juveniles to be neglected and dependent, where a subsequent order terminating the respondents' parental rights to the subject juveniles was entered during the pendency of the respondents' appeal from the adjudication of neglect and dependency. However, as was the case in *Hopkins*, the instant case is distinguishable from *N.B.* and *Stratton* because neither *N.B.* nor *Stratton* addressed the issue of whether the trial court properly exercised its *jurisdiction* by entering a TPR order during the pendency of the parents' appeal from an earlier order. In both *N.B.* and *Stratton*, this Court's analysis was limited to determination of whether the subsequent TPR proceedings afforded the parents a sufficiently "inde-

1. We wish to clarify, however, that because the order terminating respondent's parental rights is not presently before this Court for review, the conclusions necessarily reached during this Court's consideration of DSS's motion to dismiss the instant appeal regarding the trial court's lack of jurisdiction to enter the TPR order have no effect on the validity of the TPR order, and must not be construed to disturb any part of the TPR order. *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 ("As a general rule, the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken.")

pendent adjudication" of the issues raised by the earlier adjudication proceedings; in each case this Court answered in the affirmative and concluded that the appeal from the earlier adjudication order should be dismissed as moot on these grounds. *Stratton*, 159 N.C. App. at 464, 583 S.E.2d at 325 ("In short, Mr. Stratton has already received a new, independent adjudication of the neglect issue and any resolution of the issues raised on this appeal [from the order adjudicating the children as neglected and dependent] will have no practical effect on the existing controversy."); *N.B.*, 163 N.C. App. at 183, 592 S.E.2d at 598 ("Where an appellant has 'received a new, independent adjudication of the neglect issue and any resolution of the issues raised on this appeal will have no practical effect on the existing controversy,' the appeal should be dismissed.") Because neither *Stratton* nor *N.B.* addresses the issue of the trial court's jurisdiction to enter a TPR order during the pendency of an appeal from an earlier order in the same case, those decisions do not control the outcome in the instant case. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the *same issue*, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court" (emphasis added)).

II. *Permanency planning order*

We now return to respondent's appeal from the permanency planning order, which changed the permanent plan for J.C.S. and R.D.S. to adoption. By her first assignment of error, respondent contends the permanency planning order "was not supported by clear, cogent and convincing evidence, was not entered in accordance with [N.C. Gen. Stat. § 7B-907] and is contrary to North Carolina Law."[2] In her brief, respondent brings forward this lone assignment of error, under a single argument heading which is identical to this assignment of error as set forth in the record. Respondent then proceeds to argue, under this single heading, that: (1) the trial court failed to conduct a permanency planning hearing within one year of the initial order removing J.C.S. and R.D.S. from respondent's custody, as required by N.C. Gen. Stat. § 7B-907(a); (2) the order requiring DSS to cease reunification efforts, entered after the 16 July 2002 permanency planning review hearing, contained insufficient findings of fact; and (3) the permanency planning order's findings of fact were not proper under N.C. Gen. Stat.

2. Respondent's second assignment of error, as identified in the record, was not presented and discussed in her brief and is therefore deemed abandoned. *See* N.C.R. App. P. 28(a).

§ 7B-907(b), were insufficient to support the conclusion changing the permanent plan for J.C.S. and R.D.S. to adoption, and were not supported by the evidence.

We first note that respondent, by grouping this multiplicity of separate contentions and arguments together under a single assignment of error in the record and argument heading in her brief, has violated N.C.R. App. P. 10(c)(1), which requires that "[e]ach assignment of error . . . so far as practicable[] be confined to a single issue of law." However, because we have again elected to exercise our authority under N.C.R. App. P. 2, we have considered each of respondent's arguments, notwithstanding their improper presentation to this Court. We find each of respondent's arguments to be without merit.

[2] First, respondent contends the trial court failed to conduct a "permanency planning hearing within 12 months after the date of the initial order removing [J.C.S. and R.D.S. from respondent's] custody," as required by N.C. Gen. Stat. § 7B-907(a) (2003). Our review of the record indicates custody of the children was initially placed with DSS following the dispositional hearing held on 7 December 1999. Thereafter, following the permanency planning hearing held eleven months later, on 7 November 2000, the trial court selected a permanent plan of reunification with respondent. Accordingly, this argument is without merit.

[3] Second, respondent asserts the order entered after the 16 July 2002 permanency planning review hearing allowing DSS to cease reunification efforts contained insufficient findings of fact. However, in her notice of appeal filed in connection with the instant appeal, respondent indicates that she appeals only from the "Order entered in Catawba County Juvenile Court on Tuesday, December 3, 2002, ordering a Permanent Plan of Adoption for her two minor children[.]" The order allowing DSS to cease reunification efforts entered following the 16 July 2002 permanency planning review hearing is, therefore, not part of the present appeal. *See* N.C.R. App. P. 3(d) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken . . . .") Our review of the record does not reveal that respondent ever appealed from the order ceasing reunification efforts entered following the 16 July 2002 permanency planning review hearing, although she had every opportunity to do so, and her time to do so has long since run. Accordingly, we decline to further exercise our Rule 2 authority and review this order.

[4] In her final argument, respondent defines the "dispositive issue" as whether the trial court's findings in the permanency planning order support its conclusion that the permanent plan for J.C.S. and R.D.S. should be changed to adoption. Respondent argues they do not, because (1) the trial court did not make the requisite written findings as specified by N.C. Gen. Stat. § 7B-907(b), and (2) the findings were "not supported by clear, cogent, and convincing evidence."[3] We disagree.

Pursuant to N.C. Gen. Stat. § 7B-907(b), if at the conclusion of the permanency planning hearing the trial court determines the children are not to return home, the trial court must consider the following enumerated factors and make written findings of fact regarding those relevant to the case:

> (1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;
>
> (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
>
> (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;
>
> (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;
>
> (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;
>
> (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-907(b) (2003).

In the permanency planning order which is the subject of this appeal, the trial court concluded that the permanent plan for J.C.S.

3. Respondent cites no authority in support of her assertion that the findings must be supported by "clear, cogent, and convincing evidence." In fact, the trial court's findings of fact are conclusive on appeal if they are supported by any competent evidence. *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003).

and R.D.S. should be changed to adoption. While the permanency planning order does not contain a formal listing of the § 7B-907(b) (1)-(6) factors, expressly denominated as such, among its 27 comprehensive findings of fact, we conclude the trial court nevertheless did consider and make written findings regarding the relevant § 7B-907(b) factors. Despite respondent's assertion to the contrary, the instant permanency planning order is clearly distinguishable from the order at issue in *In re Harton*, where a different panel of this Court vacated a permanency planning review order which simply stated a single evidentiary fact and adopted the DSS and guardian *ad litem* reports, and remanded to the trial court "to specially make the required findings of fact under N.C. Gen. Stat. § 7B-907(b)." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003). Here, by changing the permanent plan for J.C.S. and R.D.S. to adoption, the trial court necessarily determined it was not in the children's best interests to return home within the next six months, pursuant to § 7B-907(b)(1); that the children should remain in their current foster care placement, with respondent continuing to have visitation rights, pending their adoption, pursuant to § 7B-907(b)(2) and (4); that adoption should be pursued despite the presence of potential barriers thereto, pursuant to § 7B-907(b)(3); and that DSS has made reasonable efforts to implement the original permanent plan for the children, pursuant to § 7B-907(b)(5).

After a careful review of the permanency planning order, we conclude that through findings of fact numbers 2, 3, 4, 6, 7, 9, 10, 11, 15, 17, 19, 20, 21, 22, 23, 25, 26, and 27, the trial court has made sufficient findings of ultimate facts concerning each of the § 7B-907(b) factors. While the permanency planning order does not specifically *identify* any of these findings as being made pursuant to any of the § 7B-907(b) factors, we do not read *Harton* to so require, as long as the trial court makes findings of fact on the relevant § 7B-907(b) factors and does not "simply 'recite allegations,' " but rather "through processes of logical reasoning from the evidentiary facts find[s] the ultimate facts essential to support the conclusions of law." *Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337 (citations and quotation marks omitted).

Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law. *In re Eckard*, 148 N.C. App. 541, 544, 559 S.E.2d 233, 235, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 192-93 (2002). If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal. *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134,

137 (2003). After a careful examination of the record, we conclude that the trial court's findings of fact were supported by competent evidence. The findings were supported by the detailed DSS report prepared in advance of the 3 December 2002 permanency planning hearing by the juveniles' caseworker, Carrie Beaver, as well as by the guardian *ad litem's* testimony at the hearing that he is "[i]nclined to agree with Carrie" and is "pretty much on board with DSS personnel." The trial court's findings that respondent, despite having completed the Nurturing and Women at Risk Programs as well as various substance-abuse treatment programs, remains "unable to consistently demonstrate appropriate parenting skills . . . [or] improved problem-solving and decision-making capabilities" are also supported by the several adjudication, disposition, review, and permanency planning orders entered at earlier stages of this case. All of the court orders included in the record on appeal collectively detail a history of inadequate supervision and poor decision-making by respondent with respect to her children, up to and including J.C.S. becoming pregnant and giving birth in March 2002 while living with respondent on a trial basis and respondent's failure to give R.D.S. proper attention, both during his trial placement in respondent's home following the birth of J.C.S.'s twins and later during visitation. Moreover, we conclude the trial court's findings of fact support the conclusions that DSS had exercised reasonable efforts toward reunification of J.C.S. and R.D.S. with respondent, and that changing the permanent plan from reunification to adoption was in the children's best interest.

Affirmed.

Judges BRYANT and CALABRIA concur.

MOHAMED SALEH ZUBAIDI AND ABDO A. HAFEED, PLAINTIFFS v. EARL L. PICKETT ENTERPRISES, INC. AND EARL L. PICKETT, DEFENDANTS

No. COA03-685

(Filed 4 May 2004)

1. Pleadings— verbal amendment to complaint—punitive damages

The trial court did not err in an action for breach of a lease/purchase agreement, conversion, and unfair and deceptive trade practices by allowing plaintiffs' motion to further amend

the complaint to allege a claim for punitive damages, because plaintiffs' complaints gave sufficient notice of the events or transactions which produced the claim of punitive damages.

2. Landlord and Tenant— breach of lease/purchase agreement—right of reentry—motion for directed verdict

The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim of breach of the lease/purchase agreement even though defendants contend the evidence shows that plaintiffs were in default of their payments under the agreement which gave defendants the right of reentry into the store under the lease, because: (1) plaintiffs' evidence showed that all rental payments had been made and accepted by defendants at the time of defendants' reentry into the store; (2) plaintiffs' evidence showed all promissory note payments had been made and accepted by defendants at the time of their reentry, and (3) plaintiffs presented evidence establishing that defendants failed to provide adequate notice of default prior to reentry into the store.

3. Conversion— motion for directed verdict—dispute involving lease/purchase agreement

The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim of conversion arising out of a dispute involving a lease/purchase agreement, because: (1) plaintiffs presented evidence showing that on 23 March 2000 defendants were caught in the act of removing plaintiffs' property from the store, in direct violation of a preliminary injunction issued two days earlier; and (2) defendants also admitted entering plaintiffs' store and selling plaintiffs' inventory on 12 March 2000.

4. Damages and Remedies— punitive damages—motion for directed verdict

The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim for punitive damages arising out of the breach of a lease/purchase agreement, because: (1) plaintiffs presented evidence that the lease/purchase agreement required defendants to provide notice of default and an opportunity to cure prior to exercising any right to self-help; (2) defendants failed to show plaintiffs were in default or that plaintiffs were provided with the required notice; and (3) the evidence showed willful and wanton conduct by defendants in

breaching the lease/purchase agreement and in converting plaintiffs' property.

5. Appeal and Error— preservation of issues—failure to object

Defendants waived appellate review of issues as to whether the trial court erred in an action for breach of a lease/purchase agreement, conversion, and unfair and deceptive trade practices by instructing the jury regarding the issues of punitive damages, substantial performance under the lease/purchase agreement, and possession of the leased premises, because: (1) defendants failed to object to the jury instructions before the jury retired to deliberate; and (2) plain error review does not apply to civil cases and is limited to appeals in criminal cases.

6. Damages and Remedies— punitive damages—judicial review

The trial court did not err in an action for breach of a lease/purchase agreement, conversion, and unfair and deceptive trade practices by failing to review and set aside the punitive damages awarded by the jury, because: (1) N.C.G.S. § 1D-50 does not require judicial review of a punitive damage award to be mandatory; and (2) there was no case law holding judicial review to be mandatory except in cases where the award exceeds the statutory limits, and the award in this case was within the statutory limits provided in N.C.G.S. § 1D-25(b).

7. Injunction— preliminary injunction—temporary restraining order—motion in limine

The trial court did not err in an action for breach of a lease/purchase agreement, conversion, and unfair and deceptive trade practices by denying defendants' motion in limine and allowing evidence that plaintiffs had obtained a temporary restraining order (TRO) and preliminary injunction against defendants, because: (1) defendants' willful, wanton, and malicious disregard and violation of the TRO and preliminary injunction gave rise to the aggravating factors establishing breach of the lease/purchase agreement, conversion, and punitive damages, thus making the preliminary injunction and TRO relevant; and (2) defendants failed to show that the evidence was incompetent, immaterial, or irrelevant.

8. Trials— motion for judgment notwithstanding verdict— motion for directed verdict

The trial court did not err in an action for breach of a lease/purchase agreement, conversion, and unfair and deceptive trade practices by denying defendants' motions for judgment notwithstanding the verdict, because: (1) a motion for judgment notwithstanding the verdict is essentially a renewal of the motion for directed verdict, and the same standard of review applies to both motions; and (2) the Court of Appeals already concluded the trial court did not err by denying defendants' motions for directed verdict.

Appeal by defendants from judgment entered 12 September 2001 by Judge Stafford Bullock in Durham County Superior Court. Heard in the Court of Appeals 2 March 2004.

Wardell & Associates, PLLC, by Bryan E. Wardell, for plaintiffs-appellees.

Loflin & Loflin, by Thomas F. Loflin III, for defendants-appellants.

TYSON, Judge.

Earl L. Pickett Enterprises, Inc. and Earl L. Pickett ("Pickett") (collectively, "defendants") appeal from a judgment entered after a jury's verdict finding defendants guilty of breaching the lease/purchase agreement and awarding Mohamed Saleh Zubaidi and Abdo A. Hafeed (collectively, "plaintiffs") compensatory and punitive damages.

I. Background

On 10 July 1998, plaintiffs and defendants entered into a lease/purchase agreement. Under this agreement, plaintiffs acquired business assets from defendants, including the right to operate a convenience store and gas station known as the Town N' Country Superette ("the store"). The purchase price for the sale was $235,000.00. Plaintiffs paid $100,000.00 at closing and executed a promissory note for $135,000.00 for the balance. The parties also entered into a five-year lease for the real estate and fixtures located on the property, including "the right to use all adjoining parking areas, driveways, sidewalks, roads, alleys and means of ingress and egress . . . ." The lease contained options to renew for three additional five-year terms.

A material condition of the sale was for plaintiffs to be approved as distributors for the Cary Oil Company under "terms and conditions satisfactory" to plaintiffs. Prior to the filing of the lawsuit, defendants refused to assist in the transfer of the distributorship to plaintiffs. On or about 8 March 2000, Pickett entered the store and removed the alcohol and tobacco sales licenses. Plaintiffs ceased operation of their business until they obtained new licenses.

On or about 12 March 2000, Pickett forcibly entered and operated the store and sold plaintiffs' inventory. On 15 March 2000 the trial court issued a temporary restraining order ("TRO") directing defendants to vacate the premises and prohibiting them from taking any further action regarding the store. On 21 March 2000, the trial court issued a preliminary injunction finding that defendants "failed to provide adequate notice and an adequate basis for the retaking of possession of the leased premises" and leaving the TRO in place. On 23 March 2000, plaintiffs arrived at the store and found Pickett removing inventory in violation of the preliminary injunction. Plaintiffs contacted the Durham County Sheriff's Department, and Pickett was ordered to return all items that he had removed. Upon further inspection of the store, plaintiffs found numerous items to be missing, including cash, merchandise, and equipment.

Plaintiffs brought suit against defendants alleging breach of the lease/purchase agreement, conversion, unfair and deceptive trade practices, and seeking compensatory and punitive damages. Plaintiffs also prayed for a permanent injunction enjoining further interference with their operation of the store. The jury found defendants breached the lease/purchase agreement, that plaintiffs had not breached the lease/purchase agreement, and awarded plaintiffs compensatory and punitive damages. The trial court denied defendants' motion for judgment notwithstanding the verdict and motion to set aside the verdict and for a new trial. Defendants appeal.

II. Issues

The issues are whether the trial court erred in: (1) allowing plaintiffs' verbal motion to further amend the complaint to allege a claim for punitive damages, (2) submitting the issue of punitive damages to the jury, (3) charging the jury on the issue of punitive damages, (4) failing to charge the jury that plaintiffs' burden of proof was by clear and convincing evidence on the issue of punitive damages, (5) entering final judgment for plaintiffs for punitive damages without conducting a judicial review of the award, (6) denying defendants'

motion for directed verdict, (7) using unintelligible language to charge the jury regarding whether plaintiffs substantially performed their obligations arising out of the contract, (8) instructing the jury on the issue of whether defendants were entitled to possession of the leased premises, (9) denying defendants' motion *in limine* and allowing evidence showing plaintiffs had obtained a TRO and preliminary injunction against defendants, and (10) denying defendants' motions for judgment notwithstanding the verdict and to set aside the verdict and for new trial.

III. Allowing Plaintiffs to Amend Their Complaint

[1] Defendants contend that the trial court erred in allowing plaintiffs to verbally amend their complaint to allege punitive damages. They argue plaintiffs did not give notice that they were seeking punitive damages until the day of the trial. We disagree.

A pleading setting forth a claim of relief must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief . . . ." N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2003).

> A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.

Vernon v. Crist, 291 N.C. 646, 653, 231 S.E.2d 591, 595 (1977) (quoting *Accord Rose v. Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975)). Rule 9(k) of the North Carolina Rules of Civil Procedure requires aggravating factors justifying punitive damages to be pled with particularity. N.C. Gen. Stat. § 1A-1, Rule 9(k) (2003).

In their original and amended complaints, plaintiffs alleged defendants' actions in breaching the lease/purchase agreement and seizing their property were deceitful, malicious, and willful. In their amended complaint, plaintiffs set forth facts to support unfair and deceptive trade practices, conversion, and punitive damages claims, specifically stating that these allegations were "common to all claims." Paragraph Nos. 17 through 23 of the amended complaint also set forth the fraudulent statements alleged of defendants regarding

their inability to provide plaintiffs with access to their store. In both complaints, plaintiffs specifically requested that "the Court impose punitive damages against Defendants for their wanton, reckless and malicious actions in an amount in excess of $10,000.00."

Plaintiffs' complaints gave "sufficient notice of the events or transactions which produced the claim" of punitive damages. *Vernon*, 291 N.C. at 653, 231 S.E.2d at 595. Defendants' assignment of error is overruled.

IV. Denial of Directed Verdict

Defendants argue the trial court erred in denying their motion for directed verdict on plaintiffs' claims of breach of the lease/purchase agreement, conversion, and punitive damages. We disagree.

On motion for directed verdict, "the [non-moving] party is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence, and all conflicts must be resolved in their favor." *Pemberton v. Reliance Ins. Co.*, 83 N.C. App. 289, 291, 350 S.E.2d 103, 106 (1986). "A directed verdict is proper only when the plaintiff has failed to show a right to recover upon *any* view of the facts which the evidence reasonably tends to establish." *Id.* at 291-92, 350 S.E.2d at 106. On appeal, this Court reviews the denial of a motion for directed verdict on the same grounds asserted at the trial level. *Hunt v. Montgomery Ward & Co.*, 49 N.C. App. 642, 644, 272 S.E.2d 357, 360 (1980).

A. Breach of Lease/Purchase Agreement

[2] Defendants contend that insufficient evidence was introduced to send the issue of defendants' breach of the lease/purchase agreement to the jury. Defendants argue that the evidence shows that plaintiffs were in default of their payments under the lease/purchase agreement, which gave defendants the right of reentry into the store under the lease.

The burden of proof to show plaintiffs were in arrears of their payments under the lease rested with defendants. Plaintiffs' evidence showed that all rental payments had been made and accepted by defendants at the time of defendants' reentry into the store. Plaintiffs' evidence also showed all promissory note payments had been made and accepted by defendants at the time of their reentry. Plaintiffs presented evidence establishing that defendants failed to provide adequate notice of default prior to reentry into the store. Viewed in

the light most favorable to plaintiffs, the trial court properly denied defendants' motion for directed verdict regarding defendants' breach of the lease/purchase agreement. Defendants' assignment of error is overruled.

B. Conversion

[3] Defendants also argue the evidence was insufficient for the jury to decide whether defendants converted plaintiffs' property for their own benefit.

Plaintiffs presented evidence showing that on 23 March 2000 defendants were caught in the act of removing plaintiffs' property from the store, in direct violation of a preliminary injunction issued two days earlier. The Durham County Sheriff's Department was summoned, and defendants returned the items taken from the store. However, upon detailed inspection of the store, plaintiffs discovered their inventory had been substantially reduced. Missing was $29,000.00 in cash, two cash registers, a printer, $1,500.00 in calling cards, and 350 cartons of cigarettes. Defendants also admitted entering plaintiffs' store and selling plaintiffs' inventory on 12 March 2000.

Viewed in the light most favorable to plaintiffs, the trial court properly denied defendants' motion to dismiss on the issue of conversion. Defendants' assignment of error is overruled.

C. Punitive Damages

[4] Defendants contend insufficient evidence of punitive damages was presented to send that issue to the jury. N.C. Gen. Stat. § 1D-15(a) (2003) states:

> Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.

Punitive damages cannot be awarded for breach of contract alone in North Carolina, except for a breach of contract to marry. *Shore v. Farmer*, 351 N.C. 166, 170, 522 S.E.2d 73, 76 (1999); *see* N.C. Gen. Stat. § 1D-15 (2003). In *Oestreicher v. Stores*, our Supreme Court held:

> In cases involving fraud, our Court has consistently used language such as the following: Punitive damages are never awarded, except in cases where there is an element either of fraud, malice, . . . or other causes of aggravation in the act or omission causing the injury . . . . In the so-called breach of contract actions that smack of tort because of the fraud and deceit involved, we do not think it is enough just to permit defendant to pay that which the lease contract required him to pay in the first place. If this were the law, defendant has all to gain and nothing to lose. If he is not caught in his fraudulent scheme, then he is able to retain the resulting dishonest profits. If he is caught, he has only to pay back that which he should have paid in the first place.

290 N.C. 118, 136, 225 S.E.2d 797, 808-09 (1976) (internal citations omitted).

Plaintiffs presented evidence to show the lease/purchase agreement required defendants to provide notice of default and an opportunity to cure prior to exercising any right to self-help. Defendants failed to show plaintiffs were in default or that plaintiffs were provided with the required notice. Defendants forcibly entered the store on 12 March 2000, and began operating the business as their own. Plaintiffs obtained a TRO that prohibited defendants from entering the premises or taking any action to "further dissipate the assets and inventory" of plaintiffs' store. On 21 March 2000, the trial court issued a preliminary injunction, finding that defendants "failed to provide adequate notice and an adequate basis for the retaking of possession of the leased premises."

On 23 March 2000, defendants again forcibly entered plaintiffs' store in willful violation of the preliminary injunction and removed inventory without plaintiffs' consent. The evidence showed that the Durham County Sheriff's Department was called, that a deputy read the injunction to Pickett, and that Pickett was ordered to return the inventory and to exit the premises. In response, Pickett told the officer that, "he didn't give a damn what that paper said."

Plaintiffs presented further evidence to show that after the preliminary injunction was entered that required defendants to put plaintiffs back into possession of the store, Pickett falsely told plaintiffs that they could not get back into the store because he would be out of town. In fact, Pickett was at the store removing plaintiffs' inventory. Defendants' willful, wanton, and malicious conduct in breaching

the lease/purchase agreement, violating the TRO and preliminary injunction, and converting plaintiffs' property "smack of tort." *Oestreicher*, 290 N.C. at 136, 225 S.E.2d at 809. Viewed in the light most favorable to plaintiffs and in light of our previous holding that sufficient evidence was presented of defendants' conversion of plaintiffs' property, the evidence shows willful and wanton conduct by defendants in breaching the lease/purchase agreement and in converting plaintiffs' property. The trial court properly denied defendants' motion for a directed verdict on the issue of punitive damages. Defendants' assignment of error is overruled.

V. Jury Instructions

[5] Defendants contend that the trial court erred in instructing the jury regarding the issues of punitive damages, substantial performance under the lease/purchase agreement, and possession of the leased premises. Defendants have waived their right to appellate review of these issues.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires that in order to preserve an issue for appellate review, a party must obtain a ruling upon that party's request, objection, or motion. N.C.R. App. P. 10(b)(1) (2004). Appellate Rule 10(b)(2) states, "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection . . . ." N.C.R. App. P. 10(b)(2) (2004). This Court held that "Rule 10(b)(2) of our Rules of Appellate Procedure requiring objection to the charge before the jury retires is mandatory and not merely directory." *Wachovia Bank v. Guthrie*, 67 N.C. App. 622, 626, 313 S.E.2d 603, 606 (1984) (quoting *State v. Fennell*, 307 N.C. 258, 263, 297 S.E.2d 393, 396 (1982)). Plain error review does not apply to civil cases and is limited to appeals in criminal cases. *Durham v. Quincy Mutual Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E.2d 372, 377 (1984); *Alston v. Monk*, 92 N.C. App. 59, 66, 373 S.E.2d 463, 468 (1988), *disc. rev. denied*, 324 N.C. 246, 378 S.E.2d 420 (1989).

Defendants failed to object to the jury instructions before the jury retired to deliberate. Their right to appellate review of these issues is waived. *Guthrie*, 67 N.C. App. at 626, 313 S.E.2d at 606. We decline to apply Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits of defendants' assignments of error. N.C.R. App. P. 2 (2004).

VI. Setting Aside the Punitive Damages Award

[6] Defendants contend that the trial court erred in failing to review and set aside the punitive damages awarded by the jury. We disagree.

Defendants argue that the trial court was required to review the award of punitive damages under N.C. Gen. Stat. § 1D-50 and its failure requires the award of punitive damages to be reversed or vacated. N.C. Gen. Stat. § 1D-50 (2003) states:

> *When reviewing* the evidence regarding . . . the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the . . . award. In doing so the court shall address with specificity the evidence, or lack thereof, as it bears on . . . the amount of punitive damages . . . .

(emphasis supplied). In *Muse v. Charter Hospital of Winston-Salem*, defendants argued that "pursuant to *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 113 L. Ed. 2d 1 (1991), the trial court must articulate a detailed post-judgment analysis of a jury's award of punitive damages, and that the failure to do so violates due process." 117 N.C. App. 468, 478, 452 S.E.2d 589, 597 (1995). We held,

> in the recent case of *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. —, 125 L. Ed. 2d 366 (1993), decided after the trial of the instant case, the [United States Supreme] Court held that such an articulation is not required by the Constitution. *Id.* at —, 125 L. Ed. 2d at 383-84.

Muse, 117 N.C. App. at 478, 452 S.E.2d at 597.

Furthermore, N.C. Gen. Stat. § 1D-25(b) states that

> [p]unitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.

Within the statutory limits, the jury may award punitive damages in its sound discretion, and the trial court should not disturb such an award unless the amount assessed is " 'excessively disproportionate to the circumstances of contumely and indignity present in the case.' " *Hutelmyer v. Cox*, 133 N.C. App. 364, 375, 514 S.E.2d 554, 562

(1999) (quoting *Carawan v. Tate*, 53 N.C. App. 161, 165, 280 S.E.2d 528, 531 (1981)). Nominal damages may support a substantial award of punitive damages. *Horner v. Byrnett*, 132 N.C. App. 323, 328, 511 S.E.2d 342, 346 (1999) (concluding that there was no abuse of discretion by the trial court in denying a defendant's motion for a new trial where the jury awarded the plaintiff $1.00 in compensatory damages and $85,000.00 in punitive damages for criminal conversation).

Here, the jury awarded compensatory damages in the amount of $62,001.00 for breach of the lease/purchase agreement and conversion. The jury awarded punitive damages in the amount of $150,000.00. Although the trial court made no specific findings that the award was reasonable, it ultimately determined its reasonableness by listing that amount in its judgment. This amount is well within the boundaries provided in N.C. Gen. Stat. § 1D-25(b) and "is not excessively disproportionate to the circumstances of contumely and indignity present in the case." *Id.*

As the language of the statute does not require judicial review of a punitive damage award to be mandatory and we find no case law holding judicial review to be mandatory except in cases where the award exceeds the statutory limits, the trial court did not err in failing to make specific findings of fact and failing to set aside the punitive damages awarded within statutory limits. Defendants' assignment of error is overruled.

VII. Motion *in Limine*

[7] Defendants contend that the trial court erred in denying their motion *in limine* and allowing evidence that plaintiffs had obtained a TRO and preliminary injunction against defendants. Defendants argue that this evidence was irrelevant. We disagree.

This Court held that

> [t]o obtain a new trial based upon an error of the trial court in admitting evidence, the appellant must establish that: (1) he objected to the admission of the evidence at trial; (2) the evidence was inadmissible in law because it was incompetent, immaterial, or irrelevant; and (3) the evidence was prejudicial to appellant's cause of action or defense.

Vandervoort v. McKenzie, 117 N.C. App. 152, 163, 450 S.E.2d 491, 497 (1994) (citing *Hunt v. Wooten*, 238 N.C. 42, 45, 76 S.E.2d 326, 328 (1953)). Rule 401 of the North Carolina Rules of Evidence defines

relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003).

Defendants contend that the existence of a preliminary injunction and TRO were irrelevant to the issues in the case. While defendants properly objected to this evidence at trial, they fail to show this evidence was irrelevant. Defendants' willful, wanton, and malicious disregard and violation of the preliminary injunction and TRO gave rise to the aggravating factors establishing breach of the lease/purchase agreement, conversion, and punitive damages. This conduct made the preliminary injunction and TRO relevant. Defendants failed to show that the evidence was "incompetent, immaterial, or irrelevant." *McKenzie*, 117 N.C. App. at 163, 450 S.E.2d at 497. The trial court properly denied defendants' motion *in limine* and allowed evidence of the preliminary injunction and TRO to be presented to the jury. Defendants' assignment of error is overruled.

VIII. Judgment Notwithstanding the Verdict

[8] Defendants contend that the trial court erred in denying their motions for judgment notwithstanding the verdict. We disagree.

A motion for judgment notwithstanding the verdict is essentially a renewal of the motion for directed verdict, and the same standard of review applies to both motions. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b) (2003); *see Dickinson v. Pake*, 284 N.C. 576, 584-85, 201 S.E.2d 897, 903 (1974); *see also Smith v. Price*, 74 N.C. App. 413, 418, 328 S.E.2d 811, 815, (1985), *aff'd in part, rev'd in part*, 315 N.C. 523, 340 S.E.2d 408 (1986). For reasons set forth in Section IV of this opinion explaining the trial court's denial of directed verdict, defendants' assignment of error is also overruled.

IX. Conclusion

Defendants failed to show that the trial court erred in allowing plaintiffs to amend their complaint at the beginning of trial. Defendants have waived their right to appellate review of the trial court's jury instructions. Defendants failed to show error in the trial court's denial of their motions for directed verdict, judgment notwithstanding the verdict, and to set aside the verdict and new trial. Defendants also failed to show error in the trial court's denial of their motion *in limine* and in the failure to review and set aside the punitive damage award.

No error.

Judges WYNN and HUNTER concur.

STATE OF NORTH CAROLINA v. SHAWN LAMONT BORDERS

No. COA03-439

(Filed 4 May 2004)

1. Criminal Law— instructions—admissions

There was no error in a robbery prosecution in the trial court's instruction that there was evidence tending to show that defendant had admitted one or more facts relating to the crime charged and that the jurors should consider all of the circumstances under which any admissions were made. Although defendant contended that this was tantamount to telling the jury that he had committed the robbery, the instruction was virtually identical to the Pattern Jury Instruction requested by the State, it was supported by the testimony, and it made no mention of any particular element of the offense or that defendant had admitted the robbery.

2. Appeal and Error— nonstatutory aggravating factors—no objection needed

An assignment of error to the finding of nonstatutory aggravating factors was considered even though defendant did not object at trial. The court should know that a defendant does not want the court to find an aggravating factor and an objection is not necessary to preserve the question for review.

3. Sentencing— nonstatutory aggravating factors—vulnerable victim—estimation of age and strength by court—findings insufficient

There was insufficient evidence in a sentencing hearing for robbery for the court to find the nonstatutory aggravating factor that the crime was committed against a victim who was smaller, older, and weaker, and that defendant took not only money but the vehicle which provided the victim's income. When estimating a victim's age and the relative size and

strength of individuals, the court must make relevant findings unless there is evidence in the record to allow meaningful appellate review. Here there was not.

4. Sentencing— nonstatutory aggravating factors—course of conduct—other convictions also used for prior record level

The trial court did not err when sentencing defendant for robbery by finding the nonstatutory aggravating factor that the crime was part of a course of conduct involving violence, including at least two previous robberies. Defendant's previous convictions involved violence by their nature, and there is no authority precluding the use of prior convictions to aggravate the sentence when those convictions were also used to determine defendant's prior record level.

5. Sentencing— nonstatutory aggravating factors—testimony of another crime—not reasonably related to crime for which sentence imposed

The nonstatutory aggravating factor that defendant had testified that he had sold counterfeit controlled substances to the victim was not reasonably related to robbery, the crime for which defendant was being sentenced.

Judge LEVINSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 25 September 2002 by Judge Forrest Donald Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 28 January 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Charles J. Murray, for the State.

The Teeter Law Firm, by Kelly Scott Lee, for defendant-appellant.

HUNTER, Judge.

Shawn Lamont Borders ("defendant") appeals a judgment sentencing him in the aggravated range to 146 to 185 months imprisonment for robbery with a dangerous weapon. Specifically, defendant takes issue with (I) a jury instruction, and (II) the trial court's finding of three non-statutory aggravating factors. For the reasons stated herein, we conclude there was no error as to the jury instruction, but that defendant's case must be remanded for a new sentenc-

ing hearing due to the trial court committing error by finding certain aggravating factors.

On 16 July 2001, defendant was indicted for committing a robbery with a dangerous weapon. Defendant's trial began on 23 September 2002, during which the following evidence was offered.

The State's evidence tended to show that defendant called for a taxicab at approximately 1:30 a.m. on the morning of 21 June 2001. When the taxicab arrived, defendant got in the back seat of the vehicle and subsequently held a knife with a five-inch blade to the neck of the driver, Gerald Wyatt ("Wyatt"). Defendant then proceeded to threaten and physically assault Wyatt, before taking approximately seventy-six dollars in cash from under the driver's seat, pushing Wyatt out of the taxicab, and driving off. Wyatt immediately located a police officer and told the officer that he was robbed by defendant, a man he recognized as someone he had given several taxicab rides to over the last year. Wyatt's taxicab was found approximately two days later.

Defendant was arrested on 30 June 2001. Detective Tracy Curry ("Detective Curry") testified that, following defendant's arrest, defendant stated he had actually

> asked [Wyatt] for the forty dollars that he owed him. [Wyatt] told him that [he] did not have the money, but [defendant] had seen [Wyatt] try to hide money under the seat.
>
> And that he got out of the cab, took the money from under the seat, told [Wyatt] that he should not lie to him again and left the area.

Defendant's evidence tended to show that Wyatt paged defendant on the morning in question, indicating to defendant that Wyatt wanted to arrange a drug deal. Wyatt subsequently picked defendant up in his taxicab and requested two rocks of crack cocaine for forty dollars, which defendant provided. As Wyatt smoked the crack cocaine, he realized that it was counterfeit and demanded his money back. Defendant refused and exited the taxicab. In order to seek "revenge" on defendant, Wyatt later told the police that defendant had robbed him. Defendant's earlier cross-examination of Wyatt had revealed that Wyatt did have a number of prior drug arrests, but no drug convictions. Additional facts relevant to this appeal will be provided as necessary in analyzing defendant's assigned errors.

I.

[1] By his first assignment of error, defendant argues the trial court erred by giving a jury instruction that implied he had committed the crime for which he was accused. Specifically, at the charge conference, the State proposed that Jury Instruction Number 104.60 be submitted to the jury, to which defendant objected on the grounds that he had not admitted to one or more of the elements of the crime charged. The trial court noted defendant's objection and gave the charge to the jury as follows:

> There is evidence in this case that tends to show that the Defendant has at one time or another admitted one or more facts relating to the crime charged in this case. Now if you find, that the Defendant has made any such a[n] admission, then you should consider all the circumstances under which it was made in determining whether it was a truthful admission and the weight which you will give to it.

Defendant contends that by giving the instruction, the trial court basically told the jury that he had committed robbery with a dangerous weapon. We disagree.

"A trial court is not required to give a requested instruction in the exact language of the request, but where the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Summey*, 109 N.C. App. 518, 526, 428 S.E.2d 245, 249 (1993). Here, the instruction given to the jury was "virtually identical" to Jury Instruction Number 104.60. *Id.* (citing *State v. Green*, 305 N.C. 463, 290 S.E.2d 625 (1982)). *See also* 1 N.C.P.I.—Crim. 104.60 (1970). The instruction made no specific mention of any particular element of the offense charged or that defendant had admitted robbing Wyatt with a dangerous weapon—only that the evidence tended to show an admission by defendant of "*one or more facts relating to the crime charged*[.]" Specifically, those "facts" included (1) testimony from Detective Curry that defendant told him that although Wyatt had tried to hide money from defendant, defendant "took the money from under the seat, . . . and left the area[,]" and (2) testimony from defendant that he had "snatched" money away from Wyatt, then "got out of the cab and left." Their testimony provided the evidence needed to support some of the elements of robbery with a dangerous weapon, i.e., an unlawful taking of another's personal property. *See* N.C. Gen. Stat. § 14-87(a) (2003). Thus, the requested instruction was correctly

stated in substance and supported by the evidence, resulting in no error by the trial court.

II.

[2] Defendant also assigns error to the trial court's finding that there was evidence to support three non-statutory aggravating factors, which were used to sentence defendant in the aggravated range. Initially, we note that the State argues defendant did not object to the non-statutory aggravating factors at trial and therefore, should be denied the opportunity to assign error to them on appeal. However, our Supreme Court has held that preserving this question for appellate review by objecting is unnecessary because it is clear that a defendant does "not want the court to find [an] aggravating factor and the court kn[ows] or should . . . know[] it." *See State v. Canady*, 330 N.C. 398, 402, 410 S.E.2d 875, 878 (1991). We therefore address defendant's assigned error.

"The State has the burden of proving the existence of a nonstatutory aggravating factor by a preponderance of the evidence. The State must also show that it is reasonably related to the purposes of sentencing." *State v. Hargrove*, 104 N.C. App. 194, 200, 408 S.E.2d 757, 761 (1991). The decision to depart from the presumptive range and sentence a defendant in the aggravated range is in the discretion of the court. N.C. Gen. Stat. § 15A-1340.16(a) (2003). In the instant case, defendant takes issue with the following three non-statutory aggravating factors found by the trial court.

A.

[3] Defendant contends there was no evidence offered to support, as a factor in aggravation, that the "crime was committed against a victim who was smaller, older and weaker, taking not only money but also a vehicle that provided the victim's means of income." In *State v. Ackerman*, 144 N.C. App. 452, 461-62, 551 S.E.2d 139, 145 (2001), this Court held that the trier of fact can estimate a defendant's age when necessary for establishing an element of the offense charged after having ample opportunity to view that defendant *and* when presented with the benefit of other circumstantial or direct evidence. We conclude such a determination may be made by a trial court as well. However, when estimating the respective ages of individuals, and by analogy the comparative strengths and sizes of individuals, the trial court must make relevant findings of fact, unless there is direct or circumstantial evidence in the record that allows for a meaningful view to be conducted by an appellate court.

Here, the transcript provides no findings of fact that allow this Court to review how the trial court found this non-statutory aggravating factor. Further, there was no direct or circumstantial evidence offered at trial comparing the physical characteristics of defendant and Wyatt. The only evidence that remotely inferred the respective strengths of the two men came from the following testimony of Wyatt: (1) defendant "got out of the car . . . , got me by the pants in the front, pulled me from the car and shook me down[;]" and (2) defendant "took his hands and he pushed me in the chest and I fell in the street." However, Wyatt's testimony alone is insufficient to allow this Court to definitively conclude the trial court acted properly by finding this non-statutory aggravating factor.

B.

[4] Next, defendant contends there was no evidence offered that the "crime was part of a course of conduct by the defendant involving violence against other persons, including at least 2 previous robberies." Our Supreme Court has previously held that evidence establishing a pattern or course of violent conduct by a defendant is an acceptable non-statutory aggravating factor. *See State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). Here, defendant was convicted of robbery with a dangerous weapon based on evidence that tended to show he physically assaulted and took money from Wyatt. The trial court was aware that defendant had previously been convicted of numerous offenses, which included assaulting a government employee, resisting public officers, and twice committing common law robbery. By the very nature of those convictions, violence was either threatened or occurred. Thus, while defendant's course of violent conduct could have been shown through other acts that did not result in convictions, *see Avery*, the convictions themselves merely evidenced they were predicated on violence.

As an aside, Our Legislature has clearly provided that convictions used to support an habitual felon indictment cannot be used to determine a defendant's prior record level. *See* N.C. Gen. Stat. § 14-7.6 (2003); *State v. Lee*, 150 N.C. App. 701, 564 S.E.2d 597, *disc. review denied*, 356 N.C. 171, 568 S.E.2d 856 (2002). However, we have found no statutory authority or case law precluding prior convictions (punishable by more than 60 days' confinement, *see State v. Harper*, 96 N.C. App. 36, 43, 384 S.E.2d 297, 301 (1989)) used to determine a defendant's prior record level from also being used to aggravate that defendant's sentence. While we note this distinction in the instant case because defendant's two prior robbery convictions mentioned in

this non-statutory aggravating factor were also used to determine his prior record level, we further note that if the Legislature intended to prohibit this occurrence it could have done so by enacting legislation similar to that regarding habitual felon indictments.

C.

[5] Defendant finally contends that the trial court erred in finding as a non-statutory aggravating factor that, "[d]efendant testified that, on the alleged date, he sold counterfeit controlled substances to the victim. By necessity, either this testimony is false or defendant has committed another felony with which he has not been charged." We fail to see how this aggravating factor was reasonably related to the purposes of sentencing.

N.C. Gen. Stat. § 15A-1340.12 (2003) provides:

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

Our case law clearly suggests that in order for an aggravating factor to be reasonably related to the purposes of sentencing it must be reasonably related to the crime for which defendant was convicted. *See State v. Ledford*, 315 N.C. 599, 625, 340 S.E.2d 309, 325 (1986) (holding that "the trial judge . . . erred by finding two aggravating circumstances—that the victim was very old and that the offense was especially heinous, atrocious, and cruel—which [we]re, under the facts of th[at] case, totally unrelated to the crime of felonious larceny"); *State v. Skinner*, 162 N.C. App. 434, 438-39, 590 S.E.2d 876, 881 (2004) (holding that there was insufficient evidence to support that the victim's age was a factor in aggravation because it had no bearing on her vulnerability to larceny). Here, whether defendant committed another felony or perjury, neither of those crimes were reasonably related to his conviction for robbery with a dangerous weapon.

Accordingly, non-statutory aggravating factors "A" and "C" found by the trial court were not supported by a preponderance of the evidence. Therefore, we must vacate defendant's aggravated sentence of robbery with a dangerous weapon and remand for a new sentencing hearing.

Remand for resentencing.

Judge McCULLOUGH concurs.

Judge LEVINSON concurs in part and dissents in part in a separate opinion.

LEVINSON, Judge concurring in part and dissenting in part.

I concur in the majority opinion, except with regard to its holding that it was not error for the trial court to find the nonstatutory aggravating factor that this offense was part of a course of conduct involving violence against other persons. I therefore respectfully dissent on this issue.

"The State has the burden of proving the existence of a nonstatutory aggravating factor by a preponderance of the evidence." *State v. Hargrove*, 104 N.C. App. 194, 200, 408 S.E.2d 757, 761 (1991). In the instant case, defendant's sentence was based in part upon the nonstatutory aggravating factor that defendant's commission of robbery with a dangerous weapon "was part of a course of conduct by the defendant involving violence against other persons, including at least 2 previous robberies." The court based this finding on the defendant's criminal record, which included prior convictions for, *e.g.*, common law robbery and assault. However, no evidence was adduced at trial or during sentencing concerning the facts or circumstances of these prior convictions. Thus, the trial court found the existence of this aggravating factor based solely on the bare fact of defendant's prior record. I believe this was error for several reasons.

First, the legislature has already established a mechanism for consideration of a criminal defendant's prior record in determining the appropriate sentence. Chapter 14 of the North Carolina General Statute assigns criminal offenses to a specific "class" corresponding to the seriousness of the offense. Under N.C.G.S. § 15A-1340.14 (2003), a trial judge sentencing a defendant for a felony offense must first determine the defendant's "level" by assigning a certain number of "points" for each prior conviction, depending on the class of the prior offense. Thus, the presumptive sentence for a criminal defendant is a function of both his current offense and his prior record. I would conclude that, in the absence of factual information about the defendant's prior convictions, consideration of his criminal history is generally accomplished by means of this statutory sentencing grid. In

the instant case, the trial court's finding is tantamount to a nonstatutory aggravating factor that "defendant has a prior criminal history."[1]

Secondly, the State failed to present any evidence to support this aggravating factor. In this regard, it is useful to consider a **statutory** aggravating factor that may be considered by the jury in the sentencing phase of a capital case:

> (11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

N.C.G.S. § 15A-2000(e)(11) (2003). Because the language of this aggravating factor essentially parallels that found by the trial court, cases interpreting G.S. § 15A-2000(e)(11) are instructive. In *State v. Cummings*, 346 N.C. 291, 328-29, 488 S.E.2d 550, 572 (1997) the North Carolina Supreme Court held:

> Submission of course of conduct requires that "there is evidence that the victim's murder and the other violent crimes were part of a pattern of intentional acts establishing that in defendant's mind, there existed a plan, scheme or design involving the murder of the victim and the other crimes of violence." . . . In determining whether the evidence tends to show that another crime and the crime for which defendant is being sentenced were part of a course of conduct, the trial court must consider a number of factors, including the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons.

(quoting *State v. Walls*, 342 N.C. 1, 69, 463 S.E.2d 738, 775 (1995)) (further citations omitted). Thus, the Court required a factual connection among the crimes alleged to constitute a "course of conduct." The North Carolina Supreme Court has consistently adhered to the requirements articulated in *Cummings*. For example, in *State v. Hoffman*, 349 N.C. 167, 188, 505 S.E.2d 80, 93 (1998), the Court approved submission of the aggravating factor, noting that:

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1. Another common scenario could be implicated by the majority's opinion insofar as it affirms the trial court's judgment concerning the "course of conduct" factor. Individuals being sentenced for the sale and delivery of cocaine whose prior records reveal convictions for similar offenses could be subject to a finding that "defendant has engaged in a course of conduct involving the violation of controlled substances statutes" based merely on a review of their prior criminal histories. This, in my view, would be erroneous.

> The robbery and murder in this case occurred [in] November 1995. The two bank robberies . . . occurred [in September and October 1995]. This span of time was not so great as to prevent the crimes from being considered part of the same course of conduct. There was also a similar *modus operandi* employed in the crimes. All occurred in small towns around Charlotte, North Carolina. All occurred in daylight hours while the businesses were open. The same sawed-off shotgun, green bag, ski mask, and white Nissan were used in all the crimes. Finally, all the crimes shared the same motive, pecuniary gain.

(citing *Cummings*, 346 N.C. at 328-29, 488 S.E.2d at 572). However, in *State v. Berry*, 356 N.C. 490, 573 S.E.2d 132 (2002), the Court found plain error where the trial court gave an instruction that "allowed the jury to find the aggravating circumstance without also finding that the murder of Fetter was part of a course of conduct that included the earlier murder of Maves. The mere fact that one murder followed the other does not establish a course of conduct." *Id.* at 523, 573 S.E.2d at 153.[2]

State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985), relied upon by the majority opinion, neither contradicts these holdings nor supports the proposition that the present defendant's bare criminal record can support the trial court's finding that the subject offense "was part of a course of conduct by the defendant involving violence against other persons, including at least 2 previous robberies." First, in *Avery*, 315 N.C. at 35, 337 S.E.2d at 805, the trial court based its finding that the defendant had "engaged in a pattern or course of violent conduct" on "evidence that prior to [the] date [of the subject offenses] defendant had hit several members of his family during attacks of rage, shot a gun while angry at one of his neighbors, hit his boss at another company where he once worked, and was involved in two fist fights." *Id.* at 35, 337 S.E.2d at 806. Thus, the trial court based its finding on this **factual information** about the defendant's actions, and not upon his criminal record. Indeed, the opinion does not even state whether these actions were the subject of criminal prosecution. Secondly, the issue before the Court was whether two aggravators were duplicative of each other. The Court in *Avery* did not address the issue of what

2. An individual may commit the offense of resisting a law enforcement officer without the use of physical violence. *State v. Hardy*, 298 N.C. 191, 196, 257 S.E.2d 426, 430 (1979). That the majority opinion rests its reasoning, in part, upon defendant's conviction of this offense demonstrates the danger in permitting our trial courts to find a course of conduct by merely examining criminal histories without evidence of a factual relationship among the relevant offenses.

evidence is required in order for a series of actions to constitute a "course of conduct." In sum, *Avery*, decided in 1985 under the repealed Fair Sentencing Act, neither contradicts current Supreme Court jurisprudence nor supports the trial court's finding of this aggravator in the instant case.

In the present case no evidence was presented regarding the factors cited in *Cummings* or any other factual connection between the subject offense and defendant's prior criminal behavior. This was error and, accordingly, I dissent from this part of the majority opinion.

STATE OF NORTH CAROLINA v. DWAYNE RUSSELL EDWARDS

No. COA03-736

(Filed 4 May 2004)

1. Search and Seizure— investigatory stop of vehicle—protective search—motion to suppress

The trial court did not err in a case arising out of multiple sexual assaults by denying defendant's motion to suppress evidence seized during a warrantless search of his vehicle, because: (1) the trial court made ample findings of fact upon which to conclude that based on the totality of circumstances, the officers were warranted in making an investigatory stop of defendant's vehicle, and given the actions of defendant and the details of the circumstances, the officers were warranted in checking defendant and his immediate surroundings for evidence of a crime; (2) defendant was already under surveillance, and activity at an unusual hour is a factor that may be considered by a law enforcement officer in formulating reasonable suspicion; (3) defendant's vehicle had an expired Illinois registration plate, which was sufficient in and of itself to warrant initially stopping defendant; (4) a protective search of the vehicle was justified based on the facts that the officers saw defendant reach under his car seat and then exit the vehicle with what appeared to be something in his hand, defendant repeatedly refused to comply with the officers' orders, and the officers heard on the alert tone that the victim's assailant had a handgun; and (5) despite the fact that defendant was handcuffed and sitting on the curb when the handgun was found,

defendant was still in close proximity to the interior of the vehicle, and the possibility of him gaining immediate control of the handgun while handcuffed or once the handcuffs were removed was still present.

2. Search and Seizure— search warrant—motion to suppress

The trial court did not err in a case arising out of multiple sexual assaults by denying defendant's motions to suppress the evidence seized pursuant to search warrants that were based on the initial warrantless search of his vehicle, because the magistrate had sufficient probable cause to issue search warrants for defendant's home, business, vehicle, and person.

3. Sentencing— inconsistencies—consolidation—remand for entry of formal judgment

Several of defendant's judgments must be remanded to determine the existence of, or to correct, apparent inconsistencies concerning whether the trial court ultimately elected not to consolidate several of the sentences including the felonious breaking and entering conviction in 01CRS050164 and his common law robbery conviction in 01CRS050174, as well as defendant's second-degree kidnapping conviction in 01CRS050134 and his first-degree burglary conviction in 01CRS050135. Further, the case is remanded for formal entry of judgment as to the second-degree sexual offense conviction.

4. Rape; Sexual Offenses— short-form indictments—first-degree rape—first-degree sexual offense—constitutionality

The trial court did not err by denying defendant's motion to dismiss the short-form indictments that charged him with first-degree rape and first-degree sexual offense, because the short-form indictments have been constitutionally upheld for use with these type of offenses.

Judge WYNN concurring in result only.

Appeal by defendant from judgments entered 6 June 2002 by Judge John R. Jolly, Jr. in Orange County Superior Court. Heard in the Court of Appeals 16 March 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Tina A. Krasner, for the State.

Duncan B. McCormick for defendant-appellant.

HUNTER, Judge.

Dwayne Russell Edwards ("defendant") appeals judgments arising out of three sexual assaults. Specifically, he takes issue with (I) evidence seized during a warrantless search of his vehicle, (II) evidence seized pursuant to search warrants that were issued as a result of the warrantless vehicle search, (III) inconsistences between several of the written judgments and the judgments imposed in open court, and (IV) two short-form indictments that allegedly violated his constitutional rights. For the reasons stated herein, we conclude the trial court's rulings as to the searches and short-form indictments were not in error, but several of defendant's judgments must be remanded to determine the existence of or correct apparent inconsistencies. We also remand one of defendant's convictions for formal entry of judgment.

On 25 June 2001, defendant was indicted by an Orange County Grand Jury on three counts of first degree rape, four counts of first degree sexual offense, one count of attempted first degree sexual offense, three counts of second degree sexual offense, three counts of robbery with a dangerous weapon, one count of second degree kidnapping, two counts of first degree burglary, one count of felonious breaking and entering, one count of felonious larceny, and one count of common law robbery. Prior to trial, defendant filed several motions to suppress evidence seized during a warrantless search of his vehicle, as well as subsequent searches based on the evidence seized during that warrantless search. The motions were denied. Defendant's trial began on 28 May 2002, and the jury returned verdicts finding defendant guilty of all charges on 6 June 2002. Defendant was sentenced to 3,265 to 4,073 months imprisonment.

The evidence offered at trial supporting defendant's convictions was as follows. On 23 December 2000, Victim R was sexually assaulted in her Rock Haven Road apartment in Carrboro after returning home from work. Victim R was taken to the bathroom and forced to perform fellatio on her assailant several times while he fondled her vaginal area. Afterwards, the assailant told Victim R to get in the shower and turn on the water. Before leaving, the assailant stole several items from Victim R's apartment, including cash and a cellular phone belonging to her roommate.

Victim R did not get a close look at her assailant's face. However, she described him as being a black male, approximately 5'10" in height with a medium build, wearing cream-colored gloves and a

toboggan-type head covering. She also said that her assailant had a distinctive "baby powder" smell.

In the early morning hours of 26 December 2000, Victim E was sexually assaulted in her Carrboro apartment located near Victim R's apartment. Victim E was awakened by a man holding a handgun and taken to the bathroom. There, Victim E was forced to perform fellatio on her assailant before he penetrated her vaginally. Afterwards, the assailant turned on the water in the shower and pushed Victim E into the tub.

Victim E was also unable to describe her assailant's face, but she did describe him as being approximately six feet tall, strong, and muscular. She further described the handgun used by the assailant as having two green dots. Finally, Victim E indicated that the assailant was clean smelling, having a scent similar to defendant's, a former co-worker of Victim E's who lived in Rock Creek Apartments.

Victim L1 was sexually assaulted in Chapel Hill at approximately 3:00 a.m. on the morning of 9 January 2001. Victim L1 and her boyfriend, Victim L2, were awakened by a man holding a gun to Victim L2's head. Victim L2 was told to get into the closet. The assailant then forced Victim L1 to perform fellatio on him before having vaginal intercourse with her. Afterwards, the assailant took money from Victim L2's wallet and from the closet of Victim L1's roommate. He placed Victim L1 in the closet with Victim L2 before leaving.

Victim L1 described her assailant as a black male, approximately six feet tall with a muscular build, wearing gloves and some type of head gear over a bald head. Victim L1 was shown several photographs, one of which was of defendant, but was unable to identify her assailant. However, she did recognize defendant as someone who had previously attempted to initiate a relationship with her roommate.

Due to the similarities between the 23 and 26 December 2000 assaults, the Carrboro Police Department organized a surveillance of defendant prior to the 9 January 2001 assault. Officers Seth Everett ("Officer Everett") and Michael Mikels ("Officer Mikels") participated in that surveillance and were doing so in separate vehicles on the morning of 9 January 2001. At approximately 2:50 a.m., Officer Everett noticed that defendant's vehicle, a Chevrolet Cavalier Z24 with an expired Illinois registration plate, was not in its parking place

at defendant's apartment complex. It had started snowing at approximately 1:00 a.m, and tire impressions in the snow indicated that defendant's vehicle had exited the complex headed towards Chapel Hill. At approximately 4:03 a.m., Officers Everett and Mikels heard an alert tone from the Chapel Hill police that Victim L1 had been sexually assaulted by a tall, large, black male brandishing a handgun and wearing gloves and some type of headgear. The officers immediately began looking for defendant.

After it started snowing, the officers saw no other vehicles on the road that night other than patrol cars. However, within minutes of receiving word of Victim L1's assault, defendant's vehicle passed directly in front of Officer Mikels' vehicle going towards Rock Creek Apartments from the direction of Chapel Hill. Officer Mikels radioed Officer Everett, who subsequently came up behind defendant's vehicle flashing his blue lights.

Defendant stopped his vehicle at the entrance of Rock Creek Apartments, and the officers saw him immediately put both of his hands underneath his seat. Defendant's door then "flew open and he jumped out." The officers ordered defendant back in his vehicle several times, but eventually drew their weapons on defendant after he failed to comply. Defendant was told to put his hands up, during which time the officers saw what they believed to be something in his left hand. Defendant proceeded to drop and raise his hands several times.

The officers approached defendant's vehicle and saw in plain view a large amount of money on the passenger's seat, as well as cream colored gloves and some type of headgear on the floorboard. Believing defendant had a gun in his vehicle, Officer Everett handcuffed defendant and told him to sit on the curb in front of his vehicle. Officer Everett explained to defendant that he had an expired license plate and that the officers were investigating a possible sexual assault that occurred in Chapel Hill. While defendant proceeded to produce a current vehicle sticker/registration, Officer Mikels looked under the front seat of defendant's vehicle and discovered a handgun with green night sights on it. Defendant was then told he was being charged with carrying a concealed weapon.

Based on the seizure of the handgun from defendant's vehicle and his subsequent arrest for carrying a concealed weapon, officers from the Carrboro and Chapel Hill Police Departments obtained search warrants for defendant's home, business, and vehicle. The officers also obtained hairs and bodily fluids from defendant to establish a

DNA profile, which matched the assailant's DNA found on the victims. Further, the cellular phone taken from Victim R's house was found in defendant's place of business.

I.

[1] Defendant argues the trial court erred by denying his motion to suppress evidence seized during the warrantless search of his vehicle.

> [A] trial court's findings of fact in a suppression hearing are binding on the appellate courts when supported by competent evidence. This Court must determine whether these findings of fact support the trial court's conclusions of law, and if so, the trial court's conclusions of law are binding on appeal.

State v. West, 119 N.C. App. 562, 565, 459 S.E.2d 55, 57 (1995) (citation omitted). Defendant contends the findings of fact in the trial court's 24 January 2004 order did not support the conclusions that the search and seizure of the handgun from his vehicle was permitted as either a search pursuant to an investigatory stop or incident to a lawful arrest. Having determined that the search and seizure was warranted on the basis of at least one of these conclusions, we hold the motion to suppress was properly denied.

"Article I, Section 20 of our North Carolina Constitution, as does the Fourth Amendment to the United States Constitution, protects against *unreasonable* searches and seizures." *State v. McRae*, 154 N.C. App. 624, 628, 573 S.E.2d 214, 217 (2002). "It applies to seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994). With respect to an investigatory stop of a vehicle, that stop "must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *Id.* at 441, 446 S.E.2d at 70 (citation omitted). Further, our federal and state courts have held that:

> A court must consider "the totality of the circumstances—the whole picture" in determining whether a reasonable suspicion to make an investigatory stop exists. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch."

Id. at 441-42, 446 S.E.2d at 70 (citations omitted).

In the case *sub judice*, the trial court made ample findings of fact upon which to conclude that "based on the totality of the circumstances, [the officers] were warranted in making an investigatory stop of the defendant's vehicle[]" and, "[g]iven the actions of the defendant and the details of the circumstances, . . . check the defendant and his immediate surroundings for evidence of [a] crime." The evidence established that when Officers Everett and Mikels learned that Victim L1 had been sexually assaulted in Chapel Hill by a man matching defendant's general description, they already suspected defendant of two prior sexual assaults. Since defendant was under surveillance, the officers knew he was not at home at the time of Victim L1's assault. Minutes after receiving the alert tone however, the officers saw defendant coming from the direction of Chapel Hill—it was approximately 4:00 a.m., snowing, and no other vehicles were seen on the road by the officers. "Our Supreme Court has acknowledged that activity at an unusual hour is a factor that may be considered by a law enforcement officer in formulating a reasonable suspicion." *State v. Martinez*, 158 N.C. App. 105, 107, 580 S.E.2d 54, 56, *appeal dismissed and disc. review denied*, 357 N.C. 466, 586 S.E.2d 773 (2003). The officers also knew that defendant's vehicle had an expired Illinois registration plate, which was sufficient in and of itself to warrant initially stopping defendant.

Nevertheless, once defendant was stopped, there were additional "specific and articulable facts" warranting the subsequent protective search of his vehicle. The evidence showed that the officers saw defendant reach under the front seat of his vehicle and then exit the vehicle with what appeared to be something in his left hand. The officers drew their weapons on defendant after he repeatedly refused to comply with their orders to get back in his vehicle and keep his hands up. As they approached defendant, the officers saw nothing in his hands; but a large amount of money, cream colored gloves, and headgear were seen in plain view inside the vehicle. Having heard on the alert tone that Victim L1's assailant had a handgun and believing that defendant may have placed a handgun under his seat, Officer Everett arrested defendant and Officer Mikels conducted a protective search of the vehicle.

> Our past cases indicate . . . that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the

> area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Michigan v. Long, 463 U.S. 1032, 1049, 77 L. Ed. 2d 1201, 1219-20 (1983) (footnote omitted). Despite defendant being handcuffed and sitting on the curb when the handgun was found, defendant was still in close proximity to the interior of the vehicle, and the possibility of him gaining immediate control of the handgun while handcuffed or once the handcuffs were removed was still present. Thus, based on the totality of the circumstances, the officers had reasonable suspicion to warrant an investigatory stop of defendant and conduct a protective, warrantless search of his vehicle. Accordingly, the motion to suppress was properly denied.

II.

[2] Defendant argues the trial court erred in denying his motions to suppress the evidence seized pursuant to search warrants that were based on the initial, warrantless search of his vehicle. We disagree.

When considering an application for a search warrant, magistrates are to determine whether probable cause exists to issue the warrant based on the totality of the circumstances. *State v. McLean*, 120 N.C. App. 838, 841, 463 S.E.2d 826, 829 (1995). " 'The standard for a court reviewing the issuance of a search warrant is "whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." ' " *State v. Reid*, 151 N.C. App. 420, 423, 566 S.E.2d 186, 189 (2002) (citation omitted). Here, the magistrate had sufficient probable cause to issue search warrants for defendant's home, business, vehicle, and person based on the substantial evidence detailed in Part I of this opinion. Therefore, defendant's argument is overruled.

III.

[3] Defendant's next two assigned errors take issue with inconsistencies in some of his sentences and judgments. These assigned errors are based on the following: (1) in open court the trial court *initially consolidated* and imposed a single sentence of sixteen to

twenty months for defendant's felonious breaking and entering conviction in 01CRS050164 and his common law robbery conviction in 01CRS050174; but, when the judgment in 01CRS050174 was imposed, it did not provide that the sentence was to run consecutively with the first degree sexual offense sentence imposed in 01CRS050172 pursuant to N.C. Gen. Stat. § 15A-1354(a) (2003) ("[i]f not specified or not required by statute to run consecutively, sentences shall run concurrently"); and (2) in open court the trial court *initially consolidated* and imposed a single sentence of 103-133 months for defendant's second degree kidnapping conviction in 01CRS050134 and his first degree burglary conviction in 01CRS050135; however, the judgment that was imposed as to these convictions resulted in separate sentences running consecutively. Defendant contends, and the State concedes, that these judgments were preceded by statements made by the prosecutor that were contrary to the laws on structured sentencing.

"[I]n situations where a defendant is convicted of two or more offenses, the General Assembly has given the trial court discretion to consolidate the offenses into a single judgment." *State v. Tucker*, 357 N.C. 633, 636, 588 S.E.2d 853, 855 (2003). *See also* N.C. Gen. Stat. § 15A-1340.15(b) (2003). Here, it is difficult to clearly determine whether the trial court ultimately elected not to consolidate the sentences (1) based on the prosecutor's statements, or (2) as an exercise of its discretion. Therefore, we remand these sentences to the trial court to make that determination and sentence defendant accordingly. Morever, we note that the trial transcript indicates that no judgment was entered in open court as to defendant's second degree sexual offense conviction in 01CRS050170. Thus, we also remand this conviction for formal entry of judgment.

V.

[4] Finally, defendant argues the trial court erred in denying his motion to dismiss the short-form indictments that charged him with first degree rape and first degree sexual offense because the indictments violated his constitutional rights. However, our Courts hold, and defendant acknowledges, that short-form indictments have been constitutionally upheld for use with these types of offenses. *State v. O'Hanlan*, 153 N.C. App. 546, 550-51, 570 S.E.2d 751, 755 (2002), *cert. denied*, 358 N.C. 158, — S.E.2d — (5 February 2004). Thus, this argument is without merit.

No error; remand for resentencing and entry of judgment.

Judge TYSON concurs.

Judge WYNN concurs in the result only.

STATE OF NORTH CAROLINA v. JAMES ALLEN COOK

No. COA03-396

(Filed 4 May 2004)

1. Assault— assault with deadly weapon on governmental official—use of dog—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the charges of assault with a deadly weapon on a governmental official at the close of the State's evidence and at the close of all evidence even though defendant contends there was insufficient evidence to prove the deadly weapon element based on the use of a dog, because: (1) the dog in this case could be considered a deadly weapon not only if it was deadly by its nature, but also if it was used by defendant in a deadly manner or if the police officers perceived the dog to be deadly in its use; and (2) there was sufficient evidence from which the jury could find that defendant used the dog as a deadly weapon.

2. Appeal and Error— preservation of issues—failure to object—failure to argue plain error

Although defendant contends the trial court erred in a prosecution for assault with a deadly weapon (a dog) on a governmental official by instructing the jury that the pertinent dog was under defendant's control, this assignment of error is dismissed because: (1) no objection was made at trial; and (2) defendant failed to argue plain error.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 16 December 2002 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 29 January 2004.

Attorney General Roy Cooper, by Assistant Attorney General John P. Barkley, for the State.

Lynne Rupp for the defendant.

TIMMONS-GOODSON, Judge.

James Allen Cook ("defendant") appeals his convictions of felony possession of a controlled substance, two counts of assault with a deadly weapon on a governmental official, and habitual felon. For the reasons stated herein, we hold that defendant received a trial free of prejudicial error.

The State's evidence presented at trial tends to show the following: On 21 July 2002, Greensboro police officers Russell Linstad ("Officer Linstad") and Clint Queen ("Officer Queen") stopped defendant for minor traffic offenses. When Officer Linstad approached the car and asked defendant to produce his driver's license and automobile registration, defendant was standing outside the car holding a bag of groceries. In response to defendant repeatedly reaching in his left pocket, Officer Linstad directed defendant to cease placing his hand in his pocket and attempted to frisk defendant for a weapon. Defendant attempted to strike Officer Linstad with his fists. Officer Linstad then informed defendant that he was under arrest for failing to comply with his request to produce a license and registration and for resisting a frisk search.

Officers Linstad and Queen attempted to restrain defendant, but he wrested away and ran into the back yard of his sister's home where there was a medium-sized dog on a chain. Defendant placed himself between the dog and the police officers pursuing him into the back yard. Officer Linstad reached the back yard first. Defendant pushed the dog toward Officer Linstad, called the dog by name and said "bite him." The dog moved toward Officer Linstad who was running toward defendant at full speed. Officer Linstad jumped over the dog to avoid being bitten by the dog. Officer Linstad tackled defendant and the dog bit Officer Linstad on the right ankle. Officer Queen approached and struck the dog in an effort to get the dog to release Officer Linstad. At that time, the officers were able to handcuff defendant. The dog then bit Officer Queen in the shin and in response Officer Queen shot the dog with his service revolver.

After defendant was restrained, Officer Linstad searched defendant's left pocket and found a dollar bill wrapped around an off-white

rock substance which was later identified by the State Bureau of Investigation as crack cocaine. Defendant was arrested and later indicted on charges of felony possession of a controlled substance, two counts of assault with a deadly weapon on a governmental official, and habitual felon. At a jury trial, defendant was convicted of all charges. The trial court sentenced defendant to imprisonment for a term of eleven and one-quarter years to fourteen and one-quarter years. It is from this conviction that defendant appeals.

As an initial matter, we note that defendant's brief contains arguments supporting only three of the original five assignments of error on appeal. The two omitted assignments of error are deemed abandoned pursuant to N.C. R. App. P. 28(b)(5) (2004). We therefore limit our review to those assignments of error properly preserved by defendant for appeal.

The issues presented on appeal are whether the trial court erred by (I) denying defendant's motions to dismiss the charges of assault with a deadly weapon on a governmental official at the close of the State's evidence and at the close of all evidence; and (II) instructing the jury that the dog was under defendant's control.

[1] Defendant first argues that the trial court should have granted his motions to dismiss the two counts of assault with a deadly weapon on a governmental official due to insufficiency of the evidence. Defendant contends that a dog does not satisfy the deadly weapon element of the crime, and thus the State failed to prove the charges against defendant. We disagree.

In ruling on a motion to dismiss based on insufficiency of evidence, "the trial court must determine whether there is substantial evidence of each element of the offense charged." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). When reviewing the evidence, the trial court must consider all evidence "in the light most favorable to the prosecution, granting the State the benefit of every reasonable inference." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

Defendant argues that there was no substantial evidence to prove the "deadly weapon" element of the assault charges. North Carolina General Statute § 14-34.2 provides the following:

> [A]ny person who commits an assault with a firearm or any other deadly weapon upon an officer or employee of the State or of any political subdivision of the State . . . in the performance of his duties shall be guilty of a Class F felony.

N.C. Gen. Stat. § 14-34.2 (2003). The term "deadly weapon" is defined at common law as any instrument which can produce death or great bodily harm, depending on the circumstances of its use. *State v. Parker*, 7 N.C. App. 191, 195-96, 171 S.E.2d 665, 667-68 (1970); *State v. Palmer*, 293 N.C. 633, 642-44, 239 S.E.2d 406, 412-13 (1977). While the question of a dog as a deadly weapon is an issue of first impression for this state, other states have found that dogs can be considered dangerous weapons when ordered to attack other humans, including police officers. *See Morris v. State*, 722 So. 2d 849 (Fla. 1998) *and State v. Sinks*, 483 N.W.2d 286 (Wis. 1992).

In North Carolina, when determining whether something other than a firearm is considered a deadly weapon, the following important factors are examined: "the nature of the instrument, the manner in which defendant used it or threatened to use it, and in some cases the victim's perception of the instrument and its use." *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985). Thus, the dog in the case *sub judice* could be considered a deadly weapon not only if it was deadly by its nature, but also if it was used by defendant in a deadly manner or if the police officers perceived the dog to be deadly in its use.

Guided by the foregoing principles, we conclude that there is substantial evidence from which the jury could find that defendant used the dog as a deadly weapon. The State's evidence tended to show that defendant instigated the dog's attack on the police officers by pushing the dog toward Officer Linstad and ordering it to bite him. As a result of defendant's actions, the dog bit Officer Lindstad and Officer Queen, causing injury to both officers. Officer Queen viewed the threat to him by the dog to be so great that he shot the dog three times. Defendant presented no evidence to rebut the State's evidence regarding his use of the dog. Thus, we hold that there was sufficient evidence to present this question to the jury, and therefore the trial court did not err in denying defendant's motions to dismiss.

[2] Defendant also assigns error to the instruction by the trial court to the jury that the dog was under defendant's control, arguing that such a statement was prejudicial. The State notes in its brief that "no objection was made at trial, either at the conference on jury instruc-

tions with the attorneys or after the instructions had been given to the jury . . . . Neither has Defendant identified the instruction as plain error. Therefore, this issue cannot be raised on appeal." We agree with the State.

"A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection . . ." N.C. App. R. 10(b)(2) (2004). "In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is *specifically and distinctly contended to amount to plain error.*" N.C. App. R. 10(c)(4) (2004) (emphasis added). Defendant neither objected to the jury instructions at trial, nor does defendant contend in his brief that the jury instruction amounted to plain error. Therefore, defendant has waived this assignment of error.

No error.

Judge BRYANT concurs.

Judge ELMORE dissents.

ELMORE, Judge, dissenting.

I respectfully dissent for the following reasons: first, even viewing the evidence in a light most favorable to the State, the facts are insufficient to support a conclusion that the dog was under defendant's control and should not have been considered a deadly weapon as a matter of law; and second, the jury instructions were inappropriate and prejudicial. This being a case of first impression, as noted by the majority, I am unpersuaded that the facts of this case are sufficient to establish the rule that in such a situation a dog is a deadly weapon.

The majority cites to cases from other states since this is a case of first impression for our courts. The other states which have ruled on this issue and found that a dog may be a deadly weapon, however, have done so with far clearer factual situations.

In *Morris v. State*, 722 So. 2d 849, 23 Fla. L. Weekly D 2563 (1998) (per curiam), the Court of Appeal of Florida, first district, was

presented with a case in which the dog was a large mixed breed resembling a Rottweiler, apparently owned by the defendant, and commanded to "sic" the officer. The issues of relative size of the dog to the victim and ownership and control of the dog by the defendant are distinguishable from the present case. In the present case, the defendant did not own or control the dog, which was smaller in proportion to the victim.

In *People v. Nealis*, 232 Cal. App. 3d Supp. 1, 283 Cal. Rptr. 376 (1991), the Appellate Department, Superior Court of California, Los Angeles, decided a case in which the defendant-appellant brought a Doberman Pinscher in her car to a parking lot where she commanded the dog to attack the victim and his girlfriend repeatedly. The defendant also grabbed the girlfriend by the throat and scratched her, and would not command the dog to cease the attack. The California court considered the relevant factors to be the dog's training to attack and the dog's relative size to the victim. In that case, the court found that the dog was trained to attack on command, unlike the dog in the present case. The dog was also larger and stronger relative to the female victim than the dog in the case at bar, which was a medium sized mixed breed relative to an armed male police officer.

In *State v. Bowers*, 239 Kan. 417, 721 P.2d 268 (1986), the Kansas Supreme Court decided a case in which two Doberman Pinschers were released to attack two police officers in the process of handcuffing the defendant. The defendant had warned the officers that the dogs were vicious and would "rip out the officers' 'guts' and kill them." *Bowers*, 239 Kan. at 419, 721 P.2d at 270. The defendant in the present case made no such warning, and the dog in this case was smaller and had no reputation for viciousness. There was also only one dog in the present case.

In *State v. Bodoh*, 226 Wis. 2d 718, 595 N.W.2d 330 (1999), the Wisconsin Supreme Court was presented with a case in which the defendant was convicted of negligent handling of a dangerous weapon when his two Rottweilers attacked a fourteen-year-old boy on a bicycle. In *State v. Sinks*, 168 Wis. 2d 245, 483 N.W.2d 286 (1992), the Court of Appeals of Wisconsin decided a case in which the defendant used a Doberman Pinscher to guard his victim, a female. He also used a knife, which was at all relevant times within his reach. In the case at bar, the dog was not as powerful relative to the victim and the defendant had no additional deadly weapon.

In *People v. Kay*, 121 Mich. App. 438, 328 N.W.2d 424 (1982), the Court of Appeals of Michigan decided a case in which the defendant commanded his German Shepherd to attack two store employees who followed him out of the store to his van, where the dog was, and accused him of stealing merchandise. Upon command, the dog lunged at one man's face. The Michigan court reasoned by analogy to a New York case in which the New York court had found that the dangerous weapon statute "did not exclude large dogs trained to attack." *Kay*, 121 Mich. App. at 443, 328 N.W.2d at 426. The Michigan court ruled that an animate object could be a dangerous weapon on those facts.

In *Commonwealth v. Tarrant*, 2 Mass. App. Ct. 483, 314 N.E.2d 448 (1974), the Appeals Court of Massachusetts, Suffolk, found that defendant used a dangerous weapon when he used a medium-sized German Shepherd mix, and also carried a knife. While the dog in this case was the closest to the dog in the present case, the fact that the defendant also wielded a knife sets the case apart. The defendant in the present case did not have any weapon on his person, nor did he attempt to use any object to assault the officers.

In all the above referenced cases, the various courts found that a dog may be a deadly weapon in situations markedly different from the situation in the case at bar. In the present case, the dog was a medium-sized German Shepherd mix. Defendant was not the dog's owner, and the dog was not trained to respond to commands. The dog was not a guard dog or a vicious dog, but only a pet, according to the owner's testimony. The defendant fled the police officers into a nearby familiar backyard, that of his sister. He ran to the area where the dog was tied up. The dog attacked the officer when the officer struggled with the defendant within the radius of the dog's tether. The facts do not indicate that the position was clear of the dog in defense and under the control of the defendant. The dog easily could have been guarding his territory, into which the officers had chased defendant. While I agree that a dog may be a deadly weapon in certain cases, the facts of the present case are not persuasive enough to establish that principle in our case law.

Moreover, the jury instructions, which repeatedly referred to "the dog under [defendant's] control" were entirely inappropriate. Although the defendant did not properly preserve this issue for consideration by our Court, this taken together with the unpersuasive facts of this case cause me to believe that the jury was prejudiced by the trial court's words, and that the facts alone do not support the

jury's verdicts. For this reason, I would grant a new trial on the issue discussed above.

IN THE MATTER OF: E.N.S., DOB: 2/25/02

No. COA03-718

(Filed 4 May 2004)

1. Child Abuse and Neglect— neglect—environment injurious to child's welfare

The trial court did not err by concluding that respondent mother neglected her minor child within the meaning of N.C.G.S. § 7B-101 based on the factor that the minor child lived in an environment injurious to the juvenile's welfare even though the minor child was taken from respondent immediately following his birth and before either of them had left the hospital, because: (1) the trial court carefully weighed and assessed the evidence regarding a past adjudication of neglect and the likelihood of its continuation in the future before concluding that the minor child would be at risk if allowed to remain with respondent; and (2) the findings of fact taken in their entirety are sufficient to support the conclusion that the minor child was a neglected child.

2. Child Abuse and Neglect— neglect—findings of fact—conclusions of law

The trial court did not err by allegedly failing to make appropriate findings of fact and conclusions of law in a child neglect case, because: (1) while respondent may contend that some of the findings were inaccurate and thus did not support the conclusions of law, the Court of Appeals reviewed the record and found competent evidence indicating otherwise; (2) the trial court was not required to orally state at the adjudication hearing whether the allegations in the petition have been proven by clear and convincing evidence, and the statement in the adjudication order that the court found the facts have been proven by clear and convincing evidence satisfied N.C.G.S. § 7B-804; and (3) although the amended adjudication order was inadvertently filed several days before the original order, respondent knew the order from which she was appealing had either added, deleted, or rephrased the content of the original order.

3. Child Abuse and Neglect— neglect—adjudication and disposition untimely

The trial court's failure to timely enter the adjudication and disposition orders within thirty days in a child neglect case was not prejudicial to respondent mother, because: (1) the General Assembly added the thirty-day filing requirement in 2001 with the intent of providing parties with a speedy resolution of cases where juvenile custody was at issue, and holding that the adjudication and disposition orders should be reversed simply based on untimely filing would only aid in further delaying a determination regarding the minor child's custody since juvenile petitions would have to be refiled and new hearings conducted; and (2) respondent cannot show how she was prejudiced by the late filing when respondent's right to visitation with the minor child was not affected nor was her right to appeal the orders.

Appeal by respondent from orders entered 8 and 14 May 2002 by Judge Jacquelyn L. Lee in Johnston County District Court. Heard in the Court of Appeals 16 March 2004.

W. A. Holland and Jennifer S. O'Connor for petitioner-appellee Johnston County Department of Social Services.

James D. Johnson, Jr. for Guardian ad Litem.

Katharine Chester for respondent-appellant.

HUNTER, Judge.

Respondent mother appeals both an adjudication order and disposition order concluding that her minor child, E.S., was a neglected and dependent juvenile whose best interests would be served by remaining in the custody of the Johnston County Department of Social Services ("JCDSS").[1] For the reasons stated herein, we affirm.

On 25 February 2002, respondent, then sixteen years of age, gave birth to E.S. while in the custody of JCDSS. E.S. was her second child, respondent having given birth to another son, R.S., when she was fourteen. At the time of E.S.' birth, respondent was living at PORT, a treatment facility for drug and alcohol abuse. However, PORT did not have accommodations for its patients' minor children, and JCDSS did not have another available placement that could provide the treat-

1. The guardian ad litem also filed notice of appeal in this matter, but submitted no brief to this Court.

ment and care respondent and E.S. needed. Therefore, due to respondent's inability to develop a plan of care for E.S., JCDSS took custody of the juvenile on the day he was born. A juvenile petition was filed on that same day alleging E.S.' dependency.

On 28 February 2002, JCDSS amended its juvenile petition to include allegations of neglect in that E.S. "live[d] in an environment injurious to the juvenile's welfare." Facts listed by JCDSS to support the neglect allegations were as follows:

> The juvenile's mother, [respondent], is a minor and is currently residing in a residential treatment facility and is not capable of providing care for the juvenile while residing in this facility. [JCDSS] has been working with [respondent] on or about November 1999 regarding [respondent's] first child. [Respondent's] first child was removed from her custody in 11/99. The first child was adjudicated as being neglected and dependent by [respondent] in that [respondent] failed to ensure that the child was properly fed. On or about November 2000, the Court ordered that DSS no longer had to work toward reunifying [respondent] with her oldest child. [Respondent] failed to make significant progress in addressing her neglect issues and she failed to show an interest in providing care for the juvenile. The juvenile's alleged father is unknown and no one has come forward at this time to claim paternity of this juvenile. [Respondent] has stated she does no[t] know the identity of the father. Therefore, this juvenile is an environment injurious to her [sic].

The adjudication hearing was held on 3 April 2002. At the call of the case, respondent informed the trial court that she would consent to an adjudication of dependency only. JCDSS did not accept the stipulation, and the hearing commenced. After the presentation of the evidence, the court concluded that E.S. was a dependent and neglected juvenile. Findings of fact supporting that conclusion included, *inter alia*:

> [Respondent] has been discharged from PORT, the drug and alcohol treatment facility as of March 28, 2002. She has been placed in a therapeutic foster care home. The minor child, [E.S.], continues to reside in a licensed foster care home. The Court finds that he is gaining weight and is appropriately progressing. The JCDSS has continued to explore relative placement without success.

> [Respondent] had three weekend visits while at PORT. These weekend visits were attempts to recommit her to the local community and were arranged at her grandmother's home. During all three of these visits she violated curfews by spending the night away from her grandmother's home. The mother also admitted taking a sleeping pill and upon returning to PORT, tested positive for THC. The Court finds from this evidence that the mother had [been] given an opportunity to establish a home with her grandmother and present an understanding [of] following rules in the home so that she could develop the skills to maintain and manage her own child. The mother's failure to stay in the place provided and decision to violate both the curfew and the substance problems constitutes neglect in that the mother has not demonstrated that she can supervise and control an infant. The Court further finds that the child is a dependent child and that the mother has no money, no source of income, no place to live and has demonstrated an inability to remain in placements where she could care for the minor infant.

The case immediately proceeded to disposition whereby the trial court concluded that E.S.' best interests would be served by remaining in the custody of JCDSS. A supervised visitation plan for respondent was also approved that was contingent upon respondent complying with her family services case plan. Respondent and the guardian ad litem appeal.[2]

I.

[1] Respondent argues the trial court's adjudication order should be reversed because she did not neglect E.S. within the meaning of N.C. Gen. Stat. § 7B-101 (2003). The relevant portion of this statute provides:

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

N.C. Gen. Stat. § 7B-101(15) (emphasis added). Respondent contends that since E.S. was taken from respondent immediately following his

2. Respondent is the only party that filed a brief on appeal.

birth and before either of them had left the hospital, the trial court erred in concluding E.S. was living in an environment injurious to the juvenile's welfare. We disagree.

"In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Also, in determining whether a parent has neglected a juvenile, a prior adjudication of neglect involving that parent is a relevant factor to consider, and "the trial judge [is afforded] some discretion in determining the weight to be given such evidence." *In re Nicholson and Ford*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994). *See also* N.C. Gen. Stat. § 7B-101(15).

In the case *sub judice*, the trial court's adjudication of neglect was based primarily on events that took place before E.S.' birth, in particular, the circumstances regarding respondent's oldest child being adjudicated neglected and dependent on 27 January 2000. The trial court further found that following that prior adjudication, respondent continued to demonstrate behavior that evidenced she would neglect E.S. That evidence established that while in the PORT program and prior to E.S.' birth, respondent was allowed three weekend visits with her grandmother. The purpose of those visits was to ensure that respondent could show a change in previous patterns of instability, give her an opportunity to live with R.S.[3], and determine if respondent could abide by established house rules. The first visit took place around Thanksgiving of 2001, and respondent disappeared for six hours without permission. The second visit took place around Christmas of 2001, and respondent behaved appropriately. The third visit took place in February of 2002 (approximately two weeks before E.S.' birth), and respondent stayed out all night without permission.

After E.S. was born, the evidence revealed that respondent's behavior did not improve. Shortly after E.S.' birth, respondent resumed visits with her grandmother with the following results: (1) on 15 March 2002, respondent violated her established curfew and took a sleeping pill, which was considered a violation of PORT's policy against taking drugs of any kind; and (2) in early April of 2002,

3. After being adjudicated neglected and dependent, R.S. was placed in the custody of a maternal great-aunt. R.S. and his great-aunt were residing in the home of the great-aunt's mother (respondent's grandmother) during respondent's visits.

respondent had another visit with her grandmother, stayed out all night again, and smoked marijuana. Thereafter, respondent was discharged from PORT because her PORT counselor felt that the program could offer respondent no further assistance. While her discharge was not technically considered an unsuccessful completion of the program, additional evidence established that respondent "still struggles with substance abuse."

"In cases of this sort, the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). Here, the trial court carefully weighed and assessed the evidence regarding a past adjudication of neglect and the likelihood of its continuation in the future before concluding that E.S. would be at risk if allowed to remain with respondent. "Because the neglect statute 'affords the trial judge some discretion in determining the weight to be given such evidence,' we hold that the findings of fact taken in their entirety are sufficient to support the conclusion that [E.S.] was a neglected child." *Id.* This assignment of error is overruled.

II.

[2] Respondent argues the trial court failed to make appropriate findings of fact and conclusions of law. We disagree.

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.R. Civ. P. 52(a)(1). "Findings of fact are defined as '[d]eterminations from the evidence of a case . . . concerning facts averred by one party and denied by another.' Conclusions of law are defined as '[f]inding[s] by [a] court as determined through [the] application of rules of law.' " *In re Johnston*, 151 N.C. App. 728, 731, 567 S.E.2d 219, 221 (2002) (citations omitted). "If the trial court's findings of fact are supported by competent evidence, and they support its conclusions, they are binding on appeal." *Id.*

Testimony was offered by two child placement workers, a child protective service investigator, and respondent. From their testimony, the trial court found respondent had demonstrated behavior inconsistent with caring for a child such as running away from child placements, violating established curfews, and failing to develop a

connection or demonstrate a willingness to provide any parenting skills to her oldest child that would have assisted her with the supervision and control of E.S. These findings were clearly distinguished from the court's conclusions that E.S. was a dependent and neglected juvenile as designated by the titles "Findings of Fact" and "Conclusions of Law" in the adjudication order. *See id.* at 732, 567 S.E.2d at 221 (holding that the trial court's findings of fact and conclusions of law must be distinguishable in the order in some recognizable fashion). Moreover, while respondent may contend that some of the findings were inaccurate and thus, did not support the conclusions of law, we have carefully reviewed the record and found competent evidence indicating otherwise.

Nevertheless, respondent contends the trial court erred by not orally stating at the adjudication hearing whether "the allegations in the petition have been proven by clear and convincing evidence[]" pursuant to N.C. Gen. Stat. § 7B-807(a) (2003). While the trial court did not make such an oral statement, neither statutory authority nor case law require the court to do so. However, there is clear case law that holds the order of the trial court must affirmatively state the standard of proof utilized. *See In re Church*, 136 N.C. App. 654, 525 S.E.2d 478 (2000). The first page of the trial court's adjudication order did state: "For purposes of adjudication, the Court finds . . . the following facts have been proven by clear and convincing evidence . . . ." That statement satisfies N.C. Gen. Stat. § 7B-804. Morever, the statement in the adjudication order disproves another contention of respondent's that the order failed to clearly state the requisite standard of proof.

Next, respondent contends the trial court confused matters by entering an amended juvenile adjudication order before the original order. For reasons not clearly denoted in the record, the amended adjudication order was filed on 8 May 2002, several days before the original order was filed on 14 May 2002. Yet, despite the original order being inadvertently filed on a later date, respondent's notice of appeal clearly stated that she was "appealing the amended Adjudication Order . . . ." Thus, whether or not respondent had seen the original adjudication order at that time, she knew the order from which she was appealing had either added, deleted or rephrased the content of the original order. *See* The American Heritage College Dictionary 42-43 (3rd ed. 1997).

The remainder of respondent's contentions with respect to this second argument are completely without merit and warrant no fur-

ther discussion. Accordingly, we conclude the trial court made appropriate findings of fact and conclusions of law.

III.

[3] Finally, respondent argues the trial court's decision should be reversed because it failed to timely enter the adjudication and disposition orders. We conclude the trial court's failure to timely enter the orders did not prejudice defendant.

Chapter 7B of our statutes governs the filing of adjudication and disposition orders. Specifically, an adjudication order "*shall* be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing." N.C. Gen. Stat. § 7B-807(b) (emphasis added). Likewise, a disposition order "*shall* be in writing, signed, and entered no later than 30 days from the completion of the hearing . . . ." N.C. Gen. Stat. § 7B-905(a) (2003) (emphasis added).

Here, the adjudication and disposition hearing took place on 3 April 2002. The adjudication order was filed on 8 May 2002, and the disposition order was filed on 14 May 2002, both of which occurred after the thirty-day statutory time period. Respondent cites several cases in which this Court held that "use of the language 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error." *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001). *See also In re Estes*, 157 N.C. App. 513, 579 S.E.2d 496, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003). However, none of those cases involved the untimeliness of orders, nor do the statutes at issue address the repercussions associated with untimely filing these types of orders.

The General Assembly added the thirty-day filing requirement to these statutes in 2001. *See* 2001 Sess. Laws 2001-208, § 17. While we have located no clear reasoning for this addition, logic and common sense lead us to the conclusion that the General Assembly's intent was to provide parties with a speedy resolution of cases where juvenile custody is at issue. Therefore, holding that the adjudication and disposition orders should be reversed simply because they were untimely filed would only aid in further delaying a determination regarding E.S.' custody because juvenile petitions would have to be re-filed and new hearings conducted.

Further, although the order was not filed within the specified time requirement, respondent cannot show how she was prejudiced by the late filing. *See In re Humphrey*, 156 N.C. App. 533, 538, 577

S.E.2d 421, 426 (2003) (citation omitted) (holding the respondent failed to demonstrate how she was prejudiced by petitioner's failure to comply with N.C. Gen. Stat. § 7B-1104's requirement that a petition or motion for termination of parental rights *shall* state that it " 'has not been filed to circumvent the provisions of . . . the Uniform Child-Custody Jurisdiction and Enforcement Act' "). The record shows that respondent's right to visitation with E.S. was not affected by the untimely filings nor was her right to appeal the orders. Thus, the trial court's failure to file the adjudication and disposition orders within thirty days amounted to harmless error and is not grounds for reversal.

Affirmed.

Judges WYNN and TYSON concur.

GANNETT PACIFIC CORPORATION d/b/a Asheville Citizen-Times Publishing Company, an Hawaii Corporation, and CHESAPEAKE TELEVISION, INC., t/d/b/a WLOS-TV, a Maryland Corporation, Plaintiffs v. NORTH CAROLINA STATE BUREAU OF INVESTIGATION, a Public Law Enforcement Agency of the State of North Carolina, Defendant

No. COA03-962

(Filed 4 May 2004)

Public Records— exemptions—criminal investigation—criminal intelligence information

Although the trial court did not err in a declaratory judgment action by dismissing plaintiffs' complaint seeking production of records of a criminal investigation or records of criminal intelligence information conducted by defendant State Bureau of Investigation (SBI) related to a fatal fire that occurred in a county jail, plaintiffs are entitled to release of any other information classified as public records under N.C.G.S. §§ 132-1.4(c) and (k) as well as any other public records not specifically exempted from disclosure, because: (1) the Public Records Act under N.C.G.S. § 132-1 provides exemptions including that records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information compiled by public law enforcement agencies are not public records; (2)

exclusion of these types of records protects confidentiality of government informants, protects investigative techniques used by law enforcement agencies, and protects against the use of hearsay that investigators often use for their opinions and conclusions; (3) if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired when few persons would respond candidly to investigators if they feared that their remarks would become public record, the investigative techniques of the investigating body would be disclosed to the general public, and a person's right of privacy would be violated if their name was mentioned or accused of wrongdoing in unverified or unverifiable hearsay statements of others included in such reports; (4) the Public Records Act contains no exception for disclosure of records where an investigation is complete; and (5) plaintiffs are neither criminal defendants nor civil litigants seeking discovery of admissible evidence to be used in trial, but instead they sought access to the SBI records due to their desire to know and publish the contents.

Appeal by plaintiffs from order entered 28 April 2003 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Court of Appeals 16 March 2004.

Kelly & Rowe, P.A., by James Gary Rowe, for plaintiff appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General John H. Watters, for defendant appellee.

WYNN, Judge.

Plaintiffs Gannett Pacific Corporation and Chesapeake Television, Inc. appeal from an order of the trial court dismissing their complaint seeking production of records of a criminal investigation conducted by Defendant North Carolina State Bureau of Investigation ("the SBI"). Plaintiffs argue the records are not statutorily protected from disclosure and should be released. After careful consideration, we conclude Plaintiffs are not entitled to release of the SBI's records of its criminal investigation or criminal intelligence information. We further conclude Plaintiffs are entitled to release of any other information classified as public records under the North

Carolina General Statutes. We therefore affirm in part and reverse in part the order of the trial court.

The underlying facts tend to show that on 3 February 2003, Plaintiffs filed a declaratory judgment against the SBI in Buncombe County Superior Court, seeking release of investigative records related to a fatal fire that occurred at the Mitchell County Jail in Bakersville, North Carolina on 3 May 2002. Plaintiffs alleged that since investigation of the fire was complete and no further investigation was pending, the SBI had "no just reason for withholding from disclosure the records of the criminal investigation" under North Carolina's Public Records Act. Following the trial court's dismissal of their action under Rule 12(b)(6) of the Rules of Civil Procedure, Plaintiffs appealed.

The issue on appeal is whether Plaintiffs are entitled, under our Public Records Act, to disclosure of documents relating to a criminal investigation completed by the North Carolina State Bureau of Investigation. For the reasons stated herein, we conclude Plaintiffs are not entitled to disclosure of the SBI's records of its criminal investigation or criminal intelligence information at issue, and the trial court therefore properly dismissed Plaintiffs' complaint to the extent that it sought release of such documents. Because Plaintiffs are statutorily entitled to any other information in the possession of the SBI that qualifies as public records under the Public Records Act, however, the trial court erred in part in ruling Plaintiffs' complaint failed to state a claim upon which relief could be granted.

The Public Records Act, codified in sections 132-1 *et seq.* of the North Carolina General Statutes, "affords the public a broad right of access to records in the possession of public agencies and their officials." *Times-News Publishing Co. v. State of N.C.*, 124 N.C. App. 175, 177, 476 S.E.2d 450, 451-52 (1996), *disc. review denied*, 345 N.C. 645, 483 S.E.2d 717 (1997); *see also News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992) (stating that the General Assembly's intent in enacting the Public Records Act was to provide the public with liberal access to public records). The Public Records Act permits public access to all public records in an agency's possession "*unless* either the agency or the record is specifically exempted from the statute's mandate." *Times-News Publishing Co.*, 124 N.C. App. at 177, 476 S.E.2d at 452 (emphasis added). Under the Public Records Act, "public records" include "all . . . material, regardless of physical form or characteristics, made or received pursuant to

law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." N.C. Gen. Stat. § 132-1(a) (2003). Public records and information compiled by North Carolina government agencies "are the property of the people." N.C. Gen. Stat. § 132-1(b) (2003). "Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law." *Id.*

The Public Records Act contains various exemptions, however. One such exemption provides that "[r]ecords of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information compiled by public law enforcement agencies are not public records as defined by G.S. 132-1." N.C. Gen. Stat. § 132-1.4(a) (2003). "Public law enforcement agencies" include "any State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law." N.C. Gen. Stat. § 132-1.4(b)(3) (2003). "Records of criminal investigations" are defined as "all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements." N.C. Gen. Stat. § 132-1.4(b)(1) (2003). "Records of criminal intelligence information" means "records or information that pertain to a person or group of persons that is compiled by a public law enforcement agency in an effort to anticipate, prevent, or monitor possible violations of the law." N.C. Gen. Stat. § 132-1.4(b)(2) (2003).

Because records of criminal investigations and records of criminal intelligence information are not public records, a party seeking disclosure of such records must seek release "by order of a court of competent jurisdiction." N.C. Gen. Stat. § 132-1.4(a). For example, a criminal defendant may seek an order of the trial court requiring disclosure of information compiled by public law enforcement agencies pursuant to the discovery process governed by Chapter 15A of the General Statutes. *See* N.C. Gen. Stat. § 132-1.4(g) (2003). However, "[n]othing in [section 132-1.4] shall be construed as requiring law enforcement agencies to disclose . . . (1) [i]nformation that would not be required to be disclosed under Chapter 15A of the General Statutes; or (2) [i]nformation that is reasonably likely to identify a confidential informant." N.C. Gen. Stat. § 132-1.4(h) (2003).

Despite the above-stated exemption for records of criminal investigations and intelligence information records, the following information collected by law enforcement agencies qualifies as public records:

(1) The time, date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency.

(2) The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.

(3) The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.

(4) The contents of "911" and other emergency telephone calls received by or on behalf of public law enforcement agencies, except for such contents that reveal the name, address, telephone number, or other information that may identify the caller, victim, or witness.

(5) The contents of communications between or among employees of public law enforcement agencies that are broadcast over the public airways.

(6) The name, sex, age, and address of a complaining witness.

N.C. Gen. Stat. § 132-1.4(c) (2003). In addition, "[t]he following court records are public records and may be withheld only when sealed by court order: arrest and search warrants that have been returned by law enforcement agencies, indictments, criminal summons, and nontestimonial identification orders." N.C. Gen. Stat. § 132-1.4(k) (2003).

In the instant case, Plaintiffs requested the SBI produce for their inspection the following documents:

1) A copy of the SBI report regarding the May 3, fire at the Mitchell County jail submitted to Mitchell County District Attorney James Rusher in July 2002.

2) A copy of the SBI report regarding the May 3 fire at the Mitchell County jail submitted to Mr. Rusher in November 2002.

3) All supporting documentation from the SBI's investigation into the Mitchell County jail fire.

4) Any and all correspondence between Mr. Rusher and the SBI regarding the Mitchell County jail fire and the subsequent investigation.

5) Any warrants obtained by investigators in regards to the Mitchell County jail fire.

Plaintiffs further requested "all public records relating to the investigation of the May 3, 2002 fire at the Mitchell County, North Carolina jail."

Plaintiffs are clearly entitled to any information defined as public records under sections 132-1.4(c) and (k) of the General Statutes, and any public records relating to the Mitchell County fire not specifically exempted from disclosure that the SBI may or may not possess. As Plaintiffs requested access to "all public records," which request the SBI categorically denied, Plaintiffs' complaint stated a claim upon which relief could be granted. The trial court therefore erred in part in granting the SBI's motion to dismiss Plaintiffs' complaint. The burden is on the SBI to comply with Plaintiffs' request by reviewing its records and releasing all information relating to the Mitchell County fire defined as public records. If, after reviewing its records, the SBI determines it does not have custody of any information classified as public records, denial of Plaintiffs' request may be appropriate. Before this determination is made, however, dismissal of Plaintiffs' complaint is premature.

More pertinently, however, Plaintiffs have consistently sought disclosure of the SBI's criminal investigation records related to the Mitchell County fire. Plaintiffs acknowledge that records of criminal investigations and criminal intelligence information records compiled by the SBI are not public records, but argue that the exemption of such records from the Public Records Act should not apply where no criminal prosecution has been or will be undertaken, and where the SBI's investigation is complete. Plaintiffs urge this Court to adopt a "balancing approach" to disclosure of records of criminal investigations which would allow a reviewing court in each particular case to weigh the various purposes for secrecy against the public need and right to disclosure of the documents at issue. We are not persuaded.

The principles governing statutory construction are well established: where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe a statute using its plain meaning. *Burgess v. Your House of*

Raleigh, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Section 132-1.4(a) clearly and unambiguously provides that any "[r]ecords of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information compiled by [the SBI] are not public records as defined by G.S. 132-1." N.C. Gen. Stat. § 132-1.4(a) (emphasis added). Plaintiffs are therefore not entitled to disclosure of the records as public records. Further, Plaintiffs have not alleged they are entitled to disclosure of the records through any alternate statutory grounds. For example, Plaintiffs have not alleged they are parties to any criminal or civil action which might facilitate disclosure of the records through the discovery processes contained in Chapter 15A of the General Statutes or the North Carolina Rules of Civil Procedure. We further note that "[c]ourts have given almost universal recognition to certain reasons for excluding police and investigative records from the operation of statutory rights of public access." *News and Observer v. State*; *Co. of Wake v. State; Murphy v. State*, 312 N.C. 276, 282, 322 S.E.2d 133, 137-38 (1984). Such reasons include, but are not limited to the following: (1) protection of confidentiality of government informants; (2) protection of investigative techniques used by law enforcement agencies; (3) criminal investigation reports contain the opinions and conclusions of the investigators and may be based on hearsay. *See id.* These justifications do not dissipate upon conclusion of an investigation or where no actual prosecution takes place. As noted by our Supreme Court,

> "[i]t is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public." An equally important reason for prohibiting access to police and investigative reports arises from recognition of the rights of privacy of individuals mentioned or accused of wrongdoing in unverified or unverifiable hearsay statements of others included in such reports.

Id. at 282-83, 322 S.E.2d at 138 (citations omitted) (quoting *Aspin v. Department of Defense*, 491 F. 2d 24, 30 (D.C. Cir. 1973)).

In their complaint, Plaintiffs specifically sought disclosure of the records "pursuant to the Public Records Act." The Public Records Act

does not provide for disclosure of records of criminal investigations or criminal intelligence information, however, and we may not circumvent the plain language of the statute. While we acknowledge that Plaintiffs' "balancing approach" might better serve the public interest where criminal investigations are complete and no action is pending, we are but jurists and not members of the General Assembly. As currently enacted, the Public Records Act contains no exception for disclosure of records where an investigation is complete. "Courts may not extend a statute to cover cases not within its scope or purpose, however meritorious they may be." *Burgess*, 326 N.C. at 218, 388 S.E.2d at 142. We decline to create exceptions to a statute where none exist. As such, Plaintiffs must seek relief from the General Assembly and not the judiciary.

In sum, the records of the SBI's criminal investigation and criminal intelligence information sought by Plaintiffs are not public records. Moreover, Plaintiffs are neither criminal defendants nor civil litigants seeking discovery of admissible evidence to be used in a trial. "Instead, [they] sought access to the S.B.I. records only due to [their] desire to know and publish the contents." *News and Observer*, 312 N.C. at 284, 322 S.E.2d at 139. As such, under North Carolina law, they are not entitled to disclosure of the documents sought. To the extent the trial court dismissed Plaintiffs' complaint seeking access to such documents, dismissal was proper.

The trial court erred in granting the SBI's motion to dismiss Plaintiffs' complaint, inasmuch as the complaint sought access to "all public records" relating to the Mitchell County fire in the possession of the SBI, a State governmental agency. Plaintiffs are clearly entitled to information classified as public records under the six exceptions listed in section 132-1.4(c) of the General Statutes, arrest and search warrants, indictments, criminal summons, and nontestimonial identification orders under section 132-1.4(k), and any other public records not specifically exempted from disclosure. Dismissal was otherwise proper. We therefore reverse in part the order of the trial court and remand for a determination of whether the SBI has in its possession any information related to the Mitchell County fire defined as public records under sections 132-1.4(c) and (k) of the General Statutes to which Plaintiffs are entitled, or any other information not specifically exempted from disclosure. We otherwise affirm the order of the trial court.

Affirmed in part, reversed in part, and remanded.

Judges HUNTER and TYSON concur.

SANDY MUSH PROPERTIES, INC. PLAINTIFF (HANSON AGGREGATES SOUTHEAST, INC., FORMER PLAINTIFF) v. RUTHERFORD COUNTY, BY AND THROUGH THE RUTHERFORD COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA02-1587-2

(Filed 4 May 2004)

Zoning— building moratorium—public notice requirement

After a rehearing (and with this opinion superseding the first), the Court of Appeals held that the trial court erred by not granting summary judgment for plaintiff in an action involving a building permit sought by plaintiff and a moratorium on heavy industry imposed by defendant. The moratorium dealt specifically with building permits and was therefore subject to the notice requirements of Article 18 of Chapter 153A, which were not met. N.C.G.S. § 153A-323.

Appeal by plaintiff from an order entered 3 September 2002 by Judge W. Douglas Albright in Rutherford County Superior Court. Heard in the Court of Appeals 11 September 2003.

Bazzle & Carr, P.A., by Eugene M. Carr, III, Kennedy, Covington, Lobdell & Hickman, L.L.P., by Lacy H. Reaves and Amie Flowers Carmack, for plaintiff-appellant.

Sigmon, Clark, Mackie, Hutton, Hanvey, & Ferrell, P.A., by Warren A. Hutton, Forrest A. Ferrell and Stephen L. Palmer; Nanney, Dalton & Miller, L.L.P., by Walter H. Dalton and Elizabeth Thomas Miller, for defendant-appellee.

HUNTER, Judge.

An opinion was filed in this case on 21 October 2003. On 25 November 2003, defendants filed a petition for rehearing. On 5 December 2003, we allowed that petition, reconsidering the case with the filing of additional briefs, and the hearing of oral arguments on 14 January 2004. The following opinion supersedes and replaces the opinion filed 21 October 2003.

Sandy Mush Properties, Inc. ("plaintiff") appeals an order denying its Motion for Summary Judgment and Motion to Amend Complaint; and granting Rutherford County's ("the County"), by and through the County Board of Commissioners ("the Board") (collectively "defendants"), Motion for Summary Judgment. For the reasons stated herein, we reverse.

On 21 June 2001, defendants ran a legal advertisement in *The Daily Courier*, a newspaper of general circulation in the County, noticing a public hearing to be held on 2 July 2001. The hearing was in reference to a proposed Polluting Industries Development Ordinance ("PIDO") that prohibited the operation of a new or expanded heavy industry within 2,000 feet of a church, school, residence or other structures.

At the time of the notice's publication, Hanson Aggregates Southeast, Inc. ("Hanson") had an option to lease a tract of land in the County from plaintiff that consisted of approximately 180 acres ("the Property") that was within 2,000 feet of a school boundary. On 26 June 2001, Hanson applied to the County Building Department for a building permit to operate a crushed stone quarry on the Property. The request was denied. Hanson was informed that it needed to obtain approval from the County Health Department for a septic tank and submit a set of building plans for the proposed site that were stamped by a North Carolina licensed engineer.

On 2 July 2001, the Board conducted a public hearing on the proposed PIDO. Hanson attended the hearing and spoke in opposition to the proposed ordinance. At the close of the hearing, a County Commissioner moved that an ordinance imposing a 120-day moratorium to prohibit the initiation of heavy industry in the County school zones be adopted, during which time the County Planning Commission could study a land use ordinance which would regulate future construction of heavy industry within school zones.[1] The motion was approved.

On 28 August 2001, the County Planning Commission recommended that the proposed PIDO not be adopted by the Board. Thereafter, Hanson renewed its application for a building permit on 31 August 2001 after having met those requirements that led to the application's initial denial. Nevertheless, the County Building

1. The land use ordinance that was studied during the 120-day moratorium would later be known as the School Zone Protective Ordinance.

Department denied Hanson's permit application again, basing that denial on the recent approval of the moratorium.

On 12 September 2001, Hanson filed a complaint against defendants requesting that they be enjoined from enforcing the moratorium because defendants had violated statutory procedures by not publishing adequate notice of the public hearing at which the moratorium was passed. Hanson's complaint also requested a Writ of Mandamus requiring defendants to issue it a building permit. Following a 28 September 2001 hearing on the matter, the trial court concluded that the moratorium "was not an exercise of the [County's] police power and was therefore invalid." Thus, defendants were enjoined from enforcing the moratorium and were ordered to issue Hanson the building permit; however, the court's order provided that its "findings of fact and conclusions of law concerning the injunction [were] not binding on any future court hearing this matter."

The Board met on 1 October 2001 to consider the School Zone Protective Ordinance ("SZPO"), which would prohibit the construction or operation of any heavy industry in areas identical to those listed in the moratorium. Notice of the hearing complied with relevant statutory procedures regarding ordinances that govern zoning. The Board unanimously voted to adopt the SZPO pursuant to the County's general police powers under Section 153A-121 of the North Carolina General Statutes.

Hanson filed an Amended Verified Complaint and Petition for Mandamus on 2 October 2001. Defendants answered and counterclaimed that Hanson should be enjoined from operating a crushed rock quarry on the Property because, *inter alia*, (1) the moratorium was properly enacted pursuant to the County's general police powers and therefore no notice was required, and (2) at no time prior to the adoption of the SZPO did Hanson have the requisite state permits or any vested statutory or common law right to operate a rock quarry on the Property. Following Hanson's reply to the counterclaim, defendants filed a Motion for Summary Judgment on 21 June 2002.

On 2 July 2002, it was announced that Hanson had terminated its lease with plaintiff and that plaintiff was willing to be substituted for Hanson in the action, ratifying all claims by Hanson. An order approving substitution of the parties was entered on 8 August 2002. Prior to the entry of the order, however, plaintiff filed a Motion to Amend (Hanson's Amended Verified) Complaint to add another claim on 30

July 2002, as well as its own Motion for Summary Judgment. Defendants filed an objection to the Motion to Amend Complaint.

The parties' motions were heard on 12 August 2002. The trial court subsequently denied both of plaintiff's motions and granted defendants' Motion for Summary Judgment. Finally, the court dismissed plaintiff's claims and dissolved the Writ of Mandamus and preliminary injunction issued as a result of the 28 September 2001 hearing. Plaintiff appeals.

Plaintiff assigns error to the trial court's denial of its Motion for Summary Judgment and grant of defendants' Motion for Summary Judgment. Specifically, plaintiff contends that the public hearing at which the moratorium was passed, ultimately resulting in the denial of its building permit, took place without sufficient notice pursuant to Section 153A-323 of our statutes. We agree.

Generally, "notice and public hearing are not mandated for the adoption of ordinances." *Vulcan Materials Co. v. Iredell County*, 103 N.C. App. 779, 782, 407 S.E.2d 283, 285 (1991). However, our statutes and case law recognize an exception for the adoption of any ordinance authorized by Article 18 of Chapter 153A. *Id.* "Article 18 governs zoning, subdivision regulation, building inspection (including issuance of building permits), and community development." *Id.* at 782, 407 S.E.2d at 286. "Before adopting or amending any ordinance *authorized* by this Article . . . , the board of commissioners shall hold a public hearing on the ordinance . . . [and] shall cause notice of the hearing to be published once a week for two successive calendar weeks. N.C. Gen. Stat. § 153A-323 (2003) (emphasis added). Failure to adhere to the notice requirements of Section 153A-323 will result in any subsequently enacted ordinance covered by Article 18 being invalid as demonstrated by this Court's holding in *Vulcan*.

In *Vulcan*, the plaintiff challenged a local ordinance imposing a sixty-day moratorium on the issuance of building permits pending the enactment of a zoning ordinance. The plaintiff asserted that the moratorium violated Section 153A-323 and its requirements of notice to the public and a public hearing prior to the moratorium's adoption. The trial court granted summary judgment in favor of the plaintiff and ordered that the requested building permit be granted. On appeal by the defendants, the *Vulcan* Court determined that no specific authority existed for the imposition of a moratorium on the issuance of building permits pending zoning. Nevertheless, it concluded that the

defendants' moratorium was within the purview of Article 18 because both zoning and ordinances imposing moratoriums that deal specifically with the issuance of building permits are governed by Article 18. Thus, the defendants' failure to hold a public hearing or give notice, as required under Section 153A-323, invalidated the moratorium. *Vulcan*, 103 N.C. App. at 782, 407 S.E.2d at 286.

Plaintiff contends that *Vulcan* is analogous to the present case; a contention defendants dispute. In turn, defendants cite *Maynor v. Onslow County*, 127 N.C. App. 102, 105, 488 S.E.2d 289, 291 (1997), in which this Court recognized that "[c]ounties may enact ordinances regulating land use in two fashions: one, pursuant to a comprehensive zoning plan, N.C. Gen. Stat. § 153-341 . . . , and two, pursuant to their police powers, N.C. Gen. Stat. § 153A-121 . . . ." Defendants contend this case is distinguishable from *Vulcan* because the County did not have a comprehensive zoning plan.

A zoning plan consists of ordinances designed to enable the government of counties to divide the county into districts or zones for the purpose of regulating the uses of each parcel of land in the county. James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 18-14, at 863 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 5th ed. 1999). In *Vulcan*, the moratorium enacted restricted " 'any building permits being issued in all areas not currently zoned if the building permit call[ed] for uses of the land other than stated in the land use plan.' " *Vulcan*, 103 N.C. App. at 780, 407 S.E.2d at 284. Defendant contends that unlike the County's moratorium, the moratorium in *Vulcan* "did not address any conditions affecting the health, safety or welfare of the citizens of Iredell County[,]" but "simply furthered the process already begun by the County to enact a complete countywide zoning ordinance." Therefore, any notice of a public hearing was unnecessary because the moratorium was allowable under the County's police powers pursuant to Section 153A-121, specifically stating as such, and *PNE AOA Media, L.L.C. v. Jackson Cty.*, 146 N.C. App. 470, 554 S.E.2d 657 (2001).

Section 153A-121, entitled "General ordinance-making power[,]" provides, *inter alia*, that a county's police powers, are those delegated to it by the Legislature to make ordinances which "define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county[.]" N.C. Gen. Stat. § 153A-121(a) (2001). *See also Maynor*, 127 N.C. App. at 105, 488 S.E.2d at 291. Based on this statute, the defendant in *PNE* argued that it did not have to publish notice or

advertise that it was considering adoption of a moratorium that would prohibit PNE from being issued a billboard permit that conflicted with the Jackson County zoning code. On appeal, the *PNE* Court concluded that the general police powers of Section 153A-121 did not require notice in that situation, particularly since the ordinance stated it was enacted pursuant to Section 153A-121(a). *PNE*, 146 N.C. App. at 478-79, 554 S.E.2d at 662-63.

Despite defendants' contentions, we conclude the present case is analogous to *Vulcan*. As in *Vulcan*, the moratorium had the effect of making unzoned areas of the County subject to zoning prior to the adoption of a zoning ordinance. *Vulcan*, 103 N.C. App. at 782, 407 S.E.2d at 286. Essentially, the moratorium was itself a temporary comprehensive land use plan that allowed the County Planning Commission 120 days to study the adoption of a permanent land use plan (the SZPO) to regulate heavy industry within school zones. Our statutes recognize that a comprehensive zoning land use plan does not have to be complex, it need only

> divide [a county's] territorial jurisdiction into districts of any number, shape, and area . . . . Within these districts a county may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land. . . .
>
> A county may determine that the public interest does not require that the entire territorial jurisdiction of the county be zoned and may designate one or more portions of that jurisdiction as a zoning area or areas.

N.C. Gen. Stat. § 153A-342 (2003). By approving the moratorium, the Board divided the County into two areas—zones in which heavy industry was allowed and those in which it was not. An action of this nature is *authorized* under Article 18 even though the Board sought to use Section 153A-121 to justify the County division.

Also, like *Vulcan*, this case involves the approval of a moratorium that effectively denied plaintiff the issuance of a building permit pending enactment of the SZPO. Since the moratorium "deal[t] specifically with the issuance of building permits, [it] is . . . covered by Article 18[,]" and its adoption had to comply with the notice requirements of Section 153A-323. *Id.* Yet, only one advertisement noticing the public hearing at which the moratorium was adopted appeared in the local paper approximately ten days prior to the hearing, despite Section 153A-323's requirement that "[t]he board shall cause notice of

the hearing to be published once a week for two successive calendar weeks." N.C. Gen. Stat. § 153A-323.

Finally, defendants' reliance on our holding in *PNE* is misplaced. *PNE* involved the adoption of a moratorium prohibiting the issuance of a *billboard* permit. Ordinances imposing moratoriums of that nature are not governed by Article 18 of Chapter 153A; therefore, the defendant in *PNE* properly acted under Section 153-121's general police powers. In the case *sub judice*, defendants clearly adopted an ordinance that imposed a moratorium on the issuance of *building* permits, which are governed by Article 18 of Chapter 153A. Defendants cannot now avoid the notice requirements of Section 153A-323 simply because the moratorium stated it was "enacted pursuant to and by virtue of the general police powers granted Rutherford County pursuant to N.C.G.S. 153A-121."

In conclusion, since the moratorium was the type of ordinance authorized by Article 18, the County had to comply with the notice requirements of Section 153A-323. Although the County subsequently complied with those requirements before adopting the SZPO, defendants had already been ordered to issue Hanson a building permit because the moratorium was an invalid exercise of the County's police powers. Plaintiff, as the owner of the Property and the party properly substituted for Hanson in this action, is now therefore entitled to that permit. Accordingly, we reverse the trial court's denial of plaintiff's summary judgment motion and its grant of summary judgment in favor of defendants. To hold otherwise would allow counties to make zoning decisions without complying with the statutory requirements of Article 18. Further, reversal on this issue renders the need to address plaintiff's remaining assignment of error unnecessary. It should be noted, however, that our holding provides only that the trial court erred in enforcing the moratorium against plaintiff thereby preventing it from being issued a *building* permit. Thus, regardless of those arguments raised by the parties during re-hearing of this case as to plaintiff's application to the State for a *mining* permit, there was neither sufficient evidence in the record for this Court to view that issue nor did the order from which plaintiff appeals address any issues related to the mining permit.

Reversed.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. OMAR ROMERO, DEFENDANT

No. COA03-755

(Filed 4 May 2004)

1. Child Abuse and Neglect— criminal abuse—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of felony child abuse for insufficient evidence of serious injury. Whether an injury is serious is a question for the jury; here, the evidence established that defendant hit his one-year old son at least once with a belt during an assault on his wife, the child cried after being hit, there was a visible bruise on his head, a deputy and a social worker testified about the bruise, and photographs of the bruise were admitted for the jury to observe. N.C.G.S. § 14-318.4(a).

2. Constitutional Law— double jeopardy—kidnapping and assault

The trial court did not err by refusing to arrest judgment on double jeopardy grounds on an assault with a deadly weapon conviction where defendant was also convicted of first-degree kidnapping on the same facts. Although defendant argues that the same conduct was used to prove serious bodily harm for kidnapping and serious injury for assault, there was sufficient evidence that defendant dragged his wife inside their home for the purpose of assaulting her and that the crime of kidnapping was complete once he dragged her inside, whether or not the contemplated assault was completed.

Appeal by defendant from judgment entered 6 December 2002 by Judge Zoro J. Guice, Jr., in McDowell County Superior Court. Heard in the Court of Appeals 29 March 2004.

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

Eric A. Bach for defendant-appellant.

TIMMONS-GOODSON, Judge.

Omar Romero ("defendant") appeals his conviction of assault with a deadly weapon inflicting serious injury, first-degree kidnap-

ping, assault inflicting serious injury, two counts of felony child abuse inflicting serious injury, and two counts of assault on a child under twelve. For the reasons stated herein, we hold that defendant received a trial free of prejudicial error.

The State's evidence tends to show the following: At approximately 9:00 p.m. on 24 August 2002, defendant entered the home he shared with then-pregnant Laura Valdez ("Valdez"), their four-year-old daughter, D.R., and their one-year-old son, O.R. Immediately upon entering the home, defendant began screaming at Valdez and the children. Defendant claimed that he had been spying on Valdez, and he demanded that Valdez tell him the name of the man with whom she and the two children had interacted earlier in the day.

The ensuing argument between Valdez and defendant quickly escalated to violence. For the next twenty-five minutes, defendant repeatedly beat Valdez with his fists, feet, belt, and gun. During the altercation, Valdez picked up the one-year-old child, O.R., and held him in front of her, hoping defendant would stop beating her with his belt. Defendant instead continued to strike Valdez with his belt, striking O.R. on the head with the belt as well. At another point during the altercation, defendant confronted D.R. and questioned her about the man defendant had observed D.R. and Valdez with earlier during the day. When D.R. would not answer, defendant began to beat her. Defendant struck D.R. numerous times with his belt, hitting her on her arms, legs, and back. At a third point during the altercation, Valdez escaped outside and attempted to call for help. Defendant pursued Valdez to the front yard, grabbed her by her hair, and dragged her back inside the home. Once inside, defendant threatened Valdez with a knife and then beat her again with his belt and gun.

Valdez was taken to the hospital for examination and observation, and her unborn child was examined by ultrasound. As a result of the altercation with defendant, Valdez suffered numerous bruises, welts, and blisters on her back, face, shoulders, legs, and feet. She was hospitalized overnight and was given a neck brace to wear for the next several days. D.R. suffered numerous welts, red marks, and bruises on her legs, arms, and back. O.R. suffered a bruise to his forehead.

On 14 October 2002, defendant was indicted on two counts of assault on a child under twelve, two counts of felony child abuse inflicting serious injury, one count of first-degree kidnapping, one count of assault inflicting serious injury, and one count of assault

with a deadly weapon with intent to kill inflicting serious injury. Defendant's trial commenced on 2 December 2002. On 6 December 2002, the jury returned a guilty verdict on all charges, with the exception that as to the charge of assault with a deadly weapon with intent to kill inflicting serious injury, defendant was found guilty of the lesser-included offense of assault with a deadly weapon inflicting serious injury. Defendant appeals the verdicts.

As an initial matter, we note that defendant's brief contains arguments supporting only two of his original thirteen assignments of error. Pursuant to North Carolina Rule of Appellate Procedure 28(b)(6) (2004), the eleven omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by defendant for appeal.

The issues presented on appeal are (I) whether the trial court erred by denying defendant's motion to dismiss the charge of felony child abuse against O.R.; and (II) whether the trial court erred by failing to arrest judgment on the charge of assault with a deadly weapon inflicting serious injury.

[1] Defendant first assigns error to the trial court order denying defendant's motion to dismiss the charge of felony child abuse against O.R. Defendant argues that the State presented insufficient evidence of a required element of felony child abuse. We disagree.

In ruling on a motion to dismiss, a trial court must determine whether there is substantial evidence of each essential element of the offenses charged. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). Whether the State's evidence is substantial is a question of law for the trial court. *State v. Lowe*, 154 N.C. App. 607, 609, 572 S.E.2d 850, 853 (2002). The motion to dismiss must be denied if the evidence, viewed in the light most favorable to the State, would allow a jury to reasonably infer that the defendant is guilty. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2003).

In the case *sub judice*, defendant was charged with felony child abuse in violation of N.C. Gen. Stat. § 14-318.4(a) (2003). To convict a defendant of felony child abuse, the State must prove (1) that defendant is the parent or caretaker of a child under the age of 16; (2) that defendant "intentionally inflict[ed] . . . serious physical injury upon or to the child or . . . intentionally committ[ed] an assault upon the child"; and (3) that the assault or infliction of injury resulted in "serious physical injury." N.C. Gen. Stat. § 14-318.4(a).

Defendant contends that the State presented insufficient evidence that O.R. suffered "serious physical injury" as a result of the assault. We disagree.

Under N.C. Gen. Stat. § 14-318.4, a "serious physical injury" is defined as an injury that causes "great pain and suffering." *State v. Phillips*, 328 N.C. 1, 20, 399 S.E.2d 293, 303, *cert. denied*, 501 U.S. 1208 (1991). In determining whether an injury is serious, pertinent factors to consider include, but are not limited to: hospitalization, pain, loss of blood, and time lost from work. *State v. Owens*, 65 N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983). Defendant contends O.R.'s injury should not be categorized as serious because witnesses only noticed a small bruise on O.R. and the State did not provide documentation of the nature of the injury and degree of pain associated with the injury. However, neither the statute nor our case law demand that an injury require immediate medical attention in order for it to be considered a "serious physical injury." *Williams*, 154 N.C. App. at 180, 571 S.E.2d at 622. Furthermore, because the nature of an injury is dependant upon the relative facts of each case, whether an injury is "serious" is generally a question for the jury. *See State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586-87 (1988) (holding that "[w]hether a serious injury has been inflicted must be determined according to the facts of the particular case."); *Williams*, 154 N.C. App. at 180, 571 S.E.2d at 622 (holding that "conflicts in the evidence as to [the victim's] level of activity and the extent, if any, to which she appeared to be in pain after the alleged assault are for resolution by the jury.").

The evidence presented in the case *sub judice* establishes that defendant hit his one-year-old son at least once with a belt, that the child began to cry after being hit, and that the child suffered a visible bruise to his head as a result of being struck by the belt. Both McDowell County Sheriff's Deputy David Marler ("Deputy Marler") and McDowell County Social Worker Michael Lavender ("Lavender") testified regarding the bruise above the child's hairline. Lavender's photographs of the bruise were also admitted into evidence, thereby allowing the jury to observe the extent of O.R.'s injury. Viewing the evidence in the light most favorable to the State, we conclude that the State presented sufficient evidence to allow a reasonable jury to infer that O.R. suffered a serious injury as a result of the assault. Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of felony child abuse against O.R.

[2] Defendant next assigns error to the trial court decision not to arrest judgment on the charge of assault with a deadly weapon inflict-

ing serious injury. Defendant argues that the same conduct was used to prove the serious bodily harm of the kidnapping charge and the serious injury element in the assault charge. Thus, defendant argues, the constitutional guaranty against double jeopardy prohibits defendant from being sentenced to both first-degree kidnapping and assault with a deadly weapon inflicting serious bodily injury. We disagree.

N.C. Gen. Stat. § 14-39(a) defines the law of kidnapping in North Carolina. It provides:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> > (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed[.]

N.C. Gen. Stat. § 14-39(a) (2003). Kidnapping is elevated to the first degree where the person kidnapped either was not released in a safe place or was seriously injured or sexually assaulted. N.C. Gen. Stat. § 14-39(b). N.C. Gen. Stat. § 14-32(b) defines the law of assault with a deadly weapon inflicting serious injury. It provides:

> Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.

N.C. Gen. Stat. § 14-32(b) (2003).

It is well established that more than one criminal offense may arise out of the same course of action or conduct. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351-52 (1978). For example, a defendant may break into a home intending to commit a larceny, and after breaking and entering into the home, actually commit the larceny. In such a case, the defendant may properly be convicted of the breaking and entering with an intent to commit larceny, as well as the larceny itself. *Id.* at 524, 243 S.E.2d at 352. Likewise, the Constitution does not forbid conviction for both felony kidnapping by restraining and another felony committed after such restraint, provided that the restraint constituting the kidnapping is "a separate, complete act, independent of and apart from the other felony." *Id.*; *see State v. Shue*, 163 N.C. App. 58, 63, 592 S.E.2d 233, 237 (2004) ("[W]here the first offense is committed with the intent to commit the second

offense, followed by the commission of the second offense . . . a defendant may be convicted of both offenses.").

In *Fulcher*, the Court found that the defendant kidnapped his victims for the purpose of facilitating felony crimes against nature. The Court concluded that "[t]he restraint of each of the women was separate and apart from, and not an inherent incident of, the commission upon her of the crime against nature, though closely related thereto in time." 294 N.C. at 524, 243 S.E.2d at 352. In *State v. Oxendine*, this Court concluded that asportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim but instead removed the victim to a more secluded area to prevent others from witnessing or hindering the rape. 150 N.C. App. 670, 676, 564 S.E.2d 561, 565 (2002), *disc. rev. denied*, 356 N.C. 689, 578 S.E.2d 325 (2003). In *State v. Washington*, the defendant argued that his restraint of the victim was an inherent part of his assault on the victim, and thus could not be used to support a kidnapping charge. 157 N.C. App. 535, 538, 579 S.E.2d 463, 465 (2003). Testimony in that case tended to show that the defendant grabbed the victim from his car and threw the victim to the ground and then onto the hood of the car. *Id.* at 538, 579 S.E.2d at 466. The defendant restrained the victim by parking his vehicle directly in front of the victim's vehicle and by "continu[ing] to hold [the victim] down while assaulting him." *Id.* at 538-39, 579 S.E.2d at 466. Under the facts of that case, this Court held that the restraint was separate and distinct from the assault, and that therefore it was proper to send the kidnapping charge to the jury. *Id.* at 539, 579 S.E.2d at 466.

In the case *sub judice*, the evidence presented at trial established that at some point during her altercation with defendant, Valdez fled from inside the home screaming, in an attempt to call for help. Defendant chased Valdez outside and caught her in their front yard. Defendant then grabbed Valdez from behind, dragged her back inside by her hair, and then began to beat her again. As a result of the altercation, Valdez suffered numerous bodily injuries and bruises that remained on her body for six weeks. Although Valdez cannot recall exactly when during the altercation she was beaten with the belt and gun, in his admitted confession, defendant stated that once he had dragged Valdez back inside, he picked up a knife he had dropped while pursuing Valdez and threatened her with it. He further stated that after dragging Valdez back inside, he located his gun and "hit [Valdez] once or twice in the face with the gun." Defendant also admitted to hitting Valdez with the belt several times after he had

dragged her back inside. We conclude the State presented sufficient evidence to support a finding that defendant dragged Valdez back inside his home for the purpose of assaulting her with a deadly weapon.

Once defendant dragged Valdez back inside the house, the crime of kidnapping was complete, irrespective of whether the contemplated assault with a deadly weapon ever occurred. *See Fulcher*, 294 N.C. at 524, 243 S.E.2d at 338. Defendant could have committed the assault on Valdez when he caught her in the yard. However, defendant chose to drag Valdez back inside to prevent others from witnessing him then beat Valdez with his fists, gun, and belt. Therefore, we conclude that the restraint and removal of Valdez was separate and apart from, and not an inherent incident of, the commission of the assault with a deadly weapon.

In Case No. 02 CRS 52905, defendant was indicted for "willfully and feloniously" assaulting Valdez "with a knife, a handgun, and fist, a deadly weapon, with the intent to kill and inflict serious injury." In Case No. 02 CRS 52904, defendant was indicted for "willfully and feloniously" kidnapping Valdez, "by unlawfully confining and restraining and removing her from one place to another, without [her] consent, and for the purpose of doing serious bodily injury to [her], and terrorizing [her]." Although the State may have been required to prove Valdez suffered serious bodily injury in order to show defendant's purpose in restraining and removing her, this alone does not mandate the application of the principles of double jeopardy to arrest judgment on the assault with a deadly weapon charge. *State v. Martin*, 47 N.C. App. 223, 236, 267 S.E.2d 35, 42, *appeal dismissed and disc. review denied*, 301 N.C. 238, 283 S.E.2d 134, 135 (1980). In *Martin*, we concluded that "[t]he gist of the offense proscribed by G.S. 14-39 is the unlawful, nonconsensual confinement, restraint or removal of victim, for the purposes of committing certain acts specified in the statute." *Id.* Thus, as in *Martin*, we now conclude that "the intent of the legislature in establishing the punishment for kidnapping was to impose an indivisible penalty for restraint and removal for specified purposes, no hypothetical part of which penalty represents a punishment for" defendant's actions after completion of the kidnapping. *Id.* at 236, 267 S.E.2d at 43. Therefore, we hold that the trial court did not err in refusing to arrest judgment on defendant's assault with a deadly weapon charge.

For the foregoing reasons, we hold that the defendant received a trial free of prejudicial error.

No error.

Judges LEVINSON and THORNBURG concur.

IN THE MATTER OF: J.D., MINOR CHILD

No. COA03-71-2

(Filed 4 May 2004)

Termination of Parental Rights— failure to appoint guardian ad litem for parent—mental instability

The trial court erred in a termination of parental rights case by failing to appoint a guardian ad litem to represent respondent mother as required by N.C.G.S. § 7B-1101 despite the fact that respondent's parental rights were not terminated based on juvenile dependency but instead based on neglect, because: (1) N.C.G.S. § 7B-1111(a)(6) was clearly alleged in the petition; (2) the Department of Social Services offered some evidence that tended to show respondent was incapable of caring for the minor child due to mental illness; and (3) the trial court referenced evidence of respondent's mental illness in its order. This opinion supercedes and replaces the opinion reported at 161 N.C. App. 424.

Appeal by respondent mother from judgment entered 30 May 2002 by Judge Earl J. Fowler, Jr. in Buncombe County District Court. Heard in the Court of Appeals 11 September 2003.

Charlotte A. Wade for petitioner-appellee Buncombe County Department of Social Services.

Attorney Advocate Judith Rudolph, Guardian Ad Litem.

Janet K. Ledbetter; The McDonald Law Office, P.A., by Diane K. McDonald, for respondent-appellant.

HUNTER, Judge.

An opinion was filed in this case on 2 December 2003. On 16 December 2003, respondent filed a petition for rehearing. On 13 January 2004, we allowed that petition, reconsidering the case with

the filing of additional briefs only. The following opinion supersedes and replaces the opinion filed 2 December 2003.

Respondent appeals from an order terminating her parental rights to her daughter, J.D. (d.o.b. 25 February 1991). For the reasons stated herein, we reverse the trial court's order.

On 25 September 2000, the Buncombe County Department of Social Services ("BCDSS") filed a juvenile petition alleging that J.D. was an abused and neglected juvenile. The events that occurred prior to the filing of the petition were as follows.

On 28 August 1996, BCDSS received a child protective services report ("CPS report") stating that respondent had taken J.D. (then four years old) to an emergency room claiming that the child's fourteen-year-old half-brother, M.D., had raped her. Although a medical examination did not indicate the presence of any abnormality of her hymen, J.D. began seeing a therapist in connection with the alleged sexual abuse.

On 17 January 1997, BCDSS received a report from J.D.'s therapist that J.D. stated during a therapy session that M.D. played with her vaginal area. Thereafter, respondent acknowledged that her son was a sexual offender and needed to be placed outside the home to protect J.D. However, shortly after out-of-home placement was located for M.D., respondent's husband and J.D.'s step-father, John, returned M.D. to the family home when respondent was hospitalized for psychological problems.

The juvenile court proceeded with an action against M.D. for the sexual assault of J.D. The court was ultimately unable to adjudicate M.D. as a sexual offender because J.D. and respondent recanted their previous statements, and John and M.D. denied that J.D. had been sexually abused. Without any clear evidence, M.D. was only ordered to (1) complete a sex offender specific evaluation, and (2) be placed outside the family home. Thus, a trailer was placed next to the family home for M.D. to live in that was equipped with sensory devices to prevent him from leaving undetected. However, M.D. regained access to his parents' home after his supervision by the juvenile court ended.

A third CPS report was received by BCDSS on 9 September 1997 concerning a violent fight between John and M.D. At that time, the social worker investigating the incident observed that M.D. and J.D. were both living in the family home. Respondent threatened to kill anyone who tried to take M.D. away.

On 9 October 1998, another CPS report was received by BCDSS in which J.D. disclosed to her therapist that both M.D. and John had sexually abused her. The child made no further disclosures, and the matter was not substantiated.

Next, respondent reported to BCDSS on 11 April 2000 that her step-daughter and the step-daughter's husband, Tammera and Justin respectively, smoked marijuana in the presence of their two-year-old son, Brandon. Respondent further reported that Tammera and Justin, who were living with respondent at that time, were involved in drug dealing and were being targeted for revenge because they had ripped off a drug dealer. When questioned, Justin admitted using marijuana. Tammera denied all drug usage, but later gave birth to another son on 28 July 2000 who tested positive for marijuana.

The final event that led BCDSS to file a juvenile petition with respect to J.D. occurred on 24 September 2000 when Brandon was seriously burned while in the care of respondent. Respondent's initial story was that her step-grandchild had doused himself with lighter fluid and struck a match. However, after being advised that the evidence did not support her story, respondent accused J.D. of the incident. Although Brandon never specifically stated who burned him, he did state a number of times that "grandma matched me." Thus, the preliminary results of the investigation implicated respondent as the main suspect.

Following the filing of the juvenile petition, BCDSS obtained an order for non-secure custody of J.D. on 28 September 2000. J.D. underwent a medical evaluation on 26 October 2000 which indicated abnormalities of her hymen that were not present in J.D.'s 1996 medical evaluation. The evaluating physician opined that the abnormalities suggested sexual abuse.

By order filed 11 January 2001, J.D. was adjudicated a physically and sexually abused child and a neglected juvenile in that respondent and John had "created or allowed to be created a substantial risk of serious physical injury to the child by other than accidental means . . . ." The court ordered custody of J.D. to remain with BCDSS and that a psychological evaluation of both parents and J.D. be performed.

On 4 April 2001, a permanency planning and review hearing was held. At the hearing, the court found that (1) respondent had been suffering from significant mental health issues at least since August

of 1999, (2) J.D. had to be moved from her previous foster home after BCDSS received information that respondent had threatened to take the child and run to Canada, and (3) J.D. continued to be at risk if returned to her parents' care because they continued to deny responsibility for her neglect and abuse. The court concluded that BCDSS be relieved of reunification efforts and that the permanent plan be changed to adoption.

On 27 August 2001, BCDSS filed a petition to terminate respondent's parental rights on the grounds of neglect and juvenile dependency. Prior to the hearing, respondent told BCDSS social workers that "she had separated from John . . . and that she believed that he had been sexually abusing [J.D.], and had thought so for a number of years. The respondent mother gave no explanation why she had failed to protect [J.D.,]" but claimed that she would not be reconciling with John.

The termination of parental rights hearing was held on 25-28 March 2002. At the start of the hearing, BCDSS voluntarily dismissed the termination of parental rights action against John because he had "no parental rights to terminate, as he [wa]s neither the biological father nor the legal father[]" of J.D. During the hearing, evidence was offered regarding the likelihood that respondent was responsible for setting Brandon on fire, respondent's prior and continuing mental health problems, and the family's extensive and troublesome history, most of which evidenced that J.D. had been sexually abused and neglected. As to J.D. being sexually abused, respondent testified that she did not believe M.D. "was dangerous or a threat to [J.D.], and that [respondent's] problems were limited to bad choices she made." She further testified as to her belief that John had sexually abused J.D. However, despite respondent's earlier claim that the two were separated and would not be reconciling, the court took notice that John and respondent attended court together every day during the hearing and that her apartment was in close proximity to where John was living. Based on all the evidence, the court concluded there was

> clear, cogent and convincing evidence that grounds exist to terminate the parental rights of the respondent mother pursuant to N.C.G.S. 7B-1111(a)(1) in that she had neglected the minor child when the child came into the custody of the Department, she has continued to neglect the child during the entire time the child has been in the custody of [BCDSS], and there is a probability of the repetition of neglect if the minor child was returned to her care

as the respondent mother has failed to correct the conditions which led to the abuse and neglect.

Therefore, the trial court determined it would be in J.D.'s best interests to terminate respondent's parental rights. Respondent appeals.

By her first assignment of error, respondent argues the trial court committed reversible error by not appointing a guardian ad litem to represent her as statutorily required when juvenile dependency is alleged as a ground for termination.

Subsection 7B-1111(a)(6) of our General Statutes provides, *inter alia*, that the court may terminate parental rights upon a finding that due to mental illness or any other similar cause or condition "the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future." N.C. Gen. Stat. § 7B-1111(a)(6) (2003). In cases "[w]here it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(6)," our statutes require that "a guardian ad litem shall be appointed" to act on behalf of the incapable parent. N.C. Gen. Stat. § 7B-1101 (2003). Respondent cites two cases that were reversed and remanded for a new trial by this Court due to the trial court's failure to comply with this statutory requirement.

In *In re Richard v. Michna*, 110 N.C. App. 817, 431 S.E.2d 485 (1993), the petitioner alleged and the trial court found that the mother was incapable of providing for the proper care and supervision of her children because of mental retardation and other mental conditions. On appeal, this Court held that (1) N.C. Gen. Stat. § 7A-289.23 (now Subsection 7B-1111(a)(6)) required that "a guardian ad litem 'shall be appointed' whenever the petitioner alleges . . . that parental rights should be terminated because the parent is incapable of proper care and supervision of the children due to mental retardation or other mental condition[;]" (2) although the mother failed to request a guardian ad litem, N.C. Gen. Stat. § 7A-289.23 is mandatory and does not require such a request be made; and (3) observation of the statute's mandate is required even if the mother was likely not prejudiced by the error. *Id.* at 822, 431 S.E.2d at 488.

Similarly in *In re Estes*, 157 N.C. App. 513, 579 S.E.2d 496, *disc. rev. denied*, 357 N.C. 459, 585 S.E.2d 390 (2003), the trial court determined that the mother was incapable of providing for the proper care

and supervision of her minor child, such that the child was a dependent juvenile. On appeal, the dispositive issue was whether

> the trial court could properly terminate respondent's parental rights without appointing a guardian ad litem to represent respondent at the termination hearing where the petition or motion to terminate parental rights alleged, *and the evidence supporting such allegations tended to show*, that respondent was incapable of providing proper care and supervision to the child due to mental illness.

Id. at 515, 579 S.E.2d at 498 (emphasis added). This Court held that, where

> the allegations contained in the petition or motion to terminate parental rights tend to show that the respondent is incapable of properly caring for his or her child because of mental illness, the trial court is required to appoint a guardian ad litem to represent the respondent at the termination hearing.

Id. at 518, 579 S.E.2d at 499. Accordingly, the trial court erred in failing to appoint a guardian ad litem for the mother because the petition contained numerous allegations concerning the mother's mental instability, the trial court made findings supporting those allegations, and based on those findings, concluded that the child was a dependent juvenile.

BCDSS contends that *Richard* and *Estes* are distinguishable from the present case because, although juvenile dependency was alleged in the petition as a ground for terminating respondent's parental rights, it was not pursued by BCDSS during the termination hearing. Specifically, counsel for BCDSS stated in her opening argument that BCDSS

> would be asking the Court to terminate parental rights based on the fact that [J.D.] was neglected and abused in the home of origin, and there's a substantial risk that she would be abused and neglected again because [respondent] does not accept her own responsibility for what's happened to her child . . . .

Respondent's counsel also did not address juvenile dependency as a ground for termination in her opening argument, arguing instead that

> we contend that there's no evidence of neglect occurring as of today, which is the standard for termination of parental rights, and there is adequate evidence that [respondent] has complied

> with what DSS has asked, and that she has corrected the problems which may have occurred at the time the child was taken.

We disagree with BCDSS' contention.

While neglect was the ground BCDSS pursued during the termination hearing and ultimately found by the trial court as the basis for terminating respondent's parental rights, there was nevertheless some evidence that tended to show that respondent's mental health issues and the child's neglect were so intertwined at times as to make separation of the two virtually, if not, impossible. In fact, in its order regarding adjudication, the trial court found that a doctor's psychological assessment of respondent was credible in that respondent's "psychological problems can negatively impact on her ability to be an adequate parent and caretaker. Further, that [respondent] was and is emotionally regressed and parenting would be a challenge to her." Moreover, the trial court considered respondent's mental health issues in its disposition order by stating that

> the respondent mother cannot provide a safe and permanent home for the minor child as she lacks any insight into her own significant mental health issues, how her failure to protect her daughter damaged her daughter, that she helped to create the neglectful and abusive environment, and how this has been detrimental to her daughter.

Respondent therefore should have had a guardian ad litem act on her behalf at the termination hearing.

In conclusion, the statutory mandate for appointment of a guardian ad litem was violated despite the trial court not terminating respondent's parental rights based on juvenile dependency. Subsection 7B-1111(a)(6) was clearly alleged in the petition, BCDSS offered some evidence that tended to show that respondent was incapable of caring for J.D. due to mental illness, and the trial court referenced that evidence in its order. Thus, we reverse the order terminating respondent's parental rights and remand this case for appointment of a guardian ad litem for respondent and a new trial. Our holding as to this assignment of error renders the need to address respondent's remaining assigned errors unnecessary.

Reversed and remanded.

Judges McGEE and CALABRIA concur.

TURNER O. WILEY, PLAINTIFF v. UNITED PARCEL SERVICE, INC., DEFENDANT

No. COA03-516

(Filed 4 May 2004)

Employer and Employee— employment discrimination—retaliatory action—judicial estoppel

The trial court did not err by granting summary judgment in favor of defendant employer in an employment discrimination action based on alleged retaliation for filing a workers' compensation claim, because: (1) plaintiff employee cannot establish that defendant's failure to return plaintiff to work constituted an adverse employment action nor can plaintiff demonstrate that the alleged retaliatory action was taken based on the fact that he exercised his workers' compensation rights; (2) defendant's failure to return plaintiff to work as a fueler was the result of his physicians' recommendations and plaintiff's own statements; (3) although plaintiff pointed to three other positions that he believes that he could do, he failed to offer any evidence that any one of the positions currently exists, is vacant, and is within his physical capabilities without modification; (4) unlike the Americans with Disabilities Act under 42 U.S.C. §§ 12101 to -12213, the Retaliatory Employment Discrimination Act (REDA) under N.C.G.S. §§ 95-240 to -245 does not require an employer to make an accommodation for an employee; (5) REDA does not prohibit all discharges of employees who are involved in a workers' compensation claim, but only prohibits those discharges made because the employee exercises his compensation rights; (6) plaintiff offered no evidence showing that defendant had a retaliatory motive, he never discussed his workers' compensation claim with anyone at the company, and he admits that no one at the company suggested that he should not file a workers' compensation claim; (7) defendant's attempts to identify a position for plaintiff that met all of his medical restrictions demonstrates a lack of retaliatory intent, and plaintiff has offered no circumstantial evidence otherwise; (8) judicial estoppel is inapplicable when defendant's position in the arbitration case was consistent with its position in the present case, and the record does not reflect defendant's position in plaintiff's claim before the Employment Security Commission for unemployment benefits; and (9) although findings of fact and conclusions of law are not necessary in an order determining a motion for summary judg-

ment, such findings and conclusions do not render a summary judgment void or voidable and may be helpful if the facts are not at issue and support the judgment as they did in this case.

Appeal by plaintiff from judgment entered 17 March 2003 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 17 March 2004.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellant.

Alston & Bird LLP, by Brian D. Edwards and Meredith S. Jeffries, for defendant-appellee.

MARTIN, Chief Judge.

On 6 October 2000, plaintiff filed an employment discrimination complaint with the North Carolina Department of Labor alleging that defendant United Parcel Service, Inc. (UPS) had discriminated against him in retaliation for his having filed a workers' compensation claim. After receiving a right to sue letter in December 2000, plaintiff filed this action, seeking money damages and injunctive relief, pursuant to the North Carolina Retaliatory Employment Discrimination Act (REDA). N.C. Gen. Stat. §§ 95-240 to -245 (2003). Plaintiff alleged that defendant had violated N.C. Gen. Stat. § 95-241(a)(1a) by refusing to return him to work as a retaliatory action for filing a workers' compensation claim. Defendant filed an answer, denying plaintiff's allegations, and subsequently moved for summary judgment.

The materials before the trial court disclose that plaintiff, who had been an employee of UPS since 1975, suffered a seizure while driving a UPS package car in March 1985. When plaintiff returned to work, he was unable to operate a commercial vehicle pursuant to UPS and federal regulations, 49 C.F.R. § 391.41, due to his use of seizure control medication. In order to accommodate his medical restrictions, UPS created a full time position for him by combining part time positions in the car wash and package handling areas of the facility. Plaintiff subsequently suffered two back strains and an injury to his shoulder.

Despite plaintiff's medical restrictions due to his seizures, his back and shoulder injuries, and his medical need to use the restroom frequently, UPS accommodated plaintiff in non-driving positions from 1985 until 1997. UPS terminated plaintiff in April 1997,

but rehired him in February 1999. In his new position as a car-wash fueler, plaintiff pumped diesel fuel into UPS vehicles and logged the information.

On 30 August 2000, while fueling UPS tractor-trailers, plaintiff allegedly suffered another seizure which caused a fuel spill. Although plaintiff's personal physician, Dr. Edward D. Hill, Jr., released him to return to work that same day, UPS required a company-approved doctor to examine him before he could return. On 8 September 2000, Dr. George Whittenburg, the company-approved physician, examined plaintiff and determined he should not be allowed to work at heights, with hazardous materials or machinery, or in water. In addition, Dr. Whittenburg limited plaintiff to lifting objects less than thirty pounds.

Under the Collective Bargaining Agreement provision between UPS and the union to which plaintiff belonged, in cases where a dispute arises between the company's doctor and an employee's doctor, a third doctor, whose opinion is binding upon all parties, is selected to evaluate the employee. Dr. Carlo P. Yuson examined plaintiff on 4 October 2000 and concluded that plaintiff should not be allowed to handle hazardous material, to work at heights, to work at extreme temperatures or to drive. On 20 November 2000, Dr. Hill, plaintiff's personal physician, reversed his earlier decision and concluded that plaintiff could not return to work where he was "exposed to noxious diesel fuel, as it may have been a precipitant" for his seizures.

On 10 September 2000, plaintiff filed a workers' compensation claim, which he amended on 8 November 2000, alleging that the exposure to diesel fuel fumes was a significant contributing factor to the onset of his seizure on 30 August 2000. He also claimed that the stress of his work since February 1999 "activated and accelerated the seizure he experienced."

After considering the restrictions placed upon plaintiff by the physicians, UPS determined that plaintiff could not return to work in his job as a fueler because the job could not be performed without working with diesel fuel, a hazardous material. Robert Kociolek (Kociolek), UPS's District Human Resources Manager of the West Carolina District, tried to identify a position for plaintiff that would accommodate his medical restrictions. Kociolek considered positions in the feeder division but determined that such positions required driving and/or handling of hazardous materials. He also considered positions as a car washer, operations clerk and package handler, but

such positions were either not available or they required the ability to lift packages in excess of thirty pounds. Kociolek ruled out a position as a small sorter because, among other reasons, plaintiff had previously informed UPS he was unable to work in that area due to the lack of close restroom facilities. In December 2000, Kociolek, having been unable to identify a position for plaintiff, sent plaintiff a letter informing him of this fact and asking him if there were any accommodations that could be made that would enable him to return to work. Plaintiff did not respond. Since UPS has been unable to identify a position meeting plaintiff's needs, plaintiff has not returned to work since August 2000.

The trial court granted defendant's motion for summary judgment. Plaintiff appeals.

Plaintiff argues that the trial court erred in granting summary judgment because there was a genuine issue of material fact in dispute. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The evidence must be viewed in the light most favorable to the non-moving party. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

The North Carolina Retaliatory Employment Discrimination Act (REDA) prohibits discrimination or retaliation against an employee for filing a worker's compensation claim. N.C. Gen. Stat. § 95-241(a)(1a) (2003). In order to state a claim under REDA, a plaintiff must show (1) that he exercised his rights as listed under N.C. Gen. Stat. § 95-241(a), (2) that he suffered an adverse employment action, and (3) that the alleged retaliatory action was taken because the employee exercised his rights under N.C. Gen. Stat. § 95-241(a). *Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 693, 575 S.E.2d 46, 51 (2003). An adverse action includes "the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment." N.C. Gen. Stat. § 95-240(2) (2003). If plaintiff presents a prima facie case of retaliatory discrimination, then the burden shifts to the defendant to show that he "would have taken the same unfavorable action in the absence of the protected activity of the employee." N.C. Gen. Stat. § 95-241(b)

(2003). "Although evidence of retaliation in a case such as this one may often be completely circumstantial, the causal nexus between protected activity and retaliatory discharge must be something more than speculation." *Swain v. Elfland*, 145 N.C. App. 383, 387, 550 S.E.2d 530, 534, *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001) (citation omitted).

Plaintiff exercised his rights under the Workers' Compensation Act by filing a claim alleging his exposure to fuel fumes and the stress of his work were significant factors in the onset of his seizure on 30 August 2000. However, plaintiff cannot establish that UPS's failure to return him to work constituted an adverse employment action nor can he demonstrate that the alleged retaliatory action was taken because he exercised his workers' compensation rights.

The medical doctors that examined plaintiff after his alleged seizure concluded he should be restricted from working with hazardous materials such as diesel fuel. In addition, plaintiff's workers' compensation claim states that the "occupational disease was caused by . . . the exposure to the chemical fumes" in his work as a fueler. UPS's failure to return plaintiff to work as a fueler was the result of his physicians' recommendations and plaintiff's own statements, not an adverse employment action.

Although plaintiff has not cited any authority suggesting that a failure to return an employee to work in a position other than his own violates the REDA, we need not reach that issue. Plaintiff has pointed to three other positions that he believes that he could do, but has offered no evidence that any one of the positions currently exists, is vacant, and is within his physical capabilities without modification. Unlike the Americans with Disabilities Act, 42 U.S.C. § 12101 to -12213, the REDA does not require an employer to make an accommodation for an employee. If no position currently exists that plaintiff could perform, necessarily no adverse employment action has occurred.

The REDA statute "does not prohibit all discharges of employees who are involved in a workers' compensation claim, it only prohibits those discharges made *because* the employee exercises his compensation rights." *Johnson v. Trustees of Durham Tech. Cmty. College*, 139 N.C. App. 676, 682, 535 S.E.2d 357, 361 (2000) (citation omitted). Plaintiff offered no evidence showing that UPS had a retaliatory motive, he never discussed his workers' compensation claim with anyone at UPS, and he admits that no one at UPS suggested that he

should not file a workers' compensation claim. Moreover, plaintiff has not been discharged or suspended; the only adverse employment action he cites is the failure to return him to work. UPS's attempts to identify a position for plaintiff that met all of his medical restrictions demonstrates a lack of retaliatory intent and plaintiff has offered no circumstantial evidence otherwise. Plaintiff's claim that the discharge was made because plaintiff exercised his right to file a workers' compensation claim is simply unsupported by the evidence.

Since plaintiff has not met his burden of showing a prima facie case, we are not required to address whether defendant would have taken the action in the absence of plaintiff's workers' compensation claim. Taken in the light most favorable to the plaintiff, we find there is no genuine issue of material fact as to whether defendant took retaliatory action against plaintiff because he filed a workers' compensation claim.

Plaintiff argues that the doctrine of judicial estoppel, which precludes a party from making a factual assertion on one position when it had successfully argued the opposite position in a previous proceeding, *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 28, 591 S.E.2d 870, 888 (2004), should apply in this case. In *Whitacre P'ship*, the North Carolina Supreme Court adopted the test for judicial estoppel set forth by the United States Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742, 149 L. Ed. 2d 968, *reh'g denied*, 533 U.S. 968, 150 L. Ed. 2d 793 (2001). *Id.* While noting that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," *Id.* (citation omitted), the Court identified three factors used to determine if the doctrine should apply. *Id.*

The first factor, and the only factor that is an essential element which must be present for judicial estoppel to apply, *id.* at 28 n.7, 591 S.E.2d at 888 n.7, is that a "party's subsequent position 'must be clearly inconsistent with its earlier position.' " *Id.* at 29, 591 S.E.2d at 888 (internal citations omitted). Second, the court should "inquire whether the party has succeeded in persuading a court to accept that party's earlier position." *Id.* at 29, 591 S.E.2d at 889. Third, the court should inquire "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (citation omitted). Judicial estoppel is an "equitable doctrine invoked by a court at its discretion." *Id.* (citation omitted).

In the present case, UPS asserted that the medical restrictions imposed by numerous physicians prevented plaintiff from returning to work. In 1999, plaintiff filed a grievance with Teamsters Local Union 391 asserting he was wrongfully terminated from employment with UPS. In arbitration, UPS contended that plaintiff's medical restrictions, specifically his need to urinate up to twenty times in a four hour period, limited his employment options. UPS's position in the arbitration case, that medical restrictions prevented plaintiff's return to work, was consistent with its position in the present case making judicial estoppel inapplicable.

In April 2001, plaintiff filed for unemployment benefits. The record does not reflect UPS's position in plaintiff's claim before the Employment Security Commission and UPS contends that it took no position in the adjudication. Since there is no evidence that UPS's position was inconsistent with its position in the previous claim, judicial estoppel cannot apply.

Plaintiff also asserts that the trial court erred when it made findings of fact in the order granting summary judgment. Although "[f]indings of fact and conclusions of law are not necessary in an order determining a motion for summary judgment," *Bland v. Branch Banking & Trust Co.*, 143 N.C. App. 282, 285, 547 S.E.2d 62, 64-65 (2001), "such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment." *Id.*

Here, the order includes an introductory section which recognizes that an "entry of summary judgment presupposes that there are no issues of material fact; and that findings of fact are not required." The order explicitly states that the summarized findings of fact are not at issue and support the court's conclusions of law and the entry of judgment. After careful review, we conclude the findings of fact are not in dispute and support the conclusions of law. Therefore, this assignment of error is overruled.

Affirmed.

Judges LEVINSON and GEER concur.

ANTHONY CURTIS SLOAN, JR., PLAINTIFF v. CHENAY SANDERS SLOAN, DEFENDANT v. ANTHONY C. SLOAN, SR. AND KATHY SLOAN, INTERVENORS

No. COA03-905

(Filed 4 May 2004)

1. Child Support, Custody, and Visitation— visitation— grandparents

The trial court did not err by denying defendant mother's motion to dismiss intervenor paternal grandparents' motions regarding visitation with the minor child following the death of plaintiff father and by modifying the previous child custody order to award intervenors additional visitation privileges on the grounds of a substantial change in circumstances, because: (1) although not originally parties to the custody action, as the paternal family and parents of plaintiff, intervenors were initially awarded temporary custody and subsequently awarded permanent visitation rights by those orders which were entered during the underlying custody dispute and before plaintiff's death; (2) the trial court was within its discretion to issue those orders under N.C.G.S. § 50-13.2(b1), and defendant never appealed either order resulting in each becoming a standing order of the court; (3) by filing a motion to intervene in the matter, intervenors were simply requesting to be formally recognized as parties to a child custody action in which they had already been awarded visitation rights; (4) in instances where a custody order has already been entered as to the parties, that order may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party, N.C.G.S. § 50-13.7(a); and (5) despite defendant's assertion to the contrary, the findings show that the trial court's basis for modifying the previous custody order was based on more than just defendant ceasing intervenors' telephone contact with the minor child.

2. Contempt— criminal—child custody

The trial court did not err in a child custody case by denying defendant mother's motion to dismiss intervenor paternal grandparents' motion to show cause and by ultimately concluding defendant was guilty of criminal contempt, because: (1) intervenors did not lack standing to move for a show cause hearing as to why defendant should not be held in civil or criminal contempt for violating the order awarding telephonic visitation with the

minor child prior to plaintiff father's death; and (2) the trial court found that defendant willfully, unlawfully, and without legal excuse failed to abide by that order.

Appeal by defendant from orders entered 25 February 2003 by Judge Albert A. Corbett, Jr. in Harnett County District Court. Heard in the Court of Appeals 19 April 2004.

Jones and Jones, P.L.L.C., by Cecil B. Jones, for defendant-appellant.

Hayes, Williams, Turner & Daughtry, P.A., by Parrish Hayes Daughtry, for intervenor-appellees.

HUNTER, Judge.

Chenay Sanders Sloan ("defendant") appeals separate orders (1) allowing Kathy and Anthony C. Sloan, Sr. ("intervenors") to intervene and be made formal parties to a child custody action, (2) finding defendant in criminal contempt for violating a previously entered permanent child custody order, and (3) modifying that previous custody order to allow intervenors greater visitation with their grandchild on the grounds of a substantial change in circumstances. Defendant also appeals the trial court's order denying her motion to dismiss intervenors' motions pursuant to Rule 12(b)(6) and/or because the trial court lacked subject matter jurisdiction. For the reasons stated herein, we affirm.

On 18 January 2001, Anthony Curtis Sloan, Jr. ("plaintiff") filed a complaint against defendant seeking temporary and permanent custody of their daughter ("C.S.") after defendant abandoned their marriage and moved to the State of Washington with the minor child. After defendant answered plaintiff's complaint and counterclaimed for temporary and permanent custody of C.S, a hearing to determine temporary custody was held on 17 July 2001. By order entered 20 August 2001, the trial court held, *inter alia*:

> 3. That the Temporary Custody of the minor child is hereby awarded as set forth in the following schedule:
>
> a. The Plaintiff *and the paternal family of the minor child* shall have Temporary Custody of the minor child during the period beginning with the entry of this Order until 6:00 p.m. Pacific Standard Time, September 2, 2001. The Plaintiff shall arrange for the minor child to be transported to the State of

> Washington and delivered to the Defendant no later that 6:00 p.m. Pacific Standard Time, September 2, 2001. During this period, the *Plaintiff shall not be left alone with the minor child at any time.*
>
> b. The Defendant and the maternal family of the minor child shall have Temporary Custody of the minor child during the period beginning at 6:00 p.m. Pacific Standard Time, September 2, 2001 until 9:00 a.m. Eastern Standard Time, October 9, 2001. . . .
>
> . . . .
>
> 6. That the Plaintiff and the Defendant shall each arrange for a home study to be conducted of their respective homes, *as well as the home of the minor child's paternal grandparents*, no later than October 9, 2001. . . .

(Emphasis added.) Prior to that order, the trial court had found that intervenors lived in close proximity to plaintiff and, having already established a loving relationship with C.S. as her natural paternal grandparents, would be assisting plaintiff in caring for the minor child.

A hearing for permanent custody was held on 25 October 2001. By order entered 10 January 2002, defendant was awarded permanent custody of C.S., but the court concluded, *inter alia*, "[t]hat the Plaintiff *and/or his parents* shall be entitled to contact the minor child [by telephone] two times each week for thirty (30) minutes [sic] intervals . . . ." (Emphasis added.) However, all communication with intervenors ceased when plaintiff was unexpectedly killed on 26 September 2002.

Thereafter, intervenors filed a "Motion to Intervene, Motion to Show Cause, and Motion to Modify Pervious Order" on 15 October 2002. By their motions, intervenors sought to formally be made parties to the child custody action, have defendant show cause as to why she should not be held in contempt for failing to allow them telephonic visitation with C.S. as per the previous custody order, and obtain greater visitation rights. In response, defendant sought dismissal of intervenors' motions (1) pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and/or (2) on the basis that the trial court lacked subject matter jurisdiction pursuant to Sections 50-13.3 and 50-13.5(j) of the North Carolina General Statutes.

The motions were heard on 5 November 2002. As a result, the trial court denied defendant's motions after concluding intervenors had

actually been made *de facto* parties to the child custody action when they were awarded temporary custody and telephonic visitation in the previous orders before plaintiff's death. Intervenors were thus allowed to intervene in the action, and defendant was found in criminal contempt for denying them telephonic visitation with C.S. on six different occasions. The trial court also modified intervenors visitation with C.S. on the grounds of substantial change in circumstances. Defendant appeals.

I.

[1] By defendant's first assignment of error she argues the trial court erred in denying her motion to dismiss intervenors' motions regarding visitation with C.S. We disagree.

The word "custody" is generally "deemed to include custody or visitation or both." N.C. Gen. Stat. § 50-13.1(a) (2003). Under limited circumstances, grandparents have standing to sue for visitation of their grandchild. *Montgomery v. Montgomery*, 136 N.C. App. 435, 436, 524 S.E.2d 360, 362 (2000). As articulated by this Court in *Montgomery*, those limited circumstances are as follows:

> First, N.C.G.S. § 50-13.2(b1) states that "an *order for custody of a minor child* may provide visitation rights for any grandparent of the child as the court in its discretion deems appropriate".
>
> Second, N.C.G.S. § 50-13.2A, entitles a grandparent to seek visitation when the child is "*adopted by a stepparent or a relative of the child* where a substantial relationship exists between the grandparent and the child."
>
> Third, N.C.G.S. § 50-13.5(j) entitles a grandparent to seek visitation "[i]n any action in which the *custody of a minor child has been determined*, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7".
>
> Finally, N.C.G.S. § 50-13.1(a) entitles a grandparent to "institute an action or proceeding for custody" of their grandchild. However, . . . grandparents are not entitled to seek visitation under N.C.G.S. § 50-13.1(a) when there is no ongoing custody proceeding and the grandchild's family is intact.

Id. at 436-37, 524 S.E.2d at 362 (citations omitted).

In the case *sub judice*, defendant contends the trial court erred in dismissing her motions because (1) intervenors lacked standing to

seek visitation under Section 50-13.1(a) since there was no ongoing custody proceeding and the grandchild's family was intact, and (2) the trial court no longer retained jurisdiction on the issue of custody following the death of plaintiff based on our Supreme Court's interpretation of Section 50-13.5(j). *See McIntyre v. McIntyre*, 341 N.C. 629, 633, 461 S.E.2d 745, 748 (1995) (holding the trial court retains jurisdiction over issues of custody and visitation "until the death of one of the parties"); *Fisher v. Gaydon*, 124 N.C. App. 442, 445, 477 S.E.2d 251, 253 (1996) (holding that a single parent living with his or her child is an " 'intact family' "). However, while it is clear that statutory authority and case law would support defendant's contention if the issue of grandparent visitation and/or custody had been raised for the first time when intervenors filed their motions, such was not the case here because the trial court had already awarded temporary custody and visitation to them in previous orders.

In the temporary custody order, the trial court awarded "Plaintiff and the paternal family of the minor child," temporary custody of C.S., as well as ordered a home study of intervenors' home after finding that plaintiff's parents would be assisting him in the care and maintenance of the child. Thereafter, a permanent custody order was entered awarding defendant permanent custody of C.S., but granting "Plaintiff and/or his parents" telephonic visitation with the child twice a week. Although not originally parties to the custody action, as the *paternal family* and *parents* of plaintiff, intervenors were initially awarded temporary custody and subsequently awarded permanent visitation rights by those orders, which were entered during the underlying custody dispute and before plaintiff's death. The trial court was well within its discretion to issue those orders pursuant to Section 50-13.2(b1) (2003), and defendant never appealed either order resulting in each becoming a standing order of the court.

Moreover, after a trial court has awarded custody to a person who was not a party to the action or proceeding, this Court has held that

> it would be proper and advisable for that person to be made a party to the action or proceeding to the end that such party would be subject to orders of the court. . . . [T]his may be done even after judgment and by the appellate court when the case is appealed.

In re Branch, 16 N.C. App. 413, 415, 192 S.E.2d 43, 45 (1972) (holding that a trial court was authorized to award custody to the father on the basis of change of conditions even though the father had not filed a

pleading asking for custody of his children). By filing a motion to intervene in the matter, intervenors were simply requesting to be formally recognized as parties to a child custody action in which they had already been awarded visitation rights. Therefore, the trial court did not err in granting their motion to intervene even after the order determining permanent custody of C.S. was entered.

Nevertheless, defendant contends that even if intervention by intervenors was proper, her motion to dismiss should have been granted because intervenors failed to show that the previous custody order required modification on the basis that she acted in a manner inconsistent with the best interests of the child. Specifically, defendant asserts that the trial court erred in modifying the previous custody order solely on the basis that she ceased intervenors' telephone contact with C.S. Yet, as stated earlier, the previous custody order had already determined that defendant be awarded permanent custody of C.S. and intervenors be awarded telephonic visitation. In instances where a custody order has already been entered as to the parties, that order "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party . . . ." N.C. Gen. Stat. § 50-13.7(a) (2003).

The trial court made numerous findings of fact justifying substantially modifying C.S.'s visitation with intervenors on the basis of substantial change in circumstances. Those findings were summarized a follows:

> a. The Defendant has recklessly disregarded the minor child's best interest by violating the Court's previous Orders by not allowing telephone visitation with the Intervenors as Court ordered.
>
> b. That the Defendant's actions have placed the minor child at a substantial risk of a negative impact both presently and in the future.
>
> c. That the Intervenors were previously granted and assured phone contact/visitation with the minor child; however, since the Plaintiff's untimely death this visitation has been denied and it is most likely that any physical visitation will likewise be denied unless Court ordered.
>
> d. That the Intervenors have had a continuous and extensive loving relationship with the minor child since the entry of the previous custody Order.

e. That the Intervenors have been active in the minor child's life to the extent that they have taken advantage of every available opportunity to visit with and care for the minor child since the entry of the previous custody Order.

Despite defendant's assertion to the contrary, the findings clearly show that the trial court's basis for modifying the previous custody order was based on more than just defendant ceasing intervenors' telephone contact with C.S. Defendant does not take issue with these findings, making them binding on appeal. Thus, the trial court did not err in denying defendant's motion to dismiss and subsequently modifying the previous custody order to award intervenors additional visitation privileges on the grounds of a substantial change in circumstances because "[t]he best interests of the children are and have always been the polar star in determining custody actions as well as visitation rights." *Hedrick v. Hedrick*, 90 N.C. App. 151, 156, 368 S.E.2d 14, 17 (1988).

II.

[2] Finally, defendant argues the trial court erred in finding the defendant guilty of criminal contempt. We disagree.

"An order providing for the custody of a minor child is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt . . . ." N.C. Gen. Stat. § 50-13.3(a) (2003). "It is well settled that in contempt proceedings the trial court's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Glesner v. Dembrosky*, 73 N.C. App. 594, 597, 327 S.E.2d 60, 62 (1985).

In the instant case, defendant does not argue that there was insufficient competent evidence to warrant her being found guilty of criminal contempt, only that the trial court lacked subject matter jurisdiction to do so because intervenors lacked standing to file motions in an action to which they were not parties and could not be parties due to plaintiff's death. However, once again, intervenors did not lack standing to move for a show cause hearing as to why defendant should not be held in civil or criminal contempt for violating the order awarding telephonic visitation with C.S. prior to plaintiff's death. The trial court found that defendant "willfully, unlawfully and without legal excuse failed to abide" by that order. "The integrity of

the court system and its judgments demands that parties may not cease compliance with judgments at whatever times they may see fit." *Id.* at 598, 327 S.E.2d at 63. Accordingly, the trial court did not err in denying defendant's motion to dismiss intervenors' motion to show cause, and ultimately concluding defendant was guilty of criminal contempt.

Affirmed.

Chief Judge MARTIN and Judge THORNBURG concur.

CARMEN DANIELS, PLAINTIFF v. JAMES HETRICK, NAMED DEFENDANT AND UNNAMED DEFENDANT

No. COA03-841

(Filed 4 May 2004)

1. Insurance— uninsured motorist—suit defended in name of motorist—presence during jury selection

The trial court did not err in an uninsured motorist action by introducing to the jury the police officer in whose name the suit was defended after the officer asserted immunity and was dismissed from the suit. Although plaintiff contended that the jury might hesitate to award damages against a police officer, the officer was driving the vehicle that struck plaintiff, the insurance company was defending in his name, and the trial judge carefully limited the officer's involvement.

2. Appeal and Error— constitutional objections—not raised at trial

Constitutional objections that were not raised at trial were not preserved for appeal.

3. Evidence— medical records—not used or relied upon by experts—excluded

The trial court did not err in an automobile accident case by excluding medical records from doctors who did not testify and which were not relied upon by those who did (one doctor testified that plaintiff brought these records with her, but did not testify that he relied upon them). The court admitted records produced by or relied upon by testifying experts, records from treat-

ments to which plaintiff was referred by the testifying experts, and records that were otherwise admissible.

4. Evidence— medical condition—plaintiff's testimony—not competent

A negligence plaintiff's testimony about her medical condition, Reflex Sympathetic Dystrophy (RSD), was properly disallowed because the diagnosis is complicated and controversial and plaintiff is not competent to testify about the nature of the condition, the necessity of particular treatments, the reasonableness of associated costs, or any connection between the alleged negligence and her condition. She was allowed to testify about her pain and suffering, her treatment and therapy, and how her injury affected her life.

5. Appeal and Error; Insurance— insurance defense in motorist's name—constitutional issue—not raised at trial—upheld previously

The constitutionality of statutes allowing an uninsured motorist's carrier to defend in the name of the uninsured motorist was not raised at trial and therefore was not properly before the Court of Appeals. Moreover, these statutory provisions have been challenged and upheld in the past.

6. Damages and Remedies— negligence—one dollar—supported by evidence

A jury verdict of $1 in a negligence action was adequate where there were no motions following the return of the verdict and the jury could reasonably have found on the evidence that plaintiff failed to show that her injuries were proximately caused by this accident.

Appeal by Plaintiff from judgment entered 4 October 2002 by Judge Shirley Fulton in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 April 2004.

Carmen Daniels-Leslie, pro se plaintiff-appellant.

Hill, Evans, Duncan, Jordan & Beatty, P.L.L.C., by Polly D. Sizemore, for unnamed defendant-appellee.

STEELMAN, Judge.

Plaintiff filed a complaint on or about 15 December 1999 in the Superior Court of Mecklenburg County seeking damages for personal

injuries alleged to have been sustained in an automobile accident that occurred on 18 December 1996. The accident involved James Hetrick (Hetrick), an officer working with the Charlotte Police Department, who was on duty at that time. Hetrick asserted governmental immunity and was dismissed from the lawsuit. The action continued against an unnamed defendant, plaintiff's insurance carrier, Shelby Insurance Co. (Shelby), based upon uninsured motorist's coverage. Shelby elected to defend in the name of Hetrick. The case came to trial on 30 September 2002. The jury found plaintiff was injured by the negligence of Hetrick, and awarded her $1.00 in damages. Plaintiff filed notice of appeal on 1 November 2002. Plaintiff was represented at trial by counsel, but appeals *pro se.* Further relevant facts will be discussed in the context of our review of plaintiff's assignments of error.

[1] In plaintiff's first assignment of error she argues the trial court erred by allowing Hetrick to be presented to the jury during jury selection and identified as the named defendant. We disagree.

In cases where the alleged tortfeasor is dismissed from the action based upon governmental immunity it is appropriate for the plaintiff to proceed against her own uninsured motorist's coverage. *Williams v. Holsclaw*, 128 N.C. App. 205, 495 S.E.2d 166 (1998). N.C. Gen. Stat. § 20-279.21(b)(3)a (2004) provides:

> The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name.

"It is manifest . . . that despite the contractual relation between plaintiff insured and defendant insurer, this action is actually one for the tort allegedly committed by the uninsured motorist. Any defense available to the uninsured tort-feasor should be available to the insurer." *Brown v. Lumbermens Mut. Casualty Co.*, 285 N.C. 313, 319, 204 S.E.2d 829, 834 (1974). In the instant case, Shelby elected to defend the action in the name of the uninsured motorist, Hetrick, rather than in its own name.

Hetrick was subpoenaed by both plaintiff and Shelby to appear and testify as a witness in the case. Neither party called Hetrick to testify. Hetrick was present in the courtroom at the commencement of jury selection. He was seated in the back row of the courtroom,

and at no time was seated at the defense table with counsel for Shelby. The Court introduced the parties to the jury pool, and stated: "The named defendant, in this matter, is Mr. James Hetrick, who is seated on the back row. Any of you know or recognize Mr. Hetrick? He's in the police uniform, in the back." "Any of you ever had any dealings with Mr. Hetrick, in his role as a police officer?"

Plaintiff contends that the introduction of Hetrick to the jury pool was prejudicial to her because it led the jurors to believe Hetrick was the defendant, and that jurors might be reticent to award damages against a police officer.

The uncontroverted facts in this case were that Officer Hetrick was the operator of the vehicle that struck plaintiff's automobile. Plaintiff repeatedly identified Hetrick as a police officer in her direct testimony. The trial judge carefully limited Hetrick's involvement in the trial to appearing for the jury selection. In light of the fact that Shelby was defending this action in the name of Hetrick, it was not error for the trial court to introduce Hetrick to the jury venire and to make inquiry as to whether any juror had prior dealings with Hetrick.

[2] Plaintiff further asserts that she was denied due process and equal protection by the statutory procedure that allowed Shelby to defend this action in the name of the uninsured motorist, Hetrick. These constitutional issues were not raised before the trial court, and under the provisions of North Carolina Rules of Appellate Procedure Rule 10(b)(1) are not properly preserved for appeal. *In re Change of Name of Crawford to Crawford Trull*, 134 N.C. App. 137, 142, 517 S.E.2d 161, 164 (1999). We find appellant's first assignment of error to be without merit.

[3] In her second assignment of error plaintiff argues the trial court erred in excluding certain medical records from evidence. We disagree.

In order for medical records to be admitted into evidence, the plaintiff must meet her burden of showing a causal connection between defendant's negligence and the injuries complained of. *Gillikin v. Burbage*, 263 N.C. 317, 324, 139 S.E.2d 753, 759 (1964).

> In cases involving "complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury."

Holley v. ACTS, Inc., 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003). The testifying expert has to show that the medical records at issue reflect treatment of an injury that was causally related to the alleged negligence of the defendant. He may do this by his own opinion, or by testifying that he either relied on the documents for his diagnosis (*Chamberlain v. Thames*, 131 N.C. App. 705, 717, 509 S.E.2d 443, 450 (1998)) or that the documents reflect the work of another medical professional to whom the plaintiff was referred by him. *Taylor v. Boger*, 289 N.C. 560, 568, 223 S.E.2d 350, 355 (1976). Plaintiff must further show through expert testimony that the medical treatment she received was "reasonably necessary for proper treatment of her injuries and that the charges made were reasonable in amount." *Ward v. Wentz*, 20 N.C. App. 229, 232, 201 S.E.2d 194, 197 (1973). It would be error to admit such evidence if the above conditions were not met. *Graves v. Harrington*, 6 N.C. App. 717, 171 S.E.2d 218 (1969).

Plaintiff contends that she suffers from Complex Regional Pain Syndrome, which is also known as Reflex Sympathetic Dystrophy (RSD), as a result of the accident. At trial plaintiff offered the testimony of two medical doctors, Dr. Shin and Dr. Berger. Dr. Shin testified that RSD has "been somewhat controversial in the past, perhaps, . . . but I think consensus nowadays is that it is a syndrome of pain and discomfort that is frequently mediated by the sympathetic nervous system, and it shows up after sometimes injury to the affected limb, and may not have any actually demonstrable damage to the nerves in that region. . . ." Each doctor gave an opinion that plaintiff suffered from RSD. Dr. Berger, when asked if plaintiff's condition was caused by the collision with Hetrick's vehicle stated: "I don't have an opinion." Dr. Shin was asked three times by plaintiff's counsel to express an opinion as to the cause of plaintiff's condition. He gave the following responses: "But I mean it is—it is a relationship, a timed relationship [between an accident and the onset of RSD]. We don't know enough of it to say, well causality. I guess we have to be careful with that." And, "Okay, I guess—again, the casualty [sic] is always an issue, but we see this condition many times after an injury without definite nerve injury that can be documentable. I think we would usually link that, so we'll just say [RSD] in association with the accident or the injury that occurred. So temporally, that would fit." When asked again he replied, "I think, yeah, you could say that. It—that the accident happened and then she developed this condition." And finally, "Um-hm—I think—I don't know. Yes, in a way. I mean, it's—we see this after an accident."

The testimony of plaintiff's experts revealed that the diagnosis of RSD is complex, and the plaintiff's diagnosis was confirmed only after Dr. Berger performed a stellate ganglion block. This was a condition that required the opinion of an expert witness to establish causation. *Holley*, 357 N.C. at 232, 581 S.E.2d at 753.

Plaintiff sought to enter into evidence records of medical treatments and diagnoses, bills, prescriptions, and letters from her doctors. The trial court allowed documents into evidence that were produced by the testifying experts, relied upon by the testifying experts, or that were otherwise admissible under the rules of evidence. Records were also allowed in for medical and physical therapy treatments where the evidence showed one of the testifying experts referred plaintiff for the treatments.

The excluded records were from visits to Charlotte area doctors who did not testify. These doctors were available to plaintiff, but she instructed her attorney not to subpoena them because she had instituted a medical malpractice suit against one of them and she believed they might be prejudiced against her. The only testimony linking any of these documents to the treatment of plaintiff's RSD (through either reliance upon the documents or referral) was Dr. Shin's testimony that plaintiff had brought records with her on her visit. However, there was no testimony by Dr. Shin that he relied upon these records for his diagnosis, or any specific mention of what records the plaintiff brought, other than for a three phase bone scan performed in 1999. Evidence of the bone scan was admitted at trial. Further, there was no expert testimony that the treatment and expenses in the excluded records was necessary for proper treatment of plaintiff's injuries, or reasonable in cost.

For the foregoing reasons we hold the trial court did not err in excluding certain medical records at trial. We find this assignment of error to be without merit.

[4] In her third assignment of error, plaintiff contends that the trial court erred in refusing to allow her to testify about certain of her medical conditions and treatments. We disagree.

Plaintiff was allowed to testify extensively regarding her pain and suffering, certain courses of medical treatment, physical therapy, and how her injuries have affected her life. She was prohibited from testifying about RSD and any knowledge or opinion she may have gathered from doctors who did not testify, or from outside research she

may have herself done on the subject. Plaintiff contends that her injury is "obvious," and thus expert testimony is not required. Although some of her symptoms might be obvious, RSD is a very complex and controversial diagnosis and plaintiff was not competent to testify as to the nature of the condition, the necessity of any particular treatment, the reasonableness of associated costs, or any causal connection between the alleged negligence of Hetrick and her condition. The trial court properly sustained Shelby's objection to plaintiff's testimony. We find this assignment of error to be without merit.

[5] In her fourth assignment of error plaintiff asserts that the provision of N.C. Gen. Stat. § 20-279.21(b)(3) allowing an uninsured motorist's carrier to defend an action in the name of the uninsured motorist is violative of due process and equal protection, and is therefore unconstitutional. Plaintiff further contends that this provision violates the provisions of Article I, Section 18 of the North Carolina Constitution which requires that the courts of this State be open to parties seeking redress for their injuries.

None of these constitutional issues were raised by plaintiff in the trial court and are not properly before this Court. N.C. R. App. P. 10(b)(1), *In re Crawford*, 134 N.C. App. at 142, 517 S.E.2d at 164. We note that the provisions of N.C. Gen. Stat. § 20-279.21(b)(3) and (4) allowing an uninsured motorist's carrier to defend in the name of the uninsured motorist (instead of its own name) have been challenged in the past and consistently upheld by the appellate courts of this State. *Church v. Allstate Ins. Co.*, 143 N.C. App. 527, 547 S.E.2d 458 (2001), *Sellers v. N.C. Farm Bureau Mut. Ins. Co.*, 108 N.C. App. 697, 424 S.E.2d 669 (1993). This Court has reasoned that a "jury would more likely concentrate on the facts and the law as instructed, rather than the parties," when the insurance carrier is allowed to defend in the name of the tortfeasor alone. *Sellers*, 108 N.C. App. at 699, 424 S.E.2d at 670.

[6] In her final assignment of error, plaintiff contends that the jury's verdict of $1.00 was inadequate, based upon the evidence presented to the jury. We disagree.

We note that the record in the matter before us is devoid of any indication that the plaintiff made any motions to the trial court following the return of the jury's verdict. In the absence of such motions we have examined the record before us to determine if there was evidence that would support the jury's damages verdict in the amount of $1.00.

There was no stipulation removing any element of damages from the consideration of the jury. It was the role of the jury to weigh the evidence, determine the credibility of the witnesses, the probative force to be given to their testimony and determine what the evidence proved or did not prove. It was the province of the jury to believe any part or none of the evidence. *Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979), *see also Anderson v. Hollifield*, 345 N.C. 480, 480 S.E.2d 661 (1997).

The evidence in this case showed that immediately following the accident, plaintiff twice refused offers made by the police to secure an ambulance for her. She did not seek medical treatment for her injuries alleged to have been caused by the accident until two years later. The testimony of plaintiff's expert witnesses, as set forth above, was at best equivocal concerning whether her injuries were caused by the accident. The plaintiff had suffered a number of injuries prior and subsequent to the automobile accident on 18 December 1996. Thus, the jury in this case could reasonably have found that the plaintiff failed to meet her burden of proof of showing that her injuries and expenses were proximately caused by the negligence of Hetrick. This assignment of error is without merit.

NO ERROR.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. JOSE FELIX SANTIAGO CARRILLO

No. COA03-725

(Filed 4 May 2004)

1. Searches and Seizures— anticipatory warrant—description of triggering event—sufficiency

An anticipatory search warrant was valid in a cocaine case where the warrant sufficiently incorporated the supporting affidavit, and the affidavit identified both the event which would trigger execution of the warrant (acceptance of a package) and the condition upon which the warrant would not be executed (refusal of the package).

2. Evidence— opinion—law enforcement officers—not plain error

There was no plain error in a cocaine prosecution where law enforcement officers were erroneously allowed to give their opinion that defendant knew that a package shipped to him contained cocaine and knew that he had been caught. Defendant failed to show that the jury would have reached a different verdict without this testimony.

3. Constitutional Law— effective assistance of counsel—effect on outcome—not shown

Defendant did not receive ineffective assistance of counsel in a cocaine prosecution where he did not show that a different result would have been obtained without counsel's alleged errors.

Appeal by defendant from judgment entered 20 November 2002 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 16 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General Richard L. Harrison, for the State.

Paul M. Green, for defendant-appellant.

TYSON, Judge.

Jose Felix Santiago Carrillo ("defendant") appeals from a judgment entered following a jury's verdict finding him guilty of trafficking in cocaine by possession of 400 grams or more of cocaine. We hold that defendant received a trial free from prejudicial error.

I. Background

Defendant is a Mexican national and an illegal alien who had resided within the United States for three years prior to his arrest. For six months prior to his arrest, defendant lived in an apartment in Pitt County, North Carolina, and worked as a drywall installer. The United States Customs Service ("U.S. Customs") intercepted a package mailed from an address in Mexico and addressed to defendant at his residence in Pitt County. The package was mailed from a location in Mexico, which the U.S. Customs had identified as a drug origination point for transporting drugs into the United States. U.S. Customs Inspector Richard Rice determined that the package contained a large amount of cocaine concealed inside three ceramic turtles.

U.S. Customs agents notified the City of Greenville Police of the package and its contents. An affidavit was prepared, and an anticipatory search warrant was obtained. The magistrate issued a search warrant consisting of generic language. The affidavit attached to the search warrant detailed the circumstances under which the package was intercepted, the exact address to where the package was being delivered, the person to whom the package was being delivered, and the specific events expected to happen in the future, which would, upon their occurrence, establish probable cause to suspect that defendant was in possession of and trafficking in cocaine.

Defendant had lived at the address appearing on the package for some time, and telephone service at that address was listed in defendant's name. An officer with the Greenville Police Department, disguised as a delivery man, carried the package to the address. Defendant accepted delivery of the package, signed for it, and carried the package inside the apartment. Police waited approximately ten minutes before proceeding to execute the anticipatory warrant. Police went to the door, spoke with defendant, read him portions of the search warrant in Spanish, and searched his apartment. Police found the package inside the apartment by the front door. Officers also found broken pieces of glass turtles similar to the glass turtles found inside the package delivered to and accepted by defendant. The broken pieces contained trace amounts of cocaine.

Defendant was arrested and charged with trafficking in cocaine. Defendant did not offer any evidence. The jury convicted defendant, and the trial court sentenced him to a minimum term of 175 months and a maximum term of 219 months. Defendant appeals.

II. Issues

Defendant contends the trial court erred in: (1) denying his motion to suppress the fruits of a search conducted under color of an invalid search warrant; and (2) allowing law enforcement officers to testify to their opinions of whether defendant knew the package contained illegal drugs.

III. Anticipatory Search Warrant

[1] Defendant argues the anticipatory search warrant is facially invalid because the issuing magistrate failed to indicate that it was conditioned upon a specific, narrowly drawn triggering event. We disagree.

"An anticipatory search warrant, by definition, is 'not based on present probable cause, but on the expectancy that, at some point in the future probable cause will exist.' " *State v. Baldwin*, 161 N.C. App. 382, 387, 588 S.E.2d 497, 502 (2003) (quoting *State v. Smith*, 124 N.C. App. 565, 571, 478 S.E.2d 237, 241 (1996)). "An anticipatory warrant must set out, on its face, conditions that are 'explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents.' The magistrate must ensure that the 'triggering events'—those events which form the basis for probable cause—are 'both ascertainable and preordained.' " *Smith*, 124 N.C. App. at 572, 478 S.E.2d at 242 (quoting *U.S. v. Ricciardelli*, 998 F.2d 8, 12 (1st Cir. 1993)).

The United States Supreme Court recently held, "[t]he fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Groh v. Ramirez*, 540 U.S. 551, 557, 157 L. Ed. 2d 1068, 1078 (2004) (citation omitted). The Supreme Court, however, limited this holding:

> We do not say that the Fourth Amendment forbids a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.

Id. at 557-58, 157 L. Ed. 2d 1078.

N.C. Gen. Stat. § 15A-246 (2003) sets forth the form and content requirements of a search warrant. This Court has held that these requirements may appear either on the face of the warrant or in the supporting affidavits. "It is permissible to incorporate the description of the items to be searched for and the place to be searched in the warrant by reference to the affidavit." *State v. Flowers*, 12 N.C. App. 487, 491, 183 S.E.2d 820, 822 (citing *State v. Mills*, 246 N.C. 237, 98 S.E.2d 329 (1957), *cert. denied*, 279 N.C. 728, 184 S.E.2d 885 (1971).

Defendant argues the "triggering event" was not set forth on the face of the anticipatory search warrant. The State responds that the affidavit and warrant can be read together to provide the specificity and particularity required under the United States and North Carolina

Constitutions and N.C. Gen. Stat. § 15A-246. The search warrant referenced the affidavit several times and incorporated the document by stating on the face of the warrant, "there is probable cause to believe that the property and person described in the application on the reverse side and related to the commission of a crime is located as described in the application." Additionally, the warrant stated on its face, "[y]ou are commanded to search the premises, vehicle, person and other place or item described in the application for the property and person in question." The attached affidavit, which applied for issuance of the warrant, clearly stated:

> On 20 June 2001, your applicant and other officers will attempt to deliver the . . . package to [defendant] at [defendant's address]. *If deliver* [sic] *of the package is accepted* a search will be conducted of [defendant's address] after giving the occupants time to open the package. *If delivery of the package is not accepted the search warrant will be returned unserved.*

(emphasis supplied).

In *Smith*, we recognized that an anticipatory search warrant "must minimize the officer's discretion in deciding whether or not the 'triggering event' has occurred to 'almost ministerial proportions.' This means the events which trigger probable cause must be specified in the warrant to a point 'similar to a search party's discretion in locating the place to be searched.' " 124 N.C. App. at 572, 478 S.E.2d at 242 (quoting *Ricciardelli*, 998 F.2d at 12). We granted the defendant in *Smith* a new trial because "[t]he affidavit was written in the present or past tense, and in no way expresses that it is 'contingent,' or in 'anticipation' of future events." *Smith*, 124 N.C. App. at 568, 478 S.E.2d at 239. Here, the language used in the supporting affidavit not only identifies the triggering events as occurring in the future, but also states the future condition upon which the warrant will *not* be executed.

We previously recognized, "[t]he framers of our constitution sought to check the tendency of government to overreach by placing a constitutional mantle around the right to privacy in one's person, home and effects." *Id.* at 570, 478 S.E.2d at 240 (quoting *State v. Carter*, 322 N.C. 709, 718, 370 S.E.2d 553, 558 (1988)). Here, the anticipatory search warrant sufficiently incorporated by reference the attached affidavit, which clearly identified the triggering events required to execute the warrant. This assignment of error is overruled.

IV. Opinion Testimony

[2] Defendant contends the trial court committed plain error in allowing law enforcement officers to testify to their opinions regarding defendant's knowledge that the package contained illegal drugs and that defendant realized he had been caught. Defendant argues he received ineffective assistance of counsel because his attorney did not object to the testimony he now assigns as erroneous. We disagree.

A. Plain Error

Because defense counsel did not object to the testimony now assigned as error our review is limited to a consideration of plain error. *See* N.C.R. App. P. 10(b)(1) (2004); N.C.R. App. P. 10(c)(4) (2004). "[D]efendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

Sergeant A.P. White ("Sergeant White") testified regarding the habits of drug traffickers. Defense counsel specifically asked Sergeant White, "Is it safe to say that somewhere along the lines, somebody in that situation could be an unwilling participant in the transfer of drugs?" Sergeant White responded, "Are you asking my opinion?" When defense counsel responded affirmatively, Sergeant White testified,

> No, because you're talking about $28,000.00 street value worth of cocaine. People that ship cocaine . . . know who they're shipping it to, and those people on the other unit or on the receiving end are expecting that package within a certain time period, and that was the main reason for our urgency trying to get that package delivered because we knew that they were expecting it.
>
> . . . .
>
> I think your client knew what was in that package.

Defendant made no objection or motion to strike this testimony.

U.S. Customs Agent Michael Doherty ("Agent Doherty") testified on direct examination, without objection, that defendant dropped his head, stared at the ground, and "would not answer" when asked if the turtles belonged to him and who had provided him with a fictitious Social Security Card. On cross-examination, defense counsel asked, "And he puts his head down and you bring that up now, for what rea-

son do you bring that up?" Agent Doherty testified, "His reaction. . . . I think if I can give my opinion, I think he realized he had been caught." When asked by defense counsel whether defendant's reluctance to answer questions was possibly due to the fact he had no answer, Agent Doherty testified:

> My opinion is that he realized he was caught and that he couldn't bluff or lie his way out of it. To answer your question, a very remote possibility. That's not a normal reaction from what I've seen from other individuals that I've arrested that were in his situation. When someone is cooperating with you and talking to you and all of a sudden, they quit talking and drop their eyes to the ground and they say they want to speak to an attorney, 99.9 percent of the people that have done that to me, a hundred percent of the people that have done that to me, have been guilty.

In response, defense counsel asked, "Everybody who wants to talk to an attorney is not guilty, are they?" Agent Doherty stated, "No sir. I didn't say that. . . . they realize that right then and there they are caught. . . ." As with Sergeant White's testimony, defendant made no objection or motion to strike this testimony.

Sergeant White's and Agent Doherty's testimony informed the jury how drugs are sent through a chain of drug handlers. We hold that the trial court erred in allowing the officers to offer their opinions of whether defendant was guilty. *See State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 264 (1999) ("The trial judge . . . has the duty to supervise and control a defendant's trial . . . to ensure fair and impartial justice for both parties."); *but see State v. Crawford*, 329 N.C. 466, 477, 406 S.E.2d 579, 585 (1991) ("Rule 704 provides that '[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.' N.C.G.S. § 8C-1, Rule 704 (1988)."). Defendant did not object to or move to strike any of this testimony. Defense counsel elicited much of the testimony defendant now assigns as error. Under plain error review, we must consider whether the jury would have reached a different result had the error not occurred. *Jones*, 355 N.C. at 125, 558 S.E.2d at 103.

Evidence at trial showed that the package was intercepted by the U.S. Customs agents and contained three ceramic turtles with a substantial amount of cocaine concealed inside. The package was mailed from a location in Mexico that U.S. Customs agents had identified as

a mail origination point for cocaine sent to the United States. The package was addressed to defendant at his residence. Defendant accepted the package. It was found inside his residence minutes after he had taken possession of it. Broken pieces of similar turtles containing traces of cocaine were also found inside his apartment.

Although it was error to allow the law enforcement officers to provide their opinions regarding defendant's guilt, defendant has failed to show that without this testimony the jury would have reached a different verdict. *Id.* This assignment of error is overruled.

B. Ineffective Assistance of Counsel

[3] In reviewing an appeal based on ineffective assistance of counsel, this Court must first determine whether there was a reasonable probability that without counsel's alleged errors, the outcome of the trial would have been different. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). If we were to conclude there was a reasonable probability that the outcome would have been different, this Court must consider whether counsel's actions were in fact deficient. *Id.* As we have already determined, defendant has failed to show that a different outcome at trial would have occurred if defense counsel had objected to this testimony. This assignment of error is overruled.

V. Conclusion

The anticipatory search warrant was not facially invalid. The trial court did not err in denying defendant's motion to suppress the evidence seized under a search conducted pursuant to this warrant. The trial court erred in allowing Sergeant White and Agent Doherty to offer their opinions of whether defendant was guilty. This error does not require a new trial under plain error review. Considering the totality of the evidence presented at trial, we hold defendant received a trial free from prejudicial error.

No prejudicial error.

Judge WYNN and HUNTER concur.

STATE OF NORTH CAROLINA v. DEBORAH DENISE KNOTT

No. COA03-716

(Filed 4 May 2004)

1. Criminal Law— charges dismissed by judge—record unclear

A controlled substances prosecution was remanded where defendant contended in a superior court hearing that she waived probable cause upon an agreement that some of the charges would be dropped, those charges were not dropped because the district attorney contended that the agreement involved guilty pleas to the remaining charges, the superior court judge told defendant that the charges would be dropped, and it was not clear from the record whether the judge intended to dismiss the charges as the presiding judge or whether he was relying on the State to dismiss the charges.

2. Sentencing— mitigating factors—evidence not allowed

Plain error analysis was applicable where a defendant was not allowed to present evidence of mitigating factors before she was sentenced within the presumptive range. The case was remanded because it could not be concluded that defendant's sentence was unaffected.

Appeal by defendant from judgments entered 7 November 2002 by Judge Clarence W. Carter in Surry County Superior Court. Heard in the Court of Appeals 16 March 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Linda Kimbell, for the State.

Robert W. Ewing for defendant-appellant.

HUNTER, Judge.

Deborah Denise Knott ("defendant") appeals six judgments that resulted in consecutive sentences totaling fifty-seven to seventy-two months imprisonment for three convictions of possession with intent to sell and deliver controlled substances and three convictions for the sale and delivery of controlled substances. For the reasons stated herein, we remand this case to the trial court (1) to make findings of fact regarding the dismissal of defendant's possession

charges, and (2) for resentencing after considering evidence of mitigating factors.

Defendant was arrested on or about 9 February 2001 and charged with three separate counts of possession with intent to sell and deliver controlled substances ("possession charges"), three separate counts for the sale or delivery of controlled substances ("sale or delivery charges"), and one count of maintaining a dwelling. The controlled substances on which the charges were based were diazepam, pentazocine, and codeine. On 25 April 2001, the maintaining a dwelling charge and the three possession charges were dismissed in the Surry County District Court pursuant to an agreement between defendant and the prosecutor that resulted in defendant waiving a probable cause hearing on the three sale or delivery charges. The district court bound the sale and delivery charges over to superior court.

Defendant was subsequently indicted on all six charges on 30 July 2001 in Surry County Superior Court. Thereafter, a Determination of Counsel Proceeding ("the proceeding") was held on 6 August 2001 in superior court before Judge A. Moses Massey ("Judge Massey") based on defendant moving to have the court appoint her new counsel. The motion arose from a dispute between defendant and her then-attorney, Karen Adams, regarding whether defendant was facing six charges in superior court. Defendant informed the court that it was her belief that the possession charges had been dismissed in district court and would remain so pursuant to her earlier agreement with the prosecutor. District Attorney C. Ricky Bowman ("D.A. Bowman") represented the State at that proceeding and, upon learning of the alleged agreement, stated that while he "was not aware that at District Court the prosecutor had made that agreement to dismiss three [charges] in District Court, ... I do honor all agreements made by prosecutors in my office because they are me, we are one in the same." Thus, D.A. Bowman stated, "[t]o honor that agreement I will dismiss those three dismissed in District Court."

However, after a short recess, D.A. Bowman informed the superior court that he had learned from defendant that "she called an officer and that officer said, yes, he had agreed to dismiss those three upon her waiving probable cause. But he was also under the assumption that she would be pleading guilty to the three sale and deliveries." That statement was not elaborated on further during the proceeding. Thereafter, when defendant asked for clarification as to

whether the possession charges had been dismissed, the following exchange took place:

> THE COURT: My understanding is that, yes, they're dropped because the District Attorney—frankly, you've been indicted. And I think legally the District Attorney could say, she's been indicted by a grand jury, doesn't matter what happened in District Court. But this District Attorney, out of his great sense of integrity, said if there's that understanding in District Court we're going to drop them. So it's my understanding you're facing, as I understand it, you're facing three charges before this Court, three counts of sale of—is it three counts of selling a controlled substance?
>
> MS. ADAMS: Yes, sir.
>
> MR. BOWMAN: Yes, sir.
>
> THE COURT: Those are the three charges.

Defendant then proceeded to ask to "get that in writing that them [sic] been dismissed[,]" to which the Judge Massey responded:

> I'm telling you as a Superior Court Judge that those three charges have been dismissed. And I'm telling you that I will hold the District Attorney to his word that they've been dismissed, that they will be dismissed. I'm not going to give it to you in writing. It's on record. It can be taken to the Court of Appeals in North Carolina. It can be taken to the Supreme Court of North Carolina, can be taken to the Supreme Court of the United States of America if they ever let the case get that far. I don't think you need any more. That's worth more than something in writing.

Nevertheless, defendant was prosecuted on all six charges by Assistant District Attorney Angela Puckett (who had also been present at the proceeding) when her trial began on 6 November 2002. The evidence at trial showed that on three separate occasions a confidential police informant and Detective Randy Dimmette ("Detective Dimmette"), an undercover detective with the Yadkinville Police Department, purchased controlled substances from defendant. On 6 October 2000, defendant sold Detective Dimmette Valium (diazepam) outside a nightclub. On 26 October 2000, the men went to defendant's home and purchased two Tylenol pills containing codeine. Finally, on 15 November 2000, Detective Dimmette and the informant returned to defendant's home and purchased Talwin (pentazocine). After the third purchase, the pills were sent to the SBI for analysis, confirming

that the pills were the controlled substances indicated by defendant. At the conclusion of the evidence, defendant was found guilty as charged and received six separate sentences within the presumptive range for each crime.

I.

[1] Defendant argues her convictions and judgments as to the three possession charges should be vacated because: (1) those charges were dismissed in district court pursuant to an agreement between defendant and a prosecutor that required defendant to waive her right to a probable cause hearing; and (2) D.A. Bowman agreed to honor the agreement made in district court between his office and defendant. Defendant contends that her due process rights were violated when she was prosecuted on the possession charges after agreeing to waive a probable cause hearing on the three sale or delivery charges. However, the State contends the dismissal of the possession charges was contingent not only on defendant's waiver of a probable cause hearing but also on her pleading guilty to the sale or delivery charges.

Initially, we note that defendant testified twice at trial that the possession charges had been dismissed in district court. These statements were not acted upon by either her trial counsel or the trial court. Thereafter, when defendant was tried and sentenced on the possession charges, her counsel failed to object. The State contends defense counsel's failure to raise this issue at trial resulted in it not being preserved for appellate review. However, we hold that defendant's testimony regarding the dismissal of those charges was sufficient to preserve this issue for our review.

The record clearly contains three "Dismissal—Notice of Reinstatement" forms, which state that there was a "dismissal" of each possession charge in district court because defendant agreed to a "waive[r] of P/C on felonies." These dismissals were not "with leave." Our Supreme Court has distinguished a "dismissal" and a "dismissal with leave" as follows:

> The district attorney may dismiss an indictment under either N.C.G.S. § 15A-931 or § 15A-932. Section 15A-931 provides that he may so dismiss "by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time." This is a simple and final dismissal which terminates the criminal proceedings under that indictment. Section

> 15A-931 does not bar the bringing of the same charges upon a new indictment. *See* Commentary.
>
> Section 15A-932 provides for a dismissal "with leave" when the defendant fails to appear and cannot be readily found. Under subsection (b) of section 15A-932, this dismissal results in removal of the case from the court's docket, but the criminal proceeding under the indictment is not terminated. All outstanding process retains its validity and the prosecutor may reinstitute the proceedings by filing written notice with the clerk without the necessity of a new indictment.

State v. Lamb, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988) (emphasis omitted).

Lamb provides that the dismissal of defendant's possession charges by the district court did not bar the State from bringing those charges upon a new indictment in superior court. The record is devoid of an actual agreement that the dismissals in district court were to be a final disposition of those charges. *See State v. Muncy*, 79 N.C. App. 356, 339 S.E.2d 466 (1986). Essentially, the only evidence before this Court regarding an agreement appears in the transcript of the proceeding. During that proceeding defendant informed D.A. Bowman and Judge Massey about what she believed to be the terms of her agreement with the prosecutor. D.A. Bowman expressed his willingness to honor that agreement, but later stated there was an "assumption" that the agreement also required defendant "pleading guilty to the three sale and deliveries." Thereafter, Judge Massey told defendant that the possession charges "[ha]ve been dismissed, that they will be dismissed." However, since there is nothing in the record substantiating that those charges were formally dismissed, it is unclear whether Judge Massey intended to dismiss the possession charges as the presiding superior court judge at that proceeding or whether he was relying on the State to do so thereafter. Thus, we must remand this issue to the trial court to make findings of fact as to whether or not the possession charges were dismissed at the proceeding by Judge Massey or whether or not they were to be dismissed by the State prior to defendant's trial.

II.

Next, defendant argues that once D.A. Bowman agreed to dismiss the possession indictments during the proceeding on 6 August 2001, the trial court lacked jurisdiction to try and sentence her on 6 and 7 November 2002 on those charges because the State failed to re-indict

her. However, based on our reasons for remanding this case as stated in Part I, we need not address this argument.

III.

[2] Finally, defendant argues the trial court committed plain error by failing to allow defendant to present evidence of mitigating factors and consider that evidence before sentencing her. "In order to rise to the level of plain error, the error . . . must be so fundamental that (i) absent the error, the jury probably would have reached a differed verdict; or (ii) the error *would constitute a miscarriage of justice* if not corrected." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997) (emphasis added). The State contends that this issue is not subject to plain error review because "this Court has held that plain error analysis applies only to jury instructions and evidentiary matters[.]" *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, *Wiley v. N.C.*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). However, since defendant contends she was not allowed to present *evidence* of mitigating factors, we conclude plain error analysis is applicable in this instance and was committed by the trial court.

When a "trial court imposes sentences within the presumptive range for all offenses of which defendant was convicted, [it] is not obligated to make findings regarding aggravating and mitigating factors." *State v. Rich*, 132 N.C. App. 440, 452-53, 512 S.E.2d 441, 450 (1999), *aff'd*, 351 N.C. 386, 527 S.E.2d 299 (2000). Nevertheless, "[u]nder the Structured Sentencing Act, the trial court must consider evidence of aggravating and mitigating factors" offered by the parties, even if a presumptive sentence is ultimately imposed. *State v. Kemp*, 153 N.C. App. 231, 239, 569 S.E.2d 717, 722, *disc. review denied*, 356 N.C. 441, 573 S.E.2d 158 (2002). Here, the trial court immediately sentenced defendant once the verdict was read without allowing defense counsel an opportunity to present evidence of mitigating factors. We cannot definitively conclude that defendant would not have received a mitigated sentence if the trial court had considered such evidence. Therefore, we remand this case for resentencing after evidence of mitigating factors is offered by defendant and considered by the trial court because to hold otherwise "would constitute a miscarriage of justice" to defendant.

Remanded.

Judges WYNN and TYSON concur.

HOLLAND v. HEAVNER

[164 N.C. App. 218 (2004)]

W.A. HOLLAND, JR., PLAINTIFF v. DANIEL L. HEAVNER, DANIEL LEE, R. GENE DAVIS, JR., ANTHONY E. FLANAGAN, AND CHARLES F. BOX, III, DEFENDANTS

No. COA03-811

(Filed 4 May 2004)

Appeal and Error— appellate rules violations—untimely brief—failure to reference—failure to identify assignment of error

Defendants' appeal from a judgment ordering them to pay $25,000 in earnest money from an option contract is dismissed based on failure to comply with the appellate rules, because: (1) defendants failed to timely file their brief as required by N.C. R. App. P. 13; (2) defendants failed to comply with N.C. R. App. P. 28 since their brief failed to make any reference to the record, the testimony, or exhibits, and defendants failed to indicate the assignment of error relevant to each argument and failed to identify any assignment of error by its number or the page where it appears in the record; and (3) the Court of Appeals declines to apply N.C. R. App. P. 2 to reach the merits of this appeal since there are no exceptional circumstances, significant issues, or manifest injustices that would be corrected by review of the merits of this appeal.

Appeal by defendants R. Gene Davis, Jr., and Anthony E. Flanagan from judgment entered 7 January 2003 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 30 March 2004.

No brief filed for plaintiff-appellee.

Narron, O'Hale & Whittington, P.A., by James W. Narron and Jason W. Wenzel, for defendants-appellees Daniel L. Heavner and Daniel Lee.

Davis Bibbs & Smith, PLLC, by David C. Smith, for defendants-appellants.

No brief filed for defendant-appellee Charles F. Box, III.

TYSON, Judge.

R. Gene Davis, Jr. ("Davis"), and Anthony E. Flanagan ("Flanagan") appeal from a judgment entered ordering them to pay

Daniel L. Heavner ("Heavner") and Daniel Lee ("Lee") $25,000.00 in earnest money from an option contract. For the reasons set forth below, we dismiss this appeal.

I. Background

On 5 February 2002, Heavner and Lee entered into an offer to purchase and an accompanying option to purchase with Dr. Preston H. and Judy P. Bradshaw (the "Bradshaws") for eighteen residential properties located in and around the City of Rocky Mount, Nash and Edgecombe Counties, North Carolina ("the properties"). While under contract with the Bradshaws, Heavner and Lee began marketing the properties in several newspapers. Davis and Flanagan responded to this advertising and Lee explained to Davis the nature of the transaction. Lee also faxed Davis copies of all documents pertaining to the 5 February 2002 contractual agreement among Heavner, Lee, and the Bradshaws.

On 28 February 2002, Davis, Flanagan, Heavner, and Lee entered into an agreement, wherein Davis and Flanagan contracted and agreed with Heavner and Lee to purchase the properties under the terms of the 5 February 2002 contractual relationship among Heavner, Lee, and the Bradshaws. Pursuant to this assignment, Davis and Flanagan remitted $25,000.00 to W.A. Holland, Jr. ("Holland"), in trust as consideration to take Heavner and Lee's position.

On 5 March 2002, Davis informed the Bradshaws of his and Flanagan's intent to purchase the properties and acknowledged the relationship among Heavner, Lee, and the Bradshaws. Closing was set for 11 March 2002. Closing did not occur due to delays caused by Davis and Flanagan, their agents, and employees. Due to their delays, Dr. Bradshaw declared the contract null and void on 20 March 2002.

Holland initiated this action to determine the proper party entitled to receipt of the $25,000.00 earnest money. On 7 January 2003, following a bench trial, the trial court issued a judgment ordering that Heavner and Lee were entitled to the earnest money. Davis and Flanagan filed notice of appeal on 16 January 2003.

Davis and Flanagan moved for an extension of time to file their brief with this Court. We granted the motion and ordered their brief to be filed on or before 2 September 2003. Davis and Flanagan had not filed their brief by 18 September 2003, and Heavner and Lee moved to dismiss the appeal. The motion was served on Davis and Flanagan,

who filed their brief with this Court on 25 September 2003. Davis and Flanagan have moved this Court to issue an order declaring that their brief had been timely filed.

II. Issue

The issue is whether this appeal should be dismissed because of Davis and Flanagan's numerous violations of the North Carolina Rules of Appellate Procedure ("appellate rules").

III. North Carolina Rules of Appellate Procedure

Heavner and Lee argue this Court should dismiss Davis and Flanagan's appeal because of their failure to comply with the appellate rules. We agree and grant Heavner and Lee's motion to dismiss.

"The appellate courts of this state have long and consistently held that the rules of appellate practice, now designated the Rules of Appellate Procedure, are *mandatory* and that failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (citations omitted) (emphasis supplied). Our Supreme Court has consistently recognized, for nearly a hundred years " '[i]t is, therefore, necessary to have rules of procedure and to adhere to them, and if we relax them in favor of one, we might as well abolish them.' " *Id.* (quoting *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913)). In *Steingrass*, our Supreme Court upheld this Court's dismissal of the defendant's appeal for multiple appellate rule violations. 350 N.C. at 64, 511 S.E.2d at 298.

Recently, this Court addressed the implications of violating the appellate rules. *Campbell University v. Harnett County*, 162 N.C. App. 178, 589 S.E.2d 890 (2004). We dismissed not only the homeowners-intervenors' appeal, but also the petitioner's cross-appeal for failure to comply with the appellate rules. *Id.* Here, Davis and Flanagan similarly violated numerous appellate rules.

A. Rule Violations

1. Failure to Timely File

Rule 13 of the appellate rules requires the appellant in noncapital cases to file his brief in the appellate court clerk's office within thirty days after the appellate court clerk has mailed the printed record. N.C.R. App. P. 13(a) (2004). An appellant may request from this Court

an extension of time pursuant to N.C.R. App. P. 27(c)(2) (2004). "If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed . . . ." N.C.R. App. P. 13(c) (2004).

Here, Davis and Flanagan moved for and were granted an extension of time until 2 September 2003 to file their brief. On 18 September 2003, sixteen days after the required filing date expired, Davis and Flanagan had failed to file their brief. Heavner and Lee moved to dismiss Davis and Flanagan's appeal for failure to timely file a brief. Davis and Flanagan, the appellants and parties that assign error to the trial court below, failed to file their brief until after receiving Heavner and Lee's motion to dismiss. Davis and Flanagan filed their brief on 25 September 2003, *twenty-three days after* the required date, and one week after Heavner and Lee filed their motion to dismiss.

In response, Davis and Flanagan argue their failure to timely file was a result of "administrative oversight." Even accepting this contention, Davis and Flanagan's brief violates other appellate rules.

2. Rule 28

Rule 28 of the appellate rules requires that an appellate brief contain a "non-argumentative summary of all material facts . . . supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits . . . ." N.C.R. App. P. 28(b)(5) (2004). The argument section must "reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." N.C.R. App. P. 28(b)(6) (2004). Further, "evidence . . . material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript . . . ." *Id.* "[The North Carolina Supreme Court] has noted that when the appellant's brief does not comply with the rules by properly setting forth exceptions and assignments of error with reference to the transcript and authorities relied on under each assignment, it is difficult if not impossible to properly determine the appeal." *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299 (citing *State v. Newton*, 207 N.C. 323, 329, 177 S.E. 184, 187 (1934)).

Here, Davis and Flanagan's brief fails to make any reference to the record, the 189 pages of testimony, or any of the sixteen exhibits, which include several documents totaling over 100 pages. Neither their statement of facts nor portions of their argument refer to this

material. Additionally, Davis and Flanagan failed to indicate the assignment of error relevant to each argument, and failed to identify any assignment of error by its number or the page where it appears in the record. Without reference to the assignment of error or the relevant portions of the record, transcript, or exhibits, "it is difficult if not impossible to properly determine the appeal." *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299.

Considering the numerous appellate rule violations in Davis and Flanagan's brief, in addition to the fact Heavner and Lee moved to dismiss, Davis and Flanagan's assertion of "administrative oversight" does not excuse egregious rule violations.

B. Rule 2

On occasion, our Court has agreed to reach the merits of an appeal, despite violations of the appellate rules, by exercising its discretion under N.C.R. App. P. 2. Rule 2 allows an appellate court to "suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . ." N.C.R. App. P. 2 (2004). "Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and *only in such instances*." *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300 (emphasis supplied). In *Sessoms v. Sessoms*, this Court examined the record and briefs, concluded the plaintiff's appeal lacked merit, and dismissed the appeal. 76 N.C. App. 338, 340, 332 S.E.2d 511, 513 (1985). We specifically held, "there is no basis under Appellate Rule 2 upon which we should waive plaintiff's violations of Appellate Rules . . . ." *Id.*

There are no exceptional circumstances, significant issues, or manifest injustices that would be corrected by our review of the merits of this appeal. We are not persuaded to waive Davis and Flanagan's numerous violations of the appellate rules and decline to apply Rule 2.

IV. Conclusion

"The appellate rules are promulgated by our Supreme Court pursuant to the rule-making authority conferred by Article IV, § 13(2) of the Constitution of North Carolina." *Shook v. County of Buncombe*, 125 N.C. App. 284, 286, 480 S.E.2d 706, 707 (1997). *Several* of the appellate rules grant the appellate courts the authority to dismiss an appeal for failure to comply with the requirements set forth therein.

See N.C.R. App. P. 13(c) (2004); N.C.R. App. P. 14(d)(2) (2004) ("If an appellant fails to file and serve his brief within the time allowed, the appeal [to the Supreme Court] may be dismissed on motion of any appellee . . . ."); N.C.R. App. P. 25(a) (2004) ("If after giving notice of appeal . . . the appellant shall fail within the times allowed by these rules or by order of court to take any action . . . the appeal may on motion of any other party be dismissed.); N.C.R. App. P. 28(a) (2004). The Supreme Court recognizes this authority and has affirmed our dismissals for appellate rule violations. *See Steingress*, 350 N.C. at 64, 511 S.E.2d at 298; *see also Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979); *Walter Corporation v. Gilliam*, 260 N.C. 211, 213, 132 S.E.2d 313, 315 (1963); *Woodburn v. N.C. State Univ.*, 156 N.C. App. 549, 551, 577 S.E.2d 154, 156, *disc. rev. denied*, 357 N.C. 470, 584 S.E.2d 296 (2003) (granting motion to strike documents that were included in the record in violation of the appellate rules).

" 'Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process.' " *Craver*, 298 N.C. at 236, 258 S.E.2d at 361 (quoting *Ledwell v. County of Randolph*, 31 N.C. App. 522, 523, 229 S.E.2d 836, 837 (1976)). We grant Heavner and Lee's motion to dismiss and deny Davis and Flanagan's motion for an order that their brief be deemed timely filed.

Dismissed.

Judges HUNTER and BRYANT concur.

KAY SCHOTT TREVILLIAN, PLAINTIFF v. MARK A. TREVILLIAN, DEFENDANT

No. COA03-802

(Filed 4 May 2004)

Child Support, Custody, and Visitation— support—modification—reduction in income

The trial court did not abuse its discretion by denying defendant's motion for child support modification in a case in which the child support guidelines did not apply. The court considered defendant's significant reduction in income and its impact upon his ability to support his children and himself.

Appeal by defendant from order entered 20 February 2003 by Judge Victoria Roemer, District Court, Forsyth County. Heard in the Court of Appeals 30 March 2004.

Metcalf & Beal, L.L.P., by Christopher L. Beal, for plaintiff.

C.R. "Skip" Long, Jr., for defendant.

WYNN, Judge.

Defendant Mark A. Trevillian contends the trial court erroneously denied his motion for a reduction in child support and considered improper criteria for modification of child support. We disagree and affirm the order below.

Plaintiff Kay Schott Trevillian and Defendant are formerly husband and wife with one child born during their marriage. By order dated 25 April 2001, the trial court granted Plaintiff primary custody of their child. Based upon Defendant's income, of approximately $300,000 per year for 1999 and 2000, the trial court ordered Defendant to pay $2,500 per month in child support. Defendant's income increased to $360,000 in 2001, but Plaintiff did not seek an increase in child support. However, following a reduction in Defendant's income in 2002 to $227,400 gross with a net income of $151,400 after taxes, Defendant moved for a reduction in child support. In denying Defendant's motion for a reduction in child support, the trial court found that "even after paying family related expenses and support obligations, the Defendant was left with a net of over $5,000 per month for his own personal expenses." Therefore, the trial court concluded "Defendant's drop in income did not constitute a substantial and material change in circumstances." Defendant appeals.

Defendant contends the trial court abused its discretion in denying his motion for a reduction in child support because a 25% involuntary reduction in income constitutes a substantial change in circumstances warranting child support modification.

"The burden of demonstrating changed circumstances rests upon the moving party. Once the threshold issue of substantial change in circumstances has been shown by a preponderance of the evidence, the trial court then proceeds to follow the [North Carolina Child Support] Guidelines and to compute the appropriate amount of child support. The Guidelines apply to modification of child support orders as well as to initial orders. Thus modification of a child support order

involves a two-step process. The court must first determine a substantial change of circumstances has taken place; only then does it proceed to apply the Guidelines to calculate the applicable amount of support." *McGee v. McGee*, 118 N.C. App. 19, 26-27, 453 S.E.2d 531, 535-36 (1995).

In North Carolina,

> [t]he Guidelines apply in cases in which the parents' combined adjusted gross income is equal to or less than $15,000 per month ($180,000 per year). For cases with higher combined adjusted gross income, child support should be determined on a case-by-case basis, provided that the amount of support awarded may not be lower than the maximum basic child support obligation shown in the Schedule of Basic Child Support Obligations.

Child Support Guidelines, "Determination of Support in Cases Involving High Combined Income," Annotated Rules of North Carolina (2002). To determine a party's monthly adjusted gross income, "the amount of child support payments actually made by a party under any pre-existing court order(s) or separation agreement(s) should be deducted from the party's gross income." *See* Child Support Guidelines, "Pre-existing Child Support Obligations and Responsibility for Other Children," Annotated Rules of North Carolina (2002).

At the time of the child support modification hearing, Defendant's monthly gross income was $18,950.00. Defendant had a pre-existing support order of $2,500 and paid $1,269.00 in child support for a child from a previous marriage. After deducting Defendant's pre-existing obligation and responsibility for other children from his monthly gross income [$18,950.00-($2500.00 + 1269.00)], his monthly adjusted gross income was $15,181.00. At this amount, the child support guidelines are inapplicable and child support is to be determined by the trial court on a case-by-case basis. *See* Child Support Guidelines, Annotated Rules of North Carolina (2002). Thus, assuming this reduction constituted a substantial change in circumstances, the trial court would have determined child support by assessing the particular facts of this case. *See* Child Support Guidelines, "Determination of Support in Cases Involving High Combined Income," Annotated Rules of North Carolina (2002).

The record indicates the trial court acknowledged Defendant's income had dropped significantly in 2002. The trial court then con-

sidered Defendant's family related expenses and support obligations and determined Defendant was left with a net of over $5,000 per month for his own personal expenses. Thus, the trial court determined a reduction in child support was unwarranted.

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003). Under N.C. Gen. Stat. § 50-13.4(c), "payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." As it appears the trial court considered Defendant's significant reduction in income and its impact upon his ability to support his children and himself, we conclude the trial court did not abuse its discretion in denying Defendant's motion for child support modification.

Affirmed.

Judges HUNTER and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ABERNETHY v. HOLLAR No. 03-770	Caldwell (01CVS376)	Affirmed
ANDERSON v. N.C. DEP'T OF TRANSP. No. 03-415	Ind. Comm. (I.C. 014208) (I.C. 977407) (I.C. 983955)	Affirmed
ANSON CTY. CHILD SUPPORT EX REL. McLAIN v. HOWELL No. 03-678	Anson (99CVD449)	Dismissed
DILLINGHAM CONSTR. CO. v. GARRETT No. 03-722	Buncombe (00CVS6055)	No error
ELLIS v. RELIASTAR LIFE INS. CO. No. 03-535	Haywood (01CVD1152)	Affirmed
FRANKLIN v. OUTEN No. 03-546	Mecklenburg (01CVS4420)	Affirmed
GOLDS v. GOLDS No. 03-472	Wilkes (97CVD1946)	Affirmed
IN RE D.D.T.G. No. 03-778	Johnston (01J50)	Affirmed
IN RE D.S. & D.M.S. No. 03-572	Mecklenburg (02J295) (02J296)	Affirmed
IN RE J.O. & J.O. No. 03-302	Cumberland (01J82) (01J83)	Affirmed
IN RE J.R.A. No. 03-521	Rutherford (01J43)	Affirmed
IN RE J.R.T. No. 03-963	Davie (01J78)	Affirmed
IN RE T.B. & T.B. No. 03-1281	Cabarrus (01J34) (01J35)	Affirmed
IN RE V.A.M. No. 03-925	Mecklenburg (02J744)	Affirmed; remanded for correction of clerical error
J.R. TOBACCO OF AM., INC. v. BURLINGTON OUTLET MALL JOINT VENTURE, LLP No. 03-1002	Almance (01CVS169)	Affirmed

JOHNSON v. BREWINGTON No. 03-505	Cumberland (00CVD2426)	Affirmed in part, reversed in part, and remanded
JONES-BAILEY v. CARLISLE PLASTICS, INC. No. 03-618	Ind. Comm. (I.C. 972092)	Affirmed
NORMAN v. R.J. REYNOLDS TOBACCO CO. No. 03-672	Ind. Comm. (I.C. 811206) (I.C. 914965) (I.C. 849719)	Affirmed in part, reversed and remanded in part
STATE v. ABRAMS No. 03-522	Rutherford (01CRS7303) 01CRS51669) (01CRS51670)	No error
STATE v. BELL No. 03-701	Wake (02CRS48977) (02CRS48978) (02CRS60456)	No error in the trial. Remanded to the trial court for the following correction to the written judgment and commitment entered 9 January 2003: The lead file number should reflect the file number of one of the two predicate offenses instead of the habitual felon indictment file number 02CRS060456
STATE v. BELL No. 03-708	Gaston (02CRS59086) (02CRS59087) (02CRS59088) (02CRS59089) (02CRS59090) (02CRS59091) (02CRS59092) (02CRS59093) (02CRS59094)	No error
STATE v. BETANCOURT No. 03-576	Wayne (98CRS9076) (98CRS9077) (98CRS9078)	No error
STATE v. BROWN No. 03-621	Forsyth (02CRS50543)	No error

STATE v. BROWN No. 03-1105	Guilford (01CRS106755) (01CRS106756) (02CRS73035)	Affirmed
STATE v. COOK No. 03-1142	Mecklenburg (01CRS158340)	No error
STATE v. EVANS No. 03-777	Forsyth (01CRS15461) (01CRS28291) (01CRS52836) (01CRS55948) (01CRS55988)	Dismissed
STATE v. FARRIS No. 03-844	Durham (02CRS14593) (02CRS50182)	No error
STATE v. FIELDS No. 03-929	Lenoir (01CRS55454)	No error
STATE v. GLENN No. 03-1237	Cumberland (02CRS63658)	No error
STATE v. GRAHAM No. 03-822	Mecklenburg (01CRS25058) (01CRS25059) (01CRS25060) (01CRS25061)	No error
STATE v. GRIFFITH No. 03-739	Gaston (01CRS7137) (01CRS7672) (01CRS7674) (01CRS7675) (01CRS7685) (01CRS7686) (01CRS7689) (01CRS7690) (01CRS7697) (01CRS7698) (01CRS7699) (01CRS7700) (01CRS7705) (01CRS7706) (01CRS7607) (01CRS7669)	No error
STATE v. HAWK No. 03-937	Craven (02CRS51051) (02CRS51052)	Affirmed

STATE v. HELTON No. 03-903	Rutherford (98CRS1919)	Vacated and remanded
STATE v. JACKSON No. 03-543	Guilford (01CRS91730)	No error in part; dismissed without prejudice in part
STATE v. JACKSON No. 03-1099	Wake (02CRS33009) (02CRS33010) (02CRS33012) (02CRS33013) (02CRS33014)	No error
STATE v. JENKINS No. 03-801	Graham (02CRS50034)	No error
STATE v. JOHNSON No. 03-832	Durham (92CRS21970)	No error
STATE v. JOHNSON No. 03-1036	Guilford (02CRS95786)	No error
STATE v. JONES No. 03-893	Forsyth (00CRS58997)	No error
STATE v. LANGLEY No. 03-694	Wayne (01CRS59436) (01CRS59437) (02CRS3032)	Judgments arrested and remanded for resentencing
STATE v. LEE No. 03-711	Gaston (01CRS66881)	No error
STATE v. McKINNEY No. 03-371	Rockingham (00CRS8420)	No error in part; dismissed in part
STATE v. McLEAN No. 03-1192	Robeson (00CRS7976)	No error
STATE v. NYE No. 03-35	Columbus (01CRS51935) (01CRS51937) (01CRS51938)	No error
STATE v. OLIVER No. 03-1100	Forsyth (98CRS8299) (98CRS8301) (98CRS46860)	Affirmed
STATE v. ROSSI No. 03-637	Guilford (01CRS4487)	Affirmed in part; reversed and remanded in part

STATE v. SMITH No. 03-428	Brunswick (01CRS56212) (01CRS56213) (01CRS56214) (01CRS56215)	No error
STATE v. SPRINGS No. 03-854	Forsyth (02CRS21524)	No error
STATE v. STEPP No. 03-967	Henderson (02CRS4010)	No error
STATE v. STEVENSON No. 03-927	Guilford (00CRS102709)	Affirmed
STATE v. TABOR No. 03-752	Franklin (01CRS51729) (01CRS51730) (02CRS46) (02CRS47) (02CRS48) (02CRS49) (02CRS50) (02CRS51) (02CRS52) (02CRS53) (02CRS54) (02CRS55) (02CRS56) (02CRS57)	No error
STATE v. TALBERT No. 03-633	Forsyth (02CRS60408)	No error
STATE v. TANNER No. 03-1119	Guilford (01CRS6996) (01CRS6997) (01CRS6998) (01CRS84863) (01CRS84864) (01CRS84865) (01CRS84866) (01CRS84867) (01CRS84868) (01CRS84869) (01CRS84870)	No error
STATE v. TOOMER No. 03-945	Durham (02CRS14028) (02CRS18952) (02CRS50758) (02CRS52499) (02CRS52500)	Remanded for resentencing

STATE v. TUCKER No. 03-684	Forsyth (01CRS61202)	No error
STATE v. WALKER No. 03-301	Forsyth (99CRS46399) (01CRS32253)	No error
STATE v. WEBB No. 03-971	Greene (02CRS50293) (02CRS50326)	No error
STATE v. WHITAKER No. 03-796	Beaufort (01CRS52600) (02CRS112)	No error
STATE v. WILLIAMS No. 03-473	Guilford (01CRS106745)	No error
STATE v. WILSON No. 03-1050	Guilford (00CRS109892)	No error
STATE v. WOODRUFF No. 03-451	Rowan (98CRS11899) (00CRS15032)	Affirmed
WRIGHT v. KRAUS No. 03-926	Mecklenburg (01CVS14428)	Affirmed

VALERIE THOMPSON ENOCH, PETITIONER v. ALAMANCE COUNTY DEP'T OF SOCIAL SERVICES, RESPONDENT

No. COA03-385

(Filed 18 May 2004)

1. Public Officers and Employees— county DDS—employment discrimination—nondiscriminatory reasons

The trial court did not err in an employment discrimination case by finding that respondent county department of social services articulated sufficient nondiscriminatory reasons to rebut the presumption of racial discrimination in its failure to promote petitioner to the position of program manager, because: (1) the evidence revealed that petitioner lacked the qualities specifically sought for the position as a program manager, a shortcoming not necessarily overcome by experience or education; and (2) petitioner cites no North Carolina case law to require any documentary evidence to rebut the prima facie presumption.

2. Public Officers and Employees— county DSS—employment discrimination—allegations of acting under pretext

The trial court did not err in an employment discrimination case by sustaining the administrative law judge's (ALJ) finding that the county department of social services (DSS) was not acting under any pretext in promoting a white male candidate instead of petitioner, an African-American female, to the position of program manager in 2001 even though the ALJ failed to consider any evidence surrounding the 1999 promotion of a white female candidate instead of petitioner, because: (1) petitioner offered no evidence linking the alleged prejudice of the prior director who did the hiring in 1999 to the prejudice of the present director; (2) the evidence surrounding the 1999 passing over of petitioner lacked sufficient probative value for inferring pretext in the present director's nondiscriminatory reasons for hiring the white male candidate; (3) the present director was not employed by the pertinent DSS at the time of the prior director's 1999 decision to promote another candidate, and the prior director was not employed by DSS at the time of the present director's decision; (4) the present director had supervised petitioner for the years of 1996-98, at no time did petitioner allege that the present director was discriminatory in her evaluations, and these evaluations were used by the present director in her 2001 hiring decision; and

(5) while experience is a factor in any promotional decision by an employer, experience initially serves as an objective criteria for minimum qualification used to limit the field of applicants and an employer is relatively free to value experience among the applicants as it sees fit in light of the skills required by the position to be filled.

3. Public Officers and Employees— county DSS—employment discrimination—administrative appeal scheme—due process

The administrative appeal scheme which routed the recommended decision of the Administrative Law Judge (ALJ) and the State Personnel Commission (SPC) finding no racial discrimination in an employment decision back to the Local Appointing Authority (LAA) for the final decision did not violate the employee's due process rights because, under N.C.G.S. §§ 126-37(b1) and 150B-36, the LAA will not have an opportunity to reverse a finding of discrimination by the SPC; the LAA must affirm an SPC finding that there was no discrimination unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the ALJ to evaluate the credibility of the witnesses; in her final agency decision, the LAA adopted the detailed findings of fact of the ALJ, as adopted without exception by the SPC, pursuant to the deferential standard after the ALJ had determined the credibility of her testimony; and the LAA's additional administrative review outweighed any potential risk of bias.

4. Public Officers and Employees— county department of social services—employment discrimination—rational basis

The trial court did not err by adopting without exception the administrative law judge's (ALJ) opinion finding that petitioner African-American female lacked sufficient evidence to prove employment discrimination in the decision by the director of a county department of social services to promote a white male in 2001 to the program management position instead of petitioner even though petitioner contends the ALJ's decision lacked substantial evidence or was arbitrary and capricious under the whole record test, because there was a rational basis in the record to affirm the decision.

Judge WYNN dissenting.

Appeal by petitioner from order entered 18 November 2002 by Judge James C. Spencer, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 2 December 2003.

McSurely & Osment, by Alan McSurely, for petitioner appellant.

Office of the County Attorney of Alamance County, by David I. Smith; and Adams, Kleemeier, Hagan, Hannah & Fouts, by Brian S. Clarke, for respondent appellee.

McCULLOUGH, Judge.

On 23 February 2001, petitioner appellant, Ms. Valerie Enoch (Ms. Enoch), filed a petition for a contested case hearing pursuant to N.C. Gen. Stat. § 126-34.1 (2003) with the Office of Administrative Hearings (OAH). Ms. Enoch's petition alleged that in February of 2001 respondent appellee, Alamance County Department of Social Services (DSS), failed to promote her to the position of "Social Work Program Manager" based on her race (African-American), her sex, and was the result of retaliation.

Ms. Enoch's contested case was heard before Administrative Law Judge Melissa Owens Lassiter (ALJ) on 14, 17, and 21 August 2001. The ALJ's recommended decision, based on 110 findings of fact and 86 conclusions of law, held that DSS's decision not to promote Ms. Enoch was made without discrimination. The State Personnel Commission (SPC) reviewed the ALJ's decision, and after rejecting exceptions made by petitioner, recommended the Local Appointing Authority (LAA) adopt the ALJ's findings of fact and conclusions of law in full. The LAA, Ms. Susan Osborne, Director of Alamance County DSS, followed the recommendation of the SPC. Upon judicial review, the adoption of the ALJ's findings of fact and conclusions of law by the SPC and LAA was sustained, bringing the issue now before this Court.

I. Background

This litigation is based upon the following facts of record: Ms. Enoch is an African-American woman. In both 1999 and 2001 she was denied promotion to program manager in DSS. For the 1999 position, a white female, Ms. Linda Allison, was hired but did not meet the minimum qualifications for the position. Mr. Edward R. Inman, DSS's director at the time, hired the under-qualified applicant despite being informed by Ms. Dianne Gallimore, DSS's fiscal and personnel director at the time, that Ms. Enoch was the only applicant that met the minimum qualifications for the position.

Ms. Enoch and her husband met with Mr. Inman to discuss his decision. At this meeting, neither Mr. Inman nor Ms. Gallimore disclosed to Ms. Enoch that she was the only qualified applicant for the position. Ms. Enoch alleged that race had something to do with the decision, to which Mr. Inman responded, "You people always tend to want to believe that there's some race involved, there was no—that there's discrimination involved. There was no race involved in this decision." Though Mr. Enoch pointed out the racist nature of this statement, Mr. Inman made another comment in the same vein before the meeting was ended. Mr. Inman later sent Ms. Enoch a letter, dated 21 June, 1999, explaining his decision in greater detail. Petitioner did not further appeal this hiring decision. At the end of 1999, Mr. Inman retired. Ms. Susan Osborne was hired to replace Mr. Inman as Director of DSS.

On or about 12 December 2000, DSS posted an in-house notice for a newly created program management position. Three DSS employees submitted applications for the position: Ms. Enoch, Mr. Phillip Laughlin, and Ms. Alexa Jordan. All three applicants met the minimum qualifications for the position. Ms. Osborne, who conducted the hiring process, considered a number of factors in making her selection: (a) structured interview; (b) previous evaluations; (c) input from her management team regarding interactions with the applicants; (d) input from the subordinates of each applicant; (e) the DISC profile of each applicant; (f) the experience and educational backgrounds of each applicant; and (g) consultation with DSS's human resources contact.

II. The Selection Process

A. Structured Interview

The structured interviews of the three applicants conducted by Ms. Osborne included ten questions based upon the requirements of the program management position. After the interviews, Ms. Osborne ranked each applicant, serving as the basis for her circling of "hire," "hire with reservation," or "would not hire" on her interview evaluation form. Ms. Osborne circled "would not hire" for Ms. Enoch, "hire with reservations" for Mr. Laughlin, and "hire" for Ms. Jordan.

B. Previous Evaluations

Ms. Osborne reviewed previous evaluations of Ms. Enoch in her position as Social Worker Supervisor III. These annual evaluations were all similar in form, with areas of performance rated as "exceeds

expectations," "meets expectations," or "partially meets expectations." Ms. Osborne herself supervised Ms. Enoch from 1996-1998. In the 1996 evaluation, Ms. Osborne gave Ms. Enoch only a "partially meets expectations" in the area of initiative. In the 1997 evaluation, Ms. Enoch was given "partially meets expectations" in categories of productivity and initiative. Additionally, in the managerial/supervisor supplement to the 1997 evaluation, Ms. Osborne stated, "Reorganization is complete and Valerie [Ms. Enoch] now needs to take more of a leadership role in terms of outcomes, case plans and case resolution . . . . Valerie needs to take more initiative with her staff in leading them towards case resolution." In her last evaluation by Ms. Osborne, Ms. Enoch was again given a "partially meets expectations" in the area of initiative, stating this area "continues to need improvement." Again, in the managerial/supervisor supplement to the 1998 evaluation, Ms. Enoch was given a "partially meets expectations" in the area of supervision direction. Ms. Osborne stated, "more of a leadership role in terms of outcomes, case plans and case resolutions is needed of a supervisor at this level."

The evaluations of Ms. Enoch for 1999, 2000, and 2001 were not conducted by Ms. Osborne, but by Mr. Inman and Ms. Allison. Their evaluations rated her as "meeting" or "exceeding" expectations in all areas. Ms. Osborne testified before the ALJ that Mr. Laughlin's prior evaluations had less "partially meets expectations" than the ratings for either Ms. Enoch or Ms. Jordan. Ms. Enoch put on no evidence to dispute this.

Using DSS's new county-wide evaluation form, on 24 October 2000 Ms. Enoch received an overall rating percentage of 68.75%, meaning she out-performed that percent of Alamance County employees. Mr. Laughlin received a rating of 57.60%.

C. Input from Management

Also used as criteria in the selection process was input Ms. Osborne gathered from her management team. The team was composed of Ms. Osborne, Ms. Gallimore, Marianne Putnam, Caroline Davis, Rebecca Grindstaff, and Betty Joyce. These women all had individual working relationships with the applicants.

In Ms. Davis's testimony before the ALJ, she stated that in her working relationship with Ms. Enoch, she would need to coordinate with Ms. Enoch or her team about every six weeks. Ms. Davis testified that there was difficulty in getting required information from Ms. Enoch or her team:

> [M]y staff would come to me and say, "I can't get the information. I can't get the worker to call me back. I've called Ms. Enoch. She hasn't returned my call." And then at that point, I would become involved trying to contact Ms. Enoch and—and say, you know, "we need this information so that we can work this case."

She testified further, referring to Mr. Laughlin and Ms. Jordan, "Generally, the other two would have—would provide me with what I needed."

On cross-examination, Program Manager Ms. Allison (who took the position in 1999 for which Ms. Enoch also applied) testified from her memory as to what her concerns were about Ms. Enoch for the position:

> I had concerns that perhaps she did not get outside of the office enough, outside of her own team enough, outside of Children's Services enough and had concerns about her overall ability perhaps to see the big picture of the Agency, knowing that we were working on some collaborative initiatives that required all the units to mesh and to interact and that type thing.

Ms. Allison's positive input pertaining to Mr. Laughlin was as follows:

> I felt that Mr. Laughlin was very strong in the Agency, in his relations with people from all different departments. He had a strength for being able to get to know folks and work with other people in a collaborative way. He also had strengths outside of the Agency, and was just very personable.

D. Input from Subordinates

Also used as criteria in the selection process was input Ms. Osborne received from the applicants' subordinates. Adrian Daye, an African-American woman and a social worker who had been supervised by both Ms. Jordan and Ms. Enoch, testified before the ALJ. Ms. Enoch supervised Ms. Daye during two different times, at first for nine months, and again for approximately a year. When asked about Ms. Enoch's drawbacks, she opined:

> I stated that—and—and I don't know if—I guess it depends on who's looking if there are drawbacks. I stated that the second time I had her, that my supervision was kind of me going to her when I needed her. It was me—if I had a question, you know, I went to her.

> I talked about how if you—I guess if you look at Ms. Jordan, who was out there in the community, she—you know, she was on different committees and righting [sic] grants. You know, those—those were things that Ms.—I didn't see Ms. Enoch doing as well.

F. DISC Profile

Ms. Osborne considered the DISC profile of each of the three applicants. The DISC stands for Dominance Influence Steadiness Conscientiousness, and it describes behavioral patterns in terms of these four tendencies when implicated in work-related scenarios. Ms. Osborne had the three applicants fill out a 32 factor "Role Behavior Analysis" which highlighted the duties, characteristics, and strengths needed in the program management position. Eight to ten of these 32 areas were considered "critical." In the critical areas, Ms. Jordan scored the highest, Mr. Laughlin second, and Ms. Enoch third. Ms. Osborne discussed the results of these profiles with each applicant, and Ms. Enoch informally agreed that the DISC profile accurately summarized her style and tendencies.

Additionally, using similar information, Ms. Osborne and Ms. Allison, also taking the DISC profile, considered the DISC analysis of each applicant to show which would be the best fit with their DISC profiles. This was called the "Personal Profile System Graph," or "fit analysis." Based on the fit analysis of the three applicants, Mr. Laughlin was the closest fit, followed by Ms. Jordan, and then Ms. Enoch.

G. Experience and Educational Background

In her consideration of the experience and education of each applicant, Ms. Osborne estimated in her testimony that this constituted approximately 15% of the basis of her overall hiring decision. There is no clear estimate as to the distribution of the other 85% as to forming the basis of her hiring decision.

To Ms. Osborne's understanding, at the time her hiring decision was made, each applicant had the following educational background: Ms. Enoch held a Bachelor of Arts degree in psychology from Duke University; Mr. Laughlin held a Masters of Arts degree in counseling from North Carolina Central; and Ms. Jordan held an undergraduate degree in education, a Masters degree, and a Juris Doctorate (J.D.) degree. Ms. Enoch and Mr. Laughlin had the following experience: Ms. Enoch had been employed by DSS for approximately 20 years, holding a supervisory position for approximately 7-1/2 years; Mr.

Laughlin had been employed by DSS for 8 years, holding a supervisory position for approximately 2 years and 9 months.

H. Human Resources

Before making her final decision, Ms. Osborne consulted DSS's Human Resources contact, Ms. Joanne Garner. Ms. Osborne told Ms. Garner of the selection process she had followed, some of the information she gathered about the applicants, and that she was leaning towards Mr. Laughlin. Ms. Garner advised Ms. Osborne that she concurred with Ms. Osborne's selection process, and her proposed selection.

III. The Selection

After the selection process had been concluded, but before her decision was made, Ms. Osborne listed several qualities that she wanted in a program manager. These included: an applicant should be someone with vision and people skills who could take ideas and delegate in carrying them through; who would establish public relations within the agency and the community; who would be a team builder; who would see the big picture and be open-minded to change; have good communication skills, be a good "fit" with management, and be able to follow through.

She then compared the strengths and weaknesses of each candidate. For the strengths of Ms. Enoch, Ms. Osborne listed: "longevity" and "program knowledge"; for her weaknesses, Ms. Osborne listed: "little initiative," "motivation," "no vision," "reactionary," "lack of community work," "doesn't respond well to calls," and "confrontational." For the strengths of Mr. Laughlin, Ms. Osborne listed: "relationships in agency good," "visionary," "likes change," "shows improvement when constructive [sic] criticism," "invites feedback," "communication skills," "talks the talk/right philosophy," "support from management," and "fit analysis choice"; for his weakness, Ms. Osborne listed: "perception poor in CS," "low self-confidence," "less experience than other applicants," and "can seem defensive." This list was further fleshed out in her testimony before the ALJ.

Ms. Osborne chose Mr. Laughlin on the alleged basis that he possessed the desired attributes, characteristics, and demonstrated the skills needed for the position. Ms. Garner concurred with Ms. Osborne's choice. Upon the selection of Mr. Laughlin, Ms. Enoch believed her race was the reason for being passed over again for the program management position. However, Ms. Enoch admitted in her

testimony before the ALJ that she told Ms. Osborne that had Ms. Jordan been selected, a white female, no grievance would have been filed. Ms. Enoch believed Ms. Jordan to have more "comparable skills" to herself than Mr. Laughlin.

IV. Issues on Appeal and Applicable Law

A. Standard of Review

Pursuant to those errors addressed in Ms. Enoch's brief, we review the ALJ's opinion, as adopted without alteration by the SPC, LAA, and trial court, for errors of law, violations of constitutional provisions, and whether the decision was arbitrary and capricious or an abuse of discretion; all other errors we deem abandoned. N.C. Gen. Stat. § 150B-51 (2003); *Shackleford-Moten v. Lenior Cty. DSS*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002), *disc. review denied*, 357 N.C. 252, 582 S.E.2d 609 (2003); N.C.R. App. P. 10(a); N.C.R. App. P. 28(a). As for alleged errors of law and constitutional implications, we review Ms. Enoch's contentions *de novo*. *N.C. Dep't of Health and Human Servs. v. Maxwell*, 156 N.C. App. 260, 264, 576 S.E.2d 688, 691 (2003). As for the alleged arbitrary and capricious or abuse of discretion nature of the ALJ's findings of fact and conclusions of law, we apply the "whole record" test. *Powell v. N.C. Dept. of Transportation*, 347 N.C. 614, 623, 499 S.E.2d 180, 185 (1998).

B. Errors of Law

Ms. Enoch alleges the ALJ's application of North Carolina race discrimination law was in error pursuant to N.C. Gen. Stat. §§ 126-16 and 126-36 (2003) and *Dept. of Correction v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983). Specifically, Ms. Enoch contends that after she made her *prima facie* case for discrimination under *Gibson* (discussed infra) creating a presumption of discrimination, the ALJ erroneously decided DSS met its burden to rebut and dispel the presumption. We disagree, and conclude that DSS carried its burden.

1. The Law

Under N.C. Gen. Stat. §§ 126-16 and 126-36 (2003), it is unlawful for an employer to deny an employee subject to the State Personnel Act promotion based on the employee's race or gender. Our Supreme Court has adopted the United States Supreme Court's "burden shifting" scheme set out in the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973). *Gibson*, 308 N.C. at 141, 301 S.E.2d at 85 (stating the ultimate purpose of N.C. Gen. Stat. § 126-36 and Title

VII (42 U.S.C. 2000(e), *et seq.*) is the same). Pursuant thereto, "we look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *Gibson*, 308 N.C. at 136, 301 S.E.2d at 82. Furthermore, the Court in *Gibson* stated that in properly applying the burden-shifting scheme the " 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains *at all times* with the plaintiff.' " *Id.* at 138, 301 S.E.2d at 83 (1983) (emphasis added) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 215 (1981)).

The burden to establish a *prima facie* case under *McDonnell Douglas* and *Gibson* is not an onerous one, but is as follows: (1) plaintiff is a member of a minority group; (2) she was qualified for a promotion; (3) she was passed over for the promotion; and (4) the person receiving the promotion was not a member of a protected class. *Gibson*, 308 N.C. at 137, 301 S.E.2d at 82-83; *Alvarado v. Board of Trustees*, 928 F.2d 118, 121 (4th Cir. 1991); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142, 147 L. Ed. 2d 105, 116 (2000). After a *prima facie* case is made, a presumption arises that the State unlawfully discriminated against the plaintiff. *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83. To dispel this presumption, the State then has the burden of production, stated in *Gibson* as:

> [T]o rebut the presumption of discrimination, the employer must clearly explain by admissible evidence, the nondiscriminatory reasons for the employee's rejection or discharge. The explanation must be legally sufficient to support a judgment for the employer.

Id. at 139, 301 S.E.2d at 84. If the State is able to produce such nondiscriminatory reasons, the plaintiff must then show by a preponderance of the evidence that the proffered explanation by the State is pretextual in nature, and that the employer intentionally discriminated. *Id.* at 138, 301 S.E.2d at 83. The plaintiff can reuse evidence from their *prima facie* showing to assist in carrying their burden as to pretext though the *prima facie* presumption has been dispelled. However, the Court is "not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for discrimination." *Id.* at 140, 301 S.E.2d at 84. The sole question is what is the motivation behind the employer's decision. *Id.* at 141, 301 S.E.2d at 85. In other words, " '[i]t is not enough . . . to *dis*believe the employer; the factfinder must

believe the plaintiff's explanation of intentional discrimination.' " *Reeves*, 530 U.S. at 147, 147 L. Ed. 2d at 119 (emphasis in original) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519, 125 L. Ed. 2d 407, 424 (1993)).

2. Applying the Law

a. Rebutting the Presumption of Discrimination

[1] Neither party in this case disputes that the *prima facie* case has been met, and therefore we begin our analysis with the presumption that DSS's choice of Mr. Laughlin over Ms. Enoch was discriminatory. To rebut this presumption, the ALJ cited the burden of production as: "[DSS] must explain its legitimate non-discriminatory reason(s) for its decision by admissible evidence sufficient to support a judgment for Respondent."

Ms. Enoch contends this citation of DSS's burden was in error, as the court left out the adverbs "clearly," modifying "explain," and "legally," modifying "sufficient," from the standard set out in *Gibson*. In light of other statements made by our Supreme Court in *Gibson*, we conclude the omission of these adverbs is immaterial. Specifically, that Court stated:

> [T]he employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons. The employer is not required to prove that its action was actually motivated by the proffered reasons for it is sufficient if the evidence raises a genuine issue of fact as to whether the claimant is a victim of intentional discrimination.

Gibson, 308 N.C. at 138, 301 S.E.2d at 83. *Gibson* clearly states that DSS need only raise a *genuine issue of fact* to rebut the presumption of discrimination, a burden of production sufficiently set forth in the standard used by the ALJ in this case. *See also Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 687, 504 S.E.2d 580, 584 (1998), *disc. review denied*, 350 N.C. 91, 527 S.E.2d 662 (1999); *Maxwell*, 156 N.C. App. at 263-64, 576 S.E.2d at 691.

Ms. Enoch next argues that DSS did not meet the standard set forth in *Gibson* to rebut the presumption of discrimination. Ms. Enoch states the testimonies of Ms. Osborne, Ms. Gallimore, Ms. Davis, and Ms. Daye were the only admissible evidence used to rebut the presumption of discrimination, and alleges they lacked credibility. Further, Ms. Enoch argues that there was no documentary evidence to verify the credentials of Mr. Laughlin.

In *Gibson*, an African-American man, holding the position of a Correctional Program Assistant I (CPA I), was fired after an inmate escaped from a youth center during his watch. During the 5 years preceding the incident, there had been 119 escapes from the youth center. In making his *prima facie* case, Gibson alleged other white employees had been just as negligent in their job performance as he had been, and that he was fired because of his race. The Department of Correction (DOC) met their burden to rebut the presumption of discrimination with the testimony of Superintendent F.B. Hubbar who provided the sole evidence that the nondiscriminatory reason for Gibson's termination was that Gibson's negligence was greater than his fellow white CPAs. *Id.* at 142, 301 S.E.2d at 85. The Court found this sufficient to raise a genuine issue of fact, and required Gibson to move forward with his burden of showing pretext by a preponderance of the evidence. *Id.*

Here, DSS articulated sufficient nondiscriminatory reasons to rebut the presumption of discrimination. Ms. Osborne, who made the ultimate hiring decision, gave thorough and detailed testimony as to why she choose Mr. Laughlin. Specifically, she listed the desirable qualities of a program manager to be that of a visionary who is progressive and flexible. There is sufficient evidence that Ms. Enoch had less of these attributes than the other applicants. Ms. Osborne testified as to the three annual evaluations in which Ms. Enoch was found to lack a desired level of initiative; Ms. Davis's testimony raises a genuine issue of fact as to Ms. Enoch's communication skills and ability to work effectively with various areas within the agency; and Ms. Daye's testimony raised a genuine issue of fact as to Ms. Enoch's ability to extend beyond the agency into the community. We think this is more than enough to rebut a presumption of discrimination as these testimonies allege facts that Ms. Enoch lacked the qualities specifically sought in a program manager, a shortcoming not necessarily overcome by experience or education. Furthermore, Ms. Enoch cites no North Carolina case law to require any "documentary evidence" to rebut the *prima facie* presumption. Our Supreme Court in *Gibson* found the oral testimony of the employer, who recommended Gibson's termination to be sufficient to dispel the presumption. Likewise, we find DSS produced evidence sufficient to do so in this case. *Gibson*, 308 N.C. at 142-43, 301 S.E.2d at 85-86.

b. Evidence of Pretext

[2] Ms. Enoch alleges the court erred in sustaining the ALJ's finding that DSS was not acting under any pretext in promoting Mr. Laughlin,

as the ALJ failed to consider evidence surrounding the 1999 promotion of Ms. Allison. We disagree.

When considering evidence of pretext, *Gibson* states:

> We believe it helpful to note some of the factors which courts have considered as relevant evidence of pretext. They are:
>
> (1) Evidence that white employees involved in acts against the employer of comparable seriousness were retained or rehired,
>
> (2) Evidence of the employer's treatment of the employee during his term of employment,
>
> (3) Evidence of the employer's response to the employee's legitimate civil rights activities, and
>
> (4) Evidence of the employer's general policy and practice with respect to minority employees.

Gibson, 308 N.C. at 139-40, 301 S.E.2d at 84; *see also McDonnell Douglas*, 411 U.S. 792, 36 L. Ed. 2d 668; *Abron v. N.C. Dept. of Correction*, 90 N.C. App. 229, 231, 368 S.E.2d 203, 205 (1988). Establishing the probative value of evidence is a determination best made by the administrative body. *Maxwell*, 156 N.C. App. at 263-64, 576 S.E.2d at 691; *see Johnson v. Runyon*, 928 F. Supp. 575 (D. Md. 1996), *aff'd*, 151 F.3d 1029 (4th Cir. Md. 1988). In *Johnson*, the District Court of Maryland found it was not significantly probative to infer discrimination in a decision made in 1990 from alleged discriminatory conduct by that same decision maker in 1994. *Id.* Similarly, in *Ambush v. Montgomery Cty. Government, etc.*, 620 F.2d 1048 (4th Cir. Md. 1980) the plaintiff in that case argued there was pretext by the employer due to an argument plaintiff had with a fellow white employee. The court found the argument inconclusive evidence of discrimination when it was conclusively established that the person against whom bias presumably was asserted, was not the person who made the selection of the unit to which the promotion was assigned or of the employee to be promoted in that unit. *Id.*

In conclusion of law no. 60, the ALJ stated that evidence of Mr. Inman's racial animus "may not be used to establish" pretext. While this conclusion of law is erroneous under *Gibson*, the record shows that it was not prejudicial in this case because the ALJ did in fact consider this evidence of treatment during Ms. Enoch's term of employment. *Gibson*, 308 N.C. at 139-40, 301 S.E.2d at 84. In her findings of

fact nos. 3-28, the ALJ considered Mr. Inman's decision to promote Ms. Allison to the management position in 1999 despite the fact that she did not meet the minimum qualifications for the position. Additionally, the ALJ considered the discussion as to why Ms. Enoch was passed over, and that Mr. Inman twice referred to Mr. and Ms. Enoch as "you people," referring to their race.

However, Ms. Enoch offered no evidence linking the alleged prejudice of Mr. Inman to the decision of Ms. Osborne. Thus, also in conclusion of law no. 60, the ALJ was correct in concluding that the evidence surrounding the 1999 passing over of Ms. Enoch lacked sufficient probative value for inferring pretext in Ms. Osborne's nondiscriminatory reasons for hiring Mr. Laughlin. Ms. Osborne was not employed by Alamance County DSS at the time of Mr. Inman's 1999 decision to promote Ms. Allison; Mr. Inman was not employed by DSS at the time of Ms. Osborne's decision to promote Mr. Laughlin. Furthermore, Ms. Osborne had supervised Ms. Enoch for the years of 1996-98. At no time did Ms. Enoch allege that Ms. Osborne was discriminatory in her evaluations, and these evaluations were used by Ms. Osborne in her 2001 hiring decision. Based upon the evidence before the ALJ, any inference of prejudice surrounding the 1999 promotion did not extend to Ms. Osborne's 2001 decision.

Also on the issue of pretext, Ms. Enoch next contends that her superior qualification over Mr. Laughlin was evidence of a discriminatory pretext. She argues that the ALJ misunderstood the principles of our holding in *N.C. Dept. of Correction v. Hodge*, 99 N.C. App. 602, 394 S.E.2d 285 (1990), and therefore was in legal error in failing to apply it. Ms. Enoch interprets *Hodge* in light of the State Personnel Rule that "selection for applicants for promotion will be based on a relative consideration of their qualifications" and "advantage will be given to applicants determined to be best qualified." 25 N.C. Admin. Code tit. 11.1905(a). She states in her brief that *Hodge* requires that where an agency uses subjective criteria, such as performance in an interview, the objective qualifications must carry more weight than these criteria. However, we find no such holding in our reading of *Hodge*.

In *Hodge*, the ALJ found, and the SPC sustained with additional conclusions, that the State had discriminated in promoting a white applicant over an African-American. Applying the deferential whole record test on the issue of whether Mr. Hodge was better qualified, we affirmed that the record supported the Commission's conclusion that he was more qualified. The Court in *Hodge* held that the sole selection

criteria used by DOC in that case was a subjective interview by a three-member hiring commission. Mr. Hodge had an overwhelmingly greater amount of experience, had scored higher on an eligibility examination, and was only a point behind the white applicant chosen on 14 of the 15 individual interview scores.

In the instant case, there was no single criteria used in Ms. Osborne's selection process, and she in fact used a number of different sources to generate information as to the skills and experience of each applicant. Of the evidence before the ALJ, the only areas in which Ms. Enoch clearly surpassed the other applicants were her work experience (20 years compared to Mr. Laughlin's 8), and the number of years as she had been a supervisor (7-1/2 years compared to Mr. Laughlin's 2 years and 9 months). However, in light of the diverse criteria and sources sought by Ms. Osborne in making her decision, these objective factors become less determinative. Ms. Enoch did not carry her burden in rebutting evidence as to the other areas used in making Ms. Osborne's determination. Therefore, *Hodge* is distinguishable on the issue of an applicant's objective qualifications.

To hold that *Hodge* compels this Court, as a matter of law, to find that Ms. Enoch's superior experience over the other applicants is determinative and absolute would have the effect of subverting otherwise genuine and thorough application processes seeking the best applicant for a particular position. Fairness to both applicants for promotion and employers requires more than a comparison of objective factors. *See Thompson v. McDonnell Douglas Corp.*, 416 F. Supp. 972, 982 (E.D. Mo. 1976). SPC regulations recognize that objective factors are only one source for filling positions with the best applicants:

> The training and experience requirements serve as indicators of the possession of the skills, knowledges, and abilities which have been shown through job evaluation to be important to successful performance, and as a guide to primary sources of recruitment. It is recognized that a specific quantity of formal education or numbers of years experience does not always guarantee possession of the necessary skills, knowledges, and abilities for every position. Qualifications necessary to perform successfully may be attained in a variety of combinations.

N.C. Admin. Code. § 1I.1905(b)(2) (2001). This subsection addresses the *minimum qualification* of applicants. While experience will of

course be a factor in any promotional decision by an employer, experience initially serves as an objective criteria for minimum qualification used to limit the field of applicants. Beyond this use, we conclude an employer is relatively free to value experience among the applicants as it sees fit in light of the skills required by the position to be filled. This freedom is of intrinsic value to the hiring process and business judgment of decision makers.

C. Violation of Due Process

[3] Ms. Enoch contends the administrative appeal scheme of Chapter 150B routing the recommended decision of the ALJ and SPC back to the LAA, Ms. Osborne, for the final decision, is unconstitutional. Specifically, Ms. Enoch claims her due process rights were violated because Ms. Osborne, the decision maker in hiring Mr. Laughlin, made the final administrative determination as to whether her own decision was discriminatory. We conclude that the facts presenting this issue before us do not implicate due process concerns, and we refrain from making any determination as to the overall constitutionality of the administrative appeals scheme.

Where an employer is a county department of social services, the "local appointing agency [LAA] is the director of the department." N.C. Gen. Stat. § 108A-9 (2003); *In Re Brunswick County*, 81 N.C. App. 391, 397, 344 S.E.2d 584, 586 (1986). N.C. Gen. Stat. § 126-37(b1) (2003) provides as follows:

> [E]xcept in appeals in which discrimination prohibited by Article 6 [of Chapter 126] *is found* . . . the decision of the State Personnel Commission shall be advisory to the local appointing authority. . . . The local appointing authority, *shall* within 90 days of receipt of the advisory decision of the State Personnel Commission, issue a written, final decision either accepting, rejecting, or modifying the decision of the State Personnel Commission. If the local appointing authority rejects or modifies the advisory decision, the local appointing authority must state the specific reasons why it did not adopt the advisory decision.

The substance of this is repeated in N.C. Gen. Stat. § 150B-23(a) (2003). Should the situation arise, there are no statutory alternatives when the LAA might desire to recuse herself or if she is disqualified from making the final decision. *See Hearne v. Sherman*, 350 N.C. 612, 620, 516 S.E.2d 864, 869 (1999) (Martin, J., dissenting), *reh'g denied*, 351 N.C. 122, 558 S.E.2d 196 (1999).

Ms. Enoch cites *Hearne* for guidance, though the opinion lacks any precedential value. In *Hearne*, a Court of Appeals unpublished opinion found no due process violation where a county health department director allegedly asked an employee to resign without proper cause. Upon review of the ALJ and SPC's findings that the director had in fact fired the employee without cause, the director (and LAA) chose not to adopt the SPC's recommended decision. He did so upon the determination that his own testimony was credible stating that the employee had resigned. We reversed the trial court's determination that the LAA's decision lacked substantial evidence of record, and reinstated the LAA's decision. In a three-to-three decision rendered by our Supreme Court (one justice not participating), our decision was affirmed without precedential value and with three justices finding due process violations in the administrative scheme. *Hearne*, 350 N.C. 612, 516 S.E.2d 864.

In the case of discrimination, the provisions of N.C. Gen. Stat. § 126-37(b1) and N.C. Gen. Stat. § 150B-36 provide that when the SPC makes a finding of discrimination, this is binding upon the LAA. At that point, the administrative process stops, and the case is then subject to judicial review. Therefore, the due process concerns raised in *Hearne* are not as strong in discrimination cases because the LAA will never have an opportunity to reverse a finding of discrimination by the SPC (i.e., an LAA can never find him or herself to be credible for the purpose of reversing a finding of discrimination). As in this case, the LAA still makes the final decision to affirm the SPC on a finding that there was no discrimination, but they are compelled to do so "unless the finding[s] are clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the [ALJ] to evaluate the credibility of witnesses." N.C. Gen. Stat. § 159B-36(b). If a discrimination case reaches the LAA, it will only be after the ALJ or SPC has determined the credibility of witnesses. The LAA will never be in a position to find him or herself credible for the purposes of *not* adopting an SPC decision finding discrimination.

In her final agency decision, Ms. Osborne adopted the very detailed findings of fact of the ALJ, as adopted by the SPC without exception. She did so under the deferential standard of N.C. Gen. Stat. § 150B-36(b), after the ALJ had determined the credibility of her testimony. The record supports the ALJ's findings, which were generated from a full hearing before an impartial tribunal after proper notice had been issued. While we acknowledge there is a potential risk of bias by Ms. Osborne in making the final agency decision as to

discrimination in her own decision, we hold that, for due process purposes in discrimination cases, this risk is outweighed by affording Ms. Enoch another tier of administrative review.

Our concern, however, as was Justice Martin's in his dissent in *Hearne*, is the lack of statutory alternatives when a party files an affidavit for personal bias pursuant to N.C. Gen. Stat. § 150B-36. Justice Martin stated, "I note, and the majority does not disagree, that the [APA] does not provide for an alternative or substitute arbiter in the event of [the LAA's] recusal. Therefore, any attempt by petitioner to request that [the LAA] recuse himself would have . . . been 'clearly useless[.]' " *Hearne*, 350 N.C. at 620, 516 S.E.2d at 869 (Martin, J., dissenting). Because there is no statutory alternative, the LAA must render the final agency decision as a matter of necessity despite potential bias. *Bacon v. Lee*, 353 N.C. 696, 717-18, 549 S.E.2d 840, 854-55 (Governor of North Carolina permitted to consider death row clemency petition despite his prior tenure as Attorney General), *cert. denied*, 533 U.S. 975, 150 L. Ed. 2d 804 (2001); *Long v. Watts*, 183 N.C. 99, 102, 110 S.E. 765, 767 (1922) (Court must hear case challenging application of statewide income tax to judicial salaries, despite the potential impact of decision on members of the Court).

Ms. Enoch filed such an affidavit of personal bias, and Ms. Osborne denied it in her final agency decision, stating "it to be obvious, apparent, and self-serving." This determination was in accord with N.C. Gen. Stat. § 150B(36), requiring "the agency . . . determine the matter as a part of the record in the case, and the determination is subject to judicial review." Regardless, Ms. Osborne had no alternative but herself, as the LAA, to review the SPC recommended decision. While we find this troublesome generally, we see no due process implication in cases of discrimination under N.C. Gen. Stat. § 150B-36 and N.C. Gen. Stat. § 126-37(b1), where the LAA will only be adopting the ALJ or SPC's findings as to their own credibility under a deferential standard, or choosing not to adopt the SPC upon a finding of discrimination. Furthermore, without a statutory alternative, necessity required Ms. Osborne to render a final agency decision. Therefore, we conclude Ms. Enoch's due process rights were not violated.

D. Arbitrary and Capricious Administrative Decision

[4] In her final argument, Ms. Enoch contends that ALJ's decision lacked substantial evidence or was arbitrary and capricious under the whole record test. We disagree.

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment.' " *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980) (quoting *Board of Education v. Phillips*, 264 Ala. 603, 89 So.2d 96 (1956)).

Upon our review of the ALJ's decision, constituting 110 detailed findings of fact and 86 well-cited conclusions of law, we conclude that the recommended decision, as adopted without exception by the SPC, LAA, and the trial court, to be supported by substantial competent evidence. We hold there is a rational basis in the record to affirm a finding that Ms. Enoch lacked sufficient evidence to prove discrimination in the decision by Ms. Osborne to promote Mr. Laughlin in 2001 to the program management position.

Based on a thorough review of the briefs, record, transcripts, and exhibits, we affirm the trial court's adoption without exception of the ALJ's opinion.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge WYNN dissents.

WYNN, Judge, dissenting.

A fair trial before an unbiased, impartial decision-maker is a basic requirement of due process. As was the case in *Hearne v. Sherman*, the instant case presents the due process problem of a final administrative determination in which the decision-maker ultimately adjudicated contested issues of fact regarding her own credibility and whether her own decision was discriminatory. As I did in *Hearne*, I continue to find that such a process flagrantly violates due process notions of fairness and impartiality, and on that basis I would reverse the decision of the trial court. Accordingly, I respectfully dissent.

Our Courts have long recognized the importance of a fair proceeding as a cornerstone of fundamental justice. *See In re*

Murchison, 349 U.S. 133, 136, 99 L. Ed. 942, 946 (1955) (noting that "[a] fair trial in a fair tribunal is a basic requirement of due process"); *Crump v. Bd. of Education*, 326 N.C. 603, 613, 392 S.E.2d 579, 584 (1990) (same). A vital component of a fair trial is the integrity of the procedure used to obtain a result. "Procedure must be consistent with the fundamental principles of liberty and justice." *State v. Hedgebeth*, 228 N.C. 259, 266, 45 S.E.2d 563, 568 (1947). A crucial component in insuring that a proceeding is just and in accordance with principles of fundamental fairness is the impartiality of the decision-maker. "An unbiased, impartial decision-maker is essential to due process." *Crump*, 326 N.C. at 615, 392 S.E.2d at 585.

There is an inevitable bias when a fact-finder is evaluating her own credibility.

> While the word "bias" has many connotations in general usage, the word has few specific denotations in legal terminology. Bias has been defined as "a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction," *Black's Law Dictionary* 147 (5th ed. 1979) . . . . Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination.

Id. (citations omitted). It is fundamental that no person may sit in judgment over his or her own case. "[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Murchison*, 349 U.S. at 136, 99 L. Ed. at 946.

In the present case, Petitioner filed a petition for a contested case hearing alleging that Osborne's decision not to promote her was based upon Petitioner's "race, her color, and her gender." Petitioner filed an affidavit of personal bias regarding Osborne, requesting that she be disqualified from the case. Petitioner also filed a motion to examine Osborne for personal bias before Osborne rendered the final agency decision. In her affidavit, Petitioner stated, *inter alia*, that Osborne had "always shown hostility toward" her, that she harbored racially discriminatory attitudes toward Petitioner, and that Osborne had given Petitioner lower evaluations because of her bias and because of media coverage of the case. In the final agency decision, Osborne rejected Petitioner's affidavit as "obvious, apparent, and self-serving" and adopted the ALJ's findings of fact and conclusions of

law determining that Petitioner failed to show that Osborne discriminated against Petitioner on the basis of race or gender or for retaliatory reasons. In doing so, Osborne was the ultimate fact-finder in a case in which her own credibility was a central issue. As such, the proceeding violated fundamental fairness and thereby North Carolina's Constitution.

This case is distinguishable from those cases where an administrative decision-maker is merely familiar with the facts of a matter. "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not . . . disqualify a decision-maker." *Hortonville Dist. v. Hortonville Ed. Asso.*, 426 U.S. 482, 493, 49 L. Ed. 2d 1, 9 (1976). Our Supreme Court has provided guidance on distinguishing between the permissible and impermissible:

> "It is perfectly clear that the exercise of its duties by an administrative body must necessarily proceed in a different fashion from the orthodox method of administering justice in courts. . . .
>
> Nevertheless, if the administration of public affairs by administrative tribunals is to find its place within the present framework of our government it is essential that it proceed, on what may be termed its judicial side, without too violent a departure from what many generations of English-speaking people have come to regard as essential to fair play. *One of these essentials is the resolution of contested questions by an impartial and disinterested tribunal.*"

Crump, 326 N.C. at 619, 392 S.E.2d at 587 (quoting *Berkshire Employees Ass'n, Etc. v. National Labor R. Bd.*, 121 F.2d 235, 238-39 (3d Cir. 1941)) (emphasis added).

Here, the ultimate decision-maker adopted findings of fact and conclusions of law regarding her own credibility and her own decision not to promote Petitioner. Such a process violates our established standards of fairness, impartiality and integrity. I would find Petitioner's due process rights to have been violated, and on that ground I would reverse the decision of the trial court. Accordingly, I dissent. As noted by the majority, the decision in *Hearne* stands without precedential value. Our Supreme Court is now afforded the opportunity to provide further guidance on this troubling issue.

STATE OF NORTH CAROLINA v. STEVEN KELLY BUSH

No. COA03-612

(Filed 18 May 2004)

1. Evidence— expert testimony—victim sexually abused by defendant—plain error

The trial court committed plain error in a first-degree sexual assault case by admitting the testimony of a pediatric gynecology expert that the victim was sexually abused by defendant even though the expert found no physical evidence of sexual abuse, because: (1) in a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has in fact occurred since, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility; (2) the victim was the only person to attest to the alleged sexual abuse by defendant and her credibility was questionable based on the facts that she delayed the report of the abuse for some time, the abuse was first alleged while in an argument with her mother, the mother was seeing defendant after a recent divorce with the victim's father, there was testimony from the mother that the victim wanted to break up the mother and defendant, and no other incidents had been alleged against defendant; and (3) the expert's testimony added tremendous credibility to the victim's alleged abuse by defendant, and the conclusive nature of the testimony as to the sexual abuse as well as naming defendant as the perpetrator was highly prejudicial.

2. Evidence— pornographic videotapes—sexual assault—relevancy

The trial court erred in a first-degree sexual assault case by allowing the State to introduce evidence over defendant's objection that defendant bought and owned pornographic videotapes, because: (1) there was no evidence that defendant provided pornographic videotapes to the victim or employed the tapes to seduce the victim; (2) the tapes impermissibly injected defendant's character into the case to raise the question of whether defendant acted in conformity therewith at the time in question; (3) the mere possession of pornographic materials does not meet the test of relevant evidence under N.C.G.S. § 8C-1, Rule 401; (4) evidence that one tape was brought into the home after the inci-

dent in question substantially weakens the potential use of the box of that tape under N.C.G.S. § 8C-1, Rule 404 for the theories of intent or absence of mistake at the time of the incident; and (5) assuming arguendo that the video box could be admitted under Rule 404(b), the video box had a clear prejudicial effect upon the divided jury in this case.

3. Criminal Law— instructions—affirmative defenses—sleep—unconsciousness—diminished capacity

The trial court in a first-degree sexual assault case should instruct the jury as to the unconsciousness/diminished capacity affirmative defense of sleep, along with any other defenses which have been sufficiently raised by the evidence presented at a new trial, because: (1) there is no direct evidence that defendant was awake at the time of the alleged touching; and (2) being asleep is an appropriate circumstance that requires an unconscious or diminished capacity instruction.

Judge LEVINSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 12 September 2002 by Judge Kimberly S. Taylor in Davie County Superior Court. Heard in the Court of Appeals 4 February 2004.

Attorney General Roy Cooper, by Assistant Attorney General Diane G. Miller, for the State.

Miles & Montgomery, by Mark Montgomery, for defendant appellant.

McCULLOUGH, Judge.

Defendant was convicted of first-degree sexual assault and sentenced to a minimum of 336 months and a maximum of 413 months. The evidence during the State's case tended to show the following: PB, a twelve-year-old girl, and her younger sister, a seven-year-old girl, were staying over at their mother's home. PB's mother, Rita, had visitation rights with the children every other weekend. PB's father and Rita had recently been divorced, with PB's father having primary custody.

After watching a scary movie one evening, PB and her sister went to sleep in the same bed with Rita and defendant. This was not unusual. When the girls first were in the bed, Rita was in between the two girls and defendant. During the night, the younger sister kept

kicking PB, and waking everyone up in the bed. At defendant's suggestion, PB moved to the other side of the bed, in between her mother and defendant.

Later during the night, defendant is alleged to have rubbed PB's genital area on the outside of her pajamas, after which he then inserted his finger into her vagina. Defendant continued to keep moving his finger inside her. After removing his finger, PB went to the bathroom. When her mother asked what was wrong, she replied that she was hot. Defendant got out of bed, went into the living room and had a cigarette. When he got out of bed, PB called to Rita, "He's following me." PB then got back in bed between her sister and defendant, but closer to her sister. The time period of the alleged incident, whether it was the school year or summer, was unclear in PB's memory.

After not telling anyone of the incident for sometime and expressing desire to discontinue the visitation pattern with her mother by skipping some visits, PB revealed what defendant had done. She did so during an argument she was having with Rita. Shocked by what her daughter told her, Rita then confronted defendant.

PB and Rita testified that defendant denied doing anything and was upset. Rita then suggested that it may have been an accident, or that he had done it in his sleep, mistaking PB for her. Defendant said he did not think he could have touched PB at all, but if he had that it must have been in his sleep. He said he was sorry if that is what had happened, and it was decided that PB would not sleep next to him anymore.

The incident was not raised again until an investigation by DSS was conducted, the reasons for which are not of record. During the investigation, the victim's mother told a detective that she thought the victim was trying to break up her and defendant. Defendant fled to Nebraska until he was extradited back to North Carolina and imprisoned.

The expert testimony diagnosing PB as having been sexually abused by defendant, and evidence that defendant owned and watched pornographic videotapes, were part of the State's case in chief against defendant. Further facts relevant to the issues raised by defendant are incorporated below.

Defendant now raises four issues on this appeal. He argues the trial court committed reversible error as to the following: (I) improp-

erly admitting expert testimony definitively stating that defendant had sexually abused PB when there was no physical evidence of such abuse; (II) improperly admitting evidence of defendant's possession of pornographic videos and admitting into evidence one of the boxes of these videos; (III) failing to instruct the jury of the defenses of unconsciousness, mistake of fact, and accident; and (IV) improperly computing the prior record level of defendant for the purposes of sentencing. While we find admittance of the testimony of the State's expert witness constituted plain error, and grant a new trial on that ground, we will also address those issues relating to the pornographic videos and the jury instructions because they are likely to recur during a retrial.

Expert Testimony Alleging Sexual Abuse

[1] Defendant contends that the trial court committed plain error in the admission of the testimony of Dr. Kathleen Russo, an expert in pediatric gynecology. Specifically, defendant argues admission of the doctor's statement at trial regarding her diagnosis of PB constituted plain error. Dr. Russo testified, "PB was sexually abused by Mr. Stephen Bush." She then went on to say that this diagnosis was "definite." Based on the facts of this case, we hold that allowing this highly prejudicial and otherwise inadmissible testimony rose to the level of plain error.

I. Applicable Law

A. Standard of Review

There is some question as to what standard of review we are to apply. The record indicates that defendant objected to Dr. Russo's diagnosis, but stated no grounds for his objection and did not seek to strike her subsequent testimony or object to its conclusive nature. However, because we conclude the trial court's admission of such testimony constituted a miscarriage of justice, and therefore plain error, we will apply that standard to our analysis.

Plain error is "error 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) (citations omitted), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 681 (2000). Plain error does not simply mean obvious or apparent error." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Our Supreme Court has explained that the plain error rule must be applied cautiously and

only in exceptional cases where, " 'after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." ' " *State v. Davis*, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999) (citations omitted).

B. *Expert Testimony of Sexual Abuse*

"In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002). *See also State v. Grover*, 142 N.C. App. 411, 417-18, 543 S.E.2d 179, 183-84, *aff'd*, 354 N.C. 354, 553 S.E.2d 679 (2001); *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997); *State v. Trent*, 320 N.C. 610, 614-15, 359 S.E.2d 463, 464-65 (1987). An expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has *symptoms or characteristics* so as to inform the jury that the lack of physical evidence of abuse is not conclusive that abuse did not occur. *State v. Hall*, 330 N.C. 808, 818, 412 S.E.2d 883, 888 (1992); *State v. Aguallo*, 322 N.C. 818, 822-23, 370 S.E.2d 676, 678 (1988); *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987).

II. *Dr. Russo's Testimony*

At trial Dr. Russo testified as to her qualification and certifications in Salisbury, North Carolina. This evidenced her undisputed status as an expert. She then testified to her involvement in the Child Medical Evaluations Program:

> Q: Can you explain to the ladies and gentleman what the CME program is?
>
> A: The CME or Child Medical Examination Program is an advocacy program for children that helps in investigating and determining if the child has suffered abuse, assisting in providing them treatment, assisting the non-offending family members this treatment and counseling, and then *helping to identify the individual responsible for the abuse and finding them guilty and the punishment for that.*

(Emphasis added.) Dr. Russo went on to explain her examination of PB and that she found no physical evidence of sexual abuse. She then testified that physical evidence in the vaginal area will not always be present and this would be "absolutely consistent" with that of a prepubertal child who has been sexually abused. Finally, when asked what her diagnosis of PB was, Dr. Russo stated: "My diagnosis was [PB] was sexually abused by [defendant]." The basis of her diagnosis was as follows:

> I was impressed by [PB's] sensory recollection. Children cannot fantasize visual and other sensory experiences at the same time and the fact that she could tell me how she felt, how she was feeling that evening, what she felt, and what she did when she realized what was happening, what Mr. Bush's response was when she realized he was waking up, where they were, where the other people in the family were at the time, all of that other sensory recollection was very telling and adds to the *credibility* of her story.

(Emphasis added.)

We hold the admission of Dr. Russo's diagnosis that PB was sexually abused by defendant was plain error by the trial court. This holding is based on the following facts: PB was the only person to attest to the alleged sexual abuse by defendant. While this is often the situation in sexual abuse cases, here PB's credibility was questionable as to the sexual abuse for a number of reasons. She delayed the report of the abuse for some time (how long is not clear from the record); it was first alleged while in an argument with her mother Rita; Rita was seeing defendant after a recent divorce with PB's father (who had been given primary custody of PB); there is testimony from Rita that PB wanted to break up her and defendant; and no other incidents had been alleged against defendant.

Dr. Russo's testimony added tremendous credibility to PB's alleged abuse by defendant. In her testimony, Dr. Russo reaffirms the details of PB's alleged abuse, as already testified to by PB, and without additional physical evidence. The practical effect of Dr. Russo's testimony was to give PB's story a stamp of credibility by an expert in pediatric gynecology, and Dr. Russo stated so specifically. Dr. Russo's diagnosis did not only go to the credibility of PB's allegation of sexual abuse, but conclusively stated that defendant had sexually abused PB. Furthermore, because of Dr. Russo's involvement in the CME program, which she testified to before giving her diagnosis, the jury was

sure to be severely prejudiced by Dr. Russo's conclusion that defendant had sexually abused PB.

The State opines that the cases cited by defendant are distinguishable from the case at bar, and instead *State v. Reeder*, 105 N.C. App. 343, 413 S.E.2d 580, *disc. review denied*, 331 N.C. 290, 417 S.E.2d 68 (1992) applies. Without need to distinguish *Reeder*, we note at the outset that "*Reeder* seems to be an anomaly within the case law." *Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 184. Additionally, this case is distinguishable upon its face from those in *Stancil*. While our Supreme Court in *Stancil* affirmed our finding of no plain error despite similar improper expert testimony, in *Stancil* the corroborating evidence of abuse was much stronger, and the testimony by the examining doctors went only to the fact that the victim had been sexually abused. In *Stancil*, the Court found no plain error where the jury had: (1) the testimony of the child; (2) evidence of her intense and immediate emotional trauma after the incident; (3) the consistency of her accounts; (4) her demeanor and physical manifestations during the interviews and first physical exam; (5) evidence of her symptoms and exam by examining doctors five days later; and (6) the conclusions of two experts that her actions and statements were consistent with child maltreatment or abuse. *State v. Stancil*, 146 N.C. App. 234, 240, 552 S.E.2d 212, 216 (2001), *aff'd*, *State v. Hughes*, 560 S.E.2d 148 (2002).

In the case at bar, any and all corroborating evidence is rooted solely in PB's telling of what happened, and that her story remained consistent. Furthermore, the testimony of Dr. Russo in this case was of greater prejudicial impact than that in *Stancil*, as she concluded, based upon her credibility assessment of PB's story, that it was defendant who had sexually abused PB.

Therefore, the conclusive nature of Dr. Russo's testimony as to the sexual abuse and that defendant was the perpetrator was highly prejudicial. This constituted plain error. Defendant is entitled to a new trial.

Pornographic Videos

[2] Although we have granted a new trial on the basis of the prejudicial expert testimony introduced at trial, we will address defendant's objection to evidence introduced by the State that defendant bought and owned pornographic videotapes. We do so as this issue is likely to recur at any new trial. We conclude it was error to admit any and all evidence of such tapes.

In the case at bar, the State was allowed to admit testimony that defendant had previously bought and owned pornography pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). Furthermore, a box of one of the tapes which he had purchased, depicting young women having sex and entitled "Little Pussy," was published to the jury. Rita's testimony showed this tape was first brought into PB's home after the incident in question. There was no evidence that defendant provided pornographic videotapes to PB or employed the tapes to seduce PB. Absent proof that the tapes were so utilized, such evidence, so tenuously related to the crime charged, impermissibly injected defendant's character into the case to raise the question of whether defendant acted in conformity therewith at the times in question. *See State v. Smith*, 152 N.C. App. 514, 521-22, 568 S.E.2d 289, 294, *disc. review denied, appeal dismissed*, 356 N.C. 623, 575 S.E.2d 757 (2002).

While Rule 404(b) relating to prior bad acts of defendant is generally a rule of inclusion, the evidence offered must be relevant and limited to showing such things as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b). Only those acts which follow the rationale of the rule, with a relevant purpose other than to show that defendant had the disposition to commit the alleged crime, are admissible under the rule. *See State v. White*, 135 N.C. App. 349, 520 S.E.2d 70 (1999), *disc. review allowed*, 351 N.C. 120, 541 S.E.2d 472, *disc. review withdrawn*, 351 N.C. 191, 541 S.E.2d 726 (1999) (evidence of prior sexual assault by the defendant was too dissimilar and only shows propensity to commit sexual acts against young female children). For the purposes of Rule 404(b), our Supreme Court has defined "similar" to mean "some unusual facts present" or "particularly similar acts" in the prior bad act of the defendant which indicates the same person committed the act at issue. *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890-91 (1991) (citations omitted).

In *Smith*, the defendant was on trial for taking indecent liberties with a minor and first-degree sexual offense of a female child under thirteen. The State was allowed to introduce evidence that the defendant possessed pornography.[1] On appeal, we held that the intro-

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1. The dissent attempts to draw a distinction between the picture depicted on the sleeve/jacket of the videotape and the contents of the videotape. Only the sleeve/jacket of the videotape was admitted at trial. As a video is nothing more than a series of still photos which when viewed in motion become motion pictures (as they are now classically termed), the same legal rules apply to both the still and the motion pictures.

duction of the evidence about pornography was inadmissible where there was no evidence that defendant had the complainant view the material with him:

> We agree with defendant's contention that the only purpose of such evidence was to impermissibly inject the defendant's character into the case to raise the question of whether defendant acted in conformity with his character at the times in question. . . . We hold that evidence of defendant's possession of pornographic materials, without any evidence that defendant had viewed the pornographic materials with the victim, or any evidence that defendant had asked the victim to look at pornographic materials . . . was not relevant to proving defendant committed the alleged offenses in the instant case and should not have been admitted by the trial court.

Smith, 152 N.C. App. at 522-23, 568 S.E.2d at 294.

Here there was evidence by PB's mother that the child never saw any of defendant's videos. Therefore, any evidence of the purchase or ownership of pornographic tapes is inadmissible under Rule 404(b) and *Smith*, and would constitute prejudice at any new trial. Therefore, allowing testimony of the tapes and/or publishing them to the jury is error.

The dissent would find the video box admissible under Rule 404(b) pursuant to several of that rule's rationales. When evidence of prior similar sexual offenses or acts by the defendant is offered, our Supreme Court has been markedly liberal in allowing such evidence. *See, e.g., State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). However, the mere possession of photographic images, whether in still form or on a videotape, has been deemed inadmissible as the defendant's possession of such materials does not establish motive, intent, common scheme or plan; rather the possession of such materials is held only to show the defendant has the propensity to commit the offense for which he is charged and to be highly inflammatory. *Smith*, 152 N.C. App. at 521-22, 568 S.E.2d at 294. *See also*, *State v. Doisey*, 138 N.C. App. 620, 628, 532 S.E.2d 240, 246, *disc. review denied*, 352 N.C. 678, 545 S.E.2d 434 (2000), *cert. denied*, 531 U.S. 1177, 148 L. Ed. 2d 1015 (2001). Likewise, the mere possession of pornographic materials does not meet the test of relevant evidence under Rule 401 of the North Carolina Rules of Evidence.

N.C. Gen. Stat. § 8C-1, Rule 401. Rule 401 requires the evidence has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than . . . ." *Id.*

In *Doisey*, where the defendant was charged with two counts of sexual assault of his girlfriend's daughter, testimony was offered by the State that defendant may have filmed, by hidden camcorder, children using the bathroom at the victim's home. The Court found evidence of his possession of such tapes, despite being "deviant" behavior, did not sufficiently meet the rationale of Rule 404(b) to be admissible under any theory. *Doisey*, 138 N.C. App. at 628, 532 S.E.2d at 246. In *Maxwell*, where the defendant was charged with taking indecent liberties with a minor and two separate charges of first-degree statutory rape of his adopted daughter, the Court found the following evidence of defendant's acts did not fall under any theory of Rule 404(b): defendant would go to the children's bedrooms in the nude to check on them; defendant would fondle himself in front of the mother and the children; and that defendant would use his hand and stroke his penis in the presence of the victim. *State v. Maxwell*, 96 N.C. App. 19, 23-25, 384 S.E.2d 553, 556-57 (1989), *cert. denied*, 326 N.C. 53, 389 S.E.2d 83 (1990). The Court went on to conclude:

> [W]e find that this is essentially a case of who and what to believe—the prosecutrix' accusations or defendant's claim of innocence. There was no medical or other physical evidence presented by the State in support of the prosecutrix' claims. There were no eye witnesses [sic] to these alleged events; therefore, the outcome of this case depended upon the jury's perception of the truthfulness of each witness. Consequently, the court's admission of evidence which could inflame the jury and cause a verdict to be entered on an improper basis, such as emotion, was prejudicial. In the absence of this extensive, highly prejudicial evidence, which was of questionable relevance and which tended to make defendant appear to be a sexual deviant, we cannot say that a different result could not have been reached.

Id. We see no way around the facts and holdings in *Smith*, *Doisey* and *Maxwell* in attempting to apply Rule 404(b) to admit the evidence in question. Additionally, the only evidence of when this tape was brought into PB's home, was the testimony of Rita stating it was sometime after the incident in question. This evidence substantially weakens the potential use of the video box under Rule 404(b)

as to the dissent's theory of intent or absence of mistake at the time of the incident.

Assuming *arguendo* the video box could be admitted under Rule 404(b), a trial court must then determine whether its probative value is substantially outweighed by its prejudicial effect pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. *See State v. Everhardt*, 96 N.C. App. 1, 18, 384 S.E.2d 562, 572 (1989), *aff'd*, 326 N.C. 777, 392 S.E.2d 391 (1990). Pursuant to Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. N.C. Gen. Stat. § 8C-1, Rule 403. This probative value must not merely be outweighed by the prejudicial effect, but substantially outweighed. *State v. Lyons*, 340 N.C. 646, 669, 459 S.E.2d 770, 782 (1995).

The video box had a clear prejudicial effect upon the jury in this case. The jury specifically requested it be sent into the jury room before deliberating. In little less than an hour of deliberating, the transcript reveals that the jury could not reach a verdict. The judge said they had not been deliberating long enough for him to declare a mistrial and sent them back. It is reasonable to assume the presence of the pornographic video in the room of an apparently divided jury could have a very prejudicial effect, where as demonstrated in our Rule 404(b) analysis above, the value was tenuous.

Jury Instructions

[3] While our order of a new trial is based on the analysis above, we herein address what instructions should be submitted to the jury, assuming evidence similar to that adduced during the first trial is admitted (excluding the inadmissible testimony of Dr. Russo and that relating to the pornography). We believe the defendant will be entitled to the jury instruction of unconsciousness/diminished capacity pursuant to *State v. Connell*, 127 N.C. App. 685, 493 S.E.2d 292 (1997), *disc. review denied*, 347 N.C. 579, 502 S.E.2d 602 (1998).

In *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975), our Supreme Court held:

> [U]nder the law of this State, unconsciousness, or automatism, is a complete defense to a criminal charge, separate and apart from the defense of insanity; that it is an affirmative defense; and that the burden rests upon the defendant to establish this defense,

> unless it arises out of the State's own evidence, to the satisfaction of the jury.

This defense is a complete bar from criminal liability because unconsciousness " 'not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.' " *State v. Jerrett*, 309 N.C. 239, 264-65, 307 S.E.2d 339, 353 (1983) (quoting *State v. Mercer*, 275 N.C. 108, 116, 165 S.E.2d 328, 334 (1969)). When determining whether an instruction of diminished capacity should be submitted to the jury, the Court must consider whether there is evidence sufficient to cause a reasonable doubt in the mind of a juror as to whether defendant had a culpable mental state. *State v. Clark*, 324 N.C. 146, 163, 377 S.E.2d 54, 64 (1989). If there is evidence from which an inference can be drawn that defendant committed the act without the criminal intent necessary, then the law with respect to that intent should be explained and applied to the evidence by the Court. *State v. Walker*, 35 N.C. App. 182, 186, 241 S.E.2d 89, 92 (1978). In determining whether the evidence supports an instruction on any affirmative defense, the evidence should be viewed in the light most favorable to the defendant. *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537-38 (1988).

We believe *Connell*, a case almost factually identical, to be controlling upon the facts of this case as they have been presented thus far. In *Connell*, the defendant was involved with the victim's mother in a sexual relationship. *Connell*, 127 N.C. App. at 687, 493 S.E.2d at 292. One night when defendant was sleeping at the mother's house, the victim, an eight-year-old girl got in their bed after having a bad dream. *Id.* The victim testified that the defendant began rubbing her over her underwear, despite her pushing his hand away twice. *Id.* There was no testimony that defendant was awake during the incident.

As in *Connell*, "there is no direct evidence that the defendant was awake at the time of the alleged touching" in the case before us. *Id.* at 692, 493 S.E.2d at 296. PB testified that "no one moved or no one appeared to be awake" at the time the alleged touching occurred. She further testified that defendant did not speak at all during the alleged touching, nor did he react to the jerky movements she made in response to the touching. The Court in *Connell*, a case where the defendant also chose not to put on evidence, found that being asleep is an appropriate circumstance that requires an unconscious or

diminished capacity instruction, and that failure to provide such was plain error. *Id.*

Pursuant to the mandate of *Connell*, the trial court at any new trial should properly instruct the jury as to the unconsciousness/diminished capacity defense of sleep, along with all other defenses which have been sufficiently raised by the evidence presented at the new trial.

For the reasons set forth herein, defendant's conviction is reversed and defendant is awarded a new trial. At any new trial, the expert testimony of Dr. Russo, and any evidence relating to the pornographic tape, shall be excluded. Furthermore, jury instructions shall include the affirmative defense of unconsciousness/diminished capacity and any other defenses which have been sufficiently raised by the evidence.

New trial.

Judge HUNTER concurs.

Judge LEVINSON concurs in part and dissents in part with separate opinion.

LEVINSON, Judge, concurring in part and dissenting in part.

I agree that, given the circumstances of the present case, the trial court committed plain error by permitting Dr. Rousso to testify that her "diagnosis was [PB] was sexually abused by [the defendant]" and that defendant is, therefore, entitled to a new trial. However, I respectfully disagree with the majority's application of pertinent law concerning pornographic videotapes to the facts of this case. Furthermore, I make no comment on defendant's argument that the trial court erred in failing to instruct the jury on unconsciousness/diminished capacity.

The majority cites *State v. Smith*, 152 N.C. App. 514, 523, 568 S.E.2d 289, 295, *disc. review denied, appeal dismissed*, 356 N.C. 623, 575 S.E.2d 757 (2002) for the proposition that, because defendant did not provide the pornographic videotapes to PB or use the pornographic videotapes to seduce PB, evidence concerning the pornographic videotapes is inadmissible. However, careful analysis of *Smith* reveals that it neither establishes such a broad and blunt rule, nor could it have.

In *Smith*, the defendant was convicted of sexual offenses involving his twelve-year-old stepdaughter. At trial, the State introduced evidence tending to show that defendant possessed pornographic magazines and videos at home and at work. This Court held that, because there was no nexus between Smith's possession of pornography and the offenses for which he was being tried, the trial court erred in admitting such testimony. *Smith*, 152 N.C. App. at 521-22, 568 S.E.2d at 294. This result is entirely logical, as the facts set forth in that case indicate that the materials Smith possessed were general in nature and were not involved in the commission of the offenses with which he was charged.

In reaching this conclusion, this Court provided an analysis which included a discussion of two previous decisions in which the North Carolina Supreme Court held that evidence of a criminal defendant's possession of pornography was admissible. In one of those cases, *State v. Rael*, 321 N.C. 528, 533-34, 364 S.E.2d 125, 129 (1988), the Court ruled that evidence of pornographic pictures and movies was admissible to corroborate the four-year-old victim's testimony that the defendant showed him these items during the commission of the alleged sexual offenses. In the other case, *State v. Williams*, 318 N.C. 624, 632, 350 S.E.2d 353, 358 (1986), the Supreme Court held that evidence of a defendant's insistence that his daughter attend and watch an x-rated film with him was admissible in the defendant's trial for raping his daughter; the Court found that this evidence was relevant to show the defendant's "preparation and plan to engage in sexual intercourse with her and assist in that preparation and plan by making her aware of such sexual conduct and arousing her."

The analysis in *Smith* also discusses several cases from this Court holding that evidence of deviant behavior, which is unrelated to the commission of a sex offense, is not admissible. *See State v. Doisey*, 138 N.C. App. 620, 626, 532 S.E.2d 240, 244-45 (2000) (evidence that the defendant placed a camcorder in a bathroom used by children and others which taped the activities in the bathroom was not properly admitted to show design or scheme to take sexual advantage of children); *State v. Hinson*, 102 N.C. App. 29, 36, 401 S.E.2d 371, 375 (1991) (evidence that the defendant possessed photographs depicting him in women's clothing, dildos, lubricants, vibrators and two sexually-oriented books, was not properly admitted to show proof of intent, preparation, plan, knowledge and absence of mistake, in sexual offense case involving seven-year-old victim); *State*

v. Maxwell, 96 N.C. App. 19, 24, 384 S.E.2d 553, 556-57 (1989) (evidence that the defendant frequently appeared nude in front of his children and fondled himself in presence of his adopted daughter was not properly admitted to show defendant's plan or scheme to take advantage of his adopted daughter, where there was evidence that defendant regarded nudity as "normal" and the only testimony involving defendant fondling himself in front of his adopted daughter also revealed that defendant attempted to hide this behavior from her).

Relying on these cases, this Court gleaned the rule that evidence of a defendant's "mere possession" of pornography is not relevant where, as in the *Smith* case, the pornography is general in nature, is not in any way related to the offense, and is not used in the commission of the offense: "[E]vidence of defendant's possession of pornographic materials, without any evidence that defendant had viewed the pornographic materials with the victim, or any evidence that defendant had asked the victim to look at pornographic materials other than the victim's mere speculation, was not relevant to proving defendant committed the alleged offenses in the instant case and should not have been admitted by the trial court." *Smith*, 152 N.C. App. at 522-23, 568 S.E.2d at 294-95. Stated differently, the evidence of pornography in *Smith* was not relevant under the Rules of Evidence, directly or as interpreted in *Rael* and *Williams*.

However, I do not agree with the majority that *Smith* establishes a far broader rule which proscribes admission of the evidence at issue in the case *sub judice*. Rather, in my view, *Smith* and the cases it cites require the courts to review each piece of evidence in the context of the case in which it is presented. In the instant case, I conclude that the evidence of defendant's possession of pornography is probative of a matter at issue in defendant's trial.

"As a general rule, evidence of a defendant's prior conduct, such as the possession of pornographic videos and magazines, is not admissible to prove the character of the defendant in order to show that the defendant acted in conformity therewith on a particular occasion." *Smith*, 152 N.C. App. at 521, 568 S.E.2d at 294 (citing N.C. R. Evid. 404(b)). "However, such evidence of prior conduct is admissible so long as it is relevant to some purpose other than to show the character of the defendant and the defendant's propensity for the type of conduct for which he is being tried." *Id.* (citing, *inter alia*, *Rael* and *Doisey*). "Examples of such proper purposes include 'proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.' " *Id.* (quoting N.C. R.

Evid. 404(b)). Thus, as the majority properly notes, "[o]nly those acts which follow the rationale of [Rule 404(b)], with a relevant purpose other than to show that defendant had the disposition to commit the alleged crime, are admissible under the rule."

In the instant case, the evidence with respect to pornographic videotapes falls into two categories: (1) the photographic depictions on the sleeve of a pornographic videotape possessed by defendant entitled "Little Pussy"[2] and (2) testimony by PB's mother that defendant possessed three or four pornographic videos, including the one at issue. In my view, neither is made inadmissible by operation of Rule 404(b).

Photographic Depictions on Sleeve of the Pornographic Videotape

The evidence in question with respect to the videotape involves a cardboard sleeve containing nude images of females who appear to be in their early teens; at least one female is partially clothed in a plaid skirt and small tank-top; some of the females are engaged in sexual acts with adult men. The sleeve also contains writing which characterizes the females' bodies as "tight" and their genitalia as "bare". Although the jury did not watch the videotape, it did view this cardboard sleeve.

The trial court, after considering the arguments of counsel, made a finding that the photographic depictions on the videotape sleeve had legal relevance and admitted the sleeve. Cursory examination of the exhibit reveals that a reasonable jury could properly infer that the photos on the sleeve depict *young preteen* girls. Defendant stood accused of sexually assaulting a *young preteen* girl. PB testified that defendant denied the inappropriate touching but told her that, if he had done it in his sleep, he was sorry. PB's mother testified that defendant said something similar to her. Thus, there was some evidence of mistake, accident, or absence of intent. Defendant's possession of the videotape, which was encased in a sleeve depicting photographic images involving "young girls" constitutes an "act" that can be probative of defendant's sexual interest in young girls, which tends to prove intent, and/or absence of mistake or accident under Rule 404(b).[3] Given the obvious connection between the photographic

2. Hereinafter "the videotape."

3. The majority posits that the jury should likely be instructed on unconsciousness/diminished capacity, but would nonetheless preclude evidence tending to show that the actions of defendant were associated with an exercise of volition.

images and the issues presented to the jury, together with the allowances of Rule 404(b) and our responsibility to give deferential appellate review to evidentiary rulings, I cannot agree the court erred in admitting the photographic images on the sleeve of the videotape.[4] *See State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) ("[E]ven though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.")

Testimony of PB's Mother

Additional evidence was provided by PB's mother, who testified to circumstances that established defendant was the individual who purchased and possessed the videotape at issue. To accomplish this, she necessarily had to explain how the videotape was maintained with several others in the household. In addition, the mother testified as to how she came into possession of the videotape; when she provided it to the District Attorney's Office; and that the videotape was in fact the same one she had voiced concerns to defendant about in the past. On direct examination PB's mother testified as follows:

> PROSECUTOR: When he brought [the videotape] in the home, you questioned him about it. What did you say about it? What did you ask him about it?
>
> WITNESS: I asked him wasn't it about young girls.
>
> PROSECUTOR: And what did he say to you?
>
> WITNESS: Teenagers. He said, well, you have to be 18 to be in these kind of movies, it wasn't teenagers, it was 18 and above.

She explained that she only provided the one videotape to the prosecutor because it was the only one that depicted such young girls; and that none of her children, including PB, were allowed to watch any of the videotapes and she never observed them doing so. PB's mother also provided evidence that defendant obtained the videotape after he allegedly assaulted PB.

Thus, the record reveals that the clear import of all the testimony concerning the three or four videotapes was to establish that the

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4. I cannot accept that <u>visual depictions</u> of young children possessed by those charged with sexual offenses are, *ipso facto*, inadmissible in prosecutions simply because they are part and parcel of a videotape. There is no authority to suggest that <u>visual depictions</u>—the gravamen of what the prosecutor sought to admit—cannot be probative in such prosecutions.

pornographic videotape with the sleeve depicting young girls was, in fact, one of the ones purchased and possessed by defendant. The whole point of allowing PB's mother to testify that defendant possessed three or four pornographic videotapes was to establish the circumstances surrounding the videotape at issue; this does not violate the Rules of Evidence. Indeed, trial courts necessarily have discretion to determine, on a case-by-case basis, the extent to which jurors can properly be informed about where, how, and under what circumstances the accused possessed such photographic depictions. The trial court was not required, for example, to reduce the depictions to xeroxed images on paper and preclude any further information concerning their origin.

For the sake of clarity, I note that with respect to both the videotape sleeve which was shown to the jury and the testimony of PB's mother concerning defendant's possession of pornography, the purpose of admitting this evidence is not, as the majority contends, limited to showing that "defendant has the propensity to commit the offense for which he is charged." Rather, the videotape with "young girls" on the sleeve, which defendant obtained after his alleged assault on PB, is probative that defendant's alleged inappropriate touching of PB, a young preteen girl, was not done by accident, by mistake or with a lack of intent. The testimony of PB's mother is probative of defendant's ownership of the videotape, although her testimony made brief mention of additional pornography in defendant's possession. Therefore, *Smith*, *Doisey*, and *Maxwell*, all of which dealt with other acts with no nexus at all to the offense for which those defendants were on trial, are not, as the majority contends, dispositive here.

Accordingly, I disagree with the majority's holding that the evidence presented concerning defendant's possession of pornography is inadmissible.[5] While generalized testimony that an accused possessed pornography might be legally unhelpful and violative of Rule 403 without some connection or association with a valid evidentiary issue for the trier of fact, the evidence concerning pornography at issue in the present case does not fall into such a category.

5. Furthermore, I do not discern the necessity of addressing the issues concerning the mother's testimony or the photographic depictions on the videotape sleeve, not only because defendant will receive the benefit of a new trial, but because defense counsel *thoroughly* cross examined PB's mother concerning everything defendant now complains of on appeal. *See State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995) (holding that, even though defendant objected to evidence, he "waived his objection by later cross-examining [the witness] about this same evidence").

STATE OF NORTH CAROLINA v. WILLIE FORREST, III

No. COA03-806

(Filed 18 May 2004)

1. Constitutional Law— right to counsel—personal argument to jury—counsel already appointed

A defendant who chose to be represented by appointed counsel had no right to also represent himself and personally present his closing arguments to the jury. Moreover, defense counsel read defendant's handwritten statement to the jury.

2. Appeal and Error— preservation of issues—jury instructions—no objection—no plain error assertion

A defendant who did not object to jury instructions and did not raise plain error waived appellate review of the trial court's instructions on first-degree kidnapping.

3. Constitutional Law— Confrontation Clause—kidnap victim's statements following release—*Crawford* analysis

A kidnapping and assault victim's spontaneous statements to police immediately following her rescue were nontestimonial and were not rendered inadmissible by *Crawford v. Washington*, — U.S.— (2004). She was not providing a formal statement, deposition, or affidavit, she did not know that she was bearing witness, and she was not aware that her utterances might impact further proceedings. The Confrontation Clause was not implicated.

4. Evidence— hearsay—excited utterances—rescued victim

Statements made by a kidnapping and assault victim immediately after her rescue were admissible as excited utterances.

5. Evidence— redirect examination—testimony elicited earlier

The trial court properly admitted testimony over defendant's objection on redirect examination of a detective where defendant had earlier elicited the same testimony on cross-examination.

Judge WYNN dissenting.

Appeal by defendant from judgments entered 7 March 2003 by Judge W. Osmond Smith in Wake County Superior Court. Heard in the Court of Appeals 30 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General Kevin L. Anderson, for the State.

Irving Joyner, for defendant-appellant.

TYSON, Judge.

Willie Forrest, III, ("defendant") appeals from judgments entered after a jury found him to be guilty of first-degree kidnapping, assault with a deadly weapon, and assault upon a law enforcement officer. We hold defendant received a trial free from error.

I. Background

The State's evidence tended to show that on 9 October 2002 members of the Selective Enforcement Unit of the Raleigh Police Department went to the home of Cynthia Moore ("Moore"), defendant's aunt. The police officers had reason to believe that defendant was present at the residence and armed with a knife and gun. The officers observed the house for approximately one hour.

While under observation, a man drove up to the house and knocked on the door. Defendant walked out onto the porch and asked the man to give him Moore's car keys. Moore walked out onto the porch and began walking down the steps. Defendant grabbed Moore around the waist and walked her back into the house. Defendant and Moore walked back out onto the porch approximately thirty minutes later. Defendant had his arm around Moore's shoulder and held a knife to her. The officers observed Moore trying to pull away from defendant. During this time, another police car appeared, and Moore stated, "See that. Them be here later." Defendant responded, "I know what those mother f—-ers are looking for. They are coming for me." Defendant dragged Moore back inside her house.

Between twenty and thirty minutes later, defendant and Moore came out onto the porch again. Defendant still held the knife in one hand while restraining Moore with the other. They sat on the porch for a few minutes and returned inside the house. When defendant and Moore next exited the house, defendant was holding the knife six inches from Moore's throat. The weapon appeared to be a heavy hunting knife with a four-inch blade. Defendant also held a second knife in his other hand, which appeared to be a steak knife approximately four-inches long. Defendant and Moore began to walk down the sidewalk towards the street.

The officers were instructed to take defendant down. The officers illuminated the lights mounted on their long weapons and ordered defendant to drop the knife. Defendant did not obey the command and began saying, "Don't do it, don't do it." The officers closed in on defendant, he dropped the knife in his left hand, grabbed Moore tighter, and took her onto the ground as he fell on his back. The hunting knife remained four inches from Moore's throat. Defendant used Moore as a shield to prevent the officers from shooting him. Two officers placed submachine guns to defendant's forehead and instructed him to drop the knife. Defendant refused, and the officers grabbed his hands while removing Moore from defendant's grasp. Defendant began shouting, "You are going to have to kill me, you are going to have to shoot me." As Officer A.A. Boone ("Officer Boone") removed the knife from defendant's hand, defendant rolled over onto his stomach with one of his hands underneath him. Officer Boone tried to grab defendant's concealed hand, and defendant bit into Officer Boone's finger. The officers eventually restrained defendant.

Moore suffered small lacerations and bruises on her neck, in addition to a one-and-one-half-inch laceration on her arm with a smaller, very deep laceration in the middle of the cut, which was bleeding profusely. Moore was shaking, crying, and very nervous immediately after the incident. She immediately told Detective Melanie Blalock ("Detective Blalock") what defendant had done to her while they were inside the house.

Defendant testified on his own behalf and stated that he always carries knives for protection, but that he never cut Moore and never held a knife to her throat. He stated that he and Moore were walking down the sidewalk hugging and talking. Defendant explained Moore fell to the ground because he tripped while holding onto her. Defendant denied biting Officer Boone and stated he did not have teeth at the time.

The jury found defendant to be guilty of first-degree kidnapping, assault with a deadly weapon, and assault upon a law enforcement officer. Defendant was sentenced in the aggravated range for 210 months to 261 months for first-degree kidnapping and a consecutive sentence of 150 days for the assault on a law enforcement officer. The trial court arrested judgment for assault with a deadly weapon. Defendant appeals.

II. Issues

The issues are whether the trial court erred in: (1) preventing defendant from personally presenting his closing arguments to the jury, in violation of his Sixth Amendment rights; (2) instructing the jury on first-degree kidnapping; and (3) allowing a State's witness to present testimony regarding statements made by the victim immediately following defendant's arrest.

III. Sixth Amendment Right to Counsel

[1] Defendant contends that the trial court violated his Sixth Amendment rights by not allowing him to personally present closing arguments to the jury. We disagree.

The Sixth Amendment to the United States Constitution and Article 1, Section 23 of the North Carolina Constitution provide that every criminal defendant has the right to counsel, either by a retained attorney, an appointed attorney, or the right to self-representation. U.S. Const. amend. VI; N.C. Const. art. 1, § 23. "A defendant has only two choices—'to appear *in propria persona* or, in the alternative, by counsel. There is no right to appear both *in propria persona* and by counsel.' " *State v. Thomas*, 331 N.C. 671, 677, 417 S.E.2d 473, 477 (1992), *appeal dismissed and disc. rev. denied*, 351 N.C. 119, 541 S.E.2d 468 (1999) (quoting *State v. Parton*, 303 N.C. 55, 61, 277 S.E.2d 410, 415 (1981), *disavowed on other grounds by State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985)). N.C. Gen. Stat. § 1-11 (2003) provides that "[a] party may appear *either in person or by attorney* in actions or proceedings in which he is interested." (emphasis supplied).

When a defendant chooses to be represented by counsel, "[t]actical decisions at trial, other than the right to testify and plead, are generally left to attorney discretion." *State v. McDowell*, 329 N.C. 363, 380, 407 S.E.2d 200, 209 (1991) (citing *Brown v. Dixon*, 891 F.2d 490 (4th Cir. 1989), *cert. denied*, 495 U.S. 953, 109 L. Ed. 2d 545 (1990)). "Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself." *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d. 54 (2001). Only when a "fully informed" defendant and his counsel reach an "absolute impasse" concerning tactical decisions, do the client's desires control. *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991).

Here, defendant chose to be represented by appointed counsel. At the close of all the evidence, defendant communicated his desire to personally present closing arguments to the jury. The trial court denied defendant's request. Defendant stated that he did not want defense counsel to say anything to the jury on his behalf. The trial court recessed court to allow defendant and defense counsel to confer. Following the recess, defendant indicated that he wanted defense counsel to read his handwritten paragraph to the jury. Defense counsel stated that he would not do this. The trial court spoke with defendant and encouraged defendant to allow his attorney to make the closing argument as his attorney saw fit. Defendant indicated to the trial court that he would accept the court's advice by stating that he "would listen to the wisdom of counsel, and if you say let [defense counsel] do [the closing argument], then that's what I will do."

As defense counsel made his closing argument, which ultimately included defendant's handwritten statement, defendant jumped up from his seat and screamed, "F—k this." Defendant was restrained and removed from the courtroom. When defendant was allowed to return to the courtroom, he informed the trial court that he did not want his attorney stating any elements of the crime charged to the jury because it "was irrelevant to me and I am pretty sure it's irrelevant to a lot of the jurors." The trial court informed defendant that he was not co-counsel and was not representing himself in this case. Defendant, after further discussion, stated, "Yeah, I am ready to move on with it. Let's go with it." Defendant informed the court that he was not going to say anything else and stated, "It's cool. Don't worry about it."

Defendant and defense counsel did not reach an "absolute impasse" in deciding how to proceed with closing arguments. *Ali*, 329 N.C. at 404, 407 S.E.2d at 189. Defendant ultimately consented to defense counsel making the closing arguments. *See State v. Basden*, 339 N.C. 288, 299, 451 S.E.2d 238, 244 (1994), *cert. denied*, 515 U.S. 1152, 132 L. Ed. 2d. 845 (1995) (holding that "just prior to closing arguments defendant consented on the record to his attorney's decision to concede guilt to second-degree murder or voluntary manslaughter," and this "cured any possible error in this case.") As defendant chose to be represented by appointed counsel, he had no right to also represent himself and personally present his closing arguments to the jury. *Grooms*, 353 N.C. at 61, 540 S.E.2d at 721. During presentation of defendant's closing argument, defense counsel also read defendant's handwritten statement to the jury as requested.

The trial court did not err in denying defendant's request to personally present closing arguments to the jury. Defendant's assignment of error is overruled.

IV. First-Degree Kidnapping

[2] Defendant has waived his right to appellate review of this issue by failing to object to the jury instructions at trial and by failing to assert plain error in his assignments of error.

"A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection . . . ." N.C.R. App. P. 10(b)(2) (2004). Further, when a defendant fails to specifically and distinctly allege that the trial court's ruling amounts to plain error, defendant waives his right to have the issues reviewed under plain error. *State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994). A defendant also waives plain error review by failing to allege plain error in his assignments of error. *State v. Flippen*, 349 N.C. 264, 274-75, 506 S.E.2d 702, 710 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999).

Defendant failed to object to the jury instructions regarding first-degree kidnapping after being specifically asked twice by the trial court whether he had any objections. Defendant also failed to allege plain error in his brief or in his assignments of error. Defendant's assignment of error is dismissed.

V. Victim's Statements Immediately Following Defendant's Arrest

[3] Defendant contends that the trial court erred in allowing into evidence statements made by Moore to a police officer immediately following defendant's arrest. We disagree.

A. *Crawford v. Washington*

The United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), recently overturned the previously well-settled rule of *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980), "and substantially altered the law with respect to the Sixth Amendment's Confrontation Clause and the relationship of that Clause to various rules of evidence regarding hearsay and hearsay exceptions." *People v. Moscat*, 777 N.Y.S. 2d 875 (2004).

> Under the prior rule of *Ohio v. Roberts*, the admission of an unavailable witness's statements against a criminal defendant at trial did not violate the Confrontation Clause, provided that the statement bore adequate indicia of reliability. To meet that test the statement had to either 1) fall within a "firmly rooted hearsay exception", or 2) bear "particularized guarantees of trustworthiness."

Id. at 740. "Crawford rejects the *Roberts* approach. In particular, the *Crawford* Court focused on the second part of the *Roberts* rule which permits the introduction of hearsay statements when the trial court finds that they bear 'particularized guarantees of trustworthiness.' " *Id.*

The *Crawford* Court held

> the Sixth Amendment's Confrontation Clause bars the use of a "*testimonial*" statement made by a witness who does not appear at a criminal trial, unless the witness is unavailable to testify at trial and was subject to cross-examination at the time the statement was made. On the other hand . . . where the statement is not "testimonial" in nature, the Confrontation Clause is ordinarily not implicated; in such a case the statement's admissibility is merely a matter of applying evidentiary rules regarding hearsay and various hearsay exceptions.

Id. at 741 (citing *Crawford*, 541 U.S. at 53, 158 L. Ed. 2d at 203).

Under *Crawford*, a Sixth Amendment Confrontation Clause analysis is whether a particular statement is testimonial or non-testimonial in nature, and not whether the statements offered into evidence fall into a well-rooted hearsay exception, such as the "excited utterance" exception. *Moscat*, at 744. However, the Crawford decision "expressly declines to define what a testimonial statement is . . . ." *Id.* at 742. We must first decide whether Moore's statements are testimonial or non-testimonial in nature. If these statements are non-testimonial, then the Confrontation Clause is not implicated, and "the statement's admissibility is merely a matter of applying evidentiary rules regarding hearsay and various hearsay exceptions." *Id.* at 741.

Moscat is one of the first cases to interpret *Crawford.* The Criminal Court of New York had to determine whether a 911 call made by the victim was testimonial or non-testimonial. *Id.* at 744. The court held that the 911 call was non-testimonial in nature and "is

essentially different in nature than the 'testimonial' materials that *Crawford* tells us the Confrontation Clause was designed to exclude." *Id.* The court stated:

> A 911 call is typically initiated not by the police, but by the victim of a crime. It is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather, the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril. Thus a pretrial examination is clearly "testimonial" in nature in part because it is undertaken by the government in contemplation of pursuing criminal charges against a particular person. But a 911 call is fundamentally different; it is undertaken by a caller who wants protection from immediate danger. *A testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call, it is the citizen who summons the government to her aid.*

Id. (emphasis supplied). The court went on to explain:

> Moreover, a 911 call can usually be seen as part of the criminal incident itself, rather than as part of the prosecution that follows. Many 911 calls are made while an assault or homicide is still in progress. Most other 911 calls are made in the *immediate* aftermath of the crime. Indeed, the reason why a 911 call can qualify as an "excited utterance" exempt from the rules of evidence barring hearsay is that very little time has passed between the exciting event itself and the call for help; the 911 call qualifies as an excited utterance precisely because there has been no opportunity for the caller to reflect and falsify her (or his) account of events.

Id. at 746.

> The Confrontation Clause spells out the right of defendant to confront the "witnesses" against him. A person who gives a formal statement, or deposition, or affidavit is conscious that he is bearing witness, and that his words will impact further legal proceedings. That is not usually the case with a 911 call. Typically, a woman who calls 911 for help because she has just been stabbed or shot is not contemplating being a "witness" in future legal proceedings; she is usually trying simply to save her own life.

Id.

The reasoning set forth in the *Moscat* holding that a 911 call is non-testimonial also applies here. Moore's statements concerning her kidnapping and violent assault were made immediately after her rescue by police with no time for reflection or thought on Moore's part. These statements were initiated by the victim, as was the 911 call in *Moscat*. Detective Blalock testified that she did not have to ask Moore questions because she "immediately abruptly started talking." Moore was nervous, shaking, and crying. Her demeanor never changed during the conversation with Detective Blalock. Although Detective Blalock was at the scene specifically to respond to Moore and later asked some questions, Detective Blalock did not question Moore until after she "abruptly started talking." These facts do not warrant the conversation being deemed a "police interrogation" under *Crawford*.

Just as with a 911 call, a spontaneous statement made to police immediately after a rescue can be considered "part of the criminal incident itself, rather than as part of the prosecution that follows." *Id.* Further, a spontaneous statement made immediately after a rescue from a kidnapping at knife point is typically not initiated by the police. *Id.* at 744. Moore made spontaneous statements to the police immediately following a traumatic incident. She was not providing a formal statement, deposition, or affidavit, was not aware that she was bearing witness, and was not aware that her utterances might impact further legal proceedings. *Id.* at 746. *Crawford* protects defendants from an absent witness's statements introduced after formal police interrogations in which the police are gathering additional information to further the prosecution of a defendant. *Crawford* does not prohibit spontaneous statements from an unavailable witness like those at bar.

We hold that Moore's statements are non-testimonial in nature. The Confrontation Clause is not implicated, and the trial court did not err in receiving Moore's statements into evidence without the defendant having a chance to cross-examine Moore. "[T]he statement's admissibility is merely a matter of applying evidentiary rules regarding hearsay and various hearsay exceptions." *Id.* at 741.

B. "Excited Utterances"

[4] We now must determine whether the statements at bar were "excited utterances" to fit within a recognized exception to the hearsay rule. Rule 801(c) of the North Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to

prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2003). Rule 802 states, "[h]earsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, 802 (2003). Rule 803(2) provides an exception to the hearsay rule:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (2) Excited Utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

N.C. Gen. Stat. § 8C-1, Rule 803(2) (2003). "It is well established that in order for an assertion to come within the parameters of this particular exception, 'there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.' " *State v. Coria*, 131 N.C. App. 449, 451, 508 S.E.2d 1, 3 (1998) (quoting *State v. Thomas*, 119 N.C. App. 708, 712-13, 460 S.E.2d 349, 352, *disc. review denied*, 342 N.C. 196, 463 S.E.2d 248 (1995) (citing *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985)).

Detective Blalock, who was standing by at a nearby school and waiting to speak to Moore, approached Moore immediately after her rescue and defendant's capture and arrest. Detective Blalock was not present at Moore's rescue, but arrived immediately after Moore was placed in a secure area. Detective Blalock testified that she spoke to Moore "immediately after they took her from the suspect." Detective Blalock further testified that she did not have to ask Moore questions because Moore "immediately abruptly started talking." Moore was nervous, shaking, and crying due to defendant's kidnapping her, holding her at knifepoint, and her wounds. Her demeanor never changed during the conversation with Detective Blalock. Moore told Detective Blalock that defendant had: (1) detained her in her house; (2) taken her from place to place with a knife at her throat; (3) cut her arm when she attempted to escape out the front door; and (4) possessed numerous knives while she was held captive. Moore's statements concerning her kidnapping and violent assault were made immediately after her rescue by police with no time for reflection or thought.

The facts in *State v. Guice* are very similar to the facts at bar. 141 N.C. App. 177, 541 S.E.2d 474 (2000), *cert. denied*, 353 N.C. 731, 551 S.E.2d 112 (2001). The defendant arrived at the victim's home unan-

nounced and confronted her. *Id.* at 180, 541 S.E.2d at 477. The defendant proceeded to point a gun at the victim's neighbor and dragged the victim outside. *Id.* Shortly thereafter, a police officer arrived at the scene and spoke with the victim. *Id.* We held that the trial court properly admitted these statements as "excited utterances" pursuant to Rule 803(2) of the North Carolina Rules of Evidence. *Id.* at 201, 541 S.E.2d at 489. Our Courts have consistently held statements of this nature to be admissible under the "excited utterance" hearsay exception. *See State v. Gaines*, 345 N.C. 647, 672, 483 S.E.2d 396, 411, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997) (holding that statements made by a victim to police officers after she was shot were admissible under the "excited utterance" exception as they described the circumstances surrounding the shooting and immediately followed the shooting); *State v. Wright*, 151 N.C. App. 493, 496-97, 566 S.E.2d 151, 154 (2002) (holding that statements made by victim in response to questions asked by 911 operator were excited utterances); *Coria*, 131 N.C. App. at 451, 508 S.E.2d at 3 (holding that statement made to police officer shortly after being assaulted was admissible under the excited utterance exception because the witness was very excited and upset when the statement was made and had no opportunity to reflect on her statement).

Moore's statements, made immediately after rescue from defendant, described the events surrounding her kidnapping and assault and clearly fall within the "excited utterance" exception to the hearsay rule. The trial court did not err in admitting these statements under the "excited utterance" exception to the hearsay rule.

[5] Defendant also contends that the trial court erred in allowing Detective Blalock to testify to statements made by Moore in a subsequent conversation later that day. We disagree.

Testimony regarding these statements was initially elicited by defense counsel. In an attempt to impeach Moore's earlier statements admitted as excited utterances, defense counsel cross-examined Detective Blalock and elicited testimony pertaining to statements in which Moore said she and defendant used drugs and drank alcohol together. On redirect, the State asked Detective Blalock regarding the conversation defendant elicited on cross-examination. Defendant objected to some of these questions. The trial court overruled defendant's objections.

Our Supreme Court has held, "[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is

later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) (citing *State v. Maccia*, 311 N.C. 222, 316 S.E.2d 241 (1984)). Rule 806 of our North Carolina Rules of Evidence states, "[w]hen a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness." N.C. Gen. Stat. § 8C-1, Rule 806 (2003).

Defendant attacked Moore's credibility during cross-examination of Detective Blalock and elicited testimony he now assigns as error. The trial court did not err in allowing this testimony into evidence. *See id.*; *see also Whitley*, 311 N.C. at 661, 319 S.E.2d at 588. Defendant's assignment of error is overruled.

VI. Conclusion

Defendant failed to show that the trial court erred by not allowing him to personally present closing arguments to the jury when he was represented by counsel. Defendant also failed to object to the jury instructions regarding first-degree kidnapping or to assign plain error to this issue and has waived his right to appellate review. Defendant failed to show that the trial court violated his Sixth Amendment right of confrontation in admitting the victim's non-testimonial statements, uttered immediately after her rescue, into evidence. Defendant also failed to show that the trial court erred in admitting the victim's statements when defendant elicited the same testimony on cross-examination.

No error.

Judge HUNTER concurs.

Judge WYNN dissents.

WYNN, Judge, dissenting.

As I disagree with the majority's conclusion that the witness' statements to law enforcement officers were nontestimonial in nature, I respectfully dissent.

Crawford holds that "[w]here testimonial evidence is at issue . . . the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at

—, 158 L. Ed. 2d at 203. Where nontestimonial hearsay is at issue, however, "it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Id.* "Thus, under *Crawford*, Sixth Amendment Confrontation Clause analysis will usually turn on the question whether a particular statement is testimonial in nature or not." *Moscat*, 2004 N.Y. Misc. LEXIS at 5. The first task for this Court under a proper *Crawford* analysis, therefore, is to determine whether or not the victim's statement to law enforcement officers in the instant case was testimonial. *See id.* at 13 (stating that, "[u]nder *Crawford*, the relevant inquiry now is *not* whether the [out-of-court statement] falls into a well-rooted hearsay exception such as the 'excited utterance.' Rather, the relevant inquiry under *Crawford* is whether [the out-of-court statement] is testimonial in nature.").

The *Crawford* Court expressly declined to define the term "testimonial." *See Crawford*, — U.S. at —, 158 L. Ed. 2d at 203 (stating that, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial' "). At a minimum, however, the term applies "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* Regarding police interrogations, *Crawford* specifically notes that the term "interrogation" is used "in its colloquial, rather than any technical legal, sense." *Id.* at — n.4, 158 L. Ed. 2d at 194, n.4. "Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation' . . . ." *Id. Crawford* further warns that

> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. . . .
>
> . . . .
>
> That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. England did not have a professional police force until the 19th century, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimo-

nial evidence presents the same risk, whether the officers are police or justices of the peace.

In sum, even if the *Sixth Amendment* is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.

Id. at ——, 158 L. Ed. 2d at 193-94 (citations omitted).

In the instant case, the witness gave a statement to law enforcement officers describing Defendant's actions during the incident for which he was tried and convicted. Defendant had no opportunity to cross-examine the witness concerning her statements to law enforcement officers, and the witness did not appear at trial. The police officer who interviewed the witness, Detective Blalock, testified it was her "responsibility . . . first to stand by at Mary Phillips school while we waited to determine if the [area] had been secured, meaning that . . . the victim had been removed to safety" and then to "go to the location and get that person and interview that person." After police officers removed Defendant from the scene and the area was secure, Detective Blalock arrived and took the witness' statement, which was later used at trial.

The majority relies upon the reasoning set forth in *Moscat* in concluding that the witness' statement to Detective Blalock was nontestimonial. In *Moscat*, the New York court determined that a 911 telephone call requesting emergency assistance was nontestimonial. The situation presented by a 911 call, however, is fundamentally different from the facts of the instant case. As noted by the *Moscat* court, a 911 call "is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril." *Moscat*, 2004 N.Y. Misc. LEXIS at 13.

Here, Detective Blalock's sole purpose at the scene of the incident was to obtain the victim's statement for use in prosecution of Defendant. The scene was secure, Defendant was absent, and the witness was no longer in any possible peril. Detective Blalock was not the first police officer encountered by the witness at the scene. The witness did not make any statements to the other police officers. Instead, she made her statement to Detective Blalock, who was the designated officer to receive it. The witness did not speak to Detective Blalock in an effort to obtain assistance; rather, she gave a statement because she knew that the police were there to gather evi-

dence concerning the crime. As such, I strongly disagree with the majority's statement that the witness "was not aware that she was bearing witness, and was not aware that her utterances might impact further legal proceedings." Further, the witness' demeanor and the length of time in which she had to reflect upon her statement are relevant only to a traditional "reliability" analysis under the "excited utterance" exception; they have absolutely no bearing upon whether or not the statement was testimonial or not.

I would hold that the witness' statement to Detective Blalock was essentially testimonial in nature. Contrary to the majority's statement that "*Crawford* protects defendants from absent witness's statements introduced after formal police interrogations," *Crawford* expressly states that the term "interrogation" can assume "various definitions" and should be read "in its colloquial, rather than any technical legal, sense." *Crawford*, — U.S. at —, n.4, 158 L. Ed. 2d at 194, n.4. Further,

> [i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Id. at —, n.7, 158 L. Ed. 2d at 196, n.7. Detective Blalock took the witness' statement in an effort to gather evidence concerning the incident for which Defendant was tried and convicted. The witness waited to make her statement until Detective Blalock arrived. It strains credulity to conclude that the witness was unaware that she was bearing witness, or that her statement was one she could not "reasonably expect to be used prosecutorially." *Id.* at —, 158 L. Ed. 2d at 193 (proffering as one example of a testimonial statement "pretrial statements that declarants would reasonably expect to be used prosecutorially").

Because the trial court admitted the witness' testimonial statement against Defendant, despite the fact that Defendant had no opportunity to cross-examine her, such admission violated Defendant's Sixth Amendment right to confrontation. *Id.* at —, 158 L. Ed. 2d at 203. I therefore dissent.

IN RE T.D.P.

No. COA03-222

(Filed 18 May 2004)

Termination of Parental Rights— willful failure to pay support—ability to pay

The trial court did not err by terminating respondent incarcerated father's parental rights under N.C.G.S. § 7B-1111(a)(3) based on respondent's willful failure to pay a reasonable portion of the cost of his minor child's foster care for six months prior to the petition, because: (1) contrary to respondent's assertion, a support order is not necessary to require him to pay a portion of the cost of the minor child's foster care; and (2) there was clear and convincing evidence that respondent had an ability to pay an amount greater than zero based on his being paid for work in the prison kitchen even though respondent's wages were meager.

Judge WYNN dissenting.

Appeal by respondent from order entered 1 April 2002 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 13 January 2004.

John F. Campbell for petitioner-appellee.

Womble Carlyle Sandridge & Rice, by Stuart A. Brock, and Robin Weaver-Hurmence, for Guardian ad Litem-appellee.

Katharine Chester for respondent-appellant.

TIMMONS-GOODSON, Judge.

Respondent appeals the trial court order terminating his parental rights as to his two-year-old daughter ("T.D.P."). For the reasons stated herein, we affirm the trial court's order.

The facts and procedure pertinent to the instant appeal are as follows: On 17 September 2001, Cumberland County Department of Social Services ("DSS") filed a petition seeking termination of respondent's parental rights ("the petition"). DSS alleged that respondent neglected T.D.P., that respondent willfully left T.D.P. in foster care for more than twelve months without showing reasonable progress had been made to correct those conditions which led to T.D.P.'s removal, that respondent failed to pay a reasonable portion of

the cost of foster care for T.D.P. for six months prior to the petition although respondent was financially able to do so, and that respondent was incapable as a result of substance abuse to provide proper care and supervision for T.D.P. On 1 April 2002, the trial court entered an order terminating respondent's parental rights as to T.D.P. Respondent appeals.

The issue on appeal is whether the trial court erred in terminating respondent's parental rights. Respondent argues that there was insufficient evidence to support the trial court's decision. We disagree.

"A termination of parental rights proceeding is a two-stage process." *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 160 (2003). The trial court first examines the evidence and determines whether sufficient grounds exist under N.C. Gen. Stat. § 7B-1111 to warrant termination of parental rights. *Id.* The trial court's findings must be supported by clear, cogent, and convincing evidence. *Id.* at 656, 589 S.E.2d at 160-61. If the trial court determines that any one of the grounds for termination listed in § 7B-1111 exists, the trial court may then terminate parental rights consistent with the best interests of the child. *Id.* at 656, 589 S.E.2d at 161. The trial court's decision to terminate parental rights is discretionary, and "this Court 'should affirm the trial court where the court's findings of fact are based upon clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re Yocum*, 158 N.C. App. 198, 203, 580 S.E.2d 399, 403 (quoting *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996)), *aff'd per curium*, 357 N.C. 568, 597 S.E.2d 674 (2003).

In the instant case, the trial court made the following pertinent findings of fact:

> X.
>
> The Respondent Father is currently incarcerated in the North Carolina Department of Corrections. He is incarcerated upon convictions of common law robbery and second degree kidnapping. Respondent Father's earliest release date is November 2003 and his maximum release date is January 2004.
>
> . . . .
>
> XII.
>
> Respondent Father is employed at the prison unit as a cook. He earns very little money. He has used his money to buy personal

> items but has not sent any money for the minor child, nor has he even sent her a card.

Based upon these findings, the trial court made the following pertinent conclusions of law:

> That the juvenile has been placed in the custody of the Cumberland County Department of Social Services for a continuous period of six months next preceding the filing of the petition and the Respondent Father has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so pursuant to NCGS § 7B-1111(a)(3).
>
> . . . .
>
> That grounds exist for termination of the parental rights of the Respondent Father.

Respondent argues that the trial court's conclusion to terminate his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) (2003) was not supported by a finding of fact based upon clear, cogent, and convincing evidence. We disagree.

As respondent correctly points out, "[a] finding that a parent has ability to pay support is essential to termination for nonsupport" pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). *In re Ballard*, 311 N.C. 708, 716-17, 319 S.E.2d 227, 233 (1984). Respondent first asserts that the trial court erred in failing to make such a finding. However, finding of fact number twelve clearly evidences that the trial court found that respondent had an ability to pay. Therefore, respondent's assertion is without merit. Furthermore, respondent's assertion that a support order is necessary to require him to pay a portion of the cost of T.D.P.'s foster care is also without merit. *See In re Wright*, 64 N.C. App. 135, 139, 306 S.E.2d 825, 827 (1983) ("Very early in our jurisprudence, it was recognized that there could be no law if knowledge of it was the test of its application. Too, that respondent did not know that fatherhood carries with it financial duties does not excuse his failings as a parent; it compounds them.").

Respondent's final assertion is that the trial court's finding of fact was unsupported by clear, cogent, and convincing evidence because respondent's failure to pay was not willful. Respondent contends that he lacked the means to pay any reasonable portion of the cost of T.D.P.'s foster care. Although respondent admits that he has worked

continuously while incarcerated, he also contends that because his wages ranged from only $.40 to $1.00 per day, it is unreasonable to require him to pay a portion of T.D.P.'s foster care. In support of this assertion, respondent cites *In re Clark*, where this Court stated that "[i]n determining what constitutes a 'reasonable portion' of the cost of care for a child, the parent's ability to pay is the controlling characteristic[,] [and] [a] parent is required to pay that portion of the cost of foster care . . . that is fair, just and equitable based upon the parent's ability or means to pay." 151 N.C. App. 286, 288-89, 565 S.E.2d 245, 247 (citations omitted) (quotations omitted), *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002). While the foregoing quotations are correct statements of law, they fail to encompass our holding in *Clark* or the law of this state regarding termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3).

In *Clark*, as in the instant case, it was "undisputed that respondent . . . paid nothing to DSS for [his daughter's] care." *Id.* at 289, 565 S.E.2d at 247. Recognizing that "nonpayment constitutes a failure to pay a reasonable portion 'if and only if respondent [is] able to pay some amount greater than zero,' " we held that "[b]ecause there was no clear and convincing evidence that respondent had any ability to pay an amount greater than zero, the trial court erred in concluding that respondent failed to pay a reasonable portion of the cost of his child's care." *Id.* (quoting *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802 (1982)).

In the instant case, there was clear and convincing evidence that respondent had an ability to pay an amount greater than zero. As discussed above, the trial court noted that although respondent's wages were meager, he was nevertheless being paid for his work in the prison kitchen. Respondent therefore had an ability to pay some portion of the costs of T.D.P.'s foster care.

Although " '[w]hat is within a parent's 'ability' to pay or what is within the 'means' of a parent to pay is a difficult standard which requires great flexibility in its application,' " the requirement of § 7B-1111(a)(3) " 'applies irrespective of the parent's wealth or poverty.' " *In re Montgomery*, 311 N.C. 101, 113, 316 S.E.2d 246, 254 (1984) (quoting *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981)). "The parents' economic status is merely a factor used to determine their ability to pay such costs, but *their ability to pay* is the controlling characteristic of what is a reasonable amount for them to pay." *In re Biggers*, 50 N.C. App. 332, 339, 274 S.E.2d 236, 240 (1981) (emphasis added). Thus, because the trial court in the instant

case correctly found that respondent was able to pay some amount greater than zero during the relevant time period, we hold that sufficient grounds existed for termination of respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(3). Therefore, we need not address respondent's arguments concerning other grounds for termination of his parental rights. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). Furthermore, because we conclude that the trial court properly determined that grounds for termination existed under N.C. Gen. Stat. § 7B-1111(a)(3), we also hold that the trial court did not abuse its discretion in finding that it was in T.D.P.'s best interest to terminate respondent's parental rights. *In re Becker*, 111 N.C. App. 85, 97, 431 S.E.2d 820, 828 (1993). Respondent's assignments of error are therefore overruled.

Affirmed.

Judge McCULLOUGH concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

A poor man with no living immediate family members who is incarcerated for longer than 12 months should face no greater risk of having his parental rights terminated for his child than a similarly incarcerated individual who has financial means. I respectfully disagree with the majority's conclusion that the trial court had clear, cogent and convincing evidence before it, as required by N.C. Gen. Stat. § 7B-1111, to support its findings and conclusions terminating the parental rights of T.D.P.'s father.

The uncontroverted facts indicate T.D.P. was born on 4 October 1999. Her father signed the birth certificate and was an active participant in her life. Indeed, the record shows that until his arrest on 9 February 2000, T.D.P.'s father maintained a loving and caring relationship with his daughter in the family home. His subsequent convictions for common law robbery and second degree kidnapping resulted in a prison term that ended in January 2004; but, the record shows that due to good behavior, his release date was changed to December 2003.

In November 1999, T.D.P.'s mother called DSS to relinquish her parental rights because she had a substance abuse problem and was unable to care for T.D.P. Shortly after contacting DSS, T.D.P.'s mother

changed her mind; nonetheless, DSS began an investigation into T.D.P.'s care. The DSS social worker, Antoinette Howard, testified that during November 1999, T.D.P. did not appear to be sick or malnourished, was clothed and appeared to be happy. She also testified that even though T.D.P.'s father indicated he had issues with drug abuse in November 1999, the issues did not concern her enough to file an abuse and neglect petition.

T.D.P.'s father testified that he began using marijuana at an early age and that use escalated to cocaine in 1988. He stopped using cocaine in the early 1990s and did not use again until he started having problems with T.D.P.'s mother. Due to these problems, he testified, "and you know how some people go pick up a drink, I went and picked up that drug."

In April 2000, Ms. Howard contacted T.D.P.'s father regarding placement of T.D.P. while he was incarcerated. Since his parents were deceased and he did not have any siblings, he contacted his aunt who reared him to see if she could care for his daughter; but, she was unable to do so. As he did not have any other relatives whom he could recommend as potential caretakers of T.D.P., his daughter remained in foster care.

Through May 2001, T.D.P.'s father was incarcerated at Lumberton LCI, where he did not work. He attended a drug treatment program, DART, until he was sent to Avery Mitchell Correctional Center, located in the North Carolina mountains. Upon his arrival at Avery Mitchell in May 2001, he began working in the kitchen at the tray window. In this position he earned 40 cents a day. He sent letters to his daughter's social worker to inquire about her well-being and development. The social worker received the first letter in July 2001. Shortly before T.D.P.'s second birthday, he sent a second letter in October 2001. This letter, which arrived three days after T.D.P.'s birthday, professed his love for his daughter and indicated he could not afford to purchase a birthday card. Then, at Christmas, T.D.P.'s father arranged to have a Christmas gift sent to his daughter through the Angel Tree organization. Shortly thereafter in January 2002, the termination of parental rights hearing was held.

While incarcerated T.D.P.'s father called the social worker as often as possible to inquire about his daughter. As the inmates could not call social workers collect, T.D.P.'s father explained that he would have to request a meeting with the social worker assigned to the prison. Approximately one week to a week and a half later

the social worker would call him to the office and allow him to call his daughter's social worker. During these conversations he would inquire about her well-being, her development, and the possibility of receiving pictures. The social worker acknowledged receiving letters, phone calls, and sending pictures to T.D.P.'s father at his request.

T.D.P.'s father stated that his goal during incarceration was to complete the drug treatment program, DART, make honor grade and then work release. He indicated he was eligible for honor grade in February 2002 and then in three to six months he would be eligible for work release. With the money he earned from work release, he hoped to save enough money for housing upon his release. He also regularly attended Narcotics Anonymous and Alcoholics Anonymous meetings at Avery Mitchell and he attended parenting classes.

T.D.P.'s father worked in the prison kitchen, where he earned 40 cents a day working at the tray window and, after being promoted to cook, he earned $1.00 a day. At the time of the hearing, he had $2.80 in his account. He had lost his cook position because he missed eight days in December 2001 due to his attendance at a court hearing in Fayetteville related to this case. With the money, he purchased toiletries—soap, toothpaste, deodorant, and toothbrushes.

At the time of the hearing, T.D.P.'s father was forty years old with a tenth-grade education. During his service in the U.S. Army from 1978-1983, from which he received two honorable discharges, T.D.P.'s father earned his GED. After leaving the army, from 1983-1991, he worked consistently at two different factories until those factories closed. Prior to his incarceration, he worked as a restaurant cook and the restaurant manager told him she would rehire him upon his release.

As indicated by the majority, in a termination of parental rights proceeding, the trial court's findings must be supported by clear, cogent, and convincing evidence. *See In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 160 (2003). Clear, cogent, and convincing evidence "is greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *In the Matter of D. Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984). Based upon the facts of this case, I would conclude the trial court's findings and conclusions are unsupported by clear, cogent and convincing evidence.

First, the trial court concluded:

> the father has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the juvenile pursuant to NCGS § 7B-1111(a)(2).

As an initial matter, it should be noted that the Cumberland County Department of Social Services has never identified any problematic conditions which T.D.P.'s father needed to improve. Indeed, the social worker testified that in November 1999, while T.D.P. was in her father's care, DSS concluded the minor child was happy, healthy, clothed and well-fed. Moreover, DSS did not find T.D.P.'s father's admitted substance abuse warranted the filing of an abuse and neglect petition. T.D.P.'s father testified that he admitted his drug use, took steps to treat the problem, and indicated that he had not had a drug problem since the early nineties. The uncontroverted evidence indicates T.D.P.'s father was drug-free at the time of the hearing and had voluntarily sought treatment by attending a drug treatment program, Narcotics Anonymous and Alcoholics Anonymous meetings, and parenting classes. He had remained infraction-free while incarcerated, was working in the prison kitchen, and had goals of achieving work-release status. Due to his good behavior, his release date had been changed to an earlier date, December 2003. Thus, the only condition that needed improvement was his incarcerated status. The evidence indicates T.D.P.'s father was improving this condition by maintaining good behavior.

The trial court also concluded:

> the juvenile has been placed in the custody of the Cumberland County Department of Social Services for a continuous period of six months next preceding the filing of the petition and the Respondent Father has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so pursuant to NCGS § 7B-1111(a)(3).

"In determining what constitutes a 'reasonable portion' of the cost of care for a child, the parent's ability to pay is the controlling characteristic. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the par-

ent's ability or means to pay. What is within a parent's 'ability' to pay or what is within the 'means' of a parent to pay is a difficult standard which requires great flexibility in its application." *In re Clark*, 151 N.C. App. 286, 288-89, 565 S.E.2d 245, 247 (2002). "Nonpayment constitutes a failure to pay a reasonable portion if and only if respondent is able to pay some amount greater than zero." *Id.*

In this case, T.D.P.'s father could not work while he was incarcerated in Lumberton, North Carolina. After his transfer to Avery Mitchell in May 2001, he was allowed to work in the kitchen at the tray window. From this employment, he earned 40 cents a day or $2.80 a week. With this money he purchased toiletries and other items to care for himself. He also used this money to purchase the two stamps he used to mail two letters, including the birthday letter, to his daughter's social worker.

The trial court found that:

> Respondent Father is employed at the prison unit as a cook. He earns very little money. He has used his money to buy personal items but has not sent any money for the minor child, nor has he even sent her a card.

There is no indication in this finding that the trial court determined T.D.P.'s father had the ability to pay a reasonable portion of his daughter's care. Furthermore, as stated in *Clark*, "a parent is required to pay that portion of the cost of foster care for the child that is fair, just, and equitable based upon the parent's ability or means to pay." In my opinion, a person earning 40 cents a day in wages is incapable of paying a reasonable portion of a two-year old's care.

Moreover, as acknowledged by North Carolina's Child Support Guidelines, a parent should have the ability to care for one's self. Accordingly, our Child Support Guidelines include a self support reserve:

> which ensures that obligors have sufficient income to maintain a minimum standard of living based on the 1997 federal poverty level for one person. For obligors with an adjusted gross income of less than $800, the Guidelines require, absent a deviation, the establishment of a minimum support order ($50).

At Respondent's daily wage, he would have to work two months in order to meet this minimum amount of support. Moreover, the uncontroverted evidence indicates Respondent used his minimal wages to

purchase toiletries and other items to care for himself. Given that Respondent earned a dollar or less per day, never had more than $7.00 in his account and used this money to care for basic needs, I would conclude the clear, cogent and convincing evidence indicates T.D.P.'s father did not have the means or ability to pay a reasonable portion of his daughter's foster care.

The trial court also concluded "the Respondent Father has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. The word willful encompasses more than a mere intention, but also purpose and deliberation." *In re McElmore*, 139 N.C. App. 426, 533 S.E.2d 508 (2000). As explained in *McElmore*, the court is required "to consider, during the relevant six month period, the financial support respondent has provided to the child, as well as the respondent's emotional contributions to the child. . . . A mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment. Explanations could be made which would be inconsistent with a willful intent to abandon." *Id.*

The relevant six month period in this case is March-September 2001. Between March 2001 and May 2001, Respondent was incapable of contributing financially to his daughter's care as he did not have any income. Moreover, I would conclude that upon earning money, he did not have the ability or means to contribute reasonable support to his daughter. As for emotional support, during the relevant time period, Respondent sent letters, including a birthday letter, although it was financially difficult to do so. Respondent also called the social worker to inquire about his two-year old daughter's well-being and development. He arranged for a charitable organization to send his daughter a Christmas present. Indeed, the social worker testified Respondent would write or call and indicated she had been contacted by the Angel Tree organization. T.D.P.'s father also expressed his love for his daughter and his desire to visit with her. Accordingly, the uncontroverted clear, cogent and convincing evidence does not support the conclusion Respondent willfully abandoned his daughter.

Finally, the trial court concluded Respondent was incapable of providing for the proper care and supervision of his daughter and that there was a reasonable probability that such incapability would continue for the foreseeable future. First, upon learning of T.D.P.'s placement in foster care and the mother's relinquishment of parental rights, T.D.P.'s father contacted relatives to see if anyone was able to care for his daughter. As both of his parents were deceased and he did not have any siblings, the only relative he could ask was his seventy year old aunt who raised him. As she was already taking care of other children, she was unable to care for T.D.P. Second, upon his release from prison in 2003, Respondent indicated he had a potential job with a restaurant as the restaurant manager stated she would rehire him upon his release from prison. Furthermore, he had carpentry skills and army training which could help in his job search. Respondent also indicated he was trying to obtain work release so he could save money for housing. Finally, it should be noted that the social worker testified there were two plans in place for the minor child—adoption or reunification with the father in January 2004 after his release from prison.

In sum, I believe the clear, cogent and convincing evidence in this case does not support the termination of T.D.P.'s father's parental rights. As stated by the attorney advocate for T.D.P. at the hearing:

> What a gentle spirit this man is. And certainly I can see the dilemma of the court, because I think that he truly does care for this child. There's no doubt in my mind. He's never had a child before and he was very honest and open, I think, on the witness stand. . . . If it had gone along and he and mom had split up, I think he probably would have done a good job with her . . .

In sum, there is little doubt that if T.P.D.'s father possessed wealth, his parental rights to his daughter would have never been terminated. The record shows that he loves his daughter and greatly desires to care for her. As I stated at the beginning of this dissent, a poor man with no living immediate family members who is incarcerated for longer than 12 months should face no greater risk of having his parental rights terminated for his child than a similarly incarcerated individual who has financial means.

STATE OF NORTH CAROLINA v. DENISE KHADIJAH MORGAN

No. COA03-849

(Filed 18 May 2004)

1. Evidence— reference to prior convictions—mistrial denied

There was no abuse of discretion in an assault prosecution in the denial of defendant's motion for a mistrial after testimony that defendant told the victim that she had killed before. The court immediately sustained an objection, gave a curative instruction, and asked the jurors if they could follow the instruction.

2. Assault— serious injury—evidence sufficient

There was sufficient evidence for a jury to find serious injury in a prosecution for assault with a deadly weapon inflicting serious injury.

3. Appeal and Error— sentencing hearing—State meeting its burden of proof—no objection required

An alleged sentencing hearing error based on sufficiency of evidence as a matter of law did not require an objection at the hearing for preservation of appellate review.

4. Sentencing— prior convictions—sufficiency of evidence

The State presented sufficient evidence to show the existence of defendant's prior convictions in a sentencing hearing because comments by defendant's counsel constituted a stipulation to the existence of the prior convictions listed on a worksheet submitted by the State.

5. Sentencing— prior convictions in other states—similarity to N.C. offenses

A defendant's sentencing stipulation to the existence of prior convictions did not extend to whether those convictions were similar to North Carolina offenses, and the State failed to show that defendant's prior convictions were substantially similar to North Carolina offenses.

6. Evidence— victim's statement to detective—inconsistencies with trial testimony

There was no error in allowing a detective to read to the jury a statement made to him by the victim. Alleged inconsistencies

between the victims's statement and his testimony were slight variations that did not render the statements inadmissible.

Appeal by defendant from judgment entered 20 February 2003 by Judge Ernest B. Fullwood in Superior Court, New Hanover County. Heard in the Court of Appeals 20 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Tina Lloyd Hlabse, for the State.

Haral E. Carlin for defendant appellant.

WYNN, Judge.

Denise Khadijah Morgan, Defendant, appeals from judgment of the trial court entered upon her conviction for assault with a deadly weapon inflicting serious injury. Defendant contends the trial court erred by (I) denying her motion for a mistrial; (II) denying her motion to dismiss; (III) sentencing her at a prior record level IV; and (IV) denying her motion to suppress evidence. For the reasons stated herein, we find the trial court erred in sentencing Defendant based on insufficient evidence of her prior convictions. We otherwise find no error by the trial court.

The evidence presented by the State at trial tended to show the following: On 16 April 2002, Charles Maddox visited his friend, Frances Watson, at her residence. Defendant was also present. Maddox and Defendant once resided together, but their relationship ended more than a year before the date in question. Maddox testified Defendant "got angry because I wouldn't talk to her, and she saw me talking to some other girls, and one thing led to another and she just got angrier and angrier." Maddox stated he was leaving Watson's residence when "I heard [Defendant] behind me, and I turned around. I saw her coming at me" with "knives and forks, barbecue forks[;]" she "started stabbing at me," stating, "I'll kill you, m.f., I got you now." Defendant stabbed Maddox in the eye, and he ran to the bathroom. Maddox testified "I thought I was blind. I thought my eye was out." Defendant kicked the bathroom door open and continued to attack Maddox. Maddox fled the residence, and was later treated for his injuries at a hospital. Maddox's treating physician testified he sustained multiple lacerations to his forearm, several small stab wounds to his leg, a deep laceration to his thumb, bruising to his back, and a puncture wound to his right orbital rim, which caused fracture of the bone. Maddox was referred to medical specialists to treat the injuries to his eye and thumb.

Detective Ocee D. Horton, Jr., of the Wilmington Police Department testified he visited Maddox at the hospital and took his statement. Detective Horton then read to the jury from Maddox's statement as follows:

> The victim stated he had stopped by Frances' apartment—and that would be Frances Watson—at approximately 12:00 a.m., to drop off some cigarettes, food and a few dollars to Frances. The victim stated that Frances let him into her apartment and that [Defendant] was there. The victim stated that [Defendant] started yelling and cursing at him. The victim stated that [Defendant] yelled that she hated him and that she would kill him. The victim stated that [Defendant] said she had already killed someone and that she could kill him, also.

Counsel for Defendant objected, and the trial court then instructed the jury as follows:

> Ladies and gentlemen, let me say to you that any reference that was made to any prior criminal activity on the part of the defendant is not appropriate, and you should completely and totally disregard it. If you cannot do that, then I want you to raise your hand at this time. All right, let the record reflect that no one raised his or her hand.

The trial court denied Defendant's subsequent motion for a mistrial.

Defendant testified in her own defense and denied attacking Maddox. Defendant stated she was lying on Watson's couch when Maddox approached her and "sprayed [her] face with roach spray." Defendant followed Maddox into the kitchen, where the two argued and "tassled." Maddox picked up several knives and forks. Defendant then threw a frying pan at Maddox, who ducked and slipped. From his position on the floor, Maddox cut Defendant several times on her legs. Defendant threw a heavy punch bowl at Maddox, striking him in the temple. The wound to his temple bled heavily, and Maddox retreated to the bathroom. When he emerged from the bathroom, Maddox picked up a knife and "chased [Defendant] out" of the residence. Defendant drove away in her vehicle.

Upon conclusion of the evidence, the jury found Defendant guilty of assault with a deadly weapon inflicting serious injury. At sentencing, the State contended that Defendant's prior convictions gave her a total of nine points for a prior record level IV. One of Defendant's

convictions was a New Jersey conviction for homicide in the third degree. The State contended that this charge was equivalent to voluntary manslaughter under North Carolina law, and that it should be assessed as a Class F point value. Defendant disputed the State's position, arguing that it was an unintentional homicide and that Defendant was under level III. The trial court sentenced Defendant at level IV, with a minimum term of thirty-seven months and a maximum term of fifty-four months. Defendant appealed.

Defendant argues the trial court erred by (I) denying her motion for a mistrial; (II) denying her motion to dismiss; (III) sentencing her at a level IV; and (IV) denying her motion to suppress evidence. For the reasons stated herein, we hold the trial court erred in sentencing Defendant based on insufficient evidence of her prior convictions. We otherwise find no error by the trial court.

I. *Motion for Mistrial*

[1] By her first assignment of error, Defendant contends the trial court erred in denying her motion for a mistrial after Detective Horton testified Defendant informed Maddox "she had already killed someone and that she could kill him also." Defendant argues the State elicited impermissible character evidence of Defendant's prior bad acts in an attempt to show she acted in conformity therewith during the present assault. Defendant contends the evidence substantially and irreparably prejudiced her, and that she is therefore entitled to a new trial.

Upon a motion by a defendant or with his concurrence,

> the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

N.C. Gen. Stat. § 15A-1061 (2003). The decision to grant a motion for a mistrial is within the sound discretion of the trial court. *State v. Prevatte*, 356 N.C. 178, 253-54, 570 S.E.2d 440, 482 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). A mistrial should be declared only if there are serious improprieties making it impossible to reach a fair, impartial verdict. *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 35-36 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). The trial court's decision of whether to grant a mistrial "is

to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable." *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998).

Although the statement by Detective Horton regarding possible crimes committed by Defendant was clearly inadmissible and should not have been elicited by the prosecutor, we do not conclude the trial court abused its discretion in denying her motion for mistrial. "When a court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Walker*, 319 N.C. 651, 655, 356 S.E.2d 344, 346 (1987). "Jurors are presumed to follow a trial court's instructions." *McCarver*, 341 N.C. at 384, 462 S.E.2d at 36. Here, the trial court immediately sustained Defendant's objection to the inadmissible evidence and gave a curative instruction by telling the jury to "completely and totally disregard" the objectionable statement. The trial court then asked the jury members to indicate whether they could not follow its instruction by raising their hands. The trial court indicated for the record that none of the jurors raised his or her hand. Under these circumstances, we must conclude the trial court did not abuse its discretion in denying Defendant's motion for a mistrial. *See State v. McNeill*, 349 N.C. 634, 648, 509 S.E.2d 415, 423 (1998) (holding that any potential prejudice was cured by the trial court's instruction to the jury not to consider the objectionable remark, and that the trial court did not err or abuse its discretion in denying the motion for a mistrial), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999); *State v. Pruitt*, 301 N.C. 683, 687-88, 273 S.E.2d 264, 267-68 (1981) (holding the trial court did not err in denying the defendant's motion for a mistrial upon admission of evidence related to another crime where the trial court instructed the jury that the objectionable evidence had nothing to do with the case, that the jury should strike the evidence from their minds, and that any juror who could not do so should raise his hand, which no juror did). We reject this assignment of error.

II. *Motion to Dismiss*

[2] By further assignment of error, Defendant contends the trial court erred in denying her motion to dismiss the charge of assault with a deadly weapon inflicting serious injury. Specifically, Defendant argues the State presented insufficient evidence that the alleged victim, Maddox, suffered serious injury. Defendant's argument is without merit.

"Upon a defendant's motion to dismiss, the court must consider whether the State has presented substantial evidence of each essential element of the crime charged." *State v. Alexander*, 152 N.C. App. 701, 705, 568 S.E.2d 317, 319 (2002). Substantial evidence is such "relevant evidence that a reasonable mind might accept as sufficient to support a conclusion." *State v. Allen*, 346 N.C. 731, 739, 488 S.E.2d 188, 192 (1997). The trial court is required to view the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences to be drawn therefrom. *See id.*

"The courts of this [S]tate have declined to define serious injury for purposes of assault prosecutions other than stating that the term means physical or bodily injury resulting from an assault, *State v. Alexander*, 337 N.C. 182, 188, 446 S.E.2d 83, 87, and that 'further definition seems neither wise nor desirable.' " *State v. Ezell*, 159 N.C. App. 103, 110, 582 S.E.2d 679, 684 (2003) (quoting *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962)). Whether a serious injury has been inflicted is a factual determination within the province of the jury. *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991). Relevant factors in determining whether serious injury has been inflicted include, but are not limited to: (1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work. *Id.* Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury. *State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 374 (1978).

In the instant case, the State presented evidence tending to show that Maddox was treated at a hospital for multiple lacerations to his forearm, small stab wounds to his leg, a deep laceration to his thumb, bruising to his back, and a puncture wound to his right orbital rim, causing fracture of the bone. Because of the wounds to his eye and thumb, Maddox was referred to an eye specialist and a hand specialist. Maddox testified that, after Defendant stabbed him in the eye, he "thought [he] was blind. [He] thought [his] eye was out." We conclude the State presented sufficient evidence from which the jury could find that Maddox sustained serious injury as a result of Defendant's assault, and we therefore overrule this assignment of error. *See Hedgepeth*, 330 N.C. at 55, 409 S.E.2d at 319 (holding that reasonable minds could not differ as to the seriousness of the victim's physical injuries where the victim required emergency treatment for a gunshot wound to her ear and powder burns and lacerations on her head and hand).

III. *Prior Record Level*

[3] Defendant next argues the trial court erred in sentencing her at level IV. Defendant contends the State failed to prove the existence of any prior convictions by a preponderance of the evidence, and that the State also failed to show that her out-of-state convictions were substantially similar to corresponding North Carolina offenses.

The State argues that Defendant did not properly preserve this error for appellate review because she failed to object to the prosecution's calculation of her prior record level at the sentencing hearing. However, the assignment of error in this case is not evidentiary; rather, it challenges whether the prosecution met its burden of proof at the sentencing hearing. Error based on insufficient evidence as a matter of law does not require an objection at the sentencing hearing to be preserved for appellate review. *See* N.C. Gen. Stat. §§ 15A-1446(d)(5), (d)(18) (2003). We therefore address the merits of Defendant's argument.

[4] Section 15A-1340.14(f) of the North Carolina General Statutes requires a prior conviction to be proven by one of the following methods: (1) stipulation of the parties; (2) an original or copy of the court record of the prior conviction; (3) a copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts; or (4) any other method found by the court to be reliable. *See* N.C. Gen. Stat. § 15A-1340.14(f) (2003). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction," and the State is required to "make all feasible efforts to obtain and present to the court the offender's full record." *Id.*

"There is no question that a worksheet, prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions." *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002). Oral statements by defense counsel at sentencing regarding a prior level record worksheet, however, may constitute a stipulation to the existence of the convictions listed therein. *See id.*; *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000).

In *Hanton*, the State presented no evidence as to the defendant's prior convictions other than a prior record level worksheet and a computer printout. The following exchange then occurred:

> [THE PROSECUTOR]: Mr. Hanton, by the State's reckoning, has 18 prior points, making him a Level 5.
>
> . . . .
>
> THE COURT: Mr. Farfour, with the exception of the kidnapping charge, is there any disagreement about the other convictions on there?
>
> [THE DEFENSE ATTORNEY]: No, Your Honor.
>
> THE COURT: All right.

Id. at 689, 540 S.E.2d at 382. The Court concluded that this colloquy "might reasonably be construed as an admission by defendant that he had been convicted of the other charges appearing on the prosecutor's work sheet." *Id.* at 690, 540 S.E.2d at 383.

Similarly, in *Eubanks*, the only evidence presented by the State was a prior record level worksheet purporting to list five prior convictions. Prior to the State's submission of the worksheet, the following colloquy occurred:

> THE COURT: Evidence for the State?
>
> [THE PROSECUTOR]: If Your Honor please, under the Structured Sentencing Act of North Carolina, the defendant has a prior record level of four in this case, Your Honor.
>
> THE COURT: Do you have a prior record level worksheet?
>
> [THE PROSECUTOR]: Yes, sir, I do.
>
> THE COURT: All right. Have you seen that, Mr. Prelipp [attorney for defendant]?
>
> MR. PRELIPP: I have, sir.
>
> THE COURT: Any objections to that?
>
> MR. PRELIPP: No, sir.

Eubanks, 151 N.C. App. at 504-05, 565 S.E.2d at 742. Reviewing the above-stated exchange, the Court held that the statements made by the defense counsel could "reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet." In further support of its decision, the Court noted the defendant had "not asserted in his appellate brief that any of the prior convictions listed on the worksheet [did] not, in fact, exist." *Id.* at 506, 565 S.E.2d at 743.

In the instant case, the following discussion took place regarding Defendant's prior convictions:

> THE COURT: Are we ready for sentencing in this matter?
>
> [THE PROSECUTOR]: Yes.
>
> THE COURT: What are the prior record points of this defendant?
>
> [THE PROSECUTOR]: We have a number of convictions on here. The first time would be a larceny case from 2/25/1983 in New Jersey. The next would be—no, excuse me. First in time was aggravated assault on a police officer out of New Jersey, that was in 1978, and we have a larceny in 1983 I just mentioned. There was a homicide in the third degree in New Jersey, that was 6/15/1987. We have a felony larceny that was mentioned on the stand from 6/3/93, and we have a 10/1/02 New Hanover County communicating threats. That happened while she was in jail. I also have, as best I can find out, the definition of homicide in New Jersey. I did not find the definition calling this third degree homicide. What I do have on the definition of homicide, manslaughter. It appears that New Jersey makes a distinction between homicide as an intentional act and manslaughter as an unintentional act. I have, therefore, and would contend that the homicide in the third degree cannot be any less than voluntary manslaughter, pursuant to North Carolina law. I don't think it's any more than that, but it certainly can't be any less than that and, as such, it's a Class F point value, assessed as Class F point value. That would give her a total of nine points.
>
> THE COURT: Mr. Davis?
>
> [THE PROSECUTOR]: Your Honor, if I can approach and hand that up to the court.
>
> [DEFENSE COUNSEL]: Your Honor, I have gone over this with my client. We would contend that was an unintentional homicide. My client described that to me and, again, we don't have the equivalency here. We would contend it's unintentional. It would make it, perhaps, a lesser charge in terms of points that we assign.
>
> THE COURT: So that you're contending that [Defendant] is a level three?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Rather than a level four?

[DEFENSE COUNSEL]: Yes.

[THE PROSECUTOR]: I have handed to the court—you may want to mark it for identification purposes, but I have handed to the court, as best I can find, the definition from New Jersey law from that period of time and, like I said, I've looked at it. I cannot find anything they call homicide in the third degree, but if you look through those definitions, homicide is a voluntary act and, if you go on through those definitions, they've got manslaughter defined as a reckless—so, again, I would contend anything defined in New Jersey as a homicide would be an intentional act and couldn't be any less than voluntary manslaughter. That's my argument. I would also—

THE COURT: Let counsel approach the bench, please.

(AN OFF-THE RECORD BENCH CONFERENCE WAS HELD.)

[DEFENSE COUNSEL]: I will defer to the court. My obligation is to give you what information I have, and I've done that, and whatever the court feels is appropriate, I have no—

THE COURT: Of course, sir. I was just looking at the statute. It appears to the court that involuntary manslaughter is a Class F. So if—and the worksheet shows that prior conviction, homicide conviction, up in New Jersey as—

[THE PROSECUTOR]: I counted it for F.

THE COURT: You've already counted it F; therefore the court is going to find that the prior record points of the defendant are nine.

We hold the comments by Defendant's attorney constituted a stipulation to the existence of the prior convictions listed on the worksheet submitted by the State. Defense counsel conceded the existence of the convictions by arguing that Defendant should be sentenced at a level III on the basis of her prior record. Defense counsel made no objection to the prior record level worksheet except to the number of points the third degree homicide conviction from New Jersey should receive. Defendant does not assert on appeal that any of the prior convictions listed on the worksheet do not exist. *Eubanks*, 151 N.C. App. at 506, 565 S.E.2d at 743. The State therefore presented sufficient evidence to show the existence of Defendant's prior convictions. *See id.*; *Hanton*, 140 N.C. App. at 689-90, 540 S.E.2d at 382-83.

[5] Although we conclude that Defendant stipulated to the existence of the prior convictions, such stipulation did not extend to whether the out-of-state offenses were substantially similar to the respective North Carolina offenses. *See Hanton*, 140 N.C. App. at 690, 540 S.E.2d at 383 (concluding that, although comments by the defense counsel "might be reasonably construed as an admission by defendant that he had been convicted of the other charges appearing on the prosecutor's work sheet," it was "not clear that defendant was stipulating that the out-of-state convictions were substantially similar" to North Carolina charges). Section 15A-1340.14 of the General Statutes, which addresses the classification of prior convictions from other jurisdictions, provides as follows:

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

N.C. Gen. Stat. § 15A-1340.14(e) (2003). Here, the prior record level worksheet calculates Defendant as having three prior Class A1 or 1 misdemeanor convictions. At least one of the misdemeanor convictions is for the out-of-state misdemeanor offense of larceny. It is unclear from the record upon which of Defendant's prior convictions the two remaining misdemeanor convictions are based. According to section 15A-1340.14(e), out-of-state misdemeanor offenses are classified as Class 3 misdemeanors unless "the State proves by the prepon-

derance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina." The State presented no evidence that the out-of-state misdemeanor offenses were substantially similar to offenses classified as Class A1 or Class 1 misdemeanors in North Carolina. The trial court therefore erred in sentencing Defendant based upon the prior record level worksheet assigning her prior out-of-state misdemeanor convictions as Class A1 or Class 1 misdemeanor convictions. We must therefore remand Defendant's case for resentencing.

Further, the prior record level worksheet assigned Defendant four points for her 1987 prior conviction in New Jersey of homicide in the third degree. In support of its assertion that the felony homicide conviction was substantially similar to the offense of voluntary manslaughter in North Carolina, the State presented a copy of the 2002 New Jersey homicide statute. Section 8-3 of the North Carolina General Statutes provides that a printed copy of a statute of another state is admissible as evidence of the statute law of such state. N.C. Gen. Stat. § 8-3(a) (2003); *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (holding that copies of New Jersey and New York statutes, and comparison of their provisions to the criminal laws of North Carolina, were sufficient to prove by a preponderance of the evidence that the crimes of which the defendant was convicted in those states were substantially similar to classified crimes in North Carolina for purposes of section 15A-1340.14(e)), *disc. review denied*, 349 N.C. 237, 516 S.E.2d 605 (1998). The State presented no evidence, however, that the 2002 New Jersey homicide statute was unchanged from the 1987 version under which Defendant was convicted. Because the State failed to show that Defendant's prior conviction was substantially similar to an offense in North Carolina classified as a Class I felony or higher, the trial court erred in sentencing Defendant based upon the prior record level worksheet classifying Defendant's out-of-state felony as a Class F. *See Hanton*, 140 N.C. App. at 690, 540 S.E.2d at 383. However, "[i]n the interests of justice, both the State and defendant may offer additional evidence at the resentencing hearing." *Id.*

IV. *Motion to Suppress*

[6] By her final assignment of error, Defendant contends the trial court erred in allowing Detective Horton to read to the jury the statement made to him by Maddox concerning the assault. Defendant contends the statement did not corroborate the testimony given by

Maddox and was therefore inadmissible. We disagree. We have reviewed the alleged inconsistencies between the testimony given by Maddox and the information contained in his statement, and conclude they are but "slight variations [that did] not render the statements inadmissible." *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983). The trial court did not err in admitting the statement by Maddox as corroborative evidence.

In summary, we conclude there was no error in Defendant's conviction of assault with a deadly weapon inflicting serious injury, but the case must be remanded to the Superior Court of New Hanover County for resentencing.

No error, remanded for resentencing.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. CRYSTAL STROBEL

No. COA03-566

(Filed 18 May 2004)

1. Confessions and Incriminating Statements— motion to suppress—*Miranda* warnings—voluntariness

The trial court did not err by denying defendant's motion to suppress a statement given by her to the police, because: (1) it is not essential that *Miranda* warnings be given orally rather than in written form, although the better practice would be to give the accused both; (2) although defendant contends she did not read the voluntary statement form before she signed it, it is presumed that the accused has read it or has knowledge of its contents unless it is shown that defendant was willfully misled or misinformed by the opposing party; (3) defendant's statement amounted to an equivocal request for an attorney, a detective attempted to clarify whether defendant wanted an attorney and gave her every opportunity to contact her attorney, and defendant never availed herself of these opportunities; and (4) the lack of evidence that defendant felt threatened or was being coerced supports the trial court's conclusion that defendant's statement was voluntary.

2. Constitutional Law— right to counsel—separate charges

It was permissible for the police to question defendant about a robbery charge outside the presence of the attorney who had been appointed to represent her in the conspiracy to commit robbery charge, because: (1) robbery and conspiracy to commit robbery are separate crimes; and (2) defendant's Sixth Amendment right to counsel had not attached to the robbery with a dangerous weapon charge.

Appeal by defendant from judgment entered 22 October 2002 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 4 February 2004.

Roy Cooper, Attorney General, by Daniel D. Addison, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Katherine Jane Allen, Assistant Appellate Defender, for defendant-appellant.

STEELMAN, Judge.

Defendant, Crystal Strobel, appeals the trial court's denial of her motion to suppress a statement given by her to the police. For the reasons discussed herein, we affirm.

The State's evidence tended to show that on 14 November 2001, Jessica Pritt, a manager at a Taco Bell restaurant in Havelock, North Carolina, was robbed while making a nightly deposit at the Branch Bank and Trust. Three individuals were involved in the robbery. One of the individuals, Ernest Erdman, approached Pritt with a bottle while defendant waited in the car. Pritt sustained minor head injuries as she was robbed of a $1600 deposit.

Officer Brian Woods of the Havelock City Police Department interviewed defendant on 25 November 2001, after receiving information obtained from Erdman's girlfriend that indicated defendant was involved in the crime. This was a non-custodial interview. On 29 November 2001, a warrant was issued for the arrest of defendant, charging her with conspiracy to commit robbery with a dangerous weapon. Police arrested defendant on 30 November 2001, and she appeared before the District Court of Craven County on 3 December 2001. At that time, defendant requested an attorney and the court appointed Joshua Willey to represent her on the conspiracy charge.

Sergeant David King of the Havelock Police Department subsequently interviewed Ernest Erdman, who implicated defendant as a participant in the robbery. On 18 January 2002, a warrant was issued for the arrest of defendant, charging her with robbery with a dangerous weapon. Police arrested defendant on 24 January 2002, and she gave a written statement to Sergeant King following her arrest. Defendant moved to suppress her 24 January 2002 statement. The trial court denied this motion after a hearing on 22 October 2002. Following this ruling, defendant entered pleas of guilty to robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The charges were consolidated by the trial court and defendant received an active sentence from the mitigated range of thirty-eight to fifty-five months.

[1] Defendant appeals the denial of her motion to suppress pursuant to N.C. Gen. Stat. § 15A-979(b). This is her sole assignment of error.

Sergeant King's interview of defendant on 24 January 2002 was a custodial interrogation. Prior to a custodial interrogation of a defendant, an officer must give warnings to the defendant as mandated by the holding of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966); *State v. Steptoe*, 296 N.C. 711, 716, 252 S.E.2d 707, 710 (1979). In order for a statement obtained during a custodial interrogation to be admissible, *Miranda* requires the following warnings be given to an accused before such interrogation begins: (1) that she has the right to remain silent; (2) that anything she says can and will be used against her in court; (3) that she has the right to consult with a lawyer and to have a lawyer present during interrogation; and (4) that if she cannot afford an attorney, counsel will be appointed to represent her. *Steptoe*, 296 N.C. at 716, 252 S.E.2d at 710.

The trial court found that "Detective King did not orally advise the Defendant of her Miranda Rights, but rather they were given to her to read on State's Exhibit No. 1, the Voluntary Statement." The written statement form set forth each of the *Miranda* rights. It also contained the following language:

> I do not want to talk to a lawyer and I hereby knowingly and personally waive my rights to remain silent and my right to have a lawyer present while I make the following statement to the aforesaid person, knowing that I have the right and privilege to terminate any interview at anytime hereafter and have a lawyer present

> with me before . . . answering any more questions or making any more statements if I choose to do so.

Defendant signed each page of the statement. The following language appears at the bottom of the first page of the statement:

> I have read each page of this statement consisting of four pages, each page of which bears my signature and corrections, if any, bears my initials, and I certify that the facts contained hereon are true and correct. I further certify that I have made no request for advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request the statement be stopped. I also declare that I . . . was not told or prompted what to say [in this] statement, and that this statement was completed at 10:40 a.m. on the 24th of January, 2002.

Defendant first contends Sergeant King was required to give defendant the *Miranda* warnings orally and not just in writing. Defendant further contends she did not read the *Miranda* warnings placed in front of her. As a result of these alleged defects, defendant asserts she did not knowingly waive her *Miranda* rights, and thus, her confession should have been suppressed as being obtained in violation of her rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Where a defendant challenges the admissibility of an in-custody confession, the trial judge must conduct a *voir dire* hearing to ascertain whether defendant has been informed of their constitutional rights and has knowingly, voluntarily, and intelligently waived these rights before making the challenged admissions. *State v. Jenkins*, 300 N.C. 578, 584, 268 S.E.2d 458, 463 (1980). "When the *voir dire* evidence is conflicting, as here, the trial judge must weigh the credibility of the witnesses, resolve the crucial conflicts and make appropriate findings of fact." *Id.* Where the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal. *Id.* However, the trial court's conclusions of law "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). On appeal, the conclusions of law, which are drawn from these findings are fully reviewable. *State v. Booker*, 306 N.C. 302, 308, 293 S.E.2d 78, 81 (1982).

There is no specific requirement as to the exact manner in which police must convey *Miranda* warnings to a person suspected of a

crime. *United States v. Osterburg*, 423 F.2d 704, 705 (9th Cir.), *cert. denied*, 399 U.S. 914, 26 L. Ed. 2d 571 (1970). "The requirement is that the police fully advise such a person of [their] rights" *Id.* (quoting *Bell v. United States*, 382 F.2d 985, 987 (9th Cir. 1967), *cert denied*, 390 U.S. 965, 19 L. Ed. 2d 1165 (1968)). Although we were unable to find a case in North Carolina addressing this issue, numerous other courts have found that it is not essential that the warnings required by *Miranda* be given in oral rather than written form. *See e.g.*, *State v. Sledge*, 546 F.2d 1120, 1122 (4th Cir.), *cert. denied*, 430 U.S. 910, 51 L. Ed. 2d 588 (1977); *United States v. Coleman*, 524 F.2d 593, 594 (10th Cir. 1975); *United States v. Bailey*, 468 F.2d 652, 659-60 (5th Cir. 1972); *United States v. Alexander*, 441 F.2d 403, 404 (3d Cir. 1971); *United States v. Van Dusen*, 431 F.2d 1278, 1280 (1st Cir. 1970); *United States v. Johnson*, 426 F.2d 1112, 1115 (7th Cir.), *cert denied*, 400 U.S. 842, 27 L. Ed. 2d 78 (1970); *United States v. Osterburg*, 423 F.2d 704 (9th Cir. 1970); *Bell v. United States*, 382 F.2D 985, 987 (9th Cir. 1967). Thus, the mere fact that Sergeant King did not read the *Miranda* warnings to defendant, standing alone, does not render defendant's waiver ineffective.

Defendant further argues that since she did not read the "Voluntary Statement" form before she signed it, she did not receive the required *Miranda* warnings and, therefore her statement is inadmissible. We find this argument unpersuasive.

> When a statement purporting to be a confession bears the signature of the accused, it is presumed, nothing else appearing, that the accused has read it or has knowledge of its contents." *State v. Walker*, 269 N.C. 135, 139, 152 S.E. 2d 133, 137 (1967). The rule in civil cases, also applicable to the defendant's argument in this criminal case, is that a person who signs a paper writing has a duty to ascertain the contents of the writing, and he will be held to have signed with full knowledge and assent as to its contents unless it is shown that he was wilfully misled or misinformed by the opposing party, or if the contents were fraudulently withheld from him. *Williams v. Williams*, 220 N.C. 806, 18 S.E.2d 364 (1942).

State v. King, 67 N.C. App. 524, 526, 313 S.E.2d 281, 283 (1984).

Here, the trial court found, by a preponderance of the evidence, that: (1) it had the opportunity to see and observe each witness and determine what weight and credibility to give each witness's testimony; (2) Detective King did not orally advise defendant of her

Miranda rights, but rather gave them to her to read on a form entitled "Voluntary Statement;" (3) defendant could read and write; (4) she apparently read the Voluntary Statement form; (5) defendant was 22 years old at the time she gave this statement and she had previous employment, which required her to read and sign other documents; and (6) defendant signed each page of her four page statement and on the first page of the document she signed acknowledging she had read each page of the statement and initialed any corrections made to the statement. Based on these findings of fact, the trial court concluded:

> 4. The Statement made by the Defendant to Detective David King on January 24, 2002, was made freely, voluntarily and understandingly.
>
> 5. The Defendant fully understood her constitutional rights to remain silent and her constitutional right to counsel and all other rights.
>
> 6. The Defendant freely, knowingly, intelligently and voluntarily waived each of those rights and thereupon made the statement to the abovementioned officers.

We find that there was competent evidence in the record to support the findings of fact, and these in turn support the conclusions of law.

Despite our ruling today, we do note that the better practice would have been to give the accused both an oral recitation of the required *Miranda* warnings, as well as providing her with a written explanation of such rights, and a request that she execute a legally sufficient waiver before the officers began the custodial interrogation. *See United States v. Sledge*, 546 F.2d 1120, 1122 (4th Cir. 1977) (stating that while *Miranda* does not require the warnings be in oral rather than written form, since a heavy burden rests on the State to show the waiver was knowingly given, the better practice is to give the defendant his *Miranda* warnings in both oral and written form).

Next, defendant argues in the alternative, that even if she did receive the *Miranda* warnings, the waiver of those rights was not knowing, intelligent, and voluntary. "[F]or a confession to be admissible, the *Miranda* warnings must be given, a valid waiver obtained, and the confession must be voluntary." *State v. Detter*, 298 N.C. 604, 628, 260 S.E.2d 567, 584 (1979). The State has the burden of estab-

lishing by a preponderance of the evidence that the defendant knowingly, voluntarily, and intelligently waived the rights afforded to her under *Miranda. State v. Johnson*, 304 N.C. 680, 685, 285 S.E.2d 792, 795 (1982). The voluntariness of a waiver is to be determined by the "totality of the circumstances." *State v. Wallace*, 351 N.C. 481, 520, 528 S.E.2d 326, 350, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000) (citations omitted).

In order to protect an accused's Fifth Amendment right not to be compelled to incriminate themselves, *Miranda* directs that an accused who is subject to custodial interrogation have the right to consult with an attorney and to have counsel present during such questioning. *Miranda*, 384 U.S. 436, 470, 16 L. Ed. 2d 694, 421 (1966); *Steptoe*, 296 N.C. 711, 716, 252 S.E.2d 707, 710 (1979). If at any time during the questioning a suspect requests counsel to be present, all questions must cease immediately. *Miranda*, 384 U.S. at 444-45, 16 L. Ed. 2d at 707; *Steptoe*, 296 N.C. at 716, 252 S.E.2d at 710. However, a suspect must *unambiguously* request counsel. *Davis v. United States*, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371 (1994). "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer . . . would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* (emphasis in original).

Defendant contends she asserted her Fifth Amendment right to counsel during the interrogation when she told the officer she had a court-appointed attorney representing her on the conspiracy charge. However, we find that Officer King did not deny defendant the opportunity to contact the attorney who represented her on the conspiracy charge. To the contrary, when defendant mentioned she had a court-appointed attorney representing her on her conspiracy charge, Detective King told defendant she could use the telephone and telephone book located in the room to call her attorney. Detective King also told defendant he would stop the statement until such time as she had the opportunity to talk to her lawyer. At best, defendant's statement amounted to an equivocal request for an attorney, and as the case law indicates, the officer could have and did continue questioning defendant without any constitutional violation.

Detective King attempted to clarify whether defendant wanted a lawyer. He also gave defendant every opportunity to contact her attorney. Defendant never availed herself of these opportunities. For these reasons, we find defendant's Fifth Amendment right to counsel was not violated.

Defendant, again argues in the alternative, that even if she did receive the warnings required under *Miranda v. Arizona*, the waiver of those rights was not voluntary because Detective King gave her an implied "warning" about the consequences of contacting her attorney.

For a waiver of defendant's rights to be valid, it must be given free from intimidation, coercion, or deception. *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421 (1986). As we stated above, the State has the burden of establishing by a preponderance of the evidence that the defendant voluntarily waived the rights afforded to her under *Miranda*, and that the voluntariness of a waiver is to be determined by the totality of the circumstances. *Johnson*, 304 N.C. at 685, 285 S.E.2d at 795; *Wallace*, 351 N.C. at 520, 528 S.E.2d at 350. Furthermore, where it appears that an incriminating statement was given under any circumstances indicating coercion or involuntary action, that statement will be inadmissible. *Steptoe*, 296 N.C. at 716, 252 S.E.2d at 710.

Defendant claims Officer King gave her an implied "warning" against calling her attorney by telling her that if she wanted to call her attorney he would stop his questioning and she could give her version in court. When asked at the *voir dire* hearing whether she felt she was being warned, defendant responded in the negative. She testified that Detective King never told her what, if anything, would happen to her if she did not give her statement. The lack of evidence that defendant felt threatened or was being warned supports the trial court's conclusion that defendant's statement was voluntary. Detective King's remarks could not be taken as a threat or warning. Rather, Detective King's statement to defendant, that he would stop the questioning if she chose to talk with her attorney, was simply a recital of her rights and the officer's duty as required by *Miranda v. Arizona*. The rest of Detective King's remarks, that defendant "could give her version in court," also cannot be construed as a warning, as it is merely the truth. If defendant chose not to give her statement, then she would be given the chance to tell her side of the story at trial. In considering the totality of the circumstances, none of the findings supports a claim that the officer threatened defendant or otherwise attempted to frighten or coerce her into confessing.

Our review of the record in this case affirms that the trial court did not err by denying defendant's motion to suppress, as her statement was given voluntarily and knowingly. This assignment is overruled.

[2] We also find that defendant's Sixth Amendment right to counsel was not violated. The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI. A defendant's Sixth Amendment right to counsel does not attach until a prosecution has been commenced, either "by way of a formal charge, preliminary hearing, indictment, information or arraignment." *Texas v. Cobb*, 532 U.S. 162, 167-68, 149 L. Ed. 2d 321, 328 (2001), *cert denied*, 537 U.S. 1195, 154 L. Ed. 2d 1032 (2003); *State v. Warren*, 348 N.C. 80, 95, 499 S.E.2d 431, 439, *cert denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998) (citations omitted). The police may not interrogate a defendant whose Sixth Amendment right has attached unless counsel is present or the defendant expressly waives his right to assistance of counsel. *Warren*, 348 N.C. at 95, 499 S.E.2d at 439. However, the Sixth Amendment right to counsel is *offense-specific* and "cannot be invoked once for all future prosecutions." *Cobb*, 532 U.S. at 167, 149 L. Ed. 2d at 328; *Warren*, 348 N.C. at 95, 499 S.E.2d at 439 (emphasis added) (citations omitted). Just because a defendant invokes his Sixth Amendment right to counsel on a given charge does not prevent police from questioning him about other possible criminal activity, even if the other criminal activity is factually related to the first crime charged. *Cobb*, 532 U.S. at 172-73, 149 L. Ed. at 331-32; *Warren*, 348 N.C. at 95, 499 S.E.2d at 439.

To ascertain whether the second crime is a separate crime from the first for purposes of determining whether the Sixth Amendment right to counsel has attached, the court must determine if each crime requires proof of a fact which the other does not. *Cobb*, 532 U.S. at 173, 149 L. Ed. 2d at 331-32. If the two crimes are different, then the police may question the suspect about the second crime without the presence of the attorney representing the defendant in the first crime. *Id.*

When Officer King arrested defendant on the robbery charge, defendant told the officer she had an attorney who was appointed to represent her on the conspiracy charge. Officer King told defendant that the attorney who had been appointed to represent her on the conspiracy charge had not been appointed to represent her on the robbery charge because the two charges were different. The North Carolina Supreme Court has determined that robbery and conspiracy to commit robbery are separate crimes. *State v. Kemmerlin*, 356 N.C. 446, 477, 573 S.E.2d 870, 891 (2002); *State v. Carey*, 285 N.C. 509, 513, 206 S.E.2d 222, 225 (1974). Therefore,

defendant's Sixth Amendment right to counsel had not attached to the robbery with a dangerous weapon charge. Thus, it was permissible for the police to question defendant about the robbery, outside the presence of the attorney who had been appointed to represent her in the conspiracy charge.

AFFIRMED.

Chief Judge MARTIN and Judge GEER concur.

WILLIAM A. MAXWELL, PLAINTIFF v. MICHAEL P. DOYLE, INC., DEFENDANT

No. COA03-475

(Filed 18 May 2004)

1. **Appeal and Error— motion for directed verdict—standard for review—question of law—de novo**

De novo review was applied to the denial of a motion for a directed verdict because issues of law were presented. Decisions cited by defendant did not intend to hold that a decision on the sufficiency of the evidence should be reviewed under an abuse of discretion standard, but apply only when the trial court has exercised its discretion (such as reserving decision on a motion).

2. **Brokers— commission—dispute between two brokers—procuring cause rule—not applicable between brokers**

The procuring cause rule applies to a dispute between a seller and broker and has no application to this dispute between two commercial real estate brokers. The question here is whether an enforceable contract between the brokers to divide a commission has been breached.

3. **Contracts— breach—agreement between brokers—sufficiency of evidence**

There was sufficient evidence to submit to the jury a claim for breach of contract between two commercial real estate brokers to divide a commission from the sale of an apartment complex. The question of whether the sale was within a reasonable time was for the jury.

4. Quantum Meruit— agreement between brokers—express contract—quantum meruit not available

A directed verdict for defendant on a quantum meruit claim was proper because quantum meruit is not available when there is an express contract. Moreover, plaintiff offered no evidence of the reasonable value of his services.

5. Discovery— denied—in camera review

There was no abuse of discretion in the denial of plaintiff's motion to compel production of bank statements and tax returns in an action between two commercial realtors where the court reviewed the materials in camera, denied the motion because the materials were irrelevant, and ordered the materials sealed.

Appeal by plaintiff from order entered 15 October 2002 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 28 January 2004.

Morgan, Reeves & Gilchrist, by Robert B. Morgan and C. Winston Gilchrist, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough, L.L.P., by Christopher J. Blake and Reed J. Hollander, for defendant-appellee.

GEER, Judge.

Plaintiff William A. Maxwell sued defendant Michael P. Doyle, Inc., alleging that he was entitled, under an oral agreement, to half of the commission received upon the sale of an apartment complex. At trial, the court granted defendant's motion for a directed verdict at the close of plaintiff's evidence. Because we hold that plaintiff presented sufficient evidence of breach of an enforceable agreement to withstand a motion for a directed verdict, we reverse and remand for a new trial.

Facts

William A. Maxwell is a real estate broker and agent specializing in commercial properties in the Cumberland County market. Defendant Michael P. Doyle, Inc. is a corporation located in Charlotte that provides commercial real estate brokerage services. Michael Doyle is the president and sole stockholder of the company and a licensed commercial real estate broker.

Plaintiff's evidence, viewed in the light most favorable to the plaintiff, tended to show the following. Beginning as early as 1997,

Doyle had attempted to convince Tom Wood, the owner of the Cambridge Arms Apartments in Fayetteville, to allow Doyle to attempt to sell the apartments. On 13 August 1997, Doyle wrote to Wood concerning the apartments, but did not receive a response. Doyle subsequently telephoned Wood a number of times to try to interest him in selling the apartments. Although Wood did not always return Doyle's telephone calls, Doyle did speak with Wood on the telephone approximately five times. Nevertheless, Doyle's efforts proved unsuccessful and Wood refused to sell the apartments.

On 13 September 2000, Doyle called Maxwell to discuss the Fayetteville real estate market. The two met in Fayetteville the following day and toured several properties. Later that day, Doyle asked if Maxwell knew Tom Wood. Doyle, who was called by Maxwell as an adverse witness, explained:

> I wanted to see if Bill Maxwell could give me some help on a property called Cambridge Arms, that I had failed to sell. And so I said to Bill . . . if you can make Mr. Tom Wood—the person that I had been talking to on and off for three or four years . . . —a seller—meaning he would sell his apartments—you and I can split a fee.

Maxwell testified that Doyle offered to split any commission from a sale of the apartments if Maxwell arranged a meeting with Wood and gave Doyle access to his Cambridge Arms files.

After agreeing to the proposition, Maxwell made his file available to Doyle, who removed various items. Maxwell also called Wood and convinced him to meet with Maxwell and Doyle at Wood's office on 19 September 2000. At the meeting, Wood stated that the apartments were not on the market and declined to sign a listing or commission agreement. He agreed, however, to consider any offers that plaintiff and Doyle might bring to him. After the meeting, Maxwell obtained some additional materials relating to the Cambridge Arms Apartments that he forwarded to Doyle.

Although no commission agreement was signed at the 19 September 2000 meeting, Doyle, unbeknownst to Maxwell, subsequently did obtain a listing and commission agreement from Wood for the sale of the Cambridge Arms. Wood telephoned Doyle approximately ten days after the 19 September meeting and the two met in early October. As a result of this meeting, Doyle prepared a listing and commission agreement that Wood signed on 15 October 2000. Doyle

signed the agreement, which provided for a two percent commission upon the sale of the Cambridge Arms, on 21 November 2000.

The Cambridge Arms was sold on 29 March 2001 for $14,000,000.00. Defendant earned a commission of $280,000.00 on the sale. Although Doyle and Maxwell had remained in contact during that time frame regarding other real estate matters, Doyle never informed Maxwell of his subsequent contacts with Tom Wood. Maxwell did not learn of the Cambridge Arms sale until he read about it in the newspaper. When he called Doyle and requested half of the commission, Doyle refused to pay him anything.

Plaintiff filed this breach of contract action against defendant on 27 September 2001 and the case was tried before a jury at the 30 September 2002 session of Cumberland County Superior Court. At the close of plaintiff's evidence, the trial court granted defendant's motion for directed verdict and dismissed plaintiff's claims.

Standard of Review

[1] When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence. *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580 (1983). Any conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. *Davis & Davis Realty Co., Inc. v. Rodgers*, 96 N.C. App. 306, 308-09, 385 S.E.2d 539, 541 (1989), *disc. review denied*, 326 N.C. 263, 389 S.E.2d 112 (1990). If there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied. *Clark*, 65 N.C. App. at 610, 309 S.E.2d at 580.

As our Supreme Court has explained, questions concerning the sufficiency of the evidence to withstand a Rule 50 motion for directed verdict "present only a question of law; that question is whether substantial evidence introduced at trial would support a verdict in favor of the nonmoving party." *In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999). *See also Roberts v. William N. & Kate B. Reynolds Memorial Park*, 281 N.C. 48, 53, 187 S.E.2d 721, 724 (1972) ("A motion for a directed verdict presents the question of whether, as a matter of law, the evidence offered by plaintiff, when considered in the light most favorable to the plaintiff, is sufficient to be submitted to the jury."); *Paul A. Bennett Realty Co. v. Hoots*, 7 N.C. App. 362,

364, 172 S.E.2d 215, 216 (1970) ("Whether the evidence is sufficient to carry the case to the jury is a question of law and is always to be decided by the court."). Because the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed *de novo*. *Denson v. Richmond County*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003) ("We apply *de novo* review to . . . a trial court's denial of a motion for directed verdict . . . .").

Nonetheless, defendant urges us to apply an abuse of discretion standard, citing prior decisions of this Court. We are confident that those decisions did not intend to hold, contrary to well-established Supreme Court precedent, that a decision regarding the sufficiency of the evidence, a question of law, should be reviewed under an abuse of discretion standard. Instead, these decisions are more properly construed as applying an abuse of discretion standard only when the trial court has actually exercised its discretion, such as when the court chooses, in a close case, to reserve decision on a motion for a directed verdict until after the jury has rendered a verdict. *See, e.g.*, *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989) ("[W]here the question of granting a directed verdict is a close one, we have said that the better practice is for the trial court to reserve its decision on the motion and allow the case to be submitted to the jury."). A court does not exercise discretion when deciding a question of law.

Thus, we apply a *de novo* standard of review in considering the merits of plaintiff's appeal as to the motion for a directed verdict. This Court's review is limited to "those grounds asserted by the moving party at the trial level." *Freese v. Smith*, 110 N.C. App. 28, 34, 428 S.E.2d 841, 845-46 (1993). At trial, defendant argued in support of its motion for a directed verdict (1) that plaintiff had not presented sufficient evidence of an enforceable agreement; and (2) that plaintiff had not presented sufficient evidence that he was the procuring cause of the sale.

Discussion

[2] At the outset, we note that the parties devote much of their briefs to strenuous argument over whether the contract required plaintiff to be the "procuring cause" of the sale. Defendant argues that plaintiff was required to show that he was the procuring cause of the sale and that he failed to do so. Plaintiff contends either that the terms of the contract altered the strict application of the procuring cause rule, or,

alternatively, that his evidence was sufficient to establish that he was in fact a procuring cause of the sale. We find that these arguments are beside the point.

Our Supreme Court set forth the procuring cause rule in *S & W Realty & Bonded Commercial Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 250-51, 162 S.E.2d 486, 491 (1968) (emphasis added) (internal citations omitted):

> Ordinarily, a broker with whom an owner's property is listed for sale becomes entitled to his commission whenever he procures a party who actually contracts for the purchase of the property at a price acceptable to the owner. *If any act of the broker in pursuance of his authority to find a purchaser is the initiating act which is the procuring cause of a sale ultimately made by the owner, the owner must pay the commission* provided the case is not taken out of the rule by the contract of employment.

The Court explained the basis for the rule: "The law does not permit an owner to reap the benefits of the broker's labor without just reward if he has requested a broker to undertake the sale of his property and accepts the results of service rendered at his request." *Id.* at 251, 162 S.E.2d at 491 (internal quotation marks omitted).

The procuring cause doctrine as adopted in *S & W Realty* thus relates to a dispute between the seller of property and the broker. Likewise, the question in the cases cited by the parties is whether the plaintiff broker was entitled to a commission from the defendant seller. This analysis has no application to circumstances such as those presented here: a breach of contract dispute between two brokers regarding a split of a commission already paid by the seller.

North Carolina courts have not previously discussed this issue specifically. Significantly, however, the few decisions addressing disputes between brokers over a commission do not mention the concept of procuring cause, but rather apply general contract principles. *See, e.g.*, *Smith v. Barnes*, 236 N.C. 176, 72 S.E.2d 216 (1952) (no consideration supplied for agreement to split commission); *Chears v. Robert A. Young & Assoc., Inc.*, 49 N.C. App. 674, 272 S.E.2d 402 (1980) (rights under an agreement to divide commissions do not arise until the seller has paid the commission); *Bennett v. Hoots*, 7 N.C. App. 362, 172 S.E.2d 215 (1970) (no evidence of a contract to divide commissions).

Decisions from other jurisdictions have expressly held that the procuring cause rule does not apply to disputes between brokers arising out of an agreement to divide a commission. As one court has explained:

> [W]here one broker sues another for a share of commissions after an agreement between them to that effect and the subsequent sale of the property involved[,] . . . the issue was not who was the "efficient producing cause" of each sale, but rather what were the terms of the agreement between the parties regarding the distribution of commissions earned.

De Benedictis v. Gerechoff, 134 N.J. Super. 238, 242-43, 339 A.2d 225, 228 (1975) (internal citations omitted). *See also Howell v. Steffey*, 204 A.2d 695, 696 (D.C. 1964) (when one broker who was not the procuring cause of a sale sues another broker for a share of the commission, the rights of the parties are governed by the terms of the brokers' agreement with each other "rather than by the contract of sale . . . or by rules which customarily govern the rights of real estate brokers to commission for the sale of land"); *Blake v. Gunkey*, 88 Kan. 272, 274, 128 P. 181, 182 (1912) (where two brokers agreed to work together and divide commissions from any sale of land, the question of which agent was the procuring cause of the sale was an "entirely immaterial matter"); *Drew v. Maxim*, 150 Me. 322, 324-25, 110 A.2d 602, 604 (1954) (in action for breach of fee-splitting contract with another broker, the doctrine of procuring cause is "not applicable"). Likewise, one commentator has observed:

> To entitle a broker to recover his share of compensation under the terms of a particular fee-splitting arrangement, he must show that he performed the services required of him in accordance with the terms of the contract. . . . [including] when he is required to merely initiate the transaction or otherwise assist in consummating the deal.

John D. Perovich, Annotation, *Construction of Agreement Between Real-Estate Agents to Share Commissions*, 71 A.L.R.3d 586, 591 (1976).

In light of the explanation of the procuring cause doctrine by our Supreme Court in *S & W Realty*, we agree with the jurisdictions cited above and hold that a broker suing another broker for a division of a commission pursuant to an agreement between the brokers need not establish that he or she was a procuring cause of the sale. Instead, the

question is whether there was a breach of an enforceable contract between the brokers.

[3] We must, therefore, determine whether Maxwell offered sufficient evidence of a breach of a valid, enforceable contract with Doyle for division of a commission. To be enforceable, the terms of a contract must be sufficiently definite and certain. *Brooks v. Hackney*, 329 N.C. 166, 170, 404 S.E.2d 854, 857 (1991). In addition, "[i]t is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement." *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995).

According to Maxwell's testimony, Maxwell and Doyle agreed:

> If it materialized into a sale—and we shook hands on this in the beginning, that we were going to co-broker on a 50-50 basis—that we would work the Cambridge Arms on the same basis, because, even though he had known about them, he had not been able to make any headway, and since I know Mr. Wood, since I knew the apartments—and we shook hands and had a meeting of the minds right there—that if it materialized into a sale and there was a commission paid and a closing takes place, that I would get fifty percent of the commission and that I was to assist him by letting him go through my files . . . of all the materials.

Doyle subsequently sent a memo to Maxwell dated 18 September 2000, that stated:

> After reflecting over the weekend regarding a potential fee schedule for us and a sale price, I strongly believe that we should increase Mr. Wood's price by $500,000.00 to $16,500,000.00 and obtain a Commission Agreement for 3%, of which we would split equally.
>
> . . . .
>
> I can be there Tuesday or anytime you can arrange meeting face to face with Tom Wood for lunch or any other reason. I'll plan on Tuesday if you think you can get us a visit.

In arguing that plaintiff's evidence did not establish sufficiently definite and certain contract terms, defendant relies largely on the fact that Maxwell used different phrases to describe the arrangement, such as "finder's fee" or "co-broker." Defendant does not, however, point to any evidence or cite to any authority establishing what these

labels mean or how they might render the contract indefinite. *See, e.g.*, *Beasley-Kelso Assoc., Inc. v. Tenney*, 30 N.C. App. 708, 718-19, 228 S.E.2d 620, 626, *disc. review denied*, 291 N.C. 323, 230 S.E.2d 675 (1976) (noting testimony that a co-broker was simply "someone that is working with another broker"). As a result, any inconsistencies in plaintiff's descriptions of the agreement relate to his credibility—an issue for the jury to resolve. *See Davis & Davis Realty Co.*, 96 N.C. App. at 311, 385 S.E.2d at 542 (internal citation omitted) (trial court properly denied motion for directed verdict where parties disputed terms of an oral agreement involving a real estate commission because "[a]ny inconsistencies in the plaintiff's evidence with regard to when the commission was actually due and payable were for resolution by the jury. . . . [P]laintiff's evidence, albeit somewhat contradictory[,] . . . did not rise to the level of binding adverse testimony, as argued by defendants.")

Defendant also points to the fact that there was no agreement as to the time for performance. Our courts have, however, long held that "where a contract does not specify the time of performance . . ., the law will prescribe that performance must be within a reasonable time and that the contract will continue for a reasonable time, 'taking into account the purposes the parties intended to accomplish.' " *Rodin v. Merritt*, 48 N.C. App. 64, 71-72, 268 S.E.2d 539, 544 (quoting *Scarborough v. Adams*, 264 N.C. 631, 641, 142 S.E.2d 608, 615 (1965)), *disc. review denied*, 301 N.C. 402, 274 S.E.2d 226 (1980). *See also S & W Realty*, 274 N.C. at 254, 162 S.E.2d at 493-94 (when no time is specified in a contract for a commission, the sale must occur within "a reasonable time").

The determination of what constitutes a reasonable time for performance presents a mixed question of law and fact:

> If, from the admitted facts, the Court can draw the conclusion as to whether the time is reasonable or unreasonable, by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or circumstances are numerous and complicated, and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences cannot be reasonably drawn from them, that the question ever becomes one of law.

Hardee's Food Systems, Inc. v. Hicks, 5 N.C. App. 595, 599, 169 S.E.2d 70, 73 (1969) (internal quotation marks omitted). In this case, (1)

Maxwell and Doyle dispute when the sale was required to occur, (2) the issues may involve practices or customs within the real estate industry, and (3) it is not possible for this Court to determine based on plaintiff's evidence that a sale of an apartment complex eight months after the parties entered into their commission agreement necessarily exceeded a reasonable time. The question whether the sale occurred within a reasonable time from the parties' agreement was an issue for the jury.

We believe that Maxwell's evidence was sufficiently definite as to the material terms of the agreement: (1) he was required to arrange a meeting with Wood and allow Doyle access to his files; and (2) if a sale resulted within a reasonable period of time, he was then entitled to a 50-50 split of any commission. Defendant has not specified any other material terms necessary to the enforcement of the contract that were missing or indefinite and, after reviewing the record, we have been unable to identify any.

Since Maxwell offered evidence of the material terms of the agreement, that he performed his obligations under the agreement, and that Doyle later brokered the sale of the apartment complex and earned a sizeable commission that he failed to split with plaintiff, we hold that there was sufficient evidence of a breach of contract for this case to be submitted to the jury. We, therefore, reverse the trial court and remand for a new trial.

[4] Because the question may arise again, we address Maxwell's argument, in the alternative, that he is entitled to recover the reasonable value of his services under a theory of *quantum meruit*. We hold that the trial court properly granted a directed verdict as to this claim. Although we note that it appears plaintiff expressly abandoned this claim at trial, recovery in *quantum meruit* is not, in any event, available when, as here, there is an express contract. *Beckham v. Klein*, 59 N.C. App. 52, 58, 295 S.E.2d 504, 508 (1982) (internal citations omitted) ("But it is well established that where an express contract concerning the same subject matter is found, no contract will be implied. . . . All the services [plaintiff] rendered and upon which plaintiffs rely in their *quantum meruit* theory are services contemplated in the parties' express agreement and the express contract therefore controls."). Plaintiff also offered no evidence of the reasonable value of his services and without such evidence, the claim could not proceed to the jury. *Federal Realty Inv. Trust v. Belk-Tyler of Elizabeth City, Inc.*, 56 N.C. App. 363, 366, 289 S.E.2d 145, 147 (1982) ("We find nothing in the record from which the jury could have quantified

the value of defendant's benefit from plaintiff's services here."). A directed verdict was properly entered as to the claim based on *quantum meruit.*

[5] Finally, Maxwell argues that the trial court erred in denying his motion to compel production of defendant's corporate bank statements and tax returns for the relevant period. The trial court reviewed the materials *in camera*, denied the motion on the ground that the materials were not relevant, and ordered the materials sealed for the purpose of appellate review.

Rule 26(b)(1) of the Rules of Civil Procedure provides that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2003). A trial court's determination regarding relevance for purposes of discovery may be reversed only upon a showing of an abuse of discretion. *Adams v. Lovette*, 105 N.C. App. 23, 29, 411 S.E.2d 620, 624, *aff'd per curiam*, 332 N.C. 659, 422 S.E.2d 575 (1992). A trial court abuses its discretion only when its actions are manifestly unsupported by reason. *Id.* After reviewing the sealed documents, we are unable to conclude that the trial court's determination was manifestly unreasonable. This assignment of error is, therefore, overruled.

Reversed in part, affirmed in part, and remanded.

Chief Judge MARTIN and Judge STEELMAN concur.

KATRINA LETRESS GRIFFIS, PLAINTIFF v. PATRICIA JOYCE LAZAROVICH AND JOHN EDWARD LAZAROVICH, AND CASSANDRA MICHELLE LEAK, DEFENDANTS

No. COA03-823

(Filed 18 May 2004)

1. Trials— motion to proceed as pauper—filed after verdict and motion for costs

The trial court did not abuse its discretion by denying plaintiffs' motion to proceed as a pauper where plaintiff filed her motion after a verdict for defendants and after the first defendant filed her motion for costs. A party may not file a motion to proceed as a pauper to escape payment of costs.

2. Costs— court's discretion—appellate review

The trial court's discretion in awarding costs is not reviewable on appeal where the court specifically stated that costs were taxed in its discretion. Moreover, plaintiff rejected a settlement offer and received a less favourable result at trial, so that Rule 68 required the taxing of costs.

Judge WYNN concurring in part and dissenting in part.

Appeal by plaintiff from orders entered 13 March 2003, 24 March 2003, and 28 April 2003 by Judge Paul G. Gessner Wake County District Court. Heard in the Court of Appeals 2 March 2004.

E. Gregory Stott, for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Dayatra T. King, for defendants-appellees Patricia Joyce Lazarovich and John Edward Lazarovich.

Hall & Messick, L.L.P., by Jonathan E. Hall and Kathleen M. Millikan, for defendant-appellee Cassandra Michelle Leak.

TYSON, Judge.

Katrina Letress Griffis ("plaintiff") appeals from orders entered denying her motion to proceed *in forma pauperis* and granting Patricia Joyce Lazarovich ("Lazarovich"), John Edward Lazarovich, and Cassandra Michelle Leak's ("Leak") (collectively, "defendants") motions for costs. We affirm.

I. Background

This is the second appeal arising from plaintiff's action for personal injuries sustained as the result of an automobile accident involving a vehicle driven by Lazarovich and a vehicle driven by Leak, in which plaintiff was a passenger. *See Griffis v. Lazarovich*, 161 N.C. App. 434, 588 S.E.2d 918 (2003) (*"Griffis I"*). In *Griffis I*, we held there was no error in the jury's verdict, the 26 July 2002 judgment entered thereon of no negligence on the part of defendants, and the 29 August 2002 trial court's order denying plaintiff's motions for judgment notwithstanding the verdict and a new trial. *Id.*

On 14 August 2002, Leak filed a motion for costs. Thereafter, on 16 August 2002, plaintiff filed a motion to proceed *in forma pauperis*. On 19 August 2002, Lazarovich and her husband John

Edward Lazarovich (collectively, "the Lazaroviches") also filed a motion for costs. Subsequent to this motion, on 4 September 2002 plaintiff filed an affidavit in support of her motion to proceed *in forma pauperis*. By orders dated 13 March 2003, 24 March 2003, and 28 April 2003, the trial court granted defendants' motions for costs and denied plaintiff's motion to proceed *in forma pauperis*. Plaintiff appeals.

II. Issues

Plaintiff contends the trial court erred in: (1) denying her motion to proceed *in forma pauperis*; and (2) granting defendants' motions for costs.

III. Motion to Proceed *In Forma Pauperis*

[1] "The right to sue as a pauper is a favor granted by the court and remains throughout the trial in the power and discretion of the court." *Whedbee v. Ruffin*, 191 N.C. 257, 259, 131 S.E. 653, 654 (1926) (citing *Dale v. Presnell*, 119 N.C. 489, 26 S.E. 27 (1896)). To support an abuse of discretion, plaintiff must show that the trial court's ruling was "manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

Plaintiff contends the trial court abused its discretion in denying her motion to proceed *in forma pauperis* under both N.C. Gen. Stat. § 1-288 and N.C. Gen. Stat. § 1-110.

A. N.C. Gen. Stat. § 1-288

Under N.C. Gen. Stat. § 1-288 (2003), a person seeking to proceed *in forma pauperis* on appeal is required to file an affidavit indicating that he or she is unable by reason of poverty to give the security required by law within thirty days after the entry of the judgment or order. The judgment was entered on 26 July 2002, and plaintiff did not file her affidavit of indigency until 4 September 2002. Plaintiff's affidavit was not filed within thirty days of the entry of judgment. The trial court did not abuse its discretion in denying plaintiff's motion to proceed *in forma pauperis* on appeal pursuant to N.C. Gen. Stat. § 1-288.

B. N.C. Gen. Stat. § 1-110

N.C. Gen. Stat. § 1-110 (2003) is entitled, "Suit as an indigent" and states,

> (a) Subject to the provisions of subsection (b) of this section with respect to prison inmates, any superior or district court judge or clerk of the superior court may authorize a person to sue as an indigent in their respective courts when the person makes affidavit that he or she is unable to advance the required court costs. The clerk of superior court shall authorize a person to sue as an indigent if the person makes the required affidavit and meets one or more of the following criteria:
>
> (1) Receives food stamps.
>
> (2) Receives Work First Family Assistance.
>
> (3) Receives Supplemental Security Income (SSI)
>
> . . . .

This statute is found in Article 9 of the civil procedure chapter and applies to "prosecution bonds."

Here, the trial court made findings of fact, to which plaintiff does not assign as error on appeal. Findings of fact not challenged by an exception or assignment of error are binding on appeal. *Tinkham v. Hall*, 47 N.C. App. 652-53, 267 S.E.2d 588, 590 (1980). The trial court's findings show that plaintiff is a single mother of one child, lives in subsidized housing, and has a present monthly income of $960.00. Her expenses total $716.60, and her only alleged debt are medical bills for unrelated treatment. Plaintiff's affidavit alleges that she receives part of her income from "Welfare, Food Stamps, S/S, Pensions, etc."

While N.C. Gen. Stat. § 1-110 limits the trial court's discretion in ruling on a motion to proceed *in forma pauperis*, no evidence in the record shows and the trial court made no findings of fact that plaintiff receives "food stamps," "Work First Family Assistance," or "Supplemental Security Income" to comply with any of the criteria listed in N.C. Gen. Stat. § 1-110(a). Plaintiff's affidavit does not specify or allege that she receives one or all of these statutorily enumerated factors. Plaintiff's affidavit only indicates that she possibly receives "Welfare, Food Stamps, S/S, Pension, etc." Plaintiff does not argue on appeal that she receives any of these enumerated criteria set forth in the statute to require the court to authorize her to sue as an indigent. The trial court possessed discretion to grant or deny plaintiff's request and to not authorize her to proceed as an indigent.

Our Supreme Court has recognized that a party may not file a motion to proceed *in forma pauperis* "as a subterfuge to escape pay-

ment of costs which otherwise might be taxed against the [party]." *Perry v. Perry*, 230 N.C. 515, 515-16, 53 S.E.2d 457 (1949). Here, the trial court found and the evidence shows plaintiff filed her motion to proceed *in forma pauperis* and affidavit *after* the jury returned a verdict for defendants and *after* Leak had filed her motion for costs. The trial court's order concluded:

> According to North Carolina law, a motion to proceed as an indigent is not to be used as "a mere subterfuge to escape payment of costs which might otherwise be taxed against the [party]." *Perry v. Perry*, 230 N.C. 515, 53 S.E.2d 457 (1949).

We agree with the trial court that the timing of plaintiff's motion tends to show she filed it as a subterfuge.

The dissenting opinion suggests that the timing of plaintiff's motion is not indicative and would hold that there is no time limitation imposed by N.C. Gen. Stat. § 1-110. We disagree. The statute permits the filing of a motion when a plaintiff is "unable to *advance* the required court costs." N.C. Gen. Stat. § 1-110(a) (emphasis supplied). Upon a proper showing, the trial court then has the discretion to "authorize a person *to sue* as an indigent." *Id.* (emphasis supplied). The legislature's use of the words "to sue" and "advance" clearly indicate its intent that a motion to proceed *in forma pauperis* should be filed in "advance" of filing suit. Our State Constitution provides that "all courts shall be open." N.C. Const. art. 1, § 18. N.C. Gen. Stat. § 1-110 furthers this right by allowing access "to sue" in our courts, notwithstanding a party's inability to "advance" court costs.

In her affidavit, plaintiff stated, "to require me to pay court costs and to post a bond with the appellate court would create undue and inappropriate hardship upon me . . . ." Plaintiff's own affidavit clearly shows that she requested the court to declare her indigent to avoid paying court costs *after* the trial and not to be relieved from advancing costs required by the court to initially file her action.

Further, N.C. Gen. Stat. § 1-110 provides that the trial court may relieve plaintiff from advancing the required court costs, but does not relieve a party from ultimate liability to pay costs. *See* N.C. Gen. Stat. § 1-110 (2003). Plaintiff cites no statute or case law to support her notion that filing a motion to proceed *in forma pauperis* relieves her of her ultimate liability for costs. The dissenting opinion cites *Draper v. J.A. Buxton & Co.*, 90 N.C. 182 (1884), and *Clark v. Dupree*, 13 N.C. 411 (1830), as authority to conclude that a pauper is relieved from lia-

bility for costs. These cases, however, involved a distinctly different statute from our current statute that allows parties to proceed *in forma pauperis*. When the Supreme Court handed down its decision in *Draper*, the statute read, "THE CODE, sec. 212, provides that, 'whenever any person shall sue as a pauper, no officer shall require of him any fee, *and he shall recover no costs.*' " *Draper*, 90 N.C. at 185. Our Supreme Court's interpretation over a century ago of a *different* statute is not controlling when our current statute gives no relief from the *payment* of costs. N.C. Gen. Stat. § 1-110 only relieves a pauper from *advancing* costs when filing a suit.

Even if evidence supports a finding that plaintiff should have been authorized to proceed as an indigent, the statute grants relief only for the *advancement* of costs and does not relieve her of the ultimate liability to pay. The trial court did not abuse its discretion in concluding that plaintiff "is not incapable, by reason of poverty, to advance the costs of this proceeding." Plaintiff has not shown that the trial court's ruling was "manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision." *Briley*, 348 N.C. at 547, 501 S.E.2d at 656. This assignment of error is overruled.

IV. Motions for Costs

[2] Plaintiff argues the trial court erred in granting defendants' motions for costs. We disagree.

In her brief, plaintiff "restates and incorporates" her arguments in her first assignment of error, as well as the "arguments made in her brief filed in Case No. COA03-181." This Court has already ruled on No. COA03-181 in *Griffis I*, and we held the trial court did not err and affirmed its denial of plaintiff's motions for judgment notwithstanding the verdict and new trial. Except for plaintiff's restatement and incorporation of earlier arguments, plaintiff has failed to cite any authority for this assignment of error as required by N.C.R. App. P. 28(b)(6) (2003). For these reasons, we have already ruled on plaintiff's arguments regarding this assignment of error, and this assignment of error is dismissed.

The defendants at bar filed separate motions requesting the trial court to tax costs against plaintiff. In *Whedbee*, our Supreme Court ruled on a similar issue, wherein plaintiff had assigned error to the trial court's "taxing the costs against him, after having been allowed to sue as a pauper." 191 N.C. at 259, 131 S.E. at 654. The Court found no error at trial and concluded, "the matter of taxing costs is a col-

lateral matter [to requiring plaintiff to pay a deposit], and, if any injustice has been done to the plaintiff in this respect, he must make a motion as provided by law for the retaxing or proper taxing of costs." *Id.* at 257, 131 S.E. at 655.

Here, plaintiff did not file a separate motion for "the retaxing or proper taxing of costs." *Id.* Her motion to proceed *in forma pauperis* was filed in response to defendants' motions for costs. The trial court did not abuse its discretion in denying this motion. Further, our Supreme Court held in *Whedbee* that the trial court's discretion in granting or denying these motions runs *throughout* the trial. *Id.* at 257, 131 S.E. at 654.

Plaintiff does not argue the trial court abused its discretion in taxing the costs against her. "The awarding of costs to a defendant in a personal injury suit . . . may be allowed in the court's discretion under N.C.G.S. § 6-20 (1986)." *Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 180, 552 S.E.2d 674, 679 (2001). "The court's discretion under N.C.G.S. § 6-20 is not reviewable on appeal," where the court specifically states the costs awarded defendants were taxed against plaintiff in the court's discretion. *Id.* Here, the trial court clearly indicated it was taxing costs against plaintiff in its discretion pursuant to N.C. Gen. Stat. § 6-20.

Additionally, the Lazaroviches based their motion for costs on N.C.R. Civ. P. 68 (2003) ("Rule 68"). Rule 68 allows a party to recover costs when that party makes an offer to settle that is rejected by the opposing party. The rule states, "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the costs incurred after the making of the offer." N.C.R. Civ. P. 68(a) (2003) (emphasis supplied). The Lazaroviches filed and served plaintiff with an offer of judgment in the lump sum amount of $500.00. At trial, the jury found that plaintiff was not injured by the negligence of Lazarovich. Rule 68 *required* the trial court to tax plaintiff with the Lazaroviches' costs of proceeding with trial after plaintiff rejected this offer and received a less favorable result at trial. The dissenting opinion fails to address the motions for costs. This assignment of error is overruled.

V. Conclusion

The trial court did not abuse its discretion in denying plaintiff's motion to proceed *in forma pauperis*, filed following a trial and jury verdict and made in response to Leak's motion for costs. The evidence shows that plaintiff has attempted to use her motion as a "sub-

terfuge to escape payment of costs." *Perry*, 230 N.C. at 515-16, 53 S.E.2d at 547. Our Supreme Court has clearly spoken on this issue and has long recognized that "the right to sue as a pauper is a favor granted the plaintiff, and is in the power and discretion of the Court." *Dale*, 119 N.C. at 491-92, 26 S.E. at 28.

Statutes allowing a party to proceed *in forma pauperis* are a "means of protection to the poor." *Id.* at 493, 26 S.E. at 28. Here, plaintiff has failed to show that the trial court abused its discretion in concluding that she was attempting to use this "means of protection" as a subterfuge to avoid paying costs. *Id.* Plaintiff's appeal is without merit. The orders of the trial court are affirmed.

Affirmed.

Judge HUNTER concurs.

Judge WYNN concurs in part, dissents in part.

WYNN, Judge concurring in part, dissenting in part.

I agree with the majority's conclusion that because Plaintiff failed to timely file an affidavit of indigency, the trial court did not abuse its discretion in denying Plaintiff's motion to proceed *in forma pauperis* on appeal. However, I disagree with the majority's analysis regarding Plaintiff's right to proceed *in forma pauperis* in the proceedings below.

A trial court does not possess unfettered discretion in determining whether a person can sue as an indigent. N.C. Gen. Stat. § 1-110, authorizes an individual to sue as an indigent if the "person makes the required affidavit and meets one or more of the following criteria:

(1) Receives food stamps.

(2) Receives Work First Family Assistance.

(3) Receives Supplemental Security Income (SSI).

(4) Is represented by a legal services organization that has as its primary purpose the furnishing of legal services to indigent persons.

(5) Is represented by private counsel working on the behalf of or under the auspices of a legal services organization under subdivision (4) of this section.

(6) Is seeking to obtain a domestic violence protective order pursuant to G.S. 50B-2."

In instances where an individual does not meet one of these criteria, "a superior or district court judge or clerk of superior court may authorize a person . . . to sue as an indigent if the person is unable to advance the required court costs." N.C. Gen. Stat. § 1-110(a). Thus, N.C. Gen. Stat. § 1-110 limits the trial court's discretionary authority for determining indigency to those instances where an individual fails to meet one of the six criteria.

In this case, Plaintiff's affidavit of indigency indicates her monthly income was $700.00 plus an additional $260.00 from another source of income, possibly welfare, food stamps, S/S, pension, etc. However, the Administrative Office of the Courts form AOC-CR-226 entitled "Affidavit of Indigency" does not allow a party to specify the nature of the other source of income; it simply states "Other Income (Welfare, Food Stamps, S/S, Pensions, etc.). Nonetheless, the trial court was on notice that one of the six criteria of N.C. Gen. Stat. § 1-110 may have been implicated by this case. However, the trial court's findings of fact and conclusions of law failed to address any of these factors.

Plaintiff's Affidavit of Indigency also indicates her monthly expenses amounted to $716.60 and she owed $4,130.75 in hospital and medical bills unrelated to her claims in this action. Plaintiff also lives in subsidized housing. Accordingly, as Plaintiff appears to be unable to pay the costs of this action, I would remand for a determination of whether Plaintiff met one of the six criteria.

The majority, citing a portion of *Perry v. Perry*, 230 N.C. 515, 515-16, 53 S.E.2d 457 (1949), states our Supreme Court recognized that a party may not file a motion to proceed *in forma pauperis* "as a subterfuge to escape payment of costs which otherwise might be taxed against the [party]." In *Perry*, our Supreme Court opined:

> The statutory provision for appeals *in forma pauperis* is to preserve the right of appeal to those who, by reason of their poverty, are unable to make a reasonable deposit or give security for the payment of costs incurred on appeal to this Court. It is not to be used as a subterfuge to escape payment of costs which otherwise might be taxed against the appellant.

Id. Thereafter, our Supreme Court considered the party's monthly earnings in that case and remanded for further consideration by the

trial court. Thus, the concern is whether a party truly has an inability to pay the costs of the particular action.

My research does not reveal a case in which the determination of whether a party may proceed *in forma pauperis* pursuant to N.C. Gen. Stat. § 1-110 is conditioned upon when the party files the motion. Moreover, N.C. Gen. Stat. § 1-110, governing suits by indigents, does not provide a time limitation; whereas, appeals by indigents do impose time limitations. *See* N.C. Gen. Stat. § 7A-228(b1) (requiring a person desiring to appeal a magistrate judgment as an indigent to file the appropriate documents within ten days of entry of the judgment); N.C. Gen. Stat. § 1-288 (imposing a 30 day time limit). In my opinion, the absence of a time limitation in N.C.G.S. 1-110, which governs moving to sue as an indigent, and the presence of a time limitation in moving to appeal as an indigent, is an indication that our General Assembly did not intend to limit the time period in which a party could move to sue as an indigent. Indeed, N.C. Const. Art. I, § 18 provides "all courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." Thus, to limit the filing of a motion to sue as an indigent to a certain time period, could restrict a citizen's constitutional right of access to our courts.

Finally, N.C. Gen. Stat. § 1-110 is silent as to a party's ultimate liability for costs. However, as early as 1884, in construing a prior law governing suits *in forma pauperis*, our Supreme Court stated "the change in phraseology, we think, was intended to declare that as he (the pauper plaintiff) paid none of the defendant's costs if he failed, so if successful in his action, the defendant should be taxed with none of his costs." *Draper v. J.A. Buxton & Co.*, 90 N.C. 182, 185 (1884). As further stated by our Supreme Court, unless he is dispaupered, "a pauper neither recovers nor pays costs, in general." *Clark v. Dupree*, 13 N.C. 411, 413 (1830). Thus, our Supreme Court enjoys a long history of ensuring the poor have access to our courts. Likewise, this Court should follow that history in answering the question of whether a party proceeding *in forma pauperis* can be held liable for the costs of the action.

Finally, I agree with the majority opinion that *Draper* and *Dupree* addressed a different pauper statute. Nonetheless, the majority implicitly recognizes that the current statute is silent about a party's ultimate liability for costs. It is well recognized that the legislature, not this Court, should determine the requirements and implications of

filing a motion to proceed *in forma pauperis*. In the absence of a directive by our legislature, it is appropriate for this Court to rely on policy language from earlier cases of our Supreme Court that provide guidance for our decision-making process.

In sum, the trial court does not have unlimited discretion in determining whether a party may proceed *in forma pauperis*. Rather, our General Assembly in N.C. Gen. Stat. § 1-110 has indicated that if a party meets one of six criteria, the party shall be allowed to proceed *in forma pauperis*. The trial court's discretion is limited to those instances where one of the six criteria is unmet. Moreover, our General Assembly has not imposed a time limitation upon filing a motion to proceed *in forma pauperis*. Accordingly, I dissent.

JOHN M. HODGES, PLAINTIFF V. EQUITY GROUP, DEFENDANT, SEDGWICK CMS, SERVICING AGENT

No. COA03-930

(Filed 18 May 2004)

1. Workers' Compensation— cause of fall at work—inferred—injury compensable

Even though a workers' compensation plaintiff could not explain the cause of his fall, an inference that the fall had its origin in his employment is permitted and the Industrial Commission properly found and concluded that plaintiff's injuries were compensable, work-related, and arose out of his employment.

2. Workers' Compensation— findings—injury arising out of employment

The Industrial Commission's findings in a workers' compensation case sufficiently indicated that plaintiff's injuries arose out of his employment where it found that he fell as he approached a piece of machinery.

3. Workers' Compensation— company doctor—ex parte communications

There was competent evidence in a workers' compensation case to support a finding that a company doctor had engaged in ex parte communications at defendant employer's request

when he contacted plaintiff's other doctors about plaintiff's ability to work.

4. Workers' Compensation— credibility of witness—Commission as sole judge

The Industrial Commission is the sole judge of the credibility and weight of the evidence and testimony before it, and the contention that the Commission should have denied a workers' compensation claim because plaintiff was not a credible witness was without merit.

5. Workers' Compensation— attorney fees—findings

The award of attorney fees in a workers' compensation case under N.C.G.S. § 97-88 (expenses of appeals brought by insurers) was remanded for additional findings where the Commission did not make findings regarding the costs associated with defendants' appeal of the deputy commissioner's opinion and award.

6. Workers' Compensation— attorney fees—denied

The Industrial Commission did not abuse its discretion by deciding against an award of attorney fees under N.C.G.S. § 97-88.1 where defendant employer initially defended upon unfounded allegations of fraud but also defended reasonably upon the basis of causation.

Appeal by defendants from opinion and award entered 26 March 2003 by the Industrial Commission. Heard in the Court of Appeals 27 April 2004.

McAngus, Goudelock & Courie, P.L.L.C., by John T. Jeffries, for defendants.

Anne R. Harris for plaintiff.

WYNN, Judge.

From the Industrial Commission's award in favor of Plaintiff-employee John M. Hodges, Defendants Equity Group and Sedgwick-CMS argue on appeal that: (I) Plaintiff's fall neither related to nor arose out of his employment; (II) the Commission erroneously based its findings of fact and conclusions of law upon incredible evidence; (III) the Commission's findings of fact regarding Dr. Guarino's *ex parte* communication were unsupported by evidence and (IV) attorney's fees pursuant to N.C. Gen. Stat. § 97-88 were inappropriate. By

cross-appeal, Plaintiff contends an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 was appropriate in this matter. We conclude the Commission's findings of fact and conclusions of law regarding the compensability of Plaintiff's claim were supported by competent evidence and the applicable law. We further hold that the Commission's award of attorney's fees under N.C. Gen. Stat. § 97-88 was unsupported by appropriate findings of fact, and uphold the Commission's decision to not award attorney's fees under N.C. Gen. Stat. § 97-88.1. Accordingly, we remand to the Commission for entry of findings of fact to support the award of attorney's fees under N.C. Gen. Stat. § 97-88.

The record shows that Plaintiff fell at work on 16 April 2001. On this date, Plaintiff, a mechanic at Equity Group, worked overtime as the factory was closed for the Easter holidays. He had volunteered to work the second shift, from 2:30 to 11:00 p.m., and was in the process of preparing the machines for the manufacture of a new product the next day.

At the beginning of his shift, Plaintiff worked in the maintenance shop fixing machine guards, which prevent the lines from hooking together and breaking. After he had prepared one of the guards, he decided to install it on a machine to make sure it worked properly. He left the maintenance shop, started onto the factory floor, and as he turned a corner, his "feet came out from under him" and he landed on his right hip and back. As he was gathering himself, his co-worker asked him if he was okay. Although Plaintiff testified he felt pain after the fall, he "shrugged it off" and kept working. No supervisor was on duty that evening and only one other person was working.

The next morning he felt stiffness in his hip and numbness in his leg. Upon arriving to work, he reported the injury to one of his supervisors who directed Plaintiff's immediate supervisor to fill out an accident report. He worked his entire shift that day. The next day, Wednesday, the pain had worsened. He talked with his immediate supervisor and another individual about seeing a doctor. An accident report was filled out and human resources scheduled an appointment with Dr. Joseph Guarino.

Dr. Guarino examined Plaintiff and indicated his back and hip was bruised. He prescribed an anti-inflammatory drug and ordered Plaintiff to work on light-duty tasks. No pain medication was prescribed. The following Sunday, Plaintiff went to the emergency department at Morehead Hospital because he was hurting badly. After

indicating he had slipped and fallen at work, the hospital prescribed some pain medication and ordered light-duty work. The next Tuesday, Plaintiff returned home from work and was unable to get out of his car due to the pain. Plaintiff's wife drove him to the emergency room at Martinsville Memorial Hospital. The emergency room doctors scheduled an MRI for the following Saturday and ordered three days leave from work. The MRI revealed Plaintiff had a ruptured disc in his back. The next Monday, Plaintiff saw Dr. Guarino who opined the disc herniation was not causing Plaintiff's pain because the disc herniation was on the left side and the pain was in Plaintiff's right leg and hip. Dr. Guarino told Plaintiff to return to work and he would try to obtain authorization for physical therapy. Thereafter, Plaintiff sought treatment with his family physician, Dr. M. Edward Eller, who told Plaintiff not to return to work and to see Dr. James M. Vasick, a neurosurgeon.

Dr. Vasick had operated on Plaintiff's back in 1998 in the same location as the current rupture. Plaintiff had a 100% recovery from the 1998 surgery. After reviewing Plaintiff's present condition, Dr. Vasick gave Plaintiff a range of treatment options. As Plaintiff had a successful surgery in 1998, he opted for surgery. In May and June 2001, Plaintiff underwent two surgeries to correct the disc herniation. Although the back pain subsided after the surgery, Plaintiff still experienced pain in his right hip and leg.

At the time of the hearing, Plaintiff used a cane, participated in limited exercise and daily activities and was on Social Security disability. He had been terminated from his employment with Equity Group in August 2001 and was not presently working. Dr. Vasick opined Plaintiff could not work and would need further treatment in the future. The Commission found and concluded Plaintiff sustained a compensable injury by accident as a result of his fall and suffered a disc herniation. He was awarded temporary total disability compensation. Defendants appeal.

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[1] Defendants first argue that because Plaintiff's "legs went out from under him" the risk of a resulting fall was not a hazard related to or arising out of Plaintiff's employment. We disagree.

"To be compensable under the Workmen's Compensation Act an injury must result from an accident arising out of and in the course of the employment." *Taylor v. Twin City Club*, 260 N.C. 435, 437, 132 S.E.2d 865, 867 (1963). "With respect to back injuries, however, where

injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, 'injury by accident' shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident." N.C. Gen. Stat. § 97-2(6) (2003). The "claimant has the burden of showing such injury." *Taylor*, 260 N.C. at 437, 132 S.E.2d at 867.

Defendants concede in their brief that:

> there is no question as to whether Plaintiff-Appellee's fall occurred in the course of his employment given that he was at work during working hours. Moreover, the fall was an unusual and unforeseen occurrence.

However, Defendants argue, Plaintiff failed to prove the fall arose out of his employment and the Commission failed to make any findings on the issue.

"Where any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.' " *Janney v. J.W. Jones Lumber Co., Inc.*, 145 N.C. App. 402, 404, 550 S.E.2d 543, 545-46 (2001). "An accident has a reasonable relationship to the employment when it is the result of a risk or hazard incident to the employment. When the employee's idiopathic condition is the sole cause of the injury, the injury does not arise out of the employment. The injury does arise out of the employment if the idiopathic condition of the employee combines with 'risks attributable to the employment' to cause the injury." *Id.* An idiopathic condition is "one arising spontaneously from the mental or physical condition of the particular employee." *Calhoun v. Kimbrell's Inc.*, 6 N.C. App. 386, 391, 170 S.E.2d 177, 180 (1969). "The question of whether an injury 'arises out of employment' is a mixed question of law and fact and our review is limited to whether the findings and conclusions are supported by competent evidence." *Janney*, 145 N.C. App. at 404, 550 S.E.2d at 546.

Defendants contend that because Plaintiff could not explain the circumstances surrounding his fall and because an idiopathic condition could have caused Plaintiff's fall, his injury did not arise out of his employment. Indeed, Plaintiff testified he did not stumble or trip, there were no obstructions in his way, and he did not believe he slipped. He indicated his "feet just came out from under him."

Our case law explains that where the facts indicate that at the time of an accident, an employee "was within his orbit of duty on the business premises of the employer, [and] was engaged in the duties of his employment or some activity incident thereto, was exposed to the risks inherent in his work environment and related to his employment, and the only active force involved was the employee's exertions in the performance of his duties," an "inference that the fall had its origin in the employment" is permitted. *Slizewski v. International Seafood, Inc.*, 46 N.C. App. 228, 232-33, 264 S.E.2d 810, 813 (1980).

In this case, Plaintiff fell when he was walking to a machine in order to install a guard. Although the factory was closed for the Easter holiday, plant management had asked for volunteers to work overtime on this particular day and had left a list of jobs to complete during the shift. Even though Plaintiff can not explain what caused him to fall, as stated in *Slizewski*, an inference that the fall had its origin in employment is permitted in this case because "the only active force involved was the employee's exertions in the performance of his duties." *Id.*

Defendants contend, however, that Plaintiff's fall was solely caused by an idiopathic condition—either the onset of his disc herniation or problems with his diabetes and high blood pressure. This contention is unsupported by the record. Dr. James M. Vasick, Plaintiff's neurosurgeon, was asked:

> Based upon what you said, that a disc can occur in the absence of trauma, if a disc had occurred in the absence of trauma, could one of the problems that would occur be that a person's feet just might come out from under them for no reason that we can deduce.

Dr. Vasick responded "I can't say no, but I think that it would be unusual." He further explained, "I think that it would be highly unusual that his disc rupture would have occurred just as he was falling, and I don't think that he fell because he had a new disc rupture" based upon Plaintiff's reports of the pain beginning after the fall and not before. He also opined to a reasonable degree of medical certainty that the April 2001 injury was the cause of his current disability. As for Plaintiff's diabetes and high blood pressure, Dr. M. Edward Eller, Plaintiff's family physician, testified Plaintiff's blood pressure and diabetes was under control in May 2001, shortly after the injury. Accordingly, the Commission properly found and concluded

Plaintiff's back injury and hip and leg pain were compensable work-related injuries arising out of his employment.

[2] Defendants also argue the Commission's findings of fact do not sufficiently indicate Plaintiff's injuries arose out of his employment. In Finding of Fact 2, the Commission stated:

> On April 16, 2001, the plaintiff was working overtime as the plant was closed over Easter. As the plaintiff was approaching a piece of machinery on which he was going to place a guard, the plaintiff's feet went out from under him and he fell. The plaintiff did not recall any slippery substances or obstructions on the floor. The plaintiff landed on his right side and back. The plaintiff felt immediate pain when he fell but "shook it off" and continued to work.

In this finding, the Commission specifically stated that as Plaintiff was approaching a piece of machinery on which he was going to place a guard, Plaintiff fell. Based upon this finding, the Commission could conclude Plaintiff's fall and resulting injuries had a reasonable relationship to his employment thereby justifying the conclusion that the incident and injuries arose out of Plaintiff's employment. Moreover, this finding of fact is supported by competent evidence. Plaintiff testified that after he finished repairing one of the guards in the maintenance shop, he decided to try it out on one of the machines. As he was walking towards the machine, Plaintiff fell. Accordingly, we conclude the Commission's findings of fact were adequate.

[3] Defendants also contend the Commission's finding of fact that Dr. Guarino engaged in ex-parte communication at the request of Defendants is unsupported by competent evidence. We disagree.

In Finding of Fact 12, the Commission found:

> Dr. Guarino, at defendant-employer's request, as the company doctor for defendant-employer initiated *ex parte* communications with other physicians who had written the plaintiff out of work. The purpose of these communications was to convince the plaintiff's physicians to change the plaintiff's work restrictions and allow him to work. The plaintiff was not made aware of these communications and certainly did not authorize them.

Dr. Guarino and Laura Hale, Equity Group's Human Resources Manager, testified that Dr. Guarino was Equity Group's company doc-

tor. Ms. Hale testified that she contacted Dr. Guarino and asked him to contact other physicians regarding Plaintiff's ability to work. As explained by Dr. Guarino, he was asked to help Equity Group establish a consensus among all of the doctors regarding Plaintiff's ability to work and he asked Dr. Eller to rescind his recommendation that Plaintiff refrain from working. Dr. Guarino also contacted the Martinsville Hospital emergency room physicians and, pursuant to Ms. Hale's request, informed the doctors that modified work was available for Plaintiff and asked whether they would allow him to go back to work on modified duty restrictions. He testified that Plaintiff was unaware of his contacts with other physicians and did not ask for Plaintiff's consent to make these contacts. This testimony constitutes competent evidence supporting Finding of Fact 12.

[4] Defendants next contend the Commission should have denied Plaintiff's claim because he was not a credible witness. As indicated by our Supreme Court, however, the Commission is "the sole judge of the credibility and weight to be accorded to the evidence and testimony before it." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). Accordingly, we conclude this assignment of error is without merit.

[5] Finally, Defendants contend the Commission abused its discretion in awarding Plaintiff's attorney's fees pursuant to N.C. Gen. Stat. § 97-88 (2001). Specifically, Defendants argue the Commission failed to render findings of fact supporting the award and that the Commission does not have discretionary authority under N.C. Gen. Stat. § 97-88 to award attorney's fees without inquiring as to the litigation costs of the injured employee. We agree.

N.C. Gen. Stat. § 97-88 (2001) provides:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as part of the bill of costs.

This provision "allows an injured employee to move that its attorney's fees be paid whenever an insurer appeals to the Full Commission, or to a court of the appellate division, and the insurer is required to make payments to the injured employee." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 53, 464 S.E.2d 481, 485 (1995). Whether to award attorney's fees is within the sound discretion of the Industrial Commission. *See Taylor v. J.P. Stevens Company*, 307 N.C. 392, 397, 298 S.E.2d 681, 684 (1983).

In Conclusion of Law 8, the Commission stated:

> Defendant appealed the Deputy Commissioner's Opinion and Award, and the Full Commission affirmed said opinion with compensation being paid to the plaintiff. In the discretion of the Full Commission, counsel for the plaintiff is entitled to have defendants pay an attorney's fee in the amount of $5,000.00 which is in addition to the amount awarded as a percentage of the plaintiff's compensation. N.C.G.S. § 97-88.

"Under N.C.G.S. § 97-88, the Commission may only award '*the cost to the injured employee of such hearings or proceedings including therein* [a reasonable attorney's fee].' Consequently, under N.C.G.S. § 97-88, the Commission is empowered to award to the injured employee attorney's fees only for the portion of the case attributable to the insurer's appeal(s)." *Troutman*, 121 N.C. App. at 53, 464 S.E.2d at 485 (emphasis in original); *see also Buck v. Procter & Gamble Mfg. Co.*, 58 N.C. App. 804, 806, 295 S.E.2d 243, 245 (1982). As the Commission did not render any findings regarding the costs associated with defending Defendants' appeal of the deputy commissioner's opinion, this cause must be remanded to the Commission for further findings of fact and an entry of attorney's fees award reflective of Plaintiff's costs in defending the appeal.

[6] Plaintiff contends the Commission should have affirmed the deputy commissioner's award of attorney fees in the amount of $5,000 pursuant to N.C. Gen. Stat. § 97-88.1 (2001). The deputy commissioner's opinion and award concluded:

> 11. Although defendant defended this claim alleging that plaintiff committed fraud in prosecuting his claim, there was ample testimony that there was no evidence of plaintiff committing fraud and that these fraudulent allegations were unfounded. However, even though defendant did not list causation as a defense, they also in fact defended the case on causation grounds. While these

> grounds were found insufficient by the undersigned and were not persuasive, the causation issue was a valid, good faith defense. Considering the defendant's ultimate defense on a genuine issue but its initial defense, which showed a stubborn unfounded litigiousness in addition to a desire solely to prejudice plaintiff's claim and cast him in an unfavorable light, plaintiff is entitled to attorney fees in the amount of $5,000.00.

On appeal to the Full Commission, instead of affirming the deputy commissioner's award under N.C. Gen. Stat. § 97-88.1, the Commission awarded the same amount, $5,000, pursuant to its authority under N.C. Gen. Stat. § 97-88.

By cross-appeal, Plaintiff contends an award of attorney's fees under N.C. Gen. Stat. § 97-88.1 was appropriate because Defendants' unfounded allegations of fraud and their baseless attacks upon Plaintiff's credibility indicate they brought, prosecuted or defended without reasonable ground. Under N.C. Gen. Stat. § 97-88.1,

> [i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.

Although the Commission's decision to award attorney's fees under N.C. Gen. Stat. § 97-88.1 is discretionary, *see Taylor*, 307 N.C. at 397, 298 S.E.2d at 684, "[w]hether the defendant had a reasonable ground to bring a hearing is reviewable by this Court *de novo*. This requirement ensures that defendants do not bring hearings out of stubborn, unfounded litigiousness." *Troutman*, 121 N.C. App. at 50-51, 464 S.E.2d at 484.

As stated by the deputy commissioner and as evidenced by the record, Defendants defended reasonably upon the basis of causation. Indeed, Plaintiff's prior back problems and the lack of any explanation of how the fall occurred constituted a sufficient basis for defending on the grounds of causation as the injuries may have been caused by an idiopathic condition unrelated to Plaintiff's employment. While we find it problematic that Defendants initially defended upon unfounded allegations of fraud, we conclude the Commission did not abuse its discretion in deciding against an award of attorney's fees under N.C. Gen. Stat. § 97-88.1.

Affirmed in part, reversed in part and remanded for further proceedings.

Judges CALABRIA and STEELMAN concur.

CYNTHIA SMITH-PRICE, PLAINTIFF v. CHARTER BEHAVIORAL HEALTH SYSTEMS, D/B/A CHARTER HOSPITAL, AND JAY LAWS, JOINT AND SEVERALLY DEFENDANTS

No. COA99-1523

(Filed 18 May 2004)

1. Appeal and Error— appealability—bankruptcy court action—mootness

Defendant employer's motion to dismiss plaintiff employee's appeal in a negligent infliction of emotional distress, intentional infliction of emotional distress, defamation, retaliation for reporting illegal, unprofessional, and immoral conduct, negligent supervision, and negligent retention of employees case is allowed because the order of the bankruptcy court disallowing plaintiff's claims against defendant has rendered moot the issue of whether defendant was entitled to summary judgment dismissing plaintiff's claims.

2. Appeal and Error— preservation of issues—assignments of error

Although defendant contends that plaintiff's appeal should be dismissed based on plaintiff's alleged failure to follow N.C. R. App. P. Rule 10(c) which requires each assignment of error to state plainly, concisely, and without argumentation the legal basis upon which error is assigned, the notice of appeal sufficed as an assignment of error directed to the order of summary judgment.

3. Emotional Distress— negligent infliction—duty of care

The trial court did not err by granting defendant co-worker's motion for summary judgment on plaintiff's claim for negligent infliction of emotional distress based on defendant co-worker communicating false and misleading information regarding plaintiff's employment behavior and job performance to defend-

ant company, because plaintiff failed to present evidence that defendant co-worker owed her a duty of care or that he breached such a duty.

4. Emotional Distress— intentional infliction—extreme and outrageous conduct required

The trial court did not err by granting defendant co-worker's motion for summary judgment on plaintiff's claim for intentional infliction of emotional distress because considered in the light most favorable to plaintiff, the evidence does not show extreme and outrageous conduct on defendant's part.

5. Libel and Slander— slander—good faith

The trial court erred by granting defendant co-worker's motion for summary judgment on plaintiff's slander claim, because there are genuine issues of material fact as to whether defendant acted in good faith in accusing plaintiff of sexual harassment.

Appeal by plaintiff from judgment entered 20 September 1999 by Judge Russell G. Walker, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 17 March 2004.

Gray, Newell, Johnson & Blackmon, LLP, by Angela Newell Gray, for plaintiff-appellant.

Smith Moore LLP, by Julie C. Theall, for defendant-appellee Charter Behavioral Health Systems.

Haynsworth Baldwin Johnson & Greaves LLC, by Lucretia D. Guia, for defendant-appellee Jay Laws.

MARTIN, Chief Judge.

In her amended complaint in this action against defendants Charter Behavioral Health Systems ("Charter"), Jean Hubbard ("Hubbard"), Charter's Director of Nursing, and Jay Laws ("Laws"), a mental health specialist at Charter, plaintiff alleges claims for negligent infliction of emotional distress, intentional infliction of emotional distress, defamation and retaliation for reporting illegal, unprofessional and immoral conduct. Plaintiff also alleged claims against defendant Charter for negligent supervision and negligent retention of three of its employees. All defendants filed answers in which they denied the material allegations of plaintiff's amended

complaint and asserted affirmative defenses. Plaintiff subsequently dismissed the action against Hubbard with prejudice, and defendants Charter and Laws moved for summary judgment.

Materials before the trial court at the hearing on defendants' motions for summary judgment disclose that plaintiff, a registered nurse, and Laws worked in the children's unit at Charter's Greensboro facility. Although Laws was under the direct supervision of plaintiff, she had no administrative authority. As early as November 1997, plaintiff complained about Laws' tardiness, abuse of phone privileges, failure to follow policy, insubordination and his inappropriate sexual relationship with a co-worker. She also expressed dissatisfaction with Charter's under-staffing, but Charter took no corrective action.

On 5 February 1998, Laws arrived late at work, which, according to plaintiff, was not uncommon. After plaintiff confronted Laws about his tardiness, excessive phone calls, taking "off orders" and his attitude at work, he angrily walked away from plaintiff. Laws returned a few minutes later, claiming taking "off orders" was not his job, and threw a packet of papers containing a job description at plaintiff, hitting her in the chest. Plaintiff testified in her deposition that the impact caused her little physical pain, but the incident was emotionally traumatic. After this episode, plaintiff enlisted the help of the assistant director of nursing, Kathy Williams, who agreed that defendant Laws should be sent home for the day for insubordination. At the request of Williams, plaintiff prepared a written statement of the events to submit to Hubbard the following day.

Although Laws was not scheduled to work the following day, he came into Charter and submitted a report claiming plaintiff had sexually harassed him. An investigation of the allegation was promptly initiated by Charter. Some employees corroborated Laws' complaints while others expressed no knowledge of inappropriate behavior by plaintiff. However, because of the allegations, plaintiff was moved to the adult unit of the hospital while Laws remained on the children's unit. On or about 10 February 1998 plaintiff took a medical leave due to the stress caused by the accusations.

The trial court granted summary judgment in favor of both defendants and plaintiff gave notice of appeal. On 16 February 2000, Charter filed for relief under Chapter 11 of the United States Bankruptcy Code. By order dated 3 March 2000, this Court stayed all further proceedings in this case until notified that the automatic stay

provided by 11 U.S.C. § 362 had been lifted. Such notification was received by this Court on 16 July 2003.

Plaintiff's Appeal as to Defendant Charter

[1] On 22 October 2001, the United States Bankruptcy Court for the District of Delaware disallowed plaintiff's claims against Charter in full. Charter has moved to dismiss plaintiff's appeal of the order granting summary judgment in its favor on the grounds that plaintiff's claim against Charter has been disallowed by the Bankruptcy Court, rendering the issues between plaintiff and Charter in this appeal moot.

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

In re Peoples, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). "An appeal which presents a moot question should be dismissed." *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 698, 443 S.E.2d 127, 131 (1994). The order of the Bankruptcy Court disallowing plaintiff's claim against Charter has rendered moot the issue of whether Charter was entitled to summary judgment dismissing plaintiff's claims. Charter's motion to dismiss plaintiff's appeal is, therefore, allowed.

Plaintiff's Appeal as to Defendant Laws

I.

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Summary judgment is appropriate when "viewed in the light most favorable to the non-movant," *Id.*, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The moving party must establish the lack of any triable issue of material fact "by proving that an essential element of the opposing party's claim is non-

existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681-82, 565 S.E.2d 140, 146 (2002) (citation omitted). The burden then shifts to the nonmoving party to "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial." *Id.* (citation omitted). Although summary judgment is seldom granted in negligence cases, it may be granted where the evidence shows "a lack of any negligence on the part of the defendant." *Surrette v. Duke Power Co.*, 78 N.C. App. 647, 650, 338 S.E.2d 129, 131 (1986).

II.

[2] Initially, defendant Laws argues that plaintiff's appeal should be dismissed because plaintiff has not followed the North Carolina Rules of Appellate Procedure which require each assignment of error to "state plainly, concisely and without argumentation the legal basis upon which error is assigned." N. C. R. App. P. Rule 10(c). "An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." *Id.*

Each of plaintiff's assignments of error state, "The trial court erred by granting the defendants' motion for summary judgment as to plaintiff's claim of . . . ." An appeal from an order granting summary judgment raises only the issues of whether, on the face of the record, there is any genuine issue of material fact, and whether the prevailing party is entitled to a judgment as a matter of law. Therefore, the notice of appeal suffices as an assignment of error directed to the order of summary judgment. *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987); *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 297, 326 S.E.2d 316, 319 (1985). Plaintiff's assignments of error are clearly sufficient.

III.

[3] Plaintiff contends the trial court erred by granting defendant Laws' motion for summary judgment as to her claim for negligent infliction of emotional distress. The negligent act upon which plaintiff's claim is grounded is that Laws "communicat[ed] false and misleading information regarding the Plaintiff's employment behavior and job performance to the defendant company."

To establish a claim for negligent infliction of emotional distress, the plaintiff must prove that "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). "In order to establish actionable negligence, plaintiff must show (1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury." *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 232, 311 S.E.2d 559, 564 (1984).

In this case, plaintiff presented no evidence to establish that defendant Laws owed her a duty of care or that he breached such a duty. Therefore, an essential element of plaintiff's claim for negligent infliction of emotional distress is unsupported by the evidence and summary judgment was properly allowed. *See Guthrie v. Conroy*, 152 N.C. App. 15, 25, 567 S.E.2d 403, 411 (2002).

IV.

[4] Plaintiff next contends the trial court erred by granting defendant Laws' motion for summary judgment as to her claim for intentional infliction of emotional distress. The elements for the tort of intentional infliction of emotional distress are: "1) extreme and outrageous conduct by the defendant 2) which is intended to cause and does in fact cause 3) severe emotional distress." *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (citation omitted). Conduct is extreme and outrageous when it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, 327 S.E.2d 308, 311 (citation omitted), *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985). The behavior must be more than "mere insults, indignities, threats, . . . and . . . plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate or unkind." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 493, 340 S.E.2d 116, 123 (citation omitted), *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). The determination of whether the alleged conduct is considered extreme and outrageous is a question of law for the trial judge, however, the jury must determine whether the conduct is "suf-

ficiently extreme and outrageous to result in liability." *Id.* at 490-91, 340 S.E.2d at 121.

The evidence, considered in the light most favorable to plaintiff, does not, as a matter of law, show extreme and outrageous conduct on Laws' part. Plaintiff asserts that prior to 5 February 1998, defendant Laws failed to follow policies and procedures, took excessive personal phone calls, and failed to perform certain tasks. On 5 February 1998, when plaintiff confronted Laws, he threatened to make accusations against her, yelled at her, walked off his assignment and then, when he returned, threw a package of papers at plaintiff. The next day he filed a complaint of sexual harassment against plaintiff. Although defendant's behavior was undeniably churlish and ill-mannered, it does not rise to the level of the extreme and outrageous conduct which is required to sustain a claim for intentional infliction of emotional distress. *See Hogan*, 79 N.C. App. at 490, 340 S.E.2d at 121 (extreme and outrageous behavior found where defendant made sexually suggestive remarks and physical insinuations to plaintiff and when she refused his advances he screamed profane names at her, threatened her with bodily injury and slammed a knife down on the table in front of her); *Watson v. Dixon*, 130 N.C. App. 47, 53, 502 S.E.2d 15, 20 (1998), *aff'd*, 352 N.C. 343, 532 S.E.2d 175 (2000) (extreme and outrageous behavior found where defendant frightened and humiliated plaintiff with cruel practical jokes, made obscene comments to her, made indecent physical suggestions and threatened her personal safety); *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 527 S.E.2d 712, *disc. review denied*, 352 N.C. 357, 544 S.E.2d 563 (2000) (extreme and outrageous behavior found where defendant, after physically assaulting plaintiff, began masturbating, and ejaculated on plaintiff); *compare with Wilson v. Bellamy*, 105 N.C. App. 446, 468, 414 S.E.2d 347, 359, *disc. review denied*, 331 N.C. 558, 418 S.E.2d 668 (1992) (extreme and outrageous behavior was not found where defendant engaged in kissing and heavy petting with an intoxicated plaintiff while others were present); *Hogan*, 79 N.C. App. at 493, 340 S.E.2d at 122-23 (extreme and outrageous behavior was not found where defendant yelled and threw menus at plaintiff and interfered with her supervision of employees). Because plaintiff has not presented evidence sufficient to support a finding of the element of extreme and outrageous conduct necessary to sustain a claim for intentional infliction of emotional distress, the trial court properly granted defendant Laws' motion for summary judgment as to that claim.

V.

[5] In her final argument, plaintiff contends that the trial court erred by granting defendant Laws' motion for summary judgment as to her claim for defamation. To prevail on a claim of defamation, "a plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation." *Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987). "In North Carolina, the term defamation applies to the two distinct torts of libel and slander." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 898 (2002). Slander is defined as "the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood." *Black's Law Dictionary*, 1559 (4th Ed. 1968). In this case, plaintiff argues that defendant Laws slandered her by making accusations that she had sexually harassed him.

"However, even if it is determined that a statement is slanderous, the law recognizes certain communications as privileged." *Long v. Vertical Technologies*, 113 N.C. App. 598, 601, 439 S.E.2d 797, 800 (1994). "The essential elements for the qualified privilege to exist are good faith, an interest to be unheld, a statement limited in its scope to this purpose, a proper occasion and publication in a proper manner and the proper parties only." *Id.* at 602, 439 S.E.2d at 800. "Additionally, a qualified privilege may be lost by proof of actual malice on the part of the defendant." *Id.*

There is conflicting evidence in the record as to whether defendant's allegations were true. Laws testified that plaintiff sexually harassed him by rubbing his head and telling him his head was "sexy," hugging him inappropriately, making explicit sexual comments about his penis, and by pulling her clothing aside so as to expose her bra and thong. Hubbard testified in her deposition that although she "initially was not sure [Laws] was telling the truth," she felt like "there was something going on" even though she could not substantiate the accusations. However, in her deposition, plaintiff denied all of Laws' accusations. Therefore, there is a genuine issue of material fact as to the truth of Laws' accusations.

Moreover, although Laws had a legitimate interest in reporting any incidents of improper sexual advances or conduct to plaintiff's supervisor, there is evidence which would support a finding that he

did not act in good faith, so as to be entitled to a qualified privilege. There was evidence that Laws filed his sexual harassment claim the morning after he was sent home for insubordination, having never before mentioned any alleged sexual harassment on plaintiff's part. There was also evidence that during the 5 February 1998 incident, Laws threatened to tell Charter's administration that plaintiff was having a relationship with another employee, William Bynum. Therefore, there are genuine issues of fact as to whether defendant Laws acted in good faith in accusing plaintiff of sexual harassment and the trial court should not have granted summary judgment as to her claim for defamation.

Affirmed in part, reversed in part and remanded.

Judges HUDSON and GEER concur.

R. BRADFORD LEE, PLAINTIFF v. JOHN C. SCARBOROUGH AND EB COMP, INC., A NORTH CAROLINA CORPORATION (SUCCESSOR TO E.B. COMP SERVICES, INC. AND TO E.B. SERVICES, INC., FORMER NORTH CAROLINA CORPORATIONS), DEFENDANTS

No. COA02-1632-2

(Filed 18 May 2004)

1. Corporations— breach of stock option agreement—changed capitalization

In a superceding opinion (the prior opinion is at 162 N.C. App. 674, filed 17 February 2004), summary judgment was found to have been correctly granted against EB Comp, Inc. on a claim for breach of a stock option agreement. Defendant breached the agreement by approving a merger of the company, thereby changing its capitalization, without plaintiff's prior written consent.

2. Corporations— breach of stock option agreement—participation in merger—individual act

Defendant Scarborough breached a stock option and restriction agreement as an individual when he voluntarily participated in a merger he knew would extinguish plaintiff's stock options, and summary judgment was correctly granted for plaintiff. While the conversion of shares pursuant to a merger is essentially a corporate rather than a shareholder act, Scarborough was the sole

shareholder and director and the line between corporate actions and shareholder actions was virtually indistinguishable.

3. Contracts— recital of consideration—competency of contrary evidence

Evidence to the contrary was not competent to contradict the recital of consideration on the face of a stock option agreement.

4. Damages and Remedies— stock option agreement—evidence of readiness to exercise option

A new trial on damages was granted in a case involving a stock option agreement because the court should have admitted evidence that plaintiff could not have exercised the option due to an administrative regulation. This was relevant to whether plaintiff intended to exercise the option.

Appeal by defendants from order filed 1 June 2001 by Judge Marcus L. Johnson; order filed 28 January 2002 by Judge Timothy S. Kincaid; order filed 1 March 2002 by Judge Robert P. Johnston; order filed 18 March 2002 by Judge Clarence E. Horton, Jr.; and judgment dated 28 March 2002 and orders filed 25 April 2002 and 10 May 2002 by Judge C. Preston Cornelius in Mecklenburg County Superior Court. The appeal was heard in this Court on 10 September 2003, and the opinion was filed 17 February 2004.

On 23 March 2004, plaintiff filed a Petition for Rehearing. The petition was granted by order of this Court entered 4 May 2004, and the matter was heard on the petition to rehear without additional briefs or oral argument. We hereby withdraw the opinion filed 17 February 2004, superceding and replacing it with the following amended opinion.

Helms Mulliss & Wicker, PLLC, by E. Osborne Ayscue, Jr. and John H. Cobb, for plaintiff-appellee.

Bishop, Capitano & Abner, P.A., by J. Daniel Bishop and Joseph W. Moss, Jr., for defendants-appellants.

MARTIN, Chief Judge.

Plaintiff-appellee, R. Bradford Lee ("Lee") brought this action against defendants-appellants, John C. Scarborough ("Scarborough") and E.B. Comp., Inc. alleging defendants' breach of a stock option and restriction agreement. Briefly summarized, the record discloses

the following facts relevant to the issues raised on appeal: Both Lee and Scarborough worked in the insurance industry. Lee owned a consulting business and Scarborough was the majority owner and director of E.B. Services, Inc. ("Services"), a group health benefit plan management business. In mid-1992, Lee helped Scarborough form a company known as E.B. Comp Services, Inc. ("Comp Services"). Comp Services engaged in business as a third-party administrator ("TPA") of workers compensation insurance plans. Scarborough was the sole shareholder and sole director of Comp Services. Around the time of Comp Services' formation, Scarborough signed individually and as president of Comp Services, a Stock Option and Restriction Agreement ("Agreement") dated 16 July 1992. The Agreement, effective for five years, included the following terms:

> 2. Stock to be Purchased
>
> (a) [Plaintiff] shall have an option to purchase from Stockholder that number of shares of stock equal to 50% of all the issued and outstanding shares of Company, it being the intent of the parties that should [plaintiff] fully exercise this option, [plaintiff] will have a fifty percent (50%) ownership in Company. . . .
>
> . . . .
>
> 5. Restriction on Stockholder's Transfer of Shares. Stockholder shall not assign, encumber or dispose of any portion of his stock interest in the Company, by sale or otherwise, except upon compliance with the terms and conditions of this Agreement. . . .
>
> 6. Sale of Additional Shares by Company. Company agrees not to issue any stock, by sale or otherwise, without first obtaining [plaintiff's] written approval and without first offering such shares to [plaintiff] . . . . There shall be no split, reclassification or other change in the capitalization of Company without the prior written consent of [plaintiff].

Effective 1 January 1995, without notice to Lee, Comp Services merged into Services, which is now defendant E.B.Comp., Inc. ("Comp"). Lee filed this action alleging breach of the Agreement. Defendants answered, denying the material allegations of breach and asserting affirmative defenses. Following discovery, plaintiff and defendants moved for summary judgment; Lee was granted summary judgment on the issue of breach. The issue of damages was tried to a jury, which returned a verdict awarding Lee damages in the amount of $565,901.01. The trial court entered judgment upon the verdict and

awarded prejudgment interest in the amount of $327,695.45. Defendants appeal.

I.

In their first two arguments, defendants contend the trial court erred when it granted partial summary judgment in favor of plaintiff against defendant Comp and against defendant Scarborough, individually, on the issue of breach. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The issue of contract interpretation is a question of law. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 534 S.E.2d 653 (2000). While both option contracts and restrictions on the alienation of property interests are strictly construed, the clear intent of the parties as expressed on the face of the contract controls. *See Lagies v. Myers*, 142 N.C. App. 239, 247-48, 542 S.E.2d 336, 341-42, *disc. review denied*, 353 N.C. 526, 549 S.E.2d 218 (2001); *Bryan-Barber Realty, Inc. v. Fryar*, 120 N.C. App. 178, 181-82, 461 S.E.2d 29, 31-32 (1995).

[1] We first address the issue of Comp's breach of the Agreement. The Agreement expressly restricted Comp Services from, *inter alia*, splitting, reclassifying, or making any other changes in the capitalization of the company without the prior written consent of plaintiff. While this restriction was still in effect, Comp Services approved the merger of itself into Services pursuant to §§ 55-11-01-11-10 of the North Carolina General Statutes.

Restrictions on the alienation or transfer of property are not favored and therefore, must be strictly construed. *See Duncan v. Duncan*, 147 N.C. App. 152, 156, 553 S.E.2d 925, 928 (2001), *disc. review denied*, 355 N.C. 211, 559 S.E.2d 800 (2002). Whether a company's approval of a merger pursuant to §§ 55-11-01-11-10 is clearly prohibited by a restriction in an agreement prohibiting a change in the capitalization of a company is an issue of first impression in North Carolina.

Capitalization is defined by Black's Law Dictionary as "[t]he total amount of long-term financing used by a business, including stocks, bonds, retained earnings, and other funds." Black's Law Dictionary 202 (7th ed. 1999). When a merger takes effect, the merging corporation ceases to exist; all assets and liabilities of the

merging corporation are vested in the surviving corporation, and the shares of the merging corporation are thereupon converted into "shares, obligations, or other securities of the surviving . . . corporation or into the right to receive cash or other property . . . ." N.C. Gen. Stat. § 55-11-06 (a)(1), (2), (6) (2003).

Consolidation of two companies' assets, liabilities, and stocks pursuant to a merger necessarily involves a change in the amount and character of "stocks, bonds, retained earnings, and other funds," Black's Law Dictionary 202 (7th ed. 1999), possessed by the businesses participating in the merger. *Cf.* N.C. Gen. Stat. § 55-14A-01(a)(5) (2003) (financial reorganization of a company pursuant to bankruptcy or insolvency may include participating in a merger). We hold, therefore, that merger pursuant to §§ 55-11-01-11-10 clearly effects a change in the capitalization of a company and thus, Comp Services breached its obligation in the Agreement not to change the capitalization of the company by approving a merger of the company without the prior written consent of plaintiff.

[2] Moreover, Scarborough, individually, also breached the stock option and restriction agreement by voluntarily participating in a merger he knew would extinguish the plaintiff's stock options under the agreement. Principles of contract law are generally applied to the interpretation of options. *Lagies v. Myers*, 142 N.C. App. 239, 247, 542 S.E.2d 336, 341 (2001). "[B]ecause the other party is not bound to perform, and is under no obligation to buy," options are construed strictly in favor of the maker. *Id.* at 248, 542 S.E.2d at 342. However, "[i]f the option terms are clear and unambiguous, 'it must be enforced as it is written, and the court may not disregard the plainly expressed meaning of its language.' " *Id.* at 247, 542 S.E.2d at 342. (citation omitted).

In this case, Scarborough, as the sole shareholder of Comp Services, had a contractual obligation to plaintiff to hold open an option to purchase shares of Comp Services for a period of five years. It is undisputed that before the five year period expired, Scarborough, in his capacity as the sole shareholder and the sole director of Comp Services, decided to merge the company into Services, of which he was a 90% owner. *See* N.C. Gen. Stat. § 55-11-01(a) (2003) ("One or more corporations may merge into another corporation if the board of directors of each corporation adopts and its shareholders . . . approve a plan of merger."). When a merger takes place, the merging company, as well as its shares, cease

to exist. N.C. Gen. Stat. § 55-11-06(a)(1), (6) (2003). Thus, there is no question that the merger extinguished the plaintiff's option to buy shares of Comp Services. A breach of the agreement by Comp Services imposes liability therefor upon the surviving corporation, defendant Comp. N.C. Gen. Stat. § 55-11-06(a)(3) ("[s]urviving corporation has all liabilities of each corporation party to the merger.").

Nevertheless, defendant Scarborough argues that even though the merger extinguished plaintiff's options, he was not liable for breach of contract since a merger is essentially a corporate act, not a shareholder act. It is true that conversion of shares pursuant to a merger is initiated by corporate act and accomplished by operation of law, and not through any transfer or conveyance by a shareholder. *See* N.C. Gen. Stat. §§ 55-11-01, 55-11-06 (2003). The official comment to N.C. Gen. Stat. § 55-11-06 (2003), listing the effects of merger, states:

> ***A merger is not a conveyance or transfer***, and does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. (emphasis added).

Based on this principle, other jurisdictions have found that restriction agreements which prohibit the voluntary transfer of shares by a shareholder are not violated when parties to the agreement vote their shares in favor of a merger. *See Seven Springs Farm, Inc. v. Croker*, 801 A.2d 1212, 1216 (Pa. 2002); *Shields v. Shields*, 498 A.2d 161, 167 (Del. Ch. 1985); *But see Bruns v. Rennebohm Drug Stores, Inc.*, 442 N.W.2d 591, 595 (Wis. Ct. App. 1989) (holding that substance must control over form when interpreting stock restriction agreements).

However, this case is distinguishable on several grounds. First, this case involves a contractual promise by Scarborough to hold open an option to purchase his shares in the company for a specified period of time. In contrast, the cases in the other jurisdictions merely involved restrictions on a shareholder's ability to transfer or convey his or her shares without prior approval. Second, the corporate act of merger in this case could not have been accomplished without the solitary actions of shareholder and director Scarborough. As both the sole shareholder and sole director of Comp Services, Scarborough was the only person who could vote for and approve the merger. In contrast, in order to effectuate the mergers in the other cases, more than one person was required to vote for and approve the transaction. *See Seven Springs Farm*, 801 A.2d 1212; *and Shields*, 498 A.2d 161. Thus, the line between a corporate act and a shareholder act is virtually indistinguishable in this case.

The clear intent of the parties as expressed on the face of the Agreement in this case was to prevent the intentional extinguishment by Scarborough or Comp Services of plaintiff's option to purchase shares. This intent is evidenced in an affidavit submitted by Scarborough, stating that he merged Comp Services into Services "[i]n order to deal with the problem of [plaintiff's] perverse incentives under the existing arrangement and to provide flexibility to award [another party] part ownership of E.B. Comp Services . . . ." Given the fact that only Scarborough, and no other parties, had the power to enter into the merger, and the fact that we are bound to effectuate the clear intent and purpose of binding contractual agreements, we find that Comp Services breached its obligation under the Agreement to plaintiff not to change the capitalization of the company when it approved a merger of itself into Services and that Scarborough breached his obligation to plaintiff under the Agreement to hold open shares of Comp Services for a period of five years when he voted for and approved the merger of the company. Thus, we affirm the trial court's grant of partial summary judgment in plaintiff's favor on the issue of both defendants' breach of the stock option and restriction agreement.

II.

[3] Defendants next argue the trial court erred in granting summary judgment in plaintiff's favor because the Agreement was not supported by consideration. The Agreement states the following:

> 3. Stockholder acknowledges that Lee, in the course of formation of the Company, has provided Stockholder with invaluable assistance with regard to forming the Company and employing key personnel. Without this assistance, Stockholder acknowledges that the Company would not have been formed; Stockholder also acknowledges that such assistance is the consideration for Stockholder granting to Lee the option and right of first refusal contained herein. Stockholder further acknowledges that such assistance is adequate consideration for the restrictions on general operations of the Company contained herein.
>
> . . . .
>
> NOW, THEREFORE, for and in consideration of the premises and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged . . . .

Defendants presented evidence that plaintiff had previously been compensated $30,000 for his assistance in "establishing a company to handle Worker's Compensation claims as a TPA . . . ." Thus, they argue that the recital in the contract was insufficient to constitute adequate consideration since plaintiff had already performed and been compensated for these services. *See Penley v. Penley*, 314 N.C. 1, 18-19, 332 S.E.2d 51, 61-62 (1985) (absent certain circumstances, past services do not constitute adequate consideration for a new contract).

However, it is well established that parol evidence is not competent to contradict the terms of a subsequently entered into contract. *Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 708-09, 567 S.E.2d 184, 188 (2002). The recital on the face of the Agreement in this case specifically recites that the contract is supported by adequate consideration. Thus, evidence to the contrary was not competent to contradict this recital with regard to the validity of the contract. *See id.* at 709-10, 567 S.E.2d at 188-89; *Weiss v. Woody*, 80 N.C. App. 86, 92, 341 S.E.2d 103, 107 (1986) ("Although it is always competent to contradict the recital in the deed as to the amount paid . . . it is not competent to contradict the acknowledgment of a consideration paid in order to affect the validity of the deed . . . ."). Defendants' assignment of error is overruled.

III.

[4] Defendants assign error to the exclusion of evidence, during the trial on the issue of damages, regarding whether plaintiff was ready, willing, and able to exercise the option at some time during the period specified in the option contract and to the trial court's refusal to submit to the jury the issue of plaintiff's willingness and ability to exercise the option. We agree.

"An option is not a contract to sell, but it is transformed into one upon acceptance by the optionee in accordance with its terms." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976). Thus, in order to be entitled to more than nominal damages from the wrongful breach of an option contract, the optionee must show that he was ready, willing, and able to exercise the option at some time during the period specified in the option contract. *See id.* at 364, 222 S.E.2d at 407.

During the trial on the issue of damages, defendants attempted to present evidence showing that plaintiff could not have exercised

the option, due to a state administrative regulation, while he was still employed as a trustee for NCME, a workers' compensation insurer. The tendered evidence would have shown that while plaintiff was not compensated for his services prior to defendant's breach, plaintiff was paid approximately $75,000 for his services as trustee for NCME in 1995 and would have had to resign his position and forego these benefits had he chosen to exercise the option. Since plaintiff had not attempted to exercise the option prior to or at the time of defendant's breach, such evidence is relevant to the issue of whether plaintiff ever intended to exercise the option had it been available to him at some time during the period specified in the option contract and should have been submitted to the jury in order to properly determine the issue of damages. *See* N.C. Gen. Stat. § 8C-1, Rules 401, 402. Moreover, the admission of such evidence would have required the trial court to submit to the jury the issue of whether plaintiff was ready, willing, and able to exercise the option. *In re Estate of Ferguson*, 135 N.C. App. 102, 105, 518 S.E.2d 796, 798 (1999) (where substantial evidence exists in support of an issue, the trial court is required to submit the issue to the jury, upon request). If the jury should determine from such evidence that plaintiff was not ready, willing, and able to exercise his rights under the option, he would be entitled to no more than nominal damages for its breach. *Hocutt v. Western Union Telegraph Co.*, 147 N.C. 186, 60 S.E. 980 (1908). The exclusion of such evidence and the resulting failure of the trial court to submit the issue arising therefrom entitle defendant to a new trial on the issue of damages.

In light of our award of a new trial on the issue of damages, we need not address the remaining assignments of error brought forward in defendants' brief relating to the trial and judgment as they may not recur at retrial. In addition, those assignments of error not brought forward in defendants' brief are deemed abandoned. N.C. R. App. P. 28(a).

Affirmed in part, reversed and remanded for a new trial on the issue of damages.

Judges BRYANT and GEER concur.

JUSTICE FOR ANIMALS, INC. AND HELEN WALKER, INDIVIDUALLY, PLAINTIFFS v. ROBESON COUNTY, BILL SMITH, DIRECTOR OF ROBESON COUNTY HEALTH DEPARTMENT, HUGH COLE, DIRECTOR, ROBESON COUNTY ANIMAL CONTROL FACILITY, DEFENDANTS

No. COA02-1336

(Filed 18 May 2004)

1. Administrative Law— exhaustion of remedies—aggrieved persons—cruelty to animals

Plaintiffs were aggrieved persons under statutes and ordinances concerning the euthanasia of animals. They therefore fell within the requirement that administrative procedures be exhausted before recourse to the courts, and defendants' motion for a Rule 12(b)(6) dismissal was correctly granted. The General Assembly has expressed its intent that the broadest category of persons be deemed a real party in interest when contesting cruelty to animals. N.C.G.S. §§ 19A-1, 19A-2.

2. Animals— euthanasia—board of health rules—exhaustion of administrative remedies

Plaintiffs' claims concerning the euthanasia of animals were properly dismissed for failure to exhaust administrative remedies because their claims concerned the enforcement of rules adopted by a local board of health and thus fell within the scope of N.C.G.S. § 130A-24(b).

3. Statutes— interpretation—use of conjunctive

The use of the conjunctive "and" in N.C.G.S. § 130A-24(b) did not mean that an appeal involving a county's euthanasia of animals had to involve both the enforcement of rules and administrative penalties. Courts may substitute "or" for "and" (and vice versa) to preserve constitutionality or give effect to legislative intent. Here, the General Assembly must have intended to allow an appeal on either ground because the imposition of administrative penalties will always involve the enforcement of rules.

4. Administrative Law— exhaustion of administrative remedies—inadequate remedies—failure to allege

Plaintiffs' contention that administrative penalties were inadequate in a challenge to a county's euthanasia of animals was correctly dismissed under a Rule 12(b)(6) motion where plaintiffs did not include that contention in their complaint.

Appeal by plaintiffs from an order entered 30 August 2002 by Judge John B. Carter, Jr., in Robeson County District Court. Heard in the Court of Appeals 12 June 2003.

William A. Reppy, Jr. and Larry J. McGlothlin, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Mark A. Davis; and J. Hal Kinlaw, Jr., for defendants-appellees.

GEER, Judge.

Plaintiffs Justice for Animals, Inc. ("JFA") and Helen Walker appeal from an order granting defendants' motion to dismiss plaintiffs' complaint challenging the euthanasia procedures and record keeping of the Robeson County Animal Control Facility. Because plaintiffs failed to exhaust their administrative remedies, we affirm the trial court's dismissal.

Facts

On or about 5 November 2001, plaintiffs filed a complaint in Robeson County District Court against defendants Robeson County, the Director of the Robeson County Health Department, and the Director of the Robeson County Animal Control Facility for alleged violations of N.C. Gen. Stat. § 19A-1 *et seq.* (2003) ("Civil Remedy for Protection of Animals"), N.C. Gen. Stat. § 130A-192 (2003) (requiring that dogs and cats be euthanized by approved procedures), N.C. Gen. Stat. § 14-360 (2003) (making cruelty to animals a crime), and a Robeson County ordinance entitled "Rules and Regulations Governing Animal Control in Robeson County." In our review of the trial court's dismissal of this action pursuant to Rule 12(b)(6), we must treat the allegations of the plaintiffs' complaint as true. *Arroyo v. Scottie's Prof'l Window Cleaning*, 120 N.C. App. 154, 155, 461 S.E.2d 13, 14 (1995), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996).

According to the complaint, JFA is a non-profit domestic corporation dedicated to the health and welfare and the humane treatment of animals. Plaintiff Walker is a resident of Robeson County and an animal welfare advocate. Plaintiffs contend that the Robeson County Animal Control Facility, a division of the Robeson County Health Department, is handling and killing animals in an inhumane manner causing unnecessary pain, anxiety, and distress in the animals. Specifically, plaintiffs allege that the Robeson County Animal Control

Facility injects animals in their hearts without anesthesia resulting in pain, discomfort, and convulsive behavior, and euthanizes cats with a drug not approved for usage on cats. According to plaintiffs, these procedures are contrary to methods prescribed by the Humane Society of the United States, the American Humane Association, and the American Veterinary Medical Association.

Plaintiffs further allege that the Robeson County Animal Control Facility engages in inadequate record keeping, in violation of state law and Robeson County ordinances. According to plaintiffs' complaint, the inadequate records result in the unnecessary killing of animals before their owners can reclaim them.

Finally, plaintiffs allege that they, together with other animal welfare advocates, have expended time and funds to reform the Animal Control Facility and to provide training to county employees at no expense to the county. Although the Facility has accepted the assistance and represented that reforms were being made, plaintiffs allege that these representations were untrue. Plaintiffs allege that the citizens of Robeson County are exposed to a risk of immediate and irreparable injury should their pets and "useful animals" be impounded at the Animal Control Facility in that impounded animals are "in immediate danger of death, disease, or injury with no reasonable opportunity of an animal or pet owner to save his pet from inhumane destruction."

The complaint alleges that the treatment of animals at the Animal Control Facility is cruel and unlawful under N.C. Gen. Stat. § 19A-1 *et seq.*, § 130A-192, and § 14-360. As relief, plaintiffs sought a permanent injunction "prohibiting [defendants] from maintaining or operating an animal control facility and destroying animals in the manner heretofore complained of or from failing to maintain complete and accurate records by law and making such records available at all reasonable hours."

On 4 January 2002, defendants answered and moved to dismiss the complaint pursuant to Rules 12(b)(1), (2), and (6) of the Rules of Civil Procedure. On 11 July 2002, Judge John B. Carter, Jr. entered a temporary restraining order barring defendants "from continuing the euthanasia process in Robeson County, North Carolina until such time as this matter can be brought on for hearing as to whether or not there should be a preliminary injunction entered ordering preliminary relief, in anticipation of trial[.]" The court scheduled a hearing for 16 July 2002. Following the hearing on 16 July 2002, Judge Carter filed an

order on 30 August 2002 granting the defendants' motion to dismiss pursuant to Rule 12(b)(6) and denying any injunctive relief. Plaintiffs appeal from this order.

Discussion

[1] It is well-established that "where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed. *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999).

Defendants contend that plaintiffs had an adequate administrative remedy under N.C. Gen. Stat. § 130A-24 (2003). N.C. Gen. Stat. § 130A-24 provides:

> (b) Appeals concerning the enforcement of rules adopted by the local board of health and concerning the imposition of administrative penalties by a local health director shall be conducted in accordance with this subsection and subsections (c) and (d) of this section. The aggrieved person shall give written notice of appeal to the local health director within 30 days of the challenged action. The notice shall contain the name and address of the aggrieved person, a description of the challenged action and a statement of the reasons why the challenged action is incorrect. Upon filing of the notice, the local health director shall, within five working days, transmit to the local board of health the notice of appeal and the papers and materials upon which the challenged action was taken.
>
> (c) The local board of health shall hold a hearing within 15 days of the receipt of the notice of appeal. The board shall give the person not less than 10 days' notice of the date, time and place of the hearing. On appeal, the board shall have authority to affirm, modify or reverse the challenged action. The local board of health shall issue a written decision based on the evidence presented at the hearing. The decision shall contain a concise statement of the reasons for the decision.
>
> (d) A person who wishes to contest a decision of the local board of health under subsection (b) of this section shall have a right of appeal to the district court having jurisdiction within 30

> days after the date of the decision by the board. The scope of review in district court shall be the same as in G.S. 150B-51.

N.C. Gen. Stat. § 130A-24(b)-(d). Plaintiffs, on the other hand, contend that they are not "aggrieved persons" within the meaning of N.C. Gen. Stat. § 130A-24(b) and, therefore, no administrative remedy is available to them.

The term "aggrieved person" is not defined in N.C. Gen. Stat. § 130A-24, but our Supreme Court has held:

> The expression "person aggrieved" has no technical meaning. What it means depends on the circumstances involved. It has been variously defined: "Adversely or injuriously affected; damnified, having a grievance, having suffered a loss or injury, or injured; also having cause for complaint. More specifically the word(s) may be employed meaning adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights."

In re Assessment of Sales Tax, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963) (quoting 3 C.J.S. *Aggrieved*, p. 350). The Court has recently stressed "that whether a party is a 'person aggrieved' must be determined based on the circumstances of each individual case." *N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res.*, 357 N.C. 640, 644, 588 S.E.2d 880, 882 (2003).

The complaint alleges that conduct of the Animal Control Facility—which falls within the control of the Robeson County Board of Health—is exposing animal owners to a risk that their animals will be killed inhumanely and unnecessarily. While plaintiffs are animal welfare advocates who are in effect representing Robeson County animal owners, "[o]ne may be aggrieved within the meaning of the various statutes authorizing appeals when he is affected only in a representative capacity." *In re Assessment of Sales Tax*, 259 N.C. at 595, 131 S.E.2d at 446. Under these circumstances, we agree with defendants that plaintiffs are "aggrieved persons" entitled to proceed under N.C. Gen. Stat. § 130A-24, especially in light of the provisions of Ch. 19A of the General Statutes, which govern "Protection of Animals."

The Supreme Court has held that when a statute only sets out procedural rights and duties to resolve disputes between an agency and a "person aggrieved," the courts may look to other "organic statutes" to determine who qualifies as a "person aggrieved" entitled to bring an administrative proceeding under the procedural statute. *Empire*

Power Co. v. N.C. Dep't of Env't, Health & Natural Res., 337 N.C. 569, 583, 447 S.E.2d 768, 776-77 (1994) (holding that the N.C. Administrative Procedure Act "confers procedural rights and imposes procedural duties" while "[t]he organic statute . . . defines those rights, duties, or privileges, abrogation of which provides the grounds for an administrative hearing"). The court must decide whether the individual "is a 'person aggrieved' as defined by the [procedural statute] within the meaning of the organic statute." *Id.* at 588, 447 S.E.2d at 779. *See also In re Denial of Request for Full Admin. Hearing,* 146 N.C. App. 258, 260, 552 S.E.2d 230, 232 ("A person's rights, duties or privileges arise under the relevant organic statute."), *disc. review denied,* 354 N.C. 573, 558 S.E.2d 867 (2001).

Like the North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 130A-24(b)-(d) sets forth only procedural rights for "aggrieved persons" and imposes procedural duties on the local board of health. The statute does not specifically define who has the right to exercise the procedural rights. N.C. Gen. Stat. §§ 19A-1 and 19A-2, however, express the General Assembly's intent that the broadest category of persons or organizations be deemed "[a] real party in interest" when contesting cruelty to animals. Given that the General Assembly viewed "persons" such as plaintiffs to be real parties in interest for the purpose of litigation in court, *see* N.C. Gen. Stat. § 19A-1, we believe that plaintiffs should be considered "aggrieved persons" for the purpose of raising concerns about animal control before local boards of health.

[2] Plaintiffs next contend that even if considered "aggrieved persons," their claims do not fall within the scope of N.C. Gen. Stat. § 130A-24(b). The statute permits "[a]ppeals concerning the enforcement of rules adopted by the local board of health and concerning the imposition of administrative penalties by a local health director[.]" Plaintiffs argue that their claims do not concern the enforcement of rules adopted by the local board of health. Webster's Third New International Dictionary 470 (1968) defines "concerning" as meaning "relating to: regarding, respecting, about[.]" In short, the scope of appeals under N.C. Gen. Stat. § 130A-24(b) is broad.

Plaintiffs' complaint attached the applicable board of health rules and specifically alleged that the Animal Control Facility was failing to comply with the record keeping provisions of those rules. The rules repeatedly provide that animals must be destroyed "in a humane manner." By alleging that the Animal Control Facility kills animals in an

inhumane manner, plaintiffs' complaint necessarily alleges that defendants have failed to properly enforce the Robeson County Board of Health rules. We hold that plaintiffs' claims relate to and thus "concern[] the enforcement of rules adopted by the local board of health . . . ."

[3] Plaintiffs argue alternatively that the use of the conjunctive "and" in N.C. Gen. Stat. § 130A-24(b) means that the appeal must involve both (1) the enforcement of rules and (2) the imposition of administrative penalties. This Court has previously recognized that "courts, in interpreting statutes and regulations, may substitute 'and' for 'or', and vice versa, where necessary to preserve the constitutionality of the law or to give full effect to the legislative intent, when the context so indicates." *Pamlico Marine Co., Inc. v. N.C. Dep't of Natural Res. & Cmty. Dev.*, 80 N.C. App. 201, 207, 341 S.E.2d 108, 112-13 (1986). *See also Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893 n.1 (5th Cir.) ("The words 'and' and 'or' when used in a statute are convertible, as the sense may require. A substitution of one for the other is frequently resorted to in the interpretation of statutes, when the evident intention of the lawmaker requires it."), *cert. denied*, 356 U.S. 973, 2 L. Ed. 2d 1147, 78 S. Ct. 1136 (1958). Our review of the grammatical structure of the statutory provision reveals that the General Assembly must have intended to allow an appeal either to challenge the enforcement of rules or to challenge the imposition of administrative penalties. Plaintiffs' construction would render the portion relating to "the enforcement of rules" meaningless since the imposition of administrative penalties will always involve the enforcement of rules. *See State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) (if possible, a statute must be interpreted so as to give meaning to all of its provisions).

[4] Finally, plaintiffs contend that the relief offered by the administrative proceedings is inadequate. Plaintiffs are correct that the exhaustion requirement may be excused if the administrative remedy would be futile or inadequate. *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815 (1992). In order, however, to rely upon futility or inadequacy, "allegations of the facts justifying avoidance of the administrative process must be pled in the complaint." *Bryant v. Hogarth*, 127 N.C. App. 79, 86, 488 S.E.2d 269, 273, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 406 (1997). *See also Jackson v. N.C. Dep't of Human Res.*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 904 (1998) ("The burden of showing inadequacy [of the administrative remedy] is on the party claiming inadequacy, who must include such

allegations in the complaint."), *disc. review denied*, 350 N.C. 594, 537 S.E.2d 213 (1999). In this case, plaintiffs' complaint fails to allege either the inadequacy or the futility of the administrative remedy.

To summarize, plaintiffs had administrative remedies available to them under N.C. Gen. Stat. § 130A-24 that they did not exhaust. Because they failed to plead a basis for avoiding the exhaustion requirement, the trial court correctly dismissed the plaintiffs' complaint for lack of subject matter jurisdiction. *Bryant*, 127 N.C. App. at 87, 488 S.E.2d at 274.

Affirmed.

Judges McGEE and BRYANT concur.

DEBORAH C. TEMPLETON AND GARY W. TEMPLETON, PLAINTIFFS v. APEX HOMES, INC., SOL A. JAFFA IN HIS CAPACITY AS TRUSTEE, AND MICHAEL I. JAFFA IN HIS CAPACITY AS TRUSTEE, DEFENDANTS

No. COA03-570

(Filed 18 May 2004)

Appeal and Error— aggrieved parties—lack of standing

Plaintiffs' appeal in a restrictive covenants case challenging the trial court's entry of summary judgment in defendants' favor as to the setback requirement and the prohibition against temporary structures is dismissed since plaintiffs are not aggrieved parties within the meaning of N.C.G.S. § 1-271, and thus, lack standing to appeal, because: (1) the trial court's resolution of those issues in this case was neither necessary nor essential to the court's judgment that the pertinent house was in violation of the applicable restrictive covenants and should be removed; (2) when a party has prevailed below and any subsidiary adverse rulings will not subject the party to collateral estoppel on those issues, the party is not aggrieved for purposes of appeal; and (3) the only relief sought by plaintiffs was removal of the house, and the trial court granted that remedy.

Appeal by plaintiffs from order entered 12 February 2003 by Judge Ripley E. Rand in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 February 2004.

Aaron E. Michel, for plaintiffs-appellants.

No brief filed on behalf of Apex Homes, Inc., defendant-appellee.

No brief filed on behalf of Sol. A. Jaffa and Michael I. Jaffa, defendants-appellees.

GEER, Judge.

Plaintiffs Deborah C. and Gary W. Templeton obtained a judgment in their favor concluding that defendants had moved a house onto the lot next door to the Templetons in violation of two applicable restrictive covenants. The trial court ordered defendant Apex Homes, Inc. to remove the house. Defendants have chosen to comply with the court's judgment rather than appeal it. The Templetons have, however, appealed, arguing that the trial court should have concluded that defendants violated four restrictive covenants rather than just two. Because the Templetons are not aggrieved parties within the meaning of N.C. Gen. Stat. § 1-271 (2003), we dismiss this appeal.

Facts

The Templetons purchased a lot and house at 2701 Sandy Porter Road in Charlotte, North Carolina on 30 April 1998. Their property adjoins property purchased by defendant Apex Homes on 5 April 2001. The Apex Homes property, at 2715 Sandy Porter Road, is subject to a deed of trust held by defendants Sol. A. and Michael I. Jaffa.

The Templeton and Apex Homes properties were created by a subdivision of two lots ("Lots 1 and 2") in 1997. As a result of the 1997 subdivision, the Templeton property is a corner lot that abuts both Sandy Porter Road and Oakhaven Drive. The Apex Homes property is a composite of parts of the original Lots 1 and 2, abutting only Sandy Porter Road.

On or about 10 April 2001, Apex Homes moved a small wood-frame house built in 1946 onto the property. The house ("Apex Homes house") was placed 56.32 feet from Sandy Porter Road, with its front facing Sandy Porter Road.

The parties agreed below that ten restrictive covenants applied to the Templeton and Apex Homes properties. On 1 October 2001, the Templetons sued Apex Homes and the Jaffas, alleging that the Apex Homes house violated five of the restrictive covenants:

3. Any residence erected on said property shall contain a minimum of 1500 square feet of heated floor space.

4. No building shall be erected on any lot nearer than 100 feet to the street or road on which it faces.

5. No temporary structure shall be placed on said property and used as a residence.

6. No noxious or offensive use shall be made of said property nor shall the property be used in any way so as to constitute a nuisance.

7. All residences must be of brick construction.

The Templetons requested a permanent injunction requiring defendants to remove the house from the lot and prohibiting defendants from further construction of any structure on the lot violating the restrictive covenants. In the event that the court failed to issue the requested injunction, plaintiffs sought an award of monetary damages. Defendants filed answers denying the material allegations of the complaint.

The Templetons subsequently moved for summary judgment, seeking an order concluding that the house violated paragraphs 3, 4, 5, and 7 of the restrictive covenants. At a hearing on plaintiffs' motion, the parties announced that defendants had conceded as to all issues but two. The two issues in dispute were: (1) whether the location of the Apex Homes house violated the 100-foot setback requirement of restrictive covenant 4 (identified in the record as "issue 3"); and (2) whether the Apex Homes house was a temporary structure in violation of restrictive covenant 5 (identified in the record as "issue 4").

After hearing argument on those two remaining issues, the trial judge stated that he would enter partial summary judgment in favor of the Templetons on the issues defendants had conceded. With respect to the questions still in dispute, issues 3 and 4, the court ruled:

> With respect to issues 3 and 4, as to issue 3, the Court finds that there is a material dispute, genuine issue of fact, and summary judgment is denied as to that.
>
> And as to issue 4, the Court finds that there is a genuine issue of material fact as to that, and summary judgment is denied as to that.

Plaintiffs' counsel then argued that because of the two violations found by the court, "Plaintiff[s] would be entitled to the relief requested, the removal of the Defendant's structure." Counsel for Apex Homes, however, urged the court to order Apex Homes to modify the house to conform with the restrictions within a specified period. The trial court decided not to order a remedy, but rather to allow the case to proceed to trial the following week:

> I don't think that it's appropriate for me at this point given that there are still outstanding issues, to make a ruling that that's premature.
>
> If the case is scheduled to go on the trial calendar next week, I'm inclined just to rule as I have ruled, enter an order to that effect, and then however the trial shakes out, that will be up to the Trial Judge to decide what, if anything, to do once the case is concluded in its entirety.

At that point, counsel for Apex Homes made an oral motion for summary judgment in its favor on the two disputed issues. Plaintiffs' counsel stated: "Of course, if the Court entered summary judgment in favor of the Defendant on those two points at this point, then the case would be ripe for providing the remedy." The court accordingly granted summary judgment for defendant on the remaining two issues. Plaintiffs' counsel noted his exception "to entering summary judgment against the Plaintiffs without notice."

The trial court then asked: "What do we do with the property?" Plaintiffs' counsel responded: "The case law is clear on the remedy. That remedy is removal. I'm not aware of any case in which any other remedy has been provided once it's been found that the restrictive covenants . . . [have] been breached." Plaintiffs did not seek any further relief or remedy apart from removal of the house. Counsel for Apex Homes again requested time to renovate the house to bring it into compliance with the restrictive covenants. The court ultimately scheduled a hearing for the following day to allow the parties time to conduct additional research regarding the appropriate remedy. At the second hearing, following argument, the court ruled: "[N]ow with respect to the remedy that the judgment of the Court is that the Defendant [Apex Homes] shall remove the offending property, or the offending structure from the property, and will have 45 days from today's date to do so."

On 12 February 2003, the trial court entered its order granting summary judgment to plaintiffs in part and to defendants in part and

ordering defendant Apex Homes to remove the residence at 2715 Sandy Porter Road by 16 March 2003 at 5:00 p.m. The Templetons filed notice of appeal on 11 March 2003. On 24 July 2003, Apex Homes filed a Notice of Non-Opposition, informing this Court that it does not oppose the Templetons' appeal as it has removed the Apex Homes house as ordered.

Discussion

On appeal, the Templetons challenge the trial court's entry of summary judgment in defendants' favor as to the setback requirement and the prohibition against temporary structures. They argue that they were entitled either to summary judgment on those issues or, if a genuine issue of material fact existed, a trial.

We first note that the trial court initially concluded that a trial was appropriate on those issues, but that the parties joined together to encourage the court to enter summary judgment on all issues in order to proceed immediately to the question of remedy. It appears, therefore, that plaintiffs may have invited any error, precluding them from appealing the trial court's entry of summary judgment. Our Courts have long held to the principle that a party may not appeal from a judgment entered on its own motion, *Wachovia Bank & Trust Co. v. Morgan*, 9 N.C. App. 460, 466, 176 S.E.2d 860, 864 (1970), or provisions in a judgment inserted at its own request, *Dillon v. Wentz*, 227 N.C. 117, 123, 41 S.E.2d 202, 207 (1947).

We need not, however, base our decision on this principle because the Templetons are not a "party aggrieved" within the meaning of N.C. Gen. Stat. § 1-271 and, therefore, lack standing to appeal. N.C. Gen. Stat. § 1-271 ("Any party aggrieved may appeal in the cases prescribed in this Chapter."). "A party aggrieved is one whose rights are substantially affected by judicial order." *Carawan v. Tate*, 304 N.C. 696, 700, 286 S.E.2d 99, 101 (1982). The Templetons have failed to show that their rights were substantially affected by the trial court's judgment. At the summary judgment hearing, plaintiffs sought a single remedy: removal of the house. The trial court entered judgment ordering precisely that remedy.

The Templetons' brief on appeal suggests that they are concerned that the trial court's order may allow defendants in the future to violate the two restrictions upon which the Templetons did not prevail. This argument appears to be based on a belief that in the absence of an appeal of the grant of summary judgment as to those two restric-

tions, the Templetons may be subject to the defense of collateral estoppel in any litigation arising out of future construction on the lot. This concern is misplaced.

Collateral estoppel or issue preclusion may arise only when four requirements have been met:

> "(1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issue must have been material and relevant to the disposition of the prior action; and *(4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.*"

Key v. Burchette, 134 N.C. App. 369, 371, 517 S.E.2d 667, 669 (emphasis added; quoting *Johnson v. Smith*, 97 N.C. App. 450, 452-53, 388 S.E.2d 582, 583-84, *disc. review denied*, 326 N.C. 596, 393 S.E.2d 878 (1990)), *disc. review denied*, 351 N.C. 106, 540 S.E.2d 363 (1999). Even if precisely the same issues regarding the restrictive covenants should arise in future litigation, the trial court's resolution of those issues in this case was neither necessary nor essential to the court's judgment that the Apex Homes house was in violation of applicable restrictive covenants and should be removed.

When a party has prevailed below and any subsidiary adverse rulings will not subject the party to collateral estoppel on those issues, the party is not aggrieved for purposes of appeal. *Lennon v. Wahler*, 84 N.C. App. 141, 145, 351 S.E.2d 843, 845 (1987) (when judgment was entered in defendant's favor, defendant could not appeal from adverse conclusion of law because it "would not be binding on any court in any future litigation"). Because the only relief sought by the Templetons was removal of the Apex Homes house and the trial court granted that remedy and because any adverse determinations were not necessary and essential to the judgment, the Templetons are not "aggrieved" within the meaning of N.C. Gen. Stat. § 1-271. This appeal must be dismissed. *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 195, 132 S.E.2d 345, 347 (1963) ("Where a party is not aggrieved by the judicial order entered, as in the present case, his appeal will be dismissed.").

Dismissed.

Chief Judge MARTIN and Judge STEELMAN concur.

RANDY DEAN McDANIEL, JR., PLAINTIFF v. DARREN TIMOTHY McBRAYER, DEFENDANT

No. COA03-939

(Filed 18 May 2004)

1. Costs— attorney fees—abuse of discretion standard

The trial court did abuse its discretion by awarding plaintiff $4,500 in attorney fees and $1,437.90 in costs following a jury verdict in the amount of $800 for injuries sustained in an automobile accident even though defendant made an offer of judgment of $5,000, or by denying defendant's motion for costs, because: (1) the trial court properly considered the timing and amount of the settlement offers; (2) the trial court's failure to make a finding as to defendant's exercise of unfair bargaining power is not grounds for reversal; (3) where an insurance company is not a named defendant, there is no requirement that the trial court make an unwarranted refusal finding in order to award attorney fees; and (4) the trial court exercised its discretion by considering the whole record and by applying the factors in *Washington*, 132 N.C. App. 347 (1999).

2. Costs— expert witness fee—speculation

Although defendant contends the trial court erred by awarding plaintiff an expert witness fee of $400 as part of the costs without sufficient evidence that the expert was subpoenaed to testify, the record does not include the deposition testimony of the expert, defendant failed to object to the trial court's award of the expert witness fee on the basis of non-service, and under these circumstances, the Court of Appeals cannot hold there was error without engaging in speculation.

Appeal by defendant from judgment and order entered 12 May 2003 by Judge Larry G. Ford in Superior Court, Davie County. Heard in the Court of Appeals 20 April 2004.

Lewis & Daggett, Attorneys at Law, P.A., by C. Michael Day, for plaintiff appellee.

Davis & Hamrick, L.L.P., by H. Lee Davis, Jr. and Richard Clay Stuart, for defendant appellant.

WYNN, Judge.

Defendant Darren Timothy McBrayer appeals from a judgment and order of the trial court awarding to Plaintiff Randy Dean McDaniel, Jr. $4,500.00 in attorneys' fees and $1,437.90 in costs following a favorable jury verdict and award in the amount of $800.00. Defendant contends the trial court erred in awarding attorneys' fees and costs to Plaintiff where Defendant made an offer of judgment of $5,000.00, and the jury awarded Plaintiff only $800.00. For the reasons stated herein, we affirm the order of the trial court.

The pertinent facts of the instant appeal are as follows: Plaintiff filed a complaint 15 January 2002 in Superior Court, Davie County, seeking recovery for injuries he sustained in an automobile collision with Defendant. On 1 July 2002, Defendant made an offer of judgment pursuant to Rule 68 of our Rules of Civil Procedure in the amount of $5,000.00. Defendant repeated his offer 10 October 2002. On 21 April 2003, the case came for trial, following which the jury awarded Plaintiff $800.00 for his personal injuries. The trial court thereafter awarded Plaintiff costs in the amount of $1,437.90 and attorneys' fees in the amount of $4,500.00. The trial court denied Defendant's motion for costs. Defendant appealed.

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[1] Defendant contends the trial court abused its discretion in awarding Plaintiff $4,500.00 in attorneys' fees where Defendant made an offer of judgment in the amount of $5,000.00 and the jury awarded Plaintiff only $800.00. Defendant argues the trial court further abused its discretion in awarding Plaintiff costs and denying Defendant's motion for costs. For the reasons stated herein, we hold the trial court acted within its discretion in awarding attorneys' fees and costs to Plaintiff.

Section 6-21.1 of our General Statutes provides that:

> In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment

> for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

N.C. Gen. Stat. § 6-21.1 (2003). The trial court's decision to award attorneys' fees is discretionary and will not be overturned absent a showing of abuse of discretion. *Overton v. Purvis*, 162 N.C. App. 241, 591 S.E.2d 18, 22 (2004); *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 570, 551 S.E.2d 852, 855 (2001). "To prevail, defendant must show that the trial court's ruling is 'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Robinson v. Shue*, 145 N.C. App. 60, 65, 550 S.E.2d 830, 833 (2001) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

In determining whether to award attorneys' fees, the trial court must consider the entire record, including, but not limited to, the following factors: (1) settlement offers made prior to the institution of the action; (2) offers of judgment pursuant to Rule 68, and whether the "judgment finally obtained" was more favorable than such offers; (3) whether the defendant unjustly exercised "superior bargaining power[;]" (4) in the case of an unwarranted refusal by an insurance company, the "context in which the dispute arose[];" (5) the timing of settlement offers; and (6) the amounts of the settlement offers as compared to the jury verdict. *Washington v. Horton*, 132 N.C. App. 347, 351, 513 S.E.2d 331, 334-35 (1999); *see also Overton*, 162 N.C. App. at 246, 591 S.E.2d at 22-23.

In his first argument, Defendant contends the trial court abused its discretion in awarding attorneys' fees in that such an award was "manifestly unreasonable in light of the small verdict and Defendant's settlement offers." Defendant contends that allowing attorneys' fees in such cases "discourages settlement and is tantamount to a guarantee that lawyers will always be paid." This Court recently rejected a similar proportionality argument in *Overton*. There, the defendant argued the trial court abused its discretion by awarding attorneys' fees in excess of $32,000.00 in a case where the jury awarded only $7,000.00. *Id.* at 247, 591 S.E.2d at 23. We found no abuse of discretion by the trial court. *See also Furmick v. Miner*, 154 N.C. App. 460, 465, 573 S.E.2d 172, 176 (2002) (finding no abuse of discretion where the defendant's prejudgment offer was approximately four and one-half times the verdict). We further note that our Supreme Court, in rejecting the contention that including costs and attorneys' fees incurred after an offer of judgment in calculating the "judgment finally obtained" discourages the settlement of cases, deemed that such pol-

icy arguments are "better addressed to the legislative branch of government." *Roberts v. Swain*, 353 N.C. 246, 251, 538 S.E.2d 566, 569 (2000). Accordingly, we hold the trial court did not abuse its discretion in awarding attorneys' fees in the amount of $4,500.00.

Defendant further contends the trial court failed to consider the timing and amount of the settlement offers. We disagree. In its order granting Plaintiff attorneys' fees, the trial court made specific findings of fact detailing Defendant's two offers of judgment for $5,000.00 dated 28 March and 10 October 2002. The trial court also found Defendant repeated this offer during a mediation of the case 19 November 2002, and again at trial on 21 April 2003. In light of these detailed findings, there is no merit to Defendant's argument that the trial court failed to consider the timing and amount of his settlement offers.

Next, Defendant argues the trial court abused its discretion by awarding attorneys' fees where Defendant did not exercise "superior bargaining power" over Plaintiff, and there was no "unwarranted refusal to settle" by Defendant's insurer. We find no merit in these arguments. The trial court's failure to make a finding as to Defendant's exercise of unfair bargaining power is not grounds for reversal. *See Tew v. West*, 143 N.C. App. 534, 537, 546 S.E.2d 183, 185 (2001) (upholding fee award where the court's findings omitted whether the defendant exercised superior bargaining power). Further, it is well established that where an insurance company is not a named defendant, there is no requirement that the trial court make an "unwarranted refusal" finding in order to award attorneys' fees. *Furmick*, 154 N.C. App. at 464, 573 S.E.2d at 175; *Washington*, 132 N.C. App. at 350, 513 S.E.2d at 334. Defendant's insurer was never a named defendant in this action, and the trial court was therefore not required to make any findings regarding the insurer's actions. *See Overton*, 162 N.C. App. at 247, 591 S.E.2d at 23 (concluding that, because the case raised neither issues of "superior bargaining power" nor "unwarranted refusal," findings as to these factors were unnecessary).

We further reject Defendant's argument that the trial court believed it had no discretion in granting Plaintiff's motion for attorneys' fees. The trial court in its order specifically noted it had considered the entire record in light of *Washington*, and that "in its discretion" it would award attorneys' fees. The trial court then made nine detailed findings of fact in support of its award. The findings, in summary, included: (1) all of the offers of settlement made by both

parties and Defendant's insurer after suit was filed; (2) Defendant's two offers of judgment of $5,000.00, which was less than the "judgment finally obtained" in the amount of $6,737.90; (3) no findings regarding unjust exercise of superior bargaining power, but as we have already noted, the absence of such a finding does not require reversal, *see Davis v. Kelly*, 147 N.C. App. 102, 108, 554 S.E.2d 402, 406 (2001); (4) no findings regarding an unwarranted refusal to pay an insurance policy, which we have determined was unnecessary, however; and (5) the dates and amounts of all offers to settle by the parties in arbitration and mediation, in offers of judgment, and during trial. Further, the jury verdict was $800.00, the judgment finally obtained was $6,737.90, and Defendant offered to settle the case for $5,000.00. From the judgment and its findings, it is clear the trial court exercised its discretion by considering the whole record and in applying the *Washington* factors. The findings are sufficient to support the trial court's conclusion that Plaintiff should be awarded attorneys' fees, and therefore, the trial court properly exercised its discretion in granting Plaintiff's motion. *Messina v. Bell*, 158 N.C. App. 111, 115, 581 S.E.2d 80, 84 (2003).

By further assignment of error, Defendant argues the trial court erred in granting Plaintiff's Rule 68 motion for costs and denying Defendant's motion for costs. Defendant's argument is based entirely upon his position that the trial court abused its discretion in awarding attorneys' fees. As we discern no abuse of discretion by the trial court in awarding attorneys' fees, we necessarily overrule this assignment of error.

[2] Finally, Defendant contends the trial court erred in awarding Plaintiff's expert witness fee of $400.00 as part of the costs where there is insufficient evidence that the expert was subpoenaed to testify. Defendant correctly notes that, unless an expert witness is subpoenaed, witness fees are not recognized as costs, and the trial court is without authority to award such. *Rogers v. Sportsworld of Rocky Mount, Inc.*, 134 N.C. App. 709, 713, 518 S.E.2d 551, 554 (1999). In *Rogers*, the expert witness testified that he was not served with a subpoena. *Id.* Because the trial court was without authority to award an expert witness fee where the expert witness was not subpoenaed, we held the trial court abused its discretion in assessing the expert witness fee upon the defendant. *Id.*

Unlike *Rogers*, the record on appeal here is silent on the issue of whether the expert witness was subpoenaed. "An appellate court is not required to, and should not, assume error by the trial judge when

none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968); *Hicks v. Alford*, 156 N.C. App. 384, 389-90, 576 S.E.2d 410, 414 (2003); *Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997). We note, however, the trial court's judgment includes an award of $20.00 for "service of subpoenas" as part of Plaintiff's costs. The record does not include the deposition testimony of the expert witness, nor did Defendant object to the trial court's award of the expert witness fee on the basis of non-service. Under these circumstances, we cannot, without engaging in speculation, hold the trial court erred in awarding to Plaintiff $400.00 for his expert witness fee. *See Pharr*, 125 N.C. App. at 139, 479 S.E.2d at 34 (concluding that, where the record on appeal did not include relevant portions of the transcript, the Court would not engage in speculation as to potential error by the trial court).

In summary, we find no abuse of discretion by the trial court in awarding Plaintiff attorneys' fees and costs and in denying Defendant's motion for costs. The order of the trial court is hereby,

Affirmed.

Judges CALABRIA and STEELMAN concur.

ANITRA L. FARRIOR, VANTOICE F. FARRIOR, YVETTE A. FARRIOR, ANAIAH HILL, A MINOR APPEARING THROUGH HER GUARDIAN AD LITEM, RALPH WILEY, AND ANITRA L. FARRIOR, ADMINISTRATRIX OF THE ESTATE OF KIARIA INESHA HILL, PLAINTIFFS v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT

No. COA03-730

(Filed 18 May 2004)

Insurance— automobile—UIM rejection—one of two named insureds

Summary judgment for defendant insurance company was affirmed in an action to determine UIM coverage where one of the two named insureds had expressly rejected UIM coverage. N.C.G.S. § 20-279.21(b)(4) states that coverage is not applicable where any named insured rejects coverage; moreover, policy language in this case clearly states that any rejection is valid and binding on all.

Appeal by plaintiffs from order filed 23 April 2003 by Judge G.K. Butterfield, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 3 March 2004.

Edwards & Ricci, P.A., by Kenneth R. Massey, for plaintiff-appellants.

J. Darby Wood, P.A., by J. Darby Wood; and Sarah L. Heekin, for defendant-appellee.

BRYANT, Judge.

Plaintiffs appeal the denial of their motion for summary judgment and the award of summary judgment for the defendant filed 23 April 2003 regarding the issue of whether defendant was obligated to provide underinsured motorist (UIM) coverage to plaintiffs.

On 1 June 2000, plaintiffs Anitra Farrior, Vantoice Farrior, and Yvette Farrior were involved in an automobile accident with Keith Wayne Chadwick (Chadwick). Chadwick was allegedly operating his vehicle while under the influence of alcohol when he collided with plaintiffs' vehicle.

At the time of the accident, Anitra Farrior was approximately 23 weeks pregnant with twins. The impact of the collision caused her to go into labor. Although medical providers were able to temporarily stop labor, she prematurely gave birth to the twins on 27 June 2000. One of the twins subsequently died on 24 November 2000 as a result of complications stemming from her premature birth.

At the time of the accident, Chadwick had automobile insurance coverage for bodily injury in the amount of $25,000 per person and $50,000 per accident. Plaintiffs' vehicle was insured by defendant, State Farm Mutual Insurance Company, with bodily injury coverage of $100,000 per person and $300,000 per accident.

Plaintiffs submitted a claim to defendant for UIM coverage; however, defendant denied the claim based on execution of a selection/rejection form signed on 16 September 1996 by named insured, plaintiff Regina Farrior. Named insured Thomas Farrior never signed the form.

On 15 March 2002, plaintiffs filed a complaint for declaratory judgment. Both plaintiffs and defendant filed motions for summary judgment on 27 February 2003 and 7 March 2003 respectively, seeking

declaration as to whether UIM coverage existed based on execution of the selection/rejection form by Regina Farrior.

These matters were heard on 31 March 2003 in Wayne County Superior Court with the Honorable G.K. Butterfield presiding. By order filed 23 April 2003, the trial court denied plaintiffs' motion but granted defendant's motion for summary judgment. Plaintiffs filed notice of appeal on 2 May 2003.

On appeal, the issue is whether the trial court erred in its interpretation of N.C. Gen. Stat. § 20-279.21(b)(4) and subsequent grant of defendant's motion for summary judgment based on the conclusion that UIM coverage did not exist as evidenced by execution of a selection/rejection form signed by only one named insured.

A grant of summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2003). The moving party bears the burden of establishing the lack of genuine issues of fact. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). If the moving party meets its burden of proof, the burden then shifts to the non-moving party to present particular facts showing genuine issues of material fact. *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). On appeal from a grant of summary judgment, "we review the record in the light most favorable to the non-moving party." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 165, 557 S.E.2d 610, 612 (2001), *aff'd*, 355 N.C. 485, 562 S.E.2d 422 (2002).

Under North Carolina law, an automobile insurance policy is required to provide UIM coverage unless the insured has rejected that coverage. N.C.G.S. § 20-279.21(b)(4) (2003). Absent proof of a valid rejection, a policy is deemed to include such coverage. *State Farm Mut. Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 269, 513 S.E.2d 782, 784 (1999). An insurer bears the burden of establishing the validity of a rejection of UIM motorist coverage. *Hendrickson v. Lee*, 119 N.C. App. 444, 450, 459 S.E.2d 275, 279 (1995).

N.C. Gen. Stat. § 20-279.21(b)(4) provides, in pertinent part, that an automobile insurance policy

> [s]hall . . . provide underinsured motorist [UIM] coverage, to be used only with a policy that is written at limits that exceed those

> prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection . . . .
>
> . . . .
>
> The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. . . . The selection or rejection of underinsured motorist coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy.

N.C.G.S. § 20-279.21(b)(4) (emphasis added). *See also* N.C.G.S. § 20-279.21(b)(3) (2003) ("The coverage required under this subdivision [Uninsured or UM coverage] is not applicable where any insured named in the policy rejects the coverage. . . . The selection or rejection of uninsured motorist coverage or the failure to select or reject by a named insured is valid and binding on all insureds and vehicles under the policy.") (emphasis added). Plaintiffs argue that based on the language of N.C. Gen. Stat. § 20-279(b)(4), a rejection of UIM coverage is proper and binding only when all named insureds reject the form. Plaintiffs' argument, however, misconstrues the plain language of the statute.

> As a rule of construction, it is fundamental that the intent of the legislature controls in determining the meaning of a statute. Legislative intent may be determined from the language of the statute, the purpose of the statute, " 'and the consequences which would follow [from] its construction one way or the other.' " Nonetheless, if a statute is facially clear and unambiguous, leaving no room for interpretation, the courts will enforce the statute as written.

Haight v. Travelers/Aetna Property Casualty Corp., 132 N.C. App. 673, 675, 514 S.E.2d 102, 104 (1999) (citations omitted).

The plain language of the statute states "[t]he coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage." N.C.G.S. § 20-279.21(b)(4) (emphasis added). Further, "[t]he selection or rejection of underinsured motorist coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy." *Id.* (emphasis added). 'A' is defined as "one" or "each." *Webster's New World Dictionary and Thesaurus* 1 (2d ed. 2002). 'Any' is defined as "one, no matter which, of more than two." *Id.* at 26.

'All' is defined as "the whole quantity of," "everyone," or "entirely." *Id.* at 16.

In reviewing the plain language of the statute, it appears the legislature intended that any, no matter which, of the named insureds could properly execute a rejection form. Moreover, the rejection would be binding against everyone or the entirety of the policy insureds.

Plaintiffs rely on *Hlasnick v. Federated Mutual Ins. Co.*, 353 N.C. 240, 539 S.E.2d 274 (2000) in support of its argument. In *Hlasnick*, our Supreme Court held a two-tiered UIM coverage endorsement to be valid where the purchaser of a commercial fleet policy paid additional premiums to provide higher limits of UIM coverage to certain insured persons in excess of the statutory floor. Our Supreme Court further held that the Financial Responsibility Act does not mandate that equal UIM coverage be provided for all persons insured under a policy. We find *Hlasnick* distinguishable because *Hlasnick* did not deal with the issue of whether rejection of UM coverage by one named insured was binding on all named insureds.

Although plaintiffs attempt to distinguish *Weaver v. O'Neal*, 151 N.C. App. 556, 566 S.E.2d 146 (2002), we find it to be applicable to the issue in the instant case. In *Weaver*, Mrs. Weaver (the wife) was involved in a fatal auto accident with an uninsured party. The Weavers' insurer had issued an automobile insurance policy to Mr. Weaver in 1981 as the only named insured. In 1992, Mr. Weaver expressly rejected uninsured and underinsured motorist coverage when he renewed the policy. Later that year, Mr. Weaver added Mrs. Weaver to the policy as a named insured. Because Mrs. Weaver had not signed a selection/rejection form, the administrator for the estate argued that the selection or rejection of UM coverage by the husband was not binding on Mrs. Weaver.

Our Court found that pursuant to N.C. Gen. Stat. § 20-279.21(b)(1), the insurer was not required to offer the option of UM coverage in any amended policy unless the named insured party had made a written request to exercise a different option. Specifically, our Court held the addition of Mrs. Weaver to the husband's policy was an amendment to the policy which did not require the execution of a new selection/rejection form because it did not result in the issuance of a new policy. We find the holding in *Weaver* lends credence to the argument that any named insured may properly execute a rejection form that is binding on all insured under the policy.

We note that even if this Court had been persuaded by plaintiffs' argument regarding the mandate of N.C. Gen. Stat. § 20-279.21(b)(4), the language of plaintiffs' policy clearly states: "My selection or rejection of coverage below is valid and binding on all insured and vehicles under the policy, unless a named insured makes a written request to the company." "The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction." *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95. When the language of an insurance policy is clear and unambiguous, "the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written." *Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 687, 443 S.E.2d 357, 359 (1994). Accordingly this assignment of error is overruled.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

TRIPPS RESTAURANTS OF NORTH CAROLINA, INC., PLAINTIFF v. SHOWTIME ENTERPRISES, INC., DUELING PIANOS OF NORTH CAROLINA, INC., FRANK SCOZZAFAVE AND MICHAEL SCOZZAFAVE, DEFENDANTS

No. COA03-610

(Filed 18 May 2004)

1. Guaranty— breach of lease contract—personal guarantor

The trial court did not err in a breach of lease contract case by finding defendant liable as the personal guarantor of the pertinent lease, because: (1) defendant's signature on the contract served no other function except to acknowledge his agreement to guarantee the lease; (2) the preamble of the lease further demonstrated that defendant company was the lessee and defendant individual was a guarantor; (3) the only reasonable interpretation of defendant's signature is that he was a guarantor on the lease; and (4) the contract established the parties' intention to create a separate guaranty contract contingent upon the default of the primary obligor.

2. Landlord and Tenant— breach of lease contract—failure to mitigate damages

The trial court did not err in a breach of lease contract case by not finding that plaintiff failed to mitigate its damages, because: (1) plaintiffs presented evidence that defendants left the property in such poor condition that it would have cost several hundred thousand dollars just to restore it to a condition in which it could be rented; and (2) plaintiffs testified that it was not feasible for them to attempt these extensive repairs in the short time remaining on the lease.

Appeal by defendant from orders entered 16 August 2002 and 3 September 2002 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 25 February 2004.

Adams & Osteen, by J. Patrick Adams and William L. Osteen, Jr., for plaintiff-appellee.

William M. Black, Jr., for defendants-appellants.

LEVINSON, Judge.

Defendant (Frank Scozzafave) appeals from judgments finding him liable, as the personal guarantor of a lease, for breach of the lease contract. We affirm.

This appeal arises from the interpretation of a lease signed 12 November 1997. The first sentence of the lease states:

> This lease agreement, made and entered into this the 12th of November, 1997, by and between Tripps Restaurants of North Carolina, . . . hereinafter called the "Lessor," and Showtime Enterprises, . . . hereinafter called the "Lessee" and Frank Scozzafave . . . and Michael A. Scozzafave . . . hereinafter called the "Guarantors."

The text of the lease follows this introductory sentence, setting out the obligations of the lessor and lessee. At the conclusion of the lease are the signatures of the parties. Defendant signed on the line labeled "guarantor."

On 22 May 2001 plaintiff filed suit against defendants Showtime Enterprises, Inc., Dueling Pianos of North Carolina, Inc.,[1] Frank

1. The lease was assigned to Dueling Pianos of North Carolina, Inc., on 9 December 1997.

Scozzafave, and Michael Scozzafave. The complaint alleged that the defendants had defaulted on the terms of the lease by failing to pay rent, property taxes, or insurance, and that they were liable for payment of back rent, taxes, insurance, and attorney's fees. Plaintiff also alleged that defendant Frank Scozzafave "guaranteed the payment of the rent and all other contractual obligations of Showtime due under the lease." Following a bench trial, the trial court entered judgment for plaintiff. The court's order noted that default judgment "had previously been entered against the corporate defendants"; that "Michael Scozzafave has been discharged of any debt in this matter in bankruptcy"; and, thus, that "this order and judgment concern only the plaintiff's claims against defendant Frank Scozzafave." The court entered judgments against defendant for $256,753.00 in damages and $35,630.44 in interest. From these judgments, defendant appeals.

[1] Defendant argues first that the trial court erred by concluding that he was a guarantor on the lease. "In reviewing a judgment resulting from a bench trial, the question before this Court is whether competent evidence exists to support the trial court's findings of fact and whether those findings support the trial court's conclusions of law." *Beneficial Mortgage Co. v. Peterson*, 163 N.C. App. 73, 75, 592 S.E.2d 724, 726 (2004). In the instant case, the trial court's judgment was based in pertinent part upon its finding "that defendant Frank Scozzafave guaranteed Showtime's obligations under the lease as shown by the terms of and his signature on the lease as Guarantor[.]" We conclude that this finding was supported by competent evidence, and that it supports the conclusion that defendant was a personal guarantor of the lessee's obligations under the lease.

A personal guaranty is "a contract, obligation or liability . . . whereby the promisor, or guarantor, undertakes to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself . . . liable to such payment or performance." *Trust Co. v. Clifton*, 203 N.C. 483, 485, 166 S.E. 334, 335 (1932). The guarantor "makes his own separate contract, . . . and is not bound to do what his principal has contracted to do, except in so far as he has bound himself by his separate contract[.]" *Hutchins v. Planters National Bank of Richmond*, 130 N.C. 285, 286, 41 S.E. 487, 487 (1902). However, both contracts (between creditor and primary obligor and between creditor and guaranty) may be contained in the same instrument. 38 Am. Jur. 2d *Guaranty* § 4 (1999).

Thus, "to hold a guarantor liable under a guaranty agreement, plaintiff must first establish the existence of the agreement." *Carolina Mills Lumber Co. v. Huffman*, 96 N.C. App. 616, 618, 386 S.E.2d 437, 438 (1989). In this regard, "contracts of guaranty are subject to the more general law of contract[.]" *O'Grady v. Bank*, 296 N.C. 212, 220, 250 S.E.2d 587, 593 (1978). In construing a contract, the court must look to the intent of the parties. *See Holshouser v. Shaner Hotel Grp. Props. One*, 134 N.C. App. 391, 518 S.E.2d 17 (1999). "It is a well-settled principle of legal construction that '[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.' " *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987) (quoting *Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)). In addition, a contract should "be understood and interpreted in the light of the relationship of the parties, and the purpose they sought to accomplish." *Bank v. Corbett*, 271 N.C. 444, 447, 156 S.E.2d 835, 837 (1967).

It is true, as defendant states, that in our determination of whether a guaranty contract exists the labels given to contract terms are not necessarily *determinative* of the issue. However, this only means that "[i]t is appropriate to regard the substance, not the form, of a transaction as controlling, and we are not bound by the labels which have been appended to the episode by the parties." *Trust Co. v. Creasy*, 301 N.C. 44, 53, 269 S.E.2d 117, 123 (1980). But, this principle in no way suggests that the labels *chosen by the parties to a contract* are without weight in determining their intent. Moreover, in construing the terms employed in the lease, we are also guided by the Restatement (Third) of Suretyship and Guaranty § 15 (1996), which states in relevant part:

> § 15. Interpretation of the Secondary Obligation—Use of Particular Terms: Unless indicated to the contrary by applicable law, the language employed by the parties, agreement of the parties, or the context:
>
> (a) if the parties to a contract identify one party as a "guarantor" or the contract as a "guaranty," the party so identified is a secondary obligor and the secondary obligation is, upon default of the principal obligor on the underlying obligation, to satisfy the obligee's claim with respect to the underlying obligation[.]

In the instant case, the first sentence of the lease identifies defendant as a "guarantor," and defendant's signature appears at the

end, above the word guarantor. The lease was executed by defendant Showtime Enterprises, Inc. as lessee, and by defendant individually as a guarantor. The lease would have been binding on Showtime even without the signatures of the individual defendants as guarantors. Thus, defendant's signature serves no other function except to acknowledge his agreement to guarantee the lease. The preamble of the lease further demonstrates that Showtime was the lessee, and that defendant was a guarantor. The only reasonable interpretation of defendant's signature is that he was a guarantor on the lease. We conclude that the contract establishes the parties' intention to create a separate guaranty contract contingent upon the default of the primary obligor (Showtime), and that the trial court did not err by concluding that defendant was a guarantor on the lease. This assignment of error is overruled.

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[2] Defendant Frank Scozzafave's second assignment of error asserts that the trial court erred in not finding that plaintiff failed to mitigate its damages. "Typically, in a leasing context, the duty to mitigate means that a landlord must use reasonable efforts to relet the premises to a new tenant." *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 575, 500 S.E.2d 752, 759 (1998) (citing *Isbey v. Crews*, 55 N.C. App. 47, 51, 284 S.E.2d 534, 537 (1981)). Further, "the burden is on the breaching party to prove that the nonbreaching party failed to exercise reasonable diligence to minimize the loss." *Isbey*, 55 N.C. App. at 51, 284 S.E.2d at 538. In the instant case, plaintiff presented evidence that defendants left the property in such poor condition that it would have cost several hundred thousand dollars just to restore it to a condition in which it could be rented. Plaintiffs also testified that it was not feasible for them to attempt these extensive repairs in the short time remaining on the lease. This evidence supports the trial court's finding that plaintiff was unable to mitigate its damages and its conclusion that defendant was not entitled to a reduction in the amount of damages awarded to plaintiff. Defendant's second assignment of error is overruled.

We hold that the trial court did not err. Accordingly, the trial court's judgment in favor of plaintiff is

Affirmed.

Judges HUNTER and STEELMAN concur.

IN THE MATTER OF: J.B., MINOR CHILD

No. COA03-807
No. COA03-808

(Filed 18 May 2004)

Child Abuse and Neglect— change in permanency planning order—findings—subject matter jurisdiction

An order changing a permanency planning order (to release DSS from reunification efforts) was remanded for findings where the respondent and the child were in South Carolina when the proceedings began and there was nothing in the record supporting subject matter jurisdiction other than a bare assertion. N.C.G.S. § 50A-201.

Appeal by respondent mother from orders entered 22 October 2002 and 3 February 2003 by Judge Gary S. Cash in Buncombe County District Court. Heard in the Court of Appeals 30 March 2004. As the issues presented by respondent's appeals to this Court arise out of the same action and involve common questions of law, we have consolidated the appeals pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

Charlotte A. Wade, for petitioner-appellee Buncombe County Department of Social Services.

Hall & Hall Attorneys at Law, P.C., by Susan P. Hall, for respondent-appellant.

TYSON, Judge.

The mother of J.B. ("respondent") appeals from the 22 October 2002 order changing a prior permanency planning order, releasing Buncombe County Department of Social Services ("DSS") from all efforts to reunify respondent with her minor child, J.B. (No. COA03-807). Respondent also appeals from the 3 February 2003 order dismissing her previous appeals regarding production of medical records and the permanency planning hearings held on 13 March 2002 and 15 March 2002 (No. COA03-808). The trial court's orders in No. COA03-807 and No. COA03-808 are vacated, and the cases are remanded for the trial court to make specific findings of fact to support its conclusion of law that it possessed subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act ("UCCJA") as outlined in N.C. Gen. Stat. § 50A-201.

I. Background

On 7 May 2001, DSS filed a petition alleging that J.B. was neglected and dependent. That same day, DSS obtained a non-secure custody order placing J.B. in their custody, leaving placement in the discretion of DSS. On 12 May 2001, DSS located respondent and J.B. in South Carolina, served her with the petition and custody order, took custody of J.B., and returned him to North Carolina. Respondent asserts she moved to South Carolina on 4 May 2001. The record is devoid of any direct evidence showing when respondent and J.B. moved to South Carolina. On 26 June 2001, a hearing was held regarding the non-secure custody order. The trial court determined that non-secure custody should remain with DSS.

An order was subsequently entered finding J.B. to be neglected and dependent and continuing custody of J.B. with DSS. Numerous permanency planning and review hearings were scheduled and held. At these hearings, the trial court determined that custody of J.B. should remain with DSS, leaving reunification for J.B. with respondent as the permanent plan. The trial court determined that it had jurisdiction over the subject matter and parties without making specific findings of fact on which to base this conclusion.

On 29 July 2002, a final permanency planning hearing was held. The trial court determined, again without making any specific findings of fact, that it had jurisdiction over the subject matter and parties. The trial court ordered custody of J.B. to remain with DSS and released DSS from all reunification efforts between respondent and J.B. Respondent appeals.

II. Issues

The issues are whether the trial court: (1) had subject matter jurisdiction in this matter; (2) made appropriate findings of fact in releasing DSS from reunification efforts, which were supported by clear, cogent, and convincing evidence; (3) provided J.B. with appropriate notice of the permanency planning hearings as required by N.C. Gen. Stat. § 7B-907; (4) erred in not ordering a permanency planning hearing within thirty days following the 29 July 2002 hearing; (5) abused its discretion by dismissing respondent's appeals; and (6) whether respondent's constitutional rights were violated when no audio recording of the in-chambers portion of the proceedings at issue was made.

III. Subject Matter Jurisdiction

Respondent contends that the trial court did not possess subject matter jurisdiction in this matter because J.B. and respondent were residing outside of North Carolina at the time the proceedings in this case were initiated. While jurisdiction over the person can be waived, lack of subject matter jurisdiction can be raised at any time. *In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 291 (1979) (citing 3 Strong's North Carolina Index 3rd *Courts* § 2.1 (1976); 21 C.J.S. *Courts* § 28 (1940)); *see also Ward v. Ward*, 116 N.C. App. 643, 645, 448 S.E.2d 862, 863 (1994).

The UCCJA is set forth in N.C. Gen. Stat. § 50A-201 (2003) and "was designed to reduce interstate jurisdictional disputes in custody determinations and to prevent forum shopping by parents and other litigants dissatisfied with the results of custody cases." *In re Malone*, 129 N.C. App. 338, 341-42, 498 S.E.2d 836, 838 (1998) (citing N.C. Gen. Stat. § 50A-1 (1989)). "[T]he trial court must first consider whether it has jurisdiction to make a child custody order under N.C. Gen. Stat. § 50A-3 [now 50A-201] before it can exert the 'exclusive original' jurisdiction granted in N.C. Gen. Stat. § 7A-289.23." *In re Bean*, 132 N.C. App. 363, 366, 511 S.E.2d 683, 686 (1999) (quoting *In re Leonard*, 77 N.C. App. 439, 335 S.E.2d 73 (1985)). "Thus, the district court may assert its jurisdiction only if to do so would be compatible with the UCCJA . . . ." *In re Bean*, 132 N.C. App. at 366, 511 S.E.2d at 686.

Our State's jurisdiction is also governed by the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738(A) (1980). *In re Bean*, 132 N.C. App. at 366, 511 S.E.2d at 686. The PKPA "was designed to remedy inconsistent interpretation of the UCCJA by different state courts and to create a uniform standard." *In re Malone*, 129 N.C. App. at 342, 498 S.E.2d at 838-39 (citing *Meade v. Meade*, 812 F.2d 1473, 1476 (4th Cir. 1987)).

The trial court has jurisdiction to hear child custody issues if one of the four factors set forth in N.C. Gen. Stat. § 50A-201 is met:

> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

N.C. Gen. Stat. § 50A-201 (2003); *see also Foley v. Foley*, 156 N.C. App. 409, 412-13, 576 S.E.2d 383, 385-86 (2003). "The appropriate date for home state determination is the date of the commencement of the proceeding, not the date the order is entered." *Foley*, 156 N.C. App. at 413, 576 S.E.2d at 386.

Here, DSS argues that the trial court had jurisdiction under N.C. Gen. Stat. § 50A-201(1), as North Carolina had been J.B.'s home state within six months before the commencement of the proceedings. Nothing in the trial court's order of 22 October 2002 states that its jurisdiction is pursuant to this statute. In numerous permanency planning hearings, including the one at bar, the trial court simply states, "[t]he Court has jurisdiction over the subject matter and parties to this action" and its orders do not contain any specific findings of fact to support this conclusion of law. No evidence in the record shows: (1) how long J.B. had lived in North Carolina at the commencement of this proceeding; (2) where J.B. and respondent were living at the commencement of this proceeding; (3) when and for how long J.B. and respondent had been living in South Carolina at the commencement of this proceeding; (4) whether respondent still lived in North Carolina at the time she was served with the juvenile petition and non-secure custody order as required by N.C. Gen. Stat. § 50A-201(1); and (5) whether North Carolina was J.B.'s home state at the time DSS

commenced this proceeding. Nothing in the trial court's order supports the purported conclusion of law that the court had subject matter jurisdiction other than the order's bald assertion that it did.

The determination of subject matter jurisdiction is a question of law and this Court has the "power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882, *disc. rev. denied*, 352 N.C. 676, 545 S.E.2d 428 (2000); *see also Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85-86, *reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986). However, the record is devoid of evidence from which we may ascertain whether or not the trial court possessed subject matter jurisdiction under the UCCJA and PKPA. We vacate the order filed 22 October 2002 and remand this case for findings of fact based on competent evidence to support the trial court's conclusion of law regarding subject matter jurisdiction pursuant to the UCCJA as outlined in N.C. Gen. Stat. § 50A-201. *Foley*, 156 N.C. App. at 413, 576 S.E.2d at 386 (citing *Brewington v. Serrato*, 77 N.C. App. 726, 729, 336 S.E.2d 444, 447 (1985)) (holding a trial court assuming jurisdiction over a child custody matter must make specific findings of fact to support its action).

In light of our holding, we do not reach respondent's other assignments of error. The order in respondent's related appeal, No. COA03-808, is also vacated and remanded pursuant to the instructions of this decision.

IV. Conclusion

The trial court's orders in No. COA03-807 and No. COA03-808 are vacated, and the cases are remanded for the trial court to make specific findings of fact to support its conclusion of law that it possessed subject matter jurisdiction under the UCCJA and PKPA as outlined in N.C. Gen. Stat. § 50A-201.

Vacated and remanded.

Judges WYNN and HUNTER concur.

STATE OF NORTH CAROLINA v. MARION COX

No. COA03-593

(Filed 18 May 2004)

Indigent Defendants— waiving appointed counsel—proceeding pro se—necessary inquiry

A defendant's cocaine convictions were reversed where he clearly and unequivocally said that he would represent himself, the trial court told him to execute a waiver, and the judge never proceeded with the statutorily required waiver. The inquiry described in N.C.G.S. § 15A-1242 is mandatory in every case where the defendant requests to proceed pro se.

Judge TIMMONS-GOODSON concurring in the result.

Appeal by defendant from judgments entered 11 September 2002 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 May 2004.

Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for the State.

Leslie C. Rawls, for defendant-appellant.

CALABRIA, Judge.

Defendant was charged with conspiracy to sell cocaine, sale of cocaine, delivery of cocaine, and possession with intent to sell or deliver cocaine. Prior to trial, defendant sent his appointed counsel a letter asking that new counsel be appointed in his case. On 23 May 2002, a hearing was held before Judge Richard D. Boner on defendant's request. Defendant and the trial court then engaged in the following colloquy:

THE STATE: Your Honor, this is the defendant's motion to consider counsel.

. . .

THE COURT: He doesn't have a lawyer?

[DEFENSE COUNSEL]: I'm his appointed attorney right now. I have communicated with him about his case by letter. He sent a letter back to me stating he would like new counsel appointed.

THE COURT: Have you got the money to hire one?

[DEFENDANT]: No; I don't. I'm currently in DOC.

THE COURT: All right. You have got two choices; represent yourself or keep this lawyer. Which one do you want? That's your two choices.

[DEFENDANT]: I'm not allowed to—if I'm not satisfied with the attorney's representation—I'm saying—

THE COURT: Well, I'm just telling you if you're not satisfied then you can represent yourself or hire a lawyer. It doesn't work this way; you don't pick and choose your lawyers in here when they are court appointed.

[DEFENDANT]: I understand that, Your Honor, but if I'm not satisfied with the attorney—

THE COURT: You better get satisfied or represent yourself. That's as simple as I can make it. I'm not going to play musical lawyers. If you don't like the representation then hire your own lawyer or represent yourself.

[DEFENDANT]: I'll represent myself then.

THE COURT: All right. Step up here and execute a waiver.

Defendant complied and indicated he would "get an attorney." The trial court had defendant sworn and took his pleas of not guilty for the offenses charged. At the conclusion of the hearing, the trial court entered a note in defendant's file indicating that defendant asked for substitute counsel and that request had been denied.

Defendant appeared for trial on 9 September 2002. Defendant renewed his request that substitute counsel be appointed to represent him. The trial court denied defendant's request after reviewing the note in the file indicating the trial court had advised defendant that new counsel would not be appointed if defendant dismissed his appointed counsel and signed a waiver of counsel.

Defendant was convicted of conspiracy to sell cocaine, possession with intent to sell or deliver cocaine, sale of cocaine and delivery of cocaine. Defendant was sentenced to a term of twenty-four to twenty-nine months in the North Carolina Department of Correction for the sale of cocaine conviction, and a consecutive term of another twenty-four to twenty-nine months for the conspiracy and possession

convictions. The trial court arrested judgment on the remaining charge of delivery of cocaine. Defendant appeals.

On appeal, defendant asserts the trial court erred (I) by denying defendant's request for appointment of substitute counsel without allowing him to present evidence or argument on his request and (II) by failing to intervene on its own initiative to stop and strike certain comments directed towards defendant by a witness on cross-examination.

Defendant did not assign error to the trial court's failure to conduct further inquiry under N.C. Gen. Stat. § 15A-1242 (2003); therefore, under our rules of appellate procedure, this argument has been abandoned. N.C.R. App. P. 28(b)(6) (2004). However, we suspend the application of Rule 28(b)(6) pursuant to our discretion under N.C.R. App. P. 2 (2004).

North Carolina General Statutes § 15A-1242 provides as follows:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

"The inquiry described in G.S. § 15A-1242 is mandatory in every case where the defendant requests to proceed *pro se.*" *State v. White*, 78 N.C. App. 741, 746, 338 S.E.2d 614, 616 (1986).

In the instant case, defendant clearly and unequivocally stated he would represent himself.[1] Thereafter, the trial court instructed

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1. The State argues that there was no clear or unequivocal assertion of a desire to conduct a *pro se* defense because defendant was merely asking for substitute counsel. *See State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981); *State v. McGuire*, 297 N.C. 69, 83, 254 S.E.2d 165, 174 (1979). Those cases are distinguishable in that, in each case, the defendant continued with appointed counsel. In the instant case, defendant continued *pro se*. Accordingly, we find this case more closely analogous to, and controlled by, our analysis in *State v. White*, 78 N.C. App. at 746, 338 S.E.2d at 616-17.

him to execute a waiver but failed to proceed with the inquiry required under N.C. Gen. Stat. § 15A-1242. "A written waiver of counsel is no substitute for actual compliance by the trial court with G.S. § 15A-1242." *State v. Wells*, 78 N.C. App. 769, 773, 338 S.E.2d 573, 575 (1986). "We conclude that in the absence of . . . the inquiry required by G.S. § 15A-1242, it was error to permit defendant to go to trial without the assistance of counsel." *White*, 78 N.C. App. at 746, 338 S.E.2d at 617.

Because of our disposition of this issue, we need not address defendant's remaining arguments on appeal. Accordingly, we reverse and remand.

Reversed and remanded.

Judge ELMORE concurs.

Judge TIMMONS-GOODSON concurs in the result with a separate opinion.

TIMMONS-GOODSON, Judge, concurring in the result.

I agree with the majority's conclusion that the trial court erred in its treatment of defendant's request for the appointment of substitute counsel. However, I believe that a *pro se* inquiry analysis is not appropriate because defendant's repeated request was not that the trial court allow him to proceed *pro se*, but that the trial court appoint substitute counsel.

Defendant agreed to represent himself *pro se* only after the trial court denied his request for substitute counsel. Yet, defendant renewed his request for substitute counsel at the commencement of trial, which demonstrated his desire to be represented by counsel. Therefore, I believe that defendant's repeated request that the trial court appoint substitute counsel should be the focus of this Court's analysis.

Defendant asserts that the court failed to determine if any conflict of interest or other facts existed that would have justified or required appointing new counsel. I agree.

Our Supreme Court has stated:

> While it is a fundamental principle that an indigent defendant in a serious criminal prosecution must have counsel appointed to rep-

> resent him, an indigent defendant does not have the right to have counsel of *his choice* appointed to represent him. This does not mean, however, that a defendant is never entitled to have new or substitute counsel appointed. A trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel. Thus, when it appears to the trial court that the original counsel is reasonably competent to present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent *that* defendant, denial of defendant's request to appoint substitute counsel is entirely proper.

State v. Thacker, 301 N.C. 348, 351-52, 271 S.E.2d 252, 255 (1980) (citations omitted). In the case *sub judice*, the trial court made no inquiry whatsoever regarding defendant's request that substitute counsel be appointed to represent him, and that he could either keep his current counsel or represent himself at trial. The court afforded defendant no opportunity to explain why substitute counsel should be appointed. Thus, the trial court failed to determine whether there was a conflict of interest or other grounds upon which continued representation by his appointed counsel would deny defendant his constitutional right to counsel. *Id.* Therefore, I conclude that the trial court erred in its treatment of defendant's request for the appointment of substitute counsel.

GARY WAYNE CARLAND, PLAINTIFF-APPELLANT v. KAREN LYNN BRANCH (ANDERS), DEFENDANT-APPELLEE

No. COA03-289

(Filed 18 May 2004)

Child Support, Custody, and Visitation— custody—modification

The trial court erred by hearing defendant's motion to modify the parties' child custody agreement and subsequently by modifying the custody arrangement, because: (1) there was no written order entered when defendant filed her motion to modify, and thus, there was nothing to modify; and (2) even if it was proper

for the trial court to hear the motion, it was not possible for there to have been a change in circumstances between the time the order was entered on 13 May 2002 and the time the motion to modify was heard on 13 May 2002.

Appeal by plaintiff from judgment dated 23 May 2002 by Judge Peter L. Roda in District Court, Buncombe County. Heard in the Court of Appeals 3 December 2003.

William E. Loose for plaintiff-appellant.

Charlotte A. Wade for defendant-appellee.

McGEE, Judge.

Gary Wayne Carland (plaintiff) filed suit against Karen Lynn Branch Anders (defendant) on 2 December 1999 seeking joint custody, visitation, and the establishment of child support and paternity with respect to the minor child (the child) born to defendant on 8 June 1999. Defendant filed an answer and counterclaim dated 12 January 2000 requesting temporary and permanent sole custody of the child and requesting that plaintiff pay child support. Plaintiff filed a reply to defendant's answer and counterclaim on 12 January 2000. A temporary non-prejudicial consent order was filed on 28 March 2000 whereby the parties agreed that defendant would maintain primary care of the child and plaintiff would be entitled to visitation as provided in this temporary order. A consent order was filed on 21 July 2000 which established that plaintiff was the father of the child and provided that defendant have the primary care of the child subject to secondary care by plaintiff.

Plaintiff filed a motion on 9 March 2001 requesting that defendant be ordered to show cause as to why she should not be held in contempt of court. Defendant filed a motion on 16 March 2001 to modify the custody arrangement. In a consent order filed 19 April 2001, the trial court continued these matters until the completion of a custody evaluation. After the custody evaluation was completed, the matter was heard by the trial court on 19 November 2001 and on 3 December 2001, and the trial court announced in open court its decision to award joint custody to the parties. The order regarding this joint custody arrangement was dated 13 May 2002.

On 3 May 2002, prior to entry of the 13 May 2002 order granting joint custody, defendant filed a motion in the cause alleging a change in circumstances warranting a modification of the custody arrange-

ment which had been announced in open court on 19 November 2001. In a judgment dated 23 May 2002, the trial court allowed defendant's 3 May 2002 motion to modify custody. The judgment recited the details of the joint custody arrangement which had been previously announced in open court. The judgment included multiple facts in support of the conclusion that a substantial change in circumstances affecting the welfare of the child had occurred. Consequently, the trial court awarded sole custody to defendant with visitation to plaintiff. Plaintiff filed a motion on 3 June 2002 for a new trial pursuant to Rule 59 and to amend, pursuant to Rule 52, certain findings of fact in the 23 May 2002 judgment. The trial court denied plaintiff's motion in an order filed 4 September 2002. Plaintiff appeals.

Plaintiff first argues in assignment of error number two that the trial court erred in finding a substantial change in circumstances warranting a custody modification because the order the trial court modified was entered the same day the trial court heard the motion requesting modification. Modification of custody orders is provided for in N.C. Gen. Stat. § 50-13.7(a) (2003), which states "[s]ubject to the provisions of [the UCCJEA], an *order* of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." (emphasis added). An order is defined as "[a] *written* direction or command delivered by a court or judge." *Black's Law Dictionary* 1123 (7th ed. 1999) (emphasis added).

In this case, there was no written order by the trial court until 13 May 2002, ten days after the motion to modify had been filed. Although the trial court had announced its decision to award joint custody to the parties in open court on 19 November 2001, "an order rendered in open court is not enforceable until it is 'entered,' *i.e.*, until it is reduced to writing, signed by the judge, and filed with the clerk of court." *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998); N.C. Gen. Stat. § 1A-1, Rule 58 (2003). *See also Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737-38, *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997). Since there was no order "entered" when defendant filed her motion to modify, there was nothing to modify. Further, even if it was proper for the trial court to hear the motion, it is not possible for there to have been a change in circumstances between the time the order was entered on 13 May 2002 and the time the motion to modify was heard on 13 May 2002.

Defendant's response to plaintiff's first argument is based on an assumption that the trial court was permitted to consider what had occurred between the time the custody arrangement was announced in open court on 19 November 2001 and the date of the modification hearing in May 2002. As previously noted, there was no enforceable order between the parties until the order was entered on 13 May 2002. Accordingly, in deciding whether a change of circumstances had occurred, the trial court should not have considered the events that transpired prior to entry of the order.

Further, defendant responds that plaintiff had unclean hands because plaintiff had been directed to draft the custody order when it was announced in November 2001. However, plaintiff failed to comply with this instruction and defendant ultimately drafted the 13 May 2002 order. Although we recognize the frustration of both defendant and the trial court in plaintiff's failure to draft and present the order, there was no order on record at the time the motion to modify was filed. Accordingly, we are bound to find that the trial court should not have heard defendant's motion and subsequently should not have modified the custody arrangement. Therefore, we vacate and remand in accordance with this opinion.

In light of our decision on this issue, we need not review the remaining assignments of error.

Vacated and remanded.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA v. ANTHONY TYRONE REYNOLDS

No. COA03-620

(Filed 18 May 2004)

Sentencing— credit for time served—evidence

There was no abuse of discretion in calculating a defendant's credit for time served while revoking his probation.

Appeal by defendant from judgments entered 9 December 2002 by Judge Clarence W. Carter in Surry County Superior Court. Heard in the Court of Appeals 3 May 2004.

Attorney General Roy Cooper, by Assistant Attorney General Myra L. Griffin, for the State.

Brannon Law Firm, P.L.L.C., by Anthony M. Brannon, for defendant-appellant.

CALABRIA, Judge.

Defendant appeals from judgments entered in superior court upon the revocation of his probation for various offenses. Defendant asserts the trial court abused its discretion in failing to properly credit him for time served. We cannot find an abuse of discretion and therefore affirm the judgment of the trial court.

On 24 June 2002 in Surry County District Court, the Honorable Otis M. Oliver entered two judgments upon revocation of defendant's probation. In the first judgment, numbered 02 CR 3643, Judge Oliver activated defendant's 120-day sentence for possession of drug paraphernalia, driving while license revoked, and giving fictitious information to a police officer. In the second judgment, Judge Oliver activated defendant's sixty-day sentence for driving while license revoked in 02 CR 3644. Defendant gave notice of appeal to superior court.

On 9 December 2002 in Surry County Superior Court, the Honorable Clarence W. Carter heard defendant's admission to several charged probation violations and entered judgment upon revocation of his probation in 02 CRS 3645, activating defendant's eleven to fourteen month suspended sentence for the offenses of sale and delivery of marijuana and assault on a government official. The judgment awards defendant thirty days credit for pre-trial confinement. Judge Carter entered a second judgment revoking defendant's probation and activating his sentence of twenty to twenty-four months for conspiracy to sell or deliver cocaine in 99 CRS 8438. The judgment provides that the sentence shall run consecutive to the sentence imposed in 02 CRS 3645, and awards defendant nineteen days credit for pre-trial confinement. The hearing transcript further reflects Judge Carter's entry of judgments upon revocation of probation consistent with those entered in district court by Judge Oliver in 02 CR 3643 and 02 CR 3644. However, the superior court judgments in these cases do not appear in the record on appeal.

Defendant filed timely notice of appeal to this Court from Judge Carter's judgments. On appeal, defendant does not challenge the

superior court's decision to revoke his probation but claims the court abused its discretion by not giving him credit for all time previously served in confinement. Defendant asserts that he had been incarcerated for seven months at the time of his probation hearing and "believed he was serving time for driving while license revoked and other probation related sentences." He faults the court for failing to make sufficient findings of fact to resolve "conflicts in the evidence" on the matter. He asks that the cause be remanded to determine the correct amount of time he already served. We disagree.

Under N.C. Gen. Stat. § 15-196.1 (2003), a defendant is entitled to credit for "the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional . . . institution as a result of the charge that culminated in the sentence." Defendant thus has a statutory right to credit against his sentence for any time spent in custody on that particular charge, whether pre-trial or post-conviction. *See State v. Farris*, 336 N.C. 552, 556, 444 S.E.2d 182, 184 (1994). The statute further provides: "[u]pon sentencing or activating a sentence, the judge presiding shall determine the credits to which the defendant is entitled and shall cause the clerk to transmit to the custodian of the defendant a statement of allowable credits." N.C. Gen. Stat. § 15-196.4 (2003).

In the case at bar, Judge Carter, after hearing the evidence, determined that defendant "has willfully violated the terms of his probation," ordered he "be committed to the North Carolina Department of Corrections" and "further order[ed] he be given credit for 19 days served" in one of the pending cases. Following the Court's recitation of the order, the following exchange occurred:

> THE COURT: . . . Anything else, gentlemen?
>
> DEFENSE COUNSEL: Judge, I just ask Madam Clerk—I know she will do—at least give Mr. Reynolds any credit he's entitled.
>
> THE COURT: I gave him the 19 days you pointed out. You know of any other?
>
> DEFENSE COUNSEL: I don't know of any other other than what he's telling me. What he's telling me doesn't correspond with what Madam Clerk is saying as far as the time he's actually serving.
>
> THE COURT: I already indicated, Madam Clerk, any time he's due credit for. We'll give him credit for it day for day. Sure will.

It is clear from the transcript that the court considered the evidence before it and determined, in accordance with N.C. Gen. Stat. § 15-196.4, the credits defendant was entitled to receive. Defendant asserts on appeal the court did not consider his evidence. However, the transcript reveals merely defendant's expressed "understanding that he was doing this 120 day sentence for driving while license revoked, and 60 day sentence, Judge, I think on similar charges that he was already pulling this time was his information." Based on the evidence presented to the court, we cannot find an abuse of discretion.

We note, however, defendant is not without relief. The statute on awarding credits provides: "[u]pon reviewing a petition seeking credit not previously allowed, the court shall determine the credits due and forward an order setting forth the allowable credit to the custodian of the petitioner." N.C. Gen. Stat. § 15-196.4. Accordingly, defendant may petition the court and provide evidence of the credits he asserts are due.

Defendant has expressly abandoned his remaining assignments of error in his brief to this Court.

Affirmed.

Judges TIMMONS-GOODSON and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CLARK v. PENLAND No. 02-1561	Wake (98CVS11926)	No error
DAVIS v. USF HOLLAND No. 03-876	Ind. Comm. (I.C. 074480)	Affirmed
HILL v. BOSCH No. 03-650	Johnston (02CVS259)	Reversed and remanded
HOFSTAD v. FAIRFIELD COMMUNITIES, INC. No. 03-786	Craven (02CVS2117)	Reversed and remanded
IN RE C.C. No. 03-321	Mecklenburg (99J903)	Affirmed
IN RE D.R., A.R. & S.H. No. 03-578	Buncombe (02J222)	Reversed in part and affirmed in part
IN RE ESTATE OF PROPST No. 03-909	Lincoln (00E390)	Affirmed
JACKSON V. CITY OF CLINTON No. 03-933	Sampson (02CVS101)	Affirmed
KEARNEY v. CARTER No. 03-531	Warren (99CVD367)	Affirmed
KELLY v. ADVANCED HOMECARE, INC. No. 03-887	Ind. Comm. (I.C. 974696)	Affirmed
KISER v. KISER No. 03-765	Surry (01CVD1444)	Affirmed
LADHANI v. LADHANI No. 03-613	Wilkes (02CVD580)	Affirmed
LEDFORD v. LEDFORD No. 03-436	Lincoln (02CVD257)	Affirmed
LILLY v. VIRGINIA ELEC. & POWER CO. No. 03-889	Pasquotank (02CVS501)	Affirmed
MOREHEAD HILLS APARTMENTS v. LYONS No. 03-1184	Durham (01CVD5744)	Dismissed
PELTIER v. GREYHOUND LINES, INC. No. 03-401	Ind. Comm. (I.C. 875751)	Affirmed

POOLE v. COGDELL No. 02-1148	Wake (99CVD7578)	Affirmed
SCHUCHARDT v. AUTO- OWNERS INS. CO. No. 03-276	Wilkes (01CVS2490)	Appeal dismissed
SELLERS v. LIBBEY OWEN FORD CO. No. 03-1023	Ind. Comm. (I.C. 833513)	Affirmed
STATE v. ALSTON No. 03-596	Chatham (02CRS5263)	No error
STATE v. APPLEWHITE No. 03-734	Wayne (01CRS58475)	No error
STATE v. BLACKWELL No. 03-625	Orange (01CRS54735)	No error
STATE v. BLAKELEY No. 03-106	Guilford (01CRS94801) (01CRS94802) (01CRS94804) (01CRS94805) (01CRS94806) (01CRS94807) (01CRS94808) (01CRS94809) (01CRS94810) (01CRS94811)	No error
STATE v. BOWEN No. 03-375	Brunswick (01CRS51310)	No error
STATE v. BRADLEY No. 03-430	Guilford (00CRS84852)	Affirmed
STATE v. CARROTHERS No. 03-275	Guilford (02CRS23496) (02CRS23497) (02CRS23498)	No error
STATE v. CINTRON No. 03-1230	Robeson (99CRS199) (00CRS53238) (00CRS54130) (01CRS52680)	No error
STATE v. DEBERRY No. 03-656	Durham (00CRS52135)	Affirmed
STATE v. DOYLE No. 03-339	Wake (01CRS57902)	Reversed and remanded

STATE v. FREEMAN No. 03-1162	Pitt (93CRS28301) (94CRS1047) (94CRS1050)	No error
STATE v. GRAHAM No. 03-924	Gaston (01CRS53538) (01CRS53539) (01CRS53540) (01CRS53541)	No error
STATE v. GREENE No. 03-498	Wake (02CRS18327) (02CRS18328)	Affirmed and remanded to the trial court to correct the judgment and commitment
STATE v. GUION No. 03-1051	Pender (99CRS50321)	Reversed and remanded
STATE v. HAMRICK No. 03-402	Rutherford (02CRS2398)	No error
STATE v. HARDAWAY No. 03-389	Wake (02CRS54152) (02CRS54153)	No error
STATE v. HARRISON No. 03-1133	Pitt (01CRS59547)	Appeal dismissed
STATE v. HEATH No. 03-1229	Lenoir (94CRS2496)	Affirmed
STATE v. HELTON No. 03-824	Cumberland (00CRS70736)	No error
STATE v. HOOVER No. 03-836	Forsyth (01CRS60588)	No error
STATE v. HUBBARD No. 03-565	Guilford (98CRS69701)	No error
STATE v. JOHNSON No. 03-817	Buncombe (01CRS64545)	Affirmed
STATE v. JORDAN No. 03-519	Iredell (99CRS8793) (99CRS8795) (99CRS8797) (99CRS8798) (99CRS8801)	Affirmed
STATE v. LITTLEJOHN No. 03-567	Gaston (02CRS54645) (02CRS54648) (02CRS54649)	No error

STATE v. MARTIN No. 03-183	Randolph (00CRS54209)	No error
STATE v. NICHOLSON No. 03-447	Edgecombe (01CRS52167)	No error
STATE v. PARKER No. 03-382	Wilson (99CRS53070)	No error
STATE v. PERRY No. 03-645	Lenoir (01CRS5759) (01CRS53390)	Affirmed
STATE v. PERSON No. 03-539	Wake (01CRS23198) (01CRS23200)	No prejudicial error in part, reversed and remanded in part
STATE v. RAMSEUR No. 03-680	Iredell (02CRS54093)	No error
STATE v. ROBINSON No. 03-712	Cumberland (02CRS30853)	Reversed and remanded
STATE v. SLAYTON No. 03-509	Buncombe (01CRS61632) (01CRS64034) (01CRS64035) (01CRS64036) (01CRS64038) (02CRS1028) (02CRS1029) (02CRS1031) (02CRS55823) (02CRS57265) (02CRS57266) (02CRS57913)	No error
STATE v. SLIME No. 03-642	Pitt (02CRS6884)	Vacated and remanded
STATE v. SNEED No. 03-1376	Franklin (02CRS50987) (02CRS50988) (02CRS50989) (02CRS50990) (02CRS50991) (02CRS50992) (02CRS50993) (02CRS50994) (02CRS50995) (02CRS50996) (02CRS50997) (02CRS50998) (02CRS50999)	Affirmed

	(02CRS51000) (02CRS51001) (02CRS51002) (02CRS51003) (02CRS51004) (02CRS51005) (02CRS51006) (02CRS51007) (02CRS51008) (02CRS51009) (02CRS51010) (02CRS51011) (02CRS51012) (02CRS51013) (02CRS51015) (02CRS51016) (02CRS51017) (02CRS51018)	
STATE v. STARKEY No. 03-454	Lenoir (01CRS54199) (02CRS160)	New trial
STATE v. STEELE No. 03-559	Mecklenburg (02CRS204408)	No error
STATE v. WALKER No. 03-482	Robeson (01CRS54888)	No error
STATE v. WALL No. 03-1092	Richmond (02CRS272) (02CRS1548)	No error
STATE v. WEAVER No. 03-91	Catawba (01CRS50384)	Dismissed
STATE v. WILLIAMS No. 03-553	Harnett (00CRS54222) (00CRS54508) (00CRS54509)	No error
WEBB v. KNIGHT No. 03-898	Haywood (97CVD97)	Affirmed
WILLIAMS v. E.J. POPE & SON, INC. No. 03-384	Halifax (01CVS1428)	Affirmed
WINTERS v. ALLEN No. 03-639	Durham (00CVS1154)	Reversed

VALERIE ENOCH, PLAINTIFF v. EDWARD R. INMAN AND ALAMANCE COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS

No. COA02-1410

(Filed 1 June 2004)

Public Officers and Employees— race discrimination claim— § 1983—Title VII

The trial court erred by granting defendants' motion to dismiss plaintiff county DSS employee's race discrimination claims even though the complaint appears to attempt to assert a claim directly under the federal constitution instead of referencing 42 U.S.C. § 1983, because: (1) the mere fact that a complaint neglects to specify that it is based on § 1983 does not require dismissal even though referencing the statute is the more preferable course; (2) the allegations in the complaint were sufficient to support a § 1983 claim for violation of plaintiff's equal protection rights against both defendant DSS director individually and defendant DSS employer; and (3) a state or local government employee may pursue claims of race discrimination under Title VII, § 1983, or both.

Appeal by plaintiff from order entered 4 September 2002 by Judge J.B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 12 June 2003.

McSurely & Osment, by Alan McSurely and Ashley Osment, for plaintiff-appellant.

Office of the County Attorney of Alamance County, by David I. Smith, and Adams Kleemeier Hagan Hannah & Fouts, by Brian S. Clarke, for defendants-appellees.

GEER, Judge.

Plaintiff Valerie Enoch appeals the trial court's order granting defendants' motion to dismiss plaintiff's race discrimination claims. Although, unfortunately, the complaint fails to specifically reference any statute as the legal basis for the claim, we hold that its allegations are sufficient to state a claim under 42 U.S.C. § 1983. Although defendants contend that a public sector employee may only challenge race discrimination by filing a claim under Title VII, 42 U.S.C. § 2000e *et seq.*, a review of United States Supreme Court decisions and the legislative history of Title VII establishes that state or local govern-

mental employees may pursue claims of race discrimination under Title VII, § 1983, or both.

Facts

At the time of the events alleged in the complaint, plaintiff was an African-American employee of the Alamance County Department of Social Services ("DSS"). On 30 December 1998, defendants advertised for a vacant program manager position with DSS. The advertisement stated that only applicants meeting the minimum qualifications should apply. The minimum qualifications included at least 24 months of supervisory experience in social work programs.

When Ms. Enoch applied for the program manager position, she had 67 months of supervisory experience in social work programs. Three other people, all white, also applied for the position. Each had less supervisory experience in social work programs than Ms. Enoch: Linda Allison had 18 months, Alexa Jordan had 10 months, and Phillip Laughlin had 8 months.

In February 1999, defendant Edward R. Inman, who was the Director of DSS, interviewed the four applicants. After the initial interview, Mr. Inman eliminated Laughlin from consideration and granted second interviews to the three remaining applicants. Ms. Enoch learned in June 1999 that Mr. Inman had selected Ms. Allison for the position despite the fact that she did not possess the minimum qualifications for the position.

Ms. Enoch and her husband met with Mr. Inman to discuss Mr. Inman's reasons for selecting Ms. Allison rather than Ms. Enoch. During the course of the conversation, Mr. Inman reportedly stated, "You people always want to believe there is race involved. There was no race involved in this decision." Ms. Enoch's husband replied, "A lot of Black people consider the term 'you people' in itself to be racist. . . . I would appreciate it if you would not use the term with us." After the meeting ended and as Ms. Enoch and her husband were walking out the door, they both heard Mr. Inman repeat, "You people always choose to believe there's race involved."

On 27 March 2002, Ms. Enoch filed suit alleging that she had been subjected to racial discrimination in violation of her right to equal protection under the Fourteenth Amendment of the United States Constitution. Defendants moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) on the grounds that the complaint failed

to state a claim for relief, that plaintiff failed to exhaust her administrative remedies, and that plaintiff's claims were barred by the statute of limitations. The trial judge granted defendants' motion on 4 September 2002. Plaintiff filed a timely appeal from that order.

Discussion

Ms. Enoch contends that her complaint asserts a claim for relief under both 42 U.S.C. §§ 1981 and 1983.[1] When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001). The court must construe the complaint liberally and "should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). We review the trial court's dismissal *de novo*.

Defendants correctly point out that even though state and local governmental employees may sue for federal constitutional violations only by bringing suit under 42 U.S.C. § 1983, the complaint appears to attempt to assert a claim directly under the federal constitution. *See Cale v. City of Covington*, 586 F.2d 311, 313 (4th Cir. 1978) (plaintiff may not sue directly under the federal constitution for violations by state or local government officials, but rather must proceed under § 1983). Nevertheless, "[t]he legal theory set forth in the complaint does not determine the validity of the claim." *Braun v. Glade Valley Sch., Inc.*, 77 N.C. App. 83, 86, 334 S.E.2d 404, 406 (1985). An incorrect choice of legal theory "should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory." *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979). We must, therefore, determine whether the allegations of plaintiff's complaint are sufficient, as plaintiff argues, to support claims under 42 U.S.C. § 1981 and § 1983 even though plaintiff's complaint labels her claims solely as violations of the United States Constitution.

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1. The parties have not addressed any immunity defenses, whether defendant DSS is a state or local governmental entity, or whether DSS is a "person" under § 1983. Nothing in this opinion should be construed as expressing an opinion as to any of those issues.

I. Whether Plaintiff's Complaint is Sufficient to State a Claim for Relief under § 1983.

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983 (2000). In order to state a claim under § 1983, a plaintiff must allege: (1) that the defendant "deprived him of a right secured by the 'Constitution and laws' of the United States[;]" and (2) that defendant acted "under color of law." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150, 26 L. Ed. 2d 142, 150, 90 S. Ct. 1598, 1604 (1970).

Defendants argue that plaintiff's failure to specifically reference § 1983 renders the complaint deficient. This Court rejected this contention in *Jones v. City of Greensboro*, 51 N.C. App. 571, 592-93, 277 S.E.2d 562, 576 (1981), *overruled on other grounds by Fowler v. Valencourt*, 334 N.C. 345, 435 S.E.2d 530 (1993), holding that a trial court erred in granting a motion to dismiss even though the plaintiff's complaint contained no specific reference to 42 U.S.C. § 1983 because the factual allegations of the complaint, when liberally construed, supported a claim for relief under § 1983.

Numerous other jurisdictions have held likewise that the mere fact that a complaint neglects to specify that it is based on § 1983 does not require dismissal. *See, e.g., Am. United for Separation of Church & State v. School Dist. of the City of Grand Rapids*, 835 F.2d 627, 632 (6th Cir. 1987) (dismissal improper although complaint did not specifically recite § 1983 because plaintiff was only required to allege that it was deprived of a federal right by a person acting under color of state law); *Harper v. Summit County*, 2001 UT 10 ¶ 34 n.14, 26 P.3d 193, 200 n.14 (2001) ("A party must allege a constitutional violation but need not refer specifically to section 1983 to successfully plead a violation of it."); *Heinly v. Commonwealth of Pennsylvania*, 153 Pa. Commw. 599, 605 n.5, 621 A.2d 1212, 1215 n.5 (1993) ("[T]he mere failure to specifically plead Section 1983 will not doom the complaint."); *Rzeznik v. Chief of Police of Southampton*, 374 Mass. 475, 484 n.8, 373 N.E.2d 1128, 1135 n.8 (1978) ("Due to the fact that the plaintiff alleged all the necessary elements of a § 1983 claim in his complaint, his failure specifically to include the statute in the pleadings is not fatal to his case.").

Thus, the fact that the complaint does not reference § 1983, standing alone, does not justify dismissal of plaintiff's complaint. We stress, however, that specification of the statute upon which a plaintiff relies is by far the preferable course.

We next turn to the sufficiency of the allegations in the complaint. Plaintiff's complaint alleges each of the elements required by *Adickes*. First, she alleges that defendant Inman subjected her to race discrimination in failing to promote her in violation of her right to equal protection under the Fourteenth Amendment to the United States Constitution. Second, plaintiff alleges that Inman, as the DSS Director, was acting under color of law when discriminating against plaintiff. These allegations, including the factual details summarized above, are sufficient to support a § 1983 claim against an individual government employee.

In addition, however, plaintiff's complaint must include sufficient allegations to establish grounds to hold DSS liable. In *Monell v. New York City Dep't of Soc. Serv.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), the Supreme Court held for the first time that a local governmental body could be sued under § 1983, but that liability could not be based upon a theory of *respondeat superior*. Under *Monell*, a municipality may be held liable only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury[.]" *Id.* at 694, 56 L. Ed. 2d at 638, 98 S. Ct. at 2037-38.

Plaintiff in this case has alleged that DSS "has engaged in a longstanding pattern and practice against African American professionals, and has never placed an African American in a management position." Under notice pleading, there is no requirement that plaintiff's allegation be more specific. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, 122 L. Ed. 2d 517, 524, 113 S. Ct. 1160, 1163 (1993) (plaintiff is only required to include "a short and plain statement," under Fed. R. Civ. P. 8(a)(2), of the basis of municipal liability). *See also Jordan by Jordan v. Jackson*, 15 F.3d 333, 340 (4th Cir. 1994) (complaint sufficient under *Monell* where it described county policies that resulted in plaintiff's injury). We hold, therefore, that plaintiff has sufficiently alleged a claim under § 1983 for violation of her equal protection rights against both defendants.

Defendants, however, urge that a state or local governmental employee subjected to race discrimination may only sue under Title

VII. More specifically, defendants argue first that, under *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 105 L. Ed. 2d 598, 109 S. Ct. 2702 (1989), a state or local governmental employee may not sue for race discrimination under § 1981, but rather is limited to § 1983. Defendants then contend that any § 1983 claims are in turn preempted by Title VII.

If we were to adopt defendants' reasoning, we would be holding that private employees may sue for race discrimination under both Title VII and § 1981, but that state or local governmental employees are limited only to Title VII. Private employees could take advantage of the multi-year statute of limitations of § 1981, would be subjected to no cap on compensatory or punitive damages, and could sue employers with fewer than 15 employees. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60, 44 L. Ed. 2d 295, 301, 95 S. Ct. 1716, 1720 (1975) (private sector employee may seek relief under both § 1981 and Title VII). On the other hand, under defendants' approach, state or local governmental employees could only sue for race discrimination if they complied with the stringent time limitations of Title VII, they could not sue any employers with fewer than 15 employees, and any compensatory or punitive damages would be subject to the caps set forth in 42 U.S.C. § 1981a (2000).[2]

We are unwilling to so dramatically limit a state or local governmental employee's rights in comparison with the rights of a private employee confronted with the same unlawful, discriminatory conduct without a clear expression of such an intent by Congress. Not only have defendants failed to point to any evidence of this intent, we do not believe that their reasoning is consistent with United States Supreme Court authority or the legislative history of Title VII.

Defendants argue that we are bound by a footnote in the Fourth Circuit decision of *Hughes v. Bedsole*, 48 F.3d 1376, 1383 n.6 (4th Cir.), *cert. denied*, 516 U.S. 870, 133 L. Ed. 2d 126, 116 S. Ct. 190 (1995) ("[Plaintiff] cannot bring an action under § 1983 for violation of her Fourteenth Amendment rights because [she] originally could have instituted a Title VII cause of action."). The North Carolina Supreme Court has, however, twice held that North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court. In *Security Mills*

2. Section 1981a(b)(3) limits compensatory and punitive damages awarded under Title VII to a total of $50,000 for employers with fewer than 101 employees, to $100,000 for an employer with fewer than 201 employees, to $200,000 for an employer with fewer than 501 employees, and $300,000 for employers with more than 500 employees.

of Asheville, Inc. v. Wachovia Bank & Trust Co., 281 N.C. 525, 529, 189 S.E.2d 266, 269 (1972), the Supreme Court held:

> Our attention has been directed to no decision of the Supreme Court of the United States which determines either of these questions [of federal law]. Decisions of the lower federal courts, construing this Act of Congress, are not binding upon us, notwithstanding our respect for the tribunals which rendered them . . . . We must, therefore, construe this Act of Congress ourselves . . . .

Similarly, the Supreme Court in *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), wrote:

> State courts are no less obligated to protect and no less capable of protecting a defendant's federal constitutional rights than are federal courts. In performing this obligation a state court should exercise and apply its own independent judgment, treating, of course, decisions of the United States Supreme Court as binding and according to decisions of lower federal courts such persuasiveness as these decisions might reasonably command.

See also State v. Adams, 132 N.C. App. 819, 820, 513 S.E.2d 588, 589 (in construing the Double Jeopardy clause, holding, "with the exception of decisions of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State"), *disc. review denied*, 350 N.C. 836, 538 S.E.2d 570, *cert. denied*, 528 U.S. 1022, 145 L. Ed. 2d 414, 120 S. Ct. 534 (1999).

In any event, *Hughes* does not appear to be the law in the Fourth Circuit. Prior to *Hughes*, the Fourth Circuit rendered two decisions both expressly holding that Title VII does not preclude a public sector employee from bringing a § 1983 action based on violations of the Equal Protection Clause. *Beardsley v. Webb*, 30 F.3d 524, 527 (4th Cir. 1994) ("Title VII does not supplant § 1983"); *Keller v. Prince George's County*, 827 F.2d 952, 963 (4th Cir. 1987) ("[W]e think it difficult to imagine that the Supreme Court would uphold a ruling that Title VII in fact preempts the remedy available for a violation of the fourteenth amendment for intentional employment discrimination provided by § 1983."). The Fourth Circuit recently recognized that *Hughes* could not overrule these two decisions:

> Shortly after our decision in *Beardsley* was issued, however, a separate panel of our court, in a footnote, declined to consider a public sector employee's sex discrimination claim under § 1983.

> *See Hughes v. Bedsole*, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995). . . . This footnote, in turn, has led several district courts to erroneously conclude that [they] must follow *Hughes*, instead of *Keller*, either because *Hughes* is a more recent decision by this court or because the plaintiff in *Hughes*, unlike the plaintiff in *Keller*, did not bring a Title VII claim along with a Section 1983 claim. . . .
>
> It is quite settled that a panel of this circuit cannot overrule a prior panel. Only the *en banc* court can do that. . . . And, we are unpersuaded that the viability of a § 1983 claim hinges upon whether a plaintiff pleads a Title VII claim alongside it. . . . Because this panel is bound to follow the decisions in *Keller* and *Beardsley*, we reverse and remand [plaintiff's] § 1983 claim to the district court for further proceedings.

Booth v. Maryland, 327 F.3d 377, 382-83 (4th Cir. 2003).

With the exception of the footnote in *Hughes*, all the federal Courts of Appeals that have addressed this issue have held, consistent with *Keller*, *Beardsley*, and *Booth*, that a public employee is not limited to Title VII, but may also sue for discrimination in violation of the fourteenth amendment under § 1983. *See Thigpen v. Bibb County*, 223 F.3d 1231, 1239 (11th Cir. 2000) ("We therefore . . . hold that a section 1983 claim predicated on the violation of a right guaranteed by the Constitution—here, the right to equal protection of the laws—can be pleaded exclusive of a Title VII claim."); *Annis v. County of Westchester*, 36 F.3d 251, 255 (2d Cir. 1994) ("We therefore hold that an employment discrimination plaintiff alleging the violation of a constitutional right may bring suit under § 1983 alone, and is not required to plead concurrently a violation of Title VII."); *Wudtke v. Davel*, 128 F.3d 1057, 1063 (7th Cir. 1997) ("On the other hand, it is well established that Title VII does not preempt § 1983 for public employers."); *Southard v. Texas Bd. of Criminal Justice*, 114 F.3d 539, 549-50 (5th Cir. 1997) (a public employee may assert claims for racial discrimination under both Title VII and § 1983); *Notari v. Denver Water Dep't*, 971 F.2d 585, 588 (10th Cir. 1992) (plaintiff is not precluded by Title VII from bringing a claim under § 1983 for race discrimination in violation of the fourteenth amendment); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1079 (3d Cir. 1990) ("We have previously held that the comprehensive scheme provided in Title VII does not preempt section 1983, and that discrimination claims may be brought under either statute, or both."); *Roberts v. College of the Desert*, 870

F.2d 1411, 1415 (9th Cir. 1988) ("We agree with the reasoning of those courts that have held that Title VII does not preempt an action under section 1983 for a violation of the fourteenth amendment."); *Trigg v. Fort Wayne Cmty. Schs.*, 766 F.2d 299, 302 (7th Cir. 1985) ("A plaintiff may sue her state government employer for violations of the Fourteenth Amendment through § 1983 and escape Title VII's comprehensive remedial scheme, even if the same facts would suggest a violation of Title VII."); *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1205 (6th Cir. 1984) ("Where an employee establishes employer conduct which violates both Title VII and rights derived from another source—the Constitution or a federal statute—which existed at the time of the enactment of Title VII, the claim based on the other source is independent of the Title VII claim, and the plaintiff may seek the remedies provided by § 1983 in addition to those created by Title VII."). After reviewing these decisions, we find no reason to diverge from the overwhelming weight of authority, especially in light of Title VII's legislative history and the United States Supreme Court's relevant decisions.

Originally, as passed in 1964, Title VII did not provide a remedy for discrimination by public employers. Congress amended Title VII in 1972 to provide remedies for federal, state, and local employees. The question at issue here is whether Congress intended, through the 1972 amendments, to make Title VII the exclusive remedy for state and local governmental employees.

As *Keller* notes, 827 F.2d at 958,[3] the House Committee on Education and Labor first proposed amendments to Title VII to eliminate the exemption for state and local employers. *See* H.R. 1746, Subcomm. on Labor, U.S. Senate, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972, (H.R. 1746, P. L. 92-261) Amending Title VII of the Civil Rights Act of 1964* 1-60 (Comm. Print 1972) (hereafter "*Legislative History*"). The House Committee Report expressly explained that these amendments were not intended to eliminate the right to sue under § 1983:

> In establishing the applicability of Title VII to State and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected. . . . The bill, therefore, by extending jurisdiction

3. *Keller* provides a comprehensive analysis of Title VII's legislative history. In this opinion, we simply note the most pertinent points.

> to State and local government employees does not affect existing rights that such individuals have already been granted by previous legislation. . . . Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination "under color of state law" as embodied in the Civil Rights Act of 1871, 42 U.S.C. § 1983.

Legislative History, at 78-79. When, however, the bill reached the House floor, it was amended to make Title VII "the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice." *Id.* at 144. Over objections that the amendment would effectively erase the Civil Rights Acts, the House approved the amendment to the bill. *Id.* at 242, 276, 285, 314, 323.

When the bill moved to the Senate, the Senate Committee on Labor and Public Welfare responded to testimony criticizing the exclusivity provision and substituted a bill that omitted that provision. *Id.* at 344-409. The Senate Committee Report explained its intent: "[N]either the above provisions regarding the individual's right to sue under title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws." *Id.* at 433. When the committee bill was reported to the floor of the Senate, amendments were proposed restoring the exclusivity provision in order to bar remedies such as § 1983. *Id.* at 1095 (amendment no. 846); *id.* at 1382 (amendment no. 877). During the debates on the bill and the amendments, the sponsor of the Senate bill, Senator Williams, explained:

> [The Civil Rights Act of 1866] was followed up, in 1871, by another provision. These are basic laws from which, as the Attorney General stated, developed a body of law that should be preserved and not wiped out, and that all available resources should be used in the effort to correct discrimination in employment.

Id. at 1517.[4] *See also id.* at 1404 ("[T]o make Title VII the exclusive remedy for employment discrimination would be inconsistent with our entire legislative history of the Civil Rights Act. It would jeopardize the degree and scope of remedies available to the workers of our country."), 1400, 1403, 1405, 1512. The Senate ultimately rejected the amendments and passed the bill without any exclusivity provision. *Id.* at 1407, 1521, 1790. When the House and Senate bills were sent to

4. The Civil Rights Act of 1866 ultimately became § 1981, while the Civil Rights Act of 1871 enacted the provision that became § 1983.

conference, the House agreed to the omission of the exclusivity provision. *Id.* at 1815, 1837, 1875.

Like the Fourth Circuit in *Keller*, we believe that this legislative history—in which Congress expressly declined to adopt an exclusivity provision so as to preserve rights under §§ 1981 and 1983—"clearly indicates" that the 1972 amendments were not intended to preempt the preexisting remedy under § 1983 for violations of the Fourteenth Amendment. *Keller*, 827 F.2d at 958. In the face of this legislative history, we cannot simply assume otherwise. *Cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 416-17 n.20, 20 L. Ed. 2d 1189, 1194-95 n.20, 88 S. Ct. 2186, 2191 n.20 (1968) ("The Civil Rights Act of 1968 does not mention 42 USC § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute."). As the court in *Keller* explained:

> To conclude that Title VII preempts an action under § 1983 for a violation of the fourteenth amendment, we would be required to substitute our own notions of federal policy for those of Congress. The final result would vitiate the intent of § 2 of the 1972 Act to adopt an aggressive pro-civil rights measure. We decline to adopt as law the view of a minority of Congress when the majority will is so well documented.

Keller, 827 F.2d at 962.

Moreover, this view is consistent with the analysis of the United States Supreme Court. In 1974, only two years after the amendments to Title VII, the Court pointed to Congress' rejection in 1964 and 1972 of amendments that would have made Title VII the exclusive remedy for employment discrimination and stated "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48, 39 L. Ed. 2d 147, 158, 94 S. Ct. 1011, 1019-20 (1974).

A year later, the Court noted "the independence of the avenues of relief respectively available under Title VII and the older § 1981." *Johnson*, 421 U.S. at 460, 44 L. Ed. 2d at 301, 95 S. Ct. at 1720. In holding that a private employee may choose to sue under § 1981 rather than Title VII, the Court rejected arguments that allowing claims under other statutes would undermine Title VII:

> But these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent

> administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others, the reverse may be true. We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a § 1981 action while an EEOC claim is pending.

Id. at 461, 44 L. Ed. 2d at 302, 95 S. Ct. at 1720-21.

In 1976, the Supreme Court held, after again reviewing the 1972 amendments, that federal employees asserting employment discrimination claims are limited to Title VII. *Brown v. General Serv. Admin.*, 425 U.S. 820, 48 L. Ed. 2d 402, 96 S. Ct. 1961 (1976). In doing so, however, the Court stressed that the legislative history of Title VII explicitly manifested an intent to preserve *existing* discrimination remedies. *Id.* at 833-34, 48 L. Ed. 2d at 412, 96 S. Ct. at 1968. The Court reasoned that since Congress was unaware of any pre-existing remedies for federal employees, it could not have intended to preserve such remedies. *Id.* at 828, 48 L. Ed. 2d at 409, 96 S. Ct. at 1966 ("The legislative history thus leaves little doubt that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy."). The legislative history, or lack thereof, was dispositive. *See also Jett*, 491 U.S. at 734, 105 L. Ed. 2d at 626, 109 S. Ct. at 2722 (noting that *Brown* relied upon Congress' perception that federal employees lacked any remedy as indicating an intent to create an exclusive, preemptive administrative and judicial scheme for redress of federal employment discrimination).

In 1979, the Supreme Court again emphasized in *Great Am. Fed. Sav. & Loan Assoc. v. Novotny*, 442 U.S. 366, 60 L. Ed. 2d 957, 99 S. Ct. 2345 (1979), that the Civil Rights Acts that gave rise to §§ 1981 and 1983 survived the passage of Title VII. Although the Court held that 42 U.S.C. § 1985(3) could not be invoked to redress violations of Title VII,[5] the Court noted:

> [T]he Civil Rights Acts of 1866 and 1871 were explicitly discussed during the course of the legislative debates on both the Civil Rights Act of 1968 and the 1972 Amendments to the 1964 Act, *and the view was consistently expressed that the earlier statutes*

5. In other words, an employee could not base a § 1985(3) claim on the statutory rights of Title VII.

> *would not be implicitly repealed*. . . . Specific references were made to §§ 1981 and 1983, but, significantly, no notice appears to have been taken of § 1985."

Id. at 377 n.21, 60 L. Ed. 2d at 967 n.21, 99 S. Ct. at 2351 n.21 (emphasis added).

Finally, defendants' contention that § 1983 claims are barred by Title VII cannot be reconciled with the Supreme Court's holding in *Jett*, addressing the question whether state or local governmental employees may sue directly under § 1981. The Court held: "[T]he express 'action at law' provided by § 1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor." *Jett*, 491 U.S. at 735, 105 L. Ed. 2d at 627, 109 S. Ct. at 2723. *Jett* did not strip public sector employees of their substantive rights under § 1981, but held that "Congress thought that the declaration of rights in § 1981 would be enforced against state actors through the remedial provisions of § 1983." *Id.* at 734, 105 L. Ed. 2d at 626, 109 S. Ct. at 2722.

The Supreme Court would not have held that § 1981 rights could be enforced under § 1983 if it nonetheless believed that no remedy was available to local and state governmental employees under § 1983 for employment discrimination. Although the Supreme Court had implied a private right of action under § 1981 for private employees because there was no other procedural mechanism to enforce their rights under § 1981, the *Jett* Court found, with respect to local and state employees, "[t]hat is manifestly not the case," because of the existence of § 1983. *Id.* at 732, 105 L. Ed. 2d at 624, 109 S. Ct. at 2721. If § 1983 is not available as a remedy, then the entire underpinning for the Supreme Court's decision evaporates. *Jett* presumes the existence of a remedy for race discrimination under § 1983.

Courts have also considered the effect of the 1991 Civil Rights Act. In 1991, Congress passed a new Civil Rights Act, amending § 1981 to overrule *Patterson v. McLean Credit Union*, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989) (limiting the scope of § 1981) and amending Title VII to allow jury trials and compensatory and punitive damages (subject to caps). As the Fourth Circuit recognized in *Beardsley*, however, there is no indication that this Act manifested a change by Congress from its previous desire that Title VII supplement

rather than supplant other existing laws governing race discrimination. *Beardsley*, 30 F.3d at 527. We agree that "it is quite unlikely that Congress implicitly intended the 1991 Act to bar claimants from seeking relief under § 1983. It is more reasonable to presume that Congress intended both avenues of relief to remain open." *Id.* at 527. It is a well-established principle of statutory construction that Congress is presumed to be aware of a judicial construction of a statute and to have adopted that construction when it re-enacts that statute without expressing any intention to reject the judicial interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580, 55 L. Ed. 2d 40, 46, 98 S. Ct. 866, 870 (1978). Since Congress, when amending Title VII in 1991, never expressed any intention to preclude § 1983 claims, there is no basis for concluding that Congress' intention has changed since 1972. *See also Johnson v. City of Fort Lauderdale*, 148 F.3d 1228, 1231 (11th Cir. 1998) ("[N]othing in the Civil Rights Act of 1991 indicates congressional intent to overrule this appellate case law [retaining § 1983 as a parallel remedy for public sector employment discrimination].").

We, therefore, hold that public sector employees may sue for discrimination in violation of the Fourteenth Amendment under § 1983. Title VII does not provide an exclusive remedy for unlawful employment discrimination.

II. Whether Plaintiff's Complaint States a Claim for Relief under § 1981.

Plaintiff also contends that her complaint is sufficient to state a claim for relief under § 1981, which provides:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (2000). The 1991 Civil Rights Act amended § 1981 to confirm that the term "make and enforce contracts" includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (2000).

Even though, as discussed above, "an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory[,]" the complaint must still "give sufficient notice of the wrong complained of[.]" *Stanback*, 297 N.C. at 202, 254 S.E.2d at 625. In plaintiff's complaint, "the wrong complained of" is repeatedly asserted to be a violation of plaintiff's federal constitutional rights. There is no indication in the complaint that plaintiff is attempting to enforce her substantive rights under § 1981. Even with notice pleading, we do not believe that the complaint gives sufficient notice that it is asserting a claim for violation of plaintiff's rights under § 1981 as opposed to the federal constitution.

Defendants contend that any such claim is, in any event, barred by *Jett*. We note that in the 1991 Civil Rights Act, Congress added a subsection (c) to § 1981 that provides: "The rights protected by this section are protected against impairment by nongovernmental discrimination *and impairment under color of State law*." 42 U.S.C. § 1981(c) (2000) (emphasis added). The courts that have addressed this issue have split on the question whether § 1981(c) overrules *Jett*. *Compare Oden v. Oktibbeha County*, 246 F.3d 458, 463 (5th Cir.) (holding that the legislative history of the 1991 Civil Rights Act does not indicate an intent to overrule *Jett*), *cert. denied*, 534 U.S. 948, 151 L. Ed. 2d 258, 122 S. Ct. 341 (2001); *Butts v. County of Volusia*, 222 F.3d 891, 894 (11th Cir. 2000) ("The sparse legislative history of the Civil Rights Act of 1991 does not reveal a contrary intent" to *Jett*) *with Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir. 1996) ("[W]e conclude that the amended 42 U.S.C. § 1981 contains an implied cause of action against state actors, thereby overturning *Jett*'s holding that 42 U.S.C. § 1983 provides the exclusive federal remedy against state actors for the violation of rights under 42 U.S.C. § 1981."). Because of our holding, we need not address this question.

In summary, we hold that plaintiff's complaint states a claim for relief under § 1983, that Title VII does not preclude claims under § 1983 for violation of the Fourteenth Amendment, and that the trial court, therefore, erred in granting the motion to dismiss.

Reversed.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA v. JOSHUA DANIEL FRIEND

No. COA03-663

(Filed 1 June 2004)

1. Criminal Law— consolidated charges—factually similar and connected

The trial court did not abuse its discretion in consolidating 15 charges because the offenses were all factually similar and interconnected. Defendant was not prejudiced because one count was subsequently dismissed and the jury acquitted him on 6 counts.

2. Evidence— hearsay—business report

There was no error in a burglary and larceny prosecution in admitting testimony that the property had not been rented and that defendant did not have permission to be on the property. The monthly business report on which the testimony was based fell under the business record exception to the hearsay rule.

3. Witnesses— redirect examination—scope

The trial court did not err in a burglary prosecution by allowing a line of questioning on redirect examination of a deputy which defendant contended exceeded the scope of cross-examination.

4. Evidence— fingerprinting techniques—deputy's lay opinion

The trial court did not err by allowing a deputy to present lay opinion testimony about fingerprinting techniques. The deputy was in charge of CID and helped the jury understand why fingerprints were not recovered.

5. Possession of Stolen Property— constructive and recent possession—sufficiency of evidence

There was sufficient circumstantial evidence that defendant had constructive and recent possession of stolen items from one of several houses that had been broken into.

6. Burglary and Unlawful Breaking or Entering— no permission to enter—sufficiency of evidence

There was sufficient evidence in a prosecution for breaking and entering, larceny, and possession of stolen goods that defendant had not had permission to enter the house.

7. Possession of Stolen Property— constructive possession—knowledge that property was stolen—sufficiency of evidence

There was sufficient circumstantial evidence that defendant had constructive and recent possession of a stolen bow and knew or had reason to believe that it was stolen.

8. Possession of Stolen Property— constructive possession—sufficiency of evidence

There was sufficient evidence to establish defendant's recent and constructive possession of stolen firearms and a bow in that the stolen property was found where defendant had been staying, along with other stolen property.

9. Burglary and Unlawful Breaking or Entering— sufficiency of evidence—consent to enter

There was sufficient evidence in a second breaking and entering and larceny prosecution that defendant did not have consent to enter the house.

10. Burglary and Unlawful Breaking or Entering— evidence of another's guilt—lesser included offense—no instruction

Evidence implicating another in a breaking and entering and larceny was evidence that defendant had committed no crime at all and did not require the submission of lesser included offenses.

11. Burglary and Unlawful Breaking or Entering— breaking in to sleep—instructions on lesser included offenses

Evidence in a felonious breaking and entering prosecution that defendant had admitted breaking into a house to sleep but not to commit a larceny or another felony should have resulted in an instruction on the lesser included offense of misdemeanor breaking and entering. However, defendant was not entitled to an instruction on misdemeanor larceny because any larceny that occurred pursuant to a breaking and entering is a felony regardless of the value of what was stolen.

12. Possession of Stolen Property— instruction on lesser included offense—no conflicting evidence

Defendant was not entitled to an instruction on the lesser included offense of misdemeanor possession of stolen goods where there was no conflicting evidence. Defendant's assertion that the jury accepted a portion of the State's case and rejected other parts of it was not sufficient.

Appeal by defendant from judgments entered 17 January 2003 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 2 March 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Leonard G. Green, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant-appellant.

HUNTER, Judge.

Joshua Daniel Friend ("defendant") appeals from judgments dated 17 January 2003, entered consistent with jury verdicts finding defendant guilty of two counts of felonious breaking and entering, two counts of felonious larceny, and four counts of felonious possession of stolen goods. For the reasons stated herein, we conclude defendant is entitled to a new trial on one count of felonious breaking and entering and that there was no error in his remaining convictions.

The State's evidence tends to show that all of the offenses took place within the Colington Harbor neighborhood, on Harborview Drive. 802 Harborview Drive is the residence of Tucker Freeman ("Freeman"). In early October 2001, Freeman noticed several items missing from his garage including a Coleman stove, a green backpack, a tire iron, a drill and drill bits, an x-acto box containing knives and blades, a Daisy Red Rider BB rifle, a filet knife, and a wood knife. Defendant had been coming over to Freeman's property to fish. Freeman had given defendant permission to be there.

719 Harborview Drive is a vacation rental owned by Mr. Raymond Gross ("Gross"), and one of the neighborhood residences that was broken into. The house is often rented out under the direction of real estate agent Stan White ("White"). Gross maintained that defendant did not have permission to be in his house and that he previously made defendant aware of this. Freeman witnessed defendant emerge from inside Gross's house. Later, when Gross came to inspect the house, he found some items, such as his stove and ash tray, had been used. Later, it was discovered that several bottles of liquor had been stolen from this house. One particular bottle of Bacardi liquor had been purchased from a Class Six store at Langley Air Force Base. On this bottle was a sticker reading "AAFES." At the time of his arrest, defendant admitted having gone into Gross's house to find a place to

sleep, telling the arresting officer " 'I did go into that house . . . but I just went there so I could have a place to sleep.' "

Michael Creekmore ("Creekmore") lives at 701 Harborview Drive. On 13 or 14 October 2002, Creekmore noticed his Hoyte compound bow was missing from his garage. William Walker ("Walker") lives at 605 Harborview Drive. Walker's son Joseph testified that the Walkers kept a black powder rifle, a hunting rifle, and a compound bow in their storage area underneath the house and that these items had been stolen.

James Trent ("Trent") is the caretaker of 471 Harborview Drive, a vacation home. On 20 October 2002, Trent went to the house to do some maintenance work and found that the back door had been kicked in, the kitchen was messy, and sodas and canned goods were missing. The downstairs bedroom was in disarray. Inside the bedroom was a green backpack, liquor bottles, a Hoyte compound bow, a Pearson compound bow, a parka jacket, a Coleman stove, and a green and brown nylon wallet with a chain attached to it.

One of the liquor bottles found in 471 Harborview Drive was identified by its "AAFES" sticker as having been stolen from Gross's house. Detectives testified that the parka resembled one they had seen defendant wearing on several occasions. The green backpack matched the description of the one Freeman saw on defendant's back when defendant was leaving the inside of Gross's house. The Coleman camping stove matched the description of Freeman's stolen stove, as did some of the knives. The Hoyte compound bow matched the one stolen from Creekmore's residence.

The green and brown nylon wallet had an Albermarle Mental Health Center appointment card inside with defendant's name on it. Detectives also testified that they had seen defendant carrying a similar-looking wallet in the past.

Elizabeth Quinlan ("Quinlan") lives at 715 Harborview Drive. She allowed defendant to stay in her house. Underneath the Quinlan home is an accessible lattice-enclosed area. On 16 October 2002, Freeman found items matching the description of some of his missing items in this lattice-enclosed area including: his x-acto box, Daisy BB rifle, and filet knife. Freeman also found other stolen property under the lattice-enclosure including a case with the name "Bill Walker" on it, containing a Remington rifle and scope, a Connecticut Valley black powder rifle, a Pearson compound bow, and a Nova compound bow.

Another hunting rifle and bow were recovered directly from Billy Thompson ("Thompson") who also lives at Quinlan's residence. The evidence tends to show that Thompson is mentally impaired and had trouble performing basic tasks. Thompson turned over the rifle and bow after Quinlan told him to give up any property that he did not buy or that George (another resident of the house) had not given to him.

Prior to jury selection in Dare County Superior Court, the trial court granted the State's motion to consolidate all of the charges against defendant for trial. As a result, defendant was tried on one count of second degree burglary, four counts of felonious breaking and/or entering, five counts of felonious larceny, and five counts of felonious possession of stolen goods.

The State relied heavily on the doctrines of recent and constructive possession in trying their case. On 5 September 2002, following trial by jury, defendant was found guilty of two counts of felonious breaking and entering, two counts of felonious larceny and four counts of felonious possession of stolen goods. Defendant was found not guilty of the remaining charges submitted to the jury. As a consequence of his convictions, defendant was sentenced to four consecutive eight to ten month prison terms followed by a fifth consecutive eight to ten month sentence, which was suspended upon defendant's successful completion of thirty-six months supervised probation.

The six issues presented on appeal are whether the trial judge erred by (I) joining all of the charges against defendant into one trial; (II) allowing the State to prove its case using hearsay testimony; (III) allowing the State to examine Deputy Neiman on certain matters during re-direct examination; (IV) allowing Deputy Doughtie to offer certain testimony as to fingerprinting techniques; (V) denying defendant's motion to dismiss all of the charges against him at the close of evidence; and (VI) failing to instruct the jury on the lesser-included misdemeanor offenses requested by defendant.

I.

[1] Defendant alleges the trial court erred when it allowed the State to consolidate all of the charges against defendant into one trial. N.C. Gen. Stat. § 15A-926(a) provides that two or more offenses may be joined for trial when the offenses are based on the same act or transaction or on a series of acts or transactions connected together constituting parts of a single plan or scheme. *See State v. Cummings*, 103

N.C. App. 138, 140-41, 404 S.E.2d 496, 498 (1991). The decision to join cases for trial is within the trial court's discretion, and a trial judge's decision to join cases for trial will only be reversed if defendant was denied a fair trial. *See State v. Ruffin*, 90 N.C. App. 712, 714, 370 S.E.2d 279, 280 (1988).

This Court has recognized that the determination to be made is " 'whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant.' " *State v. Fultz*, 92 N.C. App. 80, 83, 373 S.E.2d 445, 447 (1988) (quoting *State v. Corbett*, 309 N.C. 382, 389, 307 S.E.2d 139, 144 (1983)). In this case, save for one instance, all of the charged offenses were committed on or about September and October 2001 and in the same neighborhood on Harborview Drive. Thus, we conclude the trial court did not abuse its discretion in consolidating the charges because the offenses were all factually similar and interconnected.

Defendant also alleges that the large number of charges brought against defendant alone prevents him from receiving a fair trial when all were joined in the same action. However, this Court in *State v. Harding* affirmed a trial court's decision to consolidate even when the defendant was charged with "almost 15" separate indictments. *State v. Harding*, 110 N.C. App. 155, 161-62, 429 S.E.2d 416, 420-21 (1993). The trial judge in *Harding* even commented about the " 'unbelievably complicated spider web . . . ' " created by the various allegations and indictments. *Id.* This Court concluded that since the charges were closely related in time and nature under the circumstances, joinder was proper and that defendant had nevertheless failed to show any prejudice. *Id.*

In the case before us, in addition to the factual similarity and interconnected nature of the charges, the record tends to show that defendant was not prejudiced by the joining of the fifteen charges as even after the trial court dismissed one count of possession of stolen property the jury still acquitted defendant of six of the remaining fourteen charges.

II.

[2] Defendant next argues the trial court erred when it allowed Gross to testify over objection of defense counsel that defendant did not have permission to be on Gross's property and that his property had not been rented out since October 5th. Specifically, defendant argues

that Gross's testimony was based on hearsay statements contained in a monthly report sent to him by White. The record shows that defense counsel did not object to Gross's testimony until later in the direct examination, when Gross explained that White kept him apprised of when the house was rented.

The State contends the monthly report qualifies as a business record under the records of regularly conducted activity exception to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2003). Under this exception:

> Business records are admissible as an exception to the hearsay rule if "(1) the entries are made in the regular course of business; (2) the entries are made contemporaneously with the events recorded; (3) the entries are original entries; and (4) the entries are based upon the personal knowledge of the person making them."

Piedmont Plastics v. Mize Co., 58 N.C. App. 135, 137, 293 S.E.2d 219, 221 (1982) (quoting *Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 650, 217 S.E.2d 682, 699 (1975)).

In this case, the monthly business report that White sends to Gross qualifies under the business record exception because White recorded the rental entries based on personal knowledge and in the regular course of his business at the times that the property was rented. Therefore, defense counsel's hearsay objection as to Gross's testimony fails. *See* N.C. Gen. Stat. § 8C-1, Rule 803(6).

III.

[3] Deputy Neiman was the primary investigating officer for the various Harborview offenses. During Deputy Neiman's cross-examination, defense counsel asked him several questions about his movements and observations while he was investigating the downstairs bedroom of 471 Harborview Drive. On re-direct examination, the State questioned Deputy Neiman as to what he did when he went downstairs to the bedroom, specifically whether Neiman had examined the downstairs room window. Defendant claims this line of questioning exceeded the scope of cross-examination and unfairly prejudiced the defense.

"[R]edirect examination is usually limited to clarifying the subject matter of the direct examination, and dealing with the subject matter brought out on cross-examination. It is in the discretion of the trial

court to permit the scope of the redirect to be expanded." *State v. Pearson*, 59 N.C. App. 87, 89, 295 S.E.2d 499, 500 (1982) (citation omitted). In this case, as Deputy Neiman's downstairs movements were inquired into on cross, further exploring what he did downstairs on re-direct is permissible. Moreover, even if the questioning somehow exceeded the scope of the cross-examination, it was in the trial court's discretion to allow the scope of re-direct examination to be expanded. Further, defendant has failed to show how he was prejudiced by this line of questioning as he is required to do under N.C. Gen. Stat. § 15A-1443(a) (2003). We therefore conclude the trial court did not err by allowing this re-direct examination of Deputy Neiman.

IV.

[4] Defendant further contends that the trial court improperly allowed the State to introduce lay witness testimony concerning fingerprinting techniques. Deputy J. D. Doughtie ("Doughtie") was in charge of the Criminal Investigations Division of the Dare County Sheriff's Department when the various Harborview offenses took place. At trial, Doughtie was never qualified as an expert witness. However, a lay witness may still testify to his opinions, which are rationally based on his perceptions and helpful to a clear understanding of his testimony of the determination of a fact in controversy. N.C. Gen. Stat. § 8C-1, Rule 701 (2003). Also:

> Although a lay witness is usually restricted to facts within his knowledge, "if by reason of opportunities for observation he is in a position to judge . . . the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion."

State v. Lindley, 286 N.C. 255, 257-58, 210 S.E.2d 207, 209 (1974) (citations omitted) (quoting *State v. Brodie*, 190 N.C. 554, 130 S.E. 205 (1925)).

While testifying, Doughtie explained why it is rare to find useful fingerprints and why it is unnecessary to conduct a search for fingerprints when eyewitnesses are involved. As the officer in charge of the Criminal Investigations Division, Doughtie was in a position to review the surrounding facts more accurately than anyone else and his testimony aided the jury in understanding why fingerprints were not recovered from the stolen property in this case. As such, the trial court did not err in allowing Doughtie to present his lay opinion testimony regarding fingerprinting techniques.

V.

Defendant argues that his motion to dismiss should have been granted because the State failed to carry its burden of proof in proving the various offenses. "In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 78-79, 265 S.E.2d at 169. In ruling on a defendant's motion to dismiss, the evidence is viewed in the light most favorable to the State and the State is allowed every reasonable inference. *See id.*

In this case, defendant was convicted of felonious breaking and entering, felonious larceny, and felonious possession of stolen goods. "The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986). The crime of larceny requires the " ' "taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use." ' " *State v. Boykin*, 78 N.C. App. 572, 576, 337 S.E.2d 678, 681 (1985) (citations omitted). The crime of larceny is a felony without regard to the value of the property where, *inter alia*, the larceny is committed pursuant to a breaking or entering, N.C. Gen. Stat. § 14-72(b)(2) (2003), or if the property stolen is a firearm, N.C. Gen. Stat. § 14-72(b)(4). A person is guilty of felonious possession of stolen goods if that person possesses goods stolen or taken pursuant to a larceny or felony and that person knows or has reasonable grounds to believe the property was taken or stolen pursuant to a felony. N.C. Gen. Stat. § 14-71.1 (2003); *see also* N.C. Gen. Stat. § 14-72(c) (2003).

The doctrine of recent possession " 'allows the jury to infer that the possessor of certain stolen property is guilty of larceny.' " *State v. Osbourne*, 149 N.C. App. 235, 238, 562 S.E.2d 528, 531, *per curiam aff'd*, 356 N.C. 424, 571 S.E.2d 584 (2002) (quoting *State v. Pickard*, 143 N.C. App. 485, 487, 547 S.E.2d 102, 104 (2001)). This Court has also explained that under the doctrine of recent possession, the State must show three things: "(1) that the property was stolen; (2) that defendant had possession of this same property; and (3) that defendant had possession of this property so soon after it was stolen and

under such circumstances as to make it unlikely that he obtained possession honestly." *Id.*

Under the doctrine of constructive possession, " '[p]roof of nonexclusive, constructive possession is sufficient.' " *Id.* (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001)). In fact, " '[w]here sufficient incriminating circumstances exist, constructive possession of the [property] may be inferred even where possession of the premises is nonexclusive.' " *Id.* at 239, 562 S.E.2d at 531 (quoting *State v. Kraus*, 147 N.C. App. 766, 770, 557 S.E.2d 144, 147 (2001)).

While most of the State's evidence is circumstantial, that alone will not allow a motion to dismiss to be granted. *See State v. Stokesberry*, 28 N.C. App. 96, 98, 220 S.E.2d 214, 216 (1975). As discussed below, we conclude the evidence submitted by the State was sufficient to survive a motion to dismiss on all of the charges.

802 Harborview Drive

[5] Defendant was convicted of felonious possession of stolen goods from Freeman's residence at 802 Harborview Drive. Defendant contends that there is insufficient evidence to establish that he had either constructive or recent possession of the goods and further that there is no evidence that he knew or had reason to believe that the items were stolen pursuant to a breaking or entering.

The State's evidence tends to show that in early October 2001, Freeman noticed that a number of items, including a green backpack, BB gun, a Coleman stove, and various knives and blades, were missing from his garage. Several of these items were found under Quinlan's home, where defendant stayed, on 16 October 2001 including the BB gun and knives. On 20 October, the remaining items including the backpack and stove were found at 471 Harborview Drive along with a jacket and wallet, both of which were similar to items observed to have been possessed by defendant. In addition, the wallet contained a card identifying defendant and defendant had been seen wearing the green backpack. We conclude that this is sufficient circumstantial evidence that defendant had constructive and recent possession of the items stolen from 802 Harborview Drive following their disappearance. Moreover, the fact that the items stolen from Freeman were located along with other items stolen pursuant to separate breaking and entering incidents, and evidence defendant had accessed 471 Harborview Drive, where several of Freeman's items

were found, via a breaking and entering is circumstantial evidence that defendant knew, or had reason to believe, that the items he possessed were obtained through a breaking and entering.

719 Harborview Drive

[6] Defendant was convicted of felonious breaking and entering, felonious larceny, and felonious possession of stolen goods from 719 Harborview Drive, namely bottles of liquor. Defendant contends only that the State failed to prove he did not have permission to access 719 Harborview Drive. He relies on his argument addressed above that the only evidence that he had no permission to enter was inadmissible hearsay. As we have already rejected this argument, we need not address it here. We do note, however, that Gross, the owner of 719 Harborview Drive, maintained that defendant did not have permission to enter the property and the stolen liquor bottles were later found in defendant's constructive and recent possession. Furthermore, defendant admitted at the time of his arrest to having broken into the house.

701 Harborview Drive

[7] Defendant was convicted of the felonious possession of a stolen Hoyte compound bow from Creekmore's garage at 701 Harborview Drive. This item was recovered from 471 Harborview Drive, the site of another break-in linked to defendant, along with other stolen property and defendant's wallet and parka. As we have discussed above, this is substantial circumstantial evidence that defendant had constructive and recent possession of the stolen bow, and did so knowing, or having reason to believe that it was stolen during a breaking and entering.

605 Harborview Drive

[8] Defendant was convicted of feloniously possessing stolen goods from the Walker's residence at 605 Harborview Drive. These items included a black powder rifle, a hunting rifle and scope, and a compound bow. These items were recovered from Quinlan's residence where defendant had been staying. They were initially found by Freeman who discovered his own stolen property and noticed a case with Walker's name on it. We conclude that evidence the Walker's property was found in the location defendant had been staying, along with other stolen property belonging to Freeman and linked to defendant through his constructive possession of other items stolen from Freeman and found at 471 Harborview Drive, is sufficient to

establish defendant's recent and constructive possession of Walker's stolen firearms and compound bow for purposes of surviving a motion to dismiss.

471 Harborview Drive

[9] Defendant was convicted of felonious breaking and entering and felonious larceny at 471 Harborview Drive. Trent, the property's caretaker, testified that defendant did not have permission to enter the house. He further testified that on 20 October 2001 when he arrived at the property, a door had been kicked in and it appeared someone had tried to gain entry through a window by using a BB gun. Inside, the house was in disarray and various canned goods and sodas were missing. In addition, he found a number of the items stolen from other residences and the items linked to defendant. Defendant contends only that there was insufficient evidence that he did not have permission to enter the house at 471 Harborview Drive. However, the evidence that defendant did not have permission to enter and managed only to do so through kicking in a door and entering through a locked window is sufficient to support a finding that he did not have consent to enter 471 Harborview Drive. Accordingly, the trial court did not err in denying defendant's motion to dismiss all the charges.

VI.

The trial court refused defendant's motion to instruct the jury on the lesser-included offenses of misdemeanor breaking and entering, misdemeanor larceny, and misdemeanor possession of stolen goods in all of the charges against him except in one instance where the trial judge instructed on both felonious and non-felonious breaking or entering and larceny.

" 'In North Carolina, a trial judge must submit lesser included offenses as possible verdicts, even in the absence of a request by the defendant, where sufficient evidence of the lesser offense is presented at trial.' " *State v. Lowe*, 150 N.C. App. 682, 686, 564 S.E.2d 313, 316 (2002) (quoting *State v. Owens*, 65 N.C. App. 107, 110, 308 S.E.2d 494, 497 (1983)). "[T]he trial court is not required to submit lesser degrees of a crime to the jury 'when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.' " *State v. McKinnon*, 306 N.C. 288, 301, 293 S.E.2d 118, 126 (1982) (quoting *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972)). " '[E]vidence giving rise to a reasonable inference to dispute the State's contention,' is sufficient to support an instruction on a

lesser offense." *State v. Hargett*, 148 N.C. App. 688, 692, 559 S.E.2d 282, 286 (quoting *State v. McKinnon*, 306 N.C. at 301, 293 S.E.2d at 127), *disc. review improvidently allowed*, 356 N.C. 423, 571 S.E.2d 583 (2002).

Breaking and Entering and Larceny

[10] Defendant contends he was entitled to jury instructions on the lesser included offenses of misdemeanor breaking and entering and misdemeanor larceny with respect to his conviction related to the 719 Harborview Drive property owned by Gross. Specifically, defendant contends there was conflicting evidence implicating Billy Thompson in the breaking and entering and larceny, as Thompson had been seen wandering the neighborhood and that two stolen items were recovered directly from him. This is not, however, evidence requiring the submission of the lesser included offenses, but rather evidence that defendant committed no crime at all. *See State v. Black*, 21 N.C. App. 640, 644, 205 S.E.2d 154, 156, *aff'd*, 286 N.C. 191, 209 S.E.2d 458 (1974) (evidence defendant committed no crime at all does not support the submission of lesser included offenses to the jury).

[11] However, we note that although defendant has not raised this argument before this Court, there was evidence in the record in that defendant admitted breaking into the 719 Harborview Drive property owned by Gross but did so solely with the intention of finding a place to sleep, not to commit a larceny or other felony. *See* N.C. Gen. Stat. § 14-54 (2003). This evidence necessitates an instruction on the lesser included offense of misdemeanor breaking and entering and entitles defendant to a new trial solely on this charge. As to the larceny charge, however, defendant was not entitled to an instruction on misdemeanor larceny as the evidence is uncontradicted that if a larceny occurred at 719 Harborview Drive, it occurred pursuant to a breaking and entering, whether felonious or misdemeanor, making any such larceny a felony. *See* N.C. Gen. Stat. 14-72(b)(2) (providing that any larceny committed pursuant to N.C. Gen. Stat. § 14-54, the statute governing both felonious and misdemeanor breaking and entering, is a felony without regard to the value of items stolen). Therefore, defendant is entitled to a new trial solely on the charge of felonious breaking and entering in case number 01CRS 51215.

Possession of Stolen Goods

[12] Defendant also contends that the trial court was required to submit the lesser included offense of misdemeanor possession of stolen

goods to the jury in each case. Specifically, defendant contends that there was insufficient evidence that he knew or had reason to believe the stolen property was obtained pursuant to a breaking or entering. Defendant, however, presented no conflicting evidence that he did not know or did not have reason to believe the items were stolen pursuant to a breaking or entering. *Compare Hargett*, 148 N.C. App. at 692, 559 S.E.2d at 286 (defendant entitled to instruction on misdemeanor possession of stolen goods where defendant presented evidence that the items had been given to him by a third person).

Instead, in this case, defendant relies solely on his assertion that the jury accepted a portion of the State's case and rejected other parts of the State's case by acquitting him of some breaking and entering charges. "The mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *Black*, 21 N.C. App. at 643-44, 205 S.E.2d at 156. Thus, under the State's evidence, if defendant possessed stolen property, he did so with the knowledge, or reason to believe, the property was stolen pursuant to a breaking or entering. *See id.* Therefore, defendant was not entitled to an instruction on the lesser included offense of misdemeanor possession of stolen goods where there was no conflicting evidence. Accordingly, because defendant was entitled to an instruction on the lesser included offense of misdemeanor breaking and entering, we grant defendant a new trial on the breaking and entering charge in case number 01CRS 51215, but conclude there was no error in the remaining convictions.

New trial in case number 01CRS 51215.

No error in case numbers 01CRS 51220, 02CRS 2469, 02CRS 2470, and 02CRS 2471.

Judges WYNN and TYSON concur.

CHICK v. CHICK

[164 N.C. App. 444 (2004)]

MELINDA B. CHICK, PLAINTIFF v. RANDY CHICK, DEFENDANT

No. COA03-573

(Filed 1 June 2004)

1. Child Support, Custody, and Visitation— custody—jurisdiction—home state

The trial court did not err by declining jurisdiction over this child custody matter and by concluding that Vermont was the home state of the children, because: (1) the minor children were not living in North Carolina for the required six months prior to the commencement of plaintiff mother's custody proceedings, and except for a six-week period in January and February 2002, the minor children lived continuously in Vermont from August 2001 to July 2002; (2) the totality of circumstances shows the six-week absence was merely a temporary absence, and in light of the numerous relocations and decisions, the parties' intent at the specific time they retrieved the minor children standing alone should not control the determination of whether the absence was temporary; (3) the length of absence from Vermont was a relatively short period of time, especially when compared to the fact that the minor children had spent almost the entire previous year in Vermont; and (4) Vermont's exercise of jurisdiction is proper under both North Carolina's UCCJEA provisions and Vermont's UCCJA provisions.

2. Child Support, Custody, and Visitation— custody—notice—substantial conformity

The trial court did not err in a child custody case when it found that Vermont had issued its order in substantial conformity with the UCCJA and that plaintiff mother had notice and was aware of the pendency of the issue of jurisdiction before the Vermont court on 18 September 2002, because: (1) plaintiff conceded that the notice of hearing stated in all capital letters that both parties must appear and failure to appear meant it was possible for the court to issue parental rights and responsibilities based on the evidence presented by the other party; and (2) plaintiff responded to defendant's motion and specifically raised the issue of Vermont's jurisdiction over the custody issues in light of the North Carolina proceeding plaintiff had filed.

3. Trials— recordation—conversation between courts

The trial court did not err in a child custody case by failing to make a record of the conversation which occurred between the North Carolina court and the Vermont court as required by N.C.G.S. § 50A-110(d), because: (1) the Vermont order is a sufficient record of the communication between Vermont and North Carolina; and (2) nothing in the statute specifies which court taking part in the conversation has the affirmative duty to make the record.

4. Child Support, Custody, and Visitation— custody—use of law enforcement

The trial court erred by authorizing the use of law enforcement officials to effectuate a registered child custody determination made by the home state of Vermont exercising jurisdiction in substantial conformity with our UCCJEA, because: (1) the trial court remains limited, as it was under the UCCJA, to traditional contempt proceedings; (2) the circumstances allowing for the use of law enforcement officials are not present in this case; and (3) there is no statutory basis for invoking the participation of law enforcement officers in producing the children.

Appeal by plaintiff from orders entered 11 October 2002 by Judge Joyce A. Hamilton and 28 January 2003 by Judge Jennifer M. Green in Wake County District Court. Heard in the Court of Appeals 18 March 2004.

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

Oliver & Delaney, P.A., by Sean Delaney and James A. Oliver, for defendant-appellee.

CALABRIA, Judge.

Melinda B. Chick ("mother") appeals orders entered in Wake County District Court directing law enforcement officials to assist Randy Chick ("father") in obtaining custody of their minor children and declining jurisdiction over the matter of custody of the minor children on the grounds that the State of Vermont had continuing and exclusive jurisdiction over this matter. We affirm in part and vacate in part.

On 3 September 1999, mother and father (the "parties") were married in North Carolina and are currently the natural parents of two

minor children. Due to financial hardship, mother and the minor children moved to Vermont in August of 2001 to live with father's family. Father, who was serving in the United States Marine Corps and stationed at Camp Lejeune, remained in North Carolina. In late November of 2001, father went to Vermont on leave to visit with mother and the minor children. The parties returned to North Carolina to obtain free marital counseling at Camp Lejeune. The minor children remained in Vermont until the first week in January when the parties decided to bring the minor children back to North Carolina. Six weeks later, in February of 2002, mother and the minor children returned to Vermont and resumed living with the minor children's paternal grandparents. On 26 February 2002, they were joined by father who went on terminal leave from military service.

Mother was unhappy living in Vermont and wished to return with the minor children to North Carolina where her family was located. On 1 July 2002, mother picked up the minor children from father's place of work and informed him that she may take the minor children to McDonald's before going home. Mother then returned to the parties' residence, packed her and the minor children's belongings and left Vermont with the minor children. In a note to father, she stated the following:

> I am sorry it had to come to this, but I knew you would never willingly let the kids go with me. I am not trying to keep them from you. We will work out some kind of arrangement. I will call you when I get to NC. No one knows I was doing this, so my work will probably call here. Again I am very sorry. I just hope you understand.

The following day, mother filed for custody of the minor children in Wake County District Court (the "North Carolina court"). That same day, father filed for divorce and sought custody of the minor children in the Family Court of Vermont in Windsor County (the "Vermont court").

The Vermont court declined to issue a custody order on 2 July 2002 after noting the possible jurisdictional conflict between Vermont and North Carolina. However, the following day, father requested reconsideration of the court's ruling, and the Vermont court, after noting it had reserved ruling on father's motion pending receipt of further information, issued an order granting father's "request for temporary sole physical and legal rights and responsibilities of the parties' two minor children." In addition, the Vermont court expressly

asserted jurisdiction over the children. On 30 July 2002, father filed a motion to enforce the temporary custody order entered by the Vermont court on 3 July 2002. The Vermont court calendared a hearing for father's motion on 18 September 2002.

On 13 August 2002, mother filed a motion in Wake County asking the North Carolina court to determine the existence and priority of jurisdiction. In addition, mother moved to dismiss father's complaint in Vermont on the grounds that no summons was delivered when she was served on 24 July 2002, and mother argued Vermont should defer to the pending proceeding in North Carolina. On 16 September 2002, the North Carolina court issued an *ex parte* order prohibiting the removal of the minor children from Wake County until 7 October 2002, the date for the hearing on mother's motion to determine jurisdiction.

On 18 September 2002, the Vermont court heard arguments on father's motion for custody. The Vermont court awarded temporary custody to father in a written order filed 24 September 2002. On 8 October 2002, after the North Carolina court refused to extend the *ex parte* order prohibiting the removal of the minor children from North Carolina, the Vermont court entered an order to enforce custody and directed law enforcement officials to assist in the return of the minor children. On 9 and 10 October 2002, the North Carolina court heard arguments on mother's motion to determine the priority and existence of jurisdiction and, the following day, issued an order directing local law enforcement officials to assist father in obtaining custody of the minor children from mother. In a separate order, the North Carolina court also declined jurisdiction and deferred to orders entered by the Vermont court.

Mother appeals, asserting the North Carolina court erred in (I) declining jurisdiction over the custody dispute; (II) concluding mother received proper notice of the Vermont court's 18 September 2002 hearing concerning custody and jurisdiction; (III) failing to make a proper record of communications with the Vermont court concerning the jurisdictional dispute; and (IV) ordering the use of law enforcement officials to return the children to Vermont.

I. Jurisdiction

[1] Mother asserts the North Carolina court erred in declining jurisdiction over the custody matter because (1) the minor children had not met the home state requirement and (2) father admitted Vermont

did not meet that requirement. Mother contends North Carolina, which had significant connections with the minor children, is the state which should have jurisdiction. Nonetheless, mother candidly concedes that "the Vermont court could . . . issue its [18 September custody] order . . . if Vermont had home state jurisdiction under the UCCJA, since such jurisdiction trumps all other types of jurisdiction[.]" We hold both courts correctly concluded Vermont was the home state of the children; therefore, the North Carolina court properly declined jurisdiction over the matter of custody of the minor children.

Vermont, which has not adopted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), has adopted the Uniform Child Custody Jurisdiction Act ("UCCJA"). *See* 15 V.S.A. §§ 1031-1051 (2004). Under both North Carolina's UCCJEA and Vermont law, jurisdictional primacy is given to the home state of a minor child. *See* N.C. Gen. Stat. § 50A-201 (2003); *Shute v. Shute*, 158 Vt. 242, 607 A.2d 890 (1992). The home state is "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement[[1]] of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7) (2003).[2] "A period of temporary absence of any of the mentioned persons is part of the period." *Id.* Where the child's home state is a state other than North Carolina, North Carolina may make child-custody determinations only under limited circumstances. N.C. Gen. Stat. § 50A-201.

Initially, we note there is no question that the minor children were not living in North Carolina for the required six months prior to the commencement of mother's custody proceedings; therefore, North Carolina is not the home state. It is likewise uncontested that, save for the six-week period in January and February of 2002, the minor children lived continuously in Vermont from August 2001 to July 2002. Accordingly, either Vermont is the children's home state or there is no home state. Where there is no home state, a court may look to which state has the most significant connections to the child. *See* N.C. Gen. Stat. § 50A-201(a)(2) (2003). Whether Vermont qualifies

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1. Commencement is defined as "the filing of the first pleading in a proceeding." N.C. Gen. Stat. § 50A-102(5) (2003). In the instant case, the proceedings were initiated simultaneously as they were both filed 2 July 2002. Vermont's Supreme Court has held the same. *See Chick v. Chick*, —— Vt. ——, 844 A.2d 747 (2004).

2. The statutory definition of home state in Vermont is substantially similar to our own and also includes an exception for temporary absences. *See* 15 V.S.A. § 1031(5) (2004).

as the home state of the children turns on whether the minor children's six-week absence constituted a "temporary absence."[3]

As previously noted, temporary absences are considered part of the six-month period immediately preceding the commencement of a child-custody proceeding for purposes of determining a child's home state. N.C. Gen. Stat. § 50A-102(7). The North Carolina court concluded North Carolina was not the home state and Vermont was the home state of the minor children because the "children resided in Vermont for 11 months prior to filing of the complaints except for a period of temporary absence." Mother asserts the six-week period of time in North Carolina by the minor children could not legally qualify as a temporary absence since the parties' return to North Carolina was of an indefinite duration. In so doing, mother contends the parties' intent at the time of the move should determine whether the absence is a temporary absence for purposes of home state determinations.

While the issue of whether an absence from a state amounted to a temporary absence has previously come before this Court, we have decided this issue on a case-by-case basis. *See, e.g.*, *Pheasant v. McKibben*, 100 N.C. App. 379, 384, 396 S.E.2d 333, 336 (1990). Some courts in sister states have adopted certain tests for determining whether an absence from a state was a temporary absence. These tests include (1) looking at the duration of absence, (2) examining whether the parties intended the absence to be permanent or temporary, and (3) adopting a totality of the circumstances approach to determine whether the absence was merely a temporary absence. *See S.M. v. A.S.*, 938 S.W.2d 910 (Mo. App. 1997). We deem the third option to be the most appropriate choice for several reasons. First, it comports with the approach taken by North Carolina courts in determining the issue of whether an absence was temporary on the basis

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3. Mother asserts father conceded Vermont did not have home state jurisdiction because (1) father's 2 July 2002 filing does not expressly argue Vermont is the home state and (2) father's 3 July 2002 filing states "while i[t] may be true that Vermont does not meet the technical requirements of the definition of 'home state' . . ., it comes closer tha[n] any other state." Assuming *arguendo*, father's 3 July 2002 filing did concede Vermont did not have home state jurisdiction, the determination of whether a state meets the statutory definition of a child's home state is a legal conclusion within the province of the courts. *See Hart v. Hart*, 74 N.C. App. 1, 9-10, 327 S.E.2d 631, 637 (1985). Vermont was not bound to concede its status of home state even if father unequivocally asserted Vermont did not qualify as such. Moreover, while father's 3 July 2002 filing conceded the Vermont court *could* conclude it was not the home state, it expressly contended "that Vermont is the children's home state and therefore jurisdiction [due to its status as home state] is proper[.]"

of the facts presented in each case. Second, it incorporates considerations, such as the parties' intent and the length of the absence, that courts of sister states have found important in making this determination. Third, it provides greater flexibility to the court making the determination by allowing for consideration of additional circumstances that may be presented in the multiplicity of factual settings in which child custody jurisdictional issues may arise.

We now turn to the North Carolina court's conclusion that the six-week period of time spent by the children in North Carolina was a temporary absence from Vermont. The North Carolina court made detailed findings of fact regarding the series of trips between Vermont and North Carolina. These findings include the following:

> 8. In anticipation of relocating to Vermont, in early August 2001, [mother] moved with the minor children to Vermont. They resided in Vermont with [father's] mother and step-father [[father's] parents].
>
> 9. Once in Vermont, [mother] found full-time employment and the children attended daycare. When not in daycare, the children were attended to by [mother] and [father's] parents.
>
> 10. At Thanksgiving of 2001, [father] went to Vermont on leave to visit with [mother] and the children. Near the end of his leave, [father] asked [mother] to return to North Carolina with him so that they could attend marriage counseling at no cost on the military installation.
>
> 11. [The parties] returned to North Carolina in late November 2001. The minor children remained in Vermont in the care of [father's] parents.
>
> 12. Once the parties returned to North Carolina, there were changes to their long term plans. At one point, [father] had decided to reenlist, and his duty station was uncertain, but [mother] hoped it would be in North Carolina. Later, it was decided that [father] would not reenlist, but the parties would stay in North Carolina. They investigated buying a home and securing employment.
>
> . . .
>
> 14. Later in January the parties again began discussing returning to Vermont. [Mother] wanted to stay in North Carolina and [father] wanted to return to Vermont.

15. It was subsequently decided that the parties would return to Vermont.

These findings of fact are not contested and illustrate the parties' intentions vacillated in a relatively short span of time between residing in Vermont, North Carolina, or an unknown state where father might be stationed if he reenlisted. While mother urges this Court to decide the issue of whether the six-week period was a temporary absence solely on the basis of the parties' intent at the time they retrieved the children, we decline to do so because that would ignore the fact that their intentions fluctuated. In light of the numerous relocations and decisions, the parties' intent at the specific time they retrieved the minor children, standing alone, should not control the determination of whether the absence was temporary.

Moreover, adopting mother's argument could produce absurd results. For example, if the parties retrieved the minor children with the intent to remain permanently in North Carolina only to change their minds within a couple of days, mother's test would vitiate Vermont's status as home state. That would be true even if the parties had debated the issue and changed their minds regarding their intentions multiple times, so long as their intent at the precise time of leaving Vermont was to remain in North Carolina. A trial court's determination of whether an absence was temporary should not be solely decided on whimsy or caprice.

In addition, we note the length of absence from Vermont was a relatively short period of time, especially when compared to the fact that the minor children had spent almost the entire previous year in Vermont. While mother states it would "strain logic . . . to call the children's . . . residence in North Carolina a 'temporary absence,' " we note this Court has held ten months outside of North Carolina over a two-year period constituted a temporary absence when it was pursuant to a temporary custody order issued by a Georgia court. *Pheasant v. McKibben*, 100 N.C. App. 379, 396 S.E.2d 333 (1990). In addition, as the North Carolina court noted, a finding of temporary absence is bolstered by this Court's opinion in *Plemmons v. Stiles*, 65 N.C. App. 341, 309 S.E.2d 504 (1983). In *Plemmons*, this Court determined North Carolina was the child's home state when "the minor child resided with the plaintiffs for an almost continuous 15 month period immediately preceding the commencement . . . ." *Id.*, 65 N.C. App. at 344, 309 S.E.2d at 506. We further noted "[t]he child's brief visit to Texas [of three and one-half weeks] during this time period

was not sufficient to prevent such a conclusion." *Id.*[4] We likewise conclude that the minor children's brief period of absence from North Carolina of six weeks during the eleven months they lived in Vermont was not sufficient to prevent the conclusion that Vermont was the home state.

In summary, applying the UCCJEA of this State to these facts, North Carolina in no way can qualify as the home state of the minor children. Additionally, under the same definition Vermont did qualify as the home state of the minor children prior to the bringing of this action. Vermont also qualifies as the minor children's home state under its UCCJA. Not only has Vermont not declined to exercise jurisdiction but to the contrary has firmly exercised jurisdiction over these children. There can be no doubt this exercise of jurisdiction is proper under both North Carolina's UCCJEA provisions and Vermont's UCCJA provisions. Since the provisions of North Carolina's UCCJEA allow for North Carolina, under these facts, to assume significant connection jurisdiction only if there exists no home state and since we have determined Vermont was, in fact, the home state of the minor children, this assignment of error is overruled.

II. Notice

[2] Mother asserts, in the alternative, that even if Vermont was the home state and could conduct the 18 September hearing, "it had not provided the Mother with proper notice of that hearing." Mother argues the only pending motion at the time of 18 September 2002 was father's motion to use law enforcement to enforce the earlier 3 July 2002 order by the Vermont court. Accordingly, mother contends no motion was filed or served concerning issues of jurisdiction over the child-custody determination, and she "had no indication the Vermont court would be issuing any rulings on jurisdiction." Because Vermont

4. Mother argues that *Plemmons* is distinguishable due to (1) the shorter period of absence from the home state, (2) the records and briefs for that case reveal bad faith conduct on the part of the non-custodial parents removing the children from North Carolina, and (3) the parties did not assign error to the issue of whether the period of absence from the home state was a temporary absence. We disagree. The difference in the periods of absence is not significant enough to distinguish *Plemmons* on that ground alone. Moreover, assuming bad faith conduct did exist, this Court neither mentioned it nor relied on it in determining the absence did not vitiate the required six-month period required for North Carolina to be the home state. Finally, if the period of absence did interrupt the six-month period required for North Carolina to be the home state, it would have jurisdictional implications on our authority to decide the issue of custody, and, in the absence of an assignment of error, this Court would address the issue *sua sponte*.

failed to adhere to the notice requirements of its UCCJA provisions, mother asserts, the North Carolina court erred when it "found that Vermont had issued its order in substantial conformity with the UCCJA." This argument fails.

Mother conceded the notice of hearing regarding the 18 September 2002 hearing states in all capital letters as follows: "Both parties must appear. If you fail to appear, it is possible that the court will issue parental rights and responsibilities orders based on the evidence presented by the other party/ies." Moreover, mother responded to father's motion (for which arguments were heard on 18 September 2002) and specifically raised the issue of Vermont's jurisdiction over the custody issues in light of the North Carolina proceeding she had filed. Mother "respectfully request[ed] [the Vermont] court to stay any enforcement of determination as to its jurisdiction and to consult with the appropriate judge presiding over the October 7, 2002 civil session of the Wake County District Court with respect to a determination of jurisdiction in this matter." In light of these facts, it is difficult to entertain mother's arguments that she did not receive notice or was unaware of the pendency of the issue of jurisdiction before the Vermont court on 18 September 2002 at the time of the hearing. This assignment of error is overruled.

III. Record of Communication

[3] Mother asserts the North Carolina court erred by failing to make a record of the conversation which occurred between the North Carolina court and the Vermont court as required by N.C. Gen. Stat. § 50A-110(d) (2003). Mother contends that this failure deprived her of the "protections to litigants under [the UCCJA and UCCJEA] that allow those parties to respond to issues and 'facts' shared between judges in an effort to fully and fairly inform a tribunal of a party's respective position in litigation and correct misassumptions that may be communicated between the courts."

North Carolina General Statutes § 50A-110 (2003) provides, in pertinent part, as follows:

> (a) A court of this State may communicate with a court in another state concerning a proceeding arising under [the UCCJEA].
>
> (b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the commu-

> nication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.
>
> (c) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.
>
> (d) Except as otherwise provided in subsection (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

These statutory provisions "emphasize the role of judicial communications" and "require that a record be made of the conversation and that the parties have access to that record in order to be informed of the content of the conversation." Official Commentary, N.C. Gen. Stat. § 50A-110. Relevant to the disposition of the issue in this case, a "record includes . . . a memorandum . . . made by a court after the communication." *Id.*

In the instant case, mother requested the Vermont court "consult with the appropriate judge presiding over the October 7, 2002 civil session of the Wake County District Court with respect to a determination of jurisdiction in this matter." The Vermont court, in its order, noted it had contacted the North Carolina court and the conversation disclosed that the facts alleged by the parties in their respective cases were "substantially similar." The order of the Vermont court also noted the conversation covered certain aspects of the procedural history of the proceeding in North Carolina.

We hold the Vermont order is a sufficient record of the communication between Vermont and North Carolina. First, the factual issues covered in the conversation were those alleged by and known to mother. Indeed, it appears that her version of the events leading up to the proceedings were considered and adopted as comporting with the facts as alleged by father. Mother does not contest the validity of the procedural history as set out in the Vermont order concerning the North Carolina proceeding. Second, even if the statute required more than the summary of the conversation as included in the Vermont order, the record before this Court indicates that a transcript was made by the court in Vermont, and nothing in the statute or official commentary specifies which court taking part in the conversation has the affirmative duty to make the record. On the contrary, it is sufficient if either court makes a record and that record is made avail-

able. Finally, the North Carolina court stated it was "basing [its] order . . . not necessarily on . . . any conversation with the [Vermont] judge, but *on a review of the Vermont order and the findings of fact contained therein.*" In light of the North Carolina court's express declaration that the communication between the courts was not a factor in deciding the jurisdictional issue, we fail to see how mother was deprived of "an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before [the] determination [was] made." Official Commentary, N.C. Gen. Stat. § 50A-110.

We make one final observation regarding the record of the communication made in this case: when making a record as contemplated by N.C. Gen. Stat. § 50A-110, the better practice is to include in the record greater detail than the minimum level strictly required by the statute. Generous disclosure regarding a communication between courts better enables the parties to properly prepare for and respond to the issues raised and discussed in the communication.

IV. Use of Law Enforcement Officials

[4] Mother asserts the North Carolina court erred in authorizing the use of law enforcement officials to assist father in obtaining custody of the minor children. Mother's first argument relates to the fact that the Vermont 8 October 2002 order concerning use of law enforcement officials was issued two weeks before mother was noticed for a hearing on 24 October 2002. Nevertheless, mother was properly noticed on 26 August 2002 concerning the 18 September 2002 hearing for plaintiff's motion to enforce the custody order. Moreover, the North Carolina court's order of enforcement was based upon the 24 September 2002 order and not the 8 October 2002 order by the Vermont Court.[5]

Mother's second argument relates to her assertion that "the record does not reflect any compliance by the Father with . . . [N.C. Gen. Stat. § 50A-305] . . . requiring notice to the Mother . . . twenty

5. Indeed, at the hearing, the North Carolina court stated as follows with regards to its enforcement order:

> [The 24 September custody order issued by Vermont] found as a finding, and after application of Vermont law, that Vermont is the home state of the minor child—minor children. I do, in fact, find that Vermont is the home state of the minor children. That that order dated September 24, based on the hearing September 18, was entered substantially in compliance with the UCCJA and the UCCJEA. That order is enforceable, upon proper registration by this Court . . . [and] I will authorize use of law enforcement to enforce that order if, in fact, the children are not returned to his custody pursuant to that order.

days . . . before registration is effective[.]" North Carolina General Statutes § 50A-305 provides for the manner in which a party registers in this State a child-custody determination issued by a court of another state. To register such a child-custody determination in this State, the party seeking registration must provide the following materials to the appropriate court:

> (1) A letter or other document requesting registration;
>
> (2) Two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and
>
> (3) Except as otherwise provided in G.S. 50A-209, the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child-custody determination sought to be registered.

N.C. Gen. Stat. § 50A-305(a). Once the registering court receives these documents, the court (1) files the child-custody determination as a foreign judgment with the accompanying documents and information and (2) directs the party seeking registration to serve notice to certain, specified individuals. N.C. Gen. Stat. § 50A-305(b) (2003). This notice must state that the registered determination, as of its date of registration, is enforceable in the same manner as a North Carolina child-custody determination. N.C. Gen. Stat. § 50A-305(c)(1) (2003). Once the required notice is served, a twenty-day period begins, during which the following, limited challenges to the registration are available:

> (1) The issuing court did not have jurisdiction under Part 2;
>
> (2) The child-custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under Part 2; or
>
> (3) The person contesting registration was entitled to notice, but notice was not given in accordance with the standards of G.S. 50A-108 in the proceedings before the court that issued the order for which registration is sought.

N.C. Gen. Stat. § 50A-305(d) (2003). At the earlier of the passing of the twenty-day window or a hearing in which the North Carolina court rejects the limited grounds upon which a party may oppose registration, the registered order is confirmed. N.C. Gen. Stat. § 50A-305(e)

(2003). Thereafter, the party opposing the registered order may only challenge the order by showing it has been vacated, stayed, or modified by a court properly exercising jurisdiction. N.C. Gen. Stat. § 50A-308(d)(2) (2003).

Thus, contrary to mother's contention, nothing in the statute requires that the party seeking registration wait twenty days before registration is effective. Rather, the twenty-day period provides the time frame during which a party may oppose registration on the grounds provided for in the statute or be limited to the sole ground provided in N.C. Gen. Stat. § 50A-308(d)(2).[6]

While it appears likely that mother did not receive notice technically complying with the provisions of N.C. Gen. Stat. § 50A-305 prior to the hearing, it is clear that mother received actual notice of the proceedings and was present when the North Carolina court held a hearing on both "[mother's] motion for North Carolina to assume jurisdiction, [and father's] motion . . . to enforce the Vermont order." At that hearing, mother made no objection or argument predicated on a lack of notice with respect to father's motion to enforce. This is true despite the fact that father specifically stated "we waive any objection to any notice or anything like that on the hearing. *So if they do the same, so we don't have to deal with that later.*" Thereafter, mother proceeded with the hearing both on her motion regarding priority and existence of North Carolina's jurisdiction as well as father's motion to enforce the child-custody determination by the Vermont court.

Moreover, the North Carolina court received evidence of and considered the grounds upon which mother could challenge the registration of the Vermont child-custody determination and rejected them. As the North Carolina court held at the hearing and we have approved of on appeal, Vermont had jurisdiction over the child-custody determination. Likewise, mother received the notice comporting with both our UCCJEA provisions and Vermont's UCCJA provisions regarding the 18 September 2002 hearing and 24 September 2002 order. Nothing in the record indicates the Vermont order has been stayed, modified, or vacated. In short, the Vermont order was registered, mother was afforded a chance to challenge the validity of that order on the bases

6. North Carolina General Statutes § 50A-308(d)(2) references N.C. Gen. Stat. § 50A-304. We take judicial notice that the process by which the order is registered is found in N.C. Gen. Stat. § 50A-305, and the reference to N.C. Gen. Stat. § 50A-304 appears to be a typographical error.

provided for under our UCCJEA, and those challenges failed. We hold the North Carolina court appropriately determined the 24 September 2002 order should be enforced.

Mother also contends that neither Vermont's UCCJA provisions nor our UCCJEA provisions allow for the North Carolina court's use of law enforcement officers to effectuate the return of the children to father. First, even if Vermont did not have the authority to issue enforcement orders under its UCCJA, the North Carolina court would still be entitled to enforce a registered child-custody determination by any means provided for under the UCCJEA. N.C. Gen. Stat. § 50A-306 (2003). Nothing in our statutes indicates our courts must wait for an "enabling" order from another court that properly directs the use of law enforcement. Thus, our review concerns whether the North Carolina court erred in authorizing the use of law enforcement to effectuate a registered child-custody determination made by a home state exercising jurisdiction in substantial conformity with our UCCJEA.

In a previous ruling by this Court, we vacated a trial court's order invoking the use of law enforcement to effectuate the custody determination made by a home state on the grounds that it exceeded its authority under North Carolina's UCCJA. *In re Bhatti*, 98 N.C. App. 493, 391 S.E.2d 201 (1990). "The UCCJEA anticipates a greater enforcement role for law enforcement officers than did the UCCJA." 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.142(e) (5th rev. ed. 2002). Provisions in the UCCJEA clearly approve of the use of law enforcement officials under certain circumstances. *See, e.g.*, N.C. Gen. Stat. §§ 50A-311, -315, and -316. In the absence of those circumstances, however, the trial court remains limited, as it was under the UCCJA, to traditional contempt proceedings. *Bhatti*, 98 N.C. App. at 497-98, 391 S.E.2d at 204. Because the circumstances allowing for the use of law enforcement officials are not present in this case[7] and because we remain "unaware of any statutory basis for

7. Father asserts the UCCJEA does provide for the use of law enforcement officials under N.C. Gen. Stat. §§ 50A-315 and -316. This could be true only if "prosecutor or other appropriate public official" as used in those provisions could be interpreted as including the trial court. Our research reveals that states which have adopted the UCCJEA have frequently omitted these provisions or specified these provisions apply to prosecutors, district attorneys, county prosecuting attorneys, or attorneys general. *See* Unif. Child Custody Jurisdiction & Enforcement Act § 315, 9 U.L.A. 99-100 (Supp. 2004). Moreover, if "other appropriate public official" included the court, N.C. Gen. Stat. § 50A-315(b) could be read as saying "A . . . [court] acting under this section acts on behalf of the court and may not represent any party." We decline to adopt father's proposed reading of these provisions.

invoking the participation of law enforcement officers in producing the children[,]" we vacate the portion of the North Carolina court's order authorizing the use of law enforcement officials.

Affirmed in part, vacated in part.

Judges McGEE and STEELMAN concur.

THOMAS A. McCORMICK, IN HIS OFFICIAL CAPACITY AS CITY ATTORNEY FOR THE CITY OF RALEIGH, PLAINTIFF v. HANSON AGGREGATES SOUTHEAST, INC., DEFENDANT

No. COA03-630

(Filed 1 June 2004)

1. Declaratory Judgments— government action to resist public records disclosure—improper

It was improper for a city attorney to use a declaratory judgment action to resist disclosure of documents alleged to be public records. Only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request. However, the merits of the city attorney's action would have reached the trial court on defendant's counterclaim to compel disclosure, and the trial court's ruling was addressed on appeal.

2. Public Records— city attorney—law enforcement agency

The Raleigh City Attorney's office qualifies as a public law enforcement agency for purposes of the criminal investigation exception under N.C.G.S. § 132-1.4 (The Public Records Act) because it is responsible under the Raleigh City Charter for investigating, preventing, and solving zoning violations.

3. Public Records— criminal investigation—in camera review required—purpose in preparing documents

The criminal investigation exception of the Public Records Act does not apply solely to ongoing violations of the law. In this case the trial court erred by applying a straight-line rule based on the two-year statute of limitations for misdemeanors. The court

should have conducted an in camera review to determine whether the material was subject to the exception based on the purpose in compiling each withheld document and the definitions found in the statute. Moreover, on remand the court may disclose documents which do not qualify as public records but which could be obtained by normal discovery.

4. Public Records— criminal discovery exceptions—misdemeanors

A city attorney pursuing zoning violations was not entitled to the discovery protections of Chapter 15A, and therefore to a Public Records exception. Chapter 15A is not applicable to misdemeanors. N.C.G.S. § 15A-901.

5. Public Records— city attorney—attorney-client privilege

An order compelling the release of documents by a city attorney was remanded where it was not clear whether the court was acting under the common law privilege or the Public Records Act. Furthermore, the court's application of the rule that confidential documents are subject to disclosure after three years was contrary to the statute in that it focused on the date of the document's creation rather than the date the material was received by the governmental body.

6. Public Records— city attorney—work product—subject to disclosure

A city attorney's work product was subject to disclosure under the Public Records Act unless the individual documents were independently exempted by virtue of the criminal investigation exception.

Appeal by plaintiff Thomas A. McCormick, in his official capacity as City Attorney for the City of Raleigh, and appeal by defendant from judgment filed 19 November 2002 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 February 2004.

City of Raleigh Attorney Thomas A. McCormick, by Associate City Attorney Dorothy K. Leapley, for plaintiff-appellant.

Kennedy Covington Lobdell & Hickman, L.L.P., by A. Lee Hogewood, III, for defendant-appellant.

BRYANT, Judge.

Thomas A. McCormick (the City Attorney), in his official capacity as City Attorney for the City of Raleigh, and Hanson Aggregates Southeast, Inc. (defendant) separately appeal a judgment filed 19 November 2002 ordering the partial disclosure of certain documents compiled by the City Attorney.

The City Attorney filed a complaint dated 26 June 2002 seeking a declaratory judgment from the trial court that certain documents defendant sought to obtain via a public records request on 17 June 2002 were not subject to disclosure. Defendant's public records request sought production of "all 'public records' within the meaning of G.S. § 132-1 that are in the possession or under the control of [the City Attorney's] department and that relate to the property [owned by defendant] located at 5333 Duraleigh Rd., Raleigh and commonly referred to as the Crabtree Quarry." The City Attorney alleged the documents (1) were protected by the rules governing attorney-client privilege and work product and (2) did not qualify as public records based on the criminal investigation exception in N.C. Gen. Stat. § 132-1.4. Background information contained in the complaint included the issuance of a 23 April 2002 order for compliance by the City of Raleigh Zoning Inspector Supervisor directing defendant "to cease removing dirt and borrow from one of the tracts owned by [defendant]." Defendant had appealed the order, and the appeal was pending before the Raleigh Board of Adjustment at the time of the filing of the declaratory judgment action. The City of Raleigh was to appear at the Board of Adjustment appellate hearing to offer evidence in support of the zoning inspector's order.

On 19 July 2002, defendant filed its answer and counterclaim (1) confirming the City Attorney's refusal to produce the requested documents and (2) petitioning the trial court for an order compelling the City Attorney to grant access to the requested records for inspection. The City Attorney moved for judgment on the pleadings on 21 August 2002.

In its 19 November 2002 judgment, the trial court found:

> After reviewing the pleadings, as well as the relevant statutes and decisions, it appears to the Court that the City Attorney attempts to withhold records, utilizing the Criminal Investigation exception (G.S. [§] 132-1.4(3)), created from 1985 to the present, even though **it is undisputed that the City has**

> **never instituted criminal charges against [defendant] or its predecessors for any alleged violation from 1985 through the present day**. A zoning ordinance violation is a violation of a local ordinance and is a misdemeanor punishable under the criminal law. **G.S. [§] 132-1.4(3)[,] (4) and G.S. [§] 14-4(b)**.
>
> A misdemeanor must be prosecuted within two years under G.S. § 15-1, and at this point any alleged zoning ordinance violations **are no longer prosecutable to the extent that they occurred more than two years ago**.

(Emphasis in original). The trial court concluded that the City of Raleigh and the City Attorney qualified as a "public law enforcement agency" responsible for investigating, preventing, or solving violations of law as defined in N.C. Gen. Stat. § 132-1.4(b)(3). The trial court further concluded that the records withheld by the City Attorney pursuant to section 132-1.4 were "not public records as defined in the Public Records Law." In exercising its discretion under N.C. Gen. Stat. § 132-1.4(a), however, the trial court ordered that those records "withheld solely on the basis of G.S. § 132-1.4 . . . which were prepared more than two years prior to October 31, 2002 be produced to [defendant] for inspection and copying." In addition, the trial court ordered the production of "all work product or materials that were withheld by [the City Attorney] based on the attorney-client privilege **that are dated more than three years before October 31, 2002**." (Emphasis in original). Conversely, the trial court denied production of documents: (1) related to any investigation of [defendant's] activities by the City of Raleigh and dated October 31, 2000 or later" and (2) that "are work product or based on the statutory attorney-client privilege to the extent that those documents are dated October 31, 1999 or later." Based on its ruling, the trial court dismissed defendant's counterclaim as moot.

The issues are whether: (I) a declaratory judgment action in this matter was improper; (II) the criminal investigation exception to the Public Records Act applies to the City Attorney's Office and, if so, was properly applied by the trial court; and (III) the trial court erred in its interpretation of the Public Records Act with respect to privileged material and the City Attorney's work product.

I

Declaratory Judgment Action

[1] We first address defendant's argument that the Public Records Act was not designed to allow a government entity to file for a declaratory judgment, thereby forcing the party making the public records request into litigation when it has not yet sought to compel discovery through the courts. *See* N.C.G.S. § 132-9(a) (2003) ("[a]ny person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying"). North Carolina law is silent on the question of whether a government agency may bring a declaratory judgment action under these circumstances. However, we find the following California Supreme Court holding instructive:

> Permitting a public agency to circumvent the established special statutory procedure by filing an ordinary declaratory relief action against a person who has not yet initiated litigation would eliminate statutory protections and incentives for members of the public in seeking disclosure of public records, require them to defend civil actions they otherwise might not have commenced, and discourage them from requesting records pursuant to the Act, thus frustrating the Legislature's purpose of furthering the fundamental right of every person . . . to have prompt access to information in the possession of public agencies. Therefore, we also conclude that the superior court abused its discretion in granting declaratory relief in the action initiated by the city . . . and that the court instead should have sustained petitioner's demurrer to the city's complaint.

Filarsky v. Superior Court, 28 Cal. 4th 419, 423-24, 49 P.3d 194, 195 (2002).

The North Carolina Public Records Act clearly gives the public a right to access records compiled by government agencies. *See News and Observer Publ'g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992) (" 'the legislature intended to provide that, as a general rule, the public would have liberal access to public records' ") (quoting *News and Observer v. State*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984)); N.C.G.S. § 132-1(b) (2003) (the public records compiled by the agencies of North Carolina government "are the property of the people"). "The Public Records Act permits public access to all public

records in an agency's possession 'unless either the agency or the record is specifically exempted from the statute's mandate.' " *Gannett Pacific Corp. v. N.C. State Bureau of Investigation*, 164 N.C. App. 154, 156, — S.E.2d —, — 2004 N.C. App. LEXIS 693, at *3-4 (2004) (citing *Times-News Publishing Co. v. State of North Carolina*, 124 N.C. App. 175, 177, 474 S.E.2d 450, 452 (1996)). Further, the Public Records Act does not appear to allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request. *See* N.C.G.S. § 132-9(a) (2003) ("[a]ny person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying"). We therefore hold, based on the Public Records Act and the policy consideration for disclosure under the act which are very similar to those noted by the Court in *Filarsky*, that the use of a declaratory judgment action in the instant case was improper.

However, even in the absence of the City Attorney's declaratory judgment action, the merits of this case would have reached the trial court since defendant counterclaimed to compel disclosure. *See Jennette Fruit v. Seafare Corp.*, 75 N.C. App. 478, 482, 331 S.E.2d 305, 307 (1985) ("a counterclaim survives the dismissal of the plaintiff's original claim"). Thus, we feel compelled to address the trial court's ruling on the merits, as the trial court would undoubtedly enter identical findings and conclusions upon a reversal of the declaratory judgment action in conjunction with a remand by this Court on defendant's counterclaim (previously dismissed as moot).

II

Criminal Investigation Exception

Both sides to this litigation take issue with the trial court's application of the criminal investigation exception to the materials withheld by the City Attorney. Defendant contends the City Attorney does not qualify as a "public law enforcement agency" under the statute, whereas the City Attorney takes issue with the trial court's application of the two-year statute of limitations for misdemeanors and contends the materials were further protected by Chapter 15A.

N.C. Gen. Stat. § 132-1.4 provides for the protection of criminal investigations and intelligence information and states in pertinent part:

(a) Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information compiled by public law enforcement agencies are not public records as defined by G.S. 132-1. Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information may be released by order of a court of competent jurisdiction.[1]

(b) As used in this section:

(1) "Records of criminal investigations" means all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements.

(2) "Records of criminal intelligence information" means records or information that pertain to a person or group of persons that is compiled by a public law enforcement agency in an effort to anticipate, prevent, or monitor possible violations of the law.

(3) "Public law enforcement agency" means a municipal police department, a county police department, a sheriff's department, a company police agency commissioned by the Attorney General pursuant to G.S. 74E-1, et seq., and any State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law.

(4) "Violations of the law" means crimes and offenses that are prosecutable in the criminal courts in this State or the United States and infractions as defined in G.S. 14-3.1.

N.C.G.S. § 132-1.4(a)-(b) (2003).

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1. Such discretionary disclosure of non-public records by the trial court must be governed by "one of the procedures already provided by law for discovery in civil or criminal cases." *News and Observer v. State*, 312 N.C. at 277, 322 S.E.2d at 135.

A

Public Law Enforcement Agency

[2] The City Attorney's Office thus qualifies as a "public law enforcement agency" for purposes of the criminal investigation exception if it carries the "responsib[ility] for investigating, preventing, or solving violations of the law."[2] N.C.G.S. § 132-1.4(b)(3) (2003). Because the statute applies to all "crimes and offenses that are prosecutable in the criminal courts in this State or the United States and infractions as defined in G.S. 14-3.1," violations of zoning ordinances qualify as "violations of the law." N.C.G.S. §§ 132-1.4(b)(4), 14-4 (2003) (violations of local ordinances punishable as misdemeanors); David M. Lawrence, *Public Records Law for North Carolina Local Governments* 108 (Institute of Government 1997) [hereinafter *Public Records*] ("if violation of a statute, ordinance, or regulation can cause the violator to be answerable in a criminal proceeding or in an infraction proceeding, it is a *violation of the law* as defined in G.S. 132-1.4"). As the City Attorney's Office is responsible for investigating, preventing, and solving zoning violations, *see* Raleigh City Charter § 5.6 (the City Attorney has the duty "to prosecute and defend all suits-at-law or in equity in which the City of Raleigh may become the plaintiff or defendant") and § 10-2152(4) (granting criminal enforcement powers over misdemeanors and infractions), it qualifies as a "public law enforcement agency" under section 132-1.4, *see Public Records* 108 ("any organizational unit within a county or city that is responsible for enforcement of a statute, ordinance, or regulation that carries misdemeanor or infraction penalties is capable of generating records that are covered by the statute").

B

Continuing Investigation

[3] Having ruled that the criminal investigation exception to the Public Records Act is applicable to investigations conducted by the City Attorney's Office, we now turn to the City Attorney's contention that the trial court erred in ordering the production of those records "withheld solely on the basis of G.S. § 132-1.4 . . . which were prepared more than two years prior to October 31, 2002." Specifically, the City Attorney argues that, in doing so, the trial court failed to consider whether production of the material could "compromise ongoing or future investigations."

2. Contrary to defendant's assertion in its brief to this Court, this is a legal, not a factual determination.

As is clear from the plain words of the statute, the criminal investigation exception does not apply solely to ongoing violations of the law. The statute also speaks to "attempt[s] to prevent . . . violations of the law," N.C.G.S. § 132-1.4(b)(1), (3) (2003), and "effort[s] to anticipate . . . or monitor possible violations of the law," N.C.G.S. § 132-1.4(b)(2) (2003). The statute thus contemplates situations involving investigative reports compiled prior to any actual violations. Furthermore, as observed in a publication by the North Carolina Institute of Government, North Carolina's Public Records Act "does not distinguish between active and inactive or closed investigations." *Public Records* 110. Considering the many underlying purposes for the criminal investigation exception—protecting investigative techniques, informant identities, and reputations of persons investigated but not charged, and encouraging citizens to volunteer information—"closing an investigation [should have] no effect on the status of the records of that investigation." *Public Records* 111; *see also News and Observer v. State*, 312 N.C. at 282-83, 322 S.E.2d at 138 (noting as rationale for exemption of criminal investigation reports: their common reliance on hearsay, opinions, and conclusions of investigators; the protection of investigative techniques and confidentiality of government informants; and the impairing implications for future investigations, including stifling witnesses' willingness to "respond candidly"). *See also Gannett*, 164 N.C. App. at 161, — S.E.2d at —, 2004 N.C. App. LEXIS at *13 (holding criminal intelligence records of completed SBI investigation not public records subject to disclosure). Accordingly, we agree with the City Attorney that the trial court erred in adopting a straight-line rule through the application of the 2-year statute of limitations for misdemeanors. In light of the broad scope and purposes behind the criminal investigation exception, the trial court should have conducted an *in camera* review, as requested by the City Attorney, to properly determine, based on the purpose in compiling each withheld document and the definitions for "records of criminal investigations" and "records of criminal intelligence information" found in sections 132-1.4(b)(1)-(2), whether the material was subject to the exception.[3]

With respect to documents on remand that the trial court may conclude do not qualify as public records under section 132-1.4, we observe that section 132-1.4(a) grants the trial court the discretion to nevertheless disclose such documents if they could be obtained by

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3. We note that, in its brief to this Court, defendant also advocates the need for an *in camera* review.

defendant pursuant to the normal rules of discovery. *See News and Observer v. State*, 312 N.C. at 277, 322 S.E.2d at 135.

C

Chapter 15A Protections

[4] The City Attorney contends he was further entitled to the protections granted by the discovery rules of Chapter 15A governing the North Carolina Rules of Criminal Procedure. We disagree.

In addition to the provisions listed above, the criminal investigation exception to the Public Records Act provides:

> (h) Nothing in this section shall be construed as requiring law enforcement agencies to disclose the following:
>
> (1) Information that would not be required to be disclosed under Chapter 15A of the General Statutes.

N.C.G.S. § 132-1.4(h)(1) (2003). The City Attorney's Office, however, is not subject to this provision because zoning violations, prosecutable only as misdemeanors, fall within the jurisdiction of the district court. Chapter 15A, which is subject to the superior court's jurisdiction, is therefore not applicable. *See* N.C.G.S. § 7A-271(a) (2003) ("[t]he superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article"); N.C.G.S. § 7A-272(a) (2003) ("the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony"); N.C.G.S. § 15A-901 (2003) ("[t]his Article applies to cases within the original jurisdiction of the superior court"). Moreover, the Official Commentary to N.C. Gen. Stat. § 15A-901 notes:

> As cases in district court are tried before the judge, and usually on a fairly expeditious basis, the Commission decided there was no need at present to provide for discovery procedures prior to trial in district court. As misdemeanors tried in superior court on trial de novo have already had a full trial in district court, there is little reason for requiring discovery after that trial and prior to the new trial in superior court.
>
> This Article, then, applies to felonies and misdemeanors in the original jurisdiction of the superior court.

N.C.G.S. § 15A-901 official commentary (2003). Consequently, this assignment of error is overruled.

III

We next consider whether the trial court erred in its interpretation of the Public Records Act with respect to privileged material and the City Attorney's work product.

Privilege

[5] Defendant contends the trial court erred in failing to apply the limited attorney-client privilege outlined in N.C. Gen. Stat. § 132-1.1(a) when it denied disclosure of "attorney-client materials created within three years from October 31, 2002 in this or any other proceeding." Specifically, defendant argues the trial court: (1) did not apply the statutory factors in determining privilege for purposes of a public records request and (2) erred in setting a fixed three-year period for disclosure dating from the time of the document's creation.

Section 132-1.1(a) provides:

> (a) Confidential Communications.—Public records, as defined in G.S. 132-1, shall not include written communications (and copies thereof) to any public board, council, commission or other governmental body of the State or of any county, municipality or other political subdivision or unit of government, made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. Such written communication and copies thereof shall not be open to public inspection, examination or copying unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body.

N.C.G.S. § 132-1.1(a) (2003). As reiterated by our Supreme Court in *Poole*, the statutory protection for privileged information is more narrow than the traditional common law attorney-client privilege. *Poole*, 330 N.C. at 482, 412 S.E.2d at 17. According to the statute, "[t]he

Public Records Law provides only one exception [based on privilege] to its mandate of public access to public records: written statements to a public agency, by any attorney serving the government agency, made within the scope of the attorney-client privilege," and involving a claim, defense, settlement, litigation, or administrative proceeding. *Id.* at 481-82, 412 S.E.2d at 17; N.C.G.S. § 132-1.1(a).

In this case, the wording of the trial court order leaves in doubt whether the trial court meant to disclose material under the common law privilege or under the strict guidelines of section 132-1.1. In addition, the bright-line three-year-rule adopted by the trial court, focusing on the date of a document's *creation*, is contrary to the mandate of the statute providing that all confidential documents falling within the definition of the statute become subject to disclosure as a public record "three years from the date such communication was *received* by [a] public board, council, commission or other governmental body." N.C.G.S. § 132-1.1(a) (emphasis added). We therefore remand this issue to the trial court for a consideration of and ruling on the City Attorney's documents consistent with the provisions of section 132-1.1(a).

Work Product

[6] In its brief to this Court, the City Attorney, recognizing the absence of any explicit exception for work product in the Public Records Act, argues for the proposition that the common law work product rule operates as an exception to the Act.

In support of his contention, the City Attorney relies on the provision contained in N.C. Gen. Stat. § 132-1(b), stating that "it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost *unless otherwise specifically provided by law.*" N.C.G.S. § 132-1(b) (2003) (emphasis added). According to the City Attorney, the language "unless otherwise specifically provided by law" presents a clear intent by the Legislature to "incorporate[] statutory and common law privileges into the Public Records Act, including work product immunity." We disagree with this broad reading of the statute.

In *In re Decision of the State Bd. of Elections*, this Court interpreted the language of section 132-1(b) to only recognize an exception to the Public Records Act in the face of "a 'clear statutory exemption or exception' to the Act." *In re Decision of the State Bd. of Elections*, 153 N.C. App. 804, 806, 570 S.E.2d 897, 898 (2002) (quoting

Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999)), *disc. review denied*, 356 N.C. 671, 577 S.E.2d 114 (2003). In other words, "North Carolina's public records act grants public access to documents it defines as 'public records,' absent a specific *statutory* exemption." *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686 (citing N.C.G.S. § 132-1(b)) (emphasis added). Accordingly, in the history of the Public Records Act, only statutory, not common law exceptions have been recognized. *See, e.g., Poole*, 330 N.C. at 476, 412 S.E.2d at 14 (recognizing "personnel file" exception in N.C. Gen. Stat. § 126-22 as an exemption to the rule on disclosure of public records); *Bd. of Elections*, 153 N.C. App. at 806, 570 S.E.2d at 898 (upholding exception to Public Records Act based on specific statutory provision limiting access to election ballots). As there is "[n]o statute specifically exempt[ing] from public access materials held by a local government attorney that qualify as work product" which would apply to the City Attorney, the City Attorney's documents are not protected from disclosure as work product.[4] *Public Records* 126.

The City Attorney, however, argues that even prior to the enactment of section 132-1(b), North Carolina case law indicated that work product immunity would trump a public record requests. The City Attorney relies on our Supreme Court's holding in *Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 434 S.E.2d 176 (1993). This unique case and its underlying policy are easily distinguished. *Piedmont* involved a public records request by a newspaper of audio tapes containing the radio transmissions of a police officer who had been fatally injured in a motor vehicle collision. *Id.* at 597-98, 434 S.E.2d at 177-78. The Supreme Court held that the rules governing discovery in criminal actions created an implicit exception to the Public Records Act and that the radio tapes fell within this exception. *Id.* The Supreme Court reasoned that, if the tapes could not be obtained by a criminal defendant under the rules for criminal discovery, they could also not be available through the use of a public records request by a third party. Otherwise, a criminal defendant whose discovery request was denied by the trial court could simply ask a third person to make a public records request so as to obtain such information notwithstanding the discovery ruling. *Id.* The Supreme Court

4. Exceptions for work product do exist, for example, for the Attorney General's Office. N.C.G.S. §§ 90-21.33(d), 131E-192.10(d) (2003) ("[i]n any action instituted under this section, the work product of the Department or the Attorney General or his staff is not a public record under Chapter 132 of the General Statutes and shall not be discoverable or admissible").

therefore ruled that the criminal discovery rules, limiting disclosure to the State and the defendant, governed over the newspaper's public records request. *Id.* at 598, 434 S.E.2d at 178.

As the civil discovery rules protect the disclosure of both privileged material and work product, the City Attorney contends that the holding in *Piedmont* also provides an exception in the case *sub judice*. Although use of the Public Records Act in the manner described in *Piedmont* would likewise allow for circumvention of the rules of discovery in a civil case between a litigant and a government entity, the same policy implications do not apply in the civil context.

> [I]f the criminal discovery laws did not create an implicit exception to the public records law, there would be no purpose whatever to the criminal discovery laws. The only material that those laws protect is material in the possession of public agencies, either law enforcement agencies or the district attorney's office; in the absence of statutory protection, all the material held by either a law enforcement agency or the district attorney is public record and open to public inspection. Therefore, if the rules of criminal discovery were to have any effect at all, the rules must have created an exception to the public records law; otherwise, all material subject to the rules would be public record and could be available to the defendant by that route.
>
> The Rules of Civil Procedure, however, retain almost their full scope even if they are not held to create an implicit exception to the public records law. Most civil litigants are not governments, and therefore, even if government attorney work product is accessible under the public records law, the work product of attorneys for private litigants remains exempt from discovery or any other form of access. There remains, that is, plenty of purpose for the discovery rules in civil litigation even if those rules do not protect government litigants.

Public Records 127.

In addition to these policy considerations, we note that the decision in *Piedmont* predated the Legislature's enactment of N.C. Gen. Stat. § 132-1.4, exempting most law enforcement records from public inspection and including the Chapter 15A criminal discovery protections addressed in issue II, C. *Public Records* 126. It thus appears that, faced with the implications of the *Piedmont* holding, the

Legislature chose to codify an exception to the Public Records Act for documents falling within the scope of the criminal discovery rules, *see* N.C.G.S. § 132-1.4(h)(1), but not for documents within the scope of civil discovery. This interpretation of the legislative intent underlying the Public Records Act is further bolstered by the fact that the Legislature included only a limited attorney-client privilege exception, but no work product exception in the Public Records Act. *See* N.C.G.S. § 132-1.1(a). Consequently, we conclude that the City Attorney's work product was subject to disclosure under the Act,[5] unless, of course, the relevant documents are independently exempted by virtue of the criminal investigation exception. Thus, not only was the City Attorney not entitled to greater protections than granted by the trial court's order, but the trial court erred in granting the City Attorney even limited work product protection.

Conclusion

Accordingly, the trial court's order is reversed with respect to its ruling on work product. We further remand this case to the trial court (1) to conduct an *in camera* review to determine whether materials withheld by the City Attorney are subject to the criminal investigation exception and (2) for a consideration of and ruling on the City Attorney's documents consistent with the provisions of section 132-1.1(a) on privilege.

We have reviewed the parties' remaining arguments on appeal and find them to be without merit.

Reversed and remanded.

Judges TIMMONS-GOODSON and ELMORE concur.

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5. We acknowledge that this Court has previously stated that "it would be illogical to allow plaintiff to circumvent the rules of discovery in a civil context through the use of the Public Records Act." This statement, however, was made in relation to a case involving a condemnation action in which the plaintiff had asked for and was denied discovery under the Public Records Act and the civil discovery rules, did not appeal that ruling, and later made an independent public records request. *Shella v. Moon*, 125 N.C. App. 607, 610, 481 S.E.2d 363, 365 (1997). That case thus presented a situation in which the trial court had already denied the plaintiff's right to disclosure under the Public Records Act and the plaintiff sought to get a second bite at the apple, and is therefore distinguishable from the facts of the case currently before this Court.

THE TOWN OF HIGHLANDS, A NORTH CAROLINA MUNICIPAL CORPORATION, PLAINTIFF v. KATHRYN B. HENDRICKS, AND HUSBAND, NATHAN HENDRICKS, III, SUSAN B. INMAN, AND HUSBAND, EDWARD INMAN; SIDNEY LOUIS McCARTY, III, MARY McCARTY PRESSLEY, MARGARET McCARTY EARLY, AND THE ESTATE OF SIDNEY LOUIS McCARTY, JR.; JOHN HENRY CHEATHAM, III, SUCCESSOR TRUSTEE OF THE LEILA BARNES CHEATHAM NORTH CAROLINA RESIDENCE TRUST, AND LEILA BARNES CHEATHAM; ALICE MONROE NELSON AND L. KENT NELSON; MICHAEL WENTZ; KALALANTA CORPORATION, A FLORIDA CORPORATION; MILDRED T. JOHNSON AND MILDRED FENTRISS THORNTON FELTON; ALICE BLANC MONROE NELSON AND HUSBAND, L. KENT NELSON, LINDA LOGAN MONROE, RABURN BLANC MONROE KELLY AND WIFE, STACEY KELLY, JULIAN DANTZLER KELLY, III, BUNROTHA LIMITED PARTNERSHIP, MOYNA BLAIR MONROE, DIANA MONROE LEWIS, AND J. THOMAS LEWIS; BUNROTHA LIMITED PARTNERSHIP, A GEORGIA LIMITED PARTNERSHIP, AND MALCOLM LOGAN MONROE; AND WALTER PRESTON EVINS, SAMUEL N. EVINS, JR. AND SUSAN C. EVINS, DEFENDANTS

No. COA03-55

(Filed 1 June 2004)

1. Cities and Towns— condemnation—escrow agreement—exclusive emolument

An escrow agreement established by a town for a road project providing that the town attorney would be reasonably available to contributors to the escrow account to discuss condemnation proceedings, and that the costs of such communication were to be charged against the escrow account, did not delegate the town's power of eminent domain to a group of private citizens and did not amount to an exclusive emolument in violation of N.C. Const. art. I, § 32, because: (1) there was no evidence presented that the contributors in any manner controlled proceedings or consulted with the town attorney concerning the condemnations; (2) there was ample evidence that the condemnation was for a public necessity; (3) the contributors to the escrow account would receive a benefit from the widening and paving of the pertinent road; (4) the condemnation of rights of way for the purpose of widening and paving a portion of the pertinent road was intended to promote the general public welfare; and (5) there was a reasonable basis for the town to conclude that the escrow agreement would be in the public interest, and it was not unreasonable for the town to solicit contributions to assist it in defraying the costs of the condemnation when the primary purpose was the promotion of the general public welfare and not a private interest.

2. Cities and Towns— condemnation—public use

The trial court did not err by concluding that the condemnations were for a proper public purpose even though defendants contend it was uncertain whether the condemned property could ever be used for a public use, because: (1) defendants provide no support for their contention that any contingency must defeat a direct condemnation proceeding; (2) when a town in good faith initiates condemnation proceedings for a public use and in accord with legal requirements, the fact that some obstacle may potentially derail the intended use will not defeat that purpose; and (3) the obtaining of an environmental impact study was not a prerequisite to the commencement of condemnation proceedings even if the Department of Transportation initiated it.

3. Cities and Towns— condemnation—alleged violations

The trial court did not err in a condemnation case by finding and concluding that plaintiff town's actions were lawful and binding even though defendants contend there were violations committed concerning the condemnation resolution, because: (1) N.C.G.S. § 160A-75 does not apply in the instant case since the escrow agreement was adopted as a resolution and not as an ordinance, thus affecting only those involved in the instant condemnation rather than the general public; (2) although defendants contest the propriety of the escrow agreement, any action for the breach of the escrow agreement would have to be brought by a party to the agreement; (3) although defendants contend the Department of Transportation (DOT) was not prohibited by statute from condemning the property, defendants acknowledge that the policies of DOT itself did prevent DOT from condemning the property and thus the town was authorized under its resolution to initiate the condemnation proceedings; and (4) the town did not act prematurely by sending notices of the actions before 30 September 2001 when nowhere in the authorizing resolution does it prescribe when the town may send notices of the actions, and the only limitation resolved that no official proceedings may be filed before 4 October 2001 which was the date the actions were filed.

Appeal by defendants from judgment entered 1 August 2002 by Judge James U. Downs in Macon County Superior Court. Heard in the Court of Appeals 15 October 2003.

Coward Hicks & Siler, PA, by William H. Coward, for plaintiff-appellee.

Adams Hendon Carson Crow & Saenger, PA, by Martin Reidinger and Cynthia M. Roelle, for defendant-appellants.

STEELMAN, Judge.

Defendants appeal from the order of the trial court determining that plaintiff's condemnation of defendants' real property was for a public purpose. We affirm.

In 2001 and 2002, plaintiff filed complaints, declarations of taking and notices of deposits against all defendants in separate filings. Defendants' property was to be taken for the public use of widening and improving SR 1604, or Bowery Road, an unpaved street.

Bowery Road (SR 1604) is an unpaved road located within the municipal limits of the Town of Highlands in Macon County. It is a narrow, winding road, with blind curves making it dangerous to vehicular traffic, including fire and emergency vehicles. In places, it is not wide enough for two vehicles to pass each other. Accidents frequently occur on Bowery Road. As of the time of the trial of this matter, Bowery Road served 107 residents of the Town of Highlands.

In the fall of 1998, the North Carolina Department of Transportation proposed to widen and pave Bowery Road, and requested input from the Town of Highlands concerning this project. The proposal was to widen and pave a .7 mile portion of Bowery Road beginning at its intersection with Horse Cove Road (SR 1603). At the 2 December 1998 meeting of the Town Board, the matter was discussed. There was strident disagreement among the residents owning property along Bowery Road and those using the road concerning the project. Some residents wanted the road widened and paved, deeming its present condition to be unsafe. Others were adamantly opposed to the project, concerned it would bring more traffic to the area and alter its natural beauty. These citizens preferred that a separate road be constructed to provide access to the properties beyond the .7 mile portion of Bowery Road instead of widening it.

In early 1999, the Department of Transportation sent right of way agreements to the property owners along the .7 mile portion of Bowery Road. Only three of thirteen owners signed the right of way agreements. Under Department of Transportation Division policy, it would not condemn the remaining right of way unless seventy-five

percent of the property owners agreed to grant a right of way. The Town Board set up a committee of residents from both factions to see if a solution could be agreed upon. The committee was unable to reach any agreement.

On 15 September 1999 the Town Board adopted a resolution finding that it was necessary for "the public use and benefit" for the Town to acquire right of way for the widening and improvement of Bowery Road. The resolution further provided that the costs of litigation and payment of compensation was to be funded by the property owners along the road. On 17 November 1999, the Town Board passed a resolution establishing an escrow fund for the Bowery Road project. This was subsequently amended 15 December 1999 to provide that the property owners would contribute $400,000.00 towards the project and that any costs over that amount would be borne by the Town.

In the spring of 2001, certain residents of the Bowery Road area filed an application to have certain properties placed upon the National Register of Historic Places (the Playmore/Bowery Road Historic District). This included properties that abutted the portion of Bowery Road that was being considered for right of way acquisition and improvement.

On 7 February 2001, the Town Board voted to terminate the Bowery Road escrow agreement on 30 September 2001 unless the sum of $400,000.00 had been contributed by that date. On 31 August 2001 the Town mailed notices to property owners on Bowery Road that it intended to initiate condemnation proceedings.

On 28 September 2001 and 2 October 2001, residents owning property along Bowery Road filed suit in the Superior Court of Macon County seeking to enjoin the Town of Highlands from condemning their property to widen Bowery Road. These actions were dismissed by Judge Downs under Rule 12(b)(6) of the Rules of Civil Procedure on 15 January 2002. This order was affirmed by a divided panel of the Court of Appeals on 5 August 2003. *Nelson v. Town of Highlands*, 159 N.C. App. 393, 583 S.E.2d 313 (2003). On 2 April 2004, the Supreme Court reversed the Court of Appeals, adopting the dissent. *Nelson v. Town of Highlands*, 358 N.C. 210, 594 S.E.2d 21 (2004).

On 4 October 2001, plaintiff Town of Highlands instituted the instant condemnation actions against property owners along Bowery Road. Defendants filed answers raising numerous defenses to the

condemnation actions. Following an evidentiary hearing at the 8 April 2002 session of Superior Court for Macon County, Judge Downs entered an order providing that: 1) the properties condemned were deemed taken for public purposes; 2) title to the properties vested in the Town as of 4 October 2001; 3) the determination of just compensation due the defendants was reserved for jury trial; 4) the Town's escrow agreement was declared to be legal, valid and enforceable; and 5) defendants' motions to dismiss under Rule 12(b)(6) were denied.

Defendants appeal this order. Defendants made 107 separate assignments of error in this matter, but grouped these assignments into three arguments, each with subparts. We address defendants' arguments as presented in their brief.

[1] Defendants argue in their first assignment of error that the trial court erred in finding that the escrow agreement was legal, valid and enforceable. Defendants contend that it was an exclusive emolument in violation of the North Carolina Constitution. We disagree.

De novo review is appropriate when considering allegations of constitutional violations on appeal. *Air-A-Plane Corp. v. North Carolina Dept. of Environment, Health and Natural Resources*, 118 N.C. App. 118, 124, 454 S.E.2d 297, 301, *disc. rev. denied*, 340 N.C. 358, 458 S.E.2d 184 (1995). Under a *de novo* review, this Court considers the matter anew, and may substitute its own judgment for that of the trial court. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002).

An emolument is "[a]ny perquisite, advantage, profit, or gain arising from the possession of an office." *Black's Law Dictionary*, 542 (7th ed. 1999). Exclusive emoluments are prohibited by our State Constitution. "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. Art. I., § 32.

The escrow agreement established by the Town provided that the town attorney would be reasonably available to the contributors to the escrow account to discuss the condemnation proceedings. The costs of such communications were to be charged against the escrow account. The escrow agreement further stated that "nothing in this Agreement is to be construed as an agreement for legal services between the Town Attorney and the [contributors]." It also provided that the Town had the exclusive right to make all decisions concern-

ing the condemnation, including the right to rescind any resolution authorizing the condemnation.

Defendants assert that the Town delegated its power of eminent domain to a group of private citizens, granted them an exclusive right to consult with its attorney, and that this conferred an exclusive emolument. There was no evidence presented that the contributors in any manner controlled proceedings or consulted with the Town attorney concerning the condemnations. Further, there was ample evidence that the condemnation was for a public necessity. Bowery Road was dangerous for vehicular traffic, including fire, police and emergency vehicles. This was uncontradicted in the record. The area served by Bowery Road had grown in recent years to the point that it served 107 residents.

It is clear that the contributors to the escrow account would receive a benefit from the widening and paving of Bowery Road. However, not every classification which favors a particular group is an exclusive emolument in violation of Article I § 32 of the North Carolina Constitution. Our Courts have applied a two-prong test in determining the existence of an unconstitutional exclusive emolument:

> 1) the exemption or benefit is intended to promote the general welfare rather than the benefit of the individual, and
>
> 2) there is a reasonable basis for the legislature to conclude that the granting of the exemption or benefit serves the public interest.

Peacock v. Shinn, 139 N.C. App. 487, 495, 533 S.E.2d 842, 848 (2000). In the instant case, the condemnation of rights of way for the purpose of widening and paving a portion of Bowery Road was clearly intended to promote the general public welfare. Bowery Road is a public road, to be used by anyone, not just the contributors to the escrow account. Further, there was a reasonable basis for the Town to conclude that the escrow agreement would be in the public interest. It was clear from the outset that any right of way condemnations for Bowery Road would be contentious. This would not be a normal condemnation case. Given this fact, it was not unreasonable for the Town to solicit contributions to assist it in defraying the costs of the condemnation. While this type of procedure should not be encouraged, it does not run afoul of the ban on exclusive emoluments when, as in this case, the primary purpose was the promotion of the general

public welfare and not a private interest. This assignment of error is without merit.

When a case is tried without a jury, the judge's findings of fact are binding on appeal "absent a total lack of substantial evidence to support" them. *Pulliam v. Smith*, 348 N.C. 616, 626, 501 S.E.2d 898, 903 (1998). This is true "even though the evidence might sustain a finding to the contrary." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citations omitted). It is the province of this Court to determine if the trial court's proper findings of fact support its judgment. *Alpar v. Weyerhaeuser Co.*, 20 N.C. App. 340, 345, 201 S.E.2d 503, 507 (1974), *cert. denied Alpar v. Weyerhaeuser Co.*, 285 N.C. 85, 203 S.E.2d 57 (1974). This standard of review is applicable to the defendants' remaining assignments of error.

[2] In their second assignment of error, defendants contend that the trial court erred in concluding that the condemnations were for a proper public purpose because it is uncertain whether the condemned property can ever be used for a public use. We disagree.

Defendants argue that the use of the land for a public purpose is contingent upon several factors and is therefore improper. In support of their position, defendants cite the case of *N.C. State Highway Com. v. Farm Equipment Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972). *Farm Equipment* held that:

> *substitute condemnation* is a valid exercise of a power of eminent domain only when the substitution of other property is the sole method by which the owner of land taken for public use can be justly compensated, and the practical problems resulting from the taking can be solved. The intent and effect of G.S. 136-18(16) is to require, as a condition precedent to *substitute* condemnation, (1) a written agreement binding the owner of the land to be used in highway construction to accept substitute property in exchange, and (2) a considered finding by Commission that such an exchange will save public funds and result in a safer and better highway.

Id. at 473-74, 189 S.E.2d at 281 (emphasis added). The instant case is not a substitute condemnation proceeding, but is a direct condemnation proceeding. Defendants provide no support for their contention that any contingency must defeat a direct condemnation proceeding, and our search of the law has found none. N.C. Gen. Stat. § 40A provides the "exclusive condemnation procedures to be used in this

State. . . ." N.C. Gen. Stat. § 40A-1 (2003). Nowhere in N.C. Gen. Stat. § 40A does it state that a condemnation proceeding may not move forward if there be any contingencies. N.C. Gen. Stat. § 40A-10 (2003) states: "When any property condemned by the condemnor is no longer needed for the purpose for which it was condemned, it may be used for any other public purpose or may be sold or disposed of in the manner prescribed by law for the sale and disposition of surplus property." This section recognizes that situations may change, and that condemned property may not always be used for the purpose that gave rise to the original condemnation proceeding. When a town condemns land for some public use, there is always a potential that unforseen (though perhaps foreseeable) events will frustrate that use. To require *certainty* that the land condemned will be put to the intended public use would be to doom to failure most such proceedings at their conception. When a town in good faith initiates condemnation proceedings, for a public use and in accord with legal requirements, the fact that some obstacle may potentially derail the intended use will not defeat that purpose. Here the Town properly initiated condemnation proceedings for the public purpose of widening and paving a relevant portion of Bowery Road. Once the land is condemned, plaintiff or the Department of Transportation will be required to follow all relevant statutes and regulations before proceeding with the road improvements. For this reason defendants' second assignment of error fails. Assuming *arguendo*, however, that defendants' second argument does not fail for the above reason, this assignment of error is still without merit for the reasons given below.

Defendants argue that there is no written agreement between the Town and the Department of Transportation to transfer the right of way obtained by the Town. However, the District Engineer testified that the Department of Transportation had appropriated $150,000.00 from its Small Urban Funds to accomplish the widening and paving of Bowery Road and that this was sufficient to complete the project. If Bowery Road is not paved by the Department of Transportation, the Town would still be able to pursue other avenues to complete the project.

Defendants further argue that no environmental impact study has been performed for the Bowery Road project as required by N.C. Gen. Stat. § 113A-4 (report required when a State agency is to expend public money or use public land). They argue that without the completion of the study, which they contend also mandated an archaeological

review under 7 N.C.A.C. 4R.0203 (2004), it was improper for the Town to commence condemnation proceedings. The trial court found that the Town was not a "State Agency" as defined in N.C. Gen. Stat. § 113A-9(9) and was not subject to the provisions of the Environmental Policy Act. Thus the Town has the authority to condemn the land and complete the improvements itself without complying with N.C. Gen. Stat. § 113A-4. In this case it is clear that the intent of the Town was for the Bowery Road widening and paving to be constructed by the Department of Transportation and not by the Town. Assuming the condemned land is transferred to the Department of Transportation to complete the improvements, the provisions of the Environmental Policy Act will be applicable *once the Department of Transportation takes control of the land*, since the Department of Transportation is a "State Agency" as defined by N.C. Gen. Stat. § 113A-9(9).

However, N.C. Gen. Stat. § 113A-11 authorizes each State Agency to adopt rules establishing minimum criteria for the applicability of the Environmental Policy Act for certain actions. In Chapter 2F of Title 19A of the North Carolina Administrative Code, the Department of Transportation established such minimum criteria:

> .0102 Minimum Criteria.
>
> The following are established as an indicator of the types and classes of thresholds of activities at and below which environmental documentation under the NCEPA is not required:
>
> (8) Highway or railway modernization by means of the following activities, which involve less than a total of 10 cumulative acres of ground surface previously undisturbed by highway or railway construction, limited to a single project, noncontiguous to any other project making use of this provision:
>
> (a) resurfacing, restoration or reconstruction;
>
> (b) adding lanes for travel, parking, weaving, turning, or climbing;
>
> (c) correcting substandard curves and intersections;
>
> (d) adding shoulders or minor widening;

It is clear from the record in this case that the total right of way sought (.7 miles in length, 45 feet in width), including the existing right of way, is less than 10 acres, would fall under the "min-

imum criteria" standards set forth above, and absent intervention by the Secretary of Transportation under 19A N.C.A.C. 2F.0103 (2004) no environmental impact study would be required. The obtaining of an environmental impact study was not a prerequisite to the commencement of condemnation proceedings in this matter, even if the Department of Transportation initiated the condemnation proceedings.

For all of the above reasons, defendants' second assignment of error is without merit.

[3] In their third assignment of error, defendants argue that the trial court erred in finding and concluding that plaintiff's actions were lawful and binding when there were violations committed concerning the condemnation resolution. We disagree.

Defendants first argue that the Town Board never properly authorized the condemnation resolution because it never properly adopted the Escrow Agreement, which is an integral part thereof. Defendants base their argument on N.C. Gen. Stat. § 160A-75 (2003) which states that "no ordinance or any action having the effect of any ordinance may be finally adopted on the date on which it is introduced except by an affirmative vote equal to or greater than two thirds of all the actual membership of the council." Without determining if the Town Board complied with the necessary procedures to adopt an ordinance, we find that N.C. Gen. Stat. § 160A-75 does not apply in the instant case because the Escrow Agreement was adopted as a resolution, not an ordinance. Resolutions and ordinances are not the same under North Carolina Law. This distinction:

> is evidenced by the fact that the State's statutes provide that resolutions may be used for such things as fixing the time and place of the Board of Commissioners' regular meetings, initiating an alteration in the structure of the board, and permitting the county manager to appoint officers, employees, and agents without first securing Board approval. These are all administrative matters and are in stark contrast to the express requirements in the Statute that an ordinance is required in order for a county to effect such things, for example, as the restriction of firearms, the prohibition of begging, and the regulation and licensing of trades, occupations, and professions. Moreover, the North Carolina statutes provide for the enforcement of county ordinances by fines and penalties.

Pittman v. Wilson County, 839 F.2d 225, 228-29 (4th Cir. N.C. 1988) (citations omitted). "Like a statute, an ordinance is a law binding on all concerned." *Id.* (note 7). The Town Board termed its own actions concerning the Escrow Agreement a "resolution," and defendants provide no evidence tending to show the Town Board was passing an ordinance instead of a resolution. The escrow agreement, like the condemnation authority itself, outline restrictions and authority concerning Town action (the condemnation). It affects only those involved in the instant condemnation, and is not (like the restriction of firearms) binding on the general public. The provisions of N.C. Gen. Stat. § 160A-75 do not apply and the Escrow Agreement was properly authorized.

Defendants next argue that even if plaintiff had the authority to condemn the property at issue to improve Bowery Road under state law, that authority automatically terminated because though the agreement required $400,000.00 be present in the escrow account by 30 September 2001, in fact only $396,450.00 was present in the account on that date. Defendants also argue that the funds in the escrow account were used by the Town for prohibited purposes.

The trial court concluded that defendants were "not parties to the escrow agreement and therefore [did] not have standing to contest its validity." Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter. *Neuse River Foundation, Inc. et al. v. Smithfield Foods, Inc. et al.*, 155 N.C. App. 110, 574 S.E.2d 48 (2002).

Here, the town signed an escrow agreement with contributors which set forth conditions for the condemnation of the properties. Defendants were not parties to that agreement nor were they third-party beneficiaries thereof; consequently, they have no standing to assert a breach of the agreement by the Town. *Meyer v. McCarley & Co.*, 288 N.C. 62, 70, 215 S.E.2d 583, 588 (1975). Any action for the breach of the escrow agreement would have to be brought by a party to the agreement.

Defendants further argue that the Board's condemnation authority never vested because that authorization states that "[i]f the Department of Transportation, *because of its policies*, is unable to condemn the necessary right-of-way, that the Town of Highlands initiate such proceedings." (emphasis added). Defendants contend

the Department of Transportation was not prohibited by *statute* from condemning the property, and thus the Town's own provision prevented the Town from initiating the proceedings. Defendants acknowledge that the *policies* of the Department of Transportation Division itself did prevent the Department of Transportation from condemning the property. Thus the Department of Transportation Division, by its own policy, was prohibited from initiating the condemnation, and the Town was authorized under its resolution to initiate the condemnation proceedings.

Defendants finally argue that the condemnation proceedings were initiated prematurely and thus in violation of the Town's authorizing resolution. The authorizing resolution permits the Town to initiate condemnation proceedings if the Department of Transportation is unable to do so. The resolution also provides that the costs of litigation and compensation will be paid out of the escrow fund, and that the escrow fund would terminate if it did not contain $400,000.00 by 30 September 2001. If the escrow fund had failed to hold the required funds by 30 September 2001, the Town could have authorized other means of paying for the litigation costs and compensation of the property owners, or it could have abandoned its intention to proceed with the condemnations. Nowhere in the authorizing resolution does it prescribe when the Town may send notices of the actions. The only limit in the authorizing resolution concerning the initiating of the actions was passed on 19 September 2001 when the Town Board resolved that "no official proceedings [may] be *filed* before October 4 [2001]" (emphasis added). These actions were filed on 4 October 2001. The Town did not act prematurely by sending notices of the actions before 30 September 2001.

This assignment of error is without merit.

AFFIRMED.

Chief Judge MARTIN and Judge LEVINSON concur.

JAMES E. LONG, COMMISSIONER OF INSURANCE OF NORTH CAROLINA AND LIQUIDATOR OF THE INTERNATIONAL WORKERS' GUILD HEALTH AND WELFARE TRUST FUND, PLAINTIFF v. CLAIR HAMMOND, DEFENDANT

No. COA03-638

(Filed 1 June 2004)

1. Insurance— health care—jurisdiction—multiple employer welfare arrangement—ERISA

A de novo review revealed that the trial court did not err in a declaratory judgment action by granting summary judgment in favor of the Insurance Commissioner and by denying defendant insurance agent's motion to dismiss on jurisdictional grounds of federal preemption even though defendant contends the Commissioner's attempt to recover unsatisfied health care claims under the International Workers Guild (IWG) Fund is preempted by the federal Employee Retirement Income Security Act (ERISA) under 29 U.S.C. § 1144(a), because: (1) the IWG Fund is a Multiple Employer Welfare Arrangement (MEWA), without exception, and therefore it is subject to state regulation; (2) N.C.G.S. § 58-49-10 provides that a certificate, license, or other documents have to be provided to the Insurance Commissioner in order to show jurisdictional preemption, and the parties stipulated that no such preemption documentation has been provided thus making the IWG Fund subject to all appropriate provisions of Chapter 58 regarding the conduct of its business; and (3) contrary to defendant's assertion that N.C.G.S. § 58-49-10 is in conflict with the preemptive declaration of ERISA in 29 U.S.C. § 1144(a), the statutes mesh consistently when 29 U.S.C. § 114(b)(6)(A)(ii) expressly grants MEWA regulation to the states as MEWA is defined in ERISA.

2. Insurance— health care—agents directly or indirectly writing contracts—unauthorized business—strict civil liability

A de novo review revealed that the trial court did not err in a declaratory judgment action when it ruled that defendant insurance agent who wrote unlicensed contracts of insurance to citizens of North Carolina was subject to strict civil liability for unpaid claims in the amount of $9,464.76 even though defendant contends he was acting under a genuine belief that he was marketing an ERISA certified health coverage plan which was not subject to any state licensing requirement, because: (1) the plain

language of N.C.G.S. § 58-33-95 has no intent requirement; (2) the insurance agent is in a better position than the insured to determine if the insurance company was lawfully doing business in the state; and (3) the framework and language of N.C.G.S. § 58-33-95, together with the public policy concerns of protecting the rights and claims of insureds, show that the statute imposes a standard of strict liability on agents who directly or indirectly write contracts of insurance where a company is not authorized to do business in the State of North Carolina.

Appeal by defendant from summary judgment entered 6 March 2003 by Special Superior Court Judge for Complex Business Cases Ben F. Tennille, in Wake County Superior Court. Heard in the Court of Appeals 4 February 2004.

Attorney General Roy Cooper, by Assistant Attorney General E. Clementine Peterson, for the State.

Daniel R. Flebotte for defendant appellant.

McCULLOUGH, Judge.

This case is one of twenty-seven similar cases designated as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. The following are the stipulated facts of this case: In or about 1995, certain persons in New York formed legal entities for the purpose of providing health care benefits to employees who participated in an arrangement they created which purported to be a multiple insurance plan. The arrangement was between an organization they created called the National Association of Business Owners and Professionals (NABOP) and a pre-existing labor union, the International Workers Guild (IWG). The Fidelity Group (Fidelity) was the third-party administrator of the plan for claims made under the arrangement. The arrangement was such that people seeking health care benefits would be allowed to join the IWG and would be provided health benefits through the administration of a third-party trust called International Workers' Guild Health and Welfare Trust Fund (IWG Fund). The IWG Fund was administered by Fidelity. The arrangement provided in part that employers would join in a purported collective bargaining agreement prepared by the organizers of the arrangement with IWG and NABOP. The essence of the plan was that the employers would join NABOP and the employees would join IWG. All parties would agree to bind themselves to the

purported collective bargaining agreement that was already negotiated by the organizers of the arrangement.

Certain filings were made with the United States Department of Labor to qualify and register the IWG Fund to be a federal Employee Retirement Income Security Act (ERISA) plan, 29 U.S.C. §§ 1001-1461. Prospective members were informed that the employee benefit welfare plan arrangement was designed to provide health benefits pursuant to ERISA.

Prior to marketing the employee benefit welfare plan arrangement in North Carolina, the organizers/officers of this arrangement registered the corporate entity of the International Workers Guild, Inc., with the Secretary of State of North Carolina. However, they did not seek or obtain approval to be a licensed insurer in the state pursuant to applicable North Carolina law.

Organizers/officers of this arrangement approached North Carolina insurance agents, such as defendant Mr. Clair Hammond (Mr. Hammond), to market the plan. Mr. Hammond, licensed to sell health insurance in North Carolina, attended several marketing meetings in which the arrangement was presented to him as an opportunity to provide health care benefits to citizens of North Carolina. Mr. Hammond, representing the IWG Fund, received compensation for marketing the arrangement to various employers and employees of North Carolina.

During 1997 and thereafter, claims for health care services were made by various employees of companies that participated in this arrangement throughout the United States, including many by North Carolina citizens, and many of such claims went unpaid.

On 15 December 1998, a civil action was filed by the Secretary of Labor (SOL) for the United States Department of Labor (DOL) in the U.S. District Court for the Eastern District of New York against NABOP, IWG, and the IWG Fund. The SOL charged those defendants with breaches of their fiduciary duties in administration of the IWG Fund under various ERISA provisions and sought to enjoin acts and practices alleged to be in violation of provisions of ERISA. Within the federal matter, David W. Silverman (Silverman) was appointed by court order dated 24 December 1998 to be an independent fiduciary of the IWG Fund and receiver for the original fund trustee, Fidelity.

On 7 January 2000, a supplemental complaint was filed within the federal action by Silverman to recover IWG Fund assets. Silverman

pleaded that the IWG Fund was funded by contributions from employers participating in the IWG Fund; that there were invoices characterizing a portion of the payment to the IWG Fund as "union fees" and "association fees" and that the purpose of the payment was to obtain health benefits on behalf of participants of the IWG Fund; and that contributions remitted by the employers for the purpose of obtaining benefits through the Fund, including amounts reported to be union fees or association fees, were "plan assets" within the meaning of ERISA. In the supplemental pleadings, Silverman further alleged that the insurance agents and various other persons who had marketed the arrangement, including defendant, were recipients of trust assets, and provided administrative and financial services to the IWG Fund by procuring third-party employers to purchase health services for themselves and their employees and thus were "a party in interest" under ERISA. See 29 U.S.C. § 1002(14)(B). By marketing the arrangement, these defendants became agents of NABOP and IWG and their acts were that of fiduciaries. Because these defendants received trust assets from the IWG Fund, in the form of commissions on their sales, Silverman contended that these defendants engaged in prohibited transactions in violation of ERISA and he thus sought monetary damages or a constructive trust over the assets of the agents or for other equitable relief.

Several of the North Carolina defendants to Silverman's supplemental complaint settled their claims relating to trust assets received as commissions, and a voluntary dismissal was taken against them. A default judgment was entered against Mr. Hammond.

Upon learning that there were unpaid medical claims, the North Carolina Commissioner of Insurance (Commissioner) initiated an investigation. At an administrative hearing, the Commissioner determined that the arrangement that had been sold in North Carolina was a Multiple Employer Welfare Arrangement (MEWA) and therefore subject to the North Carolina Department of Insurance. Pursuant to this determination, the State of North Carolina initiated suit in Wake County Superior Court to seek an order of liquidation against the IWG Fund. On 29 March 1999 the Court ordered the liquidation and appointed James E. Long, Commissioner of Insurance, to be liquidator. Under the order, the Commissioner was empowered and directed to exercise, enforce, and prosecute all rights, remedies, and powers of any creditor, shareholder, policyholder, or member of the IWG Fund.

Beginning in the year 2000, the Attorney General of the State of North Carolina, as counsel for the Commissioner, brought various actions against agents to collect money to pay unpaid medical claims due under IWG Fund insurance contracts. In a complaint filed 22 July 2000 against defendant, the Commissioner alleged defendant marketed and sold contracts of medical insurance for a company not licensed by North Carolina and in direct violation of State law. Specifically, the Commissioner alleged that these medical benefits provided for by the Fund were not fully insured by a State authorized insurer and the Fund operated in North Carolina as a MEWA as defined by North Carolina law and ERISA. The Commissioner further contended that the Fund was not exempt from State regulations under the ERISA provisions. Pursuant to these claims, the Commissioner sought payment of claims in the amount due under the IWG Fund contracts made through Mr. Hammond.

On 15 February 2002, the named parties to this case submitted to the superior court a joint motion for declaratory ruling with regard to two issues: the first issue was for the court to determine whether the IWG Fund was required to be licensed under the insurance laws of North Carolina; the second issue was whether the insurance agents in North Carolina who sold the IWG Fund are "strictly liable" under N.C. Gen. Stat. § 58-33-95 (2003) for unpaid claims. On 22 July 2002, the court entered its Order and Opinion. The court found that the IWG Fund did require licensing by the State, and that agents who write contracts for unlicensed insurers are strictly liable under N.C. Gen. Stat. § 58-33-95.

Pursuant to this judgment, the Commissioner filed a motion for summary judgment on 7 November 2002. On 6 March 2003, Judge Tennille, who issued the 2002 declaratory order, granted summary judgment in favor of the Commissioner in the amount of $9,464.76 which represented certain claims owed by the IWG Fund to claimants solicited to the Fund by Mr. Hammond.

In this appeal, defendant Hammond has assigned multiple errors to both Judge Tennille's declaratory order, and his order granting summary judgment. These errors are framed in two issues as set out here and addressed below: (I) the trial court committed reversible error when it denied Mr. Hammond's motion to dismiss on jurisdictional grounds of federal preemption; (II) the trial court committed reversible error when it ruled N.C. Gen. Stat. § 58-33-95 imposes a standard of strict liability on agents who directly or indirectly write

contracts of insurance where a company is not authorized to do business in the State of North Carolina. As to both of these issues reviewed *de novo*, we affirm the trial court's declaratory order and grant of summary judgment in favor of the Commissioner.

Federal Preemption

[1] In his first assignment of error, Mr. Hammond contends that the arrangement at issue in this case falls under exclusive federal jurisdiction. Specifically, defendant argues that the Commissioner's attempt to recover unsatisfied claims under the IWG Fund is preempted by ERISA, which states in relevant part: "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USC § 1003(a)] and not exempt under section 1003(b) of this title." 29 U.S.C. § 1144(a) (1999). Subparagraph (b) saves certain state laws, as well as federal laws, from ERISA preemption, including an exception for state regulation of MEWAs. 29 U.S.C. § 1144(b) (2003). Furthermore, the portion of this section of ERISA pertaining to MEWAs and known as the "MEWA Clause," provides that where the subject of regulation is an ERISA-covered MEWA that is not fully insured:

> (ii) . . . *any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.*

29 U.S.C. § 1144(b)(6)(A)(ii) (emphasis added). Mr. Hammond seems to stipulate that the IWG Fund in this case otherwise falls under the MEWA exception of this section and thus would be exposed to State regulation as a not fully insured, self-insured MEWA. But, he further contends that, because the IWG Fund was established or maintained pursuant to a collective bargaining agreement, it falls out of the definition of MEWA as set out in 29 U.S.C. § 1002(40)(A) (2003). Therefore, Mr. Hammond maintains that 29 U.S.C. § 1144(a) at all times governs the IWG Fund, preempting any State regulation. In the alternative, Mr. Hammond argues that if the IWG Fund is a MEWA subject to state law, then the state law is still preempted as being inconsistent with ERISA. We disagree on all fronts.

I. MEWA—Multiple Employer Welfare Arrangement

A. Is this Arrangement Otherwise a MEWA?

A MEWA is defined in ERISA as:

> (40)(A) The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained—
>
> > (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements,
> >
> > (ii) by a rural electric cooperative, or
> >
> > (iii) by a rural telephone cooperative association.

29 U.S.C. § 1002(40)(A).

As stipulated to in this case, employers would join the purported collective bargaining agreement between NABOP and IWG. By joining, this allowed employers to confer health care benefits to their employees as insured by the self-insured IWG Fund, a benefit described in 29 U.S.C. § 1002(1). The IWG Fund was administered by the third-party trustee, Fidelity. The health care plan was offered to employees of two or more employers domiciled in North Carolina. Therefore, we hold that under the ERISA definition, the arrangement at issue in this case was a MEWA.

We find support in our holding in Mr. Silverman's supplemental complaint to that of the SOL, in which it was alleged the arrangement was a MEWA. A default judgment was later entered against Mr. Hammond as to this complaint. The effect of a default judgment deems Mr. Hammond as having admitted the arrangement was a MEWA. *See Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 69-70 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363, 34 L. Ed. 2d 577 (1971). We therefore deem those pleadings as admitted in this Court. *First-Citizens Bank & Trust Co. v. Four Oaks Bank & Trust Co.*, 156 N.C. App. 378, 380, 576 S.E.2d 722, 724 (2003) (granting full faith and credit to a federal judgment). Additionally, at oral argument Mr. Hammond did not contest that the subject arrangement was otherwise a MEWA, but contended that it fell out of the definition of a

MEWA as it fit within the collective bargaining exception to the MEWA definition.

B. Does the IWG Fund Meet the Collective Bargaining Exception to the definition of a MEWA?

A plan that otherwise fits the definition of a MEWA, can fall out of that definition if it is "under or pursuant to one or more agreements *which the Secretary finds* to be collective bargaining agreements[.]" 29 U.S.C. § 1002(40)(A)(i) (emphasis added). There is no such finding by the SOL in the record, and both parties stipulate to such:

> 35. As of today's date neither the United States Department of Labor and any subsection thereof nor any specific secretary or assistant secretary or other authorized official has made any official determination as to whether the IWG Fund was properly established an ERISA Plan entitling it to preemption from state regulation, or that the IWG Fund was a Multiple Employer Welfare Arrangement (MEWA).

We accordingly find this arrangement a MEWA without exception.

Defendant cites *Virginia Beach Policemen's Benev. Ass'n v. Reich*, 881 F. Supp. 1059 (E.D. Va. 1995), *aff'd without opinion*, 96 F.3d 1440 (4th Cir. Va. 1996), for the proposition that a federal court is best suited to determine if a MEWA falls within a collective bargaining agreement when the SOL has made no such findings. We agree *Virginia Beach* offers guidance, but does so on the fact that a state is presumptively free to regulate a MEWA when the SOL has not made findings as to its collective bargaining status. The court in *Virginia Beach* found,

> [i]t is clear that, through ERISA section 3(40)(A)(i), Congress intended to promote state regulation of MEWAs. The Court finds that, consistent with the legislative history, *only if the Secretary chooses to make a finding*, would a MEWA receive exemption from state regulation.

Id. at 1070 (emphasis added). The rationale for this conclusion was based on interpretation of ERISA section 3(40)(A)(i), particularly with respect to the legislative history. *Id.* at 1067-71. The 10th Circuit has held similarly: "Congress obviously viewed self funded arrangements by multiple employers to be different, and less deserving of federal preemption from state insurance regulators[.]" *Fuller v. Norton*, 86 F.3d 1016, 1024 (10th Cir. 1996). The court in *Virginia*

Beach went on to hold that the SOL's decision whether to make a finding under ERISA section 3(40)(A)(i) is committed to agency discretion and therefore unreviewable. *Virginia Beach Policemen's Benev. Ass'n*, 881 F. Supp. at 1071.

The statutory language as to the collective bargaining agreement exception to the MEWA definition is clear. It refers only to those agreements that the SOL finds to be collective bargaining agreements, and therefore we need not make our own determination as to whether the subject arrangement was made pursuant to a collective bargaining agreement under North Carolina law. We conclude that, because the IWG Fund otherwise meets the definition of a MEWA, a determination the Commissioner of Insurance can make on its own, North Carolina can regulate the MEWA until the SOL makes some finding to the contrary.

Because we hold that the IWG Fund is a MEWA, without exception, and therefore subject to state regulation, we next consider the applicability of North Carolina insurance law to this MEWA.

II. Applicable State Law

A. Required Showing of Preemption in N.C.

To show jurisdictional preemption, North Carolina insurance law requires the following:

> A person may show that it is subject to the exclusive jurisdiction of another agency or subdivision of this State or the federal government, by providing to the Commissioner the appropriate certificate, license, or other document issued by the other governmental agency that permits or qualifies it to provide those services. If no documentation is issued by that other agency, the person may provide a certification by an official of that agency that states that the person is under the exclusive jurisdiction of that agency.

N.C. Gen. Stat. § 58-49-10 (2003). The record shows no "certificate, license, or other documents" have been provided to the Commissioner. The parties themselves have stipulated no such preemption documentation has been provided. Therefore, the IWG Fund was subject to all appropriate provisions of Chapter 58 regarding the conduct of its business. *See* N.C. Gen. Stat. § 58-49-20 (2003).

Mr. Hammond argues that the presumed jurisdiction of N.C. Gen. Stat. § 58-49-10, without a showing otherwise, is in conflict

with the preemptive declaration of ERISA in 29 U.S.C. § 1144(a). We disagree.

Generally, the U.S. Supreme Court has held that there is a presumption against federal preemption, absent some showing to the contrary. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 741, 85 L. Ed. 2d 728, 741 (1985). This is especially true when determining applicable regulation of a MEWA. 29 U.S.C. § 1144(b)(6)(A)(ii), expressly grants MEWA regulation to the states as MEWA is defined by ERISA. For an insurance plan that otherwise meets the definition of a MEWA to then have that MEWA status removed as one made pursuant to a collective bargaining agreement, it must provide an affirmative finding by the SOL. 29 U.S.C. § 1002(40). This finding by the SOL is tantamount to that required under N.C. Gen. Stat. § 58-49-10, and would surely suffice as such. Therefore, rather than contradictory, N.C. Gen. Stat. § 58-49-10 and ERISA at 29 U.S.C. 1144(b)(6)(A)(ii), as a MEWA is defined by ERISA section 3(40)(A), mesh consistently.

B. State MEWA Requirements

North Carolina insurance law provides that the term MEWA means that term as defined by ERISA at 29 U.S.C. § 1002(40)(A). N.C. Gen. Stat. § 58-49-30 (2003). North Carolina law requires MEWAs be licensed:

> (a) It is unlawful to operate, maintain, or establish a MEWA unless the MEWA has a valid license issued by the Commissioner. Any MEWA operating in this State without a valid license is an unauthorized insurer.

N.C. Gen. Stat. § 58-49-35 (2003). There is no dispute over the fact that Mr. Hammond did not comply with this statute when selling the IWG Fund, a MEWA. In light of the analysis above, Mr. Hammond was therefore properly subject to the penalty of N.C. Gen. Stat. § 58-33-95 for selling the unlicensed MEWA.

Strict Liability of N.C. Gen. Stat. § 58-33-95

[2] The other issue raised by Mr. Hammond in this appeal is whether he can be held strictly liable for the penalty set forth by N.C. Gen. Stat. § 58-33-95. Specifically he argues that, because he acted under a genuine belief that he was marketing an ERISA certified health coverage plan which was not subject to any state licensing requirement, he cannot be liable for the unpaid claims of $9,464.76. We disagree.

Mr. Hammond stipulates that the IWG Fund was a provider of health care benefits to residents of North Carolina; that the IWG Fund was not licensed by the North Carolina Department of Insurance; and that defendant, as a representative of the IWG Fund, sold the health care benefits to various employers and employees in North Carolina. Furthermore, as we have held above, the IWG Fund was a MEWA subject to state regulation. Mr. Hammond marketed this unlicensed IWG Fund to citizens of North Carolina for a commission, and these citizen's claims under the Fund went unpaid.

Mr. Hammond makes the argument that there should be a presumption against construing a statute as imposing strict liability upon an offender. He cites *Morissette v. United States*, 342 U.S. 246, 96 L. Ed. 288 (1952), relating to criminal intent. He further cites a number of North Carolina cases dealing with the requirement of criminal intent as related to criminal offenses. However, because there has been no criminal charges brought against Mr. Hammond under N.C. Gen. Stat. § 58-33-95, we need not consider the strict liability aspect of the statute in regard to the Class 1 misdemeanor it may impose. As to whether the statute is one of strict civil liability, we hold it to be so.

While there is no North Carolina case law specifically holding that N.C. Gen. Stat. § 58-33-95 imposes a standard of strict liability, we find the statute's surrounding framework, its plain language, and public policy concerns sufficient for our interpretation that it does.

Article 30 of Chapter 58 of the North Carolina General Statutes governs insurer supervision, rehabilitation, and liquidation. The construction and purpose of Article 30 is stated as follows:

> (b) This Article shall be *liberally* construed to effect the purpose stated in subsection (c) of this section.
>
> (c) The purpose of this Article is to protect the interests of policyholders, claimants, creditors, and the public generally with minimum interference with the normal prerogatives of the owners and managers of insurers, through;
>
> * * * *
>
> (3) Enhanced efficiency and economy of liquidation, through clarification of the law, to minimize legal uncertainty and litigation;

N.C. Gen. Stat. § 58-30-1 (2003) (emphasis added). It is under this liberal construction that a liquidator has the power "[t]o exercise and

enforce all rights, remedies, and powers of any creditor, shareholder, [or] policyholder[.]" N.C. Gen. Stat. § 58-30-120(19) (2003) (enumerating the powers of a liquidator).

Pursuant to the liberal powers of the liquidator under Article 30, the Commissioner brought an action under N.C. Gen. Stat. § 58-33-95 against Mr. Hammond, the undisputed agent of the insurer. That statute provides:

> Any person representing an insurer is *personally liable* on all contracts of insurance unlawfully made by or through him, directly or indirectly, for any company not authorized to do business in the State. . . . If any person shall unlawfully solicit, negotiate for, collect or transmit a premium for a contract of insurance or act in any way in the negotiation or transaction of any unlawful insurance with an insurance company not licensed to do an insurance business in North Carolina, he shall be guilty of a Class 1 misdemeanor.

Id. (emphasis added). The statute warrants both civil and criminal liability without mention of any intent. Summary judgment was granted in favor of the State finding Mr. Hammond personally and strictly liable under this statute. The State brought no criminal charges.

The plain language of N.C. Gen. Stat. § 58-33-95 has no intent requirement, and we will not attempt to engraft it where the language is clear and unambiguous. *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 436, 274 S.E.2d 370, 373 (1981). We find our unambiguous reading of the statute supported by the fact that Article 33 contains another section which was last amended in 1994 along with N.C. Gen. Stat. § 58-33-95, and that this section does possess an element of intent. *See* N.C. Gen. Stat. § 58-33-105 (2003) (dealing with false statements made in applications for insurance, requiring "knowing[] or willful[]" acts). We credit the legislature with deliberate composition of its statutes unless there is some construction and policy concern sufficient to raise an ambiguity. There is no such ambiguity in the statute at issue.

Our interpretation of N.C. Gen. Stat. § 58-33-95 is supported by the public policy underpinnings of comporting with the state's overall interest in protecting its insured citizens. Judge Tennille stated this policy consideration succinctly in finding no. 31 of his order, where he stated:

> [T]he agent was in a better position than the insured to determine if the company was lawfully doing business in the state. Consumers, particularly in plans such as that offered by IWG, have little knowledge of the licensing requirements and virtually no way to protect themselves. Agents, on the other hand, are more sophisticated and should know if the company they represent is licensed. If it is not, they know they are taking some risk in selling the product and have some obligation to determine if the company should be licensed. Where, as here, the agents themselves have been misled by the company, the State has elected to place the burden of the failure to pay the claims on the agents who sold the product and received commissions rather than the consumers who have paid premiums and relied on the existence of coverage. That allocation is fair.

We believe this same policy consideration is reflected in the construction of Article 30 and the liquidator's power to pursue the rights and actions of policyholders under laws that are clear and efficient. The liquidator is often acting on behalf of the state's insured, protecting their rights and claims. We conclude these policy considerations support our strict construction of N.C. Gen. Stat. § 58-33-95.

For the foregoing reasons, we uphold Judge Tennille's declaratory order and opinion and his grant of summary judgment in favor of the State, pursuant to that order and opinion. We conclude that the IWG Fund was required to be licensed under the provisions of Article 49 of Chapter 58 of the North Carolina General Statutes and that N.C. Gen. Stat. § 58-33-95 imposes a standard of strict liability on agents, such as Mr. Hammond who wrote the IWG Fund contracts of insurance. Mr. Hammond is therefore liable in the amount of $9,464.76 for unpaid claims under the IWG Fund.

Affirmed.

Judges HUNTER and LEVINSON concur.

CIRO SCOTTO DI FREGA, PLAINTIFF v. LUIGI PUGLIESE, ROBERT WADE EDWARDS, AND MARTHA E. EDWARDS, DEFENDANTS

No. COA03-950

(Filed 1 June 2004)

1. Evidence— prior crimes or bad acts—revocation of real estate license

The trial court did not abuse its discretion in a conversion of personal property and breach of contract case by excluding evidence that defendant wife's real estate license had been permanently revoked prior to trial, because: (1) defendant's real estate license was revoked twenty-one years earlier for acts similar to those alleged at bar; and (2) N.C.G.S. § 8C-1, Rule 404(b) prohibits evidence of other crimes, wrongs, or acts to show that a defendant acted in conformity therewith, and the pertinent evidence could have raised a legally spurious presumption of guilt.

2. Evidence— financial status—punitive damages

The trial court did not err in a conversion of personal property and breach of contract case by excluding evidence of defendant married couple's financial status, because: (1) evidence of financial status is admissible only in cases warranting punitive damages and not by mere assertion of a punitive damages claim; and (2) the trial court determined that plaintiff's evidence failed to show that defendants' actions in terminating plaintiff's lease were fraudulent, willful or wanton, or malicious as required by N.C.G.S. § 1D-15(a).

3. Conspiracy— civil—motion for directed verdict—suspicion or conjecture

The trial court did not err by granting defendants' motion for directed verdict regarding plaintiff's claim for civil conspiracy by defendants to terminate plaintiff's lease because, viewed in the light most favorable to plaintiff, the evidence showed only a suspicion or conjecture that a conspiracy in fact existed.

4. Unfair Trade Practices— civil conspiracy—motion for directed verdict

The trial court did not err by granting defendants' motion for directed verdict regarding plaintiff's claim for unfair and deceptive trade practices based on defendants entering into an alleged

conspiracy to terminate plaintiff's rights under his lease because, viewing the evidence in the light most favorable to plaintiff, there was insufficient evidence to support a claim for civil conspiracy and the record is devoid of any other evidence to support a claim for unfair and deceptive trade practices.

5. Damages and Remedies— punitive damages—motion for directed verdict

The trial court did not err by granting defendants' motion for directed verdict regarding plaintiff's claim for punitive damages based on defendants entering into an alleged conspiracy to terminate plaintiff's rights under his lease, because: (1) viewed in the light most favorable to plaintiff, the record is devoid of any evidence supporting a claim of civil conspiracy or unfair and deceptive trade practices; and (2) there is no evidence in the record to support plaintiff's contentions that defendants' actions were fraudulent, willful or wanton, or malicious.

6. Conversion— counterclaim—removal and disposal of property

The trial court did not err by denying plaintiff's motion to dismiss defendants' counterclaim for conversion because there was sufficient evidence showing that defendants' property remained in the pertinent restaurant, and plaintiff admits removing and disposing of defendants' property.

7. Contracts— tortious interference—motion to set aside verdict

The trial court did not abuse its discretion by denying plaintiff's motion to set aside the verdict finding no liability for tortious interference of contract by defendants on the ground that the verdict was against the greater weight of the evidence, because: (1) plaintiff rests on an alleged conversation between defendants to enter into a civil conspiracy to terminate plaintiff's lease based on alleged manufactured breaches of the lease, but evidence was presented to show the defaults to be legitimate breaches that were never cured although adequate notice and time was given to cure the breaches; and (2) credibility of evidence is ultimately left to the decision of the jury, and sufficient evidence supports its verdict that defendants did not interfere with plaintiff's contract.

8. Damages and Remedies— amount—influence of passion or prejudice

The trial court did not abuse its discretion by entering judgment based on the jury's verdict finding defendants converted plaintiff's property and breached the contract, because: (1) competent evidence supports the amount of damages awarded by the jury; and (2) plaintiff failed to show that the damages are inadequate and were given under the influence of passion or prejudice.

Appeal by plaintiff from judgment entered 8 January 2003 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 21 April 2004.

Daniel R. Johnston, for plaintiff-appellant.

Laurel O. Boyles, for defendants-appellees Robert Wade Edwards and Martha E. Edwards.

No brief filed for defendant-appellee Luigi Pugliese.

TYSON, Judge.

Ciro Scotto Di Frega ("plaintiff") appeals from a judgment entered after a jury returned a verdict in favor of plaintiff for conversion of his personal property by Robert Wade Edwards and Martha E. Edwards ("the Edwardses") and breach of contract by Luigi Pugliese ("Pugliese") (collectively, "defendants"). We hold there was no error at trial.

I. Background

The Edwardses own improved commercial property ("the premises") in Mocksville, North Carolina. On or about 13 February 1993, the Edwardses entered into a lease ("1993 lease") with an option to purchase with three individuals who planned to operate a restaurant on the premises. On 1 September 1998, at the expiration of the 1993 lease, Ibrahim A. Elaasar ("Elaasar") acquired all of the interests of his two partners, renewed and extended the lease until 31 March 2002, and changed the lessees' names from the three individual names to "Mocksville Kitchens, Inc." The lease allowed the premises to be sublet to another individual or entity without landlord's approval and provided that the premises could be purchased for $189,000.00 at any time during the term of the lease.

Plaintiff is the operator of a restaurant in Forsyth County, North Carolina. Plaintiff became interested in purchasing Elaasar's restaurant. On 4 February 1999, Mocksville Kitchens, Inc., subleased the restaurant to plaintiff and his brother, sold all of the equipment and furnishings to them for $75,000.00, and assigned all its rights in the option to purchase to plaintiff and his brother. Plaintiff claims the Edwardses knew that he was not merely subleasing the premises but was acquiring all rights in the premises. Under the terms of the sublease, plaintiff paid rent directly to the Edwardses and was bound by all of the remaining terms of the 1993 lease.

Plaintiff and his brother opened an Italian restaurant on the premises. Plaintiff's brother managed the daily operations of the restaurant. Plaintiff's brother became seriously ill and was unable to continue operating the restaurant. On 1 September 1999, plaintiff sold the business to Pugliese for $135,000.00 and subleased the building under the terms of the 1993 lease. Pugliese paid rent directly to the Edwardses. The 1993 lease contained a rent escalation clause increasing the rent from $1,600.00 per month to $1,700.00, effective 1 March 2000. Pugliese paid only $1,600.00 for rental from April to June. The rent arrearage was never paid. Around this same time, the plumbing failed in the restaurant. The Edwardses fixed the plumbing and paid for all costs. The 1993 lease required the tenant to pay all costs of maintenance, upkeep, and repairs except for those made to the roof of the building. The Edwardses have not been paid for these repairs.

Subsequently, the Edwardses, through counsel, notified the original lessee, Mocksville Kitchens, Inc., that the lease was breached. The letter listed four defaults: (1) failure to provide proof of general liability insurance; (2) failure to pay back rent in the amount of $300.00 for the months of April, May, and June of 2000; (3) failure to reimburse plumbing repairs made to the premises; and (4) failure to pay for the cost of a replacement heat pump. Elaasar was given ten days to cure, but did not respond. Plaintiff was also notified and promised to look into the matters. On 5 October 2000, the Edwardses terminated the lease with Elaasar and entered into a lease and option agreement with Pugliese.

Plaintiff brought suit against the Edwardses and Pugliese claiming fraud, civil conspiracy, conversion, unfair and deceptive trade practices, punitive damages, breach of contract, interference with contract, and unjust enrichment. Defendants moved for summary

judgment on all of plaintiff's claims. The trial court denied all defendants' motions except plaintiff's claim for fraud, which it granted. At trial, defendants' motion for directed verdict on plaintiff's claims for civil conspiracy, unfair and deceptive trade practices, and punitive damages was granted by the trial court.

The jury returned a verdict in favor of plaintiff in the amount of $17,001.00 for conversion of his personal property and breach of contract by the Edwardses, and $4,000.00 for breach of contract by Pugliese. The jury also found that plaintiff had converted property belonging to the Edwardses and awarded $1.00 in damages. The jury found against plaintiff on all other claims or awarded only nominal damages. Plaintiff appeals.

II. Issues

The issues are whether the trial court erred in: (1) excluding evidence that the North Carolina Real Estate Commission revoked Martha Edwards's real estate license; (2) excluding evidence of the Edwardses' financial status; (3) granting defendants' motion for directed verdict regarding: (a) plaintiff's claim for civil conspiracy, (b) plaintiff's claim for unfair and deceptive trade practices, and (c) plaintiff's claim for punitive damages; (4) denying plaintiff's motion to dismiss the Edwardses' counterclaim for conversion; (5) denying plaintiff's motion to set aside the verdict; and (6) entering a judgment unsupported by the evidence.

III. Evidence of Revocation of Real Estate License

[1] Plaintiff contends that the trial court erred in excluding evidence that Martha Edwards's real estate license had been permanently revoked prior to trial. We disagree.

North Carolina Rules of Evidence, Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). The trial court must balance the probative value of the proffered evidence against any alleged unfair prejudice. *State v. Mahaley*, 332 N.C. 583, 598, 423 S.E.2d 58, 67

(1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995). Our Supreme Court has held, "[t]he dangerous tendency of this class of evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subject to strict scrutiny by the courts." *State v. Johnson*, 317 N.C. 417, 430, 347 S.E.2d 7, 15 (1986).

> Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.

State v. McClain, 240 N.C. 171, 177, 81 S.E.2d 364, 368 (1954).

The trial court's sound discretion determines whether to exclude evidence on the grounds that such evidence would be unduly or unfairly prejudicial. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). To reverse the trial court's ruling, plaintiff must show that the ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d 139, 145 (1988), *overruled in part by State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000).

After hearing arguments and reviewing the conclusions of law from the North Carolina Real Estate Licensing Board in the prior order revoking the license, the trial court excluded evidence of the revocation of Martha Edwards's real estate license. The trial court held, "even if relevant . . . the application of the 403 balancing test would indicate that the prejudice, its introduction would outweigh any probative value given its age, after review of the contents of that order." The record indicates Martha Edwards's real estate license was revoked twenty-one years earlier for acts similar to those alleged at bar. Rule 404(b) prohibits evidence of other crimes, wrongs, or acts to show that a defendant "acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). This evidence could have raised "a legally spurious presumption of guilt" against Martha Edwards in violation of Rule 404(b). *McClain*, 240 N.C. at 177, 81 S.E.2d at 368. Plaintiff has failed to show the trial court abused its discretion in excluding evidence of the revocation of Martha Edwards's real estate license. Plaintiff's assignment of error is overruled.

IV. Evidence of the Edwardses' Financial Status

[2] Plaintiff contends that the trial court erred in excluding evidence regarding the Edwardses' financial status. We disagree.

"Ordinarily, a party's financial ability to respond in damages . . . is totally irrelevant to the issue of liability; and the admission of evidence tending to establish such ability is held to be prejudicial, except in cases *warranting* an award of punitive damages." *Harvel's, Inc. v. Eggleston*, 268 N.C. 388, 392, 150 S.E.2d 786, 790 (1966) (emphasis supplied). "[I]t is well established that evidence as to the financial worth of a defendant is competent for consideration by the jury when an issue as to punitive damages is *warranted* and submitted." *Hinson v. Dawson*, 244 N.C. 23, 29, 92 S.E.2d 393, 397 (1956) (emphasis supplied).

Plaintiff argues that evidence of a defendant's financial status is admissible by mere assertion of a punitive damages claim. We disagree. Evidence of this nature is admitted *only* in cases *warranting* punitive damages. *Id.* Here, the trial court determined that plaintiff's evidence failed to show that defendants' actions in terminating plaintiff's lease were fraudulent, willful or wanton, or malicious as required by N.C. Gen. Stat. § 1D-15(a). The trial court ultimately found punitive damages were not warranted and dismissed plaintiff's claim. Evidence of the Edwardses' financial status was irrelevant to the remaining claims. Plaintiff's assignment of error is overruled.

V. Granting of Directed Verdict

Plaintiff contends that the trial court erred in granting defendants' motion for directed verdict regarding his claims of civil conspiracy, unfair and deceptive trade practices, and punitive damages. We disagree. The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 158, 179 S.E.2d 396, 397 (1971).

A. Civil Conspiracy

[3] A claim for civil conspiracy exists for wrongful acts by persons pursuant to a conspiracy. *Dalton v. Camp*, 138 N.C. App. 201, 213, 531 S.E.2d 258, 266 (2000), *rev'd on other grounds*, 353 N.C. 647, 548 S.E.2d 704 (2001). A claim for civil conspiracy consists of: (1) an agreement between two or more persons; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) which agreement results in

injury to the plaintiff. *Boyd v. Drum*, 129 N.C. App. 586, 592, 501 S.E.2d 91, 96 (1998), *aff'd*, 350 N.C. 90, 511 S.E.2d 304 (1999); *see also Neugent v. Beroth Oil Co.*, 149 N.C. App. 38, 53, 560 S.E.2d 829, 839 (2002), *disc. rev. and cert. denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). A threshold requirement in any cause of action for damages caused by acts committed pursuant to a conspiracy must be the showing that a conspiracy in fact existed. *Fox v. Wilson*, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987). Although liability may be established by circumstantial evidence, the evidence of the agreement must be more than a suspicion or conjecture to justify submission of the issue to the jury. *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981).

Plaintiff argues that the testimony of Elaasar showed that defendants entered into an agreement to wrongfully terminate plaintiff's lease to allow defendants to enter into a subsequent contract. Plaintiff contends that the evidence shows that the Edwardses promised to "cut out" plaintiff so that Pugliese would not have to deal with him anymore and could enter into a contract directly with the Edwardses. Plaintiff further contends that after this agreement was made, the Edwardses manufactured breaches to terminate his lease.

A careful review of the record shows that this evidence came solely from an alleged conversation that took place in Pugliese's restaurant and overheard by Elaasar. The record is devoid of any other evidence that would tend to support a civil conspiracy. Further, nothing in the record supports plaintiff's contentions that the breaches of the lease were manufactured solely so that the Edwardses could terminate his lease. In fact, the evidence shows that Elaasar was in arrears in the amount of $300.00, that the Edwardses had not been paid for fixing the plumbing and replacing the water pump, and that Elaasar had failed to provide proof of insurance. The evidence also shows the Edwardses notified Elaasar before terminating his lease, and gave him ten days to cure all breaches. The Edwardses were neither in privity of estate nor privity of contract with plaintiff and owed no duty to notify him. *Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 162, 356 S.E.2d 912, 915, *disc. rev. denied*, 320 N.C. 794, 361 S.E.2d 80 (1987). However, plaintiff was informed of the breaches and the ten day period to cure. The breaches were never cured by any party within the period allowed.

Viewed in the light most favorable to the plaintiff, the evidence supporting a civil conspiracy by defendants to terminate plain-

tiff's lease shows only a "suspicion or conjecture" that a conspiracy in fact existed. Submission of this issue to the jury was not justified by the evidence. *Dickens*, 302 N.C. at 456, 276 S.E.2d at 337. The trial court did not err in granting defendants' motion for directed verdict on the issue of civil conspiracy. Plaintiff's assignment of error is overruled.

B. Unfair and Deceptive Trade Practices

[4] To establish a *prima facie* case of unfair and deceptive trade practices, a plaintiff must show: (1) the defendant committed an unfair or deceptive trade practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff. *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991). An act is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). "Some type of egregious or aggravating circumstances must be alleged and proved. . . . Even a party who intentionally breaches a contract is not, without more, liable for such conduct under the North Carolina Unfair Trade Practices Act." *Allied Distribs. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379 (E.D.N.C. 1993) (citing *Pee Dee Oil Co. v. Quality Oil Co.*, 80 N.C. App. 219, 341 S.E.2d 113, 116, *disc. rev. denied*, 317 N.C. 706, 347 S.E.2d 438 (1986)). Whether an act or practice is unfair or deceptive is a question of law for the court. *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681, *reh'g denied*, 352 N.C. 599, 544 S.E.2d 771 (2000).

Plaintiff contends that defendants' actions constituted unfair and deceptive trade practices. Plaintiff argues that defendants actions of entering into a civil conspiracy to terminate his lease supports this argument. We disagree.

As noted, plaintiff's evidence consisted solely of an alleged conversation that took place in Pugliese's restaurant and overheard by Elaasar. The record is devoid of any other evidence that would tend to support a civil conspiracy. In fact, the record is devoid of any evidence that defendants committed any acts whatsoever that rise to the level of being "unethical or unscrupulous" to support a claim of unfair and deceptive trade practices. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403.

In light of our holding of insufficient evidence to support a claim for civil conspiracy, and because, viewing the evidence in the light

most favorable to plaintiff, the record is devoid of any other evidence to support a claim of unfair and deceptive trade practices, the trial court did not err in granting defendants' motion for directed verdict on the issue of unfair and deceptive trade practices. Plaintiff's assignment of error is overruled.

C. Punitive Damages

[5] N.C. Gen. Stat. § 1D-15(a) (2003) states:

> Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.

Even where sufficient acts are alleged to make out an identifiable tort, the tortious conduct must be accompanied by some element of aggravation before punitive damages will be allowed. *Newton v. Insurance Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976). Whether the facts stated in the pleadings are sufficient to bring the case within the rule allowing punitive damages is a question of law. *Worthy v. Knight*, 210 N.C. 498, 500, 187 S.E. 771, 772 (1936).

Plaintiff argues that defendants' conduct was willful and wanton because defendants entered into a conspiracy to terminate plaintiff's rights under his lease. As noted, viewing the evidence in the light most favorable to plaintiff, the record is devoid of any evidence supporting a claim of civil conspiracy or unfair and deceptive trade practices. Further, there is no evidence in the record to support plaintiff's contentions that defendants' actions were fraudulent, willful or wanton, or malicious. Based on our reasoning in Sections V(A) and V(B) of this opinion, the trial court did not err in granting defendants' motion for directed verdict on the issue of punitive damages. Plaintiff's assignment of error is overruled.

VI. The Edwardses' Counterclaim for Conversion

[6] Plaintiff contends the trial court erred in denying his motion to dismiss the Edwardses' counterclaim for conversion. Plaintiff argues

that insufficient evidence was presented to submit this issue to the jury. We disagree.

Conversion is defined as: (1) the unauthorized assumption and exercise of the right of ownership; (2) over the goods or personal property; (3) of another; (4) to the exclusion of the rights of the true owner. *Nelson v. Chang*, 78 N.C. App. 471, 476, 337 S.E.2d 650, 654 (1985), *disc. rev. denied*, 317 N.C. 335, 346 S.E.2d 501 (1986).

The record and plaintiff's brief show that when plaintiff subleased the property from Elaasar, the Edwardses owned personal property and restaurant equipment that remained within the restaurant. Plaintiff acknowledges that he performed extensive renovations on the restaurant in an effort to refurbish and equip it as an Italian restaurant. These efforts included removing some of the existing equipment and property. Plaintiff admits that he disposed of "obsolete, unsuitable, and broken equipment" belonging to the Edwardses. Further, the 1993 lease entered into by the Edwardses and Mocksville Kitchens, Inc. stated, "In the event LESSEES elect not to use any portion of the equipment located on the premises, said unused equipment shall be turned over to LESSORS." As a sublessee, plaintiff was bound by all clauses in the 1993 lease and was required to take notice of and return the Edwardses' ownership of personal property and equipment.

As sufficient evidence was presented showing that the Edwardses' property remained in the restaurant and plaintiff admits removing the Edwardses' property, the trial court did not err in denying plaintiff's motion to dismiss. Plaintiff's assignment of error is overruled.

VII. Motion to Set Aside the Verdict

[7] Plaintiff contends that the trial court erred in denying his motion to set aside the jury's verdict on the ground that the verdict was against the greater weight of the evidence. We disagree.

Rule 59 of the North Carolina Rules of Civil Procedure states:

> (a) *Grounds.*—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> . . . .

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law . . . .

N.C. Gen. Stat. § 1A-1, Rule 59(a) (2003).

A denial of a motion to set aside the verdict of the jury is addressed to the sound discretion of the trial court and is reviewable on appeal under an abuse of discretion standard. *State v. Fleming*, 350 N.C. 109, 146, 512 S.E.2d 720, 745, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). A " 'ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 832 (1985)). "The jury's function as trier of fact 'must be given the utmost consideration and deference before a jury's decision is to be set aside.' " *Albrecht v. Dorsett*, 131 N.C. App. 502, 506, 508 S.E.2d 319, 322 (1998) (quoting *Coletrane v. Lamb*, 42 N.C. App. 654, 657, 257 S.E.2d 445, 447 (1979)). The credibility of the evidence is exclusively for the jury. *Albrecht*, 131 N.C. App. at 506, 508 S.E.2d at 322.

Plaintiff argues that the jury's verdict finding no liability for tortious interference of contract by the Edwardses is "nonsensical." Plaintiff again rests solely on the evidence of the alleged conversation between defendants to enter into a civil conspiracy to terminate plaintiff's lease based on manufactured breaches of the lease. This conversation was the sole evidence presented by plaintiff to support most of his claims against defendants. Evidence was presented to show the defaults to be legitimate breaches that were never cured by Elaasar or plaintiff, although both were given adequate notice and time to cure.

As the credibility of evidence is ultimately left to the decision of the jury, and sufficient evidence supports its verdict that the Edwardses did not interfere with plaintiff's contract, the trial court did not abuse its discretion in denying plaintiff's motion to set aside the verdict. Plaintiff's assignment of error is overruled.

VIII. Entering Judgment

[8] Plaintiff also contends that the trial court erred in entering judgment because the verdict in favor of plaintiff is inadequate as a matter of law. We disagree.

Rule 59 of the North Carolina Rules of Civil Procedure states:

> (a) *Grounds.*—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> . . . .
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

N.C. Gen. Stat. § 1A-1, Rule 59(a) (2003). A motion based upon inadequacy of the damages is addressed to the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion. *Albrecht,* 131 N.C. App. at 506, 508 S.E.2d at 322.

This Court has held that where there is no stipulation of the parties as to damages, testimony of witnesses as to the nature and extent of a party's injuries or damages is "simply evidence in the case to be considered by the jury." *Pelzer v. United Parcel Service*, 126 N.C. App. 305, 311, 484 S.E.2d 849, 853, *disc. rev. denied*, 346 N.C. 549, 488 S.E.2d 808 (1997) (citing *Smith v. Beasley*, 298 N.C. 798, 259 S.E.2d 907 (1979)). It is well within the jury's power to minimize or wholly disregard even the testimony given by a party's expert witnesses. *Albrecht*, 131 N.C. App. at 506, 508 S.E.2d at 322.

Here, the jury ruled in favor of plaintiff and found the Edwardses had converted plaintiff's property and breached the contract, and also found Pugliese had breached the contract. The jury awarded plaintiff $17,001.00 for conversion and breach of contract against the Edwardses and $4,000.00 for breach of contract against Pugliese. The jury also found plaintiff converted the Edwardses' restaurant equipment and awarded $1.00 in damages.

The jury weighs the credibility of the evidence presented, including the amount of damages suffered by the parties, and may disregard any and all evidence it determines to be unreliable. *Id.* Competent evidence supports the amount of damages awarded by the jury. Plaintiff has failed to show that the damages are inadequate and were given "under the influence of passion or prejudice." N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) (2003). The trial court did not abuse its discretion in entering judgment based on this verdict. Plaintiff's assignment of error is overruled.

IX. Conclusion

Plaintiff has failed to show that the trial court erred in excluding evidence of the revocation of Martha Edwards's real estate license and the Edwardses' financial status. Plaintiff has also failed to show that the trial court erred in granting defendants' motion for directed verdict on the issues of civil conspiracy, unfair and deceptive trade practices, and punitive damages. Plaintiff failed to show the trial court erred in denying his motion to dismiss the Edwardses' counterclaim for conversion. Plaintiff failed to show the trial court erred in denying his motion to set aside the verdict and in entering judgment based on this verdict. We hold there was no error at trial, in the jury's verdict, or the judgment entered thereon.

No error.

Judges McGEE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA, Plaintiff v. BRIAN FRANK GONZALES, Defendant

No. COA03-606

(Filed 1 June 2004)

Drugs— trafficking in marijuana—motion to dismiss—sufficiency of evidence—weight

A de novo review revealed that the trial court erred by granting defendant's motion to dismiss the two trafficking in marijuana charges based on alleged insufficient evidence that the amount seized was above the statutory threshold of ten pounds provided in N.C.G.S. § 90-95(h)(1)(a), because: (1) the correct weight is that at seizure, thus containing its natural moisture; (2) the "usable or suitable for consumption" standard is not within North Carolina's statutory definition of marijuana; and (3) defendant is free to argue at trial that the 6.9-pound weight taken of the marijuana at the State Bureau of Investigation is evidence that there was excess water or other extraneous debris in the first recorded weight of 25.5 pounds for the freshly cut marijuana.

Appeal by the State from grant of a motion to dismiss entered 2 January 2003 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 25 February 2004.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

Crossley, McIntosh, Prior & Collier, by Samuel H. MacRae, for defendant appellee.

McCULLOUGH, Judge.

On 3 April 2002, Detectives with the New Hanover County Sheriff's Department, Vice and Narcotics Unit, located and seized 731 potted marijuana plants growing in the county. The plants were discovered on property located in Castle Hayne in two storage containers approximately 60 feet in length. Detectives had a search warrant for the property pursuant to unrelated probable cause. During the search of the property owner's residence, the detectives discovered the marijuana plants. The property owner told the detectives that the plants were defendant's.

The growing operation discovered by the Vice Narcotics Unit included lights with a timing system, fans, and an irrigation system. Officers cut the plants at the point where they joined the soil and bagged them.

On 4 April 2002, the plants were weighed at a Wilmington business that sold weight scales. The documented weight of the freshly cut marijuana was 25.5 pounds on that day. Following this weighing, the plants were boxed and sent to the State Bureau of Investigation (SBI) for further analysis. On the day the plants were submitted to the SBI, 19 April 2002, they were characterized as "wet" green plant material. On or about 7 May 2002, the plants were weighed at SBI and recorded as weighing 6.9 pounds.

On 5 April 2002, defendant was arrested for violations of the Controlled Substances Act. On 13 May 2002, defendant was indicted by a grand jury for two counts of trafficking in marijuana: one count based on possessing the substance; and one count based on manufacturing the substance. Pursuant to N.C. Gen. Stat. § 90-95(h)(1)(a) (2003), the amount alleged was in excess of 10 pounds, but less than 50 pounds.

Defendant filed a pretrial motion to dismiss the indictments charging the trafficking offenses. The hearing was held on 16 December 2002, and on 2 January 2003 the trial court issued an order dismissing the two trafficking charges. The trial court found as a matter of law "[t]hat the legal weight of marijuana is that weight at which

it is usable or suitable for consumption." Pursuant to this conclusion of law, the court found as a matter of law that there was no evidence that the marijuana seized in this case was in excess of 10 pounds as required for a trafficking offense. The State appealed, raising the single issue that it was error by the trial court to dismiss the two charges of trafficking.

Proving the Weight of Marijuana

Defendant contends that the trial court correctly granted the motion to dismiss the trafficking charges based on the court's conclusion of law (A) that the weight of marijuana includes only that marijuana which is "usable or suitable for consumption." The State assigned as error this conclusion of law. The State argues that the weight at the time of seizure, as a matter of law, is the critical weight when determining whether the quantity was sufficient for a trafficking charge. Pursuant to our analysis below, we hold that the trial court's interpretation of the definition of "marijuana" as applied to the trafficking statute was reversible error.

I. Standard of Review

The trial court order made the following conclusion as a matter of law: "That the legal weight of marijuana is that weight at which it is usable or suitable for consumption." The trial court found, under this legal conclusion, that the State offered no evidence that the weight of the marijuana seized was over 10 pounds and therefore dismissed the trafficking charges. The trial court's conclusion was, in effect, a legal interpretation of N.C. Gen. Stat. § 90-87(16) (2003), which defines marijuana as used in the trafficking statute. We review such legal interpretations *de novo. See State v. Mitchell*, 217 N.C. 244, 7 S.E.2d 567 (1940).

II. Proving the Weight of Marijuana in North Carolina

A. Marijuana Defined

Defendant was indicted under N.C. Gen. Stat. § 90-95(h)(1)(a) for "trafficking of marijuana" at a quantity in excess of 10 pounds, but less than 50 pounds. For the purposes of this charge, marijuana is defined as:

> (16) "Marijuana" means all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or prepara-

> tion of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

N.C. Gen. Stat. § 90-87(16) (2003). Those parts of the plant not included in the statutory definition of marijuana, such as the mature stalks and sterilized seeds, are necessarily not to be included in the weight of the marijuana when determining a trafficking charge. These exclusions from the definition are not "marijuana." This definition tracks almost verbatim that of the federal statutory definition of marijuana. *See* 21 U.S.C. § 802(16) (2003).

Proving the weight of the marijuana is an element of the trafficking offense. The State has the burden of proving at trial beyond a reasonable doubt that defendant committed the offenses by possessing and manufacturing more than 10 pounds of the substance. *State v. Diaz*, 88 N.C. App. 699, 701-02, 365 S.E.2d 7, 9, *cert. denied*, 322 N.C. 327, 368 S.E.2d 870 (1988). For this issue to survive a motion to dismiss on a trafficking charge, the State must come forth with substantial evidence, viewed in a favorable light, that the weight of the marijuana meets the 10-pound threshold. *State v. Mitchell*, 336 N.C. 22, 26-27, 442 S.E.2d 24, 27 (1994). In reviewing a motion to dismiss, the trial court should not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility. *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). The weight element becomes more critical as the State's evidence of weight approaches the minimum weight charged. *State v. Anderson*, 57 N.C. App. 602, 608, 292 S.E.2d 163, 167, *cert. denied*, 306 N.C. 559, 294 S.E.2d 372 (1982).

B. Presumption All Parts of the Plant are "Marijuana"

This Court has required an affirmative showing by the defendant that the weight of marijuana, for purposes of meeting the weight element of a trafficking charge, improperly included one of the exclusions from the definition. In *Anderson*, we held that the burden is on the defendant to show that stalks were mature or that any other part of the matter or material seized did not qualify as "marijuana." *Id.* The Court in *Anderson* based their analysis on that of *State v. Childers*, 41 N.C. App. 729, 255 S.E.2d 654, *cert. denied*, 298 N.C. 302, 259 S.E.2d

916 (1979), where this Court held that if the defendant does not make any showing as to the fertility of marijuana seeds, and offers no proof that they were in any different state from that in which they naturally occurred, the State is entitled to assume that the seeds are not sterilized and to proceed upon that assumption until the contrary is shown. *Id.* at 734, 255 S.E.2d at 657-58, *cert. denied*, 298 N.C. 302, 259 S.E.2d 916 (1979). Therefore, it is the defendant's burden to show that any part of the seized matter is not "marijuana" as defined. In such a case where the defendant does come forth with evidence that the State's offered weight of the marijuana includes substances not within the definition (e.g., mature stems or sterile seeds), it then becomes the jury's duty to accurately "weigh" the evidence.

C. Moisture Naturally Contained within Marijuana

Both the State and defendant offer competing contentions, each as a matter of law, as to whether moisture contained in marijuana is within the definition of marijuana such that it should be considered part of the drug's weight under N.C. Gen. Stat. § 90-95. This issue can also be framed as follows: What is the proper time to weigh marijuana, at seizure (still containing moisture), or when it is usable or suitable for consumption (after it has completely dried)? The State contends that moisture in the marijuana is a part of the definition and therefore the determining weight is at seizure; defendant contends that only marijuana that is usable or suitable for consumption is marijuana, that being the dried weight. We find no authority in North Carolina exactly on point for either of these contentions. However, there is North Carolina case law that impliedly accepts the State's contention that the correct weight is that at seizure and therefore containing its natural moisture. There is federal guidance on point as well.

1. Usable or Suitable for Consumption

The defendant argues, as the trial court found in this case, that the determinative weight of marijuana for purposes of the trafficking statute is when the marijuana is usable or suitable for consumption. We disagree.

Defendant cites *United States v. Lipp*, 54 F. Supp. 2d 1025 (D. Kan. 1999), *aff'd*, 215 F.3d 1338 (2000), as guidance for their interpretation of "marijuana" as read in the North Carolina statutes. The *Lipp* case, also dealing with moist marijuana and its weight for the purpose of federal sentencing, interpreted 1993 and 1995 amend-

ments to the Federal Sentencing Guidelines (FSG). These amendments came in response to district courts that were issuing sentences for trafficking based on a weight of marijuana that included its natural water content. *See United States v. Pinedo-Montoya*, 966 F.2d 591 (10th Cir. 1992) (holding that the district court properly considered the moisture content in the calculation of the weight of the marijuana for sentencing purposes); *United States v. Garcia*, 925 F.2d 170 (7th Cir. 1991) (holding that, because marijuana was not otherwise specified, the entire weight, including any existing moisture content, is relevant for sentencing purposes).

Effective 1 November 1993, Amendment 484 changed Application Note 1 of the FSG to include the following language:

> Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be *used*. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

U.S. Sentencing Guidelines Manual § 2D1.1, cmt., n.1 (2004) (emphasis added). An additional amendment was added in 1995, Amendment 518, providing the following:

> Similarly, in the case of marihuana having a moisture content that renders the marihuana *unsuitable for consumption* without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

Id. (emphasis added). The Commentary to Amendment 518 is as follows:

> [T]his amendment clarifies the treatment of marihuana that has a moisture content sufficient to render it unusable without drying (e.g., a bale of marihuana left in the rain or recently harvested marihuana that has not had time to dry). In such cases, using the weight of the wet marihuana can increase the offense level for a factor that bears no relationship to the scale of the offense or the

> marketable form of the marihuana. Prior to the effective date of the 1993 amendments, two circuits had approved weighing wet marihuana despite the fact that the marihuana was not in a usable form. *United States v. Pinedo-Montoya*, 966 F.2d 591 (10th Cir. 1992); *United States v. Garcia*, 925 F.2d 170 (7th Cir. 1991). Although Application Note 1 in the Commentary to § 2D1.1, effective November 1, 1993 (pertaining to unusable parts of a mixture or substance) should produce the appropriate result because marihuana must be dried before being used, this type of case is sufficiently distinct to warrant a specific reference in this application note to ensure correct application of the guideline.

18 USCS Appx. C, § 518 (2004).

Defendant correctly interprets these amendments as a clear and intended shift from the *Garcia* and *Pinedo-Montoya* holdings, and that the weight of marijuana for federal sentencing purposes must be that when it is in its usable form, meaning suitable for consumption and dried. Defendant argues that the lower court's dismissal of the trafficking charge in this case, using the FSG for its interpretation of "marijuana" to exclude moisture content as a matter of law, should be affirmed. Defendant argues that these amendments to the FSG provide the only guidance for North Carolina courts in determining the effect of moisture content in marijuana for the purposes of the weight element of the North Carolina trafficking statute. Furthermore, they provide the jury a standard as to the correct weight to consider.

We do not find the "usable or suitable for consumption" standard to be within North Carolina's statutory definition of marijuana. In federal court, the question of whether the weight of the controlled substance seized is an element of the offense that must be found beyond a reasonable doubt or a factor in sentencing that must be found by a preponderance of the evidence, is one that has been in great dispute since the Supreme Court rendered its decision in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) (holding that factors increasing a defendant's sentence beyond the statutory maximum of the crime charged, with the exception of prior convictions, must be proven beyond a reasonable doubt). The divided circuits on this issue, and the multitude of district court analyses on this issue, make the FSG less persuasive. *See* 21 U.S.C. 841 (the federal trafficking statute); *see also United States v. McAllister*, 272 F.3d 228, 232-33 (4th Cir. 2001) (finding § 841 still constitutional); *United States v. Buckland*, 259 F.3d 1157, 1163-68 (9th Cir. 2001), *reh'g en banc granted*, 265 F.3d 1085 (2001) (holding § 841 facially unconstitu-

tional). Amendments 484 and 518 to the FSG came before *Apprendi*, and those amendments were drafted with the understanding that a judge could constitutionally approximate the quantity of the seized substance by a preponderance of the evidence for sentencing purposes. *Apprendi* has sufficiently changed the sentencing landscape on this issue, and we believe the FSG amendments offer little in the way of guidance.

In North Carolina, establishing the weight element of a trafficking charge is a question the jury must determine beyond a reasonable doubt. This requires a clear standard be given to the jury in making this determination. While "usable and suitable for consumption" is one such standard, such a point falls within a spectrum of times and thus weights. We therefore interpret our definition of "marijuana" to mean marijuana at the point of seizure. *See State v. Lemonds*, 160 N.C. App. 172, 175, 584 S.E.2d 841, 842-43 (2003) (where there were three substantially different weights taken, but all above 10 pounds). Accordingly, we hold that the trial court improperly read into the definition of marijuana "usable or otherwise suitable for consumption," and thus improperly disregarded the 25.5-pound weight offered by the State on the weight element.

B. The Weight at the Point of Seizure

Determining the weight of the marijuana at the point of seizure has been accepted *sub silentio* by this Court in trafficking cases. In *Anderson*, 57 N.C. App. at 607, 292 S.E.2d at 166, North Carolina authorities harvested two truckloads of material alleged to be marijuana. The evidence of weight was 2,700 pounds, or approximately 35% above the statutory threshold of 2,000 pounds. *Id.* The State's evidence on the weight of each of these truckloads was established on the day of seizure. *Id.* In *State v. Simmons*, 66 N.C. App. 402, 407, 311 S.E.2d 357, 360 (1984), eight truckloads of marijuana were weighed at the time of seizure. One of these loads contained plants that had been pulled up by the roots, while the remaining loads contained loads that had been mown or handpicked. *Id.* Some of the plants were damp because of rain that had interrupted the harvesting process. *Id.* The loads were weighed by officials of the License, Theft, and Weight Section of the North Carolina Division of Motor Vehicles and were found to weigh 16,620 pounds. *Id.* The State's evidence of weight was 16,620 pounds, or 66% above the statutory threshold of 10,000 pounds. *Id.* at 406, 311 S.E.2d at 359. In *State v. Grainger*, 78 N.C. App. 123, 126, 337 S.E.2d 77, 79-80 (1985), *cert. denied*, 316 N.C. 198, 341 S.E.2d 572 (1986), the weight of three truckloads of marijuana

were taken at the time of seizure yielding approximately 4,800 pounds, or approximately 141% above the statutory threshold of 2,000 pounds. In *Anderson*, *Simmons*, and *Grainger*, the weight of the marijuana taken *at the point of seizure* was found sufficient to survive a motion to dismiss without any concern over moisture content of the freshly harvested plants, and without concern over the usability and consumable state of the plants.

In this case, at the point of seizure, the marijuana plants weighed 25.5 pounds, or approximately 155% above the statutory threshold of 10 pounds. In light of our prior decisions, we hold this to be clear and substantial evidence that defendant possessed over 10 pounds of marijuana as defined in the statute.

Anderson's, *Simmons's*, and *Grainger's* presumed acceptance of weighing the marijuana at the point of seizure comports with the definition of marijuana. The first portion of the North Carolina definition of marijuana states, "all parts of the plant of the genus Cannabis, *whether growing or not*." N.C. Gen. Stat. § 90-87(16) (emphasis added.) The definition then goes on to list a number of ways "all parts" of the plant may be used illegally, expanding the definition greatly (e.g., "derivative, mixture"). *Id.* After this expansive portion of the definition, the definition then lists those things excluded from the definition (e.g., mature stalks and sterilized seeds). *Id.* The moisture of the plant is not listed as an exclusion from the definition, though any moisture within a mature stalk would impliedly fall out of the definition. As to proving an exclusion from the definition, North Carolina case law is clear that this is defendant's burden. *See Anderson*, 57 N.C. App. at 608, 292 S.E.2d at 167; and *Childers*, 41 N.C. App. at 734, 255 S.E.2d at 657-58.

Though the North Carolina definition of marijuana tracks that of the federal statutory definition, the amendments to the FSG do not affect our interpretation of marijuana as defined in North Carolina. N.C. Gen. Stat. § 90-81 was last amended in 2003, approximately ten years after FSG Amendment 484, and approximately eight years after FSG Amendment 518. The North Carolina legislature has had ample time to make the requisite changes to the statutory definition of marijuana to track these FSG amendments and specifically exclude the plant's natural moisture content from the definition of "marijuana," but has thus far chosen not to do so.

Because our legislature has chosen to maintain the federal definition of "marijuana," without incorporating any of the FSG modifica-

tions to the North Carolina definition, we find the pre-amendment cases of *Garcia* and *Pinedo-Montoya* as guideposts for our interpretation of the North Carolina definition. *Garcia* found that:

> There can be little doubt that water may constitute an integral part of a "mixture or substance" containing a detectable amount of marijuana. Indeed, water is a natural component of the growing marijuana plant and is arguably included in the statutory definition of the drug itself. Section 802(16) defines marijuana as "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin," but specifically excludes only mature stalks of the marijuana plant and their derivative products from the definition. 21 U.S.C. § 802(16).

Garcia, 925 F.2d at 172. The *Pinedo-Montoya* court interpreted *Garcia* as follows:

> Additionally, the court believed water is arguably included within the statutory definition of marijuana. 21 U.S.C. § 802(16). While the court acknowledged that the moisture content of the marijuana may affect its marketability, the court noted its interpretation had the result of minimizing judicial concerns about when the marijuana was harvested and how it was dried, processed and stored.

Pinedo-Montoya, 966 F.2d at 595. Both *Pinedo-Montoya* and *Garcia* interpret the federal definition of marijuana to arguably include the moisture content of the plant.

The North Carolina case law of *Anderson*, *Simmons*, and *Grainger*, impliedly accept that the determinative weight of marijuana is at seizure. Furthermore, the definition requires that all parts of the plant, growing or not, meet the definition of marijuana for purposes of its weight. For a defendant to challenge the State's evidence of the weight of marijuana at the time of seizure, we require an affirmative showing of a specific exclusion to the definition: mature stalks (*Anderson*), sterile seeds (*Childers*), or some other extraneous material that was included in the weighing (*e.g.*, excess water). This then should go to the jury to "balance."

III. Conclusion

Pursuant to the analysis above, we believe there was sufficient evidence for the State to survive the motion to dismiss on the traf-

ficking charges. The evidence of the 25.5-pound weight of the marijuana, taken and recorded the day after it had been seized, is substantial evidence that the weight of the marijuana exceeds the 10-pound threshold for a conviction under N.C. Gen. Stat. § 90-95(h)(1)(a). *Mitchell*, 336 N.C. at 26-27, 442 S.E.2d at 27. This weight correctly included weight of the moisture naturally within the plant. At trial, the defendant is free to challenge, among other facets of the State's case, the method the marijuana was weighed, the scales used, and whether all of the substance weighed was marijuana as defined in N.C. Gen. Stat. § 90-87(16). Furthermore, defendant could offer as evidence the 6.9-pound weight taken of the marijuana at the SBI as evidence that there was excess water or other extraneous debris in the first recorded weight because the disparity between the two figures is beyond that of typical dehydration.[1] Ultimately, these are issues of fact for a jury to decide.

We have reviewed all other assignments of error and find them moot in light of the issues addressed herein. Therefore, the granting of a motion to dismiss by the trial court on the two trafficking charges is

Reversed.

Judges HUNTER and LEVINSON concur.

STATE OF NORTH CAROLINA v. ELIZABETH GREEN BYRD

No. COA03-952

(Filed 1 June 2004)

1. Appeal and Error— preservation of issues—aggravated range of sentencing

Defendant properly preserved her right to appeal the trial court's determination of aggravating and mitigating factors in a second-degree murder case because when a defendant argues for sentencing in the mitigated range, no further objection is required to preserve the issue on appeal when the trial court sentences defendant in the aggravated range.

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1. This is a hypothetical argument, and we hold no opinion as to its validity in the present case.

2. **Sentencing— nonstatutory aggravating factor—could have been charged with shooting into occupied property**

The trial court did not err in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant could have been but was not charged with shooting into occupied property, because the additional risk defendant created by firing into a moving vehicle makes her more culpable than if she had shot the victim outside his vehicle.

3. **Sentencing— aggravating factor—shooting into occupied property—second-degree murder—use of firearm**

The trial court did not abuse its discretion in a second-degree murder case by finding as an aggravating factor that defendant fired into occupied property even though defendant contends the evidence violated N.C.G.S. § 15A-1340.16(d) since it was necessary to prove an element of the offense based on the fact that the murder was accomplished by the use of a firearm, because: (1) evidence of the use of a firearm may be used to prove an aggravating factor for an underlying conviction involving the use of that firearm so long as the gravamen of the aggravating factor is not merely the use of a weapon, but that the weapon was used in some way, proved by additional evidence, increasing defendant's culpability beyond that already attached to the underlying conviction; and (2) the evidence necessary to prove the aggravating factor of firing into the vehicle was different than that necessary to prove the element of malice for second-degree murder, the gravamen of the factor is different than the mere use of the firearm, and defendant's action of firing into the vehicle increased her culpability.

4. **Sentencing— nonstatutory aggravating factor—defendant committed felony murder**

The trial court erred in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant committed felony murder but was not charged with it, because: (1) defendant was allowed to plead to second-degree murder in order to avoid going to trial on charges of first-degree murder; and (2) defendant could not have been charged with or convicted of felony murder, but could only have been charged with first-degree murder and subsequently convicted under one or both theories of first-degree murder.

5. Sentencing— aggravating factor—shooting into occupied property—beyond a reasonable doubt standard

The trial court did not violate defendant's rights to due process and to a jury trial in a second-degree murder case by finding as an aggravating factor that defendant shot into occupied property because defendant's sentence was not in excess of the applicable statutory maximum sentence, and therefore, this aggravating factor did not need to be proved to a jury beyond a reasonable doubt.

6. Sentencing— nonstatutory aggravating factor—premeditation and deliberation

The trial court did not abuse its discretion in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant acted with premeditation and deliberation, because: (1) when a defendant pleads to second-degree murder, a finding that defendant acted with premeditation and deliberation may be used to aggravate the sentence if proved by a preponderance of the evidence; (2) threats against the victim by defendant and previous ill will between the victim and defendant are two factors relevant to a finding of premeditation and deliberation, and the evidence showed that defendant had previously threatened to kill the victim and that they had a history of ill will and confrontation; and (3) the evidence further showed that defendant had checked to make sure a round was chambered in her gun, defendant threatened the victim with the gun once shortly before killing him, and the victim was backing his vehicle away from defendant at the time he was shot.

7. Sentencing— nonstatutory aggravating factor—voluntarily entered affray

The trial court erred in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant voluntarily entered the affray, because: (1) there was no evidence that defendant did anything to enter the affray other than actually shooting the victim; and (2) shooting the victim was evidence necessary to prove an element of the offense charged, and thus, may not support an aggravating factor.

8. Sentencing— mitigating factor—strong provocation when killed victim

The trial court did not err in a second-degree murder case by failing to find as a mitigating factor that defendant acted under

strong provocation when she killed the victim, because: (1) even though defendant's evidence tended to show a history of confrontation between the victim and defendant, a finding of strong provocation is not mandatory even if defendant's evidence is uncontroverted; and (2) defendant did not meet her burden of proving the trial court's decision denying the mitigating factor was not the result of a reasoned decision.

Appeal by defendant from judgment entered 10 December 2002 by Judge Michael E. Helms in Wilkes County Superior Court. Heard in the Court of Appeals 27 April 2004.

Roy Cooper, Attorney General, by Amar Majmundar, Special Deputy Attorney General, for the State.

Marjorie S. Canaday for defendant-Appellant.

STEELMAN, Judge.

Defendant, Elizabeth Byrd, pled guilty to second-degree murder pursuant to an agreement with the State on 9 December 2002. Under the terms of the plea agreement, the State reduced the charge from first-degree murder, with no provisions relating to sentencing. The sentencing hearing was conducted on that same day, and both the State and defendant offered evidence. The trial judge found four non-statutory aggravating factors and three statutory mitigating factors. The trial court determined that the aggravating factors outweighed the mitigating factors, and sentenced the defendant to an aggravated range sentence of 180-225 months imprisonment.

The evidence tends to show that the defendant killed Travis Parks by shooting him while he was in a motor vehicle. Defendant and Parks had a history of bad blood between them, and one witness interviewed by police indicated that defendant had threatened to kill Parks in the past. On 14 May 2002, Parks had been in an argument with several people outside of defendant's house. This escalated into a fight with Charlie Billings. Parks hit Billings with a pair of pliers, and upon feeling blood on his face, Billings shouted "He stabbed me." At that point others called for defendant (who was in her house at the time) to call the police. Defendant emerged from her house carrying a phone and a rifle and told Parks to stay put because the police were on the way. Parks got in his vehicle and left. A few minutes later, Parks returned in his vehicle. Billings and defendant contended that Parks was driving the vehicle towards them at a high

rate of speed when defendant shot him. The State's evidence tended to show that Parks was backing away from defendant at the time of the shooting.

[1] The State argues that defendant has waived her right to appeal her assignments of error because she failed to bring them to the attention of the trial judge by timely objection. While it is true that defendant must normally make specific objections to preserve issues on appeal, our Supreme Court has stated "We shall not require that after a trial is completed and a judge is preparing a judgment or making findings of aggravating factors in a criminal case, that a party object as each fact or factor is found in order to preserve the question for appeal." *State v. Canady*, 330 N.C. 398, 402, 410 S.E.2d 875, 878 (1991). The *Canady* Court further held that when a defendant argues for sentencing in the mitigated range, no further objection is required to preserve the issue on appeal when the trial judge sentences her in the aggravated range. *Id.* In the case at bar, defendant argued for a sentence in the mitigated range, but was sentenced from the aggravated range. She properly preserved her right to appeal the trial court's determination of aggravating and mitigating factors.

All of defendant's assignments of error relate to the trial court's decisions concerning aggravating and mitigating factors. "The mere fact that a guilty plea has been accepted pursuant to a plea bargain does not preclude the sentencing court from reviewing all of the circumstances surrounding the admitted offense in determining the presence of aggravating or mitigating factors." *State v. Melton*, 307 N.C. 370, 377, 298 S.E.2d 673, 678 (1983) (citations omitted). "As long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing." *Id.* at 378, 298 S.E.2d at 679 (citations omitted). The defendant bears the burden of proving the existence of a mitigating factor, while the State bears the burden for aggravating factors. N.C. Gen. Stat. § 15A-1340.16(a) (2003). The proponent must prove by a preponderance of the evidence that the facts are as asserted, and the trial court is *compelled* to find the factor only if the evidence "so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn." *State v. Clark*, 314 N.C. 638, 642, 336 S.E.2d 83, 86 (1985) (quoting *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 455 (1983)). The trial court is given great latitude in its decision to allow or disallow aggravating or mitigating factors since it is the one

that "observes the demeanor of the witnesses and hears the testimony." *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988) (*quoting State v. Ahearn*, 307 N.C. 584, 596, 300 S.E.2d 689, 697(1983)). The trial court's discretionary ruling on sentencing factors "will be upset only upon a showing that it could not have been the result of a reasoned decision." *Canty*, 321 N.C. at 524, 377 S.E.2d at 413 (quoting *State v. Cameron*, 314 N.C. 516, 519, 335 S.E.2d 9, 11 (1985). We note that many of the cases analyzing trial courts' decisions concerning aggravating and mitigating factors were decided under the Fair Sentencing Act. Even though this case was heard under Structured Sentencing (N.C. Gen. Stat. Article 81B), the logic of the cases under the earlier act as to aggravating and mitigating factors remains valid.

[2] In her first and fifth assignments of error, defendant argues that the trial court erred in finding as a non-statutory aggravating factor that "the defendant could have been; but was not charged with shooting into occupied property." We disagree.

Defendant contends that the aggravating factor of shooting into occupied property is not reasonably related to sentencing in this case. In order for a non-statutory aggravating factor to be considered in sentencing, it must be "reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.16(d)(20) (2003). In order to be reasonably related to sentencing, an aggravating factor must "be based upon conduct which goes beyond that normally encompassed by the particular crime for which the defendant is convicted." *State v. Jones*, 104 N.C. App. 251, 257, 409 S.E.2d 322, 325 (1991). The conduct must make the defendant more culpable or blameworthy. N.C. Gen. Stat. § 15A-1340.12 (2003), *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985). In *Jones*, this court found that in a conviction for firing into occupied property, the fact that the defendant fired more than once was an appropriate aggravating factor because the crime only required proof of one shot, and the additional shots increased the danger to those in the building, thus increasing the culpability of the defendant. *Jones*, 104 N.C. App. at 259, 409 S.E.2d at 326-27. When defendant fired into the vehicle in the instant case, she created a risk to others who were present. First, she could not have been certain if anyone else other than Parks was in the vehicle when she fired. Second, she knew that at least four people other than herself and Parks were in the vicinity of the vehicle when she fired. When she shot Parks as he was driving, she created an additional risk to the bystanders, who may have been injured or killed, by Parks either los-

ing control of the vehicle, or attempting to flee in a panic. The additional risk defendant created by firing into a moving vehicle makes her more culpable than if she had shot Parks outside his vehicle. This assignment of error is without merit.

[3] Defendant also argues that finding as an aggravating factor that she fired into occupied property (in this case a motor vehicle) violated the rule of N.C. Gen. Stat. § 15A-1340.16(d) that "evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation." When a defendant pleads guilty to second-degree murder, and the murder was accomplished by use of a firearm, use of the firearm is by law evidence necessary to prove the element of malice. *State v. Blackwelder*, 309 N.C. 410, 417-18, 306 S.E.2d 783, 788 (1983); *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983). For this reason, when a defendant pleads to second-degree murder, and the murder was accomplished through the use of a firearm, N.C. Gen. Stat. § 15A-1340.16(d) prohibits the trial court from finding the statutory aggravating factor (N.C. Gen. Stat. § 15A-1340.16(d)(10)) that the "defendant was armed with or used a deadly weapon at the time of the crime." *Id.* Defendant contends that this prohibition also prevents the trial court from *ever* considering the same evidence of the use of the firearm for the purpose of aggravating sentencing. Defendant is mistaken. In *State v. Sellers*, 155 N.C. App. 51, 57, 574 S.E.2d 101, 106 (2002), the defendant argued that:

> since it was necessary for the State to prove defendant used a firearm to be convicted of assault with a firearm, shooting into an occupied vehicle, and assault with intent to inflict serious bodily injury, therefore the trial court could not consider the use of the firearm as evidence to support an aggravating factor.

This court disagreed with the defendant's argument in *Sellers*, finding that since the State needed to prove evidence *additional to* the mere use of the firearm in order to prove the aggravating factor, finding the factor did not violate N.C. Gen. Stat. § 15A-1340.16(d). *Id.* The appellate courts of this state have consistently allowed evidence of the use of a firearm to support an aggravating factor even though the underlying offense required evidence of the use of the firearm to prove an element of that offense. *See State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990) (trial court properly found as an aggravating factor to second-degree murder that defendant knowingly created risk to more than one person by firing a shotgun in direction of more than one person); *State v. Demos*, 148 N.C. App. 343, 355, 559 S.E.2d 17, 25 (2002), *cert. denied*, *State v. Demos*, 355 N.C. 495, 564 S.E.2d

47 (2002) (trial court properly found as an aggravating factor to second-degree murder that defendant knowingly created risk to more than one person by firing a semi-automatic handgun in direction of more than one person); *but see State v. Swann*, 115 N.C. App. 92, 97, 443 S.E.2d 740, 743 (1994) (evidence that defendant took a deadly weapon with him was "so closely connected to the evidence possibly used by the jury to find that the killing was done with malice that under *Blackwelder*, it was error for the trial court to consider the use of the pistol again in sentencing"). Evidence of the use of a firearm may be used to prove an aggravating factor for an underlying conviction involving the use of that firearm, so long as the gravamen of the aggravating factor is "not merely the use of a weapon," but that the weapon was used in some way, proved by additional evidence, increasing defendant's culpability beyond that already attached to the underlying conviction. *See Taylor*, 309 N.C. at 574, 308 S.E.2d at 306 (in this instance the Supreme Court was considering evidence used to support two different aggravating factors).

In the instant case defendant killed Parks by firing one shot into the vehicle Parks was driving. Defendant could have been charged and convicted of both second-degree murder and firing into occupied property because additional evidence is required to prove the crime of firing into occupied property. *Sellers*, 155 N.C. App. at 57, 574 S.E.2d at 106; *See also State v. Carson*, 337 N.C. 407, 445 S.E.2d 585 (1994); *State v. James*, 342 N.C. 589, 466 S.E.2d 710 (1996). She was not charged with firing into occupied property. Therefore, the circumstances surrounding the crime, including the fact that she fired into the vehicle, were properly considered at the sentencing hearing. The evidence necessary to prove the aggravating factor of firing into the vehicle was different than that necessary to prove the element of malice for second-degree murder, the gravamen of the factor is different than the mere use of the firearm, and defendant's action of firing into the vehicle increased her culpability (as discussed in defendant's fifth assignment of error above). The trial judge did not abuse his discretion by finding this aggravating factor. This assignment of error is without merit.

[4] In her fourth assignment of error defendant contends that the trial court erred by finding as a non-statutory aggravating factor that "defendant committed felony murder but was not charged with it." We agree.

Defendant was indicted for the crime of first-degree murder. Under N.C. Gen. Stat. § 15-144 (2003) the indictment used to charge

defendant with first-degree murder was sufficient to support that charge under either the premeditation and deliberation theory, or the felony murder theory. *State v. Norwood*, 303 N.C. 473, 479, 279 S.E.2d 550, 554 (1981). "The State is not required at any time to elect a theory [premeditation or felony murder] upon which it will proceed against the defendant on the charge of first degree murder . . . ." *State v. Clark*, 325 N.C. 677, 684, 386 S.E.2d 191, 195 (1989). As our Supreme Court has reasoned: "Defendant was charged with *only one crime*, first degree murder; she was convicted of that crime. Premeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory. *Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes.*" *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989), *cert. denied*, *Brewer v. North Carolina*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990) (emphasis added).

The defendant in the instant case was allowed to plead to second-degree murder in order to avoid going to trial on charges of first-degree murder. She could not have been charged with or convicted of felony murder; she could only have been charged with first-degree murder and subsequently convicted under one or both *theories* of first-degree murder. As noted above, the State need not select a theory upon which to proceed in a first-degree murder trial, and thus it could have proceeded against defendant on a theory of felony murder. It was error to find this as an aggravating factor and a new sentencing hearing is required. *State v. Chatman*, 308 N.C. 169, 180-81, 301 S.E.2d 71, 78 (1983).

[5] In her sixth assignment of error defendant argues that the trial court violated both her right to due process and her right to a jury trial by finding as aggravating factors that defendant could have been charged with both felony murder and shooting into occupied property but was not. We disagree.

In light of our finding in defendant's fourth assignment of error above, we restrict our discussion to finding as an aggravating factor that defendant shot into occupied property. Defendant relies on the United States Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002) in support of her proposition. These cases hold that when it is necessary to find aggravating factors in order to sentence a defendant above the statutory maximum sentence, these factors must be found beyond a reasonable doubt by a

jury in order to comport with constitutional due process and the right to a jury trial.

Our Supreme Court has held that "unless the statute describing the offense explicitly sets out a maximum sentence, the statutory maximum sentence for a criminal offense in North Carolina is that which results from: (1) findings that the defendant falls into the highest criminal history category for the applicable class offense and that the offense was aggravated, followed by (2) a decision by the sentencing court to impose the highest possible corresponding minimum sentence from the ranges presented in the chart found in N.C.G.S. § 15A-1340.17(c). The statutory maximum sentence is then found by reference to the chart set out in N.C.G.S. § 15A-1340.17(e)." *State v. Lucas*, 353 N.C. 568, 596, 548 S.E.2d 712, 731 (2001). In the instant case, defendant was convicted of a class B2 felony. Using the sentencing charts of N.C. Gen. Stat. § 15A-1340.17(c) and (e1) to find the maximum time allowed for the highest prior record level in the aggravated range, regardless of the defendant's actual prior record level, we find the statutory maximum sentence allowed for a B2 felony is 480 months. Defendant was sentenced to 180-225 months. Since defendant's sentence was not in excess of the applicable statutory maximum sentence for a B2 felony, *Apprendi* and *Ring* do not require that this aggravating factor be proved to a jury beyond a reasonable doubt. *See also State v. McDonald*, 2004 N.C. App. LEXIS 510, 593 S.E.2d 793 (2004). This assignment of error is without merit.

[6] In her seventh assignment of error, defendant argues that the trial court erred in finding as a non-statutory aggravating factor that defendant acted with premeditation and deliberation because this finding was not supported by a preponderance of the evidence. We disagree.

When a defendant pleads to second-degree murder, a finding that the defendant acted with premeditation and deliberation may be used to aggravate the sentence if proved by a preponderance of the evidence. *State v. Melton*, 307 N.C. 370, 376, 298 S.E.2d 673, 678 (1983). "Threats against the victim by the defendant, [and] previous ill will between the victim and the defendant" are two factors relevant to a finding of premeditation and deliberation. *State v. Carter*, 318 N.C. 487, 491, 349 S.E.2d 580, 582 (1986). In the instant case the State's evidence tended to show that defendant had previously threatened to kill Parks, and that they had a history of ill will and confrontation. State's evidence further tended to show that defendant had checked

to make sure a round was chambered in her gun, that she had threatened Parks with the gun once shortly before killing him, and that Parks was backing his vehicle away from defendant at the time he was shot. We find upon reviewing the evidence that the trial judge did not abuse his discretion in finding this aggravating factor. This assignment of error is without merit.

[7] In her eighth assignment of error, defendant argues that the trial court erred in finding as a non-statutory aggravating factor that she "voluntarily entered the affray." We agree.

The evidence of the State tended to show that defendant was inside her house when the "affray" began. Parks and his girlfriend had been in an argument, Charlie Billings stepped in between the two, then Parks hit Billings with a pair of pliers. Believing he was cut with a knife, Billings cried "he stabbed me." At this time, witnesses outside began shouting to defendant inside her house to call the police. Defendant exited her house holding a phone and a rifle. She dialed 911 and gave the phone to Judy Billings to speak with the police. Parks left the scene in his vehicle, but returned a few minutes later, and it was at this time that defendant shot him. This evidence, supplied by the State, shows that defendant only left her house after Charlie Billings had called out "he stabbed me," and others yelled for defendant to call the police. Not knowing the extent of the affray, or the danger involved, defendant's actions at this point do not support a claim that she voluntarily entered the affray. Furthermore, the affray had ended when Parks left the scene. When Parks returned a few minutes later, and was shot, defendant was still in her yard with the rifle. There is no evidence that defendant did anything at this point to enter the affray other than actually shooting Parks. Shooting Parks is evidence necessary to prove an element of the offense charged, and thus may not support an aggravating factor. It was error under the facts of this case for the trial judge to consider as an aggravating factor that defendant voluntarily entered the affray, and thus a new sentencing hearing is required.

[8] In her ninth assignment of error defendant argues the trial court erred when it failed to find as a mitigating factor that the defendant acted under strong provocation when she killed Parks. We disagree.

In the instant case, defendant's evidence tended to show a history of confrontation between Parks and defendant, including an incident

several months prior to the shooting where defendant's husband was hit with a baseball bat by Parks' girlfriend as the two men were fighting, and other incidents involving physical altercations (though not between defendant and Parks) resulting in strong feelings of animosity between the two. The State did not dispute the "bad blood" between defendant and Parks. Defendant also contended Parks was driving toward her at some speed when she shot him, and that she felt threatened by this action. Even if defendant's evidence is uncontroverted, a finding of strong provocation is not mandatory. *State v. Cameron*, 71 N.C. App. 776, 777, 323 S.E.2d 396, 397 (1984), *aff'd*, *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985). The State's evidence (which the trial judge found to be more credible) tended to show Parks was backing away from defendant when he was shot. In *Canty*, the Supreme Court of this state held that the trial court did not err when it failed to find strong provocation even though the victim had stabbed the defendant 48 hours before the murder, had threatened defendant's life, had refused to discuss the stabbing with defendant, and defendant believed the victim was armed at the time he shot him. *Canty*, 321 N.C. at 526, 364 S.E.2d at 415. On the facts of this case we cannot say defendant has met her burden of proving the trial judge's decision denying the mitigating factor "could not have been the result of a reasoned decision." This assignment of error is without merit.

We need not consider defendant's other assignments of error in light of our findings above. We note, as we have on many previous occasions, that "the trial judge may wish to exercise restraint when considering non-statutory aggravating factors . . . . This prudent course of conduct would lessen the chance of having the case remanded for re-sentencing." *State v. Baucom*, 66 N.C. App. 298, 302, 311 S.E.2d 73, 75 (1984). This case is remanded to the trial court for a new sentencing hearing consistent with this opinion.

REMANDED FOR RE-SENTENCING.

Judges WYNN and CALABRIA concur.

PAUL JOSEPH DANIEL AND LISA HORNE DANIEL, PLAINTIFFS v. JEFF G. MOORE, INDIVIDUALLY, JEFF G. MOORE ENTERPRISES, INC., THROUGH ITS REGISTERED AGENT JEFF G. MOORE, THE COUNTY OF WAYNE, THROUGH ITS MANAGER WILL R. SULLIVAN, AND JOSEPH B. NASSEF, JR., INDIVIDUALLY AND IN HIS CAPACITY AS A BUILDING INSPECTOR FOR THE COUNTY OF WAYNE, DEFENDANTS

No. COA03-458

(Filed 1 June 2004)

Attorneys; Judgments— attorney-client relationship—consent judgment—authority

The trial court abused its discretion in an action arising out of the faulty construction of plaintiffs' home by denying plaintiffs' motion for a new trial even though plaintiffs' attorney agreed to entry of a consent judgment on 10 October 2002 after plaintiffs faxed and e-mailed communications on 13 September 2002 to their attorney stating that she did not have authority to enter into the consent judgment and plaintiffs wrote a letter dated 24 September 2002 that discharged their attorney, because: (1) an attorney-client relationship is based upon principles of agency and an agency can be revoked at any time before a valid and binding contract has been made with a third party; and (2) plaintiffs met their burden of proving the invalidity of the consent judgment by showing they revoked their attorney's authority to enter the consent judgment before final entry of the judgment.

Judge BRYANT dissenting.

Appeal by plaintiffs from judgment entered 10 October 2002 and from order filed 8 January 2003 by Judge Jerry Braswell in Wayne County Superior Court. Heard in the Court of Appeals 14 January 2004.

Shipman & Associates, L.L.P., by Meredith P. Ezzell, for plaintiff-appellants.

David M. Rouse for defendant-appellees Jeff. G. Moore, Individually, and Jeff G. Moore Enterprises, Inc.

ELMORE, Judge.

Paul Joseph Daniel and Lisa Horne Daniel (collectively, plaintiffs) appeal from entry of a consent judgment entered 10 October 2002 and an order filed 8 January 2003 denying their motion for a

new trial. For the reasons set forth herein, we vacate the consent judgment and reverse the trial court's order denying plaintiffs' motion for a new trial.

The record reveals that on 1 September 2000, plaintiffs filed a complaint against Jeff G. Moore and Jeff G. Moore Enterprises, Inc. (collectively, defendants) seeking damages for the allegedly faulty construction of plaintiffs' home in Wayne County, North Carolina.[1] The matter was calendared for trial in Wayne County Superior Court on 9 September 2002 before the Honorable Jerry Braswell. The parties appeared on that date, represented by counsel and prepared to proceed with trial. However, prior to commencing the trial, Judge Braswell held a lengthy pretrial conference in chambers with LeAnn M. Rhodes (Rhodes), the attorney retained by plaintiffs to represent them at trial, and counsel for defendants. The parties themselves did not participate in the pretrial conference, but their respective attorneys conferred with them during several breaks in the conference. After the conference, Judge Braswell pronounced in open court and in the presence of the attorneys that the attorneys had settled the case. Judge Braswell stated the terms of the settlement and requested that the attorneys prepare a written consent judgment.

Four days later, however, on 13 September 2002, Lisa Daniel sent Rhodes a brief communication via e-mail and fax which stated as follows: "I, Lisa Daniel, do NOT consent to the Order of September 9, 2002 handed down by Judge Braswell, and you do NOT have my authority to approve the wording of that Order." (emphasis in original). Thereafter, by letter to Rhodes dated 24 September 2002, plaintiffs indicated they had received a copy of the proposed consent judgment drafted by defendants' counsel, and noted their objection to certain terms contained therein. In this letter, plaintiffs also expressed frustration at their inability to speak with Rhodes over the previous two weeks and reiterated that they no longer consented to the settlement terms stated by Judge Braswell in open court on 9 September 2002. Plaintiffs' 24 September 2002 letter to Rhodes stated, in pertinent part, as follows:

> . . . . We feel we have no choice but to release you as our attorney of record as of today . . . and your employment, by us, is hereby terminated.

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1. Also named as defendants were Wayne County and Joseph B. Nassef, Jr. However, plaintiffs settled all claims against these two defendants before 9 September 2002, the scheduled trial date.

> Therefore, as I previously notified you in writing, via E-mail and fax, we do not consent to the order of Sept. 9, 02 handed down by Judge Braswell, and you do not have authority to approve the wording of that order. . . .
>
> We are representing ourselves per se [sic]. We want . . . all of our records, exhibits, tapes and any other materials that are in your possession[] . . . returned to us as soon as possible.

Rhodes, in a letter dated 26 September 2002, acknowledged receipt of the foregoing communications and informed plaintiffs that, unless plaintiffs advised to the contrary, she would neither respond to a telephone call she had received from defendants' attorney regarding the proposed consent judgment nor address the discrepancies between the proposed consent judgment drafted by defendants' counsel and the judgment pronounced in open court by Judge Braswell. On 3 October 2002, Rhodes advised defendants' attorney by telephone that she no longer represented plaintiffs.

Despite the foregoing, defendants' attorney received a letter dated 4 October 2002 from Rhodes, stating that she had reviewed his draft of the proposed consent judgment and that she objected to certain terms. The letter also stated that Rhodes "would welcome the opportunity to discuss these discrepancies" and that Rhodes "look[ed] forward to receipt of the modified Judgment," and indicated that copies of the letter were sent to plaintiffs and to Judge Braswell. On 9 October 2002, a subsequent draft of the proposed consent judgment, with modifications as suggested by Rhodes, was marked "CONSENTED AND AGREED TO," signed by Rhodes, and sent to defendants' counsel by Rhodes via fax. The consent judgment was subsequently signed by Judge Braswell and entered on 10 October 2002.

On 21 October 2002, plaintiffs filed a "Motion for a New Trial or to Amend Judgment," pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (2003). In support of their motion, plaintiffs argued that (1) the trial judge's biased conduct during the pretrial conference denied plaintiffs their right to a trial;[2] (2) plaintiffs did not actually consent to the proposed settlement or to entry of judgment on the terms pronounced by Judge Braswell in open court on 9 September 2002, or, in

2. We note that there was no recorded transcript of the *in camera* pretrial conference, and that the affidavits of plaintiffs, Rhodes, and defendants' attorney, each of which contained averments regarding Judge Braswell's conduct during the pretrial conference, were considered by the trial court.

the alternative, plaintiffs revoked their consent by their subsequent written communications informing Rhodes that she did not have authority to enter the proposed consent order on plaintiffs' behalf; and (3) the judgment contained vague and uncertain terms, rendering it incapable of execution.[3] The trial court denied plaintiffs' motion, finding that Rhodes' conduct evidenced plaintiffs' consent to entry of the proposed judgment, the terms of which were "sufficiently clear to be objectively enforced." Regarding plaintiffs' consent to the judgment, the trial court specifically found as follows:

> . . . Rhodes[] did at one time after September 9, 2002, tell the defendants' attorney that she was no longer representing the plaintiffs, but, thereafter, she continued to confer with the defendants' attorney concerning the details of the consent judgment and sent plaintiffs a proposed copy of the consent judgment, which indicates that her representation of them did, in fact, continue, and additionally shows that they, at that time, still consented to the judgment.

The order did not address plaintiffs' contention regarding judicial bias.

Plaintiffs appeal from entry of the consent judgment and the subsequent order denying their motion for a new trial, contending that Rhodes acted without authority in consenting to entry of the judgment. "The granting or denial of a motion for new trial lies within the trial court's sole discretion." *Marley v. Graper*, 135 N.C. App. 423, 433, 521 S.E.2d 129, 136 (1999). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. . . . [A]nd will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). In the present case, our review of the record indicates plaintiffs withdrew their consent to entry of the judgment prior to the time that Rhodes, acting without authority, signed the proposed consent judgment and sent it to defendants' attorney on 9 October 2002. Accordingly, we hold that the trial court abused its discretion in denying plaintiffs' motion for a new trial.

Our Supreme Court has stated that "[t]he power of the court to sign a consent judgment depends upon the unqualified consent of the

3. The hearing transcript indicates that plaintiffs' main argument at the hearing concerned the issue of whether plaintiffs had ever given their consent to entry of the judgment, and if they had, whether they had revoked their consent.

parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment." *King v. King*, 225 N.C. 639, 641, 35 S.E.2d 893, 895 (1945). This Court has previously stated as follows regarding entry of consent judgments:

> Without his client's consent, an attorney has no inherent authority to enter into a settlement agreement that is binding on his client. . . . Thus, the trial court's authority to enter the consent order hinges on *whether the defendants' counsel had authority to sign the order.*

Royal v. Hartle, 145 N.C. App. 181, 183, 551 S.E.2d 168, 170 (citations omitted) (emphasis added), *disc. review denied*, 354 N.C. 365, 555 S.E.2d 922 (2001); *see also Howard v. Boyce*, 254 N.C. 255, 263, 118 S.E.2d 897, 903 (1961) ("An attorney has no inherent or imputed power or authority to compromise his client's cause or consent to a judgment which gives away the whole corpus of the controversy . . . . an attorney must be so authorized.") Moreover,

> For a valid consent order, the parties' consent to the terms "must still subsist at the time the court is called upon" to sign the consent judgment. *If a party repudiates the agreement by withdrawing consent before entry of the judgment, the trial court is "without power to sign [the] judgment."*

Chance v. Henderson, 134 N.C. App. 657, 663, 518 S.E.2d 780, 784 (1999) (citations omitted) (emphasis added); *see also In re Estate of Peebles*, 118 N.C. App. 296, 298, 454 S.E.2d 854, 856 (1995) ("[A] consent judgment is void if a party withdraws consent before the judgment is entered."). The party challenging the validity of a consent judgment bears the burden of proving that it is invalid. *Milner v. Littlejohn*, 126 N.C. App. 184, 187, 484 S.E.2d 453, 456, *disc. review denied*, 347 N.C. 268, 493 S.E.2d 458-59 (1997).

In the present case, plaintiffs first contend that they never consented to the judgment as pronounced by Judge Braswell on 9 September 2002 following the pretrial conference. In support of this contention, plaintiffs argue that they were not in the courtroom during most of Judge Braswell's reading of the consent judgment's terms and therefore did not have an opportunity to hear and object to the findings of fact. Assuming this assertion to be true, it is nevertheless immaterial to the disposition of this appeal because the record indicates that Rhodes, as plaintiffs' attorney at the time, was present during the entire pronouncement of the judgment's terms on 9 Septem-

ber 2002 and consented on plaintiffs' behalf. *Boyce*, 254 N.C. at 263, 118 S.E.2d at 903 (an attorney is presumed to have apparent authority to make representations on his client's behalf). Our examination of the record reveals that plaintiffs consented, albeit reluctantly, to the settlement prior to the pronouncement of the consent judgment's terms in open court on 9 September 2002.[4]

However, the record also reveals that plaintiffs thereafter expressly revoked their consent to entry of the consent judgment prior to the time that Rhodes, acting on her own authority, purported to bind plaintiffs to it by marking the proposed consent judgment "consented and agreed to," signing it, and forwarding it to defendants' counsel on 9 October 2002. Lisa Daniels' fax and email communications to Rhodes on 13 September 2002 and plaintiffs' letter to Rhodes dated 24 September 2002 each stated, in clear and unmistakable language, that plaintiffs no longer consented to the judgment as pronounced in open court on 9 September 2002, and that Rhodes did not have authority to approve the terms of the judgment. Additionally, plaintiffs' 24 September 2002 letter discharged Rhodes from representation of plaintiffs. Rhodes acknowledged receipt of these communications in her letter to plaintiffs dated 26 September 2002, but nevertheless purported to act on plaintiffs' behalf by signing the consent judgment and forwarding it to defendants' attorney for entry by the trial court.

"North Carolina law has long recognized that an attorney-client relationship is based upon principles of agency." *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 532-33, 463 S.E.2d 397, 400 (1995). "[A]n agency can be revoked at any time before a valid and binding contract, within the scope of the agency, has been made with a third party." *Insurance Co. v. Disher*, 225 N.C. 345, 347, 34 S.E.2d 200, 201 (1945). A consent judgment is a contract between the parties entered, with the sanction of a court of competent jurisdiction, upon the court's records. *Milner v. Littlejohn*, 126 N.C. App. 184, 187, 484 S.E.2d 453, 455, *disc. review denied*, 347 N.C. 268, 493 S.E.2d 458-59 (1997).

Because we conclude that plaintiffs revoked Rhodes' authority to enter the consent judgment before final entry of the judgment upon

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4. Lisa Daniel stated in her affidavit that before the pronouncement of judgment on 9 September 2002, Rhodes twice asked her outside the courtroom for authority to settle the case, and Lisa Daniel said "fine" or "whatever" each time. Paul Daniel also stated in his affidavit that he "shook [his] head up and down while shrugging [his] shoulders" in response to the same request from Rhodes.

the court's records, we hold that plaintiffs have carried their burden of proving the invalidity of the consent judgment. Accordingly, we conclude that the trial court abused its discretion by denying plaintiffs' motion for a new trial. We therefore vacate the consent judgment entered 10 October 2002, and we reverse the order denying plaintiffs' motion for a new trial entered 8 January 2003.

The judgment entered 10 October 2002 is

Vacated.

The order entered 8 January 2003 is

Reversed.

Judge CALABRIA concurs.

Judge BRYANT dissents.

BRYANT, Judge dissenting.

Because I conclude the trial court did not err in not voiding the consent judgment and denying plaintiffs' motion for a new trial, I respectfully dissent.

In the case *sub judice*, the trial court found Rhodes consented to the judgment pronounced by the court, and that

> Rhodes[] did at one time after September 9, 2002, tell . . . defendants' attorney that she was no longer representing the plaintiffs, but, thereafter, she continued to confer with . . . defendants' attorney concerning the details of the consent judgment and sent plaintiffs a proposed copy of the consent judgment, which indicates that her representation of them did, in fact, continue, and additionally shows that they, at that time, still consented to the judgment.

In the instant case, the trial court's findings are supported by competent evidence and thus binding on appeal. *See Ledford v. Ledford*, 229 N.C. 373, 376, 49 S.E.2d 794, 796 (1948) (if supported by some evidence, the findings of fact made by the trial judge in determining whether a party gave consent to a judgment as entered are binding on appeal); *Royal v. Hartle*, 145 N.C. App. 181, 182, 551 S.E.2d 168, 170 (2001) (the trial court's findings when supported by competent evidence are binding on appeal).

Moreover, the decision to grant or deny a motion for a new trial lies within the sound discretion of the trial court. *Marley v. Graper*, 135 N.C. App. 423, 433, 521 S.E.2d 129, 136 (1999). The trial court's decision in this regard will not be overturned unless the decision was manifestly unsupported by reason. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985); *see Campbell v. Pitt County Mem'l Hosp.*, 321 N.C. 260, 265, 362 S.E.2d 273, 276 (1987) (" 'an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice' ") (citation omitted).

The record in this case, including the transcript and plaintiffs' affidavits, indicates Rhodes was in the courtroom during the trial court's pronouncement of the judgment and consented to it. Plaintiffs however later asserted they were not in the courtroom until the end of the proceeding and therefore did not have an opportunity to hear and object to the findings of fact. Assuming this assertion to be true, it is immaterial to the disposition of this appeal because Rhodes, as plaintiffs' attorney at the time, consented on their behalf. *See Howard v.* Boyce, 254 N.C. 255, 263, 118 S.E.2d 897, 903 (1961) (an attorney is presumed to have apparent authority to make representations on behalf of his client). Moreover, the record indicates plaintiffs agreed to the settlement, albeit reluctantly, prior to the pronouncement of judgment.[5]

The record further shows: Rhodes received Lisa Daniel's written communications prohibiting Rhodes from (1) approving any written consent judgment and (2) terminating Rhodes' representation of them; defendants' attorney was advised by Rhodes' letter that she no longer represented plaintiffs; defendants' attorney subsequently received Rhodes' letter indicating she had reviewed the proposed consent judgment, objected to certain terms, and expressed her anticipation of receiving a modified judgment from defendants' attorney; Rhodes' letter (dated 4 October 2002, five days before the trial court signed the consent order) also indicated copies of it would be forwarded to the trial court and plaintiffs; and Rhodes eventually signed the proposed judgment. Plaintiffs however argue Rhodes acted without authority.

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5. In an affidavit, Lisa Daniel admitted that before the pronouncement of judgment, Rhodes twice asked her outside the courtroom to settle the action, and Lisa Daniel said "fine" or "whatever" each time in response to Rhodes. Paul Daniel also stated in his affidavit that at the time, he "shook [his] head up and down while shrugging [his] shoulders" in response to the same request from Rhodes.

In North Carolina, a court must consider the following principles when determining whether a consent judgment should be voided:

> (1) the general desirability that a final judgment not be lightly disturbed, (2) where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure, (3) the opportunity the movant had to present his claim or defense, and (4) any intervening equities.

Royal, 145 N.C. App. at 183-84, 551 S.E.2d at 171 (citations omitted).

Here, the judgment at issue stated it resolved all issues arising from the lawsuit between the parties and is a final judgment. *See Janus Theatres of Burlington v. Aragon*, 104 N.C. App. 534, 536, 410 S.E.2d 218, 219 (1991) (" '[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court' ") (citation omitted). In addition, the evidence indicates Rhodes acted with the apparent authority of an attorney for plaintiffs.

> Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses. "The determination of a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had[] under the circumstances conferred upon his agent."

Bell Atlantic Tricon Leasing Corp. v. DRR, Inc., 114 N.C. App. 771, 774-75, 443 S.E.2d 374, 376 (1994) (citing *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 31, 209 S.E.2d 795, 799 (1974)). Rhodes' discussion with defendant's attorney about modifications to the consent order and her signing it were acts within the scope of an attorney representing a party. *See Howard*, 254 N.C. at 263, 118 S.E.2d at 903 (an attorney is presumed to have apparent authority to make representations on behalf of his client). *Cf. Heath v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 243-45, 388 S.E.2d 178, 182-83 (holding the law firm was not liable for investments the client made through a member associate because the investments made were not related to the associate's legal representation of the client, and the associate did not have apparent authority to make said investments), *disc. review denied*, 327 N.C. 428, 395 S.E.2d 678 (1990). Therefore, based on her continuing actions on behalf of plaintiffs despite her

earlier statement to the contrary, defendants' attorney was justified in believing Rhodes had continuing authority to represent plaintiffs.

By signing the consent order, Rhodes led the trial court to reasonably believe she had authority to enter the consent judgment. Furthermore, despite the allegations in their affidavits, plaintiffs have failed to overcome the presumption that Rhodes had requisite authority to agree to the consent judgment.

In light of the above facts and our legal principles as to consent judgments, I would hold the judgment in this case was properly entered by the trial court.

SHARON G. HALSTEAD, PLAINTIFF v. ROBERT W. HALSTEAD, DEFENDANT

No. COA03-1020

(Filed 1 June 2004)

Divorce— equitable distribution—military retirement benefits—disability

The trial court erred in an equitable distribution case by awarding plaintiff wife a larger percentage of defendant husband's military retirement benefits based on the fact that defendant elected to receive disability pay in lieu of a portion of his retirement pay, because: (1) the Uniformed Services Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans disability benefits, 10 U.S.C. § 1408; (2) the trial court could not substitute its own definition of military retired pay in lieu of the definition of disposable retirement pay as defined by Congress since federal law governs state action regarding military retirement pay or disability benefits; and (3) the order requiring defendant to pay his former wife any amount withheld from her share of defendant's military retirement due to future reductions caused by an act or omission, including future waivers of retirement pay, contravenes 38 U.S.C. § 5301.

Appeal by defendant from order entered 2 April 2003 by Judge C. Christopher Bean, District Court, Pasquotank County. Heard in the Court of Appeals 27 April 2004.

The Twiford Law Firm, P.C., by Edward A. O'Neal, for plaintiff.

Frank P. Hiner, IV, for defendant

WYNN, Judge.

Defendant, Robert W. Halstead, appeals the trial court's equitable distribution order awarding Plaintiff, Sharon G. Halstead, an unequal distribution of marital assets contending the trial court erroneously awarded Plaintiff a larger percentage of his military retirement benefits in contravention of federal law. We agree and reverse the order below.

Defendant entered military service on 24 April 1967 and married Plaintiff on 4 October 1969. Twenty-six years later, the parties separated on 26 February 1996. The following year, Defendant retired from the military on 1 May 1997.

Due to a service-related disability, Defendant received military disability benefits. Federal law, however, precludes the receipt of military disability benefits and military retirement benefits; thus, Defendant elected to waive a portion of his military retirement pay in order to receive military disability pay. Nonetheless, in this case, because Defendant elected to receive disability pay in lieu of retirement benefits, the trial court concluded:

> Since the amount of disability rating is deducted from retirement benefits dollar for dollar, Plaintiff will be effectively deprived of her marital share (44%) of total monthly retirement benefits due to reclassification of retirement benefits to disability benefits. Therefore, the percentage of retirement payable to Plaintiff should be increased and the percentage payable to Defendant should be decreased to account for the partial disability deduction payment made to the Defendant.

From that conclusion, Defendant appeals.

On appeal, Defendant argues the trial court erroneously (I) defined military retired pay; (II) awarded Plaintiff an increased percentage of Defendant's military retirement; and (III) assigned any future disability pay to Plaintiff in direct proportion to the unequal share she received pursuant to the trial court's order in contravention of 10 U.S.C. § 1408 and 38 U.S.C. § 5301 et seq. We agree.

In *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), the United States Supreme Court held that upon dissolu-

tion of a marriage, federal law precluded a state court from dividing military non-disability retired pay pursuant to state community property laws. In direct response to the *McCarty* decision, the United States Congress enacted the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, "which authorizes state courts to treat 'disposable retired or retainer pay' as community property." *Mansell v. Mansell*, 490 U.S. 581, 584, 109 S. Ct. 2023, 2026, 104 L. Ed. 2d 675, 682 (1989).[1] "Because pre-existing federal law, . . ., completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property." *Mansell*, 490 U.S. at 588, 109 S. Ct. at 2028, 104 L. Ed. 2d at 684. Thus, Congress sought to change the legal landscape created by the *McCarty* decision by enacting the Uniformed Services Former Spouses' Protection Act. *Mansell*, 490 U.S. at 587, 109 S. Ct. at 2028, 104 L. Ed. 2d at 684.

Under the Uniformed Services Former Spouses' Protection Act, state courts are permitted to "treat 'disposable retired or retainer pay' of a military retiree as marital property. However, because military disability payments are not included within the definition of 'disposable retired or retainer pay,' such disability payments cannot be classified as marital property subject to distribution under state equitable distribution laws." *Bishop v. Bishop*, 113 N.C. App. 725, 733, 440 S.E.2d 591, 597 (1994).

In this case, the trial court did not classify Defendant's military disability payments as marital property. Indeed, in Finding of Fact 8, the trial court deducted Defendant's Veterans Administration disability payment from his gross retirement pay in determining Defendant's disposable retirement income. However, the trial court then found:

> A portion of Defendant's gross monthly retirement benefits, currently in the total amount of $3,366.00, of which 88% is considered marital, has been reclassified since [date of separation] to disability benefits. Plaintiff is not entitled by law to any portion of the disability benefits (currently $633.00 per month). Since the amount of disability rating is deducted from retirement benefits dollar for dollar, Plaintiff will be effectively deprived of her mari-

1. The Court in *Mansell* indicated "the language of Uniformed Services Former Spouses' Protection Act covers both community property and equitable distribution States, as does our decision today." *Mansell*, 490 U.S. at 584, 109 S. Ct. at 2026, 104 L. Ed. 2d at 682.

> tal share (44%) of total monthly retirement benefits due to reclassification of retirement benefits to disability benefits. Therefore, the percentage of retirement payable to Plaintiff should be increased and the percentage payable to Defendant should be decreased to account for the partial disability deduction payment made to the Defendant.

Although Defendant acknowledges that in North Carolina, the payment of disability benefits must be treated as a distributional factor when making an equitable distribution between the parties, he argues that "when the payment of disability benefits is the only factor a court considers in providing an unequal distribution of a military retirement and a judge treats the disability benefits by providing a dollar for dollar compensation to the non-military spouse, the disability payments become less a factor and more an acknowledgment that the non-military spouse has an ownership interest in both the military retirement and the disability payments." We are persuaded by his argument to agree.

Due to federal preemption, the application of state equitable distribution laws to military retirement and military disability pay is limited to those areas in which Congress has authorized state action. *See Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). The Uniformed Services Former Spouses' Protection Act "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans disability benefits." *Mansell*, 490 U.S. at 594-95, 109 S. Ct. at 2032, 104 L. Ed. 2d at 689. Although the trial court in this case deducted Defendant's veterans' disability benefits from his gross military retirement pay, it then circumvented the mandates of 10 U.S.C. § 1408 by increasing Plaintiff's share of Defendant's military retirement based solely upon Defendant's election to waive a portion of his military retirement pay based upon the amount of his disability benefits. Indeed, the trial court's order explicitly states that the reason for increasing Plaintiff's share arose from Defendant's election to receive disability benefits in lieu of retirement pay. Such an attempt to circumvent the mandates of 10 U.S.C. § 1408 can not be sanctioned by this Court.[2]

In North Carolina, military disability payments are treated as a distributional factor. *Bishop v. Bishop*, 113 N.C. App. 725, 734, 440

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2. Although the trial court concluded an unequal distribution in favor of Mrs. Halstead was equitable, Mr. Halstead's share of the marital estate was $395,136.57 and Mrs. Halstead's share was $369,596.95.

S.E.2d 591, 597 (1994); *see also White v. White*, 152 N.C. App. 588, 594, 568 S.E.2d 283, 286 (2002). Similar to North Carolina, the Supreme Court of Alaska has held the federal law did not preclude the consideration of the economic consequences of a decision to waive military retirement pay in order to receive disability pay in determining the equitable distribution of marital assets. In addressing an issue somewhat similar to the one in this case, the Alaska Supreme Court explained:

> We are aware of the risk that our holding today might lead trial courts to simply shift an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side. This is unacceptable. In arriving at an equitable distribution of marital assets, courts should only consider a party's military disability benefits as they affect the financial circumstances of both parties. Disability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage.
>
> This is, however, precisely what happened in the case before us. The trial court's modification order simply replaced direct federal garnishment of [the husband's] retirement benefits with a state order to pay. The trial judge even ordered that increases in [the husband's] retirement pay be passed on to [the wife] without any apparent recognition that James no longer has any retirement pay. The court was clearly trying to regain the status quo as if the *Mansell* decision did not exist. The effect of the order was to divide retirement benefits that have been waived to receive disability benefits in direct contravention of the holding in Mansell. This simply cannot be done under the Supremacy Clause of the federal constitution.

Clauson v. Clauson, 831 P.2d 1257, 1264 (Alaska 1992). Likewise, in this case, the trial court acknowledged federal law allowed Defendant to waive retirement benefits in order to receive disability benefits and precluded the division of the disability benefits as marital property. Therefore, the trial court accounted for the reduction in retirement income by increasing Plaintiff's share of the disposable retirement income. We hold that the trial court's order contravened federal law.

Defendant also contends the trial court erroneously defined military retirement pay in Conclusion of Law 8, which in pertinent part states:

> It is intended that the Plaintiff shall receive her full share of the Defendant's military retired pay as set out herein and without further reduction for civil service income, disability pay or any other reason. Military retired pay is deemed by the Court to include:
>
> a. Retired pay actually paid or to which the Defendant would be entitled based on the length of service of his active duty or reserve service;
>
> b. All payments paid or payable pursuant to Chapter 38 or Chapter 61, Title 10, UPS Code, before any statutory, regulatory or elective deductions are applied.
>
> c. All amounts of retired pay waived or forfeited in any manner and for any reason or purpose including any amounts waived to qualify for VA benefits or forfeiture due to the misconduct of the Defendant.

Pursuant to 10 U.S.C. § 1408(c)(1), a court may treat disposable retired pay "either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." The provision defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled less amounts which— . . . (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38." 10 U.S.C. § 1408(a)(4)(B). Subsection 4(C) addresses the deduction of retirement benefits authorized under Chapter 61 by allowing a percentage of such benefits to be deducted from a member's total monthly retired pay in order to determine the disposable retired pay.

As noted earlier, federal preemption limits state action regarding military retirement pay and military disability pay to those actions authorized by Congress. Thus, the trial court could not substitute its own definition of military retired pay in lieu of the definition of disposable retirement pay as defined by the Congress.

Finally, Defendant argues the trial court erroneously assigned, dollar-for-dollar, any future diminution in the military retirement based upon reclassification of further amounts of retirement pay as disability pay in contravention of 10 U.S.C. § 1408 and 38 U.S.C. § 5301 et seq.

Under 38 U.S.C. § 5301,

> payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

In its decree, the trial court ordered:

> 6. If there is a diminution deduction or cessation of the amounts paid to the Plaintiff pursuant to the next preceding paragraph, and any cost of living increases subsequent to the date that the first payment to the Plaintiff is due and payable pursuant to this order, due to an act or omission of the Defendant, the Defendant shall personally pay to the Plaintiff through the Office of the Clerk of Superior Court of Pasquotank County that amount not paid directly to her by the Defendant Finance and Accounting Service and the Defendant is designated as a constructive trustee in that regard.
>
> 7. If the Defendant receives disability pay or civil service income and this event causes a reduction of the Defendant's disposable retired pay from the amount set out herein, thus reducing the Plaintiff's share thereof, the Defendant will pay to the Plaintiff through the Office of the Clerk of Superior Court of Pasquotank County each month any amount that is withheld from Plaintiff's share of the Defendant's military retirement for the above reasons. The monthly payments herein shall be paid to the Plaintiff regardless of her marital status and shall not end at remarriage.

We hold that the order requiring Defendant to pay his former wife any amount withheld from her share of Defendant's military retirement due to future reductions caused by an act or omission, including future waivers of retirement pay, contravenes 38 U.S.C. § 5301 (precluding "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.").

The policy underlying our holding was well stated by the United States Supreme Court in *Mansell*: "Veterans who became disabled as

a result of military service are eligible for disability benefits . . . calculated according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired. . . . In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay. Because disability benefits are exempt from federal, state, and local taxation, military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common." *Mansell*, 490 U.S. at 583-84, 109 S. Ct. at 2026, 104 L. Ed. 2d at 681-82.

In sum, the trial court's order awarding Plaintiff a greater percentage of Defendant's disposable retirement pay because Defendant elected to receive disability pay in lieu of a portion of his retirement pay contravenes 10 U.S.C. § 1408. Furthermore, the order requiring Defendant to pay Plaintiff any amounts withheld from her share of his retirement due to future elections or any acts or omissions on his part causing a reduction in disposable retirement pay violates 38 U.S.C. § 5301 et seq. Finally, as federal law governs state action regarding military retirement pay or disability benefits, the trial court could not substitute its own definition for disposable retirement pay. Accordingly, the trial court's order is reversed and this cause is remanded for a new equitable distribution hearing.

Reversed and remanded.

Judges CALABRIA and STEELMAN concur.

YORK OIL COMPANY, Petitioner v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, DIVISION OF ENVIRONMENTAL MANAGEMENT, Respondent

No. COA03-674

(Filed 1 June 2004)

Environmental Law— underground storage tanks—reimbursement for clean-up costs—date release discovered

The trial court erred by affirming a final agency decision granting summary judgment in favor of defendant North Carolina Department of Environment, Health and Natural

Resources which denied petitioner's eligibility to receive reimbursement for clean-up costs from the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund under N.C.G.S. § 143-215.94B, because there was a genuine issue of material fact as to whether a leakage had been discovered by petitioner prior to the fund's effective date of 30 June 1988 within the meaning of 15A N.C.A.C. 2P.0202(b)(4) from the underground storage tanks at the pertinent gas station.

Appeal by petitioner from an order entered 14 February 2003 by Judge John O. Craig, III in Surry County Superior Court. Heard in the Court of Appeals 2 March 2004.

Kilpatrick Stockton, L.L.P., by Stephen R. Berlin, J. Jason Link, and Corena A. Norris-McCluney, for petitioner-appellant.

Attorney General Roy A. Cooper, III, by Special Deputy Attorneys General James P. Longest, Jr. and Judith R. Bullock, Assistant Attorneys General Kimberly W. Duffley and William W. Stewart, Jr., for respondent-appellee.

HUNTER, Judge.

York Oil Company ("YOCO") appeals from an order dated 11 February 2003 affirming a final agency decision dated 11 February 2000 by the North Carolina Department of Environment, Health and Natural Resources ("NCDEHNR") denying YOCO eligibility to receive reimbursement for clean up costs from the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund, N.C. Gen. Stat. § 143-215.94B (2003), ("the Fund"). Because summary judgment was improperly granted, we reverse and remand.

The evidence contained in the record on appeal tends to show the following. YOCO has owned underground storage tanks ("USTs") located at the One-Stop gas station ("One-Stop") on Vance Road in Kernersville, North Carolina, since 1979 and installed new USTs in 1981. *See James v. Clark*, 118 N.C. App. 178, 179-80, 454 S.E.2d 826, 827 (1995). One-Stop is owned by David Clark ("Clark"). In July 1986, Walter James ("James") who owned property neighboring One-Stop reported to the regional office of NCDEHNR that his well was contaminated with gasoline. Subsequent investigation of James' complaint by Stephen Kay, an NCDEHNR employee, revealed that the water on James' property had been contaminated for about five years and smelled heavily of gasoline. One-Stop was the only gas station within

a half-mile radius of James' property and the James' well was located 150 feet down gradient from the USTs.

Kay interviewed both the manager of One-Stop and Clark, the owner. The store manager stated that the store bought bottled water for drinking and that a gasoline odor could sometimes be detected when the toilets were flushed. Clark informed Kay that contamination in the water from One-Stop's own well had been noticeable since one or two years after the well's installation in 1982. Clark did not recall a conversation about contamination, but did recall a conversation about the septic system. Kay concluded in his report that One-Stop was the only possible source of the contamination and arranged for monitoring wells to be placed nearby to establish the extent of the contamination as well as to gather evidence to support a notice of violation.

As a result of the reports of contamination on the neighboring property, YOCO hired Collins Petroleum to perform some testing. In a letter not dated until 23 August 1988, Collins Petroleum stated that it had dug eighteen inches below the bottom of two of the USTs to look for leaks and had found none, but had discovered the odor of gasoline above the tanks. In September 1986, a letter was sent by the Forsyth County Health Department to Clark informing him that test results showed One-Stop's water supply tested positive for fecal coliform bacteria and in addition petroleum contamination was suspected at One-Stop and that further testing was being done. A 12 September 1986 newspaper article in a local paper revealed that NCDEHNR had in fact discovered the James' water to be contaminated with gasoline probably from leaking USTs. Although denying he ever received official notification of the testing, Clark acknowledged that he had read the newspaper article and had given it to YOCO. In a subsequent deposition, Gary York, the owner of YOCO, admitted that someone had made him aware of a problem with contamination or spillage of petroleum on an adjoining property in 1986. An analysis of a water sample taken from One-Stop in November 1986, however, revealed that there was "[n]o base/neutral or acid extractable organics detected."

On 11 March 1988, two and a half feet of gasoline was discovered in a monitoring well located at One-Stop. A letter dated 20 May 1988 addressed to James indicated that NCDEHNR had not made any determinations from its investigation of the contamination of James' property. On 28 November 1988, NCDEHNR issued a draft report concluding the contamination of James' water supply was caused by

leaking USTs at One-Stop. As a result of the March 1988 discovery, a notice of violation was ultimately sent to YOCO and Clark on 10 February 1989.

On 17 April 1997, YOCO applied for reimbursement from the Fund for expenses related to the clean up of leaking UST's. The application was denied by NCDEHNR on 17 June 1997 because the leakage had been "discovered" prior to the Fund's effective date of 30 June 1988. *See* N.C. Gen. Stat. § 143-215.94N (2003). On 14 August 1997, YOCO filed a petition for a contested case hearing arguing that YOCO had not been made aware of the leak until 1989. On 15 April 1999, both NCDEHNR and YOCO moved for summary judgment before the Administrative Law Judge ("ALJ"). The ALJ in a recommended decision concluded that the denial of YOCO's eligibility to receive reimbursement from the fund was proper and granted summary judgment for NCDEHNR. In a final agency decision dated 11 February 2000, NCDEHNR adopted the recommended decision of the ALJ and affirmed the denial of reimbursement under the Fund.

YOCO petitioned for judicial review of the decision before the trial court. YOCO also sought to have the trial court consider a letter issued by NCDEHNR on 2 April 2001 in a separate matter, which indicated that a single report of odor of gasoline alone was insufficient to support a conclusion that a leak had been detected prior to the effective date of the Fund in determining eligibility to receive reimbursement. The trial court refused to consider this letter as it was not part of the record submitted from the final agency decision. In its 11 February 2003 decision, the trial court affirmed the final agency decision.

The dispositive issue is whether the trial court properly affirmed the final agency decision adopting summary judgment in favor of NCDEHNR.[1] Specifically, YOCO contends that (A) in granting summary judgment in favor of NCDEHNR, the ALJ applied the wrong legal standard as to whether YOCO had discovered the release prior to the effective date of the Fund, and (B) there was a genuine issue of material fact as to whether the release had been discovered prior to the effective date of the Fund.

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1. YOCO also argues to this Court that the trial court erred in failing to consider the letter issued by NCDEHNR on 2 April 2001. Because, however, we conclude summary judgment was granted improperly and reverse and remand this case on that ground, it is unnecessary to reach this contention as on remand, YOCO may seek to have the letter properly included in the record.

"In reviewing a final agency decision allowing . . . summary judgment . . . , the [trial] court may enter any order allowed by . . . Rule 56." N.C. Gen. Stat. § 150B-51(d) (2003). The role of an appellate court in reviewing a trial court's order affirming a decision by an administrative agency is two-fold. *In re Appeal by McCrary*, 112 N.C. App. 161, 166, 435 S.E.2d 359, 363 (1993). We must: "(1) determine the appropriate standard of review and, when applicable, (2) determine whether the trial court properly applied this standard." *Id. De novo* review is applied where an error of law is alleged. *See id.* "When the issue on appeal is whether a state agency erred in interpreting a regulatory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Britt v. N.C. Sheriffs' Educ. and Training Stds. Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998). In addition, the grant of summary judgment involves a matter of law, which is reviewable *de novo*. *See Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999).

A.

In this case, the trial court properly applied a *de novo* standard of review to determine if the final agency decision applied the correct interpretation of the rules regarding whether a release had been discovered at One-Stop prior to 30 June 1988. We must now determine whether the trial court correctly applied that standard of review.

In order to be eligible to receive reimbursement for clean-up of leaking commercial UST's, the discharge or release must have been discovered or reported after 30 June 1988. *See* N.C. Gen. Stat. § 143-215.94N. For purposes of determining whether a leak has been detected to establish eligibility to receive reimbursement from the Fund, a " '[d]iscovered release' means a release which an owner or operator, or its employee or agent, has been made aware of, has been notified of, or has a reasonable basis for knowing has occurred." 15A N.C.A.C. 2P.0202(b)(4) (July 2003). NCDEHNR's interpretation of this rule, as applied by the ALJ, the final agency decision, and the trial court, provides that a leak may be "discovered" either by analytical testing, official or unofficial notification, or through other factual circumstances. YOCO contends the appropriate standard should be that in the absence of specific knowledge of analytical testing results showing contamination, the only basis for detecting a leak should be upon official notification by NCDEHNR.

However, "an administrative agency's interpretation of its own regulation should be accorded due deference unless it is plainly

erroneous or inconsistent with the regulation." *Simonel v. N.C. School of the Arts*, 119 N.C. App. 772, 775, 460 S.E.2d 194, 196 (1995). In this case, NCDEHNR's interpretation of its own rule is neither plainly erroneous nor inconsistent with the regulation. NCDEHNR's interpretation instead includes scenarios in which an owner or operator has specific actual knowledge of a leak, has been made aware of a leak, officially notified of a violation, or where there are sufficient circumstances that it is reasonable a leak should have been discovered, which are the exact scenarios that are encompassed in the broad language of the rule. Accordingly, the trial court did not err in affirming the interpretation of the regulation, applied to determine when a release was discovered, used in the Final Agency Decision and by the ALJ.

B.

In affirming the final agency decision adopting the recommended decision of the ALJ granting summary judgment to NCDEHNR, the trial court used the "whole record" test to determine that there was sufficient evidence to support the final agency decision that the release was discovered prior to 30 June 1988. Because the issue before the trial court was, however, whether summary judgment was properly granted, the correct standard of review remained *de novo*. Thus, the question before the trial court should have been whether there were any genuine issues of material fact and whether any party was entitled to judgment as a matter of law. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003); *see also* N.C. Gen. Stat. § 150B-51(d) (scope and standard of review in reviewing a final agency decision allowing judgment on the pleadings or summary judgment).

In this case, the ALJ's decision recommending summary judgment and the final agency decision contained a number of factual findings. This Court has previously discussed the role of findings of fact in a summary judgment order.

> The entry of summary judgment presupposes that there are no issues of material fact; so findings of fact are not required. Nevertheless, it may be helpful in some cases for the trial court to summarize the undisputed facts which justify its order. If findings of fact are needed to resolve a material issue, however, summary judgment is improper and any such findings are disregarded on appeal. Accordingly, we must determine whether the . . . order is supported by the undisputed facts as they appear in the record without regard to the . . . findings of fact.

Cieszko v. Clark, 92 N.C. App. 290, 292-93, 374 S.E.2d 456, 458 (1988) (citations omitted). In this case, the ultimate factual issue to be decided was whether YOCO had been "made aware of, . . . notified of, or ha[d] a reasonable basis for knowing" a release had occurred from its USTs prior to 30 June 1988. 15A N.C.A.C. 2P.0202(b)(4). This issue is one of material fact because a finding that YOCO had discovered a release prior to 30 June 1988 would make YOCO ineligible to receive reimbursement from the Fund. On the other hand, a determination that the release had not been discovered by YOCO prior to that date would allow YOCO to be reimbursed from the Fund for clean up related to the leaking USTs.

NCDEHNR contends the grant of its motion for summary judgment was proper and points to the following facts in support of its argument that YOCO had a reasonable basis for knowing of the leaking USTs at One-Stop prior to 30 June 1988. One-Stop was located next to James' property. The James' property was located 150 feet down gradient from One-Stop; and One-Stop was the only gas station within a half-mile radius. Gasoline contamination of the James' water supply was reported to NCDEHNR in 1986. An affidavit by Kay regarding his investigation showed that he interviewed One-Stop's store manager who stated that One-Stop purchased bottled water for drinking and the odor of gasoline could occasionally be observed emanating from One-Stop's water supply. Furthermore, Clark, One-Stop's owner, stated that contamination had been noticeable in the water since shortly after a well had been installed in 1982. In September 1986, a letter from NCDEHNR informed Clark that One-Stop was suspected of petroleum contamination. Clark was also aware of a 1986 newspaper article discussing petroleum contamination of James' water supply and notified YOCO of the article, and Gary York, the president of YOCO, admitted having been made aware of the contamination.

In considering whether summary judgment is appropriate, however, the evidence must be viewed in the light most favorable to the nonmoving party, *see Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001), and "[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant," *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

In that regard, YOCO presents conflicting evidence of record that shows the following in support of its contention that there was not a reasonable basis for discovering the leaking USTs at One-Stop. Once YOCO was made aware of contamination of James' water supply,

Collins Petroleum was hired to inspect One-Stop's USTs. The Collins Petroleum testing found no leaks. The September 1986 letter to Clark from NCDEHNR showed only that One-Stop's water had tested positive for fecal coliform bacteria, not petroleum contamination. A November 1986 analysis of One-Stop's water, following the publication of the newspaper article, revealed "[n]o base/neutral or acid extractable organics detected." Moreover, in May 1988, NCDEHNR sent a letter to James, which stated that at that point, NCDEHNR had not even made any determinations from its investigation, despite discovering petroleum in a monitoring well at One-Stop. NCDEHNR's draft report was not issued until November 1988 and notices of violation did not issue to YOCO or One-Stop until 10 February 1989. Furthermore, there is no evidence that YOCO or One-Stop was made aware of the discovery of petroleum in the monitoring well in March 1988 prior to the issuance of the draft report or the notices of violation.

Viewing the evidence in the light most favorable to YOCO, we conclude that there is conflicting evidence on the issue of whether YOCO had a reasonable basis for discovering the leaking USTs prior to 30 June 1988, where even though the evidence shows YOCO was aware of petroleum contamination in the water supply of a neighboring property located down gradient from One-Stop, and that the odor of gasoline could occasionally be detected from One-Stop's water supply: YOCO's own testing by Collins Petroleum revealed no leaks from the USTs; NCDEHNR's testing of One-Stop's water supply revealed only fecal coliform bacteria contamination and "[n]o base/neutral or acid extractable organics detected"; and, NCDEHNR did not issue its notice of violation to YOCO until February 1989.

Therefore, there was a genuine issue of material fact to be decided as to whether a release had been "discovered" prior to 30 June 1988 within the meaning of 15A N.C.A.C. 2P.0202(b)(4) from the USTs at One-Stop. Thus, summary judgment in favor of NCDEHNR ruling that YOCO was ineligible to receive reimbursement from the Fund was improperly granted. Accordingly, we reverse the order affirming the final agency decision and remand this case to the trial court.

Reversed and remanded.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. RONNIE DANIELS, DEFENDANT

No. COA03-450

(Filed 1 June 2004)

1. Criminal Law— plea agreement—validity

The trial court did not err in a statutory sex offense, sexual activity by a substitute parent, indecent liberties with a child, first-degree statutory rape, and first-degree statutory sex offense case by concluding that a valid plea agreement did not exist between defendant and the State on 15 July 2002, because: (1) defendant rejected three plea arrangements before this case went to trial; and (2) the fact that the trial court rejected the 26 June 2002 plea arrangement means that the arrangement was no longer available for defendant to accept on 15 July 2002 unless the prosecutor negotiated another plea arrangement with defendant, and the record does not reflect that such a negotiation took place.

2. Criminal Law— motion for continuance—invalid plea agreement

The trial court did not abuse its discretion in a statutory sex offense, sexual activity by a substitute parent, indecent liberties with a child, first-degree statutory rape, and first-degree statutory sex offense case by denying defendant a continuance after the trial court declined defendant's request to consider his alleged plea arrangement, because there was no proposed plea agreement before the court when defendant's statement to the trial court on 15 July 2002 that he was prepared to accept the plea was an attempt to resurrect the 26 June 2002 plea arrangement which had been rendered null and void once the trial court rejected it.

3. Appeal and Error— preservation of issues—plain error

Although defendant contends the trial court committed plain error in a statutory sex offense, sexual activity by a substitute parent, indecent liberties with a child, first-degree statutory rape, and first-degree statutory sex offense case by allowing the State to present evidence of prior bad acts including evidence that defendant had been incarcerated in Arizona, that he used illegal drugs, and that he abused his wife, defendant did not properly preserve this issue for appeal because: (1) defendant provided no explanation, analysis or specific contention in his brief support-

ing the bare assertion that the claimed error is so fundamental that justice could not have been done; and (2) the right and requirement to specifically and distinctly contend an error amounts to plain error does not obviate the requirement that a party provide argument supporting the contention that the trial court's actions amounted to plain error as required by N.C. R. App. P. 28(a) and (b)(6).

4. Constitutional Law— effective assistance of counsel—failure to meet burden of proof

Although defendant contends the trial court erred in a statutory sex offense, sexual activity by a substitute parent, indecent liberties with a child, first-degree statutory rape, and first-degree statutory sex offense case by concluding that defendant did not receive ineffective assistance of counsel based on counsel's alleged failure to object to inadmissible evidence, this assignment of error is dismissed because defendant failed to show that counsel's performance fell below an objective standard of reasonableness or that the error committed was so serious that a reasonable probability existed that the trial result would have been different absent the error.

5. Sexual Offenses— statutory sex offense against person 13, 14, or 15 years old—short-form indictment

The trial court did not err by concluding that the indictment for statutory sex offense against a person who is 13, 14, or 15 years old was sufficient to apprise defendant of the crime with which he was charged, because: (1) N.C.G.S. § 15-144.2 permits a short-form indictment for this crime; and (2) the statute does not require the State to provide the details of the alleged sexual offense in the indictment, but specifically states that it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim.

Appeal by defendant from judgment entered 18 July 2002 by Judge Wiley F. Bowen in Lee County Superior Court. Heard in the Court of Appeals 26 February 2004.

Attorney General Roy Cooper, by Associate Attorney General Q. Shantè-Martin, for the State.

Russell J. Hollers, III, for the defendant.

TIMMONS-GOODSON, Judge.

Ronnie Daniels ("defendant") appeals his convictions of statutory sex offense, two counts of sexual activity by a substitute parent, two counts of indecent liberties with a child, first-degree statutory rape, and first-degree statutory sex offense. For the reasons stated herein, we hold that defendant received a trial free of prejudicial error.

Defendant is accused of sexually abusing his two step-daughters. The procedural history of this case is described in the trial court's Order Pertaining to Plea Arrangement as to Sentence and Order Deny[ing] Continuance as follows: On 25 September 2001, defendant was called upon to enter his plea before the trial court. As the trial court reviewed the Transcript of Plea with defendant, defendant rejected the plea offer and his case was set for trial on 11 June 2002. However, before the case was called to trial, the parties announced that a plea would be entered.

On 14 June 2002, the case was docketed for a plea hearing. During this hearing, the trial court observed a conversation between defendant and his trial counsel where it appeared to the court that counsel was attempting to convince defendant to accept the plea while defendant "vociferously opposed." The trial court continued the case until 26 June 2002.

On 26 June 2002, the trial court was informed for the third time that defendant and the State had negotiated a plea agreement. While being questioned in accordance with the transcript of plea, defendant responded to the trial court question that he was "not guilty," thereby rejecting the plea. The trial court then stated that a plea would not be accepted from defendant because to do so would only bring motions for appropriate relief and contentions of a coerced plea. The trial court directed that defendant's case be continued until the next session of court for trial.

On 15 July 2002, defendant through trial counsel asserted that he desired to plead guilty pursuant to the plea arrangement. The trial court declined to hear defendant's plea, and called the case for trial. Following a jury trial, defendant was convicted of all charges. It is from these convictions that defendant appeals.

As an initial matter, we note that defendant's brief contains arguments supporting only five of the original nine assignments of error on appeal. The four omitted assignments of error are deemed

abandoned pursuant to N.C.R. App. R. 28(b)(6) (2004). We therefore limit our review to those assignments of error addressed in defendant's brief.

The remaining issues presented on appeal are whether (I) a valid plea agreement existed between defendant and the State on 15 July 2002; (II) the trial court erred by denying defendant a continuance; (III) the trial court erred by allowing the State to present evidence of prior bad acts; (IV) defense counsel rendered ineffective assistance to defendant; (V) one of the indictments for first-degree statutory sex offense was sufficient to apprise defendant of the crime with which he was charged.

[1] Defendant first argues that a valid plea agreement existed on 15 July 2002 between defendant and the State. We disagree.

"G.S. 15A-1021(c) allows the parties to a plea arrangement to advise the trial judge of the terms of the proposed agreement, *provided an agreement has been reached.*" *State v. Slade*, 291 N.C. 275, 278, 229 S.E.2d 921, 924 (1976) (emphasis added). "There is no absolute right to have a guilty plea accepted." *State v. Collins*, 300 N.C. 142, 148, 265 S.E.2d 172, 176 (1980).

In the case *sub judice*, the State argues, and we agree, that no valid plea agreement existed when the case was called for trial on 15 July 2002. Defendant rejected three plea arrangements before this case went to trial. The Transcript of Plea reflects the trial court's account of defendant's actions in that it documents the 14 June and 26 June plea arrangements. The Transcript of Plea contains the terms of the arrangement, and is originally signed and dated 14 June 2002. The plea arrangement appears to have been renewed after defendant rejected it on 14 June 2002 because the original date is crossed out and a new date of 26 June 2002 is entered, and the change is initialed by the prosecutor. This 26 June 2002 plea arrangement was rejected by the trial court when defendant stated that he was "not guilty" as the trial court reviewed the Transcript of Plea.

The trial court's ruling on 26 June 2002 rendered the negotiated plea arrangement "null and void." *See Collins*, 300 N.C. at 149, 265 S.E.2d at 176. Thus, the fact that the trial court rejected the 26 June 2002 plea arrangement means that the arrangement was no longer available for defendant to accept on 15 July 2002 unless the prosecutor negotiated another plea arrangement with defendant. The record does not reflect that such a negotiation took place. There are no addi-

tional changes to the Transcript of Plea, there is no new Transcript of Plea signed prior to the trial date, nor did the prosecution announce that the parties had reached another plea agreement when the case was called for trial on 15 July 2002. Thus, defendant had no basis for announcing to the judge that he wished to accept the State's plea arrangement. Accordingly, we find no error in the trial court's ruling on this matter.

[2] Defendant next argues that the trial court erred by denying his right to continue after the trial court declined defendant's request to consider his plea arrangement. We disagree.

Absent a specific statutory provision, a ruling by the trial court on a motion to continue is "within the sound discretion of the trial court and reviewable upon appeal only for abuse of discretion." *State v. Gardner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988). In determining whether to grant a motion to continue, the trial court must consider "[w]hether the failure to grant a continuance would be likely to result in a miscarriage of justice." N.C. Gen. Stat. § 15A-952(g)(1) (2003). "Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court." N.C. Gen. Stat. § 15A-1023(b) (2003). This Court has held that by virtue of this statutory language, "the legislature has clearly granted to the defendant such an absolute right upon rejection of a *proposed* plea agreement at arraignment." *State v. Tyndall*, 55 N.C. App. 57, 63, 284 S.E.2d 575, 578 (1981) (emphasis added).

As discussed *supra*, in the present case there was no proposed plea agreement before the court. Defendant's statement to the trial court on 15 July 2002 that he was prepared to accept the plea was an attempt to resurrect the 26 June 2002 plea arrangement, which had been rendered null and void once the trial court rejected it. Because there was no valid plea agreement for the trial court to consider, we hold that the trial court did not abuse its discretion in denying defendant's request for a continuance.

[3] Defendant next assigns error to the admission by the trial court of evidence of defendant's prior bad acts. Defendant contends that the trial court should not have admitted evidence that defendant had been incarcerated in Arizona, that he used illegal drugs, and that he abused his wife. The State argues that defendant has not properly preserved the issue for appeal. We agree with the State.

"In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law

without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(c)(4) (2004).

In his appellate brief, defendant concedes that defense "counsel did not object to the admission of this evidence," and asserts that plain error is present. Although defendant alleges plain error in the corresponding assignment of error in the record, "he provides no explanation, analysis or specific contention in his brief supporting the bare assertion that the claimed error is so fundamental that justice could not have been done." *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997 (2001). "The right and requirement to specifically and distinctly contend an error amounts to plain error does not obviate the requirement that a party provide argument supporting the contention" that the trial court's actions amounted to plain error, as required by N.C.R. App. P. 28(a) and (b)(6) (2003). *Id.*

> To hold otherwise would negate those requirements, as well as those in Rule 10(b)(2). Defendant's empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule. By simply relying on the use of the words "plain error" as the extent of his argument in support of plain error, defendant has effectively failed to argue plain error and has thereby waived appellate review.

Cummings, 352 N.C. at 636-37, 536 S.E.2d at 60 (citations omitted). Accordingly, defendant has waived this assignment of error.

[4] Defendant also argues that defense counsel rendered ineffective assistance to him by failing to object to inadmissible evidence. For the reasons stated *infra*, we decline to address this assignment of error.

In *State v. Blakeney*, our Supreme Court held that

> [t]o successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. *See Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052 (1984). First, he must show that counsel's performance fell below an objective standard of reasonableness. *See State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). Second, once defendant satisfies the first prong, he must show

> that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error. *See Strickland*, 466 U.S. at 691-96, 80 L. Ed. 2d at 696-99.

352 N.C. 287, 307, 531 S.E.2d 799, 814 (2000). "[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166-67, 557 S.E.2d 500, 524-25 (2001), *cert. denied*, 535 U.S. 1114 (2002).

We conclude that there is inadequate evidence of ineffective assistance of counsel on the record for this Court to review the issue on appeal without such ancillary procedures as described in *Blakeney*. Accordingly, this assignment of error is dismissed, without prejudice to file a Motion for Appropriate Relief in the trial court.

[5] In his final argument, defendant asserts that his indictment for Statutory Sex Offense Against A Person Who Is 13, 14, or 15 Years Old was not sufficient to confer jurisdiction on the trial court. We disagree.

Defendant's argument is two-fold. First, defendant argues that the statute governing short-form indictments does not provide such an indictment for the specific crime with which he is charged.

Short-form indictments are permitted for sex offenses under N.C. Gen. Stat. § 15-144.2, which reads in pertinent part as follows:

> (a) In indictments for sex offense it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the sex offense was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a first degree sex offense and will support a ver-

dict of guilty of a sex offense in the first degree, a sex offense in the second degree, an attempt to commit a sex offense or an assault.

(b) If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years and all lesser included offenses.

While section (b) of the statute provides specific requirements for short-form indictments for sexual offenses committed against persons under the age of 13, the statute does not preclude short-form indictments for sexual offenses committed against persons 13, 14, or 15 years old. Such an indictment would simply be governed by section (a) of the statute. Accordingly, we conclude that N.C. Gen. Stat. § 15-144.2 permits a short-form indictment for the crime with which defendant was charged. *See also State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000) (Upholding short-form indictments for rape and sex offense), *cert. denied*, 531 U.S. 1018 (2000), *reh'g denied*, 531 U.S. 1120 (2001).

Defendant also argues that because the "indictment does not specify what 'sex offense' Mr[.] Daniels engaged in," it is not specific enough to clearly apprise defendant of the charge brought against him.

As provided *supra*, the statute does not require the State to provide the details of the alleged sexual offense in the indictment. In fact, the statute specifically states that "it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim." N.C. Gen. Stat. § 15-144.2(a) (2003). In the case *sub judice*, the indictment in question reads as follows:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant . . . unlawfully, willfully and feloniously did engage in a sex offense with [the victim], a child 13, 14 or 15 years old, while the defendant was at least six years older than [the victim], and the defendant was at least 12 years old.

Thus, we conclude that the indictment contained sufficient information under the statute.

No error.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. CAROLINE GOLDNER FORD

No. COA03-474

(Filed 1 June 2004)

1. Contempt— criminal—public intoxication in court—beyond reasonable doubt standard

The superior court erred in its de novo review of an appeal from a summary finding of contempt in district court arising from defendant's public intoxication in court for a driving while impaired charge by failing to sufficiently find that the facts upon which the judgment was based were established beyond a reasonable doubt, because: (1) neither the district court's findings in the summary proceeding, nor the superior court's findings in their de novo plenary proceeding, specifically indicate that the "beyond a reasonable doubt" standard of proof required by N.C.G.S. § 5A-14 for summary proceedings or N.C.G.S. § 5A-15(f) for plenary proceedings was actually applied; (2) at best, the transcript indicates the judgment may or may not have applied the proper standard, and there is no indication of the standard applied by the district court; and (3) failure of the superior court to indicate that the reasonable doubt standard of proof was applied is fatally defective unless the proceeding is of a limited instance where there were no factual determinations for the court to make.

2. Evidence— results of alco-sensor test—alcohol cause of impairment

The trial court erred in a criminal contempt proceeding arising from defendant's public intoxication in court for a driving while impaired charge by admitting the results of defendant's alco-sensor test, because: (1) N.C.G.S. § 20-16.3(d) provides that

the only instance in which the results can be used for substantive evidence is to determine whether a person's alleged impairment is caused by an impairing substance other than alcohol; and (2) the test in this case was used to show that alcohol was in fact the cause of her impairment and that she was impaired.

Appeal by defendant from order entered 12 March 2003 by Judge Zoro J. Guice in Henderson County Criminal Superior Court. Heard in the Court of Appeals 28 January 2004.

Attorney General Roy Cooper, by Assistant Attorney General Floyd M. Lewis, for the State.

Atkins & Craven, by Lee Atkins and Susan S. Craven, for defendant appellant.

McCULLOUGH, Judge.

On 6 May 2002, defendant was present in Henderson County Criminal District Court for her trial on a driving while impaired charge. The court bailiff was informed by the clerk that defendant had an odor of alcohol about her. The bailiff walked by defendant while she was standing in the courtroom and smelled the odor of alcohol. The bailiff was within two feet of defendant, but did not speak to her. Defendant was unstable on her feet when trying to stand up straight, and was weaving back and forth. The bailiff then notified the Assistant District Attorney, and the Henderson County District Court Judge, the Honorable Randy Pool.

After receiving the information as to defendant's supposed condition, the judge called defendant around to make an inquiry of her. He asked defendant if she had been drinking, which she first denied. The judge informed her that it had come to his attention that she had the odor of alcohol about her, to which she admitted having had a drink during lunch. After this admission, the judge asked that she submit to an alco-sensor test. The judge later testified that he observed defendant's face to be redder the day of the summary contempt hearing in his courtroom, than it did at her *de novo* hearing before the superior court. He further testified that "I didn't think she was staggering, certainly not; but I thought that she was a little uneasy maybe on her feet, or unsteady maybe slightly on her feet."

Officer John M. Johnson, a K-9 patrol officer with the Henderson County Sheriff's Office, administered an alco-sensor test using the

sensor he kept in his car. Defendant registered approximately .08 on the alco-sensor, and Officer Johnson reported this to the judge.

The judge reported the results of the test to defendant, telling her that she was legally impaired. Based upon this, and the odor from her breath, he held her in contempt of court because she had willfully reached the legal level of intoxication before coming to court on her driving while impaired charge. The judge testified that he did not believe he could try defendant in her condition as her competency to stand trial was in question, and she would have been of questionable assistance to her attorney. This caused the judge to stop his proceedings and deal with the situation. He testified his proceeding was delayed 15 minutes by defendant's impairment. The judge further testified that he entered an oral order holding defendant in contempt of court and that defendant was represented by counsel. An order and commitment on the contempt charge was signed that day, 6 May 2002, by the judge. The judge ordered defendant to serve 24 hours in jail and to turn in her driver's license and not operate a motor vehicle until disposition of her charge of driving while impaired.

In between the contempt order of 6 May 2002, and the *de novo* superior court hearing before Judge Guice, defendant told her probation officer, Donna Cannon, that on 6 May 2002 defendant had two glasses of wine before going to court. Defendant believed it did not matter as she was not driving.

After the *de novo* superior court hearing on the contempt charge, Judge Guice found that defendant was in direct criminal contempt of the District Court of Henderson County on 6 May 2002. Judge Guice adopted the same punishment as ordered by the district court judge, ordering defendant be discharged from any further obligation to the court.

On appeal, defendant raises six issues alleging reversible error: (I) that the district court and superior court did not sufficiently find that the facts upon which the judgment was based were established beyond a reasonable doubt; (II) & (III) that the trial court improperly admitted the evidence of the alco-sensor test results; (IV) & (V) that the trial court's findings of fact do not sufficiently show that defendant was in contempt; and (VI) that defendant was unlawfully prosecuted for public intoxication without any showing that defendant was disruptive. Because we find that it was reversible error for the trial court not to indicate the standard of proof used in its *de novo* order, this opinion does not reach the other issues on appeal.

Standard of Proof for Plenary Proceedings for Contempt

[1] Defendant contends that the district court and the superior court failed to find that the facts upon which the judgment rests were established beyond a reasonable doubt. Specifically, defendant argues that the district and superior courts were required to show that this standard of proof was applied in making its respective findings of fact. We hold the superior court, in its *de novo* review, issued an order that was deficient as a matter of law.

An appeal from a summary finding of contempt in district court is reviewed *de novo* by a superior court. N.C. Gen. Stat. § 5A-17 (2003). The *de novo* hearings are plenary proceedings that must be conducted in accordance with N.C. Gen. Stat. § 5A-15 (2003). It has long been held that when reviewing a contempt order *de novo*, the superior court reviews the facts and law, and additional testimony can be heard. *In re Deaton*, 105 N.C. 59, 62-63, 11 S.E. 244, 245 (1890). When an appeal proceeds to our Court, the findings of the judge as to the facts are conclusive, and we can only review the law applicable to such state of facts. *Id.* at 63, 11 S.E. at 245.

N.C. Gen. Stat. § 5A-14(b), relating to summary proceedings for contempt, states:

> (b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. *The facts must be established beyond a reasonable doubt.*

Id. (emphasis added). N.C. Gen. Stat. § 5A-15(f), relating to plenary hearings, states:

> (f) At the conclusion of the hearing, the judge must enter a finding of guilty or not guilty. If the person is found to be in contempt, the judge must make findings of fact and enter judgment. *The facts must be established beyond a reasonable doubt.*

Id. (emphasis added). For summary hearings, this Court has therefore required:

> [T]he statute (N.C. Gen. Stat[]. § 5A-14(b)) clearly requires that the standard should be "beyond a reasonable doubt" and we find implicit in the statute the requirement that the judicial official's

> findings should *indicate* that that standard was applied to his findings of fact.

State v. Verbal, 41 N.C. App. 306, 307, 254 S.E.2d 794, 795 (1979) (emphasis added). We hold the same is required in an order issued from a plenary hearing, as the import and consequences of the two hearings is substantially equivalent.

In *Verbal*, the defendant, an attorney, was cited by the trial court for direct contempt and sentenced after a summary proceeding to imprisonment for being 18 minutes late in returning to court after a lunch recess while a trial in which defendant was appearing was in progress. We reversed the superior court's finding of contempt during a summary proceeding when the trial court failed to allow the defendant an opportunity to be heard, nor did the court indicate what standard was applied in the court's contempt order. *Id.* We held these violations of the statute to make the lower court's order of contempt "fatally deficient" and reversed. *Id.*[1]

In the present case, neither the district court's findings in the summary proceeding, nor the superior court's findings in their *de novo* plenary proceeding, specifically *indicate* that the "beyond a reasonable doubt" standard of proof required by N.C. Gen. Stat. § 5A-14(b) (for summary proceedings) or N.C. Gen. Stat. § 5A-15(f) (for plenary proceedings) was actually applied. The State argues that the record does indicate, albeit indirectly, that the proper standard was used. Before making his findings of fact and conclusions of law from the *de novo* hearing, the superior court judge said that he "want[ed] to look at 5A-11 and 5A-14." The district attorney replied, "I have that, Judge. I've got it open to 5A-11." However, in his order, the trial judge cites only to N.C. Gen. Stat. § 5A-11, stating "that under [N.C. Gen. Stat.] § 5A-11, Criminal Contempt, that Criminal Contempt (a)(1), the conduct of the defendant was conduct which did interrupt[.]" The record does not indicate that he looked at N.C. Gen. Stat. § 5A-15(f) for the standard of proof required in plenary proceed-

1. In the most recent edition of the District Court *North Carolina Trial Judges' Bench Book*, 2d Ed. 1996, issued by the Association of District Court Judges of North Carolina and in cooperation with The Institute of Government, *Verbal* is cited for requiring the district court order indicated in its findings of fact, that the reasonable doubt standard was applied. *See* Chapter 4, page 9. In the most recent edition of the Superior Court *North Carolina Trial Judges' Bench Book*, 3d Ed. 1999, issued by the North Carolina Conference of Superior Court Judges and in cooperation with The Institute of Government, in the Orders and Forms Section, the model order for a Direct Criminal Contempt Order states in two places: "The court finds beyond a reasonable doubt."

ings. The only indication that the proper standard of review was applied was that he asked to review the statute before making his findings and that at the beginning of his findings, the boilerplate language of the order states "after consideration of the applicable law." We do not believe this sufficient to meet the requirement of *Verbal* that the "findings should *indicate* that that standard was applied[.]" *Verbal*, 41 N.C. App. at 307, 254 S.E.2d at 795 (emphasis added). Here, at best, the transcript indicates the judge may or may not have applied the proper standard, and there is no indication of the standard applied by the district court.

The State argues that, assuming we find the order did not comply with the principles of *Verbal*, the error was harmless and there is no reasonable possibility that a different result would have been reached. *See* N.C. Gen. Stat. § 15A-1443(a) (2003). However, as guided by *Verbal's* mandate concerning summary contempt proceedings, we hold that a superior court order from a plenary proceeding of contempt must also indicate that the reasonable doubt standard of proof was applied. Failure to make such an indication is fatally deficient, unless the proceeding is of a limited instance where there were no factual determinations for the court to make. *See In Re Owens*, 128 N.C. App. 577, 582, 496 S.E.2d 592, 595 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605 (1999) (Though the trial court failed to make a finding of the standard of proof applied, contempt was upheld of a witness for refusing to answer a question directed.).

Alco-Sensor Test Results

[2] As the issue will likely recur at any new contempt proceeding in superior court, we here address the admissibility of the alco-sensor test. We agree with the position of Ms. Ford that the results of the alco-sensor test, as used by the trial court in this case, was error.

The most compelling evidence offered by the State as to Ms. Ford's condition was the result of the alco-sensor test. We have recognized that an "alco-sensor is an approved alcohol screening test device pursuant to the provisions of 15A N.C.A.C. 19B.0503(a)(1)." *State v. Bartlett*, 130 N.C. App. 79, 82, 502 S.E.2d 53, 55 (1998). The scope of the admissibility as to the results of the alco-sensor test are governed by N.C. Gen. Stat. § 20-16.3(d). This statute provides only one instance in which the results can be used for substantive evidence: " 'Negative or low results on the alcohol screening test may be used in factually appropriate cases by the officer, a court, or an administrative agency in determining whether a person's alleged

impairment is caused by an impairing substance other than alcohol.' " *Bartlett*, 130 N.C. App. at 82, 502 S.E.2d at 55 (quoting N.C. Gen. Stat. § 20-16.3 (2003)). The only other use of the results is not as substantiative evidence, but for "determin[ing] if there are reasonable grounds to believe that the [driver] has committed an implied-consent offense under G.S. 20-16.2." *Id.* "Except as provided in *this subsection*, the results of an alcohol screening test may not be admitted in evidence in any court or administrative proceeding." N.C. Gen. Stat. § 20-16.3(d) (emphasis added). *See Powers v. Powers*, 130 N.C. App. 37, 44-45, 502 S.E.2d 398, 403-04, *disc. review denied*, 349 N.C. 530, 526 S.E.2d 180 (1998) (Admission of the alco-sensor results was error as evidence for establishing findings of abuse and neglect.).

In the case before us, there is no contention that the alco-sensor test results were admitted to show that Ms. Ford was impaired by some substance other than alcohol. In fact, the tests were used to show that alcohol was in fact the cause of her impairment, and that she was impaired. Thus, the test results at this contempt hearing were clearly not admissible and the court erred when considering them. *Bartlett*, 130 N.C. App. at 86, 502 S.E.2d at 57. Therefore, in the event of any rehearing on the issue of contempt, the results of this test shall not be admissible.

For the reasons stated herein, we

Reverse.

Judges HUNTER and LEVINSON concur.

ROBERT J. EISINGER, JR., PLAINTIFF-APPELLANT v. KENNETH R. ROBINSON, DEFENDANT-APPELLEE

No. COA03-379

(Filed 1 June 2004)

1. Arbitration and Mediation— North Carolina Arbitration Act—contract provision for settlement of arbitration

The trial court did not err by applying the Uniform Arbitration Act, N.C.G.S. § 1-567.1 et seq., in an arbitration arising out of an underinsured motorists policy, because: (1) the agreement between plaintiff and the insurance company providing

underinsured motorists coverage was the type of agreement contemplated by N.C.G.S. § 1-567.2(b) in that it is a provision for the settlement by arbitration of any controversy arising between them related to their contract; and (2) the exclusions in subsection (b) do not apply in this case.

2. Arbitration and Mediation— trial court's authority to modify arbitration award—costs

The trial court did not err by finding that it could not award costs in an arbitration arising out of an underinsurance policy, because an award of costs does not fit within the parameters of the trial court's authority to modify an arbitration award under N.C.G.S. § 1-567.13.

3. Arbitration and Mediation— modification of arbitration award—prejudgment interest

The trial court did not err by holding that prejudgment interest could not be awarded in an arbitration arising out of an underinsurance policy, because: (1) N.C.G.S. § 1-567.14 provides the sole means by which a party may have an award modified or corrected; and (2) the arbitrator's failure to include prejudgment interest was not due to mathematical error, error relating to form, or error resulting from his exceeding his authority.

Appeal by plaintiff from order entered 27 December 2002 by Judge Daniel R. Green in Superior Court, Gaston County. Heard in the Court of Appeals 14 January 2004.

Don H. Bumgardner for plaintiff-appellant.

Baucom, Claytor, Benton, Morgan and Wood, P.A., by Richard F. Kronk, for defendant-appellee.

McGEE, Judge.

Robert J. Eisinger, Jr. (plaintiff) filed suit against Kenneth R. Robinson (defendant) on 19 July 2000 for damages arising from a 14 October 1998 automobile collision. Nationwide Insurance (Nationwide) provided underinsured motorists (UIM) coverage in the amount of $100,000 and Discovery Insurance (Discovery) provided primary coverage. Discovery tendered its full coverage in the amount of $25,000 on 7 August 2000, without filing an answer. Nationwide was notified of the tender of the primary coverage by letter on 9 August 2000. Nationwide did not advance any funds to plaintiff.

Plaintiff accepted Discovery's tender on 13 September 2000. Plaintiff requested binding arbitration on 2 January 2001 and the case was removed from the docket on 8 January 2001.

An arbitration hearing was held on 25 June 2002 to determine the value of plaintiff's claim for personal injuries arising from the collision. Plaintiff and defendant agreed at the time of the hearing that the award would be only for the value of the personal injury claim and would not include interest or costs. The amount of the arbitration award was $45,000.

Nationwide paid plaintiff $20,000, being the difference between the arbitration award and the $25,000 paid by Discovery. Plaintiff agreed that with the payment of the $20,000, there would be no claim for interest arising after 25 June 2002. Plaintiff filed a motion for interest and costs on 15 July 2002. After a hearing on 22 July 2002, the trial court denied plaintiff's motion for interest and costs in an order filed 27 December 2002. Plaintiff appeals.

[1] Plaintiff argues in his first assignment of error that the trial court erred in applying the "North Carolina Arbitration Act" to the arbitration in this case. At the time of plaintiff's and defendant's agreement to arbitrate, the Uniform Arbitration Act, as set forth in N.C. Gen. Stat. § 1-567.1 et seq. (2001), was in effect. We note that North Carolina has now adopted the Revised Uniform Arbitration Act, which applies to agreements to arbitrate entered into on or after 1 January 2004. N.C. Gen. Stat. § 1-569.1 et seq. (2003).

The Uniform Arbitration Act, which pertains to this case, states that

> [t]wo or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

N.C. Gen. Stat. § 1-567.2(a). Further, the Uniform Arbitration Act does not apply to "(1) [a]ny agreement or provision to arbitrate in which it is stipulated that this Article shall not apply or to any arbitration or award thereunder; [and] (2) [a]rbitration agreements between

employers and employees or between their respective representatives, unless the agreement provides that this Article shall apply." N.C. Gen. Stat. § 1-567.2(b).

In the case before us, plaintiff and Nationwide had an agreement to arbitrate. The agreement stated that if Nationwide and plaintiff disagreed over whether plaintiff was entitled to recover compensatory damages from the owner or driver of an underinsured vehicle or over the amount of damages, plaintiff could "demand to settle the dispute by arbitration." The arbitration agreement also set forth specific arbitration procedures. This agreement between Nationwide and plaintiff is the type of agreement contemplated by N.C. Gen. Stat. § 1-567.2(a) in that it is a "provision for the settlement by arbitration of any controversy . . . arising between them relating to [their] contract[.]" N.C. Gen. Stat. § 1-567.2(a). Further, the exclusions in subsection (b) do not apply in this case. The trial court, therefore, did not err in applying the Uniform Arbitration Act. Accordingly, assignment of error number one is without merit.

[2] Plaintiff next argues in assignment of error number two that the trial court erred in finding that the trial court could not award costs in an arbitration under an underinsurance policy because the costs were not awarded by the arbitrator. The Uniform Arbitration Act addresses fees and expenses in N.C. Gen. Stat. § 1-567.11, which states that "[u]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." In this case, the parties did address the issue of fees in the actual arbitration agreement. The applicable provision in the agreement states, "[e]ach party will pay its chosen arbitrator. Each will pay half of all other expenses of arbitration. Fees to lawyers and expert witnesses are not considered arbitration expenses and are to be paid by the party hiring these persons."

In plaintiff's motion for interest and costs, he requests reimbursement of expenses related to expert testimony. Plaintiff's request includes a deposition fee and expert witness fee for both Dr. Matthew T. Matthew and Dr. Robert Brown. Plaintiff's other requests are for deposition costs of another doctor, a highway patrolman, and plaintiff himself. The arbitration agreement states expert witness fees are not recoverable by plaintiff. Further, whether plaintiff is entitled to partial reimbursement for the other fees is not relevant in light of our determination below as to the trial court's authority to modify or correct awards.

We note that the trial court has limited power after an arbitration award is entered. The trial court can vacate, modify, or correct an arbitration award only under specified conditions. In fact, N.C. Gen. Stat. § 1-567.13 and N.C. Gen. Stat. § 1-567.14 "provide the exclusive grounds for vacating, modifying or correcting an arbitration award." *Wilson Building Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 686, 355 S.E.2d 815, 817, *disc. review denied*, 320 N.C. 798, 361 S.E.2d 75 (1987).

N.C. Gen. Stat. § 1-567.13 allows a trial court to vacate an award. However, plaintiff in this case did not ask that the award be vacated. Rather, plaintiff requested that costs be awarded in addition to the compensatory award. N.C. Gen. Stat. § 1-567.14, which allows for modification or correction of an award, is therefore relevant. However, the statute allows for modification of an award only where

(1) [t]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) [t]he arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) [t]he award is imperfect in a matter of form, not affecting the merits of the controversy.

N.C. Gen. Stat. § 1-567.14(a). An award of costs does not fit within the parameters of the trial court's authority to modify an award. Accordingly, the trial court did not err in denying plaintiff's motion for costs and this assignment of error is without merit.

[3] Plaintiff argues in assignment of error number three that the trial court erred in holding that prejudgment interest could not be awarded in an arbitration arising out of an underinsurance policy. Plaintiff essentially argues that the arbitration award should be treated the same as a jury verdict. This exact argument was asserted by the plaintiff in *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 499 S.E.2d 801 (1998). Our Court held that "[w]e similarly reject plaintiff's argument that the arbitrator's award should be treated like a jury verdict, upon which a judge could then award prejudgment interest in entering judgment on that verdict. Plaintiff references and we have found no citation of authority for this proposition." *Palmer*, 129 N.C. App. at 498, 499 S.E.2d at 807. Similarly, in the case before our Court, plaintiff cites no authority for his argument that

arbitration awards should be treated the same as jury verdicts. Rather, plaintiff argues that the policy provision stating, "[j]udgment upon award may be entered in any proper court" indicates that the arbitration award is analogous to a jury award. However, we find this argument unpersuasive.

Plaintiff's reliance on *Beaver v. Hampton*, 333 N.C. 455, 427 S.E.2d 317 (1993) is misplaced. *Beaver* involved a motor vehicle collision in which the plaintiff was injured. The defendants' liability carrier paid its policy limits into the Office of the Clerk of Court. The jury entered an award for the plaintiff. The trial court deducted the amount previously paid by the defendants' liability carrier and awarded prejudgment interest only on the remaining amount. *Beaver*, 333 N.C. at 456, 427 S.E.2d at 317. Our Supreme Court affirmed this Court's holding that it was error for the trial court not to award prejudgment interest on the full amount of the jury award. *Id.* at 457, 427 S.E.2d at 318. Although prejudgment interest was proper in *Beaver*, the case before us is distinguishable and the same result is not warranted. *Beaver* involved a jury award, rather than an arbitration award, and *Beaver* is therefore not controlling.

Through his motion for interest and costs, plaintiff essentially asked the trial court to modify the arbitration award which had been entered. As we noted above, "North Carolina General Statutes section 1-567.14 provides the sole means by which a party may have an award modified or corrected." *Palmer*, 129 N.C. App. at 496, 499 S.E.2d at 806. This statute allows for modification of an award by a court in only three limited situations: (1) evident miscalculation or evident mistake in a description, (2) arbitrators awarded upon a matter not submitted to them, or (3) the award was imperfect in form. Plaintiff's request for interest does not fall within any of these grounds permitting modification. Just as in *Palmer*, "the arbitrator's failure to include prejudgment interest was not due to mathematical error, error relating to form, or error resulting from his exceeding his authority[.]" *Palmer*, 129 N.C. App. at 498, 499 S.E.2d at 808. Thus, the trial court was without authority to modify the award to include prejudgment interest.

This case is similar to *Sentry Building Systems v. Onslow County Bd. of Education*, 116 N.C. App. 442, 448 S.E.2d 145 (1994). In *Sentry*, the parties agreed to arbitrate a dispute concerning a construction contract. *Sentry*, 116 N.C. App. at 443, 448 S.E.2d at 145-46. The award was in favor of the plaintiff and the defendant specifically

asked whether the award included interest. *Id.* at 443, 448 S.E.2d at 146. The arbitrator stated that interest was not included. The plaintiff filed a motion for interest in superior court. *Id.* The trial court awarded interest but this Court reversed, stating that "the trial court erred by concluding that N.C. Gen. Stat. § 1-567.14 did not apply to the instant case and by reviewing the arbitration award when the plaintiff had not made a proper application as provided by the statute." *Id.* at 444-45, 448 S.E.2d at 146. Likewise, in the case before this Court, the trial court lacked authority to modify the award. Thus, we hold that the trial court did not err in denying plaintiff's motion to award prejudgment interest and this assignment of error is without merit.

Affirmed.

Judges HUNTER and GEER concur.

JONATHAN GUOX, SHERYN GUOX, AND ILIANA GUOX, BY AND THROUGH THEIR GUARDIAN AD LITEM, STANLEY ABRAMS, AND STANTOS VICENTE GUOX, PLAINTIFFS v. ROBERT ALLEN SATTERLY, DEFENDANT

No. COA03-966

(Filed 1 June 2004)

1. Trials— motion for new trial—abuse of discretion standard

The trial court did not err in an action arising out of an automobile accident by setting aside the verdict and by granting plaintiffs' motion for a new trial on the issue of damages to the minor plaintiffs, because: (1) an appellate court may reverse the trial court's decision to grant a new trial, but only in those exceptional cases where abuse of discretion is clearly shown; and (2) a review of the record revealed that the trial court did not abuse its discretion in granting plaintiffs' motion.

2. Evidence— defendant's testimony—damages

The trial court did not err in an action arising out of an automobile accident by considering defendant's testimony as a basis for awarding a new trial on the issue of damages to the minor plaintiffs where plaintiff never objected to such testimony at trial, because: (1) a trial court is not prevented from considering specific testimony when ruling on a motion for a new

trial under N.C.G.S. § 1A-1, Rule 59(a)(6) even if a party did not object to it; and (2) Rule 59(a)(6) requires the trial court to find the award of damages to have been influenced by passion or prejudice, and such a determination requires a consideration of the entire record.

3. Evidence— findings of fact—conclusions of law

The trial court did not err in an action arising out of an automobile accident by its finding of fact number 12 because it was supported by competent evidence, and the conclusions of law were supported by the findings of fact.

4. Trials— motion for new trial—abuse of discretion standard—de novo review

While a trial court's conclusions of law are reviewable de novo, a ruling in the discretion of the trial court such as a decision to grant or deny a motion for a new trial raises no question of law, and thus, the issue before the court is whether the trial court abused its discretion instead of whether the trial court's decision was proper under a de novo review.

Appeal by plaintiff from judgment entered 19 March 2003 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 20 April 2004.

Taylor Law Office, by W. Earl Taylor, Jr. for plaintiffs-appellees.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P, by Carrie E. Meigs, for defendant-appellant.

STEELMAN, Judge.

Defendant, Robert Satterly, appeals the trial court's order setting aside the verdict previously entered and granting a new trial on the issue of damages to the minor plaintiffs. For the reasons discussed herein, we affirm.

On 3 March 1998, the parties herein were involved in an automobile accident, when defendant's vehicle ran a red light and collided into the vehicle in which plaintiffs were passengers. After the accident occurred, defendant came over to plaintiffs' vehicle to see if anyone was hurt. Defendant stated that when he looked into the vehicle, he saw the driver's wife holding the baby, and in the rear of the car he saw one child standing in the seat, kind of jumping up and

down, and the other child lying on the back seat of the car. The children were initially taken to Wilson Memorial Hospital for treatment of their injuries, but shortly after their arrival they were transferred to Pitt Memorial Hospital in Greenville, North Carolina.

As a result of the accident: (1) minor plaintiff, Sheryn Guox, suffered multiple bruising and a fracture of her clavicle, with some malpositioning of the bone requiring hospitalization for four days; (2) minor plaintiff, Jonathan Guox, suffered a rib fracture and a pulmonary contusion requiring hospitalization for three days; and (3) minor plaintiff, Iliana Guox, suffered a loss of consciousness, multiple skull fractures, and a moderate to severe brain injury requiring hospitalization for five days. Several medical experts presented conflicting evidence as to the nature and extent of Iliana's injuries. Santos Vicente Guox, the minor plaintiffs' mother, incurred medical expenses for the treatment of her children's injuries from the automobile accident in the amount of (1) $5,526.40 for treatment of Sheryn Guox; (2) $9,477.95 for treatment of Jonathan Guox; and (3) $15,523.09 for treatment of Iliana Guox.

An eyewitness testified defendant's light was red when he proceeded into the intersection. At trial defendant did not dispute the eyewitness' statement and accepted responsibility for the accident. The trial judge directed a verdict against defendant on the issue of liability. Consequently, the only issue remaining for the jury was the amount, if any, to award the minor plaintiffs for damages.

After hearing the evidence, the jury awarded damages to the plaintiff, Santos Vicente Guox, for medical expenses for her minor children in the amount of $5,526.40 for Sheryn, $9,477.95 for Jonathan, and $15,523.09 for Iliana. The jury awarded damages for pain, suffering, and permanent injury to the minor plaintiffs in the amount of (1) $2,000.00 for Sheryn; (2) $2,000.00 for Jonathan; and (3) $37,000.00 for Iliana.

On 16 July 2002, plaintiffs filed a motion for a new trial pursuant to N.C. R. Civ. P. 59(a)(6) on the grounds that inadequate damages appeared to have been awarded to the minor plaintiffs based on passion or prejudice. In support of plaintiffs' motion, they cited four pieces of testimony by defendant which they believed contributed to the inadequate damages award: (1) defendant's observations regarding the minor children following the motor vehicle accident, which plaintiffs contend suggested that the children were not wearing proper safety restraints; (2) that he purchased toys and visited the

children both at the hospital and at their home; (3) that he offered money to the family while they were in the hospital to assist with expenses; and (4) that he discontinued contact with the family because he knew they had contacted an attorney and he knew "what was coming next." On 15 March 2003, Judge Sumner granted plaintiffs' motion for a new trial on the issue of damages and set aside the verdicts previously entered on the issue of damages to the minor plaintiffs. As a basis for granting plaintiffs' motion, the trial court cited in its findings of fact those four pieces of testimony from defendant, as well as the extent of the injuries the minor plaintiffs incurred as a result of defendant's negligence. Defendant appealed.

[1] In his first assignment of error, defendant contends the trial court erred in granting plaintiffs' motion for a new trial. We disagree.

The trial court may grant a new trial due to "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice[.]" N.C. R. Civ. P. 59(a)(6) (2003). " 'A motion for a new trial on the grounds of inadequate damages is addressed to the sound discretion of the trial court[.]' " *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 320, 542 S.E.2d 317, 319 (2001) (quoting *Estate of Smith v. Underwood*, 127 N.C. App. 1, 12, 487 S.E.2d 807, 814, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997)). After reading the cold record, an appellate court may reverse such a decision, but "only in those exceptional cases where abuse of discretion is clearly shown." *Lusk v. Case*, 94 N.C. App. 215, 217, 379 S.E.2d 651, 652 (1989). Thus, the trial court's discretion is " 'practically unlimited.' " *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997) (quoting *Campbell v. Pitt County Memorial Hosp.*, 321 N.C. 260, 264-65, 362 S.E.2d 273, 275-76 (1987)).

After a careful review of the record, we are unable to say that the trial judge abused his discretion in granting plaintiffs' motion for a new trial. Therefore, we hold that the trial court did not err.

[2] In his second assignment of error, defendant contends the trial court erred in considering his testimony, as referenced above, as a basis for awarding a new trial where plaintiff never objected to such testimony at trial.

In determining whether a damages award was excessive or inadequate due to the influence of passion or prejudice, the trial judge must consider the testimony and evidence presented at trial. Just because a party did not object to specific testimony does not prevent

the trial court from considering it when ruling on a motion for a new trial pursuant to N.C. R. Civ. P. 59(a)(6). While there is no case law directly on point, there are several reasons that support our conclusion. First, nothing in Rule 59(a)(6) requires that such an objection be made at trial in order to serve as grounds for a new trial. We find it telling that another of the grounds listed in Rule 59(a) for awarding a new trial does specifically require such an objection to be made at trial. Rule 59(a)(8) states that the trial court may grant a motion for a new trial where there was an "[e]rror in law occurring at the trial and *objected to* by the party making the motion[.]" N.C. R. Civ. P. 59(a)(8) (2003) (emphasis added). Second, Rule 59(a)(6) requires the trial court to find the award of damages to have been influenced by "passion or prejudice." Such a determination requires a consideration of the entire record. *See Britt v. Allen*, 291 N.C. 630, 634-35, 231 S.E.2d 607, 611 (1977) (noting that where a party moves for a new trial because the verdict is against the greater weight of the evidence, such a motion requires the trial judge to *appraise the testimony given* since the judge has the discretionary power to set the verdict aside). For these reasons, we hold that the trial judge did not err in considering defendant's testimony when ruling on the Rule 59(a)(6) motion for a new trial, even though plaintiffs' counsel never objected to the testimony at trial.

[3] In defendant's third and final assignment of error, he contends Finding of Fact No. 12 is unsupported by competent record evidence and the conclusions of law are unsupported by the findings of fact.

After careful review of the whole record, including the transcripts, we hold the trial court's finding of fact No. 12 is supported by competent evidence in the record.

Defendant further contends Findings of Fact Nos. 13 and 14 are more properly classified as conclusions of law rather than findings of fact.

A determination which requires the exercise of judgment or the application of legal principles is more appropriately a conclusion of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Findings of Fact 13 and 14 read as follows:

> 13. The court finds, in its considered discretion, that inadequate damages were awarded to the minor plaintiffs, Jonathan Guox, Sheryn Guox, and Iliana Guox.

14. The courts finds, in its considered discretion, that the inadequate damages appear to have been given under the influence of passion or prejudice.

Even though these determinations were stated as findings of fact, they are more properly conclusions of law, as they require the application of legal principles to the facts of the case. "Generally, a judgment is in a form that contains findings, conclusions, and a decree." *Langston v. Johnson*, 142 N.C. App. 506, 508, 543 S.E.2d 176, 178 (2001). Where the lower court fails to follow this exact form, it will not be fatal to the judgment, as the adequacy of a writing purporting to be a judgment "is to be tested by its substance rather than its form." *Id.* Here, we are able to determine that the findings of fact are supported by competent evidence, and in turn the conclusions of law are supported by the findings of fact.

[4] Finally, defendant contends that since the findings of fact, which are more properly classified as conclusions of law are reviewable *de novo*, the inquiry then becomes whether the trial court's decision was proper. While it is true that a trial court's conclusions of law are reviewable *de novo*, *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003), that is not the case here. Pursuant to Rule 59(a), the trial court is vested with the discretionary authority to grant or deny a motion for a new trial. *Frye v. Anderson*, 86 N.C. App. 94, 96, 356 S.E.2d 370, 371, *disc. review denied*, 320 N.C. 791, 361 S.E.2d 74 (1987). "A ruling in the discretion of the trial judge *raises no question of law*." *Id.* at 95, 356 S.E.2d at 371 (emphasis added). As a result, the issue before this Court is not whether the trial court's decision was proper under a *de novo* review, as defendant suggests. Rather, our review is limited to whether the trial court abused its discretion, and as we stated above, it did not.

Therefore, the order of the trial court which sets aside the verdict and grants a new trial is affirmed.

AFFIRMED.

Judges WYNN and CALABRIA concur.

[164 N.C. App. 584 (2004)]

BARBARA GARRISON DALTON, PLAINTIFF v. ROBERT FRANK DALTON, DEFENDANT

No. COA03-839

(Filed 1 June 2004)

Divorce— equitable distribution—unincorporated separation agreement—mistake of law

The trial court did not err by granting summary judgment in favor of plaintiff wife on defendant husband's counterclaim for equitable distribution of the parties' marital and divisible property even though defendant sought to set aside the parties' separation agreement drafted by plaintiff based on the fact that plaintiff fraudulently or mistakenly represented to defendant that the law in North Carolina required each of them to retain their respective retirement savings accounts as their separate property, because: (1) a separation agreement which is not incorporated into a court judgment is a contract, and a party cannot attack the making of a contract on the basis of fraud where the proof regarding the misrepresentation or misstatement relates to a matter of law since everyone is equally capable of determining the law; (2) the existence of a relationship of confidence and trust does not operate as an exception to the general rule that fraud cannot be premised upon a misrepresentation of law; (3) a bare mistake of law generally affords no grounds for reformation, and the separation agreement in the instant case succeeded in accomplishing the intention of the parties to distribute their retirement benefits pursuant to an erroneous understanding of North Carolina law; and (4) contrary to defendant's assertion, the record contained a copy of the separation agreement bearing a notary stamp for the signatures of both plaintiff and defendant.

Appeal by defendant from order entered 19 March 2003 by Judge Thomas G. Foster in Guilford County District Court. Heard in the Court of Appeals 1 April 2004.

Diane Q. Hamrick, for plaintiff-appellee.

Robert R. Schoch, for defendant-appellant.

CALABRIA, Judge.

Robert Frank Dalton ("defendant") is appealing the entry of summary judgment against him on his counterclaim for equitable distribution of the parties' marital and divisible property. We affirm.

Defendant and Barbara Garrison Dalton ("plaintiff") were married on 22 May 1982. On or about 31 December 2000, the parties separated. The parties executed a document on 25 January 2001 entitled "Separation and Property Settlement Agreement." The agreement distributed the parties' real property and personal property, including seven parcels of real property, household and personal belongings, vehicles, bank and financial accounts and retirement benefits. In dividing the parties' retirement accounts, the agreement provided, in pertinent part, as follows: "f. Retirement Benefits. Husband shall be the sole owner of all funds and benefits in his name in the SEP account with Wachovia. Wife shall be the sole owner of all funds and benefits in her name in the SEP account with Wachovia." As of the date of separation, plaintiff's retirement savings account was valued at approximately $600,000 while defendant's retirement savings account was valued at approximately $100,000.

On 9 July 2002, plaintiff filed a complaint for absolute divorce and cited the parties' separation agreement as resolving "[a]ny and all claims of the parties for support, alimony and/or equitable distribution of marital property." In an amended answer, defendant counterclaimed for equitable distribution, seeking to set aside the separation agreement on the grounds of fraud, constructive fraud, misrepresentation, mutual mistake, undue influence, unconscionability and manifest unfairness, and failure to observe the proper formalities in executing the agreement. Plaintiff replied to defendant's answer asserting defendant's counterclaims were barred by various affirmative defenses, including accord and satisfaction, waiver, estoppel, and ratification. On 24 January 2003, plaintiff moved for summary judgment "on the grounds that there is no genuine issue as to any material fact related to Defendant's Counterclaim, and Plaintiff is entitled to Summary Judgment in her favor as a matter of law." In an order filed 19 March 2003, the trial court granted plaintiff's motion. Defendant appeals.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a mat-

ter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The party moving for summary judgment must establish the lack of any triable issue, and all inferences of fact from the evidence proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. *Boyce v. Meade*, 71 N.C. App. 592, 593, 322 S.E.2d 605, 607 (1984). Nonetheless, "[s]ummary judgment should be looked upon with favor where no genuine issue of material fact is presented." *Lowry v. Lowry*, 99 N.C. App. 246, 249, 393 S.E.2d 141, 143 (1990).

Here, defendant asserts plaintiff engaged in a series of "expertly-machinated manipulations and deceptions" resulting in "his financial fleecing." Defendant contends the marital history of plaintiff's dominance conditioned him to follow her advice and, when they decided to separate, plaintiff suggested she prepare their separation agreement without involving attorneys and he assented. Defendant further contends that, after the unequal distribution of the parties' retirement savings accounts, plaintiff fraudulently or mistakenly represented to defendant that the law in North Carolina required each of them to retain their respective retirement savings accounts as their separate property.

It should be noted at the outset that there was no confusion as to any issue of fact on the part of either of the parties. To the contrary, both parties readily concede that (1) plaintiff had a retirement savings account in her name with approximately $600,000, (2) defendant had a retirement savings account in his name with approximately $100,000, and (3) both knew the respective amounts in each account. Defendant's claim depends on his assertion that plaintiff misrepresented the law of North Carolina when she divided the parties' retirement benefits in the separation agreement. In short, our holding is limited to situations involving misrepresentations of law and not of fact.

"A separation agreement which is not incorporated into a court judgment is a contract[.]" *Rose v. Rose*, 108 N.C. App. 90, 94, 422 S.E.2d 446, 448 (1992). Generally speaking, a party cannot attack the making of a contract on the basis of fraud where the proof regarding the misrepresentation or misstatement relates to a matter of law. Richard A. Lord, Williston on Contracts § 69:10 (4th ed. 1993). This is based primarily on the following related principles: "that everyone is equally capable of determining the law, is presumed to know the law and is bound to take notice of the law and, therefore, in legal contemplation, cannot be deceived by representations concerning the law or permitted to say he or she has been misled." *Id.* A widely held

exception to this rule is "where there is a relation of trust and confidence between the parties[.]" *Avriett v. Avriett*, 88 N.C. App. 506, 512, 363 S.E.2d 875, 880 (1988) (Greene, J. dissenting) (citation omitted). This exception, however, cannot avail defendant.

In *Avriett*, a wife claimed her former husband's failure to reveal his attorney's legal advice constituted fraud. The husband failed to reveal the "significant 'difference between the ramifications of alimony and property settlement as it pertains to the [husband's] military pension[.]' "[1] *Id.* The majority held the wife's claim for fraud was fatally deficient for three reasons. *Id.*, 88 N.C. App. at 508-09, 363 S.E.2d at 877-78. One of the three alternative and independent grounds upon which the wife's claim failed was that "fraud cannot be based upon ignorance of the law." *Id.*, 88 N.C. App. at 508, 363 S.E.2d at 878. In so doing, this Court rejected the proposition that the existence of a relationship of confidence and trust operates as an exception to the general rule that fraud cannot be premised upon a misrepresentation of law. *Id.* This conclusion is bolstered by the fact that each of these deficiencies was propounded by the majority as fatal to the wife's claim despite the dissent's specific reference to the exception in question. Accordingly, we are bound by our holding in *Avriett* and, thus, conclude that plaintiff's claims premised upon fraud are fatally deficient. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding when one "panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court").

In the alternative, defendant, relying on *Durham v. Creech*, asserts the separation agreement should be reformed because appellee's "inducing statements about the law 'requiring' the parties to retain savings in their individual names . . . clearly demonstrate she also was mistaken (at least) about the law." *See id.*, 32 N.C. App. 55, 231 S.E.2d 163 (1977). Relief has been granted where there "exist[s] . . . a mutual mistake as to a *material fact* comprising the essence of the agreement. . . ." *Lancaster v. Lancaster*, 138 N.C. App. 459, 465, 530 S.E.2d 82, 85 (2000) (emphasis added). However, "[a]bare mistake of law generally affords no grounds for reforma-

1. We do not perceive a meaningful distinction between the plaintiff's failure to reveal certain information in *Avriett* as compared to plaintiff's alleged misrepresentation in the instant case. *See Link v. Link*, 278 N.C. 181, 191, 179 S.E.2d 697, 703 (1971) ("[f]raud rests upon deception by misrepresentation or concealment"); *Vail v. Vail*, 233 N.C. 109, 113, 63 S.E.2d 202, 205 (1951) ("fraud may be said to embrace all acts, omissions, and concealments") (internal quotation marks and citation omitted).

tion." *Durham*, 32 N.C. App. at 60, 231 S.E.2d at 167. In *Durham*, the sellers of certain real property sought to have the deed reformed to reflect the intention of the parties to reserve a life estate for the sellers. The deed failed to include the language reserving the life estate due to the mistake of the draftsman. This Court held a directed verdict for the buyers was improper because "the failure to accomplish the intention of the parties, to reserve a life estate, was a mistake of fact which will afford reformation." *Id.* This Court's analysis in *Durham* turned on the deed's failure to accomplish the intention of the parties. However, in the instant case, the separation agreement succeeded in accomplishing the intention of the parties. Specifically, the parties intended to distribute their retirement benefits pursuant to an erroneous understanding of North Carolina law. That the parties' distribution scheme, in actuality, differed from that established by North Carolina law constitutes merely a "bare mistake of law." Defendant's claim cannot avail him.

Finally, defendant contends the separation agreement cannot be upheld on the grounds that it was not acknowledged by both parties before a certifying officer as required by N.C. Gen. Stat. § 52-10.1 (2003). Contrary to defendant's assertion, the record contains a copy of the separation agreement bearing a notary stamp for the signatures of both plaintiff and defendant. We have carefully considered defendant's remaining arguments and find them to be without merit.

Affirmed.

Judges McGEE and STEELMAN concur.

JOHN BERNARD WOODRING, EXECUTOR OF THE ESTATE OF ERNEST S. WOODRING, PLAINTIFF v. GENE WOODRING, ROBERT WOODRING, BETTY WOODRING KAYLOR, JO ANN WOODRING TILLEY, JAMES WOODRING, SANDRA WOODRING, AND GRADY WOODRING, DEFENDANTS

No. COA03-1040

(Filed 1 June 2004)

Wills— interpretation of provisions—sufficiency of findings

A declaratory judgment interpreting a will was remanded for further findings where the trial court merely recited the requests in the complaint, recited the pertinent articles from the will, and concluded that the testator intended his sister and her husband to

take by the entirety rather than individually. The law applied by the court could not be determined from the order.

Appeal by defendants Gene Woodring, Robert Woodring, Betty Woodring Kaylor, Jo Ann Woodring Tilley, James Woodring, and Sandra Woodring from order entered 14 May 2003 by Judge James L. Baker, Jr., in Watauga County Superior Court. Heard in the Court of Appeals 28 April 2004.

Robert B. Angle, Jr., for plaintiff-appellee.

John M. Logsdon for defendants-appellants.

No brief filed by defendant-appellee Grady Woodring.

TIMMONS-GOODSON, Judge.

Gene Woodring ("Gene"), Robert Woodring ("Robert"), Betty Woodring Kaylor ("Betty"), Jo Ann Woodring Tilley ("Jo Ann"), James Woodring ("James"), and Sandra Woodring ("Sandra") (collectively, "defendants") appeal the trial court's order interpreting the will of Ernest Smith Woodring ("Ernest") and establishing the method of division of his estate among the named beneficiaries. For the reasons discussed herein, we reverse the trial court's order.

The facts and procedural history of the instant case are as follows: Ernest Smith Woodring died testate in Watauga County on 5 October 2001. The following were named as beneficiaries in his will: Donzola Woodring ("Donzola"), Ernest's sister; Gene Woodring ("Gene"), Donzola's husband; Grady Cleveland Woodring ("Grady"), Ernest's brother; and John Bernard Woodring ("John"), Ernest's nephew. Ernest's will did not mention either Eula May or Earline, his other two surviving sisters. At the time of his death, Donzola had predeceased Ernest and left five surviving children: Robert, Betty, Jo Ann, James, and Sandra.

With the consent of all beneficiaries, John was appointed personal representative of Ernest's estate. On 24 February 2003, John filed a declaratory judgment action, seeking a judicial interpretation of Ernest's will and direction as to how to distribute the net proceeds of Ernest's estate. The pertinent language of the will is as follows:

Article Two

I will, devise, and bequeath all my property of every sort, kind and description, real personal and mixed, which I may own at the

> time of my death, unto my sister, Donzola Woodring and her husband, Gene Woodring, and my brother, Grady Cleveland Woodring, and unto my nephew, John Bernard Woodring, share and share alike.
>
> Article Three
>
> In the event that my sister, Donzola Woodring and her husband, Gene Woodring, and my brother, Grady Cleveland Woodring, and my nephew John Bernard Woodring, should predecease me, I hereby will, devise and bequeath all of the share that they might have individually taken to their issue them [sic] living, share and share alike.

At trial, John contended that the language of Article Two created three equal shares: one share for Grady, one share for John, and one share for Donzola and Gene as tenants by the entirety. Defendants contended that the language created four equal shares: one share for Grady, one share for John, one share for Gene, and one share for Donzola. On 14 May 2003, the trial court declared that Ernest's will created a tenancy by the entirety between Donzola and Gene, and the trial court ordered the estate divided into three shares, with one share going to Gene, one share to Grady, and one share to John. It is from this order that defendants appeal.

The only issue on appeal is whether the trial court erred in concluding that Ernest's will created a tenancy by the entirety between Donzola and Gene. Defendants fail to make specific exceptions to the trial court's findings of fact, choosing rather to make a general exception to the trial court's conclusion of law. Absent specific exceptions to findings of fact, this Court's review is limited to a determination of whether the trial court's findings of fact support its conclusions of law. *Denise v. Cornell*, 72 N.C. App. 358, 359, 324 S.E.2d 305, 306-07, *petition for writ of supersedeas and temporary stay denied*, 313 N.C. 173, 326 S.E.2d 36 (1985). We conclude that they do not.

In his 24 February 2003 Complaint for Declaratory Judgment, plaintiff requested the trial court "declare the rights, status and legal ownership of estate proceeds of Ernest Smith Woodring." In its declaratory judgment, the trial court entered the following findings of fact:

> 1. This matter was properly before the Court upon a "Complaint for Declaratory Judgment" filed by the Plaintiff[] to obtain the

Court's interpretation of the will and guidance on how to distribute the proceeds of the Estate of Ernest Smith Woodring, Estate #01 E 293.

2. That the Plaintiff was represented by Robert B. Angle, Jr.

3. That the Defendants were represented by John Logsdon.

4. That the language to be interpreted in the will was contained in Article Two and Three and read in full:

> Article Two
>
> I will, devise and bequeath all of my property of every sort, kind and description, real, personal and mixed, which I may own at the time of my death, unto my sister, Donzola Woodring and her husband, Gene Woodring, and my brother, Grady Cleveland Woodring, and unto my nephew, John Bernard Woodring, share and share alike.
>
> Article Three
>
> In the event that my sister, Donzola Woodring and her husband, Gene Woodring, and my brother, Grady Woodring, and my nephew, John Bernard Woodring, should predecease me, I hereby will: [sic] devise and bequeath all of the share that they might have individually taken to their issue them (should be then) living share and share alike.

5. That the issue before the Court is for a determination of whether the intent of the Testator, as expressed in the will, was to divide the residue of his estate into three parts, with "Donzola Woodring and her husband, Gene Woodring" taking one part in a Tenancy by the Entirety, or, to divide the estate into four parts with Donzola getting a share and her husband Gene getting a share (Donzola predeceased the Testator so her share would go to her children).

"Based on the foregoing findings of fact," the trial court then "conclude[d] as a matter of law that the intent of the Testator, as expressed in the will, was to create a Tenancy by the Entireties between 'Donzola Woodring and her husband, Gene Woodring' and to divide the estate into three shares with Gene Woodring taking the share as the survivor of the Tenancy by the Entirety." We conclude the trial court's findings of fact do not adequately support its conclusion of law.

"Declaratory judgments may be reviewed in the same manner as other judgments." *Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 520, 581 S.E.2d 94, 96 (2003). "In all actions tried upon the facts without a jury[,] . . . the [trial] court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2003); *Id.* When the trial court fails to make the requisite findings of fact or conclusions of law, this Court " 'may order a new trial or allow additional evidence to be heard by the trial court or leave it to the trial court to decide whether further findings should be on the basis of the existing record or on the record as supplemented.' " *Harris v. N.C. Farm Bureau Mutual Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988) (citation omitted). "Remand is unnecessary, however, where the facts of the case are undisputed and those facts lead to only one inference." *Cumberland Homes*, 158 N.C. App. at 520-21, 581 S.E.2d at 96.

The facts of the instant case do not lead to only one inference. The issue before the trial court in the declaratory judgment concerned two articles of Ernest's will that could reasonably be interpreted as creating either a tenancy in common or a tenancy by the entirety between Donzola and Gene. This Court has previously noted that the intent of the testator is the polar star in the interpretation of wills. *Finch v. Wachovia Bank & Tr. Co.*, 156 N.C. App. 343, 349, 577 S.E.2d 306, 310 (2003). Thus, courts are required to effectuate the testator's intent "unless it is contrary to some rule of law or is conflict with public policy." *Canoy v. Canoy*, 135 N.C. App. 326, 328-29, 520 S.E.2d 128, 131 (1999). In determining the testator's intent, the language used in the will and the "sense in which it is used by the testator" are the primary sources of information, because the will itself is recognized as "the expressed intention of the testator[.]" *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960). However, when construing its terms, courts must also consider the "circumstances attendant" to a will along with its four corners. *Pittman v. Thomas*, 307 N.C. 485, 492-93, 299 S.E.2d 207, 211 (1983).

In the instant case, the trial court made no findings of fact regarding Ernest's intent or the circumstances attendant to the will. Instead, the trial court merely recited the requests contained in the Complaint For Declaratory Judgment as well as the pertinent articles plaintiff requested the trial court review, and then concluded that Ernest intended to divide the estate into three shares, with Donzola and Gene taking one share as tenants by the entirety. We are thus unable

from the trial court's order to determine the precise law the trial court applied to the facts before it.

"The requirement for appropriately detailed findings is . . . not a mere formality or a rule of empty ritual; it is designed instead 'to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.' " *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 158, 231 S.E.2d 26, 29 (1977)). Without meaningful and sufficient findings of fact, appellate courts are unable to determine whether the trial court was correct in its conclusions of law. *Montgomery*, 32 N.C. App. at 158, 231 S.E.2d at 29. In the instant case, because the order appealed from does not contain findings of fact sufficient to support the trial court's conclusion of law, we reverse and remand the trial court's order. On remand, the trial court may in its discretion receive such additional evidence and arguments deemed necessary and appropriate to comply with this opinion.

Reversed and Remanded.

Judges McGEE and TYSON concur.

IN THE MATTER OF A.W. (DOB: 10/30/98); E.W. (DOB: 10/24/00)

No. COA03-632

(Filed 1 June 2004)

Child Abuse and Neglect— neglect—clear, cogent, and convincing evidence

The trial court erred in a child neglect adjudicatory hearing by entering findings of fact not proved by clear, cogent, and convincing evidence even though respondent mother denied the allegations without contesting them, because: (1) the Department of Social Services (DSS) still had the burden of proving by clear, cogent, and convincing evidence the allegations contained in the petition; and (2) DSS did not present any evidence by which the trial court could make findings of fact or conclusions of law.

Appeal by respondent from judgment entered 27 December 2002 by Judge Marvin Pope, Jr. in Buncombe County District Court. Heard in the Court of Appeals 15 March 2004.

Hall & Hall Attorneys at Law, PC by Douglas L. Hall for respondent-appellant.

Charlotte A. Wade for petitioner-appellee.

Michael N. Tousey for guardian ad litem-appellee.

TIMMONS-GOODSON, Judge.

K.S. ("respondent") appeals an order of the trial court adjudicating her biological children, A.W. and E.W., neglected and granting guardianship of the children to their paternal grandparents. For the reasons stated herein, we vacate the order of the trial court and remand the case for a new trial.

The pertinent factual and procedural history of this case is as follows: On 27 June 2002, the Buncombe County Department of Social Services ("DSS") filed a petition alleging that the minor children were neglected in that they lived in an environment injurious to their welfare. The petition alleged that on or about 19 December 2001, DSS found conditions at the home that respondent shared with A.W., E.W., and the children's biological father, L.K.W., to be "unsanitary" and "hazardous." The children were voluntarily placed with their paternal grandmother and her husband while respondent and the children's father were referred to a substance abuse treatment program. From that time until the hearing at issue on appeal, respondent had no contact with the children.

At the adjudication and disposition hearing, DSS sought to grant guardianship of the children to their grandparents. At the hearing, respondent stated that she denied the allegations of neglect "without contesting them." The trial court entered an order adjudicating A.W and E.W. as neglected, and granted guardianship of the children to their grandparents. It is from this order that respondent appeals.

The dispositive issue on appeal is whether the trial court's findings that the children were neglected are supported by clear, cogent and convincing evidence where respondent denied the allegations "without contesting them."

Respondent asserts that although she denied the allegations, "without contesting them," DSS still had the burden of proving by

clear, cogent and convincing evidence the allegations contained in the petition. We agree.

The Juvenile Code contained in our General Statutes provides that an adjudicatory hearing is "a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." N.C. Gen. Stat. § 7B-802 (2003). The trial court is obligated during the adjudicatory hearing to "protect the rights of the juvenile and the juvenile's parent to assure due process of law." *Id.* "The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2003).

> If the court finds that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state. If the court finds that the allegations have not been proven, the court shall dismiss the petition with prejudice . . . . The adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law.

N.C. Gen. Stat. § 7B-807 (2003).

A neglected juvenile is defined by statute as a juvenile who

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

N.C. Gen. Stat. § 7B-101(15) (2003). "An adjudication of abuse, neglect or dependency in the absence of an adjudicatory hearing is permitted only in very limited circumstances." *In re Shaw*, 152 N.C. App. 126, 129, 566 S.E.2d 744, 746 (2002).

In the present case, DSS did not present any evidence by which the trial court could make findings of fact or conclusions of law. The extent of the adjudicatory phase of the hearing is as follows:

DSS: This is the West matter on Margin 4 of the calendar. Anyone involved in the West matter please come into the courtroom at this time. [Respondent's counsel] just informed me that with respect to the allegations alleged, that the client would deny but not contest.

Court: Okay.

DSS: It is my understanding in speaking with Ms. Shade who represents the caregiver, that she consents—or has no objections to anything.

Respondent: There's no allegations, Your Honor.

Court: Okay.

DSS: Your Honor, we're ready to proceed on dispositioning.

Nevertheless, the trial court entered the following pertinent findings of fact on adjudication:

6. That the Court was informed that [K.S.] denies, but does not contest, that the minor children are neglected children based on the allegations contained in the Juvenile Petitions.

7. That on or about December 19, 2001, the Buncombe County Department of Social Services substantiated neglect due to the minor children residing in a home where parent's [sic] engaged in substance abuse. In addition, there were concerns about the condition of the home, including broken glass, unsafe steps to the entry to the home, trash piled up to the point of limiting one's ability to walk in the home as well as outside the home. The Buncombe County Department of Social Services substantiated that the parent's [sic] created an injurious environment for their children by allowing their children to reside in a hazardous environment with their drug use and the unsanitary conditions of the home. The children were voluntarily placed with the paternal grandparents in a kinship placement on December 19, 2001. And the parent's [sic] were referred to Blue Ridge Center for a Substance Abuse assessment and/or treatment. The case plan also included that the parents maintain a safe and secure home for the children. Since December 19, 2001, the parents moved several times and at the time of the filing of the juvenile petitions their whereabouts were unknown. The parents also refused to comply with the recommendations of the Buncombe County Department of Social Services to address their substance abuse issues by not keeping scheduled appointments, submitting to drug and alcohol assessments, and remaining drug/alcohol free. The parents failed to provide emotional and

physical care for their children, the parents have not had contact with the children since December 2001 when the children were placed in a kinship placement.

8. That based on the above findings of fact the minor children are neglected children as defined by N.C.G.S. §7B-101, due to the children living in an environment injurious to their welfare due to the substance abuse problems of their parents and the unsanitary condition of the home.

Finding of fact number 7 recites verbatim the Summary of DSS Intervention with Family provided in the DSS's Dispositional Report to the Court. However, this report was not introduced into evidence during the brief adjudicatory phase of the hearing. A trial court may not find as fact that which was not presented as evidence at trial. *Cf. State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) ("The trial court's findings of fact must be supported by the evidence."). Likewise, where there is no evidence presented at an adjudicatory hearing, the trial court cannot make findings of fact based on clear and convincing evidence. *See In re Ellis*, 135 N.C. App. 338, 342, 520 S.E.2d 118, 121 (1999) (Affirming a trial court's finding of fact that there was insufficient evidence to support a finding of neglect or abuse). For these reasons, we hold that the trial court erred by entering findings of fact not proved by clear, cogent and convincing evidence. Accordingly, we hereby reverse the judgment of the trial court and remand the case for trial.

Reversed and remanded.

Judges LEVINSON and THORNBURG concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Case	Court	Disposition
ARNOLD v. WAL-MART STORES, INC. No. 03-1080	Ind. Comm. (I.C.840798)	Affirmed
BILLINGS v. BILLINGS No. 03-721	Rockingham (97CVD227)	Reversed
BRYSON v. BRYSON No. 03-847	Harnett (01CVD1622)	Affirmed
FURR v. ANVIL KNITWEAR, INC. No. 03-837	Ind. Comm. (I.C. 923954)	Affirmed
IN RE A.F. No. 03-1129	Catawba (02J172)	Affirmed
IN RE C.A.J. & K.M.J. No. 03-564	McDowell (02J54[02J26]) (02j55[02J27])	Affirmed
IN RE L.C. & A.N. No. 03-569	Mecklenburg (01J1257) (01J1258)	Affirmed
MORRONI v. MAITIN No. 03-992	Jackson (02CVS584)	Dismissed
SCHMELTZLE v. SCHMELTZLE No. 02-1758	Wilson (98CVD1437)	Affirmed
SHELLA v. ANGELA C. FOSTER, PC No. 03-1366	Guilford (02CVS11260)	Dismissed
SMITH v. HARVEY No. 03-1211	Lenoir (02CVS234)	Affirmed
SMITH v. PALLMAN No. 03-693	Cabarrus (02CVS795)	Affirmed in part, reversed in part, and remanded
STATE v. ACOSTA No. 03-1120	Robeson (01CRS56741) (01CRS56745) (02CRS4427)	No error
STATE v. AVERY No. 03-919	Wake (00CRS36532) (00CRS36533)	No error
STATE v. BARNES No. 03-911	Wilson (01CRS55794)	No error

STATE v. BATTLE No. 03-670	Pitt (02CRS53947)	No error
STATE v. BROWN No. 03-1168	Cumberland (03CRS52862)	No error
STATE v. BYRD No. 03-568	Mecklenburg (02CRS75247) (02CRS236014)	No error
STATE v. COATNEY No. 03-563	Bladen (01CRS51557)	No error
STATE v. COBB No. 03-48	Guilford (01CRS85168)	No error
STATE v. ELLIS No. 03-1245	Forsyth (02CRS14588) (02CRS55079)	No error
STATE v. FITZGERALD No. 03-1029	Mecklenburg (01CRS52330) (01CRS52333) (01CRS52334) (01CRS52335)	No error in part, dismissed without prejudice in part (as to ineffective assistance), remanded for the correction of clerical errors
STATE v. FRAZIER No. 03-1146	Craven (02CRS53978)	No error
STATE v. FREEMAN No. 03-575	Columbus (97CRS970)	Affirmed
STATE v. FRYE No. 03-97	Forsyth (01CRS26882) (01CRS36355) (01CRS60883) (01CRS60886)	No error
STATE v. GARY No. 03-1089	Northampton (01CRS1024) (01CRS1025) (01CRS1026)	Vacated in part and no error in part
STATE v. GORDON No. 03-391	Haywood (01CRS52622)	No error
STATE v. HAIRSTON No. 03-1236	Stokes (03CRS1426) (03CRS50252) (03CRS50253) (03CRS50275) (03CRS50286)	Remanded

STATE v. HERNANDEZ No. 03-991	Randolph (02CRS51090)	No error
STATE v. HILL No. 03-1166	Duplin (02CRS8539) (02CRS52772) (02CRS53008) (02CRS53009) (02CRS53010)	No error
STATE v. JAMISON No. 03-695	Mecklenburg (01CRS35525) (02CRS49879)	Affirmed
STATE v. JOHNSON No. 03-717	Wake (02CRS65989)	No error
STATE v. LONG No. 03-1331	Iredell (98CRS18677)	No error
STATE v. LYNCH No. 03-617	Gaston (02CRS15890) (02CRS63637)	No error
STATE v. MALONE No. 03-1343	Guilford (00CRS107538) (01CRS24102) (01CRS77877)	No error
STATE v. MERCER No. 03-888	Durham (01CRS56695)	No error
STATE v. MILLER No. 03-902	Cabarrus (02CCRS6936) (02CRS11389) (02CRS11390)	No error
STATE v. NIVENS No. 02-1601	Forsyth (01CRS63110)	Vacated in part; no error in part
STATE v. O'NEAL No. 03-835	Scotland (99CRS7935) (99CRS7936) (99CRS7937)	No error
STATE v. PETERSON No. 03-948	Sampson (02CRS50002)	No error
STATE v. REED No. 03-698	Wake (00CRS16904)	No error
STATE v. ROBINSON No. 03-856	Robeson (01CRS53909)	No error

STATE v. SANDERS No. 03-533	Wake (02CRS52699) (02CRS68987) (02CRS74185)	Dismissed
STATE v. SIMMONS No. 03-669	Mecklenburg (01CRS118094)	Affirmed
STATE v. SINGLETARY No. 03-977	Forsyth (02CRS52167)	No error
STATE v. SPENCER No. 03-729	Rutherford (01CRS51686) (02CRS1360)	Affirmed
STATE v. WEBB No. 03-1391	Pitt (02CRS5679) (02CRS54431)	No error
STATE v. WELLS No. 03-619	Durham (99CRS56226)	Affirmed
STATE v. WILBURN No. 03-1347	New Hanover (02CRS23349)	No error
STATE v. WILLIAMS No. 03-1113	Guilford (02CRS23852) (02CRS92989)	Dismissed
STATE v. WOOD No. 03-551	Forsyth (00CRS55022)	No error
STRICKLAND v. KENT No. 03-1076	Wake (00CVD11053)	New trial
WALKER v. MYERS No. 03-523	Sampson (00CVS1523)	Reversed and remanded
WOLFSON v. COX No. 03-800	New Hanover (01CVS4973)	Affirmed

ELIZABETH SMITH ZALIAGIRIS, PLAINTIFF v. THOMAS E. ZALIAGIRIS, SR., DEFENDANT

No. COA03-649

(Filed 1 June 2004)

1. Appeal and Error— interlocutory appeal—writ of certiorari

It is an appropriate exercise of the Court of Appeals' discretion to issue a writ of certiorari in an interlocutory appeal where there is merit to an appellant's substantive arguments and it is in the interests of justice to treat the appeal as a petition for a writ of certiorari.

2. Divorce— equitable distribution—expert witness fee as sanction—required notice

An award against a defendant in an equitable distribution proceeding as a sanction was reversed because defendant was not given proper notice that he would be subject to the sanction or notice of the grounds for the sanction. The trial court initially ordered defendant to pay plaintiff's expert witness fee as a court cost, but changed the award to a sanction under N.C.G.S. § 50-21(e) and added plaintiff's related attorney fee after it was pointed out that the expert had not been subpoenaed. The sanction was also improper to the extent that it was issued under N.C.G.S. § 1A-1, Rule 11 because it had nothing to do with the improper signing or filing of documents with the court.

3. Child Support, Custody, and Visitation— child support—obligation to subsequent child—findings

A child support order was reversed and remanded where, in an action in which the presumptive guidelines did not apply, the court's finding that defendant was not under any other child support obligation was contradicted by uncontroverted evidence that defendant was under a district court order to provide support for a child born from a subsequent marriage. The findings were not sufficient to establish that the court took due regard of defendant's estates, earnings, conditions, and other facts of the particular case.

4. Child Support, Custody, and Visitation— permanent child support—retroactive date

The failure to set an earlier retroactive date for permanent child support (which was at a lower amount than the temporary support) was not an abuse of discretion.

Judge LEVINSON dissenting.

Appeal by defendant from orders entered 11 September 2002 and 30 October 2002 by Judge Regan A. Miller in Mecklenburg County District Court.[1] Heard in the Court of Appeals 25 February 2004.

James, McElroy & Diehl, P.A., by G. Russell Kornegay, III and Preston O. Odom, III, for plaintiff-appellee.

Horack, Talley, Pharr & Lowndes, P.A., by Kary C. Watson and Tate K. Sterrett, for defendant-appellant.

HUNTER, Judge.

Thomas E. Zaliagiris, Sr. ("defendant") appeals from an amended Judgment and Order on Equitable Distribution, Alimony, and Child Support filed 11 September 2002 and a Memorandum Order filed 30 October 2002. Because we conclude the trial court (1) erred in assessing sanctions against defendant without giving him proper due process notice, and (2) erred in failing to take into account defendant's child support obligation to a child born of a subsequent marriage in setting defendant's permanent child support payments in a case not controlled by the presumptive child support guidelines, we reverse in part and remand.

Defendant and Elizabeth Smith Zaliagiris ("plaintiff") were married on 20 August 1983 and separated on 21 January 1998. On 7 February 2000, plaintiff filed a complaint seeking custody of the two children born of the marriage, child support, post-separation support, alimony, equitable distribution, and attorney's fees. On 17 April 2000, defendant filed his answer and counterclaim. Following the resolution of the post-separation support, temporary child support, and custody claims, the remaining equitable distribution, alimony, and child support claims came on for trial on 13 February 2002. Prior to trial,

1. Defendant's notice of appeal states that defendant is also appealing orders entered 22 December 2000, 22 January 2001, 19 March 2001, 17 April 2001, 24 September 2001, 5 November 2001, 11 February 2002, and 24 June 2002. Defendant, however, has failed to preserve his appeal from any of these orders, and we, in fact, note a number of these orders are not even contained in the record on appeal.

the trial court, on motion of plaintiff, entered a preliminary injunction freezing all of defendant's assets, which resulted in defendant releasing his attorney and proceeding to trial *pro se* due to his representation he would be unable to pay an attorney.

At trial, both parties produced expert witness testimony regarding the valuation of defendant's twenty-five percent (25%) share in a business entity. T. Randolph Whitt ("Whitt"), plaintiff's expert, testified that the interest was valued at $413,000.00 on the date the parties separated and was worth $527,000.00 in August 2001. Timothy Allen Stump ("Stump"), defendant's expert, testified that on the date of separation, defendant's interest in the company was only $61,241.00, and in October 2001 was worth $172,509.00. Stump had been unaware until shortly before trial that defendant had sold his ownership interest in the business for $400,000.00 in 2001.

With regard to the child support portion of the action, both parties agree that this was not a case in which the presumptive child support guidelines apply. Prior to trial, defendant submitted an affidavit in which he stated that he was responsible for child support in the amount of $1,440.00 per month for a child born during his subsequent marriage who was not a part of the action. At trial, both plaintiff and defendant produced evidence that defendant was under a court order to pay child support for this child in the amount of $1,440.00. The record further indicates that a Catawba County District Court order requiring defendant to pay this amount was entered into evidence by defendant.[2]

In a Judgment and Order filed 24 June 2002, the trial court found that the value of defendant's interest in the business was $413,000.00 on the date of separation and ordered defendant to reimburse plaintiff for the cost of hiring Whitt as an expert witness. The trial court also found that although defendant had a child from a subsequent marriage, and was now separated, he was nevertheless not under a court order or other written obligation to provide child support for that child, and thus the trial court did not factor in any other child support obligation in determining defendant's child support requirements in this case. In addition, the trial court made the award of alimony and permanent child support retroactively effective to 1 February 2002.

2. Although this order is not contained in the record on appeal as an exhibit introduced at trial, the transcript provides sufficient context to establish that this child support order from Catawba County was introduced at trial.

Both parties subsequently filed motions requesting the trial court to reconsider and amend its 24 June 2002 judgment and order. As an exhibit to his motion for reconsideration, defendant attached a copy of the Catawba County child support order. A hearing was conducted on these motions on 29 August 2002, at which an affidavit from Whitt was presented showing that he had not given his expert testimony at trial on behalf of plaintiff pursuant to a subpoena. Once it was pointed out to the trial court that, as Whitt had not been subpoenaed, the expert witness fee could not be assessed as a court cost, the trial court announced *sua sponte* that instead of assessing the expert witness fees as costs, they would be assessed as a Rule 11 sanction against defendant. The trial court stated defendant was "going to have to pay these fees one way or another" and that the trial court would "figure out a way to" make defendant pay Whitt's expert witness fee because defendant should have stipulated to the valuation of the business. Plaintiff's counsel noted that the appropriate statute for sanctioning defendant would be N.C. Gen. Stat. § 50-21(e) for willful obstruction and unreasonable delay of an equitable distribution proceeding. The trial court later stated it would make additional findings of fact to justify the award of expert witness fees as a sanction against defendant.

On the issue of whether the award of permanent child support should be modified to reflect defendant's child support obligations to his child from the subsequent marriage, the trial court stated that even if it had considered the amount of defendant's other child support obligation, it would not have altered the trial court's ruling in this case "because [defendant] decided to have another child after he separated from his wife." The trial court further clarified "I would not have adversely affected [the amount of support to the children of his marriage to plaintiff] to allow him to support this third child because that's just something that he was going to have to . . . figure out a way to do . . . ."

The trial court entered an amended judgment and order on 11 September 2002. In this amended judgment, the trial court made no adjustment to the amount of permanent child support and did not alter its finding of fact regarding defendant's other child support obligations to his child from a subsequent marriage. Furthermore, the trial court made additional findings of fact that defendant's refusal to accept plaintiff's valuation of the business resulted in a willful obstruction and unnecessary delay of the proceedings and concluded as a matter of law that defendant should be sanctioned under both

Rule 11 and N.C. Gen. Stat. § 50-21(e). As a result, defendant was ordered to not only pay a sanction in the amount of the expert witness fee of $14,500.00, but in addition to pay plaintiff's attorney's fees related to the presentation of the expert witness testimony in the amount of $4,235.00. The trial court further did not alter the effective date of alimony and permanent child support.

On 20 September 2002, defendant filed a motion for a new trial. In an order filed 30 October 2002, the trial court granted this motion in part on the limited issue of the appropriate amount of sanctions to be assessed against defendant. Before the trial court could reconsider the amount of sanctions, defendant filed a notice of appeal on 20 December 2002. The trial court subsequently entered an order filed on 14 February 2003, which reduced the amount of sanctions awarded by five dollars and awarded the sanctions solely under N.C. Gen. Stat. § 50-21(e).

The issues are whether (I) the trial court erred by summarily recasting the improper assessment of an expert witness fee as a sanction against defendant; (II) the trial court erred in failing to consider defendant's child support obligation to a child born of a subsequent marriage in a case where the presumptive child support guidelines do not apply; and (III) the trial court abused its discretion in setting the retroactive effective date of the award of alimony and child support.

[1] At the outset, we note that it appears this appeal was taken prematurely before the trial court could enter its final ruling on the appropriate award of sanctions against defendant. To the extent, however, this is an interlocutory appeal subject to dismissal, we elect to exercise our discretion under Rule 21 of the North Carolina Rules of Appellate Procedure and grant *certiorari* to consider the full merits of this appeal including the 14 February 2003 order filed subsequent to the notice of appeal. The dissent, while not disagreeing with our analysis on the merits, takes issue solely with our decision to grant a writ of certiorari in this matter.

It is an appropriate exercise of this Court's discretion to issue a writ of certiorari in an interlocutory appeal where, as in this case, there is merit to an appellant's substantive arguments and it is in "the interests of justice" to treat an appeal as a petition for writ of certiorari. *Sack v. N.C. State Univ.*, 155 N.C. App. 484, 490, 574 S.E.2d 120, 126 (2002); *see also Huffman v. Aircraft Co.*, 260 N.C. 308, 310, 132 S.E.2d 614, 615-16 (1963) (discussing the appropriateness of treating an appeal as a petition for writ of certiorari based on the merits of the

substantive issues). Contrary to the dissent's assertions, the North Carolina Court of Appeals has the discretionary authority to treat a purported appeal as a petition for a writ of certiorari and to issue such a writ in order to consider the appeal. *Staton v. Russell*, 151 N.C. App. 1, 7, 565 S.E.2d 103, 107 (2002). Under Rule 21 of the North Carolina Rules of Appellate Procedure:

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists . . . .

N.C.R. App. P. 21(a)(1). In this case, the dissent generally contends that we should not issue a writ of certiorari because this appeal, when originally taken, was interlocutory and no substantial right would have been lost had we declined to take the appeal. Under the express provision of Rule 21, however, this is exactly one of the situations in which our discretion to issue a writ of certiorari applies, i.e. when an appeal is interlocutory and unappealable.

The dissent specifically disagrees with our decision to include the 14 February 2003 order in our review of this appeal.[3] First of all, the issue of whether or not this Court has the power to issue a *sua sponte* writ of certiorari is not before us in this case. In defendant's petition for writ of certiorari to this Court, he expressly petitions this Court to review the 14 February 2003 order if we deem it necessary to the appeal, simply arguing in the alternative that since the errors assigned occurred in previous orders it was not necessary for him to appeal from the 14 February 2003 order. Specifically, defendant states in the opening paragraph of his petition, that he "respectfully requests that this Court enter an Order denying [the motion to dismiss the appeal] or in the alternative review the [Order] . . . dated . . . February 14, 2003 . . . ." In conclusion, defendant's petition to this Court states, "However, should this Court determine that [defendant] was required to perfect his appeal of the February 14, 2003 Sanctions Order in order for this Court to review the errors contained in the Judgment, Amended Judgment and Memorandum Order, [defendant] respect-

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3. Although it has not been raised as a separate issue, even though the appeal of this case was taken prior to the entry of the 14 February 2003 order, the trial court retained jurisdiction to enter that order since an appeal from an unappealable interlocutory order does not divest the trial court of jurisdiction to proceed with the case. *See RPR & Assocs. v. University of N.C.-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002).

fully requests . . . that this Court issue its writ of certiorari and allow him to proceed with the pending appeal." Thus, defendant has requested this Court to issue a writ of certiorari to review the 14 February 2003 order.

Furthermore, because no appeal was taken specifically from the 14 February 2003 order, defendant has lost the right to appeal from that order by failing to take timely action, which is the second scenario under Rule 21 of the Appellate Rules where this Court has the discretion to issue a writ of certiorari. We note the dissent's suggestion, that the better approach would have been to take two separate appeals and then seek to consolidate them, while true, would have left us in essentially the same procedural posture in which we now find ourselves by granting the writ of certiorari.

Finally, the dissent suggests that reaching the merits of this appeal is inappropriate with regard to the 14 February 2003 order because there is not an adequate record to review the proceedings, stating that it is possible that other matters including child support may have been addressed. The 30 October 2002 order granting a new hearing, however, did so only on the limited issue of the amount of sanctions imposed against defendant and the 14 February 2003 order makes no reference to child support or any issue other than the amount of sanctions imposed. Therefore, the writ of certiorari is granted.

I.

[2] Defendant first argues the trial court erred in sanctioning him by requiring defendant to reimburse plaintiff for her expert witness fees and to pay the related attorney's fees.[4] We agree.

A trial court may not assess expert witness fees against a party as costs, unless the expert's appearance is pursuant to a subpoena. *See Rogers v. Sportsworld of Rocky Mount, Inc.*, 134 N.C. App. 709, 713, 518 S.E.2d 551, 554 (1999). Under N.C. Gen. Stat. § 50-21(e), a trial court shall impose sanctions if it finds a party "has willfully obstructed or unreasonably delayed or attempted to obstruct or

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4. We note that to the extent defendant was sanctioned under Rule 11 of the Rules of Civil Procedure in the trial court's 11 September 2002 amended order, the trial court erred as a matter of law because the sanctions imposed upon defendant had nothing to do with the improper signing or filing of documents with the court. *See* N.C. Gen. Stat. § 1A-1, Rule 11 (2003) (trial court may impose sanctions for improper filing of frivolous pleadings, motions, or other papers); *See also Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 33-34 (1999) (decision to impose sanctions under Rule 11 is reviewable *de novo*).

unreasonably delay any pending equitable distribution proceeding," and that "[t]he willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party." N.C. Gen. Stat. § 50-21(e) (2003). A trial court's decision to impose sanctions under Section 50-21(e) is generally reviewed for an abuse of discretion. *See Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 33-34 (1999). Moreover, a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions. *Griffin v. Griffin*, 348 N.C. 278, 279-80, 500 S.E.2d 437, 438-39 (1998). "In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him." *Id.* at 280, 500 S.E.2d at 439. The fact that the party against whom sanctions are imposed took part in the hearing "and did the best he could do without knowing in advance the sanctions which might be imposed does not show a proper notice was given." *Id.*

In this case, the trial court initially ordered defendant to pay plaintiff's expert witness fee as a court cost, which was clearly impermissible since no subpoena had been issued. Once, however, it was pointed out that the expert had not been subpoenaed, the trial court simply ordered the expert witness fee paid as a sanction against defendant and added an additional sanction of attorney's fees, making appropriate findings to support the award of sanctions. Defendant was, however, given no due process notice that he would be subject to the imposition of sanctions upon reconsideration of the 24 June 2002 judgment and order, or the grounds upon which those sanctions would be imposed. *See id.* Here, defendant was misled by the notice he actually received of the hearing because he only had notice that the improper assessment of costs would be reconsidered, not that sanctions would be imposed as an alternative. *See id.*

Thus, the trial court erred by failing to provide defendant with proper notice that sanctions might be imposed upon him in violation of defendant's due process right to proper notice. Consequently, we conclude that it was error under N.C. Gen. Stat. § 50-21(e) for the trial court to summarily recast the improper assessment of expert witness costs as a sanction against defendant, where defendant was given no notice that he would be made subject to such a sanction or the grounds upon which such sanction would be imposed.[5] Thus, we

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5. We note that we in no way address whether, had defendant been given proper notice, it was permissible under these facts to impose sanctions under N.C. Gen. Stat. § 50-21(e).

reverse the award of sanctions against defendant including both the award of the amount of the expert witness fee and the related attorneys' fees.

II.

[3] Defendant next contends it was error for the trial court to fail to consider his child support obligation to a child born of his subsequent marriage in determining his child support in the present case. Again, we agree. Where, as in this case, the presumptive child support guidelines do not apply:

> In determining child support on a case-by-case basis, the order "must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount."

Taylor v. Taylor, 118 N.C. App. 356, 362, 455 S.E.2d 442, 447 (1995) (quoting *Newman v. Newman*, 64 N.C. App. 125, 127, 306 S.E.2d 540, 542 (1983)), *rev'd on other grounds* 343 N.C. 50, 468 S.E.2d 33 (1996). In determining the relative ability of the parties to pay child support, the trial court " 'must hear evidence and make findings of fact on the parents' income[s], estates . . . and present reasonable expenses.' " *Id.* at 362-63, 455 S.E.2d at 447 (quoting *Little v. Little*, 74 N.C. App. 12, 20, 327 S.E.2d 283, 290 (1985)). Although the trial court is granted considerable discretion in its consideration of the factors contained in N.C. Gen. Stat. § 50-13.4(c), the trial court's finding in this regard must be supported by competent evidence in the record and be specific enough to enable this Court to make a determination that the trial court " 'took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents.' " *Id.* at 363, 455 S.E.2d at 447 (citation omitted).

In this case, the trial court's finding that defendant was not under any other child support obligation pursuant to a court order or other written obligation flies in the face of the uncontroverted evidence presented at trial by both parties that defendant was under a Catawba County District Court order to provide child support payments for a child born from his subsequent marriage. Thus, the trial court's finding is not supported by competent evidence in the record and is not sufficient to establish that the trial court took due regard of defendant's estates, earnings, conditions and other facts of the particular case as required under N.C. Gen. Stat. § 50-13.4(c). Therefore, we

hold, on the facts of this case, that in determining child support obligations where the presumptive guidelines do not apply, a trial court must take into consideration a parent's court ordered financial obligation to another child born of a subsequent marriage. Accordingly, we reverse the child support portion of the 11 September 2002 amended Judgment and Order and remand this case to the trial court for a redetermination of the parties' child support obligations.

III.

[4] Defendant finally contends that the trial court abused its discretion in making his child support obligations retroactive only until 1 February 2002. Prior to the entry of the permanent child support order, defendant had been ordered to pay temporary child support in a greater amount than finally ordered. Defendant argues that the trial court erred by not using its discretion to set an even earlier retroactive date for his permanent child support obligation. We conclude that although the prior temporary child support order was subject to modification, the trial court did not abuse its discretion in failing to modify that temporary order to set an earlier retroactive effective date for permanent child support. *See Miller v. Miller*, 153 N.C. App. 40, 48-49, 568 S.E.2d 914, 919-20 (2002).

Accordingly, we affirm the portion of the trial court's 11 September 2002 amended Judgment and Order setting the effective date of defendant's permanent child support obligation; we reverse the award of sanctions under Rule 11 and N.C. Gen. Stat. § 50-21(e); and reverse and remand this case for a new determination of the amount of defendant's child support obligation.

Affirmed in part, reversed in part and remanded.

Judge McCULLOUGH concurs.

Judge LEVINSON dissents.

LEVINSON, Judge dissenting.

This Court lacks the authority to address the merits of this appeal because (1) defendant appeals from an interlocutory order that does not implicate a substantial right, (2) defendant has not appealed from the final order, nor sought *certiorari* on the final order, and (3) neither N.C.R. App. P. Rule 21, nor any other statutory or common law basis, gives this Court jurisdiction to issue a writ of *certiorari sua*

sponte where a litigant neither appeals from a judgment or order, nor files a petition seeking *certiorari* for review of a judgment. The desire to provide appellate review for litigants is understandable. However, because jurisdiction is lacking, this appeal must be dismissed.

While the factual and procedural history outlined by the majority opinion is accurate, I note several additional events. After granting defendant's 20 September 2002 motion for a new trial on the issue of sanctions, the trial court conducted a hearing on the same on 11 December 2002. Thereafter, on 14 February 2003, the trial court entered what the majority acknowledges was the final order. The final order contained an amended order on sanctions, incorporated the findings of fact and conclusions of law of the 11 September 2002 Amended Judgment, and added new findings and conclusions pertaining to the imposition of sanctions. *After* the hearing on 11 December 2002 but *before* the trial court entered its final order on 14 February 2003, defendant gave notice of appeal from several of the court's earlier orders. However, defendant has neither appealed from the order of 14 February 2003, nor assigned error to it. On 10 October 2003 plaintiff filed a motion to dismiss defendant's appeal as interlocutory, and for violations of the North Carolina Rules of Appellate Procedure. On 23 October 2003 defendant filed a response asking this Court either to deny plaintiff's dismissal motion or to "issue its writ of *certiorari* and allow [defendant] to proceed with the **pending** appeal." (emphasis added). At that time no appeal from the final order was "pending."

I agree with the majority that defendant's appeal is interlocutory. Under N.C.G.S. § 1A-1, Rule 54(a) (2003), a judgment "is either interlocutory or the final determination of the rights of the parties." A final judgment "is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950).

Defendant appealed from several orders, the latest of which was the 30 October 2002 order, which granted in part defendant's motion for a new trial and scheduled a hearing on the issue of sanctions. The order of 30 October clearly required "further action by the trial court," and was therefore interlocutory.

I agree the final judgment in this case was the order of 14 February 2003. Defendant concedes as much in his Appeal

Information Statement, which lists 14 February 2003 as the date final judgment was entered. In reaching this conclusion, I reject defendant's argument that the order of 14 February 2003 cannot be the final judgment because it "merely" determined the amount of sanctions. *See Steadman v. Steadman*, 148 N.C. App. 713, 559 S.E.2d 291 (2002) (trial court's order was interlocutory where it determined plaintiff was entitled to a money judgment, but deferred determination of the amount of judgment and attorney's fees until a later hearing). Furthermore, the final order also incorporated findings and conclusions from earlier orders, and added new findings and conclusions.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). In the instant case, the Record on Appeal does not include a notice of appeal from the 14 February order. Also, defendant did not assign error to the final judgment, did not argue in his brief that there was error in this order, and has not sought to amend the record to include notice of appeal from the final order entered 14 February 2003. Moreover, in his response to plaintiff's dismissal motion and his petition for *certiorari*, defendant expressly disavows any desire to appeal the final order. "Failure of a party to file a notice of appeal regarding a particular order deprives this Court of jurisdiction over issues arising out of the order." *Albrecht v. Dorsett*, 131 N.C. App. 502, 504, 508 S.E.2d 319, 321 (1998).

The majority purports to utilize Rule 21 to grant *certiorari* in order to review the 14 February 2003 order. However, defendant's appeal from the interlocutory order of 30 October 2002 and earlier orders does not confer jurisdiction on this Court to review the final judgment of 14 February 2003 by way of Rule 21 *certiorari*. Under N.C.R. App. P. 21(a)(1), this Court may issue a writ of *certiorari* "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists[.]" Thus, we may issue a writ of *certiorari* in order to reach issues raised by an appellant who failed to timely file notice of appeal or failed to include the notice in the Record on Appeal. *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) ("Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by *certiorari* even if the party has failed to file notice of appeal in a timely manner."). Rule 21 does not apply, however, to the present case.

Defendant has not sought *certiorari* review of the 14 February 2003 order. It bears repeating that defendant did not assign error to the final judgment or argue in his brief that it was erroneous. Nor does defendant's petition for *certiorari* ask us to issue a writ of *certiorari* to permit him to appeal the 14 February 2003 order. Although defendant's introductory paragraph mentions the order, in the body of his motion and petition defendant takes pains to inform this Court that he intentionally "chose not to perfect his appeal, nor assign error" to the 14 February 2003 order "because he believed that the errors committed by the trial court were contained in [the trial court's earlier orders]." Indeed, defendant argues that he "should not be required to pursue an appeal of an order, or assign error to it, when he does not find that the trial court's errors were committed . . . in that order." Finally, the concluding paragraph of defendant's motion asks that "**in order for this Court to review the errors contained in the Judgment, Amended Judgment and Memorandum Order**, . . . [defendant requests] that this Court issue its writ of certiorari and allow him to proceed with **the pending appeal**." (emphasis added). The "pending appeal" concerned everything *but* the final order.

I am unaware of any other statutory or common law basis for our issuance of a writ of *certiorari sua sponte* where a litigant neither appeals from a judgment or order, nor files a petition seeking *certiorari* for review of a judgment. Such is the present circumstance.

Moreover, as a practical matter, the majority's attempt to review the final order ignores several glaring problems. Because notice of appeal was not taken from the final order, a record on appeal was not prepared as to that order. Because no assignments of error have been made as to the final order, the majority is apparently assuming that the errors assigned to the interlocutory orders apply equally to the final order. But, because the record does not include a transcript of the 11 December 2002 hearing on defendant's motion for a new trial, this Court has no information about the arguments and evidence presented at the hearing. Although the 11 December 2002 hearing was intended to concern only the issue of sanctions, it is possible that the court took additional evidence concerning the child support issue. Our Rules of Appellate Procedure, including Rule 21, afford appropriate structure to avoid such problems. The majority's application of Rule 21 to address the final order creates a dangerous precedent. To obtain review of the final order, defendant could—and should—have timely appealed from the final order or sought *certiorari* review as to that order. In that event, we could have consolidated both appeals.

Rule 21 affords this Court an opportunity to overlook technical violations of the Rules under appropriate, specifically prescribed limitations. But the authority to do so should be limited to cases in which the parties are actually *trying* to appeal an order and make a request to do so. Again, defendant has expressly insisted he has not tried to do so.

Finally, defendant failed to include the Statement of Grounds for Appellate Review required by N.C.R. App. P. 28(b)(4). This might not ordinarily warrant a dismissal. However, in the instant case, the question of defendant's entitlement to appellate review is a **central issue** before this Court, and the omission of a statement of grounds for appellate review is not merely a technical oversight. "It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" *Jeffreys v. Raleigh Oaks Joint Venture,* 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Accordingly, this violation, in and of itself, is sufficient to warrant dismissal. During oral argument, counsel for defendant could not provide a satisfactory legal argument as to how this Court could address the merits of the 14 February 2003 order given the posture of this matter. Indeed, no such argument exists.

In sum, defendant's appeal is interlocutory and he has neither appealed from nor properly sought review by *certiorari* of the 14 February 2003 final judgment. In addition, defendant's failure to include a Statement of Grounds for Appellate Review constitutes a substantial violation of the Rules of Appellate Procedure warranting dismissal. In my view, defendant's appeal must be dismissed.

CEDRICK BOBBY LEMON, PLAINTIFF v. SEAN "PUFFY" COMBS, DEFENDANT

No. COA03-690

(Filed 1 June 2004)

1. Process and Service— proof of service—throwing papers at feet

There was sufficient proof of service of process where the sheriff's certification of service indicated the manner in which defendant was served and plaintiff presented affidavits supporting the deputy's version of how service was made.

The court did not abuse its discretion by rendering a decision based solely on affidavits.

2. Jurisdiction— personal—default judgment

Although plaintiff served defendant with a summons and complaint and obtained an entry of default upon defendant's failure to appear, plaintiff did not provide a basis upon which personal jurisdiction could be established and the default judgment was void. N.C.G.S. § 1-75.11.

Judge TYSON concurring in part and concurring in the result in part.

Appeal by plaintiff and defendant from order entered 6 February 2003 by Judge William Z. Wood, Jr., Superior Court, Forsyth County. Heard in the Court of Appeals 2 March 2004.

Horton and Gsteiger, PLLC, by Urs R. Gsteiger and Howard C. Jones II, for plaintiff.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr. and Jack M. Strauch, for defendant.

WYNN, Judge.

This appeal arises from the entry of a default judgment against Defendant Sean Combs awarding Plaintiff Cedrick Bobby Lemon $450,000 in compensatory damages and $2,000,000 in punitive damages for personal injuries inflicted by bodyguards allegedly employed, supervised and managed by Combs. From the trial court's order upholding the compensatory damage award, Combs appeals; and, from the setting aside of the punitive damage award, Lemon appeals. We hold that because Lemon failed to fulfill the requirements of N.C. Gen. Stat. § 1-75.11, we must vacate the trial court's entry of default judgment.

The pertinent facts indicate that following a concert given by singer Mary J. Blige on 25 June 1995 at the Lawrence Joel Veterans Memorial Coliseum in Winston-Salem, North Carolina, two of her bodyguards beat and severely injured Lemon. Thereafter, Lemon brought three actions arising from that incident; the third of which is the subject of this appeal.[1] In this action, brought in May 2002,

1. Lemon brought the first action in July 1996 against several defendants including the two bodyguards and their employer, Steve Lucas Management. That action resulted in judgment against Steve Lucas Management. Lemon brought a second action in May 1999 against Blige which was settled.

Lemon alleged that Combs was vicariously liable for the injuries caused by the bodyguards who were allegedly employed, supervised and managed by Combs.

At the default judgment hearing, Lemon presented evidence showing that Guilford County Deputy Sheriff C.L. Overcash personally served Combs with the Alias Summons and a copy of the Complaint for this action on 21 June 2002 by throwing the copies of the summons and complaint at Combs' feet and stating "You are served" after Combs tried to avoid service. Combs, however, refuted that he was ever served and submitted affidavits of eleven individuals stating that no one attempted to serve him at the Coliseum on that date.

After Combs neither appeared, answered, nor otherwise pleaded to the Complaint, Lemon obtained an entry of default; thereafter on 10 September 2002, Lemon obtained a default judgment awarding damages in the earlier stated amounts. Upon learning of the judgment in media reports, Combs moved for relief from the judgment on 30 October 2002. By order dated 6 February 2003, the trial court upheld the compensatory damage award but set aside the punitive damage award to allow Combs the opportunity to contest Lemon's claim for punitive damages. Both parties appeal.

Both parties acknowledge their appeals are interlocutory but contend that based upon this Court's decision in *Clark v. Penland*, 146 N.C. App. 288, 552 S.E.2d 243 (2001) a substantial right is affected. We need not decide whether this appeal affects a substantial right because we reach the merits of this appeal by granting the petitions of both parties to allow certiorari review of the issues on appeal.

The dispositive issue on appeal is whether the default judgment entered by the trial court should be set aside because Lemon failed to comply with N.C. Gen. Stat. § 1-75.11. We answer, yes.

N.C. Gen. Stat. § 1-75.11 (2001) provides:

> Where a defendant fails to appear in the action within apt time the court shall, before entering a judgment against such defendant, require proof of service of the summons in the manner required by G.S. 1-75.10 and, in addition, shall require further proof as follows:
>
> (1) Where Personal Jurisdiction Is Claimed Over the defendant.—

> Where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, to be made and filed, of the existence of any fact shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. The court may require such additional proof as the interests of justice require. . . .

Under this statute, a plaintiff must show proof of proper service and evidence establishing personal jurisdiction to obtain a default judgment against a defendant. Combs contends (1) he was not served with the Complaint in a manner required by N.C. Gen. Stat. § 1-75.10 and (2) there was insufficient and inadequate proof establishing personal jurisdiction. We address each contention separately.

(1) Service of Process

[1] In the order partially denying Combs's motion for relief from entry of default and default judgment, the trial court concluded Combs was "personally served with the Alias Summons and Complaint in a proper and sufficient manner" on 21 June 2002. The trial court found:

> 2. Deputy Sheriff C.L. Overcash of the Office of the Guilford County Sheriff personally served the defendant with the Alias Summons and a copy of the Complaint in this action at the Greensboro Coliseum Complex ("GCC") in Guilford County on June 21, 2002 in the following manner as is described by the affidavits of Deputy Overcash, Lieutenant J.E. Hinson, Jr. of the Greensboro Police Department and Eric W. Schneider, the supervisor of back stage security employed by Show Pros Entertainment Services for the defendant's stage performance at the GCC:
>
> (a) Deputy Overcash stood directly in front of the defendant as he looked at her while she identified herself by name and displayed to the defendant her Deputy Sheriff badge and her Office of Guilford County Sheriff picture identification card;
>
> (b) Deputy Overcash explained to the defendant that she had a civil summons for him in the above entitled case and that he or his attorney had 30 days from June 21, 2002 to respond in writing to the Complaint attached to the summons;
>
> (c) The defendant tried to avoid service by indicating that he would not take it and started to walk away; and

(d) Deputy Sheriff Overcash immediately threw copies of the Alias Civil Summons and Complaint at the feet of the defendant and stated to him in a clear and distinct voice that "You are served."

3. In addition, one of the defendant's bodyguards was witnessed by Lieutenant Hinson picking up the copies of the Alias Summons and Complaint that Deputy Overcash had thrown at defendant's feet and carrying them to the defendant's dressing room.

"Findings of fact made by the trial court upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence." *Norton v. Sawyer*, 30 N.C. App. 420, 422, 227 S.E.2d 148, 151, *review denied by*, 291 N.C. 176, 229 S.E.2d 689 (1976). Our review of the record, specifically the affidavits of Deputy Overcash, Lieutenant J.E. Hinson, Jr. and Eric W. Schneider, indicates competent evidence supports these findings of fact. Thus, we conclude the trial court's findings of fact were supported by competent evidence.

Combs also contends that because competing and contradictory affidavits were submitted by the parties regarding service, the trial court should have received oral testimony regarding the events of 21 June 2002 to properly assess the credibility of the affiants. However, it is within the trial court's discretion as to whether it will consider affidavits, oral testimony, or both in motion hearings. *See* N.C. R. Civ. P. 43(e); *Webb v. James*, 46 N.C. App. 551, 265 S.E.2d 642 (1980). In this case, Combs chose not to present oral testimony despite the trial court's willingness to receive such testimony. Thus, we conclude the trial court did not abuse its discretion in rendering its decision based solely upon affidavits.

In sum, under N.C. Gen. Stat. § 1-75.10(1), proof of service of the summons is shown by (1) the sheriff's certificate showing the place, time and manner of service or (2) by affidavit showing the place, time and manner of service, the affiant's qualifications to make service, that he knew the person to be served and that he delivered and left a copy with said person or some other identified person. In this case, the sheriff's certificate of service indicated the manner in which Combs was served; moreover, Lemon presented affidavits supporting Deputy Overcash's version of how service was made upon Combs. We conclude Lemon presented sufficient proof of service in accordance with N.C. Gen. Stat. § 1-75.10.

(2) Personal Jurisdiction

[2] Under N.C. Gen. Stat. § 1-75.11, "proof of service of summons is only part of the proof necessary to establish grounds for personal jurisdiction before entering the judgment. The additional proof required is that an 'affidavit or other evidence' be made and filed of the existence of any fact needed to establish grounds for personal jurisdiction over a defendant which is not shown by a verified complaint." *Hill v. Hill*, 11 N.C. App. 1, 8, 180 S.E.2d 424, 429 (1971), *writ of cert. denied by* 279 N.C. 348, 182 S.E.2d 580 (1971); *see also McIlwaine v. Williams*, 155 N.C. App. 426, 430, 573 S.E.2d 262, 265 (2002). In this case, Lemon's complaint was unverified. Therefore, all of the facts needed to establish grounds for personal jurisdiction in this case had to be shown by affidavit or other evidence made and filed with the court. *Id.*

During the 9 September 2002 hearing for default judgment, Lemon presented to the trial court (1) the sheriff's return of service, (2) three certificates of service indicating the motion for default judgment and calendar request were sent to two of Combs' last known addresses, (3) the unverified complaint, (4) Lemon's affidavit, (5) a copy of Blige's interrogatory answers, (6) Lemon's testimony, (7) an internet excerpt from Fortune Magazine indicating Combs was one of the wealthiest people in America, and (8) a copy of a Court of Claims of the State of New York decision, which included the recitation of Combs' testimony in that case as a non-party witness.

Lemon contends his affidavit and Blige's interrogatory answers establish grounds for personal jurisdiction pursuant to N.C. Gen. Stat. §§ 1-75.2(3) and 1-75.4(3).[2]

In Paragraph 3(d) of his affidavit, Lemon states:

> Tauraen Russell Bennett and Odarus Chron Bennett were employed by Combs to serve as Blige's bodyguards and accompanied Blige while she was at the Coliseum.

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2. N.C. Gen. Stat. § 1-75.2(3) defines "Defendant" as "the person named as defendant in a civil action and where in this Article acts of the defendant are referred to, the reference includes any person's acts for which the defendant is legally responsible. In determining for jurisdictional purposes the defendant's legal responsibility for the acts of another, the substantive liability of the defendant to the plaintiff is irrelevant." N.C. Gen. Stat. § 1-75.4(3) provides, as a grounds for personal jurisdiction, "local act or omission—in any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant."

However, evidence in the record shows that Lemon lacked personal knowledge of the circumstances surrounding the employment of Tauraen and Odarus Bennett. Indeed, at the 9 September 2002 motion hearing, Lemon indicated he learned of Combs' alleged hiring of Tauraen and Odarus Bennett through Blige's interrogatory answers.

In North Carolina, affidavits must be based upon personal knowledge pursuant to our statutory and case law. N.C. Gen. Stat. § 1A-1, Rule 43(e) states:

> *Evidence on motions.*—When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

In interpreting this provision, this Court has held the N.C. R. Civ. Pro. 56(e) requirement that affidavits must be based upon personal knowledge applies to Rule 43(e). In *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 238, 506 S.E.2d 754, 759 (1998), this Court, in its discussion of *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E.2d 640 (1979), stated:

> This, Court reasoning that a motion to dismiss can result in termination of a lawsuit just as much as a motion for summary judgment, held that to the extent that Rule 43(e) applies to a motion to dismiss, the trial court in ruling on a Rule 12(b)(2) motion should rely only on material that would be admissible at trial. The court thus should consider whether there were sufficient allegations based upon plaintiff's personal knowledge to support the exercise of personal jurisdiction over the . . . defendants.

Rule 43(e) has been applied to motions related to default judgments. *See Webb v. James*, 46 N.C. App. 551, 265 S.E.2d 642 (1980). Moreover, as a default judgment also results in the termination of a lawsuit, affidavits purporting to establish personal jurisdiction should be based upon personal knowledge.

Furthermore, the requirement that affidavits shall be based upon personal knowledge is found in other areas of North Carolina law. As indicated, affidavits in support of or in opposition to motions for summary judgment must be based upon personal knowledge. *See* N.C. R. Civ. P. 56(e). In the context of motions for Rule 11 sanctions, "any affidavits submitted, either in support of or in opposition to a Rule 11 motion, must be based on *personal knowledge*, must set forth facts

which would be admissible in evidence, and must show that the affiant is competent to testify to the matters stated therein." *Taylor v. Taylor Prods.*, 105 N.C. App. 620, 629, 414 S.E.2d 568, 575 (1992), *overruled in part on other grounds by Brooks v. Giesey*, 334 N.C. 303, 318, 432 S.E.2d 339, 347 (1993) (emphasis supplied). In the criminal context, affidavits in support of search warrants or in support of a motion to suppress evidence must be based upon personal knowledge of the affiant or the source of the information. *See* N.C. Gen. Stat. 15A-977(a) (providing "the motion [to suppress evidence] must be accompanied by an affidavit containing facts supporting the motion" and that said "affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated"); *State v. Edwards*, 85 N.C. App. 145, 354 S.E.2d 344 (1987) (indicating "the affidavit of the officer who applied for the search warrant contained sworn statements that a confidential informant had personal knowledge that marijuana was being sold out of defendant's residence and that this informant had given reliable information in the past"). Thus, it is a general legal principle that affidavits must be based upon personal knowledge. As stated in 3 Am. Jur. 2d, *Affidavits* § 13,

> An affidavit must be based on personal knowledge, and its allegations should be of the pertinent facts and circumstances, rather than conclusions. Although an affidavit must be verified by a person with personal knowledge of the facts, the court may rely on reasonable inferences drawn from the facts stated. An affidavit may be considered, even if conclusions are intermingled with facts. When an affiant makes a conclusion of fact, it must appear that the affiant had an opportunity to observe and did observe matters about which he or she testifies. Statements in affidavits as to opinion, belief, or conclusions of law are of no effect. The affiant must swear or affirm under oath that facts stated are true.

As stated in 3 Am. Jur. 2d, *Affidavits* § 14,

> Generally, affidavits must be made on the affiant's personal knowledge of the facts alleged in the petition. The affidavit must in some way show that the affiant is personally familiar with the facts so that he could personally testify as a witness. The personal knowledge of the facts asserted in an affidavit is not presumed from a mere positive averment of facts but rather the court should be shown how the affiant knew or could have known such facts and if there is no evidence from which an inference of personal knowledge can be drawn, then it is presumed

> that such does not exist. However, where it appears that an affidavit is based on the personal knowledge of the affiant and reasonable inference is that the affiant could competently testify to the contents of the affidavit at trial, there is no requirement that the affiant specifically attest to those facts.

In this case, neither the record nor the affidavit shows that Lemon had personal knowledge of the circumstances surrounding the hiring of the bodyguards, Tauraen and Odarus Bennett. Accordingly, Lemon's affidavit does not provide a sufficient basis upon which personal jurisdiction could be grounded.

Lemon also relies upon Mary J. Blige's interrogatory answers. Questions 3(c) and (d) regarding her knowledge of Tauraen Russell Bennett stated:

> (c) Describe fully how he was selected for employment or to perform services related to Mary J. Blige on June 25, 1995 and the full extent of your involvement in that selection.
>
> (d) All services that he performed for you during the tour that included your performance at the Lawrence Joel Veterans Memorial Coliseum on June 25, 1995.

In responding to these questions, Blige stated:

> (c) Unknown. Tauraen Russell Bennett, was an independent contractor retained by Steve Lucas Management and Sean "Puffy" Combs. How he was selected is unknown to this party.
>
> (d) I am advised that he was assigned by Steve Lucas Management and Sean "Puffy" Combs to provide security services.

In Questions 4(c) and (d), Blige was asked the same questions regarding Odarus Chron Bennett. She responded:

> (c) Unknown. Steve Lucas Management and Sean "Puffy" Combs. See answer to 3.(c).
>
> (d) Unknown. On information and belief, Odorus Chron Bennett was an independent contractor retained by Steve Lucas Management and Sean "Puffy" Combs. How he was selected is unknown to this party.

After responding to all of the interrogatories, Blige limited her certification to those facts of which she had personal knowledge. In her certification, she indicated she did not have personal knowledge of

the subject matter in questions 3 and 4. The pertinent portions of her certification state:

> 2. I have reviewed the answers to the interrogatories submitted on my behalf in this action. I certify as to the facts to which I have personal knowledge, and contained therein, I verify them to be true.
>
> 5. The statements set forth in my answers to questions Number 5, 6, 8 and 13 indicate my personal knowledge concerning Steve Lucas, Steve Lucas Management, and the restrictions on the plaintiff, Cedrick Bobby Lemon. I cannot do the investigative work for the plaintiff, to assist his case in determining the whereabouts of Steve Lucas.
>
> 8. As to the subject matter, my sister, LaTonya Blige-DaCosta, and my attorney, Ernest Booker, are more familiar with the facts demanded by the plaintiff concerning the other defendants and the incident, and could [indiscernible] as my surrogates.

Thus, Blige's certification indicates she did not have personal knowledge regarding the hiring of Tauraen and Odarus Bennett and that her sister, LaTonya Blige-DaCosta and her attorney, Ernest Booker, were the individuals more familiar with the facts of this case. As Blige limited her certification and verification of her interrogatory responses to the subject matter of which she had personal knowledge, the trial court could not rely upon responses 3 and 4 as grounds for personal jurisdiction. *See Corda v. Brook Valley Enterprises, Inc.*, 63 N.C. App. 653, 657, 306 S.E.2d 173, 176 (1983) (affirming the trial court's exclusion of interrogatory answers that were not based upon personal knowledge; but rather, were based upon information and belief).

Moreover, DaCosta, in her affidavit submitted in other litigation arising out of this incident, stated:

> (1) I am the personal assistant to defendant Mary J. Blige and held that position in June, 1995.
>
> (2) I have personal knowledge of the facts herein . . .
>
> (3) The hiring of the two bodyguards, Taurean Russell Bennett and Odarus Chron Bennett (bodyguards) was under the control of Steven Lucas, Mary J. Blige's then agent, or his company, Steve Lucas Management, Inc.

(4) Steve Lucas was responsible for many of the details of the day-to-day running of the Mary J. Blige tour of 1995 up to and including the hiring and firing of the bodyguards.

(5) Mary J. Blige herself had no personal knowledge of these bodyguards prior to their employment by Steve Lucas for the 1995 tour. She assumed they were professionals who would use their independent knowledge of their specialized skills and training in their work.

Thus, Blige's interrogatory answers do not provide sufficient facts upon which personal jurisdiction could be established.

In sum, although Lemon served Combs with the summons and complaint and obtained an entry of default upon Combs' failure to timely answer, pursuant to N.C. Gen. Stat. § 1-75.11, Lemon had to provide the trial court with sufficient facts upon which the trial court could establish grounds for personal jurisdiction. *See Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971) (stating "there is a distinction between obtaining jurisdiction by service of process and the proof of jurisdiction as required by G.S. 1-75.11 before entry of a judgment against a non-appearing defendant). Lemon's unverified complaint, affidavit and Blige's interrogatory responses do not provide a basis upon which personal jurisdiction may be established. Indeed, Lemon and Blige lack personal knowledge regarding the circumstances surrounding the employment of Taurean and Odarus Bennett.

Therefore, as indicated in *Hill v. Hill*, 11 N.C. App. at 10, 180 S.E.2d at 430, "for the failure of the record to show, as required by G.S. 1-75.11, personal jurisdiction of Combs by the court, the judgment entered herein was void and could be considered and treated as a nullity." However, the entry of default is valid. *See Silverman v. Tate*, 61 N.C. App. 670, 301 S.E.2d 732 (1983) (indicating that jurisdictional proof is not required for an entry of default).

As the default judgment was null and void, it is unnecessary to address Lemon's appeal regarding the propriety of the trial court's order setting aside the punitive damages award. Furthermore, we decline to render an advisory opinion regarding how the parties should proceed below. Indeed, "it is no part of the function of the courts to issue advisory opinions." *Wise v. Harrington Grove Community Association*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003). As the concurring opinion addresses issues neither presented to this Court nor argued by the parties, we decline to advise the par-

ties and the trial court as to what evidence would satisfy the requirements of N.C. Gen. Stat. § 1-75.11. *See id.* (stating "this is not an issue drawn into focus by these proceedings, and to reach this question would be to render an unnecessary advisory opinion"). In conclusion, we affirm the entry of default but vacate the entry of default judgment.

Affirmed in part, Vacated in part.

Judge HUNTER concurs.

Judge TYSON concurring in part and concurring in the result in part.

TYSON, Judge concurring in part and concurring in the result in part.

I concur in that portion of the majority's opinion which affirms the entry of default and vacates the entry of default judgment due to insufficient evidence of personal jurisdiction as required by N.C. Gen. Stat. § 1-75.11.

I agree with the majority's opinion that proof of service of summons does not, by itself, satisfy both requirements of N.C. Gen. Stat. § 1-75.11. *Hill v. Hill*, 11 N.C. App. 1, 8-9, 180 S.E.2d 424, 429, *cert. denied*, 279 N.C. 348, 182 S.E.2d 580 (1971). I disagree, however, with dicta in the majority's opinion which asserts that issues not presented to this Court or argued by the parties are being addressed. Defendant Combs specifically assigned error to the trial court's entry of default judgment and argued plaintiff failed to comply with the requirements of N.C. Gen. Stat. § 1-75.11. Therefore, this issue is properly before this Court.

The record before us contains three affidavits which were before the trial court on defendant's motion to set aside the default judgment. These affidavits were not before the trial court when it entered default judgment but provide the required proof of personal jurisdiction over defendant Combs to satisfy the requirements of N.C. Gen. Stat. § 1-75.11.

N.C. Gen. Stat. § 1-75.4 (2003) states:

> A court of this State . . . has jurisdiction over a person . . . under any of the following circumstances:

(1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:

a. Is a natural person present within this State.

(emphasis supplied).

The sworn affidavits of: (1) C.L. Overcash, Deputy Sheriff of Guilford County, who actually served defendant Combs at the GCC; (2) J.E. Hinson, Jr., an officer with the Greensboro Police Department, who was working off-duty at the GCC and physically present to witness the service on the night defendant Combs was served; and (3) Erik W. Schneider, Security Supervisor at GCC on the night of the incident, who escorted defendant Combs to his dressing room after his performance and witnessed the service, show defendant Combs was properly served *and* served while *physically present* within the State of North Carolina. If a defendant who is a "natural person" is served with process while "present within this State," the court possesses the jurisdiction to enter a "judgment against a party personally," based upon jurisdictional grounds set forth in N.C. Gen. Stat. § 1-75.4. *See* N.C. Gen. Stat. § 1.75.3 (2003); *see also Hill*, 11 N.C. App. at 8-9, 180 S.E.2d at 429.

We all agree that proof of service of summons was sufficient and entry of default was proper. Since, however, the complaint is unverified and the affidavits before the trial court when it entered judgment by default against defendant Combs were insufficient to show personal jurisdiction over defendant, the default judgment must be vacated.

However, the affidavits of C.L. Overcash, J.E. Hinson, Jr., and Erik W. Schneider show defendant Combs was properly served while *physically present* in Greensboro, North Carolina; provide the trial court with personal jurisdiction over defendant Combs pursuant to N.C. Gen. Stat. § 1-75.4; and satisfy the requirements of N.C. Gen. Stat. § 1-75.11.

JOSEPH J. HARDEE, D.C., PETITIONER v. NORTH CAROLINA BOARD OF CHIROPRACTIC EXAMINERS, RESPONDENT

No. COA03-860

(Filed 1 June 2004)

1. Chiropractors— Board of Examiners—governed by Administrative Procedure Act

The Board of Chiropractic Examiners is an occupational licensing agency and its hearings are governed by the North Carolina Administrative Procedure Act.

2. Chiropractors— disciplinary hearing—evidence of dishonesty

The Board of Chiropractic Examiners did not err by considering evidence of dishonesty (failure to comply with an informal agreement intended to avoid more severe discipline) as relevant to the scope, length, and nature of the discipline imposed for felonies involving moral turpitude. Discipline is in the discretion of the Board, and the Board may consider evidence of truthfulness and character.

3. Chiropractors— discipline—not arbitrary and capricious

The Board of Chiropractic Examiners did not act arbitrarily and capriciously in imposing a more severe punishment in this case than in others. This petitioner played a substantial role in committing felonies and there was considerable evidence of bad character; furthermore, the discipline here is rationally related to the misconduct.

Appeal by petitioner from judgment entered 2 April 2003 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 15 March 2004.

Johnson, Hearn, Vinegar, Gee & Mercer, PLLC, by George G. Hearn and Frank X. Trainor, III, for petitioner-appellant.

Vance C. Kinlaw for respondent-appellee.

LEVINSON, Judge.

Dr. Joseph J. Hardee, D.C., (Hardee) appeals from a superior court order affirming a disciplinary decision of the North Carolina Board of Chiropractic Examiners (the Board) which established

Hardee's sanction for being convicted of two felonies involving moral turpitude. We affirm.

Hardee is a licensed chiropractic physician with a practice in Raleigh, North Carolina. In December 2000, he was convicted of two felony offenses in Wake County Superior Court upon his tender of *Alford* pleas, one for felony obtaining possession of twelve tablets of Tylenol with Codeine by fraud, and the second for felony embezzlement from a previous employer. Pursuant to N.C.G.S. § 90-154(b)(2), conviction of these offenses subjected Hardee to discipline by the North Carolina Board of Chiropractic Examiners.

In August 2000, the Board initiated disciplinary proceedings against Hardee. Seeking to resolve the issue of professional discipline in an informal manner, the Secretary of the Board and Hardee entered into an "Informal Settlement Agreement" (ISA) that prescribed a truncated chiropractic license suspension and substance dependency treatment requirements.

Hardee and the Secretary of the Board subsequently agreed that the ISA would be rescinded prospectively and that the Board could substitute its original complaint with a new one. Therefore, on 8 October 2001, the Board again initiated disciplinary proceedings against Hardee on the basis of the December 2000 convictions. The parties assented to an extensive pre-hearing agreement in which they stipulated that "[t]he Hearing Panel [could] consider the terms of th[e] Informal Settlement Agreement and issues of whether [Hardee] complied or did not comply, in whole or in part, with the Informal Settlement Agreement." Moreover, both parties stipulated that one of the issues to be determined was "[w]hether Dr. Hardee possesses the requisite good moral character to be licensed as a doctor of chiropractic by the Board." The pre-hearing agreement also included a variety of "mitigating factors" Hardee wished for the Board to consider, while the Board sought to have Hardee's "failure to fully comply with the Informal Settlement Agreement" considered as an "aggravating factor."

At the disciplinary hearing on the 8 October 2001 complaint, evidence was presented concerning numerous topics, including the following evidence related to the ISA: Pursuant to the ISA, Hardee agreed to voluntarily surrender his chiropractic license for a period of three years; however, after only six months of this suspension, he would be permitted to apply for reinstatement of his license if he satisfied certain conditions related to overcoming a drug dependency

problem. A letter to Hardee from the Secretary of the Board provided the following clarification as to the applicable restrictions imposed upon Hardee during his license suspension:

> During the term of license suspension, an unlicensed chiropractor may *not*:
>
> 1. Be present during business hours at a chiropractic office or clinic in which he has an ownership interest or which has been advertised to the public as his office or clinic.
>
> 2. Interpret or analyze x-rays.
>
> 3. Make a diagnosis or perform any component of physical examination that requires clinical judgment or interpretation.
>
> 4. Perform any adjustment or manipulation, either by hand or by instrument. . . .
>
> [5]. Consult with, make any report of findings to, or develop any treatment plan for a patient.
>
> 6. Sign or submit any insurance claim form.
>
> 7. Own an interest in a chiropractic office or clinic after twelve months have elapsed without reinstatement of license.
>
> 8. Purchase an interest in any chiropractic office or clinic until his license is reinstated.

There was evidence that, prior to the beginning of his license suspension under the ISA, Hardee transferred nominal ownership of his clinic to other parties, removed his name from the signs and stationary of his clinic, and hired a relatively inexperienced chiropractor, Dr. Alicia Nossov, to perform adjustments on patients at his clinic at a rate of $7.50 per adjustment.

An undercover investigator, hired by the Board to pose as a new patient, testified that he visited Hardee's clinic five times. The undercover investigator observed Hardee at the clinic and noticed him perform a series of tasks, including: pressing on the investigator's neck and back to determine whether the investigator was sore in a particular place, interpreting x-rays, reporting chiropractic findings to the investigator, recommending a plan of treatment, and using an Acuspark device and a massager on the investigator. According to the investigator, Hardee informed him that he could pay for his visits by drafting a check payable to "Dr. Hardee."

Dr. Nossov testified that Hardee told her that his problem with the Board was attributable to the fraudulent conduct of another chiropractor for whom he once worked and that his agreement with the Board only prohibited him from performing adjustments for patients. She further testified that during the term of his proposed suspension under the ISA, Hardee was present during business hours, greeted patients, performed initial physical examinations, interpreted and analyzed x-rays, developed diagnoses and treatment plans, performed adjustments on some of his friends, and provided written instructions to Dr. Nossov specifying adjustments to be performed on patients. According to Dr. Nossov, Hardee also discussed personal injury claims with patients' attorneys, prepared and mailed billing statements to insurers and attorneys, and prepared patients' personal injury treatment narratives for Dr. Nossov to sign.

Hardee testified on his own behalf at the hearing. Though he admitted to performing adjustments on a few of his friends during his suspension under the ISA, he denied practicing as a chiropractor during his suspension and characterized his activities at the clinic as those of a chiropractic assistant.

Following the hearing, the Board rendered a decision including findings of fact and the following conclusions of law:

3. G.S. [§] 90-154(b)(2) states that conviction of a felony or of a crime involving moral turpitude is grounds for disciplinary action by the Board.

4. G.S. [§] 90-143 requires an applicant for licensure as a chiropractic physician in this State to present satisfactory evidence of good moral character. After licensure, a chiropractic physician has an affirmative duty to maintain good moral character.

. . . .

6. Obtaining a Controlled Substance by Fraud, in violation of G.S. [§] 90-108, is both a felony and a crime involving moral turpitude.

7. Embezzlement, in violation of G.S. [§] 14-90, is both a felony and a crime involving moral turpitude.

8. A respondent's willful violation of an Informal Settlement Agreement entered into with the Secretary of the Board is evidence of a lack of trustworthiness and the loss of good moral character.

The Board determined Hardee was "guilty of having been convicted of two felonies, in violation of G.S. [§] 90-154(b)(2)" and imposed a five-year chiropractic license suspension, the implementation of which was stayed on condition that Hardee comply with certain probationary terms. Specifically, Hardee's license was to be placed on "probationary status" for five years, during which time he would serve a three year active license suspension, seek Board approval of professional business arrangements, have a mentor appointed, and submit to quarterly urine drug screens. While on probationary status, Hardee would be permitted to perform the duties of a chiropractic assistant.

Pursuant to N.C.G.S. § 150B-45, Hardee appealed to the Wake County Superior Court, which entered an order affirming the Board's decision. From the superior court's order, Hardee appeals to this Court, contending (1) the Board's decision unlawfully imposes punishment for his non-compliance with the ISA, (2) the Board's sanction is arbitrary and capricious, and (3) the Board committed other miscellaneous errors that merit reversal. We conclude these contentions lack merit.

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[1] The following principles govern judicial review of the Board's disciplinary decision: The Board of Chiropractic Examiners is an "occupational licensing agency" as defined by N.C.G.S. § 150B-2(4b) (2003). Accordingly, hearings conducted by the Board are governed by Article 3A of the North Carolina Administrative Procedure Act. N.C.G.S. § 150B-38(a)(1) (2003). "To obtain judicial review of a final agency decision . . . , the person seeking review must file a petition in the Superior Court of Wake County. . . ." N.C.G.S. § 150B-45 (2003). "The review by a superior court of agency decisions . . . [is] conducted by the court without a jury." N.C.G.S. § 150B-50 (2003).

> [I]n reviewing a final decision, the court may affirm the decision of the agency or remand the case . . . for further proceedings. It may also reverse or modify the agency's decision . . . if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51(b) (2003). As to matters of fact, a reviewing court must apply the "whole record test" and "is bound by the findings of the [agency] if they are supported by competent, material, and substantial evidence in view of the entire record as submitted." *Bashford v. N.C. Licensing Bd. for General Contractors*, 107 N.C. App. 462, 465, 420 S.E.2d 466, 468 (1992) (citations and internal quotation marks omitted). "If it is alleged that an agency's decision was based on an error of law then a *de novo* review is required." *Walker v. N.C. Dep't of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990) (citation omitted). "A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court. . . . The scope of review to be applied by the appellate court . . . is the same as it is for other civil cases." N.C.G.S. § 150B-52 (2003). Thus, this Court examines the trial court's order for errors of law; this "twofold task" involves: "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Eury v. N.C. Employment Sec. Comm'n*, 115 N.C. App. 590, 597, 446 S.E.2d 383, 387-88 (1994) (citation omitted).

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[2] With these principles in mind, we address Hardee's first argument on appeal, in which he contends that the Board's discipline was "primarily based upon consideration of the ISA" and that the alleged reliance on the ISA "was an error of law and in excess of the Board's statutory authority[.]" This is so, Hardee contends, because (1) the ISA does not comply with the North Carolina General Statues and is, therefore, an unenforceable document that "cannot be used as a basis for discipline[,]" and (2) even assuming *arguendo* that the ISA is enforceable, the Board still erred in using it as a basis for discipline because the Board does not have the statutory authority to impose discipline for breach of contract. We conclude that the Board did not err in considering whether Hardee's willful refusal to comply with the ISA evinced dishonesty such that his sanction should be aggravated in the interests of protecting the public and preserving the integrity of the chiropractic profession.

As an initial matter, we note that, inasmuch as Hardee argues that he was disciplined for breaching the ISA, he mischaracterizes the adjudication made by the Board. In its order, the Board expressly provides that the grounds for professional discipline are Hardee's two convictions for felonies involving moral turpitude. The Board's order does not purport to enforce the ISA, and Hardee has produced, at best, unprepossessing evidence in favor of his argument that the Board's disciplinary order is a pretext for enforcement of the ISA. Therefore, the issue before us is not whether the Board erred in imposing discipline for breach of the ISA, and we need not pass on the validity of the ISA.

However, it is implicit in the Board's order, and the Board's attorney admitted to the superior court, that Hardee's sanction was aggravated because of a pattern of dishonesty, evinced in part by his willful refusal to keep his word with respect to the ISA. Accordingly, the issue for this Court, properly characterized, is whether the Board erred in considering Hardee's noncompliance with the ISA as evidence of dishonesty and in intensifying the punishment he received as a result of the dishonesty.

Chapter 90, Article 8 of the North Carolina General Statutes governs the licensing and regulation of chiropractors. Located within this article, N.C.G.S. § 90-154(b)(2) (2003) provides that "[c]onviction of a felony or of a crime involving moral turpitude" is "grounds for disciplinary action by the Board[.]" N.C.G.S. § 90-154(a) (2003) sets forth the disciplinary options available to the Board:

> The Board of Chiropractic Examiners may impose any of the following sanctions, singly or in combination, when it finds that a practitioner or applicant is guilty of any offense described in subsection (b):
>
> (1) Permanently revoke a license to practice chiropractic;
>
> (2) Suspend a license to practice chiropractic;
>
> (3) Refuse to grant a license;
>
> (4) Censure a practitioner;
>
> (5) Issue a letter of reprimand;
>
> (6) Place a practitioner on probationary status and require him to report regularly to the Board upon the matters which are the basis of probation.

The discipline imposed upon chiropractors is consigned to the discretion of the Board. In exercising this discretion, the Board may consider evidence concerning a chiropractor's truthfulness and character. Indeed, honesty and good moral character are prevalent themes in the North Carolina Chiropractic Act. Pursuant to N.C.G.S. § 90-143 (2003), a chiropractic license applicant must produce "[s]atisfactory evidence of good moral character" as a precondition to being licensed. Further, many of the grounds for discipline listed in G.S. § 90-154(b) are concerned directly or indirectly with honesty and good character on the part of chiropractic practitioners. Where the legislature has taken steps to ensure that only those of good moral character become licensed chiropractors and to provide for discipline for actions evincing poor moral character, it follows that the Board may consider evidence concerning honesty and good character, or a lack thereof, when determining the scope, length and/or nature of the sanction for a chiropractor adjudged guilty of disciplinary infractions.

In the present case, Hardee committed two felonies involving moral turpitude, which subjected him to professional discipline by the Board under G.S. § 90-154(b). Though the Board imposed discipline only for the felony convictions, its choice of sanction was more severe than it otherwise may have been due to dishonesty on Hardee's part, evidenced by, *inter alia*, his furtive and willful violation of the ISA. As the Chiropractic Act makes the honesty of practitioners a proper concern of the Board of Chiropractic Examiners, we conclude that the Board did not err in considering this evidence of dishonesty as relevant to the scope, length and/or nature of discipline.

Moreover, Hardee's argument that the Board could not consider his dishonest noncompliance with the ISA is unavailing, as he **stipulated** that the Board could consider such evidence as **relevant to his discipline** for the felony convictions. On appeal, Hardee's counsel contends that evidence of Hardee's noncompliance with the ISA could be admissible for **other** purposes, but did not suggest what those purposes might be.[1] As Hardee pled "guilty and responsible" to

1. During oral argument, counsel for Hardee stated that if the active suspension was shorter, his argument that the discipline was really grounded upon Hardee's noncompliance with the ISA would have less force. This illustrates the fallacy in Hardee's central argument on appeal, as it is tantamount to a request of this Court to replace its judgment concerning an appropriate sanction for that of the Board. Indeed, the statements by Hardee's counsel correctly acknowledge that the Board exercises discretion in fashioning appropriate sanctions within the parameters of G.S. § 90-154(a).

having been convicted of two felonies, the central issue before the Board was the scope, length and/or nature of the discipline. This, together with Hardee's stipulation that the hearing panel could consider evidence of his noncompliance with the ISA, helps us easily conclude that Hardee stipulated that his noncompliance with the ISA was relevant for the Board to consider in fixing the penalty for his conviction of two felonies.

Furthermore, we note that Hardee's position is internally inconsistent. Hardee cites a previous Board disciplinary decision, *In re Moore*, in support of his argument that his own sanction is unusually harsh.[2] In that case, the Board made a finding that the chiropractor who was subject to discipline presented the testimony of four character witnesses, tendered approximately 115 additional character witnesses, and submitted written statements from approximately 150 patients and members of his community attesting to his good character. The Board may have considered this evidence of good character in arriving at a lenient sanction for the chiropractor in that case. However, there is no statutory allowance for the Board to consider such material, and it is not directly related to the commission of a felony for which discipline may be imposed pursuant to G.S. § 90-154(b)(2). Rather, the Board considered this evidence of good character as relevant to the appropriate professional discipline, much as it considered Hardee's furtive and willful noncompliance with the ISA as evidence of bad character and untruthfulness. This assignment of error is overruled.

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[3] We next address Hardee's argument that the discipline imposed by the Board was arbitrary and capricious because it is (1) severe in comparison to previous Board decisions imposing discipline for felony convictions, and (2) not rationally related to his misconduct. We are unpersuaded by these arguments.

"The arbitrary and capricious standard is a difficult one to meet." *McCollough v. N.C. State Bd. of Dental Examiners*, 111 N.C. App. 186, 193, 431 S.E.2d 816, 819 (1993) (citation omitted).

> These imposing terms apply when . . . decisions are whimsical because they indicate a lack of fair and careful consideration; when they fail to indicate any course of reasoning and exercise of judgment, or when they impose or omit procedural requirements

2. There is no citation for this opinion, but it is a part of the records of the Board of Chiropractic Examiners.

> that result in manifest unfairness in the circumstances though within the letter of statutory requirements.

Id. (citations and internal quotation marks omitted).

In support of his argument that his sanction is more severe than the sanctions previously imposed for the same transgression, Hardee has produced two Board decisions imposing discipline upon chiropractors for felony convictions. These decisions do not support Hardee's argument that the sanction at issue in the present case is arbitrary and capricious.

In one decision, *In re Cobb*, a chiropractor was convicted of felony wire fraud in federal district court.[3] The Board imposed a five year active license suspension, stayed in favor of placing him on probationary status with a ninety-day active license suspension. In that case, a co-conspirator masterminded the conduct for which the chiropractor was convicted, and the chiropractor's participation in the felony was limited. As such, there were factors counseling in favor of mitigation.

The other Board's decision cited by Hardee is *In re Moore*, previously discussed in this opinion. In *Moore*, a chiropractor was convicted of four counts of obtaining property by false pretenses, for which the Board imposed a ninety-day active license suspension followed by five years on probationary status. In imposing discipline, the Board made a finding that the chiropractor offered the testimony of four character witnesses, tendered approximately 115 additional character witnesses, and submitted written statements from approximately 150 patients and members of his community attesting to the chiropractor's good character. As such, there were factors counseling in favor of mitigation.

In the instant case, Hardee played a substantial role in the commission of the felonies for which he was convicted. In addition, there was considerable evidence of bad character. Specifically, the evidence before the Board tended to show that, *inter alia*, Hardee agreed to abide by the terms of an informal agreement in order to avoid more severe discipline, and, in addition to not complying with the terms to which he had agreed, dishonestly represented to the Board that he had complied with "the letter and spirit" of the agreement. Accordingly, we easily conclude that the Board did not act arbi-

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3. There is no citation for this opinion, but it is a part of the records of the Board of Chiropractic Examiners.

trarily and capriciously in imposing a more severe punishment in the instant case as compared with past decisions of the Board.

With respect to Hardee's argument that the Board's discipline is not rationally related to his misconduct, we conclude that Board's discipline is not inappropriate in light of the facts and circumstances of the instant case. Hardee was convicted of embezzlement and obtaining a controlled substance by fraud, both of which are felonies involving dishonesty. He has a prior misdemeanor conviction for obtaining a prescription drug by fraud, which is a crime involving dishonesty. Additionally, Hardee's furtive and wilful violation of the ISA provided additional evidence of dishonesty. This assignment of error is overruled.

We have also reviewed Hardee's remaining assignments of error and conclude that they lack merit. These assignments of error are overruled.

Affirmed.

Judges TIMMONS-GOODSON and THORNBURG concur.

STATE OF NORTH CAROLINA v. MICHAEL CORNELIUS WILLIAMS, DEFENDANT

No. COA03-503

(Filed 1 June 2004)

Evidence— hearsay—reputation of neighborhood for narcotics

The trial court erroneously allowed testimony about the reputation of a neighborhood for drug dealing; evidence of the general reputation of a defendant's home or neighborhood in drug cases constitutes inadmissible hearsay in North Carolina. Moreover, there exists the reasonable possibility of a different result without the improper reputation evidence.

Appeal by defendant from judgment entered 13 September 2002 by Judge John R. Jolly, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 3 February 2004.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the State.

Brian Michael Aus for the defendant-appellant.

WYNN, Judge.

In North Carolina, the "general rule is that in a criminal prosecution evidence of the reputation of a place or neighborhood is ordinarily inadmissible hearsay." *State v. Weldon*, 314 N.C. 401, 408, 333 S.E.2d 701, 705 (1985). In this case, the trial court erroneously allowed testimony indicating Defendant was in a neighborhood known as an "open air market for drugs." Because we conclude that had this error not been committed, there is a reasonable possibility that a different result would have been reached at trial, we grant Defendant a new trial.

The underlying facts tend to show that on the evening of 19 December 2002, Raleigh Police Officer M.E. Campos and Detective James Hobby along with several Raleigh police officers and detectives executed undercover drug buys in the area surrounding Martin and Freeman Streets in Raleigh, North Carolina. At approximately 10:45 p.m., Officer Campos and Detective Hobby traveled to Freeman Street in an unmarked Ford pick-up truck. According to their testimony, they were immediately approached by a black male wearing a navy blue jacket, blue jeans, tan work boots and a black toboggan with the words "New York" in white on the front. The individual also had "a little bit of a goatee." Officer Campos purchased from this individual what he believed to be a twenty dollar amount of crack cocaine. Subsequent testimony indicated the purported crack cocaine was actually Goody's Headache Powder.

As the officers were leaving Freeman Street, they radioed a description of the individual to other officers in the area for arrest. Shortly thereafter, members of the Raleigh Police Department Selective Enforcement Unit arrived in the Freeman and Martin Street area and began looking for the described individual. As there were several people fitting the description, two individuals were initially detained including Defendant who was detained and searched by Officers Charles Rosa and Christopher Robb. However, after receiving notification the described individual was being detained by other officers, Defendant was released. Approximately five minutes later, Officers Robb and Rosa were notified that they needed to locate Defendant again, as Detective Hobby and Officer Campos indicated

the other individual was not the one who sold them the counterfeit drug. In response, Officers Robb and Rosa went to a house on Freeman Street where they thought the released individual could be located.

At the house, the officers located, detained, frisked and ordered Defendant to place his left hand on the top of his head. As he did this, Officer Rosa noticed Defendant open his hand and drop an item that appeared to be crack cocaine but was later determined to be Goody's Headache Powder. Thereafter, Detective Hobby and Officer Campos identified Defendant as the individual who sold them the purported crack cocaine.

Based upon the State's evidence regarding the alleged sale of the counterfeit drug to Detective Hobby and Officer Campos, a jury acquitted Defendant of the charges for the sale of counterfeit cocaine and the delivery of counterfeit cocaine. However, based upon the State's evidence regarding Defendant's encounter with Officers Rosa and Robb on the porch of the house at Freeman Street, the jury found Defendant guilty of possession with intent to sell counterfeit cocaine and possession with intent to deliver counterfeit cocaine. The jury also found Defendant had attained habitual felon status.

On appeal, Defendant contends the trial court erroneously admitted testimony indicating Defendant was in a neighborhood known as an 'open air market for drugs.' Specifically, Defendant contends the trial court erroneously permitted testimony characterizing the conduct and frequency of drug sales in the residential area surrounding Freeman and Martin Streets in Raleigh, North Carolina. We agree.

Defendant challenges the following testimony from Officer Campos elicited by the prosecution:

> Q: And how are street sales done for the most part in Raleigh, particularly in the area around Martin and Freeman Street?
>
> A: Usually groups of folks gather together. They will have one or two crack-heads or crack users.
>
> MR. MANNING: Your Honor, I object.
>
> THE COURT: Overruled. Go ahead.
>
> MS. SHANDLES: Go ahead.
>
> A: Usually street drug dealers will have one or two crack users looking out for the police, and most of them will stand on street

corners and they look for vehicular traffic driving by and most of the time they try to flag you down. They waive at you with their hands and try to get your attention, try to get you to stop.

MR. MANNING: Motion to strike the answer.

THE COURT: Overruled. Denied.

Officer Campos further testified:

Q: And during the period of time that you have been working in that area [Martin and Freeman Street] the last three years, can you give us an idea of approximately how many drug arrests—cocaine arrests specifically you have made in that area?

MR. MANNING: Objection.

THE COURT: Overruled.

THE WITNESS: I—I have made a number of drug arrests in that area. I couldn't give an exact number, but I have made many arrests in the 700 block, the 800 block, and the 300 block of Freeman Street as well.

Q: BY MS. SHANDLES: Are we talking—

MR. MANNING: Motion to strike the answer.

THE COURT: Denied.

Q: BY MS. SHANDLES: Officer, are we talking in the nature of one or two or ten or twenty or dozens of arrests?

MR. MANNING: Objection.

THE COURT: Overruled.

THE WITNESS: I would say no less than fifteen, twenty arrests just made by compass officers. Usually two or three officers involved.

MR. MANNING: Motion to strike.

THE COURT: Denied.

Q: BY MS. SHANDLES: Have you found that as well as people selling crack cocaine in that area, that people also occasionally sell things as crack cocaine that are not in fact cocaine?

MR. MANNING: Objection.

THE COURT: Wait a minute. I am thinking about that.

MR. MANNING: Motion to strike the answer he just gave.

THE COURT: Well, overruled. Motion to strike denied.

Q: MS. SHANDLES: Now you get to answer.

A: Yes. A lot of times people would sell counterfeit crack cocaine.

MR. MANNING: Motion to strike the answer.

THE COURT: Denied.

Defendant also challenges the following testimony from Detective Hobby:

Q: For how long have you worked in that area [Martin and Freeman Streets]?

A: I rode a beat in that area for approximately a year and a half back when I was on uniformed division and that's a strong period as far as trying to work for drugs. We have—I have probably been on at least three or four searches in that area alone since I have been in drugs and vice.

MR. MANNING: Objection.

THE COURT: It's not responsive, but I will allow it. Overruled at the same time.

In further testimony, Detective Hobby testified:

Q: In your experience have you found that in Raleigh, in the area of Martin and Freeman Street, that not only crack cocaine is sold, but also things that are sold as crack cocaine but turn out not to be?

MR. MANNING: Objection.

THE COURT: Overruled.

THE WITNESS: Yes.

MR. MANNING: Motion to strike the answer.

THE COURT: Denied.

Detective Hobby also testified:

Q: BY MS. SHANDLES: And are you aware of why Martin and Freeman Street has been targeted on those occasions by the police department?

A: Because it is an open air market for drugs.

MR. MANNING: Objection.

THE COURT: Overruled.

THE WITNESS: Numerous complaints from citizens, normal patrols. There is a high percentage of drug arrests made in that area.

Q: BY MS. SHANDLES: Were you working—

MR. MANNING: Objection.

THE COURT: Overruled.

The general rule in North Carolina regarding evidence of the reputation of a home or neighborhood is that such evidence is inadmissible hearsay. *State v. Weldon*, 314 N.C. 401, 333 S.E.2d 701 (1985); *State v. Tessnear*, 265 N.C. 319, 144 S.E.2d 43 (1965); *State v. Crawford*, 104 N.C. App. 591, 598, 410 S.E.2d 499, 503 (1991). In support of its contention that the evidence was admissible, the State relies upon *State v. Stevenson*, 136 N.C. App. 235, 523 S.E.2d 734 (1999). In *Stevenson*, this Court upheld the admission of evidence regarding the reputation of an area known as an area for dealing drugs because the State's theory was the defendant committed robbery in order to buy drugs. This Court stated that "evidence that defendant went to a place known for dealing drugs immediately after the robbery is relevant to show motive." *Stevenson*, 136 N.C. App. at 241, 523 S.E.2d at 737.

However, in *State v. Weldon*, in distinguishing other cases, our Supreme Court rejected the notion that "the reputation of a place is admissible to show the intent or guilty knowledge of one charged with illicit possession of contraband in that place." *Weldon*, 314 N.C. at 410, 333 S.E.2d at 706. In *Weldon*, in reversing this Court's opinion that testimony from a police officer that the defendant's home had a reputation as a place where heroin and other illegal drugs could be bought or sold was admissible, our Supreme Court stated "the applicable general rule is that in a criminal prosecution evidence of the reputation of a place or neighborhood is ordinarily inadmissible hearsay." 314 N.C. at 408, 333 S.E.2d at 705. In rejecting this Court's holding that "evidence concerning the reputation of a place or neighborhood is admissible where it goes to show the intent of the person charged," the Supreme Court stated this Court's reliance upon *State v. Lee*, 51 N.C. App. 344, 276 S.E.2d 501 (1981) was misplaced as *Lee* was based upon improper authority, *State v. Chisenhall*, 106 N.C. 676, 11 S.E. 518 (1890). *Weldon*, 314 N.C. at 408-10, 333 S.E.2d at 705-07.

Rather, our Supreme Court stated the general rule in this State may be found in *State v. Tessnear*, 265 N.C. 319, 144 S.E.2d 43 (1965). In *Tessnear*, our Supreme Court stated that "North Carolina is included among those jurisdictions which hold that evidence of the general reputation of defendant's premises is inadmissible in prosecutions for liquor law violations involving a charge of unlawful sale or possession of intoxicants at particular premises." *Tessnear*, 265 N.C. at 322; 144 S.E.2d at 46. Similarly, evidence of the reputation of Defendant's home or neighborhood in drug cases constitutes inadmissible hearsay. *See State v. Weldon*, 314 N.C. 401, 333 S.E.2d 701 (1985); *State v. Crawford*, 104 N.C. App. 591, 410 S.E.2d 499 (1991); *State v. Harper*, 96 N.C. App. 36, 384 S.E.2d 297 (1989). Accordingly, the trial court erroneously allowed the admission of testimony regarding the reputation of the Freeman and Martin Street area of Raleigh, North Carolina.

As stated in *Crawford*, however, "errors not amounting to constitutional violations do not warrant a new trial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. *See* N.C.G.S. § 15A-1443 (2001). If there is overwhelming evidence of defendant's guilt or an abundance of other evidence to support the State's contention, the erroneous admission of evidence is harmless." *Crawford*, 104 N.C. App. at 598, 410 S.E.2d at 503.

Under N.C. Gen. Stat. § 90-95(a)(2), to obtain a conviction of possession with intent to sell and deliver a counterfeit controlled substance, the State must prove (1) that defendant possessed a counterfeit controlled substance, and (2) that defendant intended to "sell or deliver" the counterfeit controlled substance. N.C. Gen. Stat. § 90-95(a)(2) (2001); *see State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985) (listing the elements of possession with intent to sell or deliver a controlled substance under N.C. Gen. Stat. § 90-95(a)(1)). Our General Statutes define 'counterfeit controlled substance' as:

> Any substance which is by any means intentionally represented as a controlled substance. It is evidence that the substance has been intentionally misrepresented as a controlled substance if the following factors are established:
>
> 1. The substance was packaged or delivered in a manner normally used for the illegal delivery of controlled substances.

> 2. Money or other valuable property has been exchanged or requested for the substance, and the amount of that consideration was substantially in excess of the reasonable value of the substance.
>
> 3. The physical appearance of the tablets, capsules or other finished product containing the substance is substantially identical to a specified controlled substance.

N.C. Gen. Stat. § 90-87(6)(b) (2001).

In this case, Defendant was charged with crimes arising from two separate events—(1) the sale and delivery of counterfeit crack cocaine to Detective Hobby and Officer Campos for $20.00 and (2) possession with intent to sell and possession with intent to deliver counterfeit crack cocaine based upon a search conducted by Officers Robb and Rosa of Defendant's person at a house located on Freeman Street. The jury acquitted Defendant of the sale and delivery of counterfeit crack cocaine to Officer Campos and Detective Hobby.

"A verdict may be given significance and a proper interpretation by reference to the indictment, the evidence, and the instructions of the court." *State v. Hampton*, 294 N.C. 242, 248, 239 S.E.2d 835, 839 (1978); *see also State v. Whitley*, 208 N.C. 661, 664, 182 S.E. 338, 340 (1935) (stating "it is the rule with us, both in civil and criminal actions, that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court"); *State v. Hemphill*, 273 N.C. 388, 390, 160 S.E.2d 53, 55 (1968) (stating "a verdict must be responsive to the issue or issues submitted by the court").

In the present case, the trial court instructed the jury on the sale and delivery of counterfeit crack cocaine as follows:

> In Count Three, the defendant has been charged with selling a counterfeit controlled substance. As to this count, I instruct you that you may determine defendant's guilt or innocence as to this Count Three *only as it relates to the alleged sale of the substance identified as State's Exhibit 1. The State offered no evidence that defendant sold the substance identified as State's Exhibit 1A and you should not consider such exhibit in relation to this Count Three.*
>
> In this regard, for you to find the defendant guilty of this offense, the State must prove two things to you beyond a reasonable doubt.

> First, that the defendant *knowingly sold counterfeit crack cocaine to Officer M.E. Campos of the Raleigh Police Department, representing it to be crack cocaine, a controlled substance.*
>
> Second, that the substance sold was a counterfeit controlled substance. . . .
>
> So, I charge you as to this Count Three that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the *defendant knowingly sold counterfeit crack cocaine to Officer M.E. Campos of the Raleigh Police Department, representing it to be crack cocaine, a controlled substance, and that the substance sold was a counterfeit controlled substance, it would be your duty to return a verdict of guilty as to this Count Three.*
>
> . . .
>
> *If you do* not so find, or if you have a reasonable doubt as to one or more of these things, it would then be your duty to return a verdict of not guilty of this Count Three.

The trial court rendered similar instructions as to Count Four of the indictment, the delivery of counterfeit crack cocaine. In both instructions, the trial court limited the jury's deliberations of these counts to the alleged sale of counterfeit crack cocaine to Officer Campos by Defendant. Thereafter, the jury rejected the State's evidence that Defendant sold and delivered counterfeit crack cocaine to Officer Campos and returned verdicts of not guilty on those charges.

Thus, in light of the trial court's instructions limiting the consideration of the evidence of the alleged sale and delivery of a counterfeit substance to Officer Campos, the jury's verdict of not guilty of the sale and delivery of a counterfeit substance to Officer Campos, and in the absence of the erroneously admitted reputation evidence, the remaining evidence tended to show that: Officers Rosa and Robb initially detained Defendant while other officers detained another individual. The officers frisked Defendant for weapons and conducted a pat-down but found neither weapons nor drug—real or counterfeit. After hearing they had detained the wrong individual, the officers released Defendant and watched him walk to a house on Freeman Street. Shortly thereafter, Officers Robb and Rosa were notified that a mistake had been made and they needed to locate the individual they had initially detained and released. The officers went to the house where they had seen Defendant go and found Defendant

sitting in a chair on the front porch conversing with a group of five to six people.

After removing Defendant from the porch, Officer Robb, who was standing behind Defendant, began searching him. As Defendant raised his left hand towards the top of his head, Officer Rosa saw Defendant drop something from his left hand and land two feet behind him. Officer Robb did not see anything drop from Defendant's hand. Upon the arrival of Detective Hobby and Officer Campos for the show-up, Officer Rosa handed the contraband to Officer Campos and indicated the item was part of his case.

Although the alleged contraband looked like crack cocaine, it was counterfeit—i.e., Goody's Headache Powder. After initially characterizing this item as a "dosage unit," Officer Campos later testified that this item was known as a $50 flip, "which is a rock that you buy on the streets for $50 and you cut it up and you make five pieces out of it and you go back out in the street and you sell each piece for $20 and you make $100 out of it. That's why it's called a $50 flip because you double your profit." However, this particular "rock" was not broken into smaller units for sale. Officer Rosa further testified the counterfeit cocaine was packaged in a clear torn piece of a plastic baggy. He testified that "if they are purchasing [crack cocaine], it's usually not packaged and it's been taken out of a package. But if they are carrying it, it's either in plastic, clear plastic."

We hold that under this evidence, there is a reasonable possibility that, had the erroneous reputation evidence not been admitted, the jury would have reached a different result at trial. Indeed, the evidence tends to show only that defendant possessed an unbroken dosage unit of a counterfeit substance while sitting on the front porch of a house socializing with five to six people. A jury could therefore conclude that Defendant merely possessed a substance with the appearance of a counterfeit controlled substance. In that instance, North Carolina law would require acquittal because the mere possession of a *counterfeit* controlled substance is not a crime. *See* N.C. Gen. Stat. § 90-95(a) (2001).[1] Accordingly, we conclude admission of

1. N.C. Gen. Stat. § 90-95(a) (2001) states:

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

the neighborhood's reputation was not harmless error as there was not overwhelming evidence of defendant's guilt.

New trial.

Judges McGEE and TYSON concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. DAVID H. ROGERS, DEFENDANT

No. COA03-706

(Filed 1 June 2004)

1. Attorneys— discipline—selection of members of DHC—no due process violation

The selection process for members of the Disciplinary Hearing Commission of the North Carolina State Bar did not deprive defendant of a fair tribunal and did not violate due process.

2. Administrative Law— State Bar disciplinary proceeding—specific process provided

Defendant was not entitled to application of the Administrative Procedure Act to his State Bar disciplinary proceeding. The APA is a statute of general applicability and does not apply where the legislature has provided a more specific administrative process.

3. Attorneys— discipline—severance of claims

The denial of defendant's motion to sever two matters before the Disciplinary Hearing Commission of the North Carolina State Bar was not an abuse of discretion. Defendant did not assign error to the DHC's conclusion that its findings and conclusions about the second matter were independent of its findings and conclusions about the first.

4. Attorneys— discipline—combined claims—single case

There was no error where a defendant before the State Bar claimed that the DHC erroneously combined two cases which were filed more than ninety days apart, but the State Bar instead filed an amended complaint adding a second claim in a single case.

5. Attorneys— discipline—admissibility of prior convictions and a prior suspension

Evidence of prior convictions and a prior suspension of defendant's law license twenty years earlier was properly admitted in a hearing before the State Bar where the evidence was admitted as a factor in aggravation rather than to impeach defendant's credibility. N.C.G.S. § 8C-1, Rule 609 was not applicable.

6. Attorneys— discipline—warning letter—disclosure to DHC—within three years

A warning letter from the State Bar to a lawyer was properly considered in determining disciplinary sanctions where the complaint was filed three years to the day after issuance of the warning and so was within the DHC rule for use of such letters. Defendant waived a further argument regarding use of the letter in an amended claim by not raising it below.

7. Attorneys— discipline—refusal to acknowledge wrongdoing

An attorney's refusal to acknowledge his wrongdoing to the State Bar was not used to punish him unconstitutionally for exercising his right to a trial. The purpose of sanctions is to protect the public and the profession, and the presence or absence of remorse is highly relevant. Moreover, aggravating and mitigating factors are considered only after misconduct is established.

8. Attorneys— discipline—deposition expenses as costs

The Disciplinary Hearing Commission of the North Carolina State Bar did not abuse its discretion by assessing deposition expenses as costs.

9. Attorneys— discipline—appellate review

Direct appeal from the State Bar to the Court of Appeals is not facially unconstitutional. The general mandates of the Administrative Procedure Act are not applicable because the Legislature has provided a specific procedure.

Appeal by defendant from an order entered 10 January 2003 by the North Carolina State Bar. Heard in the Court of Appeals 2 March 2004.

Deputy Counsel Thomas F. Moffitt and Dottie Miani for plaintiff-appellee.

David H. Rogers, defendant-appellant, pro se.

HUNTER, Judge.

David H. Rogers ("defendant") appeals from an order of the Disciplinary Hearing Commission of the North Carolina State Bar ("DHC") filed 10 January 2003, suspending defendant's license to practice law for three years. For the reasons stated herein, we conclude there was no error in defendant's disciplinary hearing and affirm the order of discipline.

On 25 July 2001, the North Carolina State Bar ("the State Bar") filed a complaint against defendant alleging the facts of the "Flanagan Matter" set out below. Defendant filed his answer on 4 September 2001. Subsequently, on 6 June 2002, the State Bar filed an amended complaint, which in addition to the "Flanagan Matter," alleged the facts of the "Hayes Matter" also set out below.

Defendant does not assign error to the DHC's findings of fact and they are, therefore, deemed binding on appeal. *See Watson v. Employment Security Comm.*, 111 N.C. App. 410, 412, 432 S.E.2d 399, 400 (1993). In summary, the DHC found the following as fact. Defendant was admitted to the State Bar in 1979 and was engaged in the practice of law in Raleigh, North Carolina. He was properly served with process and received notice of the hearing. The allegations against defendant involved two separate incidents.

The Hayes Matter

Defendant purchased a house next door to the Hayes residence in 1971. Some time during that decade, defendant planted a birch tree in a strip of grass between the two properties. In July 2000, the Hayes hired a surveyor to mark the property line in order to erect a fence and plant a hedgerow. The surveyor placed stakes along the property line, which indicated that the birch tree was actually planted on the Hayes' property. Defendant removed the stakes and in September 2000 sent a letter to his neighbors stating he had acquired the property around the birch tree by adverse possession and that if the Hayes insisted on erecting the fence on that property, he would file a civil lawsuit.

However, defendant, in July 2000, had recorded a deed purporting to convey his interest in his property to his children. At no time did Rogers inform the Hayes of this purported transfer. When the Hayes, through counsel, challenged defendant's claim of adverse possession, noting the deed to his children, defendant responded that it was, in fact, his children who were claiming adverse possession and that he

was acting as their attorney. Not only had defendant's children not made any claim of adverse possession, they were unaware of the conveyance of the property to them and had not authorized defendant to act as their attorney.

In the Hayes' subsequent quiet title action, after receiving an answer from defendant's children denying they were making any claim of adverse possession, the Hayes amended their complaint to include defendant and properly served him with the summons and complaint. Defendant, nevertheless, filed a motion to dismiss the suit based upon insufficiency of process and service of process. The trial court in that case denied defendant's motion and ordered him sanctioned under Rule 11 of the Rules of Civil Procedure for filing the motion to dismiss for improper purposes.[1]

Flanagan Matter

In October 1999, Yolanda Flanagan contacted defendant about representing her regarding problems with a residential property sales contract. Flanagan had contracted to sell real property to a Michael Assad, in which the mortgage on the property was to be left in Flanagan's name until closing, but paid by Assad. Assad subsequently failed to make the required payments.

Flanagan told defendant that her primary objectives were selling the property and being free and clear of it, and ensuring the mortgage holder did not foreclose on the property. Defendant advised Flanagan that Assad would never qualify for a mortgage and that she should file a breach of contract action against him. Assad did qualify for a mortgage and Assad's attorney scheduled a closing to consummate the sale of the property. Defendant did not respond to telephone calls or letters sent to him by Assad's attorney about the closing. After receiving these letters and phone calls, defendant sent a complaint to Flanagan for her verification, without informing her that Assad had qualified for a mortgage or that a closing date had been set.

The closing date was rescheduled, again without Flanagan being informed and Flanagan returned the verified complaint to defendant, who continued to insist that she pursue the breach of contract action. The lawsuit was filed and events continued along the same pattern: the closing would be rescheduled and defendant would fail to inform Flanagan. Ultimately, Flanagan discovered from other sources that a

1. This Court upheld the denial of the motion and the imposition of sanctions in an unpublished opinion. *Hayes v. Rogers*, 155 N.C. App. 220, 573 S.E.2d 775, 2002 N.C. App. LEXIS 1698 (filed 31 December 2002) (unpublished).

closing date had been set and that Assad had qualified for a mortgage, but defendant dismissed those reports advising Flanagan to proceed with the lawsuit. When Flanagan later asked how the suit was proceeding, and defendant told her Assad had not yet been served with the complaint, Flanagan insisted the lawsuit be dropped and the sale consummated. Defendant replied that he "didn't do closings." Defendant terminated his representation and demanded that Flanagan pay him $1,425.00 in addition to the flat fee Flanagan had already paid. The DHC found this would have resulted in defendant collecting twice for services for which he had already been paid, and at an inflated hourly rate of $180.00 per hour.

Based on these findings, the DHC concluded that defendant's conduct constituted grounds for discipline. The Commission further found as aggravating factors: prior disciplinary offenses; dishonest or selfish motive; a pattern of misconduct; multiple offenses; submission of false evidence, false statements, or other deceptive practice during the disciplinary process; refusal to acknowledge the wrongful nature of the conduct; and, substantial experience in the practice of law. The DHC found that the remoteness of defendant's prior disciplinary offenses mitigated that aggravating factor, but that the aggravating factors substantially outweighed the one mitigating factor.

The issues presented by defendant on appeal to this Court are whether (I) the DHC constitutes an illegal and improper tribunal in violation of defendant's due process and equal protection rights; (II) the DHC properly denied his motion for separate hearings; (III) the DHC improperly joined for trial two separate complaints filed more than ninety days apart; (IV) the DHC erred in allowing evidence during the disciplinary phase of the hearing (A) of two prior misdemeanor convictions, and (B) of a prior letter of warning from the State Bar; (V) use of the aggravating factor that defendant failed to acknowledge the wrongfulness of his actions violates defendant's constitutional rights; (VI) the DHC erred in awarding costs assessed against defendant; (VII) N.C. Gen. Stat. § 84-28(h), requiring appeal from DHC decisions directly to this Court is facially unconstitutional as it denies defendant an appeal to the state superior courts.

I.

[1] Defendant first contends that the composition of the DHC results in a trial in front of a biased decision maker, as the members of the DHC are "hand-picked" by the State Bar, the plaintiffs in the

case against him, denying defendant due process of law. Instead, he maintains, he should have had a hearing before an administrative law judge under the Administrative Procedures Act, N.C. Gen. Stat. § 150B-1, *et seq.* (2003) ("the APA"). We conclude these contentions are without merit.

A license to practice law constitutes a property interest that cannot be taken away without due process of law. *In re Lamm*, 116 N.C. App. 382, 385, 448 S.E.2d 125, 128 (1994), *per curiam aff'd*, 341 N.C. 196, 458 S.E.2d 921 (1995). "The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998). Furthermore, " '[a] fair trial in a fair tribunal is a basic requirement of due process.' " *Crump v. Bd. of Education*, 326 N.C. 603, 613, 392 S.E.2d 579, 584 (1990) (quoting *In re Murchinson*, 349 U.S. 133, 136, 99 L. Ed. 942, 946 (1955)).

Defendant's contention that the DHC is "hand-picked" by the State Bar is flawed. The DHC is actually selected by a combination of the State Bar Council, the Governor, and the Legislature. At the time of defendant's hearing, the State Bar Council, which is the governing body of the State Bar, *see* N.C. Gen. Stat. § 84-17 (2003), selected the ten lawyer members of the DHC, the Governor selected three non-lawyer members and the Legislature selected two non-lawyer members, *see* N.C. Gen. Stat. § 84-28.1(a) (2001).[2] The Chair of the DHC then assigns DHC members to the individual hearing committees, which hear complaints. *See* 27 N.C.A.C. 1B.0108(a)(2) (July 2003). Thus, the State Bar, itself, has no role in selecting the DHC or the particular hearing committee chosen to hear defendant's case. Furthermore, neither the DHC nor the particular hearing committee receives any compensation from the State Bar. Instead, by statute, the DHC members receive the same per diem and travel expenses as authorized for members of State Commissions, *see* N.C. Gen. Stat. § 84-28.1(c), which are paid from the funds of the State Treasury, *see* N.C. Gen. Stat. § 138-5 (2003). Thus, we reject defendant's argument that he has been deprived of a fair tribunal in violation of due process by the selection process of DHC members.

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2. This statute was amended effective 1 October 2003 to provide for twenty members of the DHC, twelve lawyer members selected by the State Bar Council, four non-lawyer members selected by the Governor and four non-lawyers selected by the General Assembly. *See* N.C. Gen. Stat. § 84-28.1(a) (2003).

[2] We also reject defendant's contention that he should be entitled to a hearing before an administrative law judge under the APA.[3] The APA is a statute of general applicability, and does not apply where the Legislature has provided for a more specific administrative procedure to govern a state agency. *See Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 586-87, 447 S.E.2d 768, 778-79 (1994). The Legislature has expressly and specifically given the State Bar Council and DHC the power to regulate and handle disciplinary proceedings of the State Bar. *See* N.C. Gen. Stat. § 84-28 (2003) (powers of the State Bar Council to discipline attorneys); N.C. Gen. Stat. § 84-28.1 (disciplinary hearing commission powers). As such, defendant is not entitled to application of the APA to his State Bar disciplinary proceeding in this case.

II.

[3] Defendant next argues it was error for the DHC to deny his motions seeking to sever the Hayes matter and the Flanagan matter into separate hearings. Proceedings before a hearing committee are governed "as nearly as practicable" by the North Carolina Rules of Civil Procedure. 27 N.C.A.C. 1B.0114(n) (July 2003). The chair of the hearing committee has the power to dispose of any non-dispositive pretrial motions. Under Rule 42(b) of the North Carolina Rules of Civil Procedure, a trial court may order separate trials of claims in the furtherance of convenience or to avoid prejudice. *See* N.C. Gen. Stat. § 1A-1, Rule 42(b) (2003). The decision to sever a trial is left to the sound discretion of the trial court. *See Wallace v. Evans*, 60 N.C. App. 145, 149, 298 S.E.2d 193, 196 (1982).

In this case, defendant contends that he was prejudiced by the failure to sever the claims due to the " 'spill-over' effect" of his culpability in one case to the other. The DHC, however, expressly concluded that it "made its findings and conclusions regarding the second claim for relief involving Flanagan independent of its findings and conclusions regarding the first claim for relief involving the Hayeses." Defendant has not assigned error to this conclusion. We therefore conclude there was no abuse of discretion on the part of the DHC in denying defendant's severance motion.

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3. This contention appears to be the basis for defendant's claim that a hearing before the DHC violated his equal protection rights, presumably because disciplinary hearings for other state agencies are conducted under the APA. Defendant, however, does not argue the constitutional ramifications of this distinction in his brief to this Court and we decline to address it further.

III.

[4] Defendant also contends that the DHC erred in combining two separate cases for trial that were filed more than ninety days apart. The chairperson of the DHC has the authority to consolidate two or more cases filed within ninety days of each other. 27 N.C.A.C. 1B.0108(a)(5). In this case, however, the chair of the DHC did not consolidate two separate cases, instead the State Bar filed an amended complaint in a single case to add a second claim for relief and, therefore, 27 N.C.A.C. 1B.0108(a)(5) is inapplicable.

IV.

Defendant next asserts that the trial court erred in the dispositional phase of the hearing by not granting his motion *in limine* to exclude evidence of his twenty-year-old prior convictions under Rule 609 of the Rules of Evidence and by considering a letter of warning issued to defendant in 1998.

A.

[5] Rule 609 allows for evidence of a witness's prior convictions to be used to attack the credibility of the witness. *See* N.C. Gen. Stat. § 8C-1, Rule 609(a) (2003). With certain limited exceptions, evidence of a conviction that is more than ten years old may not be used to impeach the witness. *See* N.C. Gen. Stat. § 8C-1, Rule 609(b). In this case, defendant contends the introduction into evidence of two misdemeanor convictions from approximately twenty years earlier, as a result of which defendant's law license was suspended, was error in violation of Rule 609(b).

The evidence of defendant's prior convictions was, however, not admitted as impeachment evidence, but rather as evidence of an aggravating factor to defendant's misconduct in the present case. The DHC hearing committee has the authority to consider aggravating factors in imposing discipline, including the existence of prior disciplinary offenses. *See* 27 N.C.A.C. 1B.0114(w)(1)(A). The State Bar was not introducing evidence that defendant's law license was judicially suspended as a result of two misdemeanor convictions to impeach his credibility, but rather as evidence of a factor in aggravation to be considered by the hearing committee in setting defendant's discipline. Thus, Rule 609 is inapplicable, and the evidence of defendant's prior convictions and suspension of his law license was admissible as evidence of an aggravating factor.

B.

[6] Defendant contends that the DHC should not have been allowed to consider a letter of warning issued to him on 25 July 1998. The complaint in this case was filed 25 July 2001. Defendant contends that admission of this letter violated the DHC's rule that a letter of warning may only be disclosed to the committee if the letter was issued within three years of the present complaint. Defendant specifically argues that as three years is the equivalent of 1,095 days, because the intervening year 2000 was a leap year, 1,096 days had actually passed between the issuance of the letter of warning and the filing of the complaint. We reject this argument. It is apparent from the record that the complaint in this case was filed three years to the day after the issuance of the letter of warning. Thus, the letter of warning was properly considered in determining disciplinary sanctions against defendant.

Defendant alternatively argues that even if the letter of warning was properly admitted as evidence of an aggravating factor in the claim contained in the original 25 July 2001 complaint, it should not be considered as an aggravating factor in the Hayes matter, which was the additional claim alleged in the amended complaint filed by the State Bar on 6 June 2002. Defendant, however, did not raise this argument below, and has therefore waived it on appeal. *See* N.C.R. App. P. 10(b)(1).

V.

[7] Defendant also contends that the aggravating factor that he refused to acknowledge the wrongful nature of his conduct is unconstitutional because it punishes him for exercising his right to a trial. We disagree.

Initially, we note that the stated purpose of the imposition of sanctions on attorneys found guilty of misconduct is not punitive, but rather to protect the public, the courts, and the legal profession. *See* 27 N.C.A.C. 1B.0101 (July 2003). Consideration of a defendant's remorse and recognition of his wrongful conduct is highly relevant in determining the sanction that should be imposed to best protect the public, the courts, and the legal profession from continued misconduct.

Furthermore, nothing in the rules of the DHC indicates that this aggravating factor has as its purpose to punish a defendant for exercising his right to a hearing. To the contrary, the rules of the

DHC presume that only following the establishment of misconduct, does the committee consider evidence both in aggravation and mitigation, including failure to acknowledge the wrongfulness of the conduct or remorse. *See* 27 N.C.A.C. 1B.0114(w). Thus, after being found guilty of misconduct, a defendant still has the opportunity to acknowledge that his conduct was indeed wrongful. Moreover, defendant in this case has failed to make any showing in the record that the use of the aggravating factor was unconstitutionally applied to him by the committee.

VI.

[8] Next defendant asserts it was error to assess deposition expenses as costs against him. We disagree. A trial court has discretion to assess necessary deposition expenses as costs. *See Alsup v. Pitman*, 98 N.C. App. 389, 390-91, 390 S.E.2d 750, 751 (1990). In this case, we discern no such abuse of discretion. *See Lewis v. Setty*, 140 N.C. App. 536, 540, 537 S.E.2d 505, 507-08 (2000).

VII.

[9] Defendant finally contests the facial constitutionality of N.C. Gen. Stat. § 84-28(h) providing for direct appeal from DHC determinations to this Court. Defendant argues this is in violation of the procedures under the APA, and therefore deprives him of due process by bypassing review by a superior court judge as required under the APA. As we have already noted, however, the provisions of the APA are generally inapplicable to the procedure of a DHC hearing and subsequent appeals because the Legislature has provided for a specific procedure to be followed rather than the general mandates of the APA. Moreover, " '[n]o appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute.' " *Empire Power Co.*, 337 N.C. at 586, 447 S.E.2d at 778 (quoting *In re Assessment of Sales Tax*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963)). Thus, defendant has no right of appeal from the DHC decision, except to this Court pursuant to the express provision of N.C. Gen. Stat. § 84-28(h).

Affirmed.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. ERIC SCOTT REDMON

No. COA03-895

(Filed 1 June 2004)

Motor Vehicles— impaired driving—entrapment

The failure to give a requested instruction on entrapment resulted in the reversal of a driving while impaired conviction where a defendant was found sleeping in a truck, there was evidence that he had been drinking but not driving and did not intend to drive, defendant had a conversation with an officer in which he may have been told to move along, and the officer arrested defendant as he drove away.

Appeal by defendant from judgment entered 20 February 2003 by Judge Zoro J. Guice, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 22 April 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Cloninger, Lindsay, Hensley & Searson, P.L.L.C., by Stephen P. Lindsay, for defendant-appellant.

LEVINSON, Judge.

Defendant (Scott Redmon) appeals from conviction and judgment of driving while impaired. He argues on appeal that the trial court committed reversible error by denying his request to instruct the jury on the defense of entrapment. We agree and reverse.

The trial testimony tended to show the following: During the early morning hours of 30 March 2002, Deputy Brian Styles of the Buncombe County Sheriff's Department was patrolling the southern part of Buncombe County. At around 4:15 a.m. he was dispatched to the Glenn Shelton apartments to investigate an anonymous report that a man was sleeping in a truck parked at the apartment complex. Upon arriving at the apartment parking lot, Styles identified the truck that had been described to him. The truck was parked and its engine was turned off. He ran a license plate check which showed that the truck was not stolen or otherwise implicated in criminal activity. Styles then knocked on the truck window and awakened the defendant, who was asleep in the truck's front seat. He ran a computer check

of defendant's drivers license and determined that defendant had no outstanding warrants.

Styles testified at trial that when he woke up the defendant he "notice[d] that he had been drinking" and that the defendant smelled strongly of alcohol, appeared sleepy, and had red, glassy eyes. When questioned, the defendant told Styles he had been drinking alcoholic beverages that night, and explained that he was waiting for a friend who lived at the apartments to return home. Styles testified that he told defendant to see if his friend was home yet, so he would not have to drive in his condition. He denied telling the defendant to "move along" or otherwise suggesting that he drive.

Styles left the parking lot and briefly patrolled the immediate area, then returned to the intersection next to the apartment complex. Very shortly thereafter, Styles saw a truck leave the parking lot. He testified that he did not know it was defendant's truck, and that he stopped the truck because it was exceeding a safe speed. After administering a roadside Alcosensor test, Styles arrested defendant for exceeding a safe speed and suspicion of DWI, and called the North Carolina Highway Patrol to send a trooper with a license to operate an Intoxilyzer 5000 instrument.

On cross-examination, Styles acknowledged that defendant was doing nothing illegal in the parking lot and had cooperated with all of his requests. The officer agreed that he had no grounds to arrest defendant arising out of their interaction in the parking lot. He also conceded that there was "limited traffic if any" on the stretch of road where he was stopped when he saw defendant leave the parking lot, and that he arrested defendant no more than seven to ten minutes after arriving at the apartment parking lot. Styles denied parking out of sight and turning off his headlights to wait for defendant to leave the parking lot. He also denied recognizing defendant's truck before he pulled it over, or approaching defendant's truck with his Alcosensor instrument already in hand.

Trooper Denman of the North Carolina Highway Patrol testified that an Intoxilyzer 5000 test performed on defendant revealed a blood alcohol level of .10. In his opinion, defendant was clearly "unfit to drive" and his impairment was "obvious."

Defendant testified that he was 33 years old and a lifetime resident of Buncombe County, and that he had no criminal convictions. He owned an electrical, refrigeration, heating and air conditioning

contracting business. On 30 March 2002 defendant went to his girlfriend's apartment after work, and they agreed to go out separately with friends, then meet later at her apartment. Accordingly, a friend of defendant's, Mark Guice, picked him up at his girlfriend's apartment. Defendant and Guice left defendant's truck at the apartment, and went to a local restaurant for supper. Thereafter, they went to a bar where defendant had four or five large beers. Defendant did not do any driving while he and Mark were out. At around 11:30 p.m. Guice drove defendant back to the apartment complex where his girlfriend lived. However, she was not home yet and defendant could not reach her by cell phone. Realizing he was too intoxicated to drive, defendant decided to wait in his truck until his girlfriend returned home. At some point during this vigil defendant fell asleep in the truck. He was awakened by Styles opening his truck door, which "kind of scared" him. Styles asked to see defendant's identification, and told him there had been a "complaint" about a man sleeping in a truck. Defendant gave Styles his drivers' license, and explained to the officer that he had fallen asleep while waiting for his girlfriend to get home. When questioned by Styles, defendant told the officer he had been drinking earlier that night. Defendant testified that Styles never suggested that he check to see if his girlfriend had gotten home yet. Instead, Styles told the defendant that he could not remain in the parking lot, and directed him to "move along." After talking with defendant, Styles drove out of the parking lot.

It was then 4:30 a.m., with a "moderate rain" falling and standing water on the roads. The defendant lived 30 miles from the apartment. He took a few minutes to wake up more fully before starting his truck and leaving. Defendant testified that until the officer instructed him to "move along" he had no intention of driving because "I knew I couldn't drive, so I didn't drive. I have too much at stake[.]" He testified that he would never have driven that night if Styles had not woken him up and told him he had to leave the parking lot.

Defendant testified that he drove out of the parking lot about four or five minutes after Styles woke him up. As he was pulling onto the road, he saw a Buncombe County Sheriff's Department car stopped on the side of the road. His truck windows were fogged, so he rolled them down to get a better look. But, when he looked again, the vehicle had "backed out of [his] sight" and was "sitting dead still with no headlights on." Defendant testified that at the time "I thought nothing of it, because the guy told me to leave, I'm leaving[.]" He denied driving in excess of the speed limit. However, just a few seconds after

defendant entered the roadway, Styles signaled with his blue light for defendant to stop. Defendant pulled over, and Styles approached his car holding the Alcosensor device.

Mark Guice testified that he was a friend of defendant's and that they had spent the evening of 30 March 2002 together. Guice corroborated defendant's testimony that when he picked up defendant at his girlfriend's apartment, they left defendant's truck locked up and went out to a local bar and restaurant. Guice did all of the driving during the evening. After he took defendant back to the apartment, defendant said he would wait in his truck for his girlfriend to come home.

Lori Peak testified that she worked for a local law firm that had previously represented defendant on the current charges. Prior to trial in district court, she had interviewed Officer Styles and Trooper Denham. Styles stated to Peak that he told defendant he had to leave the parking lot because he wasn't a resident of the apartment complex, and that he directed defendant to "move along" after defendant told him that he had been drinking. He also told Peak that he recognized the defendant's truck when it pulled out of the parking lot; and that because he already knew defendant was drunk, he had the Alcosensor instrument in hand when he approached defendant's truck. Trooper Denham told Peak that he had spoken with Styles, who shared with Denham that he told defendant to leave the parking lot, and that when the defendant said he should not drive because he had been drinking, Styles had told defendant "he still had to leave, to drive anyway, that he was okay to drive."

During the charge conference, defendant's request for a jury instruction on the defense of entrapment was denied by the trial court. Defendant renewed his request after the jury instructions were delivered, which was also denied. The jury began its deliberations, which continued until the jury returned to the courtroom with the following question:

> FOREPERSON: The question is if the jury sees evidence of entrapment and bird-dogging and/or finds the deputy guilty of these things, should that weigh or carry—impact our decision as to whether the Defendant is guilty of DWI?
>
> THE COURT: I say to you and the jury that you have heard the evidence for the State and the evidence for the Defendant. And the function of the jury is to find the facts from the evidence pre-

> sented and to apply to those facts the law which the Court has given you. And the Court has given you its instructions.

Thereafter, the jury returned a verdict of guilty of impaired driving and not guilty of driving too fast for conditions. Defendant received a suspended 60 day sentence and was placed on unsupervised probation as a Level V offender. From this judgment and conviction, defendant appeals.

Defendant argues on appeal that the trial court erred by refusing to instruct the jury on the defense of entrapment. We agree.

"The law . . . forbids convictions that rest upon entrapment." *United States v. Jimenez Recio*, 537 U.S. 270, 276, 154 L. Ed. 2d 744, 750 (2003) (citing *Jacobson v. United States*, 503 U.S. 540, 118 L. Ed. 2d 174 (1992)). "Entrapment is a complete defense to the crime charged." *State v. Branham*, 153 N.C. App. 91, 100-01, 569 S.E.2d 24, 29 (2002). In general:

> [t]he defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.

State v. Walker, 295 N.C. 510, 513, 246 S.E.2d 748, 749-50 (1978) (citation omitted).

To be entitled to an instruction on entrapment, the defendant must produce "some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law." *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d 191, 197 (1955) (citation omitted). The issue in this case is whether defendant met the burden of production of "some credible evidence" that his driving while impaired was the result of entrapment. "This burden acts as a screening device. It serves to prevent the defendant from obtaining instructions on defenses supported by mere conjecture or speculation but is not intended to be so rigorous as to keep the jury from receiving instructions on and deciding defenses for which supporting evidence exists." JOHN RUBIN, THE ENTRAPMENT DEFENSE IN NORTH CAROLINA, § 6.2(b) (Institute of Government, University of North Carolina at Chapel Hill, 2001).

Moreover, "[t]he issue of whether or not a defendant was entrapped is generally a question of fact to be resolved by the jury." *State v. Collins*, 160 N.C. App. 310, 320, 585 S.E.2d 481, 489 (2003), *aff'd* 358 N.C. 135, 591 S.E.2d 518 (2004) (citing *State v. Worthington*, 84 N.C. App. 150, 157, 352 S.E.2d 695, 700 (1987)). Thus, "[i]f defendant's evidence creates an issue of fact as to entrapment, then the jury must be instructed on the defense of entrapment." *State v. Branham*, 153 N.C. App. 91, 100, 569 S.E.2d 24, 29 (2002). Further, "[a] defendant is entitled to a jury instruction on entrapment whenever the defense is supported by defendant's evidence, viewed in the light most favorable to the defendant. The instruction should be given even where the state's evidence conflicts with defendant's." *State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983) (citation omitted).

In appropriate factual circumstances, the defense of entrapment is available in a DWI trial. *See State v. Crouch*, 42 N.C. App. 729, 730, 257 S.E.2d 646, 647 (1979) ("trial judge submitted the issue of entrapment to the jury" in defendant's trial for DWI). However, as in other cases, the defendant must produce some evidence of both inducement and lack of predisposition before he is entitled to a jury instruction on entrapment. Thus, in *State v. McCaslin*, 132 N.C. App. 352, 511 S.E.2d 347 (1999), this Court upheld the trial court's refusal to instruct on entrapment on these facts: the defendant left the scene of an automobile accident and later returned in a car driven by a friend. The law enforcement officer investigating the accident informed defendant that he needed to see the truck that was involved in the accident. Only later, after defendant returned to the scene driving the truck, did the officer realize that defendant was intoxicated. This Court held that defendant was not entitled to an instruction on entrapment because (1) there was no evidence that the officer knew defendant was intoxicated when he instructed him to bring his truck back to the accident scene, and (2) there was no indication that the officer directed the **defendant** to drive, inasmuch as he was being driven by a friend when he first encountered the officer. Similarly, in *State v. Bailey*, 93 N.C. App. 721, 379 S.E.2d 266 (1989), there was evidence that the defendant, who was visibly intoxicated, approached a law enforcement officer directing traffic at the Charlotte Motor Speedway and asked the officer for assistance in locating his truck. This Court held that the officer's response to defendant's request—he merely indicated the general area where defendant's vehicle was likely parked—did not constitute evidence supporting an entrapment instruction at defendant's DWI trial.

The facts of the instant case are easily distinguishable from those of *McCaslin* and *Bailey*. Regarding defendant's lack of predisposition to drunk driving, evidence was presented from which the jury could find that: (1) on 30 March 2002 defendant left his truck at the apartment when he and Guice went out; (2) Guice did all the driving that evening; (3) after returning to the apartment, defendant stated he would wait in the truck until his girlfriend returned; (4) when Styles arrived at the parking lot, defendant was asleep in the truck with the engine turned off; and (5) defendant testified that he would never have driven after drinking if Styles had not awakened him and told him to "move along" and leave the parking lot. We conclude that there was sufficient evidence of defendant's lack of predisposition to drive while impaired to warrant an instruction on entrapment. Regarding inducement, evidence was presented from which the jury could find that: (1) in response to an anonymous call, Styles went to the apartment complex to check on the circumstances of a man reportedly sleeping in a truck; (2) when Styles woke up defendant he immediately observed obvious signs that defendant was impaired; (3) when questioned, defendant told Styles he had been drinking, and explained that he was just waiting for his girlfriend to get home; (4) defendant fully cooperated with Styles' requests; (5) Styles told defendant he could not wait in the parking lot and directed him to "move along"; (6) after Styles drove out of the parking lot, he stayed in the general area of the apartment complex; (7) a few minutes later, when defendant left the apartment parking lot, Styles's patrol vehicle was hiding out of sight with its lights off, at the intersection next to the apartments; and (8) as soon as defendant started driving, Styles pulled him over and approached defendant's truck carrying an Alcosensor device. We find this sufficient evidence of inducement to commit the offense of DWI to entitle defendant to an instruction on entrapment.

This evidence, if believed, would tend to show that defendant was not predisposed to drive while impaired; that Styles knew that defendant was impaired; that although defendant may not have been doing anything illegal, Styles directed defendant to leave the parking lot and "move along"; that at 4:30 a.m. in rainy weather Styles knew that driving was likely defendant's only realistic means of "moving along"; that Styles lingered in the area of the apartment complex after telling defendant to leave; that when defendant left the lot Styles was waiting in the dark with his vehicle lights turned off; and that as soon as defendant drove away Styles immediately arrested him for DWI. We conclude that on the facts presented in this case, defendant was

entitled to an instruction on entrapment, and that the trial court erred by denying defendant's request for this jury instruction.

Under N.C.G.S. § 15A-1443 (a) (2003), a criminal defendant is prejudiced by non-constitutional errors "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" In the present case, defendant's evidence was substantial. Moreover, the jury's question for the trial court illustrates that even without an instruction on entrapment, the jury found that the defense might be an issue in the case. We conclude that the failure to instruct the jury on entrapment was prejudicial and requires a

New Trial.

Judges McCULLOUGH and HUDSON concur.

STATE OF NORTH CAROLINA v. GEORGE ERVIN ALLEN, JR., DEFENDANT

No. COA03-406

(Filed 1 June 2004)

1. Motor Vehicles— driving while impaired—sufficiency of evidence

There was sufficient evidence of driving while impaired based on a Trooper's observations and defendant's refusal of the intoxilyzer test, which is admissible as substantive evidence of guilt.

2. Sentencing— habitual felon—guilty plea—knowing and voluntary

A guilty plea to being an habitual felon was knowing and voluntary. The trial court sufficiently established a record of the plea, the judge's query was sufficient to clarify for the defendant the consequences of the plea, and the transcript indicates that defendant understood.

3. Indictment and Information— habitual driving while impaired—witness name not marked

A driving while impaired indictment was not invalid where the box beside the witness's name on the indictment was not checked. N.C.G.S. § 15A-623(c).

4. Motor Vehicles— habitual driving while impaired—predicate convictions

There were three predicate convictions supporting defendant's habitual DWI conviction. Despite defendant's contention that the first conviction was not reduced to writing and signed, the uniform citation form was signed by the presiding judge. Moreover, defendant had two other convictions, even though they were consolidated for judgment. The determinations of what qualifies as a predicate conviction are done differently under the Habitual Impaired Driving statute and the Habitual Felon Act.

Appeal by defendant from judgment entered 9 May 2002 by Judge Henry E. Frye, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 15 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General Patricia A. Duffy, for the State.

James P. Hill, Jr., for defendant-appellant.

THORNBURG, Judge.

Defendant was cited for driving while impaired ("DWI"), driving while license revoked, operating a vehicle while displaying a fictitious license tag, failure to register a vehicle and operating a vehicle without requisite financial responsibility, all arising out of an incident on 24 February 2001. Defendant was also later indicted on one count of habitual DWI and as being an habitual felon. The State dismissed the registration and financial responsibility charges at trial. Defendant was found guilty of driving while impaired and driving while license revoked. Defendant stipulated to the three previous DWI convictions included in the bill of indictment on the habitual DWI charge. Defendant admitted his habitual felon status. Defendant appeals.

I. Facts

On 24 February 2001, Trooper Darren C. Yoder of the North Carolina Highway Patrol was dispatched to Mitzpah Church Road in the Reidsville area of Rockingham County to locate an impaired driver. Trooper Yoder was informed that the suspect was driving an older model white Toyota pickup truck. After reaching Mitzpah Church Road, Trooper Yoder witnessed the truck cross the centerline of the road. Trooper Yoder activated his patrol car's blue warning lights and siren in order to stop the truck. The truck pulled off the road and into a private driveway. Defendant was the driver of the truck.

Trooper Yoder approached the truck to speak with defendant. Trooper Yoder noticed a very strong odor of alcohol emanating from the truck while he spoke with defendant. Trooper Yoder asked defendant to get out of the truck and walk to the patrol car for further questioning. Trooper Yoder noticed that defendant was unsteady on his feet, had difficulty stepping out of the truck and had to hold onto the side of the truck in order to walk. While defendant was cooperative, Trooper Yoder noted that defendant seemed sleepy, his speech was slurred and he was difficult to understand. Trooper Yoder did not ask defendant to perform any psychophysical tests to estimate his level of impairment because Trooper Yoder believed that defendant was incapable of performing the tests without risk of physical harm from a potential fall.

During the interview with defendant, Trooper Yoder formed the opinion that defendant was impaired and placed him under arrest for impaired driving. Defendant was transported to the Rockingham County sheriff's office in Wentworth for the purpose of administering an intoxilyzer test. After being informed of his legal rights in regard to the test, defendant refused to take the test.

Defendant was found guilty at trial of DWI and driving while license revoked. Judgment was entered on the habitual DWI charge and driving while license revoked charge. Defendant was sentenced as an habitual felon due to his admission to having attained that status. Defendant appeals and argues: (1) that the trial court erred in denying defendant's motion to dismiss the charge of DWI for insufficiency of the evidence; (2) that defendant failed to execute a valid plea pursuant to the habitual felon indictment; (3) that the indictment charging defendant with habitual DWI is invalid and (4) that imposing habitual felon punishment violated defendant's

federal and state constitutional rights. These arguments are unpersuasive. We find no error.

II. Insufficiency of the Evidence

[1] Defendant argues that the State failed to present substantial evidence of his impairment. Defendant asserts that while the State presented some evidence of his impairment, this evidence was counterbalanced by the testimony of Trooper Yoder that defendant was able to drive normally after Trooper Yoder activated his vehicle's blue warning lights and siren, that defendant then drove at a safe rate of speed and that defendant was cooperative throughout the traffic stop.

In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *Id.*

The North Carolina Supreme Court affirmed in *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000), that

> "an odor [of alcohol], *standing alone*, is no evidence that [a driver] is under the influence of an intoxicant." *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 793 (1970). However, in that same case, this Court also stated, "the '[f]act that a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [N.C.G.S. §] 20-138.' " *Id.* at 185, 176 S.E.2d at 794 (quoting *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965)).

Rich at 398, 527 S.E.2d at 306. In the instant case, the State presented Trooper Yoder's testimony that it was his opinion that defendant was impaired. Trooper Yoder testified that he smelled a very strong odor of alcohol about defendant, that defendant was driving across the centerline, and that defendant was sleepy and had difficulty walking and speaking clearly. In addition to Trooper Yoder's observations of defendant on the night of defendant's arrest, it is significant that defendant refused to take the intoxilyzer test. A defendant's refusal of this test is admissible as substantive evidence of a defendant's guilt. *See* N.C. Gen. Stat. § 20-139.1(f) (2003); *State v. Pyatt*, 125 N.C. App. 147, 150-51, 479 S.E.2d 218, 220 (1997). The State presented sufficient

evidence of defendant's impairment to withstand defendant's motion to dismiss. Defendant's assignment of error fails.

III. Habitual Felon Plea

[2] Defendant also argues that his plea of guilty to the habitual felon charge was not a knowing and voluntary plea. Defendant points to several instances during the trial when the trial judge indicated that he was in a hurry to leave court. Defendant also points to several exchanges between the trial judge and defendant to show that defendant did not knowingly and voluntarily plead guilty. Specifically, defendant cites to the following exchange:

> The Court: Do you understand that you are pleading guilty to the charge of habitual felon which can authorize up to 261 months in prison?
>
> The Defendant: Yes.
>
> The Court: Do you now personally plead guilty to that charge? I am going to ask you something in just a minute, but you have to say yes to that.
>
> The Defendant: Yes.
>
> The Court: Do you now consider it to be in your best interest to plead guilty? In other words, I am not asking are you, in fact, guilty. Do you now consider it in your best interest to plead guilty?
>
> The Defendant: Well, I don't consider it to be in my best interest.

Defendant cites this exchange as an indication that the trial judge was pressuring defendant to plead guilty to the habitual felon charge, that defendant was confused and ambivalent regarding his admission to habitual felon status and that his resulting plea cannot be considered knowing, voluntary or a product of informed choice. We disagree.

In order for a plea of guilty to be valid, it must be made knowingly and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274 (1969). "The requirement that the plea be knowing and voluntary is so important that the record must affirmatively show on its face that the guilty plea was knowing and voluntary." *In re Chavis and In re Curry and In re Outlaw*, 31 N.C. App. 579, 580-81, 230 S.E.2d 198, 200 (1976), *disc. rev. denied*, 291 N.C. 711, 232 S.E.2d 203 (1977). "[A] plea of guilty . . ., unaccompanied by evidence that the plea was entered voluntarily and understandingly, and a judgment entered

thereon, must be vacated . . . ." *State v. Ford*, 281 N.C. 62, 68, 187 S.E.2d 741, 745 (1972). This Court has also said:

> "[I]t is well established that a guilty plea is not considered voluntary and intelligent unless it is 'entered by one fully aware of the direct consequences. . . .' " Direct consequences have been broadly defined "as those having a 'definite, immediate and largely automatic effect on the range of the defendant's punishment.' " This definition, however, should not be applied in a technical, ritualistic manner.

State v. Williams, 133 N.C. App. 326, 331, 515 S.E.2d 80, 83 (1999) (internal citations omitted).

In the instant case, the trial judge emphasized in his exchange with defendant the knowing and voluntary quality of defendant's plea. Defendant acknowledged that he was aware of the charges against him, that he was waiving his right to trial by jury and that he understood the maximum term of imprisonment that could be imposed against him as an habitual felon. We also note that, following the recitations highlighted by defendant, the following exchange took place:

> The Court: Well then, do you want to say that you are, in fact, guilty as to the habitual felon?
>
> The Defendant: Yes.

Furthermore, defendant admitted that he was proceeding voluntarily and without the inducement of promises or threats other than the plea arrangement.

The trial judge sufficiently established a record of the plea. He continued his query of defendant to such an extent as to clarify for defendant the consequences of the plea. The transcript indicates that defendant understood the consequences of his plea. Defendant's assignment of error fails.

IV. Habitual DWI Indictment

[3] Defendant next argues that the indictment charging him with habitual DWI was invalid. Defendant argues that: (1) the indictment fails to comply with N.C. Gen. Stat. § 15A-623(c) and (2) the indictment fails to allege the requisite number of valid predicate convictions to support a violation of N.C. Gen. Stat. § 20-138.5.

Defendant asserts that, because the box beside the witness's name on the indictment was not checked, the indictment for habitual DWI fails to indicate that any witnesses were called, sworn or examined before the grand jury. Defendant argues that, accordingly, the State failed to secure a true bill of indictment. However, N.C. Gen. Stat. § 15A-623(c) provides:

> The foreman must indicate on each bill of indictment or presentment the witness or witnesses sworn and examined before the grand jury. Failure to comply with this provision does not vitiate a bill of indictment or presentment.

N.C. Gen. Stat. § 15A-623(c) (2003). *See also State v. Mitchell*, 260 N.C. 235, 237-38, 132 S.E.2d 481, 482 (1963) (holding an indictment is not fatally defective where the names of the witnesses to the grand jury are not marked). Accordingly, defendant's argument fails.

[4] Defendant makes two arguments regarding the predicate convictions supporting the habitual DWI indictment. N.C. Gen. Stat. § 20-138.5(a) provides:

> A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense.

N.C. Gen. Stat. § 20-138.5(a) (2003). Defendant argues that the indictment fails to allege three prior convictions, reasoning that one of the prior convictions is void and that the other two convictions should only count as one conviction since they were consolidated for judgment. We find neither of these arguments persuasive.

Defendant asserts that one of the prior convictions, 94 CR 35127, is void because the judgment was not reduced to writing and signed by the presiding judge. *See In re Pittman*, 151 N.C. App. 112, 114, 564 S.E.2d 899, 900 (2002). However, defendant misapprehends the meaning of "judgment" in the context of a district court criminal proceeding. The judgment in 94 CR 35127 was signed by the presiding judge on the uniform citation form which is included in the record on appeal. The document to which defendant refers as the judgment, is in fact the judgment and commitment and serves as evidence of the original judgment. This predicate conviction is valid. Defendant's argument fails.

Defendant also contends that three prior convictions were not alleged because two of the alleged convictions were consolidated for judgment. Defendant argues that N.C. Gen. Stat. § 20-138.5 is a recidivist statute that must be applied similarly to the Habitual Felon Act, N.C. Gen. Stat. § 14-7.1 *et seq.* (2003). N.C. Gen. Stat. § 14-7.1 prevents the use of multiple offenses consolidated for judgment as more than one predicate offense. Defendant asserts that it is reasonable to infer that the legislature intended similar structural limitations with respect to N.C. Gen. Stat. § 20-138.5. We disagree.

The Habitual Felon Act in N.C. Gen. Stat. § 14-7.1 contains explicit guidelines for what qualifies as a predicate felony. N.C. Gen. Stat. § 14-7.1 states in part:

> The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony.

N.C. Gen. Stat. § 14-7.1 (2003). By contrast, N.C. Gen. Stat. § 20-138.5(a) only states:

> A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of *three or more offenses* involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense.

(Emphasis added.) In reading our statutes, this Court has said:

> "The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." The first step in determining a statute's purpose is to examine the statute's plain language. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning."

State v. Hooper, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) (internal citations omitted). Thus, the determination of what qualifies as a predicate conviction is carried out differently under the Habitual Impaired Driving statute and the Habitual Felon Act. Defendant was convicted of two separate offenses of impaired driving, occurring on 11 July 1998 and 10 February 1999, despite the convictions being consolidated for judgment in 99 CRS 1592.

Because we find that the conviction in 94 CR 35127 is valid and that the consolidated convictions in 99 CRS 1592 are two separate offenses under N.C. Gen. Stat. § 20-138.5, there were three predicate convictions alleged in the indictment for habitual DWI. Defendant's assignment of error fails.

V. Habitual Felon Indictment

In his last argument on appeal, defendant argues that imposing judgment based on his conviction of habitual felon status is violative of his federal and state constitutional right to due process. Defendant again asserts that the indictment failed to indicate that any witnesses were called before the grand jury and he reiterates by reference his arguments with regard to his guilty plea to habitual felon status and the habitual DWI indictment. Given our decision and discussion of these matters above, defendant's assignment of error fails.

Defendant failed to set out his remaining assignments of error in his brief. Because he has neither cited any authority nor stated any argument in support of those assignments of error, they are deemed abandoned. N.C. R. App. P. 28(b)(6).

Affirmed.

Judges TIMMONS-GOODSON and LEVINSON concur.

STATE OF NORTH CAROLINA v. MICHAEL EUGENE FREEMAN

No. COA03-878

(Filed 1 June 2004)

1. Appeal and Error— preservation of issues—sufficiency of evidence—failure to move to dismiss

Defendant's failure to move to dismiss a charge of cutting another's timber at the close of all the evidence barred defendant from raising the issue on appeal. Moreover, plain error only applies to jury instructions and evidentiary matters in criminal cases.

2. Probation and Parole— restitution—cutting timber—values from forestry report and sales of similar property—averaged

The trial court did not err when determining restitution as a condition of probation for cutting another's timber by averaging the values from a forestry report and from the owner's sale of similar property. The values were both supported by evidence and authorized under N.C.G.S. § 15A-1340.35.

3. Appeal and Error— preservation of issues—failure to assign error—no objection at trial

Defendant's failure to assign error or object at trial waived the question of whether the court erred by not considering his ability to pay restitution.

Appeal by defendant from judgment entered 13 February 2003 by Judge Gary L. Locklear in Cumberland County Superior Court. Heard in the Court of Appeals 21 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Donna B. Wojcik, for the State.

Mark A. Key and Penny K. Bell, for defendant-appellant.

TYSON, Judge.

Michael Eugene Freeman ("defendant") appeals from judgment entered after a jury found him to be guilty of misdemeanor cutting, injuring, or removing another's timber. Defendant was sentenced to imprisonment for 120 days. The trial court suspended this sentence and placed defendant on probation for sixty months. As part of the judgment, defendant was ordered to pay restitution in the amount of $12,837.00 to Billy Cain ("Cain"). We find no error at trial and affirm the judgment ordering restitution.

I. Background

During November and December 1999, defendant was employed as a logger with Ross Logging Company, owned by Riley Ross ("Ross"). In November 1999, Ross contracted with Elvin Simmons ("Simmons") to cut and remove timber from his property. Ross hired Canal Wood Company to remove the timber, sell it, and pay Simmons the proceeds. Simmons was obligated to pay Ross Logging Company. The project was completed in late December 1999. Ross and Simmons testified that trees on adjoining properties were left when the Simmons's job was completed.

Steven Shaffer ("Shaffer") testified that his grandmother lived down the road from Simmons's and Cain's properties, although none of these individuals were personally acquainted. In late 1999 or early 2000, Shaffer observed several men, including defendant, and two trucks bearing the logo "All American Timber" near his grandmother's property. Shaffer engaged in a conversation with defendant, who informed him that Simmons had permitted the men to cut trees. The men were there to identify, or "tag," the trees to be cut. Shaffer requested defendant to remove some trees from his grandmother's property. Defendant gave Shaffer a business card with his name and phone number written on the back. The front of the card read, "All American Timber Company," which matched the name on the trucks.

Cain owns property adjoining Simmons's land. Prior to 1999, ninety-five percent (95%) of his land was covered by large, longleaf, southern yellow pine trees, with trunks up to twenty-four inches in diameter. In late 1999 or early 2000, Cain visited his property and observed that timber from approximately five acres of his land had been cut and removed. Cain spoke with neighbors, including Shaffer's grandmother, and learned that trees Shaffer saw being tagged were actually located on Cain's property. He called the Fayetteville Police Department and reported his trees had been cut.

Defendant contacted Cain approximately five times by phone and two times in person after charges were filed against him. In the first telephone conversation with Cain, defendant admitted that he cut the timber, but contended that he acted at the direction of the company and was not personally responsible. A few weeks later, defendant called Cain and informed him that a "Mr. Riley" had cut the timber. Six weeks later, defendant met with Cain. Cain provided defendant with an estimate of the stolen timber's value. Cain asked how much money defendant received from the timber. Defendant admitting cutting the timber and receiving payment for it, but could not remember the amount of money he had received. Cain testified that defendant's story changed from working *for* Mr. Riley to working *with* Mr. Riley.

Defendant asked Cain what amount of money he wanted. Cain replied that he would be satisfied if defendant paid for the value of the timber and reimburse him for the cost of obtaining the estimate. Defendant stated he would see what he could do about getting the money and left. Defendant later visited Cain's office and told Cain that he would pay for the timber but was trying to raise money. A few

days after this visit, defendant called Cain again and stated that Cain had damaged his name and would sue Cain if he did not drop the charges. Cain told defendant never to contact him again and had no further contact with defendant until trial.

The jury found defendant to be guilty of cutting, injuring, or removing Cain's timber and the trial court proceeded to sentencing and restitution. The State offered two methods to determine the issue of damages. The first method involved Cain's testimony that he had sold a similar tract of land in 2002 that was slightly larger, measuring approximately 8.4 acres, and included 6.2 acres of cuttable timber. The second method was based on Cain's testimony that he hired a forestry agent who documented and estimated the value of the timber cut from Cain's land.

The trial court averaged the results of the two methods and ordered defendant to pay restitution in the amount of $12,337.00, plus the $500.00 Cain paid for the forestry report, for a total of $12,837.00. The trial court suspended defendant's sentence and placed defendant on probation for five years on the condition that he pay the restitution and costs of the action. Defendant appeals.

II. Issues

The issues presented are whether the trial court erred in: (1) failing to dismiss the case and submitting the case to the jury; (2) failing to consider the factors set forth in N.C. Gen. Stat. § 15A-1340.35 by not measuring damages at the time and place of the alleged loss; and (3) speculating as to the amount of restitution due and whether defendant had the ability to pay.

III. Motion to Dismiss

[1] Defendant contends the State presented insufficient evidence to submit the charge of cutting, injuring, or removing another's timber to the jury. We disagree and dismiss this assignment of error.

The failure of a defendant to move to dismiss at the close of all the evidence bars him from raising this issue on appeal. *State v. Richardson*, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995). Rule 10 of the North Carolina Rules of Appellate Procedure provides that "a defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . ." N.C.R. App. P. 10(b)(3) (2004). Further, "if a defendant fails to move to dismiss the action . . . at the close of all the

evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." *Id.*

Here, defendant failed to renew his motion to dismiss and waived appellate review of this issue. Defendant argues we should apply plain error review. Plain error, however, only applies to jury instructions and evidentiary matters in criminal cases. *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). While this is a criminal case, defendant's failure to renew his motion to dismiss does not trigger a plain error analysis. *See Richardson*, 341 N.C. at 676-77, 462 S.E.2d at 504 (Our Supreme Court declined to apply plain error when defendant failed to renew motion to dismiss and preserve issue for review pursuant to N.C.R. App. P. 10(b)(3)). This assignment of error is dismissed.

IV. N.C. Gen. Stat. § 15A-1340.35

[2] Defendant contends the trial court failed to consider the requirements of N.C. Gen. Stat. § 15A-1340.35 in ordering restitution. We disagree.

The trial court may order restitution as a condition of probation. *State v. Canady*, 153 N.C. App. 455, 460, 570 S.E.2d 262, 266 (2002); N.C. Gen. Stat. § 15A-1343(d) (2003). "Restitution, imposed as a condition of probation, is not a legal obligation equivalent to a civil judgment, but rather an option which may be voluntarily exercised by the defendant for the purpose of avoiding the serving of an active sentence." *State v. Smith*, 99 N.C. App. 184, 186-87, 392 S.E.2d 625, 626 (1990), *cert. denied*, 483 S.E.2d 189 (1997) (citing *Shew v. Southern Fire & Casualty Co.*, 307 N.C. 438, 298 S.E.2d 380 (1983)).

The amount of restitution ordered by the court must be supported by the evidence. *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986) (citing *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986)); *see also Canady*, 153 N.C. App. at 461, 570 S.E.2d at 266. The trial court is not required to make specific findings of fact. *Hunt*, 80 N.C. App. at 195, 341 S.E.2d at 354 (citing *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986)). If there is "some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *Hunt*, 80 N.C. App. at 195, 341 S.E.2d at 354.

"When restitution or reparation is a condition imposed, the court shall take into consideration the factors set out in G.S. 15A-1340.35 and G.S. 15A-1340.36." N.C. Gen. Stat. § 15A-1343(d) (2003). To deter-

mine the amount of restitution where the offense results in damage, loss, or destruction of a victim's property, and the return of that property is impossible, impractical, or inadequate, the trial court shall consider: "(1) The value of the property on the date of the damage, loss, or destruction; or (2) The value of the property on the date of sentencing, less the value of any part of the property that is returned." N.C. Gen. Stat. § 15A-1340.35(a)(2); N.C. Gen. Stat. § 15A-1340.35(b)(1)-(2) (2003).

Here, two methods were offered to determine the issue of damages at trial and during the sentencing hearing. The tract at bar was five acres, with approximately 4.6 acres of merchantable timber. Cain testified at trial that he had sold a similar, although slightly larger, tract of land with approximately 6.2 acres of cuttable timber in 2002. This tract contained large, longleaf, southern yellow pine trees that were "substantially similar" to the timber removed from the tract at bar. During the sentencing hearing, Cain testified he received $15,000.00 from the sale. Using this evidence, the trial court calculated an amount of $11,129.00 for the 4.6 acres of timber cut from Cain's property.

The State also submitted at the sentencing hearing a report taken by a JMG Forestry agent ("forestry report"), which Cain had obtained in April 2000 as a result of discussions with defendant. The forestry report estimated the tract had a market value of approximately $13,545.00.

Defendant was sentenced on 12 February 2003. The trial court valued the timber based on the forestry report estimating the value of the timber near the "date of the damage, loss, or destruction." N.C. Gen. Stat. § 15A-1340.35 (b)(1). The trial court also considered Cain's sale of similar property in 2002, near the date of sentencing. N.C. Gen. Stat. § 15A-1340.35 (b)(2). None of the timber was recovered, and the restitution does not credit any "value of any part of the property that is returned." *Id.*

The trial court averaged the value it calculated from Cain's testimony and the value set forth in the forestry report. The trial court ordered restitution in the amount of $12,837.00, including $500.00 Cain had paid to obtain the forestry report. The trial court did not err in averaging the two values, which were both supported by evidence and authorized under N.C. Gen. Stat. § 15A-1340.35, and ordering the averaged amount as restitution. This assignment of error is overruled.

V. Ability to Pay Restitution

[3] Defendant contends the trial court erred in failing to consider his ability to pay the amount of restitution due under the order. We disagree and dismiss this assignment of error.

"[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C.R. App. P. 10(a) (2004). Further, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C.R. App. P. 10(b) (2004).

Here, defendant did not identify within his assignments of error contained in the record that the trial court failed to consider his ability to pay the ordered restitution. Defendant did not object to the trial court's ruling by arguing that defendant could not pay the $214.00 monthly payment over five years. Defendant failed to object when the trial court conducted an inquiry regarding whether defendant intended to pay the ordered amount:

THE COURT: Look me in the eyes, Mr. Freeman. Do you plan to pay this money back at about—its going to be just a little better than $200.00 a month. Do you plan to pay it back?

THE DEFENDANT: If I have to.

THE COURT: You have to.

THE DEFENDANT: Okay.

. . . .

THE COURT: The other alternative . . . is going to prison.

THE DEFENDANT: Right. That's right.

Defendant has waived appellate review of this argument. *See* N.C.R. App. P. 10 (2004). Additionally, defendant testified at trial that he worked all his life as a logger, had owned his own logging business with his father, and was currently employed. Defendant presents no argument on appeal of his inability to pay the ordered amount. This assignment of error is dismissed.

VI. Conclusion

Defendant failed to renew his motion to dismiss at the close of all evidence and to assign error to the trial court's ruling that he had the

ability to pay the restitution amount. We dismiss these arguments pursuant to the North Carolina Rules of Appellate Procedure. *See* N.C.R. App. P. 10. In ordering restitution, the trial court properly considered the requirements set forth in N.C. Gen. Stat. § 15A-1340.35. We hold that defendant received a trial free from error. The trial court's order setting the restitution amount is affirmed.

No Error.

Judges McGEE and TIMMONS-GOODSON concur.

JEFFREY PAUL TRIVETTE, PLAINTIFF v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT

No. COA03-986

(Filed 1 June 2004)

Insurance— automobile—UIM coverages—stacking—two policies—highest applicable limit

The trial court did not err by concluding that N.C.G.S. § 20-279.21(b)(3) prohibited stacking the underinsured motorists (UIM) coverages at bar and by granting defendant's motion for summary judgment. The plain language of plaintiff's policy and the policy issued by defendant to plaintiff's parents, with whom plaintiff lived, plainly and clearly limits plaintiff's recovery to the highest applicable limit. Plaintiff's interpretation of the statute would allow those who are not named insureds to stack coverage limits and receive a UIM windfall denied to named insureds who pay premiums for UIM coverage.

Judge TIMMONS-GOODSON concurring in the result.

Appeal by plaintiff from judgment entered 27 May 2003 by Judge Russell G. Walker, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 21 April 2004.

Lewis & Daggett, Attorneys at Law, P.A., by Michael P. Williams, for plaintiff-appellant.

Kent L. Hamrick, for defendant-appellee.

TYSON, Judge.

Jeffrey Paul Trivette ("plaintiff") appeals from a judgment granting summary judgment for State Farm Mutual Automobile Insurance Company ("defendant") and denying plaintiff's motion for summary judgment. We affirm.

I. Background

On 17 August 2000, plaintiff was operating his vehicle and was hit by a 1992 Ford owned by Jose Hernandez ("Hernandez"). At the time of the accident, a policy issued by New South Insurance Company ("New South") provided Hernandez with liability limits of $25,000.00 per person and $50,000.00 per accident. Plaintiff claimed damages for bodily injuries sustained in the accident and was paid the per person liability limit of $25,000.00 in Hernandez's policy.

Plaintiff owned an automobile insurance policy issued by Integon Casualty Insurance Company ("Integon") that provided uninsured motorist ("UM") coverage limits of $30,000.00 per person and $60,000.00 per accident. Plaintiff also filed a UM claim with Integon, contending Hernandez was underinsured. Integon agreed and paid plaintiff $5,000.00, the difference between Hernandez's policy limits and Integon's per person limit.

At the time of the accident, plaintiff lived with his parents who were named insureds under an automobile policy issued by defendant. This policy contained UM limits of $50,000.00 per person and $100,000.00 per accident. Plaintiff claimed damages for bodily injury in excess of the $30,000.00 received from New South and Integon. Defendant contended entitlement to a credit or setoff for the $25,000.00 liability paid by New South and the $5,000.00 UM payment previously paid by Integon. Defendant paid plaintiff $20,000.00 under the UM coverage and claimed it had met the policy's per person UM limit of $50,000.00.

On 3 October 2002, plaintiff filed a declaratory judgment action alleging defendant owed additional UM liability payments under the policy. Plaintiff contended the UM limits under all the insurance policies should be "stacked" or combined and that defendant was not entitled to a credit or setoff for the payments made by New South and Integon. Defendant denied further UM liability and filed a motion for summary judgment on 21 April 2003. Plaintiff filed his motion for summary judgment on 14 May 2003. After reviewing the documents and hearing oral arguments, the trial court granted

defendant's motion and dismissed the complaint with prejudice. Plaintiff appeals.

II. Issue

The sole issue is whether the trial court erred in granting defendant's motion for summary judgment and concluding inter-policy stacking of UM coverage was prohibited by N.C. Gen. Stat. § 20-279.21(b)(3).

III. Standard of Review for Summary Judgment

Plaintiff contends the trial court erred in granting defendant's motion for summary judgment and in concluding that N.C. Gen. Stat. § 20-279.21(b)(3) prohibits inter-policy stacking of UM coverage here.

Our standard to review the granting of a motion for summary judgment is whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 707-08, 582 S.E.2d 343, 345 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520 (2004), *reh'g denied*, 2004 N.C. Lexis 520 (N.C. May 6, 2004) (citing *Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603, *disc. rev. denied*, 354 N.C. 371, 555 S.E.2d 280 (2001)); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003).

> A defendant may show entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense."

Draughon, 158 N.C. App. at 708, 582 S.E.2d at 345 (quoting *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. rev. denied*, 340 N.C. 359, 458 S.E.2d 187 (1995)).

" 'Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.' " *Draughon*, 158 N.C. App. at 708, 582 S.E.2d at 345 (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000)).

IV. N.C. Gen. Stat. § 20-279.21(b)(3)

In 1991, our Legislature amended the Financial Responsibility Act to provide when UM coverage could be aggregated or stacked.

> Where coverage is provided on more than one vehicle insured on the same policy or where the owner or the named insured has more than one policy with coverage under this subdivision, there shall not be permitted any combination of coverage within a policy or where more than one policy may apply to determine the total amount of coverage available.

N.C. Gen. Stat. § 20-279.21(b)(3) (2001).

Plaintiff argues the anti-stacking provisions of the statute do not apply because he was neither defendant's insured nor the owner of any vehicle covered by defendant's policy. We disagree.

In *Hoover v. State Farm Mut. Ins. Co.*, plaintiff was injured by an uninsured motorist while driving a vehicle he jointly owned with his employer, 156 N.C. App. 418, 576 S.E.2d 396, 397 (2003). Plaintiff owned an insurance policy with UM coverage of $250,000.00 per person on the jointly owned automobile. *Id.* His employer owned an insurance policy with UM coverage of $1,000,000.00 per person on the same automobile. *Id.* Plaintiff sought to stack the UM coverage from both policies. *Id.* at 419, 576 S.E.2d at 397. The insurance carriers argued that UM coverage was capped at the higher limit of the two policies or $1,000,000.00. *Id.* The trial court granted summary judgment for the carriers and concluded that N.C. Gen. Stat. § 20-279.21(b)(3) prohibited inter-policy stacking of UM coverage. *Id.* This Court affirmed the trial court's decision and held:

> It is illogical that an individual who has purchased multiple UM policies and who pays multiple insurance premiums for those policies would not be allowed to stack coverage from those policies but an individual who has only one UM policy and is injured while driving another's vehicle for which the individual may have third party UM coverage could stack coverage.

Id. at 420, 576 S.E.2d at 398.

Here, plaintiff received $25,000.00 from Hernandez's policy and another $5,000.00 from his own policy, which provided UM coverage limits of $30,000.00 per person. Plaintiff then sought to recover an additional $50,000.00 of UM coverage from his parents' insurance policy issued by defendant. Plaintiff paid no premiums for this policy.

Plaintiff was covered under this policy solely because he was a resident within his parents' home. The policy at bar contained a clause that limited defendant's UM liability to the highest amount in either policy if both policies covered the same accident:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum amount payable for all injuries caused by an uninsured motor vehicle under all policies shall not exceed the highest applicable limit of liability under any one policy.

Plaintiff's insurance policy issued by Integon contained virtually the same provision. These two policies unambiguously limit total UM coverage under both policies to the higher of the two limits, which is $50,000.00 under the policy issued by defendant.

In *Government Employees Insurance Co. v. Herndon*, this Court reviewed two policies with clauses virtually identical to those at bar and held, "[t]here is no ambiguity in the language used in GEICO's policies. Recovery under both policies is clearly limited to the highest applicable limit of liability under any one policy." 79 N.C. App. 365, 368, 339 S.E.2d 472, 474 (1986). Where there is no ambiguity in a policy's language, the courts must apply the plain meaning of the policy language and enforce the policy as written. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

As plaintiff received UM coverage from his own policy and his parents' policy, we hold plaintiff "has more than one policy with coverage under this subdivision" and is not entitled to stack UM coverage limits under the policies. The plain language of both policies clearly limits the total UM coverage to the "highest applicable limit of liability under any one policy." Plaintiff was paid $30,000.00: $25,000.00 for his personal injuries from Hernandez's policy and $5,000.00 in UM coverage from his own policy. Between his policy and defendant's policy, the "highest applicable limit" was $50,000.00. As plaintiff had already been paid $30,000.00, defendant was liable for $20,000.00, to bring the total amount to the "highest applicable limit" of $50,000.00.

Adopting plaintiff's interpretation of N.C. Gen. Stat. § 20-279.21(b)(3) would allow those who are not named insureds on a policy to stack coverage limits and receive a UM windfall while denying equal treatment to named insureds who actually pay the premiums for UM coverage. This "illogical" conclusion is unsup-

ported by amended N.C. Gen. Stat. § 20-279.21 and precedent. *Hoover*, 156 N.C. App. at 420, 576 S.E.2d at 398. The trial court did not err by granting defendant's motion for summary judgment. Plaintiff's assignment of error is overruled.

V. Conclusion

The trial court did not err in concluding that N.C. Gen. Stat. § 20-279.21(b)(3) prohibited stacking the UM coverage at bar and in granting defendant's motion for summary judgment. The plain language of plaintiff's policy and the policy issued by defendant plainly and clearly limits plaintiff's recovery to the "highest applicable limit." The trial court's judgment is affirmed.

Affirmed.

Judge McGEE concurs.

Judge TIMMONS-GOODSON concurs in the result by separate opinion.

TIMMONS-GOODSON, Judge, concurring in the result.

I agree with the majority that the trial court did not err in granting summary judgment in favor of defendant. However, unlike the majority, I believe the trial court's decision is supported more by the language of the applicable insurance policies than by N.C. Gen. Stat. § 20-279.21 and *Hoover*. Therefore, I write separately to distinguish the reasoning behind my conclusion.

Because the words used in an insurance company's policy are chosen by the insurance company itself, "any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder, or the beneficiary, and against the company." *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). "However, ambiguity in the terms of an insurance policy is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning." *Id.* Instead, ambiguity exists only where, in the opinion of the court, the language of the policy is "fairly and reasonably susceptible to" differing interpretations by the parties. *Id.* Where there is no ambiguity in a policy's language, courts "must enforce the contract as the parties have made it[,] and [courts] may not, under the guise of interpreting an ambiguous provision, remake the contract and impose

liability upon the company which it did not assume and for which the policyholder did not pay." *Id.*

In *Government Employees Insurance Co. v. Herndon*, 79 N.C. App. 365, 339 S.E.2d 472 (1986), this Court reviewed two policy clauses similar to those in the instant case. Noting that "[r]ecovery under both policies is clearly limited to 'the highest applicable limit of liability under any one policy,' " we concluded there was "no ambiguity in the language used" in the policies, and we held that the defendants were not allowed to "stack" uninsured motorist compensation claims. *Id.* at 368, 339 S.E.2d at 474.

In the instant case, the policy of plaintiff's parents with defendant reads as follows:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum payable for injuries to you or a ***family member*** caused by an ***underinsured motor vehicle*** shall be the sum of the highest limit of liability for this coverage under each such policy.

(emphasis in original). According to the record, plaintiff's own policy with Integon contained the same provision. I conclude the plain and unambiguous language of both policies clearly limits the total underinsured motorist coverage to the "highest applicable limit of liability" for underinsured motorist coverage under each policy.

Plaintiff's Integon policy offered him $30,000 in underinsured motorist coverage, while his parent's policy with defendant offered him $50,000 in underinsured motorist coverage. Accordingly, defendant was only responsible for underinsured motorist coverage up to $50,000, the "highest applicable limit of liability" under the two policies. Hernandez's policy paid plaintiff $25,000 for his personal injuries, while plaintiff's own Integon policy paid plaintiff $5,000 in underinsured motorist coverage. Therefore, under the unambiguous terms of the insurance policies, defendant was liable only for the $20,000 necessary to bring the total amount paid to plaintiff to $50,000, and plaintiff was not entitled to stack underinsured motorist coverage limits under the two policies.

For the reasons discussed above, I agree with the majority that the trial court did not err in granting defendant's motion for summary judgment.

DAVID N., PLAINTIFF v. JASON N., DEFENDANT

No. COA02-1464

(Filed 1 June 2004)

1. Child Support, Custody, and Visitation— custody to grandparent over parent—inconsistent findings

The trial court erred by awarding custody to a grandparent over a natural parent after concluding both that defendant's actions were inconsistent with his constitutionally protected status and that both plaintiff and defendant were fit and proper for custody.

2. Child Support, Custody, and Visitation— child custody claim—amendment for support added

The trial court did not abuse its discretion by allowing the plaintiff to amend his child custody complaint to add a claim for child support. Although asserting a right to custody while trying to avoid support is precarious, defendant's lack of support is relevant to custody and would likely be a matter of record regardless of the support claim.

Judge WYNN dissenting.

Appeal by defendant from order entered 10 June 2002 by Judge Peter L. Roda in Buncombe County District Court. Heard in the Court of Appeals 12 November 2003.

Mary E. Arrowood for Plaintiff-Appellee.

Sutton & Edmonds, by John R. Sutton and April Burt Sutton for Defendant-Appellant.

ELMORE, Judge.

Jason N. (defendant), the biological father of J.L.N., born 2 July 1992, appeals from an award of custody to David N., the paternal grandfather, and his wife (plaintiffs). Defendant previously appealed the denial of his motion to dismiss, which appeal was dismissed as interlocutory. COA01-87, filed 16 October 2001.

In the custody order, the trial court found as fact that the minor child resided with and had been raised since the age of ten months by the plaintiffs. The trial court found that defendant was not active in

the child's life and did not attend events or sports programs or financially support his son. The trial court found:

> 18. That at the hearing on the second portion of the bifurcated trial, the minor child's therapist testified that in his opinion it would be contrary to the minor child's best interest to remove the child from the plaintiffs['] primary placement at this time.
>
> 19. That the plaintiffs and the defendant, [JASON N.], are both fit and proper to have [. . .] the care, custody, and control of the minor child, and it is in the best interest of the minor child that he continue to reside primarily with the plaintiffs and visit with the defendant, [JASON N.], on the following schedule: . . .

The trial court concluded as a matter of law:

> 3. That the facts set forth above constitute acts on behalf of defendant, [JASON N.], that are inconsistent with his preferred status as the biological parent of the minor child in that those acts are tantamount to abandonment, neglect, abuse or other acts inconsistent with natural parent's constitutionally protected interest as set forth in Petersen v. Rogers, 445 S.E.2d 901, 337 N.C. 397 (1994); Price v. Howard, 484 S.E.2d 528, 346 N.C. 68 (1997); et seq and therefore the "best interest of the child" test prescribed in N.C.G.S. 50-13.2(a) shall apply to this custody determination.
>
> 4. It is in the best interest of the minor child that he be placed in the joint custody and control of both parties, with the primary placement in the plaintiffs subject to the father's visitation as set forth above.

I.

"In a child custody case, the trial court's findings of fact are binding on this Court if they are supported by competent evidence, and its conclusions of law must be supported by its findings of fact." *Cantrell v. Wishon*, 141 N.C. App. 340, 342, 540 S.E.2d 804, 805 (2000). Further, "the findings and conclusions of the trial court must comport with our case law regarding child custody matters." *Cantrell*, 141 N.C. App. at 342, 540 S.E.2d at 806. This standard of review guides our consideration of defendant's appeal.

II.

[1] Defendant argues on appeal first that the trial court erred in awarding custody to a non-parent over the natural parent without first making findings of unfitness, neglect, or that the natural parent ever acted in a manner inconsistent with his constitutionally protected status as a parent.

Our Supreme Court has held that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994).

In the recent decision of *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003), our Supreme Court reversed the Court of Appeals and reinstated the order of the trial court in a case in which it held that the evidence did not support an adjudication of the father of the subject children being unfit. Although in the present case we are not asked to decide the sufficiency of the evidence, but only the sufficiency of the findings of fact to support the conclusions of law, *Owenby* is instructive on the constitutional interest of a natural parent. *Owenby* stated:

> the "Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000). This parental liberty interest "is perhaps the oldest of the fundamental liberty interests" the United States Supreme Court has recognized. *Id.* at 65, 147 L. Ed. 2d at 56. . . . Indeed, the protection of the family unit is guaranteed not only by the Due Process Clause, but also by the Equal Protection Clause of the Fourteenth Amendment and possibly by the Ninth Amendment. *Stanley v. Illinois*, 405 U.S. 645, 661, 31 L. Ed. 2d 551, 559 (1972).

Owenby v. Young, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003).

Considering then the importance of the constitutional protection of a parent's interest,"[t]he government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody . . . ." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001). (citing *Jolly v. Queen*, 264 N.C. 711, 715-16, 142 S.E.2d 592, 596 (1965)). A parent's child should not be placed "in the hands of a third person except upon convincing proof that the parent

is an unfit person to have custody of the child or for some other extraordinary fact or circumstance." *Id.* (citing 3 Suzanne Reynolds, Lee's North Carolina Family Law § 224 at 22:32 (5th ed. 2000)). "If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent would offend the Due Process Clause." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citing *Petersen*, 337 N.C. 397, 445 S.E.2d 901; *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 520; *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 862-63, 53 L. Ed. 2d 14, 46-47 (1977)). *See also Barger v. Barger*, 149 N.C. App. 224, 560 S.E.2d 194 (2002) (holding that a natural parent is properly awarded custody when found to be a fit parent.)

The trial court is required to make a finding that a natural parent is unfit before denying custody to that parent. *See Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003) (reversing the trial court's order denying reinstatement of appellant's visitation rights with his minor child because there was no finding of unfitness.)

In the case at bar, while the trial court did conclude as a matter of law that the acts of the defendant were "inconsistent with his constitutionally protected status," and were "tantamount to abandonment, neglect, abuse or other acts inconsistent with natural parent's constitutionally protected interest . . ." the trial court also found as fact that both the plaintiff and the defendant were "fit and proper" to have custody of the minor child. This finding of the natural father's fitness is inconsistent with the conclusion of law that he not be afforded his constitutional right to parent his child. Because this finding of fact does not support the trial court's conclusions of law, we remand for the trial court to make such findings as will support its conclusions.

The issue of whether the evidence supports a finding of fitness is not before us on appeal, so this opinion does not reflect a review of that issue.

III.

[2] Defendant next assigns error to the trial court's allowing the plaintiff to amend his complaint to add a claim for child support. Defendant argues that this amendment materially prejudiced him because it required him to deny a claim of child support while at the same time fighting for custody.

Section 1A-1, Rule 15(a) of our General Statutes provides that leave to amend shall be "freely given when justice so requires." The trial judge has broad discretion to permit amendments to pleadings. *See Dobias v. White*, 240 N.C. 680, 83 S.E.2d 785 (1954). The court's ruling is not reviewable on appeal absent a showing of abuse of discretion. *Mangum v. Surles*, 12 N.C. App. 547, 183 S.E.2d 839 (1971), *rev'd on other grounds*, 281 N.C. 91, 187 S.E.2d 697 (1972). The burden is upon the party objecting to the amendment to set forth the grounds for his objection and to establish that he will be prejudiced if the motion is allowed. *Vernon v. Crist*, 291 N.C. 646, 231 S.E.2d 591 (1977).

While we appreciate the precarious position of the defendant in trying to avoid child support payments while asserting his right to child custody, we do not consider that situation prejudicial, or likely to affect the outcome of the case. The defendant's lack of financial support of his child will be a relevant finding of fact in a trial court's consideration of custody issues, and will likely be a matter of record regardless of a child support claim. Because of defendant's failure to demonstrate prejudice, we hold that the trial court did not abuse its discretion in allowing the plaintiff's amendment of his complaint.

IV.

Defendant's two remaining assignments of error concern the trial court's denial of his motions for summary judgment and dismissal. Because the first assignment of error is dispositive, we do not reach these assignments.

Reversed and remanded.

Judge TIMMONS-GOODSON concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

I respectfully disagree with the majority's determination that the trial court's finding of unfitness is inconsistent with the conclusion of law that the father acted in a manner inconsistent with his constitutionally protected status as a parent. First, I believe a finding of fitness does not exclude a determination that the parent acted in a manner inconsistent with his constitutionally protected status as a parent. Second, the case law states disjunctively that natural parents may for-

feit their constitutionally protected status by a finding of either (1) unfitness, *or* (2) acting in a manner that is inconsistent with their constitutionally protected status. *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994); *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997). Thus, the case law recognizes that a finding of fitness does not preclude a determination that the parent has acted inconsistent with his or her constitutionally protected status.

> The Due Process Clause ensures that the government cannot unconstitutionally infringe upon a parent's paramount right to custody solely to obtain a better result for the child. As a result, the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody, *or* where the parent's conduct is inconsistent with his or her constitutionally protected status.

Adams v. Tessener, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (emphasis supplied).

> Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents.

Price, 346 N.C. at 79, 484 S.E.2d at 534-35.

In sum, unfitness is one basis upon which it can be concluded a parent has acted inconsistently with his or her constitutionally protected status as a parent. *See id.* (indicating that although unfitness, neglect and abandonment clearly constitute conduct inconsistent with a natural parent's protected status, other conduct, viewed on a case by case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents). In this case, the trial court determined that although the natural father was fit, his failure to provide financial support and to maintain involvement in his child's life constituted conduct inconsistent with his constitutionally protected status. Since the findings support this conclusion, I would uphold the trial court's award of joint custody to the natural father and grandparents.

STATE OF NORTH CAROLINA v. JEFFREY RAY HARRISON

No. COA03-84

(Filed 1 June 2004)

1. Sentencing— aggravating factors—consolidated counts—same elements as offenses

There was no error in the use of aggravating factors when sentencing a defendant for consolidated counts of forgery and other offenses. Although defendant contended that the two factors used to enhance the sentence were elements of the offenses, a consolidated judgment with equally classified offenses can be aggravated by any factor that is an element of one but not all of the offenses.

2. Sentencing— aggravating factor—sufficiency of evidence

There was sufficient evidence of an aggravating factor where the State summarized and the defendant stipulated to the factual basis of defendant's plea and the factor.

3. Sentencing— mitigating factor—completion of drug treatment—defendant's credibility

The trial court did not err by failing to adopt as a mitigating factor defendant's completion of drug treatment. Defendant produced no documentation, and there were discrepancies bearing on defendant's credibility. N.C.G.S. § 15A-1340.16(e)(16).

4. Sentencing— not disproportionate—30 felonies

Defendant's sentence was not disproportionate and did not constitute cruel and unusual punishment where he received 210-261 months as an habitual felon, pursuant to a plea bargain, for 30 felony offenses, including assault with a deadly weapon on a government official.

Appeal by defendant from judgment entered 29 May 2002 by Judge James R. Vosburgh in Beaufort County Superior Court. Heard in the Court of Appeals 30 October 2003.

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

Hosford & Hosford, P.L.L.C., by Sofie W. Hosford, for defendant-appellant.

CALABRIA, Judge.

Jeffrey Ray Harrison ("defendant") pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970) on 28 May 2002 in Beaufort County Superior Court on twelve counts each of forgery and uttering forged papers, five counts of having attained habitual felon status, one count of assault with a deadly weapon on a government official, one count of fleeing to elude arrest with a motor vehicle, one count of possession of a stolen vehicle, and three counts of obtaining property by false pretenses. Pursuant to defendant's plea bargain with the State, all counts were consolidated for judgment and defendant was sentenced as a habitual felon in the class C felony range. The court found no mitigating factors and two aggravating factors: the offense was committed for the purpose of avoiding or preventing a lawful arrest (the "first factor") and defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person (the "second factor"). The court determined defendant's prior record level as a level VI and imposed a sentence of a minimum term of 210 to a maximum term of 261 months in the North Carolina Department of Correction. Defendant appeals.

Prior to 11 June 2001, defendant stole a truck belonging to Donnie Baker. Inside the truck were various items of personal property, including a checkbook and tools. Defendant pawned the tools and presented numerous forged checks at several locations. At approximately 8:00 a.m. on 11 June 2001, defendant attempted to present another forged check at Food Lion. Food Lion employees recognized the check was forged and summoned officers from the Washington Police Department. A high-speed chase ensued, at times reaching speeds in excess of 100 mph. During his attempt to elude law enforcement, defendant tried to ram his vehicle into one driven by Officer Hails, who was involved in the pursuit, and forced him off the road. The chase commenced in Beaufort County and continued into Pitt County, where defendant abandoned the stolen vehicle. Defendant fled on foot to Martin County, where he was ultimately apprehended.

While the case was pending, defendant was incarcerated and overheard incriminating statements by another inmate concerning the attempted murder of a police officer. Defendant's cooperation regarding the incriminating statements he overheard prompted defendant's plea bargain with the State. Defendant appeals, asserting the trial court erred in (I) finding aggravating factors and imposing an aggravated sentence because such factors were elements of the

charged offenses; (II) finding aggravating factors where there was insufficient evidence to support them; (III) failing to find any mitigating factors; and (IV) imposing a cruel and unusual sentence.

I. Elements of the Charged Offense

[1] Defendant assigns error to the trial court's use of the two aggravating factors to enhance the sentence imposed on the grounds that the factors constituted elements of the offenses to which defendant pled guilty. Specifically, defendant contends the trial court erred because the first factor constitutes an element of the offense of fleeing to elude arrest and the second factor constitutes an element of the offense of assault with a deadly weapon on a law enforcement officer.

"Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation . . . ." N.C. Gen. Stat. § 15A-1340.16(d) (2003).

> [W]hen separate offenses of different class levels are consolidated for judgment, the trial judge is required to enter judgment containing a sentence for the conviction at the highest class. Accordingly, the trial judge is limited to the statutory sentencing guidelines, set out at N.C.G.S. § [15A-]1340.17(c), for the class level of the most serious offense, rather than any of the lesser offenses in that same consolidated judgment. The trial court may, however, depart from the appropriate sentencing guidelines for the most serious offense upon finding that aggravating or mitigating factors exist.

State v. Tucker, 357 N.C. 633, 637, 588 S.E.2d 853, 855 (2003). Aggravating factors found by the trial court and applied to the sentence entered on a consolidated judgment "necessarily only apply to the offense in the judgment which provides the basis for the sentencing guidelines." *Id.* Accordingly, "aggravating factors applied to the sentence for a consolidated judgment will only apply to the most serious offense in that judgment." *Id.*

Unlike *Tucker*, each of the offenses in the instant case were equally classified as class C felonies by virtue of defendant's status as a habitual felon. Accordingly, each offense is equally the highest classified offense in the consolidated judgment and each offense could provide the basis for the sentencing guidelines. Where multiple offenses are equally classified, we hold the consolidated judgment can be aggravated by any factor that is an element of one, but not all, of the offenses.

Although the findings in the judgment do not specify to which offense each aggravating factor applies, the transcript indicates the trial court found the assault was committed for the purpose of avoiding or preventing a lawful arrest. There is no error in the trial court's application of the first factor to this offense. Moreover, we note defendant asserts the second factor, that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, is an element of assault with a deadly weapon on a law enforcement officer, but it is not an element of the offense of fleeing to elude arrest, which had also been elevated to a class C offense. Accordingly, the court correctly found both of these aggravating factors, even though the judgments were consolidated, since each factor could apply to a co-equal highest class offense in the consolidated judgment.

II. Insufficient Evidence

[2] Defendant asserts there was insufficient evidence supporting the aggravating factors found by the trial court, and the trial court merely accepted the prosecutor's assertion that the factors existed. "Under the Structured Sentencing Act, the trial court must impose a sentence within the statutorily set presumptive range unless it determines that aggravating or mitigating factors warrant a greater or lesser sentence." *State v. Radford*, 156 N.C. App. 161, 164, 576 S.E.2d 134, 136 (2003) (citing N.C. Gen. Stat. § 15A-1340.16(a) (2001)). Deviation from the presumptive range is "in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a) (2003). The State bears the burden of proving, by a preponderance of the evidence, that an aggravating factor exists. *Radford*, 156 N.C. App. at 164, 576 S.E.2d at 136. Where the evidence supporting the existence of an aggravating factor consists merely of a prosecutor's assertion, the State has not carried its burden, and defendant is entitled to a new sentencing hearing. *Radford*, 156 N.C. App. at 164, 576 S.E.2d at 136-37. Where defendant, however, stipulates to the existence of an aggravating factor, the prosecutor's statements constitute adequate evidence. *State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 71 (1986).

Regarding the first factor, the State summarized and defendant stipulated to the factual basis for defendant's plea. This stipulated summary included evidence that defendant tried to ram into the vehicle driven by a pursuing officer "in [an] effort to elude law enforcement." Indeed, in responding to the State's request for this aggravating factor, defendant stated, "Your Honor, I believe that for

[the first factor], certainly what he said was correct but because that aggravating factor and some of the elements of one of the offenses and all of the offenses are consolidated, I would argue to the Court that we can't use that as an aggravating factor." We hold there was a preponderance of the evidence supporting the trial court's finding of this aggravating factor.

Regarding the second factor, we again note the State summarized and defendant stipulated to the pertinent facts supporting this factor. These facts include the following: defendant was involved in a high-speed chase beginning in Washington on Fifteenth Street and continuing at speeds in excess of 100 mph; defendant was chased by law enforcement across two counties in a car; and defendant's flight commenced around 8:00 a.m. on a weekday, which the court observed was "a busy time of day." Based on these facts, there was a preponderance of evidence supporting the trial court's finding of this aggravating factor, and this assignment of error is overruled.

III. Mitigating Factor

[3] Defendant next asserts the trial court erred in failing to adopt defendant's testimony concerning his completion of a drug treatment program while incarcerated in support of the following mitigating factor: "[t]he defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial." N.C. Gen. Stat. § 15A-1340.16(e)(16) (2003). Unlike aggravating factors, "the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." N.C. Gen. Stat. § 15A-1340.16(a).

Defendant offered testimony that he had taken a drug treatment program during his incarceration, that it was a "six-week intensive narcotics program," and that it was "under DART." Nonetheless, defendant could produce no documentation substantiating his testimony. In addition, the trial court noted that the DART program was, in actuality, a 90-day program. Moreover, defendant testified he "never had no [sic] violent crimes" but admitted on cross-examination that he had been convicted of assault with a deadly weapon on a government official and robbery. Finally, the trial court had before it twelve charges of forgery and uttering forged papers, three counts of obtaining property by false pretenses, and a prior record level indicating, *inter alia*, twenty-six previous convictions of obtaining property by false pretenses and three counts of uttering forged instruments, all of which bore upon defendant's truthfulness.

After the trial court observed the demeanor of the witness and noted the discrepancies in defendant's testimony, the court could find that defendant's self-serving testimony, bolstered only by his impeached credibility, did not constitute a preponderance of the evidence supporting a finding in mitigation that defendant had successfully completed a drug treatment program. This assignment of error is overruled.

IV. Cruel and Unusual Punishment

[4] Finally, defendant asserts the sentence imposed in the case *sub judice* is "so disproportionate to the charge that it results in an unconstitutional infliction of cruel and unusual punishment [and] violates the eighth and fourteenth amendments to the United States Constitution." Our state has "made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety." *Ewing v. Cal.*, 538 U.S. 11, 24, 155 L. Ed. 2d 108, 119 (2003). We have often reiterated our Supreme Court's holding that "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). In defendant's plea transcript, he acknowledged that he understood the charges attached to the plea transcript carried a total punishment of 1874 months or 156.17 years. Defendant received, pursuant to a plea bargain with the State, only 210 to 261 months in the North Carolina Department of Correction as a habitual felon for a total of thirty felony offenses, including an assault with a deadly weapon on a government official. In *State v. Hensley*, 156 N.C. App. 634, 577 S.E.2d 417, *disc. rev. denied*, 357 N.C. 167, 581 S.E.2d 64 (2003), we upheld an active sentence of 90 to 117 months based on a defendant's habitual felon status and the commission of one nonviolent substantive offense. We find no merit to defendant's assertion, and this assignment of error is overruled.

Affirmed.

Judge McGEE concurs.

Judge HUDSON concurs in the result.

IN RE: O.W.

No. COA03-941

(Filed 1 June 2004)

1. Child Abuse and Neglect— adjudication and disposition—consolidation

There was no error in consolidating an abuse and neglect adjudication and disposition. Even though different evidentiary standards apply at each stage, the proceedings are heard by a judge rather than a jury, and the judge is presumed to consider the evidence under the applicable standard.

2. Child Abuse and Neglect— statement of standard applied—sufficient

A trial court's statement in an abuse and neglect order that it reached its conclusions through clear, cogent, and convincing evidence was sufficient to meet the requirement of N.C.G.S. § 7B-807. There is no requirement about where or how such a recital of the standard should be included.

3. Child Abuse and Neglect— findings—not sufficient for review

An abuse and neglect adjudication was remanded where the court's findings were not sufficient for the Court of Appeals to determine that the adjudication was adequately supported by competent evidence. The court's findings must consist of more than a recitation of the allegations.

Appeal by respondent from judgment entered 13 December 2002 by Judge Herbert L. Richardson, in Robeson County District Court. Heard in the Court of Appeals 20 April 2004.

J. Hal Kinlaw Jr. for petitioner-appellee.

Janet K. Ledbetter for respondent-appellant.

STEELMAN, Judge.

Respondent, K.M., appeals the district court's adjudication and disposition order finding abuse and neglect of the minor child, O.W., born 28 March 2001.

Respondent-appellant ("respondent") is the natural mother and B.F. is the natural father of O.W. On 12 August 2001, the Robeson

County Department of Social Services (DSS) received a complaint from a "collateral source" that O.W. was being abused and neglected by her mother. The "collateral source" said respondent had been giving the child alcohol to drink and she had placed a plastic bag over the child's head. Due to these allegations, DSS removed the child from the home. Respondent claimed O.W.'s father made these allegations in order to avoid paying child support. DSS placed the child with its paternal grandmother.

DSS has extensive history with respondent. In 1992, DSS removed respondent's oldest daughter, K.W. from her care after respondent was incarcerated, and again in 1999 due to respondent's physical abuse of the minor child. In 2001, respondent's mother was removed from her daughter's home by DSS due to improper care.

In 1999, respondent underwent a psychological evaluation. At that time, Dr. Aiello diagnosed her as having borderline intellectual functioning, antisocial personality disorder, and episodic alcohol abuse, and she needed supervision and guidance in her care-taking responsibilities of her child. In 2001, respondent underwent another psychological evaluation by Dr. Aiello. Respondent provided Dr. Aiello with ample documentation that she had participated and completed all of the classes and programs DSS recommend. She also produced documentation showing DSS had closed her case in September 2001 regarding her oldest daughter. The results of respondent's 2001 psychological evaluation were greatly improved from the results of her 1999 evaluation. Dr. Aiello attributed these improvements to the therapeutic services she received subsequent to her 1999 evaluation. Dr. Aiello's evaluation indicated respondent no longer required reliance on a fully competent party to supervise her parental functions.

At all times respondent has denied the allegations that she gave alcohol to her child or that she ever placed a plastic bag over the child's head. During the adjudication and disposition hearing, none of the "collateral sources" appeared to testify as to what they were alleged to have witnessed.

After hearing the evidence presented at trial, the judge found O.W. was neglected and abused pursuant to N.C. Gen. Stat. § 7B-101(1), (15). Respondent appeals this determination.

[1] In her first assignment of error, respondent contends the trial court erred when it consolidated the adjudication and disposition hearings for evidentiary purposes.

To preserve a question for appellate review, a party must have presented the trial court with "a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." N.C. R. App. P. 10(b)(1). When Mr. Kinlaw, the attorney for DSS requested the adjudication and disposition hearings be consolidated, respondent did not object. Thus, respondent has failed to properly preserve this issue for appellate review. However, we exercise our authority under Rule 2 of the Rules of Appellate Procedure and address the merits of this argument. N.C. R. App. P. 2.

This Court has held that although adjudicatory and dispositional hearings require the application of different evidentiary standards at each stage, there is no requirement that the adjudicatory and dispositional hearings be conducted at two separate times for the purpose of terminating parental rights. *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 470 (1986). *See also*, *In re Dhermy*, 161 N.C. App. 424, 588 S.E.2d 555, 560 (2003).

We find this reasoning to be applicable to a determination of whether a child is abused or neglected. Just as a termination of parental rights proceeding involves a two stage process, so does a proceeding adjudicating whether a child is abused or neglected. *See White*, 81 N.C. App. at 85, 344 S.E.2d at 37 (noting that in a proceeding to terminate parental rights, petitioner must show the grounds for termination by clear, cogent and convincing evidence, while at the disposition stage, the court's decision regarding termination of parental rights is discretionary). In the adjudicatory phase of a hearing to determine if a child is abused or neglected, the petitioner is required to prove allegations of abuse or neglect by "clear and convincing evidence," N.C. Gen. Stat. § 7B-805 (2003), while in the disposition stage the court's decision as to the best interests of the child and its placement is discretionary. N.C. Gen. Stat. § 7B-901 (2003). Just as in *White*, we find no requirement in the statutes that the stages be conducted at two separate hearings, even though the trial court is required to apply different evidentiary standards at each stage of the proceedings. *White*, 81 N.C. App. at 85, 344 S.E.2d at 38. Additionally, since these proceedings are heard by a judge, and not a jury, "it is presumed . . . that the judge, having knowledge of the law, is able to consider the evidence in light of the applicable legal standard and to determine whether [there is evidence of abuse or neglect] before proceeding to consider evidence relevant only to the dispositional stage." *Id.* Thus, the trial court did not err in consolidating the two hearings.

[2] In her second assignment of error, respondent contends the trial court erred when it failed to recite the standard of proof the court relied on in its determination of abuse and neglect. N.C. Gen. Stat. § 7B-807 requires the trial court to affirmatively state that the allegations in the petition have been proven by clear and convincing evidence. N.C. Gen. Stat. § 7B-807 (2003). Failure by the trial court to state the standard of proof applied is reversible error. *In re Wheeler*, 87 N.C. App. 189, 193, 360 S.E.2d 458, 461 (1987). However, there is no requirement as to where or how such a recital of the standard should be included. In the trial court's order, it clearly states that it "CONCLUDES THROUGH CLEAR, COGENT AND CONVINCING EVIDENCE[.]" We find this to be sufficient to meet the requirement of N.C. Gen. Stat. § 7B-807. Therefore, this assignment of error is without merit.

[3] In respondent's third assignment of error, she contends the trial court erred when it failed to make ultimate findings of fact. N.C. Gen. Stat. § 7B-805 requires that the "adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-807(b) (2003). While petitioner is correct that there is no specific statutory criteria which must be stated in the findings of fact or conclusions of law, the trial court's findings must consist of more than a recitation of the allegations. *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon . . . ." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2003). Thus, the trial court must, through "processes of logical reasoning," based on the evidentiary facts before it, "find the ultimate facts essential to support the conclusions of law." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003). The resulting findings of fact must be "sufficiently specific" to allow an appellate court to "review the decision and test the correctness of the judgment." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

In the trial court's order it states "upon consideration of the evidence presented the Court finds the following facts": and lists facts numbered one through twenty. Of those twenty findings of fact, fifteen of those are a verbatim recitation of the facts stated in DSS's petition for abuse and neglect, some of which are unsupported by any evidence. For example, Findings of Fact Nos. 12-15 are not even really facts as they simply recite what some unknown source said:

> 12. That collaterals state that [B.F.] has a history of cocaine and crack use.
>
> 13. That collaterals also state that [B.F.] has a bad temper, he is inpatient, he hollers at the baby and slaps her on her hands.
>
> 14. That collaterals state that B.F. only wants the child, so he won't have to pay child support.
>
> 15. That collaterals stated that [the] paternal grandmother, states that she is unwilling to help to baby-sit the child while she is in her home.

A more appropriate example of an "ultimate finding of fact" would have been for the court to state that "B.F. has a history of cocaine and crack use" or that "B.F. has a bad temper, he is impatient, he hollers at the baby and slaps her on her hands," if it found these facts were true.

Another example where the trial court failed to make "ultimate findings" occurs in Findings of Fact Nos. 8 and 11, which state:

> 8. That on June 21, 2001, Robeson County DSS substantiated injurious environment on both of [respondent's] children after [respondent] pulled a knife on [K.W.'s] father during a visit with both children present. [Respondent] was under the influence of alcohol at the time.
>
> . . . .
>
> 11. That on August 16, 2002, a visit was held by [B.F.] at Dukes and Daisies Daycare for [respondent] and [O.W.]. Daycare staff stated that [respondent] smelled like alcohol and appeared to be unbalanced during the visit. The staff also stated that [respondent] heard a child cry at the daycare and became irritated and asked to end the visit after fifteen or twenty minutes.

In Finding of Fact No. 8, we are unable to tell whether the trial court found that the events occurred or if DSS substantiated an injurious environment based upon what someone told them. Furthermore, Finding of Fact 11 is not even really a finding of fact as it merely recites the testimony that was given by Selene Locklear, a Social Worker with DSS, who was simply reciting what the daycare had told DSS. And as we stated above, it is not the role of the trial court as fact finder to simply restate the testimony given.

Accordingly, the trial court's findings are not "specific ultimate facts," which are sufficient for this Court to determine that the adjudication of abuse and neglect is adequately supported by competent evidence. We remand this order to the trial court to make appropriate findings of fact, not inconsistent with this opinion. It is unnecessary for us to address the remainder of respondent's assignments or error.

AFFIRMED IN PART, REMANDED IN PART.

Judges WYNN and CALABRIA concur.

RANDY BROWN, PLAINTIFF v. COUNTY OF AVERY, DEFENDANT

No. COA03-805

(Filed 1 June 2004)

1. Trials— appeal from magistrate to district court—arbitration—trial de novo—dismissed—posture of case

A district court judge hearing defendant's appeal from a magistrate's judgment had the authority to dismiss the appeal when defendant did not appear and did not render its decision under a misapprehension of the procedural posture of the case. Although the case involved both an appeal from the magistrate to district court and trial de novo after court-ordered arbitration, the court here was dealing with defendant's appeal from the magistrate's judgment and was not hearing an appeal from the arbitrator's award.

2. Trials— continuance denied—no abuse of discretion

A district court judge did not abuse its discretion by denying a continuance, under the facts of the case, where defendant's attorney was scheduled for mandatory training in bankruptcy court.

Appeal by defendant from order entered 7 March 2003 by Judge William A. Leavell, III, District Court, Avery County. Heard in the Court of Appeals 30 March 2004.

Hall & Hall Attorneys At Law, P.C., by Douglas L. Hall, for Defendant.

Mr. Randy Brown, pro se.

WYNN, Judge.

Under N.C. Gen. Stat. § 7A-228(c), which governs appeals for trial de novo from a Magistrate's judgment in small claims actions, if "the appellant fails to appear and prosecute his appeal, the presiding judge may have the appellant called and the appeal dismissed; and in such case the judgment of the magistrate shall be affirmed." Defendant, Avery County, North Carolina, argues the trial court abused its discretion by denying Defendant's request for a continuance and committed plain error in dismissing Defendant's appeal from magistrate court. We disagree and affirm the trial court's order.

The pertinent facts indicate Plaintiff, Randy Brown, was terminated from his employment as an Avery County Deputy Sheriff on or about 1 February 2002. He was notified by letter that due to a new Avery County policy, he would not be compensated for unused vacation time. Thereafter, Plaintiff filed a complaint for money owed against Avery County, seeking $974.29 for the unused vacation time.

The procedural history indicates Plaintiff filed a complaint for money owed on 18 June 2002 in the Small Claims Division of the District Court of Avery County. A hearing was scheduled before an Avery County Magistrate on 26 June 2002. After Defendant did not appear, a judgment was entered in favor of Plaintiff on 26 June 2002. Defendant filed a notice of appeal for a trial *de novo* in District Court on 3 July 2002. The matter was scheduled for court-ordered arbitration on 17 September 2002.[1]

1. Pursuant to Rule 1(a) of the Rules for Court-Ordered Arbitration, "appeals from judgments of magistrates in which there is claim or there are claims for monetary relief not exceeding $15,000 total, exclusive of interest, costs and attorneys' fees, are subject to court-ordered arbitration." "If a party who has been notified of the date, time and place of the hearing fails to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear." Rule 3(j) of the Rules for Court-Ordered Arbitration. "The award shall be in writing, signed by the arbitrator and filed with the court within 3 days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later." Rule 4(a) of the Rules for Court-Ordered Arbitration. "Any party . . . who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties, on an approved form within 30 days

Although the record indicates both parties received notice of the arbitration in this case, Plaintiff failed to attend. After considering the evidence presented, the arbitrator entered an award in favor of Defendant and taxed costs to Plaintiff on 17 September 2002. Thereafter, pursuant to Rules for Court-Ordered Arbitration Rule 5(a), Plaintiff filed a request for trial *de novo* on 25 September 2002. Therefore, a judgment was not entered on the arbitrator's award.

The trial *de novo* was scheduled for the 16 December 2002 term of District Court. However, the record indicates defense counsel was going to be unavailable for the 16 December 2002 term of District Court; so, the trial court re-calendared this matter for 27 January 2003. At the opening of the 27 January 2003 term of court, Defendant did not appear and the trial court explained to Plaintiff that another matter had a peremptory setting and that Plaintiff's case would not be addressed that day. The matter was rescheduled to the 5 March 2003 term.

On 26 February 2003, Defendant moved for a continuance as defense counsel was scheduled to attend a mandatory training at the U.S. Bankruptcy Court in Asheville, North Carolina on that same date. On 5 March 2003, defense counsel's secretary presented the trial court with a letter from defense counsel explaining the scheduling conflict and asking for either a continuance or that the matter be held open until that afternoon. The trial court denied Defendant's request and, pursuant to N.C. Gen. Stat. § 7A-228(c), dismissed Defendant's appeal, struck his pleadings and motions and affirmed the magistrate court's 26 June 2002 judgment in favor of Plaintiff. Defendant appeals.

This appeal presents issues of: (1) whether the trial judge acted under a misapprehension of the procedural posture of this case by dismissing Defendant's appeal from the Magistrate when Defendant had prevailed before the Arbitrator, and (2) whether the trial court abused its discretion by denying Defendant a continuance.

[1] In its order, the trial court dismissed Defendant's appeal from magistrate Court, struck his pleadings and motions and affirmed the Magistrate's Judgment in favor of Plaintiff, stating:

after the arbitrator's award has been filed." Rule 5(a) of the Rules for Court-Ordered Arbitration. "If the case is not terminated by agreement of the parties, and no party files a demand for trial de novo within 30 days after the award if filed, the clerk or the court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action." Rule 6(b) of the Rules for Court-Ordered Arbitration.

> this court has the authority, pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, and under the facts previously stated, to dismiss the Defendant's appeal from Small Claims Court, on the Court's motion to strike the Defendant's pleadings and Motions and to affirm the Judgment of the magistrate, based on the Defendant's failure to prosecute his appeal.

Pursuant to Rule 41(b), "for failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him."

After Defendant filed its 2 July 2002 notice of appeal from the 26 June 2002 Judgment entered in Magistrate Court, this case was scheduled for court-ordered arbitration on 17 September 2002. After Plaintiff failed to appear, an award was entered in favor of Defendant based upon consideration of Defendant's evidence. A week later, on 25 September 2002, Plaintiff filed a written demand for a trial de novo pursuant to Rule 5 of the Rules for Court-Ordered Arbitration. In this context, "a trial de novo is not an 'appeal,' in the sense of an appeal to the North Carolina Court of Appeals from Superior Court or District Court, from the arbitrator's award." Rule 6 of the Rules for Court-Ordered Arbitration, "Comments." Rather, in non-binding arbitration, if a party is dissatisfied with an arbitrator's award, they may have a trial de novo as of right. *See* Rule 5(a) of the Rules for Court-Ordered Arbitration; *see also* N.C. Gen. Stat. § 7A-37.1(b). Thus, on 5 March 2003, the district court was not scheduled to hear Plaintiff's appeal from the Arbitrator's award; rather, the trial court was hearing Defendant's appeal from the magistrate's judgment. Accordingly, the trial court did not render its decision under a misapprehension of the procedural posture of this case and had authority pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) and N.C. Gen. Stat. § 7A-228(c) to dismiss Defendant's appeal.

[2] Nonetheless, Defendant argues the trial court abused its discretion in denying Defendant's motion for a continuance. Continuances are granted "only for good cause shown and upon such terms and conditions as justice may require." N.C. Gen. Stat. § 1A-1, Rule 40(b). "Continuances are generally not favored, and the burden of showing sufficient grounds for a continuance is upon the party seeking it. Motions to continue are addressed to the sound discretion of the trial judge, who must determine whether the grant or denial of a continuance will be in furtherance of substantial justice. In making that determination, the trial judge must consider, in addition to the grounds for the motion, whether the moving party has acted with dili-

gence and in good faith, and may consider facts of record as well as facts within his judicial knowledge. The trial court's decision whether to grant or deny a motion to continue may be reversed only for a manifest abuse of discretion. An abuse of discretion occurs where the ruling of the trial court could not have been the result of a reasoned decision." *May v. City of Durham*, 136 N.C. App. 578, 581-82, 525 S.E.2d 223, 227 (2000).

As indicated in the General Rules of Practice for the Superior and District Courts Rule 3, "when an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Superior Court, District Court, Magistrate's Court." In this case, defense counsel requested a continuance because he needed to attend a mandatory training session in order to file documents in other court cases. However, as stated, whether to grant a continuance is within the sound discretion of the trial court and we conclude Defendant has not shown an abuse of discretion. Indeed, "attorneys, under the guise of having business requiring their presence elsewhere, ought not to be allowed to delay, defeat or prevent a litigant from having his case tried or being heard on a motion at some reasonably suitable and convenient time." *Jenkins v. Jenkins*, 27 N.C. App. 205, 206-07, 218 S.E.2d 518, 519 (1975) (affirming the trial court's refusal to grant a continuance where an attorney was handling a trial in superior court). Under the facts of this case, the record does not show that the trial court abused its discretion by denying Defendant's request for a continuance.

Affirmed.

Judges HUNTER and STEELMAN concur.

STATE OF NORTH CAROLINA v. ANTHONY JOHN BENARDELLO, DEFENDANT

No. COA03-1011

(Filed 1 June 2004)

1. Conspiracy— one side of telephone conversation—insufficient evidence

There was insufficient evidence of a conspiracy to shoot into occupied property and to commit first-degree murder where one side of a telephone conversation involved a possible agreement to

resolve a money problem but did not mention shooting, killing, or violence. There was nothing to support an inference that the other person on the telephone even knew about defendant's plan to use violence.

2. Evidence— other offenses and acts—no plain error

Given the strength of the other evidence, there was no plain error in a prosecution for soliciting shooting into occupied property in the admission of testimony about defendant's threats to kill a third party and to engage in a swap of drugs for stolen goods.

3. Evidence— other offenses and acts—no plain error

There was no plain error in a prosecution for soliciting shooting into occupied property in admitting without a limiting instruction testimony about defendant's intent to have someone shot. Any error was not so prejudicial that it resulted in a miscarriage of justice.

Appeal by defendant from judgments entered 26 March 2003 by Judge Mark E. Klass in the Superior Court in Cabarrus County. Heard in the Court of Appeals 29 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General E. Clementine Peterson, for the State.

Leslie C. Rawls, for defendant-appellant.

HUDSON, Judge.

At the 17 March 2003 session of criminal superior court, a jury convicted defendant Anthony John Benardello of one count of Conspiracy to Commit First-Degree Murder, two counts of Conspiracy to Commit Shooting into Occupied Property, and two counts of Solicitation to Commit Shooting into Occupied Property. The jury acquitted defendant of a second charge of Conspiracy to Commit Murder. The court imposed a consolidated sentence of twelve to fifteen months for the two solicitation charges, a consolidated sentence of nineteen to twenty-three months for the two conspiracy to shoot into occupied property charges, and a concurrent sentence of 151 to 191 months for conspiracy to commit first degree murder. Defendant appeals. We reverse his conspiracy convictions and affirm his solicitation convictions.

The evidence tended to show that defendant had loaned fifty dollars to Wesley Russell ("Russell") in early 2002. At the time, Russell lived with his mother, Peggy Russell. Russell was subsequently unable to repay the loan, and defendant declared he would begin charging fifty dollars per day in interest, eventually demanding a total repayment of $1600. Defendant then demanded that Russell sell Oxycontin pills to repay the debt. Russell took the pills to the home of his aunt, Louann Linker ("Linker"), who forbade Russell to sell the drugs. Linker then called defendant and told him to come and pick up the pills. Defendant later made threatening statements to both Linker and Russell's mother.

Defendant next told Shawn Llewellyn, an associate, that he wanted to have someone "shoot up" the Russell and Linker houses and to "whack" Russell. Llewellyn notified the Cabarrus County Sheriff's Department and helped Detective Derek Waller set up a meeting with defendant during which Detective Waller would pose as a hit man. Detective Waller wore a hidden wire that recorded audio and video of the entire meeting, which occurred in a restaurant. Defendant told the detective and Llewellyn about his money problems and anger at Linker and the Russells, and about his various criminal endeavors and experiences. Then defendant received a brief cell phone call. Defendant's side of the conversation was recorded and follows, in its entirety:

> Yes sir. Uhh, I am working on your money problem right now. I have somebody who is going to take care of it and there is no need to plan anything. Okay, sir. When I get the money I'll pass it up. No problem sir. No sir. I'll check with you tomorrow, alright sir? Alright. [hangs up]
>
> The boss. We all answer to somebody.

[1] The State contends that this evidence revealed three separate agreements with the unknown third party who called defendant's cell phone to murder Russell and to shoot into the Linker and Russell homes. Defendant argues that this single, brief one-sided phone conversation is insufficient to support even a single conspiracy conviction, and that the evidence instead reveals only solicitation. We agree.

This Court has previously addressed the difference between solicitation and conspiracy:

> Solicitation is complete when the request to commit a crime is made, regardless of whether the crime solicited is ever commit-

> ted or attempted. Conspiracy, on the other hand, is the agreement of two or more persons to do an unlawful act or to do a lawful act by an unlawful means. The reaching of an agreement is an essential element of conspiracy. It is certainly possible to solicit another to commit a crime without the agreement essential to a conspiracy ever being reached.

State v. Richardson, 100 N.C. App. 240, 247, 395 S.E.2d 143, 148, *appeal dismissed and rev. denied* 327 N.C. 641, 399 S.E.2d 332 (1990) (internal citations omitted). Here, the only evidence pointing to a possible conspiracy is the above-quoted portion of a cell phone call, which supports inferences about a possible agreement to resolve a money problem. There is no mention of shooting, killing or violence of any kind, and thus nothing to support an inference that the unknown person on the phone even knew about defendant's plan to use violence, much less that he or she agreed to it.

While conspiracy can be proved by inferences and circumstantial evidence, it "cannot be established by a mere suspicion, nor does a mere relationship between the parties or association show a conspiracy." *State v. Massey*, 76 N.C. App. 660, 662, 334 S.E.2d 71, 72 (1985). Instead "[i]f the conspiracy is to be proved by inferences drawn from the evidence, such evidence must point unerringly to the existence of a conspiracy." *Id.* The evidence here does not point unerringly toward conspiracies to commit murder or to shoot into occupied properties and is insufficient to support convictions on those charges.

[2] Defendant next argues that it was plain error for the court to admit testimony about defendant's alleged threats to kill a third party and to engage in a swap of drugs for stolen goods with Detective Waller. We disagree.

"Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to appellant of a fair trial." *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996). A defendant must show "that absent this error, the jury would have probably reached a different result." *State v. Morganherring*, 350 N.C. 701, 722, 517 S.E.2d 622, 634 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322, 120 S. Ct. 1432 (2000). Given the strength of the other evidence that defendant solicited the shooting into an occupied property,

we are not persuaded that admission of this evidence was a fundamental error without which the jury would have reached a different result.

[3] Defendant also argues that it was plain error to admit without a limiting instruction Shawn Llewellyn's comments to Detective Waller about defendant's supposed intention to have someone shot. The testimony from Detective Waller was offered to provide background to the restaurant meeting between defendant, Llewellyn, and the detective. Under the plain error standard discussed in detail above, we conclude that this admission, if error, was not so prejudicial that it resulted in a miscarriage of justice or in the denial of a fair trial to appellant.

Conclusion

For the foregoing reasons, we reverse defendant's three conspiracy convictions and affirm his conviction for solicitation.

Reversed in part and affirmed in part.

Judges McCULLOUGH and LEVINSON concur.

STATE OF NORTH CAROLINA v. VELMA M. EDGERSON

No. COA03-1344

(Filed 1 June 2004)

Probation and Parole— modification—no right to appeal

An appeal was dismissed where defendant admitted violating her probation, the court modified the terms of her probation, and counsel submitted an Anders brief. Although a defendant may appeal by statute when the trial court activates a sentence or imposes special probation, neither occurred in this case. N.C.G.S. § 15A-1347.

Appeal by defendant from order dated 6 December 2002 by Judge Judson D. DeRamus, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 10 May 2004.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Brannon Strickland, PLLC, by Anthony M. Brannon, for defendant-appellant.

McGEE, Judge.

Defendant pled guilty to misdemeanor larceny on 22 October 2001 and was sentenced to forty-five days of imprisonment. The sentence was suspended and defendant was placed on supervised probation for eighteen months.

A probation violation report was filed on 12 September 2002 alleging that defendant had failed to complete any community service, had failed to make payments toward her monetary obligation, and had missed scheduled appointments with her probation officer. Defendant admitted violating her probation, and the trial court found that defendant willfully violated two of the conditions of her probation by failing to complete community service and by failing to pay her monetary obligation. The trial court continued defendant's probation and modified the terms. The trial court ordered defendant to (1) serve six months of intensive supervised probation; (2) complete 100 hours of community service within six months; (3) pay costs associated with her probation violation; and (4) submit to mental health evaluation, counseling and treatment. Defendant appeals.

Counsel appointed to represent defendant has been unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has also shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of her right to file written arguments with this Court and by providing her with the documents necessary for her to do so. Defendant has not filed any written arguments on her own behalf with this Court and a reasonable time in which she could have done so has passed.

The State has filed a motion to dismiss the appeal. The State argues that there is no right to appeal from an order modifying probation. We agree.

" 'In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute.' " *State v. Jamerson*, 161 N.C. App. 527, 528, 588 S.E.2d 545, 546 (2003) (quoting *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002)). N.C. Gen. Stat. § 15A-1347 (2003) provides that:

> When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant may appeal under G.S. 7A-27.

Defendant's sentence was neither activated nor was it modified to "special probation." *See* N.C. Gen. Stat. § 15A-1344(e) (2003). Defendant therefore has no right to appeal.

We further deny defendant's petition for writ of certiorari. This Court has stated that:

> Where a defendant has no appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari. However, our appellate rules limit our ability to grant petitions for writ of certiorari to cases where: (1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) the trial court denied defendant's motion for appropriate relief. In considering appellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21.

State v. Jones, 161 N.C. App. 60, 63, 588 S.E.2d 5, 8 (2003) (citations omitted); *see also* N.C. Gen. Stat. § 15A-1444(e) (2003). Accordingly, we are without authority to review, either by right or by certiorari, the trial court's modification of defendant's probation.

Dismissed.

Chief Judge MARTIN and Judge BRYANT concur.

CHRISTOPHER R. HOWLETT, AND RICHARD B. WILLIAMS, PLAINTIFFS v. CSB, LLC, AND CARDINAL STATE BANK, DEFENDANTS

No. COA03-746

(Filed 15 June 2004)

1. Statute of Frauds— proposed lease and cover letter— mutual assent not present

A proposed lease and a cover letter did not satisfy the statute of frauds and the trial court did not err by granting summary judgment for defendants. The letter on its face showed that defendants had not yet agreed to the lease; although plaintiffs argued that an agreement was subsequently reached, a writing cannot comply with the statute of frauds when it predates the agreement of which it is the memorial.

2. Discovery— business plan—not relevant to existence of lease

A business plan was not relevant to the dispositive issue of whether the parties entered into a lease enforceable under the statute of frauds, and the trial court did not abuse its discretion by denying a motion to compel production of the plan.

Appeal by plaintiffs from order entered 18 June 2002 by Judge Wade Barber and from judgment entered 23 August 2002 by Judge W. Osmond Smith, III in Orange County Superior Court. Heard in the Court of Appeals 3 March 2004.

Stark Law Group, P.L.L.C., by Thomas H. Stark, for plaintiffs-appellants.

Kennon, Craver, Belo, Craig & McKee, P.L.L.C., by Joel M. Craig and Erin M. Locklear, for defendants-appellees.

GEER, Judge.

Plaintiffs Christopher R. Howlett and Richard B. Williams appeal from the trial court's judgment granting defendants' motion for a directed verdict based on the statute of frauds and dismissing this action for breach of a commercial lease. We hold that because the writings relied upon by plaintiffs do not include language indicating an intention by defendants to be bound, plaintiffs' evidence of an oral agreement to enter into a lease was insufficient to satisfy the statute

of frauds, and the trial court therefore did not err in granting defendants' motion for a directed verdict.

Facts

Plaintiffs' evidence tended to show the following. Plaintiffs Howlett and Williams are engaged in the real estate business in the Research Triangle area. At some time prior to the summer of 2000, Williams' friend John Mallard informed him that he was planning to charter a new bank. Defendant CSB, LLC was formed to organize the new bank, to be called Cardinal State Bank (defendants are collectively identified as "CSB").

During the summer of 2000, plaintiffs discovered a piece of property for sale on the corner of Estes Drive and Franklin Street in Chapel Hill ("the property") that they thought would be an excellent location for Mallard's new bank. After plaintiffs entered into a contract to purchase the property on 23 October 2000, Williams contacted Mallard to inquire whether he would be interested in opening a CSB branch on the property. Mallard expressed interest and told Williams not to market the property to anyone else. In anticipation of leasing the property to CSB, Williams and Howlett did not attempt to market the property to other potential lessees.

During the fall of 2000 and continuing into January 2001, Mallard and plaintiffs engaged in lease negotiations in a series of letters. Each of the three letters sent by Mallard to plaintiffs with proposed lease terms stated: "Nothing in this letter shall be considered to obligate CSB, LLC, or its nominee, to enter into a lease agreement for the premises or to purchase the same. Only the terms of a subsequently written lease agreement shall obligate any of the parties."

On 17 January 2001, Mallard sent another letter to plaintiffs along with an enclosure entitled "Lease Agreement" providing for a five-year lease. The letter stated:

> Enclosed please find a copy of the proposed Lease Agreement for the above referenced property wherein CSB, LLC, or its nominee, is the Tenant. As a condition of our signing this Lease Agreement, we propose that:
>
> A. You waive the payment of the Ten Thousand and No/100 Dollars ($10,000.00) non-refundable deposit that was to be paid to you on or about March 1, 2001; and

> B. You agree to pay Fifty Percent (50%) of our "due diligence" costs incurred in inspecting the leased property and in determining its satisfactory condition for use as a bank.
>
> Given the many terms in the Lease Agreement that favor the Landlord's position, we think that the above are reasonable requests prior to our agreeing to execute the said Lease.

On 25 January 2001, the parties met to discuss the proposed lease and came to an agreement as to the conditions specified in the above letter. At the meeting, Mallard shook Williams' hand and said, "We have an agreement." Mallard, however, later informed Williams that the board of CSB had decided not to lease the property due to concern over possible underground storage tanks and the parties never executed the lease agreement.

On 11 July 2001, plaintiffs filed a complaint asserting two claims: (1) breach of a commercial lease; and (2) negligent misrepresentation during the lease negotiations. Defendants filed an answer on 22 August 2001, raising various defenses including the statute of frauds. During discovery, plaintiffs filed a motion to compel production of documents that Judge Wade Barber denied on 18 June 2002. The case went to trial before a jury at the 19 August 2002 civil session of Orange County Superior Court with Judge W. Osmond Smith, III presiding. At the conclusion of plaintiffs' evidence, defendants moved for a directed verdict on both of plaintiffs' claims. On 23 August 2002, Judge Smith granted the motion and entered judgment dismissing the lawsuit with prejudice. Plaintiffs filed notice of appeal from the judgment on 9 September 2002.

Standard of Review

The purpose of a motion for a directed verdict pursuant to N.C.R. Civ. P. 50(a) is to test the legal sufficiency of the evidence to take a case to the jury. *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 84, 557 S.E.2d 176, 179 (2001), *disc. review denied*, 355 N.C. 283, 560 S.E.2d 795 (2002). "Accordingly, a defendant is not entitled to a directed verdict unless the court, after viewing the evidence in a light most favorable to the plaintiff, determines the plaintiff has failed to establish a *prima facie* case or right to relief." *Id.* If there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied. *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580-81, (1983). Conflicts and inconsistencies in the evidence are to be resolved in

favor of the non-moving party. *Davis & Davis Realty Co. v. Rodgers*, 96 N.C. App. 306, 308-09, 385 S.E.2d 539, 541 (1989), *disc. review denied*, 326 N.C. 263, 389 S.E.2d 112 (1990).

This Court reviews a trial court's order granting a motion for directed verdict *de novo*. *Denson v. Richmond County*, 159 N.C. App. 408, 411-12, 583 S.E.2d 318, 320 (2003). This Court must affirm the ruling of the trial court if the directed verdict was proper for any of the grounds argued by the defendant in the trial court. *Cobb v. Reitter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992) (appellate court can properly affirm directed verdict only on a ground stated in defendant's motion at trial).

Discussion

[1] With respect to the breach of contract claim, defendants argued to the trial court, in support of their motion for directed verdict, that plaintiffs had not satisfied the statute of frauds and that conditions precedent to a valid agreement had not been met. Plaintiffs contend on appeal that they presented sufficient evidence on both points to take the case to the jury. Because we hold that the trial court properly directed a verdict based on the statute of frauds, we need not reach the issue of conditions precedent. *Id.* ("We must affirm the ruling of the trial court if the directed verdict was proper for either of the two grounds argued by the defendant in the trial court.").

North Carolina's statute of frauds provides in its relevant portion:

> All . . . leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

N.C. Gen. Stat. § 22-2 (2003). As this Court has explained, the statute of frauds' requirement of a writing is satisfied as follows:

> If all essential elements of a contract to convey or lease land have been agreed upon by the parties and are contained in some writing or memoranda, signed by the party to be charged or his authorized agent, then there can still be a valid, binding contract to convey or lease land, even if there is no agreement on other non-essential terms. Furthermore, an enforceable lease or conveyance of land need not be set out in a single instrument, but may arise from a series of separate but related letters or

> other documents signed by the person to be charged or his authorized agent.

Satterfield v. Pappas, 67 N.C. App. 28, 35, 312 S.E.2d 511, 515-16 (internal citations omitted), *disc. review denied*, 311 N.C. 403, 319 S.E.2d 274 (1984). In short, the required writing may be composed of more than one document and need only set forth the contract's essential terms. As part of the required essential terms, however, the writing or writings must show the intent and obligation of the party to be bound to the contract. *Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.*, 124 N.C. App. 383, 388, 477 S.E.2d 262, 265 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 163 (1997).

Plaintiffs contend that although the parties had not executed a written lease, the 17 January 2001 cover letter prepared and signed by Mallard, to which a "proposed Lease Agreement" for a five-year lease was attached, constituted a memorandum sufficient to satisfy the statute of frauds. Defendants counter that plaintiffs have not produced a writing (or combination of writings) signed by defendants documenting a mutuality of assent and an intent to be bound. We find this Court's decisions in *Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.*, 124 N.C. App. 383, 388, 477 S.E.2d 262, 265 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 163 (1997) and *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 84, 557 S.E.2d 176, 179 (2001), *disc. review denied*, 355 N.C. 283, 560 S.E.2d 795 (2002) cited by defendants, materially indistinguishable and therefore controlling.

In *Computer Decisions*, 124 N.C. App. at 385-86, 477 S.E.2d at 263-64, representatives of the parties met to discuss entering into a lease and, after reaching a verbal agreement as to the major terms, the defendant's vice-president told the plaintiff's president that they had a deal. To serve as the basis for a draft lease, the defendant lessor then created a written internal document signed by two vice presidents and specifying the material terms. The parties continued to negotiate over non-essential terms and to exchange drafts of proposed lease agreements. The parties ultimately never executed a final lease and the defendant leased the premises to another party. The plaintiff lessee sued for breach of contract. This Court held that the internal form did not satisfy the statute of frauds:

> We find the internal request form relied upon by plaintiff insufficient to satisfy the statute of frauds . . . [The form] requests creation of a draft lease and sets out the terms to be included. It is signed by two Rouse vice presidents, and includes the name of

> the tenant, description of the premises, rent, lease term, and additional provisions. *However, there is no indication, from the face of the document, that the parties made an agreement to be bound. This writing fails to show the essential elements of a contract.*
>
> *We also hold that the 18 December 1992 draft lease, either alone or combined with the internal form, is insufficient under the statute of frauds as it too fails to contain evidence of contract formation.* Since the alleged oral lease agreement, even if proven to exist, is unenforceable under the statute of frauds, the trial court did not err in granting summary judgment on plaintiff's claim for breach of lease.

Id. at 388, 477 S.E.2d at 265 (internal citation omitted; emphasis added).

Similarly, in *B & F Slosman*, 148 N.C. App. at 85, 557 S.E.2d at 179, the defendant's employee prepared and signed a "Negotiation Summary" incorporating the terms of the plaintiff's offer, but the parties never executed a written lease. Although the plaintiff contended that the summary constituted a memorandum sufficient to satisfy the statute of frauds, this Court disagreed:

> Our review of the "Negotiation Summary" reveals that it simply outlined the various stages in the negotiation process and *does not include any language signifying an intention on the part of defendant to be legally bound to a five-year lease.* Therefore, the "Negotiation Summary" lacks the mutuality of agreement necessary for the formation of a contract.

Id. (emphasis added).

In this case, even though the 17 January 2001 cover letter signed by Mallard and attached proposed lease agreement contain certain essential lease terms, the documents do not manifest an intent by defendants to be legally bound. The letter refers to the enclosed "*proposed* Lease Agreement" and proposes additional terms "[a]s a condition of [CSB's] signing this Lease Agreement." (Emphasis added.) Finally, the letter closes with the statement that "we think that the above are reasonable requests *prior to our agreeing to execute the said Lease.*" (Emphasis added.) The language of the letter does not evidence the mutuality of assent and intention to be bound necessary to comply with the statute of frauds. To the contrary, it shows on its face that defendants had not yet agreed to enter into the lease.

Although plaintiffs urge that they subsequently reached agreement on all of the terms, the 17 January 2001 letter and attached proposed lease cannot serve as a "memorandum" of any later agreement that the parties may have reached during the 25 January 2001 meeting. A writing cannot comply with the statute of frauds when it predates the agreement that it is purportedly memorializing. As our Supreme Court has explained, "It is not necessary . . . that a writing be signed at the time a contract is made. 'The writing is not the contract; it is the party's admission that the contract was made.' It is sufficient if *subsequent to the contract* a memorandum thereof is reduced to writing and signed by the party to be charged." *Millikan v. Simmons*, 244 N.C. 195, 199-200, 93 S.E.2d 59, 62-63 (1956) (quoting 9 John H. Wigmore, *Evidence* § 2454, at 175 (3d ed.); emphasis added).

The cases cited by plaintiffs do not require a different result. In each of those cases, the plaintiff had offered evidence that the parties had actually entered into a written contract. None of those cases involved a plaintiff's failure to present evidence of a writing indicating an intent by the defendant to be bound by the contract. *See Pee Dee Oil Co. v. Quality Oil Co.*, 80 N.C. App. 219, 223, 341 S.E.2d 113, 116 (where plaintiff's evidence tended to show that parties entered into a written contract, statute of frauds was satisfied because each party signed a writing that met its requirements), *disc. review denied*, 317 N.C. 706, 347 S.E.2d 438 (1986); *House v. Stokes*, 66 N.C. App. 636, 638, 311 S.E.2d 671, 673 ("There is no question that the contract in this case was in writing and signed by all the parties. The question is whether the contract was patently ambiguous, and, therefore, void under the statute of frauds."), *cert. denied*, 311 N.C. 755, 321 S.E.2d 133 (1984); *Mezzanotte v. Freeland*, 20 N.C. App. 11, 16, 200 S.E.2d 410, 414 (1973) (evidence was undisputed that parties had signed a written contract that was sufficient to satisfy statute of frauds when taken together with an attachment containing an adequate description of property), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974).

In sum, plaintiffs failed to present sufficient evidence to avoid the statute of frauds. Accordingly, the trial court properly granted defendants' motion for a directed verdict as to plaintiffs' breach of contract claim.

Plaintiffs also assign error to the trial court's directed verdict as to their claim for negligent misrepresentation. This claim, brought in the alternative to the claim for breach of a lease, was based on

Mallard's representation to plaintiffs that he did not need the CSB board's approval to enter into a lease agreement on behalf of CSB. Plaintiffs advance a very narrow argument on appeal, arguing that "[i]f the breach of lease claim were found not to stand due to an authority issue, these facts should have been submitted to the jury for determination as an alternative claim for negligent misrepresentation." Since our resolution of plaintiffs' breach of contract claim does not turn on an authority issue, we need not address this assignment of error.

[2] Finally, plaintiffs assign error to the trial court's denial of their motion to compel production of documents. During discovery, plaintiffs requested production of "[a]ny and all documents referring to, constituting or comprising the 'business plan' " of CSB. Defendants objected on the ground that the request sought proprietary and confidential business information irrelevant to the action and not reasonably calculated to lead to admissible evidence. The trial court denied plaintiffs' motion to compel production of the business plan documents.

"Under the rules governing discovery, a party may obtain discovery concerning any unprivileged matter as long as relevant to the pending action and reasonably calculated to lead to the discovery of admissible evidence." *Wagoner v. Elkin City Schools' Bd. of Educ.*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994). A motion to compel production of documents is committed to the trial court's sound discretion and the trial court's ruling will not be reversed absent an abuse of that discretion. *Id.* "An abuse of discretion occurs only when a court makes a patently arbitrary decision, manifestly unsupported by reason." *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994).

Plaintiffs argue on appeal that the request for the business plan was "interposed for the purpose of obtaining full disclosure of CSB's state of mind at the time it notified Plaintiffs that it did not intend to abide by the lease agreement." We need not decide whether this purpose was relevant to plaintiffs' causes of action generally since plaintiffs do not demonstrate that the business plan was relevant to the question ultimately dispositive here: whether a contract enforceable under the statute of frauds existed. In the absence of a showing that the discovery sought was relevant to that question, any error in denying plaintiffs' motion to compel was harmless.

No error.

Chief Judge MARTIN and Judge HUDSON concur.

STATE OF NORTH CAROLINA v. NATHAN SHAW, DEFENDANT

No. COA03-917

(Filed 15 June 2004)

1. Aiding and Abetting— voluntary manslaughter—intent

Defendant could properly be convicted for aiding and abetting voluntary manslaughter even though defendant argues that aiding and abetting requires specific intent to commit the underlying crime whereas voluntary manslaughter is a general intent crime, because: (1) defendant concedes that North Carolina has long held that an aider and abettor can be liable for voluntary manslaughter; (2) aiding and abetting is not a crime separate and apart from the underlying offense, but rather it is a theory upon which a person's culpability for the underlying offense may be based; and (3) depending upon the type of criminal intent required to consider an offender culpable for the underlying offense, an aider and abetter, like any other principal to an offense, may develop either specific or general intent.

2. Robbery— common law—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of common law robbery which was based on the taking of both money and marijuana from the victim's person and presence, because: (1) viewed in the light most favorable to the State, the evidence is sufficient to create an inference that defendant intended to aid, encourage, or assist his coparticipant in taking money from the victim's person; (2) the evidence showed the victim placed marijuana into a vase on defendant's porch for safekeeping while he visited defendant's house, and defendant took the marijuana and moved it into a hiding place in the garage while the victim was being assaulted by a coparticipant; and (3) even though defendant made the statement about the taking from the presence of the victim while defendant was in police custody, there was substantial cor-

roborating evidence to support the essential elements embraced in defendant's statement.

Appeal by defendant from judgments entered 31 October 2002 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 26 April 2004.

Roy A. Cooper, III, Attorney General, by Douglas W. Corkhill, Assistant Attorney General, for the State.

Rudolf, Maher, Widenhouse & Fialko, by Andrew G. Schopler, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged, in proper bills of indictment, with second degree murder and common law robbery. He appeals from judgments imposing active sentences entered upon his convictions by a jury of voluntary manslaughter and common law robbery. We find no error.

The State's evidence at trial tended to show the following: On 3 October 2001, seventeen-year-old defendant Nathan Shaw invited his neighbor, co-defendant Ronnie Duncan, to spend the night at his house. The next morning, defendant invited another neighbor, Adam Mace, over to the house. Mace arrived with a shopping bag containing marijuana, and the three youths smoked marijuana and drank beer together on the porch. Mace placed some of the marijuana from the bag in a vase on defendant's front porch for safekeeping.

After some time had passed, Mace told Duncan that he owed him some money. When Duncan refused to give Mace any money, a fight ensued, and Duncan placed Mace in a headlock and told him to leave. Duncan then went into the house, prepared a joint of marijuana, and returned outside through the garage.

When Duncan returned, Mace was standing at the garage door and refused to leave. The two youths began fighting again, and Duncan quickly overpowered Mace, hitting him in the face ten to fifteen times. At this point, defendant, who had been present during the entire altercation, pulled out a buck knife belonging to Duncan, and began swinging it randomly around the two fighting youths. Defendant almost stabbed Duncan, at which time Mace grabbed the knife by the blade and took it away from defendant. Mace then started yelling that his hand was bleeding and Duncan stopped assaulting Mace.

Mace then got up, walked out of the garage, and yelled to the others that he would get them both. Upon hearing this, Duncan again attacked Mace, and the two youths began choking each other. After about two minutes, defendant shouted, "Kill him. Kill him. Are you going to let him hit you like that?" At this point, Duncan testified that he began to back off, but defendant shouted, "Go ahead and finish the job." The two youths then began choking each other again and during this altercation, Duncan strangled Mace to death. In his statement to police, defendant stated that when he realized Duncan was going to kill Mace, he decided to take Mace's stash of marijuana out of the vase on the front porch and put it into a radio in the garage.

When defendant and Duncan realized that Mace was dead, Duncan asked defendant to call the police. Defendant stated, "They'll never believe us," and suggested that they just bury the body on his property. The two youths then proceeded to take Mace's body approximately 180 yards into the woods behind defendant's house, where they buried him. As they were burying the body, Duncan retrieved $30 from Mace's right pocket. Duncan testified that he took $5 and defendant took $25; defendant claimed in his statement that he only took $5 of the money. During the burial, the two youths also concocted a story regarding the last time they saw Mace in case they were questioned by police. They returned to defendant's house, washed up, and divided the marijuana.

The following day, Mace was reported missing by his family. Five days later, after repeated questioning, defendant made a statement to law enforcement officers regarding Mace's death. He led the officers to Mace's body; as a result of defendant's statement to police, they were able to apprehend Duncan, who also confessed. Duncan pleaded guilty to second degree murder and common law robbery and testified for the State at defendant's trial.

Defendant neither testified nor offered any evidence. A jury found defendant guilty of voluntary manslaughter because of aiding and abetting and common law robbery, and he was sentenced in the presumptive range for each crime.

Defendant presents arguments in support of four of the seven assignments of error contained in the record on appeal. His remaining assignments of error are deemed abandoned. N.C. R. App. P. 28(a).

[1] Defendant first argues that his conviction for aiding and abetting voluntary manslaughter must be vacated because it is not a cognizable offense under North Carolina law. We disagree.

"[V]oluntary manslaughter is an intentional killing without premeditation, deliberation or malice but done in the heat of passion suddenly aroused by adequate provocation or in the exercise of imperfect self-defense where excessive force under the circumstances was used or where the defendant is the aggressor." *State v. Wallace*, 309 N.C. 141, 149, 305 S.E.2d 548, 553 (1983). Voluntary manslaughter is typically considered a general intent crime. *See State v. McCoy*, 122 N.C. App. 482, 485, 470 S.E.2d 542, 544, *disc. review denied*, 343 N.C. 755, 473 S.E.2d 622 (1996) (citing *State v. Clark*, 324 N.C. 146, 164, 377 S.E.2d 54, 65 (1989)). *But see State v. Rainey*, 154 N.C. App. 282, 289, 574 S.E.2d 25, 29, *disc. review denied*, 356 N.C. 621, 575 S.E.2d 520 (2002) (holding that heat of passion voluntary manslaughter is a specific intent crime).

"A person who aids or abets another in the commission of a crime is equally guilty with that other person as principal." *State v. Noffsinger*, 137 N.C. App. 418, 425, 528 S.E.2d 605, 610 (2000). In *State v. Kendrick*, 9 N.C. App. 688, 690, 177 S.E.2d 345, 347 (1970), this Court explained the elements of aiding and abetting as it applies to a bystander who is present at the crime:

> A person aids or abets in the commission of a crime within the meaning of this rule when he shares in the criminal intent of the actual perpetrator [], and renders assistance or encouragement to him in the perpetration of the crime. [] While mere presence cannot constitute aiding and abetting in legal contemplation, a bystander does become a[n aider and abettor] by his presence at the time and place of a crime where he is present to the knowledge of the actual perpetrator for the purpose of assisting, if necessary, in the commission of the crime, and his presence and purpose do, in fact, encourage the actual perpetrator to commit the crime. []
>
> *Id.*

Defendant argues that aiding and abetting requires specific intent to commit the underlying crime and since voluntary manslaughter is typically considered a general intent crime, it is legally impossible for one to aid and abet a voluntary manslaughter. Although defendant concedes that North Carolina has long held that an aider and abettor can be liable for voluntary manslaughter, *see, e.g.*, *State v. Allison*,

200 N.C. 190, 195-96, 156 S.E. 547, 550 (1931); *State v. Burton*, 119 N.C. App. 625, 635-36, 460 S.E.2d 181, 189 (1995), he argues that our Supreme Court's holding in *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000) implicitly challenges this principle.

In *Coble*, the Court held that since attempt is a specific intent crime and second degree murder is a general intent crime, it is legally impossible to commit attempted second degree murder because one cannot have specific intent to commit a general intent crime. 351 N.C. at 452, 527 S.E.2d at 48. However, this case is distinguishable from *Coble* because, unlike attempt, aiding and abetting is not a crime separate and apart from the underlying offense, *see Coble*, 351 N.C. at 449, 527 S.E.2d at 46, but rather it is a theory upon which a person's culpability for the underlying offense may be based, *see State v. Williams*, 299 N.C. 652, 655, 263 S.E.2d 774, 777 (1980) (explaining that a person may be found culpable for an offense if he "either (1) actually commits the offense[,] or (2) does some act which forms a part thereof, or (3) if he assists in the actual commission of the offense or of any act which forms part thereof, or (4) directly or indirectly counsels or procures any person to commit the offense or to do any act forming a part thereof") (internal quotation omitted); N.C. Gen. Stat. § 14-5.2 (2003) (abolishing the distinction between accessories before the fact, principals in the first degree and principals in the second degree, and punishing all parties who previously fell into one of these categories as principals to that crime). Thus, depending upon the type of criminal intent required to consider an offender culpable for the underlying offense, an aider and abetter, like any other principal to an offense, may develop either specific or general intent. *See, e.g., State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996) (aiding and abetting first degree murder); *State v. Allen*, 127 N.C. App. 182, 184, 488 S.E.2d 294, 296 (1997) (aiding and abetting second degree murder); *Burton*, 119 N.C. App. at 635-36, 460 S.E.2d at 189 (aiding and abetting voluntary manslaughter); *State v. Whitaker*, 43 N.C. App. 600, 605, 259 S.E.2d 316, 319 (1979) (aiding and abetting involuntary manslaughter). Defendant's argument to the contrary is overruled.

[2] In his next two assignments of error, defendant argues the trial court erred by failing to grant his motion to dismiss the charge of common law robbery because the evidence was insufficient as a matter of law. He also asserts that the lack of evidence regarding the taking of marijuana was so apparent as to make it grossly improper for the prosecutor to argue otherwise.

The trial court must grant a defendant's motion to dismiss if the State fails to present "substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "In determining the sufficiency of the evidence we consider it in the light most favorable to the State." *Id.*

In *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 368 (1988), our Supreme Court defined common law robbery as follows:

> Common law robbery is defined as the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear. The felonious taking element of common law robbery requires a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker.

Id. (internal quotations and citations omitted). As previously discussed, "[a] person who aids or abets another in the commission of a crime is equally guilty with that other person as principal." *State v. Noffsinger*, 137 N.C. App. 418, 425, 528 S.E.2d 605, 610 (2000).

The State argued, and the indictment alleged, that defendant was culpable for common law robbery based on the taking of both money and marijuana from Mace's person and presence. Defendant first argues the State failed to present sufficient evidence that defendant intended to aid, encourage, or assist Duncan in committing common law robbery with regard to the taking of the money.

Duncan testified to the following regarding the taking of the money:

> Q. How about any other items that belonged to [Mr. Mace]? Did you all take anything else?
>
> A. $30
>
> Q. And where did that come from?
>
> A. [Mr. Mace]'s right pocket.
>
> Q. When did you all find that money?
>
> A. When we threw the clothes in the hole.
>
> Q. And who was it that found it?
>
> A. I did.

Q. And what did y'all do with the money?

A. [Defendant] kept $25 and I kept $5.

Our Supreme Court has stated that "intent is a mental attitude seldom provable by direct evidence" and thus, "must ordinarily be proved by circumstances from which it may be inferred." *Herring*, 322 N.C. at 740, 370 S.E.2d at 368. When the entire record is viewed in the light most favorable to the State, the evidence is sufficient to create an inference that defendant intended to aid, encourage, or assist Duncan in taking money from Mace's person.

Defendant next argues the evidence was insufficient to show that he took marijuana from the person or presence of Mace. With regard to common law robbery, our court has stated that "[t]he word 'presence' must be interpreted broadly . . . with due consideration given to the element of the crime that requires the property to be taken by violence or by putting [the victim] in fear." *State v. Styles*, 93 N.C. App. 596, 605, 379 S.E.2d 255, 261 (1989) (internal quotations omitted). In *Styles*, this Court found that money taken from a chair near the victim's bed after she had been forcibly raped and assaulted was sufficient to show a taking from the presence of the victim. *Id.*

In this case, the evidence showed that Mace placed marijuana into a vase on defendant's porch for safekeeping while he visited defendant's house. While Mace was being assaulted by Duncan, defendant took the marijuana and moved it into a hiding place in the garage. This evidence is equally sufficient "to show a taking from the presence of the victim through violence . . . ." *Id.; see also State v. Clemmons*, 35 N.C. App. 192, 196, 241 S.E.2d 116, 118-19, *cert. denied*, 294 N.C. 737, 244 S.E.2d 155 (1978) (where force or intimidation caused victim to flee the premises, property taken from the premises immediately after the victim's departure was deemed taken from the victim's presence).

Defendant argues that even if this evidence was sufficient to show a taking from the presence of the victim, it was based in part upon a statement made by defendant while in police custody and that such statements in non-capital cases are not competent to support a conviction unless there is "substantial independent evidence tending to establish its trustworthiness." *State v. Parker*, 315 N.C. 222, 236, 337 S.E.2d 487, 495 (1985). The record, however, contains substantial corroborating evidence to support the essential elements embraced in the defendant's statement. *See id.* Thus, aspects of

defendant's statement may be used to support defendant's conviction for common law robbery, and defendant's assignment of error to the contrary is overruled.

Having determined that there was sufficient evidence to support defendant's conviction of common law robbery based on both the taking of Mace's money and marijuana, we need not address defendant's final argument that it was grossly improper for the prosecutor to argue that the jury could convict defendant of common law robbery based solely on the taking of marijuana. Defendant's final assignment of error is overruled.

No error.

Judges HUNTER and THORNBURG concur.

WILLIAM A. LORD AND WIFE JENNIFER L. LORD, PLAINTIFFS-APPELLEES v. CUSTOMIZED CONSULTING SPECIALTY, INC., DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLEE v. 84 COMPONENTS COMPANY, 84 LUMBER COMPANY, AND 84 LUMBER COMPANY, A LIMITED PARTNERSHIP THIRD PARTY DEFENDANTS-APPELLANTS

No. COA03-848

(Filed 15 June 2004)

1. Costs— voluntary dismissal—recovery by third-party defendant

Third-party defendants may recover costs from the original plaintiffs after plaintiffs voluntarily dismiss their action under N.C.G.S. § 1A-1, Rule 41. However, third-party defendants may not recover from the original defendants, whose claim was simply extinguished when the plaintiffs dismissed their action. N.C.G.S. § 1A-1, Rule 41(d).

2. Costs— voluntary dismissal—statutory—common law

Costs assessed under N.C.G.S. § 7A-305 must be awarded in a voluntary dismissal, while common law costs awarded under N.C.G.S. § 6-20 are in the discretion of the court.

3. Costs— telephone charges—copying expenses

Telephone and copying expenses are not specifically authorized as costs under N.C.G.S. § 7A-305(d), and the trial court did

not abuse its discretion by denying them (assuming that these are allowable common law costs under N.C.G.S. § 6-20.)

4. Costs— voluntary dismissal—expert witnesses—not subpoenaed

Expert witness fees could not be assessed under N.C.G.S. § 7A-305(d) in this case because the witnesses were not subpoenaed, and the authority to tax expert witness fees as a common law cost does not exist under N.C.G.S. § 6-20.

5. Costs— voluntary dismissal—deposition expenses

Deposition costs are not allowed under N.C.G.S. § 7A-305(d), and the trial court did not abuse its discretion by not allowing reimbursement of those costs to a third-party defendant after plaintiff's voluntary dismissal.

6. Costs— voluntary dismissal—mediator fee

The trial court erred by not taxing a mediator fee as a cost following a voluntary dismissal. N.C.G.S. § 7A-305(d)(7).

Appeal by third party defendants from order denying third party defendants' motion for costs entered on 8 April 2003 by Judge Clarence E. Horton, Jr. in Iredell County Superior Court. Heard in the Court of Appeals 1 April 2004.

Tate, Young, Morphis, Bach & Taylor, LLP by Thomas C. Morphis and Valeree R. Adams for Third Party Defendants-Appellants.

Stark Law Group, PLLC by Thomas H. Stark and Fiona V. Ginter for Plaintiffs-Appellees.

Morris, York, Williams, Surles & Barringer, LLP by Kimberly A. Gossage for Defendant and Third Party Plaintiff-Appellees.

STEELMAN, Judge.

The issue in this appeal is whether a third party defendant may recover costs under N.C.R. Civ. P., Rule 41(d) (2003) from original plaintiff upon plaintiff's voluntary dismissal of the action under N.C.R. Civ. P., Rule 41(a). We hold that such recovery is permitted.

84 Components Company, 84 Lumber Company, and 84 Lumber Company, a limited liability partnership (third party defendants) appeal from the trial court's order denying their motion for costs. Customized Consulting Specialty, Inc. (defendant) sold a new house

to William and Jennifer Lord (plaintiffs) on 15 January 1999. After occupying the house, plaintiffs complained of various defects in its construction, including sagging floor and roof trusses supplied to defendant by third party defendants. Plaintiffs filed this action against defendant on 7 December 2001, alleging defendant breached its implied warranty of workmanlike construction and was negligent in its construction of the house. On 14 February 2002, defendant filed an answer and third party complaint against third party defendants seeking indemnity and contribution from third party defendants in the event that the plaintiffs were entitled to recover any sums from them. The only relief sought by defendant from third party defendants was expressly contingent upon plaintiffs recovering from defendant. No claims were filed by plaintiffs against third party defendants and third party defendants asserted no claims against plaintiffs or defendant. On 31 January 2003 plaintiffs voluntarily dismissed their action against defendant, without prejudice, under Rule 41(a)(1). Third party defendants moved that costs be assessed pursuant to Rule 41(d). On 26 February 2003 third party defendants filed an affidavit in support of their motion for costs pursuant to Rule 41(d), seeking costs in the amount of $9,891.95. On April 8, 2003 Judge Horton entered an order denying third party defendants' motion, in his discretion. Third party defendants appeal.

[1] In their sole assignment of error, third party defendants contend that the trial court erred in denying their motion for costs under Rule 41(d) of the North Carolina Rules of Civil Procedure. We agree in part.

The relevant part of Rule 41(d) states: "A plaintiff who dismisses an action or claim under section (a) of this rule *shall* be taxed with the costs of the action unless that action was brought *in forma pauperis.*" (emphasis added). Under Rule 41(d) the awarding of costs is mandatory. *Cosentino v. Weeks*, 160 N.C. App. 511, 518, 586 S.E.2d 787, 790 (2003), *Sims v. Oakwood Trailer Sales Corp.*, 18 N.C. App. 726, 728, 198 S.E.2d 73, 74 (1973). Rule 41(d) does not explicitly specify which parties may be entitled to recover costs from plaintiff upon the filing of a Rule 41(a) dismissal.

The issue presented, whether a third party defendant can recover its costs from the original plaintiff under Rule 41(d), is one of first impression in North Carolina.

This Court has held the purpose of Rule 41(d) to be two-fold: 1) reimbursing defendants for costs when through no fault of

their own they are denied a hearing on the merits, and 2) curtailing vexatious lawsuits by creating consequences for the plaintiff's voluntary dismissal. *Alsup v. Pitman*, 98 N.C. App. 389, 390, 390 S.E.2d 750, 751 (1990). Both of these objectives are furthered by allowing third party defendants to recover their costs under Rule 41(d), and neither would be furthered by denying third party defendants recovery of their costs.

In the absence of North Carolina case law, we look to federal cases for guidance on this issue. Federal courts have determined that when third party defendants are brought into an action pursuant to Fed. R. Civ. P. Rule 14, and are thus entitled to assert any and all defenses against the plaintiff that the defendant could assert, the third party defendant holds the same adversarial position to the plaintiff as the defendant. For this reason, the third party defendant is a prevailing party for the purposes of taxing costs, and awarding costs to the third party defendant when the defendant prevails against the plaintiff is proper. *See American State Bank v. Pace*, 124 F.R.D. 641, 650-51 (D. Neb. 1987) (plaintiff sued defendant, who instituted a third party suit against third party defendant. Defendant prevailed at trial and the trial court taxed third party defendant's costs against plaintiff, holding third party defendant was a prevailing party under Federal Rule 54, even though plaintiff had not sued third party defendant).

Under Rule 14(a) of the North Carolina Rules of Civil Procedure, a defendant is permitted to file a third party action against "a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claims against him." In the instant case, defendant filed a third party complaint seeking indemnity and contribution from third party defendants. Each of these claims was related to plaintiffs' claims against defendant. When plaintiffs' claims against defendant were voluntarily dismissed, defendant's third party claims ceased to exist. All of the claims of plaintiffs and defendant were part of the same action. It is therefore equitable and proper that the costs of the third party defendants be taxed to the plaintiffs in this case.

In the instant case, third party defendants moved for costs to be taxed against plaintiffs. Judge Horton's order denied third party defendants' request that costs be taxed to plaintiffs, and did not address defendant's liability for costs. Third party defendants do not argue in their brief that costs should be taxed to defendant, and plaintiffs do not explicitly argue that defendant should be responsible for whatever costs, if any, are awarded to third party defendants in this

action. Defendant filed a brief in this matter, however, arguing that if this Court were to determine third party defendants are entitled to costs under Rule 41(d), those costs should be taxed to plaintiffs, and not defendant. The issue has thus been raised before this Court as to whether third party defendants can recover costs from defendant in the instant case. We hold that they may not.

Defendant did not dismiss its action against third party defendants, nor was there any ruling on the merits of the third party claim. The defendant's claim against third party defendants was simply extinguished when plaintiffs voluntarily dismissed their action under Rule 41(a). There is no basis to tax costs against defendant in this instance. *See Bacon Trust v. Transition Ptnrs.*, 2004 U.S. Dist. LEXIS 3079, 5 (D.Kan.2004).

[2] Having established third party defendants' rights to recover costs from plaintiffs under Rule 41(d), we must now determine what costs, if any, third party defendants were entitled to recover. "[C]osts in this State, are entirely creatures of legislation, and without this they do not exist." *Clerk's Office v. Commissioners of Carteret County*, 121 N.C. 29, 30, 27 S.E. 1003 (1897) (cited in *Charlotte v. McNeely*, 281 N.C. 684, 190 S.E.2d 179 (1972). This Court has determined that two statutes control what costs are allowed under Rule 41(d). Costs under N.C. Gen. Stat. § 7A-305 *must* be awarded under Rule 41(d). *DOT v. Charlotte Area Manufactured Hous., Inc.*, 160 N.C. App. 461, 586 S.E.2d 780 (2003). However, other costs, which have been described as "common law costs," are awarded under N.C. Gen. Stat. § 6-20, and the awarding of these costs, even in the context of Rule 41(d), is in the discretion of the trial court. *Cosentino*, 160 N.C. App. at 516, 586 S.E.2d at 789. In *Charlotte Area*, this court defined these "common law" costs as being those costs established by case law prior to the enactment of N.C. Gen. Stat. § 7A-320 in 1983. N.C. Gen. Stat. § 7A-320 stated that the costs established in Article 28 of Chapter 7A were "complete and exclusive, and in lieu of any other costs and fees."

In analyzing whether costs are properly assessed under Rule 41(d), we must undertake a three-step analysis. First, if the costs are items provided as costs under N.C. Gen. Stat. § 7A-305, then the trial court is required to assess these items as costs. Second, for items not costs under N.C. Gen. Stat. § 7A-305, it must be determined if they are "common law costs" under the rationale of *Charlotte Area*. Third, as to "common law costs" we must determine if the trial court abused its discretion in awarding or denying these costs under N.C. Gen. Stat. § 6-20.

We must now examine the costs for which third party defendants seek reimbursement. In this case, third party defendants seek reimbursement for costs related to 1) copy expenses, 2) telephone charges, 3) expert witness fees, 4) depositions and deposition related expenses, and 5) mediator fee. We address each of these costs in turn.

Copy and Telephone Expenses.

[3] These expenses are not specifically authorized as costs under N.C. Gen. Stat. § 7A-305(d). In the absence of such authority, and assuming *arguendo* that these costs were associated with costs allowed under N.C. Gen. Stat. § 6-20 (such as deposition expenses), these expenses must be analyzed under the provisions of N.C. Gen. Stat. § 6-20, which provides that costs "may be allowed or not, in the discretion of the court." We discern no abuse of discretion by the trial judge in denying these items as costs.

Expert Witness Fees.

[4] N.C. Gen. Stat. § 7A-305(d)(1) provides that witness fees are assessable as costs "as provided by law." This refers to the provisions of N.C. Gen. Stat. § 7A-314 which provides for witness fees where the witness is under subpoena. In this case, the experts were never under subpoena. Further, the invoices from third party defendants's experts make no reference to a deposition. The fees sought to be taxed as costs were for the review and analysis of the case, and the preparation of a report. The trial court was empowered to award witness fees only where the witness was under subpoena. *Overton v. Purvis*, 162 N.C. App. 241, 591 S.E.2d 18 (2004) (citing *Holtman v. Reese*, 119 N.C. App. 747, 752, 460 S.E.2d 338, 342 (1995) and *Brandenburg Land Co. v. Champion Int'l Corp.*, 107 N.C. App. 102, 104-05, 418 S.E.2d 526, 528-29 (1992)). The trial court was thus not permitted to award expert witness fees pursuant to N.C. Gen. Stat. § 7A-305(d), and the authority to tax expert witness fees does not exist as a "common law" cost under N.C. Gen. Stat. § 6-20. *See Brandenburg Land Co. v. Champion Int'l Corp.*, 107 N.C. App. 102, 418 S.E.2d 526 (1992) (reversing the trial court's award of Rule 41(d) costs for expert witness' preparation of an affidavit used in support of defendant's motion for summary judgment after plaintiff voluntarily dismissed under Rule 41(a)); *See also Wade v. Wade*, 72 N.C. App. 372, 384, 325 S.E.2d 260, 271 (1985).

Depositions and Deposition Related Costs.

[5] These cost items are not allowed under N.C. Gen. Stat. § 7A-305(d). However, *Cosentino* holds that this cost item may be

taxed to a plaintiff who dismisses under Rule 41(a) in the discretion of the trial court. *Cosentino*, 160 N.C. App. 511, 586 S.E.2d 787; *see also Charlotte Area*, 160 N.C. App. at 468, 586 S.E.2d at 784 (which finds that the trial court may award deposition costs in its discretion under N.C. Gen. Stat. § 6-20 after the enactment of N.C. Gen. Stat. § 7A-320). The trial court's denial of deposition related costs may thus only be reversed upon a showing of abuse of discretion. Third party defendants make no argument in their brief that the trial court abused its discretion in refusing to award this item as costs, nor do we discern any abuse of discretion.

Mediator Fee

[6] N.C. Gen. Stat. § 7A-38.1 mandates that a mediated settlement conference be held in all Superior Court civil actions pursuant to rules adopted by the Supreme Court. The record in this matter shows that a mediated settlement conference was held on 25 November 2002, during the pendency of this action and that third party defendants incurred a mediator fee of $145.80. Costs of mediation are costs provided for under the provisions of N.C. Gen. Stat. § 7A-305(d)(7). *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 500 S.E.2d 732 (1998), *rev'd on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999). The mediator's fee was a cost that the trial court was required to tax as costs under Rule 41(d) and N.C. Gen. Stat. § 7A-305(d)(7). It was error for the trial court not to assess this item as costs against plaintiffs.

We hold that third party defendants were entitled to recover costs from plaintiffs as provided by law, and should recover from plaintiffs $145.80 for the cost of court ordered mediation. We reverse and remand to the trial court for entry of an order consistent with this opinion.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

Judges McGEE and CALABRIA concur.

IN THE MATTER OF: Q.V., DOB: 07/26/94

No. COA03-738

(Filed 15 June 2004)

Child Custody, Support, and Visitation— foreign custody order—motion for reimbursement of costs

The trial court did not err by denying respondent father's motion for reimbursement of costs incurred to enforce a California custody order pursuant to N.C.G.S. § 50A-312 to recover physical custody of his son from the Orange County Department of Social Services, because: (1) N.C.G.S. § 50A-312 specifically provides that fees, costs, and expenses may not be awarded against a state unless authorized by some law other than the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); and (2) there is no indication, explicit or implicit, that our General Assembly intended to exclude county departments of social services from its meaning of the word "state" as used generally in the UCCJEA, and specifically in N.C.G.S. § 50A-312(b).

Appeal by respondent-father from order entered 4 September 2002 by Judge M. Patricia DeVine in Orange County District Court. Heard in the Court of Appeals 26 April 2004.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Mark A. Davis, for petitioner-appellee.

Katharine Chester, for respondent-appellant father.

MARTIN, Chief Judge.

Respondent-father appeals from an order denying his motion for reimbursement of costs incurred to recover physical custody of his son, pursuant to G.S. § 50A-312, from the Orange County Department of Social Services ("DSS").

DSS assumed emergency non-secure custody of respondent's son, Q.V., on 1 February 2001, upon the admittance of Q.V.'s mother into the psychiatric unit of the North Carolina Memorial Hospital. On 5 February 2001, DSS filed a petition in the Orange County District Court alleging Q.V. was neglected and dependent. At a child planning conference held on 7 February 2001, Q.V. was adjudicated neglected and dependent in accordance with a stipulation by Q.V.'s mother and stepfather, and placement authority was vested with DSS. The matter

was set to be reviewed on 19 April 2001. Respondent-father, a California resident, was not notified of these proceedings.

Subsequent to the adjudication, Q.V.'s mother was extradited to California to face charges for parole violations. In a letter dated 18 February 2001, Q.V.'s paternal grandmother informed the Orange County court that respondent-father was also incarcerated in California and requested that Q.V. be placed with her and Q.V.'s paternal grandfather in California where Q.V.'s sister also resided. On 3 April 2001, Q.V.'s paternal grandmother filed documents in the superior court of California, County of Sonoma, requesting that court to assert its jurisdiction over Q.V. and communicate with the North Carolina court regarding resolution of the temporary custody order.

Respondent-father was formally served with a summons and copy of the juvenile petition in this matter on 12 April 2001. On 13 April 2001, respondent-father filed an affidavit with the Orange County District Court stating that he was the natural father of Q.V. and that he had joint custody of Q.V. pursuant to a custody order entered in California on 7 July 2000 and attached to the affidavit. Respondent-father requested that the trial court place Q.V. with his mother, Q.V.'s paternal grandmother, until respondent-father was released from jail. The attached custody order indicated that respondent-father and Q.V.'s mother shared joint legal and physical custody of Q.V., with primary physical custody of Q.V. being with Q.V.'s mother. The custody order specifically stated that jurisdiction over the issue of Q.V.'s custody was to remain with the Sonoma County California Superior Court.

On 19 April 2001, a review hearing was held in the district court in Orange County. The court did not address the issue of jurisdiction, but ordered that Q.V.'s custody should remain with DSS pending the completion of home studies of Q.V.'s grandparents in California. There is no indication in the record that respondent-father was present or represented by counsel at this hearing.

At review hearings conducted on 21 June and 2 August 2001, the district court determined that it had both personal and subject matter jurisdiction over the matter and concluded that the best interests of Q.V. required that he continue with DSS placement in North Carolina. Again, respondent-father was neither present nor represented by counsel at these hearings.

On 3 December 2001, the Sonoma County California Superior Court ordered Q.V.'s mother and DSS to show cause as to why physi-

cal custody of Q.V. should not be placed with respondent-father and granted temporary physical custody of Q.V. to respondent-father. That same day, respondent-father, through counsel, filed a petition in Orange County for an expedited hearing to enforce the California child custody determination pursuant to G.S. § 50A-308, along with motions to dismiss and vacate Orange County District Court's previous orders due to lack of jurisdiction. The matter was heard on 6 December 2001, at which time the court declined respondent-father's request for an expedited hearing to address the enforcement of the California custody order and set a hearing to address the issue of jurisdiction for 31 January 2002. Following an order issued by this Court, however, the district court entered an order on 10 January 2002 in which it denied respondent-father's motions to dismiss and vacate previous orders.

On 15 January 2002, the superior court of Sonoma County, California issued an order asserting exclusive, continuing jurisdiction over the custody determination of Q.V. On 20 March 2002, the Orange County District Court relinquished jurisdiction regarding Q.V.'s custody to the State of California. Respondent-father then filed a motion in the Orange County District Court seeking reimbursement, pursuant to N.C. Gen. Stat. § 50A-312, from DSS for expenses in excess of $40,000 allegedly incurred in recovering custody of Q.V. Respondent-father appeals from an order in which the district court determined that both DSS and the court had acted appropriately in the matter and in which the court denied respondent-father's motion for costs.

The Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA") provides a uniform set of jurisdictional rules and guidelines for the national enforcement of child custody orders. *See* N.C. Gen. Stat. §§ 50A-101 *et seq.* (Official Comment) (2003). N.C. Gen. Stat. § 50A-312 (2003) is located under Part 3 of the Act, which provides for enforcement.

Under the UCCJEA, a party wishing to enforce a child-custody determination of another state with jurisdiction must file a petition for enforcement with a court of the state in which the respondent is located. N.C. Gen. Stat. § 50A-308 (2003). The statute defines "petitioner" to mean "a person who seeks enforcement . . . of a child-custody determination" and "respondent" to mean "a person against whom a proceeding has been commenced for enforcement . . . of a child-custody determination." N.C. Gen. Stat. § 50A-301 (2003). The UCCJEA defines "person" to mean:

> an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, ***government; governmental subdivision, agency, or instrumentality***; public corporation; or any other legal or commercial entity.

N.C. Gen. Stat. § 50A-102(12) (2003) (emphasis added). Thus, a state agency, such as a department of social services, may qualify as a petitioner or respondent in such an enforcement proceeding. *See* N.C. Gen. Stat. § 50A-102 (Official Comment) ("The term 'person' has been added to ensure that the provisions of this Act apply when the State is the moving party in a custody proceeding or has legal custody of a child.").

Respondent-father's motion for reimbursement of fees and expenses incurred in enforcing the California custody order was made pursuant to N.C. Gen. Stat. § 50A-312 (2003). That statute provides:

> (a) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.
>
> (b) The court may not assess fees, costs, or expenses against a state unless authorized by law other than this Article.

Id.

Respondent-father asserts multiple violations of the UCCJEA, as well as his constitutional rights, by DSS and by the district court of Orange County, and argues that such violations were so egregious as to justify an award, pursuant to G.S. § 50A-312, of his costs and expenses incurred in the proceeding. He assigns multiple errors to the trial court's actions in this case, as well as to its failure to find that he was the prevailing party and that reimbursement is reasonable under the circumstances. While many of his contentions with respect to the apparently tortured course this proceeding followed in this State's trial court may arguably have merit, we do not consider them because even had they been found by the trial court, they would not afford a basis for relief under G.S. § 50A-312.

G.S. § 50A-312(a) obligates a court to award fees, costs, and expenses to the prevailing party of a petition for enforcement of a child-custody determination pursuant to G.S. § 50A-308 "unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate." N.C. Gen. Stat. § 50A-312 (2003); *see also* N.C. Gen. Stat. §§ 50A-308 through 310 (2003). However, G.S. § 50A-312(b) specifically provides that fees, costs and expenses may not be awarded against a state unless authorized by some law other than the UCCJEA.

The UCCJEA defines the term "state" as follows:

> "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

N.C. Gen. Stat. § 50A-102(15) (2003). The State of North Carolina is comprised of one hundred counties and those counties "make up the state and are, literally, the state itself." *Archer v. Rockingham County*, 144 N.C. App. 550, 553, 548 S.E.2d 788, 790 (2001), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002). While the laws of some other states, as well as federal courts, treat counties "as something other than constituent parts of the state[,]" *id.* at 554, 548 S.E.2d at 791, North Carolina law has long held otherwise:

> Counties are creatures of the General Assembly and constituent parts of the State government. . . . In the exercise of ordinary governmental functions, they are simply agencies of the State, constituted for the convenience of local administration in certain portions of the State's territory . . . . The powers and functions of a county bear reference to the general policy of the State, and are in fact an integral portion of the general administration of State policy.

Harris v. Board of Commissioners, 274 N.C. 343, 346-47, 163 S.E.2d 387, 390 (1968) (internal quotations and citations omitted). Thus, when interpreting the General Statutes of North Carolina, it is presumed that any reference to the State implicitly includes all its constituent parts, unless otherwise indicated in the statute or case law. *See Archer*, 144 N.C. App. at 553, 548 S.E.2d at 790.

We find no indication, explicit or implicit, that our General Assembly intended to exclude county departments of social serv-

ices from its meaning of the word "state" as used generally in the UCCJEA, and specifically in N.C. Gen. Stat. § 50A-312(b). Pursuant to North Carolina's juvenile code, the director of the department of social services in each county of the State is mandated by law to establish protective services for juveniles alleged to be abused, neglected, or dependent, investigate such allegations, and if warranted, file petitions with the court seeking adjudication of such juveniles as abused, neglected, or dependent. *See* N.C. Gen. Stat. §§ 7B-300 *et seq.* (2003). Where it is found that a juvenile is abused, neglected, or dependent, or there is reasonable grounds to believe such, the department of social services in each county of the State is vested with the authority to assume custody and control over such affected juveniles. N.C. Gen. Stat. §§ 7B-500 *et seq.* (2003). Thus, any party seeking to enforce a child custody determination pursuant to G.S. § 50A-308 against the State of North Carolina will necessarily be dealing with a specific county department of social services within the state. Accordingly, it would be illogical to assume that the legislature did not intend to include such agencies within its meaning of the term "state." This intent is further implied in the official comment to G.S. § 50A-312, which states the following:

> Subsection (b) was added to ensure that this section would not apply to the State unless otherwise authorized. The language is taken from UIFSA [Uniform Interstate Family Support Act] § 313 (court may assess costs against obligee or ***support enforcement agency*** only if allowed by local law).

N.C. Gen. Stat. § 50A-312 (Official Comment) (2003) (emphasis added). Our conclusion is also consistent with the underlying purpose of the UCCJEA, which is "to prevent parents from forum shopping their child custody disputes and assure that these disputes are litigated in the state with which the child and the child's family have the closest connection." *In re Van Kooten*, 126 N.C. App. 764, 768, 487 S.E.2d 160, 162 (1997) (referring to the UCCJEA's predecessor, the Uniform Child Custody Jurisdiction Act).

Since N.C. Gen. Stat. § 50A-312(b) prohibits an award of expenses against the Orange County DSS, we need not consider respondent-father's other assignments of error relating to the trial court's order denying his motion in this case. The order denying respondent-father's motion for reimbursement of costs and expenses is affirmed.

Affirmed.

Judges HUNTER and THORNBURG concur.

IN THE MATTER OF: V.L.B.

No. COA03-766

(Filed 15 June 2004)

Appeal and Error— appealability—permanency planning order—termination of parental rights—mootness

Respondent mother's appeal from a permanency planning order making adoption the permanent plan for her minor child is dismissed as moot, because: (1) while the appeal was pending, the trial court entered a termination of parental rights (TPR) order, and any findings in the permanency planning order that are also in the TPR order are superceded by the latter; (2) the TPR order was based upon N.C.G.S. § 7B-1111(a)(9) and does not rely on the permanency planning order that is the subject of this appeal; and (3) even if the Court of Appeals were to reverse the trial court's order making adoption the permanent plan for the minor child, this action would have no practical effect on the existing controversy.

Judge TIMMONS-GOODSON dissenting.

Appeal by respondent mother from order entered 14 April 2003 by Judge L. Suzanne Owsley in Burke County District Court. Heard in the Court of Appeals 29 March 2004.

Stephen M. Schoeberle for petitioner-appellee Burke County Department of Social Services.

Nancy Einstein Triebert, Attorney Advocate.

Nancy R. Gaines for respondent-appellant.

Juleigh Sitton, Guardian ad Litem.

LEVINSON, Judge.

Respondent mother (Angel Babcock) appeals from a permanency planning order making adoption the permanent plan for her minor child (hereinafter V.L.B.).

On 17 June 2002 the Burke County Department of Social Services (DSS) filed a Juvenile Petition alleging neglect. On 19 August 2002, the trial court entered an order, based upon the stipulations of the parties, that (1) the allegations of neglect in the petition were true, and (2) V.L.B. was a dependent juvenile within the meaning of N.C.G.S. § 7B-101(9).[1] The court continued disposition until psychological evaluations could be obtained. In the meantime, custody remained with DSS, as the court concluded reunification was not in the best interest of V.L.B. at that time. On 6 January 2003, following a permanency planning hearing, the trial court entered an order setting adoption as the permanent plan for V.L.B. Respondent gave notice of appeal from this 6 January order, assigning as error the trial court's failure to make adequate findings of fact pursuant to N.C.G.S. § 7B-907.

On 29 September 2003 the trial court entered an order terminating respondent-mother's parental rights over V.L.B. We grant the motions filed by DSS and the attorney advocate to dismiss this appeal as moot.

In determining whether an appeal should be dismissed as moot, this Court has held:

> A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Further, whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

In re Stratton, 159 N.C. App. 461, 463, 583 S.E.2d 323, 324, *appeal dismissed*, 357 N.C. 506, 588 S.E.2d 472 (2003) (internal quotation marks and citations omitted).

In *Stratton*, the respondent appealed an adjudication of neglect and dependency alleging errors arising from conduct during the adju-

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1. This appeal does not concern the variance between the allegations of neglect in the petition and the court's conclusion of dependency.

dication hearing as well as insufficiency of the evidence. While the appeal was pending, the trial court entered a termination of parental rights (TPR) order. This Court took judicial notice of the TPR order and dismissed the appeal as moot. This Court held, *inter alia*, that the issues raised on appeal had been rendered "academic" by the subsequent TPR order. This Court reasoned that the findings in the adjudication ordered were superceded by the subsequent findings in the TPR order, and that the trial court had made an "entirely independent" determination of neglect. *Id.* at 463, 583 S.E.2d at 324.

The purposes associated with a permanency review hearing are "to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C.G.S. § 7B-907(a) (2003). These hearings are generally held "within 12 months after the date of the initial order removing custody" and every six months thereafter. *Id.* The criteria set forth in N.C.G.S. § 7B-907(b) (2003) are designed to ensure that courts adhere to the purposes of the statute. Significantly, we observe there is little alignment between the criteria set forth in G.S. § 7B-907(b), and the grounds for termination of parental rights set forth in N.C.G.S. § 7B-1111(a) (2003).

The 29 September 2003 TPR order addressing respondent's parental rights over V.L.B. is based upon G.S. § 7B-1111(a)(9) (termination of parental rights as to other children), and does not rely on the permanency planning order that is the subject of this appeal.[2] Indeed, the court, after hearing the testimony of witnesses and admitting the entire "court file" into evidence, made independent findings and conclusions that do not rely on the permanency planning order. In the present case, like *Stratton*, any findings in the permanency planning order that are also in the TPR order are superceded by the latter. *Accord In re N.B.*, 163 N.C. App. 182, 184, 592 S.E.2d 597, 598 (2004). These circumstances, together with (1) our observation concerning the lack of a direct relationship between the criteria in G.S. § 7B-907(b) and the grounds in G.S. § 7B-1111(a), and (2) our reliance on the principles in *Stratton*, lead us to an inescapable conclusion that the present appeal has become moot.

In relying on *Stratton* and *N.B.*, we recognize that we are necessarily failing to follow the reasoning and holding set forth in *In re Hopkins*, 163 N.C. App. 38, 42-43, 592 S.E.2d 22, 25 (2004). We

2. For example, while one of the findings of fact in the permanency review order on appeal is that respondent "had her parental rights to 5 prior children terminated[,]" the TPR order reveals respondent admitted the same in a responsive pleading to the TPR motion.

observe that, although there has been some recent effort to reconcile these two lines of cases, *In re J.C.S. and R.D.S.*, 164 N.C. App. 96, 102-03, 595 S.E.2d 155, 159 (2004), the lines are, in practice, **irreconcilable**.

Like our colleague in the dissent, we appreciate the importance of providing review to orders of the trial division. However, we fail to discern how any decision related to the present appeal can have any practical effect on the juvenile or the respondents. Moreover, we have less confidence than the dissent in this Court's practical ability to "deny review to fruitless appeals" or "sanction . . . recalcitrant attorneys and parties that file them." Likewise, this Court has not generally resolved juvenile appeals within a time frame that would enable county social services agencies to comport with their **statutory duty** to file petitions for termination of parental rights within certain time frames prescribed in N.C.G.S. § 7B-907(e) (2003) (requiring petition to be filed within 60 calendar days from the date of permanency planning hearing). The dissent, like *Hopkins*, fails to account for this clear legislative mandate and could give parents the power to indefinitely suspend entry of a TPR by taking repeated appeals.

Even if this Court were to reverse the trial court's order making adoption the permanent plan for V.L.B., this would have no practical effect on the existing controversy.

Dismissed as moot.

Judge THORNBURG concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

Because I conclude the trial court did not have jurisdiction over DSS's petition to terminate parental rights while respondent's appeal of the permanency planning order was pending before this Court, I respectfully dissent.

In reaching its conclusion, the majority ignores this Court's decision in a case factually similar to the instant case. In *In re Hopkins*, 163 N.C. App. 38, 592 S.E.2d 22 (2004), the trial court held a permanency planning hearing on 29 November 2001 and entered an order 7 December 2001, concluding that the permanent plan for the minor child should be adoption. The respondent-father appealed the trial

court's order to this Court. While that appeal was still pending, the trial court held a hearing on a TPR petition filed by DSS, and entered an order terminating respondent-father's parental rights. On appeal, this Court held that "the trial court was without jurisdiction to enter the order terminating respondent-father's parental rights," and we vacated the portion of the TPR order terminating the respondent-father's parental rights. *Id.* at 42-43, 592 S.E.2d at 25. I conclude the reasoning of *Hopkins* applies to the instant case.

As we noted in *Hopkins*, the Juvenile Code requires that "review of any final order of the court in a juvenile matter . . . be before the Court of Appeals." N.C. Gen. Stat. § 7B-1001 (2003); *Hopkins*, 163 N.C. App. at 42, 592 S.E.2d at 24. A final order includes "[a]ny order modifying custodial rights." N.C. Gen. Stat. § 7B-1001(4). Thus, "[p]ending disposition of such an appeal, the trial court's authority over the juvenile is statutorily limited to entry of 'a *temporary* order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.' " *Hopkins*, 163 N.C. App. at 42, 592 S.E.2d at 24-25 (quoting N.C. Gen. Stat. § 7B-1003 (2003)) (emphasis in original). An order terminating parental rights "is, by its very nature, a *permanent* rather than a *temporary* order affecting the juvenile's custody or placement." *Hopkins*, 163 N.C. App. at 42, 592 S.E.2d at 25 (emphasis in original); *see* N.C. Gen. Stat. § 7B-1100(2) (2003) ("It is the further purpose of this Article [11, governing termination of parental rights] to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age[.]"). Therefore, where a trial court enters an order terminating a parent's rights while that parent's appeal is still pending, the trial court exceeds the authority expressly granted to it under N.C. Gen. Stat. § 7B-1103 and is without jurisdiction to enter the order. *Hopkins*, 163 N.C. App. at 42, 592 S.E.2d at 25.

The majority relies upon this Court's opinion in *In re Stratton*, 159 N.C. App. 461, 583 S.E.2d 323, *appeal dismissed*, 357 N.C. 506, 588 S.E.2d 472 (2003), to support its conclusion that the instant appeal is moot. While the TPR order in that case as well as the TPR order in the instant case may have been based upon evidence "entirely independent" from the original order appealed from, I disagree that issuance of a TPR order renders the issues raised on appeal "academic." *Id.* at 463, 583 S.E.2d at 324. The North Carolina Court of Appeals is an error-correcting tribunal, charged with addressing and adjusting any errors of law committed by the courts below. In the instant case, the majority's conclusion allows a lower court to remove

an appeal from this Court's review by issuing a TPR order *while the appeal is still pending.* I do not believe it was the intent of the legislature either in enacting the Juvenile Code or in creating this state's court systems to transform the trial court into its own appellate court, with the power to override its own determinations and errors without review from a higher court. Nor do I believe this Court should be so quick to dismiss as "academic" those errors that are later "corrected" by the very source from which the errors originate.

I recognize that, when read to its extreme, *Hopkins* allows a respondent to continuously appeal permanency planning orders every six months, thereby burdening this Court with unnecessary appeals and suspending the disposition of custody suits. However, I am confident not only in this Court's ability to deny review to fruitless appeals, but also in its ability to sanction the recalcitrant attorneys and parties that file them. *See* N.C.R. App. P. 34 (2004). Furthermore, I believe the burdens of appellate review in such matters would be greatly outweighed by the benefits created in ensuring that the processes used to determine the custodial status of minor children are error-free.

For the foregoing reasons, I conclude the judgment terminating respondent's parental rights does not render her appeal of the permanency planning order moot. Thus, I believe this Court should reach the merits of respondent's appeal. Therefore, I respectfully dissent.

ERIE INSURANCE EXCHANGE, PLAINTIFF v. GRZEGORZ SZAMATOWICZ, CARMEN EVANS, AND JENNIFER WILSON, DEFENDANTS

No. COA 03-699

(Filed 15 June 2004)

1. Insurance— homeowners policy—coverage of birthday party in warehouse

The trial court did not err by granting summary judgment for plaintiff on the issue of whether his homeowners insurance policy covered a birthday party in a rented warehouse. The warehouse provided a more appropriate place for an activity that normally would have taken place at his home, and the use was in connection with his residence as that term is used in the policy.

2. Insurance— homeowners policy—business pursuit exclusion—birthday party in warehouse

The business pursuit exclusion in a homeowners insurance policy did not apply to a birthday party held in a warehouse. There was no evidence that the injured parties went to the warehouse for any business purpose, and, while the insured had rented the warehouse as an investment, he had not taken steps to establish any business at the warehouse and was not engaged in a business activity at the time of the fire.

3. Insurance— homeowners policy—notice of claim—reasonable

An insured gave notice to the insurer as soon as practicable once he reasonably believed that the policy would provide coverage where a fire occurred on 16 September 2001; defendant Szamatowicz did not learn that anyone was pursuing a claim until 15 February 2002, when he was served with a summons and complaint; defendant then contacted an attorney; and the attorney obtained an extension of time to answer, notified plaintiff insurance company on 10 April 2002, and filed an answer for defendant on 15 April 2002.

Appeal by plaintiff from order entered 24 March 2003 by Judge Evelyn W. Hill in Superior Court in Wake County. Heard in the Court of Appeals 3 March 2004.

Bailey & Dixon, L.L.P., by David S. Coats, for plaintiff-appellant.

Maupin, Taylor, P.A., by Mark A. Whitson, for defendant-appellee Grzegorz Szamatowicz.

Duffus & Associates, by Adriana C. Corder, for defendant-appellees Carmen Evans and Jennifer Wilson.

HUDSON, Judge.

This declaratory judgment action stems from an early morning fire on 16 September 2001 during a birthday party for defendant Grzegorz Szamatowicz. At the time of the fire, Mr. Szamatowicz and his then-wife had in effect a homeowner's insurance policy ("the Policy") issued by plaintiff Erie Insurance Exchange ("Erie") that covered their residence in Durham, North Carolina along with other Policy-defined insured locations. Erie subsequently instituted the

present action seeking a declaration that the Policy did not cover the accident at the warehouse. Erie and Mr. Szamatowicz filed cross motions for summary judgment. Following a hearing, the trial court denied Erie's motion and granted Mr. Szamatowicz's motion, declaring that the Policy covered the warehouse fire. Erie appeals. As explained below, we affirm.

Due to the expected 100 to 150 guests, Mr. Szamatowicz decided he could not comfortably host the party at his home. He also thought that the music and other noise associated with the party would interfere with his infant son's sleep. Mr. Szamatowicz subleased a warehouse located at 509 North West Street in Raleigh and held the party there. At the time of the sublease, Mr. Szamatowicz had no intended business purpose for the warehouse.

A few days after the party, a friend told Mr. Szamatowicz that two women were injured in the warehouse fire. He did not learn that anyone was alleging a claim against him until the two women, defendants Evans and Wilson, filed suit. In a letter sent 10 April 2002, before he filed an Answer to the Evans/Wilson complaints, Mr. Szamatowicz notified an Erie agent of the accident and inquired whether his homeowners' policy provided coverage. Having received no response from Erie, Mr. Szamatowicz filed his Answer on 15 April 2002. Erie later admitted it received notice of the claim no later than 19 April 2002, and agreed to defend Mr. Szamatowicz's law suits under a full reservation of rights.

The standard of review on appeal of a grant of summary judgment is well established:

> Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003) (emphasis added). A party moving for summary judgment satisfies its burden of proof (1) by showing an essential element of the opposing party's claim is nonexistent or cannot be proven, or (2) by showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Once the movant satisfies its burden of proof, the burden then shifts to the non-movant to set forth specific facts showing there is a genuine issue of material fact as to that essential element.

Belcher v. Fleetwood Enters., 162 N.C. App. 80, 84-85, 590 S.E.2d 15, 18 (2004) (internal citations omitted).

I. *Insured location*

[1] First, Erie argues that the trial court erred in granting defendants' motion for summary judgment because the warehouse was not an "insured location" under the terms of the Policy. We disagree.

The homeowners' policy at issue covers personal liability as follows:

> COVERAGE E—PERSONAL LIABILITY
>
> If a claim is made or suit is brought against an insured for damages because of bodily injury, personal injury or property damage caused by an occurrence to which this coverage applies, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable.
>
> 2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the occurrence equals our limit of liability.

The "insured location" exclusion in the Policy provides as follows:

> 1. Coverage E—Personal Liability and Coverage F Medical Payments to Others do not apply to bodily injury or property damage:
>
> ***
>
> d. arising out of premises:
>
> 1. owned by an insured;
>
> 2. rented to an insured;
>
> 3. rented to other by an insured;
>
> that is not an insured location[.]

The Policy defines "insured location" as:

> 4. "insured location" means:
>
> a. the residence premises;
>
> b. the part of other premises, other structures and grounds used by you as a residence and;
>
> 1. which is shown in the declarations; or
>
> 2. which is acquired by you during the policy period for your use as a residence;
>
> c. any premises used by you in connection with a premises in 4.a and 4.b above;

Our Courts have held that if language contained in an insurance policy is reasonably susceptible to two interpretations, it is to be construed in favor of coverage. *Insurance Co. v. Surety Co.*, 46 N.C. App. 242, 244, 264 S.E.2d 913, 915 (1980); *see also Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E.2d 773 (1978). Additionally, this Court has interpreted the phrase "in connection with" and held it to be unambiguous and to have a "broad definition." *Nationwide Mut. Fire Ins. Co. v. Grady*, 130 N.C. App. 292, 297, 502 S.E.2d 648, 652 (1998).

In *Nationwide Mut. Ins. Co. v. Prevatte*, 108 N.C. App. 152, 423 S.E.2d 90 (1992), *disc. review denied*, 333 N.C. 463, 428 S.E.2d 184 (1993), at issue was whether a homeowner's policy covered injuries sustained by a guest riding the insured's all-terrain vehicle. The guest was riding on a trail which began on nearby property and ended on the property owned by a neighbor at the time the accident occurred. *Id.* at 153, 423 S.E.2d at 91. The Prevatte's policy excluded injuries arising out of the ownership or use of a motor vehicle or other motorized land conveyances. The policy also provided that the exclusion did not apply to motorized land conveyances designed for recreational use off public roads, not subject to vehicle registration and not owned by an insured, or "owned by an insured and on an insured location." *Id.* at 154, 423 S.E.2d at 91.

Like the Policy here, the definition of "insured location" in *Prevatte* included "any premises used by you in connection with a premises in 4a or 4b above." *Id.* Based upon that language, this Court concluded that "the location where the accident occurred was an insured location as defined by the policy because it was used in con-

nection with the Simpson residence." *Id.* at 156, 423 S.E.2d at 92. Erie argues, however, that since the warehouse was some twenty miles from the insured's residence, it could not possibly be used in connection with the residence insured under the Policy. In *Prevatte*, we rejected a similar argument and refused to limit the definition of an insured location to only "reasonable geographical limits" absent express language in the policy to that effect. *Id.* Thus, we conclude that there is no per se limit on distance.

Here, Mr. Szamatowicz decided to have his birthday party at the warehouse instead of his residence, due to the number of guests, and out of concern for his infant son. The warehouse provided a more appropriate area for an activity that normally would have taken place at his residence. We conclude that Mr. Szamatowicz's use of the warehouse on this occasion was "in connection with" his residence as that term is used in the Policy. Thus, the superior court did not err in denying plaintiff's motion for summary judgment.

II. *Business Pursuits Exception*

[2] Plaintiff next argues that the trial court erred in granting defendants' motion for summary judgment because the business pursuit exclusion precludes coverage. We disagree.

The business purpose exclusion of the Policy provides that medical payments to others do not apply to bodily injury "arising out of or in connection with a business engaged in by an insured." Plaintiff directs our attention to *Nationwide Mut. Fire Ins. Co. v. Grady*, 130 N.C. App. 292, 502 S.E.2d 648 (1998) and *Nationwide Mutual Fire Ins. Co. v. Nunn*, 114 N.C. App. 604, 442 S.E.2d 340, *disc. review denied*, 336 N.C. 782, 447 S.E.2d 426 (1994), in support of its argument that the business purposes exclusion should apply. Plaintiff's reliance on these cases, however, is misplaced. In *Grady*, an employee of the Department of Revenue alleged that his supervisor, insured defendant Christopher Grady, assaulted him while he was walking down a hallway at the workplace. *Id.* at 293, 502 S.E.2d at 650. The trial court granted Nationwide declaratory judgment under the business pursuits exclusion contained in Grady's homeowners' policy, and this Court affirmed. *Id.* In doing so, we noted that the injury arose "because of Grady's business pursuits" and that "but for his job with the Revenue Department, Grady and [the employee] would not have been on the premises . . . and the tort claim would not have arisen." *Id.* at 297, 502 S.E.2d at 652.

Similarly, in *Nunn*, the insureds rented out a part of their house as a bed and breakfast and for other social events. During a wedding reception, a dog bit a guest as she was leaving the premises. She made a claim under the Nunns' homeowners' policy. In ruling that the business pursuits policy exclusion applied, we stated that "but for the reception, [the victim] would not have been on the premises and the tort claim would not have arisen." *Nunn*, 114 N.C. App. at 609, 442 S.E.2d at 344.

Here, there is no evidence that Evans and Wilson went to Mr. Szamatowicz's warehouse on the evening in question for any business purpose. Unlike the reception in *Nunn*, Mr. Szamatowicz did not collect an admission or other type of fee from the guests, nor did he otherwise host the party for profit. Indeed, Mr. Szamatowicz's deposition testimony reveals that his sublease of the warehouse was a mere passive investment. He had no specific use or purpose in mind when he acquired the warehouse, though he did consider three possibilities for the property: subleasing the property for profit, establishing a marble and granite business, or opening a restaurant and/or nightclub. However, Mr. Szamatowicz had taken no affirmative steps to establish any business at the warehouse, and thus, at the time of the accident, was not engaged in any business activity there. For the foregoing reasons, we overrule this assignment of error.

III. *Late Notice Provision*

[3] Erie next argues that Mr. Szamatowicz breached the late notice provision of the Policy, and therefore the trial court erred in granting defendants' summary judgment motion. We disagree.

North Carolina has a three-pronged test for determining the timeliness of notice to an insurer. Under this test, the court must determine (1) whether the notice was given as soon as practicable, (2) if not, whether the insured acted in good faith in notifying the insurer, and (3) if the insured acted in good faith, whether the late notice materially prejudiced the insurer's ability to investigate and defend the claim for liability. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 580, 573 S.E.2d 118, 124 (2002).

Here, the affidavits and deposition testimony show that, although the fire occurred on 16 September 2001, Mr. Szamatowicz did not learn until 15 February 2002, when he was served with a summons and complaint, that anyone was pursuing a claim arising from the fire. Thereafter, Mr. Szamatowicz contacted an attorney, who obtained an extension of time within which to answer the com-

plaint, and who then notified an agent for Erie regarding the claim on or about 10 April 2002. Mr. Szamatowicz's counsel filed an answer on his behalf on 15 April 2002. We conclude that Mr. Szamatowicz gave notice to Erie as soon as practicable once he learned that a claim was being made against him and that he reasonably believed the Policy would provide coverage. We overrule this assignment of error. As a result, we deem it unnecessary to address Erie's remaining assignments of error.

Affirmed.

JUDGES McCULLOUGH and GEER concur.

DEBORAH R. SILLINS, M.D., AN INDIVIDUAL, PLAINTIFF v. DANIEL T. NESS, M.D., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; PIEDMONT PLASTIC SURGERY CENTER, A NORTH CAROLINA CORPORATION, DEFENDANTS

No. COA03-697

(Filed 15 June 2004)

Arbitration and Mediation— application of federal or state statutes—initial determination—burden of proof

The trial court's denial of defendants' motion for arbitration was remanded for determination of whether the arbitration clause was governed by the Federal Arbitration Act or the N. C. Uniform Arbitration Act. If neither the FAA nor the UAA governs, the court has no authority to compel arbitration. Defendants have the burden of establishing that the arbitration clause is enforceable because they are the party seeking to compel and are required to submit evidence that the contract involved interstate commerce.

Appeal by defendants from orders entered 8 January 2003 and 24 January 2003 by Judge Jesse B. Caldwell, III in Gaston County Superior Court. Heard in the Court of Appeals 3 March 2004.

Caudle & Spears, P.A., by Harold C. Spears; and Arcangela M. Mazzariello, for plaintiff-appellee.

Van Hoy, Reutlinger, Adams & Dunn, by Craig A. Reutlinger and Stephen J. Dunn, for defendants-appellants.

GEER, Judge.

Defendants Daniel T. Ness and Piedmont Plastic Surgery Center appeal from the trial court's order denying their motion to compel arbitration of plaintiff Deborah R. Sillins' claims. Because the trial court did not specifically address whether the arbitration clause at issue is governed by the Federal Arbitration Act or by the North Carolina Uniform Arbitration Act, we are compelled by *Eddings v. Southern Orthopedic & Musculoskeletal Assocs.*, 356 N.C. 285, 569 S.E.2d 645 (2002) to remand this case to the trial court for an initial determination of that question.

Facts

Plaintiff, Dr. Sillins, is a plastic surgeon. While she was completing a fellowship at UCLA, Dr. Ness, the president of Piedmont Plastic Surgery Center ("Piedmont"), recruited her to move from California to Asheville to work for Piedmont. On 21 May 1999, plaintiff entered into an employment contract with Piedmont. The employment contract contained the following arbitration clause:

> 17. Arbitration. Any controversy or claim arising out of, or relating to this Agreement, or the breach thereof (except for the Employer's right to enforce the restrictive covenant and seek remedies pursuant to paragraph 13 above) shall be settled by arbitration in Gaston County, North Carolina, in accordance with the arbitration rules and procedures of the American Arbitration Association.

Dr. Sillins was employed by Piedmont from 2 August 1999 until approximately 23 September 2001, when she was fired.

Dr. Sillins filed suit in Gaston County Superior Court asserting various claims arising out of her employment and her termination. Defendants moved to dismiss the complaint, to compel arbitration of any actionable claims, and for sanctions. After plaintiff voluntarily dismissed certain claims, the trial court entered an order denying defendants' motion. Defendants filed a motion for reconsideration of that order, which the court also denied.

Discussion

Defendants assigned error only to the trial court's denial of their motion to compel arbitration. Although that order is interlocutory, it is immediately appealable as it affects a substantial right. *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881

("The right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable."), *disc. review denied*, 350 N.C. 832, 539 S.E.2d 288 (1999), *cert. denied*, 528 U.S. 1155, 145 L. Ed. 2d 1072, 120 S. Ct. 1161 (2000).

Plaintiff contends that the arbitration clause is unenforceable under the North Carolina Uniform Arbitration Act ("UAA"). N.C. Gen. Stat. § 1-567.2(b)(2) (2003) provides that the UAA does not apply to "[a]rbitration agreements between employers and employees or between their respective representatives, unless the agreement provides that this Article shall apply."[1] Before, however, a court may consider whether the UAA would render the parties' arbitration agreement unenforceable, it must determine whether the Federal Arbitration Act ("FAA") applies. That question is critical because the FAA preempts conflicting state law, including any state statutes that render arbitration agreements unenforceable. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272, 130 L. Ed. 2d 753, 763, 115 S. Ct. 834, 838 (1995) (because the FAA preempts state law, "state courts cannot apply state statutes that invalidate arbitration agreements"). Plaintiff does not dispute that if the FAA applies, then the parties' arbitration agreement is enforceable.

The FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1994). The FAA includes within its scope employment contracts with the exception of those covering workers engaged in transportation. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289, 151 L. Ed. 2d 755, 765-66, 122 S. Ct. 754, 761 (2002).

In deciding the applicability of the FAA, the dispositive question is whether the employment agreement at issue is a "contract evi-

1. This statute was repealed effective 1 January 2004. It remains applicable to agreements to arbitrate made prior to that date. 2003 N.C. Sess. Laws ch. 2003-345, § 1.

dencing a transaction involving commerce[.]" 9 U.S.C. § 2. *Eddings* directs that the trial court must specifically make this determination. 356 N.C. at 286, 569 S.E.2d at 645, *adopting per curiam*, 147 N.C. App. 375, 386, 555 S.E.2d 649, 656 (2001) (Greene, J., dissenting). This Court may not resolve the question for the first time on appeal. *Id.*

In *Eddings*, the plaintiff was a Tennessee physician who moved to Asheville and signed an employment agreement containing an arbitration clause with the defendant medical group. He sued the medical group seeking rescission of the agreement. The trial court denied the medical group's motion to compel arbitration, and the group appealed. A divided panel of this Court held that because the agreement evidenced a transaction in which the plaintiff crossed state lines to begin practicing in North Carolina, the arbitration clause was governed by the FAA. *Id.* at 383, 555 S.E.2d at 654.

Judge Greene dissented on the ground that it was impossible for this Court to make the initial determination whether the transaction in the case involved interstate commerce and, therefore, fell within the scope of the FAA. *Id.* at 385, 555 S.E.2d at 656. Judge Greene observed that whether a contract evidenced "a transaction involving commerce" within the meaning of the FAA is a question of fact that an appellate court should not initially decide. *Id.* He then reasoned:

> With the exception of the fact plaintiff was in Tennessee before moving to Asheville to join [the medical group], there is no evidence in this case that the transaction involved multiple states. Indeed, the record to this Court is devoid of any evidence the [employment agreement] or plaintiff's employment "involve[d] interstate commerce and [is] within the scope of the FAA." Although this Court "may speculate on what may have been the nature of the performance required by the contract, it is impossible for us to determine on appeal whether the [FAA] applies" due to the contract in question involving interstate commerce. Accordingly, I would remand this case to the trial court for the initial determination of whether the [employment agreement] involved interstate commerce.

Id. at 385-86, 555 S.E.2d at 656 (quoting *Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Comm'n*, 387 F.2d 768, 772 (3d Cir. 1967)). The Supreme Court reversed the decision of this Court for the reasons stated in Judge Greene's dissenting opinion. *Eddings*, 356 N.C. at 286, 569 S.E.2d at 645.

This case is indistinguishable from *Eddings*. While plaintiff argues that defendants failed to request formal findings and, therefore, "it is presumed that the judge made the determination based upon proper evidence[,]" *House Healers Restorations, Inc. v. Ball*, 112 N.C. App. 783, 786, 437 S.E.2d 383, 385 (1993), *Eddings* nonetheless appears to require an express determination by the trial court of the applicability of the FAA.

Defendants have argued that no remand is necessary because the arbitration agreement is enforceable under state law as well as under the FAA. Defendants acknowledge that employment agreements, such as the one at issue here, are excluded from the scope of the UAA when the UAA is not specifically referenced within the agreement. N.C. Gen. Stat. § 1-567.2(b)(2). Defendants urge, however, that even if an arbitration agreement falls outside the scope of both the FAA and the UAA a trial court is still required to compel arbitration. North Carolina law holds otherwise. In *Skinner v. Gaither Corp.*, 234 N.C. 385, 386, 67 S.E.2d 267, 269 (1951), our Supreme Court first noted that when an arbitration agreement is not a contract to arbitrate under the UAA, then "the common law rule applies." Applying the common law rule, the Court then held: "It is settled law in this jurisdiction, as in most others, that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by an agreement, previously entered into, to submit the rights and liabilities of the parties to arbitration or to some other tribunal named in the agreement." *Id.* at 386-87, 67 S.E.2d at 269. In short, if neither the FAA nor the UAA (nor any other statutory provision) governs an arbitration agreement, then a court has no authority to compel arbitration. *Id.* at 387, 67 S.E.2d at 269 ("In an action on the [arbitration agreement] the courts will not decree specific performance of the agreement. Neither will they, by indirection, compel specific performance by refusing to entertain a suit until after arbitration is had under the agreement."). *See also Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 232, 321 S.E.2d 872, 878 (1984) ("As long as the statutory requirements of the [UAA] have been met . . ., a court must order arbitration on motion of a party to the contract.").

Because the question whether the FAA or the UAA governs this arbitration agreement determines whether the trial court properly denied the motion to compel arbitration, we must, in accordance with controlling precedent in *Eddings*, reverse and remand the case to the trial court to decide whether the employment agreement evidenced a transaction involving interstate commerce. In making that determina-

tion, the trial court must apply the principles announced in *Allied-Bruce*, 513 U.S. at 273-74, 130 L. Ed. 2d at 764, 115 S. Ct. at 839. Under *Allied-Bruce*, the FAA's term "involving commerce" is considered the functional equivalent of "affecting commerce." *Id.* It is broader than the term "in commerce" and "signals an intent to exercise Congress' commerce power to the full." *Id.* at 277, 130 L. Ed. 2d at 766, 115 S. Ct. at 841. With respect to the meaning of "evidencing a transaction," the Court read the Act's language "as insisting that the 'transaction' in fact 'involv[e]' interstate commerce, even if the parties did not contemplate an interstate commerce connection." *Id.* at 281, 130 L. Ed. 2d at 769, 115 S. Ct. at 843.

We observe that defendants have the burden of establishing that the arbitration clause is enforceable. *Tohato, Inc. v. Pinewild Mgmt., Inc.*, 128 N.C. App. 386, 393, 496 S.E.2d 800, 805 (1998) (when a party seeks to compel arbitration, he must first establish his right to that remedy). *See also Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 581 (2004) ("Defendants, as the parties seeking to compel arbitration, held the burden of proof."). As a result, defendants were required to submit sufficient evidence in support of their motion to compel arbitration to establish that plaintiff's contract evidenced a transaction involving interstate commerce. *See Am. Gen. Fin., Inc. v. Morton*, 812 So. 2d 282, 284-85 (Ala. 2001) ("The party seeking to compel arbitration has the initial burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction substantially affecting interstate commerce."). Here, defendants offered no evidence in support of their motion to compel arbitration apart from the employment agreement attached to plaintiff's complaint.[2]

Reversed and remanded.

Chief Judge MARTIN and Judge HUDSON concur.

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2. Their only attempt to present evidence on this issue came when they filed their motion for reconsideration. Defendants have not, however, assigned error to the trial court's denial of that motion.

LUDOVICUS KEYZER A/K/A LUDO KEYZER, PLAINTIFF v. AMERLINK, LTD., DEFENDANT

No. COA03-598

(Filed 15 June 2004)

Trials— voluntary dismissal—refiling—limitation period

The trial court erred by dismissing an action with prejudice after concluding that plaintiff had exceeded the one year limit for refiling after a voluntary dismissal. An oral notice in open court generally begins the one year limitation period for refiling, but there is an exception, applicable here, when the original court instructs or permits the filing of the written notice at a later date. N.C.G.S. § 1A-1, Rule 41(a)(1)(ii).

Appeal by plaintiff from order entered 25 March 2003 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 5 February 2004.

Barry Nakell for plaintiff-appellant.

Meyer & Meuser, P.A., by Linda K. Wood, Deborah N. Meyer, and John B. Meuser, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Ludovicus Keyzer, a/k/a Ludo Keyzer, ("plaintiff") appeals the trial court's order dismissing his action with prejudice. For the reasons detailed below, we reverse the decision of the trial court.

The pertinent facts and procedure of the instant appeal are as follows: On 22 February 1999, plaintiff filed a complaint against Amerlink, Ltd. ("defendant"), alleging breach of contract, breach of express and implied warranties, fraud, and unfair and deceptive trade practices arising out of the sale of a log home package. The action proceeded to trial, and on 10 September 2001, after plaintiff had rested his case and while defendant was presenting its defense, the parties reached a settlement which was reduced to writing that same day ("the Agreement"). The hand-written Agreement provided that:

> Upon execution of this settlement agreement the court will declare a mistrial in this action; and thereafter, on or before Jan. 2, 2002, the parties will file a stipulation of dismissal without prejudice under Rule 41(a).

The trial court thereafter declared a mistrial and dismissed the jury.

On 12 September 2001, the parties executed a typed supplement to the Agreement, which did not contain the language requiring the parties file a stipulation of dismissal. However, on 10 January 2002, the parties entered into a supplement to the "Agreement Dated September 12, 2001," which provided that the parties would file a stipulation of dismissal pursuant to Rule 41(a)(1)(ii) on or before 15 January 2002. On 15 January 2002, the parties filed a Stipulation of Dismissal.

On 4 December 2002, plaintiff filed a breach of contract action, claiming defendant failed to make a settlement payment required by the Agreement. Plaintiff also refiled his previous action, based upon the same claims as those made in February 1999. That same day, defendant filed a Motion to Stay, alleging breach of contract and seeking release from further performance under the Agreement because of plaintiff's alleged violation of the confidentiality clause contained in the Agreement. On 27 January 2003, defendant filed a "Motion to Convert Motion to Stay to Motion to Dismiss or in the Alternative to Stay."

On 25 March 2003, the trial court granted defendant's motion to dismiss, concluding as a matter of law that:

> 1. At the time the Court dismissed the jury . . ., the parties did not seek leave of court to file, nor did they in fact file a Motion for Dismissal under Rule 41(a)[(1)](ii).
>
> 2. The one year period for commencing an action after taking a voluntary dismissal under Rule 41(a) began to run on or about September 10, 2001 when the Court . . . dismissed the jury.
>
> 3. A party to an action cannot establish a longer period of time for commencing an action by delaying the filing of a Rule 41(a) dismissal. Nor can the parties contract to extend the period.
>
> 4. [Plaintiff's] failure to commence this action within the one year of the date upon which the Court dismissed the jury . . . warrants a dismissal of this action.
>
> 5. The statute of limitations has expired on [plaintiff's] underlying claims and such claims are absolutely barred.
>
> 6. Based upon information presented to this Court, an [sic] in accordance with the provisions of Rule 12(h)(3) of the North Carolina Rules of Civil Procedure, the Court lacks jurisdiction of the subject matter of this action.

The trial court ordered plaintiff's action be dismissed with prejudice. It is from this order that plaintiff appeals.

We note as an initial matter that plaintiff's brief contains arguments supporting only six of his original eleven assignments of error. Pursuant to North Carolina Rule of Appellate Procedure 28(b)(6) (2004), the five omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by plaintiff for appeal.

The dispositive issue on appeal is whether the statute of limitations barred plaintiff's claims. Plaintiff argues that the one-year period in which he may refile his claims after voluntary dismissal began on 15 January 2002, the date the parties filed the Stipulation of Dismissal. We agree.

According to N.C.R. Civ. Pro. 41(a)(1), any action may be dismissed by a plaintiff without order of the trial court (i) by filing a notice of dismissal at any time before the plaintiff rests his or her case, or (ii) by filing a stipulation of dismissal signed by all parties to the action. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2003). A new action based on a voluntarily dismissed claim may be commenced within one year after the dismissal, unless the stipulation of dismissal signed by the parties "shall specify a shorter time." *Id.* In the instant case, the second trial court concluded that the one-year period for refiling plaintiff's action began to run on 10 September 2001, the date the first trial court dismissed the jury after receiving oral notice of dismissal from the parties. The second trial court determined that the parties could not establish a longer period of time for refiling the action by delaying the entry of their Rule 41(a) stipulation of dismissal. We conclude the second trial court erred in its conclusion.

Generally, "oral notice in open court of voluntary dismissal operates to commence the one-year limitation period set out in Rule 41(a)(1)." *Baker v. Becan*, 123 N.C. App. 551, 553, 473 S.E.2d 413, 415, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996); *see Danielson v. Cummings*, 300 N.C. 175, 180, 265 S.E.2d 161, 164 (1980) ("[W]hen a case has proceeded to trial and both parties are present in court[,] the one-year period in which a plaintiff is allowed to reinstate a suit from a Rule 41(a) voluntary dismissal begins to run from the time of oral notice of voluntary dismissal in open court."). However, in *Thompson v. Newman*, 331 N.C. 709, 417 S.E.2d 224 (1992), our Supreme Court created an exception to the general rule that is applicable to the instant case. In *Thompson*, the plaintiff complied with the trial court's

express permission to file written notice of dismissal two days after the plaintiff gave notice of dismissal in open court. *Id.* at 713, 417 S.E.2d at 226. Plaintiff later refiled his claim within a year after his written notice of dismissal, but over a year after his oral notice of dismissal. The defendant moved for summary judgment, arguing that the plaintiff's oral notice commenced the one-year savings provision. The Court disagreed with the defendant and held:

> [W]hen a trial court instructs, or expressly permits, a plaintiff who has given oral notice of voluntary dismissal pursuant to Rule 41(a)(1) to file written notice to the same effect at a later date during the session of court at which oral notice was given, and plaintiff files written notice accordingly, the one-year period for refiling provided by the rule begins to run when written notice is filed.

Id. at 712, 417 S.E.2d at 225.

In the instant case, counsel for both parties engaged in a discussion with the first trial court judge on 10 September 2001. As a result of these discussions, the trial judge and the parties agreed that after the court declared a mistrial, the court would "put the case on inactive status[] and [the parties] would file [their] stipulation of dismissal in January." Pursuant to these discussions, the parties signed the Agreement on 10 September 2001 and later executed the two supplements detailed above, which extended the date for filing the Stipulation of Dismissal from 2 January 2002 to 15 January 2002.

Defendant argues that because the Agreement and its supplements permitted the parties to file the Stipulation of Dismissal after the court session had ended, the Agreement was inconsistent with this Court's decision in *Baker*. In *Baker*, after recognizing that the "plaintiff's written notice of dismissal was filed after the subject session of court had concluded[,]" we held that the plaintiff's oral notice in court commenced the one-year limitation period of Rule 41(a). 123 N.C. App. at 554, 473 S.E.2d at 415. However, we note that in *Baker* the plaintiff gave notice of voluntary dismissal pursuant to Rule 41(a)(1)(i) before she had rested her case, while in the instant case the parties informed the first trial court of their agreement to dismiss the action after plaintiff had rested his case and during defendant's presentation of evidence. Thus, the dismissal in the instant case was pursuant to Rule 41(a)(1)(ii), which requires the assent of both parties to the dismissal. In order for plaintiff to extend the period for refiling his action, plaintiff would have to gain defendant's assent to

the execution of a supplement or revision of the Agreement. Therefore, as in *Thompson*, "[t]here was no danger plaintiff could have extended indefinitely the one-year savings provision of [Rule 41(a)]." *Id.* at 713, 417 S.E.2d at 226.

As detailed above, the second trial court based its dismissal of plaintiff's action on the conclusion that the parties wrongfully contracted to extend the period of time plaintiff could refile his action. However, the Agreement does not extend the one-year period in which plaintiff may refile his claim following the Rule 41 dismissal; it merely dictates the date the dismissal will be filed. Furthermore, the Agreement does not wrongfully extend the statute of limitations governing plaintiff's breach of contract, breach of express and implied warranties, fraud, and unfair and deceptive trade practices claims. Although plaintiff's second action was filed outside of the period allowed by the statute of limitations, the action was filed within one year of the stipulation of dismissal entered pursuant to Rule 41(a). In such an instance, it is well established that the statute of limitations is tolled by the filing of a Rule 41(a) voluntary dismissal, and the plaintiff is not forbidden from subsequently refiling an action outside the statute of limitations period but within the period proscribed by Rule 41(a). *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 365, 344 S.E.2d 302, 304 (1986); *Whitehurst v. Transportation Co.*, 19 N.C. App. 352, 356, 198 S.E.2d 741, 743 (1973).

We conclude that plaintiff's claims should not be barred because he followed the clear directives of a superior court judge and the terms of an agreement he signed with an opposing party. Thus, we hold that the trial court erred in concluding that plaintiff's claims were barred, and we therefore reverse the order of the trial court.

Reversed and remanded.

Judge ELMORE concurs.

Judge BRYANT concurs in the result.

MILTON KNIGHT AND MARVA KNIGHT, PETITIONERS v. TOWN OF KNIGHTDALE AND THE TOWN COUNCIL OF THE TOWN OF KNIGHTDALE, RESPONDENTS

No. COA 03-355

(Filed 15 June 2004)

Cities and Towns— unified development ordinance—zoning compliance permit

A de novo review revealed that the superior court erred in finding that, as a matter of law, petitioners' application for a zoning compliance permit for petitioners' home did not meet the requirements contained in respondent town's unified development ordinance (UDO) because according to the UDO as written, the town could have considered any of the specific physical effects listed in the UDO, but had no authority to consider the site plan's potential effect on surrounding property values.

On writ of certiorari from judgment entered 11 September 2002 by Judge Jack W. Jenkins in Superior Court in Wake County. Heard in the Court of Appeals 4 December 2003.

Frederic E. Toms & Associates, P.L.L.C., by Frederic E. Toms and Allen Mills, for petitioner-appellants.

Holt, York, McDarris & High, L.L.P., by Bradford A. Williams, for respondent-appellees.

HUDSON, Judge.

On 14 January 2002, petitioners Milton and Marva Knight applied for, and initially received, permits from the Town of Knightdale ("the Town") to construct a modular home at 101 Dearing Drive in the Lynnwood Estates subdivision. Subsequently, the Town Council ("Council") denied petitioners' application, and the superior court affirmed. Petitioners appeal. For the reasons discussed here, we reverse and remand.

The tract of land upon which petitioners' sought to build is zoned Residential/Agricultural ("RA"). The Town's Planning Staff ("Staff") initially determined that petitioners' home was a manufactured home, and that pursuant to the Town's Unified Development Ordinance ("UDO"), zoning compliance permits for manufactured homes in an RA District require only staff, not Council, approval. Staff issued the permits.

After Staff issued the permits, construction began on petitioners' home. On 4 February 2002, several residents of the Lynnwood Estates subdivision attended a Council meeting and raised questions regarding petitioners' home. The Council directed Staff and the Town attorney to research further whether petitioners' home met the definition of a "manufactured" home.

Staff determined that petitioners' home was not "manufactured," but rather "modular." Under the Town's UDO, a modular home in the RA District requires a zoning compliance permit with Council site plan approval. Therefore, the Town advised petitioners by letter 12 February 2002 that it would not issue a Certificate of Occupancy until after it took action on the zoning compliance permit.

At its 20 February 2002 meeting, the Council took public comment on petitioners' request for site plan approval, and then referred petitioners' site plan to the Town's Planning and Appearance Board ("Board"). The Board received a report from the Land Use Administrator, and discussed the site plan at its 25 February 2002 meeting. Based upon that report, the Board voted to recommend that the Council approve petitioners' site plan subject to certain changes to which petitioners agreed. The changes included adding a porch, constructing a concrete driveway and sidewalk, and encasing the chimney in such materials as would resemble a traditional chimney.

At its 4 March 2002 meeting, the Council again addressed petitioners' zoning compliance permit. The Council reviewed the Land Use Administrator's report, and the Board's recommended approval of petitioners' site plan with the above changes. Again, the Council took public comment. After discussions, the Council denied petitioners' permit application.

Petitioners sought review in the superior court in Wake County. After a hearing, the superior court ruled that the Council's decision was supported by the evidence and was not arbitrary and capricious.

Petitioners appealed to this Court, which appeal we dismissed. Petitioners then filed a petition for writ of certiorari, which we granted on 13 March 2003.

First, petitioners argue that the superior court "erred in finding that, as a matter of law, the petitioners' application for a zoning compliance permit did not meet the requirements contained in the [Town's UDO]." We agree, and for the following reasons reverse the order of the superior court and remand for further proceedings.

Upon review of a decision from a Board of Adjustment, the superior court should:

> (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust., 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999). On review of the superior court's order, this Court must determine whether the trial court correctly applied the proper standard of review. *Id.*

To review the sufficiency of the evidence, this Court applies the "whole record" test to determine "whether the Board's findings are supported by substantial evidence contained in the whole record." *Id.* at 468, 513 S.E.2d at 73. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.* "Where the petitioner alleges that a board decision is based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined." *Id.* at 470, 513 S.E.2d at 74.

Although the Council made no written findings of fact or conclusions of law, the minutes of the 4 March 2002 meeting indicate that the Coucil based the denial upon the likelihood of diminution in the property values of those properties surrounding petitioner. At oral argument, counsel for both parties agreed that the Council denied the permit on this basis. Petitioners allege that the Town and superior court erred as a matter of law in ruling that petitioners' site plan was not in compliance with the Town's UDO. We review the superior court's order *de novo*.

The superior court's order states that "[t]he evidence in the whole [r]ecord established that Petitioners failed to carry their burden, as set forth in Sections 4.3.5.4.3 and 4.3.5.4.3.2 of the Town's UDO." The pertinent sections of the Town's UDO read as follows:

> <u>4.3.5.4.3</u>
>
> The Town Council shall approve, approve with conditions, or deny, or take any other action consistent with its usual rules

of procedure on the site plan. Actions shall be based on conformity with this chapter, the Comprehensive Plan, and other adopted plans and standards; however, no site plan shall be approved unless the Town Council first finds that the plan meets all the following:

***

4.3.5.4.3.2

The plan contains adequate measures to protect other properties, including public corridors, from adverse effects expected from the development, including without limitation, stormwater, noise, odor, on and off-street parking, dust, light, smoke and vibration.

"The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Cogdell v. Taylor*, 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965). The basic rule of statutory construction "is to ascertain and effectuate the intention of the municipal legislative body." *George v. Town of Edenton*, 294 N.C. 679, 684, 242 S.E.2d 877, 880 (1978). "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." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

The rule of statutory construction *ejusdem generis* provides that:

> where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.

State v. Lee, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970). Referring specifically to zoning ordinances, our Supreme Court has stated the following:

> Since zoning ordinances are in derogation of common-law property rights, limitations and restrictions not clearly within the scope of the language employed in such ordinances should be excluded from the operation thereof.

Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjust., 334 N.C. 132, 138-39, 431 S.E.2d 183, 188 (1993).

Here, the adverse effects listed in Section 4.3.5.4.3.2 of the Town's UDO ("stormwater, noise, odor, on and off-street parking, dust, light,

smoke and vibration") are all physical in nature. Nonetheless, respondents argue that the phrase "without limitation" preceding the enumerated effects allows the Town to consider any negative impact a plan would have on surrounding properties. We disagree.

Given the Supreme Court's limitation of zoning restrictions as laid out in *Capricorn*, we conclude that diminution in neighboring property values is excluded from the scope and intent of Section 4.3.5.4.3.2 of the Town's UDO. According to the UDO as written, therefore, Town could have considered any of the specific physical effects listed in the UDO, but had no authority to consider the site plan's potential effect on surrounding property values. We hold that the Town erroneously denied petitioners' application for site plan approval, and, in turn, the superior court erred in upholding such denial. Thus, we reverse the decision of the superior court and remand for entry of an order requiring respondents to issue the zoning compliance permit for petitioners' home.

Reversed and remanded.

Judges TYSON and STEELMAN concur.

STATE OF NORTH CAROLINA v. WILBERT LESTER FAIR

No. COA03-707

(Filed 15 June 2004)

Discovery— foundation of expert opinion—laboratory results—data collection procedures

The trial court erred in a sale and delivery of cocaine and possession with intent to sell or deliver cocaine case by denying defendant's motion for further discovery from the State concerning the foundation of its expert's opinion as to the testing by the SBI laboratory to determine the nature of the substance submitted, because: (1) although defendant's oral discovery requests made at the conclusion of the voir dire hearing were not embodied in his earlier written motion and were properly denied since they did not comply with N.C.G.S. § 15A-903, defendant's written discovery motion did comply with this statute; (2) defendant is entitled to more than just the naked results of the State's labora-

tory analysis; and (3) although it is beyond the discovery provisions of N.C.G.S. § 15A-903 to require the State to provide defendant with information concerning peer review of the testing procedure, whether the procedure has been submitted to the scrutiny of the scientific community or is generally accepted in the scientific community, citations to empirical studies supporting the opinion, or citations to articles in scientific treatises or journals supporting the opinion, the State is required to provide discovery of data collection procedures requested by defendant.

On writ of certiorari by defendant to review judgment entered 21 September 2000 by Judge J. Marlene Hyatt in Henderson County Superior Court. Heard in the Court of Appeals 4 March 2004.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

CALABRIA, Judge.

Wilbert Lester Fair ("defendant") seeks review of a judgment entered on jury verdicts finding him guilty of sale and delivery of cocaine and possession with intent to sell or deliver cocaine.[1] The court found his prior record level was level IV and sentenced him as a habitual felon to a term of 107 to 138 months' imprisonment in the North Carolina Department of Correction. Because we find prejudicial error, we conclude defendant is entitled to a new trial.

On 20 March 2000, the Hendersonville Police Department conducted an undercover narcotics investigation. As part of this investigation, Kimberly Shelton, working as an undercover agent, purchased two off-white rocks resembling crack cocaine from defendant for twenty dollars. The substance was sent to the State Bureau of Investigation ("SBI") for chemical analysis. Jay Pintacuda ("Pintacuda"), a chemical analyst employed by the SBI, determined the substance contained cocaine and weighed .07 grams. This determination was based on the performance of cobalt thiocyanate, infrared spectrographic, and gold chloride crystallography analyses. Pintacuda memorialized the tests he performed and the results of his testing in a laboratory report.

1. Our review of the judgment is pursuant to a petition for writ of certiorari granted by this Court on 28 January 2003.

Prior to trial, the State properly notified defendant of its intention to introduce the SBI laboratory report into evidence without further authentication pursuant to N.C. Gen. Stat. § 90-95(g). Defendant filed a written motion for discovery on 12 September 2000 in which he (1) objected to the introduction of the State's laboratory report pursuant to N.C. Gen. Stat. § 90-95(g), (2) moved for a pretrial hearing to "evaluate the adequacy of the foundation of the opinions to be proffered by the State[,]" and (3) requested that the State disclose the following:

> a. A concise and specific statement of each expert opinion the State intends to introduce;
>
> b. The name, address and curriculum vita [sic] of each witness the State intends to qualify as an expert in order to present such opinion testimony;
>
> c. The scientific or technical foundations of each opinion, including, but not limited to:
>
> > i. Citations to empirical studies supporting the opinion;
> >
> > ii. Citations to articles or chapters in scientific treatises or journals supporting the opinion;
> >
> > iii. Data collected by the . . . witness or those under his/her supervision, in connection with this case, including the data collections instruments used, the data collection procedures, and the statistical analysis applied to the data in forming the opinion to be proffered.

In response to the motion filed by defendant, the State provided defendant with a form entitled "Western Regional Lab Analysis Form," which listed the tests performed on the substance, the results of the tests, the analyst, and the analyst's conclusion that the substance contained a "cocaine base."

The trial court heard arguments on defendant's motion immediately before trial on 20 September 2000. The trial court allowed defendant to *voir dire* Pintacuda prior to his testimony. During *voir dire*, Pintacuda testified concerning the methodology of the tests performed, the relevant protocols and manuals governing the tests, and quality control measures. Following the *voir dire*, defendant moved that the State be required to provide him with copies of the quality control manual, accreditations manual, and DEA training manual. This motion was denied by the trial court.

In his appeal to this Court, defendant asserts in relevant part that the trial court erred in denying defendant's motion for further discovery from the State concerning the foundation of its expert's opinion as to the testing by the SBI laboratory to determine the nature of the substance submitted. Specifically, defendant contends he was entitled to receive protocols, procedures, and manuals concerning quality control, accreditation, and training under the rationale of *State v. Cunningham*, 108 N.C. App. 185, 423 S.E.2d 802 (1992) and *State v. Dunn*, 154 N.C. App. 1, 571 S.E.2d 650 (2002), *disc. rev. denied*, 356 N.C. 685, 578 S.E.2d 314 (2003).

Discovery by a defendant in a criminal case is governed by the provisions of N.C. Gen. Stat. § 15A-903 (2003). Subsection (e) deals with reports of examinations and tests and provides, in relevant part, as follows:

> Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor.

With the exception of evidence falling under the rationale of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), there is no general right of discovery in criminal cases under the United States Constitution. *Cunningham*, 108 N.C. App. at 195, 423 S.E.2d at 808.

North Carolina General Statutes § 15A-902(a) (2003) requires that discovery requests must be in writing and filed within the time periods specified in N.C. Gen. Stat. § 15A-902(d). Defendant's oral discovery requests made at the conclusion of the *voir dire* hearing, to the extent they were not embodied in his earlier written motion, did not comply with this statute and were properly denied by the trial court. However, defendant's written discovery motion did comply with this statute.

Under N.C. Gen. Stat. § 15A-903 as construed by this Court's decisions in *Cunningham* and *Dunn*, a defendant is entitled to more than just the naked results of the State's laboratory analysis. Under our present statutes and case law a defendant is entitled to the following discovery:

1. Results or reports of physical or mental examinations or of tests, measurements or experiments. N.C. Gen. Stat. § 15A-903(e).

2. Inspection, examination or testing of physical evidence by the defendant. *Id.*

3. Tests performed or procedures utilized by experts to reach their conclusions. *Cunningham*, 108 N.C. App. 185, 423 S.E.2d 802.

4. Laboratory protocol documents. *Dunn*, 154 N.C. App. 1, 571 S.E.2d 650.

5. Reports documenting "false positives" in the laboratory results. *Id.*

6. Credentials of individuals who tested the substance. *Id.*

The scope of discovery sought by defendant in this case goes far beyond that allowed under *Cunningham* and *Dunn*. Defendant asserts in his brief:

> [The State] did not, however, provide him with the discovery he requested of information regarding the procedures used in the tests; the data derived from the tests or *other materials pertinent to whether the techniques used have been tested; subjected to peer review and publication or submitted to the scrutiny of the scientific community.* Nor did the State provide the requested discovery of the technique's known or potential rates of error and *general acceptance in the scientific community.*

Defendant thus seeks to expand discovery in criminal cases to include articles and publications which would cast doubt upon the scientific validity of the testing procedure and form the basis of a challenge to the procedure under the rationale of *Daubert v. Merrell Dow*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993).

Defendant is entitled to discover the results of the tests and the manner in which the tests were performed. This information is necessary for the defendant to understand the testing procedure and to conduct an effective cross-examination of the State's expert witness. *See Dunn*, 154 N.C. App. at 6, 571 S.E.2d at 654. However, it is beyond the scope of N.C. Gen. Stat. § 15A-903's discovery provisions to require the State to provide defendant with information concerning peer review of the testing procedure, whether the procedure has been submitted to the scrutiny of the scientific community, or is generally

accepted in the scientific community. It is further beyond the scope of permitted discovery to require the State to produce citations to empirical studies supporting the opinion, or citations to articles in scientific treatises or journals supporting the opinion. This is information that is not under the control of the State, and is generally available in the scientific community.

Thus, the trial court erred in not requiring the State to provide discovery of data collection procedures requested by the defendant. Such information falls under laboratory protocol documents held discoverable under *Dunn*, without which defendant could not effectively cross-examine the State's expert witness. This error requires a new trial. Defendant brought forward no argument concerning the failure of the State to provide a curriculum vitae of the State's expert or any statistical analysis; therefore, these matters are not before us.

New trial.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. JOHNNY RAY CANELLAS

No. COA03-192

(Filed 15 June 2004)

1. Sentencing— habitual felon—prior record level—prior conviction—prayer for judgment continued

The trial court did not err in a felony breaking and entering and habitual felon case by calculating defendant's prior record level by adding one point for the prayer for judgment continued on the assault on a female charge, because: (1) the North Carolina Structured Sentencing Statute under N.C.G.S. § 15A-1340.11(7) provides that a person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime; and (2) N.C.G.S. § 15A-1331(b) provides that for the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest, and the Court of Appeals has determined that formal entry of judgment is not required in order to have a conviction.

2. Appeal and Error— preservation of issues—constitutional issue—failure to raise at trial

Although defendant contends in a felony breaking and entering and habitual felon case that N.C.G.S. § 15A-1331(b) is unconstitutional, defendant failed to properly preserve this issue for appellate review because defendant failed to raise this issue at trial.

Appeal by defendant from judgment entered 10 June 2002 by Judge Wiley F. Bowen in Lee County Superior Court. Heard in the Court of Appeals 2 December 2003.

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

Mark A. Key and Penny K. Bell, attorneys for the defendant-appellant.

TIMMONS-GOODSON, Judge.

Johnny Ray Canellas ("defendant") appeals his sentence of 151 months to 191 months imprisonment following his plea of guilty to two counts of felony breaking and entering and admission of habitual felon status. The sentence is to begin at the expiration of any and all sentences that defendant is currently serving. For the reasons stated herein, we affirm the decision of the trial court.

The factual and procedural history of this case is as follows: On 11 November 1999, defendant was convicted of assault on a female and received a prayer for judgment continued on the condition that he enroll in a domestic violence program for 18 months. Defendant was indicted by the Lee County Grand Jury on 25 February 2002 on the following charges: felony breaking and entering; felony larceny; felony possession of stolen property; and attaining habitual felon status. The Harnett County Grand Jury indicted defendant on the additional charges of two counts each of felony breaking and entering, felony larceny, and felony possession of stolen property. After defendant's Harnett County cases were transferred to Lee County for disposition, defendant tendered a plea of guilty on 10 June 2002 to two counts of felony breaking and entering and admitted his status as an habitual felon.

Pursuant to the plea agreement, the State dismissed all of the remaining charges. Defendant had numerous prior convictions which

included the prayer for judgment continued on the charge of assault on a female. At defendant's sentencing hearing, the State contended that defendant's prior convictions amounted to fifteen prior record level points. Defendant contended that his prior convictions allow for only fourteen prior record level points and that his prayer for judgment continued on the assault on a female charge should not count toward the trial court's prior record level determination. The trial court assessed defendant fifteen prior record level points and ordered him to serve 151 months to 191 months in prison. It is from this sentence that defendant appeals.

The issues presented on appeal are (I) whether the trial court erred in calculating defendant's prior record level, and (II) whether N.C. Gen. Stat. § 15A-1331(b) is unconstitutional on its face or as applied to defendant.

As an initial matter, we note that defendant failed to cite to the assignments of error on the record in his appellate brief. The Rules of Appellate Procedure require that "[i]mmediately following each question presented shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." N.C. R. App. P. 28(b)(6) (2004). "[A]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." *Id.* The failure to comply with Rule 28 subjects defendant's appeal to dismissal. *Northwood Homeowners Assn., Inc. v. Town of Chapel Hill*, 112 N.C. App. 630, 632, 436 S.E.2d 282, 283 (1993). However, pursuant to Rule 2 of the N.C. Rules of Appellate Procedure, we nonetheless consider the merits of defendant's arguments. N.C. R. App. P. 2 (2004) ("[T]o expedite decision in the public interest [the Court of Appeals] may . . . suspend or vary the requirements or provisions of any of [the Rules of Appellate Procedure] in a case pending before it . . . upon its own initiative.").

[1] Defendant first argues that the trial court erred in calculating defendant's prior record level by adding one point for the prayer for judgment continued on the assault on a female charge. We disagree.

The North Carolina Structured Sentencing Statutes provide that "[a] person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime." N.C. Gen. Stat. § 15A-1340.11(7) (2003). "For the

purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." N.C. Gen. Stat. § 15A-1331(b) (2003). Furthermore, this Court has "interpreted N.C. Gen. Stat. § 15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction." *State v. Hatcher*, 136 N.C. App. 524, 527, 524 S.E.2d 815, 817 (2000).

In the case at bar, defendant tendered a plea of guilty to a charge of assault on a female in November 1999 and asked the trial court to continue judgment. Defendant was granted the prayer for judgment continued on the condition that he attend a domestic violence program for 18 months. There is no evidence in the record to suggest that defendant did not complete the domestic violence program. Thus, we presume that defendant met the conditions of his prayer for judgment continued. Therefore, pursuant to N.C. Gen. Stat. § 15A-1331 and this Court's holding in *Hatcher*, we hold that defendant's prayer for judgment continued in the assault on a female case is a prior conviction for sentencing purposes. Accordingly, we conclude that the trial court did not err by considering the assault conviction for the purpose of prior record level sentencing.

[2] Next, defendant argues that N.C. Gen. Stat. § 15A-1331(b) is unconstitutional. It is well established that to challenge the constitutionality of an issue on appeal, the party must raise the issue at trial. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). Defendant failed to demonstrate that he raised the constitutionality of N.C. Gen. Stat. § 15A-1331 at trial, thus defendant failed to properly preserve this issue for appellate review. Accordingly, we decline to address defendant's constitutionality argument.

For the reasons stated above, we hold that the trial court did not err in determining defendant's sentence.

AFFIRMED.

Judges WYNN and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 JUNE 2004

ALDRIDGE v. MAYFIELD No. 03-1006	Watauga (02CVD607)	Affirmed
FORD v. INTEGON NAT'L INS. CO. No. 03-80	Mecklenburg (02CVS13053)	Affirmed in part and reversed in part
FRAZELLE v. MAOLA MILK CO. No. 03-294	Ind. Comm. (I.C. 824147) (I.C. 801638)	Affirmed
FREEMAN v. CRAWFORD & CO. No. 03-921	Ind. Comm. (I.C. 857502)	Affirmed
IN RE A.L.B. No. 03-1275	Mecklenburg (02J100)	Affirmed in part, vacated in part, and remanded for a new disposition hearing
IN RE C.A.C. No. 03-923	Wake (02J354)	Affirmed
IN RE H.H. & A.H. No. 03-1355	McDowell (02J13) (02J14)	Affirmed
IN RE M.L. No. 03-441	Cleveland (02J22)	Affirmed in part, reversed in part
IN RE P.B. No. 03-1096	Caldwell (02J64)	No error
IN RE R.S. & M.S. No. 03-982	Alamance (01J172) (01J173)	Affirmed
LANGE v. LANGE No. 03-1070	Dare (02CVD493)	Affirmed
MARVIN v. MARVIN No. 04-26	Watauga (02CVD144)	Dismissed
REEP v. BECK No. 03-961	Wake (02CVS16880)	Reversed and remanded
STATE v. BROADNAX No. 03-724	Rockingham (99CRS12478) (00CRS2561)	No error
STATE v. BROOKS No. 03-1241	Cleveland (02CRS57060) (02CRS57061)	No error

STATE v. CLARK No. 03-812	Wake (99CRS17704)	No error
STATE v. COPPAGE No. 03-1205	Pitt (01CRS56431)	No error
STATE v. DAVIS No. 03-1037	Johnston (02CRS56283)	No error
STATE v. DAWKINS No. 03-702	Pitt (00CRS58799) (00CRS58800) (00CRS58801) (00CRS58802)	No error
STATE v. GENTRY No. 03-855	Durham (93CRS20688) (93CRS20689) (93CRS20690)	Affirmed
STATE v. GLASPY No. 03-1471	Mecklenburg (03CRS23869)	Affirmed
STATE v. HAYWOOD No. 03-1277	Mecklenburg (98CRS40712) (98CRS40713) (98CRS152234) (98CRS152235) (99CRS129012) (99CRS129013) (99CRS129014) (99CRS129015)	No error
STATE v. HILL No. 03-1172	Halifax (01CRS54502)	Remanded for resentencing
STATE v. McCULLUM No. 03-1315	Forsyth (02CRS50354)	Remanded for correction of clerical error
STATE v. REED No. 03-1433	Wake (98CRS30650) (99CRS106128)	No error
STATE v. RICHARDSON No. 03-1292	Johnston (01CRS58293) (02CRS5154)	No error
SUDDRETH v. SUDDRETH No. 03-1250	Caldwell (00CVD934)	Affirmed
WHITE v. ROEBUCK No. 03-987	Pasquotank (03CVS7)	Affirmed in part, reversed in part, and remanded

APPENDIXES

ORDER ADOPTING STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

AMENDMENT TO NORTH CAROLINA SUPREME COURT LIBRARY RULES

ORDER ADOPTING AMENDMENT TO THE RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA

ORDER ADOPTING STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the mediated settlement conference program established pursuant to N.C.G.S. § 7A-38.1,

WHEREAS, N.C.G.S. § 7A-38.3(e) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the prelitigation farm nuisance mediation program established pursuant to N.C.G.S. § 7A-38.3, and

WHEREAS, N.C.G.S. § 7A-38.4(1) provides for this Court to adopt standards for the conduct of mediators and of mediators training programs participating in the program for settlement of equitable distribution and other family financial matters established pursuant to N.C.G.S. § 7A-38.4.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), N.C.G.S. § 7A-38.3(e), and N.C.G.S. § 7A-38.4(1), Standards of Professional Conduct For Mediators are hereby adopted to read as in the following pages. These Standards shall be effective on the 20th day of October, 2004. Until that date, the Standards adopted by this court on the 16th day of August, 2001, shall remain in effect.

Adopted by the Court in conference the 6th day of October, 2004. The Appellate Division Reporter shall promulgate by publication as soon as practicable the Standards of Professional Conduct for Mediators in their entirety, as amended through this action, in the advance sheets of the Supreme Court and the Court of Appeals.

s/Brady, J.

For the Court

STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

PREAMBLE

These standards are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators ~~who~~ participat~~e~~<u>ing</u> in mediated settlement conferences in the State of North Carolina pursuant to NCGS 7A-38.1, NCGS 7A-38.3, ~~or~~ NCGS 7A-38.4<u>A</u> or who are certified to do so. <u>These Standards, however, shall not apply in instances where a mediator is participating in a mediation program or process which is governed by other statutes, program rules, and/or Standards of Conduct and there is a conflict between these Standards and the statutes, rules, or Standards governing the other program. In such instance, the mediator's conduct shall be governed by the conflicting statutory provision, rule, or Standard applicable to the program or process in which the mediator is participating.</u>

Mediation is a process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his/her judgment as to whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

    (1) a party objects to his/her serving on grounds of lack of impartiality or

    (2) the mediator determines he/she cannot serve impartially.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

A. A mediator shall not disclose, directly or indirectly, to any non-party, any information communicated to the mediator by a party within the mediation process.

B. A mediator shall not disclose, directly or indirectly, to any party to the mediation, information communicated to the mediator in confidence by any other party, unless that party gives permission to do so. A mediator may encourage a party to permit disclosure, but absent such permission, the mediator shall not disclose.

C. The confidentiality provisions set forth in A. and B. above notwithstanding, a mediator has discretion to report otherwise confidential ~~information~~ conduct or statements made in preparation for, during, or as a follow-up to a mediated settlement conference to a

party, non-party, or law enforcement personnel or to give an affidavit or to testify about such conduct or statements in the following circumstances:

(1) ~~the mediator is under a statutory duty to report the confidential information, see, for example, N.C. Gen. Stat. §7A-38.1 and §7A-38.4 which provide for an exception to confidentiality when the mediator has reason to believe that a child or elder has been or may be abused.~~

(1) A statute requires or permits a mediator to testify or give an affidavit; or

(2) public safety is an issue:

~~(2)~~(i) a party to the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat~~.~~; or

~~(3)~~(ii) a party to the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat~~.~~; or

~~(4)~~(iii) a party's conduct during the mediation results in direct bodily injury or death to a person.

D. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. A mediator shall also inform the parties of the following:

(1) that mediation is private;

(2) that mediation is informal;

(3) that mediation is confidential to the extent provided by law;

(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;

(5) the mediator's role; and

(6) what fees, if any, will be charged by the mediator for his/her services.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator may and shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.

D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the process, issues or options for settlement, the mediator shall discontinue the mediation.

E. In appropriate circumstances, a mediator shall encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process. A mediator shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He/She may assist them in making informed and thoughtful decisions, but shall not impose his/her judgment or opinions for ~~that~~ those of the parties concerning any aspect of the mediation.

B. ~~Subject to Section A. above and Standard VI. below, a~~ A mediator may raise questions for the ~~parties~~ participants to consider regarding their perceptions of the dispute as well as the acceptability~~, sufficiency, and feasibility, for all sides,~~ of proposed options for settlement and ~~— including~~ their impact on third parties. Furthermore, a mediator may ~~make suggestions~~ suggest for ~~the parties'~~ consideration options for settlement in addition to those conceived of by the parties themselves. ~~However at no time shall a mediator make a decision for the parties, or express an opinion about or advise for or against any proposal under consideration.~~

C. ~~Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes~~. A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

This section prohibits imposing one's opinions, advice and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

D. Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

~~D~~.E. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, the inability or unwillingness of a party to participate meaningfully, ~~gross~~ inequality of bargaining power or ability, ~~gross~~ unfairness resulting from nondisclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may, in areas where he/she is qualified by training and experience, raise questions regarding the information presented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice. Mediators may respond to a party's request for an opinion on the merits of the case or suitability of settlement proposals only in accordance with Section V.C. above. ~~whether in response to statements or questions by the parties or otherwise.~~

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his/her own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer or other professional shall not advise or represent ~~either~~ any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute, or an out growth of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral of clients for mediation services.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, (and subject to Standard V. D. above) nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality.

AMENDMENT TO NORTH CAROLINA SUPREME COURT LIBRARY RULES

Pursuant to Section 7A-13(d) of the General Statutes of North Carolina, the following amendment to the NORTH CAROLINA SUPREME COURT LIBRARY RULES has been approved by the Library Committee and is hereby promulgated:

Section 1. Rule 11, entitled "Copy service, fees, and certification," is amended to read as follows:

Rule 11. Copy service.

(a) All copies made by members and employees of the Supreme Court and the Court of Appeals shall be furnished without charge.

(b) Provided that the number of copies made in any one month does not exceed three hundred (300) pages, or with the permission of the Librarian regardless of the number of pages, such copies as made by persons holding positions listed in the Official Register if used in the discharge of their official duties shall be made without charge.

(c) Except as provided for in sections (a) and (b) of this Rule, patrons may make photocopies for ten cents ($.10) per page.

Section 2. This amendment shall become effective November 2, 2004.

This the 15th day of November, 2004.

Thomas P. Davis
Librarian

Approved:
Associate Justice Robert H. Edmunds, Jr.
Chairman, For the Library Committee

Order Adopting Amendment to the Rules for Court-Ordered Arbitration in North Carolina

WHEREAS, Section 7A-37.1 of the North Carolina General Statutes authorized statewide court-ordered, non-binding arbitration in certain civil actions, and further authorized the Supreme Court of North Carolina to adopt rules governing this procedure and to supervise its implementation and operation through the Administrative Office of the Courts; and

WHEREAS, it has been determined that the Rules for Court-Ordered Arbitration should be amended to increase the fee from $75 to $100.

NOW, THEREFORE, Rule 2(c) of the Rules for Court-Ordered Arbitration is amended and adopted to read as follows:

(c) **Fees and Expenses.** Arbitrators shall be paid a $100 fee by the Court for each arbitration hearing when they file their awards with the Court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hearing and paid a reasonable fee not exceeding $100 for work on a case not resulting in a hearing upon the arbitrator's written application to and approval by the Chief Judge of the District Court.

This rule, as amended, shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page(http://www.nccourts.org). It shall be effective on the 1st day of January, 2005, for arbitration hearings conducted on or after the 1st day of January, 2005.

Adopted by the Court in Conference this the 16th day of December, 2004

Newby, J.
For the Court

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AIDING AND ABETTING

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ANIMALS

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APPEAL AND ERROR

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APPEAL AND ERROR—Continued

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APPEAL AND ERROR—Continued

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Preservation of issues—assignment of error—summary judgment—Although defendant contends that plaintiff's appeal should be dismissed based on plaintiff's alleged failure to follow N.C. R. App. P. Rule 10(c), the notice of appeal sufficed as an assignment of error directed to the order of summary judgment. **Smith-Price v. Charter Behavioral Health Sys., 349.**

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Preservation of issues—failure to assign error—no objection at trial—Defendant's failure to assign error or object at trial waived the question of whether the court erred by not considering his ability to pay restitution. **State v. Freeman, 673.**

Preservation of issues—failure to make assignment of error—Although defendant contends the trial court erred by failing to instruct the jury to consider each defendant separately when determining their guilt or innocence as to the crimes charged, this assignment of error is dismissed because defendant failed to set out this argument as an assignment of error in the record. **State v. Johnson, 1.**

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APPEAL AND ERROR—Continued

Preservation of issues—jury instructions—no objection—no plain error assertion—A defendant who did not object to jury instructions and did not raise plain error waived appellate review of the trial court's instructions on first-degree kidnapping. **State v. Forrest, 272.**

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ARBITRATION AND MEDIATION

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ASSAULT

Assault on law enforcement officer—motion to dismiss—sufficiency of evidence—The trial court did not err by failing to dismiss the assault on a law enforcement officer indictments even though defendant contends there was a

ASSAULT—Continued

variance regarding the evidence for the phrase "by shooting at him" because such allegation was surplusage. **State v. Pelham, 70.**

Assault with deadly weapon on governmental official—use of dog—sufficiency of evidence—The trial court did not err by denying defendant's motions to dismiss the charges of assault with a deadly weapon on a governmental official at the close of the State's evidence and at the close of all evidence even though defendant contends there was insufficient evidence to prove the deadly weapon element based on the use of a dog. **State v. Cook, 139.**

Defense of habitation—instruction—assault with firearm on law enforcement officer—Although the trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury, assault with a firearm on a law enforcement officer, and drug case by failing to give defendant's requested instruction on the defense of habitation in a situation where officers possessed a search warrant, defendant was awakened by the officers' distraction device, and defendant as well as other witnesses maintained that they never head the officers' warning that they were from the sheriff's department and had a search warrant, this assignment of error is dismissed as harmless error because, by finding defendant guilty of assault with a firearm on a law officer, the jury necessarily concluded that defendant was aware or had reasonable grounds to be aware that officers were acting within the scope of their authority. **State v. Pelham, 70.**

Serious injury—evidence sufficient—There was sufficient evidence for a jury to find serious injury in a prosecution for assault with a deadly weapon inflicting serious injury. **State v. Morgan, 298.**

ATTORNEYS

Attorney-client relationship—consent judgment—authority—The trial court abused its discretion in an action arising out of the faulty construction of plaintiffs' home by denying plaintiffs' motion for a new trial even though plaintiffs' attorney agreed to entry of a consent judgment on 10 October 2002 after plaintiffs faxed and e-mailed communications on 13 September 2002 to their attorney stating that she did not have authority to enter into the consent judgment and plaintiffs wrote a letter dated 24 September 2002 that discharged their attorney. **Daniel v. Moore, 534.**

Discipline—admissibility of prior convictions and a prior suspension—Evidence of prior convictions and a prior suspension of defendant's law license twenty years earlier was properly admitted in a hearing before the State Bar where the evidence was admitted as a factor in aggravation rather than to impeach defendant's credibility. N.C.G.S. § 8C-1, Rule 609 was not applicable. **N.C. State Bar v. Rogers, 648.**

Discipline—appellate review—Direct appeal from the State Bar to the Court of Appeals is not facially unconstitutional. The general mandates of the Administrative Procedure Act are not applicable because the Legislature has provided a specific procedure. **N.C. State Bar v. Rogers, 648.**

Discipline—combined claims—single case—There was no error where a defendant before the State Bar claimed that the DHC erroneously combined two cases which were filed more than ninety days apart, but the State Bar instead

ATTORNEYS—Continued

filed an amended complaint adding a second claim in a single case. **N.C. State Bar v. Rogers, 648.**

Discipline—deposition expenses as costs—The Disciplinary Hearing Commission of the North Carolina State Bar did not abuse its discretion by assessing deposition expenses as costs. **N.C. State Bar v. Rogers, 648.**

Discipline—refusal to acknowledge wrongdoing—An attorney's refusal to acknowledge his wrongdoing to the State Bar was not used to punish him unconstitutionally for exercising his right to a trial. The purpose of sanctions is to protect the public and the profession, and the presence or absence of remorse is highly relevant. Moreover, aggravating and mitigating factors are considered only after misconduct is established. **N.C. State Bar v. Rogers, 648.**

Discipline—selection of members of DHC—no due process violation—The selection process for members of the Disciplinary Hearing Commission of the North Carolina State Bar did not deprive defendant of a fair tribunal and did not violate due process. **N.C. State Bar v. Rogers, 648.**

Discipline—severance of claims—The denial of defendant's motion to sever two matters before the Disciplinary Hearing Commission of the North Carolina State Bar was not an abuse of discretion. Defendant did not assign error to the DHC's conclusion that its findings and conclusions about the second matter were independent of its findings and conclusions about the first. **N.C. State Bar v. Rogers, 648.**

Discipline—warning letter—disclosure to DHC—within three years—A warning letter from the State Bar to a lawyer was properly considered in determining disciplinary sanctions where the complaint was filed three years to the day after issuance of the warning and so was within the DHC rule for use of such letters. Defendant waived a further argument regarding use of the letter in an amended claim by not raising it below. **N.C. State Bar v. Rogers, 648.**

BROKERS

Commission—procuring cause rule—not applicable between brokers—The procuring cause rule applies to a dispute between a seller and broker and has no application to this dispute between two commercial real estate brokers. The question here is whether an enforceable contract between the brokers to divide a commission has been breached. **Maxwell v. Michael P. Doyle, Inc., 319.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Breaking in to sleep—instructions on lesser included offenses—Evidence in a felonious breaking and entering prosecution that defendant had admitted breaking into a house to sleep but not to commit a larceny or another felony should have resulted in an instruction on the lesser included offense of misdemeanor breaking and entering. However, defendant was not entitled to an instruction on misdemeanor larceny because any larceny that occurred pursuant to a breaking and entering is a felony regardless of the value of what was stolen. **State v. Friend, 430.**

Evidence of another's guilt—lesser included offense—no instruction—Evidence implicating another in a breaking and entering and larceny was evi-

BURGLARY AND UNLAWFUL BREAKING OR ENTERING—Continued

dence that defendant had committed no crime at all and did not require the submission of lesser included offenses. **State v. Friend, 430.**

No permission to enter—sufficiency of evidence—There was sufficient evidence in two prosecutions for breaking and entering, and larceny that defendant did not have permission to enter the house. **State v. Friend, 430.**

CHILD ABUSE AND NEGLECT

Adjudication and disposition—consolidation—There was no error in consolidating an abuse and neglect adjudication and disposition. Even though different evidentiary standards apply at each stage, the proceedings are heard by a judge rather than a jury, and the judge is presumed to consider the evidence under the applicable standard. **In re O.W., 699.**

Appeal from order—further trial court action—The Court of Appeals denied a motion to dismiss an appeal from a permanency planning order as moot following the issuance of a trial court order terminating parental rights during the pendency of the appeal of the planning order. The Juvenile Code provides that the trial court's jurisdiction is limited to a temporary order affecting custody or placement during the pendency of appeal, and an order terminating parental rights is a permanent order. Cases dismissing similar appeals as moot did not address the trial court's jurisdiction. **In re J.C.S., 96.**

Change in permanency planning order—findings—subject matter jurisdiction—An order changing a permanency planning order (to release DSS from reunification efforts) was remanded for findings where the respondent and the child were in South Carolina when the proceedings began and there was nothing in the record supporting subject matter jurisdiction other than a bare assertion. **In re J.B., 394.**

Criminal abuse—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge of felony child abuse for insufficient evidence of serious injury. Whether an injury is serious is a question for the jury; here, the evidence established that defendant hit his one-year old son at least once with a belt during an assault on his wife, the child cried after being hit, there was a visible bruise on his head, a deputy and a social worker testified about the bruise, and photographs of the bruise were admitted for the jury to observe. **State v. Romero, 169.**

Findings—not sufficient for review—An abuse and neglect adjudication was remanded where the court's findings were not sufficient for the Court of Appeals to determine that the adjudication was adequately supported by competent evidence. The court's findings must consist of more than a recitation of the allegations. **In re O.W., 699.**

Neglect—adjudication and disposition untimely—The trial court's failure to timely enter the adjudication and disposition orders within thirty days in a child neglect case was not prejudicial to respondent mother. **In re E.N.S., 146.**

Neglect—clear, cogent, and convincing evidence—The trial court erred in a child neglect adjudicatory hearing by entering findings of fact not proved by clear, cogent, and convincing evidence even though respondent mother denied the allegations without contesting them. **In re A.W., E.W., 593.**

CHILD ABUSE AND NEGLECT—Continued

Neglect—environment injurious to child's welfare—The trial court did not err by concluding that respondent mother neglected her minor child within the meaning of N.C.G.S. § 7B-101 based on the factor that the minor child lived in an environment injurious to the juvenile's welfare even though the minor child was taken from respondent immediately following his birth and before either of them had left the hospital. **In re E.N.S., 146.**

Neglect—findings of fact—conclusions of law—The trial court did not err by allegedly failing to make appropriate findings of fact and conclusions of law in a child neglect case, because: (1) while respondent may contend that some of the findings were inaccurate and thus did not support the conclusions of law, the Court of Appeals reviewed the record and found competent evidence indicating otherwise; (2) the trial court was not required to orally state at the adjudication hearing whether the allegations in the petition have been proven by clear and convincing evidence, and the statement in the adjudication order that the court found the facts have been proven by clear and convincing evidence satisfied N.C.G.S. § 7B-804; and (3) although the amended adjudication order was inadvertently filed several days before the original order, respondent knew the order from which she was appealing had either added, deleted, or rephrased the content of the original order. **In re E.N.S., 146.**

Permanency planning hearing—timely—A permanency planning hearing was held within 12 months of the initial order as required by statute, despite subsequent hearings. **In re J.C.S., 96.**

Permanency planning order—findings—sufficient—There were sufficient findings of fact in a permanency planning order which would allow DSS to cease reunification efforts, and those findings were supported by the evidence. While the order does not contain a formal, specifically identified list of statutory factors, the court considered and made written findings about the relevant factors and did not simply recite allegations. **In re J.C.S., 96.**

Statement of standard applied—sufficient—A trial court's statement in an abuse and neglect order that it reached its conclusions through clear, cogent, and convincing evidence was sufficient to meet the requirement of N.C.G.S. § 7B-807. There is no requirement about where or how such a recital of the standard should be included. **In re O.W., 699.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Custody—jurisdiction—home state—The trial court did not err by declining jurisdiction over this child custody matter and by concluding that Vermont was the home state of the children. **Chick v. Chick, 444.**

Custody—modification—The trial court erred by hearing defendant's motion to modify the parties' child custody agreement and subsequently by modifying the custody arrangement because there was no written order entered when defendant filed her motion to modify and thus there was nothing to modify. **Carland v. Branch, 403.**

Custody—notice—substantial conformity—The trial court did not err in a child custody case when it found that Vermont had issued its order in substantial conformity with the UCCJA and that plaintiff mother had notice and was aware

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

of the pendency of the issue of jurisdiction before the Vermont court on 18 September 2002. **Chick v. Chick, 444.**

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Custody—use of law enforcement—The trial court erred by authorizing the use of law enforcement officials to effectuate a registered child custody determination made by the home state of Vermont exercising jurisdiction in substantial conformity with our UCCJEA. **Chick v. Chick, 444.**

Custody claim—amendment for support added—The trial court did not abuse its discretion by allowing the plaintiff to amend his child custody complaint to add a claim for child support. Although asserting a right to custody while trying to avoid support is precarious, defendant's lack of support is relevant to custody and would likely be a matter of record regardless of the support claim. **David N. v. Jason N., 687.**

Foreign custody order—motion for reimbursement of costs—The trial court did not err by denying respondent father's motion for reimbursement of costs incurred to enforce a California custody order pursuant to N.C.G.S. § 50A-312 to recover physical custody of his son from the Orange County Department of Social Services. **In re Q.V., 737.**

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Support—modification—reduction in income—The trial court did not abuse its discretion by denying defendant's motion for child support modification in a case in which the child support guidelines did not apply. The court considered defendant's significant reduction in income and its impact upon his ability to support his children and himself. **Trevillian v. Trevillian, 223.**

Support—obligation to subsequent child—findings—A child support order was reversed and remanded where, in an action in which the presumptive guidelines did not apply, the court's finding that defendant was not under any other child support obligation was contradicted by uncontroverted evidence that defendant was under a district court order to provide support for a child born from a subsequent marriage. The findings were not sufficient to establish that the court took due regard of defendant's estates, earnings, conditions, and other facts of the particular case. **Zaliagiris v. Zaliagiris, 602.**

Visitation—grandparents—The trial court did not err by denying defendant mother's motion to dismiss intervenor paternal grandparents' motions regarding visitation with the minor child following the death of plaintiff father and by modifying the previous child custody order to award intervenors additional visitation privileges on the grounds of a substantial change in circumstances. **Sloan v. Sloan, 190.**

CHIROPRACTORS

Board of Examiners—governed by Administrative Procedure Act—The Board of Chiropractic Examiners is an occupational licensing agency and its hearings are governed by the North Carolina Administrative Procedure Act. **Hardee v. N.C. Bd. of Chiropractic Exam'rs, 628.**

Disciplinary hearing—evidence of dishonesty—The Board of Chiropractic Examiners did not err by considering evidence of dishonesty (failure to comply with an informal agreement intended to avoid more severe discipline) as relevant to the scope, length, and nature of the discipline imposed for felonies involving moral turpitude. Discipline is in the discretion of the Board, and the Board may consider evidence of truthfulness and character. **Hardee v. N.C. Bd. of Chiropractic Exam'rs, 628.**

Discipline—not arbitrary and capricious—The Board of Chiropractic Examiners did not act arbitrarily and capriciously in imposing a more severe punishment in this case than in others. This petitioner played a substantial role in committing felonies and there was considerable evidence of bad character; furthermore, the discipline here is rationally related to the misconduct. **Hardee v. N.C. Bd. of Chiropractic Exam'rs, 628.**

CITIES AND TOWNS

Condemnation—alleged violations—The trial court did not err in a condemnation case by finding and concluding that plaintiff town's actions were lawful and binding even though defendants contend there were violations committed concerning the condemnation resolution. **Town of Highlands v. Hendricks, 474.**

Condemnation—escrow agreement—exclusive emolument—An escrow agreement established by a town for a road project providing that the town attorney would be reasonably available to contributors to the escrow account to discuss condemnation proceedings, and that the costs of such communications were to be charged against the escrow account, did not delegate the town's power of eminent domain to a group of private citizens and did not amount to an exclusive emolument in violation of N.C. Const. art. I, § 32. **Town of Highlands v. Hendricks, 474.**

Condemnation—public use—The trial court did not err by concluding that the condemnations were for a proper public purpose even though defendants contend it was uncertain whether the condemned property could ever be used for a public use because the fact that some obstacle may potentially derail the intended use will not defeat the public purpose. **Town of Highlands v. Hendricks, 474.**

Unified development ordinance—zoning compliance permit—The superior court erred in finding that, as a matter of law, petitioners' application for a zoning compliance permit for petitioners' modular home did not meet the requirements contained in respondent town's unified development ordinance because the town had no authority to consider the home's potential effect on surrounding property values. **Knight v. Town of Knightdale, 766.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Motion to suppress—Miranda warnings—voluntariness—The trial court did not err by denying defendant's motion to suppress a statement given by her to the police, because: (1) it is not essential that Miranda warnings be given orally rather than in written form, although the better practice would be to give the accused both; (2) although defendant contends she did not read the voluntary statement form before she signed it, it is presumed that the accused has read it or has knowledge of its contents unless it is shown that defendant was willfully misled or misinformed by the opposing party; (3) defendant's statement amounted to an equivocal request for an attorney, a detective attempted to clarify whether defendant wanted an attorney and gave her every opportunity to contact her attorney, and defendant never availed herself of these opportunities; and (4) the lack of evidence that defendant felt threatened or was being coerced supports the trial court's conclusion that defendant's statement was voluntary. **State v. Strobel, 310.**

CONSPIRACY

Armed robbery—failure to instruct on lesser-included offense—The trial court in an armed robbery prosecution did not err by failing to instruct the jury on conspiracy to commit common law robbery. **State v. Johnson, 1.**

Civil—motion for directed verdict—suspicion or conjecture—The trial court did not err by granting defendants' motion for directed verdict regarding plaintiff's claim for civil conspiracy by defendants to terminate plaintiff's lease because the evidence showed only a suspicion or conjecture that a conspiracy in fact existed. **Di Frega v. Pugliese, 499.**

One side of telephone conversation—insufficient evidence—There was insufficient evidence of a conspiracy to shoot into occupied property and to commit first-degree murder where one side of a telephone conversation involved a possible agreement to resolve a money problem but did not mention shooting, killing, or violence. There was nothing to support an inference that the other person on the telephone even knew about defendant's plan to use violence. **State v. Benardello, 708.**

Robbery with a dangerous weapon—sufficiency of evidence—The trial court did not err by concluding that the State presented sufficient evidence of conspiracy to commit robbery with a dangerous weapon. **State v. Johnson, 1.**

CONSTITUTIONAL LAW

Confrontation Clause—kidnap victim's statements following release—*Crawford* analysis—A kidnapping and assault victim's spontaneous statements to police immediately following her rescue were nontestimonial and were not rendered inadmissible by *Crawford v. Washington*, —— U.S. —— (2004). She was not providing a formal statement, deposition, or affidavit, she did not know that she was bearing witness, and she was not aware that her utterances might impact further proceedings. The Confrontation Clause was not implicated. **State v. Forrest, 272.**

Double jeopardy—evidence from prior trial—Admission of evidence from a prior district court trial for assaulting an officer, in which defendant was acquitted, did not violate double jeopardy in defendant's trial for obstructing an officer.

CONSTITUTIONAL LAW—Continued

Evidence is inadmissible under double jeopardy when it falls within the collateral estoppel rule; a defendant who can only speculate about the basis for her prior acquittal does not meet that burden. **State v. Bell, 83.**

Double jeopardy—kidnapping and assault—The trial court did not err by refusing to arrest judgment on double jeopardy grounds on an assault with a deadly weapon conviction where defendant was also convicted of first-degree kidnapping on the same facts. Although defendant argues that the same conduct was used to prove serious bodily harm for kidnapping and serious injury for assault, there was sufficient evidence that defendant dragged his wife inside their home for the purpose of assaulting her and that the crime of kidnapping was complete once he dragged her inside, whether or not the contemplated assault was completed. **State v. Romero, 169.**

Double jeopardy—same facts as basis of two offenses—separate offenses—The trial court did not err in a prosecution for obstructing an officer by not giving defendant's requested instruction that a subsequent incident which led to an assault charge was separate and not probative of obstruction. Although defendant contended that the instruction was required under double jeopardy, the limitation on the same facts forming the basis for two convictions applies only if the two offenses are actually one. These two offense are separate and distinct and a jury could find that evidence of one is not supportive of the other. **State v. Bell, 83.**

Effective assistance of counsel—effect on outcome—not shown—Defendant did not receive ineffective assistance of counsel in a cocaine prosecution where he did not show that a different result would have been obtained without counsel's alleged errors. **State v. Carrillo, 204.**

Effective assistance of counsel—failure to meet burden of proof—Although defendant contends the trial court erred in a statutory sex offense, sexual activity by a substitute parent, indecent liberties with a child, first-degree statutory rape, and first-degree statutory sex offense case by concluding that defendant did not receive ineffective assistance of counsel based on counsel's alleged failure to object to inadmissible evidence, this assignment of error is dismissed because defendant failed to show that counsel's performance fell below an objective standard of reasonableness. **State v. Daniels, 558.**

Right to counsel—personal argument to jury—counsel already appointed—A defendant who chose to be represented by appointed counsel had no right to also represent himself and personally present his closing arguments to the jury. Moreover, defense counsel read defendant's handwritten statement to the jury. **State v. Forrest, 272.**

Right to counsel—separate charges—It was permissible for the police to question defendant about a robbery charge outside the presence of the attorney who had been appointed to represent her in the conspiracy to commit robbery charge. **State v. Strobel, 310.**

Vagueness—obstructing an officer—The contention that N.C.G.S. § 14-223, a magistrate's order finding probable cause, and the trial court's instructions in a prosecution for obstructing an officer were all so vague as to violate due process was without merit. **State v. Bell, 83.**

CONTEMPT

Criminal—child custody—The trial court did not err in a child custody case by denying defendant mother's motion to dismiss intervenor paternal grandparents' motion to show cause and by ultimately concluding defendant was guilty of criminal contempt for violating an order awarding telephonic visitation with the child. **Sloan v. Sloan, 190.**

Criminal—public intoxication in court—beyond reasonable doubt standard—The superior court erred in its de novo review of an appeal from a summary finding of contempt in district court arising from defendant's public intoxication in court for a driving while impaired charge by failing to sufficiently find that the facts upon which the judgment was based were established beyond a reasonable doubt. **State v. Ford, 566.**

CONTRACTS

Breach—agreement between brokers—sufficiency of evidence—There was sufficient evidence to submit to the jury a claim for breach of contract between two commercial real estate brokers to divide a commission from the sale of an apartment complex. The question of whether the sale was within a reasonable time was for the jury. **Maxwell v. Michael P. Doyle, Inc., 319.**

Recital of consideration—competency of contrary evidence—Evidence to the contrary was not competent to contradict the recital of consideration on the face of a stock option agreement. **Lee v. Scarborough, 357.**

Tortious interference—motion to set aside verdict—The trial court did not abuse its discretion by denying plaintiff's motion to set aside the verdict finding no liability for tortious interference of contract by defendants on the ground that the verdict was against the greater weight of the evidence. **Di Frega v. Pugliese, 499.**

CONVERSION

Counterclaim—removal and disposal of property—The trial court did not err by denying plaintiff's motion to dismiss defendants' counterclaim for conversion of defendant's property that remained in a restaurant. **Di Frega v. Pugliese, 499.**

Motion for directed verdict—dispute involving lease/purchase agreement—The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim of conversion arising out of a dispute involving a lease/purchase agreement. **Zubaidi v. Earl L. Pickett Enters., Inc., 107.**

CORPORATIONS

Breach of stock option agreement—changed capitalization—In a superceding opinion (the prior opinion is at 162 N.C. App. 674, filed 17 February 2004), summary judgment was found to have been correctly granted against EB Comp, Inc. on a claim for breach of a stock option agreement. Defendant breached the agreement by approving a merger of the company, thereby changing its capitalization, without plaintiff's prior written consent. **Lee v. Scarborough, 357.**

CORPORATIONS—Continued

Breach of stock option agreement—participation in merger—individual act—Defendant Scarborough breached a stock option and restriction agreement as an individual when he voluntarily participated in a merger he knew would extinguish plaintiff's stock options, and summary judgment was correctly granted for plaintiff. While the conversion of shares pursuant to a merger is essentially a corporate rather than a shareholder act, Scarborough was the sole shareholder and director and the line between corporate actions and shareholder actions was virtually indistinguishable. **Lee v. Scarborough, 357.**

COSTS

Attorney fees—abuse of discretion standard—The trial court did abuse its discretion by awarding plaintiff $4,500 in attorney fees and $1,437.90 in costs following a jury verdict in the amount of $800 for injuries sustained in an automobile accident even though defendant made an offer of judgment of $5,000, or by denying defendant's motion for costs. **McDaniel v. McBrayer, 379.**

Court's discretion—appellate review—The trial court's discretion in awarding costs is not reviewable on appeal where the court specifically stated that costs were taxed in its discretion. Moreover, plaintiff rejected a settlement offer and received a less favorable result at trial, so that Rule 68 required the taxing of costs. **Griffis v. Lazarovich, 329.**

Expert witness fee—speculation—Although defendant contends the trial court erred by awarding plaintiff an expert witness fee of $400 as part of the costs without sufficient evidence that the expert was subpoenaed to testify, the Court of Appeals cannot hold there was error without engaging in speculation. **McDaniel v. McBrayer, 379.**

Telephone charges—copying expenses—Telephone and copying expenses are not specifically authorized as costs under N.C.G.S. § 7A-305(d), and the trial court did not abuse its discretion by denying them (assuming that these are allowable common law costs under N.C.G.S. § 6-20.) **Lord v. Customized Consulting Specialty, Inc., 730.**

Voluntary dismissal—deposition expenses—Deposition costs are not allowed under N.C.G.S. § 7A-305(d), and the trial court did not abuse its discretion by not allowing reimbursement of those costs to a third-party defendant after plaintiff's voluntary dismissal. **Lord v. Customized Consulting Specialty, Inc., 730.**

Voluntary dismissal—expert witnesses—not subpoenaed—Expert witness fees could not be assessed under N.C.G.S. § 7A-305(d) in this case because the witnesses were not subpoenaed, and the authority to tax expert witness fees as a common law cost does not exist under N.C.G.S. § 6-20. **Lord v. Customized Consulting Specialty, Inc., 730.**

Voluntary dismissal—mediator fee—The trial court erred by not taxing a mediator fee as a cost following a voluntary dismissal. N.C.G.S. § 7A-305(d)(7). **Lord v. Customized Consulting Specialty, Inc., 730.**

Voluntary dismissal—recovery by third-party defendant—Third-party defendants may recover costs from the original plaintiffs after plaintiffs voluntarily dismiss their action under N.C.G.S. § 1A-1, Rule 41. However, third-party

COSTS—Continued

defendants may not recover from the original defendants, whose claim was simply extinguished when the plaintiffs dismissed their action. **Lord v. Customized Consulting Specialty, Inc., 730.**

Voluntary dismissal—statutory—common law—Costs assessed under N.C.G.S. § 7A-305 must be awarded in a voluntary dismissal, while common law costs awarded under N.C.G.S. § 6-20 are in the discretion of the court. **Lord v. Customized Consulting Specialty, Inc., 730.**

CRIMINAL LAW

Charges dismissed by judge—record unclear—A controlled substances prosecution was remanded where defendant contended in a superior court hearing that she waived probable cause upon an agreement that some of the charges would be dropped, those charges were not dropped because the district attorney contended that the agreement involved guilty pleas to the remaining charges, the superior court judge told defendant that the charges would be dropped, and it was not clear from the record whether the judge intended to dismiss the charges as the presiding judge or whether he was relying on the State to dismiss the charges. **State v. Knott, 212.**

Consolidated charges—factually similar and connected—The trial court did not abuse its discretion in consolidating 15 charges because the offenses were all factually similar and interconnected. Defendant was not prejudiced because one count was subsequently dismissed and the jury acquitted him on 6 counts. **State v. Friend, 430.**

Instructions—admissions—There was no error in a robbery prosecution in the trial court's instruction that there was evidence tending to show that defendant had admitted one or more facts relating to the crime charged and that the jurors should consider all of the circumstances under which any admissions were made. Although defendant contended that this was tantamount to telling the jury that he had committed the robbery, the instruction was virtually identical to the Pattern Jury Instruction requested by the State, it was supported by the testimony, and it made no mention of any particular element of the offense or that defendant had admitted the robbery. **State v. Borders, 120.**

Instructions—affirmative defenses—sleep—unconsciousness—diminished capacity—The trial court in a first-degree sexual assault case should instruct the jury as to the unconsciousness/diminished capacity affirmative defense of sleep, along with any other defenses which have been sufficiently raised by the evidence presented at a new trial. **State v. Bush, 254.**

Joinder of trials—motion to sever—The trial court did not abuse its discretion in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by denying a defendant's motion to sever his trial from his codefendant. **State v. Johnson, 1.**

Judge's pretrial comments—unavailability of transcript—Although the trial court erred in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by failing to affirmatively exercise its discretion under N.C.G.S.

CRIMINAL LAW—Continued

§ 15A-1233(a) based on its pretrial comments telling the jurors to remember the evidence because "we don't have anything that can bring it back there to you" even though there was no request by the jury to review any testimony or transcripts, the error was not prejudicial because defendant did not argue any circumstances indicating that there was evidence involving issues of confusion and contradiction that would make it likely that the jury would have wanted to review it. **State v. Johnson, 1.**

Motion for continuance—invalid plea agreement—The trial court did not abuse its discretion in a statutory sex offense, sexual activity by a substitute parent, indecent liberties with a child, first-degree statutory rape, and first-degree statutory sex offense case by denying defendant a continuance after the trial court declined defendant's request to consider his alleged plea arrangement which had been rendered null and void after the court rejected it. **State v. Daniels, 558.**

Plea agreement—validity—The trial court did not err in a statutory sex offense, sexual activity by a substitute parent, indecent liberties with a child, first-degree statutory rape, and first-degree statutory sex offense case by concluding that a valid plea agreement did not exist between defendant and the State on 15 July 2002. **State v. Daniels, 558.**

DAMAGES AND REMEDIES

Amount—influence of passion or prejudice—The trial court did not abuse its discretion by entering judgment based on the jury's verdict finding defendants converted plaintiff's property and breached the contract because competent evidence supports the amount of damages awarded by the jury. **Di Frega v. Pugliese, 499.**

Negligence—one dollar—supported by evidence—A jury verdict of $1 in a negligence action was adequate where there were no motions following the return of the verdict and the jury could reasonably have found on the evidence that plaintiff failed to show that her injuries were proximately caused by this accident. **Daniels v. Hetrick, 197.**

Punitive damages—judicial review—The trial court did not err in an action for breach of a lease/purchase agreement, conversion, and unfair and deceptive trade practices by failing to review and set aside the punitive damages awarded by the jury. **Zubaidi v. Earl L. Pickett Enters., Inc., 107.**

Punitive damages—motion for directed verdict—The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim for punitive damages arising out of the breach of a lease/purchase agreement. **Zubaidi v. Earl L. Pickett Enters., Inc., 107.**

Punitive damages—motion for directed verdict—The trial court did not err by granting defendants' motion for directed verdict regarding plaintiff's claim for punitive damages based on defendants entering into an alleged conspiracy to terminate plaintiff's rights under his lease because the record is devoid of evidence of a civil conspiracy or unfair and deceptive trade practices and of fraudulent, willful or malicious acts by defendants. **Di Frega v. Pugliese, 499.**

Stock option agreement—evidence of readiness to exercise option—A new trial on damages was granted in a case involving a stock option agreement

DAMAGES AND REMEDIES—Continued

because the court should have admitted evidence that plaintiff could not have exercised the option due to an administrative regulation. This was relevant to whether plaintiff intended to exercise the option. **Lee v. Scarborough, 357.**

DECLARATORY JUDGMENTS

Government action to resist public records disclosure—improper—It was improper for a city attorney to use a declaratory judgment action to resist disclosure of documents alleged to be public records. Only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request. However, the merits of the city attorney's action would have reached the trial court on defendant's counterclaim to compel disclosure, and the trial court's ruling was addressed on appeal. **McCormick v. Hanson Aggregates Southeast, Inc., 459.**

DISCOVERY

Business plan—not relevant to existence of lease—A business plan was not relevant to the dispositive issue of whether the parties entered into a lease enforceable under the statute of frauds, and the trial court did not abuse its discretion by denying a motion to compel production of the plan. **Howlett v. CSB, LLC, 715.**

Denied—in camera review—There was no abuse of discretion in the denial of plaintiff's motion to compel production of bank statements and tax returns in an action between two commercial realtors where the court reviewed the materials in camera, denied the motion because the materials were irrelevant, and ordered the materials sealed. **Maxwell v. Michael P. Doyle, Inc., 319.**

Foundation of expert opinion—laboratory results—data collection procedures—The trial court erred in a sale and delivery of cocaine and possession with intent to sell or deliver cocaine case by denying defendant's motion for further discovery from the State concerning the foundation of its expert's opinion as to the testing by the SBI laboratory to determine the nature of the substance submitted. **State v. Fair, 770.**

DIVORCE

Equitable distribution—expert witness fee as sanction—required notice—An award against a defendant in an equitable distribution proceeding as a sanction was reversed because defendant was not given proper notice that he would be subject to the sanction or notice of the grounds for the sanction. **Zaliagiris v. Zaliagiris, 602.**

Equitable distribution—military retirement benefits—disability—The trial court erred in an equitable distribution case by awarding plaintiff wife a larger percentage of defendant husband's military retirement benefits based on the fact that defendant elected to receive disability pay in lieu of a portion of his retirement pay. **Halstead v. Halstead, 543.**

Equitable distribution—unincorporated separation agreement—mistake of law—The trial court did not err by granting summary judgment in favor of plaintiff wife on defendant husband's counterclaim for equitable distribution of

DIVORCE—Continued

the parties' marital and divisible property even though defendant sought to set aside the parties' separation agreement drafted by plaintiff based on the fact that plaintiff fraudulently or mistakenly represented to defendant that the law in North Carolina required each of them to retain their respective retirement savings accounts as their separate property. **Dalton v. Dalton, 584.**

DRUGS

Trafficking in marijuana—motion to dismiss—sufficiency of evidence—weight—The trial court erred by granting defendant's motion to dismiss two trafficking in marijuana charges based on alleged insufficient evidence that the amount seized was above the statutory threshold of ten pounds because the correct weight is that at seizure, and defendant may argue at trial that the 6.9-pound weight taken at the S.B.I. showed that there was excess water or other extraneous debris in the first recorded weight of 25.5 pounds for the freshly-cut marijuana. **State v. Gonzales, 512.**

EMOTIONAL DISTRESS

Intentional infliction—extreme and outrageous conduct required—The trial court did not err by granting defendant co-worker's motion for summary judgment on plaintiff's claim for intentional infliction of emotional distress because the evidence did not show extreme or outrageous conduct by defendant. **Smith-Price v. Charter Behavioral Health Sys., 349.**

Negligent infliction—duty of care—The trial court did not err by granting defendant co-worker's motion for summary judgment on plaintiff's claim for negligent infliction of emotional distress based on defendant co-worker communicating false and misleading information regarding plaintiff's employment behavior and job performance to defendant company. **Smith-Price v. Charter Behavioral Health Sys., 349.**

EMPLOYER AND EMPLOYEE

Employment discrimination—retaliatory action—judicial estoppel—The trial court did not err by granting summary judgment in favor of defendant employer in an employment discrimination action based on alleged retaliation for filing a workers' compensation claim where defendant's failure to return plaintiff to work as a fueler was the result of his physicians' recommendations and his own statements. **Wiley v. United Parcel Serv., Inc., 183.**

ENVIRONMENTAL LAW

Underground storage tanks—reimbursement for clean-up costs—date release discovered—The trial court erred by affirming a final agency decision granting summary judgment in favor of defendant North Carolina Department of Environment, Health and Natural Resources which denied petitioner's eligibility to receive reimbursement for clean-up costs from the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund because there was a genuine issue of material fact as to whether a leakage in underground storage tanks had been discovered by petitioner prior to the fund's effective date. **York Oil Co. v. N.C. Dep't of Env't, Health & Natural Res., 550.**

EVIDENCE

Acquittal of related offense—chain of circumstances—admissible— Events leading to a charge of assaulting an officer (upon which defendant was acquitted in district court) were admissible in defendant's trial for obstructing an officer because the events formed a chain of circumstances. **State v. Bell, 83.**

Cross-examination—defendant unaware gun was to be used during robbery—The trial court did not err in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by limiting a witness's cross-examination by excluding defendant's statement immediately after the robbery inquiring why his codefendant pulled out a gun. **State v. Johnson, 1.**

Defendant's testimony—damages—The trial court did not err in an action arising out of an automobile accident by considering defendant's testimony as a basis for awarding a new trial on the issue of damages to the minor plaintiffs where plaintiff never objected to such testimony at trial. **Guox v. Satterly, 578.**

Exhibit—supplemental report—statement by nontestifying codefendant—no *Bruton* violation—The trial court did not violate defendant's right to confrontation in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by admitting State's Exhibit #8 into evidence which was a supplemental report prepared by a detective regarding his interrogation of a coparticipant, because: (1) the exhibit was redacted to eliminate any statements made by a nontestifying codefendant; and (2) defendant's argument that there was a clear implication from the exhibit and other evidence presented at trial that the codefendant told the detective that a person named "Bomber Clock," who was identified as defendant, participated in the robbery is speculative and insufficient to constitute the introduction of a nontestifying codefendant's statement within the confines of *Bruton v. United States*, 391 U.S. 123 (1968). **State v. Johnson, 1.**

Expert testimony—victim sexually abused by defendant—plain error— The trial court committed plain error in a first-degree sexual assault case by admitting the testimony of a pediatric gynecology expert that the victim was sexually abused by defendant even though the expert found no physical evidence of sexual abuse. **State v. Bush, 254.**

Financial status—punitive damages—The trial court did not err in a conversion of personal property and breach of contract case by excluding evidence of defendant married couple's financial status. **Di Frega v. Pugliese, 499.**

Hearsay—business report—There was no error in a burglary and larceny prosecution in admitting testimony that the property had not been rented and that defendant did not have permission to be on the property. The monthly business report on which the testimony was based fell under the business record exception to the hearsay rule. **State v. Friend, 430.**

Hearsay—excited utterances—rescued victim—Statements made by a kidnapping and assault victim immediately after her rescue were admissible as excited utterances. **State v. Forrest, 272.**

Hearsay—reputation of neighborhood for narcotics—The trial court erroneously allowed testimony about the reputation of a neighborhood for drug dealing; evidence of the general reputation of a defendant's home or neighborhood in

EVIDENCE—Continued

drug cases constitutes inadmissible hearsay in North Carolina. Moreover, there exists the reasonable possibility of a different result without the improper reputation evidence. **State v. Williams, 638.**

Medical condition—plaintiff's testimony—not competent—A negligence plaintiff's testimony about her medical condition, Reflex Sympathetic Dystrophy (RSD), was properly disallowed because the diagnosis is complicated and controversial and plaintiff is not competent to testify about the nature of the condition, the necessity of particular treatments, the reasonableness of associated costs, or any connection between the alleged negligence and her condition. She was allowed to testify about her pain and suffering, her treatment and therapy, and how her injury affected her life. **Daniels v. Hetrick, 197.**

Medical records—not used or relied upon by experts—excluded—The trial court did not err in an automobile accident case by excluding medical records from doctors who did not testify and which were not relied upon by those who did (one doctor testified that plaintiff brought these records with her, but did not testify that he relied upon them). The court admitted records produced by or relied upon by testifying experts, records from treatments to which plaintiff was referred by the testifying experts, and records that were otherwise admissible. **Daniels v. Hetrick, 197.**

Opinion—law enforcement officers—knowledge by defendant—no plain error—There was no plain error in a cocaine prosecution where law enforcement officers were erroneously allowed to give their opinion that defendant knew that a package shipped to him contained cocaine and knew that he had been caught. Defendant failed to show that the jury would have reached a different verdict without this testimony. **State v. Carrillo, 204.**

Other offenses and acts—no plain error—Given the strength of the other evidence, there was no plain error in a prosecution for soliciting shooting into occupied property in the admission of testimony about defendant's threats to kill a third party and to engage in a swap of drugs for stolen goods. **State v. Benardello, 708.**

Other offenses and acts—no plain error—There was no plain error in a prosecution for soliciting shooting into occupied property in admitting without a limiting instruction testimony about defendant's intent to have someone shot. Any error was not so prejudicial that it resulted in a miscarriage of justice. **State v. Benardello, 708.**

Pornographic videotapes—sexual assault—relevancy—The trial court erred in a first-degree sexual assault case by allowing the State to introduce evidence over defendant's objection that defendant bought and owned pornographic videotapes because there was no evidence that the victim viewed the videotapes, the videotapes impermissibly injected defendant's character into the case, and evidence that one tape was brought into the home after the incident in question renders the box of that tape inadmissible to show intent or absence of mistake. **State v. Bush, 254.**

Prior crimes or bad acts—revocation of real estate license—The trial court did not abuse its discretion in a conversion of personal property and

EVIDENCE—Continued

breach of contract case by excluding evidence that defendant wife's real estate license had been permanently revoked twenty-one years earlier. **Di Frega v. Pugliese, 499.**

Redirect examination—testimony elicited earlier—The trial court properly admitted testimony over defendant's objection on re-direct examination of a detective where defendant had earlier elicited the same testimony on cross-examination. **State v. Forrest, 272.**

Reference to prior convictions—mistrial denied—There was no abuse of discretion in an assault prosecution in the denial of defendant's motion for a mistrial after testimony that defendant told the victim that she had killed before. The court immediately sustained an objection, gave a curative instruction, and asked the jury if it could follow the instruction. **State v. Morgan, 298.**

Results of alco-sensor test—alcohol cause of impairment—The trial court erred in a criminal contempt proceeding arising from defendant's public intoxication in court for a driving while impaired charge by admitting the results of defendant's alco-sensor test because the only instance in which the results can be used for substantive evidence is to determine whether a person's alleged impairment is caused by an impairing substance other than alcohol. **State v. Ford, 566.**

Victim's statement to detective—inconsistencies with trial testimony—There was no error in allowing a detective to read the jury a statement made to him by the victim. Alleged inconsistencies between the victims's statement and his testimony were slight variations that did not render the statements inadmissible. **State v. Morgan, 298.**

GUARANTY

Breach of lease contract—personal guarantor—The trial court did not err in a breach of lease contract case by finding defendant liable as the personal guarantor of the pertinent lease. **Tripps Rests. of N.C. v. Showtime Enters., Inc., 389.**

INDICTMENT AND INFORMATION

Habitual driving while impaired—witness name not marked—A driving while impaired indictment was not invalid where the box beside the witness's name on the indictment was not checked. N.C.G.S. § 15A-623(c). **State v. Allen, 665.**

INDIGENT DEFENDANTS

Waiving appointed counsel—proceeding pro se—necessary inquiry—A defendant's cocaine convictions were reversed where he clearly and unequivocally said that he would represent himself, the trial court told him to execute a waiver, and the judge never proceeded with the statutorily required waiver. The inquiry described in N.C.G.S. § 15A-1242 is mandatory in every case where the defendant requests to proceed pro se. **State v. Cox, 399.**

INJUNCTIONS

Preliminary injunction—temporary restraining order—motion in limine—The trial court did not err in an action for breach of a lease/purchase agreement, conversion, and unfair and deceptive trade practices by denying defendants' motion in limine and allowing evidence that plaintiffs had obtained a temporary restraining order (TRO) and preliminary injunction against defendants because defendants' willful and malicious disregard and violation of the TRO and preliminary injunction gave rise to the aggravating factors establishing breach of the lease/purchase agreement, conversion, and punitive damages. **Zubaidi v. Earl L. Pickett Enters., Inc., 107.**

INSURANCE

Automobile—UIM coverages—stacking—two policies—highest applicable limit—The trial court did not err by concluding that N.C.G.S. § 20-279.21(b)(3) prohibited stacking the underinsured motorists (UIM) coverages at bar and by granting defendant's motion for summary judgment. The plain language of plaintiff's policy and the policy issued by defendant to plaintiff's parents, with whom plaintiff lived, plainly and clearly limit plaintiff's recovery to the highest applicable limits. Plaintiff's interpretation of the statute would allow those who are not named insureds to stack coverage limits and receive a UIM windfall denied to named insureds who pay premiums for UIM coverage. **Trivette v. State Farm Mut. Auto. Ins. Co., 680.**

Automobile—UIM rejection—one of two named insureds—Summary judgment for defendant insurance company was affirmed in an action to determine UIM coverage where one of the two named insureds had expressly rejected UIM coverage. N.C.G.S. § 20-279.21(b)(4) states that coverage is not applicable where any named insured rejects coverage; moreover, policy language in this case clearly states that any rejection is valid and binding on all. **Farrior v. State Farm Mut. Auto. Ins. Co., 384.**

Health care—agents directly or indirectly writing contracts—unauthorized business—strict civil liability—A de novo review revealed that the trial court did not err in a declaratory judgment action when it ruled that defendant insurance agent who wrote unlicensed contracts of insurance to citizens of North Carolina was subject to strict civil liability for unpaid claims in the amount of $9,464.76 even though defendant contends he was acting under a genuine belief that he was marketing an ERISA certified health coverage plan which was not subject to any state licensing requirement. **Long v. Hammond, 486.**

Health care—jurisdiction—multiple employer welfare arrangement—ERISA—A de novo review revealed that the trial court did not err in a declaratory judgment action by granting summary judgment in favor of the Insurance Commissioner and by denying defendant insurance agent's motion to dismiss on jurisdictional grounds of federal preemption even though defendant contends the Commissioner's attempt to recover unsatisfied health care claims under the International Workers Guild (IWG) Fund is preempted by the federal Employee Retirement Income Security Act (ERISA) under 29 U.S.C. § 1144(a). **Long v. Hammond, 486.**

Homeowners policy—business pursuit exclusion—birthday party in warehouse—The business pursuit exclusion in a homeowners insurance policy did not apply to a birthday party held in a warehouse. There was no evidence that the

INSURANCE—Continued

injured parties went to the warehouse for any business purpose, and, while the insured had rented the warehouse as an investment, he had not taken steps to establish any business at the warehouse and was not engaged in a business activity at the time of the fire. **Erie Ins. Exch. v. Szamatowicz, 748.**

Homeowners policy—coverage of birthday party in warehouse—The trial court did not err by granting summary judgment for plaintiff on the issue of whether his homeowners insurance policy covered a birthday party in a rented warehouse. The warehouse provided a more appropriate place for an activity that normally would have taken place at his home, and the use was in connection with his residence as that term is used in the policy. **Erie Ins. Exch. v. Szamatowicz, 748.**

Homeowners policy—notice of claim—reasonable—An insured gave notice to the insurer as soon as practicable once he reasonably believed that the policy would provide coverage. **Erie Ins. Exch. v. Szamatowicz, 748.**

Insurance defense in motorist's name—Statutory provisions allowing an uninsured motorist insurer to defend in the motorist's name have been challenged and upheld in the past. **Daniels v. Hetrick, 197.**

Uninsured motorist—suit defended in name of motorist—presence during jury selection—The trial court did not err in an uninsured motorist action by introducing to the jury the police officer in whose name the suit was defended after the officer asserted immunity and was dismissed from the suit. Although plaintiff contended that the jury might hesitate to award damages against a police officer, the officer was driving the vehicle that struck plaintiff, the insurance company was defending in his name, and the trial judge carefully limited the officer's involvement. **Daniels v. Hetrick, 197.**

JUDGMENTS

Attorney-client relationship—consent judgment—authority—The trial court abused its discretion in an action arising out of the faulty construction of plaintiffs' home by denying plaintiffs' motion for a new trial even though plaintiffs' attorney agreed to entry of a consent judgment on 10 October 2002 after plaintiffs faxed and e-mailed communications on 13 September 2002 to their attorney stating that she did not have authority to enter into the consent judgment and plaintiffs wrote a letter dated 24 September 2002 that discharged their attorney. **Daniel v. Moore, 534.**

JURISDICTION

Personal—default judgment—Although plaintiff served defendant with a summons and complaint and obtained an entry of default upon defendant's failure to appear, plaintiff did not provide a basis upon which personal jurisdiction could be established and the default judgment was void. **Lemon v. Combs, 615.**

JURY

Voir dire—automatic disregard of testimony in light of plea bargain—The trial court did not abuse its discretion in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery

JURY—Continued

with a dangerous weapon case by permitting the State to ask potential jurors during voir dire if there was anyone who would automatically disregard any and all testimony of a coparticipant even in light of other believable evidence if the jury found out that the coparticipant actually received a plea bargain. **State v. Johnson, 1.**

LANDLORD AND TENANT

Breach of lease contract—failure to mitigate damages—The trial court did not err in a breach of lease contract case by not finding that plaintiff failed to mitigate its damages where plaintiffs presented evidence that defendants left the property in such poor condition that it was not feasible for them to make the extensive repairs needed to restore the property in the short time remaining on the lease. **Tripps Rests. of N.C. v. Showtime Enters., Inc., 389.**

Breach of lease/purchase agreement—right of reentry—motion for directed verdict—The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claim of breach of the lease/purchase agreement even though defendants contend the evidence shows that plaintiffs were in default of their payments under the agreement which gave defendants the right of reentry into the store under the lease because plaintiffs' evidence showed that all rental and promissory note payments had been made and accepted by defendants at the time of their reentry and that defendants failed to provide notice of default prior to reentry. **Zubaidi v. Earl L. Pickett Enters., Inc., 107.**

LIBEL AND SLANDER

Slander—good faith—The trial court erred by granting defendant co-worker's motion for summary judgment on plaintiff's slander claim because there are genuine issues of material fact as to whether defendant acted in good faith in accusing plaintiff of sexual harassment. **Smith-Price v. Charter Behavioral Health Sys., 349.**

MINING AND MINERALS

Revocation of mining permit—application of whole record test—evidence supporting findings—The trial court erred in its application of the whole record test when reversing an agency decision to revoke a mining permit. Contrary to the trial court's conclusion, the findings made by the agency in revoking the permit were supported by substantial, uncontroverted evidence that the mining operation had a significant adverse impact on the Appalachian Trail, a publically owned and federally designated National Scenic Trail. **Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 24.**

Revocation of mining permit—authority—The trial court erred by determining that the Department of Environment and Natural Resources lacked authority to revoke a mining permit based on a finding that the mine operation had a significant impact on the Appalachian Trail, a publically owned and federally designated National Scenic Trail. An operation violates the Mining Act when it adversely affects the purposes of a publicly owned park, forest, or recreation area to a significant degree. **Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 24.**

MINING AND MINERALS—Continued

Revocation of mining permit—procedure—The trial court erred by concluding that a mining permit was revoked upon improper procedure; DENR could have modified the permit had it so chosen, but there was no obligation to do so. **Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 24.**

Revocation of mining permit—violation of permit terms—willful—The trial court erred by concluding that a mining permit could not be revoked because any violation of the Mining Act was not willful. Petitioner took inadequate steps to properly and effectively address the violation after being put on notice and despite guidance from DENR. That failure cannot be deemed anything other than willful. **Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 24.**

Vested rights—revocation of mining permit—permit mistakenly granted—The doctrine of vested rights did not protect a mining permit where the permit was mistakenly issued in violation of an existing statute. Permits mistakenly issued do not create a vested right; moreover, the vested rights doctrine arises from a validly issued permit, while this permit's validity has been specifically and consistently challenged. **Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 24.**

MORTGAGES AND DEEDS OF TRUST

Action to quiet title—tax foreclosure sale—judicial estoppel—The trial court did not err by granting summary judgment in favor of plaintiff in an action to quiet title and set aside a tax foreclosure sale where the debtors defaulted on their deed of trust, a foreclosure sale was held, the debtors filed Chapter 13 bankruptcy relief prior to the expiration of the 10-day upset bid period triggering an automatic stay of the foreclosure sale, and the bankruptcy judge denied the foreclosure trustee's motion to annul the stay conditioned on the fact that debtors must sell by 15 January 1996 or else the movant would be deemed the owner of the real property because (1) the recordation of a deed in the county registry on 23 June 1995 by the last and highest bidder at the foreclosure sale was in violation of the stay while the debtors were in the midst of a bankruptcy proceeding and the state law 10-day upset period had not run; (2) although defendants contend the 15 January 1996 deadline from the bankruptcy judge's order came and went, it did not give retroactive legal validity to the 23 June 1995 recorded deed when no parties' rights were ever fixed as to the subject real property and nothing could be legally recorded; (3) upon lifting the stay as of 15 January 1996, the foreclosing trustee was to pursue foreclosure by again advertising and selling the property in accordance with the provisions of N.C.G.S. §§ 45-21.16A, 45-21.17, and 45-21.17A, and the foreclosure trustee did not take the necessary steps to finalize foreclosure proceedings in light of the stay being lifted. **Beneficial Mtge. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 41.**

MOTOR VEHICLES

Driving while impaired—entrapment—The failure to give a requested instruction on entrapment resulted in the reversal of a driving while impaired conviction where a defendant was found sleeping in a truck, there was evidence that he had been drinking but not driving and did not intend to drive, defendant had a conversation with an officer in which he may have been told to move along, and the officer arrested defendant as he drove away. **State v. Redmon, 658.**

MOTOR VEHICLES—Continued

Driving while impaired—sufficiency of evidence—There was sufficient evidence of driving while impaired based on a Trooper's observations and defendant's refusal of the intoxilyzer test, which is admissible as substantive evidence of guilt. **State v. Allen, 665.**

Habitual driving while impaired—predicate convictions—There were three predicate convictions supporting defendant's habitual DWI conviction. Despite defendant's contention that the first conviction was not reduced to writing and signed, the uniform citation form was signed by the presiding judge. Moreover, defendant had two other convictions, even though they were consolidated for judgment. The determinations of what qualifies as a predicate conviction are done differently under the Habitual Impaired Driving statute and the Habitual Felon Act. **State v. Allen, 665.**

PLEADINGS

Verbal amendment to complaint—punitive damages—The trial court did not err in an action for breach of a lease/purchase agreement, conversion, and unfair and deceptive trade practices by allowing plaintiffs' motion to further amend the complaint to allege a claim for punitive damages because the complaint gave sufficient noitice of the events or transactions which produced the claim for punitive damages. **Zubaidi v. Earl L. Pickett Enters., Inc., 107.**

POLICE OFFICERS

Obstructing charge—assault on an officer acquittal—not relevant—Acquittal of assault on an officer is not relevant to guilt of obstructing an officer and was properly excluded from a prosecution for obstructing an officer. **State v. Bell, 83.**

Obstructing charge—sufficiency of evidence—Defendant's motion to dismiss a charge of obstructing an officer for insufficient evidence was correctly dismissed. The evidence was that defendant did not merely remonstrate with an officer on behalf of another and was sufficient to allow a jury to find that defendant had obstructed and delayed an officer in the performance of his duties. **State v. Bell, 83.**

POSSESSION OF STOLEN PROPERTY

Constructive possession—knowledge that property was stolen—sufficiency of evidence—There was sufficient circumstantial evidence that defendant had constructive and recent possession of a stolen bow and knew or had reason to believe that it was stolen. **State v. Friend, 430.**

Constructive possession—sufficiency of evidence—There was sufficient evidence to establish defendant's recent and constructive possession of stolen firearms and a bow in that the stolen property was found where defendant had been staying, along with other stolen property. **State v. Friend, 430.**

Constructive possession—sufficiency of evidence—There was sufficient circumstantial evidence that defendant had constructive and recent possession of stolen items from one of several houses that had been broken into. **State v. Friend, 430.**

POSSESSION OF STOLEN PROPERTY—Continued

Instruction on lesser included offense—no conflicting evidence—Defendant was not entitled to an instruction on the lesser included offense of misdemeanor possession of stolen goods where there was no conflicting evidence. Defendant's assertion that the jury accepted a portion of the State's case and rejected other parts of it was not sufficient. **State v. Friend, 430.**

PROBATION AND PAROLE

Cutting timber—restitution—values from forestry report and sales of similar property—averaged—The trial court did not err when determining restitution as a condition of probation for cutting another's timber by averaging the values from a forestry report and from the owner's sale of similar property. The values were both supported by evidence and authorized under N.C.G.S. § 15A-1340.35. **State v. Freeman, 673.**

Modification—no right to appeal—An appeal was dismissed where defendant admitted violating her probation, the court modified the terms of her probation, and counsel submitted an Anders brief. Although a defendant may appeal by statute when the trial court activates a sentence or imposes special probation, neither occurred in this case. **State v. Edgerson, 712.**

PROCESS AND SERVICE

Proof of service—throwing papers at feet—There was sufficient proof of service of process where the sheriff's certification of service indicated the manner in which defendant was served and plaintiff presented affidavits supporting the deputy's version of how service was made. The court did not abuse its discretion by rendering a decision based solely on affidavits. **Lemon v. Combs, 615.**

PUBLIC OFFICERS AND EMPLOYEES

County DSS—employment discrimination—administrative appeal scheme—due process—The administrative appeal scheme which routed the recommended decision of the Administrative Law Judge (ALJ) and the State Personnel Commission (SPC) finding no racial discrimination in an employment decision back to the Local Appointing Authority (LAA) for the final decision did not violate the employee's due process rights because, under N.C.G.S. §§ 126-37(b1) and 150B-36, the LAA will not have an opportunity to reverse a finding of discrimination by the SPC; the LAA must affirm an SPC finding that there was no discrimination unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the ALJ to evaluate the credibility of the witnesses; in her final agency decision, the LAA adopted the detailed findings of fact of the ALJ, as adopted without exception by the SPC, pursuant to the deferential standard after the ALJ had determined the credibility of her testimony; and the LAA's additional administrative review outweighed any potential risk of bias. **Enoch v. Alamance Cty. DSS, 233.**

County DSS—employment discrimination—allegations of acting under pretext—The trial court did not err in an employment discrimination case by sustaining the administrative law judge's (ALJ) finding that the county department of social services (DSS) was not acting under any pretext in promoting a

PUBLIC OFFICERS AND EMPLOYEES—Continued

white male candidate instead of petitioner, an African-American female, to the position of program manager in 2001, even though the ALJ failed to consider any evidence surrounding the 1999 promotion of a white female candidate instead of petitioner. **Enoch v. Alamance Cty. DSS, 233.**

County DSS—employment discrimination—nondiscriminatory reasons— The trial court did not err in an employment discrimination case by finding that respondent county department of social services articulated sufficient nondiscriminatory reasons to rebut the presumption of racial discrimination in its failure to promote petitioner to the position of program manager. **Enoch v. Alamance Cty. DSS, 233.**

County DSS—employment discrimination—rational basis—The trial court did not err by adopting without exception the administrative law judge's (ALJ) opinion finding that petitioner African-American female lacked sufficient evidence to prove employment discrimination in the decision by the director of a county department of social services to promote a white male in 2001 to the program management position instead of petitioner. **Enoch v. Alamance Cty. DSS, 233.**

Race discrimination claim—§ 1983—Title VII—The trial court erred by granting defendants' motion to dismiss plaintiff county DSS employee's race discrimination claims even though the complaint appears to attempt to assert a claim directly under the federal constitution instead of referencing 42 U.S.C. § 1983 where the allegations of the complaint were sufficient to support a § 1983 claim for violation of plaintiff's equal protection rights against both defendant DSS director individually and defendant DSS employer. **Enoch v. Inman, 415.**

PUBLIC RECORDS

City attorney—attorney-client privilege—An ordering compelling the release of documents by a city attorney was remanded where it was not clear whether the court was acting under the common law privilege or the Public Records Act. Furthermore, the court's application of the rule that confidential documents are subject to disclosure after three years was contrary to the statute in that it focused on the date of the document's creation rather than the date the material was received by the governmental body. **McCormick v. Hanson Aggregates Southeast, Inc., 459.**

City attorney—law enforcement agency—The Raleigh City Attorney's office qualifies as a public law enforcement agency for purposes of the criminal investigation exception under N.C.G.S. § 132-1.4 (The Public Records Act) because it is responsible under the Raleigh City Charter for investigating, preventing, and solving zoning violations. **McCormick v. Hanson Aggregates Southeast, Inc., 459.**

City attorney—work product—subject to disclosure—A city attorney's work product was subject to disclosure under the Public Records Act unless the individual documents were independently exempted by virtue of the criminal investigation exception. **McCormick v. Hanson Aggregates Southeast, Inc., 459.**

Criminal discovery exceptions—misdemeanors—A city attorney pursuing zoning violations was not entitled to the discovery protections of Chapter 15A,

PUBLIC RECORDS—Continued

and therefore to a Public Records exception. Chapter 15A is not applicable to misdemeanors. N.C.G.S. § 15A-901. **McCormick v. Hanson Aggregates Southeast, Inc., 459.**

Criminal investigation—exemptions—criminal intelligence information—Although the trial court did not err in a declaratory judgment action by dismissing plaintiffs' complaint seeking production of records of a criminal investigation or records of criminal intelligence information conducted by defendant State Bureau of Investigation (SBI) related to a fatal fire that occurred in a county jail, plaintiffs are entitled to release of any other information classified as public records under N.C.G.S. §§ 132-1.4(c) and (k) as well as any other public records not specifically exempted from disclosure. **Gannett Pacific Corp. v. N.C. State Bureau of Investigation, 154.**

Criminal investigation—in camera review required—purpose in preparing documents—The criminal investigation exception of the Public Records Act does not apply solely to ongoing violations of the law. In this case the trial court erred by applying a straight-line rule based on the two-year statute of limitations for misdemeanors. The court should have conducted an in camera review to determine whether the material was subject to the exception based on the purpose in compiling each withheld document and the definitions found in the statute. Moreover, on remand the court may disclose documents which do not qualify as public records but which could be obtained by normal discovery. **McCormick v. Hanson Aggregates Southeast, Inc., 459.**

QUANTUM MERUIT

Agreement between brokers—express contract—quantum meruit not available—A directed verdict for defendant on a quantum meruit claim was proper because quantum meruit is not available when there is an express contract. Moreover, plaintiff offered no evidence of the reasonable value of his services. **Maxwell v. Michael P. Doyle, Inc., 319.**

RAPE

Short-form indictments—first-degree rape—first-degree sexual offense—constitutionality—The trial court did not err by denying defendant's motion to dismiss the short-form indictments that charged him with first-degree rape and first-degree sexual offense. **State v. Edwards, 130.**

ROBBERY

Common law—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of common law robbery which was based on the taking of both money and marijuana from the victim's person and presence. **State v. Shaw, 723.**

Dangerous weapon—instruction—acting in concert—The trial court did not err in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case by failing to instruct the jury in accordance with defendant's request concerning the theory of acting in concert where jurors were correctly instructed that they need

ROBBERY—Continued

not find that defendant had the intent to use a dangerous weapon in order to be convicted of armed robbery, but that they need only find that defendant acted in concert to commit robbery and that his codefendant used the dangerous weapon in pursuance of that common purpose to commit robbery. **State v. Johnson, 1.**

Dangerous weapon—instruction—lesser-included offense of common law robbery—The trial court did not err by concluding that defendant was not entitled to a jury instruction regarding the lesser-included offense of common law robbery of one of the victims. **State v. Johnson, 1.**

Dangerous weapon—sufficiency of evidence—danger or threat to life of victim—The trial court did not commit plain error when it submitted to the jury the issue of defendant's guilt of robbery with a firearm or other dangerous weapon instead of the lesser-included offense of common law robbery as to one of the victims even though defendant contends there was insufficient evidence to prove danger or threat to the life of the victim by the possession, use, or threatened use of a dangerous weapon based on the fact that the victim did not see or know about a gun during the robbery. **State v. Johnson, 1.**

SEARCH AND SEIZURE

Anticipatory warrant—description of triggering event—sufficient—An anticipatory search warrant was valid in a cocaine case where the warrant sufficiently incorporated the supporting affidavit, and the affidavit identified both the event which would trigger execution of the warrant (acceptance of a package) and the condition upon which the warrant would not be executed (refusal of the package). **State v. Carrillo, 204.**

Basis for warrant—trash pick-up—insufficient connection to house—The trial court correctly suppressed evidence of marijuana seized from defendant's residence where the seizure was based on a search warrant supported by an affidavit stating that marijuana had been found in a trash bag near the curb in defendant's front yard. The affidavit did not contain sufficient facts and circumstances linking the bag to defendant's residence and failed to establish probable cause for a warrant to search the house. **State v. Sinapi, 56.**

Execution of warrant—knock and announce—failure to object—not ineffective assistance of counsel—While officers may not have knocked on defendant's door before they used a battering ram to open the door while executing a search warrant, they had announced their presence and purpose and thus complied with the requirements of the "knock and announce" statute, N.C.G.S. § 15A-249. Therefore, the failure of defendant's counsel to contest the method of execution of the warrant did not constitute the ineffective assistance of counsel. **State v. Pelham, 70.**

Investigatory stop of vehicle—protective search—motion to suppress—The trial court did not err in a case arising out of multiple sexual assaults by denying defendant's motion to suppress evidence seized during a warrantless search of his vehicle because the trial court made ample findings of fact upon which to conclude that based on the totality of circumstances, the officers were warranted in making an investigatory stop of defendant's vehicle, and given the actions of defendant and the details of the circumstances, the officers were warranted in checking defendant and his immediate surroundings for evidence of a crime. **State v. Edwards, 130.**

SEARCH AND SEIZURE—Continued

Search warrant—motion to suppress—The trial court did not err in a case arising out of multiple sexual assaults by denying defendant's motions to suppress the evidence seized pursuant to search warrants that were based on the initial warrantless search of his vehicle. **State v. Edwards, 130.**

Validity of warrant—failure to show false statements—Defendant failed to show that a search warrant was invalid on the ground that the affiant knowingly or recklessly made a false statement in the affidavit where defendant merely denied what the confidential informant and the officer-affiant asserted. **State v. Pelham, 70.**

SENTENCING

Aggravating factors—consolidated counts—same elements as offenses—There was no error in the use of aggravating factors when sentencing a defendant for consolidated counts of forgery and other offenses. Although defendant contended that the two factors used to enhance the sentence were elements of the offenses, a consolidated judgment with equally classified offenses can be aggravated by any factor that is an element of one but not all of the offenses. **State v. Harrison, 693.**

Aggravating factors—shooting into occupied property—beyond a reasonable doubt standard—The trial court did not violate defendant's rights to due process and to a jury trial in a second-degree murder case by finding as an aggravating factor that defendant shot into occupied property because defendant's sentence was not in excess of the statutory maximum and this aggravating factor thus did not need to be proved to the jury beyond a reasonable doubt. **State v. Byrd, 522.**

Aggravating factors—shooting into occupied property—second-degree murder—use of firearm—The trial court did not abuse its discretion in a second-degree murder case by finding as an aggravating factor that defendant fired into occupied property even though defendant contends the evidence violated N.C.G.S. § 15A-1340.16(d) since it was necessary to prove an element of the offense based on the fact that the murder was accomplished by the use of a firearm. **State v. Byrd, 522.**

Aggravating factors—sufficiency of evidence—There was sufficient evidence of an aggravating factor where the State summarized and the defendant stipulated to the factual basis of defendant's plea and the factor. **State v. Harrison, 693.**

Credit for time served—evidence—There was no abuse of discretion in calculating a defendant's credit for time served while revoking his probation. **State v. Reynolds, 406.**

Habitual felon—guilty plea—knowing and voluntary—A guilty plea to being an habitual felon was knowing and voluntary. The trial court sufficiently established a record of the plea., the judge's query was sufficient to clarify for the defendant the consequences of the plea, and the transcript indicates that defendant understood. **State v. Allen, 665.**

Habitual felon—prior record level—prior conviction—prayer for judgment continued—The trial court did not err in a felony breaking and entering

SENTENCING—Continued

and habitual felon case by calculating defendant's prior record level by adding one point for the prayer for judgment continued on the assault on a female charge. **State v. Canellas, 775.**

Inconsistencies—consolidation—remand for entry of formal judgment— Several of defendant's judgments must be remanded to determine the existence of, or to correct, apparent inconsistencies concerning whether the trial court ultimately elected not to consolidate several of the sentences. Further, the case is remanded for formal entry of judgment as to the second-degree sexual offense conviction. **State v. Edwards, 130.**

Mitigating factors—completion of drug treatment—defendant's credibility—The trial court did not err by failing to adopt as a mitigating factor defendant's completion of drug treatment. Defendant produced no documentation, and there were discrepancies bearing on defendant's credibility. **State v. Harrison, 693.**

Mitigating factors—evidence not allowed—Plain error analysis was applicable where a defendant was not allowed to present evidence of mitigating factors before she was sentenced within the presumptive range. The case was remanded because it could not be concluded that defendant's sentence was unaffected. **State v. Knott, 212.**

Mitigating factors—offense committed under strong provocation—The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury, assault with a firearm on a law enforcement officer, and drug case by failing to find that defendant acted under extreme provocation. **State v. Pelham, 70.**

Mitigating factors—strong provocation when killed victim—The trial court did not err in a second-degree murder case by failing to find as a mitigating factor that defendant acted under strong provocation when she killed the victim even though there was evidence showing a history of confrontation between the victim and defendant. **State v. Byrd, 522.**

Nonstatutory aggravating factors—could have been charged with shooting into occupied property—The trial court did not err in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant could have been but was not charged with shooting into occupied property. **State v. Byrd, 522.**

Nonstatutory aggravating factors—course of conduct—other convictions also used for prior record level—The trial court did not err when sentencing defendant for robbery by finding the nonstatutory aggravating factor that the crime was part of a course of conduct involving violence, including at least two previous robberies. Defendant's previous convictions involved violence by their nature, and there is no authority precluding the use of prior convictions to aggravate the sentence when those convictions were also used to determine defendant's prior record level. **State v. Borders, 120.**

Nonstatutory aggravating factors—defendant committed felony murder—The trial court erred in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant committed felony murder but was not charged with it where defendant was allowed to plead guilty to second-degree murder. **State v. Byrd, 522.**

SENTENCING—Continued

Nonstatutory aggravating factors—premeditation and deliberation—The trial court did not abuse its discretion in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant acted with premeditation and deliberation. **State v. Byrd, 522.**

Nonstatutory aggravating factors—testimony of another crime—not reasonably related to crime for which sentence imposed—The nonstatutory aggravating factor that defendant had testified that he had sold counterfeit controlled substances to the victim was not reasonably related to robbery, the crime for which defendant was being sentenced. **State v. Borders, 120.**

Nonstatutory aggravating factors—voluntarily entered affray—The trial court erred in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant voluntarily entered the affray, because: (1) there was no evidence that defendant did anything to enter the affray other than actually shooting the victim; and (2) shooting the victim was evidence necessary to prove an element of the offense charged, and thus, may not support an aggravating factor. **State v. Byrd, 522.**

Nonstatutory aggravating factors—vulnerable victim—estimation of age and strength by court—findings insufficient—There was insufficient evidence in a sentencing hearing for robbery for the court to find the nonstatutory aggravating factor that the crime was committed against a victim who was smaller, older, and weaker, and that defendant took not only money but the vehicle which provided the victim's income. When estimating a victim's age and the relative size and strength of individuals, the court must make relevant findings unless there is evidence in the record to allow meaningful appellate review. Here there was not. **State v. Borders, 120.**

Not disproportionate—30 felonies—Defendant's sentence was not disproportionate and did not constitute cruel and unusual punishment where he received 210-261 months as an habitual felon, pursuant to a plea bargain, for 30 felony offenses, including assault with a deadly weapon on a government official. **State v. Harrison, 693.**

Prior convictions—other states—similarity to N.C. offenses—A defendant's sentencing stipulation to the existence of prior convictions did not extend to whether those convictions were similar to North Carolina offenses, and the State failed to show that defendant's prior convictions were substantially similar to North Carolina offenses. **State v. Morgan, 298.**

Prior convictions—sufficiency of evidence—The State presented sufficient evidence to show the existence of defendant's prior convictions in a sentencing hearing because comments by defendant's counsel constituted a stipulation to the existence of the prior convictions listed on a worksheet submitted by the State. **State v. Morgan, 298.**

Prior record level—stipulation—Defendant is not entitled to a new sentencing hearing in a robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon case based on the State's alleged failure to meet its burden of proving by a preponderance of the evidence defendant's prior record level because the trial court's exchange with defense counsel regarding the worksheet submitted by the

SENTENCING—Continued

State constituted a stipulation by defendant to the prior convictions listed on the worksheet. **State v. Johnson, 1.**

SEXUAL OFFENSES

Short-form indictment—first-degree rape—first-degree sexual offense—constitutionality—The trial court did not err by denying defendant's motion to dismiss the short-form indictments that charged him with first-degree rape and first-degree sexual offense. **State v. Edwards, 130.**

Short-form indictment—statutory sex offense against person 13, 14, or 15 years old—The trial court did not err by concluding that the indictment for statutory sex offense against a person who is 13, 14, or 15 years old was sufficient to apprise defendant of the crime with which he was charged. **State v. Daniels, 558.**

STATUTES

Interpretation—use of conjunctive—The use of the conjunctive "and" in N.C.G.S. § 130A-24(b) did not mean that an appeal involving a county's euthanasia of animals had to involve both the enforcement of rules and administrative penalties. Courts may substitute "or" for "and" (and vice versa) to preserve constitutionality or give effect to legislative intent. Here, the General Assembly must have intended to allow an appeal on either ground because the imposition of administrative penalties will always involve the enforcement of rules. **Justice for Animals, Inc. v. Robeson Cty., 366.**

STATUTES OF FRAUD

Proposed lease and cover letter—mutual assent not present—A proposed lease and a cover letter did not satisfy the statute of frauds and the trial court did not err by granting summary judgment for defendants. The letter on its face showed that defendants had not yet agreed to the lease; although plaintiffs argued that an agreement was subsequently reached, a writing cannot comply with the statute of frauds when it predates the agreement of which it is the memorial. **Howlett v. CSB, LLC, 715.**

TERMINATION OF PARENTAL RIGHTS

Failure to appoint guardian ad litem for parent—mental instability—The trial court erred in a termination of parental rights case by failing to appoint a guardian ad litem to represent respondent mother as required by N.C.G.S. § 7B-1101 despite the fact that respondent's parental rights were not terminated based on juvenile dependency but instead based on neglect. **In re J.D., 176.**

Willful failure to pay support—ability to pay—The trial court did not err by terminating respondent incarcerated father's parental rights under N.C.G.S. § 7B-1111(a)(3) based on respondent's willful failure to pay a reasonable portion of the cost of his minor child's foster care for six months prior to the petition. **In re T.D.P., 287.**

TRIALS

Appeal from magistrate to district court—arbitration—trial de novo—posture of case—A district court judge hearing defendant's appeal from a magistrate's judgment had the authority to dismiss the appeal when defendant did not appear and did not render its decision under a misapprehension of the procedural posture of the case. Although the case involved both an appeal from the magistrate to district court and trial de novo after court-ordered arbitration, the court here was dealing with defendant's appeal from the magistrate's judgment and was not hearing an appeal from the arbitrator's award. **Brown v. Avery Cty., 704.**

Continuance denied—no abuse of discretion—A district court judge did not abuse its discretion by denying a continuance, under the facts of the case, where defendant's attorney was scheduled for mandatory training in bankruptcy court. **Brown v. Avery Cty., 704.**

Motion for judgment notwithstanding verdict—motion for directed verdict—The trial court did not err in an action for breach of a lease/purchase agreement, conversion, and unfair and deceptive trade practices by denying defendants' motions for judgment notwithstanding the verdict. **Zubaidi v. Earl L. Pickett Enters., Inc., 107.**

Motion for new trial—abuse of discretion standard—The trial court did not abuse its discretion in an action arising out of an automobile accident by setting aside the verdict and by granting plaintiffs' motion for a new trial on the issue of damages to the minor plaintiffs. **Guox v. Satterly, 578.**

Motion for new trial—abuse of discretion standard—de novo review—While a trial court's conclusions of law are reviewable de novo, a ruling in the discretion of the trial court such as a decision to grant or deny a motion for a new trial raises no question of law, and thus, the issue before the court is whether the trial court abused its discretion. **Guox v. Satterly, 578.**

Motion to proceed as pauper—filed after verdict and motion for costs—The trial court did not abuse its discretion by denying plaintiffs' motion to proceed as a pauper where plaintiff filed her motion after a verdict for defendants and after the first defendant filed her motion for costs. A party may not file a motion to proceed as a pauper to escape payment of costs. **Griffis v. Lazarovich, 329.**

Recordation—conversation between courts—The trial court did not err in a child custody case by failing to make a record of the conversation which occurred between the North Carolina court and the Vermont court as required by N.C.G.S. § 50A-110(d). **Chick v. Chick, 444.**

Voluntary dismissal—refiling—limitation period—The trial court erred by dismissing an action with prejudice after concluding that plaintiff had exceeded the one year limit for refiling after a voluntary dismissal. An oral notice in open court generally begins the one year limitation period for refiling, but there is an exception, applicable here, when the original court instructs or permits the filing of the written notice at a later date. **Keyzer v. Amerlink, Ltd., 761.**

UNFAIR TRADE PRACTICES

Civil conspiracy—motion for directed verdict—The trial court did not err by granting defendants' motion for directed verdict regarding plaintiff's claim for

UNFAIR TRADE PRACTICES—Continued

unfair and deceptive trade practices based on defendants entering into an alleged conspiracy to terminate plaintiff's rights under his lease. **Di Frega v. Pugliese, 499.**

WILLS

Interpretation of provisions—sufficiency of findings—A declaratory judgment interpreting a will was remanded for further findings where the trial court merely recited the requests in the complaint, recited the pertinent articles from the will, and concluded that the testator intended his sister and her husband to take by the entirety rather than individually. The law applied by the court could not be determined from the order. **Woodring v. Woodring, 588.**

WITNESSES

Fingerprinting techniques—deputy's lay opinion—The trial court did not err by allowing a deputy to present lay opinion testimony about fingerprinting techniques. The deputy was in charge of CID and helped the jury understand why fingerprints were not recovered. **State v. Friend, 430.**

Redirect examination—scope—The trial court did not err in a burglary prosecution by allowing a line of questioning on re-direct examination of a deputy which defendant contended extended the scope of direct-examination. **State v. Friend, 430.**

WORKERS' COMPENSATION

Attorney fees—denied—The Industrial Commission did not abuse its discretion by deciding against an award of attorney fees under N.C.G.S. § 97-88.1 where defendant employer initially defended upon unfounded allegations of fraud but also defended reasonably upon the basis of causation. **Hodges v. Equity Grp., 339.**

Attorney fees—findings—The award of attorney fees in a workers' compensation case under N.C.G.S. § 97-88 (expenses of appeals brought by insurers) was remanded for additional findings where the Commission did not make findings regarding the costs associated with defendants' appeal of the deputy commissioner's opinion and award. **Hodges v. Equity Grp., 339.**

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