NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 169

15 MARCH 2005

19 APRIL 2005

RALEIGH
2006

CITE THIS VOLUME
169 N.C. APP.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

NORTH CAROLINA MEDICAL SOCIETY, NORTH CAROLINA SOCIETY OF ANESTHESIOLOGISTS, INC., ERIC W. MASON, M.D., AND THE NORTH CAROLINA MEDICAL BOARD F/K/A THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA, PETITIONERS V. NORTH CAROLINA BOARD OF NURSING, RESPONDENT

No. COA04-682

(Filed 15 March 2005)

1. Nurses; Physicians and Surgeons— supervision of nursing personnel involved in anesthesia activities—certified registered nurse anesthetist

The trial court did not err by denying respondent Board of Nursing's motion for enforcement of a 1994 consent order seeking primarily an order from the trial court directing petitioner Medical Board to remove language from a Medical Board position statement that anesthesia administered in an office-based surgical setting should either be administered by an anesthesiologist or by a certified registered nurse anesthetist (CRNA) under the supervision of a physician, because: (1) the consent order did not constitute acquiescence by petitioners to respondent's proposed collaboration standard wherein the relationship between a CRNA and a physician changed from a relationship where the physician supervised the CRNA to a relationship in which the CRNA worked in collaboration with a physician; (2) the pertinent revised rule and the consent order must be read as requiring

physician supervision for those nurse anesthetist activities which involve prescribing a medical treatment or making a medical diagnosis; (3) lack of details in the pertinent affidavits renders them ineffective as to the issue of acquiescence to the collaboration standard; (4) physician supervision of nurse anesthetists providing anesthesia care, when that care includes prescribing medical treatment regimens and making medical diagnoses, is a fundamental patient safety standard required by North Carolina law; (5) neither the 1994 consent order nor the position statement changed the statutory requirement of when physician supervision is necessary; (6) the Medical Board, as an administrative board established pursuant to N.C.G.S. § 90-2, cannot be estopped from exercising its duty to regulate the practice of medicine in the interest of the public; and (7) a state agency is prohibited from adopting a rule that enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.

2. Trials— denial of objection and motion to strike consent order—failure to show reliance on incompetent evidence

The trial court did not err by denying respondent's objection and motion to strike the submission of, and by admitting, considering, and basing its order on the consent order issued by the Medical Board in the matter captioned *In re Peter Loren Tucker, M.D.*, or any related material, because: (1) appeal on this issue has been waived since respondent failed to object to the trial court's authorization of the filing of supplemental materials; and (2) respondent failed to meet its burden of proving that the trial court relied upon this alleged incompetent evidence in making its determination.

3. Trials— pro hac vice motion for counsel—amicus brief—failure to show reliance on incompetent evidence

The trial court did not err by failing to rule on, or in implicitly overruling respondent's objection to, the pro hac vice motion for counsel for the American Society of Anesthesiology (ASA), and in considering the amicus brief tendered by counsel for ASA, because: (1) in the context of a bench trial, an appellant must show that the court relied on the incompetent or inadmissible evidence in making its determination; and (2) respondent failed to show that the trial court relied on this allegedly inadmissible evidence.

Appeal by respondent from order filed 31 December 2003 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 27 January 2005.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Susan H. Hargrove, Dana E. Simpson, and Candice M. Murphy-Farmer, for petitioners North Carolina Medical Society, North Carolina Society of Anesthesiologists, Inc., and Eric W. Mason, M.D.

Marcus Jimison and Thomas W. Mansfield for petitioner North Carolina Medical Board f/k/a the Board of Medical Examiners of the State of North Carolina.

Howard A. Kramer; Womble Carlyle Sandridge & Rice, PLLC, by Johnny M. Loper, Leighton P. Roper, III, and John W. O'Tuel, III, for respondent.

BRYANT, Judge.

North Carolina Board of Nursing (BON) (respondent) appeals an order filed 31 December 2003, denying respondent's motion for enforcement of a consent order as against North Carolina Medical Society (Medical Society), North Carolina Society of Anesthesiologists, Inc. (NCSA), Eric W. Mason, M.D., and the North Carolina Medical Board f/k/a the Board of Medical Examiners of the State of North Carolina (Medical Board), (petitioners).

On 6 August 2003, BON filed a motion for enforcement of consent order seeking, primarily, an order from the trial court directing the Medical Board to remove language from a Medical Board position statement that stated that anesthesia administered in an office-based surgical setting should either be administered by an anesthesiologist, or by a certified registered nurse anesthetist (CRNA) under the supervision of a physician. BON contends the Medical Board's position statement constituted a violation of the 1994 consent order between the parties. Contemporaneous with the filing of its motion, BON served upon the Medical Board certain requests for discovery.

On 6 October 2003, petitioners filed a motion for protective order seeking an order that "discovery not be had with respect to the motion to enforce the consent order." The motion to enforce the consent order was calendared for hearing on 27 October 2003 in Wake County Superior Court.

Prior to the hearing date, counsel for the Medical Society requested a continuance. Counsel for BON wrote the trial court administrator for Wake County stating that, in his opinion, "good cause" did not exist for moving the hearing date and that BON needed the "requested discovery in order to appropriately argue the motion."

The matter came for hearing at the 27 October 2003 civil session of Wake County Superior Court with the Honorable Evelyn W. Hill presiding. At the hearing, counsel for BON did not make a motion to compel responses to his discovery requests, nor did he seek a continuance of the hearing so that BON could have discovery before proceeding with the hearing. After oral argument, the trial court took the matter under advisement and requested that the parties submit post-hearing briefs and/or any other materials or documents that they wished to have the court consider. The trial court stated it would advise counsel by 1 December 2003 if the trial court would require additional presentation or argument prior to rendering a decision.

Both parties provided the trial court with supplemental briefs on or about 17 November 2003. On 25 November 2003, petitioners provided the trial court with an exhibit to their 17 November 2003 brief in the form of a consent order between the Medical Board and Peter Loren Tucker, M.D., which had been entered into on 20 November 2003. On 30 December 2003, the trial court entered an order denying BON's motion to enforce the 1994 consent order.

Respondent gave timely notice of appeal.

Facts

In 1992, BON proposed an administrative rule, 21 N.C.A.C. 36.0226 (rule .0226), that would expand the scope of practice of a CRNA. The proposed rule sought to change the relationship between a CRNA and a physician from a relationship where the physician supervised the CRNA, to a relationship in which the CRNA worked in collaboration with a physician. During the rulemaking process and prior to final adoption of the proposed rule, NCSA, requested that BON adopt a similar, but different rule.

NCSA proposed that BON include the statutory language of N.C. Gen. Stat. § 90-171.20(7)(e)[1] and (f)[2], requiring the supervision of a licensed physician when a nurse performed acts that required the making of a medical diagnosis or the implementation of a treatment or pharmaceutical regimen. BON rejected NCSA's request.

On 19 November 1993, the Medical Board issued a series of declaratory rulings declaring that many of the activities described in proposed rule .0226 constituted the practice of medicine (i.e., the making of a medical diagnosis and/or implementation of a treatment or pharmaceutical regimen). Despite the objections, declaratory rulings, and requests that a different rule be adopted, BON adopted rule .0226 with an effective date of 1 July 1993.

Petitioners requested judicial review of rule .0226 in August 1993 and February 1994. In their August 1993 petition for judicial review, petitioners wrote the following:

> In such petition [Petition for Adoption of Rules], the Board of Nursing was requested to adopt rules substantially similar to the rules that were being considered by the Board of Nursing (and which have since been adopted), but with brief yet vital revisions limited to bringing the rules within the scope of the Board of Nursing's statutory authority and the General Assembly's statement of the bounds of the scope of the practice of nursing by a registered nurse. **The requested changes merely include the statutory language relating to supervision by a licensed physician and implementing medical treatment regimens only as prescribed by a person so authorized under State law.**

(emphasis added).

In March 1994, the Medical Board moved to intervene in the judicial review actions. On 21 September 1994, the parties executed a consent order resolving the petitions for judicial review. In resolving the dispute between the parties, the consent order provided, in pertinent part, as follows:

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1. "Collaborating with other health care providers in determining the appropriate health care for a patient but, subject to the provisions of G.S. 90-18.2, not prescribing a medical treatment regimen or making a medical diagnosis, except under supervision of a licensed physician." N.C.G.S. § 90-171.20(7)(e) (2003).

2. "Implementing the treatment and pharmaceutical regimen prescribed by any person authorized by State law to prescribe the regimen." N.C.G.S. § 90-171.20(7)(f) (2003).

5. It is jointly agreed that the provisions of the Nursing Practice Act, including the provisions found at N.C. Gen. Stat. § 90-171.20(e) and (f), establish the scope of the practice of nursing by a registered nurse, and nothing contained in the rules of the Respondent at 21 N.C.A.C. 36.0226 in any way constitutes an expansion of such practice.

6. Respondent agrees to adopt as a final rule the revisions to 21 N.C.A.C. 36.0226 as proposed in the notice published in the North Carolina Register on August 15, 1994, and Petitioners agree not to challenge such revised rule under the North Carolina Administrative Procedure Act.

The consent order called for an amendment to rule .0226. The pre-amendment rule .0226, in pertinent part, reads as follows:

(b) Qualifications and Definitions:

(1) The registered nurse who completes a program accredited by the Council on Accreditation of Nurse Anesthesia Education Programs, is credentialed as a certified registered nurse anesthetist by the Council on Certification of Nurse Anesthetists, and who maintains recertification through the Council on Recertification of Nurse Anesthetists, may perform nurse anesthesia activities in collaboration with a physician, dentist, podiatrist, or other lawfully qualified health care provider.

The amendment to rule .0226 (as a consequence of the parties' settlement) retained all the language of the pre-amendment rule, but added the following:

(b) Qualifications and Definitions:

(1) The registered nurse who completes a program accredited by the Council on Accreditation of Nurse Anesthesia Education Programs, is credentialed as a certified registered nurse anesthetist by the Council on Certification of Nurse Anesthetists, and who maintains recertification through the Council on Recertification of Nurse Anesthetists, may perform nurse anesthesia activities in collaboration with a physician, dentist, podiatrist, or other lawfully qualified health care provider, **but may not prescribe a medical treatment regimen or make a medical diagnosis except under the supervision of a licensed physician.**

(emphasis added)[3]. The effect of the amendment was to add the statutorily required physician supervision language to the rule, while also leaving intact the collaboration language.

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3. Rule .0226, as adopted, reads in its entirety:

(a) Only those registered nurses who meet the qualifications as outlined in Paragraph (b) of this Rule may perform nurse anesthesia activities outlined in Paragraph (c) of this Rule.

(b) Qualifications and Definitions:

(1) The registered nurse who completes a program accredited by the Council on Accreditation of Nurse Anesthesia Educational Programs, is credentialed as a certified registered nurse anesthetist by the Council on Certification of Nurse Anesthetists, and who maintains recertification through the Council on Recertification of Nurse Anesthetists, may perform nurse anesthesia activities in collaboration with a physician, dentist, podiatrist, or other lawfully qualified health care provider, but may not prescribe a medical treatment regimen or make a medical diagnosis except under the supervision of a licensed physician.

(2) The graduate nurse anesthetist is a registered nurse who has completed a program accredited by the Council on Accreditation of Nurse Anesthesia Educational Programs, is awaiting initial certification by the Council on Certification of Nurse Anesthetists and is listed as such with the Board of Nursing. The graduate nurse anesthetist may perform nurse anesthesia activities under the supervision of a certified registered nurse anesthetist, physician, dentist, podiatrist, or other lawfully qualified health care provider provided that initial certification is obtained within 18 months after completion of an accredited nurse anesthesia program.

(3) Collaboration is a process by which the certified registered nurse anesthetist or graduate nurse anesthetist works with one or more qualified health care providers, each contributing his or her respective area of expertise consistent with the appropriate occupational licensure laws of the State and according to the established policies, procedures, practices and channels of communication which lend support to nurse anesthesia services and which define the role(s) and responsibilities of the qualified nurse anesthetist within the practice setting. The individual nurse anesthetist maintains accountability for the outcome of his or her actions.

(c) Nurse Anesthesia activities and responsibilities which the appropriately qualified registered nurse anesthetist may safely accept are dependent upon the individual's knowledge and skills and other variables in each practice setting as outlined in 21 NCAC 36 .0224(a). These activities include:

(1) Preanesthesia preparation and evaluation of the client to include:

(A) performing a pre-operative health assessment;

(B) recommending, requesting and evaluating pertinent diagnostic studies; and

(C) selecting and administering preanesthetic medications.

(2) Anesthesia induction, maintenance and emergence of the client to include:

(A) securing, preparing and providing basic safety checks on all equipment, monitors, supplies and pharmaceutical agents used for the administration of anesthesia;

After execution of the 1994 consent order, the parties interpreted the consent order to mean different things. BON interpreted the consent order to mean acceptance by the Medical Board and the other petitioners that the activities described in rule .0226 do not involve

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(B) selecting, implementing, and managing general anesthesia, monitored anesthesia care, and regional anesthesia modalities, including administering anesthetic and related pharmaceutical agents, consistent with the client's needs and procedural requirements;

(C) performing tracheal intubation, extubation and providing mechanical ventilation;

(D) providing perianesthetic invasive and non-invasive monitoring, recognizing abnormal findings, implementing corrective action, and requesting consultation with appropriately qualified health care providers as necessary;

(E) managing the client's fluid, blood, electrolyte and acid-base balance; and

(F) evaluating the client's response during emergency from anesthesia and implementing pharmaceutical and supportive treatment to ensure the adequacy of client recovery from anesthesia.

(3) Postanesthesia Care of the client to include:

(A) providing postanesthesia follow-up care, including evaluating the client's response to anesthesia, recognizing potential anesthetic complications, implementing corrective actions, and requesting consultation with appropriately qualified health care professionals as necessary;

(B) initiating and administering respiratory support to ensure adequate ventilation and oxygenation in the immediate postanesthesia period;

(C) initiating and administering pharmacological or fluid support of the cardiovascular system during the immediate postanesthesia period;

(D) documenting all aspects of nurse anesthesia care and reporting the client's status, perianesthetic course, and anticipated problems to an appropriately qualified postanesthetic health care provider who assumes the client's care following anesthesia consistent with 21 NCAC 36 .0224(f); and

(E) releasing clients from the postanesthesia care or surgical setting as per established agency policy.

(d) Other clinical activities for which the qualified registered nurse anesthetist may accept responsibility include, but are not limited to:

(1) inserting central vascular access catheters and epidural catheters;

(2) identifying, responding to and managing emergency situations, including initiating and participating in cardiopulmonary resuscitation;

(3) providing consultation related to respiratory and ventilatory care and implementing such care according to established policies within the practice setting; and

(4) initiating and managing pain relief therapy utilizing pharmaceutical agents, regional anesthetic techniques and other accepted pain relief modalities according to established policies and protocols within the practice setting.

21 N.C.A.C. 36.0226 (2003).

the practice of medicine, and therefore, do not require physician supervision. The Medical Board and the other petitioners, however, interpreted the consent order as preserving the physician supervision requirement for those activities described in rule .0226 that involve the practice of medicine.

Subsequent to 1994, there has been no judicial determination or legislative clarification as to whether any of the described activities in rule .0226 constitute the practice of medicine, and thus require physician supervision. In December 1998, the North Carolina Attorney General (Attorney General) issued an advisory opinion on the following issue: "whether it is lawful for certified registered nurse anesthetists ("CRNAs") to provide anesthesia care without physician supervision[?]" The Attorney General responded that: "[f]or reasons which follow, it is our opinion that it is not. Anesthesia care largely constitutes diagnosis of, or prescription of medical treatment for a human ailment, thus constituting the practice of medicine under the Medical Practice Act, (Article 1, Chapter 90, of the N.C. General Statutes)." 1998 N.C.A.G. 58 (12/31/98). To date, it appears the December 1998 Attorney General opinion remains the only determination by an entity not associated with a party to the present litigation, that some of the activities described in rule .0226 constitute the practice of medicine.

In 2003, as a result of a great increase in the number of individuals receiving surgery in physicians' offices, the Medical Board adopted a position statement on office-based procedures (office-based anesthesia guideline). The position statement was the Medical Board's attempt to provide guidance to its licensees as to what might be considered acceptable standards of medical practice. The position statement covers such topics as credentialing, equipment maintenance, personnel, emergency procedures, infection control, performance improvement, informed consent, medical records, as well as the provision of anesthesia. While neither a statute nor a rule, the position statement was meant to serve as a guideline for physicians practicing surgery in their own offices.

On 1 May 2003, the Medical Board issued charges against Peter Loren Tucker, M.D. (Dr. Tucker) after an investigation stemming from an April 2001 incident. The Medical Board charged Dr. Tucker with practicing below minimum standards of medical practice when he failed to supervise his CRNA adequately. The facts involving the *Tucker* case were that a CRNA, employed by Dr. Tucker, had administered two cubic centimeters (cc's) of fentanyl, a highly potent anal-

gesic, to a patient post-operatively after the patient received a mini-facelift performed by Dr. Tucker in his office. The CRNA did not possess prescribing privileges, yet she administered a schedule II controlled substance to the patient for her post-operative pain without authorization from Dr. Tucker. After the administration of the two cc's of fentanyl, the patient experienced respiratory arrest and efforts were made to revive the patient in Dr. Tucker's office. The patient, a 45-year-old mother of two, died three days later in the hospital as a result of respiratory arrest brought about by the fentanyl injection.

The Medical Board referred its investigative material of the *Tucker* case to BON for appropriate action regarding the CRNA. On 6 August 2003, three months after the Medical Board issued public charges against Dr. Tucker and referred the case to BON for appropriate action, BON filed its motion to enforce the 1994 consent order, alleging, among other things, that:

> Upon information and belief, in the nearly nine years since the parties' execution of the Consent Order, no investigation has been undertaken, nor has any other action been initiated or reported, by any Petitioner against any physician, surgeon, or CRNA on the grounds that such persons are practicing in conformity with the "collaboration" standard set forth in the [Rule .0226] rather than under the "supervision" standard that Petitioners now assert was required under the Consent Order.

Furthermore, at the 27 October hearing, counsel for BON made the following statement:

> And, as we say in our motion, not once has the Medical Board, so far as we know, investigated a physician for suspicion of violating the supervision/collaboration issue. Not once have they investigated a nurse anesthetist. Not once have they brought anyone up on charges. There can be no more clear evidence of what the intent of the parties was back in 1994 than how they've lived that Consent Order for the ten years—nine years plus.

On 20 November 2003, the Medical Board and Dr. Tucker entered into a consent order resolving the charges against him.

The issues on appeal are whether the trial court erred by: (I) denying respondent's motion for enforcement of the consent order; (II) denying respondent's objections and motion to strike the submission of the consent order issued by the North Carolina Medical Board

in the matter captioned *In Re Peter Loren Tucker, M.D.*; and (III) failing to rule on the *pro hac vice* motion for counsel for the American Society of Anesthesiology, and in considering the amicus brief tendered by counsel for the American Society of Anesthesiology.

As a preliminary matter, we note the following issues were not before this Court, and not before the trial court: (I) the statutory interpretation of rule .0226, and (II) precisely what nursing procedures must be completed under physician supervision versus those procedures completed in collaboration with a physician pursuant to the consent order. Accordingly, this Court will refrain from any interpretation of rule .0226. Further, this Court will not review what nursing procedures pursuant to rule .0226 must be completed under physician supervision versus in collaboration with a physician.

I

[1] Respondent first argues the trial court erred in denying its motion for enforcement of the 1994 consent order.

A consent judgment is essentially a contract between parties, entered with the approval and sanction of the court, which creates a final determination of their rights and duties. *See King v. King*, 146 N.C. App. 442, 444, 552 S.E.2d 262, 264 (2001); *Harborgate Prop. Owners Ass'n, Inc. v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 297, 551 S.E.2d 207, 212 (2001). It is basic contract law that a party is not entitled to specific performance arising under a contract unless the opposing party has breached its agreement pursuant to the contract. *RGK, Inc. v. United States Fidelity & Guaranty Co.*, 292 N.C. 668, 675, 235 S.E.2d 234, 238 (1977) (stating that the complaint must allege the existence of a contract between the parties, the specific provisions breached, the facts constituting the breach, and the amount of damages resulting from the breach). If there is no breach, there can be no basis for relief. *See id.*

Moreover, as articulated by Arthur Corbin:

> Specific performance will not be decreed unless the terms of the contract are so definite and certain that the acts to be performed can be ascertained and the court can determine whether or not the performance rendered is in accord with the contractual duty assumed.

12 Arthur L. Corbin, *Corbin on Contracts* § 1174, at 335 (2002); *see also Cummings v. Dosam, Inc.*, 273 N.C. 28, 33, 159 S.E.2d 513, 517

(1968) ("if the nature and extent of the intended restriction cannot be determined with reasonable certainty from the language of the covenant, it will not serve as the basis for the issuance of an injunction"); *Munchak Corp. v. Caldwell*, 46 N.C. App. 414, 419, 265 S.E.2d 654, 658 (1980) (holding that "[a] court of equity is not authorized to order the specific performance of a contract which is not certain, definite and clear, and so precise in all of its material terms that neither party can reasonably misunderstand it").

Petitioners argue that the only certain, definite, precise and clear behavior required of petitioners in the 1994 consent order is to refrain from challenging the revised rule .0226 under the Administrative Procedure Act (APA). It is undisputed that petitioners have not challenged the revised rule .0226 pursuant to the APA. Accordingly, petitioners argue that respondent's motion to enforce the consent order: (1) promotes an expansive interpretation of the 1994 consent order, and (2) asks the trial court to order specific performance of allegedly implied obligations.

Petitioners also argue that respondent's efforts, to expand the 1994 consent order to prohibit conduct not described therein and to inhibit the Medical Board from publishing guidelines for its licensees, have no basis in law or in fact. In addition, petitioners contend that because the remedy requested would have no effect on the ability of the Medical Board to enforce N.C. Gen. Stat. § 90-14.12, or to pursue criminal penalties pursuant to N.C. Gen. Stat. §§ 90-18(a) and 90-21, the alleged potential injury would not be eliminated by invalidation of the position statement. We will analyze the arguments below.

Respondent argues the trial court incorrectly construed revised rule .0226 and relevant statutes. However, the trial court was called upon to construe only the 1994 consent order. The relevant statutes and revised rule .0226 would only come under consideration to the extent that the 1994 consent order constituted a definitive agreement as to the construction of the statutes and revised rule .0226.

The relevant inquiry is, therefore, whether the 1994 consent order constitutes acquiescence by petitioners in the "collaboration standard" as argued by respondent. This Court is of the opinion that the consent order did not constitute acquiescence by petitioners to the collaboration standard. Petitioners initiated the 1993 action due to concerns that the proposed rule could be interpreted to allow CRNAs to administer anesthesia and prescribe medication without physician

supervision, in violation of N.C. Gen. Stat. § 90-171.20(7)(e) and (f). The 1993 action was resolved after respondent agreed to add language to the proposed rule clarifying that the rule did not purport to allow CRNAs to prescribe a medical treatment or make a medical diagnosis except under the supervision of a licensed physician, and acknowledgment that the revised rule could not abridge the governing statutes.

The 1994 consent order does not purport to interpret the governing statutes, the proposed rule, or the revised rule. Petitioners argue if they had intended to acquiesce in a uniform collaboration standard, they would not have initiated the 1993 action or would have dismissed the action pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. Instead, they obtained concessions from respondent in order to resolve the 1993 action, those being, incorporation of the governing statutes into the revised rule and acknowledgment that revised rule .0226 could not abridge the governing statutes. Further, paragraph 7 of the 1994 consent order, which specifically provides that the 1994 consent order shall not be construed as acquiescence of either party in the position of the other, defeats respondent's argument.

Petitioners' position on supervision of nursing personnel involved in anesthesia activities was set forth in the 19 November 1993 declaratory ruling regarding the scope and definition of the practice of medicine pursuant to N.C. Gen. Stat. § 90-18. Respondent's position, that the 1994 consent order represents abandonment by the Medical Board of the physician supervision standard and a surrender to the collaboration standard, is inconsistent with and contradictory to the language of the 1994 consent order. The revised rule and the 1994 consent order must be read as requiring physician supervision for those nurse anesthetist activities which involve prescribing a medical treatment or making a medical diagnosis. Therefore, the position statement, which recommends that anesthesia in an office setting be administered by an anesthesiologist or a CRNA supervised by a physician, cannot be held to violate the 1994 consent order.

Respondent asserts that the three affidavits it submitted to the trial court compelled the conclusion that the Medical Board has acquiesced in the collaboration standard for a nine-year period. However, these affidavits fail to support such conclusion. The affidavits make no mention of what specific medical acts were performed under the collaboration standard, nor do the affiants

specifically claim that the respondent's licensees were unsupervised. This lack of detail renders these affidavits ineffective as to the issue of acquiescence in the collaboration standard.

Therefore, we cannot agree with respondent's assertion that the affidavits compel a conclusion that the Medical Board abandoned the standard of care—supervision of medical acts performed by nurse anesthetists. Furthermore, petitioners submitted to the trial court the consent order issued by the Medical Board in the matter captioned *In Re Peter Loren Tucker, M.D.* as an example of the Medical Board's enforcement of the supervision standard.

Physician supervision of nurse anesthetists providing anesthesia care, when that care includes prescribing medical treatment regimens and making medical diagnoses, is a fundamental patient safety standard required by North Carolina law. *See* N.C.G.S. § 90-18(b) (2003); N.C.G.S. § 90-171.20(7)(e). Neither the 1994 consent order nor the position statement changed the statutory requirement of when physician supervision is necessary.

Respondent asserts the Medical Board must follow the 1994 consent order regardless of whether the 1994 consent order could be read to impede its obligation to regulate the activities of its licensee physicians. However, even assuming the 1994 consent order could be read as evidencing an intent by the Medical Board to acquiesce in a collaboration standard, the Medical Board cannot be forbidden from advising its licensees on the standard of care in medical practice in order to protect the public interest. *See Gaddis v. Cherokee County Road Comm.*, 195 N.C. 107, 111, 141 S.E. 358, 360 (1928) ("Administrative boards, exercising public functions, cannot by contract deprive themselves of the right to exercise the discretion delegated by law, in the performance of public duties."). The Medical Board, as an administrative board established pursuant to N.C. Gen. Stat. § 90-2, cannot be estopped from exercising its duty to regulate the practice of medicine in the interest of the public.

Moreover, a state agency is prohibited from adopting a rule that enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required. N.C.G.S. § 150B-19(2) (2003); *see also In re Trulove*, 54 N.C. App. 218, 221, 282 S.E.2d 544 (1981) ("Administrative regulations must be drafted to comply with statutory grants of power and not vice versa."). Accordingly, this assignment of error is overruled.

II

[2] Respondent next argues that the trial court erred in denying its objection and motion to strike the submission of, and in admitting, considering, and basing its order on the consent order issued by the Medical Board in the matter captioned *In Re Peter Loren Tucker, M.D.*, or any related material.

At the hearing on the motion to enforce, respondent asserted that the Medical Board had never prosecuted a physician for violating the supervision standard. In direct response to this assertion, counsel for the Medical Board offered to the trial court that the Medical Board was, in fact, currently prosecuting a physician for just such a violation. Respondent made no objection to this testimony by counsel for the Medical Board.

After the hearing, petitioners filed both a supplemental brief and a copy of the consent order in the *Tucker* matter. The provision of these supplemental materials was in full compliance with the trial court's express authorization of submission of additional briefing or other clarifying materials to which respondent made no objection.

Accordingly, because respondent failed to object to the trial court's authorization of the filing of supplemental materials, appeal on this issue has been waived. N.C. R. App. P. 10(b)(1).

In addition, this Court has previously held:

> The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. Rather, the appellant must also show that the incompetent evidence caused some prejudice. In the context of a bench trial, an appellant must show that the court relied on the incompetent evidence in making its [determination]. Where there is competent evidence in the record supporting the court's [determination], we presume that the court relied upon it and disregarded the incompetent evidence.

In re Morales, 159 N.C. App. 429, 433, 583 S.E.2d 692, 695 (2003); *see also In re Spivey*, 345 N.C. 404, 417, 480 S.E.2d 693, 700 (1997) ("Where, as here, the trial judge acted as the finder of fact, it is presumed that he disregarded any inadmissible evidence that was admitted and based his judgment solely on the admissible evidence that was before him."); *Bizzell v. Bizzell*, 247 N.C. 590, 604, 101 S.E.2d 668, 678 (1958) ("where a case has been tried before the

court without a jury the admission of incompetent evidence is ordinarily deemed to have been harmless unless it affirmatively appears that the action of the court was influenced thereby. In other words it is presumed that incompetent evidence was disregarded by the court in making up its decision.") (citation omitted) (internal quotations omitted).

The order from which respondent appeals, reads in its entirety:

> This cause coming on to be heard and being heard out of the presence of any jurors on Respondent's Motion for Enforcement of Consent Order and the Court having heard arguments, having reviewed all matters filed in this matter, having considered all briefs, memoranda and documents submitted to it, and having considered all relevant and applicable law, now orders that Respondent's Motion for Enforcement of Consent Order be, and the same hereby is, DENIED.

Here, respondents failed to object to the admission of the evidence before the trial court, and further failed to meet its burden of proving that the trial court relied upon this alleged incompetent evidence in making its determination. This assignment of error is overruled.

III

[3] Respondent lastly argues that the trial court erred in failing to rule on, or in implicitly overruling respondent's objection to, the *pro hac vice* motion for counsel for the American Society of Anesthesiology, and in considering the amicus brief tendered by counsel for the American Society of Anesthesiology.

As stated *supra* Issue II, the appellant (BON) has an affirmative duty to "show that the incompetent evidence caused some prejudice. In the context of a bench trial, an appellant must show that the court relied on the incompetent [or inadmissible] evidence in making its [determination]." *Morales*, 159 N.C. App. at 433, 583 S.E.2d at 695; *see also Spivey*, 345 N.C. at 417, 480 S.E.2d at 700; *Bizzell*, 247 N.C. at 604, 101 S.E.2d at 678. Without an affirmative showing that the trial court relied on this allegedly inadmissible evidence in rendering its decision, this assignment of error is overruled.

Conclusion

It appears petitioners have not violated the 1994 consent order as the consent order is too vague to support specific performance,

and further, respondent's potential injury is speculative and would not be cured by the remedy requested. In addition, the consent order cannot be construed as petitioners' acquiescence in respondent's position on collaboration.

Affirmed.

Judges HUNTER and JACKSON concur.

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, RESPONDENT v. WEEKLEY HOMES, L.P., D/B/A DAVID WEEKLEY HOMES, PETITIONER

No. COA03-1634

(Filed 15 March 2005)

1. Appeal and Error— assignments of error—required—appendixes—statutes, rules, regulations

The Court of Appeals considered certain arguments, in its discretion, even though the questions did not refer to the pertinent assignments of error, as required. Respondent's motion to strike certain appendixes to petitioner's brief was denied, even though they were not part of the printed record on appeal nor offered into evidence, because appendixes were relevant portions of statutes, rules, or regulations, as permitted by N.C.R. App. P. 28 (d)(1)(c). An appendix consisting of an excerpt from S.B. 575 was stricken.

2. Administrative Law— judicial review of agency decision—standard of review—whole record and de novo

The superior court properly employed both de novo review and the whole record test in reviewing an OSHA citation where petitioner alleged that the Department of Labor's decision was affected by error of law and was unsupported by substantial evidence.

3. Employer and Employee— OSHA—violations by subcontractors—general contractor's duty to inspect job site

A general contractor had a duty to inspect the job site to detect safety violations committed by its subcontractors as well as its own employees. Under N.C.G.S. § 95-129(2), the general

contractor's duty extends to employees of subcontractors on job sites, but only to violations that could reasonably be detected by inspecting the job site.

4. Administrative Law— Operations Manual statement—rule-making not required

The multi-employer OSHA citation policy is not invalid because it has not been promulgated as a rule. The multi-employer policy is from the North Carolina Operations Manual, which is a nonbinding interpretative statement, not a rule requiring formal rule-making procedures.

Appeal by petitioner from order entered 26 September 2003 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 11 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General Jane Ammons Gilchrist and Assistant Attorney General Linda Kimbell, for the State.

Maupin Taylor, P.A., by Michael C. Lord, and Rader & Campbell, by Robert E. Rader, Jr., for petitioner.

MARTIN, Chief Judge.

Petitioner, Weekley Homes, L.P. (Weekley), appeals from a citation issued by the North Carolina Department of Labor on 21 May 1999 alleging a violation of the Occupational Safety and Health Standards. Weekley, a general contractor, coordinated subcontractors, materials and homeowners for thirty-eight houses under construction in a subdivision in Huntersville, North Carolina. For this project, Weekley employed two "builders" who maintained the construction schedule for six to ten houses at a time. The builders spent seventy to eighty percent of their time in the job site trailer coordinating approximately one hundred subcontractors and delivery of materials for the project.

On 17 March 1999, Lee Peacock (Peacock), a Safety Compliance Officer in the North Carolina Department of Labor, observed from a public road individuals working on a steep pitch roof over six feet from the ground without fall protection. After receiving permission from his supervisor, Peacock conducted an inspection of the job site on 18 March 1999. He observed three houses where employees of a Weekley subcontractor were working without fall protection.

The Department of Labor cited Weekley for a violation of 29 CFR 1926.20(b)(2) for failure to conduct "[f]requent or regular inspections of the jobsite . . . as part of an accident prevention program." On 5 December 2000, after hearing evidence and reviewing the parties' briefs, an Administrative Law Judge with the Safety and Health Review Board entered an order affirming the citation. After Weekley petitioned for review, the North Carolina Safety and Health Review Board affirmed the order. Weekley petitioned for judicial review and after considering the record, the briefs and the arguments of the parties the Superior Court affirmed the order of the review board. Weekley gave notice of appeal to this Court.

I.

[1] As an initial matter we address respondent-appellee's motion to dismiss petitioner's appeal for violation of the North Carolina Rules of Appellate Procedure. Respondent points out numerous violations in petitioner's brief including, most importantly, that the questions presented for argument do not refer to the pertinent assignments of error in the record as required by N.C. R. App. P. 28(b)(6) (2004). "The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal." *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). Nevertheless, in our discretion, we will consider petitioner's arguments on the merits. N.C. R. App. P. 2 (2004).

Respondent-appellee also moves the Court to strike Appendixes 2, 3, 4 and 5 of petitioner's brief pursuant to N.C. R. App. P. 37(a) because the content of these appendixes was not part of the printed record on appeal nor were they offered into evidence. N.C. R. App. P. 28(d)(1)(c) allows the attachment of "relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief" as an appendix. Petitioner has attached as Appendix 2, portions of the Federal OSHA Compliance Operations Manual (1972); as Appendix 3, portions of the North Carolina Operations Manual (1973); as Appendix 4, portions of the North Carolina Operations Manual (1993); and as Appendix 5 an excerpt from S.B. 575. Since Appendixes 2, 3 and 4 fall within those items permitted by Rule 28, we deny respondent's motion to strike these Appendixes. However, we grant respondent's motion to strike Appendix 5.

II.

[2] The standard of review of an administrative agency's decision on judicial review is determined by the issues presented on appeal. *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). A reviewing court:

> may affirm the decision of the agency or remand . . . for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge'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 admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2003).

Where the party alleges the agency violated subsections one through four of N.C. Gen. Stat. § 150B-51, the court engages in *de novo* review, reviewing for errors of law. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62, 468 S.E.2d 557, 559, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996). However, when the substance of the allegation implicates subsections five or six, the reviewing court employs the "whole record" test. *Id.* "The 'whole record' test requires the court to examine all competent evidence comprising the 'whole record' in order to ascertain if substantial evidence therein supports the administrative agency decision." *Id.* at 62, 468 S.E.2d at 560. Substantial evidence is defined as evidence "which a reasonable mind would regard as adequately supporting a particular conclusion." *Id.* The appellate court examines the superior court's order for errors of law by "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392 (quoting *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)).

In this case, petitioner alleged the agency's decision was affected by error of law and was unsupported by substantial evidence. The superior court properly employed both standards of review and concluded the review board's findings were supported by substantial evidence and were not affected by error of law.

III.

[3] Petitioner argues that the Occupational Safety and Health Act (OSHA) makes a general contractor responsible only for the safety of his own employees. Congress enacted OSHA in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651. North Carolina, as permitted under the federal act, 29 U.S.C. § 667, *Brooks, Comr. of Labor v. Butler*, 70 N.C. App. 681, 684, 321 S.E.2d 440, 442 (1984), *disc. review denied*, 313 N.C. 327, 329 S.E.2d 385 (1985), administers and operates, under federal supervision, its own plan, known as the Occupational Safety and Health Act of North Carolina (OSHANC). N.C. Gen. Stat. § 95-126 *et. seq.* (2003). Pursuant to N.C. Gen. Stat. § 95-131, the federal occupational safety and health standards have been adopted by North Carolina. N.C. Gen. Stat. § 95-131 (2003). OSHANC sets forth the rights and duties of employers including but not limited to the following provisions:

> (1) Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees;
>
> (2) Each employer shall comply with occupational safety and health standards or regulations promulgated pursuant to this Article.

N.C. Gen. Stat. § 95-129(1) and (2) (2003). North Carolina's Act is substantially the same as the federal Act. 29 U.S.C. § 654.

Petitioner contends that neither Congress nor the North Carolina legislature intended to impose a duty on an employer to protect the employees of its independent contractors. In support of their argument, petitioner points to definitions in the Act. An "occupational safety and health standard" is defined as a standard "reasonably necessary and appropriate to provide safe and healthful employment and places of employment," N.C. Gen. Stat. § 95-127(15) (2003); *see* 29 U.S.C. § 652(8) (1998), while "employer" is defined as "a person engaged in a business who has employees." N.C. Gen. Stat.

§ 95-127(10) (2003); *see* 29 U.S.C. § 652(5) (1998). Petitioner interprets these definitions in combination as prescribing the duties of an employer only in reference to his own employees, not those of another entity.

In addition, petitioner argues that N.C. Gen. Stat. § 95-129 and 29 U.S.C. § 654(a) impose a duty on each employer to furnish a safe workplace and to comply with specific standards regarding only *his own* employees. Petitioner contends the legislature understood the difference between one who operates or controls the workplace and one who is an employer and argues that had the legislature intended the Act to apply to employees of another employer on a multi-employer worksite, it would have defined "employer" differently. We reject petitioner's interpretation of the statute.

"When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 580, 281 S.E.2d 24, 29 (1981) (citations omitted). "However, even when reviewing a case *de novo*, courts recognize the long-standing tradition of according deference to the agency's interpretation," *County of Durham v. N.C. Dep't of Env't. & Natural Resources*, 131 N.C. App. 395, 396, 507 S.E.2d 310, 311 (1998), *disc. review denied*, 350 N.C. 92, 528 S.E.2d 361 (1999), as long as the agency's interpretation was a reasonable and permissible construction of the statute. *Id.* at 397, 507 S.E.2d at 311.

In *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43, 81 L. E. 2d 694, 702-03, *reh'g denied*, 468 U.S. 1227, 82 L. Ed. 2d 921 (1984), the United States Supreme Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the

specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

When a statute is ambiguous, "the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish," *Tellado v. Ti-Caro Corp.*, 119 N.C. App. 529, 533, 459 S.E.2d 27, 30 (1995), in order to assure that the intent of the legislature is accomplished. *Id.*

Neither OSHANC nor OSHA specifically address whether an employer is responsible for violation of standards by a subcontractor's employees on a multi-employer worksite. While we agree that N.C. Gen. Stat. § 95-129(1) imposes a general duty on an employer to protect his employees, we believe N.C. Gen. Stat. § 95-129(2), which imposes a specific or special duty on an employer to comply with OSHA standards, does not limit the duty of the employer only to his *own* employees. N.C. Gen. Stat. § 95-126(2) declares the purpose of the act is "to ensure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions and to preserve our human resources." N.C. Gen. Stat. § 95-126(2) (2003). This broad purpose, protecting "every working man and woman," does not fit with petitioner's narrow reading of the statute. As the Sixth Circuit held when deciding this issue in *Teal v. E.I. Dupont*, 728 F.2d 799, 804 (6th Cir. 1984), "If the special duty provision is logically construed as imposing an obligation on the part of employers to protect *all* of the employees who work at a particular job site, then the employees of an independent contractor who work on the premises of another employer must be considered members of the class that Sec. 654(a)(2) was intended to protect." Furthermore, "the conspicuous absence of any limiting language . . . indicate[s] that a broader class was meant to be protected." *U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 983 (7th Cir. 1999); *see Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 23 (1983).

"The multi-employer doctrine provides that an employer who controls or creates a worksite safety hazard may be liable under the Occupational Safety and Health Act even if the employees threatened by the hazard are solely employees of another employer." *Universal Const. Co., Inc. v. O.S.H.R.C.*, 182 F.3d 726, 728 (10th Cir. 1999). The theory underlying the doctrine "is that since the contractor is subject to OSHA's regulations of safety in construction by virtue of being engaged in the construction business, and has to comply with those regulations in order to protect his own workers at the site, it is sen-

sible to think of him as assuming the same duty to the other workers at the site who might be injured or killed if he violated the regulations." *U.S. v. MYR Group, Inc.*, 361 F.3d 364, 366 (7th Cir. 2004). "Each employer at the worksite controls a part of the dangerous activities occurring at the site and is the logical person to be made responsible for protecting everyone at the site from the dangers that are within his power to control." *Id.* at 367.

The only two North Carolina cases that address the multi-employer worksite doctrine are inapposite to the issue presented in the present case. In both of those cases, the Court affirmed citations against employers because they had allowed their *own employees*, rather than employees of a subcontractor, to be exposed to the hazards created by the subcontractor. *Brooks v. BCF Piping*, 109 N.C. App. 26, 426 S.E.2d 282, (1993) (holding an employer's duty to provide a safe workplace is nondelegable); *Brooks, Com'r. of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 372 S.E.2d 342 (1988) (holding "an employer is expected to make reasonable efforts to detect and abate any violation of safety standards of which it is aware and to which its employees are exposed."). However, because of the substantial similarities between OSHANC and the federal Act, this Court also looks to federal court decisions for guidance in interpreting OSHANC. *Butler*, 70 N.C. App. at 684, 321 S.E.2d at 442; *Brooks, Com'r. of Labor v. Dover Elevator Co.*, 94 N.C. App. 139, 142, 379 S.E.2d 707, 709 (1989). Most circuits have expressed approval of the multi-employer worksite doctrine. *See Pitt-Des Moines, Inc.*, 168 F.3d at 984-85; *R. P. Carbone v. OSHRC*, 166 F.3d 815, 818 (6th Cir. 1998); *Beatty Equipment Leasing v. Secretary of Labor*, 577 F.2d 534, 537 (9th Cir. 1978); *Marshall v. Knutson Const. Co.*, 566 F.2d 596, 599-600 (8th Cir. 1977); *Brennan v. Occupational Safety & Health Rev. Com'n*, 513 F.2d 1032, 1037-39 (2d Cir. 1975); *Universal Const. Co., Inc.*, 182 F.3d at 730-31; *but see Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 710-11 (5th Cir. 1981) (holding that OSHA regulations protect only an employer's own employees).

In addition, although not binding on this Court, the Safety and Health Review Board of North Carolina has previously addressed the issue of liability of a general contractor for violations of OSHA standards to which a subcontractor's employees are exposed:

> [A] general contractor's duty under N.C.G.S. § 95-129(2) to comply with "occupational safety and health standards or regulations" runs to employees of subcontractors on the jobsite.

> However, that duty is a reasonable duty and although the general contractor is responsible for assuring that the contractors fulfill their obligations for employee safety that affect the whole construction site, the general contractor is only liable for those "violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity."

Commissioner of Labor v. Romeo Guest Associates, Inc., OSHANC 96-3513, Slip Op., (RB 1998).

Petitioner argues *Romeo Guest*, like *BCF Piping* and *Rebarco*, did not address the issue at hand. It asserts *Romeo Guest* relied on *Brennan v. Occupational Safety & Health Rev. Com'n.*, 513 F.2d 1032 (2d Cir. 1975), where "the court was discussing the liability of the contractor *who had created the hazard.*" Although the contractor in *Occupational Safety & Health Rev. Com'n. had* created the hazard, the 2nd Circuit held that "to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that *the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking.*" *Id.* at 1038 (emphasis added). The court further opined the employer was responsible for creation of a hazard if it "had control over the areas in which the hazards were located and the duty to maintain those areas." *Id.* at 1039. Thus, neither *Romeo Guest* nor *Occupational Safety & Health Rev. Com'n.* are false foundations for the decision of the Safety and Health Review Board. In addition, in its contract with subcontractor Paige, petitioner reserved, *inter alia*, the following rights:

(a) the right to inspect Paige's work from time to time and to reject portions of the work if not done in a satisfactory manner, with satisfactory materials or in a timely fashion in accordance with the [petitioner's] standards;

(b) the right to schedule Paige's work and the work of other contractors;

(c) the right to prevent Paige from impeding the progress of the work by other contractors;

(d) the right to compel Paige to keep the job site clean of debris at all times and to clean the job site upon completion of each stage of the project;

(e) the right to compel Paige to comply with all safety, health and other laws, ordinances, rules and regulations applicable to the project; and

(f) the right to withhold payment or terminate the contract if Paige does not comply with its terms and conditions, including failure to comply with OSHA requirements after respondent tells them that they are in violation.

Section 1926.20(b)(2) of the OSHA regulations provides, "[accident prevention] programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers." Contractually, petitioner had the right to compel Paige to comply with all safety regulations, giving petitioner the power to protect the subcontractor's employees by inspecting the worksite and compelling the subcontractor to comply with safety regulations. *See Bechtel Power Corporation v. Secretary of Labor*, 548 F.2d 248 (8th Cir. 1977) (holding the construction manager who was contractually responsible for the construction site's safety program possessed the power to protect its employees). After reviewing the statute, the history of the multi-employer doctrine, and the spirit and goals of OSHA, we conclude the agency's decision was based on a permissible construction of the statute. Therefore, we hold that N.C. Gen. Stat. § 95-129 does not limit an employer's responsibility to comply with occupational health and safety standards to only its own employees.

Next, petitioner contends that OSHA's own regulations, specifically 29 C.F.R. § 1910.2(a) (1998) and 1910.5(d) (1998), provide that one employer may not be cited for violations of another employer's infractions. As previously stated, Congress enacted OSHA to reduce employment related injury and illness. 29 U.S.C. § 651 (1998). "For further guidance, Congress provided OSHA with authority to promulgate occupational safety and health standards by regulation." *Modern Continental v. Occupational Safety*, 305 F.3d 43, 49 (1st Cir. 2002). OSHA has issued two different types of standards: (1) general industry standards, *see* 29 C.F.R. § 1910 (1998), which act as a default set of standards, and (2) standards applicable only to certain industries such as the construction industry. *Id.*; *see* 29 C.F.R. § 1926 (1998). These specific construction industry regulations are "applicable to any place of employment where construction work is performed." *Id.*; *see* 29 C.F.R. § 1910.12(a) (1998).

Section 1910.12 establishes § 1926 as the standard for the construction industry. Although section (a) provides in part that "[e]ach employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph," 29 C.F.R. § 1910.12(a), this sentence, when read in context, simply requires the contractor to comply with the appropriate construction industry standards. General industry standards, such as those in § 1910, essentially fill in the gaps that are not addressed in § 1926. 29 C.F.R. § 1910.5(c) (1998).

Section 1910.5(d) provides, "In the event a standard protects on its face a class of persons larger than employees, the standard shall be applicable under this part only to employees and their employment and places of employment." 29 C.F.R. § 1910.5 (1998). We interpret this as distinguishing between employees on a job site and "passersby or unrelated third persons." *Occupational Safety & Health Rev. Com'n.*, 513 F.2d at 1038 n.10 (2nd Cir. 1975); *IBP, Inc. v. Herman*, 144 F.3d 861, 865 (D.C. Cir. 1998); *but see Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974) (where the Secretary issued an interpretive statement limiting the effect of safety regulations to the employment relationship, the court did not address whether Congress granted the Secretary authority to require employers in multi-employment worksites to obey safety regulations for the protection of subcontractors).

Petitioner also contends that 29 C.F.R. § 1926.20(b)(1) limits the duty to inspect to the employer of the affected employee, i.e., in this case, the subcontractor. However, "employer" is defined in section 1926.32, the part which applies to the construction industry, as a "contractor *or subcontractor* within the meaning of the Act." (emphasis added) Petitioner's argument is without merit.

Petitioner also argues that the review board's decision upholding the citation contravenes established principles of statutory construction because (1) Congress revisited OSHA in 1990 and did not revise or repeal OSHA's interpretation or policy, and (2) the agency's initial interpretation of the Act should be accorded more weight than a recent contrary interpretation. He also argues that OSHA's initial interpretation of the Act and its initial policy on multi-employer worksites are an admission that the Act itself does not impose a duty on a general contractor to detect subcontractor violations through inspection. However, petitioner failed to acknowledge the evolution

of the multi-employer worksite doctrine through thirty years of court decisions. Since there has been no legislation by Congress or the North Carolina General Assembly overturning these decisions, they are established precedent which are binding on the courts in their jurisdiction.

We hold that a general contractor's duty under N.C. Gen. Stat. § 95-129(2), requiring that "[e]ach employer shall comply with occupational safety and health standards or regulations," extends to employees of subcontractors on job sites. However, as stated in *Romeo Guest*, the duty is a reasonable duty and the general contractor is only liable for violations that its subcontractor may create if it could reasonably have been expected to detect the violation by inspecting the job site. *Romeo Guest*, OSHANC 96-3513, Slip Op.

In the present case, petitioner was cited for failing to conduct "frequent and regular inspections of the job sites[]." 29 C.F.R. § 1926.20(b)(2). Petitioner had a duty to inspect the job site to detect safety violations committed by its own employees and also those committed by its subcontractors.

IV.

[4] In petitioner's second argument, he contends the multi-employer citation policy is invalid because it has not been promulgated as a rule. An administrative rule is not valid unless adopted in accordance with Article 2A of the Administrative Procedure Act. N.C. Gen. Stat. § 150B-18 (2003); *Dillingham v. N.C. Dep't of Human Resources*, 132 N.C. App. 704, 710, 513 S.E.2d 823, 827 (1999). N.C. Gen. Stat. § 150B-2 defines a rule as "any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency." N.C. Gen. Stat. § 150B-2 (2003). Another distinguishing factor of a rule is that sanctions attach to the violation of a rule. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 411, 269 S.E.2d 547, 568 (1980). However, the term "rule" does not include:

a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not

directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

. . .

c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

. . .

g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

N.C. Gen. Stat. § 150B-2(8a).

Weekley was cited for violation of 29 C.F.R. § 1926.20(b) which required "the employer to provide for frequent and regular inspections of the job sites." In regards to the multi-employer worksite, the North Carolina Operations Manual (1993) states:

On multi-employer worksites, both construction and nonconstruction citations normally shall be issued to employers whose employees are exposed to hazards (the exposing employer).

a. Additionally, the following employers normally shall be cited, whether or not their own employees are exposed:

(1) The employer who actually creates the hazard (the creating employer);

(2) The employer who is responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer);

(3) The employer who has the responsibility for actually correcting the hazard (the correcting employer).

b. It must be shown that each employer to be cited has knowledge of the hazardous condition or could have had such knowledge with the exercise of reasonable diligence.

The Operations Manual is a nonbinding statement which interprets, *inter alia*, the rule requiring inspections. In requiring an employer to inspect the worksite regularly, the Operations Manual merely guides the inspectors regarding who can be cited for a violation. Furthermore, the multi-employer policy as stated in the Operations Manual does not impose sanctions for failure to comply. Sanctions are imposed for violation of the rule, i.e., failure to inspect, not for violation of the policy which only describes who can be cited. Therefore, the multi-employer policy, an interpretive statement established in the Operations Manual, falls within the exception created by N.C. Gen. Stat. § 150B-(8a)(c) and does not have to be promulgated as a rule.

Petitioner relies on *Dillingham*, where the Department of Social Services' "Aged, Blind and Disabled Medicaid Manual" established a policy that when an applicant transferred assets at less than fair market value in order to qualify for Medicaid, the applicant was required to present written evidence as to the reason for the transfer. *Dillingham*, 132 N.C. App. at 711, 513 S.E.2d at 823. The Court determined this was a "rule" under the APA because there was "neither statutory nor regulatory authority for the requirement that a Medicaid applicant present *written* evidence to rebut the presumption that a transfer of assets for less than fair market value was for the purpose of establishing Medicaid eligibility." *Id.* at 711, 513 S.E.2d 823, 827-28 (emphasis original). Here, however, there is statutory authority granted to the Department of Labor to protect the health and safety of all employees in North Carolina. N.C. Gen. Stat. § 95-126(b)(2)(m) (2003). The Operations Manual is merely an interpretive guideline as to who can be cited and does not require additional evidence or a more stringent standard of proof.

Petitioner argues that even if the multi-employer citation policy was not required to be promulgated as a rule initially, the revision of that policy in the Operations Manual requires that it be subject to formal rule-making procedures. N.C. Gen. Stat. § 150B-2(8a)(c) provides that a "rule" does not include "[n]onbinding interpretive statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule." *See Okale v. N.C. Dep't. of Health & Human Services*, 153 N.C. App. 475, 478-79, 570 S.E.2d 741, 743 (2002) (holding the North Carolina Family and Children's Medicaid Manual is a "nonbinding statement from the agency which defines, interprets and explains the statutes and rules for Medicaid" and does not require the procedures of formal rule-

making); *Ford v. State of North Carolina*, 115 N.C. App. 556, 445 S.E.2d 425 (1994) (a memorandum setting forth guidelines to be followed when investigating and prosecuting violations of state law fell within the meaning of N.C. Gen. Stat. § 150B-2(8a)(c) and (g) and therefore was not subject to formal rule-making). Therefore, contrary to petitioner's argument, the Operations Manual is a non-binding interpretive statement, not a rule requiring formal rule-making procedures. Accordingly, the exception which requires rule-making if the rights and duties of the employer are affected does not apply. We hold that the Operations Manual merely established guidelines that directed OSHA inspectors as to what parties could be cited for violation of a rule and thus did not require formal rule-making.

V.

Petitioner's third argument, that the Safety and Health Review Board did not address the issues of legislative intent or OSHA's own regulations precluding multi-employer liability, was not assigned as error. Therefore, pursuant to the Rules of Appellant Procedure, we decline to address the argument further. N.C. R. App. P. 10(a) (2004). In addition, petitioner's second and third assignments of error were not brought forward in its brief and are therefore deemed abandoned. N.C. R. App. P. 28(a) (2004).

We affirm the decision of the Superior Court.

Affirmed.

Judges TIMMONS-GOODSON and GEER concur.

NONA DAVIS YOUNG (LINDQUIST), PLAINTIFF v. STEVEN PAUL YOUNG DEFENDANT v. ALVIN YOUNG AND SHARON YOUNG, DEFENDANTS-INTERVENORS

No. COA04-438

(Filed 15 March 2005)

1. Child Support, Custody, and Visitation; Contempt— civil contempt—failure to comply with visitation order granting rights to grandparents

The trial court did not err by finding plaintiff mother in willful civil contempt for failing to comply with the terms of a consent order concerning the visitation rights of her minor

daughter's paternal grandparents, because: (1) plaintiff did not dispute that the pertinent consent order granted the grandparents visitation rights and plaintiff confirmed that the grandparents had exercised their right to visitation since a 1997 order which first granted that right; (2) in a letter dated 6 May 2003, plaintiff wrote to inform the grandparents that she would not make the minor child go with the grandparents for a week in the future; (3) on 11 June 2003, plaintiff sent the grandparents another letter informing them that she was making the child unavailable for visitation by taking her to Hawaii; (4) while plaintiff knew on 1 May 2003 that she and the child would be going to Hawaii, she did not contact the grandparents about their travel plans until the day of their departure; (5) plaintiff's 11 June 2003 letter postdated the grandparents' request to make the child available for visitation beginning 13 July, as well as defendant father's motion for contempt for failure to make the child available for visitation; and (6) there was competent evidence that plaintiff willfully, i.e., knowingly and stubbornly, violated the consent order.

2. Child Support, Custody, and Visitation— agreement between parties incorporated into order—improper limitation on authority of court

The trial court erred by including in its order a provision based upon the parties' agreement at the hearing that precluded plaintiff mother from seeking an increase in child support from defendant father based upon an increase in defendant's income, reduction in defendant's income, or reduction in the time that defendant is allotted for summer visitation within two years, and the provision is deemed void because: (1) neither party may preclude the courts of this State from evaluating whether circumstances, which may include though may not be limited to an increase in defendant's income, warrant an increase in support; (2) an increase in defendant's income may properly be considered as a factor in determining whether support should be increased and the courts of this State cannot be precluded from protecting a child's best interest; (3) the provision precluding plaintiff from seeking an increase based upon a reduction in defendant's income is superfluous as a decrease in a support payor's income may warrant a decrease and not an increase in support; and (4) while a reduction in visitation may constitute a changed circumstance warranting a support modification, the

courts cannot sua sponte modify support, and courts cannot be precluded from protecting a child's best interest.

3. Child Support, Custody, and Visitation— equal access to records of minor child

The trial court did not err in a child support and visitation case by including in its order matters that were allegedly not before the court, including the parties' agreement that plaintiff mother share with defendant father all school and medical records of the minor child and copies of all school records, that defendant be notified prior to medical appointments of the child unless it is an emergency, that the parties inform one another of the physical address where they reside and a current telephone number, and that plaintiff provide defendant with copies of all order forms for defendant to purchase school pictures of the child, because those portions of the order were within the purview of the provision of N.C.G.S. § 50-13.2(b) stating that "each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child."

4. Appeal and Error— preservation of issues—clerical errors—failure to object

The trial court did not err in a child support and visitation case by omitting from its order matters that were addressed before the court such as the partial omission of the time of day when the minor child would be picked up for visitation, because: (1) nothing indicated that plaintiff objected to this omission or made any motion to add the visitation pick-up time to the order prior to its entry, and in fact plaintiff through her attorney approved the form and signed off on the order; (2) N.C.G.S. § 1A-1, Rule 60 addresses clerical mistakes and provides that trial courts may correct mistakes or omissions even during the pendency of an appeal either before the appeal is docketed or thereafter with leave of the appellate division, and nothing indicated that plaintiff petitioned the trial court to correct the order during the pendency of this appeal; and (3) plaintiff's failure to object or make any motion to add the visitation pick-up time to the order, as well as her explicit approval of what she now contends is a clerical error, means plaintiff failed to preserve this issue for appeal.

Judge TYSON concurring in part and dissenting in part.

Appeal by Plaintiff from order entered 8 October 2003 by Judge Dougald N. Clark, Jr. in District Court, Cumberland County. Heard in the Court of Appeals 7 December 2004.

Dale S. Morrison, for plaintiff-appellant.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, by Ronnie M. Mitchell and H. Lee Boughman, Jr., for defendant-appellee.

Sullivan & Grace, P.A., Nancy L. Grace, for defendant-intervenor-appellees.

WYNN, Judge.

Plaintiff, Nona Davis Young Lindquist, asserts in this appeal that the trial court erred by: (1) finding her in willful civil contempt for failing to comply with the terms of a Consent Order concerning the visitation rights of her minor daughter's paternal grandparents, Alvin and Sharon Young; (2) precluding her from seeking an increase in child support from the child's father, Steven Paul Young, based upon certain conditions; (3) including in its order matters not before the court; and (4) omitting from its order matters addressed before the court. After careful review, we affirm in part and vacate in part the order of the trial court.

The underlying facts tend to show that following their divorce in 1999, Lindquist and Young consented to an Order entered in Cumberland County, North Carolina providing for joint custody of their daughter, Shaughnessy, with primary custody to Lindquist. The Order entitled Young to six weeks of visitation with Shaughnessy every summer and granted the paternal grandparents, who live in Minnesota, one week of visitation per year. Lindquist eventually moved with Shaughnessy to Ohio, where she works as a teacher.

On 6 May 2003, Lindquist wrote letters to Young and the grandparents, informing them that Shaughnessy did not wish to visit with them for any extended period of time and that Lindquist was therefore not going to make Shaughnessy visit with them. The record on appeal shows that a few days earlier, on 1 May 2003, Lindquist learned that she had been selected for a summer teaching position in Hawaii. According to her own testimony, on 11 June 2003, the day of Shaughnessy's and her departure for Hawaii, Lindquist sent letters to Young and the grandparents regarding their impending travels to

Hawaii.[1] Lindquist's letter postdated Young's motion for contempt for Lindquist's failure to make Shaughnessy available for visitation and the grandparents' request for visitation to begin 13 July 2003.

On 28 July 2003, the trial court held a hearing on the contempt motions. During the hearing, Lindquist reached an agreement with Young to dismiss his contempt motion. There was no such resolution with the grandparents, whose motion was granted by the trial court. Lindquist appeals from that order.

I.

[1] On appeal, Lindquist first asserts that the trial court erred in holding that she was in willful civil contempt for failing to comply with the terms of the Consent Order concerning the grandparents' visitation rights. We disagree.

"In contempt proceedings the judge'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." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978). Under North Carolina law,

> Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2003). Our courts define willful as with "knowledge and a stubborn resistance." *Mauney v. Mauney*, 268 N.C. 254, 268, 150 S.E.2d 391, 393 (1966); *Clayton v. Clayton*, 54 N.C. App. 612, 615, 284 S.E.2d 125, 127 (1981) (stating that "willfully implies that

1. We note that, while Lindquist's letters are dated 9 June 2003, no postmark is provided and Lindquist testified that "I sent them a letter on June 11th."

the act was done knowingly and of stubborn purpose."). Willfulness implicates "more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983).

Here, the trial court made the findings required for contempt:

> 8. On the 22nd day of September, 1999, a Consent Order was entered by this Court, [by] the terms of which, [the paternal grandparents] were granted visitation privileges with the minor child for seven days during [] each summer upon thirty days advance notice and that said Order is still in force and effect and the purpose of said Order may still be served by compliance with the same.
>
> * * *
>
> 17. That Plaintiff has had the ability to comply with the visitation Order involving [the paternal grandparents] but has willfully failed and refused to do so.

The record reveals that competent evidence supported these findings. At the 28 July 2003 hearing, Lindquist did not dispute that the Consent Order granting the grandparents visitation rights was in effect. Indeed, Lindquist confirmed that the grandparents had exercised their right to visitation since a 1997 order, which first granted that right, took effect. Nevertheless, in a letter dated 6 May 2003, Lindquist wrote "to inform" the grandparents that she "will not make Shaughnessy go with you for a week in the future." On 11 June 2003, Lindquist sent the grandparents another letter, informing them that she was making Shaughnessy unavailable for visitation by taking her to Hawaii. While Lindquist knew on 1 May 2003 that she and Shaughnessy would be going to Hawaii, she did not contact the grandparents about their travel plans until the day of their departure. Moreover, Lindquist's 11 June 2003 letter postdated the grandparents' request to make Shaughnessy available for visitation beginning 13 July, as well as Young's motion for contempt for failure to make Shaughnessy available for visitation. These and other facts reflected in the record constitute competent evidence to support the trial court's finding that Lindquist was in willful civil contempt for failing to allow Shaughnessy's grandparents to exercise their visitation rights.

Lindquist relies heavily on *Hancock v. Hancock*, 122 N.C. App. 518, 471 S.E.2d 415 (1996), and *Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003), to support her argument that the trial court erred in finding her in contempt. These cases are, however, easily distinguishable. In *Hancock*, we found that:

> Nowhere in the record do we find evidence that plaintiff acted purposefully and deliberately or with knowledge and stubborn resistance to prevent defendant's visitation with the child. The evidence shows plaintiff prepared the child to go, encouraged him to visit with his father, and told him he had to go. The child simply refused. Plaintiff did everything possible short of using physical force or a threat of punishment to make the child go with his father.

Hancock, 122 N.C. App. at 525, 471 S.E.2d at 419. The same cannot be said here, where there is competent evidence, discussed above, supporting the trial court's conclusion that Lindquist willfully, *i.e.*, knowingly and stubbornly, violated the Consent Order granting the grandparents visitation rights.

In *Ruth*, we reversed a finding of contempt where the alleged contemnor fully complied with the relevant court order prior to the hearing on the motion to show cause regarding contempt. We held that "a district court does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt of court." *Ruth*, 158 N.C. App. at 126, 579 S.E.2d at 912 (citation omitted). Here, in contrast, the grandparents had not yet had their visitation, and Lindquist was not in compliance with the prior court order, at the time of the hearing. *Ruth* is therefore also inapplicable.

Accordingly, we uphold the trial court's finding that Lindquist was in willful civil contempt for failing to allow Shaughnessy's grandparents to exercise their visitation rights.

II.

[2] Lindquist next contends that the trial court erred by including in its order a provision to which she and Young had agreed at the hearing: that Lindquist "will not file a motion to increase child support based upon an increase in [Young's] income, reduction in [Young's]

income or reduction in the time that [Young] is allotted for summer visitation within two years."[2] We agree.[3]

Under North Carolina General Statute section 50-13.7(a), "[a]n order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances." N.C. Gen. Stat. § 50-13.7(a) (2003); *Crutchley v. Crutchley*, 306 N.C. 518, 524-25, 293 S.E.2d 793, 797-98 (1982) ("[A] court order pertaining to custody or support of a minor child . . . may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances[.]") (quotation and citations omitted). A court may not *sua sponte* modify an existing support order; modification may occur only upon motion and a showing of changed circumstances by an interested party. *Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 579-80 (1995).

Increased income alone does not constitute changed circumstances. Indeed, "[i]t is well established that an increase in child support is improper if based solely upon the ground that the support payor's income has *increased*." *Thomas v. Thomas*, 134 N.C. App. 591, 594, 518 S.E.2d 513, 515 (1999) (citing *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991) (stating that "[w]ithout evidence of any change of circumstances affecting the welfare of the child or an increase in need . . . an increase for support based solely on the ground that the support payor's income has increased is improper"); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963) (holding that an increase in support was not warranted in the absence of evidence of changed circumstances, particularly where the increase was sought solely on the ground that the payor's income had increased)). Because an increase in child support may not be based solely on an increase in the payor's income, were Lindquist to file a motion to increase Young's support obligation solely because of an increase in Young's income, such motion would necessarily fail. The provision at issue is therefore superfluous under these circumstances.

2. Additionally, at the hearing, Lindquist and Young verbally agreed that Lindquist would be precluded from seeking an increase in Young's support obligation were Lindquist's income to decrease. Because this provision was not included in the written court order being appealed, we refrain from addressing it.

3. The dissent argues that Lindquist's appeal of this issue is not yet ripe, as she has not filed a motion to modify child support. Were Lindquist to make such a motion under the circumstances prohibited by the order, Lindquist would be in violation of the court order and open herself up to further contempt proceedings. *See, e.g.*, N.C. Gen. Stat. § 5A-21(a) ("Failure to comply with an order of a court is a continuing [] contempt . . . ."). We therefore find this argument unpersuasive.

However, a non-custodial parent's increased income is properly considered as a factor in determining whether changed circumstances warranting an increase in child support exist. *See, e.g., Gibson v. Gibson*, 24 N.C. App. 520, 523, 211 S.E.2d 522, 524 (1975) (an increase in support was properly justified by a showing of increased support costs and substantially increased spendable income of the payor); *Roberts v. Roberts*, 38 N.C. App. 295, 301-02, 248 S.E.2d 85, 89 (1978) (non-custodial parent's ability to pay support, as well as custodial parent's inability to provide "an adequate standard of living[]" for herself and the child, were properly considered as factors in determining support obligations); *cf. Thomas*, 134 N.C. App. at 596, 518 S.E.2d at 516-17 (where the sole ground cited for increased support was an increase in the payor's income, the case was remanded to the trial court for further findings as to whether any change in the children's needs or circumstances affecting their welfare existed).

Neither Lindquist nor Young may preclude the courts of this State from evaluating whether circumstances, which may include (though may not be limited to) an increase in Young's income, warranting an increase in support exist. Indeed,

> [N]o agreement or contract between husband and wife will serve to deprive the courts of their . . . authority to protect the interests and provide for the welfare of [children]. They may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children . . . from the protective custody of the court.

Griffin v. Griffin, 96 N.C. App. 324, 328, 385 S.E.2d 526, 529 (1989) (quoting *Fuchs*, 260 N.C. at 639, 133 S.E.2d at 491; citing *Voss v. Summerfield*, 77 N.C. App. 839, 840, 336 S.E.2d 144, 145 (1985)); *see also Story v. Story*, 221 N.C. 114, 116, 19 S.E.2d 136, 137 (1942) ("[P]arents cannot contract away the jurisdiction of the court which is always alert in the discharge of its duty toward its wards—the children of the State whose personal or property interests require protection." (citation omitted)). Because an increase in Young's income may properly be considered as a factor in determining whether support should be increased, and because the courts of this State cannot be precluded from protecting a child's best interest yet cannot *sua sponte* modify support (*Royall*, 120 N.C. App. at 882, 463 S.E.2d at 579-80), the provision barring Lindquist from bringing a motion to increase Young's support obligation based in part on Young's increased ability to pay is void.

The provision also precludes Lindquist from seeking an increase in Young's support obligation in the event of a reduction in Young's income. This is, however, superfluous, as a decrease in a support payor's income may warrant a *decrease*, not an increase, in support. This Court has routinely held that decreased income may constitute changed circumstances warranting a reduction in support. *See, e.g., Hammill v. Cusack*, 118 N.C. App. 82, 453 S.E.2d 539 (1995) (finding no error where trial court decreased support based on involuntary decrease in payor's income despite no change in children's needs); *McGee v. McGee*, 118 N.C. App. 19, 27, 453 S.E.2d 531, 536 (1995) ("[I]t now appears settled that a significant involuntary decrease in a child support obligor's income satisfies the necessary showing" of changed circumstances to decrease a support obligation.); *O'Neal v. Wynn*, 64 N.C. App. 149, 151-53, 306 S.E.2d 822, 823-24 (1983), *aff'd*, 310 N.C. 621, 313 S.E.2d 159 (1984) (determination of changed circumstances and reduction of child support affirmed absent change in child's needs where payor's income decreased as a result of job loss and borrowing money to start a new business); *Schroader v. Schroader*, 120 N.C. App. 790, 794, 463 S.E.2d 790, 793 (1995) ("[A] voluntary decrease in income, absent a finding of bad faith, may be considered to support a finding of changed circumstances.").

Finally, the provision precludes Lindquist from seeking an increase in Young's support obligation in the event of a reduction in the time that Young is allotted for summer visitation. Our Supreme Court has held that "[v]isitation privileges are but a lesser degree of custody[]" and thus encompassed by the term custody for purposes of North Carolina General Statute section 50-13.7 regarding modification of orders for child support or custody. *Clark*, 294 N.C. at 575-76, 243 S.E.2d at 142; *Lamond v. Mahoney*, 159 N.C. App. 400, 402-03, 583 S.E.2d 656, 658 (2003) ("[B]ecause visitation privileges are but a lesser degree of custody, we must apply the same principles to visitation [] that apply to custody[]." (quotation omitted)). This Court has held that a change in custody may constitute a changed circumstance supporting modification of support obligations. *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) ("In this case, the trial court properly found that the change in [the child's] custody constituted a changed circumstance supporting modification of Defendant's child support obligation."). This makes sense, given that a reduction in non-custodial visitation from, for example, six weeks to one week per year would increase the custodial parent's time, and likely related costs, of care by nearly ten percent annually.

Because a reduction in visitation may constitute a changed circumstance warranting a support modification, and because the courts of this State cannot *sua sponte* modify support (*Royall*, 120 N.C. App. at 882, 463 S.E.2d at 579-80), yet cannot be precluded from protecting a child's best interest (*Griffin*, 96 N.C. App. at 328, 385 S.E.2d at 529), the provision barring Lindquist from bringing a motion to increase Young's support obligation based in part on a reduction in Young's visitation is void.[4]

In sum, because the provision precluding Lindquist from moving for an increase in Young's support obligation under certain circumstances for at least a two-year period is superfluous under certain of the specified conditions and void under the others, we hold the entire provision to be void.

III.

[3] Lindquist next asserts that the trial court erred by including in its order matters not before the court. Specifically, Lindquist contends that she and Young reached an agreement that served as the basis for the trial court's order, and the trial court exceeded its authority by providing further relief not contemplated by the parties. She therefore challenges that part of the trial court order requiring that (1) Lindquist share with Young "all school and medical records of the minor child" and "copies of all school records[;]" (2) Young be "notif[ied] . . . prior to medical appointment[s] of the minor child unless it is an emergency[;]" (3) Young and Lindquist "inform [one another] of [each other's] physical address where they reside and a current telephone number; if either of these numbers should change the party must notify the other within 72 hours of the change[;]" and (4) Lindquist "provide Defendant copies of all order forms for Defendant to purchase school pictures of the minor child."

4. We are familiar with the case law indicating that support and visitation may not be tied to one another. Those cases, however, are inapplicable, as they hold that payment of support, awarded for the child's welfare, may not be made conditional upon the custodial parent's compliance with visitation. This is not at issue here. *See, e.g.*, *Appert v. Appert*, 80 N.C. App. 27, 40, 341 S.E.2d 342, 349 (1986) (holding that "conditioning the payment or receipt of child support upon compliance with an order granting the noncustodial parent visitation privileges as a means of enforcing the visitation order is inherently detrimental to the best interest of the minor child and is therefore contrary to the law"); *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 595-96 (2002) (stating that "[t]he duty to provide financial support is independent of visitation rights and one may not be made contingent upon the other" and that "child support is guided by concern for the best interests of the child and not by a desire to punish a disobedient parent[]" and holding that the court's terminating child support where the custodial parent was in contempt regarding visitation was therefore an abuse of discretion).

North Carolina General Statute section 50-13.2(b) states that "each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child." N.C. Gen. Stat. § 50-13.2(b) (2003). The order provisions Lindquist challenges are well within the purview of the statute.

The only North Carolina case Lindquist cites to support her argument is *Elrod v. Elrod*, 125 N.C. App. 407, 481 S.E.2d 108 (1997), which is easily distinguishable. In *Elrod*, the trial court entered an order permitting home schooling of the children conditioned on the mother allowing the father visitation. On appeal, this Court held that the trial court did not have the authority to condition the right of home schooling on compliance with visitation because the initial custody order did not limit the education of the children. *Elrod*, 125 N.C. App. at 411, 481 S.E.2d at 111. Here, in contrast, the trial court in no way limited the parties' control of Shaughnessy's education, health, and welfare, nor did it condition aspects of Shaughnessy's education on Young's visitation. Instead, the trial court ordered the sharing of information about Shaughnessy's education, health, and welfare, to which both parents have a right.

IV.

[4] Finally, Lindquist contends that the trial court erred in omitting from its order matters that were addressed before the court. The only example Lindquist identifies is the trial court's partial omission of the time of day when Shaughnessy would be picked up for visitation—an alleged error even Lindquist admits is merely "clerical."

Nothing before this Court indicates that Lindquist objected to this omission or made any motion to add the visitation pick-up time to the order prior to its entry. In fact, Lindquist, through her attorney, read, *approved as to form*, and signed off on the order. Moreover, contrary to Lindquist's assertion that, upon her filing a notice of appeal, the trial court lacked authority to correct the error, North Carolina General Statute section 1A-1, Rule 60(a), addressing clerical mistakes, makes plain that trial courts may correct mistakes or omissions even during the pendency of an appeal, either before the appeal is docketed in the appellate division or thereafter with leave of the appellate division. N.C. Gen. Stat. § 1A-1, Rule 60 (2003); *Sink v. Easter*, 288 N.C. 183, 199, 217 S.E.2d 532, 542 (1975) ("Rule 60(a) specifically permits the trial court to correct clerical mistakes before the appeal is docketed in the appellate court, and thereafter while the appeal is pending with leave of the appellate court[.]"). Nothing

before this Court indicates that Lindquist petitioned the trial court to correct the order during the pendency of this appeal. Because Lindquist apparently at no time objected or made any motion to add the visitation pick-up time to the order, and because the record indicates that Lindquist explicitly approved what she now contends is a clerical error, she has not preserved this issue for appeal. N.C. R. App. P. 10(b) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion[.]").

For the reasons stated herein, we affirm the order of the trial court, except the provision therein precluding Lindquist from bringing a motion for an increase in Young's support obligation, which is vacated.

Affirmed in part, vacated in part.

Judge McGEE concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge concurring in part, dissenting in part.

I concur with the majority's opinion to the extent it: (1) affirms the trial court's order finding plaintiff in willful contempt; (2) affirms the trial court's decision to order the parties to share information regarding Shaughnessy; and (3) dismisses plaintiff's argument relating to omissions in the trial court's order. I disagree with the holding in the majority's opinion that the provision precluding Lindquist from moving for an increase in Young's support obligation under certain circumstances for a two-year period to be void. I respectfully dissent.

I. Untimely Appeal

Young argues Lindquist's appeal of whether the provision was appropriately placed in the trial court's Order is not properly before this Court because Lindquist is not yet aggrieved to warrant such appeal. I agree.

Our appellate courts have long recognized the rule that:

> Only a party aggrieved may appeal. G.S. 1-271; *Rubber Co. v. Tire Co.*, 270 N.C. 50, 153 S.E.2d 737 (1967); *Coburn v. Timber Corp.*, 260 N.C. 173, 132 S.E.2d 340 (1963); *Langley v. Gore*, 242 N.C.

> 302, 87 S.E.2d 519 (1955). The scope of review by an appellate court is usually limited to a consideration of the assignments of error in the record on appeal and it is well established that if the appealing party has no right to appeal the appellate court should dismiss the appeal *ex mero motu*. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980); *see also* Rules of Appellate Procedure, Rule 10(a). When a party fails to raise an appealable issue, the appellate court will generally not raise it for that party. *Henderson v. Matthews*, 290 N.C. 87, 224 S.E.2d 612 (1976).

Harris v. Harris, 307 N.C. 684, 690, 300 S.E.2d 369, 373-74 (1983). "No appeal lies from a judgment until somebody is hurt or 'aggrieved' by it." *Yadkin County et. al. v. City of High Point et. al.*, 219 N.C. 94, 95, 13 S.E.2d 71, 72 (1941) (citing C.S., 632).

Here, the challenged provision is prospective in nature, was not adjudicated, and has not affected the rights of either party, or Shaughnessy, at this stage. Until Lindquist moves for a modification in child support and the trial court denies her motion based on the challenged provision, she is not "a party aggrieved." *See* N.C. Gen. Stat. § 1-271 (2003). This assignment of error is not properly before this Court and should be dismissed.

II. Waiver

In addition to this issue not being properly before our Court, Lindquist waived any rights to challenge the provision. At trial, Lindquist's attorney stated:

> My client will allow her child to miss three days of school in order for that child to visit . . . In addition, in return for that, your Honor, that will resolve the issue of the complainant's motion to modify visitation. It will resolve the issue at this time of the motion to modify child support. And the plaintiff will agree she will not file a motion to modify child support based on either an increased income or a reduction in the time that [defendant] is allotted for his summer visitation within two years, based on those two grounds, solely on those two grounds.

In addition, once the findings of fact were entered, including the challenged provisions, Lindquist's attorney signed the order acknowledged he "read [it] and approved [it] as to form." Lindquist now attempts to assign error to portions of the order she consented to during trial.

Rule 10 of the North Carolina Rules of Appellate Procedure provide:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. . . . Any such question which was properly preserved . . . may be made the basis of an assignment of error in the record on appeal.

N.C.R. App. P. 10(b)(1) (2004). "The Rules of Appellate Procedure are mandatory. They are designed to keep the process of perfecting an appeal flowing in an orderly manner." *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979) (citation omitted).

Although Lindquist has assigned error to the provisions, she: (1) failed to make any objection before the trial court; (2) agreed to the order; and (3) waived any right to challenge the order. Her assignment of error was not "properly preserved," which precludes our review. N.C.R. App. P. 10(b)(1). This assignment of error should be dismissed.

III. Conclusion

I concur with sections one, three, and four of the majority's opinion and agree with its reasoning and resolution of Lindquist's assignments of error addressed in those sections.

I disagree with the majority's decision to reach the merits of Lindquist's assignments of error in section two. The majority's opinion reverses the trial court without addressing the ripeness of Lindquist's appeal, or her waiver by failing to object and her consent to the order prior to entry. Further, the majority's opinion correctly states that the trial court "is without authority to *sua sponte* modify an existing support order." *Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 579-80 (1995). The majority's decision to address this issue contradicts our appellate rules, which are mandatory. I respectfully dissent.

JUDITH LYNN JACKSON, PLAINTIFF v. FRED H. JACKSON, JR., DEFENDANT

No. COA04-666

(Filed 15 March 2005)

1. Divorce— separation agreement—vague—void

A separation agreement was correctly declared void where it had not been ratified by the court and was governed by the general principles of contracts. This agreement lacked the required certainty and specificity in eight areas ranging from child support and alimony to insurance and retirement benefits.

2. Evidence— parol evidence rule—not used to add terms—vague separation agreement

The parol evidence rule prohibited the trial court from allowing the introduction of parol evidence to add to the terms of a vague and uncertain separation agreement. Parol evidence is allowed when the writing is not a full integration of the terms of the contract or to make certain the intention behind an ambiguous contract.

3. Divorce— separation agreement—vague provisions—entire agreement voided

The trial court did not err by voiding an entire separation agreement where the deficiencies in the agreement were such that merely striking portions of it was not feasible. Moreover, plaintiff failed to object or otherwise dissent from the trial court's decision.

Judge HUNTER dissenting.

Appeal by plaintiff from order filed 1 March 2004 by Judge Kimbrell Kelly Tucker in Cumberland County District Court. Heard in the Court of Appeals 27 January 2005.

Reid, Lewis, Deese, Nance & Person, LLP, by Renny W. Deese, for plaintiff.

Sullivan & Grace, P.A., by Nancy L. Grace, for defendant.

BRYANT, Judge.

Judith Lynn Jackson (plaintiff-ex-wife) appeals from an order filed 1 March 2004, denying and dismissing her claim for specific per-

formance pursuant to a separation agreement entered into with Fred H. Jackson, Jr. (defendant-ex-husband).

Plaintiff and defendant were married on 3 November 1981. Two children were born to the marriage; respectively, Jo-Von Jackson, born 24 August 1984 and Jan-Quil Jackson, born 2 March 1993. On or about 1 December 2001, the parties separated and on 19 December 2001 signed a separation agreement. The separation agreement provided for child custody, child support, alimony, and equitable distribution. On 21 March 2003, the parties divorced, but the terms of the separation agreement were not incorporated into the divorce judgment.

Plaintiff filed this action on 17 June 2003, seeking specific performance of the separation agreement; specifically alleging that defendant failed to pay the correct amount of child support, failed to name plaintiff as beneficiary on a life insurance policy, and failed to pay the correct amount of military retirement pay to plaintiff. On 19 September 2003, defendant answered and counterclaimed for rescission of the separation agreement on the grounds that the separation agreement was vague, contradictory, and inconsistent.

This matter came for hearing at the 9 February 2004 civil session of Cumberland County District Court with the Honorable Kimbrell Kelly Tucker presiding. By order filed 1 March 2004, the trial court denied plaintiff's claims and defendant's counterclaim, and dismissed the complaint, ruling that the separation agreement was "vague, null and void, unenforceable, and is hereby set aside." Plaintiff gave timely notice of appeal.

The issues on appeal are whether: (I) the separation agreement was enforceable as written and could have been enforced had the trial court considered the intent of the parties in construing the separation agreement; (II) the trial court erred in voiding the entire contract, instead of striking only portions of the separation agreement, in light of the fact that the separation agreement contained a severability clause; and (III) the trial court erred in failing to consider any parol evidence or evidentiary representations on the issues claimed to be vague, inconsistent or omitted to determine the intent of the parties.

I

[1] Plaintiff first argues that the trial court committed reversible error by holding that the separation agreement was so vague, incon-

sistent, and contained such omissions as to render the separation agreement null and void as a matter of law. Moreover, plaintiff argues that the separation agreement was enforceable as written and could have been enforced had the trial court considered the intent of the parties in construing the separation agreement.

Separation agreements that have not been ratified by a court, are not enforceable as court orders, but rather are governed by the general principles of contracts. *See Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004); *Gilmore v. Garner*, 157 N.C. App. 664, 666, 580 S.E.2d 15, 17-18 (2003) ("Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally."). With all contracts, the goal of construction is to arrive at the intent of the parties when the contract was issued. *Wal-Mart Stores, Inc. v. Ingles Mkts., Inc.*, 158 N.C. App. 414, 418, 581 S.E.2d 111, 115 (2003). The intent of the parties may be derived from the language in the contract. *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996).

To constitute a valid contract, the terms of the contract require sufficient certainty and specificity with regard to material terms[1]. *Rosen v. Rosen*, 105 N.C. App. 326, 328, 413 S.E.2d 6, 7 (1992). "A contract, and by implication[,] a provision, leaving material portions open for future agreement is nugatory and void for indefiniteness. . . . Consequently, any contract provision . . . failing to specify either directly or by implication a material term is invalid as a matter of law." *Id.*; *see Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001) (citations omitted) ("For an agreement to constitute a valid contract, the parties' ' "minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." ' "); *Creech*

1. Depending upon the nature of the contract, various terms must be agreed to in order to form the particular type of contract in question, and these terms are described as the "material terms" or "essential elements." However, even if the material terms of a contract are stated in some positive fashion, there can be no mutual assent if the terms are left indefinite. Thus, if the parties have not expressed themselves in terms that will permit a court to ascertain with a reasonable degree of certainty what the parties intended then no contract will have formed. This is this case even though there may be proof that the parties reached a mutual understanding that they believed at the time formed a binding agreement; it is crucial that the stipulated terms be sufficiently definite so that a court may determine whether the contract has been performed or not.

Hutson & Miskimon, *North Carolina Contract Law* § 2-29, at 131 (Matthew Bender 2001).

v. Melnik, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998) (explaining that no contract results "when there has been no meeting of the minds on the essentials of an agreement"); *Normile v. Miller*, 313 N.C. 98, 108, 326 S.E.2d 11, 18 (1985) (stating that no contract exists absent a meeting of the minds or mutual assent between the parties).

"The challenge to vagueness in [a] contract goes to its sufficiency as giving rise to a cause of action. Breach of an invalid contract, if that paradox could exist, gives rise to no cause of action." *Williamson v. Miller*, 231 N.C. 722, 728, 58 S.E.2d 743, 747 (1950). Thus, "[i]f the uncertainty as to the meaning of a contract is so great as to prevent the giving of any legal remedy, direct or indirect, there is no contract." *Id.*

As noted by the trial court, the separation agreement is insufficient in the following respects:

(1) "Child Support" paragraph reads: "The Husband shall pay to the Wife support for the minor children the sum of $900.00 per month beginning the first day of January, 2002, [a]nd continuing each and every month thereafter until such time as the youngest child reached the age of 20."

Two children were born to the marriage more than eight years apart. According to this provision of the separation agreement, defendant will continue to pay child support for both children until the youngest of the two children reaches the age of twenty.

(2) "Hospital, Medical, Dental Insurance" paragraph reads: "The minor children are now covered by the Husband's health insurance and the husband shall maintain said coverage on minor children and pay any premiums theron, until said minor children reach age of 21 if not in college or the age of 23 if minor children are attending college."

The separation agreement is unclear as to whether the coverage is to end for one or both children when either the oldest or youngest child attends college.

(3) "Payment of Medical and Dental Expenses of the Minor Children" paragraph reads: "The Husband shall pay one-half the medical and dental, including orthodontia if needed, expenses of the minor children over and above any medical insurance coverage that may be available."

The separation agreement is unclear as to the duration of the coverage. Specifically, when the coverage is to begin and end.

(4) "Military Benefits" paragraph reads:

> The minor children shall receive all benefits to which they are entitled to as military dependents so long as they shall be entitled to receive said benefits under the prevailing laws and regulations of the United States of America, and the Husband shall execute such documents and take such action as may be reasonable, necessary or expeditious to enable the minor children to obtain such benefits and the appropriate identification cards therefor.

Under the military benefits regulations, the children would only be entitled to military benefits as long as they were under the age of eighteen and attending college, or over the age of eighteen as long as attending college. This paragraph attempts to establish a different time table for payments of military benefits than does the child support paragraph.

(5) "Life Insurance" paragraph reads:

> The Wife shall maintain in good standing the Whole life insurance policies currently held with Metropolitan Life Insurance and shall be solely responsible for any and all premiums on these policies. The Husband shall be solely responsible for any and all premiums on the MCI Life Insurance policy. The Husband shall name the Wife as the sole beneficiary on these policies and shall not take any steps, which may cancel or terminate these policies or change the beneficiary.

There existed only one policy of which defendant was the policy owner and responsible for paying the premium, however, the paragraph states he is to make plaintiff the beneficiary on "these policies." Plaintiff is the policy owner of the Metropolitan Life Insurance policy and is responsible for paying the premium. Therefore, it is unclear whether he is actually to be responsible for one or both policies.

(6) "Retirement" paragraph reads:

> That said 46% of the marital portion of the Husband's vested pension, retirement, or other deferred compensation pay from the United States Army will be transferred to the Wife by payments that Husband will set up through allotment to wife's existing account. Husband will pay Wife before the 5th of each month.
>
> . . .

That the Husband shall leave Wife as sole beneficiary of the Survivors Benefit Plan taken upon his retirement. And will take appropriate action to notify the SBP in writing that former spouse is entitled to the SBP when divorce is granted. That the Husband shall be solely responsible for any cost of the SBP.

The separation agreement is unclear as to when the payments are to begin and for what duration these payments will continue.

(7) The second "Military Benefits" paragraph reads:

> The Wife shall have all benefits to which she shall be entitled to as a military dependent. The husband shall execute such documents and take such action as may be reasonable, necessary or expeditious to enable the Wife to obtain such benefits and the appropriate identification cards until remarriage or death which ever comes first therefore.

The separation agreement does not make clear whether the wife is to obtain said benefits and identification cards until her or defendant's remarriage or death.

(8) "Alimony" paragraph reads:

> That the Husband shall pay the sum of $500.00 per month in permanent alimony to Wife. $200.00 starting when oldest minor child support ends, and the remaining $300[.00] to be paid when youngest minor child support ends, to total $500.00 And continuing each and every month thereafter. The Husband shall establish an allotment payable to the wife in the amount of $250.00 two times per month. The alimony shall cease at the occurrence at one of the following:
>
> a) The death of the Husband
>
> b) The death of the Wife
>
> c) The remarriage of Wife

This paragraph does not establish exactly when alimony payments will begin. In light of the fact that the two children were born to the marriage more than eight years apart, it remains unclear whether defendant will continue to pay child support for both children until the youngest of the two children reaches the age of twenty.

[2] Plaintiff argues that the vagueness and uncertainty in the separation agreement should have been resolved by use of parol evidence.

"The parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict a written instrument intended to be the final integration of the transaction." *Hall v. Hotel L'Europe, Inc.*, 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984). " 'The rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract,' " *Vestal v. Vestal*, 49 N.C. App. 263, 266, 271 S.E.2d 306, 308 (1980) (citation omitted), or "[w]hen a contract is ambiguous, parol evidence is admissible to show and make certain the intention behind the contract," *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852-53 (2001).

Here, the trial court could not allow the introduction of parol evidence to add, or supplement the terms of the separation agreement. "It is the province of the court to construe and not make contracts for the parties." *Williamson*, 231 N.C. at 727, 58 S.E.2d at 747. Accordingly, the trial court could not create new terms for the parties, and did not commit error in declaring the agreement void without hearing additional parol evidence. This assignment of error is overruled.

II

[3] Plaintiff next argues that the trial court erred in voiding the entire contract, instead of striking portions of the separation agreement, in light of the fact that the separation agreement contained a severability clause.

"When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced." *Rose v. Materials Co.*, 282 N.C. 643, 658, 194 S.E.2d 521, 531-32 (1973). Here, the separation agreement contained a severability clause, however, the vagueness, inconsistencies, and uncertainties as to the material terms of the separation agreement were such as to render the entire agreement void. Specifically, the trial court noted:

> Now I believe that I have two options. I can try and go through this, okay, and I can strike the provisions that are vague and unenforceable. But do you know what that leaves you with? A worse mess. Because if I do that, that leaves you with a worse mess.
>
> . . .

I mean, you're left—if I gut it partially, you are left with worse, almost worse than what you started with, because I don't believe as a judge I'm going to be able to try—should you come in here and try and enforce the visitation, try and enforce something called alienation of affection that's in here, it is so vague it is going to be virtually impossible for me to determine—and I'm looking at your counterclaim now, as to whether somebody violated this vague provision.

. . .

So the provisions you're contending he violated are vague and unenforceable as against him. The claims he has against you are for provisions that he contends you violated. Those are just as vague as the ones he did.

Counsel, it is my intent, rather than to try and gut it, just to declare this agreement unenforceable, vague, unenforceable, and it is null and void, and we start from scratch.

The record on appeal reveals that the deficiencies contained within the separation agreement were such that it was not feasible for the trial court to merely strike portions of the agreement without eviscerating the entire agreement. Moreover, counsel for plaintiff failed to object to or otherwise dissent from the trial court's decision to void the entire agreement. *See* N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion . . . ."). Accordingly, this assignment of error is overruled.

III

Plaintiff lastly argues that the trial court erred in failing to consider any parol evidence or evidentiary representations on the issues claimed to be vague, inconsistent or omitted, because where ambiguities exist, the court is required to undertake a factual inquiry to determine the intent of the parties.

As stated *supra* Issue I, the trial court could not allow the introduction of parol evidence to add to, or supplement the terms of the separation agreement. "It is the province of the court to construe and not make contracts for the parties." *Williamson*, 231 N.C. at 727, 58 S.E.2d at 747. Accordingly, the trial court could not create new terms for the parties, and did not commit error in declaring the agreement

void without hearing additional parol evidence. This assignment of error is overruled.

Affirmed.

Judge JACKSON concurs.

Judge HUNTER dissents in separate opinion.

HUNTER, Judge, dissenting.

I respectfully dissent from the majority opinion, as I find that the trial court erred in holding the separation agreement vague, inconsistent, and so full of omissions as to render the agreement null and void as a matter of law.

As the majority correctly notes, separation agreements not ratified by a court are governed by the general principles of contracts. *See Dalton v. Dalton*, 164 N.C. App. 584, 586, 596 S.E.2d 331, 333 (2004). Although this Court has noted that, to be enforceable, separation agreements must have mutuality of agreement as to the material terms specified directly or by implication, *see Rosen v. Rosen*, 105 N.C. App. 326, 328, 413 S.E.2d 6, 7 (1992), our Supreme Court has held that "[w]here . . . the parties have attempted to put in writing an agreement fixing the rights and duties owing to each other, courts will not deny relief because of vagueness and uncertainty in the language used, if the intent of the parties can be ascertained." *Goodyear v. Goodyear*, 257 N.C. 374, 379, 126 S.E.2d 113, 117 (1962). Our courts, in determining the intent of the parties, look first to the language of the agreement. *See Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) ("[i]f the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract"). If a term is ambiguous, parol evidence may be admitted to explain the term. *See Vestal v. Vestal*, 49 N.C. App. 263, 266-67, 271 S.E.2d 306, 309 (1980) ("[a]lthough parol evidence may not be allowed to vary, add to, or contradict an integrated written instrument, . . . an ambiguous term may be explained or construed with the aid of parol evidence). A closer examination of the contested provisions of the agreement is therefore warranted to determine if the intent of the parties can be ascertained from the plain language, or if parol evidence could properly be admitted to explain ambiguous terms.

The majority first finds the paragraph entitled "Child Support" to be defective, as it requires payment of the full amount of support, $900.00, on a monthly basis until the youngest child is 20 years old. Although an age difference of eight years exists between the children, thus resulting in continued payments of the full $900.00 for ten years after the eldest child reaches majority, such an age difference does not render the paragraph ambiguous. While parents have a legal obligation to support their children and cannot by contract relieve themselves of that obligation, *see Thomas v. Thomas*, 248 N.C. 269, 274-75, 103 S.E.2d 371, 375 (1958), "a parent can by contract assume an obligation to his child greater than the law otherwise imposes, and by contract bind himself to support his child after emancipation and past majority." *Shaffner v. Shaffner*, 36 N.C. App. 586, 588, 244 S.E.2d 444, 446 (1978). In *Goodyear v. Goodyear*, a provision of the separation agreement included payments of $400.00 monthly by the father to the mother for benefit of their two children. *Goodyear*, 257 N.C. at 376, 126 S.E.2d at 114-15. Such payments were required to be made subsequent to the date of the eldest child's twenty-first birthday. *Id.* at 378, 126 S.E.2d at 116. Our Supreme Court found this contract term to be enforceable, holding that the contract term required a monthly payment of $400.00, rather than a monthly payment of $200.00 per child. *Id.* at 378, 126 S.E.2d at 117. Here, similarly, the parties agreed to a lump sum payment for the benefit of the two children which would continue into the eldest child's majority by their plain language. Such a term, although providing for support beyond the requirements of law, is nonetheless enforceable on its face.

The majority next notes the provision concerning "Hospital, Medical and Dental Insurance" is unclear as to when the coverage ends. The language of the provision states that coverage will continue "until said minor children reach age of 21 if not in college or the age of 23 if minor children are attending college." Here, the plain language again reveals the intent of the parties. Unlike the child support provision, which specifies that support is to end for both children at a fixed point in time, the insurance provision refers to coverage ending for each of the minor children as soon as they reach the age of twenty-one or twenty-three, depending on their educational status. Thus, the plain language of this agreement creates no ambiguity as to when the insurance coverage ends.

The majority next addresses the "Payment of Medical and Dental Expenses of Minor Children" provision, finding that it is unclear as to duration. Although the paragraph does not include a specific termi-

nation, the plain language requires payment of the "expenses of the minor children." Thus it can be inferred that the payments of these expenses are to be made for each child until that child reaches the age of majority.

The majority next addresses the paragraph regarding "Military Benefits," finding it void as it establishes a different time table for benefits than the "Child Support" paragraph. The "Military Benefits" paragraph states that the "minor children shall receive all benefits to which they are entitled to as military dependents so long as they shall be entitled to receive said benefits under the prevailing laws[.]" Although this provision does provide a different termination period than the provision for child support, payment of health insurance, and payment of other medical expenses, each section refers to separate benefits, and therefore differing schedules for duration of the distinct benefits should not render the provisions void.

The majority next finds that the provision entitled "Life Insurance" is unclear as to whether defendant is responsible for one or both policies, as he is to "name the Wife as the sole beneficiary on these policies[.]" The paragraph is clear as to who is responsible for maintaining premiums on the respective policies: the wife is responsible for the policies held through Metropolitan Life Insurance and the husband is responsible for those held through MCI Life Insurance. Further, the paragraph is clear that the husband "shall name the Wife as the sole beneficiary[.]" The evidence of record fails to show, however, who is the actual policy holder for the three life insurance policies on defendant's life, and thus who is the proper party to designate the beneficiary. Therefore, parol evidence should properly be considered to clarify this ambiguity. *See Vestal*, 49 N.C. App. at 266-67, 271 S.E.2d at 309.

The majority next addresses the "Retirement" paragraph, finding the section unclear as to when the payments of the military pension and retirement pay are to begin, and as to their duration. Here the plain language of the paragraph is sufficient to create a definite obligation between the parties, specifying an exact percentage of defendant's military retirement to be received by plaintiff. The paragraph also states that payments are to be made by the fifth of each month. Further, evidence presented to the trial court indicated that defendant, already retired, began paying plaintiff a portion of the retirement benefits as soon as the separation agreement was effective. Our Supreme Court has held that:

> A contract . . . encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion. "The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question."
>
> "If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it."

Lane v. Scarborough, 284 N.C. 407, 410, 200 S.E.2d 622, 624-25 (1973) (citations omitted). Thus, a term can be implied from the language and circumstances that the parties intended the payment of retirement benefits to begin upon certification of the separation agreement.

Although the paragraph does not specify a duration of the military retirement benefits, duration of such benefits would be governed by the requirements of the retirement and pension plans. Therefore, admission of parol evidence as to the retirement and pension benefit plans would be appropriate to clarify this ambiguity. *See Vestal*, 49 N.C. App. at 266-67, 271 S.E.2d at 309.

The majority next addresses the second paragraph entitled "Military Benefits," finding that the paragraph does not make clear whether the benefit terminates on plaintiff or defendant's remarriage or death. The plain language of the agreement indicates that the benefits in question are those of the military dependant. Thus the provision that such benefits shall be received by "the Wife" until "remarriage or death which ever comes first" clearly refers to the wife's remarriage or death, as she is the dependant in question.

The majority finally addresses the paragraph entitled "Alimony," finding that the section fails to establish when alimony payments will begin, as the section provides for a graduated schedule that requires defendant to provide $200.00 monthly to plaintiff after the support to the oldest minor child ends, and an additional $300.00 monthly to plaintiff when the support to the youngest minor child ends. As discussed *supra*, the agreement does not provide for a staggered termination of child support. "A contract must be considered as a whole,

considering each clause and word with reference to other provisions and giving effect to each if possible by any reasonable construction." *Development Enterprises v. Ortiz*, 86 N.C. App. 191, 194, 356 S.E.2d 922, 924 (1987). Here, the "Alimony" provision can be reasonably construed to provide a payment of $500.00 to plaintiff only upon termination of child support when the youngest minor child reaches the age of twenty, and to provide no alimony payments to plaintiff prior to that time. As the intent of the parties can be inferred from the language of the agreement, the provision is enforceable.

As the intent of the parties can be determined by the plain language of the separation agreement, and any ambiguities creating questions of fact may properly be resolved with the use of parol evidence, the trial court erred in dismissing plaintiff's claim on the grounds the separation agreement was vague and unenforceable. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA v. ROGER DALE HOWELL, DEFENDANT

No. COA03-1491

(Filed 15 March 2005)

1. Sexual Offenses— third-degree sexual exploitation of minor—motion to dismiss—multiplicity of convictions

The trial court did not err in a multiple third-degree sexual exploitation of a minor case by denying defendant's motion to dismiss some or all of the charges on grounds of double jeopardy and by denying his motion to arrest judgment on all but one count arising from 43 child pornography images on defendant's computer hard drive, because: (1) the plain language of N.C.G.S. § 14-190.17A(a) supports multiple convictions, and the intent of the child pornography statutes is to prevent the victimization of individual children and to protect minors from physiological and psychological injuries resulting from sexual exploitation and abuse; and (2) even if there were only five downloads, the State's evidence tended to show that each of the two hundred individual photographs on defendant's computer, found within the five zip directories, had been opened, and saved on defendant's hard drive.

2. Constitutional Law— overbreadth—child pornography statutes—case-by-case analysis of fact situations

N.C.G.S. §§ 14-190.17A(a) and 14-190.13 which protect against child pornography are not overbroad even though they extend to images of minors which do not require a live minor for their production and even though defendant contends they allegedly criminalize material that does not violate community standards, because: (1) both the Court of Appeals and our Supreme Court have addressed this very issue and concluded that the statutes are constitutional; and (2) whatever overbreadth may exist should be cured on a case-by-case analysis of fact situations to which their sanctions assertedly may not be applied.

3. Sentencing— consecutive probationary sentences—sexual exploitation of minor

The trial court did not err in a multiple third-degree sexual exploitation of a minor case by allegedly imposing consecutive probationary sentences in violation of N.C.G.S. § 15A-1346, because: (1) defendant did not receive consecutive probationary sentences; (2) the judgment indicated that defendant was subject to six consecutive suspended sentences and a total of five years of probation, that defendant would serve six consecutive sentences if defendant's probation is revoked, and the trial court in its discretion may sentence a defendant this way; and (3) the trial court imposed 60 months of supervised probation only after making a finding that a longer period was necessary than that prescribed in N.C.G.S. § 15A-1343.2(d).

Appeal by defendant from judgments entered 3 January 2003 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 1 September 2004.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Leslie C. Rawls, for defendant-appellant.

HUDSON, Judge.

On 7 August 2000, Defendant Roger Dale Howell was indicted by a Gaston County Grand Jury on multiple counts of second-degree sexual exploitation of a minor. On 25 November 2002, a jury convicted defendant of 43 counts of third-degree sexual exploitation of a minor. Upon his convictions, Judge Patti sentenced defendant to six

consecutive terms of imprisonment of six to eight years. These sentences were suspended and defendant was placed on supervised probation for 60 months. Defendant appeals his convictions and sentence, and for the reasons set forth below, we find no error.

BACKGROUND

The evidence tends to show that in February or March 2000, defendant began communicating over the Internet with Jamie Renee Hammonds via instant messages. Although both lived in Gastonia, North Carolina, defendant and Ms. Hammonds were not acquainted. Ms. Hammonds testified that on 24 May 2000, she began posing online as "Sissy," Ms. Hammonds' fifteen-year-old babysitter. Initially, she posed as the babysitter to get defendant to leave her alone, but after conversing with defendant as "Sissy," Ms. Hammonds became suspicious of defendant's interest in the purported fifteen-year-old. Hammonds sent defendant a picture of her actual babysitter and testified that defendant later asked "Sissy" to make a "very sexy picture that on a scale of 1 to 10 would be a 10." Hammonds testified that the two discussed meeting somewhere and that defendant again asked "Sissy" to send a "sexy" picture of herself. Hammonds continued communicating with defendant and contacted law enforcement authorities including Crimestoppers, the Missing and Exploited Children's hotline, and Detective Hawkins of the Gastonia Police Department.

After further online conversations between Hammonds and defendant, Detective Hawkins went to Hammonds' house and viewed transcripts of her conversations with defendant, as well as photographs defendant had sent her. The police then set up an undercover meeting between "Sissy" and defendant. A female officer went to Hammonds' house, where posing as "Sissy," she chatted with defendant online, spoke with him on the telephone, and set up a meeting. Defendant met the undercover officer at a local park, believing she was "Sissy," and asked her about the pictures she was supposed to bring to him. Officers arrested him in the park.

Police officers executed a search warrant at defendant's home and seized a computer, which was turned over to SBI Agent Mike Smith, an expert in computers and computer evidence of crimes against children. On the hard drive of the seized computer, Agent Smith found over 200 pictures depicting minors engaged in sexual acts. These images were received in five zip files, and then stored on the computer's hard drive in five separate directories.

ANALYSIS

I.

[1] Defendant argues that the trial court erred when it denied his motion to dismiss some or all of the charges on grounds of double jeopardy and when it denied his motion to arrest judgment on all but one count. In these assignments of error, defendant contends that the charges against him were multiplicitous. Defendant asserts that the possession of photos on a single hard drive constitutes only one offense or, in the alternative, no more than five separate counts, one for each downloaded zip file. We disagree.

Defendant argues that the applicable statutory definitions do not support the multiple charges against him. Defendant was convicted of violating N.C.G.S. § 14-190.17A(a) (2000), which provides in pertinent part:

> A person commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity.

Id. N.C.G.S. § 14-190.13 (2000) defines "material" as: "Pictures, drawings, video recordings, films or other visual depictions or representations but not material consisting entirely of written words." *Id.* Defendant suggests that because the definition of "material" specifies items in the plural, the photographs found on his computer constitute only a single charge.

In support of this argument, defendant cites a Delaware case where the court held that multiple charges against a defendant who possessed multiple child pornography photographs were not multiplicitous because the applicable statute referred to a singular "visual depiction." *Fink v. State*, 817 A.2d 781 (Del. 2003). Although not controlling, we read *Fink* as undermining rather than supporting defendant's argument. Defendant focuses solely on the plural form in the definition of material, in N.C.G.S. § 14-190.13, while ignoring the plain language of the statute under which he was convicted, N.C.G.S. § 14-190.17A(a). The latter section makes possession of material containing "a visual representation," a violation of the law. N.C.G.S. § 14-190.17A(a) (emphasis added). *Fink* supports conviction on multiple counts where the statute proscribes possession of a singular visual depiction or representation, as it does here.

Furthermore, we conclude that the listing of plural items in the definition of "material" is merely a matter of style.

Although North Carolina Courts have not previously addressed multiplicitous charges under these statutes, many jurisdictions have done so in similar cases. The Supreme Courts of Utah and South Dakota have held that their respective statutes, which, like North Carolina's, define "material" in the plural, support multiple convictions for possession of child pornography downloaded to a defendant's computer. *State v. Morrison*, 31 P.3d 547 (Utah 2001); *State v. Martin*, 674 N.W.2d 291 (S.D. 2003). In addressing the issue of multiplicity, many courts have focused on whether the relevant statutes refer to "a" or "any" visual representation. While some jurisdictions conclude that the use of "any" is ambiguous and cannot support multiple charges for possession of multiple photographs on a computer hard drive or floppy disk, most construe "any" to support multiple convictions for possession of multiple images. *See, e.g., U.S. v. Kimbrough*, 69 F.3d 723 (5th Cir. 19950; *State v. Parrella*, 736 So. 2d 94 (Fla. App. 1999); *American Film Distributors, Inc. v. State*, 471 N.E.2d 3 (Ind. App. 1984) (all holding that "any" is ambiguous). *But see Martin*, 674 N.W.2d 291; *State v. Mather*, 646 N.W.2d 605, 616 (Neb. 2002); *Morrison*, 31 P.3d 547; *State v. Multaler*, 643 N.W.2d 437 (Wis. 2002); *U.S. v. Esch*, 832 F.2d 531 (10th Cir. 1987) (all holding that "any" supports multiple convictions). We have found no jurisdictions, however, which have held the use of the singular "a", as appears in our statute, to be ambiguous. Indeed, an Alabama court stated:

> How, then, should the unit of prosecution be described so that an intent to allow multiple convictions is clear and unequivocal? Instead of using the word "any" to describe the unit of prosecution, the singular word[] "a" . . . should be used.

McKinney v. State, 511 So.2d 220, 224 (Ala. 1987). Similarly, we conclude that the plain language of N.C.G.S. § 14-190.17A(a) supports multiple convictions here.

Defendant also cites North Carolina cases in support of his argument. *See State v. Smith*, 323 N.C. 439, 373 S.E.2d 435 (1988); *State v. Petty*, 132 N.C. App. 453, 512 S.E.2d 428 (1999). Neither of these cases, however, involves violations of the child pornography statutes. *Id.* In *Petty*, the Court addressed whether a first-degree sexual offense is a single wrong for jury unanimity purposes and thus is inapposite. 132 N.C. App. at 460-61, 512 S.E.2d at 433. In its short

discussion of multiplicity, the *Petty* Court noted that to avoid multiplicity in an indictment, "a criminal pleading must contain . . . [a] separate count addressed to each offense charged." *Id.* at 463, 512 S.E.2d at 435 (internal citations omitted). Defendant makes no argument regarding the number of indictments.

In *Smith*, the Court held that a single sale of multiple pornographic magazines could not yield multiple convictions. 323 N.C. at 444, 373 S.E.2d at 438. However, *Smith* is also easily distinguished from this case, as it involved the defendant's conviction under N.C.G.S. § 14-190.1(a), for intentionally disseminating obscenity. *Id.* The statute involved here, N.C.G.S. § 14-190.17A(a), differs from the one in *Smith* in two important ways. First, although enacted at the same time and under the same bill as N.C.G.S. § 14-190.17A(a), the statute in *Smith* makes it illegal to sell "*any* obscene writing, picture or other representation or embodiment of the obscene." N.C.G.S. § 14-190.1(a)(1) (emphasis added). The Court reasoned that this language, using "any" rather than "a," failed to indicate a "clear expression of legislative intent to punish separately and cumulatively for *each and every* obscene item." *Smith* at 437, 373 S.E.2d at 441-42. By contrast, in N.C.G.S. § 14-190.17A(a), the legislature chose to use the term "a" visual depiction, thus indicating a different intent.

Both N.C.G.S. §§ 14-190.1(a) and 14-190.17A(a) were enacted under a bill entitled, "An act to strengthen the obscenity laws of this State and the enforcement of these laws . . . and *to stop the sexual exploitation . . . of minors*" (emphasis added). *See Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 549, 351 S.E.2d 305, 309 (1986), aff'd 320 N.C. 485, 358 S.E.2d 383 (1987). But, in the two statutes, the legislature addressed two distinct societal problems. Obscenity laws, such as N.C.G.S. § 14-190.1(a), address the public or community morality and serve to "protect[] . . . society as a willing or unwilling audience from the corrupting effects of obscenity." *Id.* at 551-52, 351 S.E.2d at 311. Child pornography laws, such as N.C.G.S. § 14-190.17A(a), on the other hand, are designed to prevent the victimization of individual children, and to protect "minors from the physiological and psychological injuries resulting from sexual exploitation and abuse." *Id.* This Court has noted that child pornography poses a particular threat to the child victim because "the child's actions are reduced to a recording [and] the pornography may haunt him in future years, long after the original misdeed took place." *Id.* at 568-69, 351 S.E.2d at 320 (citing *New York v. Ferber*, 458 U.S. 747, 759, 73 L.Ed. 2d 1113, 1124 (1982)). Intending to protect individual minors

from harm, the General Assembly wrote N.C.G.S. § 14-190.17A(a) to support a charge for each image. In *Smith*, the statute was directed at the community morality concerns of obscenity, not to the victimization of individual children. We conclude, therefore, that the legislature intended by § 14-190.17A(a) that a defendant could be charged and convicted on multiple counts for the 43 child pornography images on his computer hard drive.

Without abandoning his argument that he should only have been convicted on one count of possession of child pornography, defendant argues alternatively that the evidence supports, at most, five counts, as there were five downloads of one zip file each. Although the State's evidence regarding the downloads is somewhat confusing, it did show five zip files on defendant's hard drive, each containing multiple compressed files with child pornography images. The State's witness, Agent Smith, testified that it appeared that defendant downloaded these files from the Internet. Defendant argues that each of the five downloaded zip files is the technological equivalent of a digital magazine. Accordingly, defendant asserts that as in *Smith*, where a magazine supported only one charge, we should treat each zip file as only one item, rather than allowing separate charges for each photo. We decline to do so.

As discussed, *Smith* does not apply here, as the intent of obscenity statutes is different from that of child pornography statutes. Furthermore, even if there were only five "downloads," the State's evidence tended to show that each of the two hundred individual photographs on defendant's computer, found within the five zip directories, had been opened on defendant's computer. As each of the images had been opened, and saved on defendant's hard drive (regardless of what "directory" they were in), we hold that the evidence supports the conclusion that defendant "possessed" each of these 43 images, per N.C.G.S. § 14-190.17A(a).

Thus, we conclude that defendant's multiple convictions are consistent with the language and intent of the child pornography statutes and do not violate his right to be free from double jeopardy.

II.

[2] Defendant also argues that the statutes under which he was convicted are unconstitutionally overbroad, in violation of the First Amendment of the United States and North Carolina Constitutions.

Defendant asserts that the statutes which resulted in his conviction are unconstitutional both facially and as applied to him. However, both this Court, and our Supreme Court have previously addressed this very issue and concluded that the statutes are constitutional. *Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 352 S.E.2d 305 (1986), aff'd 320 N.C. 485, 358 S.E.2d 383 (1987). Defendant has failed to cite to this controlling precedent or to distinguish his case. As explained below, we are bound to follow the sound rulings of the *Cinema I* cases.

It is well-established that obscenity is not protected expression. *Cinema I*, 83 N.C. App. at 565, 351 S.E.2d at 318. "The Supreme Court of the United States has ruled that it is constitutionally permissible to consider as without the protections of the First Amendment those materials classified as child pornography." *Id.* (citing *Ferber*, 458 U.S. at 764, 73 L. Ed. 2d at 1127, which held that pornography depicting actual children can be proscribed regardless of whether the images are obscene because of the State's paramount interest in protecting children exploited by the production process). Like the defendants in *Cinema I*, defendant here argues that N.C.G.S. §§ 14-190.17A(a) and 14-190.13 are overbroad because they extend to images of minors which do not require a live minor for their production and because they prohibit material which is accepted by the community. Although a defendant ordinarily may challenge the constitutionality of a statute only if it is unconstitutional as applied to his prosecution, he may challenge its constitutionality regardless of its application to him if the statute, "may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 37 L. Ed. 2d 830, 840 (1973). Thus, defendant's challenge on this basis is properly before the Court. But, our Courts determined, in the *Cinema I* cases, that the challenged statutes were not unconstitutionally overbroad. *Supra.*

Defendant argues that N.C.G.S. § 14-190.17A(a) contains unconstitutionally overbroad statutory definitions. The statutory definitions to which defendant objects, include those of "minor," "material," and "sexual activity," which appear in in N.C.G.S. § 14-190.13, as follows:

> (2) Material—Pictures, drawings, video recordings, films or other visual depictions or representations but not material consisting entirely of written words.
>
> . . .

(5) Sexual Activity.—Any of the following acts:

a. Masturbation, whether done alone or with another human or an animal.

. . .

c. Touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female.

Id. Defendant argues that the United States Supreme Court's holding in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 152 L. Ed. 2d 403 (2002), supports his overbreadth argument. We disagree.

In *Free Speech Coalition*, the United States Supreme Court held that the Child Pornography Prevention Act of 1996 (CPPA) was unconstitutionally overbroad because it proscribed "virtual" child pornography, as well as movies where adult actors play minor children, both of which depict minors but are produced *without using real children*. *Id.* at 241, 152 L. Ed. 2d at 415. The Court reasoned that because such depictions "record[] no crime and create[] no victims by [their] production, [they are] not 'intrinsically related' " to the sexual abuse of children and thus do not fall under *Ferber*. *Id.* at 250, 152 L. Ed. 2d at 421. In his brief, defendant contends the State made no showing that the photographs involved depict actual children. We note that defendant did not raise this issue at trial, did not assign it as error on appeal, devotes only one sentence to this argument in his brief, and has never asserted that the children in the picture were other than actual children. Even if he had, however, *Cinema I* adequately disposes of defendant's argument.

Defendant also argues that the statute in his case sweeps too broadly by criminalizing material that does not violate community standards. Specifically, defendant objects to the prohibitions found in N.C.G.S. §§ 14-190.13 (5)(a) and (c), against depictions of masturbation and touching in an act of apparent sexual stimulation. Again, defendant relies on *Free Speech Coalition*, which held that the CPAA unconstitutionally proscribed

> the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPAA, images are prohibited so long as the persons *appear to be* under 18 years of age.

535 U.S. at 246-47, 152 L. Ed. 2d at 418-19 (emphasis added). The crucial distinction between the CPAA and the North Carolina statutes is that the CPAA prohibits images in which the person only *appears* to be a minor, whereas our statutes prohibit only depictions which use an *actual* minor in their production. Thus, we conclude that *Free Speech Coalition* is inapposite.

We recognize and echo the concerns expressed by defendant and noted by the *Cinema I* Courts regarding this issue, but ultimately must conclude that the statutes are constitutional. In *Cinema I*, the Court agreed with plaintiffs that many "PG" and "R" rated films which are " 'accepted entertainment' " may fall within the ambit of N.C.G.S. § 14-190.13 (5)(c). The Court held, though, that

> whatever value those . . . films may have, such value is overwhelmingly outweighed by the State's compelling interest in protecting its youth from the debilitating psychological and emotional trauma that are attendant with child pornography and bear so heavily and pervasively upon the welfare of children. Our sentiment in this regard was aptly expressed by the Court in *Ferber* [], as follows:
>
> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications.

83 N.C. App. at 566, 351 S.E.2d at 319. (internal quotations and citations omitted). Importantly, the Court further held that "whatever overbreadth may exist should be cured through a case-by-case analysis of fact situations to which its sanctions assertedly may not be applied." *Id.* Our Supreme Court, in affirming the Court of Appeals' *Cinema I* decision, reiterated that, "[f]act situations are readily conceivable in which the statutes at issue, if improperly applied, would be unconstitutional." 320 N.C. at 491, 358 S.E.2d at 385. Here, while recognizing this possibility, we are bound by the *Cinema I* decisions that the statutes were not facially overbroad and we conclude that the statutes are constitutional as applied to defendant.

III.

[3] Defendant also argues that the trial court erred by imposing consecutive probationary sentences, in violation of N.C. G.S. § 15A-1346 (2000). We disagree. Consecutive probationary sentences, would indeed violate N.C.G.S. § 15A-1346, which states that:

> (a) Commencement of Probation.—Except as provided in subsection (b), a period of probation commences on the day it is

> imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period.
>
> (b) Consecutive and Concurrent Sentences.—If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently.

Id. This Court has held that imposition of consecutive terms of probation violates this statute and must be reversed. *State v. Canady*, 153 N.C. App. 455, 570 S.E.2d 262 (2002). We disagree, in that the defendant here did not receive consecutive probationary sentences.

The judgments indicate that the defendant is subject to six consecutive suspended sentences and a total of five years of probation, and that if defendant's probation is revoked, the trial court orders that he serve six consecutive sentences. The trial court may, in its discretion, sentence a defendant this way. *State v. Moore*, 162 N.C. App. 268, 592 S.E.2d 562 (2004). The court imposed 60 months of supervised probation only after making a finding that a longer period was necessary than that prescribed in N.C.G.S. § 15A-1343.2 (d) (2000) (which would have been not more than 30 months). As we conclude that defendant did not receive consecutive probationary sentences, we overrule this assignment of error.

No error.

Judges TYSON and GEER concur.

HEMRIC v. GROCE

[169 N.C. App. 69 (2005)]

GILBERT HEMRIC AND VANN HEMRIC, PLAINTIFFS v. DONALD GROCE AND BETTY GROCE, DEFENDANTS

No. COA04-92

(Filed 15 March 2005)

1. Appeal and Error— bench trial—standard of review

In reviewing the findings from a bench trial, the Court of Appeals reviews matters of law de novo and reviews matters of fact for any competent supporting evidence, whether or not there is contradictory evidence of any one fact.

2. Agriculture— lease of farm and tobacco allotments—duration

There was testimony in a bench trial supporting the trial court's finding that a consent judgment reflected the agreement of the parties that a lease of two farms and tobacco allotments would terminate by 1 December 1999 and not extend into 2000.

3. Agriculture— lease of farms and tobacco allotments—overproduction of tobacco

In a bench trial involving the lease of two farms and tobacco allotments, there was evidence supporting a finding that plaintiffs had overproduced 11,500 pounds of tobacco on one of the farms. Defendant did not take exception to that finding and it is binding on appeal.

4. Agriculture— lease of farms and tobacco allotments—marketing cards—expiration of lease

The trial court erred by concluding that defendants breached their contract arising out of the consent judgment regarding the lease of two farms and tobacco allotments by not delivering the year 2000 marketing cards. Although these parties clearly contemplated the possible sale of tobacco grown on defendants' lands after 1 December 1999, nothing in the consent judgment or lease agreement suggests an intention of the parties to agree that defendants accepted any responsibility or obligation to turn over their 2000 marketing cards to plaintiffs to procure the sale of the overproduced tobacco after expiration of the lease in 1999.

5. False Imprisonment— contempt to enforce consent judgment—insufficient evidence

The findings supported the trial court's conclusion that defendants failed to prove a cause of action for false imprisonment arising from a show cause order to enforce a consent judgment concerning farm leases and tobacco allotments. The trial court's finding that defendant Donald Groce consented to his imprisonment by failing to deliver to plaintiffs the year 2000 tobacco marketing cards, unsupported by the evidence, was not necessary to support the trial court's conclusion that defendants failed to prove an intentional or unlawful detention by plaintiffs.

6. Abuse of Process— evidence not sufficient—false imprisonment claim

The trial court did not err by concluding that plaintiffs did not commit an abuse of process in an action concerning the lease of two farms and tobacco allotments where defendants did not identify any evidence that plaintiffs maliciously abused the legal process.

Appeal by defendants from order and judgment entered 29 September 2003 and order entered 26 November 2003 by Judge Russell G. Walker, Jr., in Yadkin County Superior Court. Heard in the Court of Appeals 21 October 2004.

Finger, Parker, Avram & Roemer, L.L.P., by Raymond A. Parker and Andrew G. Brown, for plaintiffs-appellees.

Hendrick & Bryant, L.L.P., by Matthew H. Bryant, for defendants-appellants.

TYSON, Judge.

Donald Groce and Betty Groce (collectively, "defendants") appeal from an order and judgment entered following a bench trial finding defendants breached their contract with Gilbert Hemric and Vann Hemric (collectively, "plaintiffs"). The trial court also denied defendants' claims for abuse of process and false imprisonment. We affirm in part, reverse in part, and remand.

I. Background

The uncontroverted findings of fact show that in 1997, plaintiffs leased two Yadkin County farms, one owned by Donald Groce and one owned by Betty Groce, together with their corresponding

tobacco allotments to raise and harvest a tobacco crop. The written agreement originally expired on 15 November 1997. The parties orally agreed to extend it for the 1998 agricultural year. After the end of the 1998 crop year, plaintiffs expended time, labor, and money to prepare defendants' farms for planting a third crop of tobacco in 1999. Defendants, however, refused to lease their farms to plaintiffs for the 1999 agricultural year.

Plaintiffs instituted an action in Yadkin County District Court, which resulted in a settlement evidenced by a memorandum of judgment and subsequent consent judgment entered. These judgments allowed plaintiffs to plant and harvest a tobacco crop during the 1999 agricultural year for a rent of 52.5 cents per pound of tobacco sold payable to defendants. The consent judgment, signed by all parties, stated, "If some tobacco grown on the property of the defendants by the plaintiffs in the year 1999 is not sold before November 15, 1999, plaintiffs shall pay defendants their 52.5 cents ($0.525) per pound when said tobacco is sold."

Plaintiffs overproduced their tobacco allotment in 1999. In August 2000, plaintiffs sought to obtain defendants' tobacco marketing cards for 2000 ("2000 marketing cards") in order to sell the surplus. Following a hearing, the Yadkin County Farm Service Agency refused to issue defendants' marketing cards to plaintiffs because regulations required the marketing cards to "be issued separately to the operator of [the farms]."

Plaintiffs subsequently filed a motion to show cause against defendants. The trial court entered an order requiring defendants to appear before the trial court and to show cause "why you should not be held in civil and/or criminal contempt for willful refusal to comply with the [memorandum of judgment and consent order] filed in this action . . . ." Following the hearing, the trial court entered an order concluding that

> the tobacco grown by plaintiffs on defendants['] farm could not be sold without the sales cards of the defendants . . . . [and] any refusal by the defendants to allow the plaintiffs to use the tobacco sales cards for tobacco grown by the plaintiffs on defendants' lands in the year 1999 would violate a clear and reasonable intent of the consent judgment signed by the parties . . . .

The trial court ordered defendants to "turn[] over [the tobacco cards] to the plaintiffs . . . to sell the tobacco . . . ." Betty Groce allowed

plaintiffs to use her 2000 marketing card to sell 2,500 pounds of the excess 1999 production from her farm.

Defendants appeared before the trial court on 9 October 2000. The trial court ordered Donald Groce to "make available to the plaintiffs his tobacco sales cards . . . on or before Noon on November 1, 2000 or to report to the Yadkin County Jail . . . ." The trial court ordered Betty Groce to "turn over to the plaintiffs on or before November 1, 2000 tobacco sales cards necessary for the plaintiffs to sell a total of 3,200 pounds of tobacco . . . [or] her inaction could be subject to further hearings in this matter . . . ." Betty Groce was not held in civil contempt because she had complied with the trial court's earlier order to the extent she authorized plaintiffs to sell 2,500 pounds of tobacco on her 2000 marketing card. Donald Groce refused to allow plaintiff to use his 2000 marketing card and presented himself to the Yadkin County Sheriff on 1 November 2000. He was incarcerated in the county jail for thirteen days.

Plaintiffs were unable to sell the over allotment tobacco. Plaintiffs filed a complaint in Yadkin County Superior Court on 10 January 2001 seeking compensatory and punitive damages caused by defendants' failure to relinquish their 2000 marketing cards. Defendants answered and asserted several defenses, along with a counterclaim for abuse of process and false arrest. On 2 August 2001, defendants moved for relief from judgment regarding the 9 October 2000 order arising out of the consent judgment action and for summary judgment with respect to plaintiffs' action to recover damages. The trial court denied both motions, and defendants appealed.

We addressed defendants' initial appeal in *Hemric v. Groce*, 154 N.C. App. 393, 572 S.E.2d 254 (2002) ("*Hemric I*"). In *Hemric I*, this Court affirmed the trial court's denial of defendants' motion for summary judgment and reversed the trial court's denial of defendants' motion for relief from the judgment. *Id.* We held the trial court did not possess the authority to enforce the parties' consent judgment through a finding of contempt and remanded the case to vacate the contempt orders. *Id.*

Following a trial without a jury, the trial court entered an order and judgment awarding plaintiffs $15,122.50 plus interest and denying defendants claims for false imprisonment and abuse of process. Defendants appeal.

II. Issues

The issues are whether the trial court erred by: (1) entering findings of fact numbered 4, 5, 7, 8, and 13, which defendants argue are not supported by the evidence; (2) concluding defendants breached their contract with plaintiffs by failing to deliver their 2000 marketing card to plaintiffs when the memorandum of judgment does not provide any rights to defendants' marketing cards; (3) failing to find the memorandum of judgment is ambiguous and ignoring undisputed extrinsic evidence of the parties' intent; (4) failing to consider the extrinsic evidence regarding the negotiation of the memorandum of judgment and the undisputed purpose of the parties' agreement; (5) concluding that Betty Groce breached her contract when plaintiffs did not plead her liability for the pounds from Donald Groce's farm and the trial court found that Betty Groce permitted plaintiffs to sell 2,500 pounds of tobacco on her 2000 marketing card; (6) concluding Donald Groce was unlawfully detained by plaintiffs; and (7) concluding plaintiffs did not commit an abuse of process.

III. Findings of Fact

Defendants contend no evidence supports the trial court's findings of fact number 4, 5, 7, 8, and 13. At the outset, we note that defendants failed to present any argument or authority to support its assignment of error regarding findings number 4, 5, and 7 and they are deemed abandoned. N.C.R. App. P. 28(b)(6) (2004).

[1] "As to findings in a bench trial, we review matters of law *de novo*; we review matters of fact for any competent evidence of record to support the trial court's findings of fact and conclusions of law, whether or not contradictory evidence as to any one fact exists." *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 548-49, 589 S.E.2d 391, 397 (2003) (citing *Graham v. Martin*, 149 N.C. App. 831, 561 S.E.2d 583 (2002)), *disc. rev. denied and rev. dismissed*, 358 N.C. 241, 594 S.E.2d 194 (2004). Findings of fact numbers 8 and 13 are matters of fact and must be supported by competent evidence admitted before the trial court.

[2] In finding number 8, the trial court found:

> 8. The Consent Judgment clearly reflects the agreement of the parties that there would be no lease of Defendants' lands by the Plaintiffs for the 2000 crop year[,] which began on December 1, 1999

The consent judgment, signed by the parties and their attorneys, states:

> Both parties acknowledge that any and all lease agreements shall upon the signing of this Judgment terminate not later than November 15, 1999 and shall not extend into a new agricultural year beginning December 1, 1999 and there shall be no extension of the present lease beyond December 1, 1999.

At trial, Gilbert Hemric admitted on cross-examination that he "understood [his] lease was over with . . . Mr. Groce—at the end of November 15, 1999." Vann Hemric was asked whether he "understood that [his] tobacco—[his] farm and tobacco lease with the Groces was over in 1999?" He responded, "I understood that the farm lease was over and tobacco [sic] I think I could see what I had left over." Further, Donald Groce acknowledged on direct examination, "we had a contract for November 15 at the end of the 15th, the contract was over." This testimony supports the trial court's finding that the consent judgment reflects that the parties' lease would terminate by 1 December 1999 and not extend into 2000.

[3] Defendants also contend the trial court's finding number 13 is unsupported by the evidence. It states:

> 13. That Plaintiffs could have sold the 11,500 pounds of tobacco which was over-produced on Donald Groce's farm in 1999, had Donald Groce allowed Plaintiffs to use his 2000 marketing card and could have done so for a price substantially equivalent to the price obtained upon the sale of the excess poundage from Betty Groce's farm . . .

Defendants argue that because plaintiffs overproduced 182,081 pounds from all the farms they leased and the tobacco was stored in barns in unmarked bales, there was no way to determine what amount, if any, was overproduced on defendants' farm. Defendants, however, failed to take exception to finding of fact number 14, which states, "the 11,500 pounds of excess production on the Donald Groce farm has deteriorated . . . ."

"Where no exceptions have been taken to the findings of fact, the findings are presumed to be supported by competent evidence and are binding on appeal." *K&S Enters. v. Kennedy Office Supply Co.*, 135 N.C. App. 260, 267, 520 S.E.2d 122, 127 (1999) (citation omitted), *aff'd*, 351 N.C. 470, 527 S.E.2d 644 (2000). Finding number 14, which

is binding, supports that portion of the trial court's finding in number 13 that plaintiffs overproduced 11,500 pounds of tobacco on Donald Groce's farm.

The challenged findings are supported by the evidence. This assignment of error is overruled.

IV. Consent Judgment

[4] Defendants contend the trial court erred by concluding they breached their contract arising out of the consent judgment with plaintiffs by failing to deliver the 2000 marketing cards. We agree.

A. Standard of Review

"The general rule is that a consent judgment is the contract of the parties entered upon the record with the sanction of the court." *Crane v. Green*, 114 N.C. App. 105, 106, 441 S.E.2d 144-45 (1994) (citing *Armstrong v. Insurance Co.*, 249 N.C. 352, 106 S.E.2d 515 (1959)).

> The consent judgment is a contractual agreement and its meaning is to be gathered from the terms used therein, and the judgment should not be extended beyond the clear import of such terms. However, to interpret the nature and import of the consent judgment more precisely, courts are not bound by the "four corners" of the instrument itself. The agreement, usually reflecting the intricate course of events surrounding the particular litigation, also should be interpreted in the light of the controversy and the purposes intended to be accomplished by it.

Price v. Horn, 30 N.C. App. 10, 16, 226 S.E.2d 165, 168-69 (internal citations and quotations omitted), *cert. denied*, 290 N.C. 663, 228 S.E.2d 450 (1976).

Our review of an appeal from a trial court's order finding a breach of a contract through a violation of a consent judgment is well-established.

> Where the plain language of a consent judgment is clear, the original intention of the parties is inferred from its words. The trial court's determination of original intent is a question of fact. On appeal, a trial court's findings of fact have the force of a jury verdict and are conclusive if supported by competent evidence. The trial court's determination of whether the language in a consent judgment is ambiguous, however, is a question of law and therefore our review of that determination is *de novo*.

Potter v. Hilemn Labs., Inc., 150 N.C. App. 326, 331, 564 S.E.2d 259, 263 (2002) (internal citations and quotation omitted).

Following a bench trial, the trial court found that the "Consent Judgment clearly reflects that the parties contemplated the possibility that all the tobacco raised might not be sold by November 15, 1999, and also clearly states their mutual agreement that the agreed upon price would be paid on any unsold tobacco when that tobacco was eventually sold." Usage of the term "clearly states" indicates the trial court's ruling that the consent judgment was not ambiguous as to this issue. We review this finding *de novo*. *Potter*, 150 N.C. App. at 331, 564 S.E.2d at 263.

B. Plain Language

" 'An ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.' " *Id.* (quoting *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993)).

> Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms.

Martin v. Martin, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975) (citation omitted). " 'If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.' " *Potter*, 150 N.C. App. at 334, 564 S.E.2d at 264 (citations omitted) (quoting *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996)).

The consent judgment, signed by all parties, provided:

1. Plaintiffs shall pay to the defendants on or before the 15th day of November, 1999 the sum of 52.5 cents ($0.525) per pound for all tobacco raised on defendants' properties and sold in 1999. If some tobacco grown on the property of the defendants by the plaintiffs in the year 1999 is not sold before November 15, 1999, plaintiffs shall pay defendants their 52.5 ($0.525) per pound when said tobacco is sold.

The "plain language" of the Consent Judgment supports the trial court's finding that the parties "clearly . . . contemplated the possibil-

ity that all the tobacco raised might not be sold by November 15, 1999, and . . . that the agreed upon price would be paid . . . when that tobacco was eventually sold . . . ." *See Potter*, 150 N.C. App. at 334, 564 S.E.2d at 264.

The consent judgment reflects the parties intended the lease to terminate no later than 1 December 1999 and states:

> 4. Both parties acknowledge that any and all lease agreements shall upon the signing of this Judgement terminate not later than November 15, 1999 and shall not extend into a new agricultural year beginning December 1, 1999 and there shall be no extension of the present lease beyond December 1, 1999.

The "plain language" supports the trial court's finding that the "Consent Judgment clearly reflects the agreement of the parties that there would be no lease of Defendants' lands by the Plaintiffs for the 2000 crop year which began on December 1, 1999 . . . ." *See id.*

C. Breach of Contract

In proving a breach of contract, the plaintiff must show: "(1) existence of a valid contract and (2) breach of that contract." *Poor v. Hill*, 138 N.C. App. 19, 29, 530 S.E.2d 838, 845 (2000). The parties here do not dispute the validity of the consent judgment.

The trial court concluded defendants' refusal to turn over the 2000 marketing cards constituted a breach of contract. This conclusion of law is not supported by the trial court's findings.

The trial court found the lease was to expire on 1 December 1999, based on the consent judgment's provision that "any and all lease agreements" would terminate no later than 1 December 1999. The trial court made no findings that the parties agreed or intended that defendants would provide their marketing cards to plaintiffs for any year following expiration of the lease on 1 December 1999. Further, the lease agreement is silent on and makes no provision regarding plaintiffs' permission or entitlement to use the marketing cards following termination of the lease.

Were we to presume an ambiguity in the Consent Judgment, the trial court's findings are still inadequate to support its conclusion. Where an ambiguity exists, "[t]he object of contract construction is to ascertain the intention of the parties 'from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.' " *Silver v. Board of Transportation*, 47

N.C. App. 261, 268, 267 S.E.2d 49, 55 (1980) (quoting *Electric Co. v. Insurance Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948)).

Although the parties "clearly" contemplated the possible sale of tobacco grown on defendants' lands after 1 December 1999, nothing in the consent judgment or lease agreement suggests "the intention of the parties" to agree that defendants accepted any responsibility or obligation to turn over their 2000 marketing cards to plaintiff to procure the sale of the overproduced tobacco after expiration of the lease in 1999. *Silver*, 47 N.C. App. at 268, 267 S.E.2d at 55. No findings were made regarding whether plaintiffs were entitled to the 2000 marketing cards as a result of the lease agreement or consent judgment.

The trial court found and competent evidence shows the parties intended the lease to extend no further than 1 December 1999. The trial court's order purports to extend this lease into the year 2000 by concluding defendants breached a contract by failing to turn over the 2000 marketing cards. This conclusions is unsupported by the findings of fact or any evidence in the record. To the extent the trial court's order finds defendants breached the contract with plaintiffs and awards damages thereon, it is reversed.

V. False Imprisonment

[5] Defendants contend the trial court erred by concluding plaintiffs did not falsely imprison Donald Groce as a matter of law. We disagree.

" 'False imprisonment' has been defined as 'the illegal restraint of a person against his will.' " *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (quoting *Marlowe v. Piner*, 119 N.C. App. 125, 129, 458 S.E.2d 220, 223 (1995) (citing *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993))). " 'Illegal' or 'unlawful' [restraint] necessarily implies *deliberateness* in [the alleged wrongdoer's] actions." *Emory v. Pendergraph*, 154 N.C. App. 181, 185, 571 S.E.2d 845, 848 (2002) (emphasis supplied); *see also Harwood v. Johnson*, 326 N.C. 231, 388 S.E.2d 439, *reh'g denied*, 326 N.C. 488, 392 S.E.2d 90 (1990).

Plaintiffs argue Donald Groce "voluntarily" imprisoned himself and failed to avoid imprisonment by turning over the 2000 marketing cards. We held above that neither the consent judgment nor the lease agreement required defendants to release to plaintiffs the 2000 marketing cards after 1 December 1999. This argument is without merit. The trial court's finding of fact that Donald Groce "consented to his

imprisonment" by failing to deliver to plaintiffs the 2000 marketing cards is unsupported by the evidence. However, this finding of fact is not necessary to support the trial court's conclusion that defendants failed to prove "an intentional detention by Plaintiffs or a detention which was unlawful."

The trial court found "Plaintiffs' use of a Motion to Show Cause was done for the direct, obvious and plain purpose of bringing about Defendants' compliance with specific terms of the Consent Judgment." The record contains evidence to support this finding. After plaintiffs filed their motion to show cause, a summons was issued and the trial court conducted a hearing in which defendants were represented by counsel. Following the hearing on 25 September 2000, the trial court ordered defendants to "cooperate with the plaintiffs to the end that the unsold tobacco raised and harvested by the plaintiffs on the defendants' land . . . can be sold on the sales cards of the defendants." The trial court did not hold defendants in contempt in the 25 September 2000 order and continued the hearing until 9 October 2000. Following the hearing on 9 October 2000, the trial court ordered Donald Groce in contempt for his failure to comply with the 25 September 2000 order.

The trial court, as fact finder, concluded defendants did not prove "deliberateness" on the part of plaintiffs to unlawfully imprison Donald Groce after a full trial on the merits. We do not address the question of whether a *subsequent* determination that contempt was not *initially* a viable legal vehicle for enforcement of a court order can trigger a prima facie claim for false imprisonment, to survive a motion for judgment on the pleadings, summary judgment, or directed verdict.

The trial court's finding that plaintiffs intended to use the motion to show cause to bring about defendants' compliance with the consent judgment is supported by evidence in the record. This finding of fact supports the trial court's conclusion that defendants failed to prove a cause of action for false imprisonment. This assignment of error is overruled.

VI. Abuse of Process

[6] Defendants contend the trial court erred by concluding plaintiffs did not commit an abuse of process. We disagree.

Our Supreme Court has explained the requirements to prevail on a claim for abuse of process.

> [A]buse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attended to be secured.

Fowle v. Fowle, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965). Defendants fail to identify any evidence that plaintiffs maliciously abused the legal process. False imprisonment, alone, is insufficient to support allegations of abuse of process. *See Fowle*, 263 N.C. at 727-28, 140 S.E.2d at 401. This assignment of error is overruled.

VII. Conclusion

The trial court erred by concluding defendants breached their contractual obligations to plaintiffs and awarding damages for the breach. That portion of the trial court's order and judgment is reversed. The trial court did not err in concluding defendants failed to show false imprisonment and that defendants presented insufficient evidence to establish their counterclaim for abuse of process. The trial court's order and judgment is affirmed in part, reversed in part, and remanded.

Affirmed in part; Reversed in part; and Remanded.

Judges BRYANT and LEVINSON concur.

FRANK A. MOODY, II, PLAINTIFF-APPELLEE v. ABLE OUTDOOR, INC.; PNE MEDIA HOLDINGS, L.L.C.; PNE/ABLE, L.L.C.; PNE MEDIA, L.L.C; BRAUN INSURANCE GROUP OF THE CAROLINAS, INC.; AND MORGAN & MORGAN LTD., DEFENDANTS-APPELLANTS

No. COA03-1493

(Filed 15 March 2005)

1. Appeal and Error— appealability—denial of summary judgment—res judicata—immediate appeal

The denial of a motion for summary judgment on the basis of res judicata affects a substantial right and entitles a party to an immediate appeal.

2. Appeal and Error— standard of review—denial of summary judgment

The standard of review for a superior court order denying a motion for summary judgment is de novo.

3. Collateral Estoppel and Res Judicata— sale of business— prior actions—res judicata

Prior judgments in two earlier cases and res judicata barred plaintiff from bringing the current action against the PNE defendants arising from the sale of a business, a lease agreement, and the failure to maintain fire insurance. Summary judgment should have been granted for defendants.

Judge TYSON concurring in the result only.

Appeal by defendants from order dated 14 August 2003 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 1 September 2004.

Kelly & Rowe, P.A., by E. Glenn Kelly, for plaintiff-appellee.

McGuire, Wood & Bissette, P.A., by T. Douglas Wilson, Jr., for defendants-appellants.

Kilpatrick Stockton, L.L.P., by Stephen E. Husdon, pro hoc vice, for defendants-appellants.

BRYANT, Judge.

Able Outdoor, PNE Media Holdings, PNE/Able, and PNE Media, (collectively PNE defendants) appeal from a 14 August 2003 order denying defendant's motion for summary judgment.

In February 1999, Frank A. Moody, II (plaintiff) sold his billboard company, Able Outdoor, to PNE. Able Outdoor's three-year lease to occupy the building owned by plaintiff was assigned to PNE. One of the lease provisions required PNE to maintain fire insurance on the "buildings, improvements, and fixtures" or notify plaintiff in the event insurance coverage ceased. In January 2001, PNE ceased using the leased building and abandoned the space, since the PNE division occupying Moody's space had been sold to another billboard company.

In February 2001, fire insurance for the building was canceled. Another billboard company, SMS Media,. L.L.C., operated by Julie

Snipes then moved into the building. Snipes obtained fire insurance to cover the building and its contents. In November 2001, plaintiff contacted Braun Insurance about procuring fire insurance. Shortly thereafter and about the time plaintiff had listed his building for sale with a real estate agent, a fire occurred, damaging the building.

Plaintiff has brought three separate actions arising out of his business relationship with PNE defendants. Plaintiff filed a lawsuit (Case I) against PNE defendants on 24 May 2001 for the following: breach of contract (based on failure to pay rent from August 1999 to December 1999); fraud (based on misrepresentations regarding the timing and proceeds from a public stock offering of PNE Holdings); unfair and deceptive trade practices (based on the sale of Able Outdoor assets to be used to pay PNE Media Holdings' debts; and breach of employment contract (based on failure to pay alleged bonuses, vacation benefits and contract termination fees). Defendants counterclaimed. Almost two years later, on 4 February 2003, all claims and counterclaims were dismissed with prejudice.

On 28 January 2002 plaintiff filed a second lawsuit, this one in federal court (Case II) against PNE Media Holdings and several individual defendants initially alleging securities fraud and breach of contract based on an alleged violation of a stock purchase agreement. Defendants counterclaimed. The matter was sent to arbitration. Plaintiff then amended his complaint to add claims for: fraud (based on violations of state and federal securities law); breach of contract (based on failure to pay plaintiff pursuant to the lease agreement for rent and for the purchase of Able Outdoor); breach of fiduciary duty (for conduct including breach of lease agreement and canceling fire insurance without notifying plaintiff); fraud and misrepresentation; negligence and negligent misrepresentation; respondeat superior; and breach of the implied covenant of good faith and fair dealing. The claims were arbitrated and a judgment entered on 3 June 2003 dismissing all claims, with prejudice.

The present action was filed on 25 February 2002 (present action) against Case I PNE defendants (Able Outdoor, PNE Media Holdings, PNE/Able, and PNE Media); Braun Insurance Group (plaintiff's insurance broker), and Morgan & Morgan (PNE defendants' insurance broker). In the present action, plaintiff alleged PNE defendants were in breach of contract (based on allowing the fire insurance policy to lapse) and had committed unfair and deceptive trade practices. Plaintiff alleged Morgan & Morgan breached the

lease agreement and breached the fiduciary duty owed to plaintiff by canceling the insurance and failing to notify him accordingly. Plaintiff alleged Braun Insurance Group breached the lease agreement and the fiduciary duty owed to plaintiff by listing Julie Snipes, instead of plaintiff, as policy holder.

In Case I, pursuant to a Settlement Agreement entered on 4 February 2003, the parties agreed to jointly dismiss all claims and counterclaims with prejudice. In Case II, plaintiff's and defendants' claims and counterclaims were resolved through arbitration. Most significantly, in Case II plaintiff's claim for breach of fiduciary duty (for conduct including breach of the lease agreement and canceling the fire insurance without notifying plaintiff) was dismissed with prejudice in an order confirming the arbitration award dated 3 June 2003. In the present action PNE defendants filed a motion for summary judgment based on res judicata which was denied on 14 August 2003.

PNE defendants appeal.

The dispositive issue is whether the trial court erred in denying defendants' motion for summary judgment. Because we find that summary judgment should have been granted based on res judicata, we reverse the decision of the trial court.

[1] The denial of a motion for summary judgment is interlocutory and not immediately appealable unless it affects a substantial right. N.C. Gen. Stat. § 7A-27 (2003). The denial of a motion for summary judgment on the basis of res judicata affects a substantial right and thus, entitles a party to an immediate appeal. *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 160 (1993). Therefore, PNE defendants' appeal is properly before this Court.

[2] In reviewing a superior court order denying a motion for summary judgment, the standard of review is de novo. *Falk Integrated Techs., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). Such review requires a two-step analysis whereby "[s]ummary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Stephenson v. Warren*, 136 N.C. App. 768, 771-72, 525 S.E.2d 809, 811-12 (2000). "Once the movant makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrat-

ing specific facts, as opposed to allegations, establishing at least a prima facie case at trial." *Id.* "Summary judgment is appropriate for the defending party when (1) an essential element of the other party's claim or defense is non-existent; (2) the other party cannot produce evidence to support an essential element of its claim or defense; **or (3) the other party cannot overcome an affirmative defense which would bar the claim.**" *Caswell Realty Assocs. I, L.P. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 611 (1998) (emphasis added) (citing *Gibson v. Mutual Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 465 S.E.2d 56 (1996)).

[3] Res judicata precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction. *Northwestern Fin. Group v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692-93 (1993) (citations omitted). A judgment operates as an estoppel not only as to all matters actually determined or litigated in the proceeding, "but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination." *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985). "In general, 'privity involves a person so identified in interest with another that he represents the same legal right' previously represented at trial." *State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (quoting *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 417, S.E.2d 127, 130 (1996)). In determining whether such a privity relationship exists, " 'courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest.' " *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 36, 591 S.E.2d 870, 893 (2004) (citing *State v. Summers*, 351 N.C. 620, 623-24, 528 S.E.2d 17, 21 (2000).

PNE defendants contend the trial court committed error by failing to grant summary judgment based on the doctrine of res judicata. In order to successfully assert the doctrine of res judicata, a litigant must prove the following essential elements: (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits.

In the present action, this Court must determine if the prior judgments (in either Case I or Case II) bar plaintiff from bringing

the present action against PNE defendants. It is clear that Case I resulted in a final judgment on the merits due to a joint dismissal with prejudice entered by all parties in settlement on 4 February 2003. *See Riviere v. Riviere*, 134 N.C. App. 302, 306, 517 S.E.2d 673, 676 (1999) (quoting *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998) ("[A] voluntary dismissal with prejudice is a final judgment on the merits")); *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 712, 306 S.E.2d 513, 515 (1983); *Barnes v. McGee*, 21 N.C. App. 287, 290, 204 S.E.2d 203, 205 (1974). It is also clear that the parties involved in Case I (*Moody v. PNE* defendants) are the same as those in the present action.

In Case II plaintiff brought state and federal claims against only one of the PNE defendants, PNE Media Holdings. All claims and counterclaims were dismissed in arbitration, including plaintiff's claim that PNE defendants were liable for canceling fire and extended insurance coverage under the 12 February 1999 lease. PNE defendants now assert that plaintiff's claims in Case II are the same as in the present action. PNE defendants also assert that PNE Media Holdings was in privity with PNE defendants, and therefore, the dismissal of the claims against PNE Media Holdings through federal arbitration preclude plaintiff's claim against all PNE defendants in the present action. We agree.

"The doctrine of res judicata applies to a judgment entered on an arbitration award as it does to any other final judgment." *Rodgers*, 76 N.C. App. at 22, 331 S.E.2d at 730 (breach of contract claims asserted in the present action were, or should have been, brought forward in the arbitration proceeding, therefore the plaintiff's claims were barred by res judicata); *see also Futrelle v. Duke Univ.*, 127 N.C. App. 244, 250-51, 488 S.E.2d 635, 640 (1997).

Our Supreme Court has held that for the "breach of an entire indivisible contract only one action for damages will lie." *Gaither Corp. v. Skinner*, 241 N.C. 532, 536, 85 S.E.2d 909, 912 (1955); *accord Bockweg*, 333 N.C. at 494, 428 S.E.2d at 162 (1993). Here, plaintiff has brought three actions for breach of the same contract. The single, three-year lease agreement between plaintiff and Able Outdoor dated 12 February 1999 is an "entire and indivisible contract."

At the crux of the res judicata issue is plaintiff's Revised Statement of Claim in Case II, where plaintiff alleges:

> 4. Fiduciary Duty . . . Respondents failed to act in good faith and breached their duty owed to Claimant by engaging in the (e)

> **breaching the Lease Agreement between Claimant and Able Outdoor including, but not limited to, the cancellation of insurance coverage on the premises in violation of Paragraph 6 of the Lease Agreement, the failure to notify Claimant of the cancellation in a timely manner and the failure to notify Claimant of the transfer of the Lease Agreement from Able to PNE.**

(Emphasis added).

In an effort to explain his legal strategy, in his brief, plaintiff points to the following language:

> Where the omission of an item from a single cause of action is caused by fraud or deception of the opposing party, **or where the owner of the cause of action had no knowledge or means of knowledge of the item, the judgment in the first action does not ordinarily bar a subsequent action for the omitted item.**

Gaither Corp., 241 N.C. at 536, 85 S.E.2d at 912 (emphasis added).

Applying the above principle from *Gaither Corp.* to the present action, we agree plaintiff could not have known in May 2001 when he filed Case I that a fire would occur in November 2001 and cause extensive property damage. There is, however, some question as to whether plaintiff knew his building was not covered by insurance at the time he filed Case I. Notwithstanding, plaintiff amended his complaint on 9 October 2001 to include additional damages. Plaintiff filed no other amendments to Case I between the time of the fire in November 2001 and the settlement of Case I on 4 February 2003. Therefore, instead of amending Case I to include damages incident to the fire as part of the breach of contract claim, plaintiff filed another complaint, Case II, and therein asserted a breach of fiduciary duty claim against PNE Media Holdings for canceling fire insurance and failing to notify plaintiff of the cancellation. Plaintiff certainly cannot claim lack of knowledge of the fire loss at the time he filed Case II.

In Case II, PNE defendants' asserted res judicata as an affirmative defense alleging plaintiff's claims should have been asserted in Case I, which was then still pending. After receiving PNE defendants' answer, plaintiff revised and expanded his "Statement of Claim" in Case II to include state law claims for fraud, breach of contract, negligence, and breach of fiduciary duties based on PNE defendants'

conduct in canceling the fire insurance. The arbitrator in Case II dismissed all claims of plaintiff's and defendants', including plaintiff's claim against PNE Media for "the cancellation of the insurance policy and the failure to notify plaintiff of the cancellation."

It is well settled that under principles of res judicata a final judgment is conclusive "not only as to all matters actually litigated and determined, but also as to matters which could properly have been litigated and determined in the former action. . . ." *Fickley v. Greystone Enters.*, 140 N.C. App. 258, 260, 536 S.E.2d 331, 333 (2000) (citations omitted); *See, e.g., Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 442 S.E.2d 94 (1994) (holding res judicata precluded landlord from bringing second action for damages of unpaid future rents after a final judgment determined tenant's damages arising out of the breach of lease in landlord's first action) (emphasis added).

"The procedural history of the case below demonstrates that plaintiff[] [chose] not to have all [] claims adjudicated in the prior lawsuit. The doctrine of res judicata estops [him] from litigating any of those claims in a second lawsuit." *Ballance v. Dunn*, 96 N.C. App. 286, 292, 385 S.E.2d 522, 525 (1989). We find the above language in Dunn particularly appropriate in this case. The doctrine of res judicata requires the dismissal of all plaintiff's claims against PNE defendants since plaintiff has already obtained a final judgment regarding his claim for breach of the lease agreement in Case I and in Case II. There are no genuine issues of material fact as to plaintiff's claim of fire loss arising out of PNE defendants' failure to maintain insurance, or to notify plaintiff of a cancellation of policy. Because defendants have successfully asserted the doctrine of res judicata the trial court erred in denying PNE defendants' motion for summary judgment.

Reversed and remanded.

Judge HUDSON concurs.

Judge TYSON concurs in the result only.

TYSON, Judge concurring in the result only.

Because plaintiff could have asserted this cause of action in *Case I* but failed to do so, I vote to reverse the trial court's order. Any dis-

cussion of *Case II* is unnecessary to resolve this appeal. I respectfully concur in the result only of the majority's opinion.

I. *Res Judicata*

Under the doctrine of *res judicata*, "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). "The doctrine of *res judicata* is a principle of universal jurisprudence, forming a part of the legal systems of all civilized nations as an obvious rule of expediency, justice and public tranquillity." *Queen City Coach Company v. Frank Burrell*, 241 N.C. 432, 434-35, 85 S.E.2d 688, 691 (1955) (citation omitted).

"The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier lawsuit; (2) identity of the cause of action in the prior suit and the later suit; and (3) an identity of the parties or their privies in both suits." *Culler v. Hamlett*, 148 N.C. App. 389, 392, 559 S.E.2d 192, 194 (2002). " 'Strict identity of issues . . . is not absolutely required and the doctrine of *res judicata* has been accordingly expanded to apply to those issues which *could have been raised* in the prior action.' " *Stafford v. County of Bladen*, 163 N.C. App. 149, 152, 592 S.E.2d 711, 713 (emphasis supplied) (quoting *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998)), *appeal dismissed and disc. rev. denied*, 358 N.C. 545, 599 S.E.2d 409, (2004).

Our Supreme Court noted long-ago that "[t]he bar of the judgment in such cases extends not only to matters actually determined but also to other matters which in the exercise of due diligence could have been presented for determination in the prior action." *Gaither Corp. v. Skinner*, 241 N.C. 532, 535-36, 85 S.E.2d 909, 911 (1955) (citation omitted). In analyzing the doctrine of *res judicata* as it applies to breach of contract claims, "[o]rdinarily, for the breach of an entire and indivisible contract only one action for damages will lie." *Gaither Corp.*, 241 N.C. at 536, 85 S.E.2d at 912 (citation omitted).

In *Bockweg v. Anderson*, our Supreme Court held that *res judicata* did not bar the plaintiffs' action where they were "seeking a remedy for a separate and distinct negligent act leading to a separate and distinct injury." 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993). However, *Bockweg* reconciled its result with that in *Gaither* by clearly distinguishing the causes of action: "While *Gaither* may be

read broadly as defendants contend, *Gaither* dealt with *res judicata* only in the context of a second suit for damages under an entire and indivisible contract, not a negligence action as in the instant case." *Id.* at 494, 428 S.E.2d at 162; *see also Davenport v. North Carolina Dep't of Transp.*, 3 F.3d 89 (4th Cir. 1993).

II. Analysis

I would follow our Supreme Court's reasoning in both *Bockweg* and *Gaither* to reverse the trial court's order denying PNE defendants' motion for summary judgment. Here, plaintiff brought the first cause of action on 25 May 2001. Barely one month prior to the fire, in October 2001, plaintiff amended his complaint to include additional causes of action. Presuming plaintiff was unaware at the time of the first action that PNE defendants were in breach of the contract for failure to procure fire insurance, plaintiff most certainly became aware of PNE defendants' breach in November 2001 following the fire.

The "exercise of due diligence" language in *Gaither* should not be construed broadly. Considering the facts of this case, plaintiff not only *could have* amended his complaint to include another claim for breach of contract, but *should have* included this action. The action at bar was filed 25 February 2002, while *Case I* was still pending. The parties did not settle *Case I* until 4 February 2003, a year after the filing of the action at bar.

Following the well-established rule that "for the breach of an entire and indivisible contract only one action for damages will lie," *Gaither Corp.*, 241 N.C. at 536, 85 S.E.2d at 912, plaintiff had the opportunity, upon discovery of additional breaches, to include any additional claims arising out of the *only* contract it had with PNE defendants. *See Smoky Mountain Enterprises, Inc. v. Jesse Rose*, 283 N.C. 373, 378, 196 S.E.2d 189, 192 (1973) ("Plaintiff cannot in this action seek relief which, in the exercise of reasonable diligence, could have been presented for determination in the prior action.").

I would reverse the trial court solely on this basis. Any discussion in the majority's opinion regarding *Case II* and privies is unnecessary to the resolution of this case. I respectfully concur in the result only in the majority's opinion.

STATE OF NORTH CAROLINA v. SHELDON LEE SUTTON

No. COA04-101

(Filed 15 March 2005)

1. Constitutional Law— effective assistance of counsel—failure to request recordation—failure to request limiting instruction

Defendant did not receive ineffective assistance of counsel in a first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury case based on his trial attorney's failure to request recordation of jury selection, opening statements, and closing arguments, as well as his attorney's failure to request a limiting instruction regarding evidence that defendant was arrested for carrying a knife, because: (1) assuming arguendo that defendant's attorney should have requested recordation of jury selection and opening and closing arguments, defendant makes no argument that there was any prejudicial conduct in these portions of the trial and the record is devoid of any objection made by defendant as to the State's closing argument; and (2) assuming arguendo that defendant's attorney should have requested a limiting instruction when testimony was received showing defendant was arrested at an earlier time for carrying a knife, defendant failed to show any prejudice when the evidence was offered for the purpose of identifying defendant as the perpetrator and there was plenary testimony by the State's witnesses, as well as by defendant himself, that defendant was in the habit of carrying a knife.

2. Constitutional Law— *right to confront witnesses*—interrogation—unavailable witness—excited utterance

The trial court did not commit plain error by violating defendant's Sixth Amendment right to confront witnesses against him in a first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury case when it allowed one of the victim's statements to police to be admitted into evidence as an excited utterance when she did not testify at trial, because: (1) although the police questioning of the witness was interrogation, meaning the statement produced by that questioning was testimonial and the trial court erred by providing no opportunity for defendant to

cross-examine the witness on the contents of the statement, there was plenary evidence of defendant's guilt; and (2) there was substantial evidence that defendant was the primary participant in the murder, robbery, and assault even though the jury only needed to find beyond a reasonable doubt that defendant and his coparticipant acted together with a common purpose to rob the victims that night since the jury was instructed on acting in concert.

Appeal by defendant from judgment entered 24 July 2003 by Judge Steve A. Balog in Craven County Superior Court. Heard in the Court of Appeals 22 September 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General A. Daneille Marquis, for the State.

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

STEELMAN, Judge.

Defendant was found guilty by a jury of first-degree murder, attempted robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury on 24 July 2003.

In the summer of 1998, defendant and Vernon Deon Forrest (Forrest) lived together with their respective girlfriends, Iesha Gay (Gay) and Rose Sutton (Sutton) in an apartment in New Bern. On the night of 30 July 1998, defendant and Forrest left the apartment on foot and walked the streets of New Bern together for several hours. At approximately midnight the two men found themselves in a cemetery which was frequently used as a short-cut for local residents. In the cemetery defendant and Forrest came upon Elvis Gallagher (Elvis) and his wife Margaret Gallagher (Margaret) who were walking through the cemetery. Defendant and Forrest attempted to rob the Gallaghers. Elvis was stabbed in his upper torso and Margaret received a cut on her arm and a deep cut across her throat. Elvis died of his wounds, but Margaret survived. Both defendant and Forrest admitted to having been present at the time of the attempted robbery and assault, but each accused the other of having assaulted the Gallaghers.

That night Gay and Sutton were sitting on the front porch of their apartment waiting for their boyfriends to return when they saw two

figures in dark clothing running towards the apartment. Both women testified that Forrest had a large bloodstain on his white undershirt. Gay also noticed that the front of defendant's shirt was wet with something, but because the shirt was dark in color, she could not tell if it was blood. Sutton did not notice anything unusual about defendant's clothing, but both women testified that defendant and Forrest took off their clothes and washed them shortly after returning to the apartment. The women testified that they were present during a conversation between defendant and Forrest where the men discussed the murder and assault, and acted out how it happened. The two men stated that Forrest fought with Elvis while defendant attacked Margaret with a knife. Defendant then went to where Forrest and Elvis were fighting and stabbed Elvis once in the chest. Sutton testified that she found a bloody knife, which she recognized as belonging to defendant, in her book bag the following day. Gay testified that defendant admitted to her that they had killed two people that night (apparently believing Margaret had also died). Defendant told Gay that Forrest was fighting the man, and he was fighting the woman, who was screaming. According to Gay, Defendant told her that "he wanted [the woman] to shut up, and he, he said he had slit her throat." Defendant told Gay that he then ran over and stabbed the man in the chest as he was fighting with Forrest. Gay also testified that defendant liked knives, and that he frequently carried one. Defendant admitted that he sometimes carried a knife, and that he was arrested once for carrying a knife concealed in the sleeve of his coat. Following that arrest, defendant's knife was taken by the police. Gay stated that she accompanied defendant to K-Mart to replace the knife. Defendant denied carrying a knife on the night of the assault. On the same night following the assault, Gay saw the knife defendant bought at K-Mart on the floor of the bedroom she shared with defendant. She testified that the following morning she noticed the knife had blood on it. None of the testifying witnesses, including defendant, had ever seen Forrest carry a knife.

Margaret Gallagher did not testify at trial. A detective was dispatched to West Virginia to transport her back to North Carolina for the trial, but Margaret, who had mental disabilities, locked herself in her bedroom and refused to come to North Carolina and testify. The State moved to admit a statement Margaret had given to officers at the crime scene into evidence under the "excited utterance" exception to the hearsay rule. Defendant did not object to the admission of this statement, and the trial court admitted the statement into evidence.

The statement was read to the jury at trial. Margaret stated that as she and Elvis were walking through the cemetery, they passed two African-American males, one wearing a dark shirt, dark pants, dark shoes with white soles and something over his head, and the other, in his twenties, also wearing dark clothing, with a goatee and a hoop style earring. She told police that the one wearing something on his head pulled a large knife out of his sock, grabbed her, threw her to the ground, and cut her arm before saying anything. He then demanded money. She dumped the contents of her purse onto the ground to show she had no money. The assailant then cut her throat. That assailant then went to where the other assailant was fighting with her husband and joined in the attack. Margaret ran screaming out of the cemetery.

Forrest testified that he and defendant had planned to rob a drug dealer to get some money, and left that night to scout out some possible areas for the robbery. However, he stated that there was no plan to rob anyone that particular night. He testified that while they sat in the cemetery resting and talking, they saw the Gallaghers walking by. According to Forrest, he said to defendant "let's go[,]" and they got up to leave. Defendant then said something that sounded like "F*** this" and grabbed Margaret by the hair and dragged her onto the grass. Forrest stated that he was shocked by this action, and wanted to help Margaret, but that Elvis attacked him. He broke away from Elvis, and was some distance away when defendant came over and stabbed Elvis. Forrest then ran out of the cemetery, and defendant followed. Defendant denied there was ever a plan to rob anyone, and testified that he was afraid of Forrest, that it was Forrest who attacked the Gallaghers, and that he turned and ran away once he realized what Forrest was doing.

The trial court instructed the jury on each of the crimes charged, and also instructed on the theory of acting in concert. The jury found defendant guilty of first-degree murder under the felony murder rule, but not under a theory of premeditation and deliberation. The jury also found defendant guilty of attempted robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court imposed the mandatory sentence of life in prison without parole for the first-degree murder charge. The trial court arrested judgment on the attempted robbery and assault charges. Defendant appeals.

[1] In defendant's first and second assignments of error, he argues that his trial attorney's failure to request recordation of jury selection,

opening statements, and closing arguments, as well as his attorney's failure to request a limiting instruction regarding evidence that defendant was arrested for carrying a knife amounted to ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution. We disagree.

> "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). In order to meet this burden, a defendant must satisfy a two-part test:
>
> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Roache, 358 N.C. 243, 279, 595 S.E.2d 381, 405 (2004). (*citing Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). "[C]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73, 123 S. Ct. 184 (2002). "Moreover, this Court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *Roache*, 358 N.C. at 280, 595 S.E.2d at 406 (citation omitted).

Defendant first argues that his attorney was ineffective in that he failed to request recordation of jury selection, opening statements, and closing arguments because recording these portions of the trial "would have shown whether the prosecutor used improper argument to persuade the jury to convict [defendant] of the charges."

Defendant does not assert that any such improper conduct actually occurred at trial. Assuming *arguendo* that defendant's attorney should have requested recordation of jury selection and opening and closing arguments, defendant makes no argument that there was any prejudicial conduct in these portions of the trial. The record in this

matter is devoid of any objection made by defendant as to the State's closing argument. Because defendant has failed to show any prejudice attributable to the failure of counsel to request recordation, there is no error. *State v. Stevenson*, 136 N.C. App. 235, 244, 523 S.E.2d 734, 739 (1999); *State v. Watts*, 77 N.C. App. 124, 127, 334 S.E.2d 400, 402 (1985). Defendant's first assignment of error is without merit.

Defendant argues in his second assignment of error that his attorney's failure to ask for a limiting instruction when testimony was received showing defendant was arrested at an earlier time for carrying a knife amounted to ineffective assistance of counsel. Assuming *arguendo* that defendant's trial counsel should have requested the limiting instruction, we hold defendant has failed to demonstrate any prejudice.

The State offered evidence of the prior arrest at trial pursuant to Rule 404(b) of the North Carolina Rules of Evidence for the purpose of identifying the defendant as the perpetrator. There was plenary testimony by the State's witnesses, as well as by defendant himself, that defendant was in the habit of carrying a knife. These same witnesses, including defendant, testified that they had never seen Forrest carry a knife. Defendant raises no objection to any of this testimony on appeal. The evidence of defendant's arrest for carrying a concealed knife was simply one more piece of evidence offered by the State to identify defendant as the person who cut Margaret's throat and stabbed Elvis in the chest.

There was no dispute at trial that both defendant and Forrest were present when the crimes occurred, and no dispute that only one of them wielded a knife that night. The only dispute was which one cut and stabbed the victims. This evidence tends to identify defendant as the perpetrator, as it shows that defendant was in the habit of carrying a knife, while other evidence tended to show that Forrest was not.

Gay's testimony, taken along with this evidence, is particularly relevant. She testified that after defendant's arrest, defendant's knife was confiscated. She then accompanied defendant to K-Mart to buy a replacement knife. This was the very same knife that she later saw, bloody, on the floor of defendant's room on the night of the murder. The evidence of defendant's arrest was properly admitted under Rule 404(b) for the purpose of identifying defendant as the perpetrator of the crimes.

Defendant argues that his counsel should have requested an instruction to the jury limiting their consideration of the evidence to identity. The evidence tended to show that defendant carried a knife, not that he was in the habit of using a knife. Additionally, the plenary evidence of defendant's penchant for knives greatly diminished any potential for prejudice. Based on these facts we cannot find that "counsel's errors [if any] were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Roache*, 358 N.C. at 279, 595 S.E.2d at 405. Defendant's argument fails the second prong of the *Strickland* test. Defendant's second assignment of error is without merit.

[2] In defendant's third assignment of error he argues that his Sixth Amendment right to confront witnesses against him was violated when the trial court allowed Margaret's statement to police to be admitted into evidence when she did not testify at trial. We note that defendant did not object to the admission of this statement at trial, and now argues that the admission of the statement by the trial court amounts to plain error requiring reversal of his conviction. We disagree.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This constitutional guarantee applies to both federal and state prosecutions. *Crawford v. Washington*, 541 U.S. 36, 42, 158 L. Ed. 2d 177, 187 (2004). The Confrontation Clause is primarily concerned with "testimonial" statements. *Id.* at 53, 158 L. Ed. 2d at 194. Statements are testimonial if they " 'were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]' " *Id.* at 52, 158 L. Ed. 2d at 193 (citation omitted). "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id.* The Confrontation Clause of the Sixth Amendment mandates that (with the possible exception of dying declarations) testimonial statements of witnesses absent from trial may only be admitted if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *Id.* at 59, 158 L. Ed. 2d at 197.

In the instant case, Margaret refused to testify. The trial court admitted her statement into evidence under Rule 803(2) of the North Carolina Rules of Evidence as an "excited utterance" ("A

statement describing or explaining an event or condition made while the declarant was under the stress of excitement caused by the event or condition"), finding that she was still operating under the shock of the horrible events of the night.

We assume *arguendo* that Margaret was unavailable to testify for the purposes of the Confrontation Clause. However, there is no dispute that the defendant did not have an opportunity to cross-examine Margaret about the statement entered into evidence. The question presented this Court is whether Margaret's statement to the police at the scene of the crime is testimonial for the purposes of the Confrontation Clause. Because "Statements taken by police officers *in the course of interrogations* are . . . testimonial under even a narrow standard[,]" *Id.* at 52, 158 L. Ed. 2d at 193 (emphasis added), we must determine if the police questioning of Margaret at the crime scene constituted an "interrogation." The United States Supreme Court in *Crawford* noted the following concerning its use of the word "interrogation":

> We use the term "interrogation" in its colloquial, rather than any technical legal, sense. Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. [The declarant's] recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.

Id. at 53 n.4, 158 L. Ed. 2d at 194 (citation omitted). The United States Supreme Court further noted:

> Involvement 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 56 n.7, 158 L. Ed. 2d at 196. When a police officer questions the victim of a crime, that officer clearly has "an eye toward trial" and to allow such testimony to be admitted at trial without affording the defendant the opportunity to cross-examine the witness does present an opportunity for abuse. This Court has previously held that police questioning of a witness was testimonial and thus impli-

cated *Crawford*. *State v. Clark*, 165 N.C. App. 279, 284, 598 S.E.2d 213, 217-18 (2004).

In this case, there is no dispute that the police approached Margaret and questioned her. Her statement was neither spontaneous nor unsolicited. It was, in fact, the second statement that she gave to police that night. An objective witness would reasonably believe on these facts that the statement would be available for use at trial.

We hold that the police questioning in the instant case was an interrogation, and thus the statement produced by that questioning was testimonial. The admission of Margaret's statement in this case, where there was no prior opportunity to cross-examine her on its contents, was in violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution.

Because defendant did not object to the admission of the statement at trial, our review is limited to determining if the improper admission of the statement amounts to plain error. *See State v. Pullen*, 163 N.C. App. 696, 701, 594 S.E.2d 248, 252 (2004) ("In deciding whether an error by the trial court constituted plain error, 'the appellate court must examine the entire record and determine if the . . . error had a probable impact on the jury's finding of guilt.' ") (citations omitted). 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. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), cert. denied, 485 U.S. 1036, 99 L. Ed. 2d 912, 108 S. Ct. 1598 (1988), *cited in State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999). This standard applies even though the error constituted a violation of the United States Constitution. *See Pullen*, 163 N.C. App. at 702, 594 S.E.2d at 252; *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986).

In light of the plenary evidence of defendant's guilt, we hold that he has failed to meet his burden of proving plain error. Forrest identified defendant as the person who wielded the knife that night. Gay and Sutton's testimony that defendant confessed to the crimes corroborates Forrest. Both Gay and Sutton testified that defendant washed all the clothes he was wearing that night. They both testified that they saw a knife they identified as belonging to defendant the day following the murder, and that there was blood on it. Multiple witnesses testified that defendant had a habit of carrying knives. There was no evidence that Forrest routinely carried a knife. Gay testified that the front of defendant's shirt was wet that night, but she couldn't

determine what was on it because it was dark in color. She testified that both defendant and Forrest threatened her and Sutton to keep quiet. There was substantial evidence that defendant was the primary participant in the murder, robbery and assault.

Further, in order to convict defendant the jury did not have to believe the plenary evidence that it was he who actually cut Margaret and killed Elvis. Because they were instructed on acting in concert, the jury only needed to find beyond a reasonable doubt that defendant and Forrest acted together, with a common purpose to rob the Gallaghers that night.

Based on this evidence, we hold that defendant has not met his burden of proving that the improper admission of Margaret's statement "probably resulted in the jury reaching a different verdict than it otherwise would have reached." *Bagley*, 321 N.C. at 213, 362 S.E.2d at 251. This assignment of error is without merit.

Because defendant has not argued his other assignment of error in his brief, it is deemed abandoned. N.C.R. App. P. Rule 28(b)(6) (2003).

NO PREJUDICIAL ERROR.

Judges CALABRIA and GEER concur.

DONALD CLAUDE FRIEND, PLAINTIFF v. STATE OF NORTH CAROLINA, DEFENDANT

No. COA04-570

(Filed 15 March 2005)

Firearms and Other Weapons— status as convicted felon— prayer for judgment continued

A defendant who pled guilty to felony sale and delivery of a controlled substance and felony conspiracy to sell a controlled substance and received a prayer for judgment continued for those charges was a convicted felon for purposes of N.C.G.S. § 14-404 and was thus not entitled to obtain a permit to purchase a handgun.

Judge LEVINSON dissenting.

Appeal by the State of North Carolina from judgment entered 2 March 2004 by Judge Lisa V.L. Menefee in Forsyth County District Court. Heard in the Court of Appeals 17 February 2005.

Theodore M. Molitoris for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Lorrin Freeman and Assistant Attorney General Ashby Ray, for the State.

TIMMONS-GOODSON, Judge.

The State of North Carolina ("the State") appeals the entry of summary judgment in favor of Donald Claude Friend ("plaintiff") in a declaratory judgment action. Because plaintiff was a convicted felon for the purposes of N.C. Gen. Stat. § 14-404, we reverse.

The facts and procedural history pertinent to the instant appeal are as follows: In 1980, plaintiff was charged in Forsyth County with possession with intent to sell and deliver a controlled substance, sale and delivery of a controlled substance, and conspiracy to sell and deliver a controlled substance. On 24 March 1981, plaintiff entered a plea of guilty to misdemeanor possession of a controlled substance, felony sale and delivery of a controlled substance, and felony conspiracy to sell a controlled substance. Plaintiff received a suspended sentence on the misdemeanor charge, and a prayer for judgment continued was entered with regard to the two felony charges.

Pursuant to N.C. Gen. Stat. § 14-403, on 31 October 2003, plaintiff applied for a permit to purchase a pistol in Forsyth County. In response to a question on the permit application, plaintiff indicated that he had not previously been convicted of a felony. The Forsyth County Sheriff's Office subsequently denied plaintiff's application, noting that plaintiff had previously been convicted for felony sale and delivery of a controlled substance.

On 11 November 2003, plaintiff was indicted for perjury and attempting to obtain property by false pretenses in connection with the pistol purchase permit application. The charges were dismissed on 5 December 2003. On 17 December 2003, plaintiff filed a declaratory judgment complaint against the State, seeking to determine "his status as a 'convicted felon' and his entitlement to lawfully obtain a handgun permit." The declaratory judgment complaint requested that the trial court enter a judgment adjudicating the following:

1. That this plaintiff is not a "convicted felon" under the laws of this State; and

2. That the plaintiff is entitled to all privileges and responsibilities guaranteed by United States of America and State of North Carolina citizenship; and

3. That the plaintiff is entitled to obtain a handgun permit from the Forsyth County, North Carolina Sheriff's Department or any other lawful jurisdiction within the State of North Carolina; and

4. For such other and further relief as to the Court seems just and proper.

On 22 January 2004, the State filed a motion requesting summary judgment in its favor as well as dismissal of plaintiff's complaint for failure to join a necessary party. On 30 January 2004, plaintiff moved the trial court to award summary judgment in his favor and to grant him the relief requested in the declaratory judgment complaint. On 2 March 2004, the trial court entered a declaratory judgment containing the following pertinent findings of fact:

4. The Judgment for "Prayer for Judgment Continued from term to term to term" in the felony guilty pleas was not a "conviction" with respect to the two felony guilty pleas entered.

5. The plaintiff is not a "convicted felon" under the laws and the Constitution of the State of North Carolina.

6. The plaintiff is entitled to a handgun permit in Forsyth County or any other territorial jurisdiction.

Based upon these findings of fact, the trial court awarded summary judgment in plaintiff's favor and denied the State's motion to dismiss plaintiff's complaint. The declaratory judgment contains the following pertinent decrees:

3. The plaintiff is adjudged to not be a "convicted felon" under the Constitution or the laws of the State of North Carolina; and

4. The plaintiff is entitled to apply for and obtain a handgun permit in Forsyth County, State of North Carolina or any other territorial jurisdiction.

The State appeals.

The dispositive issue on appeal is whether the trial court erred by ruling that plaintiff is not a convicted felon.[1] The State argues that plaintiff's prior prayer for judgment continued qualifies as a felony conviction for the purposes of N.C. Gen. Stat. § 14-404. We agree.

The record reflects that plaintiff applied for a permit to purchase a pistol pursuant to N.C. Gen. Stat. § 14-403 (2003), which requires that handgun licenses or permits be issued by a county sheriff. N.C. Gen. Stat. § 14-404(c)(1) (2003) provides that a handgun permit may not be issued to an individual "who is under an indictment or information for or has been convicted in any state, or in any court of the United States, of a felony[.]" When an individual is a convicted felon, N.C. Gen. Stat. § 14-415.1(a) (2003) prohibits the individual from purchasing, owning, possessing, or having in his custody, care, or control, "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches[.]" The statute further provides in pertinent part:

> (b) Prior convictions which cause disentitlement under this section shall only include:
>
> (1) Felony convictions in North Carolina that occur before, on, or after December 1, 1995; and
>
> . . . .
>
> When a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in the courts of any other state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section. The term "conviction" is defined as a final judgment in any case in which felony punishment, or imprisonment for a term exceeding one year, as the case may be, is permissible, with-

1. The trial court also ruled that plaintiff "is entitled to apply for and obtain a handgun permit in Forsyth County, State of North Carolina or any other territorial jurisdiction." However, on 1 March 2004, prior to the trial court's entry of its order, plaintiff filed a stipulation withdrawing "the request for relief stated in the Complaint to the effect that the plaintiff desires that the Court adjudicate that he is entitled to obtain a handgun permit from the Forsyth County Sheriff's Department or in any other lawful jurisdiction in the State of North Carolina." We note that by virtue of plaintiff's express withdrawal of the request, the trial court was without authority to rule on the issue. Furthermore, pursuant to N.C. Gen. Stat. § 14-404, whether an individual has been convicted of a felony is only one of several factors to be considered by the sheriff in determining whether to issue a handgun permit. Although we recognize that the State has assigned error to this issue on appeal, because we have determined that other issues in the appeal are dispositive, we choose not to address the issue.

> out regard to the plea entered or to the sentence imposed. A judgment of a conviction of the defendant or a plea of guilty by the defendant to such an offense certified to a superior court of this State from the custodian of records of any state or federal court shall be prima facie evidence of the facts so certified.

N.C. Gen. Stat. § 14-415.1(b).

In the instant case, the trial court concluded that plaintiff's pleas of guilty to felony sale and delivery of a controlled substance and felony conspiracy to sell a controlled substance did not result in a "conviction" because plaintiff received a prayer for judgment continued with respect to the charges. However, we note that in *State v. Sidberry*, 337 N.C. 779, 448 S.E.2d 798 (1994), the defendant argued that a prayer for judgment continued did not constitute a final judgment and should not be treated as a conviction for the purposes of N.C. Gen. Stat. § 8C-1, Rule 609. Citing the well-established rule that " 'a plea of guilty, freely, understandingly, and voluntarily entered, is equivalent to a conviction of the offense charged[,]' " our Supreme Court concluded that the defendant's prior pleas of guilty to sale and delivery of cocaine, although continued pending disposition of a murder charge, could be used to attack the defendant's credibility when he testified during the murder trial. *Id.* at 782, 448 S.E.2d at 800 (quoting *State v. Watkins*, 283 N.C. 17, 27, 194 S.E.2d 800, 808, *cert. denied*, 414 U.S. 1000, 38 L. Ed. 2d 235 (1973)). Similarly, in *State v. Hatcher*, 136 N.C. App. 524, 524 S.E.2d 815 (2000), the defendant argued that the trial court erred in computing his prior record level by assessing points to a charge to which he pled no contest and for which prayer for judgment was continued. This Court noted that, for the purposes of the Fair Sentencing Act, a person is convicted " 'when he has been adjudged guilty or has entered a plea of guilty or no contest[,]' " and "formal entry is not required to have a conviction." *Id.* at 527, 524 S.E.2d at 817 (quoting N.C. Gen. Stat. § 15A-1331(b) (1997)). "Consequently," we concluded that the defendant "was convicted of the prior offense when he entered the plea of no contest even though no final judgment had been entered." *Hatcher*, 136 N.C. App. at 527, 524 S.E.2d at 817; *see Britt v. North Carolina Sheriffs' Educ. & Training Stds. Comm'n*, 348 N.C. 573, 576-77, 501 S.E.2d 75, 77 (1998) (concluding that a plea of no contest to misdemeanor obstruction of justice was a "conviction" for purposes of the petitioner's deputy sheriff's certification, despite the trial court's entry of a prayer for judgment continued).

Plaintiff contends that these cases do not apply to the Felony Firearms Act and are instead limited to the statutes discussed therein. However, plaintiff provides no authority for this contention, and we note that in *State v. Watts*, 72 N.C. App. 661, 325 S.E.2d 505, *disc. review denied*, 313 N.C. 611, 332 S.E.2d 83 (1985), the defendant argued that evidence of his "no contest" plea in a prior case was insufficient to prove that he had been previously convicted of a felony under N.C. Gen. Stat. § 14-415.1. After reviewing the statute, this Court concluded that "the plain words of th[e] statute require[] us to hold that if a defendant enters a plea, including a plea of no contest, so that a felony judgment or imprisonment for more than two years may be imposed[,] then it constitutes a conviction under G.S. 14-415.1." *Id.* at 663, 325 S.E.2d at 506. In the instant case, plaintiff pled guilty to the sale and delivery of a controlled substance and conspiracy to sell a controlled substance, both felony charges. We conclude that the reasoning of *Watts* and the above-cited cases are both persuasive in and applicable to the instant case.

Under N.C. Gen. Stat. § 14-415.1(b), a conviction is a judgment in which felony judgment or imprisonment for more than one year is permissible, "without regard to the plea entered or to the sentence imposed." Under N.C. Gen. Stat. § 14-415.1(c), the indictment charging an individual with possession of a firearm by a felon must set forth the date the prior offense was committed, the type of offense and the penalty thereof, "the date that the defendant was *convicted or plead guilty* to such offense, the identity of the court in which the conviction or plea of guilty took place *and the verdict and judgment rendered therein.*" (emphasis added). Thus, by its owns terms, the statute prohibiting the possession of a firearm by a felon contemplates an individual being indicted for the crime regardless of the sentence rendered by the trial court. Furthermore, we note that under N.C. Gen. Stat. § 14-415.12(b) (2003), a sheriff is required to deny a concealed handgun permit to any applicant who "[h]as been adjudicated guilty in any court of a felony" or has "had entry of a prayer for judgment continued for a criminal offense which would disqualify the person from obtaining a concealed handgun permit." N.C. Gen. Stat. § 14-415.12(b)(3), (9). In light of the foregoing case and statutory law, we hold that by virtue of his prior guilty pleas to felony sale and delivery of a controlled substance and felony conspiracy to sell a controlled substance, plaintiff is a "convicted felon" for the purposes of N.C. Gen. Stat. § 14-404. Therefore, the trial court's judgment to the contrary is reversed.

Reversed.

Judge BRYANT concurs.

Judge LEVINSON dissents.

LEVINSON, Judge dissenting.

There is no case or controversy between the parties, and thus no basis for a declaratory judgment action. For this reason, I would reverse and remand the order of the district court with instructions to dismiss.

Plaintiff was denied a pistol purchase permit by the Forsyth County Sheriff's Office, on the grounds that he had a prior felony conviction. The record does not indicate that plaintiff ever sought review of the Sheriff's denial of his application for a permit by petition to the chief district court judge as provided in N.C.G.S. § 14-404(b) (2003). Plaintiff was later charged with the criminal offenses of perjury and obtaining property by false pretenses for his representation in the pistol permit application that he was not a convicted felon. These criminal charges were subsequently dismissed. Plaintiff then filed the instant action, which includes the following pertinent allegations:

> 3. This action is brought for the purpose of determining, by Declaratory Judgment action, the plaintiff's citizenship and the cons[e]quences thereto resulting from certain criminal process brought by the defendant against the plaintiff in 1980.
>
> 4. Specifically, plaintiff alleges, in support of his claim for a Declaratory Judgment the following factual controversy:
>
> > a. Certain criminal process were brought against the plaintiff in the Superior Court Division of the General Hall of Justice in Forsyth County, North Carolina, which were designated as case 80 CR 47395, 80 CR 47396 and 80 CR 47397. The specific charges were conspiracy to sell and deliver a controlled substance, possession within [sic] intent to sell and deliver a controlled substance and sale and delivery of a controlled substance.
> >
> > b. On March 24, 1981, a final disposition was made of these charges and this plaintiff entered a plea of guilty to the misdemeanor charge of possession of a controlled substance and

two felony guilty pleas to sale and delivery of a controlled substance and cons[p]iracy to sell a controlled substance.

c. The plaintiff was sentenced in the misdemeanor charge to not less than twelve months, no more than eighteen months, as a regular committed youthful offender, said sentence suspended for a period of three years on the condition that he pay the costs of Court and not, at any future date, possess a controlled substance unless under a doctor's prescription. The Court entered a Prayer for Judgment continued from term to term with regard to the two felony charges and no Court costs or other consequences were attached to those charges.

d. Since the entry of those criminal Judgments, the plaintiff has exercised his State and Federal constitutional right to vote and attached hereto is a true copy of his Voter Registration Card. In addition, the plaintiff has served as a juror in the Superior Court of Forsyth County, North Carolina and attached hereto is a true copy of his juror certification.

e. The plaintiff has recently applied for a handgun permit with the Sheriff of Forsyth County, North Carolina and, as a consequence of this application and his written and verbal statement that he had never been convicted of a felony, was arrested and made to respond to certain criminal process instituted in Forsyth County, North Carolina for obtaining property by false pretense and perjury in case 03 CR 62319, the State of North Carolina contending that the "official record" of this State is that the defendant is a convicted felon.

f. When this matter came on for probable cause hearing on December 5, 2003, the Honorable Assistant District Attorney, Eric Saunders, took a voluntary dismissal of these recent charges, but the defendant believes and therefore alleges that he would be in further jeopardy if he again attempts to obtain a handgun permit under the still existing controversy and seeks to obtain a Declaratory Judgment from this Court concerning his status as a "convicted felon" and his entitlement to lawfully obtain a handgun permit.

5. A genuine controversy exists, such that the provisions of the North Carolina Declaratory Judgment Action are hereby invoked and this Court is empowered to enter a Declaratory Judgment

adjudicating the plaintiff's rights to possession of a handgun, as well as his entitlement to all other constitutional privileges guaranteed by the United States of America and the State of North Carolina Constitutions.

"A justiciable controversy is a prerequisite to a court's obtaining jurisdiction. 'An actual controversy between the parties must exist at the time the complaint is filed in order for the court to have jurisdiction to render a declaratory judgment.' . . . This Court consistently has held that 'future or anticipated action of a litigant does not give subject matter jurisdiction to our courts under the Declaratory Judgment Act.' " *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140-41, 544 S.E.2d 821, 825 (2001) (quoting *Town of Pine Knoll Shores v. Carolina Water Service*, 128 N.C. App. 321, 494 S.E.2d 618 (1998), and *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 628, 518 S.E.2d 205, 207 (1999)). "[T]o satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable." *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 589, 347 S.E.2d 25, 32 (1986) (citation omitted). Moreover, " 'the proceedings of a court without jurisdiction of the subject matter are a nullity.' " *Sarda v. City/Cty. of Durham Bd. of Adjust.*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) (quoting *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)).

"A challenge to subject matter jurisdiction may be . . . raised by the appellate court on its own motion, even when not raised by the parties." *Whittaker v. Furniture Factory Outlet Shops*, 145 N.C. App. 169, 172, 550 S.E.2d 822, 824 (2001) (citing *Askew v. Leonard Tire Co.*, 264 N.C. 168, 171, 141 S.E.2d 280, 282 (1965)). In the present case, plaintiff's complaint fails to demonstrate a current case or controversy between the parties. The complaint neither alleges that plaintiff reapplied for a pistol permit, nor expresses any clear intention to reapply. Plaintiff merely voices the generalized concern that he "believes and therefore alleges that he would be in further jeopardy **if** he again attempts to obtain a handgun permit under the still existing controversy." Indeed, plaintiff concedes in his complaint that his reason for seeking a declaration that he is not a convicted felon under the laws of North Carolina and is thus "entitled to all privileges and responsibilities guaranteed by United States of America and State of North Carolina citizenship" is so that the declaration will be available if he decides in the future to reapply for a pistol permit. This is clearly insufficient to support the subject matter jurisdiction of the court. *See City of Raleigh v. R.R. Co.*, 275 N.C. 454, 168 S.E.2d 389

(1969) (parties seeking judicial interpretation of city ordinance not yet adopted when suit was filed; this Court finds no justiciable case or controversy).

The holding of the majority opinion makes it unlikely plaintiff will reapply for a pistol purchase permit. Nonetheless, I observe that in the event he **does** reapply for a permit which is again denied on the basis of a prior felony conviction, he would have some recourse through the operation of G.S. § 14-404(b), which authorizes review of the Sheriff's decision by a judicial official. I make no comment on whether, under such circumstances, an ancillary action for a declaratory judgment seeking the relief set forth in this complaint could be sustained.

Finally, no case or controversy is generated by the mere fact that plaintiff's complaint was filed after certain unpleasant interactions with the Forsyth County Sheriff and District Attorney's Office. Plaintiff's complaint remains simply a complaint by a citizen who is displeased with the possible future treatment he might receive from public officials in the course of a possible future application for a pistol permit. Plaintiff's status is the same as other citizens of North Carolina who might want a declaratory judgment that they are not convicted felons. However, our courts are not available for such declarations until a case or controversy requires determination of their status.

Because I would reverse and remand with instructions to dismiss the subject complaint, I make no comment on the central issue addressed by the majority opinion.

GERTRUDE MARSTON FRANK, PLAINTIFF v. STEPHEN FUNKHOUSER AND DOROTHY FUNKHOUSER, INDIVIDUALLY, AND IN THEIR CAPACITY AS THE NATURAL PARENTS OF, AND LEGAL GUARDIANS FOR, NATHANIEL FUNKHOUSER, A MINOR, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. KAREN ARGO AND HAYMOUNT UNITED METHODIST CHURCH, THIRD-PARTY DEFENDANTS

No. COA04-485

(Filed 15 March 2005)

1. Appeal and Error— notice of appeal—third-party defendants

The third-party defendants' motion to dismiss an appeal was granted in an action arising from a church group ski accident where neither plaintiff nor defendants filed a notice of

appeal from the 31 October summary judgment order granted in favor of the third-party defendants, although plaintiff filed a notice of appeal from a 30 October order granting summary judgment in favor of defendants and dismissing plaintiff's claims with prejudice.

2. Negligence— skiing accident—failure to take ski lesson

The trial court properly granted summary judgment for defendants under West Virginia law in an action arising from a church group ski accident. Plaintiff's argument that the adult defendants placed a dangerous instrumentality (skis) in the hands of their son was not raised in the trial court and is precluded on appeal; the failure to take a ski lesson prior to skiing for the first time does not constitute negligence; and plaintiff did not present sufficient evidence to overcome the rebuttable presumption that a twelve-year-old was incapable of negligence.

Appeal by plaintiff from judgment entered 30 October 2003 by Judge Knox V. Jenkins, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 1 December 2004.

The Barrington and Jones Law Firm, P.A., by Carl A. Barrington, Jr., for plaintiff-appellant.

Murray, Craven & Inman, L.L.P., by Richard T. Craven and Thomas W. Pleasant, for defendants and third-party plaintiff-appellees.

Sharpless & Stavola, P.A., by Frederick K. Sharpless and Christina L. Lewis, for third-party defendant-appellees.

HUNTER, Judge.

Gertrude Marston Frank ("plaintiff") presents the following issues for our consideration: Whether the trial court erroneously granted defendants' and third-party defendants' motions for summary judgment. Karen Argo and Haymount United Methodist Church, third-party defendants, argue the appeal challenging the order granting them summary judgment should be dismissed because neither party appealed the order. After careful review, we conclude the third-party defendants should be dismissed from this appeal and we affirm the trial court's grant of summary judgment in favor of defendants.

The relevant undisputed facts indicate that plaintiff was injured on 13 January 2001 in a skiing accident at a West Virginia ski resort.

At the time of the accident, plaintiff was a Florida resident and was on a ski trip with her church, Van Dyke United Methodist Church. She was supervising the church youth on the ski trip.

On the same date, Karen Argo, a resident of Fayetteville, North Carolina, was supervising her youth group from Haymount United Methodist Church. Argo was the full-time youth director at the church. Nathaniel Funkhouser, a twelve-year old boy and member of Haymount United Methodist Church, was on his first ski trip with the church. His parents, Stephen and Dorothy Funkhouser ("defendants"), paid for Nathaniel to go on the trip, but did not attend themselves.

Both church groups arrived in West Virginia between 3:00 and 4:00 p.m. on Saturday, 13 January 2001. Upon arrival, Nathaniel and his friend, a thirteen-year old boy, went skiing on the beginner slopes. An experienced adult skier with the Haymount church group supervised the two boys. Argo remained in the lodge while the other children and adults skied.

At approximately 6:30 p.m. on Saturday evening, plaintiff began instructing an inexperienced teenage skier how to ski on the beginner slope. After plaintiff and the young lady reached the bottom of the beginners' slope, plaintiff gave the young lady the "thumbs up" sign indicating she had done a good job. As she was finishing the motion, Nathaniel Funkhouser skied into her from behind, collided with her right shoulder, and caused her to fall. Plaintiff did not see him approach, and the young lady, who saw Nathaniel approaching, did not warn plaintiff after she realized Nathaniel was going to hit plaintiff.

Just prior to the accident, Nathaniel was skiing the beginners' slope with his thirteen-year old friend. His adult supervisor was skiing behind them. While skiing the "bunny slope," Nathaniel hit an icy patch and became "out of control," which caused him to ski faster. Although Nathaniel tried to avoid plaintiff, he collided with her. Plaintiff suffered a broken leg and a displaced broken hip. She remained in the hospital for five days, underwent two surgeries, had a steel plate placed in her leg, attended a rehabilitation clinic for two weeks, had to have around the clock care for seven weeks, and had to use a walker, cane, or crutches for over a year.

On 13 December 2002, plaintiff filed a complaint against Stephen and Dorothy Funkhouser, individually and in their capacity as natural

parents of and legal guardians for Nathaniel Funkhouser. The complaint alleged the parents' negligence, combined with the minor child's negligence, proximately caused plaintiff's injuries. Defendants answered and filed a third-party complaint against Karen Argo and Haymount United Methodist Church seeking indemnification and/or contribution. The third-party defendants answered the third-party complaint on 20 May 2003. On 13 August 2003, the third-party defendants moved for summary judgment; and two days later on 15 August 2003, defendants moved for summary judgment. On 30 October 2003, summary judgment was entered in favor of defendants and third-party plaintiffs on plaintiff's claims. In a separate order filed on 31 October 2003, summary judgment was entered in favor of the third-party defendants against the third-party plaintiffs on all claims. On 7 November 2003, plaintiff filed her notice of appeal from the summary judgment order filed on 30 October 2003. No notice of appeal was filed from the 31 October 2003 summary judgment order.

As the ski accident between plaintiff and the minor child, Nathaniel Funkhouser, occurred in West Virginia, West Virginia law governs the substantive issues and North Carolina law governs the procedural issues. *See Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 854 (1988).

[1] First, we consider the third-party defendants' motion to dismiss this appeal because neither plaintiff nor defendants filed a notice of appeal from the summary judgment order granted in favor of the third-party defendants. Indeed, the record indicates plaintiff filed a notice of appeal on 7 November 2003 from the summary judgment order dated 29 October 2003 and filed on 30 October 2003 (hereinafter "30 October 2003 order"). This order and judgment granted defendants and third-party plaintiffs, Stephen and Dorothy Funkhouser, summary judgment and only referenced the claims of plaintiff against defendants. In contrast, the order dated 30 October 2003 and filed 31 October 2003 (hereinafter "31 October 2003 order") granted third-party defendants, Karen Argo and Haymount United Methodist Church, summary judgment on all claims asserted against them. In pertinent part, the 31 October 2003 order stated, "[d]efendant[s'] motion for summary judgment is the subject of a separate order and judgment. This order and judgment reflects the court's ruling only on the motion of the third-party defendants for summary judgment."

A notice of appeal must "designate the judgment or order from which appeal is taken . . . ." N.C.R. App. P. 3(d). "This rule, except as

qualified by statute, is jurisdictional and cannot be waived." *Johnson & Laughlin, Inc. v. Hostetler*, 101 N.C. App. 543, 546, 400 S.E.2d 80, 82 (1991).

In this case, plaintiff filed a notice of appeal from the 30 October 2003 order granting summary judgment in favor of defendants and dismissing plaintiff's claims with prejudice. Defendants and third-party plaintiffs did not file a notice of appeal from the 31 October 2003 summary judgment order in favor of Karen Argo and Haymount United Methodist Church, which dismissed defendants' third party complaint for indemnification or contribution with prejudice. According to N.C.R. App. P. 3(c), defendants had thirty days after the entry of order and judgment to file a notice of appeal. According to the certificate of service, plaintiff's notice of appeal was sent to defendants on 7 November 2003. Therefore, defendants had time remaining within the thirty days and could have filed a notice of appeal from the 31 October 2003 order.

Similarly, plaintiff did not file a notice of appeal from the 31 October 2003 order and judgment.[1] *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (stating "[a] careful reading of Rule 3 reveals that its various subsections afford no avenue of appeal to either entities or persons who are nonparties to a civil action"). Thus, we are precluded from addressing plaintiff's arguments regarding the summary judgment order in favor of the third-party defendants. As neither plaintiff nor defendants filed a notice of appeal from the 31 October 2003 order, Karen Argo and Haymount United Methodist Church's motion to dismiss the appeal is granted. Accordingly, we will not address the remaining arguments presented by the third-party defendants.

[2] The remaining issue for our consideration is whether the trial court properly granted summary judgment in favor of defendants, Stephen, Dorothy, and Nathaniel Funkhouser. As previously stated, West Virginia law governs the substantive aspects of this case and North Carolina law governs the procedural issues.

According to North Carolina law, summary judgment "is ' "a somewhat drastic remedy, [that] must be used with due regard to its

1. The third-party defendants argue plaintiff lacked standing to appeal the 31 October 2003 order because plaintiff was not a party to the third-party complaint filed by defendants/third-party plaintiffs against Karen Argo and Haymount United Methodist Church. As plaintiff did not file a notice of appeal from the 31 October 2003 order, it is unnecessary to address whether plaintiff had standing to appeal the order.

purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." ' " *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 682, 565 S.E.2d 140, 146 (2002) (citations omitted). " 'The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed.' " *Talbert v. Choplin*, 40 N.C. App. 360, 363, 253 S.E.2d 37, 40 (1979) (citation omitted).

Summary judgment is proper "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). " '[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.' " *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 447, 579 S.E.2d 505, 507 (2003) (citation omitted).

A defendant may show entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is nonexistent, 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 which would bar the claim." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). Summary judgment is not appropriate where questions of credibility and determinations regarding the weight of the evidence exist. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979).

" '[O]nce 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.' " *Pacheco*, 157 N.C. App. at 448, 579 S.E.2d at 507 (citation omitted). " 'To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.' " *Id.* (citation omitted).

In North Carolina:

> Under well-settled principles, summary adjudications are disfavored in negligence cases "because application of the prudent [person] test, or any other applicable standard of care, is generally for the jury." "Hence it is only in exceptional negligence cases that summary judgment is appropriate because the . . . applicable standard of care must be applied, and ordinarily the jury should apply it under appropriate instructions from the court."

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 216, 580 S.E.2d 732, 737-38 (2003) (Wynn, J., dissenting) (citations omitted).

Plaintiff first contends summary judgment was improvidently granted because the parents, Stephen and Dorothy Funkhouser, placed a dangerous instrumentality into the hands of their minor child. However, plaintiff did not present this argument to the trial court below. Her complaint does not allege the parents were negligent because they entrusted their son with a dangerous instrumentality—skis. Plaintiff also did not make this contention in her argument in opposition to defendants' and third-party defendants' motions for summary judgment. Accordingly, we are precluded from considering this argument on appeal. *See Hall v. Hall*, 35 N.C. App. 664, 665-66, 242 S.E.2d 170, 172 (1978) (declining to review an argument on appeal where the party did not make the argument below and stating the pleadings could not be read to imply the argument).

Plaintiff next argues a genuine issue of material fact exists as to the parents' negligence because they sent their child on a ski trip, knowing that he had never skied, without providing him ski lessons that were available and would have made him a much safer skier. Plaintiff contends Nathaniel would have been taught to sit down when out of control and the collision would have been avoided. Plaintiff argues the parents' failure to provide a lesson was the proximate cause of her injuries because the failure to provide a ski lesson made the injurious result foreseeable. Thus, plaintiff contends the jury should determine whether the parents' conduct was negligent and summary judgment should not have been granted.

The parties do not dispute the fact that the parents did not pay for a ski lesson for Nathaniel. However, we conclude, on the facts of this case that as a matter of law that the failure to take a ski lesson prior to skiing for the first time on the beginners' slope does not constitute negligence. There are several ways in which a person may

learn how to ski—trial and error or another person may provide instruction. Indeed, at the time of plaintiff's accident, she was instructing an inexperienced teenager on how to ski. Similarly, Nathaniel was skiing with an experienced adult skier on the beginner slope, who was also supervising the boys. Moreover, Argo testified that upon their arrival at the ski resort, they had been instructed on safety and respect on the slopes by Action Ski, the company with whom the church contracted to coordinate the ski trip. Accordingly, we conclude that summary judgment was not improvidently granted in favor of the parents.

Finally, plaintiff argues summary judgment was improvidently granted because a genuine issue of material fact exists as to whether Nathaniel, a twelve-year old boy, negligently collided into her. Specifically, she argues she has presented a sufficient forecast of evidence to overcome the rebuttable presumption that Nathaniel was incapable of negligence.

In West Virginia, there is a rebuttable presumption that children between the ages of seven and fourteen are incapable of negligence. *Pino v. Szuch*, 408 S.E.2d 55, 58 (W.Va. 1991). "The rationale for the rebuttable presumption for children between the ages of seven and fourteen is that these children usually lack the intelligence, maturity, and judgmental capacity to be held accountable for their actions." *Id.* Thus, "in order to rebut the presumption that a child between the ages of seven and fourteen lacks the capacity to be negligent, evidence of the child's intelligence, maturity, experience, and judgmental capacity must be presented to the jury." *Id.* at 59. Merely showing that a child is bright, smart, or industrious is not enough to rebut the presumption. *Id.*

Plaintiff argues Nathaniel's hesitation to ski without first taking a skiing lesson reflects upon his judgmental capacity and is a sufficient forecast of evidence to create a jury question of whether the rebuttable presumption had been overcome. According to plaintiff, on the day of the accident while Nathaniel and his youth group were traveling to West Virginia, Nathaniel asked the youth director for money to take a ski lesson. Karen Argo did not testify Nathaniel requested money for a ski lesson during the bus trip; rather, she testified that after they arrived, Nathaniel asked to borrow money to take a ski lesson the next day. Nathaniel neither expressed any fear or apprehension about skiing without taking a lesson nor did Nathaniel express any concerns about safety. Moreover, the group had been instructed on safety and respect on the slopes by their professional ski trip coor-

dinators upon arrival. Also, the record does not contain any evidence regarding whether Nathaniel had previous skiing experience or whether he had prior ski lessons. According to the record, this was Nathaniel's first ski trip with the church group. Plaintiff also argues that ski lessons would have taught Nathaniel to sit down when skiing out of control and therefore the accident would have been avoided. However, West Virginia recognizes "that skiing as a recreational sport is hazardous to skiers, regardless of all feasible safety measures which can be taken." W.Va. Code, § 20-3A-5. Thus, plaintiff did not present a sufficient forecast of evidence to overcome the rebuttable presumption that Nathaniel was incapable of negligence.

Plaintiff argues, however, that she is not required to present a forecast of evidence sufficient to overcome the rebuttable presumption because whether the rebuttable presumption that a child between the ages of seven and fourteen is incapable of negligence has been overcome is a question for a jury. North Carolina case[2] law does indicate that whether the presumption has been rebutted is generally a question for the jury. *See Brown v. Lyons*, 93 N.C. App. 453, 460, 378 S.E.2d 243, 247-48 (1989). Moreover, "our appellate courts have consistently held that summary judgment is rarely appropriate in negligence actions[.]" *Patterson v. Pierce*, 115 N.C. App. 142, 143, 443 S.E.2d 770, 771 (1994). However, the purpose of summary judgment is "to 'eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim . . . of a party is exposed.' " *Hall v. Post*, 85 N.C. App. 610, 613, 355 S.E.2d 819, 822 (1987), *rev'd on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988).

Nonetheless, plaintiff refers to *Wilson v. Bright*, 255 N.C. 329, 121 S.E.2d 601 (1961), as support for her contention that the jury must determine whether the presumption has been rebutted. In *Wilson*, a nine-year old boy lost his shoe while riding a bicycle, and a car collided with his bicycle while he was bending over to pick up his shoe. *Id.* at 331-32, 121 S.E.2d at 602-03. His father sued for damages on his behalf, and the defendant alleged contributory negligence as an affirmative defense. *Id.* The jury determined the defendant was negligent and the boy was not contributorily negligent. *Id.* The defendant moved for an involuntary nonsuit after the jury verdict, and the

2. Under our conflict of laws rules, whether a party has presented sufficient evidence to have an issue presented to the jury is determined by the law of the forum. *See Kirby v. Fulbright*, 262 N.C. 144, 136 S.E.2d 652 (1964); *Chewning v. Chewning*, 20 N.C. App. 283, 201 S.E.2d 353 (1973).

defendant appealed after the trial court denied its motion. *Id.* at 330, 121 S.E.2d at 602. Our Supreme Court determined that the question of whether the boy was capable of contributory negligence was for the jury. *Id.* at 331-32, 121 S.E.2d at 603. Indeed, the facts indicated a sufficient factual dispute as to whether a young boy bending over to pick up a shoe without maintaining a proper lookout for oncoming traffic constituted contributory negligence. The driver testified she noticed the boy riding his bike in front of her car when she was about a half a car length away and she was traveling down the center of the road when the child was struck. *Id.* The boy testified he was on the right-hand side of the road and not in oncoming traffic. *Id.* These disputed facts created a jury question as to whether the nine-year old boy was capable of contributory negligence.

As previously discussed, plaintiff did not present a sufficient forecast of evidence to create a jury question regarding the rebuttable presumption that Nathaniel was incapable of negligence due to his age. *See supra.* Although summary judgment is disfavored in negligence actions, "summary judgment should be entered where the forecast of evidence before the trial court demonstrates that a plaintiff cannot support an essential element of his claim." *Patterson v. Pierce*, 115 N.C. App. at 143, 443 S.E.2d at 771. To hold otherwise would indicate that summary judgment would never be appropriate in cases where the rebuttable presumption applies even though a party did not present a forecast of evidence sufficient to overcome the presumption. Accordingly, we conclude summary judgment was properly entered as plaintiff failed to present a sufficient forecast of evidence to present a jury question as to whether the rebuttable presumption has been overcome.

In sum, the third-party defendants' motion to dismiss the appeal from the 31 October 2003 order is granted. After careful review of West Virginia law, we affirm the trial court's order granting defendants' motion for summary judgment. As we have concluded the trial court did not erroneously grant summary judgment in favor of defendants, we do not address the parties' contentions regarding assumption of risk and contributory negligence.

Affirmed.

Judges CALABRIA and LEVINSON concur.

[169 N.C. App. 118 (2005)]

PRITCHETT & BURCH, PLLC, PLAINTIFF v. REBECCA H. BOYD, W.B. LONG, JOHN HUNTER DAILEY, AND OLIVIA DAILEY ALBERTI, DEFENDANTS

No. COA04-420

(Filed 15 March 2005)

1. Attorneys; Contracts— breach of contract—discharged attorney—costs—summary judgment

The trial court did not err in an action arising out of a contingency fee contract to perform legal services and for representation during a caveat proceeding by awarding summary judgment in favor of defendants on plaintiff discharged law firm's claim for breach of contract and by denying plaintiff's motion for summary judgment on this claim, because: (1) although plaintiff contends defendants are contractually obligated to pay plaintiff thirty-three and one-third percent of the settlement amount even though the written settlement agreement was never executed by defendants, plaintiff presents no authority to support its argument; (2) the legal services contract is silent on whether defendants agreed to pay costs independent of the outcome at trial, and any ambiguity in the contract is to be construed against plaintiff, the drafting party; and (3) plaintiff presented no case authority to support its argument that defendants were contractually obligated to reimburse costs plaintiff incurred on their behalf.

2. Quantum Meruit— contingency fee contracts between attorney and client—attorney discharged—attorney fees

The trial court erred in an action arising out of a contingency fee contract to perform legal services and for representation during a caveat proceeding by awarding summary judgment in favor of plaintiff law firm on its quantum meruit claim for attorney fees, and the case is remanded for entry of summary judgment in favor of defendants because although in contingency fee contracts between an attorney and client quantum meruit permits a claim for and an award of attorney fees and costs once the client discharges the attorney, plaintiff is not entitled to recover fees under quantum meruit since there was no settlement or judgment in favor of defendants which was the contingency specified in the attorney fee contract.

3. Quantum Meruit— contingency fee contracts between attorney and client—attorney discharged—costs and expenses

The trial court did not err in an action arising out of a contingency fee contract to perform legal services and for representation during a caveat proceeding by awarding summary judgment in favor of plaintiff law firm on its quantum meruit claim for costs and expenses advanced by plaintiff to defendants because: (1) the North Carolina Rules of Professional Conduct in effect during the pendency of this case prohibited a lawyer from advancing court costs unless the client remains ultimately liable for such costs and expenses; and (2) plaintiff cannot be liable for costs even in a contingency fee contract.

Appeal by plaintiff and cross-appeal by defendants from judgment entered 15 December 2003 by Judge Quentin T. Sumner in Bertie County Superior Court. Heard in the Court of Appeals 2 December 2004.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr., and Lars P. Simonsen, for plaintiff-appellant/cross-appellee.

The Blount Law Firm, P.A., by Marvin K. Blount, Jr., Rebecca Cameron Blount, and Harry H. Albritton, Jr., for defendants-appellees/cross-appellants.

TYSON, Judge.

Pritchett & Burch, PLLC ("plaintiff") appeals from the trial court's judgment awarding summary judgment to Rebecca H. Boyd ("Boyd"), W.B. Long ("Long"), John Hunter Dailey ("Dailey"), and Olivia Dailey Alberti ("Alberti") (collectively, "defendants") on its breach of contract claim. Defendants' cross-appeal the award of summary judgment for plaintiff on its *quantum meruit* claim. We affirm in part, reverse in part, and remand.

I. Background

In 1998, defendants entered into a contingency fee contract with plaintiff to perform legal services and to represent them in a caveat proceeding involving the purported Last Will and Testament of Francis M. Barnes ("Barnes"), deceased, a native of Martin County. The parties executed an employment contract in which defendants

agreed to pay plaintiff a contingent fee in the amount of thirty-three percent of "any settlement, verdict or recovery" from the caveat.

A. The Initial Action

Barnes died purportedly testate on or about 17 October 1996. Defendants contested the propounded Last Will and Testament of Barnes dated 22 November 1989 ("the 1989 Will"). Defendants are named beneficiaries under an earlier Last Will and Testament of Barnes dated 25 May 1967 ("the 1967 Will").

On 21 September 1998, plaintiff filed a caveat to the 1989 Will on behalf of defendants. Plaintiff conducted discovery, including taking numerous depositions in and outside of North Carolina. Plaintiff advanced costs incurred for conducting those depositions. Plaintiff, as defendants' agent, also retained the services of a certified public accountant, Richard Cox ("Cox"), to conduct an audit of Barnes's estate and trust. Cox performed the audit and issued a memorandum of his findings. Plaintiff advanced payment for Cox's services.

The propounders of the 1989 Will moved for summary judgment. The motion was calendared for hearing on 1 September 2000. At the hearing, the parties entered into settlement negotiations, which plaintiff alleges resulted in a settlement agreement. The settlement terms were reduced to writing and signed by: (1) William W. Pritchett, Jr., ("Pritchett"), a member of the plaintiff law firm; (2) the propounders of the 1989 Will; and (3) the presiding trial judge. Plaintiff contends that defendants accepted the settlement. Defendants did not sign the agreement and deny they agreed to the settlement offer.

Under the "settlement" terms, Barnes's estate agreed to pay a total amount of $1,200,000.00 to defendants. Based on the agreement, $332,053.67 was to be paid to plaintiff: $300,000.00 in attorney's fees and $32,053.67 in advanced costs and expenses.

On or about 20 September 2000, defendants notified plaintiff that they refused to sign the Settlement Agreement and discharged plaintiff from further representation. Defendants retained the services of The Blount Law Firm to represent them further in the caveat proceeding.

The propounders of the 1989 Will moved to enforce the settlement agreement purportedly agreed to by the parties on 1 September 2000. Following a hearing, the trial court denied the propounders' motion by order entered 24 January 2001. Although Pritchett testified

at that hearing, neither plaintiff nor Pritchett joined the motion to enforce or were parties to the caveat proceeding.

Defendants, now represented by The Blount Law Firm, tried the caveat proceeding before a jury on 29 January 2001. The jury found that the 1989 Will was invalid due to Barnes's lack of testamentary capacity at the time she executed the Will. Defendants proceeded to probate in solemn form the 1967 Will wherein they were named beneficiaries. The jury rendered a verdict that Barnes had revoked the 1967 Will. Defendants recovered nothing from the Barnes's estate and exhausted all appeals. The jury's verdict was favorable to defendants on the 1989 Will, but adverse to defendants on the 1967 Will. The jury's verdict determined Barnes died intestate. That determination became the final judgment in the underlying case, after all appeals were exhausted.

B. The Present Action

On 13 September 2002, plaintiff filed a complaint against defendants and alleged claims for breach of contract and *quantum meruit*. Defendants moved to dismiss for plaintiff's failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After plaintiff moved for summary judgment and attached supporting documents, defendants also moved for summary judgment.

According to the affidavit of plaintiff's bookkeeper and office manager, Virginia Jenkins, attorney Pritchett expended 160.22 hours representing defendants in the underlying caveat proceeding. Pritchett customarily charged an hourly rate of $175.00. Travis Ellis, an associate with plaintiff, expended 15.5 hours on the case and customarily billed an hourly rate of $115.00. Various paralegals and members of plaintiff's staff also worked in the case, including May Robertson, who spent 4.25 hours on the case and was billed at an hourly rate of $85.00.

Plaintiff also advanced costs on behalf of defendants in the prosecution of the caveat proceeding. Virginia Jenkins's uncontradicted affidavit shows that plaintiff advanced $32,689.90 in costs and expenses on behalf of defendants, including: (1) expert witness fees paid to Cox, CPA, in the amount of $29,090.50; (2) court reporter costs of $2,549.45; (3) filing fees of $35.00; and (4) $1,014.95 for business meals and travel by Pritchett and other members of the firm.

The trial court granted summary judgment for defendants on plaintiff's breach of contract claim and granted summary judgment for plaintiff on its *quantum meruit* claim in the amount of $62,872.15. The trial court concluded "the hourly rates charged by the plaintiff for the work of its partners, associates and paralegals are hourly rates that are regularly and customarily charged by attorneys with similar experience and expertise and are reasonable hourly rates . . . ." The trial court also concluded the "expenses advanced by plaintiff for defendants were reasonable and necessary expenses which were incurred on behalf of and for the benefit of defendants." Both parties appeal.

II. Issues

We must determine whether the trial court erred by: (1) granting summary judgment for defendants on its discharged attorney's claim for breach of contract; and (2) granting summary judgment for plaintiff on its *quantum meruit* claim.

III. Standard of Review

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).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is nonexistent, 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 . . . . 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 v. Harnett Cty. Bd. of Educ., 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520, *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004) (internal citations and quotations omitted).

IV. Breach of Contract

[1] Plaintiff contends the trial court erred in granting summary judgment for defendants and denying its motion for summary judgment on its claim for breach of contract. We disagree.

A. Settlement Agreement

Plaintiff argues defendants are contractually obligated to pay plaintiff thirty-three and one-third percent of the "settlement" amount even though the written settlement agreement was never executed by defendants. In its brief, the only authority cited regarding this assignment of error is *Clerk of Superior Court of Guilford County v. Guilford Builders Supply Co.*, 87 N.C. App. 386, 361 S.E.2d 115 (1987), *disc. rev. denied*, 321 N.C. 471. 364 S.E.2d 918 (1988), which plaintiff concedes is contrary to its argument and attempts to distinguish. We are bound by prior decisions of this Court. *In the Matter of Appeal from the Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

Plaintiff presents no authority to support its argument in violation of the mandatory requirements of our appellate rules. *See* N.C.R. App. P. 28(b)(6) (2004); *Holland v. Heavner*, 164 N.C. App. 218, 595 S.E.2d 224, 226 (2004) (holding that appellate rules are mandatory and " 'failure to follow [them] will subject an appeal to dismissal' ") (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (citations omitted)). Plaintiff's assignment of error that defendants accepted the terms of the settlement is dismissed. N.C.R. App. P. 28(b)(6); *see State v. Walters*, 357 N.C. 68, 85-86, 588 S.E.2d 344, 355, *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003); *Byrne v. Bordeaux*, 85 N.C. App. 262, 265, 354 S.E.2d 277, 279 (1987) (citing *Groves & Sons v. State*, 50 N.C. App. 1, 273 S.E.2d 465 (1980), *cert. denied*, 302 N.C. 396, 279 S.E.2d 353 (1981)).

B. Costs

Plaintiff cites *Scott v. United Carolina Bank*, 130 N.C. App. 426, 503 S.E.2d 149 (1998), *disc. rev. denied*, 350 N.C. 99, 528 S.E.2d 584 (1999), in support of its claim that defendants should be held responsible for costs it advanced to Cox. *Scott* states, "[a]n agent acting within the scope of his authority is not liable upon a contract made for his principal, absent an agreement to be bound by the contract." 130 N.C. App. at 434, 503 S.E.2d at 154 (citations omitted). Here, the legal services contract is silent on whether defendants agreed to pay costs independent of the outcome at trial. Any ambiguity in the contract is to be construed against plaintiff, the drafting party. *See*

NovaCare Orthotics & Prostetics East, Inc. v. Speelman, 137 N.C. App. 471, 476, 528 S.E.2d 918, 921 (2000). Plaintiff presents no case authority to support its argument that defendants were contractually obligated to reimburse costs plaintiff incurred on their behalf.

Aside from an attorney's ethical requirements, discussed below, plaintiff failed to forecast material facts or questions of law to support a breach of contract claim regarding costs. This assignment of error is dismissed.

V. *Quantum Meruit*

[2] Defendants contend the trial court erred in granting summary judgment for plaintiff on the issue of *quantum meruit*. We disagree.

> *Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. It operates as an equitable remedy based upon a quasi contract or a contract implied in law. A *quasi* contract or a contract implied in law is not a contract. An implied contract is not based on an actual agreement, and *quantum meruit* is not an appropriate remedy when there is an actual agreement between the parties. Only in the absence of an express agreement of the parties will courts impose a *quasi* contract or a contract implied in law in order to prevent an unjust enrichment.

Paul L. Whitfield, P.A. v. Gilchrist, 348 N.C. 39, 42, 497 S.E.2d 412, 414-15 (1998). Generally, *quantum meruit* is unavailable as a remedy where an express agreement exists between the parties. *See Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 328, 595 S.E.2d 759, 765 (2004) ("Recovery in *quantum meruit* is not, in any event, available when, as here, there is an express contract.").

In contingency fee contracts between an attorney and client, once the client discharges the attorney, *quantum meruit* permits a claim for and an award of attorney's fees and costs. *See Randolph v. Schuyler*, 284 N.C. 496, 502, 201 S.E.2d 833, 837 (1974). This Court has stated

> [a] contract for legal services is not like other contracts. The client has the right to discharge his attorney at any time, and it is our view that upon such discharge the attorney is entitled to recover the reasonable value of the services he has already provided. As the New York Court noted in *Martin v. Camp*, [219 N.Y. 170, 114 N.E. 46 (1916)]: "The rule secures to the attorney the

> right to recover the reasonable value of the services which he has rendered, and is well calculated to promote public confidence in the members of an honorable profession whose relation to their clients is personal and confidential." *Id.* at 176, 114 N.E. at 48.

Covington v. Rhodes, 38 N.C. App. 61, 66, 247 S.E.2d 305, 309 (1978). "[A] claim by an attorney who has provided legal service pursuant to a contingency fee agreement and then fired has a viable claim in North Carolina in *quantum meruit* against the former client or its subsequent representative." *Guess v. Parrott*, 160 N.C. App. 325, 331, 585 S.E.2d 464, 468 (2003).

A. Attorneys Fees

Defendants argue that plaintiff was not entitled to recover attorney's fees under the theory of *quantum meruit* because defendants never settled or received a favorable judgment. "It is the skill, diligence, ability, experience, judicial knowledge, and judgment of the attorney that is thereby rewarded, and the performance of duties that require no such qualities is wholly insufficient to sustain such fee as the true measure of such services can be ascertained on a *quantum meruit*." *Randolph*, 284 N.C. at 502, 201 S.E.2d at 836 (1974) (quoting *Dorr v. Camden*, 55 W.Va. 226, 46 S.E. 1014 (1904); citing 7 C.J.S., Attorney and Client, § 186 b).

Recovery, however, is conditioned upon occurrence of the contingency specified in the attorney's fee contract. *Clerk of Superior Court of Guilford County*, 87 N.C. App. at 389, 361 S.E.2d at 118. In *Covington*, unlike defendants at bar, the former clients obtained a favorable recovery in the underlying action and satisfied the original fee schedule arrangement that was contingent upon prevailing in the matter. 34 N.C. App. at 66, 247 S.E.2d at 309. In *Clerk of Superior Court of Guilford County*, this Court explained:

> [W]e believe it would be improper to burden the client with an absolute obligation to pay his former attorney regardless of the outcome of the litigation. The client may and often is very likely to be a person of limited means for whom the contingent fee arrangement offers the only realistic hope of establishing a legal claim. Having determined that he no longer has the trust and confidence in his attorney necessary to sustain that unique relationship, he should not be held to have incurred an absolute obligation to compensate his former attorney. Rather, since the attorney agreed initially to take his chances on recovering any fee whatever, we believe that the fact that the success of the litiga-

> tion is no longer under his control is insufficient to justify imposing a new and more onerous burden on the client.

Id. at 390-91, 361 S.E.2d at 118 (quoting *Fracasee v. Brent*, 6 Cal.3d 784, 792, 100 Cal. Rptr. 385, 390, 494 P.2d 9, 14 (1972)); *see also Rosenberg v. Levin*, 409 So.2d 1016, 1022 (Fla. S. Ct. 1982) ("[I]n contingency fee cases, the cause of action for *quantum meruit* arises only upon the successful occurrence of the contingency. If the client fails in his recovery, the discharged attorney will similarly fail and recover nothing."). Here, since there was no settlement or judgment in favor of defendants—the contingency specified in the attorney's fee contract—plaintiff is not entitled to recover fees under *quantum meruit*.

The trial court erred by granting plaintiff's motion for summary judgment on the issue of *quantum meruit* for attorney's fees. As defendants obtained no recovery in the underlying caveat action, the contingency in the contract did not occur. We reverse that portion of the trial court's judgment awarding summary judgment on *quantum meruit* to allow plaintiff to recover attorney's fees and remand for entry of summary judgment for defendants on this issue.

Defendants' present attorneys have petitioned the estate in the underlying action pursuant to N.C. Gen. Stat. § 6-21(2) (2003), which states, "the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit." Our ruling above does not prejudice plaintiff's ability to seek fees from the estate. We do not express an opinion regarding plaintiff's entitlement to such fees.

B. Costs Recovery Under *Quantum Meruit*

[3] Plaintiff asserts and defendants concede that at the time of this action, the North Caroline Rules of Professional Conduct prohibited a lawyer from advancing court costs unless "the client remains ultimately liable for such costs and expenses." *See Street v. Smart Corp*, 157 N.C. App. 303, 306, 578 S.E.2d 695, 698 (2003) (quoting Rev. R. Prof. Conduct N.C. St. B. 1.8(e), 2003 Ann. R. (N.C.) 625).

Here, *quantum meruit* is the proper remedy for plaintiff to seek to recover their expenses incurred in advancing the costs of litigation despite the fact defendants had no recovery in the underlying action. At oral argument, defendants conceded that Cox's deposition, taken by plaintiff, was presented at trial in the original action. Defendants

received the benefit of plaintiff's advancement of costs and must remain liable.

Based on our review of the Rules of Professional Conduct in effect during the pendency of this case, plaintiff cannot be liable for costs, even in a contingency fee contract. *See Street*, 157 N.C. App. at 306, 578 S.E.2d at 698. We hold the trial court did not err in awarding summary judgment for plaintiff on the issue of costs and expenses under the equitable doctrine of *quantum meruit*. Defendants' assignment of error on costs is overruled.

VI. Conclusion

The trial court did not err in awarding summary judgment for defendants on plaintiff's claim for breach of contract. The trial court erred by awarding to plaintiff attorney's fees under the doctrine of *quantum meruit*, when defendants recovered nothing in the underlying action and plaintiff had and has failed to assert a remedy at law under N.C. Gen. Stat. § 6-21(2). Defendants are entitled to summary judgment on this issue. The trial court did not err by granting summary judgment for plaintiff on the issue of costs. Plaintiff was not allowed to advance those costs without defendants, as clients, remaining ultimately liable under ethics rules. The trial court's judgment is affirmed in part, reversed in part, and remanded for entry of summary judgment for defendants on plaintiff's claim for attorney's fees under *quantum meruit*.

Affirmed in part; Reversed in part; and Remanded.

Judges TIMMONS-GOODSON and GEER concur.

STATE OF NORTH CAROLINA v. DOUGLAS PAGE, JR.

No. COA04-452

(Filed 15 March 2005)

1. Search and Seizure— gunshot residue test—no court order—exigent circumstances

The trial court's findings supported its conclusion that, under the circumstances, exigent circumstances and probable cause existed to conduct a gunshot residue test without a nontestimo-

nial identification or other order. The results of the test were correctly admitted.

2. Search and Seizure— gunshot residue test—consent

The trial court's finding of fact supports its conclusion that defendant consented to a gunshot residue test and, even if defendant had objected to this finding, it was supported by properly admitted testimony from officers who participated in administering the test.

3. Constitutional Law— right to counsel—gunshot residue test

While it was error to fail to advise defendant of his right to have counsel present during a gunshot residue test, the error was not prejudicial because defendant did not assign error to the admission of statements made during the test. The physical evidence would have been seized even if counsel had been present.

4. Homicide— second-degree murder—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of second-degree murder where, resolving all inconsistencies in favor of the State, defendant admitted being at the scene when the victim was shot, did not render assistance in reviving the victim or contact emergency personnel regarding the shooting, defendant's hands contained gunshot residue, and defendant's inconsistent statements regarding his location during the shooting is circumstantial evidence of defendant's guilt.

Appeal by defendant from judgment entered 21 November 2003 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 11 January 2005.

Attorney General Roy Cooper, by Assistant Attorney General Diane A. Reeves, for the State.

M. Alexander Charns, for defendant-appellant.

TYSON, Judge.

Douglas Page, Jr. ("defendant") appeals from a judgment entered after a jury found him to be guilty of second-degree murder. The trial court sentenced defendant to a minimum term of 137 months and a maximum term of 174 months. The trial court did not err when it

denied defendant's motion to suppress and motion to dismiss defendant's charge of second-degree murder. We find no prejudicial error.

I. Background

On 1 May 2002, defendant, Marvin George McNeill ("McNeill"), and Valerie Willis ("Willis") were present at the mobile home where defendant and McNeill lived. Defendant and McNeill worked together repairing cars and mowing grass. Both originally arrived home around 8:00 p.m. They left and returned around 10:40 p.m.

At approximately 10:45 p.m., Willis left to pick up her friend, Diane Luther ("Luther"), and the two women returned to McNeill's mobile home around 11:20 p.m. Upon arrival, they found McNeill "on his knees with his head down in the couch." Willis and Luther obtained a telephone, and Luther called 911. Luther determined that McNeill had a pulse, received assistance from Willis in turning McNeill on his back, and administered CPR to him. Defendant was not present when Willis and Luther arrived but entered the room shortly thereafter. During this time, Willis testified that defendant would not "respond[] to anything," and she "didn't know if he was in shock or what." Luther testified that defendant refused to help her administer aid to McNeill.

Deputy Paul Mead ("Deputy Mead") responded to the scene and spoke with defendant. Defendant stated he was standing outside unloading lawn equipment when he heard several gunshots. He came around the mobile home and noticed a light-skinned black male with dreadlocks get into a car and flee the scene. Later, defendant stated to McNeill's brother that he had been inside the house in the restroom when he heard "several" shots. Defendant stated he came out and saw the man with the same description he had given to Deputy Mead in the living room and running out the front door. Luther and Willis testified that upon returning to the house that evening, they had observed a blue-green car nearby and the man inside might have had "dreads."

McNeill was known to sell drugs from his mobile home. Defendant informed McNeill's brother that after the shooting, McNeill had asked him to hide two bags of marijuana located in the house. After the shooting, defendant showed McNeill's brother where he had hidden the bags.

No weapon was recovered. The trial court admitted, over defendant's motion to suppress and subsequent objection, evidence from a

gunshot residue test taken the night of the shooting that revealed gunshot residue on the back of defendant's hands. Although defendant argued otherwise, the State presented evidence defendant had consented to the administration of the gunshot residue test. Defendant was shackled when the test was conducted, although Deputy Mead testified defendant was not under arrest and had not received a Miranda warning. The trial court admitted the evidence concluding that: (1) "it would have been a practical impossibility for law enforcement to secure a non-testimonial identification order . . . ;" (2) probable cause and exigent circumstances had existed; and (3)defendant consented to the test.

Defendant did not present any evidence. The jury returned a verdict of guilty of second-degree murder. Defendant was sentenced in the presumptive range to a minimum term of 137 months and a maximum term of 174 months. Defendant appeals.

II. Issues

The issues presented on appeal are whether the trial court erred by: (1) failing to grant defendant's motion to suppress the results from a gunshot residue test; and (2) denying defendant's motion to dismiss the charge of second-degree murder.

III. Motion to Suppress

[1] Defendant contends the trial court erred by admitting into evidence gunshot residue test results taken the night of the murder. We disagree.

> On appeal of a motion to suppress, our review is
>
> limited to a determination of whether competent evidence supported the trial court's findings of fact and whether the findings of fact supported the trial court's conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). In the present case, defendant does not object to the findings of fact which the trial court made in the order denying defendant's motion to suppress. Defendant merely assigns error to the denial of the motion to suppress. Therefore, the issues before this Court are whether the trial court's findings of fact support its conclusions of law and whether its conclusions of law are legally correct.

State v. Coplen, 138 N.C. App. 48, 52, 530 S.E.2d 313, 317, *disc. rev. denied*, 352 N.C. 677, 545 S.E.2d 438 (2000). Here, defendant did not

assign error to the trial court's findings of fact. Our review is limited to: (1) whether the findings of fact support the conclusions of law; and (2) whether the conclusions of law are correct. *Id.*

The unchallenged findings of fact show, in part:

4. At or about midnight on the 1st day of May 2002 law enforcement arrived at the trailer home of the victim after receiving a 911 call and found the victim deceased as a result of several gunshot wounds.

5. Located at the scene was the defendant along with two distraught females, one being a sister of the victim and a friend of the victim's sister. The two females had arrived at the trailer some time after the shooting, discovering the victim on the floor of the trailer.

6. Upon the arrival of law enforcement and emergency personnel, a large crowd of neighbors and relatives formed around the scene necessitating the placing [of] crime scene tape to secure the scene.

7. The defendant initially told law enforcement that he had been outside the victim's trailer unloading lawnmowers from a trailer when he heard several gunshots and saw a light-skinned black male with dreadlocks run from the trailer, entering a vehicle that left the scene.

8. The defendant later said he was in the rear of the trailer when he heard the gunshots and saw someone running from the trailer.

9. While the officers were securing the scene, the defendant was placed in the rear of a patrol car and the car door was left open and the defendant was told that he was not under arrest.

10. It was decided by law enforcement that the gunshot residue test would be administered on the defendant. The defendant was asked if he would submit to the test and he consented. The defendant was asked if leg shackles could be attached while the test was being administered and the defendant consented.

11. The [gunshot residue] test was then administered on the defendant and the shackles were then removed.

12. Crime scene investigator Jimmy Shackleford testified that the testing guidelines require that the [gunshot residue] test be administered within 3 or 4 hours of suspected use of a weapon. He also testified that evidence of a firing of a gun could be destroyed by wiping or washing hands.

13. The officer also testified that from the remote location of the crime scene, it would have taken at least 2 to 3 hours to obtain a search warrant to administer the [gunshot residue] test.

Based upon these and other findings of fact, the trial court concluded: (1) "it would have been a practical impossibility for law enforcement to secure a non-testimonial identification order . . . due to the time limitations and the evanescent nature of the gunshot residue evidence;" (2) "under the circumstances known to the officers at the scene and the conflicting stories told to them by the defendant and the fact that the defendant was the last admitted person to have seen the victim before the shooting, probable cause and exigent circumstances existed" to warrant the gunshot residue test without a court order; and (3) "the defendant consented to the [gunshot residue] test willfully, understandingly and voluntarily."

A. Probable Cause

Defendant argues the officers did not have probable cause to conduct the gunshot residue test and conducted the test in violation of his constitutional rights. We disagree.

"The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (citing *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994)).

> The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures and establishes, as a general rule, that a valid search warrant must accompany every search or seizure. However, an exception arises when law enforcement officers have probable cause to search and the circumstances of a particular case render impracticable a delay to obtain a warrant. If probable cause to search exists and the exigencies of the situation make a warrantless search necessary, it is lawful to conduct a warrantless search.
>
> Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonable

> trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Coplen, 138 N.C. App. at 54, 530 S.E.2d at 318 (internal quotations and citations omitted).

A gunshot residue test is a nontestimonial identification procedure "comparable to handwriting exemplars, voice samples, photographs, and lineups." *Id.* at 54, 530 S.E.2d at 318. In *Coplen*, this Court upheld the trial court's denial of a motion to suppress evidence obtained through a gunshot residue test based on the existence of probable cause and exigent circumstances to administer the test. 138 N.C. App. at 55, 530 S.E.2d at 318-19. The trial court's unchallenged findings of fact in *Coplen* showed: (1) the defendant made inconsistent statements to investigating officers regarding the alleged shooting; (2) the victim "was alive when she left the home to get him some beer and she found him in a pool of blood when she returned home;" (3) expert testimony "that gunshot residue wipings must be taken within a four hour time frame, measured from the time of shooting, in order to have any evidentiary value when dealing with a live subject engaging in normal activities;" and (4) testimony that "gunshot residue may be easily removed or destroyed through normal activities such as wringing hands, putting hands in pockets, or shaking hands . . . [and] may be easily destroyed by a person wishing to destroy evidence by such action as hand washing." 138 N.C. App. at 56-57, 530 S.E.2d at 319-20. These findings are substantially similar to those at bar.

Here, the trial court supported its conclusion that probable cause and exigent circumstances existed by finding: (1) defendant was "the last admitted person to have seen the victim before the shooting;" (2) two females arrived on the scene following the shooting and found defendant to be the only person present; (3) defendant offered inconsistent statements to investigating officers regarding his whereabouts during the shooting; (4) the State presented testimony from Investigator Jimmy Shackleford that the test must be conducted within three to four hours of suspected firearm use; and (5) the State presented testimony that evidence of firing a weapon could be destroyed by "wiping or washing hands." The trial court's findings of fact support its conclusion that "under the circumstances known to the officers at the scene and the conflicting stories told to them by the defendant, . . . probable cause and exigent circumstances existed to conduct [the] procedure without a court order of any type."

B. Consent

[2] Defendant argues no probable cause existed to conduct a gunshot residue test without a court order. Even if no probable cause existed, the gunshot residue test results may be admitted if "obtained by some [other] lawful procedure." *Coplen*, 138 N.C. App. at 54, 530 S.E.2d at 318.

> Consent . . . has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given. For the warrantless, consensual search to pass muster under the Fourth Amendment, consent must be given and the consent must be voluntary. Whether the consent is voluntary is to be determined from the totality of the circumstances.

Smith, 346 N.C. at 798, 488 S.E.2d at 213 (citations omitted).

Defendant's assignments of error relating to the denial of his motion to suppress do not challenge the trial court's *finding* of consent. He argues error in the trial court's conclusion of law that "the defendant consented to the [gunshot residue] test willfully, understandingly and voluntarily." The trial found as a fact, unchallenged on appeal, that defendant consented to the gunshot residue test.

Deputy Mead and Investigator Shackleford, two officers who participated in administering the test, testified that defendant consented to the test, did not withdraw his consent, and continued to cooperate during the administration of the gunshot residue test. Even if defendant had objected to or challenged this finding of fact, it is supported by the officers' properly admitted testimony. Defendant did not object to the officers' *voir dire* testimony regarding defendant's consent and cooperation. The trial court's finding of fact supports its conclusion that defendant consented to the gunshot residue test. This assignment of error is overruled.

C. Right to Counsel

[3] Defendant also argues that any consent he gave was not knowingly or voluntarily made because he did not have counsel present. In *Coplen*, this Court restated our Supreme Court's holding in *State v. Odom*, 303 N.C. 163, 167, 277 S.E.2d 352, 355, *cert. denied*, 454 U.S. 1052, 70 L. Ed. 2d 587 (1981), that there is "no right to have counsel

present during a gunshot residue test." 138 N.C. App. at 57, 530 S.E.2d at 320.

However, under N.C. Gen. Stat. § 15A-279(d) (2003):

> Any such person is entitled to have counsel present and *must be advised prior to being subjected to any nontestimonial identification procedures* of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel. . . . No statement made during nontestimonial identification procedures by the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made.

(Emphasis supplied). In *Coplen*, this Court explained the impact of this statute on an assignment of error identical to that defendant asserts here, "Section 15A-279(d) 'addresses the implementation of orders requiring submission for nontestimonial identification procedures. . . . [and] the provision protects the defendant from having statements made during the nontestimonial identification procedure used against her at trial where counsel was not present during the procedure.' " 138 N.C. App. at 58, 530 S.E.2d at 320 (quoting *State v. Young*, 317 N.C. 396, 410, 346 S.E.2d 626, 634 (1986) (other citations omitted)).

Applying the statute to the *Coplen* facts, this Court noted the "defendant did not seek to suppress *statements* made during the procedure but instead sought to suppress the *results* of the test." *Coplen*, 138 N.C. App. at 58, 530 S.E.2d at 320 (emphasis supplied); *quoted in State v. Pearson*, 356 N.C. 22, 36, 566 S.E.2d 50, 58, *reh'g denied*, 356 N.C. 177, 569 S.E.2d 271 (2003), *cert. denied*, 537 U.S. 1121, 154 L. Ed. 2d 802 (2002). In *Coplen*, we held that N.C. Gen. Stat. § 15A-279(d) did not "afford defendant any relief on the counsel issue." 138 N.C. App. at 58, 530 S.E.2d at 320. Here, defendant neither identifies in the record nor assigns error to the admission of any *statements* made during the administration of the gunshot residue test to show a violation of defendant's right to counsel.

Our Supreme Court addressed the application of N.C. Gen. Stat. § 15A-279(d) and held "[a]lthough it was error to deny defendant counsel at the [] procedure, such error was not prejudicial under these circumstances." *Pearson*, 356 N.C. at 39, 566 S.E.2d at 60. The Supreme Court held there was no prejudicial error and stated "[t]he

physical evidence would have been seized from the defendant even if counsel had been present . . . ." *Id.* at 35, 566 S.E.2d at 58.

Here, defendant was not denied counsel but was not advised of his right to have counsel present. While this omission was error under N.C. Gen. Stat. § 15A-279(d), *see Pearson*, *supra*, defendant has failed to show any prejudice by "demonstrat[ing] how the presence of counsel when the evidence was taken would have further protected his rights." *Id.*

Following this Court's precedent in *Coplen* and our Supreme Court's holding in *Pearson*, defendant's assignment of error is overruled.

IV. Motion to Dismiss

[4] Defendant contends the trial court erred by denying his motion to dismiss the charge of second-degree murder. We disagree.

In ruling on a motion to dismiss:

> When a defendant makes a motion to dismiss based on the insufficiency of the evidence, the trial court must determine whether the State presented substantial evidence of each essential element of the offense and that the defendant was the perpetrator of the offense. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). The evidence must be considered in the light most favorable to the State. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Coplen, 138 N.C. App. at 58-59, 530 S.E.2d at 320-21.

Second-degree murder is "defined as the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. King*, 353 N.C. 457, 484, 546 S.E.2d 575, 595 (2001) (citations and quotations omitted), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002, *reh'g denied*, 535 U.S. 1030, 152 L. Ed. 2d 646 (2002). To prove malice, "the State need only show that defendant had the intent to perform the act . . . in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *State v. Miller*, 142 N.C. App. 435, 441, 543 S.E.2d 201, 205 (2001) (citation omitted).

In defendant's statements to Deputy Mead, he admitted being present at the scene when McNeill was shot. The State presented evidence that defendant did not render assistance in reviving McNeill or contact emergency personnel regarding the shooting. Defendant's hands were shown to contain gunshot residue. We held the admission of this evidence was not error. Additionally, defendant's inconsistent statements regarding his location during the shooting is circumstantial evidence of defendant's guilt. *See State v. Rick*, 342 N.C. 91, 99, 463 S.E.2d 182, 186 (1995) (holding "the circumstantial evidence presented in this case, together with the reasonable inferences which could be properly drawn therefrom, is sufficient for the jury's consideration and determination").

Resolving all inconsistencies in the evidence in the light most favorable to the State, we hold the trial court did not err in submitting the charge of second-degree murder to the jury. This assignment of error is overruled.

V. Conclusion

The trial court did not err in denying defendant's motion to suppress or motion to dismiss. Defendant received a fair trial free from prejudicial errors he assigned and argued.

No Prejudicial Error.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. ROBERT GREGORY WINSLOW

No. COA04-647

(Filed 15 March 2005)

1. Motor Vehicles— habitual DWI—indictment—date of prior conviction—amendment—Rule of Lenity

The indictment used to charge defendant with habitual DWI was not fatally defective even though it originally alleged that one of defendant's prior DWI convictions occurred on 1 April 1993, which was actually the date of the offense and eight days outside the seven-year limitation of the habitual DWI statute, N.C.G.S. § 20-138.5(a), where the trial court allowed the prosecu-

tor's motion to amend the indictment to reflect the date of conviction on 11 August 1993. The Rule of Lenity did not require that the date of the offense rather than the date of conviction be used in the interpretation of the DWI statute because the statute clearly refers to prior convictions, and there is no ambiguity in the statute.

2. Indictment and Information— amendment—habitual driving while impaired—no substantial alteration

The trial court did not err in a habitual driving while impaired case by allowing the State to amend the indictment after the State rested, because: (1) permitting the State to amend the indictment in the instant case to reflect the date of conviction rather than the date of the offense did not impair defendant's ability to defend the charge of habitual DWI; (2) time was not of the essence as the indictment specified defendant was being charged with habitual DWI; (3) defendant never denied having been convicted of the 1993 DWI, he had notice of the 1993 DWI, and he had ample time to prepare for trial; and (4) the amendment to the indictment did not substantially alter the charge set forth in the indictment.

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 6 November 2001 by Judge J. Richard Parker in Gates County Superior Court. Heard in the Court of Appeals 13 January 2005.

Attorney General Roy Cooper, by Assistant Attorney General Patricia A. Duffy, for the State.

Richard E. Jester for defendant-appellant.

BRYANT, Judge.

Robert Gregory Winslow (defendant) appeals from a jury verdict entered 6 November 2001 finding him guilty of driving while impaired (DWI). Defendant was sentenced as a Prior Record Level IV to a minimum of 25 months and a maximum of 30 months for habitual driving while impaired (habitual DWI). Defendant failed to give timely notice of appeal. On 27 October 2003, defendant's Petition for Writ of Certiorari was granted pursuant to N.C. R. App. P. 21.

On 9 April 2000 defendant was arrested and charged with DWI. Defendant was also charged with habitual DWI in violation of

N.C. Gen. Stat. § 20-138.5 based on prior DWI convictions dated as follows: 1 April 1993 in Perquimans County; 22 November 1998 in Gates County; and 2 October 1999 in Suffolk County, Virginia. Defendant pled not guilty and a jury trial followed on 5 November 2001. After the State had rested its case, counsel for defendant moved to dismiss the indictment. The trial court allowed the State to amend the indictment as to defendant's 1993 DWI to allege the conviction date of 11 August 1993 versus the occurrence date of 1 April 1993, over defendant's objection. The jury returned a guilty verdict of DWI. Defendant admitted his status of habitual DWI and the trial court entered judgment, sentencing him to 25 to 30 months imprisonment. Defendant appeals.

On appeal, defendant raises two issues: (I) whether the indictment is fatally defective, and (II) whether the trial court erred in allowing the State to amend the indictment after the State rested.

(I)

[1] Defendant argues his felony conviction for habitual DWI should be vacated on the ground that the indictment charging him with habitual DWI was fatally defective. Specifically, defendant contends one of the three offenses enumerated in the indictment was outside the seven-year period, as provided in N.C. Gen. Stat. § 20-138.5(a) (2003):

> 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.

Jurisdiction to try an accused for a felony depends upon a valid bill of indictment. *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969). A valid bill of indictment must allege all essential elements of a statutory offense. *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975). Pursuant to N.C. Gen. Stat. § 15A-928(c) (2003), a defendant may admit a previous conviction and thereby establish an element of an offense. *State v. Smith*, 291 N.C. 438, 441-42, 230 S.E.2d 644, 646 (1976). An indictment is fatally defective if it "wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998); *State v. Crawford*, 167 N.C. App. 777, 779, 606 S.E.2d 375, 377 (2005) (citations omitted).

In this case, the indictment for habitual DWI alleged that defendant was convicted of DWI on 1 April 1993. Defendant was charged with the current DWI offense on 9 April 2000. Defendant argues the 1 April 1993 offense was eight days outside of the seven year limitation. When defendant brought his motion to dismiss based on a defective indictment, the prosecutor explained to the trial court a typographical error existed, since the certified copy of the court records and the Department of Motor Vehicles report indicated defendant was actually convicted of the DWI offense on 11 August 1993, within the seven-year period required by statute. The prosecutor moved to amend the indictment to reflect the date of conviction rather than the date of the offense, which motion the trial court granted. The trial court denied defendant's motion to dismiss based on the indictment and based on insufficient evidence. Defendant thereafter admitted to the prior convictions as alleged in the amended indictment.

Defendant argues the Rule of Lenity[1] should be applied to require that this Court use the date of the *offense*, rather than the date of *conviction* in interpreting N.C.G.S. § 20-138.5, and therefore omit the 1993 DWI from the indictment; however, N.C.G.S. § 20-138.5 clearly refers to prior *convictions*. Therefore, because there is no ambiguity in the statute, we decline to apply the Rule of Lenity.

In this case, the indictment alleged the essential elements of the offense of habitual driving while impaired, since it alleged defendant had been previously convicted of three DWI offenses. Further, no fatal variance is shown between the indictment and proof at trial since defendant admitted the prior convictions, based on the amended indictment. *State v. Baldwin*, 117 N.C. App. 713, 716, 453 S.E.2d 193, 194 (1995) (holding defendant stipulated to convictions alleged in indictment; indictment was sufficient to support charge of violating N.C. Gen. Stat. § 20-138.5(a); and indictment served as proper notice to defendant). Defendant has failed to show that he is entitled to the relief sought. This assignment of error is overruled.

(II)

[2] Defendant next argues the trial court erred in allowing the State to amend the indictment after the close of the State's evidence.

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1. The Rule of Lenity is defined as "a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." Black's Law Dictionary, 1332-33 (7th ed. 1999).

As previously noted, N.C. Gen. Stat. § 15A-923 (e) provides that a bill of indictment may not be amended. N.C. Gen. Stat. § 15A-923 (e) (2003). "An 'amendment' is 'any change in the indictment which would substantially alter the charge set forth in the indictment.' " *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984); *State v. Lewis*, 162 N.C. App. 277, 285, 590 S.E.2d 318, 324 (2004). In addition, this Court has held, "[a] bill of indictment is legally sufficient if it charges the substance of the offense and puts the defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated." *State v. Rankin*, 55 N.C. App. 478, 480, 286 S.E.2d 119, 120 (1982); *State v. Ingram*, 160 N.C. App. 224, 225, 585 S.E.2d 253, 255 (2003). "The elements need only be alleged to the extent that the indictment (1) identifies the offense; (2) protects against double jeopardy; (3) enables the defendant to prepare for trial; and (4) supports a judgment on conviction." *State v. Holliman*, 155 N.C. App. 120, 126, 573 S.E.2d 682, 687 (2002) (quotations omitted).

Our Supreme Court has recognized a judgment should not be reversed when the indictment lists an incorrect date or time " 'if time was not of the essence' " of the offense, and " 'the error or omission did not mislead the defendant to his prejudice.' " *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991) (quoting N.C.G.S. § 15A-924(a)(4)). Also, N.C. Gen. Stat. § 15-155 indicates judgment will not be reversed where time is not of the essence:

> No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, . . . nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened . . . when the court shall appear by the indictment to have had jurisdiction of the offense.

N.C. Gen. Stat. § 15-155 (2003). "A variance as to time . . . becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense." *State v. Price*, 310 N.C. 596, 599, 313 S.E.2d 556, 559 (1984).

Permitting the State to amend the indictment in the instant case to reflect the date of conviction rather than the date of the offense did not impair defendant's ability to defend the charge of habitual DWI.

Here, time was not of the essence as the indictment clearly specified defendant was being charged with habitual DWI. Defendant never denied having been convicted of the 1993 DWI. He had notice of the 1993 DWI and had ample time to prepare for trial. In fact, in response to whether defendant would admit to his prior convictions, defense counsel stated to the trial court, "the defendant after thoughtful inquiry and thoughtful consideration . . . admit[s] the prior convictions." The amendment to the indictment did not substantially alter the charge set forth in the indictment. *See Lewis*, 162 N.C. App. at 285, 590 S.E.2d at 324 (although habitual felon indictment incorrectly stated the date and county of defendant's conviction, it sufficiently notified defendant of the particular conviction that was being used to support his status as habitual felon and defendant did not argue he lacked notice at trial). This assignment of error is overruled.

No error.

Judge JACKSON concurs.

Judge HUNTER concurs in part, dissents in part.

HUNTER, Judge, concurring in part, dissenting in part.

I concur that the habitual impaired driving statute clearly refers to prior convictions. However, I respectfully dissent from the majority opinion in that I believe the trial court erroneously allowed an amendment to the habitual impaired driving indictment.

> It is well established that "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." The purpose of an indictment is to give a defendant notice of the crime for which he is being charged. Our General Statutes state that "a bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2001), which has been interpreted by our Supreme Court to mean that "an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.' "

State v. Cathey, 162 N.C. App. 350, 352, 590 S.E.2d 408, 410 (2004) (citations omitted). "Thus, a 'non-essential variance is not fatal to the charged offense,' and any 'averment unnecessary to charge the offense . . . may be disregarded as inconsequential surplusage.' " *State v. Brady*, 147 N.C. App. 755, 758, 557 S.E.2d 148, 151 (2001) (citation omitted).

In this case, defendant was indicted for a violation of N.C. Gen. Stat. § 20-138.5(a) (2003), habitual impaired driving, which 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." *Id.* The conviction of three or more offenses involving impaired driving within seven years of the present offense are necessary elements for the charge of habitual impaired driving. *See id.*; *State v. Vardiman*, 146 N.C. App. 381, 384, 552 S.E.2d 697, 700 (2001) (indicating habitual impaired driving is a substantive offense with the conviction of three or more offenses within seven years of the present offense as necessary elements). Therefore the date of the conviction is necessary to charge the offense and not mere surplusage. *See Brady*, 147 N.C. App. at 758, 557 S.E.2d at 151. In this case, the present offense occurred on 9 April 2000. The State acknowledged in its brief that the original indictment erroneously reflected the date of the 1993 driving while impaired offense, 1 April 1993, rather than the date of the 1993 conviction, 11 August 1993. By including the offense date in the indictment, which was eight days outside of the seven year time period for habitual impaired driving, the State did not properly indict defendant for habitual impaired driving. Accordingly, the indictment amendment allowed at trial was a substantial alteration of the charge and was not allowed under N.C. Gen. Stat. § 15A-923(e).

Moreover, the indictment amendment was a substantial alteration of the charge because it elevated defendant's offense to a felony from a misdemeanor. To be convicted of habitual impaired driving, the State must first prove the defendant violated N.C. Gen. Stat. § 20-138.1, impaired driving, a misdemeanor. If the State meets its burden of proof regarding whether the defendant violated N.C. Gen. Stat. § 20-138.1, the State must then prove the defendant had three prior convictions involving impaired driving within seven years of the present offense. *See* N.C. Gen. Stat. § 15A-928(c). If the State so proves, or if the defendant stipulates to the prior convictions, the defendant is punished as a Class F felon and is sentenced to not less than twelve months active imprisonment. *See* N.C. Gen. Stat. § 20-138.5.

In this case, the State did not allege three prior convictions within seven years in the original habitual impaired driving indictment.[2]

2. We note that the State was not precluded from filing a superseding indictment prior to trial which properly alleged three prior convictions within the seven year time period.

Thus, under the original indictment, defendant could not be convicted of habitual impaired driving and would only be sentenced for the misdemeanor impaired driving charge. By amending the indictment at trial to include a conviction date within the seven year time period, defendant's charge was enhanced to a felony. An indictment amendment which elevates a misdemeanor charge to a felony is a substantial alteration and is not permitted under N.C. Gen. Stat. § 15A-923(e). *See State v. Moses*, 154 N.C. App. 332, 338, 572 S.E.2d 223, 228 (2002) (stating the addition of an aggravating factor which elevates a charge to a felony from a misdemeanor is a substantial alteration of an indictment). Accordingly, I would vacate judgment on the habitual impaired driving indictment and remand for resentencing on the misdemeanor charge of impaired driving.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. RALPH EDWARD McLAURIN, JR., DEFENDANT

No. COA04-722

(Filed 15 March 2005)

1. **Attorneys— discipline—motion to continue show cause hearing—abuse of discretion standard**

The Disciplinary Hearing Commission of the North Carolina State Bar (DHC) did not abuse its discretion by denying defendant's motion to continue the show cause hearing resulting from defendant's failure to provide the State Bar with documentation showing he had paid his taxes in compliance with a consent order arising out of defendant's prior willful failure to timely file federal individual income tax returns with the Internal Revenue Service for the calendar years 1992 through 1996, because defendant failed to show sufficient grounds warranting a continuance of the hearing when his accountant was present at the hearing and could have testified to the information defendant contended required the DHC to continue the hearing.

2. **Attorneys— suspension of law license—whole record test—severity of punishment**

The whole record test revealed that the Disciplinary Hearing Commission of the North Carolina State Bar's (DHC) suspension of defendant's license for ninety days was not excessive,

did not fail to account for evidence from which conflicting inferences could be drawn, and was not beyond the appropriate measure of discipline as defined by the provisions of 27 N.C.A.C. § 1B.0114(x), because: (1) the unchallenged findings of fact were sufficient to support DHC's conclusion of law that defendant had violated the 6 November 2001 consent order of discipline and the violation was knowing and willful; (2) DHC found that defendant violated the consent order, and therefore, it was permissible for DHC to suspend defendant's license; and (3) there was no abuse of discretion regarding the severity of the punishment when defendant's violation of the consent order was of the same nature as his original offense and DHC only activated a small portion of the two-year suspension.

Appeal by defendant from an order of discipline entered 1 December 2003 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 15 February 2005.

Carolin Bakewell for plaintiff-appellee.

Stark Law Group, PLLC, by Thomas H. Stark and W. Russell Congleton, for defendant-appellant.

STEELMAN, Judge.

Defendant, Ralph Edward McLaurin, Jr., appeals from an order of the Disciplinary Hearing Commission of the North Carolina State Bar (DHC) suspending his license to practice law for ninety days. For the reasons stated herein, we affirm the DHC's order.

Defendant was licensed to practice law in North Carolina in 1975 and practiced in Chatham County. On 29 June 1999, defendant was charged in federal court with five counts of willful failure to timely file federal income tax returns for the calendar years 1992 through 1996 in violation of 26 U.S.C. § 7203. On 7 October 1999, defendant pled guilty to one count of misdemeanor failure to timely file a federal income tax return for 1992. On 10 April 2000, judgment was entered finding defendant guilty on one count and dismissing the remaining four counts. The judgment placed defendant on probation for one year subject to standard and special conditions of supervision.

Following entry of judgment in federal court, the North Carolina State Bar began its own investigation of defendant and instituted dis-

ciplinary proceedings. The matter came on for hearing before the DHC on 9 November 2001. Following that hearing, defendant entered into a consent order of discipline with the State Bar, in which he consented to the findings of fact, conclusions of law, and an order of discipline. Specifically, the consent order found that defendant "wilfully failed to timely file federal individual income tax returns with the Internal Revenue Service for the calendar years 1992 through 1996." The DHC concluded that defendant had been "convicted of a criminal offense showing professional unfitness in violation of N.C. Gen. Stat. § 84-28(b)(1)," and that defendant had "committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects, in violation of Rule 8.4(b) of the Revised Rules of Professional Conduct." The consent order suspended defendant's law license for a period of two years, but stayed the suspension for three years subject to certain conditions. The conditions relevant to this appeal required defendant to: (1) timely file all state and federal tax returns; (2) timely pay all required estimated or annual state and federal taxes; and (3) provide the Secretary of the State Bar written verification on or before April 15 of each year of the stayed suspension that all required state and federal tax returns had been filed or written verification that a timely extension was sought, to be submitted within one week of the filing date of that return. Finally, the consent order provided that if defendant failed to comply with any one or more of the conditions, the DHC could lift the stay and activate his suspension, or any portion thereof, pursuant to § B.0114(x) of the North Carolina State Bar Discipline and Disability Rules.

By the terms of the consent order, defendant was required to provide written verification of his compliance as to his 2001 tax returns by 15 April 2002. Having received no correspondence from defendant, the State Bar wrote to defendant on 13 August 2002, notifying him of the delinquency and asking him to produce the required documentation. In response, defendant sent a handwritten note, dated 22 August 2002, stating he had filed his 2000 tax returns and had received an extension to file his 2001 returns.

On 13 January 2003, the State Bar requested defendant produce copies of any extensions received for his 2001 tax returns, and to advise the State Bar whether the 2001 return had been filed and the taxes paid. When defendant failed to respond to the letter, the State Bar filed a motion seeking an order to show cause. On 12 February 2003, the DHC issued a show cause order. Shortly thereafter, defend-

ant sent a letter to the State Bar stating that his 2001 tax returns were timely filed after an extension was granted. Defendant provided none of the documents requested in the 13 January 2003 letter. The 15 April 2003 deadline for submitting written verification of the filing of his 2002 tax returns also passed without defendant submitting any documentation to the State Bar.

On 9 May 2003, the DHC held a hearing on the motion to show cause and issued an order suspending defendant's license for ninety days. Defendant moved to have the order set aside for lack of notice of the hearing. On 9 July 2003, the DHC granted defendant's motion for a stay of the order suspending his license for ninety days. By order entered 2 September 2003, the DHC set a hearing on defendant's motion for a new hearing for 7 November 2003. The order also contained specific language notifying defendant that if his motion was allowed, the new hearing on the State Bar's motion to show cause would commence on 7 November 2003 immediately following the conclusion of the hearing on defendant's motion.

On 7 November 2003, the DHC granted defendant's motion for a new trial, and defendant immediately moved for a continuance of the hearing on the motion to show cause. Defendant argued he was awaiting "other information" from his accountant that would show he was in compliance with the consent order. The DHC denied defendant's motion to continue. A hearing was held on 7 November 2003 on the DHC's show cause order.

After hearing evidence presented by the State Bar and defendant, the DHC concluded that defendant committed knowing and willful violations of the consent order, and ordered defendant's license be suspended for ninety days. Defendant appeals.

[1] In defendant's first assignment of error he contends the DHC erred in denying his motion to continue the show cause hearing. We disagree.

Although defendant's assignment of error is couched in terms of the DHC abusing its discretion in denying his motion for a continuance, defendant argues in his brief the appellate standard of review is the "whole record test." It is true that the "whole record test" is the standard of judicial review to be employed when considering the adequacy of an administrative agency's findings of fact in its final decision. *See N.C. State Bar v. Talford*, 356 N.C. 626, 632, 576 S.E.2d 305, 309-10 (2003); *N.C. State Bar v. DuMont*, 304 N.C. 627, 642-43, 286

S.E.2d 89, 98-99 (1982) (*DuMont II*). However, the "whole record test" is not the correct standard of review when considering the appropriateness of a preliminary, discretionary decision, such as a motion to continue. Rather, a motion to continue is addressed to the sound discretion of the applicable tribunal, and will not be overturned absent a showing that the decision was so arbitrary that it 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). Continuances are generally not favored and the party seeking the continuance has the burden of showing sufficient grounds for it. *Id.* at 581, 525 S.E.2d at 227.

Defendant maintained that the reason for his failure to provide the State Bar with documentation showing he had paid his taxes in compliance with the consent order was because he was waiting for a tax refund based upon losses incurred by a limited liability company in which he had an interest. At the 7 November 2003 hearing, defendant claimed additional information regarding his taxes would be forthcoming within a matter of a few days, at most. Defendant had over two months to obtain any evidence he believed would be crucial to his case. On 2 September 2003, the DHC entered an order setting the hearing date for defendant's motion for a new hearing and notifying him that if his motion was granted the show cause hearing would be held on 7 November 2003. Nevertheless, defendant failed to have this "additional information," which he contended would show his compliance with the consent order. Further, defendant's counsel advised the DHC that defendant's accountant was present at the hearing and could testify as to this matter if necessary, and that they were ready to proceed with the hearing on the motion to show cause if the continuance was denied. Defendant did not call the accountant as a witness at the hearing.

Defendant failed to show sufficient grounds warranting a continuance of the hearing, in that his accountant was present at the hearing and could have testified to the information defendant contended required the DHC continue the hearing. The DHC did not abuse its discretion in denying defendant's motion to continue. This assignment of error is overruled.

[2] In defendant's second assignment of error he contends the DHC's suspension of his license for ninety days was excessive, failed to account for evidence from which conflicting inferences could be drawn, and was beyond the appropriate measure of discipline as defined by statute.

Defendant first argues that the findings of fact do not support the DHC's suspension of his license. When reviewing the adequacy of administrative findings, we must apply the "whole record test." *Talford*, 356 N.C. at 632, 576 S.E.2d at 309-10; *DuMont II*, 304 N.C. at 642-43, 286 S.E.2d at 98. Under the "whole record test," this Court must determine whether the DHC's findings of fact are supported by the evidence when viewed in light of the whole record, and whether those findings support its conclusions of law. *Talford*, 356 N.C. at 632, 576 S.E.2d at 309. Such evidence will be deemed sufficient if it is of a kind that a reasonable person might accept as adequate to support a conclusion. *Id.* at 632, 576 S.E.2d 309-10.

An order of discipline had already been entered against defendant—a conditional stay of the suspension of his law license. This hearing was on a motion to show cause, pursuant to 27 N.C.A.C. § 1B.0114(x), which provides that the DHC may "enter an order lifting the stay and activating the suspension, or any portion thereof, . . . if it finds that the North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition."

Our Supreme Court has directed that in order to correctly apply the whole record test, the following analysis must be performed to determine whether the DHC's decision has a "rational basis in the evidence": "(1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision?" *Talford*, 356 N.C. at 634, 576 S.E.2d at 311.

We need not address the first step in this analysis, since it is well settled that where no exception is taken to a finding of fact, the finding is presumed to be supported by competent evidence and is binding on appeal, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991); and the findings of fact which defendant did not assign as error are themselves sufficient to support the conclusions of law.

We now consider the second step in the analysis, whether the order's express findings of fact adequately support its subsequent conclusions of law. The unchallenged findings provide:

> 11. The order suspended Defendant's law license for two years and stayed the suspension of Defendant's law license for three years, based on various conditions. Pursuant to the order,

Defendant was required, inter alia, to timely pay all state and federal income taxes.

12. Defendant agreed to pay all taxes on a timely basis as a condition of the stay of the suspension of his law license.

13. The Defendant failed to pay all estimated annual income taxes and annual income taxes due and owing for 2001 on a timely basis.

14. The Defendant testified that he did not pay all of his federal income taxes for the year 2001 because he believed that he would ultimately receive a refund of taxes paid owing to losses incurred by a partnership in which he had an interest. The Defendant had not received a refund as of the hearing date herein.

15. The Defendant did not present any evidence that he was unable to pay his entire annual income taxes for the year 2001.

These unchallenged findings were sufficient to support the DHC's conclusion of law that defendant had violated the 6 November 2001 consent order of discipline and the violation was knowing and willful.

Finally, we consider the third step, whether the expressed findings or conclusions adequately support the DHC's ultimate decision to suspend defendant's license. If the DHC found that defendant violated the consent order by the "greater weight of the evidence," then the DHC "may enter an order lifting the stay and activating the suspension or any portion thereof[.]" 27 N.C.A.C. § 1B.0114(x). The DHC found that defendant violated the consent order. Therefore, it was permissible for the DHC to suspend defendant's licence.

Defendant further argues that the punishment imposed, suspension of his law licence for ninety days, was too severe in light of the balancing analysis set forth in *Talford*. *See Talford*, 356 N.C. at 638, 576 S.E.2d at 313 (holding that in order to warrant the punishment of suspension or disbarment there must be a clear showing of (1) how the attorney's actions resulted in significant or potentially significant harm to the entities listed in the statute, and (2) why suspension and disbarment are the only sanctions that can adequately protect the public from future wrongs by the offending attorney). The *Talford* analysis deals with the appropriateness of a sanction imposed by the DHC in an initial disciplinary hearing. In this case, an order of discipline had been entered *by consent*. As provided in the consent order, the DHC concluded that the appropriate discipline of defendant was

the suspension of his license for two years. Thus, it was unnecessary to apply the *Talford* balancing analysis to determine the appropriate discipline. Rather, the appropriate discipline for a violation of the previous order was expressly set forth in the consent order, which stated: "[i]f during the stay of the two-year suspension, McLaurin fails to comply with any one or more conditions stated in paragraphs 2(a)-(h) above, then the stay of the suspension of his law license may be lifted as provided in §.0114(x) of the North Carolina State Bar Discipline & Disability Rules."

The only question before the DHC was how much of the two year suspension should be activated. We review this decision under an abuse of discretion standard. Because defendant's violation of the consent order was of the same nature as his original offense, and the DHC only activated a small portion of the two year suspension, we discern no abuse of discretion. The DHC acted properly under the provisions of 27 N.C.A.C. § 1B.0114(x). This assignment of error is without merit.

For the reasons discussed herein, we affirm the ruling of the DHC, suspending defendant's license to practice for ninety days.

AFFIRMED.

Judges WYNN and HUDSON concur.

J.C. HATCHER, PLAINTIFF v. HARRAH'S NC CASINO COMPANY, LLC, DEFENDANT

No. COA04-823

(Filed 15 March 2005)

1. Indians— jurisdiction—Eastern Band of Cherokees—casino gambling dispute

The trial court correctly concluded that it did not have subject-matter jurisdiction over a dispute concerning the payment of a prize won at a casino owned by the Eastern Band of the Cherokee Indians. While the trial court erred by concluding that it lacked jurisdiction because gambling violated North Carolina public policy, the Cherokees have a greater interest than the State in resolving patron disputes with the casino, have policies and

procedures for resolving such disputes, and the exercise of state court jurisdiction would unduly infringe on the self-goverance of the Cherokees.

2. Indians— jurisdiction—Eastern Band of Cherokees—casino gambling—civil actions

The North Carolina State Courts did not have jurisdiction over an unfair trade practices claim arising from a disputed prize at a casino owned by the Eastern Band of the Cherokee Indians. The provision of the Compact between the Eastern Band of Cherokee Indians and the State of North Carolina allowing State courts to apply and enforce criminal and regulatory laws does not grant jurisdiction over civil actions of this sort.

3. Appeal and Error— failure to cite authority—dismissal of argument

The failure to cite authority resulted in the dismissal of an appellate argument concerning jurisdiction of a dispute arising in a casino owned by the Eastern Band of the Cherokee Indians.

Appeal by plaintiff from judgment entered 2 February 2004 by Judge Richlyn D. Holt in Jackson County District Court. Heard in the Court of Appeals 3 February 2005.

McLean Law Firm, P.A., by Russell L. McLean, III, for the plaintiff.

Bridgers & Ridenour, PLLC, by Ben Oshel Bridgers, for the defendant.

TIMMONS-GOODSON, Judge.

J.C. Hatcher ("plaintiff") appeals an order of the trial court granting a motion by Harrah's NC Casino Company ("defendant") to dismiss his complaint for unfair and deceptive trade practices for lack of subject matter jurisdiction. For the reasons stated herein, we affirm the order of the trial court.

The factual and procedural history of this case is as follows: Harrah's Cherokee Casino in Cherokee, North Carolina, is owned by the Eastern Band of Cherokee Indians[1] and managed by defendant. Plaintiff alleges that on 3 May 1998, he inserted money into a machine at the casino which returned a display announcing that plaintiff won

1. The Eastern Band of Cherokee Indians is not a party to this action.

a prize of $11,428.22. Plaintiff attempted to collect his winnings, but was told by a member of the casino staff that the prize would not be awarded to him.

After initially filing a complaint with the Cherokee Tribal Gaming Commission, plaintiff filed the underlying complaint in Jackson County District Court on 31 August 2000, alleging that the casino's failure to award the prize to plaintiff constitutes an unfair and deceptive trade practice. In response to the complaint, defendant filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Civil Procedure Rule 12(b)(1). The trial court granted defendant's motion to dismiss, concluding that "[t]he Indian Gaming Regulatory Act preempts the exercise of authority by this Court of the gaming dispute which is the underlying basis for the Plaintiff's claim." Plaintiff appealed the trial court's order to this Court.

In deciding *Hatcher v. Harrah's N.C. Casino Co.*, 151 N.C. App. 275, 565 S.E.2d 241 (2002) ("*Hatcher I*"), this Court was guided by a two-prong test set forth in *Jackson Co. v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (1987). The two-prong test requires our courts to consider the following: (1) "whether federal law preempted state-court jurisdiction;" and (2) "whether the exercise of state-court jurisdiction 'unduly infringe[d] on the self-governance of the Eastern Band of Cherokee Indians.' " *Hatcher I*, 151 N.C. App. at 277, 565 S.E.2d at 243 (citing *Swayney*, 319 N.C. at 56, 565 S.E.2d at 415, and quoting *Swayney*, 319 N.C. at 58, 565 S.E.2d at 417). With regard to the first prong, this Court held that "state-court jurisdiction is not preempted by federal law in this case." *Id.* at 278, 565 S.E.2d at 243. With regard to the second prong, we noted that "[t]he *Swayney* Court identified three criteria that are 'instructive on the issue of infringement.' These criteria are '(1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) the nature of the interest to be protected.' " *Id.* at 279-80, 565 S.E.2d at 244 (quoting *Swayney*, 319 N.C. at 59, 352 S.E.2d at 417-18). We held that "[f]ull consideration of the third factor identified in *Swayney* requires remand to the district court for further proceedings." *Id.* at 280, 565 S.E.2d at 244. The *Hatcher I* Court issued the following mandate to the trial court:

> On remand, the district court should determine whether state-court jurisdiction would "unduly infringe[] on the self-governance of the Eastern Band of Cherokee Indians," by applying the factors identified in *Swayney*. In particular, the district court should

> determine the nature of the activities in which plaintiff engaged and whether those activities are inconsistent with the public policy of this State. If so, the third *Swayney* factor counsels against a finding of subject matter jurisdiction.

Id. at 280, 565 S.E.2d at 244.

On remand, the trial court conducted a hearing "at which legal counsel for the parties appeared, with the Defendant presenting testimony of witnesses and both attorneys presenting documentary evidence and both counsel presenting oral argument." Upon considering the evidence and the arguments, the trial court entered an order wherein it took judicial notice of the following statutes, regulations and agreements:

(A) the Indian Gaming Regulatory Act, 25 U.S.C. 2710 et seq.;

(B) the Tribal-State Compact Between the Eastern Band of Cherokee Indians and the State of North Carolina, approved September 22, 1994;

(C) the Tribal Gaming Ordinance of the Eastern Band of Cherokee Indians, the Cherokee Code, Chapter 16;

(D) the Management Agreement between The Eastern Band of Cherokee Indians and Harrah's NC Casino Company, LLC, dated June 19, 1996;

(E) the General Statutes of the State of North Carolina.

The trial court's order contained the following pertinent finding of fact:

(J) That in May of 1998 the Plaintiff was in the Cherokee Casino playing an electronic game manufactured by Leisure Time, the game being a five card poker game which had been approved as a game involving skill or dexterity by the Certification Commission created by the Tribal-State Compact.

Based on its findings of fact, the trial court entered the following conclusions of law:

1. That the nature of the Plaintiff's activities in the Cherokee Casino are the type of acts which are inconsistent with the public policy of this State.

2. That by virtue of Section 16-12.12 of the Cherokee Gaming Ordinance, the Plaintiff consented to the jurisdiction of the Tribe for these types of activities.

3. That the Compact between the Eastern Band of Cherokee Indians and the State of North Carolina does not consent to or grant civil jurisdiction to the State of North Carolina with respect to gaming activities on the Cherokee Indian Reservation.

4. That the Plaintiff's Unfair Trade Practice claim for relief arose out of the Plaintiff's activities at the Cherokee Casino.

5. That exercise of jurisdiction in the present case would unduly infringe upon the self-governance of the Eastern Band of Cherokee Indians.

The trial court thus determined that it did not have subject matter jurisdiction, and dismissed plaintiff's complaint for a second time. It is from this order that plaintiff appeals.

The issues presented on appeal are whether the trial court erred by concluding that (I) it did not have subject matter jurisdiction because gambling was against North Carolina public policy; (II) the State of North Carolina has no civil jurisdiction with respect to gaming activities on the Cherokee Indian Reservation; and (III) plaintiff consented to the jurisdiction of the tribe for gaming activities conducted on the reservation.

[1] Plaintiff first argues that the trial court erred by concluding that the court lacked subject matter jurisdiction. Specifically, plaintiff argues that state court has jurisdiction because the Eastern Band of Cherokee Indians is not a party to the action, and state court jurisdiction "does not infringe in any way upon the political integrity of the Eastern Band or unduly threaten its rights of self-governance." We disagree.

"[T]he standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*." *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002) (citing *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001)). Article 37 of our criminal law statutes generally makes it illegal to engage in organized gambling for cash prizes in North Carolina. N.C. Gen. Stat. § 14-289-14-309.20 (2003). Specifically, N.C. Gen. Stat. § 14-306.1(a) provides that "[i]t

shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine as defined in subsection (c) of this section." (2003). Subsection (c) provides that "a video gaming machine means a slot machine as defined in G.S. 14-306(a) and other forms of electrical, mechanical, or computer games such as . . . [a] video poker game or any other kind of video playing card game." N.C. Gen. Stat. § 14-306.1(c)(1) (2003). However, the statute provides the following exception: "This section does not make any activities of a federally recognized Indian Tribe unlawful or against public policy, which are lawful for any federally recognized Indian Tribe under the Indian Gaming Regulatory Act, Public Law 100-497." N.C. Gen. Stat. § 14-306.1(n) (2003). Thus, the trial court erred by concluding that North Carolina public policy is violated by the video poker machine operated by the Eastern Band of Cherokee Indians. However, our analysis of state court subject matter jurisdiction does not end here.

We now turn to the second prong of the two-prong test identified in *Swayney*, which more broadly instructs us to weigh the interests of the Indians in settling this dispute against the interests of the state. As evidenced by our extensive statutory law prohibiting gambling, and as noted by this Court in *Hatcher I*, the state has very little interest in protecting plaintiff's right to engage in an activity that, but for the Indian Gaming Regulatory Act, would be contrary to our public policy. *See Hatcher I*, 151 N.C. App. at 280, 565 S.E.2d at 244 ("[I]f plaintiff seeks to recover gambling proceeds, the State of North Carolina would have no interest in protecting plaintiff's right to enforce his contract, although the Tribe may.").

Conversely, "[t]he Cherokee Indians have an interest in making their own laws and enforcing them." *Jackson County ex rel. Smoker v. Smoker*, 341 N.C. 182, 184, 459 S.E.2d 789, 791 (1995) (citing *Williams v. Lee*, 358 U.S. 217, 3 L. Ed. 2d 251 (1959)). The tribe has in fact established a procedure for resolving disputes arising out of gaming activity. Chapter 16 of The Cherokee Code sets forth the tribe's procedure for resolving patron disputes:

> Any person who has any dispute, disagreement or other grievance with the gaming operation that involves currency, tokens, coins, or any other thing of value, may seek resolution of such dispute from the following persons and in the following order:
>
> (a) A member of the staff relevant of the gaming operation;

(b) The supervisor in the area of the relevant gaming operation in which the dispute arose;

(c) The manager of the relevant gaming operation; and

(d) The [Cherokee Tribal Gaming] Commission.

THE CHEROKEE CODE § 16-12.08 (1996).

> When a person brings a dispute for resolution pursuant to section 16-12.08, the complainant has the right to explain his or her side of the dispute, and to present witnesses in connection with any factual allegations. At each level, if the dispute remains unresolved, the complainant shall be informed of the right to take the dispute to the next higher level as set forth in section 16-12.08. . . .

THE CHEROKEE CODE § 16-12.09 (1996). "All disputes which are submitted to the gaming Commission shall be decided by the Commission based on information provided by the complainant, including any witnesses for, or documents provided by or for, the complainant. . . ." THE CHEROKEE CODE § 16-12.10 (1996).

It is clear that the Eastern Band of Cherokee Indians has policies and procedures in place to resolve disputes such as the one plaintiff presents in the case *sub judice*. Thus, for our courts to exercise jurisdiction in this case would plainly interfere with the powers of self-government conferred upon the Eastern Band of Cherokee Indians and exercised through the Cherokee Tribal Gaming Commission. *Swayney*, 319 N.C. at 62, 352 S.E.2d at 419 (quoting *Fisher v. District Court*, 424 U.S. 382, 387-88, 47 L. Ed. 2d 106, 112 (1976). It would subject a dispute arising on the reservation between the casino and its patron to a forum other than the one the Indians have established for themselves. *Id.*

Whereas the Eastern Band of Cherokee Indians has a greater interest in resolving patron disputes related to activities within the casino, and has policies and procedures for resolving such disputes, the interests of the Indians outweigh the interests of the state. Therefore, the exercise of state court jurisdiction in the present case would unduly infringe on the self-governance of the Eastern Band of Cherokee Indians. For these reasons, we hold that our state courts must yield subject matter jurisdiction to the Eastern Band of Cherokee Indians in the case *sub judice* and affirm the decision of the trial court.

[2] Plaintiff next argues that the trial court erred by concluding that "the Compact between the Eastern Band of Cherokee Indians and the State of North Carolina does not . . . grant civil jurisdiction to the State of North Carolina with respect to gaming activities on the Cherokee Indian Reservation." We disagree.

"If a party presents to the trial court a question concerning . . . errors in conclusions of law, *de novo* is the appropriate standard of review." *N.C. Dep't of Corr. v. McKimmey*, 149 N.C. App. 605, 608, 561 S.E.2d 340, 342 (2002) (citing *Associated Mechanical Contractors, Inc. v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). Section 8 of the Tribal-State Compact between the Eastern Band of Cherokee Indians and the State of North Carolina addresses the application of state laws. Plaintiff specifically cites to the following sections of the Tribal-State Compact as granting state court jurisdiction in this case:

> (A) State civil and criminal laws shall be applicable to and enforceable by the State against any person for activities relating to Class III gaming which occur outside of Eastern Cherokee Lands.
>
> (B) State criminal laws and regulatory requirements shall be applicable to and enforceable by; the State against any person who is not a member of the Tribe for activities relating to Class III gaming which occur on tribal lands.
>
> . . . .
>
> (D) The State shall have concurrent jurisdiction to commence prosecutions for violation of any applicable state civil or criminal law or regulatory requirement as set forth in the Sections 8(A) and 8(B) of this Compact.

Tribal-State Compact Between the Eastern Band of Cherokee Indians and the State of North Carolina, Sept. 22, 1994.

In the present case, the incident that plaintiff complains of took place in a casino located on the Indian reservation. Thus, Section 8(A), which governs gaming activities that "occur outside of Eastern Cherokee Lands," does not apply to this action. Section 8(B) allows our courts to apply and enforce criminal and regulatory laws violated by non-Indians on tribal property, but does not grant jurisdiction over civil actions alleging unfair and deceptive trade practices. Section

8(D) gives the *state* the power to prosecute matters involving civil, criminal and regulatory violations, but does not grant jurisdiction for a *private* cause of action. *See Lea v. Grier*, 156 N.C. App. 503, 508, 577 S.E.2d 411, 415 (2003) *and Lane v. City of Kinston*, 142 N.C. App. 622, 628, 544 S.E.2d 810, 815 (2001) (citations omitted) (Holding that "a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute."). We agree with the trial court that the Tribal-State Compact does not grant state courts jurisdiction over this matter, and accordingly, we affirm the trial court's conclusion of law.

[3] Plaintiff's final argument is that the trial court erred by concluding that "by virtue of Section 16-12.12 of the Cherokee Gaming Ordinance, the Plaintiff consented to the jurisdiction of the Tribe" for disputes related to gaming activities conducted on the reservation. We dismiss this assignment of error.

The Rules of Appellate Procedure require that for each issue that appellant addresses in his brief, "[t]he body of the argument shall contain citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(6) (2004). This rule is mandatory, and failure to follow the rule subjects the appeal to dismissal. *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (citations omitted).

In the present case, plaintiff fails to cite any legal authority in support of his position. Accordingly, we conclude that this issue does not warrant appellate review, and we dismiss this assignment of error.

Having considered all of plaintiff's assignments of error properly brought forward, we conclude that the trial court did not err in granting defendant's motion to dismiss. Accordingly, we affirm the order of the trial court.

AFFIRMED.

Judges BRYANT and LEVINSON concur.

STATE OF NORTH CAROLINA v. CHARLES KEVIN McMILLIAN

No. COA04-375

(Filed 15 March 2005)

1. Identification of Defendants— photographic lineup—illustrative of pretrial identification

Evidence about a photographic lineup and the victim's identification of defendant was admissible where the evidence was admitted to illustrate the pretrial identification of defendant. The officer explained the methods used in the creation of the lineup, and both the officer and the victim testified that the victim's response was not prompted.

2. Evidence— prior arrest for impaired driving and resulting photograph—admission not prejudicial

There was no prejudicial error in an attempted armed robbery prosecution where the court erred by allowing an officer to testify that he had arrested defendant for driving while impaired and the resulting photograph was used in identifying defendant. The testimony about the DWI was not sufficiently similar to the attempted armed robbery to be offered for any permissible purpose; however, defendant took the stand in his own behalf, which allowed the State to proffer evidence regarding the defendant's criminal record, and defendant revealed his prior record during his direct examination.

3. Evidence— officer's testimony about defendant's statement—subsequent testimony—no prejudice

There was no prejudicial error in excluding an officer's testimony about an armed robbery defendant's statement where any error was cured by subsequent testimony.

4. Evidence— testimony about victim's identification—rebuttal—admissibility

The trial court did not err in an attempted armed robbery prosecution by allowing an officer to testify about a witness's conversation with him regarding the identification of defendant. The witness with whom the officer talked had testified for defendant, the officer was called in rebuttal, and his testimony was relevant because it concerned the circumstances surrounding the parties, was probative of his investigation of defendant as

the perpetrator, and aided the jury in understanding the circumstances surrounding the investigation.

Appeal by defendant from judgment entered 22 September 2003 by Judge James Floyd Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 10 January 2005.

Roy Cooper, Attorney General, by Jay L. Osborne, Assistant Attorney General, for the State.

Jon W. Myers, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a judgment entered upon his conviction by a jury of attempted robbery with a dangerous weapon, arising from defendant's attempt to steal money from a pizza delivery man. The evidence presented at trial tended to show that on the evening of 10 September 2002, a call was placed for pizza delivery to 353 Porter Road. When the delivery driver, Michael LaMorte ("LaMorte"), approached the front door, a man holding a gun came out of the bushes, stood approximately 10 feet away, and told him to drop the pizza and give him all his money. The assailant cocked the gun; LaMorte told him he "wasn't going to give him anything" and kicked his assailant in the groin. LaMorte testified that there was enough light to identify his assailant, who was standing about an arm's length away and made an in-court identification of the defendant. LaMorte returned to the pizza parlor and reported the attempted armed robbery to the police. LaMorte testified that he later picked the defendant's photo from a photographic lineup. He also testified that approximately a week after the incident, defendant and another man came to the pizza parlor. He recognized defendant as being the person who had tried to rob him, and acknowledged such when questioned by his manager, Tammy Koonce. Koonce continued to press him, however, asking him three or four times if he was sure. He became upset and told her that "I just picked somebody out because they all look alike," acknowledging that his remark was a racial one.

Sergeant Adam Brinkley ("Brinkley") testified, over defendant's objection, that on 12 April 2002 he was on road patrol and stopped a vehicle which he had seen on other occasions at the Porter Road residence, having answered "quite a few calls for service there." After he stopped the vehicle and ran a license check, he determined that the defendant was driving the vehicle with the permission of the owner,

Ola Mae Wilson ("Wilson"), who resided at 353 Porter Road. Brinkley testified that he charged defendant "with DWI and driving with no license," and took a photograph "at the time of the arrest."

Detective Joel Morissette ("Morissette") testified that after taking a description of his assailant from LaMorte, he investigated the address and realized that Wilson had not ordered any pizza. Wilson also indicated that she did not know anyone meeting the description of LaMorte's assailant. Morissette reasoned that whoever attempted the robbery must have been familiar with 353 Porter Road, so he "researched the location" and discovered defendant's arrest record, noting that his photograph met the description given by LaMorte. Morissette used this photograph, which he testified was more recent than the one Brinkley made, and five others "that would be consistent with his photograph" to create a random photo lineup. Using this lineup, LaMorte identified defendant as the person who robbed him. On cross examination, Morissette testified that he took a written statement from the defendant, but the trial court sustained the State's objection as to what defendant had told Morissette.

Tammy Koonce testified for defendant and related what had occurred when defendant came to the pizza parlor a couple of days after the attempted robbery of LaMorte. Koonce testified that she had gone to high school with defendant, and when he came to the store he asked her why he had been accused of robbing LaMorte. She testified that when she asked LaMorte if he recognized defendant, LaMorte replied, "No, I've never seen him before in my life." When pressed, LaMorte told Koonce that defendant was the guy he had picked out of the lineup. She then testified that later in the evening, she asked LaMorte twice more why he could not initially identify the defendant, and LaMorte finally responded, ". . . they all look alike." Koonce also testified that she had a previous relationship with defendant's cousin, but that it was ending at the time of the alleged robbery. Koonce testified that she related LaMorte's statement to Morissette and the prosecutor but that the prosecutor became upset with her because she had tampered with evidence and "tried to play lawyer."

Defendant's girlfriend, Demica Sinclair ("Sinclair"), testified on defendant's behalf that on 10 September 2002 they went to the grocery store and went back to their house where they remained the whole evening. She also testified that defendant did not have a job, and that he sold drugs.

Defendant testified in his own behalf that he was innocent, that he did not know anything about the robbery, that he was home with Sinclair on the evening in question, and that he did not rob LaMorte and in fact had never seen him until he went to the pizza place on 17 September 2002 to find out why he had been accused. He said that he did not have any conversation with LaMorte while there and only spoke with Koonce, who said that she did not think LaMorte was very sure that defendant had attempted to rob him. He testified that he contacted Morissette after he made bond and denied participating in the crime, but did not provide Morissette with his girlfriend's name because Morissette did not ask for it.

Defendant further testified that he had a DWI; had been arrested for drugs once or twice; pled guilty to possession with intent to manufacture, sell and deliver cocaine, and to misdemeanor possession of drug paraphernalia; and that he had dealt drugs for two or three years. He stated that he made $1,000.00 a week selling drugs and that his customers included residents at 353 Porter Road. He explained that he had traded cocaine for the use of Wilson's car when he was pulled over in April of 2002.

On cross examination, defendant acknowledged that in his written statement, he claimed he was with a friend at the friend's house all day and that Sinclair may not have remembered that he went to a friend's house or that she was mistaken about the time that he came home, but that she was not mistaken about being with him that night.

Wilson testified that she lived at 353 Porter Road, and that defendant had visited her roommate, but that she had never bought drugs from him. She explained that she let defendant's friend borrow her car, and perhaps that friend had allowed defendant to drive it. She also testified that her house was "busted" for drugs, but that they belonged to a houseguest.

After the defense rested, the State recalled Morissette and examined him regarding Koonce's conversation with him during which she related LaMorte's statement to Koonce that he had picked defendant's photo out of the lineup because "they all look alike." Morissette testified that he initially thought Koonce had made an honest mistake by questioning LaMorte in front of defendant about his accusation, but Koonce's "motives became clear" because she was dating defendant's cousin and had gone to high school with defendant. He stated that he was concerned Koonce was

intimidating LaMorte and victimizing him a second time by badgering him about being sure of his identification.

On appeal, defendant brings forward three arguments in support of eight of the eleven assignments of error contained in the record on appeal. His remaining assignments of error are deemed abandoned. N.C.R. App. P. 28 (b)(6) (2004). Defendant contends the trial court erred by (1) permitting testimony concerning defendant's criminal disposition and admitting into evidence the photographic lineup and testimony about how it was created; (2) failing to allow evidence of defendant's conversation with Morissette where he presented his alibi; and (3) allowing evidence regarding Morissette's interview with one of defendant's witnesses.

[1] Defendant's first argument is twofold: first, that the trial court erred by admitting Brinkley's testimony concerning his arrest of defendant for DWI, and second, the inclusion of the photographic lineup created by Morissette. He contends the evidence created an impermissible inference that defendant had a bad character.

Our Supreme Court has held that photographic lineups are admissible as long as they do not violate a defendant's right to due process by being impermissibly suggestive, creating the danger of irreparable mis-identification. *State v. Grimes*, 309 N.C. 606, 609-10, 308 S.E.2d 293, 294-95 (1983) ("all that is required is that the lineup be a fair one and that the officers conducting it do nothing to induce the witness to select one participant rather than another"). In support of his argument, defendant cites *State v. Fulcher*, 294 N.C. 503, 512, 243 S.E.2d 338, 345 (1978), where the Court noted that the State could not offer evidence of defendant's prior criminal record or bad character. In *Fulcher*, however, the Court held the photographs were admissible to illustrate the pre-trial identification of the defendant. *Id.*

In this case, the photographic lineup was admitted for precisely the same purpose. Morissette explained the methods used in the creation of the lineup, and both he and LaMorte testified that LaMorte's response when identifying the defendant was unprompted. The admission of evidence concerning the photographic lineup and LaMorte's identification of defendant was clearly not error.

[2] We agree with defendant, however, that the admission of Brinkley's testimony concerning his arrest of defendant for DWI was error. N.C. Gen. Stat. § 8C-1, Rule 404(b) states that:

> 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). While we acknowledge the State's argument that the photograph and testimony were offered to show defendant's identity, and thus meet the exception contained in Rule 404(b), under the balancing test required by N.C. Gen. Stat. § 8C-1, Rule 403 (2003), we must consider "whether the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial." *State v. Schultz*, 88 N.C. App. 197, 202, 362 S.E.2d 853, 857 (1987), *affirmed*, 322 N.C. 467-68, 368 S.E.2d 386 (1988). Here the testimony by Brinkley that he arrested defendant for DWI is not sufficiently similar to the attempted armed robbery for it to be offered for any permissible purpose. Thus, the trial court erred when it overruled the defendant's objections to the testimony. For two reasons, however, such error does not entitle defendant to a new trial.

It is the defendant's burden not just to show error but also to show that defendant was prejudiced by the error. N.C. Gen. Stat. § 15A-1443 (a) (2003). The erroneous admission of evidence "will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Smith*, 155 N.C. App. 500, 508, 573 S.E.2d 618, 624 (2002) (citation omitted), *disc. review denied*, 357 N.C. 255, 583 S.E.2d 287 (2003).

In this case, defendant took the stand as a witness and testified in his own behalf. Where a defendant takes the stand as a witness, the State is permitted to proffer evidence regarding the defendant's criminal record. "It is unquestionably true . . . that when a defendant charged with a criminal offense does not take the stand as a witness and does not offer evidence of his good character, the State cannot offer evidence of his bad character, including his previous criminal record." *Fulcher*, 294 N.C. at 512, 243 S.E.2d at 345. But when testifying, a "defendant is subject to impeachment by cross-examination generally to the same extent as any other witness" *State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991) and evidence of a prior crime is admissible "if elicited from the witness" on cross examination. N.C. Gen. Stat. 8C-1, Rule 609 (2003).

Moreover, defendant revealed his arrest record and prior criminal record, including the DWI, on his direct examination. Where evidence is admitted over objection and subsequently admitted without objection, any error in the earlier admission of the evidence is cured. *State v. Dawkins*, 162 N.C. App. 231, 234, 590 S.E.2d 324, 328, *disc. review denied*, 358 N.C. 237, 595 S.E.2d 439 (2004). In light of his subsequent testimony, defendant cannot now argue that he was prejudiced by Brinkley's statements.

[3] For similar reasons, we reject defendant's second argument. In his second argument, defendant maintains the trial court erred because it did not allow Morissette to testify concerning defendant's statement to him. However, even assuming *arguendo* there was error in the exclusion of Morissette's testimony concerning the contents of the statement, such error was cured by defendant's subsequent testimony concerning his statement and when Morissette was recalled and re-examined about the statement. *See State v. Hageman*, 307 N.C. 1, 24, 296 S.E.2d 433, 446 (1982) (no prejudice from erroneous exclusion of evidence where same or similar evidence subsequently admitted).

[4] Finally, defendant argues that it was error to permit Morissette to testify about Koonce's conversation with him regarding LaMorte's alleged admission to her that he had never seen defendant before he came to the pizza parlor. Defendant contends the testimony was not relevant and that it impermissibly interjected Morissette's personal opinion into the proceedings.

Evidence that tends 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" is relevant. N.C. Gen. Stat. § 8C-1, Rule 401 (2003). Koonce testified on defendant's behalf about a conversation she had with Morissette and the prosecutor in which she related LaMorte's alleged statement to her. Morissette was called as a rebuttal witness regarding the same conversation. His testimony was relevant, because it concerned "one of the circumstances surrounding the parties, and [was] necessary to be known, to properly understand their conduct or motives." *State v. Arnold* 284 N.C. 41, 48, 199 S.E.2d 423, 427 (1973). Morissette's answers were probative of his investigation regarding LaMorte's identification of defendant as the perpetrator, and aided the jury in understanding the circumstances surrounding the investigation. Defendant's argument is overruled.

We hold defendant received a fair trial, free from prejudicial error.

No Error.

Judges CALABRIA and GEER concur.

MARVIN ANDERSON, ET AL., PLAINTIFFS v. HOUSING AUTHORITY OF THE CITY OF RALEIGH, DEFENDANT

No. COA04-152

(Filed 15 March 2005)

Negligence— carbon monoxide poisoning—causation—mere speculation or conjecture

The trial court did not err in a negligence action arising out of the release of carbon monoxide from gas boilers installed at a public housing development where plaintiffs were residents by granting summary judgment in favor of defendant Housing Authority, because: (1) plaintiffs' counsel acknowledges that the evidence was insufficient to support a prima facie case of negligence for 10 of the 21 plaintiffs; (2) plaintiffs did not present any argument in support of their assignments of error regarding 2 other plaintiffs; and (3) in regard to the remaining 9 plaintiffs, none pointed to affirmative evidence to forecast a showing of causation beyond mere speculation or conjecture.

Appeal by plaintiffs from judgment entered 6 August 2003 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 13 October 2004.

Thigpen, Blue, Stephens & Fellers, by T. Byron Smith, and Gary, Williams, Parenti, Finney, Lewis, McManus, Watson, & Sperando, by Michael Lewis, for plaintiffs-appellants.

Cranfill, Sumner & Hartzog, L.L.P., by Dan M. Hartzog and Donna R. Rascoe, for defendant-appellee.

ELMORE, Judge.

I.

Plaintiffs are twenty-one former residents of the Walnut Terrace public housing development (Walnut Terrace) in Raleigh. The Housing Authority of Raleigh (defendant), pursuant to its authority as a landlord of Walnut Terrace, installed gas boilers on the property and began operating them in January 1987. On 2 October 1995 plaintiffs, as part of a larger group of former residents, filed a negligence action against defendant, alleging that the release of carbon monoxide from these gas boilers caused plaintiffs' injuries. Plaintiffs allege that the problems with the gas-fired heating system occurred between January 1987 and October 1992. On 8 April 2003 defendant filed a motion for summary judgment seeking to dismiss the claims of 28 of the plaintiffs. The trial court entered its order on 6 August 2003 allowing defendant's motion with respect to 23 of the 28 plaintiffs. The court found that there were no genuine issues of material fact; that defendant was entitled to judgment as a matter of law; and that the plaintiffs failed to show any causal connection between their exposure to carbon monoxide and the injuries alleged. Of the 23 plaintiffs whose claims were dismissed by the court's order, 21 filed notice of appeal to this Court.

Plaintiffs contend that the trial court erred in granting summary judgment on their negligence claims. However, plaintiffs' counsel acknowledges that the evidence is insufficient to support a *prima facie* case of negligence for 10 of the 21 plaintiffs.[1] In addition, plaintiffs do not present any argument in support of their assignments of error regarding two other plaintiffs, Edna Holder and Barry Ruffin. Accordingly, we deem plaintiffs' assignments of error with respect to these 12 plaintiffs abandoned. *See* N.C.R. App. P. 28(b)(6) (2004) ("Assignments 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."). We briefly recite the causation evidence from the record in support of the negligence claims of the remaining 9 plaintiffs to this appeal:

Dr. Cyril Allen, a physician specializing in internal medicine, examined plaintiffs in July and August 1997. The reports written by Dr. Allen following each examination were included as an exhibit

1. Plaintiffs' counsel identified the following plaintiffs, noting that these plaintiffs or their parents denied any injuries: Seneca Jones, Shanta Jones, Alisa Rhodes, Shanita Rhodes, Louis Porter, Cecilia Anderson, Logan Anderson, Zola Anderson, Tyler Johnson, and De Thabon Nettles.

in the deposition testimony submitted to the trial court at summary judgment. However, Dr. Allen did not provide a medical opinion on the matter of causation.

Yolanda Hinton

Ms. Hinton lived in Walnut Terrace from 1987 through 1992. She testified that she went to see a physician at Wake Medical Center in 1993, Dr. Haywood, and that he diagnosed her with migraine headaches. Ms. Hinton stopped seeing Dr. Haywood in 1995. The only medical documentation provided for Ms. Hinton is a report by Dr. Cyril Allen of a physical examination conducted on 3 August 1997. Dr. Allen stated in the report that Ms. Hinton had no history of recurrent headaches or blurring of vision.

Angela Vessel

Ms. Vessel testified that she lived in Walnut Terrace from June 1992 through December 1993. She stated that she suffered from headaches and consulted a physician at Wake Medical Center about this problem in December 1992. She testified that she was examined for lead and carbon monoxide exposure and thought that the results came up negative. Ms. Vessel's daughter began having nosebleeds in December 1992, and she was examined during the same visit. Ms. Vessel testified that the results for her daughter's lead test came out positive but that she could not recall the results of the carbon monoxide test. Dr. Allen conducted a physical examination of Ms. Vessel on 16 August 1997 and prepared a report noting his impression that the exam was normal.

Eddie Turner

Mr. Turner, who was 53 years old at the time of his deposition in June 2000, testified that he lived in the Walnut Terrace housing units for approximately 17 years. When asked about his medical problems, he stated that he was diagnosed with sleep apnea and that he experiences sharp pains running through his heart, for which he takes aspirin. Also, he testified that he sometimes feels nauseous in the mornings and thinks that his nausea could have been caused by carbon monoxide exposure.

Timothy Nettles

Mr. Nettles testified that he was under 10 years of age when he lived at Walnut Terrace. He described his ailments as vomiting, migraine-like headaches, dizziness, and problems with his heart beat-

ing funny. Mr. Nettles testified that he took pain reliever to treat his migraines, but he did not take any medications for the other symptoms. Dr. Allen's report noted that the overall physical examination of Mr. Nettles was normal.

Latonya Hartsfield

Ms. Hartsfield resided at Walnut Terrace from about 1989, when she was 8 years old, through 2000. She testified that she had migraines and that her mother gave her Tylenol to help her sleep. She also testified that some mornings she would wake up with a nosebleed because the air was so humid in her room.

Leroy Evans

Mr. Evans testified that he has never resided at Walnut Terrace, but that his parents lived there for about 35 years. He stated that he visited his parents on weekends and that in total he spent about two months per year at Walnut Terrace. He has suffered from nausea symptoms since 1990. Mr. Evans also experienced headaches since before 1990 and shortness of breath beginning around 1996. Mr. Evans testified that he was diagnosed with hypertension in 1997, but that his doctor did not indicate how long the hypertension had existed. He stated that he has never informed a physician about potential exposure to carbon monoxide as the cause of his symptoms. Dr. Allen noted that the overall examination of Mr. Evans was normal.

Wanda Jones

Ms. Jones testified that she lived in Walnut Terrace from 1990 through 1995. She experienced a groggy-like feeling on and off for several months after moving to Walnut Terrace. Ms. Jones stated that she took Tylenol for headaches, and that she thought the grogginess and headaches were caused by carbon monoxide exposure. However, she testified that she has never been tested for carbon monoxide exposure.

Joshua Rhodes

Joshua was born in 1986 and recalls living at Walnut Terrace when he was eight years old. He testified that he woke up one night with a nosebleed while living there. Dr. Allen examined Joshua on 19 July 1997 and noted that a limited neurological exam was within normal limits and that there were no significant abnormalities detected. Defendant's expert, Dr. William Meggs, reviewed the report by Dr.

Allen documenting Joshua's examination and concluded that nothing in the report suggested anything but a healthy child.

Manda Nettles

Ms. Nettles testified that she suffered from irregular heartbeat, blurred vision, and nausea. She stated that she thinks these symptoms were caused by exposure to carbon monoxide during the time when she lived at Walnut Terrace, between the ages of eight and eleven. Dr. Allen conducted a physical examination of Ms. Nettles on 27 July 1997 and noted in his report that she did not have a history of disease of the head, eyes, ears, or throat.

II.

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 judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The party moving for summary judgment has the burden of proving that there is no triable issue of material fact. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). This burden may be met "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim . . . ." *Id.* If the defendant meets this burden, then the plaintiff must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* In order to survive a motion for summary judgment, a plaintiff must offer evidence of each essential element of negligence beyond mere speculation or conjecture. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992).

Here, the deposition testimony of Dr. William Meggs established that the symptoms of carbon monoxide exposure include persistent headaches, nausea, and neuropsychiatric disabilities. Plaintiffs assert that the symptoms described by each of the plaintiffs in their depositions are consistent with the symptoms described by this expert witness. For example, plaintiffs point out that the deposition testimony of Wanda Jones tends to establish that prior to moving to Walnut Terrace, she did not experience any symptoms consistent with carbon monoxide poisoning and that the symptoms of headaches and groggy-like feelings began after she moved there. Thus, plaintiffs

argue, it is reasonable to infer that her condition was caused by carbon monoxide exposure. However, Ms. Jones presented no affirmative evidence, in the form of physician or laboratory reports or otherwise, connecting the injuries complained of to carbon monoxide exposure. The report by Dr. Allen does not suggest anything other than a normal examination. Likewise, plaintiffs Yolanda Hinton, Angela Vessel, Eddie Turner, Timothy Nettles, Latonya Hartsfied, Leroy Evans, Joshua Rhodes, and Manda Nettles point to no affirmative evidence to forecast a showing of causation sufficient to defeat a motion for summary judgment.

In contrast to plaintiffs' assertions that their forecast of causation evidence was sufficient, Dr. Laura Jozewicz testified that after reviewing plaintiffs' medical documents provided to her by Dr. Cyril Allen, she lacked the information about the time frame of exposure to carbon monoxide and any test results sufficient to form an opinion to a reasonable degree of medical certainty about causation. Dr. Allen testified that he referred plaintiffs to Dr. Jozewicz, a neurologist, and that he did not have any additional information which was not passed on with the referral. In each plaintiff's case, the testimony by Dr. Jozewicz and the report of physical examination by Dr. Allen refute plaintiffs' allegations.

In sum, plaintiffs have not forecast evidence of causation beyond conjecture. In particular, plaintiffs do not set forth any specific facts to controvert the testimony by Dr. Jozewicz that there is insufficient information from which to form an opinion as to whether the release of carbon monoxide caused plaintiffs' symptoms. No expert for plaintiffs testified that plaintiffs' symptoms could or might have been caused by the gas boilers at Walnut Terrace. Where a layperson can do no more than speculate as to the cause of a physical condition, the medical opinion of an expert is required to show causation. *Miller v. Lucas*, 267 N.C. 1, 14-15, 147 S.E.2d 537, 547 (1966). Therefore, even when viewed in the light most favorable to plaintiffs, the evidence fails to establish an essential element of plaintiffs' negligence claims beyond mere speculation or conjecture. *See Roumillat*, 331 N.C. at 68, 414 S.E.2d at 345; *Johnson v. Scott*, 137 N.C. App. 534, 537, 528 S.E.2d 402, 404 (2000) (plaintiff must come forward with specific facts, not mere speculation, that controvert the facts set forth in moving party's evidentiary forecast).

After reviewing the record and briefs, we hold that there is no genuine issue of material fact as to causation, and that the trial court correctly granted summary judgment in favor of defendant.

Affirmed.

Judges McGEE and McCULLOUGH concur.

GRISELDA GUTIERREZ, EMPLOYEE, PLAINTIFF v. GDX AUTOMOTIVE, EMPLOYER, ST. PAUL FIRE & MARINE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA04-415

(Filed 15 March 2005)

1. Workers' Compensation— failure to consider testimony of treating physician—reversible error

The Industrial Commission erred in a workers' compensation case by failing to consider testimony and evidence of plaintiff's treating physicians revealing that plaintiff fully recovered from the back strain she sustained at work on 14 July 1999, because: (1) it is reversible error for the Commission to fail to consider the testimony or records of a treating physician; and (2) the Commission failed to enter a finding of fact regarding the consideration, credibility, or relevancy of a treating physician's deposition testimony.

2. Workers' Compensation— causation—reasonable degree of medical certainty

The Industrial Commission erred in a workers' compensation case by awarding plaintiff compensation benefits when no competent evidence showed that plaintiff's symptoms were proximately caused by her injury, because: (1) plaintiff's own treating physicians only testified that plaintiff's injury was a possible cause of her symptoms; and (2) our Supreme Court has specifically rejected "could or might" testimony to prove causation and stated that mere possibility has never been legally competent to prove causation.

3. Workers' Compensation— disability—sufficiency of evidence

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff has been totally disabled as a direct result of her occupational injury since 5 February 2001, because: (1) plaintiff failed to present any evidence that she has been unsuccessful after a diligent effort to obtain employment,

and the record showed no evidence that plaintiff made any attempt to obtain any position after 5 February 2001; (2) plaintiff presented no evidence of a preexisting condition preventing her from earning the same or higher wages as she did while employed with defendant; and (3) the Commission's finding that plaintiff was physically incapable of work in any employment based on a doctor's report is unsupported by competent evidence in the record when the doctor testified that his office never assigned plaintiff any specific work restrictions or instructed her not to work, and he further stated that he observed the patient could work.

Appeal by defendants from opinion and award entered 4 December 2003 by Commissioner Pamela T. Young for the North Carolina Industrial Commission. Heard in the Court of Appeals 16 February 2005.

Brooke & Brooke Attorneys at Law, by Thomas M. Brooke, for plaintiff-appellee.

Stiles Byrum & Horne, L.L.P., by Henry C. Byrum, Jr., and Virginia Lee Bailey, for defendants-appellants.

TYSON, Judge.

GDX Automotive ("GDX") and St. Paul Fire & Marine Insurance Company (collectively, "defendants") appeal from opinion and award entered by the North Carolina Industrial Commission ("the Commission") awarding Griselda Gutierrez ("plaintiff") benefits for an injury she sustained at work. We reverse.

I. Background

The undisputed findings of fact show that GDX manufactures interior car parts. Plaintiff worked for GDX as an assembler from 28 June 1999 through 28 February 2001. She was approximately thirty years old, had completed approximately three years of high school, and was an undocumented worker of Mexican descent who spoke no English.

On 14 July 1999, plaintiff lifted a bin of parts weighing approximately fifteen pounds and immediately experienced lower back pain. That day, she sought medical attention at ProMed, where Dr. David Mobley ("Dr. Mobley") diagnosed her with a lumbar strain and recommended conservative treatment, to include medications and warm

compresses. On 20 July 1999, plaintiff returned to Dr. Mobley, and he noted an improvement in her condition. Plaintiff reported pain after "bending and lifting and washing and drying clothes."

She returned to ProMed again on 21 July 1999 and was examined by Dr. Ronald Huffman ("Dr. Huffman"). Dr. Huffman's examination revealed good range of motion of plaintiff's back, ability to twist without difficulty, negative straight leg raising, and no neurological symptoms. On 27 July 1999, Dr. Mobley examined plaintiff and approved her to return to work at regular duty, which she resumed that day.

Plaintiff did not seek further medical treatment until 28 March 2000, when she returned to ProMed after injuring her right elbow, and again on 21 September 2000 for treatment for a severe headache. Plaintiff did not complain of back pain during either visit.

Although plaintiff missed work on 9 January 2001, she returned to work. On 15 January 2001, plaintiff sought treatment from Dr. Michael Binder ("Dr. Binder"), a chiropractor, and stated she had been experiencing lower back pain from working on her job for approximately fifteen months. On 17 January 2001, plaintiff presented a chiropractor's note excusing her from work until 19 January 2001. Plaintiff again visited Dr. Binder's office on 5 February 2001 and received work restrictions, which her employer could not accommodate.

On 9 March 2001, plaintiff sought treatment from Dr. Jeffrey Baker ("Dr. Baker"), an orthopaedic surgeon. Dr. Baker diagnosed plaintiff with degenerative disk disease and referred her for physical therapy. Following a hearing, Deputy Commissioner George T. Glenn, II, awarded plaintiff continuing disability compensation and medical treatment for her back injury. Defendants appealed to the Full Commission, which concluded plaintiff was entitled to ongoing temporary total disability compensation and medical treatment for an injury that occurred on 14 July 1999. Defendants appeal.

II. Issues

The issues presented on appeal are whether the Commission erred by: (1) failing to consider testimony and adjudicate evidence of plaintiff's treating physicians revealing plaintiff fully recovered from the back strain she sustained on 14 July 1999; (2) concluding that plaintiff's alleged back condition after 27 July 1999 proximately resulted from her occupational injury on 14 July 1999; and (3) con-

cluding that plaintiff has been totally disabled as a direct result of her occupational injury since 5 February 2001.

III. Standard of Review

On appeal from the Commission in a workers' compensation claim, our standard of review is

> whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law. The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a finding to the contrary. In weighing the evidence[,] the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony and may reject a witness'[s] testimony entirely if warranted by disbelief of that witness.

Plummer v. Henderson Storage Co., 118 N.C. App. 727, 730-31, 456 S.E.2d 886, 888 (internal citations omitted), *disc. rev. denied*, 340 N.C. 569, 460 S.E.2d 321 (1995).

IV. Testimony of Treating Physicians

[1] Defendants contend the trial court erred by failing to consider testimony and to adjudicate evidence from plaintiff's two treating physicians that plaintiff fully recovered from her back strain injury. We agree.

Defendants concede that credibility determinations of the Commission are binding on appeal, but argue the Commission may not ignore competent evidence when weighing the evidence. We have repeatedly held "[i]t is reversible error for the Commission to fail to consider the testimony or records of a treating physician." *Whitfield v. Lab Corp. of America*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 784 (2003) (citing *Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 78, 541 S.E.2d 510, 515 (2001)). Further, before finding the facts, the Commission "must consider and evaluate all the evidence before it is rejected." *Jarvis v. Food Lion*, 134 N.C. App. 363, 366-67, 517 S.E.2d 388, 391 (1999) (citations omitted), *disc. rev. denied*, 351 N.C. 356, 541 S.E.2d 139 (1999).

Here, plaintiff failed to report any problems regarding her back injury during several subsequent visits to ProMed after her back injury and when she was treated by Dr. Eric Troyer ("Dr. Troyer")

for her headaches and menstrual problems. Defendant contends that plaintiff's failure to inform ProMed and Dr. Troyer of any continuing back injuries in 2000 shows that she was not experiencing pain or other difficulty with her back during that year. Although this evidence tends to indicate that plaintiff had no further difficulty with her back after she was released to return to work, it is not for this Court to weigh the evidence. *See Plummer*, 118 N.C. App. at 730, 456 S.E.2d at 888.

The opinion and award entered by the Commission shows that it recognized that plaintiff was treated by other physicians for unrelated injuries during the course of her treatment for the back injury. The Commission found, "Plaintiff sought treatment at ProMed for the treatment of other injuries . . .," but entered no findings regarding plaintiff's treatment with Dr. Troyer. A review of Dr. Troyer's deposition reveals that plaintiff, who was seeking treatment for symptoms totally unrelated to her back injury, omitted any reference to her back injury or back pain when giving her medical history to Dr. Troyer. The Commission is not required to receive evidence from every physician who had treated plaintiff, but is required to enter findings of fact regarding material evidence properly presented to and considered by the Commission. *See Whitfield*, 158 N.C. App. at 348, 581 S.E.2d at 784. The Commission erred by failing to enter a finding of fact regarding the consideration, credibility, or relevancy of Dr. Troyer's deposition testimony.

V. Causation

[2] Defendants also contend the Commission erred by awarding plaintiff compensation benefits when no competent evidence shows plaintiff's symptoms were proximately caused by her injury. We agree.

It is well-settled in our jurisprudence that "[i]n a worker's compensation claim, the employee has the burden of proving that his claim is compensable . . . [and] must prove that the accident was a causal factor by a preponderance of the evidence." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003) (internal quotations and citations omitted). "Although expert testimony as to the possible cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation, particularly when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation . . . ." *Id.* at 233, 581 S.E.2d at 753 (internal quotations and citations omitted). In *Holley*, our Supreme Court

held, "the entirety of causation evidence before the Commission failed to meet the reasonable degree of medical certainty standard necessary to establish a causal link between plaintiff's twisting injury and her [disabling condition]." 357 N.C. at 234, 581 S.E.2d at 754. The Court specifically noted the evidence and the plaintiff's medical history showed several potential causes of the injury.

Here, plaintiff's own treating physicians only testified that plaintiff's injury was a "possible" cause of her symptoms. This evidence is insufficient to support plaintiff's burden of proving causation to establish compensability. *Id.*

Plaintiff argues Dr. Baker's testimony that plaintiff's injury "could or might have resulted in the symptoms presented" is sufficient to establish compensability. Our Supreme Court specifically rejected "could or might" testimony to prove causation and stated, "mere possibility has never been legally competent to prove causation." *Id.* at 234, 581 S.E.2d at 753. Plaintiff's argument is without merit.

No evidence supports a finding of causation by the Commission. Without competent evidence, the Commission's conclusions are likewise unsupported and the opinion and award must be reversed.

IV. Disability

[3] Defendants also argue that the Commission erred by concluding plaintiff was disabled as a result of her injury. In addition to and as an alternative basis to support reversal of the Commission's opinion and award, we agree with defendants' argument.

We have stated:

> [D]isability as defined in the [Workers' Compensation] Act is the impairment of the injured employee's earning capacity rather than physical disablement. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986). The burden is on the employee to show that [s]he is unable to earn the same wages [s]he had earned before the injury, either in the same employment or in other employment. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982).

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). In meeting this burden, plaintiff must show:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable

> of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, *i.e.*, age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. (internal citations omitted).

Plaintiff failed to present any evidence that she has been unsuccessful after a diligent effort to obtain employment. Our review of the record shows *no* evidence that plaintiff made *any* attempt to obtain any position after 5 February 2001. Further, plaintiff presented no evidence of a preexisting condition preventing her from earning the same or higher wages as she did while employed with GDX.

The Commission found plaintiff was physically incapable of work in any employment based on Dr. Baker's report. This finding of fact is unsupported by any competent evidence in the record. Dr. Baker testified that his office never assigned plaintiff any specific work restrictions or instructed her not to work. He testified to the contrary and stated, "What I observed in the patient, she could work."

Without any evidence to support the Commission's finding that Dr. Baker "indicated that plaintiff was unable to work," the Commissions finding of disability constitutes a separate and independent reason to reverse the Commission's opinion and award.

VII. Conclusion

The Commission failed to make any finding of fact revealing that it considered the deposition testimony from Dr. Troyer, plaintiff's treating physician. The Commission further erred by concluding plaintiff's injury, which she sustained while working for GDX, was the proximate cause of her symptoms. Without any evidence to support the causation element, the Commission erred in awarding plaintiff compensation benefits. The Commission erred by determining plaintiff was disabled, when no competent evidence in the record supports this conclusion.

The opinion and award is reversed.

Reversed.

Judges McGEE and GEER concur.

LARRY RUSSELL LANE, AND JULIA ANN CHAMBERS LANE, PLAINTIFFS V. WINN-DIXIE CHARLOTTE, INC., DEFENDANT

No. COA04-709

(Filed 15 March 2005)

1. Pleadings— motions to dismiss—particularity—grounds for relief

Defendant's N.C.G.S. § 1A-1, Rule 12(b)(4) and (b)(5) motions to dismiss were stated with sufficient particularity as to the grounds alleged and sufficiently set forth the relief sought. Defendant's motion to dismiss cited Rule 12(b)(4) and 12(b)(5), specified that plaintiffs failed to properly serve the defendant, and specified that the process issued by the plaintiffs was not proper.

2. Pleadings— motion to dismiss—affidavit not attached

Plaintiffs did not show an abuse of discretion in the trial court's refusal to strike an affidavit by a mailroom employee who received service of process where defendant filed the affidavit in support of its motion to dismiss. By postponing the hearing on the motion, the trial court cured any prejudice caused by defendant's failure to serve the affidavit with its motion to dismiss.

3. Pleadings— motion to dismiss—underlying grounds

Defendant's motion to dismiss was not a nullity and the defenses contained therein were not waived where plaintiff's arguments were decided in defendant's favor elsewhere in this opinion.

4. Process and Service— summons—failure to designate person to receive for corporation

A summons was defective on its face and a presumption of service would not exist even upon a showing that the item was received by registered mail. Plaintiffs failed to designate any person authorized by N.C.G.S. § 1A-1, Rule 4 (j)(6) to be served on behalf of the corporate defendant.

Appeal by plaintiffs from order signed 23 March 2004 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 2005.

Tania L. Leon, P.A., by Tania L. Leon, for plaintiffs.

Templeton & Raynor, P.A., by Carrie H. O'Brien and Kenneth R. Raynor, for defendant.

BRYANT, Judge.

Larry Russell Lane and Julia Ann Chambers Lane (plaintiffs) appeal an order signed 23 March 2004, granting Winn-Dixie Charlotte, Inc.'s (defendant's) motion to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(4) and 12(b)(5).

Plaintiffs filed their complaint on 13 November 2002, alleging that plaintiff-husband sustained injuries on 8 December 1999, when he fell on defendant's premises. A summons was issued naming Winn-Dixie Charlotte, Inc. as defendant, and was addressed to 2401 Nevada Boulevard, Charlotte, North Carolina 28273. The summons failed to designate any person authorized to be served on behalf of the corporation. On 17 December 2002, plaintiffs filed an affidavit of completed service, attaching a copy of a signed postal receipt, showing service on Winn-Dixie mailroom employee Henry Cannon (Cannon) on 18 November 2002. The statute of limitations in this case expired 8 December 2002; however, defendant's answer was not due until 15 December 2002. Defendant was granted an extension of time through 15 January 2003 to answer the pleadings.

On 2 January 2003, defendant filed a motion to dismiss in addition to its answer. In its motion to dismiss, defendant affirmatively plead Rule 12(b)(4) and 12(b)(5) defenses. On or about 13 August 2003, defendant filed its first notice of motion. Defendant subsequently filed an amended notice of motion on 18 August 2003. On 23 September 2003, defendant filed the affidavit of Cannon in support of its motion to dismiss. Plaintiffs thereafter filed a motion to strike the affidavit of Cannon.

Plaintiffs' motion to strike the affidavit of Cannon and defendant's motion to dismiss came for hearing at the 4 March 2004 civil session of Mecklenburg County Superior Court with the Honorable Richard D. Boner presiding.

By order signed 23 March 2004, the trial court denied plaintiffs' motion to strike and granted defendant's motion to dismiss. Plaintiffs gave timely notice of appeal.

The issues on appeal are whether the trial court erred by: (I) granting defendant's motion to dismiss as defendant failed to state with particularity the grounds for dismissal as required by Rule 7(b)(1); (II) denying plaintiffs' motion to strike defendant's affidavit of Cannon as Rule 6(d) required that the affidavit be filed with the motion to dismiss; (III) granting defendant's motion to dismiss as the defenses asserted in the motion were waived pursuant to Rule 12(h)(1); and (IV) granting defendant's motion to dismiss as defendant failed to rebut the presumption of completed service established pursuant to N.C. Gen. Stat. § 1-75.10(4).

I

[1] Plaintiffs first argue that the trial court erred by granting defendant's Rule 12(b)(4) and 12(b)(5) motion to dismiss as defendant failed to state with particularity the grounds for dismissal as required by Rule 7(b)(1).

N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) states: "An application to the court for an order shall be by motion[,] . . . shall be made in writing, *shall state with particularity the grounds therefor, and shall set forth the relief or order sought.*" N.C.G.S. § 1A-1, Rule 7(b)(1) (2003) (emphasis added). Rule 7(b)(1) was amended effective 1 October 2000 to add the words "with particularity." *Id.*

The comments to Rule 7(b)(1) states:

> The 2000 amendment conforms the North Carolina rule to federal Rule 7(b). The federal courts do not apply the particularity requirement as a procedural technicality to deny otherwise meritorious motions. Rather, the federal courts apply the rule to protect parties from prejudice, to assure that opposing parties can comprehend the basis for the motion and have a fair opportunity to respond.

Id.

Rule 12(b)(4) and 12(b)(5) of the North Carolina Rules of Civil Procedure reads:

> (b) How Presented.—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim,

or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

. . .

(4) Insufficiency of process,

(5) Insufficiency of service of process[.]

N.C.G.S. § 1A-1, Rule 12 (2003).

Here, defendant's 2 January 2003 motion to dismiss stated:

Now comes the Defendant, pursuant to Rule 12(b)(5) of the North Carolina Rules of Civil Procedure to dismiss the Plaintiff[s'] Complaint on the grounds of insufficiency of service of process and shows unto the Court that the Plaintiff[s have] failed to properly serve the Defendant, and the Plaintiff[s'] Complaint should be dismissed.

. . .

Now comes the Defendant, pursuant to Rule 12 (b)(4) of the North Carolina Rules of Civil Procedure to dismiss the Plaintiff[s'] Complaint on the grounds of insufficiency of process and shows unto the Court that the process issued by the Plaintiff[s] in this case was not proper and it did not properly provide for the service of process on the corporate entity.

Defendant's motion to dismiss cited Rule 12(b)(4) and 12(b)(5), and specified that "Plaintiff[s have] failed to properly serve the Defendant" and that "the process issued by the Plaintiff[s] in this case was not proper and it did not properly provide for service of process on the corporate entity." In addition, the motion specifically stated the relief requested: to wit, that plaintiffs' complaint should be dismissed.

We hold that defendant's Rule 12(b)(4) and 12(b)(5) motion to dismiss was stated with sufficient particularity as to the grounds alleged, and sufficiently set forth the relief sought. This assignment of error is overruled.

II

[2] Plaintiffs next argue that the trial court erred by denying plaintiffs' motion to strike defendant's affidavit of Cannon as Rule 6(d) required that the affidavit be filed with the motion to dismiss.

Rule 6(d) of the North Carolina Rules of Civil Procedure provides:

> A written motion . . . and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing . . . . When a motion is supported by affidavit, the affidavit shall be served with the motion . . . . If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require.

N.C.G.S. § 1A-1, Rule 6(d) (2003). Pursuant to Rule 6(d), the trial court is empowered with discretion as whether to allow affidavits to be filed subsequent to the filing of a motion. *Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp.*, 52 App. 633, 641, 279 S.E.2d 918, 924 (1981) (stating that Rule 6(b) and (d) provides the trial court with discretion to allow the late filing of affidavits). Accordingly, this Court will review the trial court's ruling on the motion to strike the affidavit for abuse of discretion. *See Barnhill Sanitation Service v. Gaston County*, 87 N.C. App. 532, 536, 362 S.E.2d 161, 164 (1987).

In the instant case, defendant filed its first motion to dismiss on 13 August 2003, and a hearing was scheduled for 7 October 2003. Defendant filed an amended notice to dismiss on 18 September 2003, and a hearing was scheduled for 9 October 2003. Defendant then served Cannon's affidavit on 23 September 2003, in support of its motion to dismiss—sixteen days before the scheduled hearing date. The trial court continued the hearing to allow plaintiffs adequate time to take any necessary depositions to oppose defendant's motion to dismiss.

Plaintiffs noticed the deposition of Joel Barton, Division Manager of Winn-Dixie, for 22 January 2004, and the deposition took place on 23 January 2004. The hearing on the motion to dismiss was held on 4 March 2004, approximately five months after defendant served plaintiffs with Cannon's affidavit.

From the record, it is clear that defendant's motion to dismiss was heard and ruled upon only after plaintiffs were afforded a reasonable opportunity to present pertinent material necessary to

oppose defendant's motion. By postponing the hearing, the trial court cured any prejudice which plaintiffs contend was caused by defendant's failure to serve Cannon's affidavit with its motion to dismiss. Plaintiffs have failed to show abuse of discretion in the trial court's decision to deny plaintiffs' request to strike Cannon's affidavit. This assignment of error is overruled.

III

[3] Plaintiffs next argue that the trial court erred by granting defendant's Rule 12(b)(4) and 12(b)(5) motion to dismiss as, absent either the particularity requirement of Rule 7(b)(1) or an accompanying affidavit pursuant to Rule 6(d), defendant's motion to dismiss was a nullity and the defenses asserted therein were waived pursuant to Rule 12(h)(1).

Pursuant to Rule 12(h)(1) of the North Carolina Rules of Civil Procedure, defenses arising under Rule 12(b)(4) and 12(b)(5) must be affirmatively plead in a party's responsive pleadings, or are deemed thereafter waived. This Court has held *supra* Issues I & II, that defendant's motion to dismiss met the particularity requirement of Rule 7(b)(1), and the trial court did not abuse its discretion in denying plaintiffs' motion to strike Cannon's affidavit for defendant's failure to comply with Rule 6(d). Accordingly, we hold that defendant's motion to dismiss was not a nullity and the defenses contained therein were not waived pursuant to Rule 12(h)(1). This assignment of error is overruled.

IV

[4] Plaintiffs lastly argue that the trial court erred by granting defendant's Rule 12(b)(4) and 12(b)(5) motion to dismiss as defendant failed to rebut the presumption of completed service established pursuant to N.C. Gen. Stat. § 1-75.10(4).

Rule 4(j)(6) of the North Carolina Rules of Civil Procedure provides:

> Domestic or Foreign Corporation.—Upon a domestic or foreign corporation by one of the following:
>
> a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.

d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt.

N.C.G.S. § 1A-1, Rule 4(j)(6) (2003).

N.C. Gen. Stat. § 1-75.10 states:

Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

. . .

(4) Service by Registered or Certified Mail.—In the case of service by registered or certified mail, by affidavit of the serving party averring:

a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;

b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and

c. That the genuine receipt or other evidence of delivery is attached.

N.C.G.S. § 1-75.10 (2003).

Plaintiffs argue that it is well established that plaintiffs' affidavit of completed service, together with the return receipt signed by the person who received the mail, if not the addressee, in accordance with N.C. Gen. Stat. § 1-75.10(4), raises a presumption that the person who received the mail and signed the receipt was an agent of the

addressee authorized by appointment or by law to be served or to accept service of process.

A review of the summons demonstrates that plaintiffs failed to designate *any* person authorized by Rule 4(j)(6) to be served on behalf of the corporate defendant in violation of the clear requirements of the rule. Accordingly, the summons was defective on its face.

Thus, as the summons was defective on its face, a presumption of service would not exist even upon a showing that the item was received by registered mail. This assignment of error is overruled.

Affirmed.

Judges HUNTER and JACKSON concur.

DARLENE PRICE (NERCESSIAN) v. MARK ASTOR PRICE

No. COA04-393

(Filed 15 March 2005)

Estoppel— judicial estoppel—inconsistent legal contentions on child support

The doctrine of judicial estoppel precluded defendant father from challenging the service of process of the civil summons and complaint in the mother's action for divorce from bed and board and child support, and thus, the trial court's denial of defendant's motion to dismiss the child support complaint based on insufficient service of process is affirmed because: (1) the equitable doctrine of judicial estoppel prevents the use of intentional self-contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking justice; (2) defendant's legal contention in the State of Washington that the March 1994 child support order entered in Guilford County was conclusive on the issue of support, and his legal argument in North Carolina that the case should be dismissed and the child support order vacated based on improper service, are inconsistent legal contentions; and (3) defendant did not seek a ruling from the court until after his children had reached the age of majority, and a ruling in

defendant's favor would prejudice plaintiff as she would be precluded from seeking arrears or child support as the children had reached the age of majority.

Appeal by defendant from orders entered 16 September 2002 and 7 January 2003 by Judges H. Thomas Jarrell, Jr. and Patrice Hinnant, respectively, in Guilford County District Court. Heard in the Court of Appeals 3 November 2004.

Guilford County Attorney's Office, by Deputy County Attorney Michael K. Newby, for plaintiff-appellee.

Tate Law Offices, by C. Richard Tate, Jr., for defendant-appellant.

HUNTER, Judge.

Mark Astor Price ("defendant") challenges the trial court's denial of his motion to dismiss plaintiff's complaint seeking, *inter alia*, child support. Defendant contends the trial court lacked personal jurisdiction to enter the child support order because the civil summons and complaint were not properly served. Therefore, defendant contends the trial court's 11 December 2002 order determining defendant owed $187,680.30 in child support arrears and ordering defendant to pay the arrears in monthly installments of $1,904.00 should be vacated. After careful consideration, we conclude defendant was barred by the doctrine of judicial estoppel from challenging the sufficiency of service of process.

Darlene Price ("plaintiff") and defendant were married on 15 February 1981, and had two children born in 1982 and 1984. The parties separated in July 1993, and plaintiff filed for a divorce from bed and board in October 1993. She also sought custody of the children, child support, alimony, and possession of the marital home and other marital property. A civil summons was issued on 5 October 1993, but the return of service, dated 9 November 1993, indicates a sheriff's deputy was unable to serve defendant. A notation on the return of service, dated 10 November 1993, states "plaintiff advised def[endan]t now living on Hwy 26 Orangeburg, South Carolina." According to an affidavit of service, an Orangeburg, South Carolina deputy sheriff served defendant on 17 November 1993 by delivering a copy of the civil summons to defendant's fiancé, "a person of discretion residing at the defendant's residence[] and leaving with her one copy of same at 301 Truckstop . . . ."

After a February 1994 hearing, the trial court entered an order on 29 March 1994 indicating defendant had been properly served as evidenced by a sheriff's affidavit of service from the Orangeburg, South Carolina Sheriff's Department. In this order, the trial court granted plaintiff a divorce from bed and board, and *inter alia*, ordered defendant to pay $1,904.46 per month in child support. After defendant failed to pay child support the following month, an order to show cause was issued requiring defendant to appear in court on 1 July 1994. According to the return of service, the order to show cause was served on 9 May 1994 by leaving a copy of the order at a residence located at 2713 Lafayette Street in Guilford County, which was purportedly defendant's usual place of abode. The order was left with defendant's friend living at the residence. After defendant failed to appear at the show cause hearing, an order for arrest was issued. The return of service on the order for arrest, dated 21 September 1994, indicates defendant was not served because he did not live at the 2713 Lafayette Street address.

On 4 May 1995, a motion and notice of hearing for modification of child support order was filed by the assistant county attorney. According to the motion, defendant's residence was in Fossil, Oregon, and defendant was served via U.S. mail. After defendant failed to appear at another show cause hearing, an order for arrest was issued, which indicated defendant's address was at his place of business in Archdale, North Carolina. The order for arrest was not served, and the 2 August 1995 return of service indicated defendant had not worked at the address for over a year. Thereafter, on 3 October 1995, the trial court authorized the withholding of defendant's wages in the order modifying child support.

The next year, plaintiff's attorney filed a motion for contempt on 1 May 1996, as defendant had failed to make any child support payments. A copy of the motion and notice for hearing was sent to defendant at his residence in Seattle, Washington, via certified mail. After receiving the motion and hearing notice, defendant moved to dismiss on 27 June 1996 for lack of personal jurisdiction. According to defendant's affidavit, he contended he had never lived at 301 Truck Stop in Orangeburg, South Carolina, that there was no residence or dwelling house at that location, and that he had never received any papers or documents relating to this matter. The trial court did not rule upon these motions until 2002.

Prior to filing his motion to dismiss, defendant filed an amended petition for dissolution of marriage on 8 April 1996 in the State of

Washington. In the petition, defendant acknowledges the existence of the 29 March 1994 order entered in Guilford County, North Carolina, and states "[t]he effect of this order is conclusive" on the issue of child support.

In September 2002, the child support order was terminated as the two children had reached the age of majority and were no longer in primary or secondary school. On 12 November 2002, another motion to show cause was filed by plaintiff's counsel, and on 18 November 2002, defendant filed another motion to dismiss. In an 11 December 2002 order, the trial court determined defendant's arrears were $187,680.30 and ordered defendant to pay $1,904.00 per month until the arrears were paid in full. Defendant's motion to dismiss filed on 27 June 1996 was denied in a 7 January 2003 order. Defendant then filed a notice of appeal to this Court from the 16 September 2002 and 7 January 2003 orders.

Defendant contends the trial court should have granted his motion to dismiss for insufficiency of service of process, and that the trial court should have vacated the 1994 child support order and all subsequent orders based upon the initial child support order, including the 11 December 2002 order ordering defendant to pay $187,680.30 in arrears. We do not reach the issue of whether there was sufficient service of process because defendant's arguments are barred by judicial estoppel.

> In *Whitacre P'ship[v. Biosignia, Inc.*, 358 N.C. 1, 28, 591 S.E.2d 870, 888 (2004)], 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," *[i]d.* (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 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).

Wiley v. United Parcel Serv., Inc., 164 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004); *see also Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. at 28, 591 S.E.2d at 888.

"Judicial estoppel, or preclusion against inconsistent positions, is an equitable doctrine designed to protect the integrity of the courts and the judicial process. . . . [It] is to prevent litigants from playing 'fast and loose' with the courts and deliberately changing positions according to the exigencies of the moment." *Medicare Rentals, Inc. v. Advanced Services*, 119 N.C. App. 767, 769-70, 460 S.E.2d 361, 363 (1995). Thus, "[j]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation. The doctrine prevents the use of 'intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.' " *Id.* at 769, 460 S.E.2d at 363 (citations omitted).

In April 1996, defendant filed a petition for dissolution of marriage in the State of Washington, and in the petition, defendant stated:

> On March 25, 1994 an order was entered in the General Court of Justice, District Court Division of Guilford County, North Carolina concerning the marriage of Petitioner and Respondent. . . . As the Plaintiff, Darlene Elizabeth Price was granted a "Divorce from Bed and Board" which provided for child support, custody, maintenance, division and possession of property, attorney fees, and wage withholding. The effect of this order is conclusive on the above issues, but the order does not grant a divorce to the parties. The Petitioner here, Mark Astor Price, therefore seeks a Decree of Dissolution from the above-entitled court.

According to the law of the State of Washington:

> In entering a decree of dissolution of marriage . . . , the court shall determine the marital status of the parties, make provision for a parenting plan for any minor child of the marriage, *make*

provision for the support of any child of the marriage entitled to support . . . .

Wash. Rev. Code § 26.09.050 (1996) (emphasis added). Therefore, in a petition for dissolution of marriage, the petitioner must allege the names and ages of any dependent child and any arrangements for support of the children. Wash. Rev. Code § 26.09.020 (1996). As defendant stated in his petition for dissolution of marriage in the State of Washington that a conclusive order had been entered in North Carolina resolving the issue of child support, the courts in the State of Washington were led to believe that there were no issues regarding child support to be resolved.

After defendant filed his petition for dissolution of marriage, plaintiff filed a motion for contempt in North Carolina on 1 May 1996 based upon defendant's failure to pay, *inter alia*, child support. Upon being served with the motion for contempt, defendant moved to dismiss based upon insufficient service of process. In his supporting affidavit, defendant stated that he had never lived at 301 Truck Stop in Orangeburg, South Carolina, and had never been served in this matter. Defendant's motion to dismiss was not heard until November 2002, after his children had reached the age of majority and plaintiff was no longer entitled to child support.

Defendant's legal contention in the State of Washington that the March 1994 order entered in Guilford County was conclusive on the issue of child support, and his legal argument in North Carolina that the case should be dismissed and the child support order vacated because service was improper are inconsistent legal contentions. By stating the 1994 order was conclusive in his Washington petition for dissolution of marriage, defendant led the Washington courts to believe the child support issue had been properly resolved. Then, defendant presented an inconsistent legal contention in North Carolina by challenging the child support order by arguing service of process was improper. After the motion, defendant did not seek a ruling from the court until after his children had reached the age of majority. A ruling in defendant's favor would prejudice plaintiff as she would be precluded from seeking arrears or child support as the children had reached the age of majority.

As previously stated, the doctrine of judicial estoppel "prevents the use of 'intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.' " *Medicare Rentals*, 119 N.C. App. at 769, 460 S.E.2d at

363. In our discretion, we invoke the doctrine of judicial estoppel and preclude defendant from challenging the service of process of the civil summons and complaint for divorce from bed and board. *See Whitacre P'ship*, 358 N.C. at 38, 591 S.E.2d at 894-95 (quoting *New Hampshire v. Maine*, 532 U.S. at 750, 149 L. Ed. 2d at 977-78 (citation omitted), which states "judicial estoppel 'is an equitable doctrine invoked by a court at its discretion' "). Accordingly, we affirm the trial court's denial of defendant's motion to dismiss for insufficient service of process.

Affirmed.

Judges CALABRIA and LEVINSON concur.

STATE OF NORTH CAROLINA v. QUINTEN DALE STRICKLAND, DEFENDANT

No. COA04-79

(Filed 15 March 2005)

Probation and Parole— indecent liberties—special condition of probation—defendant cannot reside in home with minor child

N.C.G.S. § 15A-1343(b2)(4), which mandates a special condition of probation that defendant may not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor, was a valid condition for defendant's probation arising out of multiple convictions for taking indecent liberties with a child based upon his sexual contact with his thirteen-year-old sister-in-law and did not violate defendant's due process rights. Further, the trial court did not err by activating defendant's sentence based on a violation of this special condition of probation based on defendant residing in a home with his wife and minor son, because: (1) defendant was not losing custody of his child, but instead his right of association with his child was being restricted for a probationary period of 36 months; (2) defendant was not prohibited by the contested condition from seeing his child nor did it prevent defendant from visiting his child in the home where his wife and child were residing; (3) defendant had the potential, through good conduct, to shorten

the term of his probation; (4) defendant took advantage of the fact that he was residing with the minor victim to facilitate the abuse and the thirteen-year-old victim in the instant case was related to defendant through marriage; (5) N.C.G.S. § 15A-1343(b2)(4) serves the purpose of the goals of sentencing and probation to protect the public, assist the offender toward rehabilitation, and providing a general deterrent; (6) a restriction prohibiting defendant from residing in a household with any child, regardless of the gender or relationship of defendant to the child, is not unreasonable or violative of defendant's constitutional rights; and (7) our legislature decided to err on the side of caution by making N.C.G.S. § 15A-1343(b2)(4) a mandatory condition, and one that does not permit exceptions for defendant's own children.

Appeal by defendant from judgment and commitment entered 25 August 2003 by Judge James Floyd Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 15 November 2004.

Attorney General Roy Cooper, by Assistant Attornay General Kathleen U. Baldwin, for the State.

Adrian M. Lapas, for defendant-appellant.

STEELMAN, Judge.

From the period of 15 October 2000 to 18 January 2000 defendant, then 25 years old, was living with his wife and their small son in the home of defendant's mother-in-law. Also residing in that home was the minor sister of defendant's wife (minor). The minor was 13 years old in October of 2000, and turned 14 in December of that same year. During this period, defendant had sexual intercourse with the minor on multiple occasions. As a result of this intercourse, the minor became pregnant with defendant's child, to whom she subsequently gave birth.

Defendant was indicted 24 February 2003 for four counts of statutory rape in violation of N.C. Gen. Stat. § 14-27.7A(a) (2004); four counts of taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1(a)(1) (2004); and three counts of a crime against nature in violation of N.C. Gen. Stat. § 14-177. On 6 June 2003 defendant pled guilty to four counts of taking indecent liberties with a child and the remaining charges were dismissed by the State. The trial

court sentenced defendant to four consecutive terms of 16 to 20 months imprisonment, but suspended each sentence and placed defendant on supervised probation for a term of 36 months. Among the terms of special probation was one mandated by N.C. Gen. Stat. § 15A-1343(b2)(4) (2004) stating that defendant may: "Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor." Defendant was presented with a list of all the conditions of his probation, and he signed this list indicating his agreement to abide by all of them. On 17 June 2003 defendant's probation officer arrested him for violating his probation because defendant was residing at his home with his wife and minor son. At the 25 August 2003 revocation hearing, the trial court revoked defendant's probation and activated his sentences. From the judgments revoking his probation, defendant appeals.

In his first assignment of error, defendant argues that Section 15A-1343(b2)(4) of the North Carolina General Statutes is unconstitutional as it is overbroad and its imposition as a condition of probation deprived defendant of his constitutional rights to parent and care for his minor child without any showing that defendant was unfit or that the child was endangered. We disagree.

N.C. Gen. Stat. § 15A-1343(b2)(4) states:

> (b2) Special Conditions of Probation for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor.—As special conditions of probation, a defendant who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, must:
>
> (4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

Defendant argues that N.C. Gen. Stat. §15A-1343(b2)(4) is overbroad, and that as applied to him on these facts it constitutes an impermissible deprivation of his constitutional right to care and custody of his child without due process. Defendant argues that this right was infringed upon without any finding by the trial court that he is an unfit parent or that his child was endangered by his presence in the home.

"[T]he Constitution protects a fundamental liberty interest of a parent to the custody and care of a child. If a state actor interferes with these rights, then the parent is entitled to procedural due

process." *Perry v. Wake County Dep't of Social Servs.*, 1995 U.S. Dist. LEXIS 14586 (E.D.N.C., 1995). There is no question that in order to permanently terminate parental rights the trial court must conform to due process standards. *Newton v. Burgin*, 363 F. Supp. 782, 785-86 (W.D.N.C., 1973). It is also true that conditions of probation may affect the defendant's constitutional rights. *State v. Mitchell*, 22 N.C. App. 663, 665, 207 S.E.2d 263, 264 (1974). However, "The sentencing judge has broad discretion in setting probation conditions, including restricting fundamental rights. The restriction on [defendant's] association rights is valid if (1) primarily designed to meet the ends of rehabilitation and protection of the public, and (2) reasonably related to such ends." *United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir., 1991); *see also Commonwealth v. LaPointe*, 759 N.E.2d 294, 298 (Mass., 2001) ("A probation condition is enforceable, even if it infringes on a defendant's ability to exercise constitutionally protected rights, so long as the condition is 'reasonably related' to the goals of sentencing and probation."). " 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' " *Newton*, 363 F. Supp. at 786 (citation omitted).

Our General Assembly recognized the particular risk sex offenders pose to the public, and "that protection of the public from sex offenders is of paramount governmental interest." N.C. Gen. Stat. § 14-208.5 (2004); *State v. Sakobie*, 165 N.C. App. 447, 450, 598 S.E.2d 615, 617 (2004). "The primary purposes of criminal sentencing are to 'impose a punishment commensurate with the injury the offense has caused . . .; to protect the public by restraining offenders; to assist the offender toward rehabilitation . . .; and to provide a general deterrent to criminal behavior.' N.C. Gen. Stat. § 15A-1340.12 (1994)." *State v. Tucker*, 154 N.C. App. 653, 658, 573 S.E.2d 197, 201 (2002).

Defendant argues that we should look to child custody cases to determine the appropriate due process standard in the probation context. Defendant's argument is not convincing. The cases defendant cites, such as *Peterson v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), concern the determination of whether permanent custody of the child will reside with the parent, or some third party. More generally, child custody cases involve the permanent or long term placement of the child. In the instant case defendant was not losing custody of his child, his right of association with his child was being restricted for a probationary period of 36 months. Defendant was not prohibited by the contested condition from seeing his child. The contested condi-

tion of probation did not prevent defendant from visiting his child in the home where his wife and child were residing. The condition simply prevented him from also residing in that home for the probationary period. Defendant's child was residing with its mother, and at the successful completion of defendant's probation there would be no restrictions on his association with, or custody and control of, his child. Further, defendant had the potential, through good conduct, to shorten the term of his probation. N.C. Gen. Stat. § 15A-1342(b).

Defendant also argues that N.C. Gen. Stat. § 15A-1343(b2)(4) is unconstitutional as applied to him because he represents no threat to his child, and thus the purposes of sentencing and probation are not served in requiring him to abide by this condition. Defendant argues that his crime arose out of his sexual contact with his thirteen-year-old sister-in-law, who was not a blood relative, and that there was no evidence that he had ever abused his own children.

No court in our jurisdiction has directly addressed the constitutionality of a condition of probation preventing a defendant from residing with his own child on similar facts, so we look outside of North Carolina for guidance. In *Commonwealth v. LaPointe*, the Supreme Court of Massachusetts stated: "We reject the defendant's contention that the condition prohibiting him from residing with his son M.L. is invalid because the defendant 'has no history of any sexual relations with males (adults or children),' . . . . Irrespective of gender, as a minor, M.L. could be considered a potential target of the defendant. The judge acted reasonably in providing M.L. with some measure of protection." *Commonwealth v. LaPointe*, 759 N.E.2d 294, 299 (Mass., 2001). We believe the same logic counsels caution in allowing defendant to reside with his own child when he has been convicted of taking indecent liberties with a minor not his child, particularly, as here, when defendant took advantage of the fact that he was residing with the minor victim to facilitate the abuse. *See State v. Ehli*, 681 N.W.2d 808 (N.D., 2004). Further, the victim in the instant case was related to defendant through marriage. To the extent that defendant might feel tempted to sexually abuse a minor child when it and defendant are residing under the same roof, N.C. Gen. Stat. § 15A-1343(b2)(4) also serves the purposes of sentencing and probation of rehabilitation by removing defendant from the temptation to repeat his crimes. The limitations placed on defendant by N.C. Gen. Stat. § 15A-1343(b2)(4) further serve as a deterrent, as defendant will realize this is one consequence of his criminal acts.

Defendant would have the courts make a detailed investigation in each case to the peculiar sexual desires of a child sex offender. The trial court would then be required to tailor the conditions of a defendant's probation to his particular form of predatory behavior. We expressly reject such an approach. In light of the fact that defendant repeatedly molested a child while living in the same household as his wife and mother-in-law, we hold that a restriction prohibiting defendant from residing in a household with any child, regardless of the gender or relationship of defendant to the child, is not unreasonable, or violative of defendant's constitutional rights.

We finally note that whereas our juvenile code has as its polar star the best interest of the child, our criminal code is guided by its goals of protecting the public, reforming the defendant, and holding the defendant accountable for his bad acts in a way serving as a deterrent. The due process requirements of the two codes are distinct. There is no greater State interest than that of protecting its children. In enacting N.C. Gen. Stat. § 15A-1343(b2)(4) our legislature clearly made a choice to err on the side of caution by making N.C. Gen. Stat. § 15A-1343(b2)(4) a mandatory condition, and one that does not permit exceptions for the defendant's own children. We hold that N.C. Gen. Stat. § 15A-1343(b2)(4) is a valid condition on these facts, and does not violate defendant's due process rights, as it is reasonably related to the goals of sentencing and probation: Namely, protecting the public, assisting the offender toward rehabilitation, and providing a general deterrent. This assignment of error is without merit.

Because defendant has not argued his other assignment of error in his brief, it is deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2003).

AFFIRMED.

Chief Judge MARTIN and Judge McCULLOUGH concur.

JMM PLUMBING AND UTILITIES, INC., PLAINTIFF v. BASNIGHT CONSTRUCTION COMPANY, INC., DEFENDANT

No. COA04-740

(Filed 15 March 2005)

1. Judgments; Liens— default judgment—validity—lien enforcement not ordered

No portion of a default judgment entered by the clerk of court in favor of a subcontractor was void where plaintiff sought a lien under N.C.G.S. Ch. 44A in its complaint but did not move for enforcement of a lien in its motion for default judgment, and the clerk of court did not order enforcement of a lien in the default judgment. N.C.G.S. § 1A-1, Rule 55(b)(1).

2. Civil Procedure— default judgment—excusable neglect—waiting to be informed of hearing time

The trial court did not err by denying a motion for relief from a default judgment under N.C.G.S. § 1A-1, Rule 60(b)(1) based on excusable neglect where defendant did not contact an attorney until after the default judgment because it was under the impression that it would be informed of a hearing time by plaintiff.

3. Civil Procedure— denial of Rule 60 motion—findings

The trial court made sufficient findings which addressed the issue of excusable neglect in denying defendant's Rule 60 motion for relief from a default judgment.

Appeal by Defendant from an order entered 21 January 2004 by Judge William C. Griffin, Jr. in Superior Court, Hyde County. Heard in the Court of Appeals 1 February 2005.

Aldridge, Seawall, Spence & Felthousen, LLP. by Christopher L. Seawall and Thomas P. Routten for defendant-appellant.

The Twiford Law Firm, P.C., by Edward A. O'Neal for plaintiff-appellee.

WYNN, Judge.

When a party is duly served with a summons, yet fails to give his or her defense the attention to which a person of ordinary prudence usually gives his or her important business, there is no excusable neglect to allow setting a default judgment aside under Rule 60(b).

E. Carolina Oil Transp., Inc. v. Petroleum Fuel & Terminal Co., 82 N.C. App. 746, 748, 348 S.E.2d 165, 167 (1986), *disc. rev. denied*, 318 N.C. 693, 351 S.E.2d 745 (1987). In this case, Defendant through its agent contended that after receiving the summons in this matter, he was under the impression that he would be informed of a hearing time and did not contact an attorney until after the default judgment was entered. Because a party's failure to hire an attorney or mistaken belief that it would be informed of a hearing date does not constitute excusable neglect, we find no abuse of discretion by the trial court in denying Defendant's Rule 60(b) motion.

Plaintiff, JMM Plumbing and Utilities, Inc. ("JMM Plumbing"), is a North Carolina corporation with its principal place of business in Pasquotank County. Defendant, Basnight Construction Company, Inc. ("Basnight Construction"), is a North Carolina corporation with its principal place of business in Dare County.

Basnight Construction was a subcontractor of Peters and White Construction Company, located in Chesapeake, Virginia, on a contract for the installation of sewage collection lines and treatment facilities in Hyde County, North Carolina. On 30 May 2001, JMM Plumbing and Basnight Construction entered into a written subcontract agreement for the Hyde County project. JMM Plumbing billed Basnight Construction for work which it performed and Basnight Construction did not pay those bills.

On 30 December 2002, JMM Plumbing filed a Complaint alleging money was owed by Basnight Construction under the subcontract in the amount of $41,776.87 plus statutory interest. JMM Plumbing also requested a lien on all funds owed to Basnight Construction by Peters and White Construction Company.

After receiving the complaint, Jimmie Basnight, secretary/treasurer of Basnight Construction, contacted JMM Plumbing about the lawsuit. After that conversation, he "assumed that [JMM Plumbing and Basnight Construction] were going to go to court to get [JMM Plumbing's] money." Basnight Construction did not file an answer or any response to the complaint.

On 11 February 2003, JMM Plumbing was granted an entry of default and a judgment by default in the amount of $41,776.87 plus interest and costs. JMM Plumbing voluntarily dropped its claim for a lien. On 31 July 2003, Basnight Construction filed a motion for relief from final judgment on the grounds of mistake, inadvertence, and/or

excusable neglect. After a hearing, Judge William C. Griffin, Jr. entered an order on 21 January 2004, denying Basnight Construction's motion for relief from judgment. Basnight Construction appealed from this order.

On appeal, Basnight Construction argues that the trial court erred by: (1) granting JMM Plumbing's judgment by default; (2) denying its motion for relief from judgment; and (3) failing to make appropriate findings of fact in the order denying relief from judgment. We disagree.

[1] Basnight Construction first contends that the trial court erred by granting JMM Plumbing's judgment by default because the clerk of court was without jurisdiction to make a ruling on the lien pursuant to Rule 55(b)(1) of the North Carolina Rules of Civil Procedure. As this is an issue of subject-matter jurisdiction, it can be raised for the first time on appeal. *Forsyth County Bd. of Soc. Servs. v. Div. of Soc. Servs.*, 317 N.C. 689, 692, 346 S.E.2d 414, 416 (1986).

> The clerk of court may enter judgment by default
>
> [w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain . . . In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any . . . other contractual security . . . the clerk may likewise make all further orders required to consummate foreclosure . . . .

N.C. Gen. Stat. § 1A-1, Rule 55(b)(1) (2004). Here, JMM Plumbing sought a lien pursuant to Chapter 44A of the North Carolina General Statutes. In *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 698, 239 S.E.2d 566, 572 (1977), our Supreme Court held that

> liens established pursuant to Chapter 44A of the General Statutes are not 'contractual security' within the meaning of Rule 55(b)(1) of the Rules of Civil Procedure and that a clerk or assistant clerk of court is without jurisdiction to make orders consummating foreclosure of liens established pursuant to Chapter 44A of the General Statutes.

Id. However, only the portion of a judgment entered by the clerk of court ordering the enforcement of a lien is void. *Id.* Since JMM Plumbing did not move for enforcement of a lien in its Motion for Judgment by Default, none was ordered in the Judgment by Default

entered by the Clerk of Court of Hyde County. Therefore, no portion of the judgment by default entered 11 February 2003 is void.

[2] Basnight Construction next argues that the trial court erred in denying its motion for relief from judgment pursuant to Rule 60(b)(1) of the North Carolina Rules of Civil Procedure. We disagree.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) [m]istake, inadvertence, surprise, or excusable neglect; . . ." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2004). The party must also show the existence of a meritorious defense. *Howard v. Williams*, 40 N.C. App. 575, 577, 253 S.E.2d 571, 572 (1979). The decision whether to set aside a default judgment under Rule 60(b) is left to the sound discretion of the trial judge, and will not be overturned on appeal absent a clear showing of abuse of discretion. *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 554 (1986).

Whether neglect is "excusable" or "inexcusable" is a question of law which "depends upon what, under all the surrounding circumstances, may be reasonably expected of a party" to litigation. *Id.*, 349 S.E.2d at 555. The trial judge's conclusion in this regard will not be disturbed on appeal if competent evidence supports the judge's findings, and those findings support the conclusion. *In re Hall*, 89 N.C. App. 685, 687, 366 S.E.2d 882, 884, *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988).

When a party is duly served with a summons, yet fails to give his or her defense the attention to which a person of ordinary prudence usually gives his or her important business, there is no excusable neglect. *E. Carolina Oil Transp., Inc.*, 82 N.C. App. at 748, 348 S.E.2d at 167. "A party may not show excusable neglect by merely establishing that she failed to obtain an attorney and was ignorant of the judicial process." *Hall*, 89 N.C. App. at 688, 366 S.E.2d at 885. "Similarly, the fact that the movant claims he did not understand the case, or did not believe that the court would grant the relief requested in the complaint, has been held insufficient to show excusable neglect, even where the movant is not well educated." *Id.*

The record shows that Jimmie Basnight acknowledges receiving the Complaint and summons and does not contest service of process. However, he contends that he was under the impression that he

would be informed of a hearing time by JMM Plumbing and did not contact an attorney until after the default judgment was entered, which amounted to excusable neglect. *E. Carolina Oil Transp., Inc.*, 82 N.C. App. at 748, 348 S.E.2d at 167; *see Hall*, 89 N.C. App. at 688, 366 S.E.2d at 885 (no excusable neglect where respondent failed to respond to summons where she was unemployed and receiving aid from charitable organizations); *see, e.g., Creasman v. Creasman*, 152 N.C. App. 119, 566 S.E.2d 725 (2002) (no excusable neglect where the defendant was under the mistaken belief that he had not been served with the Complaint and did not need to take action). Basnight Construction's failure to obtain an attorney and its mistaken belief that it would be informed of a hearing date does not constitute excusable neglect.

As there was no excusable neglect, we do not need to address whether Basnight Construction had a meritorious defense. The trial court did not abuse its discretion by denying Basnight Construction's motion for relief from judgment. *Thomas M. McInnis & Assocs., Inc.*, 318 N.C. at 425, 349 S.E.2d at 554.

[3] Finally, Basnight Construction argues that the trial court erred by failing to make appropriate findings of fact in the order denying relief from judgment. We disagree.

"A trial court is not required to make written findings of fact when ruling on a Rule 60(b) motion, unless requested to do so by a party." *Creasman*, 152 N.C. App. at 124, 566 S.E.2d at 729. "Where the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is 'whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion[.]' " *Grant v. Cox*, 106 N.C. App. 122, 125, 415 S.E.2d 378, 380 (1992) (quoting *Financial Corp. v. Mann*, 36 N.C. App. 346, 349, 243 S.E.2d 904, 907 (1978)).

Here, the trial court did in fact make findings of fact in its 21 January 2004 order denying relief from judgment. The trial court made the following pertinent findings of fact:

* * *

4. Jimmie Basnight, an officer of the Defendant, testified and offered an affidavit, setting out the actions which he took after he learned that the complaint had been served on the Defendant corporation.

5. After being served with the complaint, he did not seek legal counsel or hire an attorney to defend the action and took no action to defend the allegations of the complaint.

6. He made certain assumptions concerning the lawsuit but did not take any further action to defend the lawsuit.

Based upon the findings of fact the trial court concluded that Basnight Construction had "failed to plead or show mistake, inadvertence, or excusable neglect." The findings of fact address the issue of excusable neglect by stating Basnight Construction had received the Complaint, but failed to hire an attorney or take any steps to defend the lawsuit. Additionally, as we have stated previously, there is ample evidence to support the trial court's conclusion of law that Basnight Construction failed to plead or show excusable neglect. *Grant*, 106 N.C. App. at 125, 415 S.E.2d at 380.

Affirmed.

Judges HUDSON and STEELMAN concur.

STATE OF NORTH CAROLINA v. HAROLD BOYD, JR.

No. COA04-216

(Filed 15 March 2005)

Search and Seizure— standing to challenge—car not owned by defendant—left open at scene of crime

The trial court erred by granting defendant's motion to suppress drugs seized from a car which defendant did not own or lease and where defendant left the car open as he fled from police at the scene of an assault. Defendant did not have a legitimate expectation of privacy and lacked standing.

Appeal by the State from order granting defendant's motion to suppress entered 28 October 2003 by Judge Russell J. Lanier in New Hanover County Superior Court. Heard in the Court of Appeals 15 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Jeffrey Evan Noecker for defendant appellee.

McCULLOUGH, Judge.

The State of North Carolina appeals from the trial court's decision to grant defendant's motion to suppress evidence. At the pretrial hearing, the State presented evidence which tended to show that on 19 January 2003, Officer James D. Smith of the Wilmington Police Department responded to a 911 call that originated from an apartment located at 4806 Kubeck Court in Wilmington. When he arrived, Officer Smith heard a fight in progress. A female victim was screaming, "Stop hitting me, get out." Officer Smith also heard glass breaking and things being thrown around. Officer Smith knocked on the door and identified himself as a member of the Wilmington Police Department. Since he was not allowed inside the apartment, Officer Smith went from the front door to the back door. He then called for backup, and another officer arrived.

After about fifteen minutes, the occupant of the apartment, Carrie McDonald, allowed the police to enter. Prior to going inside, the officers heard the back sliding glass door open and believed that someone may have exited the apartment. At that time, the police were unable to find any suspects.

The officers asked McDonald to identify the person who was fighting with her. She responded that the individual was "James Murphy." However, when Officer Smith asked questions about Murphy, McDonald gave evasive answers. Officer Smith did not believe that McDonald was telling the truth based on her demeanor and reluctance to answer questions.

Officer Smith began to consider how to properly identify the suspect. He noticed that a Ford Explorer was parked outside the rear of the apartment. The truck was about seven or eight feet from the apartment, and the back hatch was hanging over the patio at the rear of the apartment. Officer Smith testified that "the rear hatch was ajar, it wasn't closed."

Officer Smith asked McDonald if the truck belonged to the suspect, and she said that it did. Before giving Officer Smith consent to search the SUV, however, McDonald claimed that the suspect did not drive and that his aunt rented the vehicle for him.

Officer Smith decided to search the vehicle to get a positive identification of the assailant. He went to the rear of the vehicle and saw that the hatch was open. Officer Smith found a jacket, removed it, and began looking through it for identification. He discovered a jail release form with the name Harold Boyd, Jr. on it. Hoping to find further identification, Officer Smith opened the center console where he found crack cocaine, heroin, and marijuana. Finally, Officer Smith opened the glove box and found a document which indicated that Angela Brunson, defendant's former wife, rented the SUV. In an interview with police, Brunson verified that she had rented the vehicle for defendant.

During the hearing before the trial court, the State argued that the motion to suppress evidence should be denied because it was untimely filed and defendant lacked standing. Defendant claimed that he had standing because all the evidence indicated that he was in lawful possession of the vehicle. The trial court ruled in favor of defendant and found that the search was a violation of the Fourth Amendment. The trial court also suppressed the drug evidence that Officer Smith discovered in the vehicle. The State appeals.

On appeal, the State argues that the trial court erred in granting defendant's motion to suppress the evidence because defendant did not have standing or a legitimate expectation of privacy in the vehicle. We agree and reverse the decision of the trial court.

The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. CONST. amend. IV. "[T]o have standing to contest a search, a defendant must have a legitimate expectation of privacy in the thing to be searched." *State v. Barnes*, 333 N.C. 666, 675, 430 S.E.2d 223, 228, *cert. denied*, 510 U.S. 946, 126 L. Ed. 2d 336 (1993). Our courts consider many factors in determining whether a defendant has a legitimate expectation of privacy. *State v. Phillips*, 132 N.C. App. 765, 770, 513 S.E.2d 568, 572, *appeal dismissed, disc. review denied*, 350 N.C. 846, 539 S.E.2d 3 (1999).

"A person's right to be free from unreasonable searches and seizures is a personal right[.]" *State v. Mlo*, 335 N.C. 353, 377, 440 S.E.2d 98, 110, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994). To be entitled to the protections of the Fourth Amendment, defendant "must demonstrate that any rights alleged to have been violated

were his rights, not someone else's." *Id.* Generally, a defendant may not object to the search and seizure of the property of another. *Id.* at 378, 440 S.E.2d at 110. "The burden of showing this ownership or possessory interest is on the person who claims that his rights have been infringed." *Id.* at 378, 440 S.E.2d at 111.

In the case at bar, the issue is whether defendant has standing to challenge the search of a vehicle that he did not own and did not lease where defendant also fled from police after leaving the vehicle open at the scene of an assault. We hold that defendant did not have a legitimate expectation of privacy under these circumstances and therefore had no standing to contest the search of the vehicle.

Our appellate courts have considered specific instances in which a third party, rather than defendant, rented or owned the property which was searched. *See State v. McMillian*, 147 N.C. App. 707, 557 S.E.2d 138 (2001), *disc. review denied*, 355 N.C. 219, 560 S.E.2d 152 (2002). In *McMillian*, the police found defendant in a motel room after he robbed a man outside of a convenience store. *Id.* at 709, 557 S.E.2d at 141. Defendant argued that evidence obtained from the warrantless search of the motel room violated his constitutional rights. *Id.* at 711, 557 S.E.2d at 142. Because a third party rented the room and defendant was merely present in the room of another, "defendant did not have a reasonable expectation of privacy and . . . [could not] invoke the protections of the Fourth Amendment." *Id.* at 712, 557 S.E.2d at 143. The result in *McMillian* supports the State's position in the present case. Here, a third party, rather than defendant, rented the car which police searched. Under the general rule, defendant may not object to the search and seizure of the property of another.

Federal courts have reached similar results in at least two instances. Although these cases are not binding on this Court, we find them to be instructive. In *United States v. Carr*, 939 F.2d 1442, 1446 (10th Cir. 1991), defendant did not have a legitimate expectation of privacy in a hotel room that he occupied for three weeks because the room was not registered to him or someone with whom he was sharing it. Similarly, defendant "did not have a legitimate expectation of privacy by virtue of having stayed a week in . . . [a] vacant . . . [house] that he did not own or rent." *United States v. McRae*, 156 F.3d 708, 711 (6th Cir. 1998).

These cases reveal that temporary occupancy or temporary use of property does not automatically create an expectation of privacy in that property. Furthermore, while we recognize that these cases

involve living spaces, rather than motor vehicles, our courts have determined that "there is a diminished expectation of privacy in a motor vehicle." *State v. Spruill*, 33 N.C. App. 731, 734, 236 S.E.2d 717, 719 (1977). Thus, the distinguishing fact in the present case (use of a vehicle instead of the living space of another) does not bolster defendant's case.

We are also aware that courts may consider principles of real property law, including the right to exclude, when determining the scope of rights afforded by the Fourth Amendment. In *State v. Teltser*, 61 N.C. App. 290, 294, 300 S.E.2d 554, 556 (1983), defendant had no reasonable expectation of privacy because he abandoned a suitcase and buried it on property that he did not own. Since defendant had no ownership or possessory interest in the wooded area, he had no right to exclude others from accessing it. *Id.*

In this case, defendant did not own, rent, or lease the vehicle. Furthermore, even if he had permission to use the vehicle, defendant relinquished possession and control when, in an effort to avert police, he fled from the scene of an assault leaving the vehicle open and ajar. Under these circumstances, defendant would not have the right to exclude others from the vehicle.

Finally, the *Teltser* Court recognized that a person who abandons property may also relinquish his reasonable expectation of privacy in that property:

> "The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search."

Id. at 292, 300 S.E.2d at 555 (quoting *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973)).

Our Court explained this principle further in *State v. McLamb*, 70 N.C. App. 712, 321 S.E.2d 225 (1984). There, the Court stated that there would not be a reasonable expectation of privacy "if the defendants did not own or possess the vehicles or the land where they were located[.]" *Id.* at 716, 321 S.E.2d at 228. "[S]ince the vehicles were in rough, grassy undeveloped areas and appeared to be abandoned, [defendants] could have had no reasonable expectation of privacy as

to them." *Id.* at 717, 321 S.E.2d at 228. Likewise, in the present case, defendant abandoned the vehicle by leaving it open and ajar in a location that was seven or eight feet from the back entrance of the victim's apartment.

Based on the facts and circumstances of this case, we conclude that defendant did not have a reasonable expectation of privacy in the vehicle and therefore did not have standing to challenge the search. Accordingly, we reverse the trial court's decision which granted defendant's motion to suppress evidence. The case is remanded to the trial court for proceedings not inconsistent with this opinion.

Reversed and remanded.

Chief Judge MARTIN and Judge STEELMAN concur.

WHITESIDE ESTATES, INC., PLAINTIFF v. HIGHLANDS COVE, L.L.C., DEFENDANT

No. COA04-730

(Filed 15 March 2005)

1. Environmental Law— silt deposition into creek and lake— trespass—nuisance—future injury—cost of repairs

The jury did not err in a trespass, nuisance, and violation of the North Carolina Sedimentation Pollution Control Act case by submitting issue 2 to the jury even though defendant contends the trial court's instructions allowed the jury to recompense plaintiff for future injuries arising from a recurring temporary trespass or nuisance, because: (1) the jury did not award damages for future injury, but instead evidence of the future damage that would result from inadequate repair of the creek was admitted only as relevant to the cost of necessary repairs; (2) plaintiff's recovery under issue 2 was for the cost of repairs, necessitated by defendant's actions, that were required to forestall further silt deposition into the creek and the lake; and (3) the jury could have reasonably concluded that in order to restore and repair plaintiff's lake and creek, plaintiff would have to take adequate and reasonable measures to control the source on its property.

2. Costs— prejudgment interest—compensatory damages—accrual during pendency of appeal

The trial court did not err in a trespass, nuisance, and violation of the North Carolina Sedimentation Pollution Control Act case by awarding prejudgment interest for the time between the first and second trials from 16 March 2000 to 7 November 2003, because: (1) under N.C.G.S. § 24-5(b), any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied; (2) relevant North Carolina precedent establishes that appeal does not toll the accumulation of interest, which continues to accrue during the pendency of an appeal until defendant tenders payment either to plaintiff or the clerk of court; and (3) the Court of Appeals rejected defendant's argument that plaintiff waived the right to prejudgment interest.

Appeal by defendant from judgment entered 10 November 2003 by Judge Ronald K. Payne in Jackson County Superior Court. Heard in the Court of Appeals 26 January 2005.

Roberts & Stevens, P.A., by William Clarke, for plaintiff-appellee.

Creighton W. Sossomon, for defendant-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Elizabeth B. Partlow, for defendant-appellant.

LEVINSON, Judge.

Defendant appeals from judgment entered upon a jury verdict awarding plaintiff damages for trespass, nuisance, and violation of the North Carolina Sedimentation Pollution Act. We affirm.

The relevant facts may be summarized as follows: Plaintiff owns a 265 acre tract in Jackson County, North Carolina, through which flows Grassy Camp Creek (the creek). In 1957, plaintiff dammed the creek to create Young Lake (the lake), a private recreational lake. In 1998 defendant purchased 400 acres adjoining plaintiff's land. Defendant's property, directly upstream of plaintiff's, is also traversed by the creek. After buying the property, defendant started construction of a golf course and residential housing. As a result of defendant's land disturbing activities, significant amounts of sediment and other material washed into the creek and flowed into the

lake. The North Carolina Division of Land Resources conducted inspections of defendant's construction, and issued several reports noting defendant's failure to control soil erosion or to prevent sediment from washing into the creek, and his violation of certain provisions of the Sedimentation Pollution Control Act (Sedimentation Act).

On 31 March 1999 plaintiff filed suit against defendant, seeking damages for trespass, nuisance, and violation of the Sedimentation Act. On 6 March 2000 a jury found defendant liable on all counts, and awarded plaintiff $500,000 in damages. On 16 March 2000 the trial court entered judgment for plaintiff in that amount. Following defendant's appeal, this Court issued its opinion on 16 October 2001, in *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 553 S.E.2d 431 (2001) ("*Whiteside I*"). The Court affirmed defendant's liability for trespass, nuisance, and violation of the Sedimentation Act, but remanded for a new trial on the issue of damages.

On 3 November 2003 a second trial was conducted on the sole issue of damages. Following presentation of evidence, two issues were submitted to the jury and were answered as follows:

1. What amount of damages is the Plaintiff entitled to recover?

Answer: $575,000.00.

2. What amount, if any, is the Plaintiff entitled to recover to prevent future injury to its property because of the defendant's prior acts?

Answer: $200,000.00

Accordingly, on 6 November 2003 the trial court entered judgment for plaintiff "in the amount of $575,000.00 together with interest thereon . . . from April 1, 1999, until paid and . . . $200,000.00 together with interest at the legal rate from November 6, 2003, the date of this Judgment." From this judgment defendant appeals.

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[1] Defendant contends the trial court erred by submitting Issue 2 to the jury, arguing that the trial court's instructions allowed the jury to recompense plaintiff for future injuries arising from a recurring temporary trespass or nuisance. Defendant asserts that recovery for the costs of repairing and restoring the creek in order to prevent further injury "are not recoverable as a matter of law." We disagree.

Defendant is correct that damage arising from defendant's land disturbing activity is properly characterized as a "temporary" injury. *See Phillips v. Chesson*, 231 N.C. 566, 569, 58 S.E.2d 343, 346 (1950) (plaintiff sues for damages arising from defendant's diversion of water onto plaintiff's property: Court holds "plaintiff's suit must be regarded and treated as an action for the recovery of temporary damages"). The aim of temporary damages is to "restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money." *Id.* at 571, 58 S.E.2d at 347 (citation omitted). Such damages may include, *inter alia*, "diminished rental value, reasonable costs of replacement or repair, or restoring the property to its original condition with added damages for other incidental items of loss[.]" *Id.* at 571, 58 S.E.2d at 348. Additionally, "[f]or an abatable nuisance, plaintiff may only recover damages up to the time of the complaint or trial." *Whiteside I*, 146 N.C. App. at 461, 553 S.E.2d at 440 (citing *Phillips*, 231 N.C. at 569-70, 58 S.E.2d at 346).

In the instant case, we conclude that the jury did not award damages for future injury. The court repeatedly cautioned the jury not to award damages for injuries arising from acts occurring after the suit was filed, and not to award compensation for future damages. Instead, evidence of the future damage that would result from inadequate repair of the creek was admitted only as relevant to the cost of necessary repairs. The evidence showed that, prior to defendant's land-disturbing activities, the creek did not deposit silt and sediment into the lake. However, defendant's acts rendered the creek more vulnerable to accumulation of sediment. Accordingly, to restore the creek to its non-silt-depositing pre-nuisance condition, certain preventive measures were required.

Thus, plaintiff's recovery under Issue 2 was for the cost of repairs, necessitated by defendant's actions, that were required to forestall further silt deposition into the creek and the lake. This does not constitute an award for "future injuries." The simplest of analogies makes this clear: Assume that defendant punctures the floor of plaintiff's rowboat, which then leaks and fills with water. Obviously, plaintiff could recover damages both for the injury to his boat caused by the leak, **and** for the cost of patching the boat to prevent further leaking. Indeed, in *Whiteside I*, this Court held that "evidence about controlling the erosion coming off defendant's property, however, was not irrelevant to the determination of plaintiff's damages. . . . The jury could have reasonably concluded that in order to restore and

repair plaintiff's lake and creek, plaintiff would have to take adequate and reasonable measures to control the source on its property." *Whiteside I*, 146 N.C. App. at 463, 553 S.E.2d at 441. Thus, the Court recognized the propriety of awarding damages for repair and restoration of the creek and the lake that were adequate to prevent defendant's land-disturbing activities from causing future silt deposition. Moreover, this Court approved the following jury instruction, rejecting defendant's argument that it was error:

> Plaintiff would be entitled to costs for controlling the source of sediment on defendant's property when it impacts plaintiff's property if necessary to repair and restore the creek and lake. **If defendant does not adequately detain sediment from leaving its property or prevent injury to plaintiff's property, plaintiff can take reasonable measures to protect its property in order to repair and restore its lake and creek.**

Id. at 465, 553 S.E.2d at 442 (emphasis added). This assignment of error is overruled.

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[2] Defendant also argues that the trial court erred by awarding prejudgment interest for the time between the first and second trials. Defendant does not dispute that plaintiff is entitled to prejudgment interest for the periods (1) from 1 April 1999, when the complaint was filed, until 16 March 2000 when judgment was entered on the first trial; and (2) from 7 November 2003, when judgment was entered following the second trial, until that judgment was satisfied. Defendant argues, however, that the trial court erred by awarding plaintiff prejudgment interest for the period between 16 March 2000 (date of judgment in the first trial) and 7 November 2003 (date of judgment in the second trial). We disagree.

Under N.C.G.S. § 24-5(b) (2003), "any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied." The plain language of the statute provides that prejudgment interest continues to accrue "until the judgment is satisfied." Moreover, relevant North Carolina precedent establishes that appeal does **not** toll the accumulation of interest, which continues to accrue during the pendency of an appeal until the defendant tenders payment either to the plaintiff or the clerk of court. *See, e.g., Webb v. McKeel*, 144 N.C. App. 381, 551 S.E.2d 440 (2001) (interest on amount of judgment accrues until defendant tenders partial payment to clerk

of court; thereafter, interest accrues only on balance still owing). Defendant cites no cases holding to the contrary, and we find none. Additionally, we reject defendant's argument that plaintiff has waived the right to prejudgment interest. This assignment of error is overruled.

We conclude the trial court did not err by submitting Issue 2 to the jury or by awarding plaintiff prejudgment interest for the period between entry of the first judgment and the second. Accordingly, the trial court's order is

Affirmed.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. JERRY STANFORD

No. COA04-637

(Filed 15 March 2005)

1. Constitutional Law— right to speedy trial—pre-indictment delay

The trial court did not err in a second-degree sexual offense, second-degree rape, and taking indecent liberties with a minor case by denying defendant's motion to dismiss the charges based on the fifteen-year delay that the victim took in reporting the incidents prior to the indictment being issued, because: (1) defendant's Sixth Amendment right to a speedy trial is not implicated until he becomes accused of a crime, which in this case came on the day he was indicted; (2) the State cannot delay indictment of an offense it knew nothing about; and (3) the State has no statute of limitations on the crimes of rape, sex offense, or indecent liberties.

2. Indecent Liberties— motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of indecent liberties, because: (1) there was no substantial evidence during the pertinent time period that defendant brushed against the breast of his niece for the purpose of

arousing sexual desire, and the evidence suggested nothing more than an accidental encounter; and (2) the State's evidence supporting the other sexual offense charges occurred months after this incident, and there was no evidence suggesting that the later incidents were even similar to the first to allow a reasonable inference that defendant had the same purpose.

Appeal by defendant from judgment entered 21 November 2003 by Judge Christopher M. Collier in Davidson County Superior Court. Heard in the Court of Appeals 8 December 2004.

Attorney General Roy Cooper, by Assistant Attorney General Sonya M. Calloway, for the State.

Paul F. Herzog for Defendant-Appellant.

ELMORE, Judge.

Jerry Stanford (defendant) appeals his convictions for sexual offense in the second degree, rape in the second degree, and taking indecent liberties with a minor on the basis that 1) the delay prior to indictment violated his due process rights and 2) there was insufficient evidence to support the charge of indecent liberties. We affirm the trial court's denial of defendant's motion to dismiss for pre-indictment delay, but reverse the denial of defendant's motion to dismiss the indecent liberties charge.

[1] The offenses defendant was convicted for occurred in the months of March, May, July, and September of 1987. The victim of defendant's abuse is his niece, who at the time of trial was thirty-two years old; at the time of the incidents she was thirteen and fourteen years old. Despite her telling a few family members and close friends about defendant's interactions with her previously, she did not file a report against defendant until approximately 5 September 2002, some 15 years after the incidents took place. On 14 October 2002, within just over one month of receiving the complaint from the victim, defendant was indicted for the alleged sex crimes against his niece. Defendant contends that the extensive delay between the incidents of the sex crimes and his indictment for those offenses violated his due process rights. We disagree.

It is well settled that defendant's Sixth Amendment right to a speedy trial is not implicated until he becomes accused of a crime, which in this case came on the day he was indicted. *See State v. Gallagher*, 313 N.C. 132, 136, 326 S.E.2d 873, 877 (1985) (citing *United*

States v. Marion, 404 U.S. 307, 30 L. Ed. 2d 468 (1971)). But defendant is entitled to a limited measure of due process in the time prior to his indictment. *Id.* (citing *United States v. Lovasco*, 431 U.S. 783, 52 L. Ed. 2d 752, *reh'g. denied*, 434 U.S. 881, 54 L. Ed. 2d 164 (1977)). In order to obtain a ruling that pre-indictment delay violated his due process rights, defendant must show "actual prejudice in the conduct of his defense and that the delay was unreasonable, unjustified, and engaged in for the impermissible purpose of gaining a tactical advantage over the defendant." *State v. Jones*, 98 N.C. App. 342, 344, 391 S.E.2d 52, 54 (1990).

Yet, we need not reach the issue of whether defendant has adequately shown prejudice since it was not the State that delayed its indictment of him; defendant argues the fifteen year delay that *the victim* took in reporting the incidents violates his due process rights. But he cites no case that would allow the period of time between a violation of law the State knew nothing about and its subsequent report to the police to be a delay on behalf of the State. It is inconceivable that the State could delay indictment of an offense it knew nothing about. *See, e.g., Gallagher,* 313 N.C. at 136, 326 S.E.2d at 877 (complaining witness's five year delay in coming forward was not prejudicial).

The gravamen of defendant's argument is that this case is too stale to prosecute. He argues that the limited pre-indictment due process protection is similar in application to a statute of limitations. To the extent that this argument has any merit, it is undercut by the fact that this State has no statute of limitations on the crimes of rape, sex offense, or indecent liberties. *See State v. McKinney*, 110 N.C. App. 365, 371-72, 430 S.E.2d 300, 304 (1993); *State v. Swann*, 322 N.C. 666, 672, 370 S.E.2d 533, 536 (1988). Whether we should have one is a question for our General Assembly, not for this Court. And, to judicially carve out a time period in which a felony becomes too stale to prosecute, under the guise of due process, is an act of construction we choose not to engage in.

[2] Defendant also argues that the evidence supporting his indecent liberty charge was insufficient as a matter of law. We agree.

> Where a defendant moves to dismiss charges brought under N.C. Gen. Stat. § 14-202.1(a)(1), the State must present substantial evidence of the following elements: (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the

> victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Brown, 162 N.C. App. 333, 336, 590 S.E.2d 433, 436 (2004) (quoting *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987)).

According to the indictment, defendant was charged with taking an indecent liberty with his niece during the month of March 1987. At trial, the evidence pertaining to this time period, and reviewed in the light most favorable to the State, consisted of defendant's hand "brush[ing] against" the victim's breast. This incident occurred when no one else was in the home and while the two were smoking marijuana that defendant had provided. Defendant had come over to his niece's house to babysit her and tutor her in math. By the victim's testimony, she asked defendant what he was doing in brushing against her, and he apologized for the contact. She stated that defendant's hand was in contact with her breasts very briefly, only a couple of seconds.

Similar to our decision in *Brown*, we cannot find substantial evidence that defendant brushed against his niece for the purpose of arousing sexual desire. *Id.* at 337-38, 590 S.E.2d at 436-37; *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990) ("Defendant's purpose for committing such act is the gravamen of this offense . . . ."). To the contrary, the evidence suggests nothing more than an accidental encounter.

The State relies on our decision in *State v. Bruce*, 90 N.C. App. 547, 551, 369 S.E.2d 95, 98 (1988), to support its argument that sufficient evidence of purpose was presented. However, in *Bruce*, defendant reached under the victim's blouse while they were playing around and "rubbed" her breast. Further, he locked the door to the house before proceeding to the bedroom with the child, and stopped what he was doing when someone came to the door. That level of evidence is not present in this case. Here, defendant was in the house babysitting, and his hand very briefly brushed his niece's breast, over her clothing. The added fact that the two were smoking marijuana does nothing but foster mere speculation that would otherwise seem an accident might be for some purpose of arousal; no evidence was presented that defendant gave his niece drugs for a sexually deviant purpose. *Brown*, 162 N.C. App. at 338, 590 S.E.2d at 436-37 (if evi-

dence is sufficient only to raise suspicion, speculation, or conjecture that defendant committed an act of indecent liberties, then a dismissal is proper) (citing *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983)).

The State further argues that the jury should be allowed to infer defendant's arousal because he was also tried and convicted for counts of sexual offense and rape. Indeed, defendant was charged, convicted, and does not appeal from five counts of second-degree sexual offense and two counts of second-degree rape that were consolidated and tried with his charge for indecent liberties. Defendant had intercourse with his niece on two distinct occasions and also engaged in fellatio and cunnilingus on other occasions. But the State's evidence supporting these charges occurred at times other than when defendant brushed against the breast of his niece. In fact, the other incidents occurred months *after* this incident. Thus, the State's reliance on cases such as *State v. Hewett*, 93 N.C. App. 1, 376 S.E.2d 467 (1989), is misplaced, since those cases hold that a single specific incident of sexual offense or rape may also be sufficient for an indecent liberties charge. The cumulative evidence presented at trial did sufficiently show defendant acted with a purpose of arousing sexual desire while committing the *other* incidents of sexual offense and rape. But without any evidence suggesting that the later incidents were even similar to the first, to infer that because defendant acted with a certain purpose a month or so later then he must have had the same purpose when he brushed against the victim still remains speculation; it is not a reasonable inference borne out of the evidence.

As such we reverse the trial court's denial of defendant's motion to dismiss the indecent liberty charge and vacate the judgment entered upon the charge.[1] However, there was no pre-indictment delay affecting any of the remaining convictions against defendant.

No error in part; reversed in part.

Judges McCULLOUGH and LEVINSON concur.

1. According to the record, the judgment against defendant for the indecent liberties charge, 02 CRS 059762, was never signed by the trial court. We do not address this issue since we are reversing the conviction.

LOFTIS v. LITTLE LEAGUE BASEBALL, INC.

[169 N.C. App. 219 (2005)]

LORI D. LOFTIS, AS GUARDIAN AD LITEM FOR NICHOLAS ROTHENBERG, A MINOR, AND JOSEPH AND ALINA ROTHENBERG, PARENTS OF NICHOLAS ROTHENBERG, PLAINTIFFS v. LITTLE LEAGUE BASEBALL, INC., AND MOUNTAINEER LITTLE LEAGUE, DEFENDANTS

No. COA04-532

(Filed 15 March 2005)

Negligence— safety manuals—not distributed—not proximate cause

The trial court erred by denying defendants' motion for judgment notwithstanding the verdict on plaintiff's claim that Little League, Inc. was liable under a direct negligence theory for an accident which occurred during a pop fly drill at a baseball practice. Plaintiffs' evidence did not show that the minor plaintiff's injuries would not have occurred if Little League had distributed its safety publications to individual coaches.

Appeal by defendants from judgment entered 29 December 2003 by Judge James U. Downs in Haywood County Superior Court. Heard in the Court of Appeals 31 January 2005.

Kight Law Office, by D. Rodney Kight, Jr., for plaintiffs-appellees.

Van Winkle, Buck, Wall, Starnes, & Davis, P.A., by Allan R. Tarleton, for defendants-appellants.

ELMORE, Judge.

In the spring of 1999, nine-year-old Nicholas Rothenberg (the minor plaintiff) played for a Little League baseball team coached by Mike Meissner (Coach Meissner). Plaintiff Joseph Rothenberg, the minor plaintiff's father, was the assistant coach of the team. On the afternoon of 17 April 1999, Coach Meissner conducted a pop fly drill at practice. Coach Meissner would hit a ball from where he was standing near third base to players in the outfield. The minor plaintiff dove for a ball in an attempt to catch it, but the ball struck him in the mouth.

Plaintiffs filed a negligence action against Little League Baseball, Inc. (Little League), Mountaineer Little League, and Terry Warren, the safety director of Mountaineer Little League. Plaintiffs filed a notice of voluntary dismissal as to defendant Terry Warren. In their com-

plaint, plaintiffs alleged that Little League was negligent under two theories: 1) on the basis of *respondeat superior* through the actions of Coach Meissner; and 2) in failing to conduct training sessions or distribute safety publications to coaches. Trial began on 27 October 2003, and plaintiffs proceeded with both theories of negligence against Little League.

As evidence of direct negligence, plaintiffs introduced several coaching instruction manuals as exhibits to show that Little League publishes materials on the subject of coaching drills. Coach Meissner testified that he did not receive any of these coaching manuals; the only publication he received from Little League was the 1999 Official Regulations and Playing Rules.

Plaintiffs' evidence of negligence by Coach Meissner tended to show that on the day of the accident, Coach Meissner was hitting fly balls to a group of players in right field at distances of between 200 and 300 feet from his position between second and third base. Plaintiff Joseph Rothenberg testified that the sun was directly overhead at the time of the drill. The day before, Mr. Rothenberg had been conducting a drill where he would hit fly balls to players one at a time and at a distance of between 80 and 100 feet away. Also, plaintiffs presented evidence that Little League had prepared a practice schedule for coaches and that Coach Meissner distributed this schedule to the parents and players. At the time of the incident, Coach Meissner was conducting a Saturday practice for which he had reserved the field by contacting a Little League representative.

The trial court denied defendants' motion for a directed verdict at the close of plaintiffs' evidence and again at the close of all evidence. The court held a charge conference to discuss the verdict form to be submitted to the jury. Defendants did not object to the proposed instructions.[1] The jury answered the issues submitted to them on the verdict form as follows:

> 1. Was the minor plaintiff, Nicholas Rothenberg, injured by the negligence of the coach, Michael Meissner? No
>
> *If you answer the first issue "No," do not answer the next two issues.*

1. As defendants failed to object to the instructions before the jury retired to consider its verdict, defendants may not assign error to the instructions on appeal. N.C.R. App. P. 10(b) (2004). Thus, we do not address defendants' assignments of error concerning the court's instructions to the jury.

2. Was the coach, Michael Meissner, the agent of Little League Baseball, Inc.?

3. Was the coach, Michael Meissner, the agent of Mountaineer Little League?

4. Was the minor plaintiff, Nicholas Rothenberg, injured by the negligence of Little League Baseball, Inc.? Yes

5. Was the minor plaintiff, Nicholas Rothenberg, injured by the negligence of Mountaineer Little League? No

If you answer issues (1), (4), and (5), "No," do not answer the next issue as to damages.

If you answer issues (2), (3), (4), and (5) "No," do not answer the next issue as to damages.

6. What amount of damages are the Plaintiffs entitled to recover?

a. For medical expenses $15,000.

b. For pain and suffering $5,000.

Defendants moved for judgment notwithstanding the verdict, but the court denied the motion and entered a judgment against defendants in the amount of $20,000.00 plus costs. From this judgment entered 29 December 2003, defendants appeal.

Defendants assign error to the trial court's denial of their motion for judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict presents the question of whether the evidence was sufficient for submission to the jury. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 644, 272 S.E.2d 357, 359 (1980). The trial court must consider the evidence in the light most favorable to the party opposing the motion, and all conflicts in the evidence are resolved in favor of the opponent. *Morrison v. Kiwanis Club*, 52 N.C. App. 454, 462, 279 S.E.2d 96, 101 (citing *Potts v. Burnette*, 301 N.C. 663, 273 S.E.2d 285 (1981)), *disc. review denied*, 304 N.C. 196, 285 S.E.2d 100 (1981).

At the outset, we note that the jury found that Coach Meissner was not negligent in conducting the drill that caused the minor plaintiff's injuries. Therefore, defendants are not liable on the theory of *respondeat superior*, and we review the question of whether the evidence was sufficient for submission to the jury solely on the theory of Little League's own negligence. Defendants argue that plaintiffs did

not present evidence of proximate cause connecting Little League to the minor plaintiff's injuries. We agree. Proximate cause is defined as:

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and *without which the injuries would not have occurred*, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Lynn v. Overbrook Development, 328 N.C. 689, 696, 403 S.E.2d 469, 473 (1991) (citations omitted).

At trial, plaintiffs introduced several exhibits in support of their claim alleging that Little League's own negligence in failing to provide coaching manuals caused the minor plaintiff's injuries. Plaintiffs' exhibit 8 contained excerpts from a publication titled "Leadership Training for Little League Managers and Coaches." This publication states on page 47 that a coach should throw fly balls to outfielders from a short distance away and on page 73 that players should not be expected to perform a skill until that skill has been given appropriate teaching and practice time. Plaintiffs' exhibit 9, an excerpt from the "Instruction Manual for Managers and Coaches of Players 9 to 12 Years," provides a pictorial example of a fly ball drill in which the coach throws the ball to each player, one player at a time.

Plaintiffs assert that proximate cause was a question for the jury because their evidence showed that "[h]ad the Coach been provided with [these safety publications], he would have known the proper and safe way to conduct the drill." However, plaintiffs offered no testimony that had Coach Meissner received these manuals, he would have read each section pertinent to practice drills prior to conducting each drill. Moreover, plaintiffs' evidence fails to establish that a coach would be required, or even expected, to comply with the drills outlined in Little League coaching manuals. Thus, plaintiffs' evidence fails to show that the minor plaintiff's injuries would not have occurred if Little League had distributed several of its safety publications to individual coaches. *See Morrison*, 52 N.C. App. at 463, 279 S.E.2d at 102 (judgment notwithstanding the verdict was proper on issue of proximate cause where no evidence that accident would not have occurred if defendant Kiwanis Club had followed the customary standards for operating camps for handicapped children). Therefore, even assuming that Little League was negligent in failing to distribute

coaching safety manuals, the evidence in the record simply does not show that any negligence by Little League was the proximate cause of the minor plaintiff being hit by a ball during an outfield drill.

Accordingly, we hold that the trial court erred in denying defendants' motion for judgment notwithstanding the verdict on plaintiffs' claim that Little League was liable under a direct negligence theory. As the jury returned a verdict in favor of plaintiffs on this theory of liability alone, we must reverse the judgment in favor of plaintiffs.

Reversed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

GERARDO MURILLO AND MATHILDA MURILLO v. JON M. DALY, SR. AND BONNIE T. DALY

No. COA04-533

(Filed 15 March 2005)

Judgments; Pleadings— compulsory counterclaims—summary ejectment—breach of contract—negligence—res judicata

Plaintiff tenants' claims against defendant landlords for breach of contract, negligence and unfair and deceptive trade practices were not compulsory counterclaims in defendants' prior summary ejectment action and were thus not barred by the doctrine of res judicata, because: (1) the claims for breach of contract and negligence were different from the summary ejectment claim when plaintiffs' claims are based on defendants' failure to adequately maintain the septic tank system on the property and plaintiffs do not attack the summary ejectment proceeding; (2) although both the summary ejectment proceeding and current claims arise from the landlord-tenant relationship of the parties, a common origin alone is insufficient to characterize plaintiffs' claims as compulsory counterclaims; and (3) the remedies sought by the two parties in the two actions are different when defendants sought possession of the property and unpaid rent whereas plaintiffs sought monetary damages for breach of contract, tort claims, and for unfair and deceptive trade practices.

Appeal by Plaintiffs from judgment entered 4 January 2004 by Judge Mark E. Klass in Superior Court, Davie County. Heard in the Court of Appeals 11 January 2005.

David B. Hough for plaintiffs-appellants.

Orbock, Bowden, Ruark & Dillard, PC, by Edwin W. Boden and Allman, Spry, Leggett & Crumpler, P.A., by W. Rickert Hinnant and Roger E. Cole for defendants-appellees.

WYNN, Judge.

In North Carolina, to establish when an action will be treated as a compulsory counterclaim, the similarity in the nature of the action and the remedy sought has been characterized as more important than a basis in a common factual transaction. *Twin City Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 493, 263 S.E.2d 323, 325 (1980). In this case, Defendants argue that the trial court correctly treated Plaintiffs' claims for breach of contract and negligence as compulsory counterclaims to a summary ejectment action. Because we hold that the nature of the actions asserted and remedies sought in the claims for breach of contract and negligence are different from the summary ejectment claim, we reverse the trial court's order and remand for trial.

Gerardo and Mathilda Murillo entered into a residential lease agreement with Jon and Bonnie Daly in 1996 for the rental of a house located at 388 Riverbend Drive, Advance, North Carolina. The Murillos agreed to pay $2,200.00 per month and took possession of the property around 10 September 1996.

Throughout 2001 and 2002, the septic tank system at the rental property began to deteriorate. During this time, bathtub and toilets would backup, causing sewage to overflow into the house.

In October 2002, the Murillos stopped paying rent and demanded that the Dalys fix the septic tank system. The Murillos continued to occupy the residence for five months without paying rent.

Mr. Daly filed a Complaint in small claims court on 4 March 2003 in Davie County, North Carolina seeking to eject the Murillos from the property and to recover unpaid rent from the Murillos' breach of the lease agreement. In their counterclaim, the Murillos sought dismissal of the Complaint and "such other and further relief as the

Court deems just and proper." The Murillos asserted that the septic tank had been non-functioning for three years, allowing sewage and excrement to overflow in the bathrooms and cover the backyard. They further contended that Daly's claim was retaliatory.[1]

After hearing evidence from both parties, the Magistrate ruled against the Murillos on their counterclaim, ordered the Murillos to vacate the premises, and awarded Mr. Daly $4000.00 in unpaid rent plus the costs of the proceeding. The Murillos did not perfect their appeal to the District Court in Davie County.

Thereafter, the Murillos filed a new action in Superior Court, Davie County. The Murillos alleged essentially the same facts in their Complaint as they did in their Answer and Counterclaim in the previous action in small claims court. In this new suit, they alleged breach of contract, negligence, and unfair and deceptive trade practices. The Dalys moved for summary judgment as to all claims. On 4 January 2004, the trial court granted the motion for summary judgment on the ground that the claims were barred in their entirety by the doctrine of *res judicata*. The Murillos appealed.

On appeal, the Murillos argue that the trial court erred in granting the Dalys' Motion for Summary Judgment for their breach of contract, negligence, and unfair and deceptive trade practice claims. We agree.

Summary judgment shall be rendered if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2004). On appeal, an order allowing summary judgment is reviewed *de novo*. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

Under the doctrine of *res judicata*:

> Where a second action or proceeding is between the same parties as the first action or proceeding, the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all mat-

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1. While the Murillos asserted counterclaims before the Magistrate against the summary ejectment action under G.S. 42-26(1), this Court recognized in *Twin City Apartments, Inc.*, 45 N.C. App. at 494, 263 S.E.2d at 325-26, that:

> "G.S. 42-26(1) provides no defense because none exists. Once the estate of the lessee expires, the lessor, by virtue of his superior title, may resume possession by following proper procedures. Defendant's right to possession is protected by virtue of G.S. 42-35 and G.S. 42-36, which provide a remedy to the tenant if he is evicted, but later restored to possession."

ters which could properly have been litigated and determined in the former action or proceeding.

Fickley v. Greystone Enters., Inc., 140 N.C. App. 258, 260, 536 S.E.2d 331, 333 (2000) (citation omitted).

A counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." N.C. Gen. Stat. § 1A-1, Rule 13(a) (2004). To determine whether a claim arises out of the same transaction or occurrence as a prior claim, the court must consider: "(1) whether the issues of fact and law are largely the same; (2) whether substantially the same evidence is involved in each action; and (3) whether there is a logical relationship between the two actions." *Brooks v. Rogers*, 82 N.C. App. 502, 507-8, 346 S.E.2d 677, 681 (1986).

In this case, Mr. Daly's action for ejectment and recovery of unpaid rent[2] was based on the assertion that the Murillos breached the lease agreement by failing to pay rent, and the Murillos' counterclaim alleged that the summary ejectment was filed in retaliation. The Murillos' current claims are for breach of contract, negligence, unfair and deceptive trade practices arising from a broken septic tank system.

In *Twin City Apartments, Inc.*, 45 N.C. App. 490, 263 S.E.2d 323, this Court found a similar claim was not compulsory. The tenant filed a complaint against the landlord in Hertford County alleging: (1) the landlord breached the lease agreement for personal reasons; (2) breach of rental contract; (3) breach of covenants of the leasehold; (4) breach of covenants of fitness and habitability; (5) duty to repair; and (6) civil rights violations. *Id.* at 492, 263 S.E.2d at 324. The landlord then filed a summary ejectment complaint against the tenant in Forsyth County. *Id.* The tenant answered and argued that the landlord's claim should have been raised as a compulsory counterclaim in the Hertford County case. *Id.* This Court determined that "[t]he nature of the actions and the remedies sought are too divergent[,]" to

2. For the purposes of *res judicata* parties include all persons in privity with a party. *Hales v. N.C. Ins. Guaranty Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). "Privity" for purposes of *res judicata* "denotes a mutual or successive relationship to the same rights of property." *Id.* at 334, 445 S.E.2d at 594 (citations omitted). As Ms. Daly had a mutual relationship with regard to the rental property at issue she was in privity with Mr. Daly for the purposes of *res judicata*.

require the landlord's summary ejectment action be designated a compulsory counterclaim. *Id.* at 493, 263 S.E.2d at 325.

Here, the Murillos' claims are based on the Dalys' failure to adequately maintain the septic tank system on the property; they do not attack the summary ejectment proceeding. Both the summary ejectment proceeding and current claims arise from the landlord-tenant relationship of the parties. However, a "common origin" alone is insufficient to characterize the Murillos' claims as compulsory counterclaims. *Twin City Apartments, Inc.*, 45 N.C. App. at 493, 263 S.E.2d at 325. Also, the remedies sought by the Murillos and Dalys in the two actions are different. The Dalys sought possession of the property and unpaid rent, whereas the Murillos seek monetary damages for breach of contract, tort claims, as well as a claim of unfair and deceptive trade practices. The nature of the remedies are too divergent to classify the Murillos' claims as compulsory counterclaims. *Id.*

As the Murillos' claims were not compulsory counterclaims in the previous action, they are not now barred by the doctrine of *res judicata*. *Fickley*, 140 N.C. App. at 260, 536 S.E.2d at 333. Therefore, the trial court's order granting the Dalys' Motion for Summary Judgment must be reversed and the case remanded for trial on the merits.

Reversed and remanded.

Judges McGEE and TYSON concur.

GENE H. CARSWELL, PLAINTIFF v. HENDERSONVILLE COUNTRY CLUB, INC., A NORTH CAROLINA CORPORATION, DEFENDANT

No. COA04-691

(Filed 15 March 2005)

1. Corporations; Costs— attorney fees—access to corporate records—no court order

Plaintiff shareholder was not entitled to an award of attorney fees under N.C.G.S. § 55-16-04(c) where there was no court order enforcing plaintiff's statutory right to inspection and copying of defendant's corporate records at defendant's expense. The parties had signed a consent order that plaintiff would have access,

but that order contained no findings or conclusions and was not an adjudication of rights.

2. Costs— attorney fees—authority to award—consent order

A provision in a consent order giving the court the authority to award attorney fees in a dispute over access to corporate records was not valid in the absence of statutory authority.

3. Judgments— findings—bench trial—consent order—subsequent petition for attorney fees

The trial court did not err by failing to enter findings pursuant to N.C.G.S. § 1A-1, Rule 52(a)(1) in ruling on a petition for attorney fees. That rule applies only to "actions" tried before the trial court without a jury; here, the action had been addressed in a consent order.

Appeal by plaintiff from order entered 20 January 2004 by Judge James L. Baker, Jr. in Henderson County Superior Court. Heard in the Court of Appeals 31 January 2005.

Law Offices of William M. Alexander, Jr., PLLC, by William M. Alexander, Jr., for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Stephen J. Grabenstein, for defendant-appellee.

ELMORE, Judge.

Gene H. Carswell (plaintiff) is a shareholder of Hendersonville Country Club, Inc. (defendant) and was elected as a director in August 1999. On 7 December 2001 plaintiff made a request in writing to defendant that he be allowed to review and copy certain documents, including a shareholder list. On 14 January 2002 defendant provided plaintiff access to the minutes of board meetings and other corporate documents at the Club's management office. While copying these documents, plaintiff inquired about obtaining shareholder personal information. When defendant's staff advised plaintiff that his inquiry would be considered by management, plaintiff left the office without completing the document review he had requested.

On 1 February 2002 plaintiff's attorney, Mr. Timothy Cosgrove, demanded that defendant provide plaintiff with a list of names and home addresses of all shareholders; stock transfer records; tax returns over the past five years; and the name of defendant's 401K

administrator. Plaintiff then corresponded directly with the President of defendant's Board of Directors, Mr. John Gould. On 13 March 2002 defendant informed plaintiff that it had already made available for plaintiff's review the tax returns, stock transfer records, accounting records, minutes of director and shareholder meetings, and a list of shareholder names. Defendant indicated that its concern for shareholder privacy prompted the decision to withhold shareholder home addresses and phone numbers.

Despite being provided access to defendant's records, on 26 March 2002, plaintiff filed an application in Henderson County Superior Court for inspection of business records pursuant to N.C. Gen. Stat. § 55-16-01 *et. seq.* In response to plaintiff's conduct, defendant suspended plaintiff's membership with the Club effective 2 April 2002. Defendant then filed a motion to dismiss plaintiff's complaint, but the parties subsequently entered into settlement negotiations. The parties and their attorneys signed a consent order and voluntary dismissal with prejudice of plaintiff's action; the order was approved by Judge Zoro J. Guice on 2 July 2002. The parties agreed that plaintiff "shall have full and ongoing access to all records of the Club, and at Plaintiff's expense may copy same, during normal business hours of the Club's office . . . ." Plaintiff was granted permission to copy shareholder addresses and telephone numbers and any other documents "that Plaintiff believes necessary to fulfill his duties as director during his term or to which he is entitled to as a stockholder." The order also provided that plaintiff was reinstated as a Club member, canceling his suspension. With respect to the issue of attorneys' fees, the order stated the following:

> 6. The parties agree to submit to this court for decision by Brief and stipulated facts (if the parties cannot stipulate as to facts then by affidavit proposed by each of the parties) without request for oral argument their respective requests for the award of attorneys fees in this matter. This court shall retain jurisdiction in this matter to enforce the terms and conditions by which the parties have agreed and consented to the entry of this Order as set out herein.

In accordance with the terms of the consent order, both parties submitted affidavits setting out their requests for attorneys' fees. Judge Baker ruled on the requests and mailed a copy of his order along with a letter to the parties addressing their entitlement to attorneys' fees. In this letter, Judge Baker observed that almost every single assertion by one side was contested by the opposing party. In the order, he

determined that each party should bear its own costs and expenses and denied the requests for attorneys' fees. From this order entered 20 January 2004, plaintiff appeals.

[1] Plaintiff contends that an award of attorneys' fees was mandated under N.C. Gen. Stat. § 55-16-04. We disagree. Our General Statutes permit a shareholder who properly demands and is denied access to corporate records to apply for court-ordered inspection and copying of the requested documents at the corporation's expense. *See* N.C. Gen. Stat. § 55-16-04(a) and (b). The statute further provides that

> If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs (including reasonable attorneys' fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.

N.C. Gen. Stat. § 55-16-04(c) (2003). Thus, the language of the statute is clear that attorneys' fees may only be awarded following a court order requiring the corporation to allow inspection and copying of the records demanded by the shareholder. Here, the court did not enter an order to this effect. Rather, the parties agreed that plaintiff would have ongoing access to defendant's records and signed a consent order which was approved by the court. This consent order is not an adjudication of rights in favor of plaintiff because it contains no findings of fact or conclusions of law by the trial court. *See Ibele v. Tate*, 163 N.C. App. 779, 781, 594 S.E.2d 793, 795 (2004) (consent judgment which contains no findings or conclusions is merely recital of parties' agreement; not an adjudication of rights); *Crane v. Green*, 114 N.C. App. 105, 106, 441 S.E.2d 144, 144-45 (1994) (with the exception of domestic relations cases, a consent judgment is merely a court-approved contract without a judicial determination). As there was no court order enforcing plaintiff's statutory right to inspection and copying of defendant's corporate records at defendant's expense, plaintiff was not entitled to an award of attorneys' fees under N.C. Gen. Stat. § 55-16-04(c).

[2] Next, plaintiff argues that Paragraph 6 of the consent order provides the court with authority to award attorneys' fees. However, "[a]s a general rule contractual provisions for attorney's fees are invalid in the absence of statutory authority." *Forsyth Municipal ABC Board v. Folds*, 117 N.C. App. 232, 238, 450 S.E.2d 498, 502

(1994) (citing *Enterprises, Inc. v. Equipment, Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814-15 (1980)). The only exception recognized by our Supreme Court deals with contractual provisions for attorneys' fees contained in separation agreements. *See Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995). Thus, even though the consent order contained an express provision permitting the parties to seek recovery of attorneys' fees, neither party is entitled to an award of fees absent statutory authority. *See Harborgate Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 297-98, 551 S.E.2d 207, 212 (2001) (provision in consent judgment for attorneys' fees invalid in absence of statutory authority), *disc. review denied*, 356 N.C. 301, 570 S.E.2d 506 (2002); *see also Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 11-12, 545 S.E.2d 745, 752 (contractual provision notwithstanding, parties could not recover attorneys' fees without express statutory authority), *aff'd*, 354 N.C. 565, 556 S.E.2d 293 (2001). As the court properly denied the requests of both parties, plaintiff's argument is overruled.

[3] Finally, plaintiff argues that the trial court erred in failing to enter findings pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a)(1). We disagree. Rule 52(a)(1) of the North Carolina Rules of Civil Procedure applies only to "actions" tried before the trial court without a jury. *See* N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2003); *Tay v. Flaherty*, 100 N.C. App. 51, 55, 394 S.E.2d 217, 219 (Rule 52(a)(1) inapplicable to hearing on petition for attorneys' fees because an "action" was already in existence; petition must be characterized as motion for court order pursuant to Rule 7(b)(1)), *disc. review denied*, 327 N.C. 643, 399 S.E.2d 132 (1990). Here, the parties filed petitions for attorneys' fees and sought an order of the court; plaintiff's action had already been addressed in the consent order. Therefore, Rule 52(a)(1) does not apply to the court's order denying the petitions for an award of attorneys' fees.

We hold that the trial court properly denied both parties' requests for attorneys' fees and affirm the court's order directing each party to pay its own costs and expenses.

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

AUTEC, INC., PLAINTIFF v. SOUTHLAKE HOLDINGS, LLC, DEFENDANT

No. COA04-761

(Filed 15 March 2005)

1. **Civil Procedure— Rule 12 motion to dismiss—after default judgment—Rule 60 motion as remedy**

The trial court did not err by denying defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b) on the ground that plaintiff did not comply with all of the requirements for service by publication. As defendant never submitted an answer nor made any motion before entry of default and default judgment, the defenses of lack of jurisdiction over the person, insufficiency of process, and insufficiency of service are deemed waived. Defendant can seek relief under Rule 60, but an appeal from a Rule 12(b) decision is not interchangeable with that of a Rule 60(b) decision because different standards of review apply.

2. **Appeal and Error— standard of review—appeals from Rule 12 and Rule 60**

Appeals under Rule 12(b)(2), (4), and (5) are reviewed de novo, except that findings are binding on appeal if supported by competent evidence. A ruling under Rule 60(b) is left to the sound discretion of the trial court.

Appeal by Defendant from judgment entered 20 February 2004 by Judge Kimberly Taylor in Superior Court, Iredell County. Heard in the Court of Appeals 15 February 2005.

Caudle & Spears, P.A., by C. Grainger Pierce, Jr. and Christopher J. Loebsack for defendant-appellant.

Eisele, Ashburn, Greene & Chapman, P.A., by John D. Greene for plaintiff-appellee.

WYNN, Judge.

Under Rule 12 of the North Carolina Rules of Civil Procedure, a party waives the defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process if it is neither made by motion nor included in a responsive pleading. N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2004). In this appeal, Defendant contends the trial court erred by denying its Rule 12(b) motions made after the

entry of default judgment. Since the proper method of attacking a final judgment is under Rule 60(b) of the North Carolina Rules of Civil Procedure (which the Defendant does not raise on appeal), we affirm the trial court's denial of Defendant's motion to dismiss under Rule 12(b).

Plaintiff, Autec, Inc., filed the Complaint in this action on 12 August 2002 against Defendant, Southlake Holdings, Inc., for the collection of a balance due for the sale and installation of car wash equipment. Summons was issued on the same date to Southlake's registered agent at its registered address.

The car wash at issue is located in Mecklenburg County, North Carolina. Southlake's registered agent was Kimberly E. Fox and the registered address was in Huntersville, North Carolina in Mecklenburg County.

On 13 August 2002, service was attempted by certified mail at the registered address but was returned with the notations "Not Deliverable as Addressed" and "Forwarding Order Expired." On 9 September 2002, Alias and Pluries summons were issued for two additional addresses obtained by Autec and mailed via certified mail. But those two service attempts were returned with the notation "Unclaimed." Service was also attempted by the Sheriff of Mecklenburg County but that attempt was unsuccessful.

Autec published a notice of service by publication on 17, 24, and 31 January 2003 in the Mooresville Tribune which has a circulation throughout southern Iredell County and around the Lake Norman shoreline.

On 19 March 2003, Autec filed an affidavit of publication along with a motion for entry of default and motion for default judgment. That same day, a default judgment was entered against Southlake.

On 10 December 2003, Southlake filed a motion to dismiss and motion to set aside the default judgment and entry of default. Following a hearing, the trial court denied Southlake's motions. Southlake appealed.

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[1] On appeal, Southlake argues that the trial court erred in denying its motion to dismiss pursuant to Rules 12(b)(2), (4), and (5) of the North Carolina Rules of Civil Procedure as Autec did not comply with all requirements for service by publication. We disagree.

Rule 12(b) of the North Carolina Rules of Civil Procedure provides that,

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> . . .
>
> (2) Lack of jurisdiction over the person,
>
> . . .
>
> (4) Insufficiency of process,
>
> (5) Insufficiency of service of process,
>
> . . .
>
> A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

N.C. Gen. Stat. § 1A-1, Rule 12(b) (2004). Rule 12 goes on to state that a defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2004).

As Southlake never submitted an answer nor made any motion before entry of default and default judgment, the defenses of lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process pursuant to Rule 12(b) are deemed waived. N.C. Gen. Stat. § 1A-1, Rule 12(h)(1). *See In re Howell*, 161 N.C. App. 650, 655, 589 S.E.2d 157, 160 (2003). We recognize that a defendant that is not properly served may not have notice to answer or move for dismissal under Rule 12(b). However, under our rules, Rule 12(b) does not provide a means for dismissing a judgment. But the fact that a defendant is deemed to have waived 12(b) defenses does not leave him without relief as he can seek relief under Rule 60. Thus, since a default judgment had already been entered, the trial court did not err in denying Southlake's motion to dismiss as this was deemed waived after the pleading stage.

Indeed, the result desired by Southlake is a reversal of the default judgment on the basis of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process. The proper method of attacking a final judgment is by a motion under Rule 60(b) of the North Carolina Rules of Civil Procedure. *Sink v. Easter*, 288 N.C. 183, 196, 217 S.E.2d 532, 540 (1975). However, Southlake did not assign as error the trial court's denial of its motion to set aside judgment under Rule 60(b) of the North Carolina Rules of Civil Procedure. Nor does Southlake cite or argue Rule 60(b) in its brief.

Rule 60(b)(4) of the North Carolina Rules of Civil Procedure allows the trial court to "relieve a party . . . from a final . . . order" if "[t]he judgment is void." N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2004). " '[A] judgment or order . . . rendered without an essential element such as jurisdiction or proper service of process . . . is void.' " *Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 689, 567 S.E.2d 179, 184 (2002) (quoting *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984)). "If a judgment is void, it is a nullity and may be attacked at any time. Rule 60(b)(4) is an appropriate method of challenging such a judgment." *Burton v. Blanton*, 107 N.C. App. 615, 616-17, 421 S.E.2d 381, 383 (1992) (internal citations omitted).

[2] Moreover, an appeal under Rule 12(b)(2), (4), and (5) cannot be treated the same as an appeal under Rule 60(b)(4), as the standards of review are different. This court reviews a trial court's ruling under Rule 12(b)(2), (4), and (5) *de novo*, except that if the trial court made findings of fact, those findings are binding on appeal if supported by competent evidence. *Harper v. City of Asheville*, 160 N.C. App. 209, 215, 585 S.E.2d 240, 244 (2003). Whereas, a motion under Rule 60(b) is left to the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal without a showing that the court abused its discretion. *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983). As a motion under Rule 60(b) has a much higher burden to overturn a decision on appeal than Rule 12(b), an appeal from a Rule 12(b) motion is not interchangeable with that of a Rule 60(b) motion.

In sum, Rule 60(b) would have been the proper rule to include in the assignments of error and brief, however, as Southlake neither raised nor addressed this issue, the motion pursuant to Rule 60(b) is not before this Court. Accordingly, we affirm the trial court's denial of Defendant's motions under Rule 12(b).

Affirmed.

Judges HUDSON and STEELMAN concur.

RUTH MARIE CLARK RAY, EMPLOYEE, PLAINTIFF v. PET PARLOR, EMPLOYER, AND STATE AUTOMOBILE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA03-1600

(Filed 15 March 2005)

Workers' Compensation— facial disfigurement—Commission's failure to personally view

The Industrial Commission erred in a workers' compensation case arising out of plaintiff's face injury she sustained from a dog bite arising out of her employment as a dog groomer by awarding plaintiff compensation for facial disfigurement, and the case is remanded for a new hearing and award in accordance with the Commission's rules, because: (1) the Commission failed to personally view plaintiff's disfigurement as required by Rule 701(9) of the Workers' Compensation Rules; (2) the full Commission did not base its findings on competent evidence, but instead relied on the description given by the deputy commissioner and photographs of plaintiff which had been excluded as evidence representative of plaintiff's disfigurement by the deputy commissioner; and (3) the parties did not agree on a description of the disfigurement.

Appeals by plaintiff and defendants from opinion and award entered 1 July 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 January 2005.

Wayne O. Clontz, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Season D. Atkinson, for defendant-appellants.

MARTIN, Chief Judge.

Plaintiff filed this workers' compensation claim to recover for an injury to her face, sustained when she suffered a dog bite arising out of her employment as a dog groomer. Defendants admitted compens-

ability and plaintiff received total temporary compensation while she was out of work and underwent cosmetic surgery "to correct misalignment of the vermillion border of plaintiff's upper lip" due to the dog bite. Her plastic surgeon, Dr. Siciliano, determined that she had reached maximum medical improvement on 21 May 2001.

The deputy commissioner found that plaintiff had a permanent scar on her upper lip as a result of the 28 February 2000 compensable injury and that the scar was visible "from a distance of six feet or less." As a result of the scar, plaintiff's philtrum, the area of the upper lip directly in the middle of the nose that extends down to the bottom of the upper lip, is approximately twice the normal width. The deputy commissioner further found that plaintiff was embarrassed and self-conscious about the scar, and that the scar caused her numbness and pain or discomfort. The deputy commissioner determined that:

> 9. As a direct and proximate consequence of plaintiff's February 28, 2000 compensable injury, plaintiff has sustained serious and permanent facial disfigurement which mars her appearance to such an extent that it may reasonably be presumed to lessen her future opportunities for remunerative employment and so reduce her future earning capacity. The fair and equitable amount of compensation for this loss under the Workers' Compensation Act is $1,450.00.

Based on these findings, plaintiff was awarded compensation for facial disfigurement in the amount of $1,450.00, to be paid in a lump sum, subject to a reasonable attorney's fee of twenty-five percent (25%). Defendants were ordered to "pay all medical[] expenses incurred by plaintiff as a result of this injury by accident" and costs.

Plaintiff appealed the deputy commissioner's award to the Full Commission. Due to a mis-communication by the plaintiff's attorney, "plaintiff was not present at oral arguments" scheduled for 2 December 2002. The Commission specially scheduled a "viewing of the plaintiff" for 7 May 2003, and defendants' counsel appeared but neither plaintiff nor her attorney appeared. Upon being contacted by the Commission, plaintiff's counsel advised that plaintiff could not attend the viewing due to a lack of transportation. Plaintiff's attorney apparently sought "a further continuance" to which defendants objected.

The Commission proceeded to issue its Opinion and Award, determining "that the pictures of plaintiff in evidence and description

given by the deputy commissioner are sufficient to render a decision in this matter, especially in light of the information from plaintiff's attorney that plaintiff has received subsequently additional facial injuries from an unrelated incident." In the Opinion and Award, the Commission made, almost verbatim, the same findings of fact and conclusions of law made by the deputy commissioner and awarded plaintiff compensation for disfigurement in the amount of $1,450.00, subject to an attorney's fee of twenty-five percent (25%), and ordered defendants to pay all medical expenses incurred by plaintiff as a result of the accident. Both plaintiff and defendants appeal from the award of the Full Commission.

On appeal, plaintiff argues that the Commission's monetary award for disfigurement is inconsistent with its findings with respect to the severity of her facial disfigurement. Conversely, defendants contend the Commission erred by (1) granting plaintiff any compensation because the disfigurement is not serious and (2) failing to personally view plaintiff's disfigurement pursuant to Rule 701 (9) of the Workers Compensation Rules.

When reviewing an opinion and award of the Industrial Commission, we determine "(1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). The Commission performs the "ultimate fact-finding" function under our Workers Compensation Act. *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999) and a determination of serious facial disfigurement "is a question of fact to be resolved by the Commission." *Russell v. Laboratory Corp. of Am.*, 151 N.C. App. 63, 68, 564 S.E.2d 634, 638, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 111 (2002). When the Commission's findings are supported by competent evidence, they are conclusive on appeal, *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801-02 (1997), and this Court "may set aside a finding of fact only if it lacks evidentiary support." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003).

In this case, the Commission did not base its findings on competent evidence; rather, the Commission relied upon the "description given by the deputy commissioner" and photographs of plaintiff which had been excluded as evidence representative of plaintiff's dis-

figurement by the deputy commissioner. Industrial Commission Rule 701 (9) requires that "[a] plaintiff appealing the amount of a disfigurement award shall personally appear before the Full Commission to permit the Full Commission to view the disfigurement." Worker's Comp. R. of N.C. Indus. Comm'n 701 (9), 2003 Ann. R. (N.C.) 844. By simply adopting the facts as found by the deputy commissioner, without viewing plaintiff or having a description of the disfigurement agreed upon by the parties, the Commission has failed to base its factual findings upon competent evidence. Because there was not competent evidence before the Commission on which to base its award, the Full Commission erred in awarding plaintiff compensation for facial disfigurement. Therefore, we must remand this matter to the Commission for a new hearing and award in accordance with the Commission's rules.

Remand for new hearing.

Judges CALABRIA and GEER concur.

ARTHUR LEE MAYS, PLAINTIFF-APPELLANT v. DAVID W. CLANTON, INDIVIDUALLY, AND THE TOWN OF TAYLORSVILLE, A MUNICIPALITY, AND THE TAYLORSVILLE POLICE DEPARTMENT, DEFENDANT-APPELLEE

No. COA04-710

(Filed 15 March 2005)

Collateral Estoppel and Res Judicata— defensive collateral estoppel—mutuality of parties—consideration of criminal results in civil action

Defensive collateral estoppel no longer requires mutuality of parties in North Carolina, and the trial court properly considered plaintiff's criminal convictions for assault in granting summary judgment for defendants on plaintiff's civil claims arising from the same incident.

Appeal by Plaintiff from judgment entered 20 January 2004 by Judge Larry G. Ford in Superior Court, Alexander County. Heard in the Court of Appeals 1 February 2005.

Cunningham & Crump, PLLC, by R. Flint Crump for plaintiff-appellant.

Stiles Byrum & Horne, L.L.P., by Terry D. Horne and Virginia Lee Bailey for defendant-appellee.

WYNN, Judge.

For the use of defensive collateral estoppel, North Carolina does not require mutuality of parties. Where an issue in a civil suit has already been fully litigated in a criminal trial, evidence of that criminal conviction is admittable in the civil suit. For the reasons stated herein, we affirm the decision of the trial court.

On 28 November 2001, Plaintiff Arthur Lee Mays filed a civil action against Defendants David W. Clanton, The Town of Taylorsville, and The Taylorsville Police Department alleging battery, false imprisonment, negligent hiring, and negligent supervision. On 26 December 2003, Mays voluntarily dismissed the negligent hiring and supervision claims.

In his pleadings, Mays alleged that on 2 December 2000, Clanton, a police officer for the Town of Taylorsville, was directing traffic after a Christmas parade. Clanton instructed Mays to move his vehicle onto a street that Mays did not want to travel. Mays made a gesture to Clanton which he stated was one of confusion. The two engaged in a physical altercation; ultimately, Clanton moved the vehicle and arrested Mays.

On 14 March 2002, criminal proceedings against Mays resulted in jury verdicts of assaulting a public officer with a deadly weapon and simple assault for the events of 2 December 2000.

Thereafter, on 22 December 2003, Defendants filed a Motion for Summary Judgment as to all issues presented in the civil action against them on the basis of collateral estoppel. In response, Mays filed a Motion in Limine to exclude evidence of his criminal convictions arising from the events of 2 December 2000. From the trial court's denial of his Motion in Limine and grant of Defendants' Motion for Summary Judgment on the basis of collateral estoppel, Mays appeals to this Court.

On appeal, Mays contends that the trial court erred in considering his prior convictions as a basis for granting summary judgment in favor of Defendants on collateral estoppel grounds. We disagree.

Traditionally, under collateral estoppel "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Thomas M. McInnis & Ass'n., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986). However, our Supreme Court no longer requires mutuality of parties when a party seeks to assert collateral estoppel defensively. *Id.* at 434, 349 S.E.2d at 560; *see Johnson v. Smith*, 97 N.C. App. 450, 453, 388 S.E.2d 582, 584 (1990). The party invoking collateral estoppel need not have been a party to or in privity with a party in the first lawsuit "as long as the party to be collaterally estopped had a full and fair opportunity to litigate the issue in the earlier action." *Thomas M. McInnis & Ass'n., Inc.*, 318 N.C. at 432, 349 S.E.2d at 559. "Defensive use of collateral estoppel 'means that a stranger to the judgment, ordinarily the defendant in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense.' " *Johnson*, 97 N.C. App. at 453, 388 S.E.2d at 584 (citation omitted).

Mays relies on the traditional rule that

> evidence of a conviction and of a judgment therein, or of an acquittal, rendered in a criminal prosecution, is not admissible in evidence in a purely civil action to establish the truth of the facts on which the verdict of guilty or of acquittal was rendered, or when there is a verdict of acquittal to constitute a bar to a subsequent civil action based on the same facts.

Durham Bank & Trust Co. v. Pollard, 256 N.C. 77, 79, 123 S.E.2d 104, 106 (1961). This rule was founded on the fact that "[w]hile the same facts may be involved in two cases, one civil and the other criminal, the parties are necessarily different, for, whereas one action is prosecuted by an individual, the other is maintained by the state." *Id.* at 79-80, 123 S.E.2d at 106.

Since *Durham Bank & Trust Co.* was decided, our Supreme Court eliminated the need for mutuality of parties in the use of defensive collateral estoppel. *Thomas M. McInnis & Ass., Inc.*, 318 N.C. at 434, 349 S.E.2d at 560. Because the Court in *Durham Bank & Trust Co.* based its decision of not allowing criminal convictions used for collateral estoppel in a civil case on the lack of mutuality between parties, this analysis is no longer accurate.

Indeed, following our Supreme Court's elimination of the requirement for mutuality of parties to establish defensive collateral estop-

pel, this Court has upheld collateral estoppel of an issue in a civil suit when that issue was previously established as an element in a criminal conviction. *Burton v. City of Durham*, 118 N.C. App. 676, 680, 457 S.E.2d 329, 332 (1995) (plaintiff's conviction in district court is conclusive as evidence that plaintiff was not arrested for his verbal protests in a subsequent First Amendment claim); *Hill v. Winn-Dixie Charlotte, Inc.*, 100 N.C. App. 518, 397 S.E.2d 347, 349 (1990) (plaintiff's conviction in district court is conclusive as evidence of probable cause in a subsequent civil case for malicious prosecution unless plaintiff can produce evidence that the conviction was procured by fraud or unfair means). As determined by this Court, evidence of a prior criminal conviction is admittable in a civil suit to support a defensive use of collateral estoppel. *Burton*, 118 N.C. App. at 680, 457 S.E.2d at 332.

In light of this Court's holdings in *Burton* and *Hill*, we must conclude that the trial court properly considered Mays's 14 March 2002 criminal convictions in granting summary judgment.

Affirmed.

Judges HUDSON and STEELMAN concur.

WILLIE R. ADAMS AND PERGENIA KNIGHT, PLAINTIFFS-APPELLEES V. PRISCILLA WOODS AND ROBERT WOODS, DEFENDANTS-APPELLANTS

No. COA04-151

(Filed 15 March 2005)

Landlord and Tenant— summary ejectment action—change of ownership—no agreement with new owner

The trial court erred by ordering defendants to surrender possession of the property in a summary ejectment action where the property had changed hands and there was no evidence that defendants had entered into any lease with plaintiff, the new owner. Plaintiff's remedy is a trespass action.

Appeal by defendants from judgment entered 29 October 2003 by Judge William G. Stewart in Wilson County District Court. Heard in the Court of Appeals 30 November 2004.

No brief for pro se, plaintiffs-appellees.

Priscilla Woods and Robert Woods, pro se, defendants-appellants.

ELMORE, Judge.

Priscilla Woods and Robert Woods (defendants) appeal a judgment from the district court ordering defendants to surrender possession of their residence to Willie R. Adams (plaintiff).

Pursuant to a month-to-month lease agreement, defendants occupied a house at 5011 Highway 301 South in Lucama, North Carolina. Defendants demanded that the lessor, Zedechia Worrells, make repairs to the property. Mr. Worrells refused to make the specified repairs and then sold the property to plaintiff without giving notice to defendants. Plaintiff and defendants did not enter into any leasing agreement, but plaintiff sought to collect rent from defendants at the same rate as defendants had paid prior to the change in ownership. When defendants refused to pay any rent, plaintiff initiated a summary ejectment proceeding in the small claims division of Wilson County District Court.[1] Plaintiff's complaint consisted of the AOC-CVM-201 standard form, "Complaint In Summary Ejectment." The magistrate found for plaintiff and ordered defendants to vacate the property and pay $2,400.00 in back rent. Defendants appealed from the magistrate's judgment to the district court for a trial *de novo*. The district court concluded that plaintiff was not entitled to recover back rent from defendants because there was no enforceable contract between the parties. However, the court ordered defendants to surrender possession of the property to plaintiff. From this 28 October 2003 judgment of the district court, defendants appeal.

Defendants contend that the district court erred in failing to dismiss the action for lack of subject matter jurisdiction. The issue of subject matter jurisdiction may be raised at any stage of a proceeding. *Wood v. Guilford Cty.*, 355 N.C. 161, 164, 558 S.E.2d 490, 493 (2002). Thus, we must determine whether the district court had juris-

1. Defendants have included within the record on appeal an affidavit stating that plaintiff filed a series of summary ejectment complaints: The first action, case number 01 CVM 1206, was dismissed with prejudice by the magistrate. The second action, case number 01 CVM 4511, resulted in an involuntary dismissal for failure of plaintiff to appear in court. The third action, case number 03 CVM 2204, was dismissed with prejudice. The fourth action, case number 03 CVM 3662, is the subject of this appeal and the judgment therein is contained in the record.

diction to decide the summary ejectment action. The summary ejectment remedy provided for in N.C. Gen. Stat. § 42-26 is restricted to situations where the relationship of landlord and tenant exists. *Jones v. Swain*, 89 N.C. App. 663, 668, 367 S.E.2d 136, 138-39 (1988). The district court has jurisdiction to hear a summary ejectment proceeding even if the plaintiff does not allege a landlord-tenant relationship in the complaint, but this relationship *must be proven* in order for the plaintiff's remedy to be granted. *Id.* (emphasis added) (citing *Chandler v. Savings and Loan Assoc.*, 24 N.C. App. 455, 211 S.E.2d 484 (1975)). If the record lacks evidence to support a finding of a landlord-tenant relationship, the court must dismiss the plaintiff's cause of action. *See Hayes v. Turner*, 98 N.C. App. 451, 454-55, 391 S.E.2d 513, 515 (1990).

Here, the Complaint In Summary Ejectment alleges that defendants entered into possession of the property as a lessee of plaintiff. Plaintiffs assert that defendants entered into a month-to-month oral lease, with rent due on the first of each month. However, the district court found that "[t]he Plaintiff, Mr. Adams, and the Defendants never entered into any lease agreement." Therefore, the court concluded that "[t]here was never any enforceable contract between the Plaintiff and the Defendants." The district court's finding of this fact is deemed conclusive on appeal, as plaintiff has not assigned error to it.[2] As noted above, the jurisdiction of a court in summary ejectment proceedings is derived from N.C. Gen. Stat. § 42-26. Where, as here, the plaintiff fails to prove the existence of a landlord-tenant relationship, the district court lacks jurisdiction to enter judgment in the proceeding. *See Jones*, 89 N.C. App. at 668-69, 367 S.E.2d at 138-39.

Our decision is bolstered by a similar determination by this Court in *College Heights Credit Union v. Boyd*, 104 N.C. App. 494, 409 S.E.2d 742 (1991). In *College Heights*, the plaintiff sought to summarily evict the defendants from property to which the plaintiff claimed to have title. The plaintiff filed a standard AOC Summary Ejectment form, alleging that the parties had entered into a lease agreement. The evidence at trial contradicted the plaintiff's allegation of the existence of a lease agreement; the evidence showed that the plaintiff had acquired title to the property through a tax sale purchase. Nonetheless, the district court granted the relief requested by the plaintiff in the summary ejectment proceeding. In vacating the judgment of the district court, this Court stated as follows:

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2. Plaintiff has chosen not to file a brief with this Court and thus has not raised any assignments of error.

> It is clear that the trial court lacked jurisdiction to decide the issue of title or to order ejectment in this case. There was no evidence presented by either party which would support a finding of a landlord-tenant relationship between the parties. There is no evidence of any contract or lease between the parties concerning the leasing or occupancy of this property. . . . This is simply the wrong action to quiet title and the wrong circumstances under which to bring an action in summary ejectment.

Id., 104 N.C. App. at 497, 409 S.E.2d at 743. Likewise, here, there is simply no evidence that defendants entered into any lease agreement with plaintiff. We note that plaintiff is not without remedy; as rightful owner of the property, he may file a trespass action against defendants for invasion of his possessory rights. *See Barnard v. Rowland*, 132 N.C. App. 416, 422, 512 S.E.2d 458, 463 (1999). For the foregoing reasons, we vacate the judgment of the district court and remand for dismissal of the summary ejectment action.

Vacated and remanded.

Judges WYNN and HUDSON concur.

IN THE MATTER OF D.A., Q.A., AND T.A., MINOR CHILDREN

No. COA04-604

(Filed 15 March 2005)

Termination of Parental Rights— lack of jurisdiction—insufficient notice of motion to terminate rights

The trial court lacked jurisdiction to terminate respondent mother's parental rights, and the case is remanded for a rehearing based on insufficient notice of the motion to terminate parental rights, because: (1) N.C.G.S. § 7B-1106.1 provides the requirements for notice served on respondent, and only the first requirement of the names of the juveniles was included in the notice served on respondent; and (2) failure to comply with the statutory mandate is reversible error.

Appeal by Respondent from orders entered 22 September 2003 by Judge Samuel Grimes in District Court, Beaufort County. Heard in the Court of Appeals 11 January 2005.

Jeffrey L. Miller, for respondent-appellant.

Alice A. Espenshade, for petitioner-appellee.

WYNN, Judge.

Respondent mother appeals from orders of the trial court terminating her parental rights regarding D.A., Q.A., and T.A. Respondent argues, *inter alia*, that the trial court lacked jurisdiction because notice of the motion to terminate parental rights did not comport with North Carolina General Statutes section 1106.1. After careful review, we vacate the trial court's orders and remand for rehearing.

The procedural and factual history of the instant appeal is as follows: The children's parents had a relationship marked by instability and violence, which was found to pose a risk of harm to the children. On 11 August 2000, Beaufort County Department of Social Services ("DSS") filed petitions alleging the children to be neglected and dependent. Accordingly, DSS obtained non-secure custody of the children from their father, who had sole custody after he had ejected Respondent from the family home. On 26 January 2001, orders were entered adjudicating the children neglected and dependent. Thereafter, review and permanency planning hearings were held. While, in the context of these review and planning hearings, the trial court "admonishe[d] [Respondent] . . . that the next step is cessation of reunification[,]" the permanency plan nevertheless remained reunification.

On 11 April 2003, before a scheduled review and planning hearing, DSS filed motions to terminate Respondent's parental rights. Adjudicatory and dispositional hearings were held on 8 and 9 July 2003, and on 22 September 2003, the trial court entered orders terminating Respondent's parental rights. Respondent appeals from these orders.

On appeal, Respondent contends that notice of the motion to terminate parental rights did not comport with North Carolina General Statutes section 1106.1. We agree.[1]

North Carolina General Statutes section 1106.1 states that notice to parents in termination or parental rights proceedings shall include all of the following:

> (1) The name of the minor juvenile.
>
> (2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.
>
> (3) Notice that any attorney appointed previously to represent the parent in the abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.
>
> (4) Notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.
>
> (5) Notice that the date, time, and place of hearing will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.
>
> (6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

N.C. Gen. Stat. § 7B-1106.1 (2003). In *In re Alexander*, 158 N.C. App. 522, 581 S.E.2d 466 (2003), this Court stated unequivocally that:

> The law regarding notice accompanying a motion to terminate parental rights is clear: (1) the notice "shall" be directed to the necessary parties, including the parents of the juvenile, (2) the notice "shall" include the required elements, and (3) the notice "shall" be served in accordance with N.C. Gen. Stat. § 1A-1, Rule 5(b). This Court has held the General Assembly's use

1. Petitioner asserts that Respondent failed to preserve this matter for review and cites *In re Howell*, 161 N.C. App. 650, 589 S.E.2d 157 (2003), for support. In *In re Howell*, the respondent failed to object to process and service and agreed at a termination hearing that service of process had been proper. Here, in contrast, the record reveals that Respondent did not agree that notice complied with the statutory requirements, and Respondent objected to at least some aspects of notice and/or service thereof on or prior to 6 June 2003.

of the word "shall" establishes a mandate, and 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).

The notice requirements at issue are part of a statutory framework intended to safeguard a parent's fundamental rights "to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 2060, 147 L. Ed. 2d 49, 57 (2000). "This parental liberty interest 'is perhaps the oldest of the fundamental liberty interests[.]' " *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) (quoting *Troxel*, 530 U.S. at 65, 120 S.Ct. at 2059, 147 L. Ed. 2d at 56)). The notice requirements in the enacted framework are neither unnecessary nor overly burdensome. . . . [W]here a movant fails to give the required notice, prejudicial error exists, and a new hearing is required.

In re Alexander, 158 N.C. App. at 525-26, 581 S.E.2d at 468-69.

Here, only the first requirement, the names of the juveniles, was included in the notice served on Respondent. All other statutory requirements were omitted. Because DSS failed to give the statutorily required notice, prejudicial error exists and a new hearing is warranted. *In re Alexander*, 158 N.C. App. at 526, 581 S.E.2d at 469 ("[W]here a movant fails to give the required notice, prejudicial error exists, and a new hearing is required.").

Accordingly, we vacate the orders of the trial court and remand this matter for rehearing. Because a new hearing has been granted, we need not address Respondent's other arguments.

Vacated and remanded for rehearing.

Judges McGEE and TYSON concur.

STATE OF NORTH CAROLINA v. BARRY THOMAS CUMMINGS

No. COA04-949

(Filed 15 March 2005)

1. Criminal Law— mistrial—failure to object

A trial court judge appropriately entered a mistrial (in effect) when he discovered that he had personal knowledge of an impaired driving case after the State began its evidence, recessed, and rescheduled the trial before another judge. Defendant made no objection at the time, despite being given the opportunity, and so waived the objection on appeal.

2. Judges— overruling one another—double jeopardy

A district court judge could not dismiss an impaired driving case on double jeopardy grounds following a mistrial where another judge had already denied the motion. The rule that one superior court judge may not modify, overrule, or change the judgment or order of another also applies to district court judges.

Appeal by Defendant from judgment entered 13 May 2002 by Judge Larry G. Ford in Superior Court, Rowan County. Heard in the Court of Appeals 15 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Robert C. Montgomery, for the State.

Inge and Paris, P.A., by Douglas T. Paris for defendant-appellant.

WYNN, Judge.

Under North Carolina law, a trial court must grant a mistrial when conduct takes place inside or outside the courtroom which results in substantial and irreparable prejudice to the defendant. *State v. Brown*, 315 N.C. 40, 56, 337 S.E.2d 808, 821 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). In this case, Defendant argues that double jeopardy bars retrying him because during his initial trial, District Court Judge Charles E. Brown, upon discovering he had knowledge of the facts of the case, rescheduled his case before another judge. Because we find that

Judge Brown's order was tantamount to a mistrial, we conclude that double jeopardy does not bar Defendant's prosecution.

The underlying facts tend to show that on 18 December 2000, Defendant Barry Thomas Cummings was charged with driving while impaired and careless and reckless driving. On 17 May 2001, the case came for hearing before Judge Charles E. Brown. After the State began presenting evidence, Judge Brown recessed the trial because he "discovered through testimony of a State's witness that [he] was familiar with certain aspects of the case." Judge Brown suggested rescheduling the case for a new trial date and neither attorney objected. Accordingly, Judge Brown rescheduled the trial for 28 June 2001 before District Court Judge William C. Kluttz, Jr.

At the hearing before Judge Kluttz, Defendant made an oral motion to dismiss the charges on double jeopardy grounds. On 26 July 2001, Judge Kluttz denied this motion in open court and entered written findings of fact on 30 October 2001. The trial was rescheduled for 24 September 2001.

The case then came for hearing on 24 September 2001 before District Court Judge Samuel M. Tate. Defendant submitted another motion to dismiss the charges on double jeopardy grounds. Judge Tate, finding that trial of Defendant would violate his constitutional rights, dismissed the charges against him. The State appealed this order to Superior Court.

On 8 April 2002, the case came for a hearing in Superior Court before Judge Larry G. Ford. On 13 May 2002, Judge Ford entered an order reversing Judge Tate's order and remanding the case to the district court for trial. Defendant appealed.

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[1] On appeal, Defendant argues that the trial court erred in overturning the district court dismissal of the charges and in concluding as a matter of law that Defendant should not have been allowed to reargue the double jeopardy issue. We disagree.

Under North Carolina law, with the concurrence of the defendant a judge may declare a mistrial at any time during the trial. N.C. Gen. Stat. § 15A-1061 (2004). The trial court must grant a mistrial when conduct takes place inside or outside the courtroom which results in substantial and irreparable prejudice to the defendant. *Brown*, 315 N.C. at 56, 337 S.E.2d at 821. A mistrial was appropriate here as Judge Brown had personal familiarity with aspects of the case that

were not discovered until the State began presenting its evidence. Indeed, Judge Brown, after consulting with both the prosecution and defense counsel, "recess[ed] this trial and reschedule[d] the trial to begin anew[.]" Although Judge Brown did not use the word "mistrial," the order was tantamount to a mistrial. *State v. Lachat*, 317 N.C. 73, 82, 343 S.E.2d 872, 877 (1986) (the principle of double jeopardy "is not violated where a defendant's first trial ends with a mistrial which is declared for a manifest necessity or to serve the ends of public justice.").

Moreover, Defendant made no objection to Judge Brown's order, even though he was presented the opportunity to do so before the order was entered in open court. Since Defendant made no objection to the mistrial order, he waived the objection on appeal. *State v. Odom*, 316 N.C. 306, 310, 341 S.E.2d 332, 334 (1986).

[2] Furthermore, the rule prohibiting one superior court judge from modifying, overruling, or changing the judgment or order of another superior court judge also applies to district court judges. *Shamley v. Shamley*, 117 N.C. App. 175, 183, 455 S.E.2d 435, 439-40 (1994); *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987); *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117, *appeal dismissed and disc. review denied*, 303 N.C. 319, 281 S.E.2d 659 (1981). It is settled law that erroneous judgments and orders may be corrected only by appeal. *Id.*

Here, Judge Tate's 24 September 2001 order of dismissal overruled Judge Kluttz's previous order on the same double jeopardy issue. As Judge Tate could not overrule another district court judge's order on the same issue in this action, the superior court did not err when it reversed Judge Tate's order of dismissal. *Shamley*, 117 N.C. App. at 183, 455 S.E.2d at 439-40. And the superior court did not err when it concluded as a matter of law that Defendant "should not have been allowed to reargue the double jeopardy issue[,]" on 24 September 2001.

Defendant's remaining assignments of error were not argued in his brief and no authority was cited, therefore, they are deemed abandoned. N.C. R. App. P. 28(b)(6).

Affirmed.

Judges HUDSON and STEELMAN concur.

ROBERT BRYSON, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTIONS, DEFENDANT

No. COA04-199

(Filed 15 March 2005)

1. **Tort Claims Act— miscalculation of inmate's release date— no damages**

An inmate who alleged that the Department of Correction negligently miscalculated his release date did not prove a claim under the Tort Claims Act, and his claim should have been dismissed, where the Industrial Commission concluded that plaintiff had suffered no damages, an essential element of a claim under the Tort Claims Act.

2. **Tort Claims Act— specific performance—not authorized**

The Industrial Commission has only the authority to award money damages under the Tort Claims Act, and lacked jurisdiction to order the Department of Correction to recalculate plaintiff's release date.

Appeal by defendant from judgment entered 14 November 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 December 2004.

No brief for pro se plaintiff-appellee.

Attorney General Roy Cooper, by Associate Attorney General Iain M. Stauffer, for the State.

MARTIN, Chief Judge.

Defendant, the North Carolina Department of Corrections, (NCDOC), appeals from a decision and order of the North Carolina Industrial Commission. Plaintiff appeared *pro se* before the Deputy Commissioner and the Full Commission, and did not file a brief in this Court.

The evidence before the Commission tended to show that plaintiff was sentenced on criminal charges to two consecutive twenty-five to thirty month sentences. He was incarcerated at Mountain View Correctional Institution on 8 October 1999, with a projected release date of 18 February 2003. Defendant served 386 days of pre-sentence confinement.

On 21 September 2001, plaintiff filed a claim for damages under the Tort Claims Act, N.C. Gen. Stat. § 143-291 *et. seq.*, alleging negligence on the part of prison officials in calculating his release date. The case was heard on 28 October 2002 before a deputy commissioner, who issued an order requiring defendant to calculate plaintiff's correct release date. Upon appeal by NCDOC, the Full Commission issued a Decision and Order which ordered NCDOC to calculate plaintiff's correct release date and taxed the costs to NCDOC. NCDOC appeals.

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[1] Defendant first argues the Full Commission erred in not dismissing the claim because plaintiff did not carry his burden of proving the elements necessary to recover on a claim for negligence. We agree.

To recover upon a claim for negligence under the Tort Claims Act, a plaintiff must prove that (1) defendant owed plaintiff a duty of care; (2) the actions or failure to act by the named NCDOC employee breached that duty; (3) the breach was the actual and proximate cause of the injury and (4) plaintiff suffered damages as a result. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 406, 496 S.E.2d 790, 793 (1998). The Commission concluded that plaintiff had suffered no damages. Therefore, plaintiff failed to prove a claim for negligence under the Tort Claims Act and his claim should have been dismissed.

[2] Defendant also asserts that the Commission erred by ordering NCDOC to calculate plaintiff's correct release date and to notify plaintiff and the Commission. Again, we agree.

The North Carolina Industrial Commission is vested with jurisdiction of tort claims "against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." N.C. Gen. Stat. § 143-291(a). The statute further provides:

> The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was negligence on the part of an officer,

> employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid . . . and by appropriate order direct the payment of damages . . . .

N.C. Gen. Stat. § 143-291(a). The statute confers authority upon the Commission only to award monetary damages; "[t]here is nothing in the statute which allows the Commission to order specific performance." *Price v. N.C. Dept. of Correction*, 103 N.C. App. 609, 613-14, 406 S.E.2d 906, 909 (1991). Because the Commission lacked jurisdiction to order defendant to recalculate plaintiff's release date, we must vacate the decision and order of the Commission.

Defendant's remaining assignments of error were not brought forward in its brief and are therefore deemed abandoned. N.C. R. App. P. 28(a).

Vacated.

Judges CALABRIA and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 MARCH 2005

ASHFORD v. WAL-MART STORES No. 04-129	Ind. Comm. (I.C. 970639)	Affirmed
ATWOOD v. EAGLE No. 04-501	Davie (02CVS541)	Dismissed
BEAU RIVAGE HOMEOWNERS ASS'N v. NEW HANOVER CTY. No. 04-671	New Hanover (02CVS4389) (02CVS4628) (02CVS1422) (02CVS1423)	Affirmed
CANNON v. MEINBERG No. 04-483	Forsyth (03CVS1167)	Affirmed
ESSEX GRP., INC. v. EXPRESS WIRE SERVS., INC. No. 04-613	Mecklenburg (01CVS14332)	Affirmed
GILCHRIST v. FRENCH No. 04-121	Wake (01CVD3218)	Affirmed and remanded
HODGE v. PROCTER No. 04-364	Guilford (02CVS1467)	Affirmed
IN RE BABY W. No. 04-341	Wake (03J432)	Affirmed
IN RE J.L.R. No. 04-728	Davidson (02J117)	Affirmed
IN RE W.W. No. 04-582	Harnett (02J15)	Affirmed
LEE v. MANPOWER, INC. No. 04-187	Ind. Comm. (I.C. 983848)	Affirmed
MIYARES v. FORSYTH CTY. DEP'T OF PUB. HEALTH No. 04-249	Forsyth (03CVS2834)	Reversed
OCEAN SANDS PROP. OWNERS ASS'N v. MUNNS No. 04-304	Carteret (01CVD207)	Affirmed
SKWERER v. N.C. DEP'T OF REVENUE No. 04-674	Wake (03CVS012609)	Affirmed
STATE v. BECKHAM No. 04-51	Mecklenburg (02CRS207955) (02CRS207956)	Affirmed

STATE v. CARPENTER No. 04-392	Richmond (03CRS50814) (03CRS1571)	No error
STATE v. DIAZ No. 04-499	Union (01CRS55096) (01CRS55102) (01CRS55097) (01CRS55103)	No error
STATE v. PETTAWAY No. 04-700	Vance (02CRS5974)	No error
STATE v. PRICE No. 04-366	New Hanover (03CRS1503)	No error
STATE v. SCOTT No. 04-836	Cumberland (03CRS57686)	No error
STATE v. SHUFF No. 04-590	Mecklenburg (03CRS29315)	No prejudicial error
WHITAKER v. WHITAKER No. 04-10	Forsyth (02CVS1327)	Affirmed
WIENER v. N.C. SUBSTANCE ABUSE PROF'L CERTIFICATION BD. No. 04-853	Onslow (03CVS2456)	Affirmed

STATE OF NORTH CAROLINA v. ABRAHAM HARRISON

No. COA04-515

(Filed 5 April 2005)

1. **Constitutional Law— effective assistance of counsel— untimely motion to suppress**

Although defendant contends he received ineffective assistance of counsel in a second-degree kidnapping case based on defense counsel's untimely motion to suppress an alleged impermissibly suggestive identification procedure resulting from a show-up, this assignment of error is overruled because: (1) if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient; and (2) in the instant case even if defense counsel's actions were deficient, defendant is not entitled to relief when there was no meritorious basis to support the suppression of the victim's identification of defendant in light of the totality of circumstances.

2. **Kidnapping— second-degree—motion to dismiss—sufficiency of evidence—terrorizing victim**

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree kidnapping based on alleged insufficient evidence of defendant's intent to terrorize the victim, because the evidence tended to show that: (1) defendant restrained the victim against her will and attempted to drag her across the street and toward nearby bushes; (2) defendant grabbed the victim from behind and choked her, repeatedly telling her she better shut up; (3) at one point during the incident, defendant pushed the victim to the ground, dove on top of her, and fondled and put his hands all over her chest; (4) the victim pleaded for defendant to let her go and screamed repeatedly for help from nearby residents, and defendant let her go only after being alerted that law enforcement officers were on their way to the scene; (5) an officer testified that the victim was very emotional and distraught after the incident; and (6) a witness stated that the victim was hysterical following the incident and that she was struggling to get free while she was being dragged from her head while being hugged around her neck.

3. Kidnapping— second-degree—instruction—false imprisonment

The trial court did not err in a second-degree kidnapping case by denying defendant's motion to instruct the jury on the lesser-included offense of false imprisonment, because: (1) the record tends to show that defendant restrained the victim for the purpose of terrorizing her; and (2) even though defendant contends the evidence also tends to show that he intended to sexually assault the victim, the superseding indictment charged defendant with kidnapping the victim for the purpose of terrorizing her and the State is only required to prove the alleged purpose in order to sustain a conviction of kidnapping.

Judge STEELMAN dissenting.

Appeal by defendant from judgment entered 30 September 2003 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 8 December 2004.

Attorney General Roy Cooper, by Assistant Attorney General M. Lynne Weaver, for the State.

Miles & Montgomery, by Lisa Miles, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant appeals his conviction for second-degree kidnapping and obtaining habitual felon status. For the reasons discussed 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 4 August 2002, Karen Denise Robinson ("Robinson") was walking in High Point when she was approached by defendant, who asked Robinson if "the street back there" was Centennial Street. Robinson replied that it was, and continued walking down the street. Defendant initially walked away from Robinson, but soon "turned around and ran and caught up with" her. Upon approaching Robinson for the second time, defendant asked Robinson where "the shelter" was located. Robinson provided defendant with directions to "a place where they house men" and then "turned around from [defendant] to walk off[.]" However, defendant grabbed Robinson around her shoulder area and then attempted to drag her to the opposite side of the street. Robinson began screaming, and after defendant dragged her across the street, Robinson dropped to her knees to prevent defend-

ant from further dragging her. Defendant then pushed Robinson to the ground and "dived on top of [her]." Robinson testified that, after pushing her to the ground, defendant reached his hand inside Robinson's shirt and "fondled and put his hands all over me up here, and everywhere."

Marcie Ruth Craig ("Craig"), who lived in a nearby residence, heard Robinson's screams and yelled out of her window, "Ma'am, I'm calling the police right now." A few minutes later, Craig returned to the window and yelled, "Ma'am, the police are on their way." At this point, defendant "jumped up and ran . . . straight on out toward Centennial."

High Point Police Department Officer Christy Gambill ("Officer Gambill") was the first law enforcement officer to arrive at the scene. When Officer Gambill arrived, Robinson was "distraught, crying, upset" and talking to Craig and Craig's husband. Robinson told Officer Gambill which direction her assailant had run, and Robinson stated that the individual "was wearing a white shirt and white pants." Approximately thirty minutes after Officer Gambill arrived at the scene, High Point Police Department Officer Otis Hamilton ("Officer Hamilton") radioed Officer Gambill and informed her that he had located an individual fitting the description of Robinson's assailant. High Point Police Department Lieutenant Lawrence L. Casterline, Jr. ("Lieutenant Casterline"), directed Officer Gambill to drive Robinson to Officer Hamilton's location "to do a show-up to see if that was the person."

When Officer Gambill and Robinson arrived at Officer Hamilton's location, defendant was sitting in the rear seat of Officer Hamilton's patrol car. Immediately upon seeing defendant, Robinson told Officer Gambill, " 'That's him, that's him,' and [Robinson] became very emotional and distraught." Officer Gambill asked Robinson if she was "absolutely sure" that defendant was the individual who attacked her, and Robinson replied, "yes." Defendant was then placed under arrest and transported to the High Point Police Department.

Upon arrival at the High Point Police Department, defendant was placed in a holding cell. While Officer Hamilton spoke with Lieutenant Casterline, defendant knocked on the door of the holding cell and told Officer Hamilton and Lieutenant Casterline that he would like to speak to them "about what had took place and what he was involved in." Defendant then "voluntarily made several statements" to Officer Hamilton and Lieutenant Casterline, includ-

ing telling the officers, "I'm your man, I'm your man." According to Officer Hamilton, defendant told the officers "he approached a female after seeing her in the area of Kivett and North Centennial[,] . . . did follow her, and . . . approached [her] to ask her for directions." Defendant told the officers that as the female gave him directions, he "grabbed her by the throat and began choking her." Defendant "stated that it was important for him to be honest and to be accountable for his involvement in this incident[,] . . . [and] that he would just deal with the consequences of his actions." He also explained that the female "was wearing a very short skirt[,] . . . that women in short skirts have always turned him on sexually[,] . . . that he had recently just gotten out of jail, and that he also had a girlfriend that was also locked up, and he missed her very dearly." Defendant then provided the officers with the following written statement:

> I asked this lady for direction[s], and when I got up close to her I attacked her by grabbing her around the neck and choking her for no reason at all.

On 22 November 2002, defendant was indicted for misdemeanor assault on a female and second-degree kidnapping for the purpose of facilitating the commission of a felony. On 8 May 2003, a superceding indictment was filed, by which defendant was again charged with misdemeanor assault on a female and second-degree kidnapping. However, the superceding indictment alleged that defendant kidnapped Robinson "for the purpose of terrorizing" her rather than for the purpose of facilitating the commission of a felony. On 4 June 2003, defendant was indicted for obtaining habitual felon status.

On 29 September 2003, defendant filed a motion to suppress the evidence of Robinson's identification of him. The trial court denied defendant's motion, and defendant's trial began the same day. At the close of the State's evidence, defendant moved the trial court to dismiss the charge of second-degree kidnapping and to instruct the jury on false imprisonment. The trial court denied both motions and instructed the jury on second-degree kidnapping as well as misdemeanor assault on a female. On 30 September 2003, the jury found defendant guilty of second-degree kidnapping and misdemeanor assault on a female, and defendant pled guilty to obtaining habitual felon status. The trial court arrested judgment on the misdemeanor assault conviction and subsequently sentenced defendant to a total of 151 to 191 months incarceration. Defendant appeals.

We note initially that defendant's brief contains arguments supporting only five of the eight original assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2004), the three 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 on appeal are: (I) whether defendant received ineffective assistance of counsel; (II) whether the trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping; and (III) whether the trial court erred by denying defendant's motion to instruct the jury on false imprisonment.

[1] Defendant first argues that he is entitled to a new trial because he received ineffective assistance of counsel. Defendant asserts that his trial counsel's failure to properly file a motion to suppress resulted in reversible error, in that his arrest resulted from an impermissibly suggestive identification procedure and any statements made by him were the fruit of a poisonous tree. We disagree.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). In order to meet this burden, defendant must satisfy the following two-part test, expressed in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

On appeal, this Court "engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at

563, 324 S.E.2d at 248. "Thus, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249.

In the instant case, the trial court rejected as untimely defendant's motion to suppress the identification by Robinson. The trial court noted that defendant's trial counsel filed the motion the day of trial and without an accompanying affidavit, despite the requirement that sworn affidavits accompany such motions and that such motions be made prior to trial and by 15 September 2003. After reviewing the record in the instant case, we conclude that even if defendant's trial counsel's actions were deficient, defendant is not entitled to relief because there was no meritorious basis to support the suppression of Robinson's identification of him.

"Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). In the instant case, Robinson identified defendant during a "show-up," an often-criticized practice whereby a suspect is shown singularly to a witness or witnesses for the purposes of identification. "This identification procedure may be inherently suggestive for the reason that witnesses would be likely to assume that the police presented for their view persons who were suspected of being guilty of the offense under investigation." *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982). However, "[p]retrial show-up identifications . . . even though suggestive and unnecessary, are not *per se* violative of a defendant's due process rights." *Id.* "The primary evil sought to be avoided is the substantial likelihood of irreparable misidentification." *Id.* Thus, where "[a]n unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification . . . under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability" to withstand a motion to suppress. *Id.*

> Some of the factors that may be examined in determining the reliability of a showup identification are (1) the witness' opportunity to observe the accused, (2) the witness' degree of attention, (3) the accuracy of the witness' description, (4) the witness' level of

certainty, and (5) the time elapsed between the crime and the confrontation.

State v. Lee, 154 N.C. App. 410, 414-15, 572 S.E.2d 170, 174 (2002) (quoting *In re Stallings*, 318 N.C. 565, 571, 350 S.E.2d 327, 330 (1986)).

In the instant case, Robinson had ample opportunity to observe defendant during the incident, as she was within close proximity of defendant when he twice spoke to her on the street and then grabbed her and threw her to the ground. Although Robinson testified at trial that she "didn't really pay . . . no attention" to what defendant was wearing during the incident, Officer Gambill and Officer Hamilton both testified that Robinson informed officers at the scene that defendant was wearing a white shirt and white pants. When Officer Hamilton apprehended defendant approximately thirty minutes after the incident, defendant was dressed in white clothing. Robinson was immediately taken to defendant's location, where, as discussed above, Robinson told Officer Gambill, " 'That's him, that's him,' and became very emotional and distraught." When Officer Gambill asked Robinson whether she was "absolutely sure" that defendant was the individual who attacked her, Robinson said, "yes." In light of the totality of the circumstances, we conclude that the facts of the instant case do not support defendant's contention that the show-up was so impermissibly suggestive that it created a substantial likelihood of irreparable misidentification. Furthermore, defendant has failed to demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. Therefore, defendant's first argument is overruled.

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of second-degree kidnapping. Defendant asserts that the State produced insufficient evidence at trial to support an element of the charge. We disagree.

"In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference that can be drawn therefrom." *State v. Vick*, 341 N.C. 569, 584, 461 S.E.2d 655, 663 (1995). "[T]he trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "Whether evidence presented con-

stitutes substantial evidence is a question of law for the court." *Id.* "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

N.C. Gen. Stat. § 14-39 (2003) defines the law of kidnapping in pertinent part as follows:

> (a) 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, or any other person under the age of 16 years without the consent of a parent or legal custodian 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 or any other person[.]

Where the victim is released in a safe place or has not been seriously injured or sexually assaulted, the offense is second-degree kidnapping. N.C. Gen. Stat. § 14-39(b).

In the instant case, defendant contends that the State produced insufficient evidence to demonstrate that he kidnapped Robinson with the intent to terrorize her. "Terrorizing is defined as 'more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension.' " *State v. Davis*, 340 N.C. 1, 24, 455 S.E.2d 627, 639 (1995) (quoting *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986)). "In determining the sufficiency of the evidence, 'the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize' the victim." *Davis*, 340 N.C. at 24, 455 S.E.2d at 639 (quoting *Moore*, 315 N.C. at 745, 340 S.E.2d at 405). "[T]he victim's subjective feelings of fear [during the incident], while not determinative of the defendant's intent to terrorize, are relevant." *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). "The presence or absence of the defendant's intent or purpose to terrorize [the victim] may be inferred by the fact-finder from the circumstances surrounding the events constituting the alleged crime." *Id.* at 605, 540 S.E.2d at 821.

In the instant case, the evidence presented at trial tends to show that defendant restrained Robinson against her will and attempted to

drag her across the street and toward nearby bushes. Defendant grabbed Robinson from behind and choked her, repeatedly telling her that she "better shut up." At one point during the incident, defendant pushed Robinson to the ground, dove on top of her, and "fondled and put his hands all over" her chest. Robinson pleaded for defendant to let her go, and she screamed repeatedly for help from nearby residents. When defendant was alerted that law enforcement officers were on their way to the scene, he quickly let Robinson go and fled the scene. Officer Gambill testified that Robinson was "very emotional and distraught" after the incident, and Craig stated that Robinson was "hysterical" following the incident, "crying and shaking real bad[.]" Craig described Robinson "struggling to get free . . . she was being dragged from not only the head, but hugging around the neck, just being grabbed any which way she could." Craig saw defendant "try to force [Robinson] into the bushes" and later "just drop[] her to the concrete." In light of the foregoing evidence, we conclude that the State introduced sufficient evidence from which the jury could have concluded that defendant acted with the purpose of terrorizing Robinson. Therefore, we also conclude that the trial court did not err in denying defendant's motion to dismiss the charge of second-degree kidnapping, and, accordingly, we overrule defendant's second argument.

[3] Defendant next argues that the trial court erred in instructing the jury. Defendant asserts that the trial court was required to instruct the jury regarding the lesser-included offense of false imprisonment. We disagree.

"The crime of false imprisonment is a lesser included offense of the crime of kidnapping." *State v. Lang*, 58 N.C. App. 117, 118, 293 S.E.2d 255, 256, *disc. review denied*, 306 N.C. 747, 295 S.E.2d 761 (1982). "When there is evidence of guilt of a lesser offense, a defendant is entitled to have the trial court instruct the jury with respect to that lesser included offense[.]" *Id.* In *State v. Claypoole*, 118 N.C. App. 714, 717-18, 457 S.E.2d 322, 324 (1995), this Court distinguished second-degree kidnapping from false imprisonment as follows:

> The difference between kidnapping and the lesser-included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another person. If the purpose of the restraint was to accomplish one of the purposes enumerated in N.C. Gen. Stat. § 14-39, then the offense is kidnapping. However, if the unlawful restraint occurs without any of the purposes specified in the statute, the offense is false imprisonment.

As discussed above, the record in the instant case tends to show that defendant restrained Robinson for the purpose of terrorizing her. However, defendant contends that the record also tends to show that defendant had "an intent to commit a sexual assault" upon Robinson. In support of this contention, defendant cites his statements to law enforcement officers following the incident, in which he informed the officers that Robinson was wearing a short skirt, that short skirts "turned him on sexually," and that he missed his recently-incarcerated girlfriend. According to defendant, these statements, when coupled with his actions during the incident—including his fondling of Robinson's chest and diving upon her—support a conclusion that he restrained Robinson with the intent to sexually assault her rather than terrorize her. Thus, defendant argues, a jury instruction regarding false imprisonment was necessary. We cannot agree.

We note that " 'kidnapping is a specific intent crime' " and that " 'the State is restricted at trial to proving the purposes alleged in the indictment.' " *Baldwin*, 141 N.C. App. at 603, 540 S.E.2d at 820-21 (quoting *Moore*, 315 N.C. at 743, 340 S.E.2d at 404). However, we also note that

> The purposes specified in G.S. 14-39(a) are not mutually exclusive. A single kidnapping may be for the dual purposes of using the victim as a hostage or shield and for facilitating flight, or for the purposes of facilitating the commission of a felony and doing serious bodily harm to the victim. So long as the evidence proves the purpose charged in the indictment, the fact that it also shows the kidnapping was effectuated for another purpose enumerated in G.S. 14-39(a) is immaterial and may be disregarded.

State v. Hall, 305 N.C. 77, 82, 286 S.E.2d 552, 555 (1982), *overruled on other grounds by State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986); *see also Moore*, 315 N.C. at 743, 340 S.E.2d at 404 ("Although the indictment may allege more than one purpose for the kidnapping, the State has to prove only one of the alleged purposes in order to sustain a conviction of kidnapping.").

In the instant case, defendant contends that he was entitled to an instruction on the lesser-included offense of false imprisonment because the evidence tends to show that he intended to sexually assault Robinson. However, as discussed above, the superceding indictment charged defendant with kidnapping Robinson for the purpose of terrorizing her, and the State presented sufficient evidence at trial to support each element of that charge, including defendant's

intent to terrorize Robinson. We are not convinced that the trial court was required to instruct the jury regarding false imprisonment merely because the evidence indicates defendant also intended to sexually assault Robinson. Therefore, we conclude that the trial court did not err in denying defendant's request to instruct the jury regarding the lesser-included offense, and, accordingly, we overrule defendant's final argument.

In light of the foregoing conclusions, we hold that defendant received a trial free of prejudicial error.

No error.

Judge HUDSON concurs.

Judge STEELMAN dissents.

STEELMAN, Judge, dissenting.

Because I believe the trial court erred in refusing to submit the lesser included offense of false imprisonment to the jury, I am compelled to respectfully dissent.

The defendant was indicted for second-degree kidnapping pursuant to N.C. Gen. Stat. § 14-39(a)(3). The original indictment alleged that the kidnapping was for the purpose of facilitating the felony of rape. The superceding indictment upon which the State proceeded at trial stated that the defendant "unlawfully, willfully, and feloniously did kidnap Karen Robinson, a person who had attained the age of 16 years, by unlawfully removing the victim from one place to another, without her consent, for the purpose of terrorizing the said person so removed."

In order for the State to prove second-degree kidnapping in the instant case, it had to prove that the defendant's intent was to terrorize Robinson when he unlawfully removed her from one place to another. In *State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514 (1986), the State proceeded on a theory that the kidnapping was perpetrated in order to facilitate a felony, specifically rape. In discussing whether it was error for the trial court to have failed to instruct on the lesser included offense of false imprisonment the *Whitaker* Court stated:

> The crime of false imprisonment is a lesser included offense of kidnapping. When any evidence presented at trial would permit

> the jury to convict defendant of the lesser included offense, the trial court must instruct the jury regarding that lesser included offense. Failure to so instruct the jury constitutes reversible error not cured by a verdict of guilty of the offense charged. "So, whether a defendant who confines, restrains, or removes another is guilty of kidnapping or false imprisonment depends upon whether the act was committed to accomplish one of the purposes enumerated in our kidnapping statute." The crux of this question, then, concerns whether "there was evidence from which the jury could have concluded that the defendant, although restraining, confining and removing the victim, [did so] for some purpose other than . . . to commit [attempted second degree] rape."

Id. at 520-21, 342 S.E.2d at 518 (internal citations omitted) (brackets in original). "The trial court may refrain from submitting the lesser offense to the jury only where the 'evidence is clear and positive as to each element of the offense charged' and no evidence supports a lesser-included offense." *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000). " 'The determining factor is the presence of evidence to support a conviction of the lesser included offense.' " *State v. Kyle*, 333 N.C. 687, 703, 430 S.E.2d 412, 421 (1993), *quoting State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984).

Robinson testified at trial that after defendant had grabbed her and dragged her some distance, he pushed her to the ground, reached inside her shirt, and "fondled and put his hands all over me up here, and everywhere." Defendant made a statement to two officers that the victim was wearing a short skirt, that her attire "turned him on sexually[,]" and that he missed his girlfriend.

Defendant contends that this evidence demonstrates that his intent was to commit some form of sexual assault, and not to terrorize Robinson. The majority is correct in stating that the two purposes are not mutually exclusive; the defendant may have intended to both terrorize and sexually assault the victim. The State could have indicted defendant based on N.C. Gen. Stat. § 14-39(a)(2), removal for the purpose of facilitating the commission of a felony (in this instance, sexual assault), as well as on N.C. Gen. Stat. § 14-39(a)(3), removal for the purpose of terrorizing the victim. The State did not proceed under N.C. Gen. Stat. § 14-39(a)(2), however, and thus if the defendant's sole intent was to commit a sexual assault, he could not be convicted of second-degree kidnapping as indicted.

In the instant case, I assume *arguendo* that "the evidence was . . . sufficient to convict defendant of kidnapping for the purpose of [terrorizing the victim]. That, however, is not the issue." *State v. Lang*, 58 N.C. App. 117, 122, 293 S.E.2d 255, 258 (1982). "Only when the evidence of intent to commit [one of the enumerated purposes under N.C. Gen. Stat. § 14-39(a)] is overwhelming or uncontradicted should that factual issue of intent, which separates the greater offense from the lesser, be taken from the jury." *State v. Little*, 51 N.C. App. 64, 71, 275 S.E.2d 249, 253 (1981). The issue is whether there was any evidence from which the jury could conclude that the defendant removed the victim not for the purpose of terrorizing her, but for some other purpose.

The evidence in the instant case is neither overwhelming nor uncontradicted that the defendant removed the victim for the purpose of terrorizing her. All of the defendant's actions and statements are consistent with a purpose to sexually assault the victim in some fashion. The evidence that the defendant acted for the purpose of sexual gratification permits a reasonable inference that his purpose was *not* to terrorize. *See Lang*, 58 N.C. App. at 122, 293 S.E.2d at 258. " 'Evidence 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 (2002).

In *Whitaker*, 316 N.C. at 517, 342 S.E.2d at 516, a female taxi driver was directed by the defendant to a dead end street whereupon he grabbed her by the throat, directed her to drive to a church parking lot, told her "I want to eat you," and told her to pull her pants down to her knees. The victim managed to get away from defendant before any sexual assault occurred. The defendant was convicted of second-degree kidnapping, based on a theory that he restrained and removed her for the purpose of facilitating the commission of a felony (attempted rape). On these facts, our Supreme Court held that because the evidence could reasonably allow the jury to infer that the purpose of the restraint and removal was a sexual assault not amounting to rape (that the defendant did not intend to have forced vaginal intercourse with the victim), it was error for the trial court to refuse to instruct the jury on false imprisonment. "The question of defendant's purpose in abducting the victim, being a question of his state of mind, should have been for the jury to decide, as the evidence did not point unerringly to a conclusion that defendant did or did not intend to attempt to rape the victim." *Id.* at 521, 342 S.E.2d at 518; *see also State v. Banks*, 295 N.C. 399, 245 S.E.2d 743 (1978).

Therefore, though the State's evidence may have been sufficient to go to the jury on the charge of kidnapping based on an intent to terrorize, the State's evidence of that intent was not overwhelming, and the State's own evidence was sufficient to support a jury finding that the defendant's intent was to commit a sexual assault, and not to terrorize the victim.

This is a terrible case where an innocent victim was brutally assaulted by a stranger. As much as I would like to join in the majority opinion, the Supreme Court holding in *Whitaker* mandates a new trial in this matter.

STATE OF NORTH CAROLINA v. MIGUEL AGUILAR RIOS, DEFENDANT

No. COA04-706

(Filed 5 April 2005)

1. **Homicide— first-degree murder—failure to instruct on second-degree murder—failure to instruct on voluntary intoxication**

The trial court did not err in a first-degree murder case by failing to instruct the jury on second-degree murder based on voluntary intoxication, because: (1) the evidence was overwhelming that defendant was not intoxicated; (2) defendant's confession contained a detailed account of the murder, but no mention about ingesting alcohol or drugs; (3) viewing the evidence in the light most favor to defendant, even the testimony of his witnesses did not meet the test for submission of an instruction on voluntary intoxication; (4) defendant never testified that he was so intoxicated that he could not premeditate or form a fixed purpose to kill; and (5) the State's evidence of premeditation and deliberation for first-degree murder was very strong.

2. **Criminal Law— trial court questioning witnesses—no impression court working with prosecution**

The trial court did not abuse its discretion in a first-degree murder case by questioning witnesses and the court's questions did not give the jury the impression that the trial court and the prosecution were working together, because: (1) no one could reasonably infer from the exchanges between the trial court and

the witness that the court was expressing an opinion as to what facts had been proven; (2) the trial court questioned the witness to clarify a critical element of the case; and (3) in this bilingual trial, the court fulfilled its duty to make the proceedings as clear and easy to understand as possible for the interpreters, witnesses, defendant, and the jury.

3. Criminal Law— instruction—flight

The trial court did not commit plain error in a first-degree murder case by giving an instruction on flight, because: (1) there was evidence that defendant left the scene and took steps to avoid apprehension including that he drove down two streets at night with the lights of the car turned off when he left the scene of the shooting; and (2) failure to render assistance to the victim is a factor to be considered in giving the flight instruction.

4. Homicide— first-degree murder—short-form indictment—constitutionality

The short-form indictment used to charge defendant with first-degree murder was constitutional even though it failed to list all the necessary elements of first-degree murder.

Appeal by defendant from judgment filed 19 December 2003 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 27 January 2005.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant.

BRYANT, Judge.

Miguel Aguilar Rios (defendant) appeals his judgment filed 19 December 2003, entered consistent with a jury verdict finding him guilty of first-degree murder.

On 4 August 2003, defendant was indicted for the first-degree murder of Shahid Iqbal (Iqbal). This matter came for jury trial at the 15 December 2003 criminal session of Guilford County Superior Court with the Honorable Michael E. Helms presiding. The jury found defendant guilty as charged on 18 December 2003. By judgment filed 19 December 2003, defendant was sentenced to life

imprisonment without parole. Defendant gave notice of appeal in open court.

Facts

The State presented the following evidence at trial: The security-system videotape from Sam's Mini-Mart in High Point, North Carolina showed that at 8:15 p.m. on 19 April 2003, Abel Medina (Medina) (co-defendant) bought a 12-pack of beer. Several minutes later, Medina re-entered the store, bought a pack of cigarettes, and stayed at the counter for several more minutes after completing the purchase.

The videotape then showed defendant entering the store, pulling his shirt over his face with one hand, and carrying a semi-automatic gun with the other. Defendant walked directly to the counter and fired a shot at Iqbal, the store clerk. The gun then jammed. Defendant released his shirt and used both hands in order to clear the jam, revealing his face to the video camera. Defendant then leaned over the counter and fired another shot before pulling his shirt over his face again and leaving the store. Iqbal was then seen moving past the video camera to the telephone.

Bystanders who heard the shots saw two subjects running out of the store—Medina fleeing on foot and defendant running to his car. Defendant left the lights of his car off as he pulled out and drove down Foust and Green Streets. The bystanders who heard the shots and saw the car flee with its lights off, looked inside the store, saw the blood, and called 911. Iqbal, who was lying on the floor, was breathing with difficulty. Iqbal had called his parents' house on the telephone but was only able to say that somebody had shot him, before collapsing.

The initial broadcast of "shots fired" went out to law enforcement at 8:17 p.m. Police officers began arriving at the scene within minutes of the broadcast. EMS took Iqbal to the hospital where he later died from the gunshot wound.

At 8:24 p.m., officers driving to the scene observed a man walking on foot northwards on Green Street, approximately 200-300 yards from the store. Because most people tend to stare at a line of police cars going by, officers stopped Medina as he appeared to be turning away and hiding his face. The officers asked Medina in Spanish whether he had heard shots from the store or knew anything about the shooting. He said he did not. After obtaining his name and review-

ing his identification, the officers released Medina and proceeded on to the scene of the crime.

At 8:26 p.m., Lieutenant J.C. Blank of the High Point Police Department arrived at the store and spoke briefly with some of the officers who were already on the scene. Lt. Blank then went directly to the video monitoring system behind the counter and observed the video camera. He rewound the videotape and on the monitor saw Medina buying a 12-pack of beer, leaving the store, then minutes later, re-entering the store and buying a pack of cigarettes.

Lt. Blank continued viewing the videotape which showed defendant entering the store, pulling his shirt up over his face, and shooting at the clerk once. Then, while clearing a jam with both hands, defendant's shirt dropped, and defendant's face was clearly shown as he leaned over the counter and fired again. Thereafter, Lt. Blank called in the officers who had stopped Medina, had them view the videotape, and sent them out to locate the two men.

At 8:52 p.m., the officers' search led them to 1122 Textile Place. A small dark-colored car, meeting the witnesses' description of the car that left the scene with its lights off, was backed into the driveway, parallel to the car immediately next to it. An unopened and still cold 12-pack of beer was on the floorboard, and the engine of the car was warm. Through a window of the house, the officers observed defendant standing in the front room.

The officers knocked and received entry to the house. Defendant resisted arrest and attempted to flee, requiring two officers to handcuff him. Defendant then dropped onto a cot and hunched over. While Officer John Gianella of the High Point Police Department was searching him for weapons, defendant kept turning his body so that the officer could not search his stomach area. After putting defendant on his back, Officer Gianella discovered a 9mm semi-automatic gun[1] in defendant's pants immediately below defendant's belt and down in the groin area. The officers cleared the weapon and removed the magazine. Defendant had a second magazine in his back pocket.

Defendant and Medina were separated from each other and from the other three occupants of the house (Julio Reyes, Gabriel Solez, and Mary Alta Wainwright). As defendant sat in a chair in the bed-

1. Ballistics testing by SBI later confirmed that the cartridges found on the floor of the store and the projectile embedded in the wall came from this gun, to the exclusion of all other weapons. An SBI gunshot residue test performed on defendant also confirmed he had fired a weapon.

room, he hunched over and moved from side to side. Officer Gianella asked defendant in Spanish if he was drunk. Defendant replied he did not like beer, but was sick[2]. Officer Gianella noted defendant had no problem walking, even with his hands cuffed behind his back, did not have slurred speech, had no odor of alcohol on his person, did not have bloodshot eyes, and was able to follow Officer Gianella's directions.

Police attempted to interview the other occupants of the house. Wainwright, who also testified at trial, said that Medina, Reyes, and Solez rented the house, and defendant was just visiting. Wainwright said Solez had invited her in earlier in the afternoon and gave her a beer. At one point before it got dark, defendant and Medina left, but Medina returned about a half-hour later and was crying. Five to ten minutes after that, defendant returned. Defendant was not drinking beer at this time, and most of the times Wainwright saw him that night, he was not drinking beer. In addition, at some point in the evening, defendant kissed her on the cheek and she smelled no odor of alcohol on his breath. Reyes said defendant and Medina had left the house and were not gone long, that Medina returned first, and thirty minutes later defendant returned. Solez was too intoxicated to be interviewed.

Around 9:30 p.m., defendant was transported from 1122 Textile Place to the police station, where he was processed, including having a gunshot residue test performed on him, and was placed in a holding cell at 10:20 p.m. Officer R. L. Cecil of the High Point Police Department, who maintained custody and visual contact with defendant at all times, testified that he observed in defendant no indications of intoxication, no slurred speech, no glazed eyes, no stumbling, or poor body functioning. Officer Cecil also testified that defendant walked normally and under his own power, with his hands cuffed behind his back, and needed nothing to lean on.

At 11:45 p.m., Detective Mike Nixon of the High Point Police Department and Officer Gianella, interviewed defendant, reading him his rights in both English and Spanish. Defendant indicated orally (sometimes in English, sometimes in Spanish) and in writing that he understood his rights and he agreed to waive them in order to talk. After defendant and Officer Gianella "bonded" and could understand each other, most of defendant's confession was in Spanish.

2. At trial, defendant testified that he was ill that day and had a sore throat. Officer Gianella testified he specifically remembered defendant's statement that he did not like beer.

At first, defendant denied any involvement in the shooting or being in the store, or knowing anything about the shooting. Thereafter, Det. Nixon showed him the videotape, and defendant confessed that he shot Iqbal. Defendant said that "the Pakistani" had offended Medina while buying the beer. Defendant said he was outside the store at the time, but overheard Medina and the clerk arguing. After this, he and Medina went back to 1122 Textile Place, and Medina had told him that the clerk had called him a "mother-f[*]cking wetback" when he was buying beer. They then went back to the store ten to fifteen minutes later. Defendant admitted that he was angry about the whole situation between Medina and the clerk.

Defendant said Medina had asked him to come into the store and defend him. So, the second time Medina went in, he bought cigarettes. Defendant admitted he went in because Iqbal had offended Medina and he wanted "to speak bad to [Iqbal]" about it. As defendant entered the store, Iqbal said to defendant, "Don't put your feet on the floor, you f[*]cking wetback." Iqbal also made a comment concerning defendant's father. Defendant admitted he did not like Pakistanis. Defendant admitted he got "madder" after Iqbal's comments to him, and that is when he pulled the gun and shot Iqbal. At this point in the interview, defendant asked Det. Nixon when he could go home. Det. Nixon told him, "No time soon," and that the man he shot was dead—defendant thought Iqbal was still alive. Det. Nixon asked defendant how he felt about killing Iqbal. Defendant said a lot of Mexicans and Americans were dead because of problems with some Middle Eastern countries. He said he had not had problems with Pakistanis before, but he did not go to that particular store because he did not like Pakistanis.

Defendant never said in his interview that he was drunk or intoxicated or that he had been drinking at all. Further, Det. Nixon testified he was within two to four feet of defendant during the interview, and he did not detect any impairment or any odor of alcohol. He noted no bloodshot eyes and no slurred speech. He testified defendant did not need help to get up or to walk, defendant walked without stumbling, and Det. Nixon did not believe defendant to be impaired or intoxicated. Defendant was then charged with first-degree murder. While being taken to the magistrate's office, defendant spontaneously asked Officer Cecil, in English, "How long do you think I'll be in jail, a year or two?"

Defendant presented as witnesses Medina, his cousin Flavio Soto Ramirez, and himself. All three testified defendant had been drinking

the night in question and was very drunk. Defendant testified he remembered Iqbal insulting him and his father, but he said he did not remember walking over to him and shooting him in the chest, the gun jamming, or leaning over to shoot a second time. He then recanted and testified he did remember shooting Iqbal, but did not remember the details.

The issues on appeal are whether: (I) the trial court properly declined to instruct the jury on second-degree murder based on voluntary intoxication; (II) the trial court erred by questioning witnesses and giving the jury the impression that the trial court and the prosecution were working together; (III) the trial court committed plain error in giving an instruction on flight; and (IV) use of a short-form murder indictment violated defendant's constitutional rights in that the indictment failed to list all the necessary elements of first-degree murder.

I

[1] Defendant first argues that the trial court erred in failing to instruct the jury on second-degree murder. We hold that defendant was not entitled to an instruction on voluntary intoxication (as was provided by the trial court) and, further, was not entitled to an instruction on second-degree murder (as the trial court properly declined to instruct the jury).

The test of whether a defendant is entitled to an instruction on voluntary intoxication is as follows:

> A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.
>
> . . .
>
> The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a delib-

> erate and premeditated purpose to kill. In [the] absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

State v. Mash, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988) (internal quotations and citations omitted).

Further, where a court gives an instruction on voluntary intoxication in a case where the defendant is not entitled to it, the defendant receives a benefit. *State v. McQueen*, 324 N.C. 118, 142-43, 377 S.E.2d 38, 52 (1989). In *McQueen*, the Court concluded "that defendant was not entitled to any jury instruction on the issue of voluntary intoxication. Although the evidence was insufficient to warrant the trial court charging the jury on this issue, defendant received the benefit of an instruction. The error in the instruction was favorable to defendant. This assignment of error is overruled." *Id.*

Here, the evidence was overwhelming that defendant was not intoxicated, much less "so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. The videotape showed him walking to Iqbal and shooting, with no unsteadiness or loss of balance, even when leaning over the counter to shoot a second time. Defendant drove away and the witnesses to his driving did not observe any driving problems. The officers who apprehended defendant shortly after the shooting detected no odor of alcohol or any other signs of intoxication. Upon arrest, defendant told an officer he was not drunk and did not like beer. None of the officers who observed defendant from the time he was arrested until his confession several hours later, detected any odor of alcohol about defendant or any other signs of intoxication. Moreover, his confession contained a detailed account of the murder, but no mention about ingesting alcohol or drugs.

Viewing the evidence in the light most favorable to defendant, even the testimony of defendant's witnesses did not meet the test for submission of an instruction on voluntary intoxication. Those witnesses testified defendant was drunk, but their testimony did not indicate that he was so completely intoxicated as to render him utterly incapable of forming a fixed purpose to kill. Medina testified only that defendant drank "beer" and was "drunk."

Defendant's cousin Ramirez testified defendant was drinking "beer" earlier in the day; and just before the police arrived, defendant

was nervous and shivering when he told Ramirez he "had shot somebody." Ramirez testified defendant was "very drunk" at this time, and had "a lot" of odor of alcohol about him, and his speech was "like when a person is drunk . . . the tongue is heavy." He noticed nothing else about defendant's condition.

And finally, defendant himself contradicted the testimony of his witnesses in testifying that it was tequila he was drinking and not beer. He testified that between noon and 8:15 p.m. he drank "a little over half" of a bottle of tequila. He testified he drove his car, but did not say he had any problems driving. He testified in minute detail about Medina asking defendant to drive Medina to the store, what Medina bought, the exact words Iqbal used in insulting Medina, and the actions defendant took in response to the insults.

Defendant testified, "I got very upset because of what he said about my father and also I was drugged that day;" adding that he had used cocaine before driving to the store. His testimony regarding his explanation for the shooting was merely, "I got very upset, and what happened, happened."

As to his condition, defendant testified merely, "I was drunk, I was drugged." Defendant never testified that he was so intoxicated that he could not premeditate or form a fixed purpose to kill (or in other words, that he could not think or plan). His testimony failed to indicate he was so completely intoxicated and without the ability to form intent. Rather, his testimony was that "I got very upset, and what happened, happened."

Evidence of this sort does not qualify defendant to receive a voluntary intoxication instruction. *See State v. Hunt*, 345 N.C. 720, 727-28, 483 S.E.2d 417, 422 (1997) (citation omitted) (evidence that defendant drank continuously on day of killing, shared three half-cases of beer and a fifth of Jim Beam, smoked marijuana, and was "pretty high," was insufficient to show that defendant was " 'utterly incapable of forming a deliberate and premeditated purpose to kill' "); *State v. Geddie*, 345 N.C. 73, 945, 478 S.E.2d 146, 157 (1996) (evidence that defendant drank two pints of white lightning over a period of time before the shooting, does not satisfy defendant's burden of production for an instruction on voluntary intoxication or second-degree murder); *State v. Herring*, 338 N.C. 271, 275-76, 449 S.E.2d 183, 186 (1994) (evidence that defendant consumed forty to sixty ounces of "liquid crack," four cans of malt liquor, and three marijuana joints, did not warrant instructions on voluntary intoxica-

tion and second-degree murder as evidence showed defendant had a detailed memory, had the presence of mind to flee, was in control of his actions, and had no odor of alcohol five hours later); *State v. Morston*, 336 N.C. 381, 404, 445 S.E.2d 1, 14 (1994) (evidence that various witnesses testified that defendant had consumed "a considerable amount" of gin less than one hour before the murder, had mixed crack cocaine and pain reliever with his gin, that his eyes were "big and red" and that he "looked like he was high," held insufficient to support submission of voluntary intoxication or second-degree murder instruction); *State v. Vaughn*, 324 N.C. 301, 308, 377 S.E.2d 738, 742 (1989) (voluntary intoxication instruction not warranted where defendant was intoxicated and smelled of alcohol and had trouble walking, but was responsive and aware of what was going on around him); *State v. Kornegay*, 149 N.C. App. 390, 395-96, 562 S.E.2d 541, 545 (2002) (instructions on voluntary intoxication and second-degree murder were not warranted where defendant was "drunk and high from smoking [cocaine]" and was "coming down," but where he took steps to avoid apprehension and remembered details surrounding the murder including the conversation he had with the victim prior to the murder).

Here, defendant's testimony was that he was intoxicated after ingesting an indeterminate amount of tequila and cocaine. However, he testified, in minute detail, his conversation with Iqbal, what he did, when he did it, and what he was thinking at all times, including the fact that he knew what was going on around him. Accordingly, defendant was not entitled to an instruction of voluntary intoxication.

In addition, defendant was not entitled to an instruction on second-degree murder. "The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements." *State v. Walls*, 342 N.C. 1, 47, 463 S.E.2d 738, 762 (1995).

First-degree murder is the unlawful killing of a human being committed with malice, premeditation, and deliberation. N.C.G.S. § 14-17 (2003). The unlawful killing of a human being with malice but without premeditation and deliberation is second-degree murder. *Id.* "If the evidence satisfies the State's burden of proving each element of first-degree murder, including premeditation and deliberation, and

there is no evidence to negate these elements other than defendant's denial, the trial court should exclude second-degree murder from the jury's consideration." *Geddie*, 345 N.C. at 94, 478 S.E.2d at 156.

A killing is premeditated if "the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). A killing is deliberate if the defendant acted "in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.*

The fact that a defendant was angry or emotional will not negate the element of deliberation during a killing unless there was evidence the anger or emotion was strong enough to disturb defendant's ability to reason. *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 338 (1986). "Evidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his ability to reason." *State v. Solomon*, 340 N.C. 212, 222, 456 S.E.2d 778, 785 (1995). "[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first[-]degree." *Vaughn*, 324 N.C. at 308, 377 S.E.2d at 742. "[N]o inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law." *Mash*, 323 N.C. at 347, 372 S.E.2d at 537.

Here, the State's evidence of premeditation and deliberation was very strong. The videotape showed defendant walking to Iqbal and shooting, with no unsteadiness or loss of balance, even when leaning over the counter to shoot a second time. Defendant drove away and the witnesses to his driving did not observe any driving problems. The officers who apprehended defendant shortly after the shooting detected no odor of alcohol or any other signs of intoxication. Upon arrest, defendant told an officer he was not drunk and did not like beer. None of the officers who observed defendant from the time he was arrested until his confession several hours later, detected any odor of alcohol about defendant or any other signs of intoxication. Moreover, his confession contained a detailed account of the murder, but no mention about ingesting alcohol or drugs.

The only evidence defendant presented to the contrary was that he was intoxicated, and that he was very upset and angry. As to intox-

ication, defendant's case in the light most favorable to him showed only that he was merely intoxicated—he never presented any evidence that his intoxication affected his ability to think nor did he present evidence that he was so completely intoxicated that he was incapable of forming a deliberate and premeditated purpose to kill. We now hold, as did the Court in *State v. Strickland*, 321 N.C. 31, 42, 361 S.E.2d 882, 888 (1987), "[s]ince the State's evidence clearly showed every element of first[-]degree murder, and since defendant has not shown voluntary intoxication sufficient to negate specific intent, it follows that the trial court was not required to submit the possible verdict of second[-]degree murder to the jury."

This assignment of error is overruled.

II

[2] Defendant next argues that "the trial court erred by constantly questioning and interrupting witnesses, aiding the prosecution in making its case, and giving the jury the impression that the trial court and the prosecution were working together." Specifically, defendant argues the trial court's questions had the prejudicial effect of expressing an opinion on the case, unfairly impacting the jury's decision.

A trial court has the duty to supervise and control trial proceedings to ensure fair and impartial justice for both parties, and in carrying out this duty, the court may question a witness in order to clarify confusing or contradictory testimony. *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732 (1999); *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985). "In evaluating whether a [trial court's] comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized. Unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *Fleming*, 350 N.C. at 130, 512 S.E.2d at 735. The burden of showing prejudice is on the defendant. *Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248. The trial court's broad discretionary power to control the trial and to question witnesses to clarify testimony will not be disturbed absent a manifest abuse of discretion. *State v. Mack*, 161 N.C. App. 595, 598, 602, 589 S.E.2d 168, 171, 173 (2003), *disc. rev. denied*, 358 N.C. 379, 598 S.E.2d 140, *cert. denied*, — U.S. —, 160 L. Ed. 2d 336 (2004).

"The court may interrogate witnesses, whether called by itself or by a party." N.C.G.S. § 8C-1, Rule 614(b) (2003). The court properly uses this authority when it questions witnesses in order to clarify wit-

nesses' testimony, to enable the court to rule on the admissibility of certain evidence and exhibits, and to promote a better understanding of the testimony. *State v. Quick*, 329 N.C. 1, 25, 405 S.E.2d 179, 193 (1991); *see generally State v. Chandler*, 100 N.C. App. 706, 398 S.E.2d 337 (1990). Where the court does not express an opinion as to the facts, it is not error for a court to question a witness when necessary to clarify even a critical element of the case. *State v. Shepherd*, 163 N.C. App. 646, 652-53, 594 S.E.2d 439, 444 (2004). The trial court has a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting witnesses from prolonged or needless or abusive examination, *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 861 (1995), or "to elicit overlooked pertinent facts," *Fleming*, 350 N.C. at 130, 512 S.E.2d at 732. "When the trial [court] questions a witness to clarify his testimony or to promote an understanding of the case, such questioning does not amount to an expression of the trial [court's] opinion as to defendant's guilt or innocence." *State v. Davis*, 294 N.C. 397, 402, 241 S.E.2d 656, 659 (1978).

Here, the trial court's questioning of witnesses fell into three categories: (I) questioning unfocused witnesses or clarifying ambiguous testimony or questions; (II) clarifying technical, or non-material, or non-disputed matters in an effort to save time and promote clarity; and (III) seeking clarity where the court did not hear, or was not clear as to testimony that had already been established. *See e.g.*, *Quick*, 329 N.C. at 25, 405 S.E.2d at 193 (stating a court properly uses its authority when it questions witnesses in order to clarify ambiguous testimony and to enable the court to rule on the admissibility of certain evidence and exhibits); *State v. Yellorday*, 297 N.C. 574, 581, 256 S.E.2d 205, 210 (1979) ("From the record in this case it is crystal clear that the questions which [the trial court] asked [the witness] were solely for the purpose of clarifying his confused and sometimes conflicting testimony. . . . We are satisfied beyond peradventure that no one could reasonably infer from the exchanges between the [trial court] and [the witness] that the [trial court] was expressing an opinion as to what facts had been proven."); *Shepherd*, 163 N.C. App. at 652-53, 594 S.E.2d at 444 ("Having reviewed the trial court's examination of [the witness], we conclude that the trial [court] questioned the witness to clarify a critical element of the case, and the jury could not reasonably infer that the [trial court] was expressing an opinion as to the facts of the case."); *State v. Smarr*, 146 N.C. App. 44, 50, 551 S.E.2d 881, 885 (2001) (stating the trial court did not err in questioning witnesses where the questions were designed to clarify the

sequence of events and the trial court did not state an opinion as to the facts or the witnesses' credibility); *see also* N.C.G.S. § 8C-1, Rule 614(b) (2003) ("The court may interrogate witnesses, whether called by itself or by a party.").

Overarching all the difficulties in the circumstances of this particular case was the fact that it was a bilingual trial, with interpreters conducting translations in real-time. Here, the court fulfilled its duty to make the proceedings as clear and easy to understand as possible for the interpreters, witnesses, defendant, and the jury. In questioning witnesses in this case, the trial court was apparently seeking clarity and fairness, and did not express opinion.

When viewed in the totality of the circumstances, *Fleming*, 350 N.C. at 126, 512 S.E.2d at 732, the court here did not abuse its discretion, *Mack*, 161 N.C. App. at 598, 602, 589 S.E.2d at 171, 173, or convey the impression that the court and the prosecution were working together. Moreover, defendant has failed to present evidence that the trial court aided the prosecution in making its case, or gave the jury the impression that the trial court and the prosecution were working together. This assignment of error is overruled.

III

[3] Defendant next argues that the trial court committed plain error in giving a jury instruction on flight.

Plain error in an instruction 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. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Here, there was no plain error committed, given the evidence that defendant left the scene and took steps to avoid apprehension. Specifically, the evidence showed defendant left the scene of the shooting and drove down two streets, at night, with the lights of the car turned off.

"[A] trial court may not instruct a jury on defendant's flight unless 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.' " *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). "The relevant inquiry [is] whether there is evidence that defendant left the scene of the murder and took steps to avoid apprehension." *Levan*, 326 N.C. at 165, 388 S.E.2d at 434. If "there was evidence tend-

ing to show that defendant, after shooting the victim, ran from the scene of the crime, got in a car waiting nearby, and drove away[, this] is sufficient evidence of flight to warrant the instruction." *State v. Reeves*, 343 N.C. 111, 113, 468 S.E.2d 53, 55 (1996).

The evidence in this case consists of testimony from Frances Hines that after she heard two shots, two people came out of the store, one ran around the building on foot and the other got in a car. The driver then drove down Foust Street and Green Street with the lights turned off, despite the fact that it was dark outside. Hal Hines also testified that after he heard the shots he observed a car moving down the street with its lights turned off. It was a dark-colored car, and it was "pitch dark" outside. This constitutes "some evidence" that defendant left the scene of the crime and took steps to avoid apprehension.

Also, failure to render assistance to the victim is a factor to be considered in giving the flight instruction. *See State v. Anthony*, 354 N.C. 372, 425, 555 S.E.2d 557, 591 (2001) (flight instruction properly given where after shooting, defendant "immediately entered his car and quickly drove away from the crime scene without rendering any assistance to the victims or seeking to obtain medical aid for them"); *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 626 (2001) (trial court did not err in instructing jury on flight where defendant left crime scene hurriedly in his car without providing medical assistance to the victim).

Defendant argues the facts of this case are similar to those of *State v. Holland*, 161 N.C. App. 326, 588 S.E.2d 32 (2003), yet *Holland* is distinguishable as the defendant in *Holland* did not drive away from the crime scene, at night, with the car lights turned off. Further, the Court in *Holland* concluded that giving the flight instruction was harmless, "in light of the remaining evidence, including the identification of defendant as the perpetrator of the crimes charged." *Holland*, 161 N.C. App. at 330, 588 S.E.2d at 36.

This assignment of error is overruled.

IV

[4] Defendant finally argues the trial court erred in denying his motion to dismiss the indictment because use of a short-form murder indictment violated his constitutional rights in that the indictment failed to list all the necessary elements of first-degree murder. This

assignment of error is summarily overruled. *See State v. Anderson*, 355 N.C. 136, 558 S.E.2d 87 (2002); *State v. Long*, 354 N.C. 534, 557 S.E.2d 89 (2001); *State v. King*, 353 N.C. 457, 546 S.E.2d 575 (2001); *State v. Call*, 353 N.C. 400, 545 S.E.2d 190 (2001), *cert. denied*, 357 N.C. 579, 589 S.E.2d 130 (2003); *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000).

No error.

Judges HUNTER and JACKSON concur.

STATE OF NORTH CAROLINA v. MELVIN LEE BLIZZARD

No. COA04-312

(Filed 5 April 2005)

1. Kidnapping— first-degree—motion to dismiss—sufficiency of evidence—rape

The trial court did not err by denying defendant's motion to dismiss the first-degree kidnapping charge, because: (1) defendant's forcible movement of the victim from the front of her home to the bedroom was a sufficient asportation to support kidnapping in addition to rape; and (2) the trial court correctly arrested judgment of the first-degree kidnapping conviction after the jury's verdict and sentenced defendant in the presumptive range of second-degree kidnapping consistent with our Supreme Court's holding that a defendant may not be separately punished for the offenses of first-degree rape and first-degree kidnapping where the rape is the sexual assault used to elevate kidnapping to first-degree, although this holding does not affect the trial court's denial of defendant's motion to dismiss at the close of the State's evidence.

2. Evidence— expert testimony—rape victim believable—not plain error

Although a medical expert's testimony that the victim was "believable" in her allegation that defendant raped her was an impermissible comment on the credibility of the victim, the admission of this testimony was not plain error in light of the corroborative testimony and physical evidence offered by

the State because it did not have a probable impact on the jury's finding of guilt.

3. Evidence— poem—corroboration

The trial court did not abuse its discretion in a first-degree rape, first-degree burglary, and second-degree kidnapping case by admitting a poem written by the victim's boyfriend as a State's exhibit, because: (1) the State tendered the evidence to corroborate the victim's testimony that she did not consent to sexual intercourse with defendant due to her being in a relationship with another man and to corroborate witness testimony about the events that evening; and (2) defendant does not offer any authority to support his argument that the poem lacked any logical tendency to help prove the facts at issue or was unfairly prejudicial.

4. Rape— first-degree—instruction—serious personal injury

The trial court did not err by submitting a jury instruction on serious personal injury for the charge of first-degree rape, because: (1) the victim testified about mental or emotional harm from the attack that she still suffered at the time of trial, and a doctor testified to physical injuries she received in the attack; and (2) defendant received the opportunity to cross-examine the victim to attempt to create reasonable doubt in the jurors' minds regarding the issue.

5. Constitutional Law— effective assistance of counsel—dismissal of claim without prejudice

Although defendant contends he received ineffective assistance of counsel in a first-degree rape, first-degree burglary, and second-degree kidnapping case, this assignment of error is dismissed without prejudice for defendant to move for appropriate relief in the superior court and request a hearing to determine whether he received ineffective assistance of counsel, because: (1) the record is insufficient for the Court of Appeals to consider defendant's claim; and (2) defendant acknowledges in his brief that he is unable, on the present record, to litigate any of the claims for ineffective assistance.

Appeal by defendant from judgments entered 6 November 2003 by Judge Gregory A. Weeks in Brunswick County Superior Court. Heard in the Court of Appeals 16 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

Ligon and Hinton, by Lemuel W. Hinton, for defendant-appellant.

TYSON, Judge.

Melvin Lee Blizzard ("defendant") appeals from judgments entered after a jury returned guilty verdicts of: (1) first-degree rape; (2) first-degree burglary; and (3) first-degree kidnapping. The trial court arrested judgment on the first-degree kidnapping conviction and sentenced defendant under second-degree kidnapping presumptive sentencing guidelines. We find no prejudicial error.

I. Background

A. State's Evidence

The State's evidence tended to show that on the evening of 19 December 2002, defendant and several other people gathered in Christine "Tina" Johnston's ("Johnston") home in Leland, North Carolina. The group of visitors and residents were acquainted with each other. They played cards, rolled dice, and consumed alcoholic beverages. The victim, Johnston's next door neighbor, arrived at Johnston's home between 9:00 and 9:30 p.m. She came over to check if her boyfriend had left a telephone message and to show Johnston a framed poem from him. Upon arrival, the victim was introduced to those present, including defendant. After about twenty minutes, the victim left and went home.

Later that night, the victim was sleeping on her couch when she heard a knock at her door. She opened the door slightly and recognized defendant standing outside. Defendant asked to come in and the victim said, "no." However, defendant was persistent and "just pushed his way in [to her home]." The two spoke briefly. Defendant brandished a knife. He told the victim to remove her clothing or he would cut them off. Defendant locked the door, grabbed the victim, and pushed her against the wall.

Defendant told her that he had been watching her at her house the week before. The victim tried to escape on several occasions, but defendant subdued her. He forced the victim to undress and demanded oral sex. He then forced her into her bedroom where he forced the victim into non-consensual sexual intercourse.

Ricky Blakely ("Blakely"), a next door neighbor, knocked loudly on the front door, interrupting defendant's attack. The victim screamed. Blakely burst through the front door and confronted defendant when he emerged from the bedroom. Defendant fled naked toward Johnston's home. The victim, also nude, ran out the back door of her home and hid behind Johnston's garbage can. Defendant and his mother, who was present at Johnston's house, gathered their belongings and left in separate vehicles.

After defendant left, the victim contacted law enforcement. Officer Keith Bowling of the Brunswick County Sheriff's Department responded to the call around 12:30 a.m. Officer Bowling found the victim in Johnston's bathroom crying and extremely upset. After Officer Bowling secured the scene, Johnston drove the victim to the New Hanover Regional Medical Center. The victim was examined by Dr. Kevin John Reese ("Dr. Reese"). Dr. Reese described the victim as "extremely upset" and "fearful." Dr. Reese diagnosed the victim as suffering from blunt trauma, swelling, and scrapes. According to Dr. Reese, the victim's injuries were consistent with someone who had been forcibly restrained.

Defendant was indicted for: (1) first-degree rape; (2) first-degree kidnapping; and (3) first-degree burglary. He pled not guilty to all charges and was tried by a jury on 4 November 2003.

B. Defendant's Evidence

Defendant testified that he had met the victim before the night of the alleged crimes. He stated that on 19 December 2002, the victim hugged him, stroked his hair, and made advances to him. He further testified that when he went to the victim's home later that night, the victim encouraged and consented to sexual intercourse with him. Defendant attempted to elicit on cross-examination that the victim's injuries were the result of "rough" consensual sex. He also testified that only after Blakely came to the door and discovered the two having consensual sex did the victim scream, "help, he raped me!" Defendant denied hitting or raping the victim.

The jury found defendant guilty of all charges. The trial court arrested the first-degree kidnapping conviction and sentenced defendant under second-degree kidnapping. Defendant was found to be a record level V offender and was sentenced in the presumptive ranges to: (1) a minimum of 433 months and maximum of 529

months for first-degree rape; (2) a minimum of 107 months and maximum of 138 months for first-degree burglary; and (3) a minimum of 42 months and maximum of 60 months for second-degree kidnapping. Defendant appeals.

II. Issues

Defendant argues: (1) the trial court erred in denying defendant's motion to dismiss the first-degree kidnapping charge; (2) the trial court committed plain error by admitting expert opinion testimony regarding the credibility of a prosecuting witness; (3) the trial court erred in admitting a poem as a State's exhibit; (4) the trial court improperly submitted a jury instruction on serious personal injury; and (5) that he received ineffective assistance of counsel.

III. Motion to Dismiss

A. Standard of Review

The standard of review for a motion to dismiss in a criminal trial is " '[u]pon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. If substantial evidence, whether direct, circumstantial, or both, supports a finding that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be denied and the case goes to the jury. But, "if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed."
>
> In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or deter-

> mine any witnesses' credibility. It is concerned "only with the sufficiency of the evidence to carry the case to the jury." Ultimately, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

State v. Thaggard, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005) (internal citations and quotations omitted).

B. First-Degree Kidnapping

[1] Our Supreme Court recently restated the definition of first-degree kidnapping in *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93 (2004).

> Kidnapping is the unlawful confinement, restraint, or removal of a person from one place to another for the purpose of: (1) holding that person for a ransom or as a hostage, (2) facilitating the commission of a felony or facilitating flight of any person following the commission of a felony, (3) doing serious bodily harm to or terrorizing the person, or (4) holding that person in involuntary servitude. N.C.G.S. § 14-39(a) (2003). Kidnapping is considered to be in the first-degree when the kidnapped person is not released in a safe place or is seriously injured or sexually assaulted during the commission of the kidnapping. N.C.G.S. § 14-39(b).

Id. at 25, 603 S.E.2d at 110 (citations omitted); N.C. Gen. Stat. § 14-39 (2003). The element of "confinement, restraint, or removal" requires "a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981); *see also State v. Mebane*, 106 N.C. App. 516, 532, 418 S.E.2d 245, 255 ("restraint, confinement, and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape"), *disc. rev. denied*, 332 N.C. 670, 424 S.E.2d 414 (1992). "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, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape." *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987). Evidence tending to show the rape victim was forced down a hallway from one room to another was a sufficient asportation separate and independent of the elements of rape to support a conviction for second-degree kidnapping. *State v. Mangum*, 158 N.C. App. 187, 195, 580 S.E.2d 750, 755, *cert. denied*, 357 N.C. 510, 588 S.E.2d 378 (2003) ("Kidnapping,

whether in the first or second degree, requires the unlawful restraint or confinement of a person . . . .").

The State presented evidence that defendant forced himself into the victim's home, locked the door behind him, held the victim at knife point, demanded she perform and received oral sex, forced her into a bedroom, and engaged in non-consensual sexual intercourse with her. Under the holding in *Mangum* and cases cited therein, defendant's forcible movement of the victim from the front of her home to the bedroom was a sufficient asportation to support kidnapping in addition to the rape. 158 N.C. App. at 195, 580 S.E.2d at 755-56. Defendant forced the victim to perform oral sex at knife point at the front of the house, indicating he could have continued the assault there. *Walker*, 84 N.C. App. at 543, 353 S.E.2d at 247. Instead, he moved her under knife point away from the front door to the bedroom to engage in non-consensual sexual intercourse.

Taken in the light most favorable to the State and providing the State the benefit of every reasonable inference from the evidence, substantial evidence exists to deny defendant's motion to dismiss the charge of first-degree kidnapping. Contradictions in the evidence are to be resolved in the State's favor. The trial court properly submitted the charge of first-degree kidnapping to the jury.

The trial court correctly arrested judgment of the first-degree kidnapping conviction *after* the jury's verdict and sentenced defendant in the presumptive range of second-degree kidnapping. The trial court's decision is consistent with our Supreme Court's holding that a "defendant may not be separately punished for the offenses of first degree rape and first degree kidnapping where the rape is the sexual assault used to elevate kidnapping to first degree." *State v. Mason*, 317 N.C. 283, 292, 345 S.E.2d 195, 200 (1986). However, the holding in *Mason* does not affect the trial court's denial of defendant's motion to dismiss at the close of the State's evidence. The trial did not err in denying defendant's motion to dismiss the charge of first-degree kidnapping for lack of sufficient evidence. This assignment of error is overruled.

IV. Medical Expert Opinion Testimony

[2] Defendant contends the trial court committed "plain error" in admitting a medical expert witness's opinion testimony that the victim was "believable" in her allegation that defendant raped her. We disagree.

A. Preservation of Potential Error for Appellate Review

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C.R. App. P. 10(b)(1) (2004). Assignments of error are generally not considered on appellate review unless an appropriate and timely objection was entered and ruling obtained. *State v. Short*, 322 N.C. 783, 790, 370 S.E.2d 351, 355 (1988) (citing *State v. Reid*, 322 N.C. 309, 367 S.E.2d 672 (1988)); N.C. Gen. Stat. § 15A-1446(a) (2003).

Defendant acknowledges he failed to make a timely and specific objection when the State proffered Dr. Reese's opinion testimony into evidence. Under Rule 10(b)(1), defendant failed to preserve this assignment of error for review. Defendant urges us to consider his assignment of error under "plain error" review.

B. Plain Error Rule

Our Supreme Court adopted the plain error rule as an exception to Rule 10 in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983) (applied to assignments of error regarding jury instructions). A defendant seeking plain error review must "specifically and succinctly" argue that any error committed by the trial court amounted to plain error. *State v. Nobles*, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999), *vacated and remanded*, 357 N.C. 433, 584 S.E.2d 765 (2003). The proponent must show that:

> [A]fter reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it

> can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Our Supreme Court extended plain error review to issues concerning admissibility of evidence. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983) ("we conclude, and so hold, that the 'plain error' rule as applied in *Odom* to Rule 10(b)(2) applies with equal force to Rule 10(b)(1)").

Defendant properly argued in his brief with citations to relevant authority that the admission of Dr. Reese's expert opinion testimony constitutes plain error, warranting this Court's review of an otherwise unpreserved assignment of error.

We examine the entire record to decide whether the error "had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 379 (citation omitted). We determine whether, without this error, the jury would have "reach[ed] a different verdict." *State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986).

C. Medical Expert Opinion on Witness Credibility

This Court stated in *State v. Ewell*, 168 N.C. App. 98, 102, 606 S.E.2d 914, 918 (2005):

> N.C. Gen. Stat. § 8C-1, Rule 702(a) (2003) provides, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." However, an expert's opinion testimony may not be used to establish or bolster the credibility of a witness. *State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 568 (1986).

The transcript shows that during the State's direct examination of Dr. Reese, he was asked:

State: Dr. Reese, did you provide medical treatment to . . . [the victim] on December 20th, early morning hours of last year?

Dr. Reese: Yes, I did.

State: And how did she present to you? What—what was her condition when you saw her?

> Dr. Reese: When I first saw her in the room, I saw a young female kind of huddled on the bed, crying, shaking, very emotionally upset, very, very extremely fearful of her life is what she stated "I'm scared of [sic] my life." *She truly was believable to me* as someone who was incredibly scared of something that had happened to her.

(Emphasis supplied). Dr. Reese's response was an impermissible comment by an expert medical witness on the credibility of the victim, the prosecuting witness. *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002); *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004); *Ewell*, 168 N.C. App. at 105-06, 606 S.E.2d at 918. This testimony was admitted during the State's case-in-chief, prior to defendant "opening the door." *See State v. Baymon*, 336 N.C. 748, 752-53, 446 S.E.2d 1, 3 (1994) ("Opening the door" is the principle where one party introduces evidence of a particular fact and the opposing party may introduce evidence to explain or rebut it, even though the rebuttal evidence would be incompetent or irrelevant, if offered initially).

We hold the admission of Dr. Reese's expert opinion testimony bolstering the credibility of the victim, the State's chief prosecuting witness, was error.

D. Plain Error

Having found the admission of Dr. Reese's expert opinion testimony "to establish or bolster the credibility" of the victim was error, we now consider whether this error constitutes plain error and prejudices defendant. *Heath*, 316 N.C. at 342, 341 S.E.2d at 568.

The State offered testimony from Blakely, Johnston, and Officer Bowling in addition to that of the victim and Dr. Reese. Blakely testified that after defendant left Johnston's house to go to the victim's home, he followed defendant thinking, "something was not right." Before he reached the victim's front door, he heard her screaming inside. When he finally kicked in the victim's door, defendant was nude and ran past him out the door, saying, "I didn't do anything wrong, I didn't do anything wrong." Blakely found the victim "scared and upset," and claiming that defendant "raped me."

Officer Bowling testified that upon arrival at Johnston's house, he found the victim in the bathroom and stated, "[s]he was crying and just very upset and very hysterical at the time." When Officer

Bowling asked the victim whether defendant had "made penetration," the victim responded, "[y]es he did." He described photographs of the victim's home, which included pictures of the victim's clothes strewn across the floor.

Johnston testified that she heard someone screaming after Blakely left to check on the victim. She described it as a "terrifying scream." When the victim finally entered Johnston's house after hiding behind the trash can, Johnston testified she was "hysterically crying, shaking," and told Johnston, "he raped me."

Defendant fails to argue and our complete review of the record and transcripts does not disclose that the error admitting Dr. Reese's comments on the victim's credibility was "something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *McCaskill*, 676 F.2d at 1002. In light of the corroborative testimony and physical evidence offered by the State, we hold the error did not have "a probable impact on the jury's finding of guilt," *Odom*, 307 N.C. at 661, 300 S.E.2d at 379, or absent the error, the jury would probably have returned a different verdict. *Riddle*, 316 N.C. at 161, 340 S.E.2d at 80. We hold the admission of Dr. Reese's expert opinion testimony that the victim was "believable" was not prejudicial to defendant to warrant a new trial. This assignment of error is overruled.

V. State's Exhibit

[3] Defendant contends the trial court erred in admitting into evidence a poem written by the victim's boyfriend. We disagree.

" 'Relevant evidence' means 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). Evidence is relevant if it has any logical tendency, however slight, to prove a fact at issue. *State v. Sloan*, 316 N.C. 714, 724, 343 S.E.2d 527, 533 (1986). Our Supreme Court has "interpreted Rule 401 broadly and [has] explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994) (citations omitted).

Generally, all relevant evidence is admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (2003). However, relevant "evidence may be excluded if its probative value is substantially outweighed by the dan-

ger of unfair prejudice, confusion of the issues, or misleading the jury, or by the considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2003). Exclusion or admission of evidence under Rule 403 rests within the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986).

Here, the State tendered into evidence the poem the victim's boyfriend wrote and gave to her. The State argued two reasons for the poem's relevance and admission: (1) it corroborated the victim's testimony that she did not consent to sexual intercourse with defendant due to her being in a relationship with another man; and (2) it corroborated Johnston's and others' testimony about the events that evening. Defendant objected and asserts the poem was irrelevant or, if relevant, was misleading to the State's actual reason for admission.

Our review of the record and transcript fails to disclose that the trial court abused its discretion in admitting the poem into evidence. Defendant does not offer any authority to support his argument that the poem lacked any logical tendency to help prove the facts at issue or was unfairly prejudicial. This assignment of error is overruled.

VI. Jury Instructions

[4] Defendant contends the State's evidence did not support the trial court's instruction to the jury on "serious personal injury." We disagree.

A. Plain Error Review

Defendant acknowledges in his brief that he failed to object to this specific instruction during the charge conference or during the trial court's actual instruction to the jury. Under Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure, this assignment of error was not preserved for appellate review. However, defendant "specifically and succinctly" asserted and requested that this Court consider this issue under plain error review. *Nobles*, 350 N.C. at 514-15, 515 S.E.2d at 904.

B. Standard of Review

This Court reviews jury instructions

> contextually and in its entirety. The charge will be held to be sufficient if "it presents the law of the case in such manner as to

> leave no reasonable cause to believe the jury was misled or misinformed . . . ." The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury."

Bass v. Johnson, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (internal citations and quotations omitted).

C. Serious Personal Injury

Under N.C. Gen. Stat. § 14-27.2 (2003), "[a] person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . with another person by force and against the will of the other person, and . . . [i]nflicts serious personal injury upon the victim or another person . . . ." Serious personal injury may be shown solely upon the existence of mental and emotional injury. *State v. Boone*, 307 N.C. 198, 205, 297 S.E.2d 585, 590 (1982), *overruled on other grounds*, *State v. Richmond*, 347 N.C. 412, 429-30, 495 S.E.2d 677, 686-87 (1998) ("Any language in . . . *Boone* suggesting that the serious personal injury element of first-degree rape or sexual offense cannot [include those injuries resulting in] death is therefore disavowed.").

> [I]n order to prove a serious personal injury based on mental or emotional harm, the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the "*res gestae*" results present in every forcible rape. *Res gestae* results are those so closely connected to [an] occurrence or event in both time and substance as to be a part of the happening.

State v. Baker, 336 N.C. 58, 62-63, 441 S.E.2d 551, 553-54 (1994) (internal citations and quotations omitted).

D. Analysis

The record and transcripts show sufficient evidence was tendered by the State to support a jury instruction on serious personal injury.

The victim testified about the impact of the attack on her emotionally: "I was living a healthy, regular like a normal 22 year old would, you know. I was fine. I wasn't scared all of the time. I didn't

have all of this anxiety. I could go places and do things by myself." However, after 19 December 2002:

> I haven't been all right because I'm always scared—I'm always scared someone is watching me . . . . I don't go out by myself anymore . . . . I can't handle anyone coming up from behind me, say they're walking up behind me, it really—it does something to me. It's really traumatized me . . . . I thought it would get better . . . . I try to put it behind me but it's impossible. It's getting worse. I have nightmares, I have night sweats.

She further testified that she now varies her schedule to prevent someone from predicting her activities, like defendant claimed he had done. These effects from the attack continued to exist at trial, eleven months after the assault.

Dr. Reese testified to the victim's physical injuries he observed during his medical examination after the assault:

> she had soft tissue redness and swelling to the side of the face and her nose in the right eye area. The area had blunt trauma, swollen, and tender and red . . . . Blunt trauma, swelling to the right side of the mouth, lower lip . . . . She had soft tissue swelling to both sides of the neck underneath the chin, consistent with being held to the neck, squeezing, forceful, soft tissue, very tender underneath the neck . . . . [S]he had a large area about four to five inches, red, tender, swollen, acutely swollen area to the back of her back . . . . She had areas on both of her wrists . . . consistent with being held, scraped, someone holding her wrists . . . . [S]he had a couple of blood blisters on her fingertips.

Based on this evidence, the trial court gave the following jury instruction concerning serious personal injury:

> Serious personal injury includes serious mental or emotional injury as well as bodily injury. In order for the State to meet its burden of proof as to serious personal injury because of injury to the mind or nervous system, the State must prove not only that such injury was caused by the defendant, but also that such mental injury extended for some appreciable period of time beyond the incidents surrounding the alleged crime itself. I further instruct you that such injury must be more than that normally experienced in every forcible rape. In other words, the mental or emotional injury must be more than that which is coincident with

every rape and which are the results that one could reasonably expect to be present during and immediately after any forcible rape has been committed.

N.C.P.I.—Crim. 207.10 (2003); *Boone*, 307 N.C. at 205, 297 S.E.2d at 590.

Defendant has not shown and we fail to see that the jury was "misled or misinformed" by the instruction. The trial court thoroughly examined the issue by considering applicable case law under *Boone* and hearing oral arguments by both parties. 307 N.C. at 205, 297 S.E.2d at 590. Defendant received the opportunity to cross-examine the victim to attempt to create reasonable doubt in the jurors' minds regarding the issue. The trial court did not err in charging the jury. Finding no error in the instruction, we do not consider defendant's assignment under plain error review. This assignment of error is overruled.

VII. Ineffective Assistance of Counsel

[5] Defendant asserts his counsel failed to provide meaningful assistance which prejudiced his defense.

The United States Supreme Court outlined a two-part test in *Strickland v. Washington* to determine if an ineffective assistance of counsel ("IEAC") claim has merit. 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). Our Supreme Court adopted the test in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). First, the defendant must establish that his counsel's performance was deficient in that it fell below an "objective standard of reasonableness." *Id.* at 561-62, 324 S.E.2d at 248. Second, the defendant must show that a reasonable probability exists that but for the error, the result of defendant's trial would have been different. *Id.* at 563, 324 S.E.2d at 248.

We decline to reach defendant's IEAC assignment of error because it is not properly raised at this stage of review. A defendant's IEAC claim may be brought on direct review "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, 557 S.E.2d 500, 524, *motion denied*, 354 N.C. 576, 558 S.E.2d 861 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

Here, the record is insufficient for this Court to consider defendant's claim. From our review of the transcripts and record, we cannot determine whether defense counsel's actions or inaction defendant cites to resulted from trial tactics, strategy, lack of preparation, or unfamiliarity with the legal issues. Further, defendant acknowledges in his brief that he "is unable, on the present record, to litigate any of those claims for [IEAC]."

Our dismissal of this assignment of error is without prejudice for defendant to move for appropriate relief and request a hearing to determine whether he received effective assistance of counsel. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of [IEAC] in post-conviction proceedings, rather than direct appeal."). This assignment of error is dismissed without prejudice for defendant to file a motion for appropriate relief in superior court.

VIII. Conclusion

The trial court properly denied defendant's motion to dismiss the charge of first-degree kidnapping. The admission of Dr. Reese's medical expert opinion testimony that the victim was "believable" was error, but not prejudicial to defendant. The trial court properly admitted the poem from the victim's boyfriend as relevant evidence to corroborate testimony given by other witnesses for the State. Sufficient evidence was proffered to warrant an instruction to the jury on the element of "serious personal injury" for the charge of first-degree rape. We decline to consider defendant's claim of IEAC and dismiss the assignment of error without prejudice for defendant to file a motion for appropriate relief. Defendant received a fair trial free from prejudicial error.

No prejudicial error.

Judges McGEE and GEER concur.

STATE OF NORTH CAROLINA v. CARLTON P. JOHNSON

No. COA03-1123

(Filed 5 April 2005)

1. **Constitutional Law; Firearms and Other Weapons— possession of firearm by convicted felon—amendment of statute—not ex post facto law**

Defendant's conviction for possession of a firearm by a felon under N.C.G.S. § 14-415.1, as amended in 1995, does not violate the constitutional prohibitions against ex post facto laws even though defendant asserts that at the time of his prior felony conviction in 1983 the statute permitted him to possess a firearm five years after the date of discharge of the conviction, because: (1) the relevant time period to be considered when determining whether a statute creates an ex post facto law is the date on which the criminal offense defendant is currently being charged with was committed, which in the instant case was 15 December 2001; (2) no ex post facto problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense as long as the other relevant conduct took place after the law was passed; (3) by 2001, defendant had more than adequate notice that it was illegal for him to possess a firearm based on his status as a convicted felon, and he could have conformed his conduct to the requirements of the law; (4) N.C.G.S. § 14-415.1 does not aggravate a crime or make it greater than it was at the time of its commission; and (5) the amendment to N.C.G.S. § 14-415.1 constituted a retroactive civil or regulatory law and as such does not violate the ex post facto clause.

2. **Constitutional Law; Firearms and Other Weapons— possession of firearm by convicted felon—amendment of statute—not bill of attainder**

The 1995 amendment to N.C.G.S. § 14-415.1 regarding possession of a firearm by a convicted felon did not constitute an unconstitutional bill of attainder even though defendant contends it stripped him of his restored right to possess a handgun, because: (1) nothing in N.C.G.S. § 14-415.1 indicates the legislature enacted it as a form of retroactive punishment, nor does it fall within the historical meaning of punishment; (2) defendant's conviction was not punishment imposed without judicial process

since he received a trial; and (3) the disability this law imposes can be said to further the nonpunitive legislative purpose of lessening the danger to the public in the case of convicted felons and is not excessive in light of that purpose.

3. Constitutional Law— possession of firearm by convicted felon—due process—vested right—right to bear arms

The 1995 amendment to N.C.G.S. § 14-415.1 regarding possession of a firearm by a convicted felon did not have the effect of unconstitutionally stripping defendant of a vested right in violation of due process, because: (1) the right to bear arms is not absolute, but is subject to regulation that is reasonable and related to the achievement of preserving public peace and safety; (2) the pertinent regulation is reasonably related to further securing the public's safety; and (3) defendant has not been completely divested of his right to bear arms as N.C.G.S. § 14-415.1 allows him to possess a firearm at his home or place of business.

Appeal by defendant from judgment entered 28 March 2003 by Judge Kenneth F. Crow in New Hanover County Superior Court. Heard in the Court of Appeals 25 August 2004.

Attorney General Roy Cooper, by Assistant Attorney General Robert C. Montgomery, for the State.

William T. Peregoy, for defendant-appellant.

STEELMAN, Judge.

Defendant, Carlton P. Johnson, appeals his conviction for possession of a firearm by a convicted felon. For the reasons discussed herein, we find no error.

I. Background

Defendant was convicted on 31 January 1983 of felonious sale and delivery of cocaine. On 15 December 2001, during a traffic stop, a police officer found a .38 caliber revolver in defendant's possession. Defendant was indicted and found guilty by a jury for the felony of possession of a firearm by a felon pursuant to N.C. Gen. Stat. § 14-415.1. The trial court sentenced defendant to twelve to fifteen months imprisonment, but suspended the sentence and placed defendant on probation. Defendant appeals.

II. Issues

The issues presented on appeal are whether the application of N.C. Gen. Stat. § 14-415.1, as amended in 1995, to defendant: (1) violates the constitutional prohibitions against *ex post facto* laws; (2) constitutes an unconstitutional bill of attainder; and (3) had the effect of unconstitutionally stripping defendant of a vested right in violation of due process.

III. Felony Firearms Act: N.C. Gen. Stat. § 14-415.1

In 1971, the General Assembly enacted the Felony Firearms Act, N.C. Gen. Stat. § 14-415.1, which made unlawful the possession of a firearm by any person previously convicted of a crime punishable by imprisonment of more than two years. N.C. Gen. Stat. § 14-415.2 set forth an exemption for felons whose civil rights had been restored. 1971 N.C. Sess. Laws ch. 954, § 2.

In 1975, the General Assembly repealed N.C. Gen. Stat. § 14-415.2 and amended N.C. Gen. Stat. § 14-415.1 to ban the possession of firearms by persons convicted of *certain* crimes for five years after the date of "such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such convictions, whichever is later." 1975 N.C. Sess. Laws ch. 870, § 1. This was the law in effect in 1983 when defendant was convicted of a felony covered by the statute and in 1985 when his conviction was unconditionally discharged.

In 1995, the General Assembly amended N.C. Gen. Stat. § 14-415.1 to prohibit possession of certain firearms by *all* persons convicted of any felony. 1995 N.C. Sess. Laws ch. 487, § 3. The statute now provides, "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm . . . ." N.C. Gen. Stat. § 14-415.1(a) (2004). The current statute applies to "[f]elony convictions in North Carolina that occur before, on, or after 1 December 1995." N.C. Gen. Stat. § 14-415.1(b)(1).

IV. Ex Post Facto Law

[1] In his first assignment of error, defendant contends his conviction for possession of a firearm by a felon, in violation of N.C. Gen. Stat. § 14-415.1, violates the constitutional prohibition against *ex post facto* laws and should be vacated. Defendant asserts that at the time of his previous felony conviction in 1983, N.C. Gen. Stat. § 14-415.1

permitted him to possess a firearm five years after the date of discharge of the conviction, and thus, his conviction under N.C. Gen. Stat. § 14-415.1 as amended in 1995, violates the *ex post facto* clauses of the United States and North Carolina Constitutions. He argues the 1995 amendment to the statute changed the law to retroactively deprive him of his formerly restored right and punished him for conduct that was not previously criminal. We disagree.

"The United States and the North Carolina Constitutions prohibit the enactment of *ex post facto* laws." *State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (citing U.S. Const. art. I, § 10 which provides "No state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts . . . ." and N.C. Const. art. I, § 16 which states "Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted"), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). We will consider defendant's state and federal constitutional arguments jointly, as both the state and federal constitutional *ex post facto* provisions are evaluated under the same standard. *Wiley*, 355 N.C. at 625, 565 S.E.2d at 45.

The prohibition against the enactment of *ex post facto* laws applies in four instances:

> '1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.'

Id. (quoting *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-39 (1990) (emphasis in original).

A. Criminalizing An Act That Was Innocent When Committed

The overwhelming majority of courts have held that a statute which forbids possession of a firearm by a convicted felon does not violate the *ex post facto* clause even when the felony for which the defendant was convicted took place before the enactment of the statute. *See United States v. O'Neal*, 180 F.3d 115, 124-25 (4th Cir.

1999); *United States v. Mitchell*, 209 F.3d 319, 333 (4th Cir.), *cert. denied*, 31 U.S. 849, 148 L. Ed. 2d 78 (2000) (citing cases); *United States v. Brady*, 26 F.3d 282, 291 (2d Cir.), *cert. denied*, 513 U.S. 894, 130 L. Ed. 2d 168 (1994); *State v. Peters*, 622 N.W.2d 918, 924-25 (Neb.), *cert. denied*, 533 U.S. 952, 150 L. Ed. 2d 754 (2001); *State v. Swartz*, 601 N.W.2d 348, 351 (Iowa 1999), *cert. denied*, 528 U.S. 1167, 145 L. Ed. 2d 1094 (2000); *People v. Tice*, 558 N.W.2d 245, 247 (Mich. App. 1996); *Dodson v. Commonwealth*, 476 S.E.2d 512, 516-18 (Va. App. 1996); *Finley v. State*, 666 S.W.2d 701, 703 (Ark. 1984); *Landers v. State*, 299 S.E.2d 707 (Ga. 1983); *State v. Williams*, 358 So. 2d 943, 946 (La. 1978).

The relevant time period to be considered when determining whether a statute creates an *ex post facto* law is the date on which the criminal offense the defendant is currently being charged with was committed. *Wiley*, 355 N.C. at 626, 565 S.E.2d at 46. *C.f. State v. White*, 162 N.C. App. 183, 198, 590 S.E.2d 448, 458 (2004) (holding that although the defendant's conviction requiring him to register as a sex offender occurred in 1995, the legislature's amendment in 1998 to the statutory registration requirement did not create an *ex post facto* law because the "defendant violated the registration requirements in 2001, three years after the change in the law."); *Landers*, 299 S.E.2d at 710. Here, the relevant time period is not the date of defendant's prior 1983 felony conviction, but 15 December 2001, the date of the offense charged in this case.

We concur with the majority of jurisdictions that hold the *ex post facto* clause is not violated under the circumstances in this case. " 'It is hornbook law that no *ex post facto* problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as long as the other relevant conduct took place after the law was passed.' " *State v. White*, 162 N.C. App. at 197, 590 S.E.2d at 457 (quoting *Russell v. Gregoire*, 124 F.3d 1079, 1088-89 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007, 140 L. Ed. 2d 321 (1998)). N.C. Gen. Stat. § 14-415.1 as amended applies to defendant because he has the status of a convicted felon, although he acquired that status in 1983, prior to the amendment. The Felony Firearms Act applies to the possession of a firearm that occurs after the effective date of the statute. Defendant was found guilty of possession of a firearm five years after the 1995 amendment to the statute took effect. By 2001, defendant had more than adequate notice that it was illegal for him to possess a firearm because of his status as a convicted felon, and he could have conformed his conduct to the requirements of the

law. *Accord Brady*, 26 F.3d at 291. Furthermore, defendant's possession of a handgun in violation of N.C. Gen. Stat. § 14-415.1 was neither done before the passing of the law, nor innocent when done.

B. Aggravating a Crime

As stated above, any law that " '*aggravates a crime*, or makes it *greater* than it was, when committed' " is prohibited as an *ex post facto* law. *Wiley*, 355 N.C. at 625, 565 S.E.2d at 45 (emphasis in original) (citations omitted).

An example of this type of law is discussed in the South Dakota case of *State v. Trower*, 629 N.W.2d 594 (S.D. 2001), which plaintiff relies upon. In 1990, Trower was convicted of a child sex offense. After his conviction that offense was redefined as a "crime of violence." *Id.* at 597. Under South Dakota law, persons convicted of a crime of violence were prohibited from possessing firearms. The court in *Trower* held the redefinition of the defendant's prior offense as a "crime of violence" violated the *ex post facto* clause. *Id.* at 598 (relying on the case of *United States v. Davis*, 936 F.2d 352 (8th Cir. 1991)).

We conclude this analysis is not applicable to the instant case. Defendant was convicted of a felony, sale and delivery of cocaine, in 1983. There have been no changes in the laws of North Carolina redefining this offense. It was a felony in 1983, it was a felony in 1995, 2001, and remains so today. Had the crime of the sale and delivery of cocaine been a misdemeanor in 1983 and had the legislature subsequently amended the statute to make it a felony, this might fall under the rationale of *Trower and Davis*[1].

N.C. Gen. Stat. § 14-415.1 does not aggravate a crime or make it greater than it was at the time of its commission.

C. Increase In Punishment

The amendment to N.C. Gen. Stat. § 14-415.1 did not increase the punishment for defendant's prior felonies. As we stated above, the crime for which defendant is being punished is his violation of N.C. Gen. Stat. 14-415.1 in 2001, not his 1983 conviction. Defendant's punishment for his 1983 conviction was not increased; he was convicted

1. In *Trower*, the South Dakota Supreme Court acknowledged this distinction in its discussion of the Nebraska case of *State v. Peters*, 622 N.W.2d 918 (Neb. 2001). *Trower*, 629 N.W.2d at 598, fn.

of the new offense—possession of a firearm by a felon, one element of which was his earlier felony conviction. Therefore, the amendment to the Felony Firearms Act did not increase defendant's punishment for his prior felony in violation of the *ex post facto* clause. *See Landers* 299 S.E.2d at 710.

Further, the amendment to N.C. Gen. Stat. § 14-415.1 constituted a retroactive civil or regulatory law, and as such does not violate the *ex post facto* clause. *See White*, 162 N.C. App. at 192, 590 S.E.2d at 454 (holding that only laws which retroactively increase punishment or impose a penalty violate the *ex post facto* clause, but retroactive civil or regulatory ones generally do not). The United States Supreme Court has applied a two-part test to determine if a law retroactively imposes "punishment." *Id.* at 191-92, 590 S.E.2d at 454 (citing *Smith v. Doe*, 538 U.S. 84, 92, 155 L. Ed. 2d 164, 176 (2003)). First, the court must determine whether it was the legislature's intent to impose a punishment or merely enact a civil or regulatory law. *White*, 162 N.C. App. at 192, 590 S.E.2d at 454. In reaching this determination, the court may consider the structure and design of the statute along with any declared legislative intent. *Id.* Second, where it appears the legislature did not intend to impose a punishment, we must then consider whether the effect of the law is "so punitive as to negate any intent to deem the scheme civil." *Id.* (internal quotations marks and citations omitted). Stated another way, the second prong of the test " 'focuses upon whether the sanction or disability that the law imposes may rationally be connected to the legislature's non-punitive intent, or rather appears excessive in light of that intent.' " *United States v. Farrow*, 364 F.3d 551, 555 (4th Cir.) (holding the retroactive application to a defendant of N.C. Gen. Stat. § 14-415.1, as amended in 1995, did not violate the *ex post facto* clause) (citations omitted), *cert. denied*, —— U.S. ——, 160 L. Ed. 2d 150 (2004).

As to the first part of this test, after careful review we can find nothing in N.C. Gen. Stat. § 14-415.1 which indicates the legislature enacted it as a form of retroactive punishment. *See id.* (holding the reasoning in *O'Neal* directly applicable to N.C. Gen. Stat. § 14-415.1 as amended and concluding that just because the statute indefinitely bans a felon's right to possess a firearm does not manifest a punitive intent on the part of the legislature.) Nor does the codification of the statute in the state's criminal code suggest a punitive intent. *White*, 162 N.C. App. at 193, 590 S.E.2d at 455 (citing *Smith*, 538 U.S. at 94, 155 L. Ed. 2d at 178).

As to the second part of the test, we further conclude that the law is not so punitive in effect that it should be considered punitive rather than regulatory. This is demonstrated by the fact that:

> [t]he law remains rationally connected to the state's legitimate interest in protecting the public. It continues to exempt the possession of firearms within one's home or lawful place of business. The prohibition remains limited to weapons that, because of their concealability, pose a unique risk to public safety. Finally, the law affects only those persons who have been convicted of a felony and are thus "unfit[]to be entrusted with such dangerous instrumentalities." *O'Neal*, 180 F.3d at 124.

Farrow, 364 F.3d at 555 (referring to the current version of N.C. Gen. Stat. § 14-415.1). *See also Peters*, 622 N.W.2d at 925 (noting that such amendments are generally not viewed as further punishment for the underlying felony, but as a proscription on a felon's future conduct).

Defendant relies on several cases in support of his argument that the North Carolina statute is an *ex post facto* law. The first of which is *United States v. Davis*, 936 F.2d 352 (8th Cir. 1991), *cert. denied*, 503 U.S. 908, 117 L. Ed. 2d 486 (1992). In *Davis*, the defendant was convicted in 1971 as a violent felon and the law in effect in Minnesota at that time provided that a felon's civil rights would be fully restored upon the completion of his sentence and subsequent discharge from the state's custody. *Id.* at 356. Under the law as it existed at the time of the defendant's conviction, his rights would have been restored in 1976, allowing him to possess a pistol. *Id.* However, in 1975 while the defendant was on still on parole, Minnesota passed a law prohibiting violent felons from owning a pistol unless ten years had elapsed since the person had been restored his civil rights or the sentence had expired. *Id.* The Eighth Circuit held it would be a violation of the *ex post facto* clause to apply the 1975 Minnesota law to the defendant's 1971 conviction. *Id.* at 357. However, the holding in *Davis* has been heavily criticized for failing to consider whether the additional disentitlement period was punitive or merely civil in nature. *See O'Neal*, 180 F.3d at 125 (finding *Davis* unpersuasive because the reviewing court "assumed an answer to the very question at issue—whether the change in Davis' right to possess firearms imposed 'punishment' "). Other courts have found *Davis* inapplicable in cases involving statutes forbidding possession of a firearm by a felon since *Davis* did not involve a conviction for possession of a firearm by a felon. *See Swartz*, 601 N.W.2d at 350. We find the reasons articulated in both *O'Neal* and *Swartz* to be persuasive and elect to follow their reason-

ing, declining to apply the holding in *Davis* to cases involving the application of a statute prohibiting the possession of a firearm by a convicted felon.

Defendant also relies on *State v. Keith*, 63 N.C. 140 (1869) and *Stroger v. California*, 539 U.S. 607, 156 L. Ed. 2d 544 (2003). Each of which is distinguishable from the facts in the instant case. The holding in *State v. Keith*, is inapplicable for two reasons: (1) in this case defendant was never pardoned or exonerated for his crimes as was the defendant in *Keith*; and (2) in *Keith*, the state was attempting to use the *repeal* of a statute to prosecute the defendant for a crime which it earlier would not have been able to charge him with, while in the instant case defendant's violation of N.C. Gen. Stat. § 14-415.1 came almost six years *after* the statute was amended. The holding in *Stogner v. California*, is also inapplicable to the facts in this case. In *Stogner*, the Supreme Court held that where a law attempted to allow for the prosecution of a crime for which the statute of limitations had already expired was an *ex post facto* violation. 539 U.S. at 610, 156 L. Ed. 2d at 551. This is not the case here. The prosecution of defendant for violation of the Felony Firearms Act was not barred by the statute of limitations, nor does the Act attempt to allow for the prosecution of the crime where the statute of limitations has already expired.

D. Alteration of the Rules of Evidence

This fourth category of *ex post facto* laws is not implicated in this case, therefore we do not address it.

E. Holding Regarding Ex Post Facto Law

We hold that N.C. Gen. Stat. § 14-415.1 punishes defendant for the specific conduct of possession of a firearm by a convicted felon. It does not punish him for the underlying 1983 felony conviction, but rather his conduct in 2001. Accordingly, we agree with the reasoning in *Farrow* and hold that the application of N.C. Gen. Stat. § 14-415.1 to defendant does not violate the *ex post facto* clause of either the North Carolina or United States Constitutions. This assignment of error is without merit.

V. Bill of Attainder

[2] In defendant's second assignment of error, he contends the 1995 amendment to N.C. Gen. Stat. § 14-415.1 amounts to an unconstitutional bill of attainder because it stripped him of his restored right to possess a handgun.

A bill of attainder is a legislative act which inflicts punishment on a particular individual or a designated group of persons without a judicial trial. *United States v. Lovett*, 328 U.S. 303, 315, 90 L. Ed. 1252, 1259 (1946). A bill of attainder is prohibited by the U.S. and North Carolina Constitutions. *See* U.S. Const. art. I, § 10; N.C. Const. art. I, § 16. "If the punishment [imposed is] less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Lovett*, 328 U.S. at 315, 90 L. Ed. at 1259. The United States Supreme Court established the test for determining whether a legislative act amounts to a bill of pains and penalties:

> In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."

Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852, 82 L. Ed. 2d 632, 643 (1984) (citations omitted).

As we discussed in section I, we found nothing in N.C. Gen. Stat. § 14-415.1 which indicates the legislature enacted it as a form of retroactive punishment, nor does it fall within the "historical meaning of punishment." Furthermore, defendant's conviction was not "punishment imposed without judicial process." He received a jury trial. Defendant is not being punished for belonging to a designated class of people, but for his violation of a statute which we held was validly imposed upon that group through the legislative process. *See Swartz*, 601 N.W.2d at 351 (holding same). As discussed above, the disability this law imposes can be said to further the non-punitive legislative purpose of lessening the danger to the public in the case of convicted felons and is not excessive in light of that purpose.

Consequently, we find that the statutory prohibition of N.C. Gen. Stat. § 14-415.1 against felons possessing firearms outside of their home or business does not constitute a prohibited bill of attainder.

VI. Due Process

[3] In defendant's third and final assignment of error, he contends the application of N.C. Gen. Stat. § 14-415.1, as amended in 1995, vio-

lates his right to due process. Defendant asserts that in 1990 he regained his right to possess a handgun and that right became vested at that time.

A statute cannot be applied retrospectively if it "will interfere with rights that have 'vested' ". *Gardner v. Gardner*, 300 N.C. 715, 718-19, 268 S.E.2d 468, 471 (1980). "A vested right is a right 'which is otherwise secured, established, and immune from further legal metamorphosis.' " *Bowen v. Mabry*, 154 N.C. App. 734, 736, 572 S.E.2d 809, 811 (2002) (citations omitted). However, our case law has "consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation." *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968). The only requirement is that the regulation must be reasonable and be related to the achievement of preserving public peace and safety. *Id.* at 547, 159 S.E.2d at 10. *See also State v. Fennell*, 95 N.C. App. 140, 143-44, 382 S.E.2d 231, 233 (1989). As we discussed above, the regulation is reasonably related to further securing the public's safety. Furthermore, defendant has not been completely divested of his right to bear arms as N.C. Gen. Stat. § 14-415.1 allows him to possess a firearm at his home or place of business.

For these reasons, N.C. Gen. Stat. § 14-415.1 as amended does not violate defendant's right to due process. This assignment of error is without merit.

VII. Conclusion

For the reasons discussed herein, we conclude the retroactive application of N.C. Gen. Stat. § 14-415.1 to defendant does not violate the prohibition against *ex post facto* laws and bills of attainder, nor does it strip defendant of a vested right. Accordingly, we find the trial court did not error and affirm defendant's conviction.

NO ERROR.

Judges HUDSON and BRYANT concur.

VONDA KAY BROWN, EMPLOYEE, PLAINTIFF v. THE KROGER COMPANY, EMPLOYER, CONTINENTAL CASUALTY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA04-577

(Filed 5 April 2005)

1. Workers' Compensation— ten percent penalty—failure to comply with statutory requirement

The Industrial Commission did not err in a workers' compensation case by increasing the amount of plaintiff's compensation by ten percent pursuant to N.C.G.S. § 97-12 based on a willful failure of the employer to comply with a statutory requirement even though defendants contend no statute prohibits an employer from stretching an extension cord across a hallway, because: (1) by virtue of N.C.G.S. § 95-131(a), the requirements of 29 C.F.R. 1910.22(b)(1) are a statutory requirement that brings plaintiff's injury and defendant employer's subsequent citation within the scope of N.C.G.S. § 97-12; (2) defendants fail to cite authority for the contention that a violated statute must expressly prohibit the express action or inaction by the employer; and (3) defendant was put on sufficient notice regarding the duties, consequences and application of the Workers' Compensation Act and its relevant safety standards since N.C.G.S. § 95-131 adopts the federal occupational standards as the rules of the Commission of this State, both the state and federal regulations are published and available to employers in order to erase uncertainty as to what safety measures are required in the workplace, and N.C.G.S. § 95-129(4) provides any employer the right to participate in the development of the standards by commenting on developing standards or requesting the development of them.

2. Workers' Compensation— deposition costs—express abandonment of request for costs

Although defendant contends the full Industrial Commission erred in a workers' compensation case by failing to rule on the propriety of the deputy commissioner's assessment of the costs of a witness deposition, the Court of Appeals declines to address the merits of this argument and the case is remanded to the full Commission with instructions to amend its opinion and award to strike the assessment of costs for the deposition, because plaintiff in her brief expressly abandoned her request for costs associated with this deposition.

3. Workers' Compensation— future benefits—wage earning capacity

The Industrial Commission did not abuse its discretion in a workers' compensation case by reserving the issue of plaintiff's entitlement to future benefits regarding her wage earning capacity after 14 February 2002, because: (1) the full extent of plaintiff's injuries had not yet been determined; and (2) plaintiff was entitled to an opportunity to gather that information necessary to determine which of her conditions was causing her continuing incapacity for work.

4. Workers' Compensation— credibility—reassessment by full Commission

The Industrial Commission did not err in a workers' compensation case by reassessing the evidence and finding that plaintiff's 28 August 2001 fall was related to her prior accident, because: (1) the full Commission is not prevented from reassessing the evidence before it on appeal merely based on the fact that the evidence concerns the cause of the alleged accident rather than its consequences; (2) the full Commission is entitled to reverse a deputy commissioner's determination of credibility even if that reversal is based upon an examination of the cold record rather than live testimony; and (3) in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one.

5. Workers' Compensation— medical treatment—time limit of award

The Industrial Commission did not err in a workers' compensation case by allegedly failing to define the time limit of plaintiff's award for medical treatment, because: (1) the full Commission's award was based upon its prior conclusion of law citing N.C.G.S. §§ 97-25 and 97-25.1; and (2) the period of limitations provided by N.C.G.S. § 97-25.1 is inherent in the full Commission's award.

Appeal by defendants from opinion and award entered 2 December 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 February 2005.

Faith Herndon for plaintiff-appellee.

Young, Moore & Henderson, P.A., by Joe E. Austin, Jr., and Jennifer T. Gottsegen, for defendants-appellants.

TIMMONS-GOODSON, Judge.

The Kroger Company ("Kroger") and Continental Casualty Insurance Company ("Continental") (collectively, "defendants") appeal an opinion and award of the North Carolina Industrial Commission awarding Vonda Kay Brown ("plaintiff") total and partial disability payments, medical treatment compensation, and a ten percent increase in compensation. For the reasons discussed herein, we affirm in part and remand in part.

The facts and procedural history pertinent to the instant appeal are as follows: On 9 June 2001, plaintiff was employed by Kroger as a deli and bakery manager. As plaintiff was walking down a hallway near the manager's office, she tripped on an extension cord and fell to the floor, landing on her right side. As a result of her fall, plaintiff sustained injuries to her right shoulder, knee, and elbow, and she also sustained injuries to her sacrum and lumbar area.

Although plaintiff refused medical attention on the day of her fall, she sought medical attention from Concentra Medical Centers on 11 June 2001. Plaintiff returned to work on 21 June 2001, and she continued to work at diminished wages through 18 July 2001. After returning to work, plaintiff received medical treatment from Dr. Lyman Smith ("Dr. Smith"), an orthopedic surgeon. Dr. Smith's treatment of plaintiff focused on the on-going right knee and shoulder problems plaintiff was experiencing. Dr. Smith determined that plaintiff's shoulder problems were a result of bursitis caused by the fall on 9 June 2001, and that plaintiff's knee problems were caused by an arthritic condition aggravated by the fall. Dr. Smith recommended that plaintiff receive physical therapy for her injuries, and, on 18 July 2001, Dr. Smith provided plaintiff with a note excusing her from work until 22 August 2001. On 22 August 2001, Dr. Smith ordered plaintiff to receive magnetic resonance imaging ("MRI") on her right knee. Dr. Smith anticipated that plaintiff could return to work if the MRI results were "normal."

On 28 August 2001, plaintiff fell down stairs at her home when her right leg "gave out from under" her. Following plaintiff's 28 August 2001 fall, plaintiff sought treatment from Dr. Jeffrey Kobs ("Dr. Kobs"), an orthopedic surgeon. As a result of the fall, plaintiff sus-

tained injuries to her right ankle and her left knee. Due to these injuries, plaintiff was unable to work until 24 January 2002.

In early February 2002, plaintiff returned to work at Kroger. Plaintiff subsequently took vacation, and, on 12 February 2002, plaintiff sought treatment from Dr. Suzanne Zorn ("Dr. Zorn") of the Arthritis Rheumatology Osteoporosis Center. Dr. Zorn recommended that plaintiff refrain from working for approximately one month.

Following her fall on 9 June 2001, plaintiff filed a complaint with the North Carolina Department of Labor, Division of Occupational Safety and Health ("NCDL/DOSH"). After investigating the circumstances leading to plaintiff's 9 June 2001 fall, NCDL/DOSH cited Kroger for four "nonserious" occupational safety and health code violations. Defendants denied plaintiff's compensation claim, and on 14 February 2002, North Carolina Industrial Commission Deputy Commissioner Edward Garner, Jr. ("Deputy Commissioner Garner"), held an evidentiary hearing on the matter. Following the hearing, the parties deposed Dr. Smith and introduced stipulations and other records into evidence. On 23 October 2002, Deputy Commissioner Garner filed an opinion and award concluding that plaintiff sustained injuries as a result of the 9 June 2001 fall, which Deputy Commissioner Garner concluded arose out of and in the course of plaintiff's employment with Kroger. However, Deputy Commissioner Garner denied plaintiff's claim for compensation for those injuries associated with the 28 August 2001 fall, "reject[ing]" plaintiff's testimony regarding the fall as "not being credible." After refusing to find "that plaintiff's injury was caused by the willful failure of [Kroger] to comply with a statutory requirement[,]" Deputy Commissioner Garner also denied plaintiff's claim for a ten percent increase in compensation due to Kroger's alleged statutory violations. Deputy Commissioner Garner thereafter ordered defendants to pay plaintiff total and partial disability payments as well as compensation for her medical treatment, with the amount of compensation related to plaintiff's right knee injury deferred until plaintiff reached maximum medical improvement. Deputy Commissioner Garner also ordered defendants to pay the costs associated with the deposition of Jeanine Alston ("Alston"), an employee of NCDL/DOSH.

Both plaintiff and defendants appealed Deputy Commissioner Garner's award to the Full Commission. Following review of the matter on 5 May 2003, the Full Commission determined that it need not reconsider evidence, receive further evidence, or rehear argument from the parties. However, the Full Commission did receive evidence

regarding modifications of the compensability of plaintiff's 28 August 2001 fall. In an opinion and award filed 2 December 2003, the Full Commission concluded that plaintiff sustained injuries from the 9 June 2001 fall, which the Full Commission concluded arose out of and in the course of plaintiff's employment with Kroger. The Full Commission also concluded that plaintiff sustained injuries as a result of her 28 August 2001 fall, which the Full Commission concluded was "the direct and natural result of plaintiff's June 9, 2001 injury by accident." The Full Commission further concluded that plaintiff was entitled to a ten percent increase in compensation due to the "willful failure of [Kroger] to comply with a statutory requirement reprimand by OSHA." The Full Commission reserved the issue of plaintiff's entitlement to future benefits related to her wage-earning capacity after 14 February 2002, concluding that "this evidence was not presented before this panel." The Full Commission thereafter awarded plaintiff temporary and partial disability payments, medical treatment compensation, and a ten percent increase in compensation. Defendants appeal.

We note initially that defendants' brief contains arguments supporting only eleven of the original sixteen assignments of error on appeal. Pursuant to N.C.R. App. P. 28(b)(6) (2004), the omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those issues properly preserved by defendants for appeal.

The issues on appeal are whether the Full Commission erred by: (I) increasing the amount of plaintiff's compensation by ten percent; (II) failing to rule on the propriety of the cost of a witness deposition; (III) reserving the issue of plaintiff's entitlement to future benefits; (IV) concluding that plaintiff's 28 August 2001 fall was related to her prior accident; and (V) failing to define the time limit of plaintiff's award.

[1] Defendants first argue that the Full Commission erred by increasing the amount of plaintiff's compensation by ten percent pursuant to N.C. Gen. Stat. § 97-12. Defendants assert that there was no evidence that Kroger violated any statute warranting the increased award, and that N.C. Gen. Stat. § 97-12 is unconstitutionally vague as applied to the facts of this case. We disagree.

N.C. Gen. Stat. § 97-12 (2003) provides as follows:

> When the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful

> order of the Commission, compensation shall be increased ten percent (10%). . . . The burden of proof shall be upon him who claims an exemption or forfeiture under this section.

In the instant case, defendants contend that there was no evidence that Kroger failed to comply with any statutory requirement because "no statute prohibits an employer from stretching an extension cord across a hallway." However, as discussed above, following its investigation of Kroger, NCDL/DOSH cited Kroger for four "nonserious" violations of federal occupational safety and health codes. Specifically, NCDL/DOSH cited Kroger for violation of 29 C.F.R. 1910.22, which provides as follows:

> This section applies to all permanent places of employment, except where domestic, mining, or agricultural work only is performed. Measures for the control of toxic materials are considered to be outside the scope of this section.
>
> . . . .
>
> (b) Aisles and passageways.
>
> (1) Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repairs, with no obstruction across or in aisles that could create a hazard.

29 C.F.R. 1910.22 (2003). In its citation of Kroger, NCDL/DOSH noted the presence of a "flexible cord extending across the aisle/passageway [which] created a tripping hazard for employees working in office."

The North Carolina Occupational Safety and Health Act provides that "[a]ll occupational safety and health standards promulgated under the federal act . . . shall be adopted as the rules of the Commissioner of this State unless the Commissioner decides to adopt an alternative State rule as effective as the federal requirement and providing safe and healthful employment in places of employment . . . ." N.C. Gen. Stat. § 95-131(a) (2003); *see* N.C. Gen. Stat. § 95-129(2) (2003) ("Each employer shall comply with occupational safety and health standards or regulations promulgated pursuant to this Article[.]"). We conclude that, by virtue of N.C. Gen. Stat. § 95-131(a), the requirements of 29 C.F.R. 1910.22(b)(1) are a "statutory requirement" that brings plaintiff's injury and Kroger's sub-

sequent citation within the scope of N.C. Gen. Stat. § 97-12. *See Prevette v. Clark Equipment Co.*, 62 N.C. App. 272, 275, 302 S.E.2d 639, 641 (1983) ("By virtue of G.S. 95-129(2) the [federal] prohibition of employees riding on machinery such as the forklift involved here is a 'statutory requirement' so as to bring this employee's death within the purview of G.S. 97-12." (footnote omitted)). Therefore, if Kroger's action in violating 29 C.F.R. 1910.22(b)(1) was willful, plaintiff is entitled to a ten percent increase in compensation.

An act is considered willful "when there exists 'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another,' a duty assumed by contract or imposed by law." *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 383-84, 291 S.E.2d 897, 903 (quoting *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971)), *aff'd per curium*, 307 N.C. 267, 297 S.E.2d 397 (1982). In the instant case, defendants do not challenge the intent or purpose of Kroger in stretching the extension cord across the hallway. Instead, defendants contend that Kroger did not willfully violate 29 C.F.R. 1910.22(b)(1) because the statute does not "expressly prohibit stretching an extension cord across a hallway." In a similar contention, defendants assert that N.C. Gen. Stat. § 97-12 is unconstitutionally vague as applied to the facts of this case, in that the statute fails to warn or notify employers that stretching an extension cord across a hallway may result in a ten percent increase in compensation. However, defendants cite no authority for the contention that a violated statute must expressly prohibit the precise action or inaction by the employer, and we decline to create such a broad exception to N.C. Gen. Stat. § 97-12.

"Statutes and ordinances must be sufficiently precise; a 'statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' " *Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 128 N.C. App. 703, 708, 496 S.E.2d 825, 828 (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391, 70 L. Ed. 322, 328 (1926)), *disc. review denied and appeal dismissed*, 348 N.C. 496, 510 S.E.2d 382 (1998). "Ultimately, notice is the most important criteria; a statute or ordinance will be found to violate due process if it fails to give adequate notice to parties which might be affected by its application." *Fantasy World*, 128 N.C. App. at 708, 496 S.E.2d at 828 (citing *Smith v. Goguen*, 415 U.S. 566, 39 L. Ed. 2d 605 (1974)).

In the instant case, as detailed above, N.C. Gen. Stat. § 97-12 expressly allows a ten percent increase in compensation where an employee's injury "is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission[.]" N.C. Gen. Stat. § 95-131(a) adopts the federal occupational standards as "the rules of the Commissioner of this State," and both the state and federal regulations are published and available to employers in order to erase uncertainty as to what safety measures are required in the workplace. N.C. Gen. Stat. § 95-129(4) provides any employer the right to participate in the development of the standards by commenting on developing standards or requesting the development of them. In light of the foregoing, we conclude that defendants were put on sufficient notice regarding the duties, consequences, and application of the Workers' Compensation Act and its relevant safety standards. Accordingly, we overrule defendants' first argument.[1]

[2] Defendants next argue that the Full Commission erred by failing to rule on the propriety of Deputy Commissioner Garner's assessment of costs for the deposition of Alston. Defendants assert that the Full Commission was required to rule on the issue because defendants had assigned error to it. We note that in her brief, plaintiff expressly "abandons her request for costs associated with OSHA investigator Jeanine Alston's deposition." Therefore, we decline to address the merits of defendants' argument, and we remand the case to the Full Commission with instructions to amend its opinion and award to strike the assessment of costs for Alston's deposition.

[3] Defendants next argue that the Full Commission erred by deferring its ruling on plaintiff's entitlement to future benefits regarding her wage-earning capacity after 14 February 2002. Defendants assert that, due to the evidence presented by the parties, the Full Commission was required to rule on the issue. We disagree.

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1. We recognize that, to date, the Occupational Safety and Health Review Commission has interpreted 29 C.F.R. 1910.22(b)(1) to apply only to those obstructions occurring in areas where "mechanical handling equipment" is operated. *See Sec'y of Labor v. Joel Patterson Air Conditioning Recycling*, 19 O.S.H. Cas. (BNA) 2045, 2002 OSAHRC LEXIS 53, 13-14 (2002). However, we note that our Courts have not yet addressed this issue, and, in the instant case, defendants do not contest the applicability of the statute on the ground that mechanical handling equipment was not used in the area in which plaintiff fell. Therefore, we make no decision regarding the applicability of 29 C.F.R. 1910.22(b)(1) to those work areas where mechanical handling equipment is not operated.

According to the Workers' Compensation Act, the "[p]rocesses, procedure, and discovery" used by the Industrial Commission in its hearings "shall be as summary and simple as reasonably may be." N.C. Gen. Stat. § 97-80(a) (2003). "Strictly speaking, the rules of evidence applicable in our general courts do not govern the Commission's own administrative fact-finding." *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 97, 360 S.E.2d 109, 110 (1987) (citations omitted). In the instant case, the Full Commission chose not to participate in "administrative fact-finding" on the issue of plaintiff's wage-earning capacity after 14 February 2002, citing the lack of evidence on the issue before it. Defendants contend that the Full Commission had sufficient evidence before it to make a decision, and that the issue was litigated by implication of the parties. In support of this contention, defendants note that both parties stipulated into evidence plaintiff's post-hearing medical and wage records.

We recognize that "[t]he Industrial Commission has an obligation to make specific findings of fact and conclusions of law determining each issue which is raised by the evidence and upon which plaintiff's right to compensation depends." *Slatton v. Metro Air Conditioning*, 117 N.C. App. 226, 231, 450 S.E.2d 550, 553 (1994). However, we also recognize that "[t]he Commission is not in a position to make a proper award until the extent of disability or permanent injury, if any, is determined." *Hall v. Chevrolet Co.*, 263 N.C. 569, 575, 139 S.E.2d 857, 861 (1965) (holding that "because of plaintiff's lack of evidence at the hearing," the plaintiff's permanent partial disability claim, of which he presented no evidence at the original hearing, "has not been adjudicated."). Furthermore, we note that "[t]he Workmen's Compensation Act should be construed liberally, so that its benefits are not denied upon technical and narrow interpretation[,]" *Conklin v. Freight Lines*, 27 N.C. App. 260, 261, 218 S.E.2d 484, 485 (1975), and this Court has held that the "same reasoning" which allows a claimant to reopen his case to present new evidence "would certainly allow the Commission to keep the case open in order to give [the] claimant another opportunity to gather the missing evidence essential to the determination of the issue." *Id.* at 263, 218 S.E.2d at 486.

Under N.C. Gen. Stat. § 97-85 (2003), when an appeal of an opinion and award is taken, the Full Commission is granted the authority to "review the award, and if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]" "[W]hether 'good ground be shown therefore' in any particular case is a matter

within the sound discretion of the Commission, and the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion." *Lynch v. Construction Co.*, 41 N.C. App. 127, 131, 254 S.E.2d 236, 238 (holding that the Full Commission did not exceed its authority by remanding case for further testimony regarding causal connection of accident and injury), *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). In the instant case, in its opinion and award, the Full Commission noted that although "Dr. Zorn wrote plaintiff out of work for one month" twice following the 14 February 2002 hearing, Dr. Zorn "did not indicate whether plaintiff's incapacity for work was a result of her right knee injury, her other conditions or some combination thereof[,]" and "the record contains no indication that the surgery [on plaintiff's left knee] was ever performed." In light of the case and statutory law detailed above, we conclude that the Full Commission did not abuse its discretion by reserving its decision regarding the issue of plaintiff's wage-earning capacity after 14 February 2002. The full extent of plaintiff's injuries had not yet been determined, and plaintiff was entitled to an opportunity to gather that information necessary to determine which of her conditions was causing her continuing incapacity for work. Accordingly, we overrule this argument.

[4] Defendants next argue that the Full Commission erred by accepting plaintiff's account of the 28 August 2001 fall. Defendants assert that because Deputy Commissioner Garner was the only Commission representative to observe plaintiff's testimony regarding the fall, the Full Commission was bound by Deputy Commissioner Garner's determinations regarding the credibility of plaintiff's testimony. We disagree.

In *Adams v. AVX Corp.*, our Supreme Court addressed a similar argument and determined that "[w]hether the [F]ull Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the [Full] Commission—not the hearing officer. It is the [Full] Commission that ultimately determines credibility, whether from a cold record or from live testimony." 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998). In an attempt to distinguish *Adams* from the instant case, defendants correctly assert that in *Adams*, the deputy commissioner rejected as incredible the claimant's testimony regarding the consequences of her alleged accident, while in the instant case, Deputy Commissioner Garner rejected as incredible plaintiff's testimony regarding the cause of her accident. However, we are not persuaded that *Adams* should be read so nar-

rowly as to prevent the Full Commission from reassessing the evidence before it on appeal merely because the evidence concerns the cause of the alleged accident rather than its consequences. Instead, we conclude that, under the Court's holding in *Adams*, the Full Commission is entitled to reverse a deputy commissioner's determination of credibility, even if that reversal is based upon an examination of the "cold record" rather than "live testimony." *Id.*

Furthermore, we also disagree with defendants' contention that in cases in which observation of the claimant's actual physical behavior is a "crucial issue," the Full Commission should acknowledge the hearing officer's credibility findings and offer a full explanation if it substitutes a different judgment for those findings. Our Supreme Court expressly rejected such a contention in *Adams*, holding that "in reversing the deputy commissioner's credibility findings, the [F]ull Commission is not required to demonstrate, as *Sanders* states, 'that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one.' " *Id.* (overruling *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 641, 478 S.E.2d 223, 226 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997)). In light of *Adams*, we are not persuaded that the Full Commission was required to make those findings suggested by defendants in the instant case. Therefore, we conclude the Full Commission did not err by reassessing the evidence and finding that plaintiff's 28 August 2001 fall was a direct and natural result of the 9 June 2001 fall and injury. Accordingly, this argument is overruled.

[5] Defendants' final argument is that the Full Commission erred by failing to define the time limit of plaintiff's award for medical treatment. Defendants assert that N.C. Gen. Stat. § 97-25.1 requires that the Full Commission specify the period in which defendants must compensate plaintiff for her medical payments.

N.C. Gen. Stat. § 97-25.1 (2003) provides that

> [t]he right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. If the Commission determines that there is a substantial risk of the necessity of future medical

compensation, the Commission shall provide by order for payment of future necessary medical compensation.

In the instant case, the Full Commission ordered defendants to "pay for medical compensation incurred by plaintiff as a result of the injuries she sustained when she fell at work on June 9, 2001 and the subsequent fall of August 28, 2001." This award was based upon the Full Commission's prior conclusion of law, in which the Full Commission cited N.C. Gen. Stat. §§ 97-25 and 97-25.1. We conclude that the period of limitations provided by N.C. Gen. Stat. § 97-25.1 is inherent in the Full Commission's award. Accordingly, this argument is overruled.

In light of foregoing conclusions, we affirm the Full Commission's opinion and award in part, and we remand in part.

Affirmed in part; remanded in part.

Judges BRYANT and LEVINSON concur.

JODY CRANE, EMPLOYEE, PLAINTIFF v. BERRY'S CLEAN-UP AND LANDSCAPING, INC., EMPLOYER, NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA03-1109

(Filed 5 April 2005)

1. **Workers' Compensation— credibility—inconsistent testimony**

Although defendants contend the Industrial Commission erred in a workers' compensation case by finding that a specific traumatic incident occurred on 11 February 1999 based on plaintiff employee's inconsistent reports of when his injury occurred, this assignment of error is dismissed because: (1) this argument goes only to the credibility of the testimony; and (2) the Commission is the sole determiner of credibility.

2. **Workers' Compensation— misapprehension of law—date of specific traumatic incident**

Although the Industrial Commission erred in a workers' compensation case by concluding that plaintiff employee was disabled as a result of the 11 February 1999 specific traumatic inci-

dent instead of the 5 February 1999 incident, the case is remanded based on the Commission's misapprehension of the law to allow the Commission to make a new determination applying the correct legal standard because: (1) a claim is sufficient under N.C.G.S. § 97-24 if it identifies the accident and injury at issue and expresses an intent to invoke the Commission's jurisdiction with respect to that injury; (2) the Form 18 filed in this case specifically describes the accident at issue as occurring when plaintiff was changing a tractor tire, which occurred on 5 February 1999, and to hold that this form is insufficient to constitute a claim for the injury arising out of that incident simply based on the date of the incident listed on the form as 11 February 1999 would be inconsistent with the law governing specific traumatic incidents; (3) disputes as to the date of the actual injury raise a question of credibility that is solely within the purview of the Industrial Commission; and (4) contrary to defendants' contention, the doctors did not attribute plaintiff's inability to work solely to his depression.

Appeal by defendants from an Opinion and Award entered 6 May 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 April 2004.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, by Vickie L. Burge, for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Richard M. Lewis and Christopher M. West, for defendants-appellants.

GEER, Judge.

Defendants Berry's Clean-Up and Landscaping, Inc. and its insurance carrier, North Carolina Farm Bureau Mutual Insurance Company, appeal from an opinion and award of the North Carolina Industrial Commission awarding plaintiff Jody Crane temporary total disability benefits as a result of a back injury. Because our review of the record reveals that the Commission may have rendered its decision under a misapprehension of the law, we reverse and remand this case for further proceedings.

Facts

On Friday, 5 February 1999, Mr. Crane, a landscaper, was changing a rear tractor tire on his employer's backhoe with the help of two

co-workers. While Mr. Crane was pulling up on one side of a large star wrench and his co-workers were pushing down, a lug nut broke loose, jerking Mr. Crane. Mr. Crane first felt stiffness in his back and then increasing pain in his lower back and right hip. Mr. Crane had not previously experienced any back problems.

Mr. Crane did not immediately seek medical treatment, but rather returned to work the next week. On Thursday, 11 February 1999, Mr. Crane was climbing out of his employer's dump truck when he felt a "pop" in his back. Mr. Crane reported this incident to his employer and, according to Mr. Crane, "told him it started about a week ago when I did the tractor tire . . . ." Mr. Crane testified that he understood from his employer that, as a matter of policy, he could receive treatment only if he said the injury occurred on 11 February 1999 rather than 5 February 1999. Mr. Crane's employer allowed him to go home and agreed to make arrangements for him to see the company doctor on Monday.

Mr. Crane did not return to work the next day even though he was scheduled to work. On Saturday, 13 February 1999, he went to the emergency room complaining of pain in his lower back that extended into his right hip and down his right leg. Records from his examination stated that the injury had happened about a week earlier, but had gotten worse. Also on 13 February 1999, the employer completed a Form 19 "Employer's Report of Injury to Employee." The form stated that the injury occurred on 12 February 1999 when plaintiff was working with a tractor and "pulled wrong or either twisted wrong causing injury to the lower back."

On Monday, 15 February 1999, Mr. Crane was examined by the company doctors, U.S. Healthworks. The U.S. Healthworks records report that Mr. Crane hurt his back on 11 February 1999 while changing a tire and breaking lug nuts loose. U.S. Healthworks removed Mr. Crane from work and referred him for physical therapy and an MRI. When Mr. Crane was evaluated at Pinehurst Rehabilitation Center for Therapy, he reported that his injury was due to trouble when loosening a nut on a large tire he was changing and that the following week he had increased discomfort until he later felt a sharp pinch in his right side when climbing out of a truck.

U.S. Healthworks subsequently released Mr. Crane to return to "light duty" work beginning 3 March 1999 with no lifting of more than ten pounds; no prolonged standing or walking; no repetitive bending or stooping; and no kneeling, squatting, climbing, pushing, or pulling.

Mr. Crane, however, testified that he was unable to return to work due to his severe pain.

On 11 March 1999, Mr. Crane filed a Form 18 with the Industrial Commission. He reported that he had suffered a back injury on 11 February 1999 while "changing a tractor tire on a company tractor." Defendants denied Mr. Crane's claim on 1 April 1999 and, because of that denial, U.S. Healthworks released him from their care.

Following an MRI on 5 June 1999, Mr. Crane was referred to Dr. Martin Chipman, a neurologist. On 15 June 1999, Mr. Crane provided a history to Dr. Chipman, stating that he sustained an injury while changing a tire on 5 February 1999 followed by a "pop" in his back on 11 February 1999 when he exited a truck. When Mr. Crane's condition did not improve with conservative treatment, Dr. Chipman referred him to Dr. Kevin Vaught, a neurosurgeon. Dr. Vaught diagnosed a severe lumbar strain and severe spinal stenosis at L4 with clear neurogenic claudication symptoms. He recommended surgery that was performed on 15 October 1999.

Following the surgery, Dr. Vaught referred Mr. Crane to a pain management clinic where Mr. Crane saw Dr. Kenneth Oswalt. Dr. Oswalt's report of Mr. Crane's medical examination on 18 April 2000 indicated that the date of the onset of Mr. Crane's condition was 5 February 1999. Dr. Oswalt found that Mr. Crane suffered from chronic pain secondary to post-laminectomy syndrome of the lumbar spine, piriformis muscle syndrome of the right lower extremity, and bilateral L4-L5 facet joint syndrome. Dr. Oswalt also diagnosed Mr. Crane as suffering from depression. Dr. Oswalt explained that he had not determined the cause of the depression, but he noted that Mr. Crane had no history of any problems with depression prior to the injury.

In an opinion and award filed 28 February 2002, the deputy commissioner awarded plaintiff temporary total disability benefits beginning 12 February 1999 after concluding that Mr. Crane had sustained injuries by accident on 5 February 1999 and 11 February 1999. Defendants appealed to the Full Commission. On 6 May 2003, the Full Commission issued an opinion and award affirming and modifying the deputy commissioner's order. The Full Commission found that Mr. Crane had injured himself while changing a tractor tire on 5 February 1999 and had felt a "pop" while exiting his employer's truck on 11 February 1999. Although the Commission further found that Mr. Crane reported both incidents to his employer, it stated that he "did not file a claim with respect to [the 5 February 1999] incident." The

Commission concluded nonetheless that Mr. Crane's disability arose out of the 11 February 1999 incident and that he was accordingly entitled to temporary total disability benefits beginning 12 February 1999. Defendants timely appealed.

Standard of Review

On appeal from a decision of the Industrial Commission, this Court must determine " 'whether the record contains any evidence tending to support the [Commission's] finding.' " *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). If those findings of fact are supported by competent evidence, they are conclusive on appeal even though there may be substantial evidence that would support findings to the contrary. *Id.*, 530 S.E.2d at 552-53. This Court then determines whether the findings of fact support the Commission's conclusions of law, which we review *de novo*. *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331, 593 S.E.2d 93, 95 (2004).

Discussion

Under the Workers' Compensation Act, an employee who has sustained disability as a result of a back injury is entitled to compensation when the back injury was "the direct result of a specific traumatic incident of the work assigned." N.C. Gen. Stat. § 97-2(6) (2003). In their brief on appeal, defendants have not contested the Full Commission's finding of fact that Mr. Crane was injured when trying to change a tractor tire on a backhoe on 5 February 1999.

[1] With respect, however, to 11 February 1999, defendants argue first that the evidence does not support the Commission's finding that a specific traumatic incident occurred on that date. Defendants point to Mr. Crane's inconsistent reports of when his injury occurred. Since this argument goes only to the credibility of the testimony and the Commission is the sole determiner of credibility, we may not revisit this question. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

[2] Defendants next argue that the evidence does not support the Commission's finding that the 11 February 1999 incident caused Mr. Crane's disability. The parties do not dispute that expert testimony was required to establish causation in this case. *See Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (holding that when the exact nature and probable genesis of a

particular type of injury involves complicated medical questions removed from the ordinary experience and knowledge of laymen, only an expert can give competent evidence as to the cause of the injury).

Our review of the medical evidence reveals no support for the Commission's finding that Mr. Crane's disability was caused by the 11 February 1999 specific traumatic incident, separate and apart from the 5 February 1999 incident. All of the evidence attributes Mr. Crane's back condition and pain to the 5 February 1999 incident when Mr. Crane was attempting to change the tractor tire; none of the evidence relates that condition and pain to the 11 February 1999 "pop" as a separate event. Because there was no expert evidence of causation, we must reverse the Commission's decision that Mr. Crane was disabled as a result of the 11 February 1999 specific traumatic incident.

Our Supreme Court has, however, mandated that if an appellate court determines that the Commission made its findings of fact under a misapprehension of the law, we must remand the case to allow the Commission to make a new determination applying the correct legal standard. *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (" 'When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard.' " (quoting *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987))). It appears that the Commission, in finding that Mr. Crane's disability was caused by the 11 February 1999 incident, may have been acting under a mistaken understanding of the law governing when a claim has been filed.

In order for the Industrial Commission to have jurisdiction over a claim, the employee must timely file a claim under N.C. Gen. Stat. § 97-24 (2003). *Murray v. Associated Insurers, Inc.*, 114 N.C. App. 506, 519, 442 S.E.2d 370, 379 (1994) ("Failure to timely file a claim is a jurisdictional bar . . . ."), *rev'd on other grounds*, 341 N.C. 712, 462 S.E.2d 490 (1995). *See also Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 84, 401 S.E.2d 138, 139 (1991) (the timely filing of a claim is a condition precedent to the right to compensation). Although more informal documents may be sufficient, "[c]laimants typically satisfy the requirement that a 'claim' be filed with the Commission with the Industrial Commission's Form 18, or Form 33, 'Request that Claim Be Assigned for Hearing.' " J. Randolph Ward,

Primary Issues in Compensation Litigation, 17 Campbell L. Rev. 443, 472 (1995).

Here, on 11 March 1999, Mr. Crane filed a Form 18 stating that he suffered a back injury that "was caused by changing a tractor tire on a company tractor," resulting in "lower back pain and sometimes . . . pain in [his] right leg"—an incident that the parties agree occurred on 5 February 1999. It appears that the Commission may have believed that because the form specified 11 February 1999 as the date of the injury, the Commission was required to conclude that no claim was filed as to the 5 February 1999 incident. A "claim," however, is sufficient under N.C. Gen. Stat. § 97-24 if it identifies the accident and injury at issue and expresses an intent to invoke the Commission's jurisdiction with respect to that injury.

Thus, in *Cross v. Fieldcrest Mills, Inc.*, 19 N.C. App. 29, 198 S.E.2d 110 (1973), this Court found sufficient a letter from the employee's lawyer to the Commission that referred to two injuries resulting from accidents and requested that one hearing be held as to both injuries since "[t]here may be some question about aggravation of the pre-existing injury . . . ." *Id.* at 31, 198 S.E.2d at 112. The letter did not mention the date of the first injury, and as to the second injury, it only stated "the second week of December 1968. . . . is as close as we can pinpoint it as to time at this late date." *Id.* at 30, 198 S.E.2d at 112. *Compare Tilly v. High Point Sprinkler*, 143 N.C. App. 142, 546 S.E.2d 404 (holding that the plaintiff, who suffered two distinct accidents, did not timely file a claim as to the second accident when his Form 18 only mentioned the first accident and subsequent filings with the Commission, although mentioning the second accident, did not specifically seek review of it by the Commission), *disc. review denied*, 353 N.C. 734, 552 S.E.2d 636 (2001).

Here, the Form 18 specifically describes the accident at issue as occurring when Mr. Crane was changing a tractor tire. To hold that this form is insufficient to constitute a claim for the injury arising out of that incident—simply because of the date of the incident listed on the form—would be inconsistent with the law governing specific traumatic incidents. "While the case law interpreting the specific traumatic incident provision of N.C. Gen. Stat. § 97-2(6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury." *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 708, 449 S.E.2d 233, 237 (1994) (reversing Commission's denial of benefits when it was based on a

finding that the date specified in the Form 18 could not be accepted as credible), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995).

Because the Form 18 filed in this case identified the specific incident at issue and invoked the jurisdiction of the Commission, it was sufficient to constitute a claim for benefits arising out of the accident occurring when Mr. Crane was changing the tractor tire. Disputes as to the date of the actual injury raise a question of credibility that is solely within the purview of the Industrial Commission.

Even though the Commission's apparent misapprehension of the law ordinarily would lead to a remand, defendants have also argued that the evidence does not support any finding that Mr. Crane's disability was work-related regardless of the date of the accident. If that were correct, no remand would be necessary. Specifically, defendants argue that Mr. Crane's disability is due to his depression and that there is no expert testimony that his depression is the result of a work-related injury.

Contrary to defendants' contention, the doctors did not attribute Mr. Crane's inability to work solely to his depression. Dr. Vaught based his opinion that Mr. Crane could not work on Mr. Crane's "need for continued narcotics, his continued back pain and limitations of his range of motion in his back" and observed that "there's no question he had a mental impairment as a combination of frustration and long use of narcotics and chronic pain and depression." Dr. Oswalt in turn testified that he did not "think [Mr. Crane] mentally was able to work" and explained that "[h]e had his pain as the primary problem. I think that was compounded by his depression."

Thus, while we agree the doctors' testimony suggests (1) that they believed that Mr. Crane's depression played a role in his disability and (2) that they had not yet determined the cause of that depression, their testimony also indicates that other work-related factors—including pain, use of narcotics for that pain, and physical limitations—joined with the depression to render Mr. Crane unable to work. Even when a work-related injury combines with an entirely separate non-work-related disease or injury, compensation is appropriate upon a showing that the work-related injury significantly contributed to the employee's disability. *Weaver v. Swedish Imp. Maint., Inc.*, 319 N.C. 243, 252, 354 S.E.2d 477, 483 (1987) (holding that employee was entitled to total disability benefits when a compensable heart attack combined with three subsequent non-work-related heart attacks, resulting in a total incapacity to work). The Commis-

sion could, therefore, find that Mr. Crane's disability was caused by a work-related accident. We agree with defendants, however, that the record does not support any finding that this disability arose out of the 11 February 1999 exit from the truck as a separate incident from the 5 February 1999 tire-changing incident.

We must, therefore, reverse the Commission's opinion and award and remand for further findings. It appears based on the record before this Court that Mr. Crane did file a claim based on the tire-changing incident and that the Commission could, based on the record, conclude that Mr. Crane was disabled as a result of an injury arising out of that incident. Nonetheless, nothing in this opinion is intended to preclude defendants from raising any defenses that may be available with respect to the 5 February 1999 incident. We simply hold that the record as it appears before this Court does not support the conclusion that Mr. Crane failed to file a claim with respect to the 5 February 1999 incident.

Reversed and Remanded.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. NATOSHA RENEE WATSON

No. COA04-855

(Filed 5 April 2005)

1. Criminal law— felony stalking—constitutionality of statute

The trial court did not err by denying defendant's motion to dismiss the charges of felony stalking even though defendant contends that N.C.G.S. § 14-277.3 is unconstitutional both on its face and as applied to defendant, because: (1) the plain meaning and common usage of the statute's words put an ordinary person on notice of what conduct is prohibited; (2) anti-stalking statutes with similar language have been upheld in other states as well; and (3) contrary to defendant's contention, a person can be placed in fear for his or her personal safety and suffer substantial emotional distress at two or more particular times in the same twenty-four hour period as more than one occasion can occur in a single day.

2. Sentencing— verdict sheet—request to list "not guilty" first

The trial court did not err in a multiple felony stalking case by denying defendant's request that the verdict sheet list the possible verdict of "not guilty" first, because: (1) the verdict sheet listed "not guilty" as a choice; (2) there was no reasonable possibility that the jury would have come to a different conclusion had the choice of "not guilty" been listed first; and (3) the verdict sheet wording did not improperly shift the presumption of innocence.

Appeal by Defendant from judgment entered 23 April 2003 by Judge Benjamin G. Alford in Superior Court, New Hanover County. Heard in the Court of Appeals 8 March 2005.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin and Special Deputy Attorney General William P. Hart, for the State.

John T. Hall, for defendant-appellant.

WYNN, Judge.

Where the language of a statute allows a "person of ordinary intelligence a reasonable opportunity to know what [conduct] is prohibited," the statute is not unconstitutionally vague. *State v. Elam*, 302 N.C. 157, 161-62, 273 S.E.2d 661, 664-65 (1981) (citation omitted). In this appeal, Defendant challenges the constitutionalty of the felony stalking statute, (section 14-277.3 of the North Carolina General Statutes) on the grounds that it is too vague. Because we hold that applying the plain meaning and common usage to words in section 14-277.3 puts an ordinary person on notice of what conduct is prohibited, we uphold the constitutionality of section 14-277.3.

The facts at trial tended to show that: Sandra "Kay" Warren worked as an instructor in the adult basic education program at Cape Fear Community College. In the fall of 1995, Defendant Natosha Renee Watson became a student in Ms. Warren's class. The class met for six hours a day, four days a week. During this time Defendant discussed various family problems with Ms. Warren, who referred her to the mental health center.

The State's evidence tended to show that in November 1996, Defendant was taken out of Ms. Warren's class to take vocational classes recommended by her social worker. At this point, Defendant

became "very clingy and possessive" of Ms. Warren. In January 1997, Defendant told Ms. Warren that she was physically attracted to her. Defendant also started telling Ms. Warren bizarre things, such as that she had come to Ms. Warren's house when she was a little girl, that she remembered biting Ms. Warren's child, and other things that did not and could not have happened. Also around this time, Defendant told Ms. Warren that she felt Ms. Warren had made a sexual advance to her by bumping up to the back of Defendant's chair, and she also accused Ms. Warren of unbuttoning her blouse in front of Defendant.

At some point, Defendant tried to give Ms. Warren a music box with a white dove. Ms. Warren told her it was not an appropriate gift, but accepted it after Defendant became very upset. Defendant started telling Ms. Warren that other students in the class were looking at Ms. Warren in a sexual way. Defendant became very jealous of these other students and accused Ms. Warren of having a special relationship with them.

After meetings involving Defendant and senior staff members at the college, Defendant was suspended and informed she was not to have contact with Ms. Warren or come to Cape Fear Community College. On 3 February 1997, Defendant received notice of her suspension and confronted Ms. Warren in her classroom, tore up a piece of paper in her hand, and stated that "if [Ms. Warren] thought that this was sexual harassment, she was going to show [her] what sexual harassment was." Security removed Defendant from the premises.

Defendant left notes on Ms. Warren's desk at the college in January 1997. On one of them, she opened the note with "Dear Snow White" and signed it "Dopey." On another, the salutation read "Dear Beauty" and was signed "The Beast." On a note opening with "Dear Kay," Defendant signed it with her name. In addition, a colleague left a note on Ms. Warren's desk at school, which subsequently disappeared. Defendant later admitted to taking it and apologized.

In the fall of 1997, Ms. Warren started receiving telephone hang-up calls. She received approximately fifty calls in three days. Through the telephone company she was able to track the source of the calls. Detective Jerry Collins Ludlum testified that in October 1997, Ms. Warren filed a report of harassing phone calls. Detective Ludlum contacted Defendant's father, who stated he would speak with his daughter. The detective also spoke with Defendant by telephone; she admitted making the phone calls and said she would stop. Ms. Warren did not press charges at that time.

In fall of 1998, Ms. Warren frequently saw Defendant in her car driving through the campus parking lot or driving down the street as Ms. Warren walked to work. On three separate occasions in March 1999, Ms. Warren observed Defendant sitting in her car parked on the street across from Ms. Warren's house. Ms. Warren testified that at that point she "felt fear for [her] family" as well as her personal safety. Ms. Warren had never given Defendant her home telephone number or address.

Defendant began leaving notes to Ms. Warren on her car starting in fall of 1998. Ms. Warren received one message on 1 December 1998, with a picture of Defendant's son and Defendant's telephone number on it. Some of the messages had faces drawn on them and some were signed "Dopey." On 16 February 1999, Ms. Warren received a note with the words "I love you" written along with "Dopey." On 15 March 1999, she received a note that had a Bible verse with the words "Please don't forget me for I shall always love you. From your Baby Dopey." There were various other notes with similar messages left of Ms. Warren's car. A note was also left on Ms. Warren's rental car that said "Kay, nice car." Ms. Warren put dates on each note and then turned them over to Lieutenant Hovie W. Pope of the Wrightsville Beach Police Department.

Ms. Warren contacted a private attorney, Bill Boney, who wrote Defendant a letter on 13 April 1999, instructing Defendant to stop all contact with Ms. Warren.

Lt. Pope testified that he met with Ms. Warren in March 1999 and she informed him that she was having a problem with Defendant again. After seeing Defendant in her neighborhood, Ms. Warren went to see Lt. Pope. He described Ms. Warren as appearing "to be under a lot of stress, very nervous, on the verge of tears." She also expressed at this time that she feared for her and her children's safety. On 15 April 1999, Defendant was arrested for making harassing telephone calls.

From November 2001 through April 2002, Ms. Warren continued receiving hang-up calls and romantic messages at work, totaling over 175 calls. By this time, a block had been placed on Ms. Warren's home telephone. A caller identification box was installed at the college. On 12 November 2001, a message in Defendant's voice stated "I'm sorry. I was trying to reach my lover." In January of 2002, several messages were left on the office answering machine saying "I want you" while another said "I'm sorry I made you hate me, Kay. Please try to remem-

ber me, Kay." Yet another message stated "I'm sorry I'm not good enough for you, Kay." On 8 January 2002, a message consisted of a kissing sound and another included the words, "I want to kiss you again, Kay." Calls from Defendant continued into February including three calls on 22 February 2002 and six calls on 25 February 2002. On 26 February 2002, Ms. Warren took a call from Defendant and told her to stop calling. Defendant responded that she would not. She then left a telephone message, stating that Ms. Warren "did not know who [she] was dealing with, that not to mess with her."

On 7 January 2002, Ms. Warren again went to the Wilmington Police Department in regards to Defendant's conduct. Cape Fear Community College hired security guards to sit outside Ms. Warren's door and walk her to her car.

In February and April 2002, Ms. Warren filed complaints with the magistrate based on the phone calls. Calls continued to be made to Ms. Warren in April, May, and June 2002. The cassette tapes from the answering machine were introduced into evidence at the trial. During some calls, Defendant said things like "What do you think I'm going to do? Get a gun and come down and shoot you?" Throughout this time, Ms. Warren suffered from stress-related headaches.

At trial, Defendant admitted to making phone calls in April, May, and June 2002. She testified that when Ms. Warren explained that if she had brushed up against Defendant, it was not any kind of sexual advance, she felt hurt. She admitted making a statement to Ms. Warren that she did not want the relationship to end in a violent way; there were times she had gotten very angry at Ms. Warren; she had told Ms. Warren she was sexually attracted to her; she made repeated phone calls even after being told by school officials and the police to stop; and she followed Ms. Warren in her car and left notes on Ms. Warren's car, including the ones presented to the jury as exhibits.

Defendant further testified she loved Ms. Warren and was afraid of losing her. She admitted she had been told by a judge not to contact Ms. Warren following her earlier misdemeanor stalking conviction as a condition of her probation. She acknowledged telling Ms. Warren that "people like you cause people to loose (sic) their mind and their sanity, making people want to kill them." She also admitted saying "Each day a little bit of my mind dies . . . You know what happens when people start loosing (sic) their mind, they're capable of doing anything."

On 26 August 2002, Defendant was indicted for twelve counts of felony stalking. Before trial, Defendant moved to dismiss the charges challenging the constitutionality of the statute. The trial court denied Defendant's motion to dismiss. During trial, four of the counts were dismissed. The jury found Defendant guilty of all remaining charges. The trial court sentenced Defendant to four consecutive sentences of nineteen to twenty-three months imprisonment. Four other consecutive sentences of nineteen to twenty-three months imprisonment were suspended. Defendant appealed.

On appeal, Defendant argues that the trial court erred in (1) denying her motion to dismiss because the statute is unconstitutional; and (2) denying Defendant's request that the verdict sheet list "not guilty" as the first choice. We uphold the trial court's judgment.

I. Constitutionality of Statute

[1] Defendant contends that the felony stalking statute is unconstitutional both on its face and as applied to Defendant. The felony stalking statute, section 14-277.3(a) of the North Carolina General Statutes, defines the offense of stalking as:

> A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of, or otherwise harasses, another person without legal purpose and with the intent to do any of the following:
>
> (1) Place that person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
>
> (2) Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment, and that in fact causes that person substantial emotional distress.

N.C. Gen. Stat. § 14-277.3(a) (2004). Furthermore, the statute defines the terms "harasses" and "harassment" as:

> '[H]arasses' or 'harassment' means knowing conduct, including written or printed communication or transmission, telephone or cellular or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmis-

sions, directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

N.C. Gen. Stat. § 14-277.3(c) (2004).

A. Facial Challenge

Defendant argues that section 14-277.3 of the North Carolina General Statutes is unconstitutionally vague as it "fails to provide sufficient notice of both unlawful and lawful actions within the intent of the legislation." (Def. B. 7). This is an issue of first impression as North Carolina courts have not yet examined the constitutionality of this statute.

Statutes are presumed constitutional as we are guided by the following principle: "[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (citation omitted). "If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional, the former will be adopted." *State v. Dorsett*, 3 N.C. App. 331, 335, 164 S.E.2d 607, 609 (1968). Also, a statute is construed to ensure that the purpose of the legislature is carried out. *State v. Thompson*, 157 N.C. App. 638, 644, 580 S.E.2d 9, 13, *disc. review denied*, 357 N.C. 469, 587 S.E.2d 72 (2003). Additionally, in construing a statute, undefined words should be given their plain meaning. *Id.* at 644-45, 580 S.E.2d at 13.

If a statute fails to clearly define that which is prohibited, courts must declare the statute unconstitutionally vague. The void for vagueness test is whether the statute in question gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Elam*, 302 N.C. at 161-62, 273 S.E.2d at 664-65 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227, 92 S. Ct. 2294, 2298-99 (1972)).

In her brief, Defendant specifically contends the following phrases are vague: "legal purpose," "occasion," "substantial emotional distress," "torments," and "terrorizes." Several of these words are of common usage and their plain meaning should be given. *Thompson*, 157 N.C. App. at 644-45, 580 S.E.2d at 13. "Torment" is defined as "[t]o annoy, pester, or harass." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1428 (3d ed. 1997). "Terrorize" is defined as "[t]o fill or overpower with terror; terrify." AMERICAN HERITAGE COLLEGE DICTIONARY 1401 (3d ed. 1997); *see also State v. Taylor*, 128 N.C. App.

616, 619, 495 S.E.2d 413, 415 (1998) (animal control ordinance upheld as terms "through their daily use become meaningful so that the average person should have a sense of what is prohibited."). This Court has previously defined the word "occasion" as its commonly understood meaning: "a particular time at which something takes place: a time marked by some happening." *Gaither v. Peters*, 63 N.C. App. 559, 561, 305 S.E.2d 763, 764 (1983) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY) (interpreting the meaning of occasion in a traffic offense statute). Applying the commonly understood meaning to the term "occasion," it is clear the General Assembly intended to prevent a person from willfully stalking another at more than one particular time. Using the plain meaning of these terms, we hold that an ordinary person can reasonably understand what conduct is prohibited.

Moreover, anti-stalking statutes with similar language have been upheld in other states as well. In *Pallas v. State*, 636 So. 2d 1358 (Fla. Dist. Ct. App. 1994), *approved by*, 654 So. 2d 127 (Fla. 1995), a Florida court held that a similarly worded anti-stalking statute was not unconstitutionally vague. *Id.* at 1361. Under the Florida statute, " 'Harasses' means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose." *Id.* (citing Fla. Stat. ch. 784.048(1)(a) (Supp. 1992)). The defendant in *Pallas* argued that this definition created a subjective standard. However, the court held that the statute in fact created a "reasonable person" standard and gave fair notice of the conduct which is proscribed. *Id. See also People v. Tran*, 54 Cal. Rptr. 2d 650 (Cal. Ct. App. 1996) (stalking statute upheld as to the vagueness challenge); *People v. White*, 536 N.W.2d 876 (Mich. Ct. App. 1995) (same). We agree with the Florida court in *Pallas*. Section 14-277.3 of the North Carolina General Statutes creates a "reasonable person" standard and puts an ordinary person on notice of prohibited conduct. Thus, we conclude that section 14-277.3 is not unconstitutionally vague.

B. As-Applied Challenge

Defendant also contends that section 14-277.3 is unconstitutional in its application to her as each indictment alleged that the offense took place on one specific day. We disagree.

Each of the eight indictments for felony stalking lists for the "date of the offense" an individual day twice (*e.g.* "4-13-02, 4-13-02"). Defendant argues that listing only one day on the indictment is

an unconstitutional application of N.C. Gen. Stat. § 14-277.3, as the statute provides for the offense of stalking if "the person willfully *on more than one occasion* . . . ." N.C. Gen. Stat. § 14-277.3(a) (emphasis added).

However, as we have previously stated, "occasion" will be given its common usage meaning: "a particular time at which something takes place: a time marked by some happening." *Gaither*, 63 N.C. App. at 561, 305 S.E.2d at 764. Assuredly, a person can be placed in fear for their personal safety and suffer substantial emotional distress at two or more particular times in the same twenty-four hour period. As "more than one occasion" can occur in a single day, we conclude that N.C. Gen. Stat. § 14-277.3 was not unconstitutional as applied to Defendant.

II. Verdict Sheet

[2] Finally, Defendant argues that the trial court erred in denying her request that the verdict sheet list the possible verdict of "not guilty" first. We disagree.

There is no rule in North Carolina indicating the order choices must be listed on verdict sheets. Nor does Defendant cite any authority supporting this proposition. In *State v. Hicks*, 86 N.C. App. 36, 356 S.E.2d 595 (1987), this Court found no error by the trial court where the choice of "not guilty" was not included on the verdict form. *Id.* at 43, 356 S.E.2d at 599. The jury had to write in either "guilty" or "not guilty." *Id.* This Court stated that although "the use of 'not guilty' on the verdict sheet is preferred we conclude that there is no reasonable possibility that the outcome would have differed if the jury verdict sheet had been worded differently." *Id.*

Here, the verdict sheet listed "not guilty" as a choice. Similar to our holding in *Hicks*, we conclude here that there is no reasonable possibility that the jury would have come to a different conclusion had the choice of "not guilty" been listed first.

Nor did the verdict sheet wording improperly shift the presumption of innocence. In charging the jury, the trial court stated "[u]nder our system of justice, when a defendant pleads not guilty, she is not required to prove her innocence but is presumed to be innocent." "We presume 'that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.' " *State v. Squires*, 357 N.C. 529, 536, 591 S.E.2d 837, 841 (2003) (quoting

Francis v. Franklin, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)). Accordingly, the trial court properly charged the jury that Defendant was presumed to be innocent, regardless of the order of possible choices on the verdict sheet.

For the foregoing reasons, there was no error by the trial court.

No error.

Judges TYSON and ELMORE concur.

STATE OF NORTH CAROLINA v. DALE HOWARD MILLSAPS, DEFENDANT

No. COA04-627

(Filed 5 April 2005)

Criminal Law— insanity defense—prosecutor's improper arguments

The trial court abused its discretion in a prosecution for first-degree murder and other offenses by overruling defendant's objections to the prosecutor's improper and prejudicial remarks during closing arguments, and defendant is entitled to a new trial, because: (1) the prosecutor argued outside the evidence presented that it was 99 percent certain a judge someday can and will say release defendant, and the remark impermissibly indicated that defendant would likely be released after a very short period of time if he was found not guilty by reason of insanity; (2) the comparison of defendant's acts to those of the September 11 terrorists, which had occurred only a little over a year earlier, appealed to the jury's sense of passion and prejudice by comparing defendant's acts to infamous events outside the record; and (3) it cannot be said beyond a reasonable doubt that the improper and prejudicial arguments by the prosecutor, which were neither checked nor cured by the trial court, did not contribute to defendant's conviction.

Appeal by defendant from judgment entered 21 November 2002 by Judge James U. Downs in Graham County Superior Court. Heard in the Court of Appeals 14 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Robert C. Montgomery, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted upon charges of first-degree murder, felonious breaking and entering, assault with a deadly weapon with intent to kill inflicting serious injury, and three counts of assault with a firearm on a law enforcement officer. He entered pleas of not guilty and gave notice of his intent to rely upon the defense of insanity.

The evidence at trial tended to show that on 25 November 2001, at 6:37 a.m., an "all officer" page was issued from the Sheriff's dispatcher after receiving a call from defendant. Defendant told the dispatcher he had been in a night-long battle with his neighbors and friends, Doug and Margaret Wilson. Defendant reported that the Wilsons had been shooting at him from under his trailer, and that he shot back and killed them.

Deputy David Styles was the first officer to arrive at the scene. When he asked defendant where the people were who had been shot, defendant answered, "They're under the floor." Deputy Styles noticed a revolver stuck in defendant's pants and asked defendant to put the gun away. Defendant replied, "I'm in my own house, you just back up." After Deputy Steve Lovelace arrived, he and Deputy Styles searched around and under the trailer but found no bodies under the trailer or any blood trails.

Graham County Sheriff Steve Odom arrived at the scene at 6:46 a.m. When Sheriff Odom called defendant from his cell phone to try to talk him out of the trailer, defendant repeated the story of the shootout, telling Odom he knew he had killed the Wilsons. Margaret Wilson was contacted at home by phone and she assured the officers that there had not been a shootout and that she and her husband were fine. Sheriff Odom told everyone to leave except Deputy Lovelace who was positioned about 100 yards away from the trailer to continue surveillance.

Sheriff Odom was aware of an earlier incident, occurring on 17 November 2001, when defendant had reported that his brother, Homer, had been shot. When Graham County Deputy Sheriff Danny Millsaps arrived, defendant stepped out from behind the bushes with

a shotgun, saying, "Homer's been shot, somebody shot my brother." After defendant put down the shotgun, he and Deputy Millsaps found Homer inside his house slumped over in a chair, intoxicated. Sheriff Odom testified that on this same day, defendant shot out two windows at his home. Shortly thereafter, Homer Millsaps stopped by Sheriff Odom's office to find out about getting his brother committed. Homer and his mother were concerned about defendant and wanted to get him help. Knowing this history, Sheriff Odom left the scene the morning of 25 November to obtain a commitment order from the magistrate. He then contacted the prosecutor and a State Bureau of Investigation agent to determine the best course of action to get defendant out of his trailer.

At approximately 8:50 a.m., Deputy Billy Orr relieved Deputy Lovelace from his duty. Deputy Orr contacted Sheriff Odom at 9:11 a.m., telling him that defendant, wearing a camouflage jacket and carrying a shotgun, had left his trailer and was walking in the direction of the residence of Kenneth and Mildred Garrison. After Deputy Orr saw defendant go into the woods between his residence and that of the Garrisons, Sheriff Odom directed him to follow at a safe distance but to try to keep defendant in his sight.

The Garrisons, who lived in a double-wide mobile home about 150 yards from defendant's residence, were at their home that morning with their two sons, Jason, age 14, and Joseph, age 10. Defendant entered the residence; Kenneth was in his chair in the den, Mildred was in the master bedroom and the boys were in Jason's bedroom. Mildred heard a series of loud bangs. She opened the bedroom door and saw Kenneth staggering in the hall "with the whole side of his face shot off" and someone following behind him in a camouflage coat. She fled to the bathroom and locked the door just as a projectile came through and struck her in the arm. She screamed loudly and then became quiet so the shooter would think she was dead.

After she heard the intruder leave the house, Jason called to her. Jason and Joseph came into the bathroom with her to hide until they could get help. Kenneth Garrison had three close-range shotgun wounds and three single-shot wounds. He died as a result of these wounds. Mildred Garrison had a single gunshot injury to her arm.

Deputy Orr, who had lost sight of defendant, pulled into the Garrison's driveway, having heard gunshots coming from that direction. Sheriff Odom and another officer pulled in just seconds later. Defendant, who was outside the Garrison home, fired at the

officers with a shotgun and pistol. Sheriff Odom returned fire, and defendant was felled after being wounded twice in the abdomen and once in the arm.

Defendant presented evidence that he suffered from psychotic symptoms. In the ambulance, defendant volunteered he was "Nicodemus, a disciple of Jesus Christ." Lisa Edwards, a nurse at the Mission-St. Joseph Health Care Center, testified that she assessed defendant upon his arrival. He stated to her that "he has been dead for days," and that he had been trying all week to kill a person who had poisoned his water.

Dr. James E. Bellard, a forensic psychiatrist, testified that defendant "was so mentally ill that he could not distinguish right from wrong." He diagnosed defendant as having depression with psychotic features. Dr. James Baird Payton, child/adult psychiatrist, also opined that defendant did not know right from wrong and that he was psychotic at the time of his evaluation of defendant on 26 November 2001. A psychologist from Winston-Salem, Dr. John Frank Warren, III, first evaluated defendant on 28 November 2001. He also diagnosed defendant as suffering from depression with psychotic features and believed defendant was not capable of distinguishing between right and wrong. Additional testimony from defendant's family and friends revealed psychotic statements by defendant that someone was trying to harm him and his belief that he could not be killed because he was wearing the armor of God.

The State presented rebuttal evidence by Dr. Jennifer Schnitzer, a forensic psychology fellow at Dorothea Dix Hospital, and Dr. Peter Barboriak, a forensic psychiatrist at Dix. Both witnesses testified to their opinions that defendant suffered from a psychotic disorder but that he knew the nature and quality of his actions and was aware of the wrongfulness of his actions.

A jury convicted defendant of first-degree murder, felonious breaking and entering, assault with a deadly weapon with intent to kill inflicting serious injury, and three counts of assault with a firearm on a law enforcement officer. He appeals.

I.

Defendant's appeal raises the issue of the propriety of the prosecution's closing argument. During his closing argument, the prosecutor reminded the jury that the defense did not contest the commission

of the acts charged, but relied on the defense of insanity. The prosecutor informed the jurors that for them to find defendant not guilty by reason of insanity, the defendant had to show that he was suffering from a defect of his mind and that "the disease must have so impaired his mental capacity that either he did not know the nature and quality of the act as he was committing it or if he did he did not know that that act was wrong." He continued:

> [PROSECUTOR]: I submit that in a way that they tempt you to take an easy way out. Mr. Melrose in his opening and indicated again in his closing, going back to his opening, he said this, "the family knows he will be in prison or a mental facility for as long as he lives," leading you to believe that regardless of what your verdict is that the result and an alternative is essentially the same. So, they bring up—I didn't bring it up, they bring up this business about commitment procedures that he talked to you about this afternoon.
>
> I want to point out one thing to you. You folks learned a lot about another type of commitment procedure, and that's this commitment where a person goes to the magistrate and says, you know, due to intoxication or mental defect that a person needs to be committed. And you heard my friend read out of the book, and we know exactly what the book says about how it's supposed to work but it plays out quite differently in the real world.
>
> I submit to you that when you look out and think about this commitment procedure, that there are only three things that are for certain if you say not guilty by reason of insanity, and Judge Downs issues this commitment, there's only three things that can be counted on.
>
> The first thing is that there will be a hearing in fifty days, and that hearing will be or can be contested. It can be a dog fight, maybe worse than a dog fight you've heard here the last week or two; that there can and probably will be attorneys involved, experts involved, arguments, the whole nine yards. That's one thing you can count on. In fifty days there will be a hearing.
>
> Number 2, the second thing you can count on, is—and the only thing that we know we can rely on is that a North Carolina Superior Court Judge will hear the matter. That means somebody that lives between Franklin and Manteo, that's the only thing that we know.

The third thing that you know for certain is this; that once you come back tomorrow or the next day or next week or whenever it is and render your verdict that as of that moment this case, this situation, leaves your hands and is out of the hands of the citizens of Graham County forever; that is, the decision process what ultimately is done with this man. No say so. This trial is the last say so that you'll ever have.

I'm telling you this stuff not—members of the jury, I'm not saying find him guilty or not guilty or whatever because of this. You're not supposed to do that and I'm not supposed to ask you about it. I'm simply saying that I want you to have your eyes wide open, and I do not want you to be deceived.

I'll contend this; we don't think or contend necessarily that he's going to be back in our town or back out there life as usual at Tallulah in fifty or ninety days, but he could be. It's possible.

I submit this to you, it's almost 100 percent certain that because of what you know about the hearing that the defendant will have attorneys and more of these hired experts, and sure, they may have neutralized two potential experts, especially Bellard, by getting Bellard to say, I'd never recommend it. What about the other five or ten thousand experts across the country that are willing to do any kind of work for $300.00 an hour. There'll be experts, etc., that can say he's no longer a threat and he's under control and look at his age, look at how he acted like a choir boy during the trial, send him to mental health. Sure, as long as he's under medication he's okay, but he doesn't have to be down in Dix Hospital or over there around Central Prison to be fed medication. You heard one of the doctors say that he could be farmed out to local mental health and as long as they monitor him and make sure he takes his medication a Judge could say he's no longer a danger to himself or others.

We submit *it's 99 percent certain that Judge someday can and will say that, oh that conviction was six or eight or ten years ago, that's irrelevant, release him.* (Emphasis added).

MR. MELROSE: Your Honor, I object to that argument.

THE COURT: Overruled.

[PROSECUTOR]: All this, members of the jury,—we think this is a clear cut case, but all this is by way of meeting his goal, get out

of here and get set free. Before you do that, before you do anything blindly, we simply want you to understand that. We simply want you to understand that. We don't want you to have any surprises down the road. Are there people who won't sleep if that happens? Possibly. I don't know.

But we submit there's certainly the possibility he may get out, mark my word, the 20th of November, 2002. Write it down there, somebody. There's that possibility and they can't guarantee that that won't happen.

So, I say all that to emphasize that you shouldn't be suckered in by what looks like an easy way out that will achieve the same result. Baloney, don't be lulled into a false sense of security. Don't think there's going to be equal protection either way by taking the easy way out or have your eyes wide open. Simply vote for responsibility on this evidence rather than excuses is what we would ask you to do. Vote for responsibility and not for excuses and don't get suckered into the easy way out.

MR. MELROSE: I object to the term suckered, Your Honor, the inference that it implies.

THE COURT: Overruled.

[PROSECUTOR]: Don't—ultimately, don't put this good mother right here in the situation of having to go to those boys and say they let him off—

MR. MELROSE: Objection, Your Honor, it's improper.

THE COURT: Overruled

[PROSECUTOR]: They let him off and the only thing we know is he'll be locked up somewhere for fifty days. That's the only thing we know, boys. He killed your dad right there in front of you, but that's all we can rely on. Don't put her in that situation.

MR. MELROSE: Objection.

THE COURT: Overruled.

The prosecutor proceeded, addressing the evidence presented at trial. When he discussed motive, the exchange continued as follows:

[PROSECUTOR]: They want you to disregard all that evidence of strong motive and say, well he just had this crazy delusion about

following God's orders. Yeah, *that's like people that fly airplanes into buildings for their ends and claim to be doing God's work.* (Emphasis added).

MR. MELROSE: I object to this reference.

THE COURT: Overruled.

MR. MELROSE: It's prejudicial to the jury.

THE COURT: Overruled.

[PROSECUTOR]: Isn't it curious a person carries out their own ill will, their own desire for vengeance, their own reaction on what they call is provocation to serve, and they try to blame it on the good Lord, say the Lord made me do it. My goodness.

Defendant contends the prosecutor's arguments were improper, misleading, inflammatory, and prejudiced his right to a fair trial, and that the trial court abused its discretion in overruling his objections. We agree.

When, in a closing argument, an objection was made and overruled, the standard of review on appeal is whether the trial court abused its discretion by failing to sustain the objection. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). Upon review of a trial court's rulings with respect to objections to the State's closing argument, the appellate court must first determine if the remarks were improper, and if so, if they were of "such a magnitude that their inclusion prejudiced defendant." *Id.* Remarks in closing arguments must "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Id.* at 135, 558 S.E.2d at 108; *see* N.C. Gen. Stat. § 15A-1230(a) (2003). Once the reviewing court concludes the remarks were improper and were prejudicial to defendant, the defendant must next show that a reasonable possibility exists that "a different result would have been reached had the error not occurred." *State v. Allen*, 353 N.C. 504, 509, 546 S.E.2d 372, 375 (2001); N.C. Gen. Stat. § 15A-1443(a) (2003).

First, we address the trial court's ruling on defendant's objections to the prosecutor's remarks that "it's 99 percent certain a Judge can and will say that, oh that conviction was six or eight or ten years ago, that's irrelevant, release him," and that "the only thing we know is

he'll be locked up somewhere for fifty days." The State refers to N.C. Gen. Stat. § 122C-268.1 which provides that a person committed after being found not guilty by reason of insanity "shall be provided a hearing, unless waived, before the expiration of fifty days from the date of his commitment." N.C. Gen. Stat. § 122C-268.1(a) (2003). If the respondent provides to the court that he no longer has a mental illness or is no longer dangerous to others, "then the court shall order the respondent discharged and released." N.C. Gen. Stat. § 122C-268.1(i) (2003).

Here, the prosecution argued, outside the evidence presented, that it was "99 percent certain a Judge someday *can and will* say . . . release him." Two defense experts testified that defendant's illness could be treated but not cured and that defendant would probably need hospitalization for the rest of his life. Dr. John Warren, a psychologist, testified on cross-examination by the State that although it was a possibility that in nine or ten years a Judge could say prima facie evidence of a homicide committed by defendant was no longer relevant, in his opinion it was a remote possibility. Furthermore, Dr. Warren stated that he'd never seen a case where there was prima facie evidence of a homicide where a judge found the patient was no longer dangerous. Although defendant, if found not guilty by reason of insanity, would be provided a hearing fifty days after his commitment, no evidence supported the State's argument that it was 99 percent certain a judge would find the homicide irrelevant, therefore releasing defendant from commitment.

The remark was also impermissibly prejudicial as it indicated to the jury that defendant, if found not guilty by reason of insanity, would likely be released after a very short period of time. The failure of the trial court to sustain defense counsel's objection was an abuse of discretion.

The prosecutor also suggested a comparison of defendant's acts to the acts committed by the terrorists in their vicious and deadly attacks on New York and Washington on 11 September 2001. In *Jones*, the prosecutor made comparative references to the Columbine shooting and the bombing of the federal building in Oklahoma City. The Supreme Court found these remarks were improper because they (1) "referred to events and circumstances outside the record;" (2) "urged jurors to compare defendant's acts with the infamous acts of others;" and (3) "attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice." *Jones*, 355 N.C. at 132, 558 S.E.2d at 107. Even with

instructions to disregard the remarks, the Court found the impact of the statements was "too grave to be easily removed from the jury's consciousness." *Id.*

Similarly, in the present case, the comparison of defendant's acts to those of the September 11 terrorists, which had occurred only a little over a year earlier, appealed to the jury's "sense of passion and prejudice" by comparing defendant's acts to infamous events outside the record. *Id.* We hold the prosecutor's remarks in this case were also improper and prejudicial and defendant's objections should have been sustained.

In the present case, defendant's commission of the shootings and his mental defect at the time of the shootings were both uncontested; the contested issue at trial was whether defendant knew right from wrong at the time he committed the acts. We cannot say beyond a reasonable doubt that the improper and prejudicial argument by the prosecutor, which was neither checked nor cured by the trial court, did not contribute to defendant's conviction. A different result might have been reached had the trial court properly exercised its discretion to control the prosecutor's misleading characterizations and improper inferences. Therefore, we have no choice but to award defendant a new trial.

In light of our decision, we will not address defendant's second and third arguments since they are not likely to occur in a new trial. Defendant's remaining assignments of error were not brought forward in his brief and are therefore deemed abandoned. N.C.R. App. P. 28(a).

New trial.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. ANTHONY RICKIE BELTON, DEFENDANT, AND AEGIS SECURITY INSURANCE COMPANY, SURETY

No. COA04-653

(Filed 5 April 2005)

1. Appeal and Error— preservation of issues—failure to assign error—failure to present issue at trial

Although the surety contends that N.C.G.S. § 15A-544.8(b)(1) requires the trial court to set aside a forfeiture judgment if the surety demonstrates that it did not actually receive notice and that any construction or application of N.C.G.S. § 15A-544.4 not requiring forfeiture notices to be actually received by sureties would constitute a violation of due process, these assignments of error are dismissed, because: (1) the surety did not assert the first issue as a ground for relief in its assignments of error as required by N.C. R. App. P. 10(a), nor did it assign error to the pertinent conclusions of law; and (2) in regard to the second issue, the argument did not correspond to any of surety's assignments of error as required by N.C. R. App. P. 28, nor was this argument presented to the trial court for a ruling as required by N.C. R. App. P. 10(b)(1).

2. Penalties, Fines, and Forfeitures— appearance bond forfeiture—notice

The trial court did not err by denying the surety's appeal from an order entered on 30 January 2004 denying its motion for relief from final judgment of forfeiture of an appearance bond even though surety contends the clerk of court failed to provide notice of the entry of forfeiture as required by N.C.G.S. § 15A-544.4, because: (1) an assistant clerk placed the notice in a bin for outgoing mail; (2) there is no requirement that the clerk of court herself carry notices to the post office in order to mail them; (3) official actions taken by public officers in North Carolina are accorded the presumption of regularity, and thus the official actions of clerks of court are afforded this presumption of regularity; and (4) the trial court, after considering the affidavit of surety's employee tending to show that surety did not receive the notice of forfeiture along with the other evidence in the record, could properly conclude that the clerk had given notice in compliance with N.C.G.S. § 15A-544.4.

Appeal by surety from order entered 30 January 2004 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 17 February 2005.

Tharrington Smith, L.L.P., by Rod Malone for Lenoir County School Board.

Andresen & Vann, by Kenneth P. Andresen and Christopher M. Vann, for Surety.

LEVINSON, Judge.

Aegis Security Insurance Co. (surety) appeals from an order entered on 30 January 2004 denying its motion for relief from the final judgment of forfeiture. We affirm.

The relevant procedural history of this case is as follows: On 22 November 2002 surety signed, by the signature of its attorney in fact, an appearance bond in the amount of $100,000.00 for the pretrial release of criminal defendant Anthony Belton who was charged with first degree murder. The terms of the appearance bond required that Belton appear "whenever required" by the court, and that he remain "at all times amenable to the orders and processes of the [c]ourt."

On 12 February 2003 Belton failed to appear for a court appearance. He was "called and failed" to appear in open court, and the appearance bond was ordered forfeited. The order of forfeiture listed 12 February 2003 as the date of forfeiture, and 21 July 2003 as the date the forfeiture would become final. The notice of forfeiture was mailed to surety 21 February 2003 as demonstrated by the certificate of service, signed by the assistant clerk of court. The order of forfeiture became a final judgment 21 July 2003 and a writ of execution on the final judgment of forfeiture issued 22 July 2003.

On 26 November 2003 surety moved, pursuant to N.C.G.S. § 15A-544.8(b)(1), to vacate the final judgment of forfeiture, on the grounds that the clerk failed to provide notice of the entry of forfeiture as required by N.C.G.S. § 15A-544.4. This motion was heard in superior court on 18 December 2003.

The evidence presented at the hearing is summarized as follows: Lenoir County Assistant Clerk of Court Jeanee Wheeler testified she mailed the notice of forfeiture to surety on 21 February 2003, by enclosing the notice in an envelope with the proper address label and postage, and then placing the envelope in an "office bin" for outgoing mail. Wheeler further testified that "typically" a "maintenance

worker" responsible for mailing letters would collect the outgoing mail from the office bin between 3:00 p.m. and 4:00 p.m. each day. In this way, according to the testimony of Wheeler, mail was "placed in the U.S. Postal Service." Surety presented an affidavit by Kelly Fitzpatrick, a risk management agent of surety insurance company, stating that her office had not received the notice of forfeiture.

On 30 January 2004 the trial court entered an order denying surety's motion to set aside the judgment of forfeiture. The order included, in pertinent part, the following findings of fact:

3. On or about 21 February 2003, Jeanee M. Wheeler, Assistant Clerk of Superior Court, prepared a Bond Forfeiture Notice for defendant's failure to appear in Lenoir County Superior Court on 12 February 2003. The addresses for the Surety and the bail agent shown on the Bond Forfeiture Notice are the same addresses noted on the Bond.

4. On 21 February 2003, Jeanee M. Wheeler mailed a Bond Forfeiture Notice to the Surety and the bail agent at the addresses shown on the bond. The notice contained all of the information required by N.C. Gen. Stat. § 15A-544.3.

5. An electronic signature for Judge Paul L. Jones was inserted in the space provided for Judge Paul L. Jones to sign the judgment on the Bond Forfeiture Notice. An electronic signature for Jeanee M. Wheeler was inserted in the space provided for the Assistant Clerk of Court to sign the Certificate of Service on the Bond Forfeiture Notice. Neither Judge Jones' nor Ms. Wheeler's handwritten signatures are on the Bond Forfeiture Notice.

6. The date of forfeiture on the Bond Forfeiture Notice is 12 February 2003. The final judgment date is 21 July 2003.

7. The defendant was not arrested by the Surety or otherwise served with an order for arrest for the failure to appear on the criminal charges in this case prior to 21 July 2003.

8. None of the conditions in N.C. Gen. Stat. § 15A-544.5 were satisfied prior to 21 July 2003.

9. Subsequent to 21 July 2003, Imelda Pate, Assistant District Attorney for Lenoir County, received a telephone call from a New York probation officer informing her of the location of the defendant.

10. Ms. Pate made arrangements to have the defendant arrested in New York and transported to North Carolina.

11. The Surety did not participate or assist in the defendant's arrest and return to North Carolina.

12. The Surety presented evidence alleging that it did not receive a copy of the Bond Forfeiture Notice mailed by Ms. Wheeler on 12 February 2003.

Based on these findings, the trial court made the following conclusions of law:

1. N.C. Gen. Stat. § 15A-544.4(a) states that the court shall give notice of the entry of forfeiture by mailing a copy of the forfeiture to the defendant and to each surety whose name appears on the Bond.

2. N.C. Gen. Stat. § 15A-544.4 (e) states that notice under this section shall be mailed no later than the thirtieth day after the date on which the forfeiture is entered.

3. N.C. Gen. Stat. § 15A-544.4 (d) states that notice given under this section is effective when the notice is mailed.

4. Pursuant to N.C. Gen. Stat. § 15A-544.4, notice of the entry of judgment was provided to the Surety and the bail agent at the addresses shown on the bond.

5. N.C. Gen. Stat. § 15A-544.4 does not require that the notice given under this section be received by the Surety or bail agent.

6. N.C. Gen. Stat. § 15A-101.1 authorizes the use of electronic signatures for documents, including orders and notices, that deal with criminal process or procedure.

7. The Order of Forfeiture was signed by Judge Paul L. Jones and is valid and enforceable.

8. The certificate of service certifying that the defendant and each surety named on the Bond Forfeiture Notice were mailed a copy of the notice by first class mail was signed by Jeanee M. Wheeler, Assistant Lenoir County Clerk of Court.

9. The defendant was not arrested by the Surety or otherwise served with an order for arrest for the failure to appear on the criminal charges in this case prior to the final judgment date, 21 July 2003.

10. None of the conditions in N.C. Gen. Stat. § 15A-544.5 were satisfied prior to 21 July 2003.

From this order, surety now appeals.

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[1] We make the preliminary observation that surety has failed to preserve the two following arguments for appeal.

First, surety repeatedly argues that N.C.G.S. § 15A-544.8(b)(1) requires the trial court to set aside a forfeiture judgment if the surety demonstrates, by "clear and uncontradicted" evidence, that it did not **actually receive** notice. Surety did not assert this as a ground for relief in its assignments of error as required by N.C.R. App. P. 10(a). Nor did surety assign error to the trial court's Conclusion of Law number 5: "N.C. Gen. Stat. § 15A-544.4 does not require that the notice given under this section be received by the Surety or bail agent." Accordingly, this issue is not properly before us. *See* N.C.R. App. P. 10(a) ("[e]xcept as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]").

Secondly, surety argues that any construction or application of N.C.G.S. § 15A-544.4 not requiring forfeiture notices to be **actually received** by sureties would constitute a violation of its constitutional right to due process. This argument does not correspond to any of surety's assignments of error, as required by N.C.R. App. P. 28. *See* N.C.R. App. P. 28(b)(6) ("Assignments 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."). Nor was this argument presented to the trial court for a ruling as required by N.C.R. App. P. 10(b)(1). Accordingly, this issue is not properly before us and we do not address it. *See State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) ("This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal.")

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[2] We next consider the argument that surety has properly preserved for appellate review. Surety contends that finding of fact number 4 is unsupported by the evidence and therefore does not support conclusion of law number 4. Specifically, surety argues that the actions on the part of the clerk of court did not constitute "mailing" the notice of forfeiture as required by N.C.G.S. § 15A-544.4. On this basis, surety argues that (1) the presumption of regularity generally accorded to the official acts of public officers does not attach, and (2)

that, because the only competent evidence in the record demonstrates surety did not actually receive the notice of forfeiture, the trial court was compelled to conclude that notice of forfeiture was not "given" pursuant to N.C.G.S. § 15A-544.4. We disagree.

N.C.G.S. § 15A-544.8 (2003) sets out the limited circumstances under which a trial court has authority to set aside a judgment of forfeiture:

> (a) Relief Exclusive.—There is no relief from a final judgment of forfeiture except as provided in this section.
>
> (b) Reasons.—The court may grant the defendant or any surety named in the judgment relief from the judgment, for the following reasons, and none other:
>
> (1) **The person seeking relief was not given notice as provided in G.S. 15A-544.4.**
>
> (2) Other extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief.

(emphasis added).

In turn, N.C.G.S. § 15A-544.4 (2003) defines how the "notice" of forfeiture must be given:

> (a) The court shall give notice of the entry of forfeiture by **mailing a copy** of the forfeiture to the defendant and to each surety whose name appears on the bail bond.
>
> (b) The notice **shall be sent by first-class mail** to the defendant and to each surety named on the bond at the surety's address of record.
>
> (c) If a bail agent on behalf of an insurance company executed the bond, the court shall also provide a copy of the forfeiture to the bail agent, but failure to provide notice to the bail agent shall not affect the validity of any notice given to the insurance company.
>
> (d) Notice given under this section is effective when the notice is **mailed**.
>
> (e) Notice under this section shall be **mailed** not later than the thirtieth day after the date on which the forfeiture is entered. If

> notice under this section is not given within the prescribed time, the forfeiture shall not become a final judgment and shall not be enforced or reported to the Department of Insurance.

(emphasis added).

In addition to these statutory provisions, our review is guided by numerous principles of common law. "The well-established rule is that findings of fact made by the court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them[.]" *Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979) (citation omitted). A trial court's conclusions of law, however, are reviewable *de novo*. *Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 325 S.E.2d 493 (1985).

There is no requirement that the clerk of court herself carry notices to the post office in order to "mail" them. *See York v. York*, 271 N.C. 416, 420, 156 S.E.2d 673, 675 (1967) ("The clerk of court in Mecklenburg County would be able to do little except carry letters to the post office if he were physically and personally required to mail them.").

Official actions taken by public officers in North Carolina are accorded the presumption of regularity. *See Huntley v. Potter*, 255 N.C. 619, 628, 122 S.E.2d 681, 687 (1961) (defining the presumption of regularity as "the presumption that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.") (citations and internal quotation marks omitted). Accordingly, the official actions of clerks of court are afforded this presumption of regularity. *See Town of Winston v. Scott*, 80 N.C. App. 409, 415, 342 S.E.2d 560, 564 (1986) ("When the Clerk of Court certifies that the execution of an instrument has been properly proven the presumption is that the document was properly executed."). Thus, for example, the mailing of notices of tax foreclosures, prepared by an assistant clerk of court for mailing through the sheriff's department, is accorded the presumption of regularity. *Osteen*, 297 N.C. at 118, 254 S.E.2d at 163. The presumption of regularity of official acts is a "true presumption rather than an inferential one." *Id.* " '[T]he presumption is only one of fact and is therefore rebuttable. But in order for the [defendant] to rebut the presumption he must produce 'competent, material and substantial' evidence. . . . " *Id.* (quoting *In re Appeal of Amp, Inc.*, 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975)). "Evidence of nonreceipt of the letter by the addressee . . . is some evidence that the letter was not mailed[.]"

Wilson v. Claude J. Welch Builders, 115 N.C. App. 384, 386, 444 S.E.2d 628, 629 (1994) (citations omitted).

Applying these principles and the relevant statutes to the facts of the instant case, we conclude that the trial court's finding of fact, that the clerk of court "mailed" the notice of forfeiture, was supported by sufficient evidence in the record. We further conclude that the trial court correctly concluded that "notice of entry of judgment was provided to the [s]urety . . ." as required by G.S. § 15A-544.4.

Assistant Clerk of Court Wheeler testified not only about the regular practices of the clerk's office for preparing, collecting, and mailing outgoing mail, but also about the specific practices concerning the printing and mailing of forfeiture notices. She explained the office practice for depositing notices into the U.S. mail, and that the mail was picked up from an outgoing bin on a daily basis by an employee responsible for collecting and mailing the outgoing mail. Moreover, the clerk's certificate of service, confirming that the notice had been mailed 21 February 2003, was also before the trial court.

We recognize that the affidavit of surety's employee tended to show that surety did not receive the notice of forfeiture, and that this was relevant to the question of whether or not the clerk had mailed the notice. However, the trial court, after considering this along with the other evidence in the record, could properly conclude that the clerk had given notice in compliance with G.S. § 15A-544.4.

We hold that the evidence in the instant case was sufficient to support the trial court's finding that the assistant clerk of court mailed the notice in compliance with G.S. § 15A-544.4. This finding of fact supports the trial court's conclusion that notice was given according to G.S. § 15A-544.4. The corresponding assignments of error are overruled.

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

DAVID KEITH EVANS, PLAINTIFF v. ANGELA CARTER EVANS, DEFENDANT

No. COA04-544

(Filed 5 April 2005)

1. Child Support, Custody, and Visitation— custody—primary residence

The trial court did not abuse its discretion by granting the parties joint legal custody of their children, with the children's primary residence with plaintiff father, because: (1) there was competent evidence that plaintiff was a primary source of care for the children; (2) although defendant stated she had unpaid help in caring for the children, there was never any specific evidence offered on this point; (3) although finding of fact seventeen erroneously stated that defendant had severed her relationship with her own family when in fact evidence seemed to be to the contrary, the relationship of defendant with her own family has little or no bearing on whether it is in the best interest of the children to place physical custody with plaintiff or defendant, and the trial court's conclusion of law regarding child custody was not dependent upon this finding; (4) there was competent evidence that defendant mother had removed her home from the community where the children have been raised; and (5) by placing the children in the physical custody of plaintiff, the children remained in the home and in the community where they had been raised, their paternal grandparents and one uncle lived close by and are available to assist with the children, and plaintiff demonstrated he is capable of caring for the children on a daily basis.

2. Divorce— divorce from bed and board—post-separation support—indignities

The trial court did not err by granting plaintiff husband's request for divorce from bed and board and by denying defendant wife's claim for post-separation support, because: (1) although defendant contends the trial court lacked jurisdiction to consider defendant's appeal based on a mistake in designating only part of the pertinent order, it is readily apparent that defendant was appealing from the order dated 18 December 2001 which addresses not only child custody and support, but also post-separation support and divorce from bed and board; (2) the evidence supported the findings with respect to the conduct to which defendant subjected plaintiff, and those findings support

its conclusion that such conduct amounts to indignities entitling plaintiff to a judgment of divorce from bed and board; and (3) defendant was not entitled to postseparation support based on her actions of subjecting plaintiff to indignities, her forced removal of plaintiff from the marital home without justification, and her improper behavior.

3. Child Support, Custody, and Visitation— support—amount

The trial court did not abuse its discretion by requiring defendant wife to pay $379.80 per month in child support, because the trial court reviewed the evidence established in Worksheet A for child support obligation and calculated child support according to the presumptive guidelines.

4. Evidence— intercepted sexually explicit emails—stored on home computer

The trial court did not err in an action for divorce from bed and board, postseparation support, and child custody and support by overruling objections to the admission into evidence of intercepted sexually explicit emails between defendant wife and another man, because: (1) the emails were stored on and recovered from the hard drive of the family computer; (2) the emails were not intercepted in violation of the Electronic Communications Privacy Act since they were not intercepted at the time of transmission; and (3) defendant failed to preserve the issue of the sufficiency of the foundation for admission of this evidence.

Appeal by defendant from order entered 18 December 2001 by Judge Charles W. Wilkinson, Jr. in Granville County District Court. Heard in the Court of Appeals 14 February 2005.

Currin & Dutra, LLP, by Amy R. Edge, Thomas L. Currin and Lori A. Dutra, for plaintiff-appellee.

The Sandlin Law Firm, by Deborah Sandlin, for defendant-appellant.

MARTIN, Chief Judge.

In February 2001, plaintiff filed a complaint against defendant seeking divorce from bed and board, child custody and support, writ of possession, equitable distribution and attorney's fees. Defendant filed an answer denying plaintiff's allegations and asserting a coun-

terclaim for divorce from bed and board, custody and child support, alimony and post separation support, equitable distribution, possession of the marital home, dismissal of plaintiff's complaint, and attorney's fees. A series of motions and orders regarding temporary custody and child support were filed prior to the hearing on 7 August 2001.

The evidence tended to show that the parties were married on 11 February 1989 and two children were born of the marriage, Brent, born in 1995, and Erica, born in 1998. The parties separated in February 2001.

On 18 December 2001, the trial court entered an order awarding plaintiff a divorce from bed and board, denying defendant's motion for post-separation support, granting the parties joint legal custody of the minor children with the primary physical residence to be with plaintiff, and ordering that defendant pay $379.80 per month child support. Defendant appealed from this order and on 17 June 2003 the Court of Appeals, finding the trial court's order did not resolve the parties' claims for equitable distribution and attorney's fees, dismissed the appeal as being interlocutory. *Evans v. Evans*, 158 N.C. App. 533, 581 S.E.2d 464 (2003). The parties proceeded to mediation on 18 November 2003, resolving the issues of equitable distribution and alimony. Defendant now appeals from the trial court's order entered 18 December 2001 on the issues not resolved in mediation: divorce from bed and board, post-separation support and child custody and support.

I.

[1] The first issue on appeal is whether the trial court abused its discretion in granting the parties joint legal custody of the children, with the children's primary residence with the plaintiff. The decision of the trial court as to child custody "should not be upset on appeal absent a clear showing of abuse of discretion." *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97 (2000). Because the presiding judge "has the unique opportunity of seeing and hearing the parties, witnesses and evidence at trial," *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982), the court's findings of fact are conclusive on appeal if there is competent evidence to support them. *Id.* at 646, 290 S.E.2d at 668; *Dixon v. Dixon*, 67 N.C. App. 73, 76, 312 S.E.2d 669, 671-72 (1984). Conclusions of law, however, are reviewable *de novo*. *Browning*, 136 N.C. App. at 423, 524 S.E.2d at 98. In making the custody determination, the court "shall consider all relevant factors" and

grant custody to the party who will "best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2003).

Defendant contends the trial court erred in making the following findings of fact because they were not supported by the evidence:

> 7. The children of the parties have lived their entire lives at the home at 408 High Street, Oxford, N.C. 27565 and are enrolled in school and pre-school programs in Oxford, N.C.
>
> 8. The plaintiff has been a primary source of care and tuition for the minor children since their birth, and has a significant extended family in the immediate area of Granville County. The Plaintiff has demonstrated his desire and ability to provide excellent day to day care for the children and to meet their needs for essential services on a daily routine ongoing basis. The children spend significant time with their paternal grandparents and have healthy and established relationships with relatives and friends in Oxford.
>
> . . .
>
> 11. The defendant has voluntarily substantially increased her living expenses since the time of separation.
>
> . . .
>
> 17. The defendant has severed her relationships with the defendant's family, and has removed her home from the community where the children have been raised.
>
> . . .
>
> 19. The defendant has no family or support system in Raleigh.

At trial, plaintiff testified that the couple moved to High Street, where he continues to live, just a few months after they were married. Although defendant received temporary custody of the children and lived with them in Raleigh, plaintiff kept the children at his home on High Street in Oxford, from Friday at 3:00 p.m. until Sunday nights at 7:30 and then again from Monday at 3:00 p.m. until Tuesday morning at 7:30. Because the children lived in Oxford for a significant amount of time each week and on a regular basis, there is substantial evidence they lived their "entire lives in Oxford." According to plaintiff, Brent attended Wee School, a pre-school in Oxford, for four years. Brent was enrolled to start public school at West Oxford Elementary in August 2001. Erica started Wee School in the fall of 2000.

Accordingly, there was sufficient evidence supporting finding of fact number seven.

Defendant misconstrues the first statement in finding of fact number eight which states that "plaintiff has been a primary source of care" for the children. It does not state that he has been *the* primary care giver. Plaintiff has indeed been a primary source of care for the children as he cared for the children while defendant worked Friday through Monday at Hudson Belk, while defendant traveled to fabric shows, and following their separation, while the children stayed with him. Plaintiff bathed his children, fed them, played with them, and got up in the middle of the night with them. Plaintiff's parents, who both lived in Oxford and had a close relationship with plaintiff and his children, testified they would continue to help plaintiff care for the children. We find competent evidence to support finding of fact number eight.

Defendant testified that her expenses had increased by $1600.00 since moving to Raleigh. Although defendant stated she had unpaid help in caring for the children, there was never any specific evidence offered on this point. Her parents, who live in Knoxville, Tennessee, are unable to help except when they visit approximately three times per year. Findings of fact numbered eleven and nineteen are supported by competent evidence and are therefore conclusive.

With respect to finding of fact number seventeen, no evidence was presented that defendant had severed her relationship with her own family; in fact, the evidence seemed to be to the contrary. There was evidence that defendant had withdrawn from plaintiff's family and it appears that the trial court's reference to defendant's family in the finding may have been inadvertent. In any event, the relationship of defendant with her own family has little or no bearing on whether it is in the best interest of the children to place physical custody with plaintiff or defendant, and the trial court's conclusion of law regarding child custody was not dependent upon the finding. The second portion of finding of fact number 17, that "defendant has removed her home from the community where the children have been raised," is supported by competent evidence. Defendant gave her current address not as Oxford, but as Raleigh, supporting the finding that she "has removed her home from the community where the children have been raised."

By placing the children in the physical custody of plaintiff, the children remained in the home and in the community where they had

been raised. Their paternal grandparents and one uncle live close by and are available to assist with the children. Plaintiff demonstrated he is capable of caring for the children on a daily basis. The evidence presented at trial supports the trial court's conclusion of law that it is in the best interest of the children for plaintiff to have primary physical custody of the couple's minor children.

II.

[2] Next, defendant asserts the trial court erred in granting plaintiff's request for divorce from bed and board and denying her claim for post-separation support. She also contends it was error for the court to consider marital fault as a matter of law and to find plaintiff suffered indignities rendering his life burdensome and intolerable.

First, we address plaintiff's assertion that this Court lacks jurisdiction to review the trial court's denial of post-separation support and the granting of plaintiff's request for a divorce from bed and board. In the Notice of Appeal, filed on 12 December 2003, defendant gives notice from "the Order entered on December 18, 2001 in the District Court of Granville County, denying Defendant's claim for child custody and child support." However, "a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424 (1990) (emphasis in original) (citations omitted). Here, it is readily apparent that defendant is appealing from the order dated 18 December 2001 which addresses not only child custody and support but also post-separation support and divorce from bed and board. Therefore, this Court has jurisdiction to consider defendant's appeal of these additional issues.

Next we address the court's findings that defendant subjected plaintiff to indignities making his life burdensome and his condition intolerable. Our courts have declined to specifically define "indignities," *Hall v. Mabe*, 77 N.C. App. 758, 763, 336 S.E.2d 427, 430 (1985), preferring instead to examine the facts on a case by case basis. *Barwick v. Barwick*, 228 N.C. 109, 112, 44 S.E.2d 597, 599 (1947). Indignities consist of a course of conduct or repeated treatment over a period of time including behavior such as "unmerited reproach, studied neglect, abusive language, and other manifestations of settled

hate and estrangement." *Chambless v. Chambless*, 34 N.C. App. 720, 722, 239 S.E.2d 624, 625 (1977) (citation omitted).

Testimony at trial tended to show that defendant had condoms in her purse, even though she and plaintiff had not used a condom for about twelve years and the parties were no longer engaging in sexual relations. Defendant engaged in sexually explicit e-mails with a physician in Chapel Hill. She had plaintiff removed from the marital home on two occasions by initiating Chapter 50B domestic violence proceedings against him which were subsequently dismissed. When defendant left the house as a result of a court order, she hid the computer, wrapped in bubble wrap and placed under clothing, in the attic of the marital home. Plaintiff returned to the house after defendant was ordered to leave, but "[i]t looked like a hurricane went through it, doors off the hinges in the bathroom, closet doors laying in the floor, trash everywhere on the floor, dust this thick on the molding behind the beds and all." The cat's litter box had not been cleaned for two or three weeks and there were dead, smelly fish in the fish tank.

During the last four or five years of their marriage, defendant was hostile towards plaintiff and slapped him approximately fifteen or twenty times. Without telling plaintiff exactly where she was going, defendant took three trips, for three or four nights each, during the eighteen months preceding separation.

Grounds for divorce from bed and board include, *inter alia*, when either party "[o]ffers such indignities to the person of the other as to render his or her condition intolerable and life burdensome." N.C. Gen. Stat. § 50-7(4) (2003). The evidence fully supports the trial court's findings with respect to the conduct to which defendant subjected plaintiff, and those findings support its conclusion that such conduct amounts to indignities. Therefore, plaintiff was entitled to a judgment of divorce from bed and board. The assignment of error is overruled.

Post-separation support is "spousal support to be paid until the earlier of either the date specified in the order of postseparation support, or an order awarding or denying alimony." N.C. Gen. Stat. § 50-16.1A(4) (2003). A dependant spouse is entitled to postseparation support if the court finds "the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay." N.C. Gen. Stat. § 50-16.2A(c)) (2003). Factors such as the parties' standard of living, income, income earning abilities, debt, living expenses and legal obli-

gations to support other persons are considered in determining the financial needs of the parties. N.C. Gen. Stat. § 50-16.2A(b) (2003). In addition, the judge shall consider marital misconduct by the dependent spouse, occurring prior to or on the date of separation, and also any marital misconduct by the supporting spouse. N.C. Gen. Stat. § 50-16.2A(d) (2003). Acts of "marital misconduct" include sexual acts, N.C. Gen. Stat. § 14-27.1(4) (2003), voluntarily engaged in with someone other than a spouse, N.C. Gen. Stat. § 50-16.1A(3)(a) (2003) and "[i]ndignities rendering the condition of the other spouse intolerable and life burdensome." N.C. Gen. Stat. § 50-16.1A(3)(f) (2003).

The only findings made in reference to defendant being a dependant spouse was in finding of fact number twenty which stated, "During the marriage of the parties, the plaintiff worked one or more jobs, providing the majority of the income to the family. The defendant also worked providing income to the family." The findings did include, however, that defendant was now gainfully employed. In addition, there was evidence, as we have noted, of marital misconduct amounting to indignities.

The trial court then made the following conclusion of law:

> 3. Prior to their separation the plaintiff was a supporting spouse, however, because of the actions of the defendant in subjecting the plaintiff to indignities, her forced removal of the plaintiff from the marital home without justification, and her improper behavior she is not entitled to post separation support.

This conclusion adequately explains that the trial court declined to grant post-separation support, pursuant to N.C. Gen. Stat. § 50-16.2A(d), because of marital misconduct.

III.

[3] Defendant asserts the trial court erred in requiring her to pay $379.80 per month in child support. The amount of child support awarded is in the discretion of the trial judge and will not be disturbed upon appeal absent a showing of abuse of discretion. *Dixon*, 67 N.C. App. at 79, 312 S.E.2d at 673.

The trial court, in its findings of fact, incorporated by reference "Worksheet A, Child Support Obligation." Furthermore, at trial, the following exchange occurred:

> COURT: . . . And do you all want to figure out what the child support guidelines would be through—after you get the income.

MR. CURRIN: We will do that, Your Honor. We'll draw that and send it to Mr. Williamson for his review before we present it to the Court.

COURT: All right.

Defendant did not object to this agreement.

Worksheet A establishes the monthly gross income of each party as well as the expenses as related to the children. After reviewing the evidence presented in Worksheet A, and calculating child support according to the presumptive guidelines, the court determined that defendant should pay $379.80 per month in child support. The trial court did not abuse its discretion in determining defendant's child support obligations.

IV.

[4] In defendant's last argument, she contends the trial court committed reversible error in overruling timely and continuing objections to the admission into evidence of intercepted sexually explicit e-mails between defendant and Dr. Mark Johnson, a Chapel Hill physician. Defendant claims the e-mails, private communications received from Dr. Johnson, were illegally intercepted pursuant to 18 U.S.C. § 2511(1)(c) and (d) (2000), which prohibits the disclosure or use of any electronic communication that was intercepted in violation of the Electronic Communications Privacy Act (ECPA). However, most courts examining this issue have determined that interception "under the ECPA must occur contemporaneously with transmission." *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 113 (3d Cir., 2004). Here, the e-mails were stored on, and recovered from, the hard drive of the family computer. The e-mails were not intercepted at the time of transmission. Therefore, we hold the trial court did not admit the evidence in violation of the ECPA.

At oral argument, defendant also contended that an insufficient foundation had been established for admission of the evidence. This argument, however, was not preserved by defendant's assignment of error, which stated only that the "e-mails were obtained in violation of state and federal law." N.C. R. App. P. 10(a) (2004); *see Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991) (scope of review limited to those issues raised by the assignments of error contained in the record on appeal).

The order from which defendant appeals is affirmed.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. SANTIAGO MONTEZ HOUSTON

No. COA04-622

(Filed 5 April 2005)

1. **Appeal and Error— preservation of issues—failure to argue or set out in brief**

Defendant's assignments of error numbers one, five, six, seven, eight, nine, and ten are deemed abandoned because they are not set out or argued in defendant's brief as required by N.C. R. App. P. 28(b)(6).

2. **Search and Seizure— motion to suppress evidence—contents of safe in bedroom—voluntariness of consent**

The trial court did not err in a trafficking in cocaine by possession of more than 200 but less than 400 grams case by denying defendant's motion to suppress evidence found in the safe in his bedroom, because: (1) there was ample competent evidence in the record to show defendant, although in custody at the time consent was requested, voluntarily consented to the search of the bedroom; and (2) physical evidence obtained as a result of statements by a defendant made prior to receiving the necessary Miranda warnings need not be excluded.

3. **Evidence— prior crimes or bad acts—uncharged drug dealings**

The trial court did not err in a trafficking in cocaine by possession of more than 200 but less than 400 grams case by allowing a confidential police informant's testimony as to prior uncharged drug dealings with defendant, because: (1) the testimony was offered to show intent, knowledge, plan or scheme as well as to explain the relationship between defendant and the informant; (2) an appropriate limiting instruction was given to the jury both at the time the informant testified and in the jury instructions; and (3) the similarities between the charged

offense and the prior transactions testified to by the informant are numerous.

4. Confessions and Incriminating Statements— post-Miranda statements—voluntariness

The trial court did not err in a trafficking in cocaine by possession of more than 200 but less than 400 grams case by allowing the introduction of defendant's incriminating post-Miranda statements that were allegedly induced by the hope of some benefit, because: (1) defendant was a thirty-year-old high school graduate with significant knowledge and experience with the criminal justice system based upon his numerous prior arrests, defendant was advised of and waived his Miranda rights both orally and in writing, and defendant did not appear scared or intimidated during the one hour to one hour and fifteen minutes interview and at no time asked for a break or to speak to an attorney; (2) the officers did not discuss what the specific rewards or benefits of cooperation might be, nor did they tell defendant that his sentence would be reduced or the amount of his release bond was dependent on his cooperation; and (3) a suggestion of hope created by statements of law enforcement officers that they would talk to the District Attorney regarding defendant's cooperation where there was no indication that preferential treatment might be given in exchange for cooperation did not render the inculpatory statements involuntary.

Appeal by defendant from judgment entered 19 May 2003 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 January 2005.

Attorney General Roy Cooper, Attorney General by Special Deputy Attorney General W. Dale Talbert, for the State.

Brian Michael Aus, for the defendant-appellant.

JACKSON, Judge.

Defendant was charged with trafficking in cocaine by possession of more than 200, but less than 400, grams. Defendant entered a plea of not guilty. A jury returned a verdict finding defendant guilty of the offense charged. Defendant appeals from the verdict and the judgment entered thereon.

At trial the State's evidence tended to show that defendant was arrested on 4 March 2002 in the parking lot of his apartment building

after a confidential police informant, Pernice Davis ("Davis"), made a controlled purchase of approximately nine ounces of cocaine from him. Immediately after his arrest, officers and agents took the handcuffed defendant to an apartment on the third floor of the apartment building. Occupant Anthony General allowed them into the apartment. Defendant consented to a search of a back bedroom and attached bathroom that were identified as his. Defendant was not advised of his *Miranda* rights prior to being asked for, and consenting to the search of his apartment, nor was he advised that he could refuse to give consent. A small, locked safe was located in the bedroom. Defendant gave the officers the combination to the safe at their request. Upon opening the safe, the officers discovered a handgun, approximately 130 grams of cocaine and several thousand dollars in cash. Defendant was present when the safe was opened by the officers as well as when its contents were removed. At no time did defendant say or do anything to indicate a revocation of his consent.

After searching the apartment and securing the evidence, the officers transported defendant to the police station for an interview. After being advised of, and waiving, his *Miranda* rights, both orally and in writing, defendant admitted to the officers that he had purchased or sold drugs multiple times in the past, including prior transactions with Davis.

Prior to trial, the trial court granted Defendant's motion to suppress all incriminating statements made prior to being read his *Miranda* rights. None of the suppressed statements were submitted to the jury at trial. The trial court denied defendant's motion to suppress the physical evidence obtained at the apartment prior to his being advised of his *Miranda* rights. The handgun, cocaine and money found in the safe in defendant's bedroom were submitted to the jury by the State in its case in chief. The trial court also denied defendant's motion to suppress post-*Miranda* statements made by defendant. Defendant did not testify on his own behalf at trial.

At trial, the court allowed Davis to testify regarding his prior, uncharged drug transactions with defendant over defendant's objection that such testimony constituted impermissible character evidence that was unduly prejudicial to defendant. The trial court allowed Davis' testimony finding that it was being introduced for the purpose of showing "intent, knowledge, common plan or scheme; and also, to explain the nature of the relationship between Pernice Davis

and the defendant." A limiting instruction to that effect was given to the jury by the trial judge at the time the testimony was presented as well as in the charge to the jury prior to deliberations.

Following the presentation of all evidence, the jury found defendant guilty of trafficking by possessing more than two hundred, but less than four hundred, grams of cocaine. Defendant was sentenced to an active term of imprisonment of a minimum of seventy months and a maximum of eighty-four months in the custody of the North Carolina Department of Correction.

[1] Defendant appeals from the conviction and judgment and assigns as error the trial court's: (1) denying defendant's motion to suppress testimony of Davis regarding statements ostensibly made by defendant and contained in an audio tape made by law enforcement; (2) allowing Davis' testimony as to prior uncharged drug dealings with defendant; (3) allowing into evidence statements ostensibly made by defendant to law enforcement while in custody; (4) allowing into evidence cocaine seized from a safe in defendant's bedroom; (5) allowing the State to exercise peremptory challenges in a racially discriminatory manner; (6) denying defendant's motion for mistrial; (7) allowing Davis' testimony regarding statements ostensibly made by defendant on the date of the instant offense; (8) denying defendant's motion to dismiss for insufficient evidence; (9) jury instruction defining "knowledge" for the purpose of trafficking in cocaine; and (10) refusing to instruct the jury as to entrapment. N.C.R. App. P. 28(b)(6) provides that "[a]ny assignments of error not set out in the appellant's brief, or in support of which no reason or judgment is stated or authority cited, will be taken as abandoned." Therefore, we find that defendant's assignments of error numbers one, five, six, seven, eight, nine and ten are deemed abandoned as they are not set out or argued in defendant's brief.

Defendant successfully presented the following issues for review on appeal: (2) whether the trial court erred in allowing Davis' testimony regarding prior uncharged drug transactions with defendant; (3) whether the trial court erred by allowing the introduction of defendant's post-Miranda statements; and (4) whether the trial court erred by denying his motion to suppress evidence found in the safe in his bedroom.

[2] In an appeal of a denial of a motion to suppress, our review is limited to whether the trial court's findings of fact are supported by competent evidence. If competent evidence is found to exist, the findings

of fact are binding on appeal. We must then limit our review to whether the findings of fact support the trial court's conclusions of law. *State v. Cabe*, 136 N.C. App. 510, 512, 524 S.E.2d 828, 830, *appeal dismissed*, 351 N.C. 475, 543 S.E.2d 496 (2000) (quoting *State v. Corpening*, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993) (internal citations omitted)).

Here, the trial court allowed the evidence obtained from the safe on the basis that its discovery was the result of a valid consent search of defendant's bedroom. The only requirement for a valid consent search is the voluntary consent given by a party who had reasonably apparent authority to grant or withhold such consent. N.C. Gen. Stat. §§ 15A-221-222 (2003). Neither our state law nor federal law requires that any specific warning be provided to the party whose property is to be searched prior to obtaining consent for the consent to be valid. *Schneckloth v. Bustamonte*, 412 U.S. 218, 234, 36 L. Ed. 2d 854, 867 (1973); *State v. Vestal*, 278 N.C. 561, 579, 180 S.E.2d 755, 767 (1971), *cert. denied*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973).

In determining whether consent was given voluntarily this Court must look at the totality of the circumstances. *Schneckloth*, 412 U.S. at 226, 36 L. Ed. 2d at 862; *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994). Here, there is ample competent evidence in the record to show defendant, although obviously in custody at the time consent was requested, voluntarily consented to the search of the bedroom. In fact, defendant does not contest the fact he gave verbal consent to search the bedroom and the safe contained therein. There is no evidence in the record, and defendant makes no argument, that the consent was not made voluntarily. The evidence presented tended to show defendant did not appear nervous or scared, was "cooperative," led the officers to the bedroom, provided the combination to the safe at their request, was not threatened by the officers and was present throughout the search and gave no indication he wished to revoke his consent.

Defendant argues the evidence found in the safe should have been suppressed because it was discovered as the result of his pre-*Miranda* statement providing the officers with the combination to the safe. The statements themselves made by defendant prior to being advised of his *Miranda* rights, including his statement regarding the combination to the safe, were properly suppressed at trial. However, our Supreme Court has held that physical evidence obtained as a result of statements by a defendant made prior to receiving the necessary *Miranda* warnings need not be excluded.

State v. May, 334 N.C. 609, 612, 434 S.E.2d 180, 182 (1993), *cert. denied*, 510 U.S. 1198, 127 L. Ed. 2d 661 (1994), *see, State v. Goodman*, — N.C. App. —, 600 S.E.2d 28, 30-31, *disc. review denied*, 359 N.C. 193, N.C. LEXIS 1262 (N.C. Ct. App. 2004) (holding that *May* is still controlling in North Carolina in light of *United States v. Patane*, — U.S. —, 159 L. Ed. 2d 667, 124 S. Ct. 2620 (2004) in which the U.S. Supreme Court held that the "fruit of the poisonous tree" doctrine did not apply to physical evidence discovered as a result of statements made by the defendant when no *Miranda* warning was given). We find the trial court's holding that the contents of the safe were discovered as the result of a valid consent search to be supported by competent evidence, and therefore conclude that there was no error in the admission of the physical evidence found in the safe.

[3] Defendant next contends the trial court erred in allowing the testimony of Davis regarding prior, uncharged drug transactions between himself and defendant. Defendant argues the only purpose for introducing this testimony was to impugn the character of defendant which is a purpose specifically prohibited by N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003).

"Rule 404(b) is a rule of '*inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.' " *State v. Scott*, 343 N.C. 313, 330, 471 S.E.2d 605, 615 (1996) (quoting *State v. Weathers*, 339 N.C. 441, 448, 451 S.E.2d 266, 270 (1994)) (emphasis in original) (internal citations omitted). Examples of purposes for which evidence of other crimes, wrongs, or acts are admissible include: "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).

Here, the trial court found Davis' testimony regarding the prior, uncharged drug dealings was offered to show intent, knowledge, common plan or scheme as well as to explain the relationship between Davis and the defendant. An appropriate limiting instruction to that effect was given to the jury both at the time Davis testified and in the jury instructions.

Once the purpose for introducing the evidence has been found to be proper under Rule 404(b), the court must then determine whether

the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403; *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). The probative value of evidence of prior acts or crimes is determined by the similarity and temporal proximity. *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 489 (1989), *vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). The determination of whether the probative value of the evidence is substantially outweighed by unfair prejudice is within the sound discretion of the court and will only be reversed on appeal if the ruling is found to be so arbitrary that it could not have resulted from a reasoned decision. *State v. Bidgood*, 144 N.C. App. 267, 272, 550 S.E.2d 198, 202, *cert. denied*, 354 N.C. 222, 549 S.E.2d 647 (2001).

The similarities between the charged offense and the prior transactions testified to by Davis are numerous. Defendant and Davis were parties to both the charged transaction and the prior ones; the prior transactions primarily involved sales of cocaine; on at least eight occasions the same amount of cocaine was purchased from defendant as was purchased on 4 March 2002 for the same price and the majority of the previous transactions occurred in the same location (the parking lot of defendant's apartment) as the charged offense. Additionally, the last transaction prior to the charged offense was conducted only approximately four months prior to the date of this offense. Based upon the foregoing, we find that the evidence was admitted for a proper purpose and that the trial court did not act arbitrarily in allowing Davis' testimony regarding the prior drug transactions.

[4] Finally, defendant argues the trial court erred in allowing evidence of incriminating post-Miranda statements that were allegedly induced by the hope of some benefit and therefore not made voluntarily. The trial court found the statements were made voluntarily after defendant had been advised of his *Miranda* rights and were admissible. The determination of whether defendant's statements are voluntary "is a question of law and is fully reviewable on appeal." *State v. Greene*, 332 N.C. 565, 580, 422 S.E.2d 730, 738 (citing *State v. Barlow*, 330 N.C. 133, 409 S.E.2d 906) (1992).

An in-custody statement that is made voluntarily and understandingly is admissible. *State v. Schneider*, 306 N.C. 351, 355, 293 S.E.2d 157, 160 (1982) (citing *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975)). Like the test for whether a consent to search was given voluntarily, discussed *supra*, the test for determining if a statement

was made voluntarily requires the court to look at the totality of the circumstances. *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983). Our Supreme Court has identified several factors to be considered in evaluating whether a statement was made voluntarily. These factors include: whether the defendant was in custody; whether he was deceived; whether his Miranda rights were honored; whether he was held incommunicado; the length of his interrogation; if there were physical threats or shows of force; the familiarity defendant had with the criminal justice system; whether promises were made to obtain the statement; and the defendant's mental condition. *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (citing *Jackson*, 308 N.C. at 582, 304 S.E.2d at 153) (1994). Statements that were induced by hope or fear have consistently been held by our Supreme Court to have been coerced psychologically. *Greene*, 332 N.C. at 581, 422 S.E.2d at 739.

Of the factors identified by the North Carolina Supreme Court, defendant bases the argument that his statement was coerced solely on the consideration that promises were made to obtain the statement. As the appropriate review of the voluntariness of a statement is the totality of the circumstances, we will address the evidence in the record pertaining to the other factors briefly. At the time of questioning, defendant was a thirty year-old high school graduate with significant knowledge and experience with the criminal justice system based upon his numerous prior arrests. The interview took between one hour and one hour and fifteen minutes during which time defendant was not threatened nor were any shows of force made. Defendant was advised, orally and in writing, of his Miranda rights and he waived those rights, both orally and in writing. Defendant did not appear scared or intimidated during the interview and at no time asked for a break or to speak to an attorney.

Turning to the question of whether the statement was induced by promises or hope of benefit, the evidence shows that the officers, in discussing defendant's situation in general: advised defendant of the charge, the possible sentence he could receive, the need for him to be truthful and help himself out by cooperating; and told defendant that if he cooperated his cooperation would be related to the District Attorney's Office and the judge. The officers did not discuss what the specific rewards or benefits of cooperation might be, nor did they tell defendant that his sentence would be reduced or the amount of his release bond was dependent on his cooperation.

A suggestion of hope created by statements of law enforcement officers that they will talk to the District Attorney regarding a suspect's cooperation where there is no indication that preferential treatment might be given in exchange for cooperation does not render inculpatory statements involuntary. *State v. Branch*, 306 N.C. 101, 109-10, 291 S.E.2d 653, 659 (1982). Here, the officers made general statements that they would advise the District Attorney and judge of the defendant's cooperation and did not make any representations regarding what, if any, benefit defendant's cooperation would bring.

Based upon the foregoing evidence we agree with the trial court's finding the defendant's post-Miranda statements were made voluntarily. We hold that the trial court did not err in admitting defendant's post-*Miranda* statements.

No Error.

Judges HUNTER and BRYANT concur.

IN THE MATTER OF: L.E.B., K.T.B.

No. COA04-463

(Filed 5 April 2005)

Termination of Parental Rights— failure to enter order within thirty days from date of hearing

The trial court erred by failing to enter the order terminating respondent mother's parental rights over the minors within thirty days from the date of the hearing as required by N.C.G.S. §§ 7B-1109(e) and 7B-1110(a), and the case is remanded for a new hearing. A delay in excess of six months to enter the adjudication and disposition order terminating parental rights was highly prejudicial to all parties involved.

Judge TIMMONS-GOODSON concurring.

Appeal by respondent mother from order entered 18 September 2003 by Judge J. H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 2 December 2004.

Julia Talbutt, for petitioner-appellee New Hanover County Department of Social Services.

Regina Floyd-Davis, for petitioner-appellee Guardian ad Litem.

Michelle FormyDuval Lynch, for respondent-appellant.

TYSON, Judge.

Cora M. Brown ("respondent-mother") appeals the trial court's order terminating her parental rights over her children L.E.B. and K.T.B. (collectively, "the minors"). We reverse and remand for a new hearing.

I. Background

Respondent-mother and Larry E. Brown ("respondent-father"), (collectively, "respondents"), are the parents of L.E.B. and K.T.B.

A. Minor L.E.B.

L.E.B. was born on 8 December 1991 with a cleft palate and congenital heart defect. The New Hanover County Department of Social Services ("DSS") provided respondents with in-home services to help care for L.E.B.'s medical needs. By February 1992, L.E.B. required hospitalization due to weight loss and "failing to thrive." L.E.B. recovered under hospital care and returned home. However, he again became sick. On 11 March 1992, DSS received nonsecure custody of L.E.B. following its petition to the trial court. On 26 March 1992, the trial court conducted a hearing to consider DSS's petition to adjudicate L.E.B. neglected and dependent. The trial court found: (1) respondent-mother was mentally limited, intellectually challenged, and did not understand the level of care L.E.B. required; and (2) respondent-father abuses alcohol. The trial court concluded as a matter of law that L.E.B. was neglected and ordered that: (1) DSS place L.E.B. in foster care; (2) respondents obtain safe and adequate housing; (3) respondent-father submit to substance abuse treatment; and (4) respondents undergo psychological evaluations. Reunification efforts between DSS and respondents tended to show that L.E.B. failed to receive adequate care at respondents' home.

B. Minor K.T.B.

K.T.B. was born on 8 January 1994 with a heart murmur, a defective heart valve, and velo-cardio facial syndrome. On 25 January 1994,

DSS filed a petition with the trial court alleging she was a neglected and dependent child based on the adjudication of her brother, L.E.B. The trial court concluded as a matter of law: (1) K.T.B. was dependent and neglected under N.C. Gen. Stat. § 7A-517; (2) her best interests would be served by DSS receiving legal custody; and (3) respondents would maintain physical custody with close supervision by DSS.

Upon review in November 1994, the trial court found that respondents were not meeting the needs of K.T.B. on a regular, consistent, and adequate basis. DSS was granted legal and physical custody of K.T.B. The trial court also ordered reunification efforts to continue between respondents and both minors.

C. Minors L.E.B. and K.T.B.

Review orders were entered on June 1995, June 1996, June 1998, June 1999, January 2000, August 2000, and February 2001. After each review, the trial court ordered the minors to remain in foster care and respondents to continue visitation. The final order dated 1 February 2001 ordered DSS to pursue terminating respondents' parental rights.

In accordance with the 1 February 2001 order, DSS petitioned the trial court on 22 January 2002 to terminate respondents' parental rights to the minors. Hearings were held in February and March 2003.

On 26 September 2003, over 180 days after the hearings, the trial court entered its termination and adjudication order. It concluded as matters of law that: (1) "respondents willfully left the children in foster care for more than 12 months without showing or making reasonable progress in correcting the conditions that led to the removal of the children;" (2) "the children are neglected children and that further conditions of neglect continue to persist such that the children would again be neglected were they returned to the home of their parents;" and (3) "it is in the best interests of the [minors] that the parental rights of [respondents] be terminated." The trial court ordered respondents' parental rights terminated to both children. Respondent-mother appeals. Respondent-father did not appeal.

II. Issues

The issues on appeal are whether: (1) the trial court erred by failing to enter a signed order terminating respondent-mother's parental rights within thirty days of the hearing as required by N.C.

Gen. Stat. § 7B-1109(e) and § 7B-1110(a); and (2) clear, cogent, and convincing evidence supported the trial court's findings of neglect and respondent-mother's failure to make reasonable progress towards reunification.

III. N.C. Gen. Stat. § 7B-1109 and § 7B-1110

Respondent-mother argues the trial court erred in terminating her parental rights over the minors by failing to comply with the time limitations imposed by N.C. Gen. Stat. § 7B-1109(e) and § 7B-1110(a). We agree.

N.C. Gen. Stat. § 7B-1109 outlines the process and procedure concerning the adjudication of a termination of parental rights hearing. It provides in part, "[t]he adjudicatory order *shall* be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing." N.C. Gen. Stat. § 7B-1109(e) (2003) (emphasis supplied).

Following the trial court's adjudication:

> Should the court determine that any one or more of the conditions authorizing a termination of parental rights of a parent exist, the court *shall* issue an order terminating the parental rights of such parent . . . . Any order *shall* be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

N.C. Gen. Stat. § 7B-1110(a) (2003) (emphasis supplied). "This Court has 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) (citations omitted).

The termination of parental rights hearing for respondents was held on 17 February 2003, 18 February 2003, 26 February 2003, and 19 March 2003. The subsequent adjudication and disposition order terminating respondents' parental rights was reduced to writing, signed, and entered on 18 September 2003, more than 180 days later. This late entry is a clear and egregious violation of both N.C. Gen. Stat. § 7B-1109(e), N.C. Gen. Stat. § 1110(a), and this Court's well-established interpretation of the General Assembly's use of the word "shall." *Id.* at 713, 547 S.E.2d at 147.

This Court has previously stated that absent a showing of prejudice, the trial court's failure to reduce to writing, sign, and enter a ter-

mination order beyond the thirty day time window may be harmless error. *See In re J.L.K.*, 165 N.C. App. 311, 315, 598 S.E.2d 387, 390 (2004) (order entered eighty-nine days after the hearing), *disc. rev. denied*, 359 N.C. 68, 604 S.E.2d 314 (2004). This holding has also been applied to adjudication and disposition orders involving custody proceedings under N.C. Gen. Stat. § 7B-807(b) and § 7B-905(a). *See In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 172 (2004) (no prejudice shown on adjudication and disposition orders entered over forty days after the hearing), *disc. rev. denied*, 359 N.C. 189, 606 S.E.2d 903 (2004). The reasoning in *In re E.N.S.* was applied to petitions seeking termination of parental rights under N.C. Gen. Stat. § 7B-907(e). *See In the Matter of B.M., M.M., An.M., and Al.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005) (although no prejudice was shown, we stated, "[w]e strongly caution against this practice as it defeats the purpose of the time requirements specified in the statute, which is to provide parties with a speedy resolution of cases where juvenile custody is at issue.").

Although respondent-mother acknowledges the precedents on timeliness, she argues that more than six months is an excessive delay to enter the order and prejudiced her by adversely affecting: (1) both the family relationship between herself and the minors *and* the foster parent and the minors; (2) delaying subsequent procedural requirements; and (3) the finality of the matter.

We agree with respondent-mother's argument that a delay in excess of six months to enter the adjudication and disposition order terminating her parental rights is *highly* prejudicial to all parties involved. Respondent-mother, the minors, and the foster parent did not receive an immediate, final decision in a life altering situation for all parties. Respondent-mother could not appeal until "entry of the order." *See* N.C. Gen. Stat. § 7B-1113 (2003). If adoption becomes the ordered permanent plan for the minors, the foster parent must wait even longer to commence the adoption proceedings. The minors are prevented from settling into a permanent family environment until the order is entered and the time for any appeals has expired.

Further prejudice is shown by the fact that L.E.B., born on 8 December 1991, is thirteen years old, and K.T.B., born on 8 January 1994, is ten years old. Children in the minors' age group traditionally have faced difficulty finding adoptive homes, as many prospective parents seeking to adopt limit their search to infants or younger children.

The delay of over six months to enter the adjudication and disposition order terminating respondent-mother's parental rights prejudiced all parties, not just respondent-mother. *See In re E.N.S.*, 164 N.C. App. at 153, 595 S.E.2d at 172 ("While we have located no clear reasoning for [the thirty day time limit], 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."). Although *In re E.N.S.* involved N.C. Gen. Stat. § 7B-807(b) and § 7B-905(a), the General Assembly added the same thirty day time limitation to both N.C. Gen. Stat. § 7B-1109(e) and § 7B-1110(a) during the same legislative session. *See* 2001 N.C. Sess. Laws ch. 208, § 17, § 22, and § 23. The logic applied in *In re E.N.S.* towards N.C. Gen. Stat. § 7B-807(b) and § 7B-905(a) supports our analysis of N.C. Gen. Stat. § 7B-1109(e) and § 7B-1110(a).

We hold the trial court erred in delaying entry of the termination of parental rights order for over six months and such delay prejudiced all parties to this case. We recognize that in the case at bar, the parties will be delayed further by our holding. However, many prior cases show that those responsible for timely entry of all orders have been remiss in complying within the thirty days required by the statute, which was amended by the General Assembly to provide prompt resolution in such matters. In light of our holding, we decline to address respondent-mother's second assignment of error.

IV. Conclusion

The trial court erred in failing to enter the order terminating respondent-mother's parental rights over the minors within thirty days from the date of the hearing. Such failure was prejudicial to respondent-mother, the minors, and the foster parent. The trial court's order is reversed and this cause is remanded for a new hearing.

Reversed and remanded.

Judge GEER concurs.

Judge TIMMONS-GOODSON concurs by separate opinion.

TIMMONS-GOODSON, Judge, concurring.

I fully concur in the result reached by the majority. I write separately not to distinguish my reasoning in reaching the result, but to distinguish this case from the line of cases preceding it.

As noted by the majority, our General Assembly has recently amended N.C. Gen. Stat. §§ 7B-1109 and 7B-1110 to include the thirty-day requirements at issue in this appeal. During the same session, the legislature also amended N.C. Gen. Stat. §§ 7B-807 and 7B-905 to include similar requirements for the entry of juvenile adjudication and disposition orders. Following the legislature's amendment to these statutes, this Court has received numerous appeals citing violations of the statutory requirements. The appeals have come from all districts and counties within our state, and while some appeals have cited a delay in order-entry of only one and one-half months, others have cited a delay of over a year.

In addressing these appeals, we have traditionally weighed the requirements of the statutes against the practical effects of the delay, and we have examined the alleged harm resulting from the trial court's failure to enter an order within the prescribed period. Our analysis has considered the particular facts of each case, and our resulting decisions have uniformly concluded that where error has occurred, that error has been harmless. In the instant case, respondent asserts that the trial court's failure to enter an order within thirty days of the termination hearing was highly prejudicial to her because the delay prevented her from filing her appeal. While I am aware that this argument has previously been addressed and rejected by this Court, I am persuaded by the contention that the harm done in this case and similar cases is not limited solely to the respondent. In their own respective manners, juveniles, their foster parents, and their adoptive parents are each affected by the trial court's inability to enter an order within the prescribed time period.

I recognize that our holding in this case will only further lengthen the time in which these two juveniles experience life without a permanent plan. However, I note that in the interest of quick and efficient resolution of juvenile cases, this Court has held that where an appeal of a permanency plan is currently pending before us, a subsequent termination of the respondent's parental rights makes the pending appeal moot. *In re V.L.B.*, 164 N.C. App. 743, 745, 596 S.E.2d 896, 897 (2004); *see In re N.B.*, 163 N.C. App. 182, 183, 592 S.E.2d 597, 598 (2004) (holding that an appeal of adjudication and disposition of

neglect is rendered moot by subsequent termination of parental rights). By dismissing such pending appeals as "academic" and "moot," we acquiesce in the trial court's decision to unilaterally end the potential delay in disposition caused by the respondent's appeal. But, by allowing the trial court to delay its entry of the order terminating the respondent's parental rights, we do nothing to protect the respondent's right to a quick and speedy resolution when his or her appeal is no longer "academic." I believe that if, in the interest of efficient case-resolution, this Court allows the trial court to remove an appeal from our purview by issuing an order terminating parental rights, we should at least require that the trial court enter that order in the amount of time mandated by the legislature.

Although the requirements of N.C. Gen. Stat. §§ 7B-807, 7B-905, 7B-1109, and 7B-1110 are not overly burdensome, assignments of error based upon violations of the statutes are increasing in number. While I am aware that some of these errors may stem from mere inattentiveness or overcrowded dockets at the trial court level, because of the increasing frequency with which these errors occur, I am concerned that our past reservation in enforcing the statutes may soon be seen as an invitation to ignore their clear mandates. Therefore, because I believe the decision in the instant case aids in the restoration of these mandates, I concur.

STATE OF NORTH CAROLINA v. ANNA DANIELLE CROUSE

No. COA04-804

(Filed 5 April 2005)

1. Prisons and Prisoners— malicious conduct by prisoner— failure to instruct on misdemeanor assault on law enforcement officer as lesser-included offense

The trial court did not err by denying defendant's request to submit misdemeanor assault on a law enforcement officer as a lesser-included offense of malicious conduct by a prisoner, because: (1) misdemeanor assault on a law enforcement officer is not a lesser-included offense of malicious conduct by a prisoner; (2) although an assault may be included in the commission of malicious conduct by a prisoner, it need not be; and (3) the legis-

lature intended to address a different problem with each offense when assaults on government officials have been criminalized to punish and prevent attacks against government officials trying to perform public duties whereas the criminalization of malicious conduct by a prisoner is directed at deterring and punishing the projecting of bodily fluids or excrement at governmental employees by those in custody whether or not such conduct amounts to an assault.

2. Prisons and Prisoners— malicious conduct by prisoner— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of malicious conduct by a prisoner arising from defendant spitting on an officer even though defendant contends there was insufficient evidence that she acted knowingly and willfully, because: (1) there was evidence tending to show that defendant demonstrated control of her motor skills when she ran from the police earlier in the evening, that she expressed dissatisfaction with the officers grabbing her hands, and that she drew her breath, puckered her mouth, collected saliva, and then spit on an officer; and (2) although there was also evidence that defendant was in a stupor, there was ample evidence to support the knowing and willful element from which the jury could resolve this factual issue.

3. Evidence— officer testimony—precautions taken when arrestee's saliva comes into contact with officer

The trial court did not commit prejudicial error by overruling defendant's objection to and motion to strike an officer's testimony concerning the precautions normally taken when an arrestee's saliva comes into contact with an officer's eyes or mouth or an open wound.

Appeal by defendant from judgment entered 25 February 2004 by Judge Henry E. Frye, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 14 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Morgan Herring Morgan Green Rosenblutt & Gill, L.L.P., by J. Scott Coalter, for defendant appellant.

McCULLOUGH, Judge.

Defendant (Anna Danielle Crouse) appeals from conviction and judgment for malicious conduct by a prisoner. We hold that she received a fair trial, free of prejudicial error.

On 8 April 2003 Officer Sprinkle with the High Point Police Department was dispatched to a home on South Road in High Point, North Carolina to "check[] on the welfare of the defendant." Shortly after arriving Officer Sprinkle and some other officers were able to get defendant to exit the dwelling. According to one of the officers, defendant "had a dazed look, [an] almost . . . not completely coherent type of look" when she was first approached. Shortly after exiting the dwelling, defendant began running down South Street away from the officers. According to Officer Sprinkle, defendant "appear[ed] to have control of her motor skills" and "was running in a normal fashion."

The officers did not pursue defendant immediately, and instead checked to see if defendant had any outstanding warrants. Upon learning that there was an outstanding warrant for defendant's arrest, the officers quickly located defendant and attempted to place her under arrest. According to Officer Sprinkle, defendant was "irate . . . about the fact that she was under arrest," and she "refused to put her hands behind her back after she was told to do so, and just struggled to keep from getting her hands behind her back." After approximately thirty seconds of struggling with defendant, the officers were successful in placing her in handcuffs and moving her towards a patrol vehicle.

Defendant was transported to the High Point Police Department and then placed in a holding cell while Officers Catherine Farabee and K. D. Riesen did some paperwork. Defendant was still in handcuffs with her arms behind her back when she was placed in the holding cell. Upon making routine checks of the holding cell, Officers Farabee and Riesen twice noticed defendant lying on the floor in a fetal position under the bench attached to the cell's wall. Each time, the officers required defendant to return to a seated position on the bench. Upon being confronted a second time, defendant resisted the officers' efforts to return her to a seated position. According to Officer Farabee, defendant "wasn't recognizing being spoken to at all" and began "cussing and kicking at" the officers when they attempted to move her onto the bench. During the struggle, defendant ended up in a position from which she could reach for Officer

Farabee's belt on the side that held the officer's gun. Officer Farabee reacted by twisting the handcuffs which were restraining defendant to prevent her from reaching the belt. At this point, defendant spat in Officer Farabee's face. When her face was forced into a corner to prevent her from spitting on the officers again, defendant yelled "let go of my f—in' hands."

Officer Riesen witnessed defendant spit on Officer Farabee, which he described as follows:

> Officer Farabee had [defendant] where her head was kind of towards the wall . . . [,] and I observed [defendant] turn her head back towards Officer Farabee. She took what looked like a deep breath, like you would if you were getting ready to, I don't know, cough, but it was like you could see the chest really rise, and you could see her mouth start to pull like she was making a spit, and she puckered up, like, whooh, and then the next thing I know, before I could even have a chance to tell Officer Farabee to watch out, she had spit.

Defendant's spittle hit Officer Farabee in the face, but fortunately did not go into her eyes or mouth.

Defendant was indicted for, and convicted of, malicious conduct by a prisoner, and the trial court imposed a mitigated sentence of fifteen to eighteen months' imprisonment. Defendant now appeals.

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[1] In her first argument on appeal, defendant contends that the trial court erred in denying her request to submit misdemeanor assault on a law enforcement officer as a lesser included offense of malicious conduct by a prisoner. We do not agree.

The issue of whether assault on a law enforcement officer is a lesser included offense of malicious conduct by a prisoner has been argued previously in this Court. *See State v. Cogdell*, 165 N.C. App. 368, 599 S.E.2d 570, *disc. review denied*, 359 N.C. 71, 604 S.E.2d 918 (2004); *State v. Smith*, 163 N.C. App. 771, 594 S.E.2d 430 (2004). In *Cogdell*, we resolved the issue by concluding that, even "[a]ssuming *arguendo* that misdemeanor assault on a government official is a lesser included offense of malicious conduct by a prisoner, defendant has failed to make the factual showing required to support a jury instruction on that offense." *Cogdell*, 165 N.C. App. at 375-76, 599 S.E.2d at 574; *see also Smith*, 163 N.C. App. at 774, 594 S.E.2d at 432 (finding no error in the trial court's refusal to submit assault on

a government official to the jury where "the State presented evidence as to each essential element of the offense of malicious conduct by a prisoner and defendant presented no evidence to negate the State's evidence.").

Thus, our holdings on this issue have been narrow; we have merely determined that the issue need not be reached where the defendant fails to make the requisite factual showing. *Cogdell*, 165 N.C. App. at 376, 599 S.E.2d at 574. However, a concurring opinion was filed in *Cogdell* that addressed, and rejected, defendant's lesser included offense argument. *Id.* at 376, 599 S.E.2d at 575 (Levinson, J., concurring). With the issue now squarely before us, we hold that misdemeanor assault on a government official is not a lesser included offense of felony malicious conduct by a prisoner.

A defendant " 'is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (citation omitted). "North Carolina has adopted a definitional test for determining whether a crime is in fact a lesser offense that merges with the greater offense." *State v. Kemmerlin*, 356 N.C. 446, 475, 573 S.E.2d 870, 890 (2002). " '[A]ll of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense.' " *Id.* (citation omitted).

The statutory offense of felony malicious conduct by a prisoner is codified as follows:

> Any person in the custody of the Department of Correction, the Department of Juvenile Justice and Delinquency Prevention, any law enforcement officer, or any local confinement facility . . . , including persons pending trial, appellate review, or presentence diagnostic evaluation, who knowingly and willfully throws, emits, or causes to be used as a projectile, bodily fluids or excrement at a person who is an employee of the State or a local government while the employee is in the performance of the employee's duties is guilty of a Class F felony.

N.C. Gen. Stat. § 14-258.4 (2003). Accordingly, to convict a defendant of this offense, the State must allege and prove: (1) that a person in custody (2) knowingly and willfully (3) threw, emitted, or caused to

be used as a projectile, bodily fluids or excrement (4) at a government employee (5) in the performance of his duties. *Id.*; *State v. Robertson*, 161 N.C. App. 288, 292-93, 587 S.E.2d 902, 905 (2003).

The statutory offense of misdemeanor assault on a government official is codified as follows:

> [A]ny person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she . . . assaults 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[.]

N.C. Gen. Stat. § 14-33(c)(4) (2003). To convict a defendant of this offense, the State must allege and prove: (1) an assault (2) on a government official (3) in the actual or attempted discharge of his duties. *Id.* " 'There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules.' " *State v. Mitchell*, 358 N.C. 63, 69, 592 S.E.2d 543, 547 (2004) (citation omitted). The common law defines an assault as " ' "an overt act or an 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." ' " *Id.* at 69-70, 592 S.E.2d at 547 (citations omitted).

Malicious conduct by a prisoner includes elements that are excluded from assault on a government official. Specifically, malicious conduct by a prisoner requires that the perpetrator be in "custody," that the crime be committed knowingly and willfully, that the crime involve the use of bodily fluid or excrement, and that such material be directed "at" a government employee.

Likewise, assault on a government official includes at least one element that is not necessarily a part of the definition of malicious conduct by a prisoner: an assault. Though bespattering a law enforcement official with bodily fluids or excrement certainly includes an assault, an assault would also occur where the official is merely placed in reasonable apprehension of such conduct. *See id.* (defining assault); *State v. Johnson*, 264 N.C. 598, 599-600, 142 S.E.2d 151, 153 (1965) (discussing reasonable fear element of assault). Thus, although an assault may be included in the commission of malicious conduct by a prisoner, it need not be:

> The divergence between these two offenses is underscored by the fact that a defendant can be guilty of malicious conduct by a prisoner without committing misdemeanor assault on a government official. For example, a prisoner could throw bodily fluids or excrement "at" a prison guard under circumstances where no reasonable person in the guard's position would fear that the contaminant would actually touch him, either because the prisoner is restrained and clearly unable to throw the substance with sufficient force to reach the guard, or because the guard was not in a position to observe the conduct. In this situation, the inmate may be guilty of malicious conduct by a prisoner **without** being guilty of misdemeanor assault on a government official. This is so because G.S. § 14-258.4 requires only that a bodily fluid or excrement be thrown "at" a government official, whereas G.S. § 14-33(c)(4) requires that the official either be touched by the instrument of assault or reasonably fear such a touching.

Cogdell, 165 N.C. App. at 378, 599 S.E.2d at 576 (Levinson, J., concurring).

We note also that the legislature apparently intended to address a different problem with each offense. Assaults on government officials have been criminalized to punish, and prevent, attacks against government officials trying to perform public duties. Quite differently, the criminalization of malicious conduct by a prisoner is directed at deterring and punishing the projecting of bodily fluids or excrement at governmental employees by those in custody, whether or not such misconduct amounts to an assault.

Accordingly, defendant was not entitled to have assault on a government official submitted to the jury as a lesser included offense of malicious conduct by a prisoner. This assignment of error is overruled.

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[2] In her second argument on appeal, defendant contends that the trial court erred in denying her motion to dismiss the charge of malicious conduct by a prisoner because there was insufficient evidence that she acted knowingly and willfully. We do not agree.

A trial court should deny a motion to dismiss if, considering the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, "there is substantial evidence of each essential element of the offense charged and of the

defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981).

Our Supreme Court has held that

> [k]nowledge is a mental state that may be proved by offering circumstantial evidence to prove a contemporaneous state of mind. Jurors may infer knowledge from all the circumstances presented by the evidence. It may be proved by the conduct and statements of the defendant, by statements made to him by others, by evidence of reputation which it may be inferred had come to his attention, and by other circumstantial evidence from which an inference of knowledge might reasonably be drawn.

State v. Bogle, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citation omitted). Likewise, the willfulness of a defendant's conduct may be inferred from the circumstances surrounding the crime. *See State v. Agnew*, 294 N.C. 382, 393, 241 S.E.2d 684, 691 (1978).

In the instant case, there was evidence tending to show that defendant demonstrated control of her motor skills when she ran from the police earlier in the evening, that she expressed dissatisfaction with the officers grabbing her hands, and that she drew her breath, puckered her mouth, collected saliva, and then spit on Officer Farabee. Thus, although there was also evidence that defendant was in a stupor, there was ample evidence to support the "knowing and willful" element of malicious conduct by a prisoner. It was for the jury to resolve this factual issue. This assignment of error is overruled.

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[3] In her final argument on appeal, defendant contends that the trial court erred by overruling her objection to, and motion to strike, Officer Farabee's testimony concerning the precautions normally taken when an arrestee's saliva comes into contact with an officer's eyes or mouth or an open wound. During defendant's trial, Officer Farabee testified as follows:

> A: [Officer Farabee:] If [the spit] would have struck one of my bodily fluids, such as my eye or my mouth, any open wounds, possibly my nose, internally, I would have had to go to our city nurse, and then to an approved doctor, go through a series . . . of tests, and then be put on a series

of medications to prevent from [getting] any type of disease that anybody would have.

Q: [Prosecutor:] If you know, how long do you take these medications?

A: I don't know. 30, 60 days, but I don't know.

Even assuming *arguendo* that this testimony should have been excluded, its admission was not prejudicial error. *See* N.C. Gen. Stat. § 15A-1443(a) (2003) ("A 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 out of which the appeal arises. The burden of showing such prejudice . . . is upon the defendant."). This assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. HENRY LOUIS NICHOLSON

No. COA04-635

(Filed 5 April 2005)

1. Assault— deadly weapon with intent to kill inflicting serious injury—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury even though defendant contends there was insufficient evidence of intent to kill, because: (1) defendant repeatedly stabbed the victim, once in the chest and four times in the back, as well as continually punching and kicking the victim after the stabbings; and (2) the nature of the assault, as evidenced by both the fighting between defendant and the victim, and the victim's attempts to disengage from the argument and escape the grasp of defendant, as well as the deadly character of the weapon used in the attack, constituted sufficient proof from which defendant's intent to kill may be reasonably inferred.

2. Sentencing— aggravating factor—taking advantage of position of trust

The trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury case by finding as an aggravating factor that defendant took advantage of a position of trust, and the case is remanded for resentencing, because: (1) the trial court found evidence of the factor based on the relationship that existed between the victim's mother and defendant based on the victim's mother dating defendant's father and the mother's parental relationship with the victim; (2) while our Court of Appeals has recognized a position of trust aggravating factor in familial relationships when the child in question is a minor, there is no precedent for such a finding where the child in question is an adult; (3) as the dependency aspect of the parental relationship is not present, the evidence of record fails to establish that a position of trust existed which defendant took advantage of in the commission of the crime; and (4) assuming arguendo a position of trust did exist, the evidence fails to show defendant abused the position of trust in order to commit the assault, and the evidence shows that defendant's actions were accomplished as a result of the use of force alone. N.C.G.S. § 15A-1340.16(d)(15).

Appeal by defendant from judgment entered 14 October 2003 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 January 2005.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General James A. Wellons, for the State.

Michael E. Casterline for defendant-appellant.

HUNTER, Judge.

Henry Louis Nicholson ("defendant") appeals from judgment dated 14 October 2003 entered consistent with a jury verdict finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury. After careful review, we find no error in the trial. However, we remand for resentencing based on the trial court's erroneous finding of the aggravating factor of taking advantage of a position of trust.

The evidence tends to show that on 13 October 2002 defendant spent most of the day playing cards and drinking beer with Angela

McCray ("McCray") and Addie Pittmon ("Pittmon"), McCray's mother, at their apartment. Sometime that day, McCray's three non-custodial children were brought to the apartment for a visit. That evening, McCray, Pittmon, McCray's custodial daughter, the three non-custodial children, and defendant got into defendant's truck, driven by Pittmon, to return the non-custodial children to their paternal grandmother's house. During the trip, McCray and defendant began to argue, as was common between the two. The argument continued throughout the trip and was still ongoing when they arrived back at their apartment. Pittmon got out of the truck and sat down on a small step in front of the apartment building to smoke. Defendant exited the truck and ordered McCray to get out as well. The two continued to argue in front of the truck.

Defendant grabbed McCray by her shirt and pulled her around the corner of the apartment building, out of Pittmon's sight. McCray attempted to escape defendant's grasp by slipping out of her shirt. McCray cried out for Pittmon's help. Pittmon ran around to the side of the apartment building where she found McCray sitting on the ground. Pittmon saw defendant walking away along the fence behind the apartment complex. McCray looked up at Pittmon and then passed out. Pittmon saw blood gushing from stab wounds on McCray's back and called out for help.

Evidence and testimony further show that Nicholas Lanier ("Lanier"), while on his way to visit his girlfriend in a nearby apartment, heard McCray scream out for Pittmon. When Lanier looked in the direction of the scream, he saw a male kicking and punching a female who was lying on the ground. Lanier testified that the assailant stopped assaulting the female and walked away along the fence at the back of the apartment complex when he saw Pittmon coming towards him.

Paramedics arrived on the scene to transport McCray to the hospital for immediate medical attention. Upon arrival, paramedics believed McCray was dead based on the amount of blood at the scene and the lack of pulse in McCray's wrist. During transport, McCray ceased breathing, at which time she was considered clinically dead. Upon arrival at the Emergency Department of the Carolinas Medical Center, Chief Resident, Dr. Michael Fitch ("Dr. Fitch"), observed five wounds during his examination, one on McCray's upper-right chest below the collar bone, and four on the right side of her back. Each of these wounds was approximately one centimeter in length. Dr. Fitch testified, after being recognized as an expert in emergency medicine,

that it was his opinion that all five wounds were life-threatening wounds, all made by a sharp instrument, such as a knife. Dr. Fitch further testified that the prompt medical attention was critical to McCray's survival.

Defendant was convicted by jury verdict of assault with a deadly weapon with intent to kill inflicting serious injury and attempted voluntary manslaughter. The trial court arrested judgment on the attempted voluntary manslaughter charge, found taking advantage of a position of trust as an aggravating factor, found no mitigating factors, and sentenced defendant to 167 to 210 months on the assault with a deadly weapon with intent to kill inflicting serious injury conviction. Defendant appeals.

The issues in this case are whether: (1) the trial court erred in denying defendant's motion to dismiss the assault charge based on insufficient evidence of the intent to kill element; (2) the trial court erred in imposing an aggravated sentence upon the defendant when the finding of an aggravating factor was not supported by the record; and (3) the trial court improperly sentenced defendant in the aggravated range when the aggravating factor was neither alleged in an indictment nor submitted to a jury.

I.

[1] By his first assignment of error, defendant contends the trial court erred in denying his motion to dismiss the assault charge, as the evidence presented was insufficient to give rise to an inference of intent to kill, based on the nature of the assault, the manner in which it was made, the conduct of the parties, or other relevant circumstances. We disagree.

The standard to be applied in ruling on a motion to dismiss for insufficiency of the evidence is whether there was substantial evidence supporting each element of the offense charged. *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "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). "An intent to kill is a matter for the State to prove, and is ordinarily shown by proof of facts from which an intent to kill may be reasonably inferred." *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972) (citations omitted), *disapproved on other grounds*, *North Carolina v. Butler*, 441 U.S. 369, 60 L. Ed. 2d 286 (1979). This inference may be made from the nature of the assault, the manner in which the assault was made, the conduct

of the parties, or from any other relevant circumstance. *See State v. Revels*, 227 N.C. 34, 36, 40 S.E.2d 474, 475 (1946). In *Thacker*, the Court found ample evidence of intent to kill where the defendant repeatedly stabbed the victim in vital areas of the body with a six-inch knife blade. *Thacker*, 281 N.C. at 455, 189 S.E.2d at 150. In so finding, the Court stated, "[t]he viciousness of the assault and the deadly character of the weapon used constitute [co]mpelling proof from which [the] defendant's intent to kill may be inferred." *Id.*

Similar to the evidence in *Thacker*, there is ample evidence in the record from which a jury may reasonably infer that defendant intended to kill McCray. *See id.* Such evidence includes the repeated stabbings of McCray, once in the chest and four times in the back, as well as the continued punching and kicking of McCray by defendant after the stabbings. The nature of the assault, as evidenced by both the fighting between defendant and McCray and her attempts to disengage from the argument and escape the grasp of defendant, as well as the deadly character of the weapon used in the attack constitute sufficient proof from which defendant's intent to kill may be reasonably inferred.

As sufficient evidence was offered to permit a reasonable inference of defendant's intent to kill, we therefore find the trial court committed no error in denying defendant's motion to dismiss for insufficient evidence.

II.

[2] Defendant next contends the trial court erred in imposing an aggravated sentence when the finding of an aggravating factor is not supported in the record. We agree. However, defendant failed to object at trial to the enhancement of his sentence and properly preserve this issue for appellate review pursuant to Rule 10 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 10(b). Nonetheless, in the interest of justice, we will consider the merits of this assignment of error pursuant to Rule 2 of the Rules of Appellate Procedure. N.C.R. App. P. 2.

N.C. Gen. Stat. § 15A-1340.16(d)(15) (2003) permits the imposition of an aggravated sentence during the sentencing phase of a trial if it is found that defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense. *Id.* A finding of the position of trust aggravating factor depends on the existence of a relationship generally conducive to reliance of one

upon the other. *See State v. Daniel*, 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987). "[T]he trial court's finding of an aggravating factor must be supported by 'sufficient evidence to allow a reasonable judge to find its existence by a preponderance of the evidence.' " *State v. Distance*, 163 N.C. App. 711, 718, 594 S.E.2d 221, 226 (2004) (citation omitted).

Here, the trial court found evidence of the aggravating factor based on the relationship that existed between Pittmon and defendant. The trial court stated:

> [T]he mother of the victim, under the circumstances of this case, it appears that she certainly would have intervened, but for the fact that the defendant was a son of her boyfriend; and, a friend of her daughter.
>
> That is, she saw her daughter being dragged, behind the apartments, after getting out of the car, following an[] argument. But, nevertheless, with the defendant being a friend of her boyfriend and having dated her daughter, she didn't feel sufficiently alarmed, that she should try to intervene.
>
> And, under these circumstances, had it been a stranger, or some acquaintance of no relationship or confidence, then, under these facts, it appears quite certain that she would have jumped out of that truck and run, when she saw her daughter being pulled behind those apartments.

Our courts have found a position of trust in very limited circumstances. *See State v. Mann*, 355 N.C. 294, 319, 560 S.E.2d 776, 791 (2002). In *Mann*, the relationship between the defendant and his coworker victim was found to show an amicable working relationship, at most a friendship. *Mann*, 355 N.C. at 319-20, 560 S.E.2d at 792. The finding of a position of trust as an aggravating factor based on this amicable working relationship was found to be error, as such a relationship was found to be insufficient to establish a position of trust. *Id.* A similar relationship to that seen in *Mann* existed between Pittmon and defendant. *See id.* The evidence shows an amicable but causal relationship between the parties, who were connected by mutual acquaintances, the victim, and Pittmon's boyfriend, who was defendant's father.

The State contends that a position of trust existed between Pittmon and defendant due to Pittmon's parental relationship with the victim. While this Court has recognized a position of trust aggra-

vating factor in familial relationships when the child in question is a minor, there is no precedent for such a finding where the child in question is an adult. *See State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (finding a violation of a position of trust by the mother of a newborn child); *see also State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994) (finding a violation of a position of trust by defendant with a nine-year-old victim). In *Daniel*, the Court's finding of a violation of a position of trust as an aggravating factor was based on the dependency of the infant on its mother and the mother's singular responsibility for the child's welfare. *Daniel*, 319 N.C. at 311, 354 S.E.2d at 218. The dependency of a child on its mother prior to reaching the age of majority serves as the basis for the court's statement that the finding of an aggravating factor "depends . . . upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *Id.*

As McCray is not a minor child, the dependency of the relationship between a minor child and parent is not at issue here.[1] Thus, as the dependency aspect of the parental relationship is not present, the evidence of record fails to establish that a position of trust existed which defendant took advantage of in the commission of the crime.

Furthermore, assuming *arguendo* a position of trust did exist, the evidence fails to show defendant abused the position of trust in order to commit the assault. *See State v. Marecek*, 152 N.C. App. 479, 514, 568 S.E.2d 237, 259 (2002) (defendant husband not found to have abused his position of trust in order to murder his wife, where wife distrusted and feared him); *see contra State v. Arnold*, 329 N.C. 128, 143-44, 404 S.E.2d 822, 831-32 (1991) (defendant wife found to have abused her position of trust in order to carry out the conspiracy to have her husband murdered, where husband believed wife had come to her senses and ended her affair). In no way were defendant's actions a result of his having taken advantage of the relationship he had with Pittmon. To the contrary, the evidence tends to show that defendant's actions were accomplished as a result of the use of force alone. Defendant and McCray were arguing when defendant grabbed

1. Defendant contends the trial court erred in finding a relationship which creates the position of trust can exist between a defendant and a third party. As the evidence presented fails to support a finding of a position of trust, however, the facts of this case do not require us to reach that issue and we decline to address it. As we find the trial court improperly found the sole aggravating factor of abuse of position of trust, we therefore do not reach defendant's additional argument as to the trial court's error in imposing an aggravated sentence.

McCray by her shirt and pulled her around the building. McCray responded to this use of force by scratching and clawing at defendant in an attempt to free herself. This evidence fails to support a finding that defendant used and abused an assumed position of trust with Pittmon in order to commit the assault on McCray.

For the reasons stated herein, we find no error in the trial. However, as we find the trial court erred in its finding and application of the aggravating factor of abuse of a position of trust, we remand the case for resentencing consistent with this opinion.

No error in trial; remanded for resentencing.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. STEPHEN McILWAINE

No. COA04-165

(Filed 5 April 2005)

1. Sentencing— habitual felon—sufficiency of indictment—notice

An habitual felon indictment was not defective because it alleged that one of the prior felony convictions was for possession with intent to manufacture, sell or deliver a "Schedule I controlled substance" in violation of N.C.G.S. § 90-95 without specifically naming the controlled substance.

2. Sentencing— prior record level—State's failure to meet burden of proof

The trial court erred by sentencing defendant as an habitual felon where the State failed to meet its burden of proving defendant's prior record level and defendant is entitled to a new sentencing hearing, because: (1) N.C.G.S. § 15A-1340.14(f) requires the State to prove a felony offender's prior convictions by a preponderance of the evidence and 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 of establishing proof of prior convictions; (2) even though defendant did not disagree with statements made by the prosecu-

tor or the trial court as to his prior convictions, defendant did not clearly stipulate to his prior convictions and the State provided no other proof of prior convictions; and (3) although the trial court misstated defendant's prior record level as "VI" both in open court and in his written judgment, the sentence imposed was actually a record level IV and within the presumptive range, and this clerical error should be corrected on remand.

3. Constitutional Law— Habitual Felon Act—separation of powers—double jeopardy—cruel and unusual punishment

Although defendant raises three constitutional issues on appeal including that the trial court committed plain error by sentencing him as an habitual felon when it violates the separation of powers clause, it subjects him to double jeopardy, and it constitutes cruel and unusual punishment, these assignments of error are dismissed because: (1) defendant failed to raise these issues at trial; (2) our Court of Appeals has previously held the Habitual Felon Act is not violative of the Separation of Powers Clause; (3) our Court of Appeals has previously held that there is no double jeopardy infirmity inherent in the Habitual Felon Act as applied in conjunction with the Structured Sentencing Act; and (4) both our Court of Appeals and Supreme Court have rejected constitutional challenges to the Habitual Felon Act based on allegations of cruel and unusual punishment.

Appeal by defendant from a judgment filed 12 August 2003 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General Robert C. Montgomery, for the State.

Attorney James N. Freeman, Jr. for defendant-appellant.

BRYANT, Judge.

Stephen McIlwaine (defendant) appeals a judgment filed 12 August 2003 sentencing him to 107 to 138 months imprisonment for felonious failure to appear enhanced by habitual felon status.

On 19 February 2003, defendant, after appearing for trial on charges including felony possession with intent to sell or deliver cocaine, left the courtroom after a pretrial motion was denied and never returned. The trial court issued an order for arrest and on 24

June 2003, defendant was indicted for failure to appear on a felony. Defendant had previously been indicted for habitual felon status.

The case came for trial on 11 August 2003 in Mecklenburg County Superior Court, the Honorable Yvonne M. Evans presiding. Following presentation of evidence a jury found defendant guilty of felonious failure to appear. After the presentation of additional evidence, the jury found defendant had attained habitual felon status. Defendant appeals.

The issues to be considered on appeal are whether the trial court erred by: (I) sentencing defendant as an habitual felon based on a defective indictment, (II) sentencing defendant to 107 to 138 months imprisonment where the State failed to prove defendant's prior record level, and (III) sentencing defendant as an habitual felon in violation of certain constitutional provisions.

I

[1] Defendant first argues the trial court was without jurisdiction to sentence him as an habitual felon because the habitual felon indictment was defective on its face.

An habitual felon is "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or [S]tate court in the United States . . . ." N.C. Gen. Stat. § 14-7.1 (2003). "N.C.G.S. § 14-7.3 requires the State to allege all the elements of the offense of being a[n] habitual felon thereby providing a defendant with sufficient notice that he is being tried as a recidivist to enable him to prepare an adequate defense to that charge." *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995). "A[n] habitual felon indictment is not required to specifically refer to the predicate substantive felony." *Id.* at 727, 453 S.E.2d at 863.

In this case, the habitual felon indictment alleged that defendant had been previously convicted of three felonies including "the felony of possession with intent to manufacture, sell or deliver [S]chedule I controlled substance, in violation of N.C.G.S. [§] 90-95." Defendant contends that because the specific name of the controlled substance was not alleged in the indictment, the indictment was not sufficient to charge habitual felon. We disagree.

The habitual felon indictment clearly alleged defendant had three prior felony convictions. *See State v. Briggs*, 137 N.C. App. 125, 130-31, 526 S.E.2d 678, 681-82 (2000) (holding habitual felon indict-

ment was sufficient where it alleged the defendant had a prior conviction for "felony breaking and entering buildings in violation of N.C. Gen. Stat. § 14-54 (1999)[,]" even though it did not allege the felony which the defendant intended to commit when he broke and entered). In the case *sub judice*, the habitual felon indictment alleging a prior conviction for felony possession with intent to manufacture, sell, or deliver a Schedule I controlled substance, in addition to two other felony convictions, was sufficient notice under our statutory and case law. Moreover, because there was no defect in the indictment, the trial court had jurisdiction to sentence defendant as an habitual felon. This assignment of error is overruled.

II

[2] Defendant next argues the trial court erred in sentencing him because the State failed to meet its burden of proving defendant's prior record level.

N.C. Gen. Stat. § 15A-1340.14(f) requires the State to prove a felony offender's prior convictions by preponderance of the evidence. The methods the State may use to prove prior convictions and prior record level are:

> (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.

N.C.G.S. § 15A-1340.14(f) (2003).

During sentencing, the State bears the burden of proving defendant's prior convictions by a preponderance of the evidence. *State v. Bartley*, 156 N.C. App. 490, 501, 577 S.E.2d 319, 326 (2003). Those prior convictions can be proved in several ways, including by "[s]tipulation of the parties" and by "[a]ny other method found by the court to be reliable." *See* N.C.G.S. § 15A-1340.14(f) (2003).

"[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). "A statement by the State that an offender has . . . points, and thus is

a [certain] record level, . . . if only supported by a prior record level worksheet, is not sufficient to meet the catchall provision found in N.C.G.S. § 15A-1340.14(f)(4), even if uncontested by defendant." *State v. Riley*, 159 N.C. App. 546, 557, 583 S.E.2d 379, 387 (2003) (citing *State v. Mack*, 87 N.C. App. 24, 34, 359 S.E.2d 485, 491 (1987)); *see State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000).

After the jury returned guilty verdicts in this case, the trial court proceeded to sentencing:

> THE COURT: [Prosecutor], anything you would like to say about sentencing?
>
> [PROSECUTOR]: Your Honor, [defense counsel] and I—actually the last time [defendant] was going to possibly plead, so we did discuss what the sentence would be, the level, if he was convicted of Habitual Felon Status. We found that, and I'll hand up the [worksheet]. May I approach?
>
> THE COURT: Um-hmm.
>
> [PROSECUTOR]: We looked it over, and the ones that I've checked off on the left, left side, those were the ones that were used in the Habitual Felon Indictment. The rest of the charges are the ones we would be using for the sentencing on the C Level. That would make him **C, Level IV**, after our discussions about the cases, and what the points that we [use] as evidence to those individual cases.
>
> THE COURT: Okay.
>
> [PROSECUTOR]: Like I said, a **C Level IV**, I don't have any argument as to the low end of the presumptive or the high end. I would ask the Court to hold him to the presumptive range.
>
> THE COURT: Okay. [defense counsel].
>
> [DEFENSE COUNSEL]: And Your Honor, the only thing I would say on behalf of [defendant], is that I would ask you to sentence him to the low end of the presumptive. That's still a lot of time for this charge.

The trial court then stated:

> THE COURT: All right. In case number 2003-CRS-39291, the defendant, Stephen McIlwaine, had been convicted by the jury of the Class I Felony of Failure to Appear on Felony Charge. With

> respect to that, he has 20 points, and is a **Prior Record Level VI.** In case number 2002-CRS-78785, he's been found to have the status of Habitual Felon by the jury. And the [c]ourt adjudges him to be an Habitual Felon, and to be sentenced as a Class C felon. I will sentence him in the presumptive range to a minimum of 107 and maximum of 138 months in the custody of the Department of Corrections.

(emphasis added).

During sentencing the trial court misstated defendant's prior record level as "VI" both in open court and in his written judgment. However, the sentence imposed, 107 to 138 months, was actually a record level IV and within the presumptive range. This amounts to a clerical error that should be corrected on remand. *See State v. Brooks*, 148 N.C. App. 191, 195, 557 S.E.2d 195, 197-98 (2001) (remand to trial court for correction of clerical error in sentencing proper).

Also during the sentencing hearing, the prosecutor made an unchallenged statement that he and defendant's counsel had discussed defendant's prior convictions and prior record level. After stating defendant had a prior record level IV based on the worksheet, the prosecutor informed the trial court the State was requesting a presumptive sentence within prior record level IV. In response, the defendant's attorney sought to have the trial court sentence defendant to the low end of the presumptive range. The State urges that counsel's statement under these circumstances can reasonably be construed as an admission by defendant of a prior record level IV. Were nothing else appearing we might agree with the State's assertion. However, our sentencing statute has been interpreted quite narrowly and our courts have consistently granted new sentencing hearings under facts similar to those in the instant case. *See State v. Jeffrey*, 167 N.C. App. 575, 605 S.E.2d 672 (2004); *State v. Spellman*, 167 N.C. App. 374, 605 S.E.2d 696 (2004); *State v. Riley*, 159 N.C. App. 546, 583 S.E.2d 379 (2003); *State v. Bartley*, 156 N.C. App. 490, 577 S.E.2d 319 (2003). Even though defendant did not disagree with statements made by the prosecutor or the trial court as to his prior convictions, defendant did not clearly stipulate to his prior convictions and the State provided no other proof of prior convictions. *Jeffrey*, 167 N.C. App. at 582, 605 S.E.2d at 676 (holding the defendant was entitled to new sentencing hearing since the State only introduced the defendant's worksheet without other evidence and the defendant did not stipulate to a prior record level). "An unsupported

statement by the State that an offender has [a certain record level] even if uncontested, does not rise to the level sufficient to meet [the requirements of the statute]. *Riley*, 159 N.C. App. at 557, 583 S.E.2d at 387.

Therefore the State failed to meet its burden of proving defendant's prior record level, and defendant is entitled to a new sentencing hearing.

III

[3] In defendant's remaining assignments of error, he raises three constitutional issues, none of which were raised at trial. Defendant argues the trial court committed plain error in sentencing him as an habitual felon because: (1) it violates the separation of powers clause, (2) it subjects him to double jeopardy and (3) it constitutes cruel and unusual punishment.

"[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Benson*, 323 N.C. 318, 322, 372, S.E.2d 517, 519 (1988) (quotations omitted). Defendant admits he raises these issues for preservation purposes. Nevertheless, we note that this Court has previously held the Habitual Felon Act is not violative of the Separation of Powers Clause. *See State v. Williams*, 149 N.C. App. 795, 802, 561 S.E.2d 925, 929 (2002) (rejecting separation of powers argument). As for double jeopardy defendant acknowledges this Court has held there is no double jeopardy infirmity inherent in the Habitual Felon Act as applied in conjunction with the Structured Sentencing Act. *See State v. Brown*, 146 N.C. App. 299, 302, 552 S.E.2d 234, 236, (2001) (holding "the Habitual Felons Act used in conjunction with structured sentencing [does] not violate . . . double jeopardy protections). Finally, both this Court and our Supreme Court have rejected constitutional challenges to the Habitual Felon Act based on allegations of cruel and unusual punishment. *See State. v. Todd*, 313 N.C. 110, 118-19, 326 S.E.2d 249, 253-55 (1985); *State v. Dammons*, 159 N.C. App. 284, 298, 583 S.E.2d 606, 615, *disc. rev. denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, —— U.S. ——, 158 L. Ed. 2d 382 (2004). Defendant's arguments are without merit.

No error at trial. Remand for new sentencing hearing.

Judges TYSON and LEVINSON concur.

STATE OF NORTH CAROLINA v. DAVID CRUZ CARDENAS

No. COA04-317

(Filed 5 April 2005)

1. Evidence— hearsay—opening the door

The trial court did not err in a felonious trafficking of methamphetamine by possessing more than four hundred grams and possession with intent to sell and deliver methamphetamine case by admitting a detective's testimony describing the conversation he had with a witness that led to defendant's arrest, because: (1) defendant opened the door to this line of questioning by cross-examining the detective concerning the witness's credibility and evidence that led the detectives to defendant; (2) the testimony was not offered for the truth of the matter asserted, but was intended to explain the detectives' subsequent conduct; (3) the trial court provided a limiting instruction both prior to the admission of the evidence and during its charge to the jury; and (4) evidence pertaining to the witness's interview was discussed during both direct and cross-examination of another detective without objection by defendant.

2. Drugs— methamphetamine—instructions—knowing possession

The trial court did not err in a felonious trafficking of methamphetamine by possessing more than four hundred grams and possession with intent to sell and deliver methamphetamine case by instructing the jury that the State is not required to prove defendant had knowledge of the weight or amount of methamphetamine which he knowingly possessed, because: (1) to convict an individual of drug trafficking, the State is not required to prove that defendant had knowledge of the weight or amount of methamphetamine which he knowingly possessed or transported; and (2) N.C.G.S. § 90-95(h)(3b) requires only that defendant knowingly possess or transport the controlled substances.

3. Criminal Law— trial court response to jury question—no prejudice

The trial court did not abuse its discretion in a drug case by responding to a jury question about the amount of cocaine found in a cooler, because: (1) the transcript indicates that the trial court carefully considered the issue and solicited and received arguments from both parties; and (2) defendant was not preju-

diced as the jury found him to be not guilty of any of the charges involving cocaine.

Appeal by defendant from judgment entered 29 October 2003 by Judge Henry E. Frye, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 16 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Bertha L. Fields, for the State.

Nils E. Gerber, for defendant-appellant.

TYSON, Judge.

David Cruz Cardenas ("defendant") appeals from a judgment entered after a jury returned guilty verdicts for: (1) felonious trafficking of methamphetamine by possessing more than four hundred grams; and (2) possession with intent to sell and deliver methamphetamine. We find no error.

I. Background

The State's evidence tended to show that on 10 September 2002, Rafael Torres ("Torres") and Andrew Charles were arrested by Winston-Salem police officers in possession of large quantities of cocaine and methamphetamine. Detective Chris Spain ("Detective Spain") and Detective Jorge Alamillo ("Detective Alamillo") (collectively, "the detectives") interviewed Torres. The detectives and Torres reached an agreement whereby Torres would reveal and take the detectives to his drug source. Torres led Detective Spain and Detective Alamillo, along with other police officers, to defendant's residence. Once there, the detectives watched defendant's activities.

Detective Spain and Detective Alamillo contacted Officer Steven J. Vanderport ("Officer Vanderport") and directed him to instruct Torres to telephone defendant and "order up" some drugs. Torres remained in Officer Vanderport's custody, while he called defendant. Torres and defendant conversed in Spanish, a language Officer Vanderport does not speak.

The detectives observed defendant answer his phone and walk from his apartment to another apartment, numbered 36. Detective Spain and Detective Alamillo approached apartment 36 and knocked on the door. Defendant answered the door and the detectives asked if

they could enter. Defendant told the officers that apartment 36 was not his home, but allowed the detectives to enter. Detective Alamillo noticed defendant was nervous, sweating, and shaking while they talked. The detectives questioned defendant and he admitted there were "some drugs in the residence and a weapon" was present. The detectives searched apartment 36 and recovered $6,000.00 in cash, a handgun, two sets of electronic scales, six bricks of methamphetamine totaling 2,458 grams, a bag of powdered methamphetamine, and a bag of cocaine containing over 606 grams. Detective Alamillo placed defendant under arrest. The detectives searched defendant and found $571.00 in cash and a key to apartment 36. A subsequent search of defendant's residence revealed an additional twenty-eight grams of methamphetamine.

Defendant was indicted on 20 October 2003 for: (1) felonious trafficking of methamphetamine by possessing four hundred grams or more; (2) trafficking in cocaine; (3) conspiracy to traffic cocaine; and (4) possession with intent to sell and deliver methamphetamine. Defendant pled not guilty to all the charges.

Defendant testified that he was familiar with apartment 36 and that he had spent time there drinking and using drugs. He further testified that he "knew there were some drugs around" the apartment, but he did not know how much.

The jury found defendant not guilty of conspiracy to traffic cocaine and of trafficking in cocaine. The jury found defendant guilty of felonious trafficking of methamphetamine by possessing more than four hundred grams and possession with intent to sell and deliver methamphetamine. He was sentenced to a minimum term of 225 months and a maximum term of 279 months. Defendant appeals.

II. Issues

Defendant argues the trial court erred in: (1) admitting opinion testimony of hearsay statements; (2) instructing the jury on the crimes charged; and (3) responding to a jury question.

III. Out of Court Statements

[1] Defendant argues the trial court erred in admitting Detective Spain's testimony describing the conversation with Torres which led to defendant's arrest. We disagree.

A. Opening the Door

North Carolina law permits parties to offer otherwise inadmissible evidence " 'to explain or rebut evidence elicited by the defendant himself.' " *State v. Warren*, 347 N.C. 309, 317, 492 S.E.2d 609, 613 (1997) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998). If a party introduces evidence of a particular fact or scenario, the other party may explain or rebut that proffer by introducing testimony that would otherwise be incompetent or irrelevant, if offered initially. *Albert*, 303 N.C. at 177, 277 S.E.2d at 441.

B. Hearsay

" 'Hearsay' is 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); *Hall v. Coplon*, 85 N.C. App. 505, 510, 355 S.E.2d 195, 198 (1987). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2003); *see also Livermon v. Bridgett*, 77 N.C. App. 533, 540, 335 S.E.2d 753, 757 (1985), *cert. denied*, 315 N.C. 391, 338 S.E.2d 880 (1986).

Statements of an out of court declarant that are offered for purposes other than proving the truth of the matter asserted are not hearsay. *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). Evidence admitted "to explain the subsequent conduct of the person to whom the statement was directed" is also not hearsay. *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (citing *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990)), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002); *see also State v. White*, 298 N.C. 430, 437, 259 S.E.2d 281, 286 (1979).

C. Analysis

During cross-examination, defendant questioned Detective Spain extensively about the events and evidence which led to the investigation and arrest of defendant. Detective Spain was asked about his investigation of and conversation with Torres. The transcript indicates defendant's trial strategy may have been to question the thoroughness and validity of Detective Spain's investigation and to proffer evidence to show Torres's bias and motive in exchange for providing information about defendant.

On redirect, the State asked Detective Spain about the conversation with Torres which spurred the investigation of defendant.

Defendant objected, arguing the testimony would be both inadmissible hearsay and a violation of his Sixth Amendment right to confrontation. Both parties presented arguments to the trial court outside the presence of the jury. The trial court allowed admission of the State's question and Detective Spain's answer for the jury, but prefaced it by stating, "Ladies and gentlemen, the officer's next testimony is going to be given—is offered as the basis for the investigation, however it's for you to, however, to determine whether that fact actually happened."

We hold the trial court did not err in allowing Detective Spain to testify concerning Torres's interview. First, defendant "opened the door" to this line of questioning by cross-examining Detective Spain concerning Torres's credibility and evidence that led the detectives to defendant. Second, the testimony was not "offered for the truth of the matter asserted." Rather, it was intended to explain the detectives' subsequent conduct. Third, the trial court provided a limiting instruction both prior to the admission of the evidence and during its charge to the jury. Fourth, evidence pertaining to Torres's interview was discussed during both direct and cross-examination of Detective Alamillo without objection by defendant. This assignment of error is overruled.

IV. Jury Instructions

[2] Defendant contends the jury instructions should have included the requirement that the State prove defendant *knowingly* possessed four hundred grams or more of cocaine and four hundred grams or more of methamphetamine beyond a reasonable doubt. We disagree.

N.C. Gen. Stat. § 90-95(h)(3b) (2003) provides in part:

> (3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture involved:
>
> . . . .
>
> c. Is 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the

> State's prison and shall be fined at least two hundred fifty thousand dollars ($ 250,000).

The elements the State must prove beyond a reasonable doubt to support a conviction of trafficking in cocaine or methamphetamine by possession is that defendant: "(1) knowingly possess[ed] cocaine [or methamphetamine;] and (2) that the amount possessed was 28 grams or more." *State v. White*, 104 N.C. App. 165, 168, 408 S.E.2d 871, 873 (1991). "[T]o convict an individual of drug trafficking the State is not required to prove that defendant had knowledge of the weight or amount of methamphetamine which he knowingly possessed or transported. Instead, the statute requires only that the defendant knowingly possess or transport the controlled substances." *State v. Shelman*, 159 N.C. App. 300, 306, 584 S.E.2d 88, 93, *disc. rev. denied*, 357 N.C. 581, 589 S.E.2d 363 (2003).

The trial court did not err in instructing the jury that "the State is not required to prove that the defendant had knowledge of the weight or amount of methamphetamine or cocaine which he knowingly possessed." This assignment of error is overruled.

V. Jury Question

[3] Defendant contends the trial court erred in responding to a jury question with a factual answer, usurping the jury's role as the fact-finder. We disagree.

N.C. Gen. Stat. § 15A-1233(a) (2003) provides:

> 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 "the statute's requirement that the trial court exercise its discretion is a codification of the long-standing common law rule that the decision whether to grant or refuse a request by the jury for a restatement of the evidence lies within the discretion of the trial court." *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999). To show that the trial court abused its

discretion, the appealing party must demonstrate that the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision. *State v. Weddington*, 329 N.C. 202, 209, 404 S.E.2d 671, 676 (1991) (citing *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985)).

Here, the jury wrote to the trial court during deliberations and asked, "[w]hat was the amount of coke in the cooler . . . ?" The trial court conferred with both the State and defendant to consider how to best respond to the jury's question. Defendant requested that the jury "be instructed to use their recollection." The trial court responded by stating, "I can't tell them to rely on their recollection because there's no evidence that there was . . . I think I need to inform them no cocaine was found in the cooler." After the jury was conducted to the courtroom, the trial court stated, "[t]he question, What was the amount of coke in the cooler, ladies and gentlemen, there's no evidence presented that there was any cocaine in the cooler."

Defendant does not show and we fail to see how the trial court abused its discretion in answering the jury's question. The transcript indicates the trial court carefully considered the issue and solicited and received arguments from both parties. Further, defendant was not prejudiced as the jury found him to be not guilty of the charges involving cocaine, conspiracy to traffic cocaine, and trafficking in cocaine. This assignment of error is overruled.

VI. Conclusion

Detective Spain's testimony describing the officers' conversation with Torres was properly admitted. The trial court correctly instructed the jury on the charges of trafficking in cocaine and trafficking in methamphetamine. The trial court did not abuse its discretion in responding to the jury's question on cocaine, particularly where defendant was acquitted of charges relating to cocaine. The defendant received a fair trial free from error.

No error.

Judges McGEE and GEER concur.

JOE DON SCOGGINS D/B/A BULL CITY OPRY HOUSE, INC., PLAINTIFF V. MR. JACOB JACOBS, A.K.A. MR. TEDDY LOUIS JACOBS, DEFENDANT

No. COA04-697

(Filed 5 April 2005)

Judgments— default judgment—motion to set aside—failure to exercise due diligence—excusable neglect

The trial court did not abuse its discretion in a breach of lease agreement, conversion, and unfair and deceptive trade practices case by denying defendant's motion to set aside entry of default judgment under N.C.G.S. § 1A-1, Rule 60(b) based on defendant's failure to exercise due diligence and the finding that his failure to answer the complaint was not due to excusable neglect, because: (1) the record supports the trial court's finding that defendant failed to act with due diligence when he admitted he did not consult an attorney after receiving service of process even though he had previously consulted an attorney about instituting an action against plaintiff, and defendant stated he sent a letter to the trial court despite the fact that he said he believed plaintiff's suit had not yet been instituted; (2) neither the failure to consult an attorney nor lack of legal experience constitutes excusable neglect; and (3) although defendant contends that he did not receive three days' notice of the default judgment hearing, defendant did not preserve this issue for review since he failed to raise the notice issue before the trial court or in his assignments of error.

Appeal by Defendant from order entered 9 December 2003 by Judge A. Leon Stanback, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 1 March 2005.

Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes, for plaintiff-appellee.

Brown, Flebotte, Wilson & Horn and Webb, PLLC, by Daniel R. Flebotte, for defendant-appellant.

WYNN, Judge.

Rule 60(b) of the North Carolina Rules of Civil Procedure allows a judgment to be set aside if the moving party shows that the judgment rendered against him was due to his excusable neglect, and he

has a meritorious defense. *Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 726, 515 S.E.2d 17, 21 (1999). In this appeal, Defendant Jacob Jacobs contends the trial court erroneously failed to find that he exercised due diligence and that his failure to answer the complaint was due to excusable neglect. Because the record shows competent evidence to support the trial court's finding that Jacobs did not exercise due diligence, and neither the failure to consult an attorney nor lack of legal experience constitutes excusable neglect, we affirm the trial court's order.

A brief procedural and factual history of the instant appeal is as follows: Plaintiff Joe Don Scoggins was a tenant of Jacobs' premises in Durham, North Carolina. The tenancy was established pursuant to a "Commercial Lease Agreement," under the terms of which Scoggins operated a night club.

On 8 February 2002, a fire broke out and damaged the premises. On 10 December 2002, Scoggins brought suit, contending, *inter alia*, that Jacobs breached the lease agreement by failing to repair the premises after the fire, committed conversion by removing Scoggins' fixtures from the premises, and engaged in unfair and deceptive trade practices.

The record reflects that Scoggins served Jacobs with a summons and complaint. In response, Jacobs sent a letter, dated 4 February 2003, to Scoggins. The letter stated the following:

> Don Scoggins,
>
> I got a summons from the Sheriff today saying you were going to sue me. I called your attorney and told him I don't want to talk to you or your attorney anymore. I want to counter sue you and the City and the Fire Department and the ABC Agent that neglected their job. We know the ABC Inspector was your Drummer. So I'm waiting [sic] I've spoken with a few Attorneys. You not only put me out of business, you put everyone in the building out of business. I still think you did it!!

The record reflects that this letter was hand-delivered to Scoggins in early February. Further, Jacobs stated in an affidavit that he also mailed the letter to the trial court, though without a file number. The letter apparently was not entered into the case file. Jacobs' attorney stated that:

> It doesn't surprise me that [the letter] wouldn't show up in the court file, because it's a little one paragraph hand-signed docu-

ment with really not even the names of the various parties on [sic]. And I don't know how this could have made its way to the court file given the scant information that's on it.

Jacobs did not proffer any further response to the summons and complaint.

On 19 March 2003, default was entered against Jacobs. On 13 May 2003, a hearing was held on Scoggins' motion for default judgment, and on 21 May 2003, default judgment was granted. On 22 September 2003, Jacobs moved to set asside the entry of default and judgment under Rule 60(b) of the North Carolina Rules of Civil Procedure. The trial court denied the motion to set aside judgment, and Jacobs appealed.

" 'To set aside a judgment on the grounds of excusable neglect under Rule 60(b), the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense.' " *Higgins*, 132 N.C. App. at 726, 515 S.E.2d at 21 (quoting *Thomas M. McInnis & Assoc., Inc.*, 318 N.C. 421, 425, 349 S.E.2d 552, 554-55 (1986)); *Baker v. Baker*, 115 N.C. App. 337, 340, 444 S.E.2d 478, 480 (1994) ("A party moving to set aside a judgment under Rule 60(b)(1) must show not only one of the grounds listed above but also the existence of a meritorious defense[.]" (citations omitted)). However, "[i]n the absence of sufficient showing of excusable neglect, the question of meritorious defense becomes immaterial." *Howard v. Williams*, 40 N.C. App. 575, 580, 253 S.E.2d 571, 574 (1979) (citing *Stephens v. Childers*, 236 N.C. 348, 72 S.E.2d 849 (1952)); *Creasman v. Creasman*, 152 N.C. App. 119, 125, 566 S.E.2d 725, 729 (2002) ("Whether defendant pled a meritorious defense is immaterial absent a showing of excusable neglect." (citation omitted)).

The decision to set aside a judgment under Rule 60(b)(1) is a matter within the trial court's discretion. *Burwell v. Wilkerson*, 30 N.C. App. 110, 112, 226 S.E.2d 220, 221 (1976) ("[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the Court abused its discretion." (quotation omitted)); *In re Hall*, 89 N.C. App. 685, 687, 366 S.E.2d 882, 884, *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988) ("the decision to set aside a judgment under Rule 60(b)(1) is a matter within the trial court's discretion" (citation omitted)); *Stoner v. Stoner*, 83 N.C. App. 523, 525, 350 S.E.2d 916, 918 (1986) ("A motion under Rule 60(b) is within the sound discretion of the trial court and

appellate review is limited to a determination of whether the trial court abused its discretion." (citation omitted)). What constitutes excusable neglect is a question of law which is fully reviewable on appeal. *Higgins*, 132 N.C. App. at 726, 515 S.E.2d at 21 ("Whether a litigant's actions constitute excusable neglect is a question of law, reviewed on appeal based upon the facts as found below." (citing *Thomas M. McInnis & Assoc.*, 318 N.C. 421, 349 S.E.2d 552); *Hall*, 89 N.C. App. at 687, 366 S.E.2d at 884 ("what constitutes 'excusable neglect' is a question of law which is fully reviewable on appeal[]" (citing *Thomas M. McInnis & Assoc.*, 318 N.C. 421, 349 S.E.2d 552)). However, the trial court's decision is binding if there is competent evidence to support its findings and those findings support its conclusion. *Advanced Wall Sys. v. Highlande Builders, LLC*, — N.C. App. —, —, 605 S.E.2d 728, 731 (2004) ("The trial judge's conclusion . . . will not be disturbed on appeal if competent evidence supports the judge's findings, and those findings support the conclusion.") (citation omitted)); *Hall*, 89 N.C. App. at 687, 366 S.E.2d at 884 ("[T]he trial court's decision is final if there is competent evidence to support its findings and those findings support its conclusion.") (citation omitted)). "Once excusable neglect has been shown as a matter of law, 'whether the judge shall then set aside the judgment or not rests in his discretion . . . .' " *Advanced Wall Sys.*, — N.C. App. at —, 605 S.E.2d at 731 (quoting *Morris v. Liverpool, London & Globe Ins. Co.*, 131 N.C. 212, 213, 42 S.E. 577, 578 (1902) (citation omitted)).

In his first assignment of error, Jacobs alleges that the trial court's finding that he failed to act with due diligence was error because there was "insufficient evidence to support the finding."

As discussed above, the trial court's finding will be binding on appeal if competent evidence supports the finding. *Advanced Wall Sys.*, — N.C. App. at —, 605 S.E.2d at 731 ("The trial judge's conclusion . . . will not be disturbed on appeal if competent evidence supports the judge's findings[.]") (citations omitted)); *Hall*, 89 N.C. App. at 687, 366 S.E.2d at 884 ("the trial court's decision is final if there is competent evidence to support its findings and those findings support its conclusion[]") (citation omitted)).

Contrary to Jacobs' assertion, the record shows competent evidence supported the trial court's finding. For example, in Jacobs' affidavit, he admitted that after he received service of process he did not consult an attorney, even though he had previously consulted an

attorney about instituting an action against Scoggins. Jacobs stated that he did not realize that the summons and complaint meant that an action had been instituted against him; he thought they were "a prelude to being sued." Jacobs sent a letter to Scoggins, in which he stated that he did not "want to talk to you or your attorney anymore[,]" and that Jacobs intended "to counter sue" Scoggins. In the letter, Jacobs also accused Scoggins of putting Jacobs and others out of business. The letter did not respond to Scoggins' claims of breach of the lease agreement, conversion by removing Scoggins' fixtures, or unfair and deceptive trade practices. Despite the fact that Jacobs said he believed that Scoggins' suit had not yet been instituted, he nevertheless stated he sent a copy of the letter to the trial court. However, Jacobs indicated he failed to put the case number on the letter. And as Jacobs' own attorney stated, it is no surprise that the letter "wouldn't show up in the court file, because it's a little one paragraph hand-signed document with really not even the names of the various parties on [sic]. And I don't know how this could have made its way to the court file given the scant information that's on it."

Given that the record shows competent evidence supports the trial court's finding that Jacobs failed to act with due diligence, we must uphold the trial court's finding.

In his next assignment of error, Jacobs contends that the trial court erred in its conclusion of law that Jacobs' failure to consult with an attorney did not rise to the level of excusable neglect. Jacobs contends that the trial court's conclusion "is contrary to the current North Carolina law." We disagree.[1]

"[W]hat constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *Creasman*, 152 N.C. App. at 124, 566 S.E.2d at 729 (quoting *Thomas M. McInnis & Assoc.*, 318 N.C. at 425, 349 S.E.2d at 554-55). However, this Court has made clear that the failure of a party to obtain an attorney does not constitute excusable neglect. *See, e.g.*, *Creasman*, 152 N.C. App. at 124, 566

1. In his second assignment of error, Jacobs calls the trial court's conclusion that Jacobs' failure to consult counsel was inexcusable neglect a finding of fact. Jacobs contends that there was insufficient evidence to support that "finding of fact." The trial court's conclusion that Jacobs's failure to consult an attorney did not constitute excusable neglect was not a finding of fact but a conclusion of law. Moreover, even if we treat as a finding of fact that Jacobs failed to consult counsel, Jacobs' own affidavit, in which he stated "I did not consult with an attorney after being served with the summons and complaint" provides sufficient evidence to support that finding.

S.E.2d at 729 ("This Court has previously held that the failure of a party to obtain an attorney is not excusable neglect." (citations omitted)). In *Hall*, this Court made plain that "[a] party may not show excusable neglect by merely establishing that she failed to obtain an attorney and was ignorant of the judicial process." *Hall*, 89 N.C. App. at 688, 366 S.E.2d at 885 (citation omitted). Indeed, "[e]xcusable neglect is not shown when a party fails to hire an attorney, even if he has never been involved in a lawsuit before and lacks knowledge of when his case will come up for trial." *Moore v. City of Raleigh*, 135 N.C. App. 332, 336-37, 520 S.E.2d 133, 137 (1999) (citation omitted), *disc. review denied*, 351 N.C. 358, 543 S.E.2d 131 (2000).

In his last assignment of error, Jacobs contends that the trial court erred in its conclusion that Jacobs' lack of legal experience in the court system did not rise to the level of excusable neglect. We disagree.

As this Court made clear in *Hall*,

> A party may not show excusable neglect by merely establishing that she failed to obtain an attorney and was ignorant of the judicial process. *See Gregg v. Steele*, 24 N.C. App. 310, 210 S.E.2d 434 (1974). Similarly, the fact that the movant claims he did not understand the case, or did not believe that the court would grant the relief requested in the complaint, has been held insufficient to show excusable neglect, even where the movant is not well educated. *See Boyd v. Marsh*, 47 N.C. App. 491, 267 S.E.2d 394 (1980).

Hall, 89 N.C. App. at 688, 366 S.E.2d at 885; *see also, e.g., Moore*, 135 N.C. App. at 337, 520 S.E.2d at 137 ("[R]epresentation of self and failure to hire counsel, even when a party is not well educated or is unacquainted with the judicial process, does not constitute excusable neglect.")

Lastly, we note that Jacobs argues he was entitled to, yet did not receive, three days notice of the default judgment hearing. However, because Jacobs did not raise the notice issue before the trial court or in his assignments of error, it has not been preserved for appellate review. *Creasman*, 152 N.C. App. at 123, 566 S.E.2d at 728 ("We note that defendant did not raise this issue in his motion to set aside the judgment. The record does not reflect a ruling on this issue by the trial court. 'A contention not raised in the trial court may not be raised for the first time on appeal.' " (quoting *Town of Chapel Hill v.*

Burchette, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990), and citing N.C. R. App. P. 10(b)(1)); N.C. R. App. P. 10(a) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal").

For the reasons stated herein, we affirm the order of the trial court.

Affirmed.

Judges HUDSON and STEELMAN concur.

STATE OF NORTH CAROLINA v. DOUGLAS MITCHELL, DEFENDANT

No. COA04-284

(Filed 5 April 2005)

Evidence— witnesses' denial of prior statements—impeachment—extrinsic evidence

The trial court erred in a first-degree statutory sex offense, indecent liberties, sexual activity by a substitute parent, felony child abuse, and first-degree statutory rape case by permitting the State to impeach three witnesses who denied making prior allegations about defendant's prior sexual abuse of his own children when they were younger with extrinsic evidence, because: (1) once a witness denies having made a prior inconsistent statement, the State may not introduce the prior statement in an attempt to discredit the witness since the prior statement concerns only the collateral matter of whether the statement was ever made; (2) their denials were conclusive for impeachment purposes, and the testimony elicited from a detective and a DSS case manager during the State's rebuttal case was collateral and therefore could not be used to impeach those witnesses; (3) the pertinent statements regarding defendant's prior sexual misconduct were inadmissible to show defendant's intent, motive or plan to commit the crimes since they were hearsay statements; and (4) the evidence that defendant sexually assaulted his own daughters when they were young was highly prejudicial and there was a reasonable probability that without this evidence, the outcome of the trial may have been different.

Appeal by defendant from judgment entered 25 September 2003 by Judge W. Allen Cobb, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 6 December 2004.

Attorney General Roy Cooper, by Assistant Attorney General R. Kirk Randleman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted upon twelve counts of various sexual offenses upon his minor granddaughters, S.S.M. and T.M., occurring at various times from 1997 until 2002. He appeals from judgment imposing active terms of imprisonment entered upon his conviction by a jury of two counts of first-degree statutory sex offense, two counts of indecent liberties, one count of sexual activity by a substitute parent, one count of felony child abuse and one count of first-degree statutory rape.

The evidence at trial tended to show that defendant is a sixty-five-year-old man, who is the father of five children. In 1997, defendant and his wife, Brenda, obtained custody of two of his son Michael's children, T.M. and her brother. S.S.M., Michael's oldest child, lived with her mother but occasionally visited defendant and Brenda in Goldsboro.

S.S.M. testified that in July 1998, she went riding with defendant on a four-wheeler. During the ride, he talked to her about sexual matters and stopped the four-wheeler, rubbed her leg and put his hand up her shorts, penetrating her vagina with his finger. In March 1999, S.S.M. told her mother that defendant had touched her inappropriately the previous summer. Neither S.S.M. nor her mother reported the incident to the authorities until after her sister, T.M., made similar allegations in 2002, but S.S.M. refused to stay with her grandparents after the incident.

T.M., who was born in 1992, testified that when she was four or five years old, she fell asleep in her grandfather's bed watching television and when she woke up, he was licking her ear and his "private" was sticking out of his pants. She described other incidents which included riding on the four-wheeler with defendant, when he stopped and exposed his "private" and asked her to "suck it like a lollipop;"

that he made her "go up and down on his private" with her hand; that he had licked her breasts and tried to lick her "private;" and that he had, on multiple occasions, tried "to stick his private inside" her.

On 17 March 2002, after hearing her grandmother complain about S.S.M.'s accusations that her grandfather had sexually abused her, T.M. told her grandmother what her grandfather had done to her. After T.M. accused defendant, she moved to her aunt's home and then later moved to her father's home. Eventually, she moved to her mother's home in South Carolina.

Defendant's son, Michael Mitchell (Michael), was called as a defense witness. Michael was asked on direct examination if he had made a comment to Steven Potter (Potter), a case manager with the Wayne County Department of Social Services, about defendant's inappropriate behavior with his sister, Cathy. Michael responded that he understood he "was supposed to have said something when [he] was drunk, but [he] [didn't] remember saying nothing like that, so you'd have to ask Cathy and Tina that." On cross-examination, the prosecutor asked Michael if he had stated to Potter that he once observed his father on top of his sister, Cathy. Michael responded that he never said that to Potter.

Defendant's daughter, Cathy Beasley (Beasley), was also called as a witness for the defense. On direct examination, Beasley testified that defendant had never "improperly, physically or emotionally or sexually," abused her. The prosecutor asked Beasley, on cross-examination, if she had told Tammy Odom (Odom), a detective sergeant at the Wayne County Sheriff's office, that her "father had done something sexual to both [her] and [her] sister Phyllis and that [they] had gotten over it and these two young ladies need to do the same." Beasley denied ever telling Odom this information.

Defendant's youngest daughter, Kelly Belt (Kelly), a witness for the defense, was not questioned on direct examination about her conversation with Potter or about her half-sisters, Cathy and Phyllis. On cross-examination, however, in response to a question from the prosecutor, Kelly testified, "[my father] had told me that there had been inappropriate behavior, but he never elaborated. My sisters, I point-blank asked my sister and she said nothing ever happened." The prosecutor then asked Kelly if she had made the following two statements to Potter during his investigation: "[my] two older sisters, Cathy and Phyllis, have told [me] that incidents did occur to them," and "[my] father may have had a problem when he was younger and

now no longer has one." In each case, Kelly denied making the statements to Potter.

During the State's rebuttal evidence, the prosecutor called Odom to testify about her conversation with Beasley. The trial court, over defendant's objection, allowed Odom to testify as follows:

> [Beasley] said that she and her sister both had been sexually assaulted as a child by [defendant]. . . . She and her sister had got along well in life. They had gotten over it. They had put the past behind them and she suggested that the two children do the same thing also.

The State then called Potter and inquired about his conversation with Michael. Potter replied that Michael told him that "he had seen his father on top of his sister and that his father had made him leave the room." The prosecutor then asked Potter about his conversation with Kelly. He testified that Kelly had told him:

> she had spoken to her oldest sisters . . . and . . . something had occurred between them and their father of a sexual nature, but that she had not asked for specifics, and did not want to know specifics, and that she had hoped that he might have had a problem when he was younger but that he did not now.

Defendant testified on his own behalf that he did not sexually abuse either of the girls in any way.

The dispositive issue, raised by defendant's thirteenth and twenty-fifth assignments of error, is whether the trial court erred by permitting the State to impeach Michael Mitchell, Cathy Beasley and Kelly Belt by extrinsic evidence. Defendant contends the testimony of Detective Odom and Steven Potter, which was offered to impeach the three witnesses' denials they had made the statements about which they had been cross-examined, was inadmissible and prejudicial. It is well established that a witness's character or propensity for telling the truth is subject to impeachment through cross-examination about prior inconsistent statements; however, the answers of the witness are conclusive and may not be contradicted by extrinsic evidence. *State v. Shane*, 304 N.C. 643, 652-53, 285 S.E.2d 813, 819 (1981), *cert. denied*, 465 U.S. 1104, 80 L. Ed. 2d 134, 104 S. Ct. 1604 (1984).

The State argues that extrinsic evidence is admissible if the evidence is not collateral, and contends that in this case, the rebuttal testimony was properly admitted because the evidence was material,

not collateral. We disagree. " '[C]ollateral matters' are those which are irrelevant to the issues in the case; they involve immaterial matters and irrelevant facts inquired about to test observation and memory." *State v. Najewicz*, 112 N.C. App. 280, 289, 436 S.E.2d 132, 138 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994). In *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989), *reconsideration denied*, 339 N.C. 741, 457 S.E.2d 304 (1995), the Supreme Court stated that "testimony contradicting a witness's denial that he made a prior statement when that testimony purports to reiterate the substance of the statement" is collateral. Therefore, "once a witness *denies* having made a prior inconsistent statement, the State may not introduce the prior statement in an attempt to discredit the witness; the prior statement concerns only a *collateral matter*, *i.e.*, whether the statement was ever made." *Najewicz*, 112 N.C. App. at 289, 436 S.E.2d at 138.

In each of the above referenced instances, the witness denied having made the prior statement inquired about during his or her own testimony. Their denials were conclusive for impeachment purposes; the testimony elicited from Detective Odom and Mr. Potter during the State's rebuttal case was collateral and therefore, could not be used to impeach these witnesses.

In addition, the testimony of Odom and Potter in these instances was inadmissible for substantive purposes because the statements were hearsay that were not admissible under any of the hearsay exceptions. The State argues that although evidence of prior acts is generally not admissible, evidence of prior acts of sexual misconduct may be admissible to show defendant's intent, motive or plan to commit the crime charged. *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988); N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). However, in the first situation, the testimony in dispute is not Cathy's testimony about her father's alleged sexual abuse, but Odom's testimony about conversations she had with Cathy. In the second and third situations, the testimony in question is Potter's testimony regarding conversations with Michael and Kelly about their father's alleged sexual abuse of Cathy and Phyllis. Cathy, during her own testimony, repeatedly denied under oath that her father had sexually abused her. These statements regarding defendant's prior sexual misconduct are therefore inadmissible to show defendant's intent, motive or plan to commit the crime because they are hearsay statements.

The State also argues that if the admission of Odom's statement was error, it was not prejudicial, and therefore, defendant is not enti-

tled to a new trial. Again, we disagree. N.C. Gen. Stat. § 15A-1443(a) (2003) provides that prejudicial error exists where "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." During Odom's testimony, evidence was admitted, over defendant's objection and without any limiting instruction, that defendant sexually assaulted his own daughters when they were young. This evidence was highly prejudicial and there is a reasonable probability that without this evidence, the outcome of the trial may have been different.

Defendant did not object to Potter's rebuttal testimony regarding the statements made to him by Michael and Kelly; he contends the trial court committed plain error in admitting Potter's rebuttal testimony. "Under a plain error analysis, defendant 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). The evidence at trial was contested and inconsistencies existed between the testimony of T.M. and Kelly. The admission of Potter's testimony, in conjunction with Odom's testimony, was so highly prejudicial as to have had a probable impact in the jury's verdict. Therefore, we hold that defendant is entitled to a new trial.

In light of our decision that the error entitles defendant to a new trial, we deem it unnecessary to address defendant's remaining arguments since they are not likely to occur in a new trial. Defendant's remaining assignments of error were not brought forward in his brief and are, therefore, deemed abandoned. N.C. R. App. P. 28(a).

New trial.

Judges CALABRIA and GEER concur.

IN THE MATTER OF P.M.

No. COA04-346

(Filed 5 April 2005)

1. **Appeal and Error— preservation of issues—failure to argue in brief**

Although respondent specifically assigned error to three findings of fact, respondent abandoned her appeal of those findings of fact because she failed to specifically argue in her brief that they were unsupported by evidence. N.C. R. App. P. 28(b)(6).

2. **Child Abuse and Neglect— neglect—lives in home where another juvenile subjected to neglect**

The trial court did not err in a child abuse, neglect, and dependency case by concluding that the minor child was neglected as defined by N.C.G.S. § 7B-101(15), because: (1) the minor child lives in a home where another juvenile has been subjected to neglect by an adult who regularly lives in the home, and the weight to be given this factor is a question for the trial court; and (2) the trial court found the historical facts of the case included the fact that respondent had twice violated court-ordered protection plans with DSS, once after her four other children had already been removed from her custody, and was failing to take responsibility for harm that befell her children as a result of her conduct.

3. **Child Abuse and Neglect— dependency—availability of alternative childcare arrangements**

The trial court erred in a child abuse, neglect, and dependency case by concluding that the minor child was dependent as defined under N.C.G.S. § 7B-101(9), because the trial court failed to address the availability of appropriate alternative childcare arrangements.

Appeal by respondent from judgment entered 3 October 2003 by Judge R. Les Turner in Wayne County District Court. Heard in the Court of Appeals 4 November 2004.

E.B. Borden Parker for petitioner-appellee.

Susan J. Hall for respondent-appellant.

GEER, Judge.

Respondent mother appeals from an order of the trial court adjudicating her son P.M. to be neglected and dependent. We hold that the trial court's findings of fact support its conclusion that P.M. is neglected, but that they are insufficient to establish dependency because the court failed to address the availability of appropriate alternative childcare arrangements. We, therefore, affirm in part, reverse in part, and remand for further proceedings.

In a non-jury adjudication of abuse, neglect, and dependency, "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). This Court reviews the trial court's conclusions of law to determine whether they are supported by the findings of fact. *Id.*

[1] An appellate court's review of the sufficiency of the evidence is limited to those findings of fact specifically assigned as error. *See Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266 ("A single assignment [of error] generally challenging the sufficiency of the evidence to support numerous findings of fact . . . is broadside and ineffective" under N.C.R. App. P. 10.), *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Since respondent specifically assigned error to only three of the trial court's findings of fact, the remaining findings of fact are binding on this Court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

Even as to those three findings, respondent has failed to specifically argue in her brief that they were unsupported by evidence. She has, therefore, abandoned her appeal of those findings of fact. N.C.R. App. P. 28(b)(6) ("Assignments 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."). Accordingly, our review in this case is limited to determining whether the trial court's findings of fact support its conclusions of law that P.M. is a neglected and dependent child.

Facts

Respondent is the mother of P.M., who was born 6 June 2003. P.M.'s father was, at the time of the hearing, incarcerated in the

Department of Correction and facing additional charges. Respondent is also the mother of four other children, including three daughters and one son. In other proceedings, respondent was found to have neglected those four children.[1] The daughters are now in the custody of their paternal grandparents and the son, who has a different father, is in the custody of his paternal grandmother.

Prior to the birth of P.M., P.M.'s father sexually abused one of respondent's daughters after respondent allowed him to be in the presence of that daughter, in violation of a safety plan with the Department of Social Services ("DSS") that prohibited the father from having contact with that daughter. A psychologist who evaluated respondent after that event concluded that respondent had failed to take responsibility for the consequences of her failing to care for her four children.

On 9 July 2003, a month after the birth of P.M., DSS filed a petition alleging that P.M. was neglected and dependent based on the prior adjudications as to respondent's other children and her current lack of insight into the harm suffered by those children. Custody, however, remained with respondent after she and DSS entered into a protection plan providing that respondent's mother would always be in the home with respondent and P.M. in order to provide supervision of the care of P.M. Following a pre-adjudication conference, the trial court entered an order reporting that DSS had requested that custody of P.M. be placed with respondent's mother. After finding "[t]hat a protection plan had been previously agreed to by [respondent] wherein she would have [her mother] in her presence when the juvenile was in her presence," the trial court concluded "[t]hat the best interest of the juvenile will be promoted and served by leaving custody of the juvenile with [respondent] *but the plan should be followed.*" (Emphasis added.)

Subsequently, respondent's mother left respondent's home. In violation of the plan and the prior order, respondent did not notify DSS or make arrangements for any other person to be in the home to assist her and monitor her care of P.M. As a result, DSS prepared a report recommending that the court consider "changing custody and placement of [P.M.] if [respondent] continues to violate the court orders."

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1. Although the record contains extensive evidence regarding the abuse and neglect of the children, the trial court did not make any findings of fact regarding that evidence.

On 4 September 2003, Judge R. Les Turner conducted an initial adjudication hearing attended by both respondent and P.M's father. On 3 October 2003, the trial court entered an order that adjudicated P.M. as dependent and neglected. The court placed custody of P.M. with DSS, but authorized DSS "to leave the juvenile in the home of the mother provided that an appropriate caretaker will be in the home of the mother at all times to monitor the care that the mother gives the juvenile." The court required that this "caretaker" must be "someone approved by the Wayne County Department of Social Services." Respondent mother has appealed from this order.

Neglect

[2] Respondent first challenges the trial court's determination that P.M. is a neglected child. Respondent points out that the trial court found "[t]hat no one testified that the juvenile was not healthy and no one testified that the juvenile appeared not to be well cared for." The court nonetheless found that P.M. was neglected because "he resides in the home where siblings and half-siblings have been determined to be abused and or neglected . . . ."

N.C. Gen. Stat. § 7B-101(15) (2003) defines a 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. *In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile* lives in a home where another juvenile has died as a result of suspected abuse or neglect or *lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.*

(Emphasis added.) Respondent argues that the italicized language does not apply because P.M.'s father, who committed the abuse, does not reside in the home with P.M. Respondent, however, overlooks the fact that a court determined that *she* neglected her four other children. Accordingly, P.M. "lives in a home where another juvenile has been subjected to . . . neglect by an adult who regularly lives in the home." *Id.*

Respondent also argues that the prior adjudications are insufficient to support a conclusion of neglect. In considering the identically-worded predecessor statute, this Court held, however, that while this language regarding neglect of other children "does not mandate" a conclusion of neglect, the trial judge has "discretion in determining the weight to be given such evidence." *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994). Since the statutory definition of a neglected child includes living with a person who neglected other children and since this Court has held that the weight to be given that factor is a question for the trial court, the court, in this case, was permitted, although not required, to conclude that P.M. was neglected. In *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999), this Court explained: "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."

Here, as the trial court found, the historical facts of the case included the fact that respondent had twice violated court-ordered protection plans with DSS—once after her four other children had already been removed from her custody—and was failing to take responsibility for harm that befell her children as a result of her conduct. We hold that these findings of fact taken in their entirety are sufficient to support the conclusion that P.M. is a neglected child. *See In re E.N.S.*, 164 N.C. App. 146, 150, 595 S.E.2d 167, 170 (affirming conclusion of neglect "based primarily on events that took place before [the child's] birth, in particular, the circumstances regarding respondent's oldest child being adjudicated neglected and dependent" and a subsequent failure to demonstrate stability), *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903 (2004).

Dependency

[3] The mother also contends that the trial court erred in concluding that P.M. is a dependent child. A dependent child is defined as "[a] juvenile in need of assistance or placement because . . . [the juvenile's] parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2003). Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.

We hold the trial court did not make sufficient findings to support its conclusion that P.M. was a dependent child. In this case, the trial court found that: "the juvenile is dependent based on the fact that he does not have a parent who is capable of properly caring for him in that his father is incarcerated and his mother does not comply with Court ordered protection plans set out for the protection of the juvenile." Although a failure to comply with court-ordered protection plans may establish an inability to care for or supervise a child if the plans were adopted to ensure proper care and supervision of the child, the trial court never addressed the second prong of the dependency definition. The trial court made no finding that respondent lacked "an appropriate alternative child care arrangement." We observe that an earlier order in this case stated that respondent's mother "was willing to take custody of the juvenile to keep the juvenile from going into foster care."

Accordingly, we affirm the trial court's conclusion that P.M. is a neglected child. We reverse, however, as to the conclusion that P.M. is a dependent child and remand for further findings of fact on that issue.

Affirmed in part, reversed in part, and remanded.

Judges TIMMONS-GOODSON and TYSON concur.

GINGER F. FAULKENBERRY, PLAINTIFF v. W. MICHAEL FAULKENBERRY, DEFENDANT

No. COA04-332

(Filed 5 April 2005)

Child Support, Custody, and Visitation— custody—motion for new trial

The trial court did not abuse its discretion in a child custody case by awarding sole custody of the children to defendant father and by denying plaintiff mother's motion for a new trial, because: (1) plaintiff points to no evidence in the record contradicting the court's finding that her adulterous relationship placed stress upon the children and was the primary cause of the older child's emotional problems; (2) although plaintiff contends defendant's threats should have been a factor in determining defendant's

fitness to have custody of the children, plaintiff has not included a transcript of testimony regarding the threats; and (3) plaintiff depended solely on evidence that did not exist at the time of trial in her motion for a new trial, and this evidence is not useful as a basis for granting a new trial since any evidence related to these allegations did not exist at the time of trial.

Appeal by plaintiff from order entered 4 June 2003 by Judge James M. Honeycutt in Iredell County District Court. Heard in the Court of Appeals 30 November 2004.

Parker & Howes, PLLC, by David P. Parker, for plaintiff-appellant.

Crosswhite, Edwards & Crosswhite, by Andrea D. Edwards, for defendant-appellee.

ELMORE, Judge.

Ginger Faulkenberry (plaintiff) and Michael Faulkenberry (defendant) were married on 19 September 1992. Two children were born during the marriage. Both plaintiff and defendant were law enforcement officers employed by the Charlotte-Mecklenburg Police Department. By December 2000, plaintiff had developed an extra-marital relationship with another law enforcement officer, Ronnie Lowe. Plaintiff informed defendant of the affair and requested that he leave the marital home. Defendant met with plaintiff's counselor, Dr. Betty Russell, in an effort to keep the family together. However, Dr. Russell suggested that defendant move out of the home as a temporary solution to the parties' disagreement. The parties separated on 21 January 2001. Following the divorce, in April 2002, plaintiff married Ronnie Lowe. After the separation, the parties shared custody of the children and spent essentially equal time with them. However, on 6 November 2001, plaintiff filed an action seeking, *inter alia*, sole custody of the children. The district court awarded sole custody of the children to defendant and granted plaintiff reasonable visitation privileges. From the order of the district court entered 4 June 2003, plaintiff appeals.

First, plaintiff contends that the trial court abused its discretion in awarding sole custody of the children to defendant. Specifically, plaintiff argues the court erred in basing its conclusions upon its training and experience in custody matters. However, "[i]n child custody cases, where the trial judge has the opportunity to see and hear

the parties and witnesses, the trial court has broad discretion and its findings of fact are accorded considerable deference on appeal." *Smithwick v. Frame*, 62 N.C. App. 387, 392, 303 S.E.2d 217, 221 (1983) (citing *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974)). Accordingly, the trial court's findings of fact in custody orders are binding on the appellate courts if supported by competent evidence. *Id.*

Here, the court found that plaintiff and defendant had worked out a shared custody arrangement but that plaintiff had expressed her belief that the children needed a primary home. The court agreed with plaintiff, "primarily based upon the Court's training and experience in custody matters." Plaintiff contends because the court expressly found that both parties were fit and proper persons to have custody, the court erred in awarding exclusive custody to defendant. However, plaintiff points to no evidence in the record contradicting the court's finding that plaintiff's adulterous relationship placed stress upon the children and was the primary cause of the older child's emotional problems.

According to the North Carolina Rules of Appellate Procedure, "[i]f the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion." N.C.R. App. P. 7(a)(1) (2004). This Court has repeatedly noted that it is the appellant's duty to ensure that the record is complete. *See Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997); *State v. Brown*, 142 N.C. App. 491, 492-93, 543 S.E.2d 192, 193 (2001); *King v. King*, 146 N.C. App. 442, 445-46, 552 S.E.2d 262, 265 (2001). Without evidence in the record of error by a trial judge, the appellate court is not required to and should not assume error on the part of the trial judge. *Hicks v. Alford*, 156 N.C. App. 384, 390, 576 S.E.2d 410, 414 (2003). In *Hicks*, appellant-mother argued insufficient evidence existed to support the trial court's findings that appellant's hostility and animosity towards appellee-father was a substantial change of circumstances that had a detrimental effect on the child and it was therefore in the best interests of the child that appellee take primary custody of the child. In overruling appellant's argument, this Court noted that appellant failed to include in the record on appeal a transcript of the evidence presented to the trial court on the issue. *Id.* at 389-90, 576 S.E.2d at 414. The Court concluded that "[w]ithout the transcript, we are unable to review [appellant's] argument that the

trial court erred in making findings of fact that are unsupported by the evidence." *Id.*

Here, we have no transcript in the record with which to consider whether the finding that, from the court's training and experience in custody matters, plaintiff's conduct added to the stress on the children, that plaintiff's actions were the primary cause of the older child's emotional problems, or that the children need a primary home, as requested by plaintiff. The trial court found the best interests of the children would be served by awarding their exclusive care, custody, and control to defendant because of plaintiff's introduction of Lowe to the children at an early stage of her relationship with him and the effect that had, especially on the older child. Without a record of the relevant portions of the transcript, we are unable to conclude that the trial court erred in making these findings. We also find no abuse of discretion in the court's determination that awarding sole and exclusive custody to defendant promoted the best interests of the children. When both parents have been deemed fit, the court must make its custody determination based upon what is in the best interests of the child. *See* N.C. Gen. Stat. § 50-13.2(a) (2003). The trial court made its determination here, and plaintiff does not present adequate information in the record to support a conclusion that the trial court abused its discretion in doing so. *King v. Allen*, 25 N.C. App. 90, 92, 212 S.E.2d 396, 397, *cert. denied*, 287 N.C. 259, 214 S.E.2d 431 (1975).

Next, plaintiff assigns error to finding of fact number 25, in which the trial court found that while defendant admitted making threats to plaintiff and Ronnie Lowe, no evidence existed that either plaintiff or Lowe "believed the statements or were placed in fear of Defendant. Both Plaintiff and Ronnie Lowe are law officers, not regular private citizens." Plaintiff contends the threats should have been a factor in determining defendant's fitness to have custody of the children. Here, again, plaintiff has not included a transcript of testimony regarding the threats. Without evidence in the record of error by a trial judge, neither are we required to nor should we assume error on the part of the trial judge. *Hicks*, 156 N.C. App. at 389-90, 576 S.E.2d at 414. Because we cannot conclude that the trial court's finding was in error, plaintiff's assignment of error is without merit.

Finally, plaintiff contends the trial court erred in denying her motion for a new trial under Rule 59 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 59(a)(4) (2003) provides that a new trial may be granted if a party produces "[n]ewly discov-

ered evidence material . . . which he could not, with reasonable diligence, have discovered and produced at the trial[.]" A motion for a new trial must be served no more than 10 days after entry of judgment. N.C. Gen. Stat. § 1A-1, Rule 59(b) (2003). Rule 59 of the Federal Rules of Civil Procedure is comparable to the North Carolina rule. *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 589, 176 S.E.2d 851, 853 (1970). The phrase "newly discovered evidence" refers to evidence in existence at the time of trial and of which the movant was excusably ignorant. *Campbell v. American Foreign S.S. Corp.*, 116 F.2d 926, 928 (2d Cir. 1941), *cert. denied*, 313 U.S. 573, 85 L. Ed. 1530 (1941). This limitation on newly discovered evidence has been justified on the policy ground that, were evidence arising after the time of trial to qualify as "newly discovered evidence," litigation would be never-ending. *Id.* (cited with approval in *Cole v. Cole*, 90 N.C. App. 724, 728, 370 S.E.2d 272, 274, *disc. review denied*, 323 N.C. 475, 373 S.E.2d 862 (1988)).

Here, plaintiff depended solely on evidence that did not exist at the time of trial in her motion for a new trial. Between the announcement of the trial court's ruling in open court after the initial hearing and its entry of judgment, plaintiff's motion alleges, *inter alia*, that defendant left his job as a police officer, ceased cooperating with plaintiff on matters relating to the children, and introduced the children to his girlfriend, with whom neither child has a strong relationship. As any evidence related to these allegations did not exist at the time of trial, it is therefore not useful as a basis for granting a new trial. Further, a court's decision on a motion for a new trial under Rule 59 is not reviewable on appeal, absent a showing of abuse of discretion. *Blow v. Shaughnessy*, 88 N.C. App. 484, 494, 364 S.E.2d 444, 449 (1988). We hold the trial court's denial of plaintiff's motion for a new trial did not amount to an abuse of that court's discretion.

Affirmed.

Judges WYNN and HUDSON concur.

BRENENSTUHL v. BRENENSTUHL

[169 N.C. App. 433 (2005)]

DANIEL BRENENSTUHL, PLAINTIFF v. KAREN E. BRENENSTUHL (MAGEE), DEFENDANT

No. COA04-1007

(Filed 5 April 2005)

Divorce— incorporated separation agreement—military retirement pay

The trial court did not err by awarding defendant wife a portion of plaintiff husband's military retirement pay based on the parties' incorporated separation agreement subsequent to entry of divorce, because: (1) the incorporated provisions of the separation agreement is specifically entitled "Retirement Benefits," and the provision states that issues of retirement will be addressed at a future date; (2) the trial court had the authority to enter its subsequent order awarding defendant a portion of plaintiff's military pay since the court had not previously addressed the issue of retirement included in the separation agreement: (3) the provision in the separation agreement is not so overly broad or vague as to prevent the court from awarding defendant a portion of plaintiff's retirement pay; and (4) the separation agreement offered no specific language referring to an alternative means of distribution, and the trial court correctly applied the provisions related to retirement benefits found in N.C.G.S. § 50-20.1(d).

Appeal by plaintiff from order entered 18 May 2004 by Judge Leonard W. Thagard in Onslow County District Court. Heard in the Court of Appeals 10 March 2005.

Sims & Strout, by Hurman R. Sims, for plaintiff-appellant.

Sullivan & Grace, P.A., by Nancy L. Grace, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Daniel Brenenstuhl ("plaintiff") appeals the trial court order awarding Karen E. Brenestuhl (Magee) ("defendant") twenty-five percent of plaintiff's military retirement pay. For the reasons discussed herein, we affirm the trial court order.

The facts and procedural history pertinent to the instant appeal are as follows: Plaintiff and defendant were married on 26 September

1987. The couple separated on 30 September 1997, and on 26 November 1997, they entered into a separation agreement detailing the division of their marital assets. Paragraph 16 of the separation agreement provided for "property division and settlement," and subsection (F) of the paragraph provided as follows:

> F. Retirement Benefits. Issues of retirement will be addressed at a future date.

On 21 January 1999, plaintiff filed a complaint requesting that the trial court dissolve the marriage and grant the parties absolute divorce. Plaintiff's complaint provided two amendments to the separation agreement unrelated to retirement benefits, and the complaint requested that the trial court incorporate the amended separation agreement into its divorce judgment. Defendant did not file an answer to plaintiff's complaint, and on 5 March 1999, the trial court entered a divorce judgment in the matter. The trial court incorporated the amended separation agreement into its divorce judgment, and it granted the parties absolute divorce.

In May 2003, plaintiff retired from the military. On 10 March 2004, defendant filed a motion in the cause requesting that the trial court "award the defendant's share of the plaintiff's military retirement pay" to her. Defendant stated that her "share of the plaintiff's military retirement pay was specifically reserved for later hearing" by the separation agreement, and that by virtue of plaintiff's retirement, she was "now entitled to have her share of the plaintiff's military retirement pay determined."

On 18 May 2004, the trial court entered an order awarding defendant a percentage of plaintiff's military retirement pay. In its order, the trial court made the following pertinent findings of fact:

> 5. That the Separation and Property Settlement Agreement that was incorporated into and made a part of the divorce Judgment specifically [provided] that: "F Retirement Benefits. Issues of retirement will be addressed at a future date." The agreement did not require that the issue of retirement benefits [] be asserted or made at or before the granting of the absolute divorce.
>
> 6. The parties contracted among themselves in the Separation Agreement to address the retirement issue at a later date.
>
> 7. That the Separation Agreement specifically reserved the division of the plaintiff's military retirement pay for a later date.

8. That neither party made a request for equitable distribution; however, the Separation Agreement allows the defendant to move the Court for division of plaintiff's military retirement pay post divorce.

. . . .

10. That there is not a bar to this Court now determining the division of the retirement pay as was provided in the Separation and Property Settlement Agreement.

11. The fact that the agreement was incorporated into the divorce Judgment makes an even stronger argument that the retirement pay can be divided at this time.

12. That the plaintiff retired from the military in May of 2003. That he retired in the state of North Carolina and continues to reside in this state.

13. That the parties were married on September 26, 1987 and they separated on September 30, 1997. That the parties were married and resided together for a period of 10 years. The plaintiff served in the military for approximately 20 years.

Based upon these findings of fact, the trial court concluded that defendant's claim for a portion of plaintiff's military retirement pay was preserved by the separation agreement, and that defendant was entitled to twenty-five percent of plaintiff's military retirement pay. Plaintiff appeals.

The issue on appeal is whether the trial court erred by awarding defendant a portion of plaintiff's military retirement pay. Plaintiff argues that the incorporation of the separation agreement into the divorce judgment prohibited the trial court from subsequently entering the order in favor of defendant. We disagree.

By executing a written separation agreement, married parties forego their statutory rights to equitable distribution and decide between themselves how to divide their marital estate following divorce. N.C. Gen. Stat. § 50-20(d) (2003). "These agreements are favored in this state, as they serve the salutary purpose of enabling marital partners to come to a mutually acceptable settlement of their financial affairs." *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987).

> The same rules which govern the interpretation of contracts generally apply to separation agreements. Where the terms of a separation agreement are plain and explicit, the court will determine the legal effect and enforce it as written by the parties. When a prior separation agreement fully disposes of the spouses' property rights arising out of the marriage, it acts as a bar to equitable distribution.

Blount v. Blount, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984) (citations omitted), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985).

In the instant case, plaintiff asserts that the separation agreement entered into by the parties acts to bar defendant's claim to a portion of his military retirement pay, notwithstanding the provision of the separation agreement stating that "[i]ssues of retirement will be addressed at a future date." Plaintiff contends that the provision is too vague to establish a right in defendant to seek a portion of plaintiff's military retirement pay subsequent to entry of divorce, and that therefore the trial court was without jurisdiction to entertain defendant's subsequent claim for a portion of the retirement funds. We cannot agree.

In *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983), our Supreme Court addressed an area of family law in "great confusion." At that time, North Carolina was recognizing two types of consent judgments related to divorce. The first type of consent judgment was a court-approved separation agreement, whereby the trial court " 'merely approve[d] or sanction[ed] the payments . . . and set[] them out in a judgment[.]' " *Id.* at 385, 298 S.E.2d at 341 (quoting *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964)). In that type of consent judgment, the corresponding trial court order was unmodifiable absent consent of both parties. *Walters*, 307 N.C. at 385, 298 S.E.2d at 341. In the second type of consent judgment, court-adopted separation agreements, " 'the Court adopt[ed] the agreement of the parties as its own determination of their respective rights and obligations and orders[.]' " *Id.* (quoting *Bunn*, 262 N.C. at 69, 136 S.E.2d at 242). In that type of consent judgment, property provisions which were not satisfied could be modified by the trial court. *Walters*, 307 N.C. at 386, 298 S.E.2d at 341. After examining the differing forms of consent judgments, the Court in *Walters* determined that there was "no significant reason for the continued recognition of two separate forms" of consent judgments. *Id.* at 386, 298 S.E.2d at 341-42. The

Court accordingly rejected the "dual consent judgment approach" and announced a rule that

> whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case.

Id. at 386, 298 S.E.2d at 342.

In the instant case, the incorporated provision of the separation agreement is specifically entitled "Retirement Benefits." The provision states that "[i]ssues of retirement will be addressed at a future date." As the Court recognized in *Walters*, " '[a]n action in court is not ended by the rendition of a judgment, but in certain respects is still pending until the judgment is satisfied.' " *Id.* at 385, 298 S.E.2d at 341 (quoting *Finance Co. v. Trust Co.*, 213 N.C. 369, 371, 196 S.E. 340, 341 (1938)). In the instant case, because the trial court had not previously addressed the "issues of retirement" included in the separation agreement, specifically those "Retirement Benefits" delineated by subsection (F)'s heading, we conclude that the trial court had the authority to enter its subsequent order awarding defendant a portion of plaintiff's military retirement pay.

We also conclude that the provision of the separation agreement is not so overly broad or vague as to prevent the trial court from awarding defendant a portion of plaintiff's retirement pay. We note that "[a]bsent more specific language in the separation agreement to the contrary, the governing law in North Carolina regarding division of retirement benefits is section 50-20.1 of the North Carolina General Statutes." *Gilmore v. Garner*, 157 N.C. App. 664, 670, 580 S.E.2d 15, 20 (2003). In the instant case, the separation agreement offered no "specific language" referring to an alternate means of distribution, and the trial court correctly applied the provisions related to retirement benefits found in N.C. Gen. Stat. § 50-20.1(d).

In light of the foregoing conclusions, we hold that the trial court did not err in awarding defendant a portion of plaintiff's military retirement pay. Accordingly, the trial court order is affirmed.

Affirmed.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. KEITH WAYNE ARNOLD

No. COA04-191

(Filed 5 April 2005)

Probation and Parole— probation revocation—improperly allowing victim to give opinion

The trial court erred in a probation revocation case by allowing the victim to give his opinion as to whether defendant's probation should be revoked, because: (1) the trial court did not exercise its discretion in revoking defendant's probation, but instead allowed the victim to determine whether defendant's probation should be revoked; and (2) defendant is entitled to have and receive such punishment for his offenses as the judge may impose and as the law allows.

Appeal by defendant from judgment entered 3 November 2003 by Judge James Floyd Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 10 January 2005.

Attorney General Roy Cooper, by Assistant Attorney General Stacey A. Phipps, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Kelly D. Miller, for defendant-appellant.

CALABRIA, Judge.

Keith Wayne Arnold ("defendant") appeals from a judgment revoking his probation and activating two consecutive sentences of ten to twelve months in the North Carolina Department of Correction. On appeal, defendant takes issue with the trial court allowing the victim in this case to give his opinion as to whether defendant's probation should be revoked. After a review of the record, we reverse and remand for further proceedings.

Defendant pled guilty to two counts of obtaining property by false pretenses after duping Shelby Tart (the "victim") into purchasing two mobile homes that were subject to financing liens totaling $22,750. The trial court ordered that defendant pay $22,750 in restitution to satisfy the financing liens of the mobile homes bought by the victim. Initially, the trial court continued judgment until 5 June 2003, contingent upon defendant paying the first installment of $8,000 by that date. When defendant paid the first installment as ordered, the trial court entered judgment on 5 June 2003 suspending defendant's sentences and placing him on supervised probation for thirty-six months. In addition to the regular terms and conditions of probation, defendant was ordered to pay the balance of the restitution due to his victim within 240 days from the entry of judgment.

On or about 6 August 2003, defendant's probation officer filed violation reports in each of defendant's cases, alleging the following violations: (1) failure to contact his probation officer in Hoke County on 6/6/03, 6/16/03, 6/25/03, 7/1/03, 7/15/03, and 7/16/03; (2) failure to pay court fees as ordered by the court and being $912 in arrears; (3) residence unable to be verified due to no one being there and there being no sign of occupancy on 6/13/03, 7/15/03, 7/16/03, and 7/20/03; (4) leaving the state without permission to go to Florida on business. Defendant's probation revocation hearing was held on two court dates, 28 October and 3 November 2003, by Judge James F. Ammons, Jr. in Cumberland County Superior Court.

At the outset of the 28 October 2003 hearing, defendant, through counsel, admitted to having gone to Florida to work. Counsel, however, explained that there was some confusion because defendant believed his previous attorney had made arrangements with his probation officer entitling him to do so. Defendant returned to North Carolina when he finished his contract and was arrested for probation violations.

The court next heard from defendant's probation officer, who recommended that defendant be required to pay the $8,000 restitution payment that was currently due. Due to the problem of trying to keep up with defendant and his other pending cases in various other counties, the probation officer recommended that the court revoke defendant's probation but suggested that the court give defendant an opportunity to "purge" himself of the revocation by paying the next restitution payment at the next session of court. The court then heard from the victim, as to the amount still owing to him. Finally, the court conversed at length with defendant and counsel, who assured the

court that two of defendant's workers were coming from Florida with funds to cover the $8,000 restitution payment. Thereafter, the trial court found that defendant had willfully violated the terms and conditions of his probation and continued the matter until Monday, 3 November 2003.

When court reconvened on 3 November 2003, defendant had not paid the restitution owed. The trial court entered judgment revoking defendant's probation and activating his sentences. Defendant appeals, asserting the trial court erred in allowing the victim to decide whether his probation should be revoked. Defendant contends that the trial court violated the "minimum requirements of due process" when it abdicated its decision-making authority to the victim in this case. We agree.

" '[P]robation is an act of grace by the State to one convicted of a crime.' " *State v. Hill*, 132 N.C. App. 209, 211, 510 S.E.2d 413, 414 (1999) (quoting *State v. Freeman*, 47 N.C. App. 171, 175, 266 S.E.2d 723, 725 (1980)). Accordingly, "a proceeding to revoke probation is not bound by strict rules of evidence and an alleged violation of a probationary condition need not be proven beyond a reasonable doubt." *Id.* Rather, "[a]ll that is required is that the evidence be sufficient to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation." *State v. White*, 129 N.C. App. 52, 58, 496 S.E.2d 842, 846 (1998). "[O]nce the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Terry*, 149 N.C. App. 434, 437-38, 562 S.E.2d 537, 540 (2002). "If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation." *Id.*, 149 N.C. App. at 438, 562 S.E.2d at 540. As there are no issues concerning whether there was a willful violation of a valid condition of probation, our review is limited to whether the trial court properly exercised its discretion in revoking defendant's probation.

During the 28 October 2003 hearing, the trial court noted it had already "adjudicated the case," and indicated it would revoke defendant's probation if defendant failed to make the necessary restitution payment on or before 3 November 2003. While that may appear, initially, to be dispositive of defendant's appeal, we note the trial court made several comments in the subsequent 3 November hearing which

belie the trial court had, in fact, determined to revoke defendant's probation. These statements by the trial court at the 3 November hearing include the following: (1) "I'm going to send you to prison for the entire term unless [the victim] says give him another chance because it's his money[,]" (2) "I'm not going to [let you out] unless [the victim] asks me to . . . I am going to leave it in his hands[,]", (3) "If [the victim] want[s] me to give [defendant] another chance, I will do so. If not, I'll send him to prison today[,] (4) "If you [the victim] want me to, I will continue [defendant] on probation . . . . I want you [the victim] to make that decision." After these comments, the victim and trial court engaged in the following dialogue:

> [The victim]: My decision is, Your Honor, that he's in too much trouble . . . . I think he needs to go somewhere and grow up.
>
> The Court: Okay.
>
> [The victim]: That's my thoughts.
>
> The Court: You want me to send him on?
>
> [The victim]: Yes, sir.

The trial court reiterated that defendant willfully violated the terms and conditions of his probation and revoked defendant's probation. These comments by the trial court indicate it did not exercise its discretion in revoking defendant's probation. We agree with defendant that, under the unusual circumstances in this case, the trial court abdicated its duty to exercise its discretion and, instead, allowed the victim to determine whether defendant's probation should be revoked. As noted in *Terry*, the decision to activate a defendant's probation lies within the trial court's "sound discretion" and that discretion cannot be given over wholly to another to determine the appropriate outcome with respect to whether a defendant's probation should be revoked.

The State argues, in the alternative, that defendant cannot show a different result would have been reached at trial absent the alleged error because "[d]efendant admitted the violations and regardless of [the] victim's input, his sentence could be activated." The State is correct in noting that defendant's sentence *could* be activated. It is equally true, however, that the trial court was not obligated to activate defendant's sentence. Where the trial court failed to determine whether to activate defendant's sentence and, instead, allowed the victim to revoke defendant's probation, we are of the opinion that

prejudicial error has occurred. *Accord State v. Phillips*, 185 N.C. 614, 621-22, 115 S.E. 893, 897 (1923) (noting that the court alone has "power to pass upon the . . . guilt of a defendant or his liability to punishment" and reversing the imposition of punishment on a suspended sentence upon observing that "[t]he judge should have ascertained whether the allegation of the state that the prisoner had violated the condition on which the judgment was suspended had been shown, and . . . [i]f he decided upon competent evidence that it had been so violated, [the judge] should then have proceeded to impose such punishment as, in his sound discretion, the circumstances of the case and the law required"). As in *Phillips*, we hold defendant was not properly sentenced and is entitled "to have and receive such punishment for his offense as the judge may impose and as the law allows." *Id.*

Reversed and remanded.

Chief Judge MARTIN and Judge GEER concur.

LOIS D. FRANCIS, PLAINTIFF v. MARK E. FRANCIS, DEFENDANT

No. COA04-765

(Filed 5 April 2005)

1. Divorce— alimony—consideration of investment portfolio

The trial court did not err by denying alimony payments for a period of 22 months and considering plaintiff wife's investment portfolio when calculating the amount of alimony that the trial court awarded, because: (1) the trial court considered all the statutory factors and exercised its discretion in determining the appropriate amount, duration, and manner of payment; and (2) the trial court had the authority under N.C.G.S. § 50-16.3A(b)(15) to consider any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.

2. Child Support, Custody, and Visitation— Child Support Guidelines—combined gross monthly income

The trial court did not err by using the child support guidelines even though plaintiff contends the parents' combined gross income was greater than $20,000.00 per month, because: (1) the

trial court determined that defendant's total gross income was $11,282.00 per month and plaintiff's gross income was $698 per month, which combined was below the $20,000.00 threshold; and (2) the trial court was permitted to use the guidelines requiring defendant to continue paying $1,521.00 per month in child support.

3. Costs— attorney fees—alimony—child support

The trial court did not err in an alimony and child support case by allegedly failing to award adequate attorney fees, because: (1) plaintiff wife received one-third of her total attorney fees, which the trial court determined was reasonable based on the nature and scope of the legal services rendered and the time required of counsel and her staff; and (2) plaintiff failed to show the trial court abused its discretion.

Appeal by plaintiff from order entered 24 November 2003 by Judge Shelley H. Desvousges in Wake County District Court. Heard in the Court of Appeals 12 January 2005.

Constance M. Ludwig for plaintiff appellant.

Law Offices of Charles H. Montgomery, by Charles H. Montgomery and Jeanne B. Ford, for defendant appellee.

McCULLOUGH, Judge.

This is a family law dispute involving alimony, child support, and attorney fees. Plaintiff Lois D. Francis and defendant Mark E. Francis were married in 1981 and separated on 5 March 2000. Their daughter, Laura Francis, was born on 22 August 1988.

On 9 May 2000, plaintiff filed claims for post-separation support, child support, alimony, attorney fees, equitable distribution, and child custody. Defendant filed an answer and counterclaims for equitable distribution and child custody on 1 July 2000.

On 24 November 2003, the trial judge issued an order requiring defendant to pay: (1) $1,521.00 in child support; (2) $2,000.00 per month in alimony for five years or until plaintiff reaches the age of 62 (whichever is later); and (3) $17,202.91 for attorney fees. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred by (1) denying alimony payments for a period of 22 months and considering

plaintiff's investment portfolio when calculating the amount of alimony that the trial court did award, (2) using the child support guidelines in this case, and (3) failing to award adequate attorney fees. We disagree and affirm the decision of the trial court.

I. Alimony

[1] Plaintiff argues that the trial court erred by denying alimony payments for a period of 22 months and considering plaintiff's investment portfolio when calculating the amount of alimony that the trial court did award. We disagree.

Pursuant to N.C. Gen. Stat. § 50-16.3A(a) (2003):

> The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section.

When awarding alimony, the trial court must consider the sixteen factors set forth in N.C. Gen. Stat. § 50-16.3A(b)(1)-(16). The court also has "discretion in determining the amount, duration, and manner of payment of alimony." N.C. Gen. Stat. § 50-16.3A(b). The trial court's decision regarding the amount of alimony will not be disturbed unless there is a manifest abuse of discretion. *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999).

In the present case, the trial court determined that plaintiff was entitled to alimony since plaintiff was a dependent spouse and defendant was a supporting spouse. Additionally, the trial court considered all of the statutory factors before concluding that an award of alimony was equitable. Defendant was required to pay $2,000.00 per month beginning on 1 June 2003. The payments would last for five years or until plaintiff turned 62 (whichever is later).

Defendant has not shown that the trial court abused its discretion in denying alimony for a period of 22 months. As we have indicated, the trial court considered all the statutory factors and exercised its discretion in determining the appropriate amount, duration, and manner of payment. Additionally, the trial court acted properly in considering plaintiff's investment portfolio when calculating the amount of alimony. Undoubtedly, the trial court had the authority to evaluate this factor under N.C. Gen. Stat. § 50-16.3A(b)(15), the provision that permits consideration of "[a]ny other factor relating to the economic

circumstances of the parties that the court finds to be just and proper." We overrule this assignment of error.

II. Child Support

[2] Plaintiff argues that the trial court erred in making its determination of child support. Pursuant to N.C. Gen. Stat. § 50-13.4(c) (2003), "[t]he court shall determine the amount of child support payments by applying the presumptive guidelines[.]" However,

> [i]n cases in which the parents' combined adjusted gross income is more than $20,000 per month ($240,000 per year), the supporting parent's basic child support obligation cannot be determined by using the child support schedule.

2005 Ann. R. (N.C.) 48. In these instances, the court should consider, "on a case by case basis," "the reasonable needs of the child(ren) and the relative ability of each parent to provide support." *Id.*

In the present case, defendant voluntarily paid $1,521.00 per month, the maximum amount for supporting one child under Schedule A of the North Carolina Child Support Guidelines. Defendant contends that the trial court should not have used the child support guidelines because the parents' combined gross income was greater than $20,000.00 per month. We disagree.

Based on defendant's testimony, the trial court determined defendant's income to be $9,516.00 per month in salary and $1,766.00 per month from investments. Thus, his total gross income was $11,282.00 per month. The trial court acknowledged that some of defendant's earned income from investments and sales of stock was higher in 2001 and 2002, but this would not recur in 2003 and beyond. Plaintiff stated in her affidavit that her gross income was $698.00 per month. The parents' combined gross income was $11,980.00 which is below the $20,000.00 threshold. Accordingly, the trial court was permitted to use the child support guidelines and require defendant to continue paying $1,521.00 per month in child support. We overrule this assignment of error.

III. Attorney Fees

[3] Plaintiff argues that the trial court erred in its award of attorney fees. Plaintiff suggests that the award should have been higher. Our Supreme Court has explained:

> In order to receive an award of counsel fees in an alimony case, it must be determined that the spouse is entitled to the relief demanded; that the spouse is a dependent spouse; and that the dependent spouse is without sufficient means whereon to subsist during the prosecution of the suit, and defray the necessary expenses thereof. Whether these requirements have been met is a question of law that is reviewable on appeal, and if counsel fees are properly awarded, the amount of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for an abuse of discretion.

Clark v. Clark, 301 N.C. 123, 135-36, 271 S.E.2d 58, 67 (1980) (citations omitted). In the present case, plaintiff received one-third of her total attorney fees. The trial court determined that this amount was reasonable because of "the nature and scope of the legal services rendered[] [and] the skill and time required of counsel and her staff." Since plaintiff has failed to show that the trial judge abused her discretion in making this award, we overrule this assignment of error.

We have considered plaintiff's other arguments and have determined that they are without merit. Therefore, the trial court's order is

Affirmed.

Judges ELMORE and LEVINSON concur.

STATE OF NORTH CAROLINA v. LORI EDWARDS TEDDER, DEFENDANT

No. COA04-893

(Filed 5 April 2005)

1. Motor Vehicles— driving while impaired—voluntary dismissal

The trial court had jurisdiction to enter judgment against defendant for driving while impaired even though the State entered a voluntary dismissal of the charge against defendant after trial began, because: (1) defendant made no objection to entry of judgment at the sentencing hearing and has thus waived

her right to bring this matter forward on appeal; (2) the State filed a dismissal pursuant to N.C.G.S. § 15A-932 when defendant failed to appear on 25 April 2002, the second day of trial, and the State filed a reinstatement on 5 May 2003; and (3) the State followed the proper statutory procedures with regard to the dismissal and reinstatement of defendant's case.

2. Sentencing— aggravating factors—two prior DWI convictions

The trial court did not err by sentencing defendant for driving while impaired based upon its finding of two grossly aggravating factors which were not submitted to the jury because: (1) the case of *Blakely v. Washington*, — U.S. — (2004) specifically exempts aggravated sentences based upon prior convictions from its requirements; (2) the court found as grossly aggravating factors that defendant had two previous convictions for DWI committed within the preceding seven years of the date of the current offense and that at the time of the current offense she drove with a child under the age of sixteen years in the vehicle; (3) N.C.G.S. § 20-179(c) mandates that the trial court must impose the Level One punishment under subsection (g) if the judge determines that two or more grossly aggravating factors apply or if defendant has two prior impaired driving convictions within the 7 years preceding the offense; and (4) the finding of two prior convictions triggered the mandatory Level One sentence and the finding of another grossly aggravating factor had no impact on defendant's sentence.

3. Motor Vehicles— driving while impaired—motion to dismiss—sufficiency of evidence—diabetic attack

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired even though defendant contends there was insufficient evidence of impairment when she was allegedly suffering from a diabetic attack, because: (1) a law enforcement officer may express an opinion that a defendant is impaired so long as that opinion is based on something other than an odor of alcohol, and an officer testified that based on the results of the sobriety test he conducted that defendant was sloppy drunk and that there was not just a slight impairment; and (2) there was no evidence to explain defendant's diabetic condition or to explain how it might mimic alcohol impairment.

4. Constitutional Law— right to confront witnesses—defendant's voluntary and unexplained absence from trial—waiver

The trial court did not err in a driving while impaired case by proceeding with trial in defendant's absence, because a defendant's voluntary and unexplained absence from court subsequent to commencement of trial constitutes a waiver of the right to confront witnesses.

Appeal by defendant from judgment entered 6 October 2003 by Judge Judson D. DeRamus, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 15 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Patricia A. Duffy, for the State.

John T. Hall, for defendant.

HUDSON, Judge.

On 20 April 2001, defendant Lori Edwards Tedder was arrested and charged with driving while impaired ("DWI") and driving while license revoked ("DWLR"). In District Court, defendant pled guilty to DWLR and was found guilty of DWI. Defendant appealed the DWI conviction to superior court for trial *de novo*. At the 24 April 2002 criminal session of superior court, the jury found defendant guilty of DWI. Based on its findings of grossly aggravating factors, the court sentenced her as a level I to an active term of twenty-four months and ordered defendant to pay costs and attorney fees. Defendant appeals. We find no error.

On 20 April 2001, Officer Boak of the Winston-Salem Police Department came up behind defendant's vehicle and noticed her driving in a jerky and inconsistent manner. After he observed her cross the center line four times and run off onto the shoulder twice in only a few miles, Officer Boak pulled defendant over. Defendant immediately got out of the car and walked toward him. Officer Boak smelled alcohol and noticed that defendant slurred her speech. Defendant was unable to recite the alphabet and swayed when standing. Officer Boak arrested defendant for DWI and took her to the magistrate's office. While at the magistrate's office, defendant became ill. Officer Boak took her to a hospital, where he asked defendant to submit to a blood test. Defendant refused.

Defendant now argues that the court erred in entering judgment against her. We disagree.

[1] Defendant first contends that the court was without jurisdiction to enter judgment against her because the State entered a voluntary dismissal of the charge against her after trial began. Defendant made no objection to entry of judgment at the sentencing hearing and has thus waived her right to bring this matter forward on appeal. N.C. R. App. P. 10(b)(1).

Even if this matter were properly before this Court, defendant could not prevail.

> 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 reinstate 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). The State filed a dismissal pursuant to N.C. Gen. Stat. § 15A-932 when defendant failed to appear on 25 April 2002, the second day of trial. The State filed a reinstatement on 5 May 2003. The State having followed the proper statutory procedures with regard to the dismissal and reinstatement, defendant's assignment of error is without merit.

[2] Defendant also contends her sentencing was in error because the court found two grossly aggravating factors which were not submitted to the jury. Defendant argues that, under *Blakely v. Washington*, a judge may not impose an aggravated sentence based on facts not found by a jury beyond a reasonable doubt. — U.S. —, 159 L. Ed. 2d 403 (2004). However, *Blakely* specifically exempts aggravated sentences based on prior convictions from its requirements. *Id.* at —, 159 L. Ed. 2d at 412 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435 (2000)) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") Here, the court found two grossly aggravating factors pursuant to N.C. Gen. Stat. § 20-179(c): that defendant had two previous convictions for DWI committed within the preceding seven years of the date of the current

offense, and that at the time of the current offense, she drove with a child under the age of sixteen years in the vehicle. Section 20-179(c) mandates that the judge "*must impose* the Level One punishment under subsection (g) of this section if the judge determines that two or more grossly aggravating factors apply," or if defendant has two prior impaired driving convictions within the 7 years preceding the offense. N.C. Gen. Stat. § 20-179(c) (2001) (emphasis added). The finding of two prior convictions triggered the mandatory level one sentence; the finding of another grossly aggravating factor had no impact on defendant's sentence. Thus, *Blakely* relief is not required here, and this assignment of error is overruled.

[3] Defendant next argues that the court erred in denying her motion to dismiss the DWI charge for insufficiency of the evidence. We find no error.

Defendant contends that the State failed to prove she was impaired when the evidence suggests she was actually suffering from a diabetic attack. The standard of review on a motion to dismiss is well-established:

> When ruling on a motion to dismiss, the trial court must determine whether the prosecution has presented substantial evidence of each essential element of the crime. Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In making its decision, the trial court must view the evidence in the light most favorable to the State.

State v. Smith, 357 N.C. 604, 615-16, 588 S.E.2d 453, 461 (2003), *cert. denied*, —— U.S. ——, 159 L. Ed. 2d 819 (2004) (internal citations and quotation marks omitted). "The essential elements of DWI are: (1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance." *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002), *aff'd*, 357 N.C. 242, 580 S.E.2d 693 (2003) (per curiam) (citing N.C. Gen. § Stat. 20-138.1).

A law enforcement officer may express an opinion that a defendant is impaired, so long as that opinion is based on something more than an odor of alcohol. *State v. Rich*, 351 N.C. 386, 397-98, 527 S.E.2d 299, 305 (2000). Officer Boak testified that, based on the results of the sobriety test he conducted, defendant "was sloppy drunk" and that "there wasn't just a slight impairment." There was no evidence to

explain defendant's diabetic condition or to explain how it might mimic alcohol impairment. Because the evidence presented, taken in the light most favorable to the State, was substantial evidence of each essential element of the crime, we find no error.

[4] Defendant also argues that it was error for the court to proceed with the trial in her absence. Defendant contends the court's action violated her constitutional right to confront witnesses against her. However, "[a] defendant's voluntary and unexplained absence from court subsequent to commencement of trial constitutes . . . a waiver" of this right. *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991). In such cases, it is not error for the court to proceed with trial in the defendant's absence. *State v. Skipper*, 146 N.C. App. 532, 535, 553 S.E.2d 690, 692 (2001).

No error.

Judges WYNN and STEELMAN concur.

STEPHEN AND MICHELLE ARNOLD, ROBERT P. AND ELIZABETH M. BARR, DAVID E. AND KRYSTAL D. BOTTOM, TIMOTHY A. AND JEANETTE P. BRADLEY, CHARLES MICHAEL AND DEBRA S. BRAUN, KENT AND BARBARA CAMPBELL, ROBERT E. AND AIDA V. DUNGAN, RICHARD R. AND CHARLOTTE D. ELEY, JONATHAN A. AND PEGGY J. HILL, STEVEN P. AND CHRISTI W. HURD, JOHN P. AND KIMBERLY J. KENNEDY, PIERCE A. KAHADUWE LIVING TRUST, MARK P. AND JACQUELINE G. RUSCOE, BENJAMIN F. AND SUSAN E. TURNER, JACQUELYN M. WEBB, TRUSTEE OF THE JACQUELYN M. WEBB LIVING TRUST, MARC B. AND JACKIE LEE WESTLE, DERWIN J. AND NANCY L. C. WILLIAMS, ROBERT L. AND BECKY L. WILSON, STEPHEN M. AND JULIA R. EARGLE, AND ROBERT A. AND JANE P. ERRICO, PETITIONERS v. CITY OF ASHEVILLE, RESPONDENT

No. COA04-690

(Filed 5 April 2005)

Appeal and Error— appealability—interlocutory order—order compelling discovery

Petitioners' appeal from an order compelling discovery in an annexation case is an appeal from an interlocutory order and is not immediately appealable because: (1) it does not affect a substantial right since it does not impose sanctions on the party contesting the discovery nor does it require production of materials protected by a recognized privilege; (2) it does not appear that

petitioners are truly concerned with attaining an expedited hearing when the most significant portion of the delay in this matter was due to petitioners' refusal to answer discovery and in getting this matter before the Court of Appeals; and (3) N.C.G.S. § 160A-50(i) provides that the annexation will not be effective until the date of the final judgment in this matter in either the trial or appellate court.

Appeal by petitioners from judgment entered 20 November 2003 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 1 March 2005.

Dungan & Associates, P.A., by Shannon Lovins, for petitioners-appellants.

Robert W. Oast, Jr. for respondent-appellee.

STEELMAN, Judge.

On 27 June 2002, respondent City of Asheville (respondent, Asheville or city) enacted an annexation ordinance extending its corporate limits. On 23 August 2004, petitioners filed a petition seeking judicial review of the 27 June 2002 annexation ordinance, pursuant to N.C. Gen. Stat. § 160A-50 (2004). Petitioners alleged that the area annexed by respondent failed to meet requirements set forth in N.C. Gen. Stat. §§ 160A-45, -47, -48, -49 (2004). On 4 October 2002, the City filed a response to the petition. On 9 April 2003, respondent served upon petitioners discovery requests, including respondent's first request for admission, respondent's first set of interrogatories, and respondent's first request for production of documents. Petitioners objected to respondent's discovery requests on the basis that they constituted improper discovery under N.C. Gen. Stat. § 160A-50(c) and N.C. R. Civ. P. 26. The city filed a motion to compel. Following a hearing on this motion, the trial court entered an order compelling petitioners to respond to the discovery requests but did not impose any sanctions upon petitioners. From this order, petitioners appeal.

The threshold question is whether petitioners' appeal is properly before this Court. There is no dispute that this appeal is interlocutory, as it is from an order that was "made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *North Carolina Dep't of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995).

> In general, "there is no right to immediate appeal from an interlocutory order." "This rule is grounded in sound policy considerations. Its goal is to 'prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.' " However, there are two significant exceptions to this rule. First, an interlocutory order is immediately appealable "when the trial court enters 'a final judgment as to one or more but fewer than all of the claims or parties' and the trial court certifies in the judgment that there is no just reason to delay the appeal." Secondly, an interlocutory order may be immediately appealed if "the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits."

Evans v. Evans, 158 N.C. App. 533, 534-35, 581 S.E.2d 464, 465 (2003) (internal citations omitted). "In either instance, the burden is on the appellant 'to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.' " *Romig v. Jefferson-Pilot Life Ins. Co.*, 132 N.C. App. 682, 685, 513 S.E.2d 598, 600 (1999). There was no certification pursuant to Rule 54(a) of the North Carolina Rules of Civil Procedure in this case.

"An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). Our appellate courts have recognized very limited exceptions to this general rule, holding that an order compelling discovery might affect a substantial right, and thus allow immediate appeal, if it either imposes sanctions on the party contesting the discovery, or requires the production of materials protected by a recognized privilege. *See Sharpe*, 351 N.C. 159, 522 S.E.2d 577.

Neither of these exceptions are present in this case, nor do petitioners so contend. Instead, petitioners argue that the respondent's discovery will interfere with the petitioners' right to "expedited judicial review" as set forth in N.C. Gen. Stat. § 160A-50. We agree with petitioners that this statute does contemplate an expedited hearing procedure in annexation cases. The record in this case shows that the petition was timely filed, and responded to. There is no indication that this matter was scheduled for trial at the time respondent's dis-

covery was filed. More importantly, the record is devoid of any efforts by petitioners requesting an early trial setting. Rather, the most significant portion of the delay in this matter was due to petitioners' refusal to answer discovery (June 2003-November 2003), and in getting this matter before this court (December 2003 to March 2005). It took six months to get the record on appeal settled in this matter, and another five months for all of the briefs to be submitted. It does not appear that petitioners are truly concerned with attaining an expedited hearing in this matter. We further note that under the provisions of N.C. Gen. Stat. § 160A-50(i), the annexation will not be effective until the date of the final judgment in this matter in either the trial or appellate court.

Petitioners have failed to demonstrate that the order of the trial court affects a substantial right. This appeal is hereby dismissed.

DISMISSED.

Judges WYNN and HUDSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 APRIL 2005

BEALE v. MANLEY No. 04-809	Wayne (01CVD1394)	Dismissed
COLUMBUS CTY. EX REL. COLLINS v. DAVIS No. 04-255	Columbus (00CVD1770)	No error
COOKE v. COOKE No. 04-414	Haywood (02CVS287)	Affirmed
COULTER v. EARL TINDOL FORD, INC. No. 04-34	Gaston (03CVS2062)	Dismissed
DAHER v. DAHER No. 04-310	Mecklenburg (99CVD18510)	Dismissed
DIXON v. TAYLOR No. 04-781	Pamilco (03CVS121)	Affirmed
FUQUAY-VARINA v. SOUTHSIDE TR. No. 04-738	Wake (02CVS11705)	Affirmed
GREENE v. HICKS No. 04-803	Wake (03CVS1017)	Affirmed
HALL v. PERRY No. 04-871	Mecklenburg (03CVS6436)	Dismissed
IN RE B.A.A. & P.J.A. No. 04-223	Randolph (02J85) (02J86)	Affirmed
IN RE C.E. No. 04-685	Wayne (03J235)	Affirmed
IN RE D.G., C.S., & K.G. No. 03-1603	Chatham (02J62) (02J63) (02J64)	Affirmed in part; reversed and remanded in part
IN RE S.M.W. No. 04-204	Rowan (98J179)	Affirmed
IN RE T.B.M. No. 04-1216	Gaston (00J208)	Affirmed in part, vacated in part
IN RE T.S. No. 04-1088	Burke (02J27)	Affirmed
JEFFERS v. D'ALESSANDRO No. 04-944	Mecklenburg (03CVS13863)	Appeal dismissed

KEARNEY v. VANCE CTY. BD. OF EDUC. No. 04-762	Ind. Comm. (I.C. TA-16855)	Affirmed
LEONARD v. KING SASH & DOOR, INC. No. 04-820	Ind. Comm. (I.C. 9309)	Affirmed
McNAIR v. SUPERIOR CONSTR. CO. No. 04-1048	Ind. Comm. (I.C. 248030)	Affirmed
MOOLENAAR v. MOOLENAAR No. 04-741	Lincoln (02CVD1082)	Affirmed
PIPER v. AMP, INC. No. 04-217	Ind. Comm. (I.C. 81100)	Affirmed
ROBERO (CASTRO) v. STAFFMARK No. 04-535	Ind. Comm. (I.C. 962662)	Affirmed
SALKIN v. HORNE No. 04-743	Mecklenburg (02CVS5118)	Affirmed
SKINNER v. FURMAN No. 04-236	Watauga (01CVS542)	No error
SMITH v. SCHELERO No. 04-1103	Brunswick (03CVS1443)	Dismissed
SOUTHERN EQUIP. CO. v. LAURA & ASSOCS. No. 04-747	Wake (03CVS15377)	Affirmed
STATE v. BAILEY No. 04-1147	Forsyth (01CRS23270) (01CRS55971) (01CRS56418) (01CRS56420) (01CRS56422) (01CRS56423) (01CRS56425)	Affirmed; remanded for correction of judgment
STATE v. BANUELOS No. 04-748	Guilford (02CRS101195) (02CRS101196) (02CRS101197) (02CRS101198)	Affirmed
STATE v. BARR No. 04-325	Durham (02CRS48173)	Dismissed
STATE v. BIGELOW No. 04-800	Caswell (03CRS75)	No error
STATE v. BOGLE No. 03-1574	Gaston (96CRS39392)	Affirmed as to second degree murder;

	(98CRS13944) (98CRS13945) (98CRS13946) (98CRS13947) (98CRS13948)	remanded for new sentencing hearing on the remaining charges
STATE v. BROWN No. 04-76	Guilford (02CRS97874) (02CRS97892) (02CRS98958) (02CRS98959)	No error
STATE v. BRUTON No. 04-407	Lenoir (02CRS52879) (02CRS52880)	No error as to judgments; remanded for correction of clerical error
STATE v. COOPER No. 04-947	Forsyth (00CRS40391) (00CRS57553) (00CRS57958) (01CRS4207)	Remanded for resentencing
STATE v. COOPER No. 04-1046	New Hanover (03CRS5727) (03CRS5728) (03CRS5729)	No error
STATE v. EDVIN No. 04-889	Lee (92CRS9886) (92CRS9887)	Affirmed in part; vacated and remanded in part
STATE v. GANT No. 04-496	Lenoir (00CRS50957) (00CRS9560)	Affirmed
STATE v. GODFREY No. 04-774	McDowell (02CRS3858)	No error
STATE v. GRAHAM No. 04-784	Forsyth (00CRS28641)	Affirmed
STATE v. GRAY No. 04-478	Guilford (01CRS106779)	No error
STATE v. HOLLOWAY No. 04-287	Beaufort (02CRS52607)	No error
STATE v. HUMPHRIES No. 04-296	Cleveland (01CRS52015) (01CRS52016)	No error
STATE v. JOHNSON No. 04-626	Cleveland (02CRS58785) (03CRS3560) (03CRS3561)	No error

STATE v. KING No. 04-826	Henderson (02CRS57431)	No error
STATE v. LEBLANC No. 04-22	Gaston (02CRS19678) (02CRS54342) (02CRS61699) (02CRS61701) (02CRS61702) (02CRS61703)	No error
STATE v. LEE No. 04-950	Guilford (02CRS96841)	No error
STATE v. McDOUGLE No. 04-88	Onslow (02CRS60681) (02CRS60683)	No error in part; dismissed without prejudice in part
STATE v. MILLER No. 04-1175	Forsyth (03CRS7132) (03CRS51760)	No error in the trial. Remanded for corrections
STATE v. MOORE No. 04-562	Greene (03CRS50396)	No error
STATE v. NELSON No. 04-231	Forsyth (02CRS50551) (02CRS367)	No error
STATE v. PAULINO No. 04-749	Guilford (02CR099689) (02CR099690) (02CR099691) (02CR099692) (02CR099693) (02CR099694) (02CR099695) (02CR099696) (02CR099697)	Affirmed
STATE v. PERKINS No. 04-659	New Hanover (03CRS10927)	No error
STATE v. PITTMAN No. 04-106	Craven (03CRS50335) (03CRS50336) (03CRS50337) (03CRS50338)	No error
STATE v. POWELL No. 04-1207	Mecklenburg (03CRS216984)	No error
STATE v. RANSOM No. 04-448	Robeson (99CRS853)	No error

STATE v. ROBINSON No. 04-948	Henderson (03CRS2147) (03CRS56186) (03CRS56203) (03CRS56185)	No error
STATE v. SMITH No. 04-660	Dare (99CRS3274) (99CRS3275)	Reversed
STATE v. STRAUSSER No. 04-982	Surry (01CRS52752) (01CRS52753) (01CRS52754) (01CRS52755) (02CRS715) (02CRS2436) (02CRS50350) (02CRS50680) (02CRS51003) (02CRS51004) (02CRS51005)	Vacated in part and remanded in part for resentencing
STATE v. TATE No. 04-97	Union (01CRS55292)	No error
STATE v. VELARDI No. 04-1164	Henderson (03CRS1662) (03CRS1663) (03CRS1664) (03CRS1665)	No error
STATE v. WALKER No. 04-1020	Forsyth (03CRS51472)	No error
STATE v. WATKINS No. 04-842	Guilford (02CRS96104)	No error
STATE v. YARBOROUGH No. 04-1167	Moore (00CRS5809) (00CRS5817)	Reversed and remanded
WATERS v. WATERS No. 04-506	Caldwell (03CVD1167)	Reversed

DAPHNE BOYD, PLAINTIFF v. ROBESON COUNTY; HOWARD STRAWCUTTER, MEDICAL DIRECTOR OF JAIL HEALTH SERVICES AT THE ROBESON COUNTY DETENTION CENTER, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; FERRISS LOCKLEAR, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; GLENN MAYNOR, SHERIFF OF ROBESON COUNTY, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; RAYMOND WILLIAMS, CHIEF JAILER FOR THE ROBESON COUNTY DETENTION CENTER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; TERRY HARRIS, CHIEF OF OPERATIONS FOR THE ROBESON COUNTY DETENTION CENTER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; SHARON BYRD, WANDA HUNT, JOANN WEST, BRENDA SANDERSON, SUSAN GREEN, ANNA SMITH, AND FONDARIE LOCKLEAR, DETENTION OFFICERS FOR THE ROBESON COUNTY DETENTION CENTER, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES; AND WESTERN SURETY COMPANY, A SURETY COMPANY FOR THE SHERIFF OF ROBESON COUNTY, DEFENDANTS

No. COA03-1222

(Filed 5 April 2005)

1. **Appeal and Error— appealability—interlocutory order—civil rights claim—sheriff as person—qualified immunity**

The question of whether a governmental entity is a "person" under 42 U.S.C.§ 1983 is analogous to the public duty doctrine and to claims of immunity and therefore involves a substantial right permitting an interlocutory appeal.

2. **Appeal and Error— appealability—denial of summary judgment—inability of County for sheriff and jail staff—not an immunity claim or substantial right**

A portion of defendants' appeal from the denial of summary judgment was dismissed as interlocutory where defendants argued that Robeson County could not be held liable for the negligence of its sheriff and other jail staff and that plaintiff failed to present sufficient evidence that the sheriff and detention officers were negligent in their official capacities. These arguments do not involve any claim of immunity and defendants have made no other showing as to how this aspect of the trial court's ruling affected a substantial right.

3. **Civil Rights— 42 U.S.C. § 1983—sheriff as person**

The trial court properly concluded that a sheriff in North Carolina is a "person" under 42 U.S.C. § 1983 and North Carolina sheriffs can be sued in their official capacities under that statute.

4. **Pleadings— detention officers—sued in individual and official capacities**

Detention officers were properly sued in both their individual and official capacities for negligence in obtaining medical care for an inmate. Whether a plaintiff's allegations relate to

actions outside the scope of defendant's official duties is relevant in determining immunity, but is not relevant to determining whether the defendant is being sued in his or her official or individual capacity.

5. Civil Rights— 42 U.S.C.§ 1983—detention officers—failure to obtain medical aid—qualified immunity

The trial court properly denied a motion by detention officers for summary judgment on a 42 U.S.C.§ 1983 claim on the issue of qualified immunity. The threshold inquiry for a court in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation. A reasonable officer in 1998 would have had fair warning that ignoring an inmate's requests for medical care to address severe pain, vomiting, and nausea over two full days would violate clearly established constitutional law. The fact that plaintiff may have received some care when her requests for assistance were finally acknowledged does not relieve defendants from their responsibility.

6. Appeal and Error— appealability—interlocutory order—sufficiency of evidence to support immunity

The denial of a motion for summary judgment is an interlocutory order that generally cannot be the basis for an immediate appeal. Here, the argument that the trial court erred by determining that plaintiff had presented sufficient evidence of a constitutional violation by the individual defendants addresses the merits of plaintiff's claim rather than an immunity defense and this portion of the appeal is dismissed.

Appeal by defendants from order entered 30 June 2003 by Judge Jack A. Thompson in Robeson County Superior Court. Heard in the Court of Appeals 19 May 2004.

Beaver, Holt, Sternlicht, Glazier, Britton, & Courie, P.A., by Richard B. Glazier, Rebecca J. Britton, and Joseph W. Osman, for plaintiff-appellee.

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by Scott C. Hart, for defendants-appellants.

GEER, Judge.

This appeal arises out of a five-day episode at the Robeson County Detention Center, during which, according to plaintiff Daphne

Boyd, she was denied adequate medical treatment for a ruptured appendix despite her constant complaints of pain and pleas for assistance. Defendants Sheriff Glenn Maynor and the individual detention officers appeal from the trial court's order denying their motions for partial summary judgment, contending primarily that (1) they are not "persons" amenable to suit under 42 U.S.C. § 1983 (2000) and (2) the trial court erred in failing to hold that plaintiff's § 1983 claims are barred by the doctrine of qualified immunity.

We hold that a North Carolina sheriff is a "person" subject to suit under 42 U.S.C. § 1983 and that defendants are not entitled to summary judgment based on their defense of qualified immunity when the evidence is viewed in the light most favorable to plaintiff, the non-moving party. We decline to reach defendants' remaining arguments because they are not properly the subject of an interlocutory appeal.

Facts

The evidence, when viewed in the light most favorable to plaintiff, establishes the following facts. On 14 September 1998, plaintiff entered the Robeson County Detention Center to serve a 45-day sentence for felony worthless check convictions. On 24 October 1998, during the early morning hours, plaintiff began to suffer from nausea and "constant" abdominal pain. After notifying the officer on duty of her condition, plaintiff obtained and completed a sick call request slip. Approximately 30 minutes later, a detention officer escorted plaintiff to the Jail Health Service Clinic ("the clinic"), where a nurse gave plaintiff "something to drink" and sent plaintiff back to her cell.

Once in her cell, plaintiff vomited. Her pain became more intense and spread from her stomach, where it had previously concentrated, to the right side of her body. Plaintiff informed the detention officer and requested to visit the clinic once again. At 4:00 a.m., a detention officer took plaintiff back to the clinic where plaintiff vomited again. The nurse examined plaintiff, telephoned Dr. Ferris Locklear, the clinic physician, and administered a "shot for pain."

The next morning, 25 October 1998, plaintiff awoke and again experienced "agonizing pain" and nausea. Plaintiff gave a sick call request form to the detention officers. At some point that day, Dr. Locklear examined plaintiff. Plaintiff asked the doctor if the problem might be with her appendix, but he responded that she was suffering from a virus. When plaintiff asked to go to the hospital or see another

doctor, Dr. Locklear told her that inmates only go to the hospital for emergencies. Dr. Locklear treated plaintiff with Tylenol and she was returned to her cell. The doctor told plaintiff that he would see her the next day.

On the following day, 26 October 1998, plaintiff submitted another sick call request slip to a detention officer and reminded her that Dr. Locklear was supposed to re-examine her that day. The officer said she would give the doctor the slip. In 1998, it was the responsibility of the detention officers to deliver the sick call slips to the nurse. During the day, plaintiff's pain advanced to the left side of her abdomen and also began affecting her back. She continued to vomit and have diarrhea, with her nausea getting worse as the day went on. Throughout the day, each time a detention officer passed the window of her cell, plaintiff asked when the doctor would see her, explaining that she was still in tremendous pain. No one gave her any information or took her to the clinic. At one point, plaintiff was transported to the Robeson County Courthouse to attend a hearing. As the officers returned her to her cell, she told them again that she needed medical care.

On 27 October 1998, plaintiff requested another sick call request slip from the detention officers. She completed it and put it in the window of her cell. When the officers asked how she was feeling, she told them that she felt as if she "was going to die." Plaintiff testified: "And I just kept complaining to anybody and everybody that I thought might listen." Once plaintiff learned that the pain medication prescribed by the doctor had been halted, she repeatedly asked to get her medication back. Her pain continued to worsen over the course of the day until she could barely move. Still, the officers did not take her to the clinic.

On 28 October 1998, after plaintiff filled out another sick call request slip, a detention officer finally took her to see Dr. Locklear. Dr. Locklear examined her and ordered additional tests. He told plaintiff that he would give her something else for her pain and sent her back to her cell. Later that day, plaintiff traveled to Lumberton Radiological Associates where an ultrasound procedure revealed acute gangrenous appendicitis with peritonitis.

Due to the advanced nature of the appendicitis, plaintiff was admitted to Southeastern Regional Medical Center where Dr. Samuel Britt performed an emergency appendectomy. Her condition was consistent with an appendicitis left untreated for five days. Following the

surgery, plaintiff twice suffered a bowel obstruction requiring two additional surgeries. According to Dr. Britt, a "direct connection" existed between the surgical complications plaintiff suffered and the delay in removing plaintiff's appendix.

Boyd brought suit against defendants for violation of the Eighth and Fourteenth Amendments of the federal constitution, negligence, and spoliation of evidence. Prior to the hearing on defendants' motion for partial summary judgment, plaintiff voluntarily dismissed the following claims without prejudice: (1) all 42 U.S.C. § 1983 claims against Dr. Locklear in his official and individual capacities; (2) all 42 U.S.C. § 1983 supervisory liability claims against defendants Chief Jailer Williams, Chief of Operations Harris, and Dr. Strawcutter, Medical Director of Jail Health Services, in their individual capacities; (3) all 42 U.S.C. § 1983 claims against defendants Maynor, Williams, Harris, and Strawcutter in their individual capacities; (4) all common law negligence claims against defendants Maynor, Williams, Harris, and the seven named detention officers in their individual capacities; (5) all common law negligence claims against defendants Williams and Harris in their official capacities; and (6) the spoliation of evidence claims against all defendants. As to the remaining claims, Superior Court Judge Jack A. Thompson denied defendants' motion for partial summary judgment.

Interlocutory Appeal

[1] Defendants argue primarily on appeal that the trial court erred in denying their motion for partial summary judgment because (1) the Sheriff of Robeson County and the employees of the Sheriff's Department sued in their official capacity are not "persons" who may be sued under 42 U.S.C. § 1983, and (2) the detention officers sued in their individual capacity are entitled to qualified immunity. Because this appeal comes to this Court from the trial court's denial of a motion for partial summary judgment, this appeal is interlocutory. *Embler v. Embler*, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001). An interlocutory appeal is ordinarily permissible only if (1) the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review. *Id.*

Since this Court has consistently held that a denial of summary judgment grounded on claims of governmental immunity affects a substantial right, *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999), the detention officers' appeal from the trial

court's denial of summary judgment on their defense of qualified immunity is properly before the Court. This Court has not previously addressed whether denial of a summary judgment motion addressing whether a governmental entity is a "person" for purposes of 42 U.S.C. § 1983 affects a substantial right. In other contexts, however, this Court has held that defenses, such as the public duty doctrine, involving the same considerations as governmental immunity do involve a substantial right. *See Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). We believe that the question whether a governmental entity is a "person" under § 1983 is analogous to the public duty doctrine and claims of immunity and, therefore, hold that it involves a substantial right permitting an interlocutory appeal.

[2] Defendants have, however, also argued on appeal (1) that Robeson County cannot be held liable for the negligence of Sheriff Maynor and other jail staff and (2) that plaintiff failed to present sufficient evidence that the Sheriff and the detention officers in their official capacities were negligent. Since these arguments do not involve any claim of immunity and defendants have made no other showing as to how this aspect of the trial court's ruling affected a substantial right, we decline to address these arguments and dismiss this portion of defendants' appeal. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order . . . .").[1]

Discussion

The North Carolina Rules of Civil Procedure provide that summary judgment shall be granted "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.R. Civ. P. 56(c). In deciding the motion, " 'all inferences of fact . . . must be drawn against the movant and in favor of the party

1. Plaintiff has argued that defendants' appeal should be dismissed for failure to comply with the Rules of Appellate Procedure. Contrary to the Rules, defendants did not file with the record on appeal the depositions and exhibits upon which they ultimately relied in their appellate brief. Instead, defendants included this material in an appendix to their brief. We may not consider evidentiary material submitted in an appendix that was not served with the proposed record and filed with the record in accordance with N.C.R. App. P. 9(a)(1)(e), 9(c). We have, however, in our discretion, allowed the parties' joint motion to amend the record on appeal to include the materials submitted as appendices to the parties' briefs.

opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James W. Moore, *Moore's Federal Practice* § 56-15[3], at 2337 (2d ed. 1971)). On appeal, this Court conducts a *de novo* review of the trial court's order. *Va. Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 384-85, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

I. CLAIMS AGAINST THE ROBESON COUNTY SHERIFF

Plaintiff is pursuing her § 1983 claims against Glenn Maynor, the Sheriff of Robeson County, and defendants Williams and Harris only in their official capacities. Plaintiff also sued the detention officers both in their official capacities and their individual capacities. "Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165-66, 87 L. Ed. 2d 114, 121, 105 S. Ct. 3099, 3105 (1985) (internal quotation marks omitted). The official capacity claims in this case are, therefore, actually claims against the office of the Sheriff of Robeson County.

[3] Defendant contends that a North Carolina sheriff—or his employees—may not be sued in their official capacities under 42 U.S.C. § 1983. That statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 . . . .

The question is whether the office of North Carolina sheriff is a "person" within the meaning of § 1983.

The United States Supreme Court has held that a State, when sued for damages, is not included within the scope of the phrase "[e]very person," as used in § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 105 L. Ed. 2d 45, 53, 109 S. Ct. 2304, 2306 (1989) ("[A] State is not a person within the meaning of § 1983.").[2] It is equally

2. In federal court, the issue is usually addressed under the Eleventh Amendment. *See Will*, 491 U.S. at 66, 105 L. Ed. 2d at 55, 109 S. Ct. at 2309 ("Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations

well-established that local governmental bodies are "persons" under § 1983:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 690, 56 L. Ed. 2d 611, 635, 98 S. Ct. 2018, 2035-36 (1978). The North Carolina Supreme Court has explained, following *Monell*, that "[a]lthough a municipal government is a creation of the State, it does not have the immunity granted to the State and its agencies." *Moore v. City of Creedmoor*, 345 N.C. 356, 365, 481 S.E.2d 14, 20 (1997). The more precise issue before this Court is, therefore, whether the office of sheriff in North Carolina is "the State" or is a "local governmental unit."

A. Prior Decisions of North Carolina's Appellate Courts

Our Supreme Court answered this question more than 50 years ago. In *Southern Ry. Co. v. Mecklenburg County*, 231 N.C. 148, 56 S.E.2d 438 (1949), the Court first addressed the role of counties in our State:

> One of the primary duties of the county, acting through its public officers, is to secure the public safety by enforcing the law, maintaining order, preventing crime, apprehending criminals, and protecting its citizens in their person and property. This is an indispensable function of county government which the county officials have no right to disregard and no authority to abandon.

Id. at 151, 56 S.E.2d at 440. The Court then held in unmistakable language: "The sheriff is the chief law enforcement officer of the

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of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity . . . ."). When, however, the State is sued solely for injunctive relief, it is a "person" and there is no Eleventh Amendment bar. *Id.* at 71 n.10, 105 L. Ed. 2d at 58 n.10, 109 S. Ct. at 2312 n.10 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' " (quoting *Graham*, 473 U.S. at 167 n.14, 87 L. Ed. 2d at 122 n.14, 105 S. Ct. at 3106 n.14)).

county." *Id.* Three years ago, the North Carolina Supreme Court, in discussing the importance of counties, relied upon this portion of *Southern Railway* when describing the role of counties in "effect[ing] the administration of justice within [their] borders" and observed, "[e]ach county elects a sheriff." *Stephenson v. Bartlett*, 355 N.C. 354, 365, 562 S.E.2d 377, 386 (2002).

In addition, plaintiff points to *Hull v. Oldham*, 104 N.C. App. 29, 407 S.E.2d 611, *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991). In *Hull*, the Sheriff's Department defendants argued that sheriffs and deputies are state officers and, therefore, jurisdiction over claims asserted against them lay solely in the Industrial Commission under the State Tort Claims Act. *Id.* at 41, 407 S.E.2d at 618. In rejecting this argument, this Court held:

> Article VII of the North Carolina Constitution entitled "Local Government" provides that "[t]he General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities, and towns." N.C. Const. art. VII, § 1. Article VII further provides: "[i]n each county a Sheriff shall be elected by the qualified voters thereof at the same time and places as members of the General Assembly are elected and shall hold his office for a period of four years, subject to removal for cause as provided by law." N.C. Const. art. VII, § 2. In providing for the organization of local governments, our Constitution does not make sheriffs state rather than local officers. . . . Our courts have consistently exercised jurisdiction on appeal from the superior courts. . . . Defendants have cited no North Carolina case in which sheriffs were not considered local officers.

Id. Thus, *Hull* held—consistent with *Southern Railway*—that North Carolina sheriffs are part of local government and are not "the State" for purposes of the State Tort Claims Act.

Defendants, however, point to a trio of subsequent decisions by this Court. In the first decision, *Slade v. Vernon*, 110 N.C. App. 422, 429, 429 S.E.2d 744, 748 (1993), this Court affirmed a grant of summary judgment in favor of Sheriff's Department defendants sued in their official capacities, stating only: "Furthermore, our courts have held that plaintiffs may not maintain a suit against defendants in their *official* capacities for violation of section 1983 under these circumstances, because the only remedy plaintiffs sought is monetary damages." The *Slade* opinion cites only *Lenzer v. Flaherty*, 106

N.C. App. 496, 513, 418 S.E.2d 276, 287, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992) for this holding—even though *Lenzer* involved only employees of the State's Department of Human Resources and did not address sheriffs or any other individuals outside of state agencies.

The second opinion, *Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993), was decided a month later. It cited *Corum v. Univ. of N.C.*, 330 N.C. 761, 771, 413 S.E.2d 276, 282-83 (holding that "neither a State nor its officials" are "persons" under § 1983 when sued for monetary damages), *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431, 113 S. Ct. 493 (1992), and *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 108 N.C. App. 357, 366, 424 S.E.2d 420, 424 (holding that "neither the State nor its officials" are "persons" when sued for monetary damages), *disc. review denied*, 334 N.C. 162, 432 S.E.2d 358, *aff'd per curiam on other grounds*, 335 N.C. 158, 436 S.E.2d 821 (1993) and held: "Because the plaintiff in the instant case seeks monetary damages, he is not entitled to relief pursuant to section 1983 against the County, the Commissioners, or the sheriff and the officers sued in their official capacity." *Messick*, 110 N.C. App. at 713-14, 431 S.E.2d at 493.

In *Buchanan v. Hight*, 133 N.C. App. 299, 515 S.E.2d 225, *appeal dismissed and disc. review denied*, 351 N.C. 351, 539 S.E.2d 280 (1999), defendants' third case, this Court acknowledged *Hull*, but concluded that "plaintiffs' arguments [that a Sheriff is a 'person' under § 1983] are not persuasive because the only two appellate decisions in this State decided since *Hull* and dealing with section 1983 as applied to sheriffs hold to the contrary." *Id.* at 304, 515 S.E.2d at 229. The opinion then reasoned:

> In *Corum*, our Supreme Court held that when an action under 42 U.S.C. § 1983 seeking monetary damages is brought against "the State, its agencies, and/or its officials acting in their official capacities" in state court neither the State nor its officials are considered "persons" within the meaning of the statute. Thus, a claim under section 1983 cannot be made against those entities. This rule was applied to sheriffs by this Court in *Messick* and *Slade*. . . . Here, plaintiffs seek monetary damages for the alleged violations of section 1983; however, under *Messick* and *Slade* we conclude no recovery is available.

Id. at 304-05, 515 S.E.2d at 229 (internal citations omitted).

None of these three decisions mentions *Southern Railway* and each predates *Stephenson*. Further, the three decisions, by holding that a sheriff is "the State," effectively overrule *Hull*. It is, however, axiomatic that an appellate panel may not interpret North Carolina law in a manner that overrules a decision reached by another panel in an earlier opinion. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Our Supreme Court recently reemphasized this point in *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004): "While we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court."

We also observe that the limited analysis of *Slade* and *Messick* had effectively been overruled by our Supreme Court. In *Moore v. City of Creedmoor*, 120 N.C. App. 27, 49, 460 S.E.2d 899, 912 (1995), *aff'd in part, rev'd in part*, 345 N.C. 356, 481 S.E.2d 14 (1997), this Court held:

> Because plaintiffs in the case *sub judice* seek monetary damages for alleged violation of their constitutional rights, they are not entitled to relief under section 1983 against the City, or against [the police chief] and [a city commissioner] in their *official* capacities, *Corum*, 330 N.C. at 771, 413 S.E.2d at 283; *see also Messick*, 110 N.C. App. at 713-14, 431 S.E.2d at 493 (citations omitted), and summary judgment was proper as to those claims.

The Supreme Court granted discretionary review specifically to point out the inaccuracy of this analysis:

> We reverse the Court of Appeals. In determining this issue, the Court of Appeals erroneously relied on *Corum* . . . . In *Corum*, this Court correctly relied on *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45 (1989), in holding that the State of North Carolina and its agencies are not "persons" within the meaning of section 1983 and therefore could not be sued for monetary damages under that statute. In the present case, the Court of Appeals erroneously applied the holding of *Corum* to dismiss plaintiffs' claims against a municipality and its officials. Although a municipal government is a creation of the State, it does not have the immunity granted to the State and its agencies.

Moore, 345 N.C. at 365, 481 S.E.2d at 20. Because of the Court of Appeals' misconception that county and city officials may not be sued in their official capacity under § 1983, it is impossible to determine whether the *Messick* and *Slade* panels reached their holdings regarding a sheriff based on a proper analysis of § 1983 or based on their mistaken belief that local officials do not fall within the scope of § 1983. Since the Supreme Court effectively overruled *Slade* and *Messick*, the panel in *Buchanan* further erred in relying upon them.

Defendants urge that *Buchanan* did not overrule *Hull* because the two cases address different issues. Defendants contend that a North Carolina sheriff may be treated as a local official under *Hull* for purposes of the State Tort Claims Act and waiver of state sovereign immunity, but still be treated as "the State" for purposes of § 1983. Such an approach is precluded by the Supremacy Clause of the federal constitution.

In *Howlett v. Rose*, 496 U.S. 356, 365-66, 110 L. Ed. 2d 332, 346, 110 S. Ct. 2430, 2436 (1990), the United States Supreme Court addressed Florida case law that "extended absolute immunity from suit not only to the State and its arms but also to municipalities, counties, and school districts who might otherwise be subject to suit under § 1983 in federal court." The Court initially observed: "That holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action." *Id.* at 366, 110 L. Ed. 2d at 346, 110 S. Ct. at 2436. After determining that the Florida state courts would entertain state tort claims against state entities, such as school boards, and that the school board had offered no neutral or valid excuse for the trial court's refusal to hear § 1983 actions against the same entities, the Supreme Court held:

> A state policy that permits actions against state agencies for the failure of their officials to adequately police a parking lot and for the negligence of such officers in arresting a person on a roadside, but yet declines jurisdiction over federal actions for constitutional violations by the same persons can be based only on the rationale that such persons should not be held liable for § 1983 violations in the courts of the State. That reason . . . flatly violates the Supremacy Clause.

Id. at 380-81, 110 L. Ed. 2d at 356, 110 S. Ct. at 2245.

The effect of defendants' approach in this case is similar: they would have us hold that, although a superior court has jurisdiction

over sheriffs for tort claims because a sheriff is a local governmental officer, it does not have authority to hear a § 1983 claim against the sheriff because, for the federal claim, he is part of "the State." This constitutes discrimination against § 1983 claims in violation of the Supremacy Clause. *See also McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230, 234, 78 L. Ed. 1227, 1229, 54 S. Ct. 690, 692 (1934) ("A state may not discriminate against rights arising under federal laws."); *Hughes v. Sheriff of Fall River County Jail*, 814 F.2d 532, 535 (8th Cir.) ("South Dakota has singled out federal claims, subjecting them to more restrictive tolling provisions than those governing analogous state-law claims. . . . That it is permissible for there to be no tolling provision does not mean that a state may provide tolling for state claims but refuse to do so for analogous federal claims and have this discrimination against federal claims incorporated as federal law."), *appeal dismissed and cert. denied*, 484 U.S. 802, 98 L. Ed. 2d 10, 108 S. Ct. 46 (1987); *Williamson v. Dep't of Human Res.*, 258 Ga. App. 113, 116, 572 S.E.2d 678, 681 (2002) ("[T]he state may not selectively cloak itself in sovereign immunity as to *federal* disability discrimination by its employees. To do so would discriminate against federally based rights which the Supremacy Clause of the Constitution of the United States forbids states to do."), *cert. denied*, 2003 Ga. LEXIS 153 (2003).

Moreover, defendants' approach cannot be reconciled with *McMillian v. Monroe County*, 520 U.S. 781, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997)—an opinion relied upon by *Buchanan*. In *McMillian*, the Supreme Court held that while state law determines whether the acts of a sheriff can render a county liable under § 1983, "[t]his is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy." *Id.* at 786, 138 L. Ed. 2d at 8, 117 S. Ct. at 1737. Yet, that is precisely what *Buchanan*, *Messick*, and *Slade* purport to do: label a sheriff as a state official without regard to state law.

B. United States Supreme Court Decisions Defining a "Person" under § 1983

Buchanan's citation of *McMillian* suggests the panel believed that United States Supreme Court authority has rendered *Hull* immaterial. We, therefore, review the pertinent Supreme Court decisions.[3]

3. Notably, the Fourth Circuit has also conducted a review of the relevant Supreme Court decisions and held that a North Carolina sheriff is a "person" under § 1983 and is not entitled to Eleventh Amendment immunity. *Harter v. Vernon*, 101 F.3d 334, 338 n.1 & 343 (4th Cir. 1996), *cert. denied*, 521 U.S. 1120, 138 L. Ed. 2d 1014,

In *Will*, the United States Supreme Court acknowledged that the question whether an entity is entitled to Eleventh Amendment immunity is a separate issue from whether an entity is a "person" under § 1983. The Court nonetheless held that "the scope of the Eleventh Amendment is a consideration" in defining who is a "person" under § 1983. *Will*, 491 U.S. at 66-67, 105 L. Ed. 2d at 55, 109 S. Ct. at 2310. In *Howlett*, the Court construed *Will* as "establish[ing] that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court." 496 U.S. at 365, 110 L. Ed. 2d at 346, 110 S. Ct. at 2437. The question presently before this Court is, therefore, whether a North Carolina sheriff is an "arm of the State" that has "traditionally enjoyed Eleventh Amendment immunity." *Id. See also Harter*, 101 F.3d at 338 n.1 ("If an official or entity is not immune from suit under the Eleventh Amendment that official or entity is a 'person' subject to suit under § 1983."); *Simon v. State Comp. Ins. Auth.*, 946 P.2d 1298, 1302 (Colo. 1997) ("[U]nder *Will*, an Eleventh Amendment arm-of-the-state analysis must be applied to determine whether a state-created entity is a 'person' under § 1983."), *cert. denied*, 523 U.S. 1124, 1133, 140 L. Ed. 2d 947, 963, 118 S. Ct. 1808, 1827 (1998); *J.A.W. v. Marion County Dep't of Pub. Welfare*, 687 N.E.2d 1202 (Ind. 1997) (applying Eleventh Amendment arm-of-the-State analysis to determine if an entity is a person as used in § 1983).

In the United States Supreme Court's most recent pertinent Eleventh Amendment immunity decision, it held:

> Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore "one of the United States" within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character.

Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 430 n.5, 137 L. Ed. 2d 55, 61 n.5, 117 S. Ct. 900, 904 n.5 (1997). The Court in *Regents* also reaffirmed its holding in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 130 L. Ed. 2d 245, 115 S. Ct. 394 (1994), stating that "the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of

117 S. Ct. 2511 (1997). The court reaffirmed this holding in *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 227 (4th Cir. 2001).

considerable importance to any evaluation of the relationship between the State and the entity or individual being sued." *Regents*, 519 U.S. at 430, 137 L. Ed. 2d at 61, 117 S. Ct. at 904. The Court clarified, however, that the issue is not ultimate financial liability, but rather "the entity's potential legal liability." *Id.* at 431, 137 L. Ed. 2d at 61, 117 S. Ct. at 904.

In a second case, decided the same day as *Regents*, the United States Supreme Court relied upon a third factor. In *Auer v. Robbins*, 519 U.S. 452, 456 n.1, 137 L. Ed. 2d 79, 87 n.1, 117 S. Ct. 905, 908 n.1 (1997), the Court dismissed a contention that a Board of Police Commissioners was entitled to Eleventh Amendment immunity. The Court relied upon the fact that even though the governor of Missouri appointed four of five board members, the City of St. Louis was responsible for the Board's financial liabilities and the Board was not subject to the State's direction or control in any other respect. *Id. See also Hess*, 513 U.S. at 44, 130 L. Ed. 2d at 258, 115 S. Ct. at 402-03 (holding that the authority of the State over the defendant is an indicator of immunity).

In *Regents*, *Hess*, and *Auer*, the Supreme Court has thus most recently focused on three factors in its Eleventh Amendment analysis: (1) how provisions of state law characterize the defendant, (2) whether the State is potentially liable for any money judgment against the defendant, and (3) whether the defendant is subject to the State's direction or control. We hold that each of these factors leads to the conclusion that a North Carolina sheriff is a "person" for purposes of § 1983.

Although *McMillian* did not address the question of "personhood" under § 1983, it does provide guidance in the analysis of state law. In *McMillian*, the Court addressed whether an Alabama sheriff was a final policymaker for a county so as to render the county liable for the sheriff's acts under § 1983. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 479, 89 L. Ed. 2d 452, 463, 106 S. Ct. 1292, 1298 (1986) (holding that a municipality may be held liable for decisions of the final policymaker for the municipality). After noting that the Court's "inquiry is dependent on an analysis of state law," the Court stated "[w]e begin with the Alabama Constitution, the supreme law of the state." *McMillian*, 520 U.S. at 787, 138 L. Ed. 2d at 8, 117 S. Ct. at 1737 (internal quotation marks omitted). The Court relied as "strong evidence" upon the Alabama Supreme Court's construction of the state constitution as establishing that Alabama sheriffs "are state officers, and that tort claims brought against sheriffs based on their

official acts therefore constitute suits against the State." *Id.* at 789, 138 L. Ed. 2d at 10, 117 S. Ct. at 1738.

Under this analysis, the *Buchanan* panel should not have dismissed *Hull* as immaterial. Under *McMillian*, *Hull's* determination that the North Carolina constitution establishes Sheriff Departments as local governmental entities is critical to answering the question of how North Carolina law categorizes a sheriff. As *Hull* recognized, the state constitution creates the office of sheriff, N.C. Const. art. VII, § 2, but includes that provision within the article governing "Local Government," along with provisions for counties, cities, towns, "and other governmental subdivisions." N.C. Const. art. VII, § 1.

The *McMillian* Court considered statutory provisions as well, although it gave them less weight. 520 U.S. at 789-91, 138 L. Ed. 2d at 10-11, 117 S. Ct. at 1739-40. In North Carolina, the relevant statutory provisions also indicate that a sheriff is a local officer rather than an arm of the State. The General Assembly has stated that "[t]he sheriff is the only officer of local government required by the Constitution." N.C. Gen. Stat. § 17E-1 (2003). Further, the General Assembly has defined the Sheriff's Department as a "Local Law Enforcement Agency" rather than a "State Law-Enforcement Agency". N.C. Gen. Stat. § 160A-288.2 (2003). Likewise, the Sheriff's Department participates in the Retirement Income Plan for Local Governmental Law-Enforcement Officers, N.C. Gen. Stat. § 143-166.50 (2003), and the Workers Compensation Act deems deputy sheriffs to be employees of the county, N.C. Gen. Stat. § 97-2(2) (2003). State statutes thus characterize a Sheriff's Department as a local governmental entity.

The next factor is the State's potential liability for any monetary damage award against a sheriff. Here, there has been no contention that the State would be potentially liable for any monetary judgment entered against defendants. Nor have we uncovered any statutory or case law suggesting a basis for holding the State responsible for such a judgment. *See Harter*, 101 F.3d at 340 ("It is undisputed that North Carolina does not have to satisfy judgments against sheriffs."). *See also Smith v. Phillips*, 117 N.C. App. 378, 384, 451 S.E.2d 309, 314 (1994) ("[W]e conclude that waiver of a sheriff's official immunity may be shown by the existence of his official bond as well as by *his county's purchase of liability insurance.*" (emphasis added)).

Finally, we turn to the question of a sheriff's autonomy from or control by the State. *Hess* urges care in applying this factor since "ultimate control of every state-created entity resides with the State,

for the State may destroy or reshape any unit it creates." *Hess*, 513 U.S. at 47, 130 L. Ed. 2d at 260, 115 S. Ct. at 404. Moreover, the "control" factor is not dispositive: the Court found that the fact that States appointed and removed commissioners of the governmental body, that governors could veto the entity's actions, and that state legislatures could dictate which projects the entity undertook was not sufficient for Eleventh Amendment immunity. *Id.*

Justice O'Connor's dissent—representing a broader view of the scope of the Eleventh Amendment than the majority—attempted to define the degree of control necessary. The dissent would require "lines of oversight [that] are clear and substantial." *Id.* at 61, 130 L. Ed. 2d at 269, 115 S. Ct. at 411. The entity is considered an arm of the State "if the State appoints and removes an entity's governing personnel and retains veto or approval power over an entity's undertakings." *Id.* Like the majority, Justice O'Connor stressed that not all state oversight is sufficient: "The inquiry should turn on real, immediate control and oversight, rather than on the potentiality of a State taking action to seize the reins." *Id.* at 62, 130 L. Ed. 2d at 269, 115 S. Ct. at 411.

Since North Carolina does not have even the degree of control over a sheriff to meet the test specified in the *Hess* dissent, there cannot be a sufficient degree of State oversight to meet the requirements of the majority view. In North Carolina, the State has no control over the selection of sheriffs. Initially, that is the responsibility of a county's citizens. N.C. Const. art. VII, § 2. If a sheriff wishes to resign, he tenders his resignation to the county commissioners and they may then appoint a new sheriff. N.C. Gen. Stat. § 162-3 (2003). If a vacancy occurs for any other reason, it remains the responsibility of the county commissioners to select a new sheriff to serve the remainder of the term. N.C. Gen. Stat. §§ 162-5, -5.1 (2003). The board of county commissioners must also approve the sheriff's bond, and if the commissioners deem it insufficient, the sheriff must forfeit his office, allowing the board to choose a replacement. N.C. Gen. Stat. §§ 162-9, -10 (2003).

A sheriff's power is limited to acting within his county. N.C. Gen. Stat. § 162-14 (2003). The State has no authority to veto or approve a sheriff's actions within that county. *See* A. Fleming Bell, II and Warren J. Wicker, *County Government in North Carolina* 931 (4th ed. 1998) ("[T]he state generally exercises little control over local law enforcement operations (except by legislative enactment of the criminal laws themselves) . . . ."). It is up to the county electorate to determine

whether the sheriff is properly administering his office. Indeed, in North Carolina, "the control of the employees hired by the sheriff is vested exclusively in the sheriff." *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 450, 368 S.E.2d 892, 894, *appeal dismissed and disc. review denied*, 323 N.C. 366, 373 S.E.2d 547 (1988).

The General Assembly has enacted statutes specifying the duties of the sheriff and regulating the training of deputy sheriffs. An entity is not, however, an arm of the State simply because North Carolina regulates it or even because the state constitution creates it. *See Hess*, 513 U.S. at 47, 130 L. Ed. 2d at 260, 115 S. Ct. at 404. Municipalities and counties are "persons" under § 1983, yet they too are created by the state constitution and are more extensively regulated than sheriffs. *Compare* N.C. Gen. Stat. §§ 153A-1 *et seq.* (2003) (counties) and 160A-1 *et seq.* (2003) (cities and towns) *with* N.C. Gen. Stat. §§ 162-1 *et seq.* (2003) (sheriffs). In short, in North Carolina, the State does not have, with respect to a sheriff, the minimum degree of control required by *Hess* for Eleventh Amendment immunity.

Thus, each of the factors identified in the decisions of the United States Supreme Court since *Hull* points to the same conclusion: that a sheriff is a "person" within the meaning of § 1983. Rather than rendering *Hull* immaterial, as *Buchanan* suggests, these federal cases confirm its importance. We are bound by *Southern Railway* and *Hull* and, accordingly, hold that the trial court properly concluded that the office of North Carolina sheriff is a "person" under § 1983.

II. THE INDIVIDUAL DETENTION OFFICERS

The individual detention officers also argue that the trial court erred in denying summary judgment as to the claims asserted against them in their individual capacities because (1) the claims were actually brought against them in their official capacities; (2) they are entitled to qualified immunity; and (3) the evidence was insufficient to establish any wrongdoing performed by the specific individual defendants. We disagree with respect to the first two arguments and decline to address the third argument as not properly before the Court on an interlocutory appeal.

A. Official Versus Individual Capacity Suits

[4] The detention officers first argue that "the remaining individual capacity claims are not truly individual capacity claims at all, but rather are additional official capacity claims" because "the substantive allegations related solely to actions undertaken by the deputy as

part of his official duties." Our Supreme Court has, however, rejected this argument.

In *Isenhour v. Hutto*, 350 N.C. 601, 609, 517 S.E.2d 121, 127 (1999), a school crossing guard was sued in both her official and individual capacities. Defendants contended, however, like defendants here, that "the claim against [the crossing guard] arises solely in her official capacity because '[a]ll of the negligent acts and omissions which [the crossing guard] is alleged to have committed concern the manner in which she performed her duties as a crossing guard.' " The Court held: "As we stated in *Meyer*, however, whether plaintiff's allegations relate to acts performed outside an employee's official duties is not relevant to the determination of whether a defendant is being sued in an official or individual capacity." *Id.* (citing *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)).

Although defendants point to *Trantham v. Lane*, 127 N.C. App. 304, 307, 488 S.E.2d 625, 628 (1997), that decision was filed prior to *Meyer* and *Isenhour*. This Court has since acknowledged that "[w]hether a plaintiff's allegations relate to actions outside the scope of a defendant's official duties is relevant in determining if the defendant is entitled to [official] immunity, but it is 'not relevant in determining whether the defendant is being sued in his or her official or individual capacity.' " *Andrews v. Crump*, 144 N.C. App. 68, 78, 547 S.E.2d 117, 124 (quoting *Meyer*, 347 N.C. at 111, 489 S.E.2d at 888), *disc. review denied*, 354 N.C. 215, 553 S.E.2d 907 (2001).

In this case, (1) the amended complaint's caption reveals that the individual jail defendants are being sued in both their individual and official capacities, (2) the specific allegations of the amended complaint confirm the dual bases for suit (including separate causes of action based on the differing capacities), (3) the amended complaint expressly seeks monetary damages from the defendants in their individual capacity, and (4) the actual litigation proceedings reflected the distinction in capacities. The defendants have, therefore, been properly sued in both their individual and official capacities. *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724-25 (1998); *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887.

B. Qualified Immunity

[5] The detention officers next argue that summary judgment should have been granted on the § 1983 claims based on qualified immunity.[4]

4. Defendants include Dr. Strawcutter, the Medical Director, in their argument, as well as the detention officers. The trial court's order, however, indicates that all

The United States Supreme Court has held that "[t]he threshold inquiry a court must undertake in a qualified immunity analysis is *whether plaintiff's allegations*, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736, 153 L. Ed. 2d 666, 676, 122 S. Ct. 2508, 2513 (2002) (emphasis added). In making this determination, even with respect to a motion for summary judgment, the Supreme Court has directed that we look at what "facts are alleged by [the plaintiff]." *Id.* at 738, 153 L. Ed. 2d at 677, 122 S. Ct. at 2514.

Almost 30 years ago, the Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs *or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.*" *Estelle v. Gamble*, 429 U.S. 97, 104-05, 50 L. Ed. 2d 251, 260, 97 S. Ct. 285, 291 (1976) (emphasis added) (internal quotation marks and citations omitted).

Here, plaintiff has alleged that even though the doctor had stated that she should see him again the next day, the detention officers did not return her to the infirmary for that visit. Then, according to plaintiff's amended complaint, for more than two days, the detention officers ignored her sick call slips and her repeated requests for medical care despite her constant complaints of "excruciating abdominal and back pain, nausea, vomiting, fever, inability to sleep or eat properly and inability to have regular bowel movements," leaving plaintiff to suffer appendicitis unattended. These allegations are sufficient to state a violation of the Eighth Amendment.

There can be no question that appendicitis is a serious medical condition. *Sherrod v. Lingle*, 223 F.3d 605, 610 (7th Cir. 2000) ("As we found recently in a very similar case, an appendix on the verge of rupturing easily meets this standard [requiring an objectively serious medical condition]."); *Chavez v. Cady*, 207 F.3d 901, 904 (7th Cir. 2000) (holding that appendicitis is a serious medical condition).

Further, the allegations that the officers did not return plaintiff to see the doctor as prescribed and then ignored her requests for medical care despite her complaints of serious pain are sufficient to allege that the officers acted with deliberate indifference to plaintiff's med-

individual capacity claims asserted against Dr. Strawcutter have been dismissed without prejudice.

ical needs. *See Estelle*, 429 U.S. at 104-05, 50 L. Ed. 2d at 260, 97 S. Ct. at 291 (Eighth Amendment violated when prison guards deny or delay access to medical care or interfere with prescribed treatment); *Sherrod*, 223 F.3d at 611-12 (even though the plaintiff was not entirely ignored by the staff, evidence that they disregarded the plaintiff's worsening condition due to a ruptured appendix over the days following his receiving medical care supported a claim for a violation of the Eighth Amendment); *Chavez*, 207 F.3d at 906 (evidence supported Eighth Amendment claim when officers disregarded the plaintiff's repeated request to see the doctor and his complaints about severe pain, which—it was later determined—was caused by a ruptured appendix). *See also Cooper v. Casey*, 97 F.3d 914, 917 (7th Cir. 1996) (officers' knowledge was established by evidence "that the plaintiffs directed their request to the world at large, as it were, by screaming from their cells, rather than directing the request to a specific guard" when "[t]he defendants were all stationed in the plaintiffs' wing of the prison").

Hope explains that even if officers participated in constitutionally impermissible conduct, they "may nevertheless be shielded from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope*, 536 U.S. at 739, 153 L. Ed. 2d at 678, 122 S. Ct. at 2515 (internal quotation marks omitted). For a constitutional right to be clearly established:

> its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. (internal quotation marks and citations omitted).

Defendants state that they "do not dispute that Plaintiff had a constitutional right to be free from cruel and unusual punishment and that her right was clearly established at all times relevant to this case." They argue instead that "Plaintiff's evidence fails to establish that these Defendants should have known that their actions would violate Plaintiff's specific constitutional rights." On this issue, the Supreme Court has held that "the salient question" is whether the state of the law in the year of the unconstitutional conduct "gave

[defendants] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Id.* at 741, 153 L. Ed. 2d at 679, 122 S. Ct. at 2516. The question before this Court, therefore, is whether the state of the law in 1998 gave the defendant detention officers fair warning that their treatment of plaintiff violated the Eighth Amendment.

Estelle established in 1976 that the officers were not free to disregard the doctor's direction that plaintiff should return to see him the next day and that the infliction of pain through the denial of medical care—which occurred here when the officers ignored plaintiff's pain—violated the Eighth Amendment. Further, courts across the country had repeatedly held prior to 1998 that ignoring a request for medical assistance to alleviate complaints of severe pain violated the Eighth Amendment. *See, e.g., McElligott v. Foley*, 182 F.3d 1248, 1257 (11th Cir. 1999) (with respect to conduct occurring prior to 1998, observing "[o]ur cases, too, have recognized that prison officials may violate the Eighth Amendment's commands by failing to treat an inmate's pain"); *Cooper*, 97 F.3d at 917 (if plaintiffs were in sufficient pain to require pain medication, a failure to take them to the infirmary over a 48-hour period would violate the Eighth Amendment); *Boretti v. Wiscomb*, 930 F.2d 1150, 1154 (6th Cir. 1991) ("Just because it was a holiday weekend does not relieve the nurse of her duty to respond if plaintiff . . . was in severe pain as he alleges."); *Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir. 1976) ("We agree with the Ninth Circuit that a prisoner who is needlessly allowed to suffer pain when relief is readily available does have a cause of action against those whose deliberate indifference is the cause of his suffering."). *See also Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir. 1999) (holding with respect to a prison officer's withholding pain medication prior to 1998 that "[n]ot only the general standard of liability under the Eighth Amendment for refusal to render medical treatment, but also the application of the standard to pain medication, are both unchanged since the events giving rise to this suit and reasonably clear and definite as applied to a case as extreme as this" (internal citations omitted)).

Defendants do not argue otherwise. Instead, they assert that plaintiff received "timely and adequate response to her requests for medical care" and "almost every complaint by Plaintiff to jail personnel resulted in timely if not immediate contact with a member of the medical staff." Defendants' recitation of their version of the facts ignores a fundamental principle: the evidence must be viewed in the light most favorable to plaintiff, as this Court recently stressed.

Huber v. N.C. State Univ., 163 N.C. App. 638, 645, 594 S.E.2d 402, 408, *disc. review denied*, 358 N.C. 731, 601 S.E.2d 529 (2004).

Moreover, defendants have skipped over the two days of unrelieved pain suffered by plaintiff. The fact that plaintiff may have received some care—including emergency surgery when, as she contends, her requests for medical assistance were finally acknowledged—does not relieve defendants from their responsibility to obtain care for plaintiff during those two days. *See Sherrod*, 223 F.3d at 611-12 ("[A] prisoner is not required to show that he was literally ignored by the staff. If knowing that a patient faces a serious risk of appendicitis, the prison official gives the patient an aspirin and an enema and sends him back to his cell, a jury could find deliberate indifference although the prisoner was not 'simply ignored.' "); *McElligott*, 182 F.3d at 1258 ("The fact that [plaintiff] was ultimately hospitalized does not change matters . . . .").

We hold that a reasonable officer in 1998 would have had fair warning that ignoring an inmate's requests for medical care to address severe pain, vomiting, and nausea—over two full days—would, under these circumstances, violate clearly established constitutional law. The trial court, therefore, properly denied defendants' motion for summary judgment on the issue of qualified immunity.

C. The Sufficiency of the Evidence

[6] Defendants also argue that the trial court erred in determining that plaintiff had presented sufficient evidence of a constitutional violation by the individual defendants to go to trial. This argument addresses the merits of plaintiff's claim and not any immunity defense. It is, however, well-established that a denial of a motion for summary judgment is an interlocutory order that generally cannot be the basis for an immediate appeal. *Anderson v. Atl. Cas. Ins. Co.*, 134 N.C. App. 724, 725, 518 S.E.2d 786, 787 (1999). This portion of defendants' appeal is, therefore, dismissed. *See also Behrens v. Pelletier*, 516 U.S. 299, 313, 133 L. Ed. 2d 773, 787, 116 S. Ct. 834, 842 (1996) ("[D]eterminations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case.").

Affirmed in part and dismissed in part.

Judges BRYANT and ELMORE concur.

KENNETH W. WOLFE, PLAINTIFF v. ALLENE CURRIE VILLINES, MILDRED CURRIE JEFFRIES, JAMES WILLIAM CURRIE, INEZ CURRIE CORBETT AND OZZIE M. CURRIE, DEFENDANTS

No. COA04-467

(Filed 5 April 2005)

1. Vendor and Purchaser— land sale—sufficiency of description—latent ambiguity

The legal description of property in a land sale agreement was latently ambiguous, and the trial court erred by granting summary judgment for plaintiff where there was an issue of material fact as to the precise parcel to be conveyed.

2. Vendor and Purchaser— land sale—insufficient description—reformation—issue of fact

The trial court erred by reforming a land sale agreement through the selection one of three surveys drawn from the agreement's general description where the discovery of unknown improvements on the property created a question of fact. Such actions in equity by the trial court at the summary judgment stage are not permissible when there are issues of fact.

3. Vendor and Purchaser— land sale—survey completed late—time not of essence

A land sale agreement was not vitiated by the failure to complete a survey within the required time where time was not of the essence in the contract. There was no evidence that plaintiff delayed or tarried in completion of the contract, and the trial court properly found that the delay was not unreasonable.

Judge TYSON dissenting.

Appeal by defendants from an order entered 11 December 2003 by Judge Orlando F. Hudson, Jr. in Person County Superior Court. Heard in the Court of Appeals 17 November 2004.

Hatch, Little & Bunn, L.L.P., by David H. Permar and Elizabeth T. Martin, for plaintiff-appellee.

Ramsey, Ramsey & Long, by James E. Ramsey, for defendant-appellants.

HUNTER, Judge.

Allene Villines, Mildred Jefferies, James William Currie, Inez Corbett, and Ozie M. Currie ("defendants") appeal from an order entered 11 December 2003 granting partial summary judgment to Kenneth W. Wolfe ("plaintiff") in an action for specific performance of a land sale agreement. Defendants raise two assignments of error, contending there were genuine issues of material fact as to: (1) whether the description of the property in the land sale agreement was sufficient to satisfy the statute of frauds, and (2) whether the land sale agreement was terminated due to plaintiff's failure to complete the agreement's requirements prior to the closing date. As we find there was a material issue of fact as to the description of the property, we reverse the grant of summary judgment.

On 6 December 2001, plaintiff and defendants entered into an Offer to Purchase and Contract ("Offer") a plot of land belonging to defendants that was adjacent to plaintiff's property. The Offer described the plot to be purchased as "+ or - 25ac to be determined by a survey for property behind Mr. Wolfe's Property, to run to the first field[,]" and stated that it was a portion of the property listed in tax map 21, Lot 23, in Person County. The Offer did not specify who was responsible for obtaining the survey, but did provide that the buyer would pay for the cost. The Offer stated that the purchase price for the property was $2,200.00 per acre and that the closing should take place on or before 31 January 2002, and was signed by all parties.

A surveyor, Neil Hamlett ("Hamlett") was hired to survey the property by Tommy Bowes ("Bowes"), the real estate agent for both parties. Hamlett discovered that a house existed on the proposed plot and was instructed by Bowes to cut out the portion of the property containing the house from the surveyed land. Due to inclement weather, Hamlett did not return to complete the survey until March 2002. He was informed by defendants at that time to not complete the survey, as the time for closing had expired. Hamlett reported that three possible tracts could be surveyed in the given area, of 15.9 acres, 16.9 acres, or 20.8 acres, respectively.

Plaintiff filed a complaint seeking specific performance of the contract on 9 July 2003, alleging that defendants had repudiated the Offer by refusing to allow the land to be surveyed. Defendants counterclaimed that the Offer was unenforceable as it violated the statute of frauds and the required survey was not completed before closing.

Both parties moved for summary judgment. On 11 December 2003, the trial court entered an order denying defendants' motion and partially granting plaintiff's motion for summary judgment, ordering specific performance of the contract. Defendants appeal from this order.

I.

We first address whether the appeal from the trial court's 11 December 2003 order entitled partial summary judgment is timely. Ordinarily, a partial summary judgment, because it does not completely dispose of the case, is interlocutory, and cannot be immediately appealed. *See Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). Here however, the trial court's order fully disposed of the case by ordering specific performance of the land contract, and retained jurisdiction only in the event that good title to the property in question could not be conveyed. Indeed, plaintiff, the appellee in this case, notes in his brief that "it is apparent . . . that the order is, in fact, not a partial summary judgment because no further parties or claims are unresolved." (Emphasis omitted.) Despite its title of partial summary judgment, the order appears to not be interlocutory, as it resolves all claims raised to the court, and review of the matter would therefore be neither fragmentary nor premature.

The dissent contends that a question remains, however, as to whether the order is final or interlocutory, as the trial court did not certify this appeal pursuant to N.C.R. Civ. P. 54(b) and did retain jurisdiction for a limited purpose. We therefore, in the interest of judicial economy, and to prevent manifest injustice to both parties as a complete and final remedy has been ordered by the trial court, elect pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure to treat plaintiff's appeal as a petition for a writ of certiorari and grant the petition. *See* N.C.R. App. P. 2, *Kimzay Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 79, 404 S.E.2d 176, 177 (1991).

II.

[1] Defendants contend that the trial court erred in finding there was no genuine issue of material fact as to whether the legal description of the property in the Offer was insufficient to meet the statute of frauds.[1] We agree.

1. Defendants fail to provide a statement of the grounds for appellate review, as required by N.C.R. App. P. 28(b)(4), as to whether this matter appealed constitutes a final judgment which is properly before this Court. Violation of this rule subjects defendants' appeal to dismissal. *See State v. Wilson*, 58 N.C. App. 818, 819, 294 S.E.2d 780, 780 (1982). However, as noted *supra*, we deem it appropriate to consider this appeal on its merits pursuant to N.C.R. App. P. 2.

We first note the appropriate standard of review. Summary judgment is properly granted "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).

Our statute of frauds requires that contracts to convey land "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). The Supreme Court of North Carolina has held that:

> A valid contract to convey land, therefore, must contain expressly or by necessary implication all the essential features of an agreement to sell, one of which is a description of the land, certain in itself or capable of being rendered certain by reference to an extrinsic source designated therein.

Kidd v. Early, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976).

An agreement for the sale of land violates the statute of frauds as a matter of law if it is patently ambiguous, that is, if "it leaves the subject of the contract, the land, in a state of absolute uncertainty and refers to nothing extrinsic by which the land might be identified with certainty." *House v. Stokes*, 66 N.C. App. 636, 638, 311 S.E.2d 671, 673 (1984). However a description is latently ambiguous if "it is insufficient, by itself, to identify the land, but refers to something external by which identification might be made." *Id.* at 638, 311 S.E.2d at 674.

In *Kidd v. Early*, the Court found that the inclusion of a requirement of a survey to determine the precise boundaries of a parcel, in a contract for purchase of a portion of land from a larger tract, saved the description from patent ambiguity. *Kidd*, 289 N.C. at 356, 222 S.E.2d at 402. Although the option in *Kidd* required the seller to furnish the survey, the Court in *Kidd* relied on cases from a number of jurisdictions which also permitted the buyer to control the survey. *Id.* at 354-56, 222 S.E.2d at 401-02.

Here, the description in the Offer identified the parcel generally through a tax map designation and as the Lessie Bradsher Estate located behind plaintiff's property. Although the tract identified

encompassed more than twenty-five acres, the description further specified that the exact amount of + or - 25 acres would be determined by a survey of the property. Thus, as the contract provided an extrinsic means for identification of the precise property to be sold, we find the description was latently, rather than patently, ambiguous and therefore did not violate the statute of frauds as a matter of law.

A latently ambiguous description requires admission of extrinsic evidence to explain or refute the identification of the land in question, and thus creates a potential issue of material fact which must be determined before the trial court can conclude as a matter of law that the statute of frauds has been met. *See House*, 66 N.C. App. at 639, 311 S.E.2d at 674. Here, Hamlett's affidavit showed the surveyor was directed by Bowes to discard a portion of the parcel after buildings were discovered upon it, and further directed to move the northern line of the property. These directions resulted in the production of three potential surveys of the property to be conveyed under the contract. Unlike in *Byrd v. Freeman*, 252 N.C. 724, 727-28, 114 S.E.2d 715, 718-19 (1960), where two different survey results were produced but the evidence showed the parties mutually agreed on one of the surveys, here, a material issue of fact remained as to which of the proposed descriptions, if any, reflected the true intention of the parties. Although we note that the purpose of the statute of frauds is to "guard against fraudulent claims supported by perjured testimony" rather than to allow "defendants to evade an obligation based on a contract fairly and admittedly made[,]" *House*, 66 N.C. App. at 641, 311 S.E.2d at 675, sufficient extrinsic evidence must be adduced to identify the parcel of land intended to be conveyed by the parties and remove the latent ambiguity in the contractual description for it to be enforceable. As there exists an issue of material fact as to both the precise parcel to be conveyed, as a result of the discovery of the buildings, and as to whether the contract is void for latent ambiguity in the description, we therefore reverse the trial court's grant of summary judgment.

[2] The dissent contends that although the evidence presented to the trial court indicated the surveyor had determined three possible tracts of land could be drawn from the general land description, the trial court properly acted in equity to reform the contract and order defendants to convey the smallest of the three parcels. Such actions in equity by the trial court at the summary judgment stage of adjudication are not permissible when issues of material fact exist. In

Dettor v. BHI Property Co., 324 N.C. 518, 379 S.E.2d 851 (1989), our Supreme Court considered another disputed land contract. In *Dettor*, a contract for the sale of land included a description of the property to be sold as " '± 12 acres and highlighted in yellow on Exhibit A attached hereto' " and further that " '[t]he property shall be surveyed by a North Carolina Registered Surveyor at the expense of the Sellers . . . . Property is to have approximately 12 acres as shown on "Exhibit A" attached hereto.' " *Id.* at 519-20, 379 S.E.2d at 852. The survey conducted revealed that the property contained 12.365 acres, however, after closing, a mistake in the calculations was discovered which showed the property actually contained 17.147 acres. *Id.* at 520, 379 S.E.2d at 852. An action was brought for reformation of the deed and for specific performance to pay for the excess acreage. Both parties moved for summary judgment. *Id.* at 520-21, 379 S.E.2d at 852. The trial court granted partial summary judgment on the grounds the contract was consummated under a mutual mistake of fact,[2] but declined to award specific performance as inequitable. *Id.* at 521, 379 S.E.2d at 852. The trial court instead created a unique remedy, described as a "reformation 'in effect,' " which appointed "a triumvirate of commissioners to designate 4.782 acres to be carved out of the disputed tract and reconveyed to plaintiffs." *Id.* The Supreme Court overturned a decision by this Court affirming the trial court, on the grounds that when an issue of material fact as to the acreage intended to be transferred by the parties existed, the question must be resolved by the fact finder, and a grant of summary judgment was inappropriate. *Dettor*, 324 N.C. at 522-23, 379 S.E.2d at 853.

Similarly here, a question of material fact was created by the discovery of unknown improvements on the property, resulting in a latent ambiguity in the land description. The trial court improperly concluded that no material issue of fact existed, yet selected one of three surveys presented to the court as the remedy. As a question of material fact existed, we find the trial court erred in reforming the contract at the summary judgment stage.

III.

[3] Defendants next contend there was a genuine issue of material fact as to whether the Offer was terminated due to plaintiff's failure to complete the Offer's requirements, including a survey of the parcel of property, prior to the closing date. We disagree.

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2. We note that the order appealed in *Dettor* was also entitled Partial Summary Judgment, but was considered by both this Court and our Supreme Court.

In *Taylor v. Bailey*, 34 N.C. App. 290, 237 S.E.2d 918 (1977), this Court noted that when the only reference to time in the contract was as to a proposed closing date, and the conditions included a survey and title opinion of the property, time was not of essence to the agreement and upheld the finding that the failure to settle by the stated date did not vitiate the contract. *See Taylor*, 34 N.C. App. at 293-94, 237 S.E.2d at 920. In *Taylor*, a surveyor was hired in a timely fashion, but a problem with the title was discovered which delayed closing. *Id.* at 294, 237 S.E.2d at 920. The Court affirmed the order of specific performance of the contract however, as there was no evidence that " 'plaintiff tarried or delayed . . . and . . . stood ready, willing and able to complete the terms and conditions of said contract[.]' " *Id.* at 294-95, 237 S.E.2d at 921 (citation omitted).

Here, the Offer, like in *Taylor*, stated closing should occur "on or before 1-31-2002," but included the condition of a survey paid for by plaintiff. As time was not of the essence in the contract, the failure to complete the required survey and close by 31 January 2002 does not vitiate the contract. The question rather is one of the reasonableness of the time to complete the contract. *See Fletcher v. Jones*, 314 N.C. 389, 393, 333 S.E.2d 731, 734 (1985). "What is a 'reasonable time' in which delivery must be made is generally a mixed question of law and fact, and, therefore, for the jury, but when the facts are simple and admitted, and only one inference can be drawn, it is a question of law." *Colt v. Kimball*, 190 N.C. 169, 174, 129 S.E. 406, 409 (1925).

Evidence presented in the affidavits of Bowes and Hamlett show that the surveyor was hired in a timely fashion in December 2001 by the agent of both parties, that a problem arose with the survey when the presence of a building was discovered within the given parameters, and that as the Offer specified the contract was for land only, the surveyor was instructed by the agent to return to resurvey the property without the building. Further, Hamlett states in his corrected affidavit on 17 November 2003 that he was delayed from returning to complete the survey until March 2002 as a result of the changes, and was told at that time not to complete the survey by defendants. As there is no evidence that plaintiff "delayed or tarried" in completion of the contract, or other disputed material fact, the trial court properly found the delay of a few weeks in completion of the survey was not unreasonable as a matter of law.

As we find that a material issue of fact exists as to the land description, we therefore reverse the trial court's grant of summary judgment.

Reversed.

Judge LEVINSON concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion reverses the trial court's grant of partial summary judgment in plaintiff's favor and holds genuine issues of material fact exist concerning: (1) whether the Offer is void for latent ambiguities with the property description; and (2) which parcel should be conveyed. This appeal is interlocutory and defendants failed to comply with the North Carolina Rules of Appellate Procedure and should be dismissed. I respectfully dissent.

I. Interlocutory Appeals

Interlocutory appeals are those " 'made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy.' " *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (quoting *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999)); *accord Veazey v. Durham*, 231 N.C. 357, 362-63, 57 S.E.2d 377, 381-82, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). In addition, "[g]enerally, orders denying motions for summary judgment are not appealable." *Hill v. Smith*, 38 N.C. App. 625, 626, 248 S.E.2d 455, 456 (1978); N.C. Gen. Stat. § 1-277 (2003).

It is undisputed that the 11 December 2003 judgment from which defendants appeal is interlocutory because it was a "Partial Summary Judgment" that partially granted plaintiff's motion for summary judgment, denied defendants' motion for summary judgment, and did not dispose of the entire case. *See Carriker*, 350 N.C. at 73, 511 S.E.2d at 4. The trial court specifically ordered that it "shall retain jurisdiction for the purpose of determining what damages, if any, . . . [are] appropriate . . ." *See Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (an order is interlocutory when issues remain and require further adjudication before a final decree is issued). Here, there is no risk of inconsistent verdicts to trigger a preemptive review

by this Court. *CBP Resources, Inc. v. Mountaire Farms of N.C., Inc.*, 134 N.C. App. 169, 172, 517 S.E.2d 151, 154 (1999) ("the issue of liability has been determined, [and] the only remaining issue is that of damages and there is no danger of inconsistent verdicts"); *Schuch v. Hoke*, 82 N.C. App. 445, 446, 346 S.E.2d 313, 314 (1986) ("an order granting [a] motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, [is] an interlocutory order not subject to immediate appeal") (citing *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 492, 251 S.E.2d 443, 448 (1979)).

A. Appellate Review of Interlocutory Judgments

Generally, there is no right of immediate appeal from an interlocutory judgment. *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 292, 420 S.E.2d 426, 428 (1992). An interlocutory order may only be considered on appeal where either: (1) certification by the trial court for immediate review under N.C. Gen. Stat. § 1A-1, Rule 54(b) (2003); or (2) "a substantial right" of the appellant is affected. *Tinch v. Video Industrial Services*, 347 N.C. 380, 381, 493 S.E.2d 426, 427 (1997) (citing *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980)); N.C. Gen. Stat. § 1-277(a) (2003); N.C. Gen. Stat. § 7A-27(d) (2003). Here, the trial court did not certify its partial summary judgment "for immediate review" under Rule 54(b) and defendants have failed to show "a substantial right" that will be lost absent immediate review. *See Watts v. Slough*, 163 N.C. App. 69, 72, 592 S.E.2d 274, 276 (2004) (interlocutory appeal dismissed due to the trial court not certifying its order under Rule 54(b) and the appellant's failure to assert a substantial right that would be adversely affected without immediate review).

1. Rules of Appellate Procedure

Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires the appellant's brief to include a "statement of the grounds for appellate review." N.C.R. App. P. 28(b)(4) (2004); *see Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 105-06, 493 S.E.2d 797, 800 (1997). If the appeal is interlocutory, the "statement of the grounds" must contain sufficient facts and argument to support appellate review on the grounds that the challenged judgment either affects a substantial right, or was certified by the trial court for immediate appellate review. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). It is the appellant's duty to provide this Court the grounds to warrant appellate review. *Id.*

Defendants neither included a "statement of the grounds for appellate review" nor addressed the interlocutory nature of their appeal. Further, defendants do not assert in their arguments any substantial rights that will be adversely affected if this Court does not immediately review the trial court's order.

"Rules of Appellate Procedure are mandatory and failure to observe them is grounds for dismissal of the appeal." *State v. Wilson*, 58 N.C. App. 818, 819, 294 S.E.2d 780 (1982), *cert. denied*, —— N.C. ——, 342 S.E.2d 907 (1986). This appeal should be dismissed due to both its interlocutory nature and defendants' failure to assert the substantial rights that will be adversely affected without this Court's immediate review in violation of the North Carolina Rules of Appellate Procedure.

II. Rule 2

The majority's opinion agrees the appeal is interlocutory and that defendants failed to comply with the appellate rules. Yet, it invokes Rule 2 of the North Carolina Rules of Appellate Procedure to purportedly review the merits of defendants' claims. Rule 2 states:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon the application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2 (2004).

Our Supreme Court stated in *Steingress v. Steingress* that "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*." 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) (emphasis supplied) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)). This Court has repeatedly held that " 'there is no basis under Appellate Rule 2 upon which we should waive plaintiff's violations of Appellate Rules . . . .' " *Holland v. Heavner*, 164 N.C. App. 218, 222, 595 S.E.2d 224, 227 (2004) (quoting *Sessoms v. Sessoms*, 76 N.C. App. 338, 340, 332 S.E.2d 511, 513 (1985)).

My review of the entire record fails to disclose any "exceptional circumstances," "significant issues," or "manifest injustice" to warrant suspension of the Appellate Rules. Our precedents do not allow use of Rule 2 to reach the merits of this appeal. I vote to dismiss.

III. Property Description

I also disagree with the majority's holding that since the survey was never completed that genuine issues of fact exist: (1) concerning which of the parcels the parties intended to convey; and (2) whether the Offer is potentially void for the latently ambiguous property description.

In *Kidd v. Early*, our Supreme Court determined that a property description that references a future survey satisfies the Statute of Frauds. 289 N.C. 343, 222 S.E.2d 392 (1976); *see also* N.C. Gen. Stat. § 22-2 (2003). The property description included in the Offer is latently ambiguous, requiring parol evidence to specify its precise location. *See Bradshaw v. McElroy*, 62 N.C. App. 515, 516, 302 S.E.2d 908, 910 (1983) (citing *Lane v. Coe*, 262 N.C. 8, 13, 136 S.E.2d 269, 273 (1964)).

Defendants failed to allow the surveyor to complete the survey to remove the latent ambiguity and make the property description definite. *Kidd*, 289 N.C. at 357, 222 S.E.2d at 402. Here, Hamlett's survey divulged the existence of buildings located on the property to be conveyed during initial field work. Upon reporting this discovery to Broker Bowes, Hamlett was instructed to remove the improvements from the parcel to be conveyed and move the northern boundary line. The result was a preliminary survey including three possible tracts of land, ranging from 15.9 to 20.8 acres. Defendants wrongly refused Hamlett access to the property to complete the final survey, forcing plaintiff to instigate this action and seek specific performance, an equitable remedy.

Based on the pleadings, exhibits, affidavits, memoranda of law, admitted testimony, and oral arguments, the trial court ruled

> there is no genuine issue as to any material facts and that the Plaintiff is entitled to specific performance of the December 6, 2001 Offer to Purchase and Contract entered into between the Plaintiff and the Defendants. It is further determined that as *a matter of equity*, the contract shall be *reformed* to reflect that the parcel to be conveyed pursuant to the terms of the contract is

> that 15.9 [+-] acres excluding the 40,000 square foot outparcel containing the house and out building . . . .

(Emphasis supplied). The trial court, sitting as a Court of Equity, in its discretion and in light of all the evidence, reformed the contract and ordered defendants to convey the smallest of the three possible parcels, 15.9 acres, despite the Offer calling for a conveyance of twenty-five acres, more or less. It further ordered defendants to provide Hamlett access to the property to finalize the survey of the 15.9 acre tract.

It is apparent that the *potential* issues of material fact that the majority's opinion cites in reversing the trial court's order result from defendants' breach of the Offer. The majority's opinion acknowledges that "[t]he statute of frauds was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation based on a contract fairly and admittedly made." *House v. Stokes*, 66 N.C. App. 636, 641, 311 S.E.2d 671, 675 (1984) (citation omitted). However, its holding allows defendants to further unfairly delay plaintiff by approving their breach of the Offer and prolonging the closing of this matter through their improper actions. " '[A] court of equity may decree specific performance, when it would be a virtual fraud to allow the defendant to interpose the statute as a defense and at the same time secure to himself the benefit of what has been done in performance.' " *Ebert v. Disher*, 216 N.C. 36, 48, 3 S.E.2d 301, 309 (quotation omitted), *cert. denied*, 216 N.C. 546, 5 S.E.2d 716 (1939).

Defendants do not assert and my review of the record does not indicate the trial court abused its discretion by sitting as a court of equity, reforming the contract, and ordering specific performance. *See Harris v. Harris*, 50 N.C. App. 305, 313, 274 S.E.2d 489, 493 (this Court's review of a trial court's equitable remedy is under the abuse of discretion standard), *appeal dismissed*, 302 N.C. 397, 279 S.E.2d 351 (1981).

The majority's opinion cites *Dettor v. BHI Property Co.* as authority to hold that genuine issues of material fact preclude a trial court's grant of partial summary judgment. 324 N.C. 518, 379 S.E.2d 581 (1989). *Dettor* is readily distinguishable from the case at bar. There, our Supreme Court determined the dispositive issue concerned whether the parties intended a per-acre sale of land or a contract for approximately twelve acres. *Id.* at 519, 379 S.E.2d at 851-52. This

issue resulted from a third-party surveyor's miscalculation of the acreage to be conveyed. *Id.* at 520, 379 S.E.2d at 852. Based upon each party presenting "some plausible evidence tending to support its interpretation of the contract," the Court held the contradictions "[a]t best . . . raise a *material* question of fact." *Id.* at 522-23, 379 S.E.2d at 853 (emphasis supplied). The Court concluded that such a determination should be made by the fact finder. *Id.*

The *materiality* of the issue of fact in *Dettor* is its effect on the purchase price. *See Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E.2d 375, 379 (1976) (issues are material if the facts alleged would affect the result of the action in the non-movant's favor). Under the plaintiff/seller's "per-acre sale" argument in *Dettor*, the purchase price should have been increased relative to the difference in acreage conveyed versus the "+/- 12 acres" contracted for. 324 N.C. at 521-22, 379 S.E.2d at 853. The defendant/purchaser in *Dettor* argued it did not owe additional money because the contract was "for approximately twelve acres and it never anticipated that the tract in question might contain substantially more than twelve acres." 324 N.C. at 522, 379 S.E.2d at 853. The outcome of *Dettor* raised serious financial ramifications to the losing party based on how the terms of the contract were interpreted. That outcome is the *materiality* of the issue of fact in *Dettor*.

Here, the parties contracted to convey "+ or - 25 ac. to be determined by a surveyor for property behind Mr. Wolfe's Property, to run to the first field" at "$2200.00 Per Ac." The potential issues of fact the majority's opinion cites do not result from the possibility of the appealing party not receiving the benefit of the bargain as was intended by the Offer. Defendants are receiving the full purchase price of the Offer. In addition, they are conveying to plaintiff over nine acres less than the acreage required by the terms of the Offer. The trial court's order benefits defendants, not plaintiff.

The *materiality* of issues of fact in *Dettor* is not present here, as defendants are receiving everything they contracted for, and more. Plaintiff (the purchaser) did not appeal and has not complained about the trial court's decision to convey to him over nine acres less than the Offer called for.

Under the majority's holding, on remand, defendants stand to lose more than the 15.9 acre tract if the future finder of fact determines the parties intended a larger parcel to be conveyed by the

Offer. In addition, defendants' motives in pursuing this appeal are questionable as record evidence shows another outstanding third-party Offer to purchase defendants' remaining acreage is pending, contingent upon the outcome of this matter.

IV. Time for Closing

The majority's opinion also states the trial court properly found that time was not of the essence for the Offer. That discussion is also unnecessary as this appeal is interlocutory and defendants failed to satisfy the rules of appellate procedure. This assignment of error is also not properly before this Court and should be dismissed.

V. Conclusion

The trial court, sitting as a court of equity and in its discretion, properly ordered reformation and specific performance of the Offer. Defendants' improper breach of the Offer and refusal to allow the surveyor to complete his work created any potential issues of fact. This Court should not allow defendants' wrongful conduct to delay or avoid their contractual obligations.

I vote to dismiss this appeal due to: (1) its interlocutory nature; (2) no trial court certification; (3) the absence of a substantial right; and (4) defendants' failure to abide by the North Carolina Rules of Appellate Procedure. Also, our precedents do not allow Rule 2 to be used to excuse defendants' failure to comply with the North Carolina Rules of Appellate Procedure. *See Smith v. R.R.*, 114 N.C. 729, 749-50, 19 S.E. 863, 869 (1894) (warning that, "Looseness of language and *dicta* in judicial opinions, either silently acquiesced in or perpetuated by inadvertent repetition, often insidiously exert their influence until they result in confusing the application of the law, or themselves become crystallized into a kind of authority which the courts, without reference to true principle, are constrained to follow."). I respectfully dissent.

CASTLE McCULLOCH, INC., PLAINTIFF v. DONALD LEE FREEDMAN, D/B/A FREEDMAN ASSOCIATES, AND FREEDMAN ASSOCIATES, INC., DEFENDANTS

No. COA04-514

(Filed 5 April 2005)

1. **Unfair Trade Practices— competitor's survey—damages not shown**

The trial court did not err by granting defendant's motion for a directed verdict in an action for unfair and deceptive trade practices arising from a bridal show survey and tip sheet by a competitor where plaintiff failed to present evidence that it suffered actual injury as a proximate result of defendant's conduct. There was no evidence from which a jury could calculate lost profits from vendors or payroll damages with a reasonable certainty.

2. **Evidence— door not opened on cross-examination—witness interjecting answer**

The trial court did not err by refusing to allow plaintiff's expert to testify in an unfair and deceptive trade practices action arising from a bridal show survey and tip sheet where the court ruled that plaintiff had not properly disclosed the expert's opinion in discovery. Although plaintiff argued that defendant opened the door on cross-examination, the witness interjected the information and defendant was not the first to raise the issue.

3. **Unfair Trade Practices— costs and attorney fees—frivolous action—discretionary finding**

The trial court did not abuse its discretion by awarding costs and attorney fees to defendant in an unfair and deceptive trade practices action arising from a bridal show survey and tip sheet where it found the action to be frivolous. The court's decision was not manifestly unsupported by reason; moreover, where the court has taxed costs in its discretion, that decision is not reviewable.

Judge TYSON concurring in part and dissenting in part.

Appeal by Plaintiff from judgment entered 17 March 2003 by Judge William Z. Wood, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 25 January 2005.

Douglas S. Harris for plaintiff-appellant.

Elliot Pishko Gelbin & Morgan, P.A., by David C. Pishko for defendants-appellees.

WYNN, Judge.

To prevail on a claim of unfair and deceptive trade practices, under Chapter 75 of the North Carolina General Statutes, a plaintiff must show the defendant committed an unfair or deceptive act or practice, in or affecting commerce, and that the plaintiff was injured thereby. In this case, the record shows that Plaintiff failed to present evidence from which a jury could reasonably calculate damages. Accordingly, we hold that the trial court did not err in granting Defendant's Motion for a Directed Verdict.

Plaintiff, Castle McCulloch, Inc., owns and operates a facility in Jamestown, North Carolina used primarily for weddings and wedding receptions. In 1999, Castle McCulloch also began holding bridal shows at its facility. At a bridal show various vendors—caterers, photographers, florists, musicians, etc.—display their products and services to brides. In January 1999, Castle McCulloch's first bridal show had twenty-six vendors and 150 brides. By June 2001, the bridal show consisted of seventy vendors and 506 brides. The January 2003 bridal show included 753 brides and fifty-five vendors.

Castle McCulloch charges each vendor $650 per booth, unless they are a "preferred vendor" in which case the charge is only $325-350. A "preferred vendor" at Castle McCulloch has its literature included in a bridal notebook given to all brides that use Castle McCulloch, and the brides are encouraged to book services with the "preferred vendors." In addition, Castle McCulloch markets the "preferred vendors" at various wedding shows its employees attend around North Carolina. In exchange for this marketing service, all "preferred vendors" must pay Castle McCulloch fifteen percent (ten percent for caterers) of all sales they make to brides holding their events at Castle McCulloch. There is no charge for brides to attend the bridal show if they pre-register.

Defendant, Donald Lee Freedman, operates three large wedding shows a year in Greensboro, North Carolina and two in Winston-Salem, North Carolina. Annually, Freedman rents booths to about 400 vendors at his bridal shows collectively at a rate of $640 per booth. Most brides are charged a ten dollar entrance fee to Freedman's shows.

In March 2001, Freedman conducted a survey questionnaire asking fifteen local caterers and four local wedding planners to grade various reception sites that allow outside caterers. Thirteen of the caterers were chosen from a list of the top fifteen caterers in the Triad area (two were removed because they did not caterer weddings) and Freedman added two more caterers that were frequently used for weddings. Along with five other sites, Castle McCulloch was one of the facilities graded. Each facility was given a letter grade in six categories—professionalism, integrity, personal service, convenience, preparation/amenities, and hidden costs. Freedman received responses from fifteen vendors and averaged the letter grades into a final list. Castle McCulloch received the worst grades with four "Cs" and two "Ds." Some of the vendors who were sent the questionnaire were Castle McCulloch's "preferred vendors," while one vendor had been banned from performing services there. The survey results were sent to the nineteen vendors that the questionnaire was originally sent to, along with a few other vendors. It was not given to any brides.

In August 2001, Freedman sent Dave Card of After Five Framing a sheet entitled "How can I tell a *Good* bridal show from a not-so-good one?" in response to Card inquiring into joining either Freedman's or Castle McCulloch's bridal show. Card eventually joined Castle McCulloch's bridal show. The sheet contained the following pertinent sections:

> ***
>
> KICKBACK FEES. Believe it or not, some shows hit you for a percentage of your hard-won sales. *If you feel like you are not currently paying enough taxes, you'll love this type of deal.*
>
> REAL BRIDES. Do most brides get into the show for free? Such "brides" are not your best prospects: heck, access to free caterers' food is enough to draw a crowd. *Look for a show where 90+% pay for tickets: now <u>those</u> are brides who are planning weddings!*
>
> ***

On 16 November 2001, Castle McCulloch filed a complaint against Freedman alleging unfair and deceptive actions constituting an unfair trade practice in violation of Chapter 75 on the North Carolina General Statutes. The case went to trial on 24 February 2004, and at the close of Castle McCulloch's evidence the

trial court granted Freedman's motion for a directed verdict. Castle McCulloch appealed.

On appeal, Castle McCulloch argues that the trial court erred in (A) granting Freedman's Motion for a Directed Verdict, (B) not allowing its economic expert to testify as to damages, and (C) granting Freedman's Motion for Costs and Attorneys Fees. We disagree.

A. Directed Verdict

[1] Castle McCulloch first contends that the trial court erred in granting Freedman's Motion for a Directed Verdict at the close of its evidence when it had properly stated its case within the meaning of section 75-1.1 of the North Carolina General Statutes. We disagree.

A motion for a directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure presents the same question for both trial and appellate courts: whether the evidence, taken in a light most favorable to plaintiff, was sufficient for submission to the jury. *Helvy v. Sweat*, 58 N.C. App. 197, 199, 292 S.E.2d 733, 734, *disc. review denied*, 306 N.C. 741, 295 S.E.2d 477 (1982). The question of the evidence's sufficiency is a matter of law, and the motion should be reversed if there is more than a scintilla of evidence to support all the elements of plaintiff's *prima facie* case. *S. Ry. Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 4, 318 S.E.2d 872, 875 (1984). Therefore, this Court reviews the record and transcript *de novo*, reversing upon a finding of more than a scintilla of evidence supporting each element of plaintiff's *prima facie* case. *Whitt v. Harris Teeter, Inc.*, 165 N.C. App. 32, 46, 598 S.E.2d 151, 160 (2004).

To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show: (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby. *See Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992); N.C. Gen. Stat. § 75-1.1 (2004). The plaintiff must also establish it "suffered actual injury as a proximate result of defendants' misrepresentations or unfair conduct." *First Atl. Mgmt., Corp. v. Dunlea Realty, Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998) (citation omitted).

Here, the trial court concluded that "the plaintiff's evidence is insufficient as a matter of law to establish each of the elements of the plaintiff's claim and that the defendants' Motion should be granted." The trial court found that Castle McCulloch failed to establish with certainty the existence of any actual damages caused by Freedman.

The burden of proving damages is on the party seeking them. *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 547, 356 S.E.2d 578, 586 (1987). "As part of its burden, the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Id.* at 547-48, 356 S.E.2d at 586.

At trial, Castle McCulloch argued the damages it sustained from Freedman's survey and bridal show tip sheet amounted to the payroll time employees spent talking about the survey and the revenue from the decline in vendor booths at the wedding shows. Denisa Harvey, general manager of Castle McCulloch, testified at trial that although they had no meeting logs, based on her personal notes from staff meetings, she estimated that Castle McCulloch employees spent fifty to seventy hours working on the reaction to the Freedman survey and the average employee made ten dollars per hour. All employees were on the payroll and there was no overtime or additional employees hired in response to Freedman's survey. Richard Harris, president of Castle McCulloch, testified at trial that he calculated Castle McCulloch lost revenue in the amount of $33,000 to $67,000 due to Freedman's survey. Harris reached these numbers by calculating the amount of vendors lost since the highest point (seventy) to the current number (fifty-five) and multiplied this by $650 (the charge for a booth to a non-preferred vendor) to reach $33,000. He calculated the $67,000 by looking at the amount of vendors his show would have had if the number of vendors continued to grow as it previously had before the drop off.

The damages argued by Castle McCulloch regarding the lost vendor revenue are essentially damages for lost profits. "North Carolina courts have long held that damages for lost profits will not be awarded based upon hypothetical or speculative forecasts of losses." *Iron Steamer, Ltd. v. Trinity Rest., Inc.*, 110 N.C. App. 843, 847, 431 S.E.2d 767, 770 (1993). This Court has chosen to evaluate the quality of evidence of lost profits on an individual case-by-case basis in light of certain criteria to determine whether damages have been proven with "reasonable certainty." *Id.* at 847-48, 431 S.E.2d at 770.

In *Iron Steamer*, the defendant leasee operated a restaurant and his gross revenues for August, September, October, and November of 1989 were lower than the revenues from May, June, or July of that year. *Id.* at 848, 431 S.E.2d at 771. The trial court found that, but for the plaintiff's breach of contract, "the gross sales figures for a restau-

rant of that type and location, for the month of August, should have been similar to the gross sales figures for the month of July." *Id.* The defendant estimated his lost profits for the months of August through November, by estimating the gross sales figures would have been the same as in July and subtracting what he thought would have been the additional expenses for those months. *Id.* at 848-49, 431 S.E.2d at 771. This court found "no factual basis upon which a jury could calculate lost profits with a 'reasonable certainty.' [The defendant's] estimation of lost profits is based on assumptions that are purely speculative in nature." *Id.* at 849, 431 S.E.2d at 771. *See also Meares v. Nixon Constr. Co.*, 7 N.C. App. 614, 623, 173 S.E.2d 593, 599 (1970) (an estimate of anticipated profits does not provide an adequate factual basis for a jury to ascertain the measure of damages).

Here, as in *Iron Steamer*, Castle McCulloch merely speculated as to the number of vendors that would have attended the bridal show but for Freedman's survey. Castle McCulloch speculated that the number of vendors would not have decreased or the rate of growth would not have slowed. No evidence was presented to show that any vendor left Castle McCulloch's bridal show as a result of Freedman's survey. Castle McCulloch presented no evidence as to why those fifteen vendors left the bridal show. Also, Castle McCulloch assumed that all the missing vendors paid the full booth price without presenting evidence that the vendors who left were not "preferred vendors" who paid half that price. Additionally, Castle McCulloch subtracted nothing for the additional setup or labor costs needed for those additional vendors.

Similarly, the only evidence Castle McCulloch presented regarding damages from payroll expenses was the general manager's testimony that she looked over her personal notes from some meetings and she estimated the time and then took an average hourly wage figure. This is far from a reasonably certain calculation. There were no meeting minutes or attendance logs of who was at these meetings. Nor was there any breakdown of how much time each individual employee spent and their individual wage.

After reviewing the entire record, we find no evidence from which a jury could calculate lost profits from vendors or payroll damages with a "reasonable certainty." *Iron Steamer, Ltd.*, 110 N.C. App. at 847, 431 S.E.2d at 770. As Castle McCulloch failed to present evidence that it suffered actual injury as a proximate result of Freedman's misrepresentations or unfair conduct, the trial court did

not err in granting Freedman's motion for a directed verdict. *First Atl. Mgmt., Corp.*, 131 N.C. App. at 252, 507 S.E.2d at 63.

B. Expert Testimony

[2] Castle McCulloch next argues that the trial court erred in not allowing its expert to testify regarding damages because Freedman opened the door to the testimony by his cross-examination of Harris. We disagree.

Before trial, the trial court ruled that Castle McCulloch's expert witness, Erskine Walther, would not be permitted to testify concerning any economic impact Freedman's survey may have had on Castle McCulloch's business because his opinion had not been properly disclosed to Freedman in discovery.

On direct examination Harris testified concerning the number of vendors. "Well, well, we get a peak in June of 2001. We had 70 vendors. We currently have 55, moved around in 50s, 60s. Generally falling since June of 2001." On cross-examination, Freedman questioned Harris on his testimony regarding vendor numbers as it conflicted with his earlier deposition testimony. At his deposition, Harris stated he had "more vendors, more brides, more money." Harris then asked if he could explain the differing testimonies and stated that Walther's economic data showed him he had "been hurt."

We hold that Freedman did not open the door to Walther's testimony regarding damages. Defense counsel only questioned Harris as to the differing vendor numbers he testified to at his deposition and at trial. Harris interjected in his answer that he received information from Walther, the defense did not introduce this. "[W]hen a party first raises an issue, it opens the door to questions in response to that issue and cannot later object to testimony regarding the subject raised." *Middleton v. Russell Group, Ltd.*, 126 N.C. App. 1, 23-24, 483 S.E.2d 727, 740 (1997). However, since Freedman did not first raise the issue regarding Walther's testimony regarding damages or the issue of the decline in vendors, the door was not opened for Walther's testimony. Therefore, the trial court did not err in refusing to allow Walther's testimony regarding damages.

C. Costs and Attorney's Fees

[3] Castle McCulloch argues the trial court erred in awarding costs and attorney's fees to Freedman. We disagree.

Section 75-16.1 of the North Carolina General Statutes provides that

> [i]n any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee . . . to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that: . . . (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1 (2004). The award of attorneys' fees under section 75-16.1 of the North Carolina General Statutes is within the sound discretion of the trial judge. *Borders v. Newton*, 68 N.C. App. 768, 770, 315 S.E.2d 731, 732 (1984). A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. *Smith v. Beaufort County Hosp. Ass'n, Inc.*, 141 N.C. App. 203, 210, 540 S.E.2d 775, 780 (2000).

Castle McCulloch argues that the trial court made no finding that the action was frivolous and malicious and there was no evidence to support such a finding. In its 10 July 2003 order, the trial court found that "the plaintiff knew, or should have known, that it would be unable to establish any damages arising from the alleged conduct of the defendants and that this action was frivolous and malicious." To support this finding, the trial court went on to state that "[t]he plaintiff failed to present evidence sufficient to prove that it's [sic] business had suffered any economic injury caused by any of the alleged actions by the defendants." Here, the record shows that Castle McCulloch did not offer the testimony of any vendor that left its wedding show because of Freedman's tip sheet or questionnaire.

Moreover, the trial court made a finding of fact that the action was frivolous and malicious and supported its finding. Although, the dissent does not agree that this is competent evidence to support the trial court's finding of frivolous and malicious, we conclude that the trial court's decision was not manifestly unsupported by reason. *Smith*, 141 N.C. App. at 210, 540 S.E.2d at 780.

Finally, we point out that section 6-20 of the North Carolina General Statutes provides that "costs may be allowed or not, in the discretion of the court[.]" N.C. Gen. Stat. § 6-20 (2004). Where the court has taxed costs in a discretionary manner its decision is not reviewable. *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296

S.E.2d 512, 516 (1982). As the trial court awarded costs in its discretion, we do not review that decision on appeal.

Affirmed.

Judge McGEE concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge concurring in part, dissenting in part.

I concur in the majority's decision to affirm the trial court's grant for a directed verdict and that Freedman's cross-examination of Castle McCulloch's expert witness was insufficient to "open the door" to testimony regarding the decline in vendors. I disagree with the majority's decision to affirm the trial court's award of attorney's fees. I also vote to dismiss Castle McCulloch's assignment of error to the trial court's award of costs to Freedman. I respectfully dissent.

I. Attorney's Fees

The majority's opinion concludes, but does not set forth any evidence in the record to support the trial court's finding that "[Castle McCulloch] failed to present evidence sufficient to prove that its business has suffered any economic injury caused by any of the alleged actions by [Freedman]." The majority's opinion concludes this finding supports a conclusion of law of "frivolous and malicious" conduct by Castle McCulloch. I disagree. No evidence supports the trial court's finding that Castle McCulloch's claims were "frivolous and malicious," and its prior rulings show otherwise.

The award of attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1 rests within the sound discretion of the trial court and cannot be reversed absent a showing that its determinations are "manifestly unsupported by reason." *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994) (citations omitted).

Here, the trial court found, "Following the *denial of the defendants' Motion* of Summary Judgment on February 18, 2003, *the plaintiff* knew, or should have known, that it would be unable to establish any damages arising from the alleged conduct of the defendants and that this action was frivolous and malicious." (Emphasis supplied). A denial of defendants' motion to dismiss under Rule 12(b)(6) and their motion for summary judgment under Rule 56 cannot support the trial

court's conclusion that Castle McCulloch, as plaintiff, "knew, or should have known," its complaint was "frivolous and malicious."

A. Rule 12(b)(6)

In his answer, Freedman asserted that Castle McCulloch failed "to state a claim upon which relief can be granted and should therefore be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003). The trial court did not grant Freedman's motion to dismiss accompanying their answer. The assertion of this defense followed by the trial court's failure to dismiss Castle McCulloch's complaint indicates that Castle McCulloch's complaint stated a "claim upon which relief can be granted" and was not "frivolous and malicious." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); N.C. Gen. Stat. § 75-16.1.

B. Summary Judgment

The standard of review for summary judgment is well established by the court.

> " 'The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.' " *Pacheco v. Rogers and Breece, Inc.*, 157 N.C. App. 445, 477, 579 S.E.2d 505, 507 (2003) (quoting *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985)).
>
> A defendant may show entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is nonexistent, 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 which would bar the claim." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, disc. review denied, 340 N.C. 359, 458 S.E.2d 187 (1995). Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979).

Draughon v. Harnett County Bd. of Educ., 158 N.C. App. 208, 580 S.E.2d 732 (2003).

Following hearing, the trial court denied Freedman's motion for summary judgment. The trial court's denial of Freedman's motion establishes that Castle McCulloch's complaint, affidavits, and forecast of evidence sufficiently presented "genuine issues of material

fact" to support its causes of action, and that Freedman had failed to show or establish a defense to defeat Castle McCulloch's claims. *See id.*; *see also* N.C. Gen. Stat. § 1A-1, Rule 56 (2003).

Because Castle McCulloch prevailed over Freedman's assertion of a Rule 12(b)(6) defense and a Rule 56 motion for summary judgment, no evidence supports the trial court's conclusion that Castle McCulloch's complaint is wholly "frivolous or malicious." Otherwise, the trial court would have either dismissed Castle McCulloch's complaint under Rule 12(b)(6) or granted Freedman's motion for summary judgment pursuant to Rule 56. *See First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998) (requiring evidence of "actual injury" as an element to a cause of action for unfair and deceptive trade practices).

As Castle McCulloch prevailed in both instances, the trial court abused its discretion when it concluded that Castle McCulloch's action was "frivolous and malicious." The lack of a dismissal for Castle McCulloch's failure to state a claim and the denial of Freedman's motion for summary judgment cannot support a finding that Castle McCulloch's "knew or should have known that its action was frivolous and malicious," as required by N.C. Gen. Stat. § 75-16.1(2). The trial court's order awarding attorney's fees to Freedman is "manifestly unsupported by reason." *Buford*, 339 N.C. at 406, 451 S.E.2d at 298. The trial court's finding of fact does not support its conclusion of law and award of attorney's fees to Freedman is error. That portion of the judgment appealed from should be reversed.

II. Costs

Castle McCulloch's assignment of error to the trial court's award of costs is not properly before this Court and should be dismissed.

Freedman moved for costs pursuant to N.C. Gen. Stat. §§ 6-20 and 7A-305. N.C. Gen. Stat. § 7A-305(d) lists expenses that are recoverable. "The trial court . . . is prohibited from assessing costs in civil cases which are neither enumerated in section 7A-305 nor provided by law." *Crist v. Crist*, 145 N.C. App. 418, 424, 550 S.E.2d 260, 265 (2001) (citation omitted). N.C. Gen. Stat. § 6-20 (2003) provides that "costs may be allowed or not, in the discretion of the court." "The trial court's discretion to tax costs pursuant to N.C. Gen. Stat. § 6-20 is not reviewable on appeal absent an abuse of discretion." *Cosentino v. Weeks*, 160 N.C. App. 511, 516, 586 S.E.2d 787, 789-90 (2003).

Castle McCulloch's brief fails to assert any argument or cite to any authority to support a reversal of the trial court's award of costs to Freedman. This assignment of error is not properly before this Court. I would dismiss this portion of Castle McCulloch's assignment of error. N.C.R. App. P. 28(b)(6) (2004).

III. Conclusion

I concur with the majority's opinion to affirm the trial court's award of a directed verdict for Freedman and its discussion of Freedman's cross-examination of Castle McCulloch's expert witness. I disagree with the holding in the majority's opinion to affirm the trial court's award of attorney's fees to Freedman on the grounds that Castle McCulloch's action was "frivolous and malicious." I would dismiss Castle McCulloch's assignment of error regarding costs. *See* N.C.R. App. P. 28(b)(6) (2004). I respectfully dissent.

REUBEN LOREDO, AND J. FRANK WOOD, JR., AS GUARDIAN AD LITEM OF STACEY JAZMINE LOREDO, AND THOMAS BERKAU, AS ADMINISTRATOR OF THE ESTATE OF HENRY LOREDO, MINOR/DECEASED, AND AMELIA TORRES, ADMINISTRATRIX OF THE ESTATE OF VICTORIA TORRES, PLAINTIFFS V. CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY, D.A. GILBERT, DEFENDANTS-THIRD-PARTY PLAINTIFFS V. AMELIA TORRES, AS ADMINISTRATRIX OF THE ESTATE OF VICTORIA TORRES, FAMILY HOME & GARDEN, INC. (F/K/A FAMILY FARM SUPPLY, INC.), WALTER B. HORNE AND WIFE, JANET G. HORNE, INDIVIDUALLY AND DBA FAMILY EGG MARKET, THIRD-PARTY DEFENDANTS

No. COA04-111

(Filed 5 April 2005)

Railroads— crossing accident—Amtrack train—warnings and unobstructed view—no negligence

Summary judgment was affirmed for plaintiffs in a railroad crossing case where the evidence did not create a genuine issue of fact as to whether defendants had a duty to maintain gates or other mechanical warnings. The trial judge found as a matter of law that the conditions existing at the crossing did not render it peculiarly and unusually hazardous; while plaintiffs point to the surprise of a train approaching at between 65 and 70 miles per hour when other trains approached at less than 10 miles per hour, the variable speeds of other trains is not a condition existing at

the crossing at the time a motorist must determine whether a train is approaching. Defendants' duty is to warn a motorist of an approaching railroad crossing and train, and that duty is met when a motorist stopped safely behind a stop sign at the crossing has an unobstructed view of an approaching train.

Judge HUDSON concurring in part and dissenting in part.

Appeal by plaintiffs from judgments entered 20 December 2002 by Judge Jack W. Jenkins and 26 June 2003 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 November 2004.

Mast, Schulz, Mast, Mills, Stem, & Johnson P.A., by Charles D. Mast, George B. Mast, and David F. Mills, and Ward & Smith, P.A., by W.L. Allen, III, and E. Bradley Evans, for plaintiffs-appellants.

Millberg, Gordon & Stewart, P.L.L.C., by Frank J. Gordon, and Bode, Call & Stroupe, L.L.P., by Odes L. Stroupe, Jr., for defendants-appellees.

Robert E. Ruegger for third-party defendant Amelia Torres.

Cranfill Sumner & Hartzog, L.L.P., by Patrick H. Flannagan and George L. Simpson, IV, for third-party defendant Family Home & Garden, Walter B. Horne and Janet G. Horne.

North Carolina Academy of Trial Lawyers, by John J. Korzen, amicus curiae.

ELMORE, Judge.

This action arises out of a collision between an Amtrak train and a motor vehicle at a railroad grade crossing located off of Hillsborough Street between Raleigh and Cary. The crossing runs over two main line railroad tracks and provides access to two businesses located on the other side of the tracks. At approximately 4:34 p.m. on the afternoon of 25 April 1998, Victoria Torres was driving a van with her two children as passengers, Henry and Jazmine Loredo, when she attempted to cross over the tracks and was struck by the approaching train. Ms. Torres and Henry were killed by the collision, and Jazmine was severely injured.

The crossing was controlled and maintained by defendants CSX Transportation, Inc. (CSX) and Norfolk Southern Corporation and

Norfolk Southern Railway Company (Norfolk Southern).[1] A white stop bar was painted on the road and a stop sign and crossbucks sign were in place at the crossing where the van was traveling south to north. The Amtrak train was traveling east to west at a speed of approximately 68 miles per hour when it collided with the van's right side. Defendants' evidence showed that the train blew its horn for 21 seconds prior to the collision and that the driver's side window on the motorist's vehicle was rolled down at the time of the collision.

Plaintiffs Reuben Loredo, J. Frank Wood, Jr., Guardian *ad litem* of Jazmine Loredo, and Thomas Berkau, Administrator of the Estate of Henry Loredo, filed two separate negligence actions, one in Wake County and one in Johnston County Superior Court, on 22 February 2000. Plaintiff Amelia Torres, Administratrix of the Estate of Victoria Torres, filed a negligence action in Wake County Superior Court on 24 April 2000. On 20 December 2002, Judge Jack W. Jenkins granted summary judgment against plaintiffs in one of the actions on their claim for punitive damages. The three actions were consolidated on 23 April 2003, and the parties have stipulated that all pleadings, motions, discovery and orders entered into in one action are binding in the other two actions. In an order entered 26 June 2003, the trial court granted summary judgment to defendants as to all of plaintiffs' claims.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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); *DiOrio v. Penny*, 331 N.C. 726, 728, 417 S.E.2d 457, 459 (1992). The record is reviewed in the light most favorable to the non-movant, and all inferences are drawn against the movant. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). The trial court does not resolve issues of fact and must deny a motion for summary judgment if there is a genuine issue as to any material fact. *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980).

In North Carolina, railroad companies have a duty " 'to give to users of the highway warning, appropriate to the location and circumstances, that a railroad crossing lies ahead.' " *Collins v. CSX Transportation*, 114 N.C. App. 14, 18, 441 S.E.2d 150, 152 (quoting

1. The North Carolina Railroad owns the underlying right of way at the crossing, but has entered into lease agreements with defendants Norfolk Southern and CSX.

Cox v. Gallamore, 267 N.C. 537, 541, 148 S.E.2d 616, 619 (1966)), *disc. review denied*, 336 N.C. 603, 447 S.E.2d 388 (1994). Automatic warning devices, such as gates or flashing lights, are required only at crossings " 'so dangerous that prudent persons cannot use them with safety unless extraordinary protective means are used.' " *Price v. Railroad*, 274 N.C. 32, 46, 161 S.E.2d 590, 600 (1968) (internal quotation omitted). Thus, a railroad company is negligent in failing to maintain an automatic alarm only when the crossing is more than ordinarily hazardous[2], such as where the view at the crossing is obstructed. *Id.* This is so because "[a] railroad company is not an insurer of the safety of travelers, and it is not required to maintain a foolproof crossing or a crossing where no injury is possible." *Id.* at 39, 161 S.E.2d at 595.

In the instant case, the trial judge found as a matter of law that the conditions existing at the crossing did not render it "peculiarly and unusually hazardous." In considering the motion for summary judgment, the trial court reviewed extensive deposition testimony by experts for both parties. Plaintiffs' own expert, Archie Burnham, testified that the sight distance to the east from the stop bar was at least 1500 feet and that this sight distance was satisfactory. Also, defendants presented as exhibits two enlarged photographs of the crossing to illustrate the sight distance available on a clear day. Exhibit 2, which is referenced in the court's order, shows the view from a vehicle at the stop sign of an approaching train 1800 feet from where the collision occurred. The trial judge concluded as follows:

> According to the plaintiffs' own evidence and the undisputed details of Exhibit 2 described above, there is no genuine issue of material fact in this case as to the available sight distance at this crossing from a safe place (behind the stop bar and stop sign) on the day of the accident. The photographs and the referenced testimony from the plaintiffs' own retained expert witness establish that there was a safe point from which the plaintiff could have looked for a train and traveled over this railroad crossing safely. Thus, as a matter of law, this Court finds that this crossing was not "peculiarly and unusually hazardous[.]"

Plaintiffs contend that there were genuine issues of material fact in dispute and that the issue of whether the crossing was peculiarly and unusually hazardous should have been submitted to the jury.

2. The terms "more than ordinarily hazardous" and "peculiarly and unusually hazardous" are used interchangeably throughout the cases discussed herein.

Plaintiffs argue that the trial court erred in considering only sight distance, rather than all the conditions at the crossing. Specifically, plaintiffs point out that the surprise of a train approaching at between 65 and 70 miles per hour when other trains approach at less than 10 miles per hour may create an extraordinarily dangerous crossing.

Our Supreme Court has stated that the inquiry into whether a crossing is peculiarly dangerous focuses on "the conditions existing at or about the crossing." *Caldwell v. R.R.*, 218 N.C. 63, 70, 10 S.E.2d 680, 684 (1940). The Court described certain conditions that would show a crossing presents a peculiar danger:

> that it is a thickly populated portion of a town or city; or, that the view of the track is obstructed either by the company itself or by other objects proper in themselves; or, that the crossing is a much traveled one and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason of bustle and confusion incident to railway or other business; or, by reason of some such like cause.

Id. at 69, 10 S.E.2d at 683 (quoting *Batchelor v. R.R.*, 196 N.C. 84, 87, 144 S.E. 542, 543 (1928)). Thus, plaintiffs are correct in that the motorist's view of the tracks is not the only condition a factfinder may consider in determining whether a crossing is more than ordinarily hazardous. However, the variable speeds of other trains, e.g., a freight train as compared to a passenger train, is not a condition existing at the crossing at the time when a motorist must discern whether a train is approaching. Indeed, no case in North Carolina has recognized varying speeds of different trains as a factor bearing upon the degree of danger presented by conditions at a crossing. In contrast, our Supreme Court has consistently held obstructed view to be a material factor in analyzing the reciprocal duties of the railroad and a motorist at a grade crossing. *See, e.g., Johnson v. R.R.*, 257 N.C. 712, 127 S.E.2d 521 (1962) (nonsuit improper where evidence showed box cars partially obstructed motorist's view down tracks); *Neal v. Booth*, 287 N.C. 237, 214 S.E.2d 36 (1975) (directed verdict improper where motorist's view obstructed by a building and railroad cars); *Mansfield v. Anderson*, 299 N.C. 662, 264 S.E.2d 51 (1980) (jury question where view severely obstructed by vegetation until motorist came within few feet of tracks such that motorist did not have safe position from which to look and listen).

Here, the evidence presented to the trial court established that the crossing was marked by both a stop sign and stop bar indicating

a safe position to observe approaching trains, and there was an unobstructed view of more than 1,500 feet down the tracks for a motorist stopped behind either the stop sign or stop bar. Even viewed in the light most favorable to plaintiffs, there was no evidence placing the sight distance and unobstructed view into dispute. The record clearly indicates that the trial judge considered the evidence of sight distance at both 16 feet (at stop bar) and 21 feet (at stop sign) from the near rail. Plaintiffs assert that 24 feet from the near rail is also a reasonable point from which to measure the sight distance because the stop sign is 20 feet from the near rail and a driver's head is at least 4 feet behind the front of the vehicle. However, plaintiffs offer no evidence that the sight distance for a motorist stopped 24 feet from the rail is limited and thus are speculating that the sight distance from this point would be inadequate. In sum, plaintiffs failed to present affirmative evidence that the sight distance from behind either the stop bar or stop sign was limited or obstructed to any extent. *Cf. Parchment v. Garner*, 135 N.C. App. 312, 314, 520 S.E.2d 100, 102 (1999) (plaintiff's expert submitted report documenting severe limitations on sight distance caused by trees and vegetation), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 216 (2000); *Collins*, 114 N.C. App. at 16-17, 441 S.E.2d at 155 (evidence that motorist's view partially obstructed by foliage near the tracks); *Dixon v. CSX Transp., Inc.*, 990 F.2d 1440, 1451 (4th Cir.) (ample evidence that obstructed view prevented motorist from being able to look and listen for approaching train without stopping vehicle within 3 or 4 feet of tracks), *cert. denied*, 510 U.S. 915, 126 L. Ed. 2d 252 (1993). It is *undisputed* that a train 1500 feet away from the crossing is visible from a safe point behind either the stop bar or stop sign. The unobstructed view at the crossing permits a motorist to safely observe whether a train is approaching without using extraordinary protective means. Defendants' duty under our common law is to warn a motorist of an approaching railroad crossing and train, and that duty is met when a motorist stopped safely behind a stop sign at the crossing has an unobstructed view of an approaching train. *See Price*, 274 N.C. at 46, 161 S.E.2d at 600.

For the foregoing reasons, we hold that the undisputed evidence in the record before the trial court, considered in the light most favorable to plaintiffs, creates no genuine issue of material fact as to whether defendants had a duty to maintain gates or other mechanical warning and the grant of summary judgment must be affirmed. We do not reach plaintiffs' assignment of error challenging the court's ruling on the punitive damages claim.

Affirmed.

Chief Judge MARTIN concurs.

Judge HUDSON concurs in part and dissents in part.

HUDSON, Judge, concurring in part and dissenting in part.

The majority here affirms the grant of summary judgment to the defendants/third-party plaintiffs (the Railroad defendants). I agree with much of the majority's analysis of the applicable legal standard, but I believe that the forecast of evidence raises genuine issues of material fact as to whether the crossing was "more than ordinarily hazardous." Thus, I respectfully dissent.

As the majority notes, "[i]n North Carolina, railroad companies have a duty 'to give to users of the highway warning, appropriate to the location and circumstances, that a railroad crossing lies ahead.' " *Collins v. CSX Transportation*, 114 N.C. App. 14, 18, 441 S.E.2d 150, 152 (1994) (other citations omitted). I agree with the majority that "a railroad company is negligent in failing to maintain an automatic [warning device such as gates or lights] only when the crossing is more than ordinarily hazardous." (citing *Price v. Seaboard R.R.*, 274 N.C. 32, 46, 161 S.E.2d 590, 600 (1968)).

The parties presented a forecast of evidence in several forms, including numerous depositions, sworn answers to discovery, affidavits and photographs, *inter alia*. The majority makes little mention of plaintiff's forecast of evidence, which includes the expert depositions of Anand David Kashbekar, who visited the crossing and created a computer model to evaluate the crossing. Below are some excerpts from his testimony that, in my view, create an issue of fact as to whether the conditions at the crossing are more than ordinarily hazardous:

> A: I was taking some measurements of the track and—and the train came out of the—the east early in the morning.
>
> Q: Okay. What did you observe about it?
>
> A: It caught me by surprise a little bit, I heard—I was on the tracks, I heard the whistle and at that time of the morning if you look to the east that time of year you're looking straight into the sun . . . . It wasn't but a few seconds later that the train crossed over that crossing.

A: I've been out there other times either taking photographs, measurements and I've seen not a passenger train, but the freight trains go by there at probably as little as three or four miles per hour, walking pace. So, you know, what I gather from that is, is the crossing is used by trains at various rates of speed.

* * * * *

Q: Any of those observations about the train movements that day have anything to do with your opinions or your computer model in this case?

A: No. Well certainly it leads me—it makes me understand how this type of accident can happen. If a person is conditioned to seeing a train come there at a few miles per hour and then all of a sudden they are going across the crossing, you got one approaching at almost seventy miles an hour, it's a huge difference to contend with. Early in the morning obviously it's almost—on the days I was out there, it was virtually impossible to see a train coming from the East until it's right up on top of you . . . . [A] driver may think that he or she has a reasonable opportunity to cross the crossing and starts to do so and the next thing he or she knows is a train is right up on them.

* * * * *

A: Assuming the train is going from east to west, she's approaching from the south, heading north. If you're looking over toward the east, you've got a hillside there, you've got crossbucks and other obstructions and—-and it's clear to me that at that approach rate [of the train] it's difficult to reliably cross that crossing in a safe manner.

* * * * *

A: The only thing I'll tell you, the day I was out there I heard a train whistle. I looked both directions and I couldn't see a train and I didn't bother to get off the tracks until the tracks started rumbling.

Q: Okay. Because the sun was in your eyes?

A: I didn't see the train and—and you can hear something—I was out of my car on the tracks and to the west I could see there was no train visible to me. To the east I could see a fair amount of

track, you know, a couple hundred feet in front of me and then I was looking into the sun.

* * * * *

A: Yeah, and also you've got a dip in those tracks that start to—to lower the tracks. The tracks and the bed actually—a section of them will disappear.

* * * * *

A: I believe that from this position if you went down the tracks two thousand feet with—with an object that was the size of a train you could tell that there was something down there. Whether or not you could tell whether it was a train, a truck crossing the other crossing or trees or what—

Q: Right.

A: —is a different story.

Q: How far away—suppose you were standing on flat railroad tracks, that are flat for three miles, looking down the tracks, how far away can you see a train coming and recognize that it's a train, looking straight at it?

A: I—I think there are a lot of variables. It depends on the person, it depends on where the sun is.

* * * * *

A: [Y]ou got a double set of rails and it's a particularly hazardous crossing for that reason because you got to contend with two sets of rails and—and here is a situation where somebody may get onto the crossing and a train that's going at a hundred feet per second comes up on her and she's faced with the decision as to whether or not to stop or try to accelerate to get out of the way and that was the—the whole intention.

* * * * *

Q: Do you agree that a motorist in North Carolina should look and listen for trains from a—a point at a crossing where looking and listening will be of benefit to them?

A: To the best of their knowledge, yes. But I don't think it's reasonable to expect the average motorist to be able to determine always what that point is.

Q: Okay.

A: They—they have no idea what the train speed is. Most of them don't convert miles per hour to feet per second in their head like we have been doing and that—but that's the reason I think this crossing is particularly hazardous.

Taken in the light most favorable to the plaintiff, these excerpts alone create an issue of fact as to whether the crossing was more than ordinarily hazardous.

However, plaintiff forecast much more evidence than this, tending to show that the circumstances affecting a driver at the crossing could give rise to an unusually hazardous situation. For example, Ernest F. Mallard, a long-time State Department of Transportation Signals Engineer, identified many potential problems facing a motorist at the crossing, including the high volume and speed of train traffic, the double tracks, the proximity to busy Hillsborough Street, the distraction from irregular width and uneven surfaces of Bashford Road, and possible problems seeing down the tracks. In addition to these factors, the sun, dip in the tracks, obstructions, and the potential surprise created by the wide variation in train speeds, noted by Mr. Kashbekar, all could affect a reasonable motorist's ability to judge and cross safely at a given time. Other evidence indicated that there had been at least five previous collisions at this crossing, and James McCloskey of Norfolk and Southern Railway acknowledged that "we knew about dangerous crossings, for example, this crossing."

Thus, I believe that all of the evidence forecast creates issues of fact regarding the conditions under which trains might be viewed, as well as regarding other matters affecting the potentially hazardous nature of the crossing. This testimony, as well as other evidence, also raises genuine issues about other aspects of the conditions that might have existed on the morning of the collision, such that these issues should be for the jury.

I agree with the majority that a motorist's view of the tracks is a material factor in determining whether a crossing is so hazardous that it triggers duties on the part of the railroad. However, in light of the forecast of evidence here, I do not agree that it is "*undisputed* that a train 1500 feet away from the crossing is visible from a safe point," or that sight distance is the only factor to be considered, as the majority implies. In addition, the majority's statements that "the unobstructed view at the crossing permits a motorist to safely observe whether a train is approaching without using extraordinary

protective means," and that "the variable speeds of other trains . . . is not a condition existing at the crossing at the time when a motorist must discern whether a train is approaching," are essentially findings of fact, which should properly be for the jury. The actual issue for the jury, moreover, involves not whether trains of variable speeds were passing at the time of the incident, but rather, whether the history of variable speeds created a peculiarly hazardous condition for the plaintiff's decedent at this crossing. It is well-established that the role of this Court on appeal is not to resolve such disputed issues of fact.

The majority cites several cases in support of its conclusion, but in at least two of those cases, the appeal turned on whether there was evidence of gross negligence, and in *Collins* the issue of liability for the crossing was submitted to the jury. *See Parchment v. Garner*, 135 N.C. App. 312, 520 S.E.2d 100 (1999); *Collins v. CSX Transportation*, 114 N.C. 14, 441 S.E.2d 150 (1994). Similarly, viewing the evidence in the light most favorable to the plaintiff, I believe that we should reverse and remand, so that the case may be tried to the jury.

Accordingly, I would reverse the grant of summary judgment and remand for trial.

STATE OF NORTH CAROLINA v. PERCELL WATKINS, JR., DEFENDANT

No. COA04-295

(Filed 5 April 2005)

1. Homicide— short form indictment—attempted murder

Defendant's short form indictment for attempted murder was fatally defective in that it failed to allege that defendant acted with the specific intent to kill. The application of N.C.G.S. § 15-144 (authorizing short form indictments for murder or manslaughter) to attempted murder goes beyond the plain language of the statute.

2. Search and Seizure— permission by live-in girlfriend—constitutional

A search of a shop outside a home was constitutional where defendant's live-in girlfriend (Riley) gave permission for the search. The court found that Riley had been defendant's girl-

friend for thirteen years and had lived in defendant's home the entire time; her status as a resident of the home had been known by the officers seeking permission for the search for three or four years before the search; the officers had no reason to suspect that she did not have control over the premises, including the shop; and Riley's consent was voluntary and without hesitation.

3. Evidence— statements by defendant's girlfriend—admitted through officer's testimony—not prejudicial

There was no plain error in the admission of statements by defendant's girlfriend through the testimony of investigating officers. While the statements may have been admissible as corroboration of earlier testimony, the absence of the statements would not have changed the verdict in light of the other admitted evidence.

4. Constitutional Law— silence by defendant—incidental—not prejudicial

There was no plain error by admitting testimony that defendant had declined to make a statement to an officer. The testimony about defendant's silence was incidental to the entire testimony of the officer and it is doubtful that the jury assigned heavy weight to defendant's silence in light of the evidence against defendant.

5. Evidence— victim's identification of defendant—personal knowledge

There was no plain error in the admission of testimony from the victim of an attempted murder and assault that it was defendant who had shot him where the victim did not see defendant and based his testimony on what he perceived as the shooting occurred, particularly what he heard. The victim was defendant's uncle, had heard defendant's voice frequently, and had sufficient personal knowledge to identify defendant. N.C.G.S. § 8C-1, Rule 602.

6. Homicide— attempted murder—defendant as shooter—sufficiency of evidence

The evidence in an assault and attempted murder prosecution was sufficient for the jury to determine that defendant was the one who shot the victim.

7. Homicide— attempted murder—evidence of premeditation and deliberation—sufficient

There was sufficient evidence of premeditation and deliberation in an attempted murder prosecution where defendant entered the victim's house without permission, a fight resulted when defendant broke the victim's television, defendant pulled a knife, he was seen later leaving his house with a gun in his truck, and he later yelled that he had "gotten one" after shooting the victim in the shoulder.

Appeal by defendant from judgment entered 29 August 2003 by Judge W. Osmond Smith, III in Caswell County Superior Court. Heard in the Court of Appeals 16 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

ELMORE, Judge.

Defendant appeals convictions of attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. Among the grounds for appeal, defendant argues that the trial court admitted improper evidence and erred by not granting defendant's motion to dismiss. Defendant also argues that his conviction for attempted murder must be vacated. For the reasons stated herein, we find no error at trial but vacate defendant's judgment for attempted murder.

Defendant was indicted on 9 April 2002 for attempted murder and 13 May 2003 for assault with a deadly weapon with intent to kill inflicting serious injury. Following several days of trial, on 29 August 2003 a jury found defendant guilty of both crimes.

I.

The events giving rise to these convictions occurred on 22 November 2001, which was Thanksgiving Day. Defendant was living in a house located on a large family farm in rural Caswell County. Other members of defendant's family lived in separate houses on the farm, including the victim, Walter Bigelow (Bigelow), who was defendant's uncle. On Thanksgiving morning, defendant, Bigelow, and

two other friends met at Bigelow's house and began drinking gin, beer, and liquor. After drinking for several hours, the men went to the home of a friend to see his new puppies. Defendant was bitten by the mother dog after he took off his shirt and attacked the dog.

Following defendant and Bigelow's return to Bigelow's house, defendant wanted to continue drinking and entered the house against Bigelow's wishes. While he was inside, defendant stumbled into Bigelow's television and broke the screen. During a scuffle that followed, defendant pulled out a knife. Bigelow kicked the knife out of defendant's hand and threatened to call the police. Defendant then walked out into Bigelow's yard and eventually left in his truck after backing into Bigelow's fence.

At about 2:30 p.m. on the same day, Bigelow and his brother, Huston Bigelow (Huston), were walking near their mother's house when Bigelow was struck in the shoulder by two gunshots. As he fell to the ground, he heard defendant yell, "I got one of the SOBs." Huston testified that after additional shots were fired, he heard defendant yell, "I got one now and I got one more to go."

Officer Clayton Myers of the Caswell County Sheriff's Department arrived shortly after the shooting and interviewed Donita Riley (Riley), defendant's girlfriend. Officer Myers testified that during their conversation, Riley said defendant had left his home earlier with a scoped rifle to go hunting. As part of his investigation, Officer Myers called in a bloodhound to search the area where the shots had likely been fired. The bloodhound led the officers to a piece of camouflage cloth hanging from a barbed wire fence. From there, the bloodhound followed a trail to defendant's house.

During the investigation, officers asked Riley, who lived in defendant's house, for permission to enter a shop building located near the house. Riley initially refused, but she gave officers a key to the shed after they told her they would get a warrant and tear down the door. At that time, Riley also signed a form stating that she consented to the search. Inside the building, officers found a vehicle that defendant was working on along with a .22 rifle and bullets on the floorboard. In addition, when officers asked Riley for defendant's camouflage pants, she provided a pair with a missing swatch of cloth. Officers determined that the swatch of cloth recovered from the barbed wire fence perfectly matched the hole in defendant's pants.

II.

[1] In his first assignment of error, defendant contends that the indictment for "attempted murder" is defective since it lacks allegations that defendant acted with the specific intent to kill, premeditation, or deliberation. Defendant's indictment stated:

> The jurors for the State upon their oath present that on or about [November 22, 2001] and in . . . [Caswell County] the defendant named above unlawfully, willfully and feloniously did of malice and aforethought attempt to kill and murder Walter Bigelow.

This indictment for attempted murder follows the language authorized by N.C. Gen. Stat. § 15-144 for short-form indictments for murder or manslaughter.

This Court has issued inconsistent opinions on whether the language authorized in section 15-144 states all the essential elements for *attempted* murder. Most recently in *State v. Jones*, 165 N.C. App. 540, 598 S.E.2d 694, *temp. stay allowed*, 358 N.C. 736, 601 S.E.2d 202, *disc. review granted*, 359 N.C. 73, 604 S.E.2d 924 (2004), a panel of this Court determined that an indictment following the short-form language in section 15-144 did not allege all the essential elements of the crime of attempted murder and must be vacated. Yet, in *State v. Andrews*, 154 N.C. App. 553, 559-60, 572 S.E.2d 798, 803, *cert. denied*, 358 N.C. 156, 592 S.E.2d 696 (2004), as well as *State v. Choppy*, 141 N.C. App. 32, 41, 539 S.E.2d 44, 50-51 (2000), *disc. review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001), this Court determined that attempted murder indictments following section 15-144 were constitutional.

None of these cases dealt with the statutory argument that defendant raises here. Defendant argues that the plain language of section 15-144 limits its application to cases of "murder or manslaughter," not attempted murder. Notably, defendant argues that the short-form language found in section 15-144.1, dealing with rape, and section 15-144.2, dealing with sex offense, include "attempt" within the statute whereas section 15-144 does not. While our appellate opinions are replete with occasions in which our Supreme Court has upheld the constitutionality of using section 15-144 to allege murder, there is no authority on point that specifically applies the language in N.C. Gen. Stat. § 15-144 to attempted murder.[1] Both *Andrews*

1. We note that our appellate holdings have properly allowed attempted murder to be presented to the jury as a lesser included offense of murder, see N.C. Gen. Stat. § 15-170; but here, attempted murder is the charged offense, not a lesser included offense.

and *Choppy* applied North Carolina Supreme Court opinions holding that section 15-144 is constitutional for *murder* indictments as their precedent for holding that N.C. Gen. Stat. § 15-144 states all the essential elements for the crime of *attempted* murder.

We agree with defendant that the application of N.C. Gen. Stat. § 15-144 to indictments for attempted murder goes beyond the plain language of the statute. Absent statutory authority for a short-form indictment, the State must allege all essential elements of the crime charged. *See State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) ("To be sufficient under our Constitution, an indictment 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)). "Nothing in G.S. 15-153 or in G.S. 15-155 [statutes dealing with certain informalities and defects that do not vitiate a warrant or indictment] dispenses with the requirement that the essential elements of the offense must be charged." *State v. King*, 285 N.C. 305, 308, 204 S.E.2d 667, 669 (1974) (internal quotations omitted).

"The elements of an attempt to commit a crime are: '(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense.' " *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (internal quotations omitted). As a necessary element of attempted murder, the specific intent to kill must be alleged in the indictment. *See id.*, 351 N.C. at 451, 527 S.E.2d at 48 ("[T]he crime of attempted murder is logically possible only where specific intent to kill is a necessary element of the underlying offense."); *State v. Jerrett*, 309 N.C. 239, 259, 307 S.E.2d 339, 350 (1983) (Absent adoption of a short-form indictment by the General Assembly, each essential element must be alleged).

Accordingly, we hold that an indictment for attempted murder must allege the necessary element of specific intent to kill. *See Jones v. United States*, 526 U.S. 227, 232, 143 L. Ed. 2d 311, 319 (1999) (holding that elements of the offense must be charged in the indictment). An indictment for *attempted* murder is not constitutional when it only complies with the language of N.C. Gen. Stat. § 15-144, a section that remains untarnished when applied as plainly intended: to indictments for murder and manslaughter. *See State v. Holder*, 138 N.C. App. 89, 93, 530 S.E.2d 562, 565 (holding that *Jones* did not invalidate North Carolina's short-form indictment for murder), *disc. review denied*, 352 N.C. 359, 544 S.E.2d 551 (2000). Defendant's indictment for

attempted murder failed to allege that defendant acted with the specific intent to kill, and this omission was fatally defective.

III.

[2] Defendant next argues that the search of the shop outside of his house was unconstitutional and the evidence obtained therein should have been suppressed. Specifically, defendant argues that Riley did not have the apparent authority to authorize the search and did not provide valid consent for the search. When reviewing a trial court's ruling on a motion to suppress, the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (internal quotations omitted), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001); *see also State v. Barnett*, 307 N.C. 608, 613, 300 S.E.2d 340, 343 (1983).

Resolving any conflict within the evidence, the trial court found that Riley was defendant's girlfriend for thirteen years and had resided in defendant's home for the entire time. Further, the trial court found that Riley's status as a resident of the home was known to those officers seeking permission for approximately three to four years and that officers had no reason to suspect she did not have control over the premises, including the shop that was determined to be located within the curtilage of the home. Notably, the trial court found that Riley's consent was voluntary and without hesitation. Despite some evidence to the contrary, we see no reason to determine that these findings were not supported by the evidence.

"Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task 'is to determine whether the trial court's conclusion[s] of law [are] supported by the findings.' " *Brewington*, 352 N.C. at 498-99, 532 S.E.2d at 502 (quoting *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000)). This Court has previously determined that officers may rely on the consent of third-parties who have apparent control over the area requested to be searched. *See State v. Jones*, 161 N.C. App. 615, 620, 589 S.E.2d 374, 377 (2003) ("One who shares a house or room or auto with another understands that the partner, may invite strangers[, and that his] privacy is not absolute, but contingent in large measure on the decisions of another. Decisions of *either* person define the extent of the privacy involved . . .") (internal quotations omitted); *see also State v. Garner*, 340 N.C. 573, 592, 459 S.E.2d 718, 728 (1995) ("A third party may give permission to search where the third party possesses

common authority over or other sufficient relationship to the premises or effects sought to be inspected.") (internal quotations omitted). Based on its findings, the trial court did not err in determining that the search and subsequent seizure of property did not offend the Constitution.

IV.

[3] Defendant's next three assignments of error all deal with the alleged erroneous admission of evidence. Since defendant did not object to any of these admissions, we review them for plain error. Under this standard of review, "defendant has the burden of showing: '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.' " *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135 (2004) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)).

Defendant first contends that the trial court erred by admitting statements of Riley through the testimony of Officer Myers and Officer Eugene Riddick, another officer with the Caswell County Sheriff's Office investigating the shooting. The officers testified that Riley told them on 22 November 2001 defendant came home to get a long gun with a scope, telling her that he was going hunting. Reporting from their notes, they further testified she told them defendant was drunk, irate, bleeding from the face, and fell out the door. The officers also noted that Riley had told them defendant and Bigelow did not get along and defendant was becoming more uncontrollable.

The State argues that Riley's statements corroborated her earlier testimony where she described for the jury a substantially similar course of events. While we may be inclined to find that Riley's statements corroborated her earlier testimony, and thus were admissible, we are convinced that the absence of these statements would not have changed the jury's verdict. *See State v. Howard*, 320 N.C. 718, 724, 360 S.E.2d 790, 793-94 (1987) (discussing corroborative testimony). The jury heard evidence of an earlier fight between defendant and Bigelow; positive voice identification of defendant as the shooter by two people who had known him his whole life; the fact that police had tracked defendant from the scene of the shooting and were able to connect the pants he was wearing to cloth found at the scene; and that defendant had a long rifle in his truck. Thus, this assignment of error is overruled.

[4] Next, defendant contends that the trial court erred in admitting testimony that at various times he declined to make a statement to investigators. We disagree.

At trial, Officer Myers testified about his interaction with defendant during defendant's arrest. He said that defendant had been drinking, was found hiding in a shower, and charged at an officer once he was discovered. The State then asked Officer Myers questions regarding defendant's demeanor following his arrest. It was in answering these questions that Officer Myers described instances in which defendant refused to make a statement.

A defendant has the right to remain silent, and the State cannot use his exercise of that right as evidence that he is guilty. *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983) ("We have consistently held that the State may not introduce evidence that a defendant exercised his fifth amendment right to remain silent."). Nonetheless, when reviewed for plain error, a witness's incidental testimony that a defendant exercised his right to silence may be a *de minimis* violation and not prejudicial. *See, e.g., Bishop*, 346 N.C. at 385, 488 S.E.2d at 779. Under these circumstances, Officer Myers's testimony regarding defendant's exercise of his right to silence was incidental to Myers's testimony in its entirety.

Moreover, it is doubtful that the jury assigned heavy weight to defendant's exercise of his right to silence in light of the evidence against him. Accordingly, we find that no error occurred here.

[5] Concluding our plain error review, defendant states that the trial court erred by admitting Bigelow's testimony that it was defendant who shot him. We disagree.

Rule 602 of the North Carolina Rules of Evidence does provide that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2003). Yet, the Rule's official commentary states that "personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." N.C. Gen. Stat. § 8C-1, Rule 602 (Commentary) (2003); *see also State v. Poag*, 159 N.C. App. 312, 323, 583 S.E.2d 661, 669 (2003). Although Bigelow did not see defendant shoot him, his testimony was based on what he perceived as the shooting occurred. In particular, Bigelow testified that he heard defendant shout, "I got one of the SOBs" while he was falling. Bigelow, as defendant's uncle,

was certain it was defendant's voice because he heard defendant's voice "all the time." As confirmation of Bigelow's testimony, Huston, Bigelow's brother, testified that he also heard defendant's voice shortly after the shooting and that he had known defendant "since the day he was born." As a result, we conclude that Walter Bigelow had sufficient personal knowledge to identify defendant and that his opinion was rationally based on his perception of the shooting. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2003) (opinion testimony is "limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.").

V.

[6] In defendant's final two assignments of error, he asserts that the State presented insufficient evidence to 1) identify him as the shooter, and 2) establish premeditation and deliberation.

When a defendant moves for dismissal, "the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Substantial evidence is that evidence which " 'a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In determining whether the State's evidence is substantial, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom. *Id.* at 237, 400 S.E.2d at 61 (citing *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

In the light most favorable to the State, we conclude that there was ample evidence for the jury to determine that defendant was the one that shot Walter Bigelow. In particular, the evidence showed that defendant and Bigelow fought with each other before the shooting and that defendant pulled a knife on Bigelow. The State also showed that after the fight, defendant sat in his truck and pointed a gun toward Bigelow's house. Both Bigelow and Huston identified defendant's voice as the voice they heard when the shooting occurred. In addition, Riley testified that she saw defendant leave shortly after 2:00 p.m. in his truck. Finally, when officers searched defendant's shop building, they found a .22 rifle and bullets. Based on this evidence, we conclude that the trial court did not err in denying defendant's motion to dismiss.

[7] Defendant also argues that the evidence was insufficient to establish premeditation or deliberation. Our Supreme Court has stated that premeditation "means that the act is thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Jones*, 342 N.C. 628, 630, 467 S.E.2d 233, 234 (1996) (internal quotations omitted). The Court has also defined deliberation as "an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose . . ." *State v. Wise*, 225 N.C. 746, 749, 36 S.E.2d 230, 232 (1945) (internal quotations omitted).

To determine whether evidence shows premeditation and deliberation, a court should consider the following factors: "(1) lack of provocation by the deceased; (2) conduct and statements of the defendant before and after the killing; and (3) 'ill-will or previous difficulty between the parties.' " *State v. Hood*, 332 N.C. 611, 622, 422 S.E.2d 679, 685 (1992) (quoting *State v. Williams*, 308 N.C. 47, 69, 301 S.E.2d 335, 349 (1983)).

Taken in the light most favorable to the State, evidence at trial tended to show that defendant entered Bigelow's house without his permission, a fight resulted when defendant broke Bigelow's television, and defendant pulled a knife on Bigelow. Riley testified that ill-will had developed between defendant and Bigelow. Defendant left his house with a gun in his truck and after shooting Bigelow in the shoulder yelled out, "I got one now and I got one more to go." There is more than ample evidence such that a jury could determine deliberation and premeditation beyond a reasonable doubt. Thus, defendant's final assignment of error is overruled.

VI.

For the foregoing reasons, we conclude that defendant's conviction based on the indictment for attempted murder must be vacated. However, there was no error regarding defendant's trial on the remaining charge of assault with a deadly weapon with intent to kill inflicting serious bodily injury.

Vacated in part, no error in part.

Judges WYNN and HUDSON concur.

MICHAEL SWIFT, EMPLOYEE, PLAINTIFF v. RICHARDSON SPORTS, LTD. D/B/A CAROLINA PANTHERS, EMPLOYER AND LEGION INSURANCE COMPANY (CAMERON M. HARRIS & COMPANY, ADJUSTING SERVICE), CARRIERS, DEFENDANTS

No. COA04-302

(Filed 5 April 2005)

1. **Workers' Compensation— compensable injury—professional football player**

The Industrial Commission did not err by finding that a professional football player sustained a compensable injury by accident arising out of and in the course of his employment where his leg was broken and ankle tendons torn when other players fell on the back of his leg during a game. There was evidence to support the Commission's findings that the injury was unusual.

2. **Workers' Compensation— disability—professional football player—reason for being released from team—personal knowledge**

The trial court did not err by allowing plaintiff, a football player, to testify about the reason for his termination from a team. Plaintiff offered personal knowledge about why he was released and his testimony was not hearsay.

3. **Workers' Compensation— disability—injured professional football player—return with another team—eventual release**

The Industrial Commission did not err in a workers' compensation case by awarding compensation to a professional football player who was injured while playing with defendant, then returned to play with another team. While plaintiff did try out for and make the other team, he was released from that team because of injuries suffered with defendant.

4. **Workers' Compensation— disability—professional football player—dollar-for-dollar credits**

The Industrial Commission did not abuse its discretion in a workers' compensation disability case by awarding a time credit rather than a dollar-for-dollar credit for payments made by defendants to plaintiff, a professional football player, after he was injured. Dollar-for-dollar credits are precluded by North Carolina law.

5. Workers' Compensation— attorney fees—findings

An award of attorney fees in a workers' compensation case was remanded for additional findings of fact and conclusions of law on attorney fees and a statement of the specific statute relied upon in making the award.

Appeal by defendants from opinion and award entered 10 October 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 2004.

R. James Lore for plaintiff appellee.

Hedrick, Eatman, Gardner, & Kincheloe, L.L.P., by Hatcher Kincheloe and Shannon P. Herndon, for defendant appellants.

McCULLOUGH, Judge.

Defendants appeal from the opinion and award of the North Carolina Industrial Commission. Plaintiff Michael Swift was born on 28 February 1974. He graduated from high school and attended college at Austin Peay State, but did not graduate. Although he was not drafted as a professional football player, plaintiff made the San Diego Chargers as a free agent. Plaintiff worked primarily on special teams, but also played cornerback on defense. After playing two seasons with the Chargers, plaintiff signed with the Carolina Panthers and played the same positions. Plaintiff was a member of the Panthers' team from 1998-1999 and 1999-2000.

On or about 27 July 1999, plaintiff agreed to play for the Panthers in exchange for $325,000.00 which was paid in seventeen equal installments. Although the regular season consists of sixteen games, the season lasts seventeen weeks because every team receives a "bye," or one week in which there is no game.

During the fifteenth game of the regular season, plaintiff lined up on the end of the line. Plaintiff intended to go around the opposing team's players and block an extra point attempt. However, the opposing team bobbled the ball, and the play broke down. When he attempted to get the ball, an opponent knocked plaintiff on the ground, and one or two players fell on the back of plaintiff's leg. This resulted in a broken right fibula and severe tearing in the tendons of his ankle. At the time of the injury, plaintiff was taking all reasonable measures to protect himself from injury given the nature of the game.

On 27 December 1999, the Panthers' team doctor performed surgery and inserted hardware to repair plaintiff's leg and ankle. Plaintiff returned to Tennessee where he underwent physical therapy. The Panthers decided not to renew plaintiff's contract for the 1999-2000 season because plaintiff was still on crutches and was undergoing physical therapy for his ankle.

On or about 9 March 2000, the Panthers' team physician removed some of the hardware from plaintiff's leg. Afterwards, plaintiff returned to Memphis to continue his physical therapy.

Although his ankle had not fully recovered, plaintiff tried out for another team, the Jacksonville Jaguars. In spite of having continued symptoms, plaintiff made the team. However, the Jaguars released plaintiff after the first game because plaintiff's ankle injury impaired his speed and mobility.

Although several other teams asked plaintiff to participate in tryouts, plaintiff was unable to make a team because of the injury he sustained while working for the Panthers. Despite plaintiff's lengthy period of rehabilitation, the injury was career-ending.

Because he could no longer pursue a career in professional football, plaintiff worked a number of other jobs. From late November of 2000 until January of 2001, plaintiff worked as an analyst for Protein Technologies making twelve dollars per hour. From April of 2001 through October of 2002, plaintiff worked for Uniform People as a sales representative. There, he earned an annual salary of $35,000.00. Finally, plaintiff became self-employed in October of 2002. At that time, his anticipated income from selling used computer equipment was $40,000.00 per year. All of these jobs reflected plaintiff's attempt at reaching his wage earning capacity outside of the NFL.

In the NFL, a player's salary is based on his contract. In this case, the contract called for $325,000.00 to be paid in seventeen equal payments immediately after each of the sixteen games plus the bye-week during the seventeen-week season. Subsequent to 26 December 1999, the date of the injury, plaintiff had played in the fifteenth game of the season and had earned that check by the time he was injured.

The next week, plaintiff received his sixteenth and final check after the Panthers played the last game of the 1999-2000 season. Plaintiff received this $19,118.00 check under the injury protection provisions of paragraph 9 of the standard NFL Player Contract. Payments made under this disability provision are funded exclusively

from the player's side, as opposed to the employer's side of the divided league revenue under the Collective Bargaining Agreement.

On or about 31 December 2001, plaintiff received a $30,000.00 check for severance pay from the Panthers. This amount was based on the Collective Bargaining Agreement and the number of years that plaintiff played in the NFL. Although plaintiff received this check after the injury, he had earned the entire amount before the injury because in the NFL, a player accrues a year of service once he plays in the third game of the season. During the 1999-2000 season, the third game had occurred prior to plaintiff's injury on 26 December 1999.

While playing for the Jacksonville Jaguars in September 2000, plaintiff received $22,647.00, which was 1/17 of his yearly contract. The payment was for playing in one regular season game; defendant received nothing thereafter. This amount reflects the one week that plaintiff had an earning capacity equal to or greater than he had while playing with the Panthers. The Jaguars made a number of other payments for things like travel expenses and training camp. These payments would still yield an entitlement that exceeds the maximum compensation rate of $560.00 that was in effect in 1999.

Plaintiff's average weekly wage is $6,476.90. This wage is calculated by dividing the yearly contract plus all other payments the Panthers paid for the season in which the injury occurred.

Based on those facts, the Full Commission made the following conclusions of law. First, plaintiff sustained a compensable injury by accident as a result of a compensable event arising out of and in the course of his employment with defendants on 26 December 1999. Second, plaintiff is entitled to partial disability compensation at the maximum rate of $560.00 per week (the rate that was in effect in 2000) and past and future medical treatment. Finally, defendants were permitted to deduct one weekly compensation payment at the maximum applicable rate of $560.00 from the 300 weeks of compensation otherwise due.

Based upon its findings of fact and conclusions of law, the Full Commission awarded plaintiff compensation at the rate of $560.00 per week for a period of 299 weeks with the accrued relating back to 27 December 1999. This amount was to be paid in one lump sum with the balance to be paid over the remainder of the 299-week period so long as plaintiff's yearly earnings were sufficient

to yield the maximum compensation rate of $560.00 per week. Additionally, defendants had to pay a reasonable attorney fee of 25%, past and future medical expenses, and the costs of the appeal. Defendants appeal.

On appeal, defendants argue that the Full Commission erred by (1) finding that plaintiff sustained a compensable injury by accident arising out of and in the course of his employment on 26 December 1999, (2) allowing plaintiff to testify about the reason for his termination from the Jacksonville Jaguars, (3) awarding plaintiff 299 weeks of benefits, (4) incorrectly calculating the credit to which defendants were entitled, and (5) awarding attorney fees to plaintiff. We disagree and affirm the opinion and award of the Full Commission.

I. Compensable Injury

[1] Defendants contend that the Full Commission erred in finding that plaintiff sustained a compensable injury by accident arising out of and in the course of his employment on 26 December 1999.

The Workers' Compensation Act extends coverage only to an "injury by accident arising out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-2(6) (2003). Injury and accident are separate concepts, and there must be an accident which produces the injury before an employee can be awarded compensation. *Jackson v. Fayetteville Area Sys. of Transp.*, 88 N.C. App. 123, 126-27, 362 S.E.2d 569, 571 (1987). Our Supreme Court has explained:

> An accident, as the word is used in the Workmen's Compensation Act, has been defined as "an unlooked for and untoward event which is not expected or designed by the injured employee." "A result produced by a fortuitous cause." "An unexpected or unforeseen event." "An unexpected, unusual or undesigned occurrence."

Edwards v. Publishing Co., 227 N.C. 184, 186, 41 S.E.2d 592, 593 (1947) (citations omitted). "[U]nusualness and unexpectedness are its essence." *Smith v. Creamery Co.*, 217 N.C. 468, 472, 8 S.E.2d 231, 233 (1940). "To justify an award of compensation, the injury must involve more than the carrying on of usual and customary duties in the usual way." *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 116, 292 S.E.2d 763, 766 (1982). "The issue of whether a particular accident arises out of and in the course of employment is a mixed question of fact and law, and this Court's review is limited on appeal to the question of whether the findings and conclusions are supported by com-

petent evidence." *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198, *disc. review denied*, 306 N.C. 565 (1982).

In its findings of fact, the Full Commission described how plaintiff sustained his injury:

> 8. In the 15th game of the 16-game regular season, while playing on special teams in a game against the Pittsburgh Steelers in Pittsburgh, Pennsylvania, plaintiff was lined up on the end of the line to attempt to get around the opposing team's players and block an extra point attempt. On that particular play, the opposing team bobbled the ball and the play broke down. In an attempt to get to the ball, Swift was knocked to the ground and at least one other player, and possibly two, fell on the back of his leg not only breaking his right fibula but also severely tearing the tendons in his ankle.

There is competent evidence in the record which supports this finding. Plaintiff testified that he sustained an injury while playing in the fifteenth game of the season against the Pittsburgh Steelers. Additionally, plaintiff's description of the incident is consistent with the Full Commission's finding. Plaintiff indicated that when he attempted to block an extra point, the opposing team bobbled the ball. When the play broke down, one or more players fell on the back of plaintiff's leg resulting in a broken right fibula and torn tendons in the ankle.

In determining that plaintiff sustained a compensable injury by accident, the Full Commission made the following important finding of fact:

> 9. It was unexpected and unusual for a player to fall on Swift in this way so as to break his fibula and cause such a tear in his ankle tendon. At the time of injury, Swift was taking all reasonable measures to protect himself from injury given the nature of the game. At the same time, Swift was required to do what he was doing when injured and had no choice but to do it as best he could notwithstanding the risk of injury.

Once again, there was competent evidence in the record to support this finding. First, the injury was unusual in that Swift attempted to block numerous extra point attempts without sustaining a broken leg and torn tendons in his ankle. Second, it was unexpected that one or more players would fall on the back of plaintiff's leg causing a career-ending injury. Finally, Dr. J. Leonard Goldner testified that

such an injury requires a force of 3000 pounds per square inch to occur. Because there is competent evidence to support the Full Commissions' findings of fact and these findings support its conclusion of law that plaintiff sustained a compensable injury by accident, we overrule this assignment of error.

II. Hearsay Testimony

[2] Defendants argue that the Full Commission erred by allowing plaintiff to testify about the reason for his termination from the Jacksonville Jaguars. Defendants claim that the reason for the termination was outside of plaintiff's firsthand knowledge and was therefore hearsay. This argument is unpersuasive.

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(c) (2003) (emphasis added), hearsay "is 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." Here, plaintiff's attorney asked plaintiff why he was released from the Panthers. In response, plaintiff offered personal knowledge as to why he was released. He stated that he could not "perform as needed on the field." This statement does not meet the definition of hearsay because it occurred while plaintiff was testifying at the hearing. For these reasons, we overrule this assignment of error.

III. Amount Paid

[3] Defendants argue that the Full Commission erred by awarding plaintiff 299 weeks of benefits. Before addressing this contention, we recognize our limited standard of review in workers' compensation cases. In short, we must determine "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Full Commission is the "sole judge of the weight and credibility of the evidence[.]" *Id.* at 116, 530 S.E.2d at 553. An appellate court reviewing a workers' compensation claim "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* at 434, 144 S.E.2d at 274. If there is any evidence at all, taken in the light most favorable to plaintiff to support it, the finding of fact stands, even if there is evidence going the other way. *Adams v. AVX*

Corp., 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). With these principles in mind, we turn to consider defendants' arguments regarding the amount paid.

Defendants claim that plaintiff should not have received 299 weeks of benefits because he returned to football with the Jacksonville Jaguars. The Full Commission did make a finding of fact addressing this issue. In finding of fact 13, the Full Commission stated:

> 13. Although his leg and ankle had not fully recovered, Swift, who had planned on making a career out of working in the NFL as a professional football player, tried out for another professional football team, the Jacksonville Jaguars. Although he had continued symptoms with his ankle, he made the team. After his first game with the Jaguars, on September 5, 2000 plaintiff was released from the team because of limitations of speed and ability to maneuver as a result of the impairment from the ankle injury sustained while working with the Carolina Panthers. Swift's compensable work-related limitations made him more likely to be dismissed from the team relative to his teammates for reasons of relative performance.

The record indicates that plaintiff did try out and make the Jacksonville Jaguars' football team. The record also reveals that plaintiff was released from the Jaguars on or around 5 September 2000. Plaintiff's own testimony, which we have already determined to be based on his own personal knowledge, tended to show that plaintiff was released because of limitations from the injury with the Panthers. Therefore, competent evidence in the record supports this finding of fact. We overrule this assignment of error.

IV. Award of a Credit

[4] Defendants disagree with the Full Commission's award of a credit for payments defendants made to plaintiff. Under N.C. Gen. Stat. § 97-42 (2003)

> [p]ayments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by

> reducing the amount of the weekly payment. Unless otherwise provided by the plan, when payments are made to an injured employee pursuant to an employer-funded salary continuation, disability or other income replacement plan, the deduction shall be calculated from payments made by the employer in each week during which compensation was due and payable, without any carry-forward or carry-back of credit for amounts paid in excess of the compensation rate in any given week.

N.C. Gen. Stat. § 97-42 is the only statutory authority which allows an employer in North Carolina to receive a credit from workers' compensation benefits that are due to an injured employee. *Effingham v. Kroger Co.*, 149 N.C. App. 105, 119, 561 S.E.2d 287, 296 (2002). "The decision of whether to grant a credit is within the sound discretion of the Commission." *Shockley v. Cairn Studios, Ltd.*, 149 N.C. App. 961, 966, 563 S.E.2d 207, 211 (2002), *appeal dismissed, disc. review denied*, 356 N.C. 678, 577 S.E.2d 887, 888 (2003). Thus, the Commission's decision to grant or deny a credit to the employer will not be reversed unless there is an abuse of discretion. *Id.*

Defendants argue that they are entitled to a dollar-for-dollar credit for amounts they paid after plaintiff's injury. First, they contend that this Court allowed a dollar-for-dollar credit in *Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 540 S.E.2d 768 (2000), *aff'd per curiam*, 353 N.C. 520, 546 S.E.2d 87 (2001). Second, they claim that they are entitled to such a credit based on Paragraph 10 of the NFL Player Contract.

Our Court considered this exact issue in *Smith v. Richardson Sports, Ltd.*, 168 N.C. App. 410, 416, 608 S.E.2d 342 (2005) and rejected both of these arguments. There, the Court explained that *Larramore* did not entitle an employer to a dollar-for-dollar credit for amounts an employer paid to an employee after his injury. *Id.* Instead, the Court determined that N.C. Gen. Stat. § 97-42 governed this issue and under that statute, any credit the employer receives is limited to the shortening of the period in which compensation is paid, not by reducing the amount of the weekly payment. *Id.* Finally, the Court rejected the notion that Paragraph 10 of the NFL Player Contract would allow a dollar-for-dollar credit because N.C. Gen. Stat. § 97-6 (2003) states that no contract or agreement can relieve an employer, in whole or in part, from his obligation to pay workers' compensation. *Id.* at 417-18, 608 S.E.2d at 348. Since North Carolina law precludes the allowance of a dollar-for-dollar credit, we cannot allow such a recovery in the present case.

However, we believe that the Full Commission was correct in the credit it did allow defendants to receive. In conclusion of law 4, the Full Commission stated:

> 4. Defendants are entitled to deduct one weekly compensation payment at the maximum applicable rate of $560.00 weekly from the 300 weeks of compensation otherwise due and owing pursuant to N.C. Gen. Stat. § 97-30.

In short, defendants did receive a week's deduction for time, not dollars. The Full Commission required defendants to pay plaintiff for 299 weeks, rather than 300 weeks, because plaintiff returned to football for one week and exhibited earning capacity comparable to his average weekly wage. This award complies with the statutory mandate of N.C. Gen. Stat. § 97-42. Furthermore, defendants have failed to show that they are entitled to an additional one-week credit. Although plaintiff sustained his injury in the 15th game and received payment for the 16th game in which he did not play, the Commission noted that this money came exclusively from the player's side of the divided league revenue. Competent evidence in the record supports this finding since Richard Berthelson, counsel for the NFL Player's Association, testified that the funding in question came from the players' side of the revenue. Although we are troubled by the fact that the Commission awarded a 14-week credit in the *Smith* case and denied a one-week credit here, we recognize that such credits are a matter of discretion under N.C. Gen. Stat. § 97-42. While there seems to be little significant difference between the cases, we cannot conclude that the Full Commission necessarily abused its discretion in making this determination. We overrule this assignment of error.

V. Attorney Fees

[5] Defendants object to the award of attorney fees. In their briefs, both parties contend that the Full Commission made the award pursuant to N.C. Gen. Stat. § 97-88.1 (2003). Under the statute, before making an award, the Commission must determine that a hearing "has been brought, prosecuted, or defended without reasonable ground." However, the actual opinion and award sheds no light whatsoever upon this question. It contains no findings of fact or conclusions of law pertaining to attorney fees. The only mention of attorney fees is in paragraph 2 of the award section of the order which states:

> A reasonable attorney fee in the amount of twenty-five percent (25%) of the compensation due plaintiff is approved and awarded

to plaintiff's counsel as attorney's fees. This amount shall be paid as a part of the cost of this action and not deducted from Plaintiff's compensation. All sums that have accrued shall be paid in a lump sum.

We respectfully remand this issue to the Full Commission for the entry of additional findings of fact and conclusions of law on the issue of attorney fees. The Full Commission should also specifically state the statute it relied upon in making the award and should make the necessary findings of fact and conclusions of law supporting the award.

After careful consideration, the opinion and award is

Affirmed in part, remanded in part.

Chief Judge MARTIN and Judge STEELMAN concur.

DONALD EUGENE MISENHEIMER, PLAINTIFF v. JAMES CLAYTON BURRIS AND RANDALL BURRIS, DEFENDANTS

No. COA04-445

(Filed 5 April 2005)

Criminal Conversation— statute of limitations—three years—discovery rule—not applicable

Plaintiff's criminal conversation claim was barred by the statute of limitations, and the trial court erred by denying defendant's motion for a directed verdict, where the alleged affair began in 1991 and ended in 1994 or 1995, plaintiff began to suspect the affair in 1996, and he did not file the complaint until 2000. The discovery exception to statutes of limitation for certain latent causes of action does not apply here since criminal conversation is specifically identified in the three-year statute of limitations. N.C.G.S. § 1-52(5).

Judge TYSON dissenting.

Appeal by defendant James Clayton Burris from judgment entered 14 May 2003 by Judge Michael E. Beale in Stanly County Superior Court. Heard in the Court of Appeals 2 December 2004.

Walker & Bullard, by Daniel S. Bullard, for plaintiff-appellee.

Tucker & Singletary, P.A., by William C. Tucker, for defendant-appellant.

TIMMONS-GOODSON, Judge.

James Clayton Burris ("defendant")[1] appeals a jury verdict whereby he was found to have engaged in criminal conversation with the spouse of Donald Eugene Misenheimer ("plaintiff"), and resulting judgment against defendant for $350,001 in damages. For the following reasons, we reverse.

The factual and procedural history of this case is as follows: Plaintiff and Rebecca Ann Misenheimer ("Ms. Misenheimer") were married in 1971. Plaintiff and defendant met in the 1970s and became friends and business colleagues. Their families socialized together on occasion. In February 1996, Ms. Misenheimer told plaintiff that she wanted a divorce. On 15 March 1997, Ms. Misenheimer moved out of the family home and separated from plaintiff. Their divorce was made final in 2000. On 12 April 2000, plaintiff filed the underlying complaint against defendant alleging alienation of affections and criminal conversation with Ms. Misenheimer. The case proceeded to trial on 17 February 2003. At the close of plaintiff's evidence defendant moved for directed verdict, arguing that plaintiff failed to demonstrate that he filed the complaint within three years of the date of the alleged affair between defendant and Ms. Misenheimer, as required by the statute of limitations. Plaintiff counterargued that the "discovery rule" provided in N.C. Gen. Stat. § 1-52(16) applies in this case, and that the statute of limitations should not be measured by the date of the extra-marital relationship, but by the date that plaintiff became aware of the extra-marital relationship. The trial court issued the following ruling:

> the court is going to deny the motion to dismiss at the close of the plaintiff's evidence on the claim against Randall Burris for criminal conversation, and the claim against Clayton Burris on criminal conversation. The court, finding that there is no specific case that has said that 1-52.16 does not apply in this situation, and in

1. Co-defendant Randall Burris is not a party to this appeal.

light of other cases interpreting the statute, the court denies the motion to dismiss those charges, finding that there's evidence from which the jury could believe that the injury to the plaintiff became apparent or had reasonably become apparent within three years prior to the time he instituted the action.

The trial court granted directed verdict on the issue of alienation of affections.

Defendant presented his evidence, at the close of which he renewed his motion for directed verdict on the issue of criminal conversation. The trial court denied defendant's motion and submitted the case to the jury to deliberate on the following pertinent issues: (1) "Did the Defendant, Clayton Burris, commit criminal conversation with the Plaintiff's spouse?" (2) "If so, did the Plaintiff commence this action against the Defendant, Clayton Burris, before the expiration of the three year statute of limitations?" (3) "If so, what amount, if any, is the Plaintiff entitled to recover from the Defendant, Clayton Burris, for criminal conversation?" (4) "If so, is the Defendant, Clayton Burris, liable to Plaintiff for punitive damages?" (5) "If so, what amount of punitive damages, if any, does the jury in its discretion award to the Plaintiff?"

The jury found that defendant engaged in criminal conversation with Ms. Misenheimer, and that plaintiff's action was commenced within the statute of limitations. The jury awarded plaintiff $100,001 in actual damages and $250,000 in punitive damages. It is from this verdict that defendant appeals.

The dispositive issue on appeal is whether the trial court erred by ruling that the discovery rule applies in actions for criminal conversation.

Criminal conversation is a common law tort claim for adultery. *Johnson v. Pearce*, 148 N.C. App. 199, 200, 557 S.E.2d 189, 190 (2001). The elements of criminal conversation are (1) " 'the actual marriage between the spouses;' " and (2) " 'sexual intercourse between defendant and the plaintiff's spouse during the coverture.' " *Id.*, at 200-01, 557 S.E.2d at 190 (quoting *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996)). A plaintiff must file an action within three years for "criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." N.C. Gen. Stat. § 1-52(5) (2003). The discovery rule is an

exception to statutes of limitation that apply to certain latent causes of action. The discovery rule provides that

> *[u]nless otherwise provided by statute*, for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs.

N.C. Gen. Stat. § 1-52(16) (2003) (emphasis added). This Court has held that § 1-52(16) does not apply to causes of action where the limitation period is provided by statute. *See Marshburn v. Associated Indemnity Corp.*, 84 N.C. App. 365, 371-72, 353 S.E.2d 123, 127-28 (1987) (The discovery rule does not apply to claims for losses covered by an insurance policy because the limitation period is "otherwise provided by statute" in N.C. Gen. Stat. § 1-52(12)). Since the cause of action for criminal conversation is specifically identified in the three-year statute of limitations contained in § 1-52(5), the discovery exception does not apply to criminal conversation cases.

In resolving this issue, we are further guided by this Court's ruling in *Coachman v. Gould*, 122 N.C. App. 443, 470 S.E.2d 560 (1996). In *Coachman*, the defendant and the plaintiff's wife had a sexual relationship that ended in 1988, the year that plaintiff and his wife married. 122 N.C. App. at 444-46, 470 S.E.2d at 561-63. The sexual relationship between defendant and the plaintiff's wife "possibly overlapped a period in which plaintiff and [his wife] were married." 122 N.C. App. at 445, 470 S.E.2d at 562. After 1988, the plaintiff's wife maintained a relationship with the defendant by engaging in several telephone conversations with him. 122 N.C. App. at 446, 470 S.E.2d at 563. The plaintiff filed a complaint for criminal conversation in 1993. 122 N.C. App. at 446, 470 S.E.2d at 563. Citing § 1-52(5), this Court held that with regard to the sexual relationship between the defendant and the plaintiff's wife in 1988, the plaintiff's cause of action was barred by the three-year statute of limitations. 122 N.C. App. at 446, 470 S.E.2d at 562 ("Since this particular relationship allegedly occurred in 1988 at the latest, and plaintiff's complaint was not filed until 1993, the statute of limitations bars this act from constituting a cause of action relevant to the instant case."). We further held that with regard to the telephone conversations that took place after 1988, the plaintiff failed to prove all of the elements of criminal conversation, i.e., he not did demonstrate that his wife engaged in sexual inter-

course with the defendant during that time. 122 N.C. App. at 446, 470 S.E.2d at 563. For these reasons, we affirmed the trial court's summary judgment in favor of the defendant.

In the present case, the evidence presented tends to show that defendant's alleged affair with Ms. Misenheimer began in 1991 and ended in 1994 or 1995. The evidence also tends to show that plaintiff began to suspect the affair in 1996, well within the statute of limitations. However, plaintiff did not file the complaint in this action until 12 April 2000, five years after the relationship between defendant and Ms. Misenheimer ended and two years after the statute of limitations expired in 1998.

Guided by the aforementioned statutory and case law, we conclude that in the present case, the statute of limitations bars plaintiff's cause of action for criminal conversation. Thus, the trial court erred by denying defendant's motion for directed verdict. We reverse the trial court's order and remand this case to the trial court for proceedings not inconsistent with this opinion.

REVERSED.

Judge GEER concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

The jury specifically found that plaintiff filed his complaint against defendant "within three years after the time the bodily harm became apparent or reasonably to have become apparent to . . . plaintiff, whichever occurred first" after receiving an instruction from the trial court on the discovery rule. The majority's opinion correctly states the sole issue before this Court is whether the statute of limitations may be tolled until "discovery" by the aggrieved party for claims of criminal conversation. The discovery rule applies to this cause of action. I respectfully dissent.

I. The Majority's Holding

The majority's opinion contends the discovery rule is inapplicable to claims of criminal conversation due to: (1) the statutory design of N.C. Gen. Stat. § 1-52; and (2) this Court's holding in *Coachman v. Gould*, 122 N.C. App. 443, 470 S.E.2d 560 (1996).

The majority's opinion concludes the discovery rule should not be applied to an action for criminal conversation due to it being specifically identified in N.C. Gen. Stat. § 1-52(5) as a claim to which a three year statute of limitations applies. Our appellate courts have extended the discovery rule to other subsections of N.C. Gen. Stat. § 1-52. *Robertson v. City of High Point*, 129 N.C. App. 88, 91, 497 S.E.2d 300, 302 (the discovery rule could be applied to claims of trespass specifically enumerated in N.C. Gen. Stat. § 1-52(3)), *disc. rev. denied*, 348 N.C. 500, 510 S.E.2d 654, 654-55 (1998); *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 492-93, 329 S.E.2d 350, 354 (1985) (considering application of the discovery rule to N.C. Gen. Stat. § 1-52(1)); *Black v. Littlejohn*, 312 N.C. 626, 637, 325 S.E.2d 469, 477 (1985) (application of the discovery rule to injuries caused by the negligence of another); *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 507-08, 398 S.E.2d 586, 593-94 (1990) (N.C. Gen. Stat. § 1-52(5) applies three year statute of limitations to negligence actions), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991). For the reasons discussed below, I believe N.C. Gen. Stat. § 1-52(16) also applies to N.C. Gen. Stat. § 1-52(5).

The statute of limitations for criminal conversation is three years, as provided by statute and case law. As the trial court stated in its ruling, my research fails to disclose any precedent that disallows application of the discovery rule to the tort of criminal conversation. The majority cites *Coachman v. Gould* as authority for the preclusion of N.C. Gen. Stat. § 1-52(16) from claims of criminal conversation. In *Coachman*, this Court determined that the plaintiff's action for criminal conversation was barred by the three year statute of limitations. 122 N.C. App. at 445-46, 470 S.E.2d at 562-63. However, in *Coachman* this Court did not address the possibility of the three year statute of limitations being tolled by the discovery rule. *Id.*

II. The Discovery Rule

The discovery rule is limited to "personal injury or physical damage to claimant's property." N.C. Gen. Stat. § 1-52(16). The applicable statute of limitations "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to claimant." *Id.*

> The primary purpose of N.C. Gen. Stat. § 1-52(16) is that it is intended to apply to plaintiffs with latent injuries. Specifically, § 1-52(16) protects a potential plaintiff in the case of a *latent*

> *injury* by providing that a cause of action does not accrue until the *injured party becomes aware or should reasonably have become aware* of the existence of the injury. As soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run.

Soderlund v. Kuch, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (internal citations and quotations omitted) (emphasis supplied), *disc. rev. denied*, 353 N.C. 729, 551 S.E.2d 438-39 (2001).

A. Fraud and Criminal Conversation

The General Assembly's application of a discovery rule to claims of fraud is instructive. Our Supreme Court held:

> Fraud has no all-embracing definition. Because of the *multifarious* means by which human ingenuity is able to devise means to gain advantages by false suggestions and *concealment of the truth*, and in order that each case may be determined on its own facts, it has been wisely stated "that fraud is better left undefined," lest, as *Lord Hardwicke* put it, "the craft of men should find a way of committing fraud which might escape a rule or definition." However, in general terms, fraud may be said to embrace "all *acts, omissions, and concealments* involving a breach of legal or equitable duty and resulting in damage to another or the taking of *undue or unconscientious advantage of another.*"

Vail v. Vail, 233 N.C. 109, 113, 63 S.E.2d 202, 205 (1951) (citations and quotations omitted) (emphasis supplied).

Due to the clandestine and concealing nature of the tortfeasors, it is "difficult to establish with certainty when the statute of limitations on a claim of fraud begins to run." *Jennings v. Lindsey*, 69 N.C. App. 710, 715, 318 S.E.2d 318, 321 (1984). Consequently, the General Assembly specifically provided claimants of fraud actions a discovery rule. *See* N.C. Gen. Stat. § 1-52(9) (2003) ("For relief on the ground of fraud . . . the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud . . . ."). When there is concealment of material facts, "the statute of limitations does not bar a suit for relief on account of it, and thereby permit the statute which was designed to prevent fraud to become an instrument to perpetrate and perpetuate it." *Small v. Dorsett*, 223 N.C. 754, 761, 28 S.E.2d 514, 518 (1944).

Criminal conversation is defined as " 'actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture.' " *Nunn v. Allen*, 154 N.C. App. 523, 535, 574 S.E.2d 35, 43 (2002) (quoting *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996)), *motion dismissed, motion and disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 630, 631 (2003). " 'The gravamen of the cause of action . . . is the defilement of plaintiff's [spouse] by the defendant.' " *Johnson v. Pearce*, 148 N.C. App. 199, 200, 557 S.E.2d 189, 190 (2001) (quoting *Chestnut v. Sutton*, 207 N.C. 256, 257, 176 S.E. 743, 743 (1934)). The goal of the remedy is to protect a spouse's interest in " 'the fundamental right of exclusive sexual intercourse between spouses, and also on the loss of consortium.' " *Sebastian v. Kluttz*, 6 N.C. App. 201, 209, 170 S.E.2d 104, 108 (1969) (quotation omitted). "In determining damages a jury 'may consider the loss of companionship, loss of services, mental anguish, humiliation, and fear of sexually transmitted disease. In addition, there may be recovery for the injury to health and family honor . . . .' " *American Mfrs. Mut. Ins. Co. v. Morgan*, 147 N.C. App. 438, 442, 556 S.E.2d 25, 28 (2001) (quotations omitted), *cert. denied*, 355 N.C. 747, 565 S.E.2d 191, 192 (2002).

Despite the simple elements of a valid marriage and sexual intercourse by a spouse with a third party, inherent in the cause of action are acts of deceit and concealment. Typically, the spouse and interloper do not flaunt their indiscretions in the open such that it becomes readily apparent to the aggrieved party, who is often the last to know. Rather, as in situations involving fraud, the acting parties seek to conceal their behavior, not just from the aggrieved, but also from the rest of the world. The party injured by the criminal conversation defendant often would be unable to discover the truth and subsequently suffer harm until some time after the fact.

Application of the discovery rule to claims of criminal conversation to protect the "fundamental right of exclusive sexual intercourse between spouses" is in line with North Carolina's demonstrated interest in the importance of protecting marriage. N.C. Gen. Stat. § 8-57(c) (2003) ("No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage."); *Thompson v. Thompson*, 70 N.C. App. 147, 154-55, 319 S.E.2d 315, 320-21 (1984) (attorneys representing a client in a divorce proceeding may not use contingent fee contracts since they tend to promote divorce and discourage reconciliation), *rev'd on other grounds*, 313 N.C. 313, 328 S.E.2d 288

(1985); *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (the causes of action for criminal conversation and alienation of affections are recognized and valid in North Carolina); *In re Webb*, 70 N.C. App. 345, 350, 320 S.E.2d 306, 309 (1984) (" '[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.' ") (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 504, 52 L. Ed. 2d 531, 540 (1977)), *aff'd*, 313 N.C. 322, 327 S.E.2d 879, 879-80 (1985).

III. Conclusion

Our appellate courts have extended N.C. Gen. Stat. § 1-52(16) to many other subsections of N.C. Gen. Stat. § 1-52. While the statute of limitations for criminal conversation and many other torts is three years, criminal conversation is an inherently deceitful, concealing, and deceptive act. As in cases of fraud, the parties involved intentionally and actively conceal and attempt to avoid discovery by the aggrieved spouse. An aggrieved party probably will not become aware of the commissions of adultery, if ever, until well after the acts occurred. A tortfeasor should not be awarded for exceptionally egregious behavior after secretive actions intended and devised to preclude discovery. The trial court properly ruled that the discovery rule applies and tolls the three year statute of limitations until the aggrieved party did or should have discovered defendant's tortious acts. The jury specifically found as fact that plaintiff's criminal conversation claim was filed "within three years after the time the bodily harm became apparent or reasonably to have become apparent to . . . plaintiff, whichever occurred first." As "no fact tried by a jury . . . shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law[,]" U.S. Const. amend. VII; N.C. Const. art. I, § 19, defendant's assignment of error should be overruled. I vote to affirm the jury's verdict in plaintiff's favor. I respectfully dissent.

STATE OF NORTH CAROLINA v. CHARLES LAMONT AYSCUE

No. COA04-203

(Filed 5 April 2005)

1. Evidence— convenience store videotape—proper foundation

The trial court did not err by admitting a convenience store videotape for illustrative purposes in an armed robbery prosecution. A person working at the store during the robbery testified that the tape was taken out of the camera on the night of the robbery, that the tape accurately represented the incident, explained a discrepancy in the date and time, and deputies testified about the chain of custody. A proper foundation was laid. N.C.G.S. § 8-97.

2. Evidence— convenience store videotape—substantive evidence—no plain error

There was no plain error in an armed robbery prosecution in the introduction as substantive evidence of a convenience store videotape. The tape depicted the events of the robbery, corroborated the testimony of workers in the store, and there is no indication that the videotape was suggestive, confusing, or misleading, or that it provided an improper basis for the jury's verdict. The record does not reflect that the probative value of the videotape was outweighed by undue prejudice.

3. Evidence— prior convictions—not prejudicial

In light of the entire record in an armed robbery prosecution, including identification testimony, there was no prejudice from the State cross-examining defendant about his prior out-of-state conviction for possession of stolen property.

4. Sentencing— prior record level—New York conviction

The trial court erred in determining defendant's prior record level when sentencing him for armed robbery. The State failed to produce sufficient evidence that defendant's prior New York conviction for possession of stolen property in the fifth degree was substantially similar to a Class 1 misdemeanor in North Carolina.

Appeal by defendant from judgment entered 20 August 2003 by Judge Robert H. Hobgood in Vance County Superior Court. Heard in the Court of Appeals 17 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly W. Duffley, for the State.

Anne Bleyman for defendant-appellant.

TIMMONS-GOODSON, Judge.

Charles Lamont Ayscue ("defendant") appeals his conviction of robbery with a firearm. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error, but we remand the case for a new sentencing hearing.

The State's evidence presented at trial tends to show the following: On 13 April 2002, Regina Durham ("Durham") and Leon Debnam ("Debnam") were working at Currin's Mini Mart in Henderson when defendant entered the store and asked Durham for change for a fifty dollar bill. Durham had seen defendant "[n]umerous times" in the store, and the two had "conversations" on more than one occasion. Durham told defendant that she did not keep that much change that late at night, and defendant left the store. Defendant then returned to the store and told Durham, "you know you just made me miss a drug deal." Durham replied, "well, maybe I just kept you from getting in trouble[,]" and she continued working with other customers.

As Durham was waiting on another customer, defendant "pulled out [a] gun" and demanded that Durham give him money. Durham initially "didn't pay him any attention," but after defendant "clicked the gun," Durham opened the cash register and gave defendant approximately $580.00 in cash. After defendant fled the store, Durham "pushed the panic button" and locked up the store.

Debnam did not notice defendant when he first entered the store, but while Debnam was mopping the floor in front of the cash register he noticed defendant "was real fidgety, and went from one—one end of the register to the other." Debnam saw what "[l]ooked like a nine millimeter" hanging out of defendant's pants pocket, and he heard defendant say, "give it all here." Debnam initially believed defendant was talking to a customer in the store, but stated that "when I heard the (makes sound and demonstrates chambering bullet), I looked back, he had the gun pointed at [Durham]." Debnam then saw defendant flee the store after Durham gave him money from the cash register.

When law enforcement officers arrived at the store, Durham described what had happened during the robbery and informed the

officers that the store had a videotaping system. While watching the videotape with the officers, Durham told the officers that "she knew the guy, but she just couldn't kind of think of his name." She informed the officers that the assailant had twin sisters, one of whom worked at a local middle school. Vance County Sheriff's Department Deputy J.L. Goolsby ("Deputy Goolsby"), who was called to the scene to investigate the incident, had attended school with one of defendant's sisters, who worked at the middle school Durham had indicated. When Deputy Goolsby suggested that defendant was the assailant, Durham snapped her fingers and said, "that's his name." Durham also told the officers where she believed one of defendant's twin sisters lived, as well as which way defendant had fled.

On 8 July 2002, defendant was indicted for robbery with a dangerous weapon. A grand jury reindicted defendant for the same charge on 2 June 2003 and 7 July 2003. Defendant's trial began 19 August 2003. At trial, defendant objected to the State's introduction of the videotape into evidence. The trial court overruled defendant's objection and initially allowed the introduction of the videotape solely for illustrative purposes. However, following testimony related to the chain-of-custody of the videotape, the trial court allowed the State to introduce the videotape for substantive purposes as well.

Following the State's presentation of its case, defendant requested that the trial court prohibit the State from introducing evidence related to defendant's prior out-of-state conviction for possession of stolen property in the fifth degree. The trial court denied defendant's request, and defendant subsequently testified on direct examination that he did not participate in the robbery of Currin's Mini Mart and that he was at another location on the night upon which the robbery occurred. Defendant also testified that the conviction for possession of stolen property in the fifth degree occurred in New York, and that he "didn't spend no time in jail for it, or nothing." Defendant testified that he "thought they" dismissed the charge.

On 20 August 2003, the jury found defendant guilty of robbery with a firearm. The trial court reviewed defendant's criminal record and determined that defendant had a prior felony record level II. The trial court thereafter sentenced defendant to seventy to ninety-three months incarceration. Defendant appeals.

We note initially that defendant's brief contains arguments supporting only ten of the original twenty-one assignments of error.

Pursuant to N.C.R. App. P. 28(b)(6) (2004), the omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those issues properly preserved by defendant for appeal.

The issues on appeal are whether the trial court erred by: (I) admitting the videotape into evidence; (II) admitting evidence of defendant's prior out-of-state conviction; and (III) determining defendant's prior record level.

[1] Defendant first argues that the trial court erred by admitting the videotape into evidence. Defendant asserts that a proper foundation was not laid prior to the introduction of the videotape into evidence. We disagree.

Upon proper foundation, N.C. Gen. Stat. § 8-97 (2003) allows the introduction of videotapes into evidence for both illustrative and substantive purposes.

> The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . ."; (3) testimony that "the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing," (substantive purposes); or (4) "testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area 'photographed[.]' "

State v. Cannon, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988) (citations omitted), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990).

In the instant case, Durham testified that the videotape was the one taken out of the camera on the night of the robbery and that the videotape accurately represented the incident she had described to the jury. Following this testimony, the trial court allowed the introduction of the videotape into evidence for illustrative purposes only. Durham then continued to testify, and on cross-examination, she explained the discrepancy between the date and time of the incident and the date and time contained on the screen when the videotape was played. Durham testified that the store had previously been robbed, but that the store had not yet "timed [the videotape system]

back up." Durham further testified that "[w]e change that tape every day." Deputy Goolsby testified that after viewing the tape, he "went back to the office and did the report on it." Deputy Goolsby testified that "[t]he tape was put into evidence" and that "it went under Detective Almond's case load." Vance County Sheriff's Department Detective John Almond ("Detective Almond") testified that he investigated the robbery and took the videotape into custody on 13 April 2002, and that the videotape had been in his custody, unaltered and unchanged, since that date. Following this testimony, the trial court admitted the videotape into evidence for substantive purposes. In light of the foregoing, we conclude that a proper foundation was laid for the introduction of the videotape into evidence for both substantive and illustrative purposes.

[2] Defendant asserts a second basis for contesting the admissibility of the videotape. While he concedes that he did not object to the introduction of the evidence for substantive purposes, defendant maintains that the trial court committed plain error by allowing the State to introduce the videotape into evidence for substantive purposes because the videotape was "highly prejudicial" to his case. We disagree.

"Plain error exists where, after reviewing the entire record, the claimed error is so fundamental, so basic, so prejudicial, or so lacking in its elements that justice could not have been done." *State v. Fleming*, 350 N.C. 109, 132, 512 S.E.2d 720, 736, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). "A prerequisite to our engaging in a 'plain error' analysis is the determination that the [trial court's action] constitutes 'error' at all." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). Once we have determined that the trial court erred, " '[b]efore deciding that an error by the trial court amounts to "plain error," [we] must be convinced that absent the error the jury probably would have reached a different verdict.' " *Id.* (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

"Although 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 (2003). Our Supreme Court has previously concluded that "relevant evidence is properly admissible . . . unless the judge determines that it must be excluded, for instance, because of the risk of 'unfair prejudice.' " *State v. Mercer*,

317 N.C. 87, 94, 343 S.E.2d 885, 889 (1986). According to its official commentary, "unfair prejudice" within the context of Rule 403 "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." N.C. Gen. Stat. § 8C-1, Rule 403 (Commentary).

In the instant case, the record does not reflect that the probative value of the videotape was outweighed by any undue prejudice. The videotape depicted the events of the robbery and corroborated the testimony of Durham and Debnam. We note that "[e]vidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). Here, there is no indication that the videotape was suggestive, confusing, or misleading, nor is there any indication that the videotape provided an improper basis for the jury's verdict. Therefore, we conclude that the trial court did not err in allowing the introduction of the videotape as substantive evidence, and, accordingly, we overrule defendant's first argument.

[3] Defendant next argues that the trial court erred by allowing the State to cross-examine him regarding his prior out-of-state conviction for possession of stolen property in the fifth degree. Defendant asserts that the State failed to present sufficient evidence that the conviction met the requirements of N.C. Gen. Stat. § 8C-1, Rule 609(a). However, assuming *arguendo* that the trial court erred by ruling that the State would be allowed to present this evidence, defendant has failed to demonstrate that he was unfairly prejudiced by this error.

We note initially that defendant did not object to the State's questions during his testimony regarding the prior conviction. In order to preserve a question for appellate review, N.C.R. App. P. 10(b)(1) (2004) requires that "the complaining party . . . obtain a ruling upon the party's request, objection or motion." When the party's complaint involves the admissibility of evidence, the complaining party must present an objection when the evidence is introduced at trial, even where, as here, the objection was previously considered in a motion *in limine*. *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999); *but see* N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2003) (effective October 1, 2003) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."). Nevertheless, a party may preserve an

evidentiary issue where the party assigns plain error to the issue on appeal. *See* N.C.R. App. P. 10(c) (2004).

In the instant case, defendant concedes that he did not object to the introduction of this evidence during his testimony, and thus on appeal he assigns plain error to the trial court's ruling. As discussed above, "[b]efore deciding that an error by the trial court amounts to 'plain error,' [we] must be convinced that absent the error the jury probably would have reached a different verdict." *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. In the instant case, during the initial investigation of the robbery, Durham identified defendant as the individual who had allegedly robbed the store. At trial, both Durham and Debnam identified defendant as the individual who had robbed the store, and Durham and Debnam also provided versions of the incident consistent with that displayed on the videotape and played before the jury. Defendant testified that the prior charge for possession of stolen property in the fifth degree had occurred in New York in 1999, and that he believed the charges had been dismissed. After reviewing the record of the instant case, including the foregoing evidence, we are not convinced that the jury would have reached a different result absent the introduction of evidence regarding defendant's prior conviction for possession of stolen property in the fifth degree. Therefore, we conclude that the trial court did not commit plain error by allowing the State to introduce evidence regarding the prior conviction. Accordingly, defendant's second argument is overruled.

[4] Defendant's final argument is that the trial court erred in determining his prior record level. Defendant asserts that the State produced insufficient evidence to support the trial court's conclusion that he possessed a prior felony record level II. We agree.

N.C. Gen. Stat. § 15A-1340.14(e) (2003) 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 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.

While "[t]here 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), the State is permitted to provide a computerized worksheet to the trial court in order to prove a prior out-of-state conviction. *State v. Rich*, 130 N.C. App. 113, 116, 502 S.E.2d 49, 51, *disc. review denied*, 349 N.C. 237, 516 S.E.2d 605 (1998) (computerized printout with the heading "DCI—Record" and containing various identifying characteristics of the defendant held to be a copy of a Division of Criminal Information record and competent to prove prior convictions).

In the instant case, prior to defendant's trial testimony, the trial court conducted a *voir dire* hearing in which the parties discussed the introduction of evidence regarding defendant's prior conviction for possession of stolen property in the fifth degree. The State informed the trial court that it was "pulling the DCI records[,]" and that "a copy of [defendant's] record from New York indicates that it's a Class B felony in New York." The trial court thereafter determined that the charge "would be a grade of felony" and it admitted into evidence the record provided by the State. Following defendant's conviction for robbery with a firearm, the State submitted a judgment and commitment worksheet to the trial court. The judgment and commitment sheet indicated that, by virtue of the one point assigned to the prior possession of stolen property in the fifth degree conviction, defendant possessed a prior felony record level II. Defendant objected to the submission of the worksheet, arguing that "the State has not proven that [possession of stolen property in the fifth degree] is a Class [1] misdemeanor under the law." The trial court readmitted the record provided by the State, and, after being informed that the record was provided by "NCIC," the trial court found that the record "has reasonable guarantees of trustworthiness." Without other evidence, the trial court thereafter concluded that the prior conviction "would be at least" a Class 1 misdemeanor in North Carolina, and therefore the trial court determined that defendant had a prior felony record level II. On appeal, defendant does not challenge the State's proof of his prior conviction for possession of stolen property in New York. Instead, defendant contends that the State failed to demon-

strate that the offense "is substantially similar" to a Class 1 misdemeanor in North Carolina.

We note that NY CLS Penal § 165.40 (2003) provides that "[c]riminal possession of stolen property in the fifth degree is a class A misdemeanor." Although the State presents an argument in its brief comparing the elements of NY CLS Penal § 165.40 with the elements of N.C. Gen. Stat. § 14-72(a) (2003), no such argument was presented to the trial court during defendant's trial. Instead, the trial court considered only the State's judgment and commitment sheet and a copy of defendant's record, which the State incorrectly asserted "indicates that [the crime is] a Class B felony in New York." In light of the foregoing, we conclude that the State failed to produce sufficient evidence tending to show that defendant's prior conviction for possession of stolen property in the fifth degree was substantially similar to a Class 1 misdemeanor in North Carolina. Therefore, defendant is entitled to a new sentencing hearing, during which both parties may present that evidence necessary to determine whether the offense is substantially similar to a Class 1 misdemeanor in North Carolina.

In light of the foregoing conclusions, we hold that defendant received a trial free of prejudicial error, but we remand the case for a new sentencing hearing.

No error at trial; remand for new sentencing hearing.

Judges BRYANT and LEVINSON concur.

HARLEYSVILLE MUTUAL INSURANCE COMPANY, PLAINTIFF v. BERKLEY INSURANCE COMPANY OF THE CAROLINAS, DEFENDANT

No. COA04-1010

(Filed 5 April 2005)

Insurance— liability insurance—synthetic stucco—timing of coverage—acts or omissions before policy date

The trial court did not err by ordering summary judgment for defendant in a declaratory judgment action between insurance companies arising from synthetic stucco provided by RGS Builders, which was insured by plaintiff previously and by defendant when the complaint was filed. Any acts or omissions

by the insured (RGS) occurred prior to the effective date of defendant's policy.

Appeal by plaintiff from order entered 29 March 2004 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 10 March 2005.

Pinto Coates Kyre & Brown, P.L.L.C., by David L. Brown and Deborah J. Bowers, for plaintiff-appellant.

Carruthers & Roth, P.A., by Kenneth R. Keller, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Harleysville Mutual Insurance Company ("plaintiff") appeals the trial court order granting summary judgment in favor of Berkley Insurance Company of the Carolinas ("defendant"). Because we conclude that defendant was neither required to extend liability coverage nor defend a suit, we affirm the trial court order.

The facts and procedural history pertinent to the instant appeal are as follows: On 11 April 1993, RGS Builders, Inc. ("RGS") entered into a contract with Mr. and Mrs. K.C. Desai (collectively, "the Desais"), whereby RGS was to serve as contractor during the construction of the Desais' residence. Construction of the residence was completed in 1994, and the Desais were issued a certificate of occupancy on 15 December 1994. The residence included an exterior insulation finish system ("EIFS") commonly known as "synthetic stucco."

In May 1996, the Desais' residence was inspected by Prime South Construction ("Prime South"). Prime South found that portions of the residence contained medium and high moisture levels that should be further investigated by the Desais. As a result of Prime South's investigation, and in an effort to correct the water intrusion, RGS subsequently performed repairs to the residence. In May 1997, the Desais hired B.B. & Associates ("B.B.") to conduct another inspection of their residence. In a report dated 4 June 1997, B.B. recommended that the Desais "[s]eal all penetrations through the stucco system, including but not limited to receptacles, light fixtures, vents, [and] pipes[,]" as well as "[c]ontinue to seal and maintain jamb/sill connection of windows." B.B. noted that "[t]he kick outs do not have sealant where the flashing meets the stucco system[,]" and B.B. instructed the Desais to correct this problem.

On 6 April 2000, Criterium-McClancy Engineers ("McClancy Engineers") performed a third inspection of the residence. In a report dated 5 May 2000, McClancy Engineers summarized its findings as follows:

> We observed numerous examples of improper installation details of the EIFS cladding and violations of applicable building codes.
>
> In addition, we measured elevated moisture levels in many areas, which we attribute to the improper installation of the system.
>
> Because of the widespread incidence of improper installation details, the evidence of generally elevated moisture levels and the potential for further moisture penetration and subsequent structural damages, we conclude the overall installation is defective. Because of technical problems associated with the critical construction details, we do not believe the system can be repaired and we recommend that the EIFS synthetic stucco surface be removed and replaced.

On 16 May 2000, the Desais filed a complaint against RGS, alleging negligence, negligent misrepresentation, breach of implied warranty, breach of contract, and unfair and deceptive trade practices with respect to the installation of the synthetic stucco. RGS subsequently forwarded the complaint to both plaintiff and defendant as potential insurers. Plaintiff had previously provided RGS with commercial general liability coverage, and, by virtue of a policy effective 1 May 1997, defendant was currently providing commercial general liability coverage to RGS. Plaintiff agreed to aid in RGS's defense and to provide RGS with insurance coverage. By way of a letter dated 21 June 2000, defendant declined to provide RGS with insurance coverage related to the suit, stating that the property damage and the Desais' discovery of it occurred prior to 1 May 1997, the date defendant's coverage of RGS began.

On 15 August 2001, plaintiff sent a letter to defendant asking defendant to reconsider its position on the suit in light of the allegations of the Desais' complaint and this Court's decision in *Bruce-Terminex Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 504 S.E.2d 574 (1998). In response, defendant sent plaintiff a letter dated 4 September 2001, in which defendant again declined to provide RGS with insurance coverage related to the suit, citing the language of its policy with RGS as well as the Supreme Court's decision in *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558 (2000). Plaintiff and defendant exchanged similar corre-

spondence in February 2002, with defendant continuing to maintain its position of denying RGS coverage related to the suit.

On 7 June 2002, the Desais settled their suit against RGS for the sum of $87,500.00. On 13 June 2002, the Desais dismissed their claim against RGS with prejudice. Plaintiff subsequently made payment on behalf of RGS in the full amount of settlement, and, on 24 January 2003, plaintiff filed a declaratory judgment complaint against defendant. In its complaint, plaintiff alleged that defendant's insurance policy with RGS was triggered by the Desais' suit, and that therefore, plaintiff was entitled to payment from defendant for the settlement amount as well as any costs and expenses related to the settlement. On 13 March 2003, defendant filed an answer denying the allegations of plaintiff's complaint. Both parties subsequently moved the trial court for summary judgment in their favor. On 29 March 2004, the trial court granted summary judgment in favor of defendant, concluding that defendant "provides no coverage and owes no duty to defend the claim against RGS Builders," and that plaintiff is entitled to recover nothing from defendant. Plaintiff appeals.

The issue on appeal is whether the trial court erred by granting summary judgment in favor of defendant. Plaintiff argues that defendant was required to extend coverage to RGS because the Desais discovered the damage to their residence while defendant was insuring RGS. We disagree.

When reviewing a motion for summary judgment, this Court considers whether "(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664, *disc. review denied and appeal dismissed*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261 (2001); *see* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003).

In *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558 (2000), our Supreme Court overruled this Court's opinion in *West American Insurance Co. v. Tufco Flooring East*, which held that "for insurance purposes, property damage 'occurs' when it is manifested or discovered." 104 N.C. App. 312, 317, 409 S.E.2d 692, 695 (1991). In *Gaston County*, the Court concluded that, for the purposes of determining insurance liability, there is no

"bright-line rule" that property damage occurs at the time of manifestation or upon the date of discovery. 351 N.C. at 303, 524 S.E.2d at 565. Instead, the Court held, "where the date of the injury-in-fact can be known with certainty, the insurance policy or policies on the risk on that date are triggered." *Id.* at 303, 524 S.E.2d at 564. Following *Gaston County*, this Court has held that if we "can determine when the injury-in-fact occurred, the insurance policy available at the time of the injury controls." *Hutchinson v. Nationwide Mut. Fire Ins. Co.*, 163 N.C. App. 601, 604, 594 S.E.2d 61, 63 (2004). Therefore, "even in situations where damage continues over time, if the court can determine when the defect occurred from which all subsequent damages flow, the court must use the date of the defect and trigger the coverage applicable on that date." *Id.* at 605, 594 S.E.2d at 64.

In *Hutchinson*, the plaintiffs sought damages arising from the continual entry of water into a retaining wall built by the contractor. The plaintiffs argued that, as the contractor's current insurer, the defendant was responsible for damages which, although resulting from the negligent construction of the wall, were discovered after the wall's construction and while the defendant's policy was in effect. The defendant denied coverage for the claim, contending that because the alleged negligent construction occurred while the defendant was not insuring the contractor, the defendant's insurance policy was not triggered. The trial court agreed with the defendant and granted summary judgment in its favor. On appeal, we agreed with the plaintiffs' theory of the injury, but we noted that "the evidence is clear that the damage to [the] plaintiffs' retaining wall occurred outside of the period in which [the] defendant insured [the contractor]." *Id.* at 605, 594 S.E.2d at 64. Accordingly, we held that "[w]ithout any additional information suggesting that the damage was caused during the three days of coverage prior to discovery, we affirm the trial court's order granting summary judgment to defendant." *Id.* at 605-06, 594 S.E.2d at 64.

In the instant case, the Desais' damages arose from the continual entry of moisture into their residence through the synthetic stucco. Plaintiff contends that the source of the property damage, RGS's negligent installation of the synthetic stucco, was not "determined with certainty" until 5 May 2000, the date in which McClancy Engineers provided its report to the Desais. Thus, plaintiff asserts, because RGS was insured by defendant on the date of discovery, defendant was required to extend general commercial liability coverage to RGS and to defend the suit. We cannot agree.

We note that defendant's insurance policy with RGS contains the following pertinent provisions:

> A. COVERAGES
>
> 1. Business Liability
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" [or] "property damage" . . . to which this insurance applies.
>
> . . . .
>
> b. This insurance applies:
>
> (1) To "bodily injury" and "property damage" only if:
>
> . . . .
>
> (b) The "bodily injury" or "property damage" occurs during the policy period.

Thus, as in *Hutchinson*, "[u]nder the insurance policy in this case, coverage is triggered by 'property damage' when the property damage is caused by an 'occurrence' and when the property damage occurs within the policy period." *Id.* at 604, 594 S.E.2d at 63. Accordingly, "[t]he issue for this Court to determine is whether the property damage occurred within the policy period." *Id.*

The record in the instant case establishes that defendant was not insuring RGS on the dates the Desais' residence was constructed, nor was defendant insuring RGS on the dates RGS attempted to repair its previous construction efforts. RGS began construction of the residence in 1993 and completed it in 1994. The repairs took place following Prime South's inspection of the residence in 1996. Defendant's policy with RGS began on 1 May 1997, and it was effective until 1 January 2003. In its 5 May 2000 report, McClancy Engineers specifically found that the "overall installation" of the synthetic stucco was defective. The Desais' complaint against RGS alleged that, as a result of Prime South's inspection, in May 1996, RGS, "by and through agents or employees, investigated, performed repairs, and told [the Desais] that the source of the water intrusion had been corrected." The Desais further alleged in their complaint that, when the repairs were later inspected in May 1997, they discovered that "the repair efforts undertaken by or on behalf of [RGS] in 1996 were inadequate and . . . failed to correct the problem, and from said inspection, [the

Desais] discovered the existence of a latent defect associated with the manner in which the property was constructed" by RGS. In light of the foregoing, it is clear that the Desais' property damage was caused by RGS's actions or inactions prior to the effective date of its policy with defendant. Therefore, without any additional information suggesting that the damage was caused during the dates of its coverage, we conclude that defendant bears no general commercial liability for the damages caused to the Desais by RGS.

Plaintiff argues in the alternative that defendant had a general duty to defend the suit against RGS by virtue of the terms of its insurance policy. Plaintiff asserts that the facts of the Desais' pleadings triggered defendant's contractual duty to defend. We disagree.

"The duty of an insurer to defend its insured is based on the coverage contracted for in the insurance policy." *Mastrom, Inc. v. Continental Casualty Co.*, 78 N.C. App. 483, 484, 337 S.E.2d 162, 163 (1985). "An insurer has a duty to defend when the pleadings state facts demonstrating that the alleged injury is covered by the policy." *Bruce-Terminex Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 735, 504 S.E.2d 574, 578 (1998). "Provisions of insurance policies are generally to be construed in favor of coverage and against the insurer. This principle applies, however, only when the terms of the policy are ambiguous." *Mastrom*, 78 N.C. App. at 484, 337 S.E.2d at 163 (citations omitted).

In *Waste Management of the Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986), our Supreme Court distinguished an insurer's duty to indemnify an insured from its duty to defend an insured as follows:

> Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

> Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage. In this event, the insurer's refusal to defend is at his own peril: if the evidence subsequently presented at trial reveals that the events are covered, the insurer will be responsible for the cost of the defense.

(citations and footnote omitted).

In the instant case, defendant's insurance policy with RGS provides that defendant "will have the right and duty to defend any 'suit' seeking those damages" to which the policy applies. As discussed above, under the terms of the insurance policy, defendant's coverage is triggered by "property damage" only when the " 'property damage' occurs during the policy period." The Desais' complaint against RGS alleged that the synthetic stucco was "improperly installed," that RGS "failed to adequately supervise the activities of their subcontractors" during the installation of the synthetic stucco, and that RGS "failed to promptly discover the improper method" by which the synthetic stucco was installed. The Desais' complaint referenced RGS's initial acts in constructing their residence as well as RGS's repairs and assurances following the May 1996 inspection. The complaint alleged no actions or inactions by RGS following 1 May 1997, the effective date of defendant's policy with RGS. Therefore, in light of the foregoing, we conclude that defendant did not have a general duty under its policy to defend RGS from the Desais' suit.

Plaintiff maintains that RGS was provided coverage by defendant by virtue of the "Contractors Extension Endorsement" provision contained within its insurance policy. However, we note that although the "Contractors Extension Endorsement" provides that defendant will pay those sums "to which this insurance applies" and also places upon defendant a "duty to defend any suit seeking these damages[,]" the endorsement expressly states that defendant has "no duty to defend suits for damages not covered by th[e] policy." The endorsement further provides that

> [n]egligent acts, errors, omissions or defects occurring prior to the effective date of the first consecutive errors and omissions policy . . . are excluded if there is other insurance applicable or if the "insured" knew or could have reasonably foreseen that such act, error, omission or defect might be the basis of a claim or suit.

In the instant case, as discussed above, RGS's insurance policy with defendant was effective on 1 May 1997. Prior to that date, RGS had an insurance policy with plaintiff. The Desais' complaint contained allegations of acts and omissions occurring prior to the effective date of RGS's insurance policy with defendant and during RGS's insurance policy with plaintiff. Thus, we conclude that the alleged negligent acts or omissions in the instant case were not covered by the "Contractors Extension Endorsement" in RGS's insurance policy with defendant, and therefore, the "Contractors Extension Endorsement" did not require defendant to defend RGS against the Desais' suit.

In light of the foregoing conclusions, we hold that the trial court did not err in ordering summary judgment in favor of defendant. Accordingly, we affirm the trial court's order.

Affirmed.

Judges CALABRIA and GEER concur.

NORWOOD MARK HOLLAND, PLAINTIFF v. JANICE MARTIN HOLLAND, DEFENDANT

No. COA03-1501

(Filed 5 April 2005)

1. **Child Support, Custody, and Visitation— support—findings—determining income**

A child support order was remanded for further findings on plaintiff's income where the trial court based its amended order in January of 2003 on plaintiff's 2001 income. Although it would have been difficult to compute plaintiff's 2002 income accurately in January of 2003 due to the nature of his farming business, the necessary findings were not made.

2. **Child Support, Custody, and Visitation— support—determining income—depreciation**

The trial court erred in determining the self-employed plaintiff's income in a child support action by treating all depreciation as accelerated and failing to exercise its discretion in ruling on

the deductibility of straight-line depreciation as a reasonable and necessary business expense.

3. Child Support, Custody, and Visitation— support—allocation of medical expenses

Where a child support award was remanded on other grounds, the award of attorney fees and the allocation of uninsured medical or dental expenses was remanded as well. The fact that the Child Support Guidelines include a generalized, cursory instruction concerning how the court "may" structure the responsibility for uninsured medical or dental expenses does not in any way alter the trial court's discretion to apportion these expenses.

Appeal by plaintiff from orders entered 3 December 2002, 10 January 2003, and 3 March 2003 by Judge Jimmy L. Love, Jr., in Johnston County District Court. Heard in the Court of Appeals 2 September 2004.

Wyrick, Robbins, Yates & Ponton, L.L.P., by K. Edward Greene and Donald L. Beci, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Lynn P. Burleson and Jill Schnabel Jackson, for defendant-appellee.

CALABRIA, Judge.

Norwood Mark Holland ("plaintiff") appeals from an amended order entered 10 January 2003 directing him to pay permanent child support for his minor child, attorney's fees to the custodial parent, Janice Martin Holland ("defendant"), and eighty percent of the minor child's uninsured medical or dental expenses. Plaintiff additionally appeals from a 3 March 2003 order denying his Rule 59 and Rule 60 motions pertaining to the trial court's 3 December 2002 child support order. We reverse and remand.

Plaintiff and defendant were married 21 December 1997, separated 6 October 2000, and divorced 15 November 2001. One child was born to the parties on 17 November 1998. On 17 January 2001, plaintiff filed a complaint for, *inter alia*, child custody and child support. In his first claim for relief, plaintiff alleged it would be in the best interest of the minor child for the parties to be awarded joint custody. Plaintiff further alleged that he and defendant owed a duty of support to the minor child and were capable of providing adequate support.

Defendant filed an answer and counterclaims on 23 January 2001, which included, *inter alia*, counterclaims for child custody, child support, and reasonable attorney's fees. Approximately three months later, the trial court entered a temporary child support order requiring plaintiff to pay defendant $1,077.91 per month, but declined to enter an order for child custody until the parties had attended custody mediation, scheduled for May 2001.

On 16 October 2001, approximately five months after entry of the temporary child support order, plaintiff filed a motion to modify the order claiming the amount ordered was unreasonable and requesting a determination by the trial court of a reasonable and fair amount of child support. On 15 November 2001, the parties consented to custody and visitation. Pursuant to a consent order, custody of the minor child was awarded to defendant; plaintiff was awarded visitation privileges. This consent order did not include any reference to plaintiff's previously filed motion to modify the temporary child support, and the record does not reflect whether the trial court ever ruled on this motion.

A few months after the consent order for custody and visitation, on 2 August and 27 September 2002, hearings were held regarding child support. The trial court found plaintiff and defendant were both employed. Plaintiff had been employed since 1988 as a farmer and managed his mother and father's farm as well as his own farming operation. Defendant was employed as an administrative assistant at a local church, earning a monthly net income of approximately $1,600.00 with expenses in excess of her monthly income. The trial court summarized plaintiff's 2001 farming activities, and its pertinent findings of fact focused on his 2001 income and expenses. The trial court found, in pertinent part, the following facts: (1) plaintiff's yearly gross income was $99,376.00; (2) plaintiff deducted $65,006.00 for accelerated depreciation expenses; (3) plaintiff's adjusted gross income was $34,370.00; and (4) plaintiff was capable of providing child support in the amount of $1,061.38 per month beginning 1 December 2002 and was also capable of paying reasonable attorney's fees. The trial court additionally found neither party requested a deviation from the North Carolina Child Support Guidelines (the "Child Support Guidelines"). Based on these facts, the trial court entered a child support order on 3 December 2002 ordering plaintiff to pay: (1) child support in the amount of $1,061.38; (2) eighty percent of the child's uninsured medical or dental expenses, with defendant to pay the remaining twenty percent; and (3) $5,000.00 to defendant as attorney's fees.

On 9 December 2002, plaintiff filed a motion for relief from judgment, for amendment of the child support order, and for a new trial based on the trial court's use of his 2001 tax return to determine child support rather than his income at the time of the hearing. On 10 January 2003, the trial court entered an amended order. The trial court's findings of fact, conclusions of law, and orders were identical to the prior order with the exception that plaintiff was found to be capable of and ordered to provide child support in the amount of $1,055.99 per month instead of $1,061.38.

[1] Plaintiff asserts the trial court committed reversible error by improperly determining his income because the trial court based the child support order on defendant's 2001 tax return instead of his income at the time the amended order was entered. We agree.

In pertinent part, N.C. Gen. Stat. § 50-13.4(c1) (2003) states:

> [T]he Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent . . . and shall develop criteria for determining when, in a particular case, application of the guidelines would be unjust or inappropriate. . . . The purpose of the guidelines and criteria shall be to ensure that payments ordered for the support of a minor child are in such amount as to meet the reasonable needs of the child . . . 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.

The Child Support Guidelines "apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent . . . ." N.C. Child Support Guidelines, 2005 Ann. R. N.C. 47. We review a trial court's child support orders under an abuse of discretion standard, *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002), and failure to follow the Child Support Guidelines without support of proper findings of fact constitutes reversible error. *Rose v. Rose*, 108 N.C. App. 90, 93, 422 S.E.2d 446, 447 (1992).

Under the Child Support Guidelines, "[c]hild support calculations . . . are based on the parents' *current incomes at the time the order is entered.*" N.C. Child Support Guidelines 2005 Ann. R. N.C. 49 (emphasis added). While the Child Support Guidelines provide that "[d]ocumentation of current income must be supplemented with copies of the most recent tax return to provide verification of earn-

ings over a longer period[,]" *id.*, this Court has "established that child support obligations are ordinarily determined by a party's *actual income at the time the order is made or modified.*" *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997) (emphasis added). "[T]he court must determine [the parent's] gross income as of the time the child support order was originally entered, not as of the time of remand nor on the basis of [the parent's] average monthly gross income over the years preceding the original trial." *Lawrence v. Tise*, 107 N.C. App. 140, 149, 419 S.E.2d 176, 182 (1992).

The trial court may deviate from this rule and consider " 'a party's capacity to earn income . . . if it is found that the party deliberately depressed [his] income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for [his] child' . . . [and] 'that [the party's] actions which reduced his income were not taken in good faith.' " *Ellis*, 126 N.C. App. at 364, 485 S.E.2d at 83 (quoting *Askew v. Askew*, 119 N.C. App. 242, 244-45, 458 S.E.2d 217, 219 (1995)). Additionally, after the trial court has determined the presumptive amount of child support based on a parent's current income, "the trial court may deviate from the presumptive amount if it determines that the . . . amount 'would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would otherwise be unjust or inappropriate.' " *Tise*, 107 N.C. App. at 150, 419 S.E.2d at 182 (quoting N.C. Gen. Stat. § 50-13.4(c)).

In the instant case, child support hearings were held on 2 August and 27 September 2002, and the trial court entered the child support order on 3 December 2002. About six weeks later, on 10 January 2003, an amended order was entered. However, neither order included findings concerning plaintiff's 2002 income. Rather, in both orders, the trial court expressly based the child support amount on plaintiff's 2001 income. Due to the nature of plaintiff's farming business, and the fact that most of his crops would have been harvested and sold in the late summer and fall, it would have been difficult for the trial court to have computed plaintiff's 2002 income with any degree of accuracy. While we believe the trial court could have used plaintiff's 2001 income to determine his income for purposes of computing his child support obligation, the order fails to support this approach with the necessary findings of fact. *See generally Greer v. Greer*, 101 N.C. App. 351, 399 S.E.2d 399 (1991). Accordingly, we reverse and remand the order for findings concerning plaintiff's 2002 income and for the entry of a child support order on that basis.

[2] Plaintiff also asserts the trial court erred in its method of computing his income from his 2001 tax return. Since it is likely to recur upon remand, we deem it necessary to address this issue.

The trial court's findings of fact 22, 23, and 24 read as follows:

22. The plaintiff's 2001 US Individual Income Tax Return indicated an adjusted gross income of $34,370.00.

23. The plaintiff's 2001 US Individual Income Tax Return indicated deductions for accelerated depreciation expenses in the amount of $65,006.00.

24. The plaintiff's yearly gross income for the year 2001 is $99,376.00.

Plaintiff does not assign error to finding 22; therefore, it is binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Plaintiff does assign error to findings 23 and 24.

It is evident the trial court computed plaintiff's income by adding the adjusted gross income of $34,370.00 to the deduction for accelerated depreciation expenses of $65,006.00. All of the figures for findings of fact 22 through 24 are derived from plaintiff's 2001 federal income tax return, which the trial court received into evidence. Plaintiff contends the trial court erred in finding he had accelerated depreciation in the amount of $65,006.00. We agree.

The Child Support Guidelines deal specifically with the computation of income from self-employment or operation of a business. This provision is applicable to the computation of plaintiff's income since he was self-employed in the business of farming.

> **(2) Income from self-employment or operation of a business.** Gross income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Ordinary and necessary business expenses do not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the court to be inappropriate for determining gross income. In general, income and expenses from self-employment or operation of a business should be carefully reviewed to determine an appropriate level of gross income available to the

> parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes.

N.C. Child Support Guidelines, 2005 Ann. R. N.C. 49.

Schedule F of plaintiff's 2001 tax return shows depreciation of $64,234.00 and amortization of $772.00. Together these total $65,006.00. The trial court found the entire amount of this total to be accelerated depreciation. This finding is not supported by the evidence. Straight-line depreciation is computed by taking the purchase price of an asset and dividing it by the depreciable life of the asset as determined by the Internal Revenue Code ("IRC"). *See generally* 26 U.S.C. § 167 (2000); *FPC v. Memphis Light, Gas & Water Div.*, 411 U.S. 458, 460, 36 L. Ed. 2d 426, 430 n.1 (1973). For certain assets, the IRC allows assets to be depreciated more rapidly than straight-line depreciation. *See generally* 26 U.S.C. § 168 (2000); *Memphis Light*, 411 U.S. at 460, 36 L. Ed. 2d at 430 n.1. In this case, plaintiff's farm equipment was depreciated under a 150% declining-balance method, an accelerated method of depreciation. The accelerated component of depreciation is the difference between the 150% declining-balance depreciation and straight-line depreciation in a given year. It is not the entire amount of depreciation, as found by the trial court.

This is best illustrated by using an example from plaintiff's depreciation schedule, which was part of plaintiff's 2001 tax return. This schedule shows a Taylor Tobacco Combine purchased on 15 January 1999 having a depreciable life of five years and a cost basis of $22,250.00. The annual straight-line depreciation for this item would have been $4,450.00. Plaintiff claimed a depreciation deduction of $4,673.00 on his 2001 tax return. Of this amount, only $223.00 would be attributable to the accelerated-depreciation component, not the full $4,673.00. It should be noted that for most of the equipment shown on the depreciation schedule, the depreciation claimed by plaintiff for his 2001 taxes was less than the amount of straight-line depreciation.

In *Tise*, this Court held that under the Child Support Guidelines accelerated depreciation was not allowed as a deduction from a parent's business income. *Tise*, 107 N.C. App. at 147, 419 S.E.2d at 181. Regarding straight-line depreciation, *Tise* holds that "the approach more consistent with our Guidelines is to vest the trial court with the discretion to deduct from a parent's monthly gross income the

amount of straight line depreciation allowed by the Internal Revenue Code." *Id.*

The trial court erred in treating all depreciation as accelerated depreciation and failed to exercise its discretion in ruling on the deductibility of the straight-line depreciation as a reasonable and necessary business expense. Upon remand, the trial court should compute plaintiff's income in accordance with the Child Support Guidelines and this Court's decision in *Lawrence v. Tise.*

[3] Having reversed and remanded the trial court's award of child support, we also set aside the award of attorney's fees and the trial court's allocation of uninsured medical or dental expenses. On remand, the trial court, upon request, shall reconsider these issues and will have the benefit of the 2002 Child Support Guidelines effective 1 October 2002, which added the following provision concerning uninsured medical or dental expenses:

> The court *may* order that uninsured medical or dental expenses in excess of $100 per year or other uninsured health care costs (including reasonable and necessary costs related to orthodontia, dental care, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders) *be paid by the parents in proportion to their respective incomes.*

N.C. Child Support Guidelines, 2005 Ann. R. N.C. 50 (emphasis added).

The fact that the Child Support Guidelines now include a generalized, cursory instruction concerning how the court "may" structure the responsibility for these uninsured expenses does not in any way alter the trial court's discretion to apportion these expenses, described and applied in *Tise*, 107 N.C. App. at 150, 419 S.E.2d at 183. Because the Child Support Guidelines neither require the trial courts to follow a certain formula nor prescribe what the trial courts "should" or "must" do in this regard, it follows that when the trial court does not allocate uninsured medical or dental expenses consistent with the parents' "respective incomes" as revealed by the child support worksheets, such an allocation would not constitute a "deviation" from the Guidelines that would have to be supported by findings as to why application of the Guidelines would be "unjust or inappropriate." *See* N.C. Gen. Stat. § 50-13.4(c) (2003). Given the wide discretion afforded our trial courts in matters

concerning the allocation of uninsured medical or dental expenses, then, such decisions cannot be disturbed on appeal absent a manifest abuse of discretion.

Additionally, "[o]n remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999). We reverse and remand the trial court's amended order, and therefore, we need not address plaintiff's remaining arguments.

Reversed and remanded.

Judges STEELMAN and LEVINSON concur.

BOYCE & ISLEY, PLLC, EUGENE BOYCE, R. DANIEL BOYCE, PHILIP R. ISLEY, AND LAURA B. ISLEY, PLAINTIFFS v. ROY A. COOPER, III, THE COOPER COMMITTEE, JULIA WHITE, STEPHEN BRYANT, AND KRISTI HYMAN, DEFENDANTS

No. COA03-1542

(Filed 5 April 2005)

Appeal and Error— appealability—political advertisement—defamation and unfair trade practices—denial of motion for judgment on the pleadings

An appeal was dismissed as interlocutory where the trial court had denied a motion for judgment on the pleadings under N.C.G.S. § 1A-1, Rule 12(c). The complaint arose from a television advertisement broadcast during a political campaign and alleged defamation and unfair trade practices, while the answer raised constitutional defenses. Although the Court of Appeals dissent adopted per curiam in *Priest v. Sobeck*, 357 N.C. 159, was relied upon for the contention that constitutional defenses in a defamation case affect a substantial right and are immediately appealable, that case involved a different motion (summary judgment) and different facts which make it distinguishable. There is nothing here to suggest an immediate loss of First Amendment rights.

Appeal by defendants from judgment entered 22 September 2003 by Judge John B. Lewis, Jr., in Wake County Superior Court. Heard in the Court of Appeals 25 August 2004.

Boyce & Isley, P.L.L.C., G. Eugene Boyce, R. Daniel Boyce, Philip R. Isley and Laura B. Isley, pro se plaintiff-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr. and David Kushner, and Smith Moore L.L.P., by Alan W. Duncan and Allison Overbay Van Laningham, for defendant-appellants.

The Bussian Law Firm, P.L.L.C., by John A. Bussian, for the North Carolina Press Association and the North Carolina Association of Broadcasters, amicus curiae.

Everett, Gaskins, Hancock & Stevens, by Hugh Stevens and Michael J. Tadych for the North Carolina Press Foundation, Inc., amicus curiae.

HUDSON, Judge.

R. Daniel Boyce, his law firm, father, sister, and brother-in-law ("plaintiffs") brought this action against Roy A. Cooper, III, his campaign committee, and members of his campaign staff ("defendants") alleging defamation and unfair trade practices related to a political television advertisement broadcast during the 2000 election for North Carolina Attorney General. The trial court dismissed the complaint pursuant to N.C. R. Civ. P. 12(b)(6), but on appeal, this Court held that the complaint stated a cause of action for defamation under the common law. *Boyce & Isley v. Cooper*, 153 N.C. App. 25, 568 S.E.2d 893 (2002) (hereinafter "*Boyce I*"), *appeal dismissed and rev. denied*, 357 N.C. 163, 580 S.E.2d 361 (2003). On remand, defendants answered, raising various constitutional defenses, and moved for judgment on the pleadings pursuant to N.C. R. Civ. P. 12(c). Thereafter, the Chief Justice of the Supreme Court of North Carolina designated the case as exceptional, pursuant to Rule 2.1 of the General Rules of Practice, and assigned Judge John B. Lewis, Jr., to the case. On 22 September 2003, the trial court denied the motion for judgment on the pleadings. Defendants appeal.

An unusual array of additional motions also have been filed, which are pending for ruling by this Court, including the following: 1) Motion to Dismiss Appeal as Interlocutory; 2) Motion by one of Amicus Curiae for leave to respond to Motion to Dismiss; 3) Untitled

Motion [for sanctions] pursuant to Rule 34; 4) Motion to Strike Amicus Motion for leave to respond; 5) Motion to Strike plaintiffs' Memorandum of Additional Authority; and 6) Motion to Amend September 2003 Writ of Supersedeas. We will address all of these motions in this opinion.

This dispute began during the 2000 election, when plaintiff R. Daniel Boyce and defendant Roy Cooper, III, were candidates for the office of North Carolina Attorney General. During the campaign, defendants ran a television advertisement in which the audio portion stated:

> I'm Roy Cooper, candidate for Attorney general, and I sponsored this ad. Roy Cooper, endorsed by every major police organization for his record of tougher crime laws. Dan Boyce—his law firm sued the State, charging $28,000 an hour in lawyer fees to the taxpayers. The judge said it shocks the conscience. Dan Boyce's law firm wanted more than a police officer's salary for each hour's work. Dan Boyce, wrong for Attorney General.

The lawsuits to which the ad apparently referred were a group of class action lawsuits brought on behalf of thousands of plaintiffs alleging that taxes levied by the State were unconstitutional. Dan Boyce or members of the plaintiff law firm allegedly served as counsel to the plaintiffs in each of those cases, and plaintiffs referred to the cases in various campaign materials and on their law firm's website. In response to the ad, plaintiffs sued, alleging defamation and unfair trade practices.

Here, we review the trial court's denial of defendants' Rule 12(c) motion to dismiss the case on the pleadings. Because the court's denial of defendant's motion does not finally determine the rights of the parties, this appeal is interlocutory. "[N]ormally an appeal does not lie from the denial of a motion for judgment on the pleadings." *Whitaker v. Clark*, 109 N.C. App. 379, 381, 427 S.E.2d 142, 143, *cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993) (citing *Barrier v. Randolph*, 260 N.C. 741, 743, 133 S.E.2d 655, 657 (1963)). "An appeal from an interlocutory order is permitted, however, if such order affects a substantial right." *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 719, 504 S.E.2d 802, 807 (1998).

Our jurisprudence regarding the substantial right analysis is not defined by fixed rules applicable to all cases of a certain type, but rather is based on an individual determination of the facts and proce-

dural context presented by each case. *See Blackwelder v. State Dept. of Human Resources*, 60 N.C. App. 331, 334-35, 299 S.E.2d 777, 780-81 (1983) (quoting *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978) ("It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.")).

> Whether a party may appeal an interlocutory order pursuant to the substantial right exception is determined by a two-step test. *Miller v. Swann Plantation Development Co.*, 101 N.C. App. 394, 395, 399 S.E.2d 137, 138 (1991). "[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). The substantial right test is "more easily stated than applied." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). And such a determination "usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from." *Estrada v. Jaques*, 70 N.C. App. 627, 642, 321 S.E.2d 240, 250 (1984).

Wood v. McDonald's Corp., 166 N.C. App. 48, 55, 603 S.E.2d 539, 544 (2004); *see also Church v. Allstate Ins. Co.*, 143 N.C. App. 527, 531-32, 547 S.E.2d 458, 461 (2001).

Defendants rely upon *Priest v. Sobeck*, 357 N.C. 159, 579 S.E.2d 250 (2003) (*per curiam* adoption of dissent at 153 N.C. App. 662, 670-71, 571 S.E.2d 75, 80-81 (2002) (Greene, J., dissenting)), for the proposition that our Supreme Court "has recently recognized that the constitutional defenses available to a defendant in a defamation case affect a substantial right and are immediately appealable on the merits." Judge Greene's dissent, adopted *per curiam* by our Supreme Court, states in relevant part:

> I also disagree with the majority's conclusion that partial denial of defendants' summary judgment motion did not affect a substantial right. Defendants contend the trial court misapplied the *New York Times v. Sullivan* "actual malice" standard, infringing on their First Amendment right to free speech. Because misapplication of the actual malice standard, detrimental to defendants, would have a chilling effect on their rights of free speech, the trial court's order does affect a substantial right. *See Sherrill v.*

Amerada Hess Corp., 130 N.C. App. 711, 719, 504 S.E.2d 802, 807 (1998) (order implicating First Amendment rights affects a substantial right). Accordingly, this Court should also address the merits of defendants' appeal.

Priest, 153 N.C. App. at 670-71, 571 S.E.2d at 81. Since defendants' pleadings included constitutional defenses to plaintiffs' claims, they contend that the denial of the Rule 12(c) motion affects a substantial right. However, the facts and procedural context of *Priest* make it distinguishable from this case.

In *Priest*, the Court was determining whether to hear cross appeals from a partial grant and partial denial of summary judgment, which orders were interlocutory. Plaintiffs, members of a union, had brought defamation claims against the author of a union newsletter, a publication that alleged plaintiffs supported the hiring of non-union workers. The trial court, on a motion for summary judgment, determined that a genuine issue of material fact existed only as to plaintiffs' argument that the author's comments were printed with actual malice. Plaintiffs appealed the grant of summary judgment as to their other claims, while defendants argued there was no forecast of actual malice and that the trial court erred in not also granting summary judgment to the remaining claim. The majority found that under the facts presented, the appeal was indeed interlocutory and did not agree with defendants that a substantial right was affected. *Id.*, 153 N.C. App. at 669, 571 S.E.2d at 80. As noted above, the dissent opined otherwise, stating that the partial denial of summary judgment did affect a substantial right. *Id.*, 153 N.C. App. at 670, 571 S.E.2d at 81. The North Carolina Supreme Court agreed with the dissent, and reversed. *Priest v. Sobeck*, 357 N.C. 159, 579 S.E.2d 250 (2003).

However, defendants here appealed from the denial of a 12(c) motion for judgment on the pleadings, not a denial of a motion for summary judgment. The 12(c) motion is more like a 12(b)(6) motion than one for summary judgment, because at the time of filing typically no discovery has occurred, no evidence or affidavits are submitted, and a ruling is based on the pleadings themselves—along with any properly submitted exhibits. *See, e.g., Lambert v. Cartwright*, 160 N.C. App. 73, 584 S.E.2d 341, *disc. review denied*, 357 N.C. 658, 590 S.E.2d 268 (2003) (highlighting the differences between the two). Granting the motion has generally, but not exclusively, occurred when defendants raise an issue, such as immunity, in their answer which would necessarily defeat the claims alleged in the complaint, which must be taken as true. *See, e.g., id.*; *Houpe v. City of*

Statesville, 128 N.C. App. 334, 340, 497 S.E.2d 82, 87, *disc. review denied*, 348 N.C. 72, 505 S.E.2d 871 (1998).

Further, substantial right analysis includes determining whether injury will occur, or the right will be lost, if not immediately appealed. *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). The dissent in *Priest* did not discuss this analysis, which was therefore not considered by the Supreme Court. Further, the panel of this Court which decided *Priest* on remand did not determine whether a misapplication of the actual malice standard had occurred, but instead determined that plaintiffs failed to adequately forecast any evidence of damages, thus entitling defendants to summary judgment on all claims. *Priest v. Sobeck*, 160 N.C. App. 230, 584 S.E.2d 867 (2003), *cert. denied*, 358 N.C. 155, 592 S.E.2d 694 (2004). Thus, neither in *Priest* nor here has the Court applied the actual malice standard as a basis for the ruling.

The only case cited in the *Priest* dissent relevant to the inquiry of whether a right would be lost was *Sherrill*, 130 N.C. App. at 719, 504 S.E.2d at 807. In *Sherrill*, we reviewed a preliminary gag order restricting participants from talking about their case *during trial*, stating that it was a form of "prior restraint" in violation of the First Amendment *prejudicing* a substantial right. There it appeared that a substantial right was being infringed, and more importantly would be lost if not reviewed until after a final judgment. *Id.*

Despite the lack of analysis on this point in the *Priest* dissent, we conclude that misapplication of the actual malice standard on summary judgment could lead to some loss or infringement on a substantial right, whereas denial of the 12(c) motion here will not. On a motion for summary judgment the forecast of evidence is set. A court can more adequately determine whether the forecast evidence (affidavits, depositions, exhibits, and the like) presents a factual issue under the correctly applied legal standard for actual malice. In reviewing the allegations of the pleadings as in ruling on a 12(c) motion, the court need only decide if the elements of the claim, perhaps including actual malice, have been alleged, not how to apply that standard. An incorrect application of the actual malice standard to deny summary judgment results in trial, whereas denial of a 12(c) motion results in further discovery and possibly summary judgment or other proceedings. Although we recognize that the First Amendment protects substantial rights, there is nothing here to suggest an immediate loss of these rights. This case involves litigation over a political ad that had already been run in an election; it does not

involve an injunction preventing defendants from running the ad in an upcoming election. We have previously held that plaintiffs' complaint does state a cause of action. *See Boyce I.* Any defenses or arguments that plaintiffs cannot actually prove their allegations in the complaint due to lack of evidence regarding malice will not be immediately lost if this case proceeds.

Accordingly, without the trial court having applied the actual malice standard, and without a full analysis in the *Priest* dissent or from our Supreme Court providing guidance on how "misapplication of the actual malice standard, detrimental to defendants, would have a chilling effect on their rights of free speech" and therefore *affect* a substantial right, we decline to apply the adopted dissent in *Priest* here.

Nothing in *Priest* suggests that the Court abolished the second prong of substantial right analysis when a case involves issues surrounding the First Amendment. Other than *Priest*, defendants cite no authority that would support a conclusion that their asserted constitutional defenses will be lost due to the trial court's denial of their 12(c) motion, thus requiring an immediate appeal. Therefore, we follow our general rule that an appeal from a 12(c) motion is interlocutory, and hold that defendants have failed to carry their burden of showing that this case affects a substantial right which will be lost if the substance of this appeal is not heard now.

Thus we conclude that this appeal should be dismissed.

Motion to Dismiss Appeal as Interlocutory allowed per this opinion.

Motion for Leave to File Amicus Curiae Response of the North Carolina Press Association and the North Carolina Association of Broadcasters dismissed as moot.

Untitled Motion [for Sanctions] denied.

Motion (Rule 37(a)) dismissed as moot.

Motion to Strike Plaintiff-Appellees' Memorandum of Additional Authorities denied.

Motion to Amend September 2003 Writ of Supersedeas and Lift (or Partially Lift) Stay as to Discovery dismissed as moot.

Dismissed.

Chief Judge MARTIN and Judge ELMORE concur.

STEVEN HULTQUIST AND DEBRA HULTQUIST, PLAINTIFFS V. DR. LESLIE MORROW, DR. MICHAEL LISH AND DAVID DANIEL CONSTRUCTION COMPANY, DEFENDANTS

No. COA04-561

(Filed 5 April 2005)

1. Real Property— restrictive covenant—placement of septic system

The trial court did not err by construing a restrictive covenant in favor of defendants and granting summary judgment for them in an action between lot owners involving the placement of an above-ground septic system. Both the covenant and the septic system permit were filed prior to plaintiffs' closing the sale of their lot. While the language of the covenant was ambiguous, the circumstances and timing of the submission of the septic system application and the filing of the covenants suggests that the covenant was written with the intent to prevent lot owners from constructing residences within 400 feet of either existing or applied-for locations of septic systems.

2. Appeal and Error— argument not raised at trial—not considered on appeal

An argument concerning the grounds for considering an affidavit in a summary judgment hearing was not addressed on appeal where plaintiffs objected at the hearing on different grounds. A contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court.

3. Civil Procedure— summary judgment—consideration of allegedly inadmissible affidavit—other evidence—no error

There was no error in the consideration of an affidavit at a summary judgment hearing where the affidavit may have constituted parol evidence. There is no indication that the court based its ruling solely on the affidavit and the court's decision is supported by competent evidence in the record.

Appeal by plaintiffs from order entered 2 February 2004 by Judge Ronald L. Stephens in Chatham County Superior Court. Heard in the Court of Appeals 26 January 2005.

Intellectual Property/Techology Law, by Steven J. Hultquist, for plaintiffs-appellants.

Bradshaw & Robinson, L.L.P., by Nicolas P. Robinson, for defendants-appellees.

TIMMONS-GOODSON, Judge.

Steven Hultquist and Debra Hultquist (collectively, "plaintiffs") appeal the entry of summary judgment in a declaratory judgment action construing a restrictive covenant. For the reasons discussed herein, we affirm the trial court order.

The facts and procedural history pertinent to the instant appeal are as follows: In 1998, plaintiffs became interested in purchasing a lot located in the Willowbend Plantation Subdivision ("Willowbend") in Chatham County. Due to the quality of the soil of the lots in Willowbend, above-ground septic disposal systems were required for each lot. According to Patrick A. O'Neal ("O'Neal"), president of the subdivision's developer, Chatham Development Corporation ("Chatham Development"), Chatham Development was required to apply for an above-ground septic disposal system permit for each lot prior to the sale of that lot. On 25 April 1998, plaintiffs paid Chatham Development $1,000.00 in order to obtain the fourth right of selection when the lots were sold. As part of their deposit, plaintiffs executed a Reservation Deposit form, in which plaintiffs indicated that they were "aware that each parcel will be pre-approved for septic by Chatham County Health Department or The State of North Carolina DEHNR."

In July 1998, plaintiffs selected lot 9 of Willowbend in the lottery sale conducted by Chatham Development. Chatham Development sited potential locations for each lot's above-ground septic disposal system, and, on 12 August 1998, Chatham Development filed applications with the North Carolina Department of Environment and Natural Resources, Division of Water Quality ("NCDENR/DWQ"), seeking approval of the proposed construction, location, and operation of an above-ground septic disposal system on plaintiffs' lot as well as on an adjacent lot, lot 8. At that time, lot 8 was still owned by Chatham Development.

On 26 August 1998, Chatham Development filed a restrictive covenant ("Willowbend Covenant") concerning the property contained within Willowbend. On 29 September 1998, plaintiffs closed

the sale of lot 9. On 31 December 1998, NCDENR/DWQ issued Chatham Development permit No. WQ0015717 for lot 8, and permit No. WQ0015718 for lot 9. The permits authorized the construction and operation of an above-ground septic system in the areas sought in the respective applications, and the permits stated that they were effective until 31 December 2003. Plaintiffs began construction of a residence on lot 9 in 2001, and they completed the construction in January 2002.

In early 2003, Dr. Michael Lish ("Lish") and Dr. Leslie Morrow ("Morrow") acquired lot 8 from Richard Cronheim ("Cronheim"), who had previously purchased lot 8 from Chatham Development. Lot 8 was empty when Lish and Morrow acquired it. On 15 April 2003, NCDENR/DWQ reissued permit No. WQ0015717 to Lish, the only modification being a change in the name of the individual to whom the permit was issued. The permit remained effective until 31 December 2003.

Lish and Morrow subsequently hired David Daniel Construction Company ("Daniel Construction") to serve as general contractor for the construction of a residence on lot 8. Shortly after construction began, plaintiffs, through the Architectural Review Committee of the Willowbend Homeowners Association, requested that Lish and Morrow reposition the proposed location of the above-ground septic disposal system on lot 8. According to the record, Lish and Morrow's above-ground septic system was to be installed approximately fifty feet from the common boundary line of lots 8 and 9, and approximately 148 feet from the corner of plaintiffs' residence. Plaintiffs contended that the placement of the septic system in the proposed location violated the Willowbend Covenant, which, plaintiffs further contended, prohibited the installation of septic systems within 400 feet of residences.

Lish and Morrow refused to reposition the proposed location of the septic system, and, on 10 November 2003, plaintiffs sought a declaratory judgment against Lish, Morrow, and Daniel Construction (collectively, "defendants"). In their declaratory judgment complaint, plaintiffs requested that the trial court prohibit defendants from placing the septic system within 400 feet of plaintiffs' residence. On 12 November 2003, plaintiffs filed a motion for preliminary injunction, and on 21 November 2003, defendants filed a motion for summary judgment, requesting that the trial court award judgment in their favor as a matter of law.

On 1 December 2003, defendants filed an answer to plaintiffs' declaratory judgment complaint. The trial court held a hearing on the matter, following which plaintiffs orally moved for summary judgment in their favor. On 2 February 2004, the trial court granted defendants' motion for summary judgment and denied plaintiffs' motion for a permanent injunction, thereby allowing defendants to install the septic system in the proposed location. Plaintiffs appeal.

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[1] The issue on appeal is whether the trial court erred by construing the Willowbend Covenant in favor of defendants.

"Summary judgment is appropriate in a declaratory judgment action where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law." *Early v. Bowen*, 116 N.C. App. 206, 208, 447 S.E.2d 167, 169 (1994). In the instant case, the trial court was asked only to determine as a matter of law whether the Willowbend Covenant prohibited defendants from installing the septic system in the proposed location.

Restrictive covenants are strictly construed, but they should not be construed "in an unreasonable manner or a manner that defeats the plain and obvious purpose of the covenant." *Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 521, 581 S.E.2d 94, 97 (2003). "[T]he fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967).

In the instant case, the Willowbend Covenant creates a seventy-five foot natural setback from the boundary lines of each lot, wherein no building or other structure may be placed. However, according to Article IV of the Willowbend Covenant, "[a]llowable exceptions to the natural setback area" include "activities required for the installation and maintenance of septic systems and wells." Article IV of the covenant further provides as follows:

> Lots may have aboveground septic disposal spray and drip systems. There shall be a variance in the setbacks for aboveground septic systems such that no Residential dwelling o[n] any Lot shall be located closer than 400 feet to said aboveground disposal system. Construction of any building within 400 feet of such a septic disposal system shall constitute a waiver of any rights or claims, at law or in equity, against any property owner or devel-

> oper; and acceptance of any building or parcel of land in violation of said 400 foot setback shall constitute a waiver of any rights or claims, at law or in equity, against any property owner or developer.

The parties disagree as to the effect of the above-quoted language. Plaintiffs contend that the covenant prohibits defendants from installing the septic system in the proposed location, because the installation would place the septic system within 400 feet of plaintiffs' residence. Defendants contend that the covenant prohibited plaintiffs from constructing their residence within 400 feet of the proposed septic system location.

After reviewing the Willowbend Covenant, we conclude that, in drafting the convenant, Chatham Development contemplated a distance of 400 feet separating all septic systems and residences in Willowbend. However, we further conclude that the language and terms of the restrictions used by Chatham Development to achieve this separation are ambiguous. The covenant clearly provides that when a residence is constructed within 400 feet of an above-ground septic system, the owner of the residence and all future owners of the residence waive any rights or claims against the owner of the septic system. However, the covenant contains no provision addressing the respective rights and claims of owners when one lot owner installs an above-ground septic system within 400 feet of another lot owner's residence. Plaintiffs' interpretation of the covenant requires this Court to add the term "existing" to Article IV, so that the covenant provides that "no Residential dwelling o[n] any Lot shall be located closer than 400 feet to said *existing* aboveground disposal system." Under plaintiffs' interpretation, property owners waive their rights and claims only when they construct "any building within 400 feet of such a[n] *existing* septic disposal system[.]" On the other hand, defendants' interpretation of the covenant requires this Court to add the terms "permitted" and "location" to Article IV, so that the covenant provides that "no Residential dwelling o[n] any Lot shall be located closer than 400 feet to said *permitted* aboveground disposal system *location*." Under this interpretation, property owners waive their rights and claims when they construct "any building within 400 feet of such a *permitted* septic disposal system *location*[.]"

It is well established that covenants restricting the free use of property are strictly construed against limitations upon such use. *Long*, 271 N.C. at 268, 156 S.E.2d at 239. " 'Such restrictions will not be aided or extended by implication or enlarged by construction to

affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply.' " *Id.* (quoting 20 Am. Jur. 2d, Covenants, Conditions and Restrictions § 187 (1965)). Therefore, because we are unable to add the pertinent language to the covenant necessary to satisfy either parties' interpretation, we must examine all the provisions of the instrument creating the restriction as well as " 'the surrounding circumstances existing at the time of the creation of the restriction' " in order to determine the effect of the covenant's terms. *Long*, 271 N.C. at 268, 156 S.E.2d at 239 (quoting V. Woerner, Annotation, *Maintenance, Use, or Grant of Right of Way Over Restricted Property As Violation of Restrictive Covenant*, 25 A.L.R. 2d 904, 905 (1952)).

As discussed above, the record reflects that on 12 August 1998, Chatham Development applied for above-ground septic system permits for each lot in Willowbend. On 26 August 1998, approximately two weeks after submitting the applications, Chatham Development filed the Willowbend Covenant with the Chatham County Register of Deeds. Defendants contend that these circumstances suggest that Article IV of the covenant was written with the intent to prevent lot owners from constructing residences within 400 feet of the applied-for locations of above-ground septic systems. We agree. Although the applied-for permits for these locations were not approved by NCDENR/DWQ until 31 December 1998, both the permit applications and the covenant were filed prior to plaintiffs' closing the sale of their lot. Furthermore, we note that when signing the Reservation Deposit form, plaintiffs indicated that they were "aware that each parcel will be pre-approved for septic by Chatham County Health Department or The State of North Carolina DEHNR." Plaintiffs' assent to this statement indicates a recognition on their part that, prior to each lot-owner's selection and subsequent purchase of a lot, Chatham Development would have applied for and received a permit for a specific septic system location on each lot.[1]

We note that in interpreting restrictive covenants, doubt and ambiguity are resolved in favor of the unrestricted use of property, " 'so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which

1. We recognize that with respect to plaintiffs' lot, Chatham Development was unable to maintain the "receipt" portion of this assurance. However, despite Chatham Development's failure to secure a permit prior to the close of the sale of plaintiffs' lot, the assurance contained in the Reservation Deposit remains clear—prior to the date of sale, each lot in the subdivision would have been tested and would contain a proposed location for its septic system.

extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.' " *Long*, 271 N.C. at 268, 156 S.E.2d at 239 (quoting 20 Am. Jur. 2d § 187). In the instant case, we conclude that the terms of the Willowbend Covenant and its surrounding circumstances suggest that the covenant should be interpreted to prohibit construction of a residence within 400 feet of an existing above-ground septic system as well as a proposed or permitted above-ground septic system location. Therefore, we hold that the trial court did not err in construing the terms of the Willowbend Covenant, and, accordingly, we overrule plaintiffs' first argument.

[2] Plaintiffs argue in the alternative that the trial court erred by considering O'Neal's affidavit. Plaintiffs assert that O'Neal's affidavit was inadmissible because it contains non-expert opinion and conclusions regarding the ultimate issue of fact in the case. However, we note that at the summary judgment hearing, plaintiffs objected to the introduction of O'Neal's affidavit only on the grounds that the affidavit constituted parol evidence. "As has been said many times, 'the law does not permit parties to swap horses between courts in order to get a better mount,' meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); *see Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002). Therefore, we decline to address the merits of this assertion.

[3] We note that on appeal, plaintiffs nevertheless reassert their contention that O'Neal's affidavit was inadmissible because it constitutes parol evidence. In general, " '[t]he parol evidence rule excludes prior or contemporaneous oral agreements which are inconsistent with a written contract if the written contract contains the complete agreement of the parties.' " *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 65, 344 S.E.2d 68, 74 (1986) (quoting *Cable TV, Inc. v. Theatre Supply Co.*, 62 N.C. App. 61, 64-65, 302 S.E.2d 458, 460 (1983)). In the context of restrictive covenants, our Supreme Court has stated that

> [o]rdinarily [the covenanting parties' intent] must be ascertained from the deed itself, but when the language used is ambiguous it is proper to consider the situation of the parties and the circumstances surrounding their transaction. However, this intention may not be established by parol. Neither the testimony nor the declarations of a party is competent to prove intent.

Stegall v. Housing Authority, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971); *see Runyon v. Paley*, 331 N.C. 293, 313, 416 S.E.2d 177, 191 (1992) ("[D]eclarations and testimony of the parties are not admissible to prove the covenanting parties' intent.").

In the instant case, O'Neal's affidavit was included in the memoranda and documents submitted to the trial court by defendants, and it contains statements regarding Chatham Development's intent in drafting the Willowbend Covenant. Although neither O'Neal nor Chatham Development are parties to the litigation, O'Neal's affidavit was introduced by defendants in an effort to establish their rights under the covenant. The affidavit contains statements regarding intent that tend to add to and vary the terms of the covenant. However, we note that "[w]hen parties waive a jury trial 'the rules of evidence as to admission and exclusion are not so strictly enforced as in a jury trial. . . . "[I]t is presumed that incompetent evidence was disregarded by the Court in making up its decision." ' " *Insurance Co. v. Shaffer*, 250 N.C. 45, 53, 108 S.E.2d 49, 54-55 (1959) (quoting *Bizzell v. Bizzell*, 247 N.C. 590, 604-05, 101 S.E.2d 668, 678 (1958) (citations omitted)). In the instant case, there is no indication that the trial court based its ruling solely upon O'Neal's affidavit, and, notwithstanding the statements of O'Neal's affidavit, the trial court's decision is supported by competent evidence in the record regarding the covenant and its surrounding circumstances. Accordingly, we overrule plaintiffs' final argument.

In light of the foregoing conclusions, we hold that the trial court did not err in granting summary judgment in favor of defendants. Thus, the trial court order is affirmed.

Affirmed.

Judges HUDSON and STEELMAN concur.

NASH-ROCKY MOUNT BOARD OF EDUCATION, PETITIONER v. THE ROCKY MOUNT BOARD OF ADJUSTMENT, RESPONDENT

No. COA04-290

(Filed 5 April 2005)

Zoning— parking lot—special use permit—local ordinance—statutory authority exceeded

A parking lot is not a building under the applicable version of N.C.G.S. § 160A-392, and the Board of Adjustment lacked jurisdiction to issue or deny a special use permit for a parking lot for school buses. The pre-amendment version of the statute referred to the use of buildings; while the Board of Adjustment argues that the Rocky Mount ordinance defines "building" to include "parking area," that ordinance is not applicable unless Rocky Mount has authority under the statute (a local entity cannot define the scope of a grant of authority from the General Assembly). The plain meaning of "building" in the statute did not include parking lots.

Appeal by respondent from judgment entered 7 November 2003 by Judge J. Richard Parker in Nash County Superior Court. Heard in the Court of Appeals 4 November 2004.

Valentine, Adams & Lamar, L.L.P., by L. Wardlaw Lamar and Lewis W. Lamar, Jr., for petitioner-appellee.

Hoyle & Stroud, L.L.P., by William S. Hoyle and Philip A. Lane, for respondent-appellant.

GEER, Judge.

Respondent Rocky Mount Board of Adjustment ("Board of Adjustment") appeals from the judgment of the trial court reversing the Board of Adjustment's decision to deny a special use permit to the Nash-Rocky Mount Board of Education for a school bus parking lot. Because we agree with the trial court that the Board of Adjustment lacked jurisdiction over the parking lot, we affirm.

Factual Background

In 2002, the Nash-Rocky Mount Board of Education ("the School Board") contacted the City of Rocky Mount about adding a parking lot for school buses at Rocky Mount Senior High School. The parking lot was necessary because of an increased number of buses at the

high school due to pupil reassignment and the need to relocate other schools' buses due to vandalism at those schools. The Rocky Mount Zoning Board told the School Board that it would need two permits: a driveway permit and a fence permit. Once it had obtained the permits, the School Board constructed the parking lot using a crushed gravel base with a chain link fence around the exterior.

Rocky Mount Senior High School is located next to residential neighborhoods. After the parking lot went into use, local residents began complaining of noise, dust, traffic congestion, and trash. In response to the complaints, the City of Rocky Mount informed the School Board that it would need to obtain a special use permit from the Board of Adjustment in order to continue operation of the parking lot.

The Board of Adjustment conducted a hearing on the School Board's request for a special use permit. Based on the testimony of two residents living near the parking lot, the Board of Adjustment concluded that the location of the school bus parking lot would adversely affect the surrounding properties and it would endanger the public health, safety, or general welfare of the neighborhood. For these reasons, the Board denied the request for a special use permit.

The School Board filed a petition for writ of certiorari with the Nash County Superior Court, which the court allowed. The trial court concluded that the Board of Adjustment lacked jurisdiction over the School Board's parking lot and, therefore, reversed the Board of Adjustment's decision and "remanded to the Board of Adjustment for the issuance to the Nash-Rocky Mount Board of Education of a special use permit for its school bus parking lot forthwith." The Board of Adjustment filed a timely appeal.

Discussion

Although "[t]he original zoning power of the State reposes in the General Assembly[,] [i]t has delegated this power to the 'legislative body' of municipal corporations." *Allred v. City of Raleigh*, 277 N.C. 530, 540, 178 S.E.2d 432, 437 (1971) (internal citation omitted). N.C. Gen. Stat. § 160A-381(a) (2003) sets out the authority of cities and towns to engage in zoning:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may regulate and restrict the height, number of stories and size of buildings and other

> structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes . . . .

Generally, municipal zoning regulations do not apply to the State or its political subdivisions unless the legislature has clearly expressed a contrary intent. *Davidson County v. City of High Point*, 85 N.C. App. 26, 37-38, 354 S.E.2d 280, 286, *modified on other grounds*, 321 N.C. 252, 362 S.E.2d 553 (1987). In North Carolina, the General Assembly has determined that a city or town may exercise its zoning power as to other governmental entities in the limited circumstances set forth in N.C. Gen. Stat. § 160A-392 (2003) (emphasis added): "All of the provisions of this Part [relating to zoning by cities and towns] are hereby made applicable to the *erection, construction, and use of buildings* by the State of North Carolina and its political subdivisions."[1]

The question presented by this case is, therefore, whether the parking lot located at Rocky Mount Senior High School falls within the grant of zoning power contained in N.C. Gen. Stat. § 160A-392. As the Supreme Court stated in *Allred*, 277 N.C. at 540, 178 S.E.2d at 437-38, "[t]he power to zone, conferred upon the 'legislative body' of a municipality, is subject to the limitations of the enabling act." *See also Heaton v. City of Charlotte*, 277 N.C. 506, 513, 178 S.E.2d 352, 356 (1971) ("A municipality has no inherent power to zone its territory and possesses only such power to zone as is delegated to it by the enabling statutes."). Accordingly, if the parking lot comes within the terms of N.C. Gen. Stat. § 160A-392, then the Board of Adjustment has jurisdiction to issue or deny a special use permit, but if the parking lot is outside the scope of the statute, then the Board of Adjustment has no jurisdiction over the parking lot. In making this determination, we note that "[s]tatutorily granted powers are to be strictly construed." *Davidson County*, 321 N.C. at 257, 362 S.E.2d at 557.

As both parties have agreed, the question whether the Board of Adjustment has jurisdiction in this case is determined by whether the parking lot is considered either a "building" or a "use of a build-

1. After the decision rendered by the Board of Adjustment in this case, N.C. Gen. Stat. § 160A-392 was amended, effective 1 October 2004, to read as follows: "All of the provisions of this Part are hereby made applicable to the erection, construction, and use of buildings *and land* by the State of North Carolina and its political subdivisions." (Emphasis added.)

ing" under the statute. We hold that the parking lot falls into neither category.

With respect to the definition of a "building," the Board of Adjustment first argues that it has jurisdiction because the Rocky Mount Zoning Ordinance defines the word "building" to include a "parking area." This argument places the cart before the horse. The Rocky Mount Zoning Ordinance (and its definitions) cannot become applicable until after a determination that Rocky Mount had the authority to zone with respect to the parking lot under N.C. Gen. Stat. § 160A-392. A local entity cannot define the scope of the authority granted to it by the General Assembly. *See Davidson County*, 321 N.C. at 259, 362 S.E.2d at 558 ("In short, the County may not use [a condition to issuance of a permit] to impose limitations outside the scope of its statutory authority.").

We must determine whether *the General Assembly* intended to include a parking lot within the scope of the word "building." "It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise." *State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967), *cert. denied*, 390 U.S. 1028, 20 L. Ed. 2d 285, 88 S. Ct. 1418 (1968).

In *Davidson County*, 85 N.C. App. at 38, 354 S.E.2d at 286, this Court construed the word "building" as used in N.C. Gen. Stat. § 138A-347 (2003)—a statute identical to N.C. Gen. Stat. § 160A-392 with the exception that it applies to counties and not cities.[2] Except for *Davidson County*, we can find no other case that has defined "building" as that term is used in North Carolina's zoning statutes. This Court in *Davidson County* found a "building" to be a:

> "[s]tructure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like. A structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof."

Id., 354 S.E.2d at 287 (quoting *Black's Law Dictionary* 176 (5th ed. 1979)).

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2. Although the Supreme Court affirmed the result of the decision of this Court on different grounds, it "express[ed] no opinion as to the correctness of the Court of Appeals' conclusion" regarding the proper construction of the zoning statutes. *Davidson County*, 321 N.C. at 256, 362 S.E.2d at 556.

The dictionary definition of "building" is:

> a constructed edifice designed to stand more or less permanently, covering a space of land, usu. covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure—distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy.

Webster's Third New Int'l Dictionary 292 (1968). *See also Black's Law Dictionary* 207 (8th ed. 2004) (defining "building" as "[a] structure with walls and a roof, esp. a permanent structure").

No matter whether we use the definition of "building" adopted by the court in *Davidson County* or the dictionary definition, it is apparent that the plain meaning of the word "building" does not encompass a parking lot. A parking lot is not a structure; it has no roof, walls, or any other kind of permanent, immovable features apart from a fence. Put simply, a parking lot is an open air space used to temporarily park automobiles and buses. It in no way resembles a building. *See* David W. Owens, *Legislative Zoning Decisions: Legal Aspects* 253 n.63 (2nd ed. 1999) ("In some limited circumstances zoning does not affect a city, county, or state government use. For example, because a 'building' is required to trigger application of zoning, and given that 'land uses' per se are not covered, an open-air use of land without a building would not be subject to local zoning. A landfill or parking area might fit this situation.").

The Board of Adjustment argues alternatively that since a parking lot is necessary in order to use the school, the parking lot falls within the "use of buildings" language contained in N.C. Gen. Stat. § 160A-392. The Board of Adjustment asserts that the zoning provisions apply to more than just actual physical structures owned by the State. It argues that the phrase "use of buildings" means that the surrounding land used in conjunction with the actual building is also covered in the grant of jurisdictional power in the zoning act. According to the Board of Adjustment, since the parking lot is land adjoining the school building and is necessary for the School Board to fully use that building, the parking lot falls under the jurisdictional grant in N.C. Gen. Stat. § 160A-392. We disagree.

"In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is

accomplished." *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). Although we have found no North Carolina decision addressing the meaning of the word "use" within zoning statutes, the South Carolina Court of Appeals has addressed precisely that issue and observed: "As it is conventionally applied, the term 'use' is the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." *Heilker v. Zoning Bd. of Appeals*, 346 S.C. 401, 407, 552 S.E.2d 42, 45 (S.C. Ct. App. 2001) (internal quotation marks omitted). *See also* 83 Am. Jur. 2d *Zoning and Planning* § 156 (2003) ("The term 'use' as employed in the context of zoning, is generally described as a word of art denoting the purpose for which a parcel of land or building is utilized."); Owens, *supra*, at 8 ("Every [zoning] ordinance is different: each local government decides how many zoning districts it wants, what to call them, *what uses to allow*, and what special procedures to include." (emphasis added)).

A review of North Carolina's zoning statutes supports our conclusion that the General Assembly intended the word "use" in the conventional zoning sense: as relating to the purpose for which the building was constructed. *See Brown v. Flowe*, 349 N.C. 520, 523-24, 507 S.E.2d 894, 896 (1998) ("When multiple statutes address a single subject, this Court construes them *in pari materia* to determine and effectuate the legislative intent."). The initial grant of power in N.C. Gen. Stat. § 160A-381(a) permits regulation of the "use of buildings, structures and land for trade, industry, residence or other purposes." N.C. Gen. Stat. § 160A-382 (2003) provides that, in exercising that power, the city may divide its territorial jurisdiction into districts and, among other things, regulate the "use of buildings, structures, or land." The section then specifies:

> Such districts may include, but shall not be limited to, *general use districts, in which a variety of uses are permissible* in accordance with general standards; overlay districts, in which additional requirements are imposed on certain properties within one or more underlying general or special use districts; and *special use districts or conditional use districts, in which uses are permitted only upon the issuance of a special use permit or a conditional use permit.*

(Emphasis added.) In these sections, "use" can only mean "purpose." Similarly, in the remedy section, N.C. Gen. Stat. § 160A-389 (2003), the city is authorized "to prevent any illegal act, conduct, business or use in or about the premises," suggesting that "use" refers to a particular

activity. In sum, these provisions indicate an intent to permit zoning regulation of the purpose or activity for which a building, structure, or land is being utilized—in other words, the conventional meaning of the word "use" when dealing with zoning statutes. N.C. Gen. Stat. § 160A-392 should be construed consistently.

Accordingly, N.C. Gen. Stat. § 160A-392 permits a municipality to regulate the purpose for which the State or other political subdivision utilizes a building. As in effect at the time of the underlying events, the statute did not give the municipality jurisdiction to regulate land simply because it was utilized in connection with the building. *See also Davidson County*, 321 N.C. at 257, 362 S.E.2d at 557 ("A county has the power to impose reasonable zoning requirements *on buildings* operated by certain other governmental units within its boundaries." (emphasis added)).

Defendant relies upon *Yancey v. Heafner*, 268 N.C. 263, 150 S.E.2d 440 (1966) to support its theory that zoning regulations should not be limited simply to the buildings themselves. *Yancey*, however, addressed the question whether a Board of Adjustment properly granted a *building permit* for the construction of a 4,000 foot stadium. *Id.* at 265, 150 S.E.2d at 442. *Yancey* does not consider whether a municipality has jurisdiction to zone government-owned land apart from buildings.

Therefore, because the parking lot is not a "building" under the applicable version of N.C. Gen. Stat. § 160A-392, we hold that the Board of Adjustment lacked jurisdiction to issue or deny a special use permit concerning that land and affirm that portion of the trial court's order. The trial court, however, also "remanded to the Board of Adjustment for the issuance to the Nash-Rocky Mount Board of Education of a special use permit for its school bus parking lot forthwith." Since the Board of Adjustment had no authority over the parking lot, there is no need for issuance of a special use permit. That portion of the order of the trial court directing the issuance of a special use permit is, therefore, reversed. The remaining portion of the trial court's order is affirmed.

Affirmed in part and reversed in part.

Judges TIMMONS-GOODSON and TYSON concur.

ROBERT BEAMER, PLAINTIFF v. GRACE McKAY BEAMER (NOW ROAKES), DEFENDANT

No. COA04-263

(Filed 5 April 2005)

1. **Child Support, Custody, and Visitation— support—modification—children's reasonable needs—findings not sufficient**

   A child support modification was reversed and remanded where the court did not make the necessary findings about the children's reasonable needs. Although the court found that the needs of the children had not changed, the court made no finding, and the record contained no indication, of what those expenses had been. It is not enough that the court received testimony and documentation from which sufficient findings could have been made.

2. **Child Support, Custody, and Visitation— support—award in excess of Guidelines—findings insufficient**

   The trial court made insufficient findings to support an award in excess of the Child Support Guidelines where the Court of Appeals could only speculate on how the trial court reached its figure and whether it was supported by competent evidence.

Appeal by plaintiff from order entered 30 October 2003 by Judge Ben S. Thalheimer in Mecklenburg County District Court. Heard in the Court of Appeals 13 October 2004.

Knox, Brotherton, Knox & Godfrey, by Peter E. McArdle, for plaintiff-appellant.

Karro, Sellers & Langson, by Julia S. Scheer, for defendant-appellee.

GEER, Judge.

Plaintiff Robert Beamer appeals from the trial court's order modifying the amount of child support he was required to pay defendant Grace McKay Roakes. We remand for further findings of fact because the trial court's decision to deviate from the North Carolina Child Support Guidelines ("the Guidelines") is not supported by specific findings of fact as to (1) the reasonable needs of the children and (2) the basis for the amount of child support ultimately awarded.

Facts

Plaintiff and defendant were married on 1 July 1989, but separated on 1 December 1999. They are the parents of two minor children. Plaintiff and defendant entered into a Separation Agreement and Property Settlement on 14 February 2001. This agreement was incorporated into the parties' divorce judgment on 20 August 2001. In the separation agreement, the parties agreed that plaintiff's monthly child support payments would be $1,575.00, an amount computed by applying the Guidelines to plaintiff's gross income of $9,693.00 per month and defendant's gross income of $1,500.00 per month, as stated on the parties' 1999 tax returns. In addition to the basic child support obligation, plaintiff agreed in the separation agreement to be responsible for the children's private school tuition.

On 31 December 2002, the parties entered into a consent order that increased plaintiff's visitation with the children. On 26 February 2003, plaintiff filed a Motion to Modify Child Support pursuant to N.C. Gen. Stat. § 50-13.7 (2003). In his motion, plaintiff alleged a substantial change in circumstances due to (1) "a substantial and involuntary decrease in his income" and (2) the fact that plaintiff had, because of increased visitation, assumed a greater financial responsibility for the children outside of his child support payments. Plaintiff argued that child support should be computed using his current income amount and Worksheet B of the Guidelines (addressing joint or shared custody).

On 30 October 2003, the trial court entered an order agreeing that plaintiff's reduction in income constituted a substantial change in circumstances. After determining that application of Worksheet B of the Guidelines would result in a monthly child support payment of $597.53, the court found that this amount would not meet the reasonable needs of the children and awarded instead $1,110.00 per month. Plaintiff timely appealed from this order.

Discussion

In North Carolina, child support orders are not permanent and may be modified upon a showing of a substantial change in circumstances. N.C. Gen. Stat. § 50-13.7(a) ("An order of a court of this State for support 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 . . . ."); *Mittendorff v. Mittendorff*, 133 N.C. App. 343, 344, 515 S.E.2d 464, 465 (1999) ("Child support orders may be modified only upon a showing of substantial changed

circumstances."). These principles apply equally to child support agreements between the parties that have been incorporated into a court order. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) (separation agreements approved by the trial court "are modifiable . . . in the same manner as any other judgment in a domestic relations case"); *Tyndall v. Tyndall*, 80 N.C. App. 722, 723, 343 S.E.2d 284, 284 ("When the parties' child support agreement was incorporated into the divorce judgment it became an order of court that is modifiable only as other judgments involving child custody and support are modifiable."), *disc. review denied*, 318 N.C. 420, 349 S.E.2d 606 (1986).

In this case, the parties' separation agreement was incorporated into the parties' Amended Judgment of Divorce filed 20 August 2001. Thus the child support provisions could only be modified upon a showing of a substantial change of circumstances.

The trial court determined that "[p]laintiff has sustained a substantial reduction in income" and "[t]his reduction in income constitutes a substantial change in circumstances since August 20, 2001, and justifies modification of this Court's prior Order." *See McGee v. McGee*, 118 N.C. App. 19, 27, 453 S.E.2d 531, 536 (a " 'substantial and involuntary decrease in the income of a non-custodial parent [may], as a matter of law, constitute a substantial change of circumstances authorizing the court to modify a prior order by reducing child-support payments' " (quoting *Pittman v. Pittman*, 114 N.C. App. 808, 810, 443 S.E.2d 97 (1994))), *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995). Defendant has not appealed from this aspect of the trial court's ruling and it is, therefore, binding on appeal.

Once a substantial change in circumstances has been shown by the party seeking modification, the trial court then "proceeds to follow the Guidelines and to compute the appropriate amount of child support." *Davis v. Risley*, 104 N.C. App. 798, 800, 411 S.E.2d 171, 173 (1991). *See also Brooker v. Brooker*, 133 N.C. App. 285, 290, 515 S.E.2d 234, 238 (1999) (after finding a change of circumstances, "the trial court should compute the appropriate amount of child support pursuant to the Guidelines then in effect" (internal quotation marks omitted)). Child support set in accordance with the Guidelines "is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support." *Buncombe County ex rel. Blair v. Jackson*, 138 N.C. App. 284, 287, 531 S.E.2d 240, 243 (2000).

If a trial court decides to deviate from the Guidelines, it must follow a four-step process:

> First, the trial court must determine the presumptive child support amount under the Guidelines. Second, the trial court must hear evidence as to the reasonable needs of the child for support and the relative ability of each parent to provide support. Third, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate. Fourth, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the child or would be otherwise unjust or inappropriate.

Sain v. Sain, 134 N.C. App. 460, 465-66, 517 S.E.2d 921, 926 (1999) (internal citations and quotation marks omitted).

A trial court's deviation from the Guidelines is reviewed under an abuse of discretion standard. *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998). Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law. *Id.* at 441-42, 567 S.E.2d at 837.

Here, the trial court first found that plaintiff's monthly support obligation would equal $597.53 under the Guidelines. The court next concluded:

> By the greater weight of the evidence, the application of the North Carolina Child Support Guidelines would not meet the reasonable needs of the minor children considering the relative ability of each parent to provide support and would otherwise be unjust or inappropriate in that the parties contemplated a level of

> support in excess of the support guidelines when entering into their Separation Agreement Property Settlement [sic] in February of 2001, and at the time the Agreement was incorporated as an order of this Court on or about August 20, 2001.

The court then modified plaintiff's monthly child support from $1,575.00 to $1,110.00.

[1] Plaintiff first contends that the trial court erred by failing to make any findings regarding the reasonable needs of the children. On this issue, the trial court made only the following findings of fact:

> 15. Plaintiff . . . maintains major medical and hospitalization coverage for the benefit of the children at a cost of $180 per month. . . .
>
> . . . .
>
> 17. The needs of the minor children have not significantly changed since the entry of the August 20, 2001 Order, but the Plaintiff's income has been substantially reduced from the $9,693 per month figure upon which Plaintiff's current level of child support responsibility is based. Plaintiff's current average monthly income (based upon sales commissions as a real estate broker) for 2003 is approximately $5,416 per month.
>
> 18. The minor children may benefit from their attendance at an area private Catholic school as originally agreed upon between the parties, but the children do not have special education needs which require their attendance at a private school.
>
> 19. The reasonable needs of the minor children have not materially changed since August of 2001.

We agree with plaintiff that these findings of fact are not sufficient.

In finding " 'the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support,' " the trial court must consider " '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.' " *Fisher*, 131 N.C. App. at 645, 507 S.E.2d at 594 (quoting N.C. Gen. Stat. § 50-13.4(c),

(c1)). These "factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines." *Gowing v. Gowing*, 111 N.C. App. 613, 618, 432 S.E.2d 911, 914 (1993).

In this case, the trial court's findings of fact only address health insurance costs and the lack of any need for private school. The order contains no specific findings of fact regarding the children's maintenance or additional health and educational expenses. Although the trial court found that the children's needs had not changed, the court made no finding—and the record contains no indication—of what those expenses had been previously. Without knowing what the children's reasonable expenses are, we cannot review the trial court's decision to deviate from the Guidelines or the amount ultimately awarded. *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (holding that without sufficient factual findings regarding the amount of support necessary to meet the reasonable needs of the child, an appellate court has no means of determining whether the order is adequately supported by competent evidence).

Defendant argues, however, that the trial court heard testimony and received documentation detailing the reasonable needs of the children. Nevertheless, our Supreme Court has stressed that "[i]t is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it . . . ." *Id.* Because the trial court failed to include the necessary findings of fact regarding the children's reasonable needs, this Court must reverse and remand for further proceedings. *Brooker*, 133 N.C. App. at 291, 515 S.E.2d at 239 (remanding because the trial court's order deviating from the Guidelines did not include sufficient findings regarding the reasonable needs of the children). *See also* 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 10.15 (5th ed. 1999) ("If the trial court fails to make findings regarding the child's reasonable needs, it cannot determine whether the application of the guidelines would not meet the reasonable needs of the child, and deviation is improper.").

[2] Plaintiff also contends that the trial court erred in failing to provide an explanation for its award of $1,110.00, an amount $500.00 in excess of the amount prescribed by the Guidelines. While this amount may have a logical basis, the court's order does not reflect how the court reached that figure. Although an amount of child support under the Guidelines is presumptively correct, "when the trial court deviates from the presumptive guidelines, it 'shall make findings of fact as

to the criteria that justify . . . the basis for the amount ordered.' " *State ex. rel. Horne v. Horne*, 127 N.C. App. 387, 390, 489 S.E.2d 431, 433 (1997) (quoting N.C. Gen. Stat. § 50-13.4(c) (1995)).

Defendant argues that the $1,110.00 figure comes from the new amount of support under the Guidelines ($597.00) plus the approximate amount that plaintiff had been paying to cover the children's private school expenses ($510.00). There is, however, nothing in the record to indicate that defendant's proposed calculation was in fact the basis for the award or, if so, why such a calculation was considered justified by the trial court. Because the current order leaves us to speculate how the trial court reached its figure and whether it was supported by competent evidence, the trial court on remand should ensure that it explains the basis for the amount ultimately awarded. *Id.* (remanding for failure to include "sufficient findings of fact to support the *amount* of child support awarded").

Remanded.

Judges CALABRIA and STEELMAN concur.

STACY CUNNINGHAM, PLAINTIFF v. JAMES RILEY, SR., IN HIS CAPACITY AS A MECKLENBURG COUNTY DEPUTY SHERIFF, JAMES PENDERGRAPH, SHERIFF OF MECKLENBURG COUNTY, DEFENDANTS

No. COA04-806

(Filed 5 April 2005)

1. Immunity— sovereign—waiver—loss exceeding $250,000

The claims of a plaintiff who alleged that he was assaulted by a deputy while an inmate in the Mecklenburg County jail were barred by sovereign immunity unless the total loss exceeded a self-insured retention of $250,000. Mecklenburg County had purchased insurance for a total loss exceeding $250,000, including the verdict, plaintiff's costs, and defendant's costs.

2. Pleadings— motion to amend—42 U.S.C. § 1983—requirements

The trial court did not abuse its discretion by denying plaintiff's motion to amend the pleadings after the verdict to add a claim under 42 U.S.C. § 1983 where plaintiff alleged that he had been assaulted by a deputy while an inmate in the Mecklenburg

County jail. The claim against the deputy in his official capacity constituted a respondeat superior suit against the county and local government liability under 42 U.S.C. § 1983 cannot be based on a theory of respondeat superior. Moreover, a 42 U.S.C. § 1983 claimant must show that the local government had in effect a policy or custom to which the injury could be attributed, which this plaintiff did not do. Nor was this issue submitted to the jury.

3. Costs— civil assault—favorable verdict—attorney fees

The trial court did not err by denying plaintiff's motion for attorney fees following a favorable jury verdict in a civil assault case. Absent a separate authorizing statute, not found here, a successful litigant cannot recover attorney fees.

4. Costs— assistants and support staff—not allowed

The trial court did not err by denying a successful plaintiff costs for legal assistants and administrative support staff. These are not listed as recoverable expenses under N.C.G.S. § 7A-305(d) and there is no logical reason to find that these costs are recoverable when attorney fees are not generally recoverable.

Appeal by plaintiff from judgment entered 4 November 2003 by Judge Richard Doughton in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 February 2005.

Pamela A. Hunter for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Scott D. MacLatchie, for defendants-appellees.

STEELMAN, Judge.

On 2 November 1997, while an inmate at the Mecklenburg County jail, plaintiff was assaulted by James Riley, Sr. (Riley). Riley was deputy sheriff of Mecklenburg County when he assaulted plaintiff. Plaintiff initiated this lawsuit against Riley, James Pendergraph, the Sheriff of Mecklenburg County, and Mecklenburg County, seeking damages for the injuries he sustained as a result of the assault. During the course of the litigation the trial court dismissed the claims against all parties named in the amended complaint except for Riley in his official capacity as a Mecklenburg County Deputy Sheriff.

Trial was held at the 18 August 2003 session of superior court. The only issues submitted to the jury were whether Riley committed

an assault and battery upon the plaintiff, and if so, what amount of money was plaintiff entitled to recover as damages for personal injuries. The jury returned a verdict in favor of plaintiff in the amount of $49,500.00. Following the verdict, the parties made several post-verdict motions. The trial court (1) denied plaintiff's motion to amend his pleading to add a claim under 42 U.S.C. § 1983 and seek recovery of attorney's fees under 42 U.S.C. § 1988; (2) granted in part and denied in part plaintiff's motion for costs; and (3) held that plaintiff's claims were barred under the doctrine of sovereign immunity. Plaintiff appeals.

Sovereign Immunity

[1] Mecklenburg County purchased insurance covering the acts of the employees of the Mecklenburg County Sheriff's Department. A suit against a sheriff's deputy in his official capacity constituted a suit against the county, thus triggering this insurance coverage. *See Kephart v. Pendergraph*, 131 N.C. App. 559, 563, 507 S.E.2d 915, 918 (1998). However, this coverage was limited. A claim was not covered under the insurance policy unless the total loss, including the amount of the verdict, plaintiff's costs, and defendant's costs, when added together, exceeded defendant's $250,000.00 self-insured retention. The jury awarded plaintiff $49,500.00, the trial court awarded plaintiff $1,750.00 in costs, and defendant's costs for defending the action were $129,046.13. When added together, the total amount was $180,296.13. Since this was less than $250,000.00, the trial court concluded defendant had not waived sovereign immunity, and plaintiff was precluded from recovering the amount of the verdict or costs.

The doctrine of sovereign immunity generally bars recovery in actions against deputy sheriffs sued in their official capacity. *Id.* A county may waive sovereign immunity by purchasing liability insurance, but only to the extent of coverage provided. N.C. Gen. Stat. § 153A-435(a) (2004). In *Kephart*, this Court analyzed the effect of a self-insured retention provision on a plaintiff's right to recover in a case arising out of the same county and the same sheriff's department at issue in this case. The amount of the county's self-insured retention in *Kephart* was $100,000.00 and the policy limit was $2,750,000.00. This Court determined the county had not waived their sovereign immunity for claims up to $100,000.00, although it did waive immunity for claims in excess of that amount. As a result, to the extent there was a self-insured retention, the county did not waive its sovereign immunity. *Kephart*, 131 N.C. App. at 564, 507 S.E.2d at 918-19.

See also Wilhelm v. City of Fayetteville, 121 N.C. App. 87, 89, 464 S.E.2d 299, 300 (1995) (holding there was no waiver of governmental immunity by the city in being self-insured for claims up to $250,000.00, although immunity was waived for amounts in excess thereof because of purchase of liability insurance policies covering such amounts). The same issue that was litigated in *Kephart*, is at issue here, and we are bound by the holding in *Kephart. In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). In order for plaintiff to recover, the total loss must exceed the county's $250,000.00 self-insured retention. Plaintiff's claims are barred by the doctrine of sovereign immunity unless the total loss exceeded $250,000.00[1].

The remaining issues discussed in this opinion deal with plaintiff's attempts to recover costs in addition to the amount of the jury award in order to bring the total loss to a sum in excess of $250,000.00.

42 U.S.C. § 1983

[2] Plaintiff contends the trial court erred in denying his motion to amend the pleadings to add a claim under 42 U.S.C. § 1983 and to seek recovery of attorney's fees under 42 U.S.C. § 1988. We disagree.

Following the jury's verdict, plaintiff made a motion pursuant to Rule 15(b) of the North Carolina Rules of Civil Procedure, seeking leave to amend his complaint to add a cause of action against defendant under 42 U.S.C. § 1983. The trial court's ruling on a motion to amend will not be overturned absent a clear showing of abuse of discretion. *Harrold v. Dowd*, 149 N.C. App. 777, 785, 561 S.E.2d 914, 920 (2002). The trial court may deny leave to amend where such amendment would be futile. *Id.* at 785-86, 561 S.E.2d at 920.

The only defendant that remained in this action at trial was Riley, in his official capacity as a deputy sheriff. Plaintiff argued that both parties consented to a jury instruction on assault and battery that incorporated language from *Myrick v. Cooley*, 91 N.C. App. 209, 371 S.E.2d 492 (1988). This language discussed the legal standard for determining whether a police officer exceeded the limits of privileged force for purposes of liability. *Id.* at 215-16, 371 S.E.2d at 496. Plaintiff contends that by agreeing to include this language in the jury charge,

1. To the extent of the $250,000.00 self-insured retention, plaintiff could recover only if Mecklenburg County adopted a resolution pursuant to Chapter 980 of the 1988 Session Laws. The record in this case is devoid of any such resolution.

defendant impliedly consented to submit a 42 U.S.C. § 1983 cause of action to the jury.

Plaintiff contends that a sheriff and his deputies are "persons" within the meaning of 42 U.S.C. § 1983, and thus subject to suit under that provision. We need not decide this issue, as other grounds exist to support the trial court's ruling that permitting plaintiff to amend his complaint to add a cause of action under 42 U.S.C. § 1983 would be futile. In *Monell v. New York City Dep't of Soc. Serv.*, the United States Supreme Court held that while a local governmental body could be sued under § 1983, its liability could not be based upon a theory of *respondeat superior*. 436 U.S. 658, 56 L. Ed. 2d 611 (1978). The official capacity claim against Riley as deputy sheriff constituted a suit against the local governmental entity, the county, under the theory of *respondeat superior*. *Boyd v. Robeson County*, — N.C. App. —, —, — S.E.2d —, — (2005) (COA03-1222) (relying on *Kentucky v. Graham*, 473 U.S. 159, 165-66, 87 L. Ed. 2d 114, 121 (1985) which stated "Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent").

Furthermore, in order for a plaintiff to recover under 42 U.S.C. § 1983, he must show the local government had in effect a policy or custom, "whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy" to which the injury could be attributed. *Monell*, 436 U.S. at 694, 56 L. Ed. 2d at 638. Plaintiff failed to present any evidence that Riley acted pursuant to a municipal policy or custom, or committed the act while in the role of the municipality's final policymaker on that subject. Nor was this issue submitted to the jury for disposition. Consequently, the trial judge did not abuse his discretion in denying plaintiff's motion to amend his complaint to add a cause of action under 42 U.S.C. § 1983, as such an amendment would have been futile. This assignment of error is without merit.

Costs

[3] Plaintiff next contends the trial court erred in denying his motion for costs and expenses, including attorney's fees, following a favorable jury verdict. We disagree.

N.C. Gen. Stat. § 6-18 requires the trial court to award costs to the prevailing plaintiff in an action for assault or battery. N.C. Gen. Stat. § 6-18(3) (2004). The costs to be awarded under N.C. Gen.

Stat. § 6-18 are limited to the costs specifically listed in N.C. Gen. Stat. § 7A-305(d). *Dep't of Transp. v. Charlotte Area Mfd. Housing, Inc.*, 160 N.C. App. 461, 469, 586 S.E.2d 780, 785 (2003), and those awarded in the trial court's discretion under N.C. Gen. Stat. § 6-20. *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 734, 596 S.E.2d 891, 895 (2004).

In analyzing whether the trial court properly assessed costs, we must undertake a three-step analysis. First, we must determine whether the cost sought is one enumerated in N.C. Gen. Stat. § 7A-305(d); if so, the trial court is required to assess the item as costs. *Id.* Second, where the cost is not an item listed under N.C. Gen. Stat. § 7A-305(d), we must determine if it is a "common law cost" under the rationale of *Charlotte Area. Id.* (defining " 'common law' costs as being those costs established by case law prior to the enactment of N.C. Gen. Stat. § 7A-320 in 1983"). Third, if the cost sought to be recovered is a "common law cost," we must determine whether the trial court abused its discretion in awarding or denying the cost under N.C. Gen. Stat. § 6-20. *Id.*

In this case, plaintiff seeks recovery for costs related to (1) attorney's fees, (2) legal assistant and administrative support staff, (3) depositions and deposition related expenses, (4) expert witness fees, (5) copy expenses, (6) reproductions of videotapes, (7) "miscellaneous expenses (telephone bill, etc.)" (7) mailing costs, (8) transcript costs, (9) mediator fee, and (10) service of process.

A. Attorney's Fees

A prevailing party may not recover attorney's fees as damages or as part of the court costs in the absence of some contractual obligation or statutory authority. *Bailey v. State of North Carolina*, 348 N.C. 130, 159, 500 S.E.2d 54, 71 (1998); *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 570, 551 S.E.2d 852, 856 (2001). Plaintiff points to N.C. Gen. Stat. § 7A-305(d)(3), which states that "[t]he following expenses, when incurred, are also assessable or recoverable, as the case may be: . . . (3) Counsel fees, as provided by law[,]" as providing the statutory authority authorizing the trial court to award attorney's fees. This is an incorrect reading of the statute, as the provision does not merely read that the successful litigant is entitled to "counsel fees," but modifies that by stating, "as provided by law." Absent a separate statute authorizing the award of attorney's fees, such as N.C. Gen. Stat. § 6-21.1, a successful litigant cannot recover attorney's fees. *See Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 12-13,

545 S.E.2d 745, 754 (2001). Plaintiff has not cited any statute, nor do we find any authority allowing the trial judge to award attorney's fees to the prevailing party in a civil assault case, nor were they allowed at common law. The trial court did not err in denying plaintiff's motion for attorney's fees.

B. Legal Assistants and Administrative Support Staff

[4] We next address the costs attributable to legal assistants and administrative support staff. These costs are not listed as a recoverable expense under N.C. Gen. Stat. § 7A-305(d). Further, if attorney's fees are generally not a recoverable cost, there is no logical reason for us to find the costs attributable to an attorney's legal assistants and administrative support staff would be recoverable. There is no statutory authority authorizing the recovery of these costs, nor can we find any authority that they were allowed under the common law. The trial court did not err in denying plaintiff recovery of these costs.

C. Remaining Costs

Since plaintiff is not entitled to recover attorney's fees or costs associated with the attorney's legal assistants or administrative support staff, we need not discuss whether the trial court erred in denying plaintiff recovery of the remaining costs. Even if plaintiff was entitled to recover all of the other costs which he appeals, those costs combined with plaintiff's jury award and defendant's costs would not exceed $250,000.00, the amount of defendant's self-insured retention. As a result, plaintiff has failed to prove defendant waived his sovereign immunity and is barred from any recovery. We need not address plaintiff's remaining arguments.

For the reasons discussed herein, we affirm the trial court's rulings.

AFFIRMED.

Judges WYNN and HUDSON concur.

MANUEL DAVIS, EMPLOYEE, PLAINTIFF-APPELLANT v. GREAT COASTAL EXPRESS, EMPLOYER, DEFENDANT-APPELLEE, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANT-APPELLEE

No. COA04-439

(Filed 5 April 2005)

1. Workers' Compensation— truck driver—jurisdiction

The Industrial Commission did not have jurisdiction to hear the workers' compensation claim of a truck driver who made pick-ups and deliveries across the eastern part of the United States for a company based in Virginia, who received his instructions over a computer in a company truck, who lived in North Carolina, and who was injured in a traffic accident in South Carolina.

2. Workers' Compensation— truck driver—jurisdiction—finding

In a workers' compensation case in which the issue was jurisdiction, competent evidence supports the Industrial Commission finding that plaintiff was in the middle of existing trips when he returned home to North Carolina and was not dispatched from his residence.

Appeal by plaintiff from opinion and award entered 2 December 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 December 2004.

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

Mullen Holland & Cooper P.A., by James R. Martin, for defendants-appellees.

McGEE, Judge.

Manuel Davis (plaintiff), an employee of Great Coastal Express (defendant), was injured in a motor vehicle accident in the course and scope of his employment on 12 July 1999. Defendant hired plaintiff in April 1999 as an over-the-road truck driver and issued him a company truck. Plaintiff's duties included making pick-ups and deliveries across the eastern part of the United States. Plaintiff normally had two days off every two weeks, during which he returned to his home in Enka, North Carolina. Defendant's headquarters was located in Chester, Virginia. Plaintiff received instructions from defendant for

pick-ups or deliveries over a QualCom computer system installed in plaintiff's company truck.

On the day of the accident, plaintiff left his home in Enka, made deliveries in Winston-Salem and Charlotte, and then drove into South Carolina to make a delivery. In Gaffney, South Carolina, a vehicle crossed the highway median and collided with plaintiff's truck. Plaintiff suffered injuries and post traumatic stress disorder. Plaintiff filed for worker's compensation in North Carolina on 28 July 1999. Defendant denied plaintiff's workers' compensation claim on grounds that the North Carolina Industrial Commission (the Commission) did not have jurisdiction over plaintiff's workers' compensation claim.

A commissioner, acting as the initial hearing officer, issued an interlocutory opinion and award on 26 April 2001, finding that the Commission had jurisdiction over plaintiff's claim. In an opinion and award entered 11 June 2002, a deputy commissioner awarded plaintiff temporary total disability benefits, medical expenses, and attorney's fees. Defendant appealed to the Commission, which reversed the deputy commissioner's opinion, finding that the Commission did not have jurisdiction over plaintiff's claim because Virginia, not North Carolina, was plaintiff's principal place of employment. Plaintiff appeals.

N.C. Gen. Stat. § 97-36 provides:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him . . . to compensation if it had happened in this State, then the employee . . . shall be entitled to compensation (i) if the contract of employment was made in this State, (ii) if the employer's principal place of business is in this State, or (iii) if the employee's principal place of employment is within this State[.]

N.C. Gen. Stat. § 97-36 (2003). Because plaintiff's accident occurred in South Carolina, North Carolina has jurisdiction over plaintiff's workers' compensation claim only if one of the three provisions in N.C.G.S. § 97-36 applies.

Plaintiff did not contest that the employment contract was not made in North Carolina, nor that defendant's principal place of business was not in North Carolina. Therefore, the issue before the Commission was whether North Carolina was plaintiff's principal place of employment. The Commission found as fact and concluded

as law that "plaintiff [could not] meet the third circumstance as his principal place of employment was in Virginia, not North Carolina."

[1] Plaintiff first argues the Commission erred in this conclusion of law. Generally, our Court's review of an opinion and award of the Commission is limited to evaluating "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). However, our Supreme Court has held that "the Commission's findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000) (citing *Lucas v. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976); *Askew v. Tire Co.*, 264 N.C. 168, 174, 141 S.E.2d 280, 284 (1965); *Aycock v. Cooper*, 202 N.C. 500, 505, 163 S.E. 569, 571 (1932)). Rather, the reviewing court has the duty "to make its own independent findings of . . . jurisdictional facts from its consideration of all the evidence in the record." *Perkins*, 351 N.C. at 637, 528 S.E.2d at 904 (quoting *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261).

Plaintiff contends his principal place of employment was in North Carolina, and we must consider the record evidence to determine whether North Carolina was his principal place of employment. Plaintiff first analogizes the present case to that of *Perkins*, which had similar facts, and in which our Supreme Court determined that North Carolina was the plaintiff's principal place of employment. *See Perkins*, 351 N.C. at 638, 528 S.E.2d at 904. The plaintiff in *Perkins* was a truck driver who was assigned to twelve to thirteen states in the southeast, including North Carolina. *Id.* Approximately eighteen to twenty percent of the plaintiff's stops were in North Carolina and because the plaintiff's employer, Arkansas Trucking, did not have a terminal in North Carolina, the plaintiff was dispatched from his home in Dudley, North Carolina. *Id.* The plaintiff also kept his employer's truck at his residence in Dudley when the plaintiff was "off the road." *Id.* Our Supreme Court stated: "Not surprisingly, as a truck driver, plaintiff did not perform the majority of his job duties in any *one* state. The record reflects, however, that no state, standing alone, had the same degree of significant contacts to plaintiff's employment as North Carolina." *Id.*

Plaintiff argues that the present case is similar to *Perkins* in that plaintiff kept his truck at a truck stop in Candler, North Carolina when plaintiff was off the road; he began and ended his trips in North

Carolina; he was dispatched from the Candler truck stop through the QualCom computer in his truck; and he made a significant percentage of his stops in North Carolina. Nevertheless, plaintiff concedes, even by his count, that only fourteen percent of his stops were made in North Carolina, as compared to approximately eighteen to twenty percent made by the plaintiff in *Perkins*. *See Perkins*, 351 N.C. at 638, 528 S.E.2d at 904.

Plaintiff argues that even more than in *Perkins*, North Carolina was plaintiff's principal place of employment because defendant had a terminal in Charlotte from which plaintiff was sometimes dispatched. We note, however, that the Commission found that "[p]laintiff received information and instructions from defendant-employer via a Qualcom satellite link to a computer in the truck. Plaintiff was not dispatched from the Charlotte terminal."

Contrary to plaintiff's arguments, the present case raises an issue not present in *Perkins*, namely that Virginia, standing alone, had more significant contacts to plaintiff's employment than North Carolina. *See Perkins*, 351 N.C. at 638, 528 S.E.2d at 904 (stating that according to the record, "no state, standing alone, had the same degree of significant contacts to plaintiff's employment as North Carolina."). Defendant argues that Virginia had more significant contacts with plaintiff's employment because plaintiff accepted employment in Virginia, was supervised by a person in Virginia, and his paychecks were issued in Virginia. Most persuasive to our Court is the fact that plaintiff had more pick-ups and deliveries in Virginia than in any other state. Defendant argues, and the Commission found, that "nineteen percent of plaintiff's pick-ups and deliveries were in Virginia, only eight percent of his pick-ups and deliveries were in North Carolina." In reviewing plaintiff's travel logs from 25 April 1999 to 11 July 1999, there are similar percentages showing approximately ten percent of plaintiff's pick-ups and deliveries in North Carolina and approximately eighteen percent in Virginia. Plaintiff also drove considerably more miles in Virginia than in any other state, and since plaintiff was paid by the mile, the majority of his income came from work performed in Virginia.

Plaintiff argues that this evaluation of his principal place of employment violates our Workers' Compensation Act in that defendant testified that it considered all of its employees to have their principal place of employment in Virginia for workers' compensation purposes. We agree that having a policy that operates to relieve an employer of any obligation under the North Carolina Workers'

Compensation Act would violate N.C. Gen. Stat. § 97-6 (2003). *See Perkins*, 351 N.C. at 639, 528 S.E.2d at 905 (holding invalid Arkansas's policy form that attempted to limit the plaintiff's rights to seek workers' compensation in any state other than Arkansas). However, in the case before us, defendant's policy is not relevant to our determination as to whether North Carolina is the proper jurisdiction for plaintiff's workers' compensation claim. Unlike *Perkins*, the evidence in this case does not demonstrate that no other state "had the same degree of significant contacts to plaintiff's employment as North Carolina." *See Perkins*, 351 N.C. at 638, 528 S.E.2d at 904. To the contrary, the evidence in the present case shows that Virginia had more significant contacts to plaintiff's employment than North Carolina.

Plaintiff further asserts, however, that North Carolina was the principal place of his employment because North Carolina is where plaintiff "focused his duties and trips." Plaintiff notes that our Supreme Court defined "principal" to mean "most important, consequential, or influential." *Perkins*, 351 N.C. at 638, 528 S.E.2d at 904 (quoting Merriam Webster's Collegiate Dictionary 926 (10th ed. 1993)). He contends that North Carolina was the most "consequential" place for plaintiff's employment because defendant organized plaintiff's trips so that plaintiff would be as close as possible to his residence in Enka when plaintiff ended a two-week assignment. Under our standard of review, however, competent evidence supports the Commission's finding that plaintiff's returning to his home in North Carolina every two weeks was "a continuation of his existing trips as his stored truck may have contained a full or partially full load. At no time was plaintiff dispatched from his residence in North Carolina."

Plaintiff similarly argues that North Carolina was the "most important" place for plaintiff's employment because he was treated like an employee in North Carolina for income tax purposes. However, we find that plaintiff's having taxes withheld from his paycheck was more a result of plaintiff's residence in North Carolina, rather than his place of employment being in North Carolina. As the Commission found:

> 5. Defendant-Employer allowed employees to choose the state for the purposes of withholding income taxes. Plaintiff chose to have his taxes withheld in North Carolina and, consequently, defendant-employer also paid into the North Carolina unemployment system as required by law. Plaintiff could have chosen any state in the United States for income tax withholding purposes.

Since N.C.G.S. § 97-36 does not provide that an employee's residence establishes jurisdiction for receiving workers' compensation benefits, we find plaintiff's arguments unpersuasive.

For the foregoing reasons, we conclude that North Carolina was not plaintiff's principal place of business. Thus, pursuant to N.C.G.S. § 97-36, North Carolina's Industrial Commission did not have jurisdiction to hear plaintiff's workers' compensation claim, and we affirm the Commission's opinion and award.

[2] Plaintiff also assigns as error the Commission's findings of fact numbers eight and ten. However, plaintiff fails to argue why finding of fact number ten was an error and we deem this assignment of error to be abandoned pursuant to N.C.R. App. P. 28(b)(6). Finding of fact number eight states:

> 8. Plaintiff was provided a tractor-trailer for his sole use. When plaintiff would request time off, which was usually two days off every two weeks, defendant-employer would attempt to schedule a route that would take plaintiff close to his residence. During his time off, plaintiff was allowed by defendant-employer to store his truck at a rest area in Buncombe County, North Carolina near his home. These were a continuation of his existing trips as his stored truck may have contained a full or partially full load. At no time was plaintiff dispatched from his residence in North Carolina.

Specifically, plaintiff argues that there is no evidence to support the last sentence: "At no time was plaintiff dispatched from his residence in North Carolina." We disagree.

As stated above, the Commission's findings of fact will be upheld on appeal if supported by any competent evidence. *See Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Even if there is evidence to the contrary, we will affirm an opinion and award of the Commission when competent evidence supports the opinion and award. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004). In the present case, plaintiff presents his own testimony as evidence that he began and ended his trips at his home in Enka, North Carolina, and that he received dispatch instructions over the QualCom computer in his truck. However, other evidence presented, including plaintiff's testimony, showed that plaintiff generally already had his dispatch instructions and the cargo load for his next delivery when plaintiff stopped in Candler, North Carolina to return home. Thus, competent

evidence supports the finding that plaintiff was in the middle of existing trips when he returned home, and that he was not dispatched from his residence. We affirm the Commission's order and award.

Affirmed.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. LOUISE KOLAR BENBOW

No. COA04-785

(Filed 5 April 2005)

Courts; Motor Vehicles— jurisdiction—district court—driver's license reinstatement

The district court did not have jurisdiction to exempt defendant from the ignition interlock requirement where defendant was seeking reinstatement of her driver's license after having it revoked for driving with an alcohol concentration of 0.16. Although defendant had obtained an exemption for her limited driving privilege because medical conditions prevented her use of the device, N.C.G.S. § 20-17.8 does not provide any exceptions to the requirement for license reinstatement.

Appeal by the State from an order entered 22 March 2004 by Judge Mitchell L. McLean in Yadkin County District Court. Heard in the Court of Appeals 2 February 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorneys General Allison A. Pluchos and Jeffrey R. Edwards, for the State.

Shore, Hudspeth & Harding, P.A., by Donna Shore Terrell, for defendant-appellee.

HUNTER, Judge.

Under N.C. Gen. Stat. § 20-17.8 (2003), an individual who has been convicted of driving while intoxicated with a blood alcohol level of 0.16 or more is subject to a mandatory ignition interlock license restriction if the person's license is reinstated following the revoca-

tion period. In this case, the North Carolina Division of Motor Vehicles ("DMV") appeals the trial court's order compelling them to issue a license to Louise Kolar Benbow ("defendant") without the required ignition interlock device. DMV contends the district court: (I) lacked jurisdiction to enter an order compelling them to perform an act in violation of statute; (II) violated the constitutional separation of powers by exempting defendant from the statutory ignition interlock requirement; and (III) erred by ordering DMV to reinstate defendant's driver's license without the required ignition interlock restriction. Under the facts of this case, we conclude the trial court erroneously ordered DMV to reinstate defendant's driver's license without the requisite ignition interlock device.

The pertinent facts indicate that defendant was charged with driving while impaired on 16 March 2002. A chemical test of defendant's breath showed an alcohol concentration of 0.16. Defendant was convicted of driving while impaired on 13 November 2002 and was granted an interlock limited driving privilege, which allowed defendant to operate a motor vehicle under certain restrictions. On 13 December 2002, defendant had an ignition interlock device installed on her car. Four days later, she had the device removed because she could not provide a sufficient breath sample for testing by the instrument. On 21 January 2003, Dr. Patrick Healy provided defendant with a medical note which indicated: "She is unable to operate the device on her car to monitor her breathing. She has a cleft palate & a prior history of asthma; these issues may be a factor in her inability to use her breathing force to activate the device." In April 2003, defendant filed a motion to modify her limited driving privilege. On 2 April 2003, the trial court entered an order exempting defendant from the ignition interlock requirement and defendant received a modified limited driving privilege that did not contain the ignition interlock requirement. Defendant's one year revocation period ended on 13 November 2003.

In March 2004, defendant sought reinstatement of her driver's license. She was informed by DMV that she was required by law to have an ignition interlock restriction on her driver's license because she had a blood alcohol level of 0.16 at the time of her driving while impaired arrest. In a 22 March 2004 order, the trial court exempted defendant from the ignition interlock requirement and ordered DMV to reinstate her driver's license without the ignition interlock restriction. DMV appeals.

Defendant was convicted of impaired driving under N.C. Gen. Stat. § 20-138.1 (2001), which provides:

> A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.

Id. Therefore, under N.C. Gen. Stat. § 20-17(a)(2), defendant's driver's license was subject to mandatory revocation.[1] Pursuant to statute, defendant's license was revoked for one year commencing on 13 November 2002 and ending on 13 November 2003. *See* N.C. Gen. Stat. § 20-19(c1) (2001) (stating "[w]hen a license is revoked under subdivision (2) of G.S. 20-17, and the period of revocation is not determined by subsection (d) or (e) of this section, the period of revocation is one year").

After conviction, the trial court issued defendant an interlock limited driving privilege, which was effective from 13 November 2002 to 13 November 2003. Under N.C. Gen. Stat. § 20-179.3 (2001), a person convicted of driving while impaired may, under certain circumstances, seek a limited driving privilege which would allow a person to drive for essential purposes related to employment, household maintenance, education, court-ordered treatment or assessment, community service ordered as a condition of probation, or emergency medical care. N.C. Gen. Stat. § 20-179.3(g5) (2001) indicates that if a person's driver's license is revoked for a conviction of N.C. Gen. Stat. § 20-138.1, and the person had an alcohol concentration of 0.16 or more, a judge shall include the use of an interlock ignition device in the limited driving privilege. However, N.C. Gen. Stat. § 20-179.3(i) indicates the limited driving privilege may be modified. N.C. Gen. Stat. § 20-179.3(i) (2001) provides:

> Modification or Revocation of Privilege.—A judge who issues a limited driving privilege is authorized to modify or revoke the limited driving privilege upon a showing that the circumstances have

1. N.C. Gen. Stat. § 20-17(a)(2) (2001) provides "[t]he [DMV] shall forthwith revoke the license of any driver upon receiving a record of the driver's conviction for any of the following offenses: . . . (2) [e]ither of the following impaired driving offenses: a. [i]mpaired driving under G.S. 20-138.1 [or] b. [i]mpaired driving under G.S. 20-138.2."

> changed sufficiently to justify modification or revocation. . . . The judge must indicate in the order of modification or revocation the reasons for the order, or he must make specific findings indicating the reason for the order and those findings must be entered in the record of the case.

Id. In this case, defendant was convicted under N.C. Gen. Stat. § 20-138.1 (2001) and she had an alcohol concentration of 0.16. The judge granted her an interlock limited driving privilege which required her to use the ignition interlock device. Upon a showing that defendant could not use the ignition interlock device due to medical conditions substantiated by a doctor's note, the trial court modified the interlock limited driving privilege to exempt defendant from complying with the ignition interlock device pursuant to N.C. Gen. Stat. § 179.3(i) (2001). This limited driving privilege expired on 13 November 2003, at the conclusion of the one year revocation period imposed after defendant's conviction. DMV does not challenge the trial court's authority to modify the interlock limited driving privilege in this manner.

DMV does challenge the trial court's actions after defendant's revocation period ended. After defendant's one-year revocation period ended on 13 November 2003, she contacted DMV to have her driver's license restored. Under N.C. Gen. Stat. § 20-17.8 (2003)[2], when DMV restores the license of a person convicted of driving while impaired under N.C. Gen. Stat. 20-138.1 and the person had an alcohol concentration of 0.16 or more, the use of an ignition interlock device is required. Specifically, N.C. Gen. Stat. § 20-17.8 (2003) states in pertinent part:

> (a) Scope.—This section applies to a person whose license was revoked as a result of a conviction of driving while impaired, G.S. 20-138.1, and:
>
> (1) The person had an alcohol concentration of 0.16 or more; or
>
> (2) The person has been convicted of another offense involving impaired driving, which offense occurred within seven years immediately preceding the date of the offense for which the person's license has been revoked.

2. The 2001 North Carolina General Statutes are applicable to defendant's conviction for driving while impaired and sentence. The 2003 version of our General Statutes apply to defendant's application for reinstatement of her driving privileges.

(b) Ignition Interlock Required.—When the Division restores the license of a person who is subject to this section, in addition to any other restriction or condition, it shall require the person to agree to and shall indicate on the person's drivers license the following restrictions for the period designated in subsection (c):

(1) A restriction that the person may operate only a vehicle that is equipped with a functioning ignition interlock system of a type approved by the Commissioner. . . .

(2) A requirement that the person personally activate the ignition interlock system before driving the motor vehicle.

Id. Under the circumstances of defendant's case, she was required to use the ignition interlock device for one year from the date of restoration of her driver's license. *See* N.C. Gen. Stat. § 20-17.8(c)(1) (2003). N.C. Gen. Stat. § 20-17.8 (2003) does not provide any exceptions to the mandatory ignition interlock device.[3] Upon being informed she had to use the ignition interlock device, defendant moved the trial court in her driving while impaired case to exempt her from this requirement, and the trial court entered an order exempting defendant from the requirement on 22 March 2004.

DMV contends the district court did not have jurisdiction to exempt defendant from the requirements of N.C. Gen. Stat. § 20-17.8 (2003). We agree.

"Proceedings involving the suspension or revocation of a license to operate a motor vehicle are civil and not criminal in nature . . . ." *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 234, 182 S.E.2d 553, 559 (1971). Pursuant to N.C. Gen. Stat. § 20-25 (2003):

Any person denied a license or whose license has been canceled, suspended or revoked by the Division, except where such cancellation is mandatory under the provisions of this Article, shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding the court of that district, or special or emergency judge holding a court in such district in which the violation was

3. There is no review process under N.C. Gen. Stat. § 20-17.8 which would allow defendant to present her arguments to DMV. N.C. Gen. Stat. § 20-17.8(j) governs appeals of a DMV decision in cases where a person has violated the requirements of N.C. Gen. Stat. § 20-17.8. It does not govern instances where a person seeks an exemption from the requirement.

> committed, and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon 30 days' written notice to the Division, and thereupon to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this Article. Provided, a judge of the district court shall have limited jurisdiction under this section to sign and enter a temporary restraining order only.

Id. At the time defendant moved the court to exempt her from the ignition interlock requirement, her criminal case had concluded. Nonetheless, N.C. Gen. Stat. § 20-25 allowed her to petition the district court in the district where her violation occurred to review DMV's decision not to reinstate her driver's license without the requisite ignition interlock device. Although the district court had jurisdiction to review the decision, certain conditions applied. First, DMV had to be notified of the petition and had to be provided thirty days written notice of the hearing. In this case, DMV was not notified of defendant's motion and did not receive notice of the hearing. Second, there is no right to appeal to a court where the cancellation of the license is mandatory, and the provisions of N.C. Gen. Stat. § 20-17.8 are mandatory. Thus, the district court could not review DMV's decision under N.C. Gen. Stat. § 20-25.

Defendant contends the district court had the inherent authority to review DMV's decision. However, our Supreme Court has held only that a "court has inherent authority to review the *discretionary* action of any administrative agency . . . ." *In re Revocation of License of Wright*, 228 N.C. 584, 587, 46 S.E.2d 696, 698 (1948) (emphasis added). In this case DMV's decision was not discretionary; rather, it was required under the mandatory provisions in N.C. Gen. Stat. § 20-17.8.

Accordingly, as the criminal case had concluded and the district court did not have jurisdiction under N.C. Gen. Stat. § 20-25, the district court erroneously exempted defendant from the ignition interlock requirement. Moreover, even assuming the district court had jurisdiction, DMV did not have notice of the proceedings as required by statute.

As indicated by DMV in their brief to this Court, there are proper procedures for challenging the validity of a statute, which defendant may pursue in a different proceeding. In addition, the General

Assembly may want to review this matter. As we have concluded the trial court lacked jurisdiction, we do not address the parties' remaining arguments.

Reversed.

Judges CALABRIA and JACKSON concur.

BASNIGHT CONSTRUCTION COMPANY, INC., PLAINTIFF v. PETERS & WHITE CONSTRUCTION COMPANY, DEFENDANT

No. COA04-951

(Filed 5 April 2005)

1. Judgments— motion to set aside default—no reason for failure to timely file

The trial court did not abuse its discretion by denying defendant's motion to set aside an entry of default where the trial court found that defendant was careless and negligent in failing to obtain an extension of time for filing an answer. There was no dispute that defendant's Virginia counsel told its North Carolina office to file an extension of time, but no explanation was included in the record for the failure to do so.

2. Judgments— default—sum certain

The trial court abused its discretion by not setting aside a default judgment where there was nothing from which damages could be determined other than plaintiff's bare assertion of the amount owed and the clerk lacked authority to enter the default judgment.

Appeal by defendant from judgment entered 28 April 2004 by Judge William C. Griffin, Jr. in Dare County Superior Court. Heard in the Court of Appeals 14 February 2005.

Aldridge, Seawell, Spence & Felthousen, L.L.P., by Christopher L. Seawell and Thomas P. Routten, for plaintiff-appellee.

Hornthal, Riley, Ellis & Maland, L.L.P., by M.H. Hood Ellis, for defendant-appellant.

ELMORE, Judge.

Peters & White Construction Company (defendant) appeals the trial court's denial of its motion to set aside an entry of default and default judgment against it. We discern no abuse of discretion in the denial of defendant's motion to set aside the entry of default, but must reverse the order denying defendant's motion to set aside the default judgment.

Defendant was a contractor building a collection of sewer lines and treatment facilities for the Englehard Sanitary District located in Hyde County, North Carolina. Basnight Construction Company (plaintiff) was a subcontractor retained to install piping on the project. Upon plaintiff's completion of the project, it was not paid a portion of the money agreed to under the contract between the parties. Accordingly, on 9 September 2003, plaintiff filed suit against defendant for recovery of $51,799.49 under one of two claims: breach of contract or *quantum merit*. Defendant, a Virginia based corporation, was ultimately served with the complaint via the North Carolina Secretary of State on 31 October 2003 after the Secretary's office received the alias and pluries summons on 27 October 2003. Upon receipt, defendant sent the complaint to James R. Harvey, III (Harvey), its counsel at Vandeventer Black, L.L.P. (Vandeventer) in Norfolk, Virginia.

Harvey contacted an attorney in the firm's Kitty Hawk, North Carolina, office in order to transfer the case to its local office. Despite being requested by Harvey to file a motion for extension of time, the Kitty Hawk office failed to do so. In the interim, Harvey determined the firm had a conflict; could not represent defendant in the matter; and sought out and secured Hornthal, Riley, Ellis & Maland, L.L.P. (Ellis), to represent defendant. Harvey informed Ellis of his belief that a responsive pleading was due by 26 December 2003. But, in fact, the responsive pleading was due much earlier, and on 11 December 2003 plaintiff filed for and received an entry of default as well as a default judgment from the Dare County Clerk of Court. Plaintiff was awarded $51,779.49, plus interest and costs.

Harvey determined on 15 December 2003 that no extension was entered on defendant's behalf and a default judgment had been secured. He contacted Ellis who, on 6 January 2004, filed a motion to set aside the entry of default and default judgment. The trial court heard the motion on 22 March 2004 and entered an order denying defendant's motion.

The trial court found that "the failure to obtain an extension of time was the result of the Kitty Hawk Office of Vandeventer Black, LLP's failure to act on the request of the Norfolk Office to obtain said extension of time." The court also found that the failure to file for an extension "constitut[ed] carelessness and negligence." Based on those and other findings, the court concluded:

> 4. That the evidence presented by the Defendant does not constitute mistake, inadvertence, surprise or excusable neglect under the provisions of Rule 60(b)(1).
>
> 5. That the evidence presented by the Defendant does not constitute a grounds [sic] for relief from the default judgment under any other provisions of Rule 60(b).
>
> 6. That carelessness and negligence of Defendant's counsel does not constitute an excusable neglect under Rule 60(b) of the North Carolina Rules of Civil Procedure or other grounds for relief under said Rule.

Defendant appeals from this order.

[1] A trial court's decision to grant or deny a motion to set aside an entry of default and default judgment is discretionary. *See Grant v. Cox*, 106 N.C. App. 122, 124-25, 415 S.E.2d 378, 380 (1992). Absent an abuse of that discretion, this Court will not reverse the trial court's ruling. *Id.* N.C. Gen. Stat. § 1A-1, Rule 55(d) (2003), notes that an entry of default may be set aside for "good cause shown," and a default judgment may be set aside "in accordance with Rule 60(b)." Defendant's motion to set aside both the entry of default and default judgment was brought "pursuant to Rule 55" but, as did the trial court, we will look at each individual claim under their appropriate standards. *See Bailey v. Gooding*, 60 N.C. App. 459, 461, 299 S.E.2d 267, 269 (1983) ("An entry of default may be set aside, not by motion pursuant to Rule 60(b), but by motion pursuant to Rule 55(d) and a showing of good cause."); *see also Whaley v. Rhodes*, 10 N.C. App. 109, 111-12, 177 S.E.2d 735, 736 (1970).

In its order denying defendant's motion, the trial court rejected defendant's claim that "the failure to secure an extension of time and enable a timely response or answer to be filed was solely the result of a misunderstanding and mis communication [sic] between Vandeventer Black, L.L.P.'s Norfolk and Kitty Hawk offices." Rather, it found that the delay was on the Kitty Hawk of-

fice's "failure to act on the request," noting that the failure "constitut[ed] carelessness and negligence."

The trial court determined that this omission was not a sufficient showing for good cause to set aside the entry of default. We cannot hold that the trial court abused its discretion in this determination, despite the fact that perhaps other judges may have granted defendant's motion. *See Kennedy v. Starr*, 62 N.C. App. 182, 187-88, 302 S.E.2d 497, 500-01 (1983) (Whichard, J. concurring) (noting the tension between an abuse of discretion standard and a favored result of allowing litigation on the merits of cases). There was no dispute that Harvey informed the Kitty Hawk office to file the extension of time. Yet, no explanation is included in the record as to what caused that office to fail to file the extension, whether that oversight was due to case load, clerical error, or otherwise.

[2] Defendant also appeals that portion of the trial court's order denying his motion to set aside the default judgment. As previously noted, this analysis proceeds under Rule 60(b). Defendant argued that the trial court abused its discretion under several theories, but we find the argument that the default judgment was void most persuasive. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2003) ("[T]he court may relieve a party . . . from a final judgment, order, or proceeding . . . [when] [t]he judgment is void[.]").

N.C. Gen. Stat. § 1A-1, Rule 55(b) deals with the entry of a default judgment. When the plaintiff's claim is for a "sum certain or for a sum which can by computation be made certain," then the default judgment can be entered by a clerk. N.C. Gen. Stat. § 1A-1, Rule 55(b)(1) (2003). Absent a certain dollar amount, the default judgment must be entered by a judge who may conduct a hearing to adequately determine damages. N.C. Gen. Stat. § 1A-1, Rule 55(b)(2) (2003). A review of our case law and the record before us reveals that the default judgment here should have been entered by the judge and not the clerk; the claim is not for a sum certain and the clerk lacked authority to enter judgment.

Plaintiff's complaint for breach of contract stated:

> 4. The Plaintiff herein performed services pursuant to a contract with the Defendant installing piping materials in Hyde County, North Carolina.
>
> 5. Under the terms of the contract and oral modification, the Defendant agreed to pay the Plaintiff for labor and services per-

formed with the last labor and materials being provided pursuant to said contract on or about July 1, 2002.

6. The Plaintiff has made demand upon the Defendant for the payment of labor and services, but the Defendant has refused and continues to refuse to pay same.

Plaintiff's second claim for relief was for *quantum merit* and did allege that the value of the services was $51,779.49. Finally, in the prayer for relief, plaintiff asked the trial court for "$51,779.49 plus statutory interest as provided by law [] pursuant to the contract between the Plaintiff and Defendant."

The complaint was unverified and submitted without any attachments or exhibits. Therefore, plaintiff filed an affidavit with his motion for default judgment that verified the information in the complaint was true and reiterated that $51,779.49 was due pursuant to the contract. Nonetheless, no contract, invoice, or other documentation from which the Clerk could compute a sum certain was attached to the motion or the affidavit.

Our Court in *Realty, Inc. v. Hastings*, 45 N.C. App. 307, 262 S.E.2d 858 (1980), held that the mere demand for judgment of a specified dollar amount was not enough under the statute to permit the Clerk to enter a default judgment.

> Plaintiff's claim as stated in its complaint in the present case was neither for "a sum certain" nor for "a sum which can by computation be made certain" within the meaning of Rule 55(b). The mere demand for judgment of a specified dollar amount does not suffice to make plaintiff's claim one for "a sum certain" as contemplated by Rule 55(b). Such a demand is normally included in the prayer for relief in every complaint in which monetary damages are sought, including complaints alleging claims for damages for bodily injuries caused by a defendant's negligence. The complaint in the present case alleged a breach of contract by the defendant, but nothing in the allegations of the complaint makes it possible to compute the amount of damages to which plaintiff is entitled by reason of the breach.

Id., 45 N.C. App. at 309-10, 262 S.E.2d at 859-60. In *Cox*, we summarized and compared several cases dealing with this issue, determining that for damages to be certain, more evidence is needed "than simply the plaintiff['s] bare assertion of the amount owed." *Cox*, 106 N.C. App. at 127-28, 415 S.E.2d at 381-82.

There was nothing in the case *sub judice* to determine the amount of damages other than bare assertion. What would help identify the amount owed with some level of certainty would typically be the contract or submitted invoice, with which the Clerk could accurately calculate or verify the money owed. Here, the six sentence affidavit which the Clerk reviewed, and the only evidence of an exact amount, stated in one place that the amount owed was $55,779.49, and in another $51,779.49. Plaintiff argues that this is a typographical error. While that may be, this error demonstrates the *lack* of certainty as to the amount owed. The Clerk had no ability to verify which number was a typographical error and could have easily entered an award of $55,779.49 as a sum certain if all that is necessary is an assertion.

Accordingly, we find that the Clerk lacked authority to enter the default judgment and the judgment was void as a matter of law. Regardless of whether the trial court thought there was excusable neglect, it was an abuse of discretion for it to find that the evidence presented constituted no other grounds for relief under Rule 60(b). N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) states that a trial court *may* provide relief from a void judgment. Under the circumstances here, we find that the trial court did abuse its discretion in denying defendant's motion to set aside the default judgment against it.

Thus, we affirm the trial court's denial of defendant's motion pertaining to the entry of default, but we reverse the order denying defendant's motion to set aside the default judgment and remand to the trial court to determine under Rule 55(b)(2) what damages, if any, plaintiff is entitled to recover. *See Cox*, 106 N.C. App. at 128, 415 S.E.2d at 382.

Affirmed in part; vacated and remanded in part.

Chief Judge MARTIN and Judge McCULLOUGH concur.

ANNE CARSON FOARD, PLAINTIFF v. AVERY COUNTY BANK AND FIRST CITIZENS BANK & TRUST COMPANY, DEFENDANTS

No. COA04-750

(Filed 5 April 2005)

1. Securities— purchase of shares in merger—tender of payment—required information

A purchasing bank's tender of payment for shares in the purchased bank was incomplete where it lacked required information as to how the fair value of the stocks was calculated. The clear legislative intent of N.C.G.S. § 55-13-25 is to adequately inform shareholders of their rights and provide sufficient information for shareholders to assess the necessity of a judicial appraisal of the shares.

2. Securities— purchase of shares in merger—dissenter's demand for appraisal—statute of limitations

The trial court erred by dismissing an action for judicial appraisal of stock for being outside the required time period under N.C.G.S. § 55-13-30(a) where defendants did not include the required information with their tendered payment, so that the payment was not complete. The proper time for determination of plaintiff's filing date was the date of her dissenter's demand for payment, and plaintiff began this action within sixty days of that date, as required.

Appeal by plaintiff from an order entered 7 April 2004 by Judge James L. Baker, Jr. in Avery County Superior Court. Heard in the Court of Appeals 13 January 2005.

Clement Law Office, by Charles E. Clement, for plaintiff-appellant.

Ward and Smith, P.A., by Gary J. Rickner and Donalt J. Eglinton, for defendant-appellees.

Attorney General Roy A. Cooper, III, by Assistant Attorney General P. Bly Hall, for the State, amicus curiae.

HUNTER, Judge.

Anne Carson Foard ("plaintiff") appeals from an order dated 1 April 2004 dismissing her action for judicial appraisal of shares of

stock in Avery County Bank prior to its merger with First Citizens Bank & Trust (collectively "defendants"). For the reasons stated herein, we reverse the dismissal.

In 2003, First Citizens Bank & Trust ("FCB") purchased and merged with Avery County Bank ("ACB"). As required by N.C. Gen. Stat. § 55-13-20 (2003), ACB sent a notice on 27 June 2003 to all shareholders, including plaintiff, regarding a special meeting on 5 August 2003 to consider and vote on the Agreement and Plan of Share Exchange between ACB and FCB ("the Merger"). Included in the notice were the statutory rights of dissenters to the Merger, the proposed amount to be paid for shares, and the recent financial history of ACB.

Plaintiff timely exercised her right to dissent within the thirty days required by N.C. Gen. Stat. § 55-13-21 (2003) on 29 July 2003. Upon completion of the required forms and surrender of her shares, plaintiff received notification, dated 5 November 2003, that her payment demand had been received. Enclosed with the notification was a check for $78,144.40, calculated at a rate of $2,604.00 for each of plaintiff's thirty shares, plus interest. In an attempt to comply with N.C. Gen. Stat. § 55-13-25(b) (2003), the check was accompanied by a copy of ACB's financial statements, an explanation of how interest was calculated, a statement of dissenter's right to demand payment, a brief statement regarding the fair value of the stock, and a copy of Article 13 of the North Carolina Business Corporation Act.

On 5 December 2003, plaintiff notified defendants of her dissent as to the fair value of the shares, and requested an accounting of defendants' computation as to the fair value. Plaintiff then applied for an extension of time to file a complaint for judicial appraisal of her shares on 20 January 2004, which was granted, and filed her complaint in this matter on 9 February 2004.

On 3 March 2004, defendants filed a motion to dismiss, on the grounds that plaintiff had not brought her action for judicial appraisal within the required time limit of N.C. Gen. Stat. § 55-13-30 (2003). The trial court granted the motion and dismissed the action on 1 April 2004. Plaintiff appeals.

The related assignments of error in this case are whether the trial court erred in its interpretation of "payment," as defined in § 55-13-25, and as a result improperly applied the time limitations of § 55-13-30(a) in determining whether plaintiff's claim was

timely filed. Plaintiff withdrew her additional assignment of error at oral argument before this Court, and we therefore do not address that issue.

[1] Plaintiff first contends the trial court erred in granting the motion to dismiss due to its erroneous interpretation of payment as prescribed by § 55-13-25 of the North Carolina General Statutes. Plaintiff contends that the use of "shall" in § 55-13-25(b) makes the inclusion of the required information in that subsection mandatory for a payment to be complete. We agree.

Section 55-13-25 of the North Carolina Business Corporation Act, entitled Payment, is a subsection of Article 13, which provides statutory rights for dissenters to a corporate action. The statute provides that:

> (a) As soon as the proposed corporate action is taken, or within 30 days after receipt of a payment demand, the corporation shall pay each dissenter who complied with G.S. 55-13-23 the amount the corporation estimates to be the fair value of his shares, plus interest accrued to the date of payment.

N.C. Gen. Stat. § 55-13-25(a). The statute contains a second subsection which requires the payment to be accompanied by certain items of information:

> (b) The payment shall be accompanied by:
>
> (1) The corporation's most recent available balance sheet as of the end of a fiscal year ending not more than 16 months before the date of payment, an income statement for that year, a statement of cash flows for that year, and the latest available interim financial statements, if any;
>
> (2) An explanation of how the corporation estimated the fair value of the shares;
>
> (3) An explanation of how the interest was calculated;
>
> (4) A statement of the dissenter's right to demand payment under G.S. 55-13-28; and
>
> (5) A copy of this Article.

N.C. Gen. Stat. § 55-13-25(b).

In interpreting our state statutes, "the primary function of this Court is to 'ensure that the purpose of the Legislature in enacting the

law, sometimes referred to as legislative intent, is accomplished.' To determine legislative intent, we examine the language and purpose of the statute." *Albemarle Mental Health Ctr. v. N.C. Dep't of Health & Human Servs.*, 159 N.C. App. 66, 68, 582 S.E.2d 651, 653 (2003) (citations omitted).

" 'Statutory interpretation properly begins with an examination of the plain words of the statute.' *Correll v. Division of Social Servc.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). 'If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.' " *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997) (citations omitted). Our Courts have previously held that the use of the term "shall" in a statute makes the provision mandatory. In *Bailey v. Western Staff Servs.*, 151 N.C. App. 356, 566 S.E.2d 509 (2002), this Court, in interpreting a portion of the workers' compensation statute, found that when a statute stated that payment "shall be accompanied by" specific forms, use of those forms was mandatory. *Id.* at 360, 566 S.E.2d at 512.

Similarly, § 55-13-25 requires more than a mere tender of monetary compensation for the shares. The statute specifies that such a tender "shall be accompanied by" specific information. As the clear legislative intent in this statute is to adequately inform the shareholder as to their rights and provide sufficient information for the shareholder to assess the necessity of a judicial appraisal of the shares, such a requirement must be read as mandatory, rather than permissive.

Here, plaintiff submitted written notice of her dissent to the Merger on 29 July 2003 and submitted a payment demand to defendants following the Merger. Plaintiff received the sum of $78,144.40 from defendants in a letter dated 5 November 2003. The letter contained the required explanation as to the calculation of interest, and plaintiff's right to demand payment as a dissenter under § 55-13-28. Accompanying the letter and checks was a copy of the financial information required by § 55-13-25(b)(1), as well as a copy of Article 13 of the North Carolina Business Corporation Act. However, the letter failed to offer an explanation as to how the fair value of the stocks was calculated, stating only:

> We actually estimated the "fair value" of your shares at less than $78,120. We paid a substantial premium to acquire majority ownership of ACB in the Acquisition, and we estimate that the "fair

> value" to which you are entitled under Section 55-13-01(3) of the North Carolina General Statutes is substantially less than $78,120. The reason is that under Section 55-13-01(3) "fair value" is based on the value of your shares before the Share Exchange, without appreciation in anticipation of the Share Exchange unless that exclusion would be inequitable. Nevertheless, we did not want to pay you less per share than other ACB shareholders are receiving in the Acquisition, so we include the full amount per share provided for in the agreement governing the Acquisition.

Defendants conceded at oral argument that they essentially offered only a statement that they believed they were offering more than fair value. A dissenter cannot properly assess whether a judicial appraisal of shares is necessary without an explanation as to how the fair value offered was reached, and the failure to include such information undercuts the clear legislative intent of the statute. As § 55-13-25 requires the tender of both a monetary sum and required information to be rendered complete, defendants' proffered payment which lacked essential information failed to comply with the statute, and thus was incomplete.

[2] In her related second assignment of error, plaintiff contends that as a result of the trial court's erroneous interpretation of payment under § 55-13-25, plaintiff's claim was improperly dismissed under § 55-13-30. We agree.

Section 55-13-30 requires a dissenter seeking judicial appraisal of shares to "commence a proceeding within 60 days after the earlier of (i) the date payment is made under G.S. 55-13-25, or (ii) the date of the dissenter's payment demand under G.S. 55-13-28[.]" N.C. Gen. Stat. § 55-13-30(a). The statute further states that "[a] dissenter who takes no action within the 60-day period shall be deemed to have withdrawn his dissent and demand for payment." *Id.*

"It is well established that '[w]hen multiple statutes address a single matter or subject, they must be construed together, in *pari materia*, to determine the legislature's intent.' " *Wright v. Blue Ridge Area Auth.*, 134 N.C. App. 668, 672, 518 S.E.2d 772, 775 (1999) (citation omitted). " ' "[W]here one statute deals with certain subject matter in particular terms and another deals with the same subject matter in more general terms, the particular statute will be viewed as controlling in the particular circumstances absent clear legislative intent to the contrary." ' " *Woodburn v. N.C. State Univ.*, 156 N.C. App. 549, 553, 577 S.E.2d 154, 157 (2003) (citations omitted).

Section 55-13-30's specific reference to payment as made under § 55-13-25 indicates that the latter is the particular statute, and therefore its meaning of payment is controlling for determination of the sixty day period. Thus a dissenter must commence an action within sixty days after the earlier of the date of a completed payment made under § 55-13-25, including both the actual monetary sum and all required accompanying information, or the date of the dissenter's payment demand under § 55-13-28. *See* N.C. Gen. Stat. § 55-13-30(a).

Here, as discussed *supra*, defendants failed to make a completed payment under § 55-13-25. Thus the proper date for determination of the sixty day filing period is the date of the dissenter's payment demand made under § 55-13-28. Plaintiff made such a demand on 5 December 2003, and properly filed for an extension of time to file a complaint for judicial appraisal on 20 January 2004. As plaintiff commenced the action within sixty days of the dissenter's payment demand, the trial court erred in dismissing the action for failure to file within the required time period under § 55-13-30(a).

For the reasons stated herein, we reverse the decision of the lower court.

Reversed.

Judges BRYANT and JACKSON concur.

ELLIS-DON CONSTRUCTION, INC., ELLIS-DON CONSTRUCTION, INC., AS THE ASSIGNEE OF RALEIGH-DURHAM AIRPORT AUTHORITY, PLAINTIFFS v. HNTB CORPORATION, DEFENDANT

No. COA04-829

(Filed 5 April 2005)

1. **Appeal and Error— preservation of issues—questions not raised at trial**

   Issues and theories not raised at trial were not reviewed on appeal.

2. **Appeal and Error— preservation of issues—assignments of error—arguments required**

   Assignments of error not supported by argument or authorities were abandoned.

3. Arbitration and Mediation— denial of motion to compel— findings required

The denial of a motion to stay and compel arbitration in a construction dispute was reversed and remanded for further findings where the court's order contained neither factual findings that would allow review, nor a determination of whether an arbitration agreement exists between the parties.

Appeal by defendant from order entered 19 February 2004 by Judge W. Osmond Smith, III, in Wake County Superior Court. Heard in the Court of Appeals 2 March 2005.

Nigle B. Barrow, Jr.; and Hendrick Phillips Salzman & Flatt, by Martin R. Salzman and William D. Flatt, pro hac vice, for plaintiffs-appellees.

Maupin Taylor, P.A., by John I. Mabe, Jr., for defendant-appellant.

TYSON, Judge.

HNTB Corporation ("defendant") appeals the trial court's denial of its motion to dismiss and motion to stay and compel arbitration. We remand for further findings of fact and conclusions of law.

I. BACKGROUND

In June 1996, Walker Parking Consultants/Engineers, Inc. ("WPCE") contracted with Raleigh-Durham Airport Authority ("RDAA") to provide facility planning and engineering services for the construction and renovation of a parking garage at the Raleigh-Durham Airport ("the Project"). Shortly thereafter WPCE contracted with defendant to provide design services for the Project as a subcontractor.

In January 1998, Ellis-Don Construction, Inc. ("plaintiff") was awarded the general construction contract by RDAA for the Project. Both contracts between RDAA and WPCE and RDAA and plaintiff include identical arbitration clauses. The contract between WPCE and defendant incorporates the same dispute resolution clause.

While performing its obligations under the contract, plaintiff alleges it incurred unanticipated and significant cost overruns due to circumstances beyond its control. Plaintiff submitted to RDAA a request for equitable adjustment to be reimbursed for the additional

costs. Plaintiff and RDAA could not settle the matter and plaintiff demanded arbitration. During the arbitration, RDAA brought a third-party claim against WPCE for indemnification. After several days of proceedings, plaintiff and RDAA settled. As part of the settlement, plaintiff was assigned all of RDAA's claims against other participating parties, including defendant.

Plaintiff, for itself and as the assignee of RDAA's claims, filed a complaint against defendant asserting affirmative claims of negligence, breach of contract, and indemnification. On 12 September 2003, defendant responded and moved to dismiss, to stay proceedings and to compel arbitration. Following oral argument and review of submissions, the trial court denied defendant's motions on 19 February 2004. Defendant appeals.

II. Issue

The issue on appeal is whether the arbitration clause included in the contracts between plaintiff and RDAA and defendant and WPCE is binding between plaintiff and defendant.

III. Issues Preserved for Appeal

[1] Plaintiff asserts that several issues defendant argues before this Court were not raised at the trial stage. We agree.

" 'This Court has long held that issues and theories of a case not raised below will not be considered on appeal, and th[ese] issue[s are] not properly before this Court.' " *Morris v. E.A. Morris Charitable Found.*, 161 N.C. App. 673, 680, 589 S.E.2d 414, 418-19 (2003) (quoting *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001)), *disc. rev. denied*, 358 N.C. 235, 593 S.E.2d 592 (2004).

Defendant's brief includes arguments derived from the Federal Arbitration Act, third-party beneficiary contracts, and plaintiff's alleged waiver of the arbitration clause. The record fails to disclose defendant previously asserted these "theories" of its case at the trial level. We limit our review to those arguments asserted in the pleadings before the trial court and properly preserved for review. *See Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("the law does not permit parties to swap horses between courts in order to get a better mount" on appeal.)

IV. Motion to Dismiss

[2] In accordance with Rule 10(c) of the North Carolina Rules of Appellate Procedure, defendant included in the record on appeal its assignment of error that the trial court erred in denying its motion to dismiss. N.C.R. App. P. 10(c) (2004). Defendant's brief and arguments fail to argue or set out authorities to support this assignment of error.

Under Rule 28(b)(6), "[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." N.C.R. App. P. 28(b)(6) (2004). Defendant's assignment of error asserting the trial court erred in denying its motion to dismiss is abandoned. *See Smith v. Noble*, 155 N.C. App. 649, 650-51, 573 S.E.2d 719, 720 (2002) ("Assignments of error not addressed in the brief are deemed abandoned under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.").

V. Review of Denial of Arbitration

[3] This Court has repeatedly held that "an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citations omitted). Defendant properly set forth the statutory framework under N.C. Gen. Stat. § 1-567.18 (2001) permitting review of the trial court's denial of defendant's motion to stay and compel arbitration. *See* 2003 N.C. Sess. ch. 345, § 1 (N.C. Gen. Stat. §§ 1-567.1 through 1-567.20: Repealed effective January 1, 2004, and applicable to agreements to arbitrate made on or after that date).

In *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004), we held

> [t]he question of whether a dispute is subject to arbitration is an issue for judicial determination. This determination involves a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.

(internal citations and quotations omitted).

In considering the first step, "[t]he trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal

where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (citation omitted), *disc. rev. denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). We review *de novo* whether the specific dispute is governed by the arbitration agreement. *Tohato, Inc. v. Pinewild Mgmt., Inc.*, 128 N.C. App. 386, 496 S.E.2d 800 (1998).

Under former N.C. Gen. Stat. § 1-567.3(a) (2001), the trial court "shall proceed summarily" to determine whether an agreement to arbitrate exists between the parties. *See Routh v. Snap-On Tools Corp.*, 101 N.C. App. 703, 706, 400 S.E.2d 755, 757 (1991); *see also* 2003 N.C. Sess. ch. 345, § 1 (N.C. Gen. Stat. §§ 1-567.1 through 1-567.20: Repealed effective January 1, 2004, and applicable to agreements to arbitrate made on or after that date). The trial court must make this determination or risk committing reversible error. *Burke v. Wilkins*, 131 N.C. App. 687, 689, 507 S.E.2d 913, 914 (1998) (citations omitted).

A. Analysis

Here, the trial court's order denying defendant's motion to dismiss and motion to stay and compel arbitration stated *in toto*:

> This Matter came before the Court on Defendant's Motion to Dismiss and on Defendant's Motion to Stay and Compel Arbitration. After reviewing all matters submitted and hearing arguments of counsel, the Court is of the opinion that both motions should be denied. It is therefore, ordered, adjudged and decreed that Defendant's Motion to Dismiss is denied and that Defendant's Motion to Stay and Compel Arbitration is Denied.

The order appealed from does not state the grounds for the trial court's denial of defendant's motion to stay and compel arbitration. No findings of fact allow us to review and determine whether competent evidence supports the trial court's denial of defendant's motion to stay and compel arbitration. *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580.

In *Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 509, 566 S.E.2d 130, 132 (2002), this Court reviewed the same issue and held

> there is no indication that the trial court made any determination regarding the existence of an arbitration agreement between the

> parties before denying defendants' motion to stay proceedings. The order denying defendants' motion to stay proceedings does not state upon what basis the court made its decision, and as such, this Court cannot properly review whether or not the court correctly denied defendants' motion.

Here, the trial court's order does not indicate whether it determined if the parties were bound by an arbitration agreement. While denial of defendant's motion might have resulted from: (1) a lack of privity between the parties; (2) a lack of a binding arbitration agreement; (3) this specific dispute does not fall within the scope of any arbitration agreement; or, (4) any other reason, we are unable to determine the basis for the trial court's judgment.

Without findings of fact, the appellate court cannot conduct a meaningful review of the conclusions of law and "test the correctness of [the lower court's] judgment." *Appalachian Poster Adver. Co., Inc. v. Harrington*, 89 N.C. App. 476, 480, 366 S.E.2d 705, 707 (1988). The order appealed from contained neither factual findings that allow us to review the trial court's ruling, nor a determination whether an arbitration agreement exists between the parties.

VI. Conclusion

Defendant's assignment of error concerning whether the trial court erred in denying its motion to dismiss is abandoned. The trial court's denial of defendant's motion to stay and compel arbitration is reversed and the matter is remanded for further factual findings and conclusions of law in accordance with this opinion.

Reversed and remanded.

Judges McGEE and GEER concur.

COUNTY OF CABARRUS, COUNTY OF ALAMANCE, COUNTY OF STOKES, COUNTY OF CALDWELL COUNTY OF DAVIE, TOWN OF GARNER, TOWN OF YANCEYVILLE, COUNTY OF NEW HANOVER, AND ADDITIONAL LOCAL GOVERNMENTS TO BE JOINED UPON THEIR MOTION, PLAINTIFFS V. NORRIS L. TOLSON, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA04-594

(Filed 5 April 2005)

Governor— budgetary powers—suspension of payments to local governments

Summary judgment in favor of defendant-Secretary of Revenue was affirmed where defendant relied on an Executive Order in suspending payments to local governments of local government tax reimbursements and local government tax-sharing funds. The North Carolina Constitution clearly gives the Governor a duty to balance the budget and prevent a deficit, that must be done through expenditures, and expenditures are here interpreted to be payments, disbursements, allocations, or otherwise, budgeted to be paid out of State receipts within a fiscal period. Separation of powers was not violated because the Governor was exercising powers constitutionally committed to his office, and language in the Constitution limiting the use of taxes to stated special objects is directed toward the General Assembly. N.C. Const. art. III, § 5(3).

Appeal by plaintiffs from order entered 29 January 2004 by Judge Joseph R. John in Wake County Superior Court. Heard in the Court of Appeals 14 February 2005.

Boyce & Isley, P.L.L.C. by G. Eugene Boyce, R. Daniel Boyce and Philip R. Isley, for plaintiff-appellants.

Attorney General Roy Cooper, by Chief Deputy Attorney General Grayson G. Kelley, Special Deputy Attorney General John F. Maddrey, and Special Deputy Attorney General Norma S. Harrell for defendant-appellee.

ELMORE, Judge.

Plaintiffs appeal an order granting a motion for summary judgment in favor of defendant. Plaintiffs argue that the trial court erred when it failed to determine that defendant violated the doctrine of separation of powers. For the reasons stated herein, we affirm.

On 5 February 2002 during a state budget crisis, the Governor issued Executive Order 19, entitled "Classroom Protection and Orderly Budget Administration Given State of Fiscal Emergency." Within the order, the Governor noted that Article III, Section 5 of the North Carolina Constitution required him to continually survey the collection of revenue. He also determined that the estimated receipts for the fiscal year would not exceed the estimated expenditures, thus resulting in a deficit. After noting that a previous reduction in state agency expenditures was not going to be enough to prevent a deficit, the Governor, by his order, sought to "effect the necessary economies in State expenditures to prevent the deficit from occurring." Exec. Order No. 19 (2002). Among other measures, this order directed defendant, the Secretary of Revenue, to halt expenditures for capital improvements, further reduce expenditures throughout state agencies, and withhold funds appropriated to local governments.

Based on the order directing him to suspend payments to local governments, defendant withheld two types of funds: (1) local government tax reimbursements and (2) local government tax-sharing funds. The local government tax reimbursements consisted of property tax exemptions and taxes on inventories of manufacturers, retailers, and wholesalers. The local government tax sharing funds were derived from sources such as piped natural gas taxes, taxes on utilities, and alcoholic beverage taxes. The total amount withheld by defendant from these funds was $210,906,602.00. Nevertheless, Executive Order 19 stated that the funds would be paid to local governments, "if possible, after determination that such funds are not necessary to address the deficit." *Id.*

Plaintiffs, a group of counties and municipalities in North Carolina, filed suit in September 2002 seeking a writ of mandamus to compel defendant to issue the funds. Specifically, plaintiffs alleged that the Secretary was required to distribute the funds to local governments pursuant to chapter 105 of the North Carolina General Statutes. On 29 January 2004, after hearing arguments from the parties on their cross-motions for summary judgment, the trial court granted defendant's motion for summary judgment.

Plaintiffs concede that there is no material fact at issue in this case, but argue that the trial court incorrectly applied the law. Plaintiffs assert that defendant did not have the authority to withhold local government tax funds. Defendant, on the other hand, argues that he was authorized to withhold the funds based on Executive

Order 19. Thus, the issue presented in this case is whether the Governor exceeded his authority under the North Carolina Constitution by issuing Executive Order 19.

Article III of the North Carolina Constitution establishes the executive branch of the government and gives the Governor certain budgetary duties. Section 5 provides that in addition to preparing a budget for the General Assembly, the Governor is authorized to administer the budget enacted by the General Assembly. N.C. Const. art. III, § 5(3). Following the grant of authority to administer the budget, the Constitution provides that:

> [t]he total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus remaining in the State Treasury at the beginning of the period. To insure that the State does not incur a deficit for any fiscal period, *the Governor shall continually survey the collection of the revenue and shall effect the necessary economies in State expenditures[.]*

Id. (emphasis added). This provision clearly places a duty upon the Governor to balance the budget and prevent a deficit. Plaintiffs contend, however, that this provision does not give the Governor authority to withhold the funds in question, thus making Executive Order 19 constitutionally invalid. We disagree.

This Court has previously interpreted the word "expenditure" in *Boneno v. State*, 54 N.C. App. 690, 284 S.E.2d 170 (1981). There, plaintiffs argued that contractual obligations, in particular road construction contracts, should constitute an expenditure within the meaning of that term. We held that an expenditure occurs when funds are disbursed, not when they are encumbered by contract. This Court further determined that only those expenditures in excess of receipts would violate Article III, Section 5 of the North Carolina Constitution. *Id.* at 691, 284 S.E.2d at 171. In accord with that decision, here we interpret expenditures to be payments, disbursements, allocations or otherwise, that are budgeted to be paid out of State receipts within a fiscal period. It is these expenditures that the Governor must effect to balance the budget against the expected or anticipated receipts within that same period.

Under the circumstances in this case, the Governor issued Executive Order 19 in order to prevent expenditures from unbalancing the state budget. A failure to exercise his duty under the Con-

stitution via Executive Order 19 would have resulted in a deficit, a state of budgetary crisis that is precisely what Article III, Section 5(3) of the North Carolina Constitution prohibits.

Furthermore, Executive Order 19 did not violate the separation of powers doctrine, as plaintiffs suggest. A violation of the separation of powers doctrine occurs when one branch of state government exercises powers that are reserved for another branch of state government. *Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 (2003). Implicit in the duty to prevent deficits is the ability of the Governor to affect the budget he must administer. *See, e.g., Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 295 S.E.2d 589 (1982) (noting that the Governor's constitutional duty to balance the budget was paramount to the General Assembly's desire to control major budget transfers). In this case, the Governor exercised powers that were constitutionally committed to his office without invasion on the legislative branch's power.

Plaintiffs argue that despite the Governor's authority, defendant violated Article V, Section 5 of the North Carolina Constitution. This section provides that "[e]very act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to *no other purpose*." N.C. Const. art. V, § 5 (emphasis added). Plaintiffs contend that defendant violated this provision by taking funds allocated for local governments and using them for other purposes that the General Assembly did not authorize.

But nothing about Article V, Section 5 of the Constitution suggests that it is directed at the Governor and his duty to "effect the necessary economies in State expenditures." N.C. Const. art. III, § 5(3). Rather, the special objects language is directed at the General Assembly. We do not read these two provisions of the Constitution in conflict.

Other jurisdictions that have faced similar determinations are in accord with our decision. For instance, in *Michigan Ass'n of Counties v. Department of Management & Budget*, 345 N.W.2d 584 (Mich. 1984), the Governor of Michigan reduced local government revenue-sharing funds pursuant to a state constitutional duty to balance the budget. Upon review, the Michigan Supreme Court determined that the funds were expenditures that the Governor had the authority to control and, as a result, dismissed the challenge to the Governor's actions. *Id.* Similarly, in *New Eng. Div. of the Am. Cancer Soc'y v. Comm'r of Admin.*, 769 N.E.2d 1248 (Mass. 2002), the

Governor of Massachusetts prevented a shortfall by eliminating expenditures for smoking prevention and multiple sclerosis programs. The Supreme Judicial Court of Massachusetts held that the Governor had the authority to eliminate the funds and had not violated the separation of powers. *Id.*

As a result of the foregoing, we determine that Executive Order 19 was a constitutional exercise of the Governor's authority. Thus, defendant's actions in reliance on that order were not in error.

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

MOORESVILLE HOSPITAL MANAGEMENT ASSOCIATES, INC. D/B/A LAKE NORMAN REGIONAL MEDICAL CENTER, PETITIONER V. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION; ROBERT J. FITZGERALD, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF FACILITY SERVICES; AND LEE B. HOFFMAN, IN HER OFFICIAL CAPACITY AS CHIEF OF THE CERTIFICATE OF NEED SECTION, RESPONDENTS AND THE PRESBYTERIAN HOSPITAL AND THE TOWN OF HUNTERSVILLE, RESPONDENT-INTERVENORS

No. COA03-899

(Filed 19 April 2005)

1. **Hospitals and Other Medical Facilities— certificate of need—standard of review**

The exclusion of the Certificate of Need Act from the standard of review in N.C.G.S § 150B-34(c), as well as the retention of the term "recommended decision," leaves undisturbed the scope and standard of review under N.C.G.S. § 150B-51 for appellate review of DHHS action under the CON Act.

2. **Hospitals and Other Medical Facilities— certificate of need—review of ALJ recommendation—new evidence**

A DHHS decision upholding a settlement in a hospital certificate of need dispute was remanded where DHHS heard new evidence after receiving the ALJ's recommended decision. The consideration of new evidence clearly violated N.C.G.S. § 150B-51(a).

3. **Hospitals and Other Medical Facilities— certificate of need dispute—settlement—procedures**

On remand, DHHS must follow the procedural safeguards for approval of applications and for initial decisions when issuing a certificate of need pursuant to a settlement after a final agency decision.

4. **Administrative Law— final agency decision—finality**

After an agency renders a final decision on the record before it, it is the province of the judiciary to review asserted errors in the decision and not the province of the agency to consider the matter further or anew. A final agency decision must be final in order to maintain procedural consistency and coherence.

5. Hospitals and Other Medical Facilities— certificate of need—relocation of operating rooms—grandfather clause

DHHS did not err in a certificate of need case by affirming an operating room settlement where the relocation of operating rooms met the requirements of the grandfather clause in a change in the certificate of need statutes. N.C.G.S. § 131E-176(16)u.

6. Hospitals and Other Medical Facilities— certificate of need—PET settlement

DHHS exceeded its statutory authority in affirming a PET scanners settlement regardless of whether a certificate of need had been issued; however, the two hospitals could obtain PET scanners by submitting new applications in accordance with normal CON procedure (which they had done and of which the Court of Appeals took judicial notice).

7. Administrative Law— final agency decision—rejection of ALJ findings—specific reason not provided

In a disputed certificate of need case decided on other grounds, DHHS did not provide a specific reason for rejection of ALJ findings as required by statute.

8. Hospitals and Other Medical Facilities— certificate of need—procedural violations—hospital allowed to operate

A hospital that opened under a certificate of need settlement agreement improperly approved after the final agency decision was allowed to continue operations pending remand because closing the hospital would cause hardship to the community and because the parties had acted in good faith.

Judge STEELMAN concurring in part and dissenting in part.

Appeal by petitioner from a Final Agency Decision issued 20 March 2003 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 1 April 2004.

McGuire Woods, L.L.P., by C. Ralph Kinsey, Jr., William G. Broaddus, and Smith Moore, L.L.P., by James G. Exum, Jr., Maureen Demarest Murray, and Susan M. Fradenburg, for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General James A. Wellons, for respondent-appellees.

Nelson, Mullins, Riley & Scarborough, L.L.P., by Noah H. Huffstetler, III, Denise M. Gunter, and Wallace C. Hollowell, III, for respondent-intervenor-appellees.

CALABRIA, Judge.

Mooresville Hospital Management Associates, Inc., d/b/a Lake Norman Regional Medical Center ("Lake Norman") appeals a North Carolina Department of Health and Human Services final agency decision issued 20 March 2003 upholding two settlement agreements between the North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section ("DHHS") and Presbyterian Hospital ("Presbyterian"), Forsyth Medical Center ("Forsyth"), and Novant Health, Inc. ("Novant"), Presbyterian and Forsyth's parent company. We affirm in part, reverse in part, and remand with instructions.

On 14 May 1999, Presbyterian submitted an application to DHHS (the "1999 application") for a certificate of need ("CON") to construct a hospital ("Presbyterian Hospital North") in Huntersville (the "hospital project" or the "project"). On 28 October 1999, DHHS denied the 1999 application. After an appeal to the Office of Administrative Hearings ("OAH"), an Administrative Law Judge ("ALJ") entered a recommended decision to issue a CON to Presbyterian. On 13 October 2000, DHHS issued a final agency decision rejecting the ALJ's recommended decision and denying the 1999 application. Presbyterian appealed the final agency decision to this Court.

While that appeal was pending before this Court, Presbyterian filed another CON application for the hospital project in September of 2001 (the "2001 application"). On 27 February 2002, DHHS denied the 2001 application, and approximately one month later, Presbyterian petitioned OAH to review the denial of the 2001 application. Presbyterian had two pending appeals at the same time: (1) the 1999 application appeal, before this Court and (2) the 2001 application appeal, before OAH.

On 5 April 2002, the Chief of the CON Section, Lee B. Hoffman ("Hoffman"), and the Director of the Division of Facility Services, Robert J. Fitzgerald ("Fitzgerald"), met with representatives of Presbyterian, Forsyth, and Novant. As a result of the meeting, the parties agreed to negotiate eight outstanding disputes, which were eventually reduced to two settlement agreements. Pertinent to this appeal, the following three disputes were settled: (1) the litigation surround-

ing Presbyterian's 1999 and 2001 applications, which DHHS agreed to negotiate only if Presbyterian submitted additional information on the hospital project (the "hospital settlement"); (2) Presbyterian's September 2001 request for approval, without a CON review, to relocate four operating rooms from a downtown Charlotte facility to a new facility in south Charlotte (the "OR settlement"); and (3) Presbyterian and Forsyth's appeal to superior court concerning DHHS' denial of their October 2001 requests for approval, without a CON review, to replace existing diagnostic health equipment at Presbyterian Hospital in Charlotte and Forsyth Medical Center with a Positron Emission Tomography Scanner ("PET scanner") at each location (the "PET settlement") (collectively the "settlements"). Hoffman and a Presbyterian representative reviewed the newly submitted information regarding the hospital project. Although Hoffman disagreed with Presbyterian's position that the newly submitted information satisfied all the required statutory criteria for issuance of a CON, Fitzgerald approved the hospital settlement along with the other two settlements on 8 May 2002.

The hospital settlement, prompted by the newly submitted information, provided for the immediate issuance of a CON for the hospital project based on updates and amendments to the 1999 application. In addition, the hospital settlement required Presbyterian to dismiss the appeal pending before this Court concerning the 1999 application, dismiss the contested case pending before OAH concerning the 2001 application, and withdraw the 2001 application. The OR settlement approved, without a CON review, Presbyterian's relocation of four operating rooms from a downtown Charlotte facility to a new facility in south Charlotte. The PET settlement stated Presbyterian and Forsyth could each acquire a PET scanner "on or after 1 July 2004" if (1) a CON had not been issued to either hospital by that date and (2) Presbyterian and Forsyth dismissed all pending litigation concerning acquisition of PET scanners.

Throughout the 1999 and 2001 applications, Lake Norman Regional Medical Center, located approximately eleven miles from the proposed site of the hospital project, opposed issuance of a CON for the project. Lake Norman was permitted to intervene in Presbyterian's cases at OAH and also in the appeal to this Court concerning the 1999 application. After the 2001 application was withdrawn, however, Lake Norman's opposition to the 2001 application was rendered moot and could not be sustained.

From the time DHHS rendered a final agency decision denying the 1999 application, in Lake Norman's favor, until issuance of the CON pursuant to the hospital settlement, DHHS did not provide Lake Norman notice or an opportunity to be heard regarding the settlement. Lake Norman did not learn of the settlements until 9 May 2002. On 24 May 2002, Lake Norman petitioned OAH for a contested case hearing concerning the propriety of the settlements. Both Presbyterian and the Town of Huntersville were allowed to intervene in support of issuance of the CON for the hospital project. On 26 November 2002, an ALJ issued a recommended decision granting summary judgment in favor of Lake Norman, setting aside the settlements, and withdrawing the issued CON for the hospital project. On 20 March 2003, DHHS entered a final agency decision rejecting the ALJ's recommended decision, upholding the settlements, and finding, *inter alia*, that the new information Presbyterian submitted during negotiations regarding the hospital project was sufficient to show the project's compliance with all the required statutory review criteria. On 21 April 2003, Lake Norman appealed DHHS' final decision to this Court. Presbyterian and the Town of Huntersville were permitted to intervene in the appeal.

I. The Scope and Standard of Review applicable to the CON Act

[1] Before addressing the issues on appeal, we must consider the effect of the 2000 amendments (effective 1 January 2001) to Chapter 150B of the North Carolina General Statutes, the North Carolina Administrative Procedure Act (the "NCAPA"), on the scope and standard of review applicable to final agency decisions under Article 9 of Chapter 131E of the North Carolina General Statutes (the "CON Act"). Prior to the 2000 amendments, N.C. Gen. Stat. § 150B-51 (1999) controlled the scope and standard of review for all final agency decisions made after a recommended decision by an ALJ. Under N.C. Gen. Stat. § 150B-51 (1999):

> (a) . . . In reviewing a final decision in a contested case in which an [ALJ] made a *recommended decision*, the court shall make two initial determinations. First, the court shall determine whether the agency heard new evidence after receiving the *recommended decision*. If the court determines that the agency heard new evidence, the court shall reverse the decision or remand the case to the agency to enter a decision in accordance with the evidence in the official record. Second, if the agency did not adopt the *recommended decision*, the court shall determine whether the agency's decision states the specific reasons why the

agency did not adopt the *recommended decision*. If the court determines that the agency did not state specific reasons why it did not adopt a *recommended decision*, the court shall reverse the decision or remand the case to the agency to enter the specific reasons.

(b) . . . [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the 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 admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

(Emphasis added). On appeal, "[w]here the appealing party alleges that the agency made an error of law, seeking review under [N.C. Gen. Stat. § 150B-51(b)] (1), (2), (3) or (4) [(1999)], the agency's decision is reviewed *de novo* . . . ." *Burke Health Investors v. N.C. Dep't of Hum. Res.*, 135 N.C. App. 568, 571, 522 S.E.2d 96, 98 (1999).

Pursuant to the 2000 amendments to the NCAPA, N.C. Gen. Stat. § 150B-51 (2003) discards the term "recommended decision" in favor of "decision" and retains the prior scope and standard of review where "the agency adopted the [ALJ's] *decision*" but heightens the scope and standard of review where "the agency does not adopt the [ALJ's] *decision*." N.C. Gen. Stat. § 150B-51(a1), (b), (c) (2003) (emphasis added); *Cape Med. Transp., Inc. v. N.C. Dep't of Health & Human Servs.*, 162 N.C. App. 14, 21-22, 590 S.E.2d 8, 13-14 (2004). Additionally, N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) (2003) require the agency to adopt in its final decision the findings of fact and "the *decision* of the [ALJ] unless the agency demonstrates that [the findings of fact and decision are] clearly contrary to the preponderance of the admissible evidence." (Emphasis added).

Despite these amendments to the NCAPA, N.C. Gen. Stat. § 150B-34(c) (2003) provides:

> [I]n cases arising under [the CON Act], the [ALJ] shall make a *recommended decision* . . . that contains findings of fact and conclusions of law. A final decision shall be made by the agency in writing after review of the official record [prepared by OAH] and shall include findings of fact and conclusions of law. The final agency decision shall recite and address all of the facts set forth in the *recommended decision*. For each finding of fact in the *recommended decision* not adopted by the agency, the agency shall state the specific reason, based on the evidence, for not adopting the findings of fact and the agency's findings shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. *The provisions of G.S. 150B-36(b), (b1), (b2), (b3), and (d), and G.S. 150B-51 do not apply to cases decided under this subsection.*

(Emphasis added). We construe N.C. Gen. Stat. § 150B-34(c) (2003)'s exclusion of the CON Act from the requirements of N.C. Gen. Stat. § 150B-36(b), (b1), (b2), (b3), and (d) (2003) and N.C. Gen. Stat. § 150B-51 (2003) as well as the retention of the term "recommended decision" to leave undisturbed the scope and standard of review applied under N.C. Gen. Stat. § 150B-51 (1999) for purposes of appellate review of DHHS' action under the CON Act. Having set forth the relevant standard of review, we now turn to the issues presented on appeal.

II. Alleged Error under N.C. Gen. Stat. § 150B-51 (1999)

[2] Lake Norman asserts the settlement procedure used by DHHS in reaching the hospital settlement violated the first prong of N.C. Gen. Stat. § 150B-51(a) (1999). Specifically, Lake Norman argues DHHS improperly considered new evidence in approving the hospital settlement after receiving the ALJ's recommended decision concerning the 1999 application. We agree.

As stated above, the first prong of N.C. Gen. Stat. § 150B-51(a) (1999) requires a court reviewing a final agency decision to "reverse the decision or remand the case . . . [for entry of] a decision in accordance with the evidence in the official record" if it "determines that the agency heard new evidence [after receiving an ALJ's recommended decision]." (Emphasis added). *See generally*, N.C. Gen. Stat. § 150B-37 (1999); N.C. Gen. Stat. § 150B-37 (2003) (providing that

OAH shall prepare an official record in a contested case and forward a copy of it with the ALJ's recommended decision to the agency making the final decision). Here, after receiving the ALJ's recommended decision concerning the 1999 application, DHHS heard new evidence in approving the hospital settlement based on updates to this application. Given the plain language and mandate of the statute, we conclude DHHS' consideration of new evidence clearly violated N.C. Gen. Stat. § 150B-51(a) (1999) and was erroneous. Furthermore, based on this prohibited new evidence, DHHS, in effect, rendered a "second final agency decision" regarding the 1999 application through settlement countermanding its original final agency decision. Accordingly, we reverse DHHS' final decision upholding the hospital settlement.

III. Alleged Errors under the CON Act

[3] Lake Norman alternatively asserts the procedure used by DHHS in approving the hospital settlement and issuing the CON for the hospital project violated several provisions of the CON Act. We agree.

Neither the CON Act nor case law addresses the procedure for settlement of CON disputes after a final agency decision. In determining the proper procedure, we must remember that, although N.C. Gen. Stat. § 150B-22 (2003) establishes a state policy directing agencies to settle disputes if possible, " '[a]n administrative agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislature grant of authority.' " *Boston v. N.C. Private Protective Services Bd.*, 96 N.C. App. 204, 207, 385 S.E.2d 148, 150-51 (1989) (quoting *In re Williams*, 58 N.C. App. 273, 279, 293 S.E.2d 680, 685 (1982). Therefore, DHHS' ability to settle and, through settlement, to exercise powers granted it by the legislature in the CON Act may not supercede other express requirements and limitations placed upon its exercise of those powers. Accordingly, we must interpret the CON Act, looking to the language of the act and the intent of the legislature, to discern the proper procedure for the settlement of a CON dispute after a final agency decision. *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992) (stating the fundamental task in statutory interpretation "is to ascertain and adhere to the intent of the legislature"). We begin by reviewing the relevant provisions of the CON Act.

The CON Act was intended "to limit the construction of health care facilities in this state to those that the public needs and that can

be operated efficiently and economically for their benefit." *In re Humana Hosp. Corp. v. N.C. Dept. of Human Resources*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986); N.C. Gen. Stat. § 131E-175 (2003). To effectuate this purpose, the legislature granted DHHS the authority to issue CONs only after a procedural process consisting, in relevant part, of application, agency review, administrative appeal, final agency decision, and judicial appeal.

Pursuant to the CON Act, if a proposed project requires a CON, the proponent of the project must properly submit an application. N.C. Gen. Stat. § 131E-178, 182 (2003). DHHS then reviews the application for a period normally not to exceed ninety days to determine whether a CON for the proposed project should issue. N.C. Gen. Stat. § 131E-185(a1) (2003). As an initial matter, DHHS determines "whether the applicant has complied with the statutory criteria contained in N.C. Gen. Stat. § 131E-183(a) [(2003)] and rules adopted by the agency [in N.C. Admin. Code tit. 10A, r. 14C.0100 through r. 14C.0502 (June 2004)]." *Living Centers-Southeast, Inc. v. N.C. Dep't of Health & Human Servs.*, 138 N.C. App. 572, 575, 532 S.E.2d 192, 194 (2000). In rendering a decision, DHHS is statutorily limited to approving, approving with conditions, or denying the application. N.C. Gen. Stat. § 131E-186(a) (2003).

Once DHHS renders "a decision . . . to issue, deny or withdraw a certificate of need or exemption or to issue a certificate of need pursuant to a settlement agreement with an applicant to the extent permitted by law," affected persons are afforded thirty days in which to petition OAH for a contested case hearing before an ALJ. N.C. Gen. Stat. § 131E-188(a) (2003); N.C. Admin. Code tit. 10A, r. 14C.0208. If an affected person does not file a petition for a contested case hearing after a decision to issue a CON, DHHS must issue a CON within thirty-five days of the decision. N.C. Gen. Stat. § 131E-187(a) (2003). If a petition is filed, N.C. Admin. Code tit. 10A, r. 14C.0401(a), a rule promulgated by DHHS in accordance with N.C. Gen. Stat. § 131E-187(a) and 188(a), provides that a CON will not be issued. DHHS must stay issuance until the official record is received following the contested case hearing; whereupon DHHS must make its final agency decision within thirty days and thereafter may issue the CON. N.C. Gen. Stat. § 131E-188(a); N.C. Gen. Stat. § 131E-187(b) (2003). The statutory time period for an "affected person who was a party in a contested case hearing [to appeal to the Court of Appeals is] . . . 30 days [from] the receipt of the written notice of final decision . . . ." N.C. Gen. Stat. § 131E-188(b) (2003).

DHHS and Presbyterian, ostensibly, contend the procedural process outlined in the CON Act does not apply to approvals of CON settlements. However, N.C. Gen. Stat. § 131E-188(a) refers to approval of a settlement as "a *decision* [by DHHS]. . . to issue a certificate of need pursuant to a settlement agreement . . . ." Therefore, we construe such an approval to occupy the same procedural position as an initial "*decision* to 'approve' [or] 'approve with conditions,' . . . an application" under N.C. Gen. Stat. § 131E-186(a). This also compels construing the settlement agreement itself as being equivalent to a new application. Therefore, it follows that all procedural safeguards applying to application approval and initial decisions, as discussed above, apply equally to approval of settlements.

Accordingly, prior to approving a settlement, DHHS must determine that the project referenced in the settlement will be "consistent with or not in conflict with [the] criteria" enumerated under N.C. Gen. Stat. § 131E-183(a). After a decision to issue a CON pursuant to a settlement, DHHS must wait thirty days before issuing a CON so affected persons may request a contested case hearing. N.C. Gen. Stat. § 131E-187(a), 188(a); N.C. Admin. Code tit. 10A, r. 14C.0208. If a contested case hearing is requested, DHHS may not issue a CON pursuant to the settlement unless the "hearing has been withdrawn or the final agency decision has been made following [receipt of the official record and an ALJ recommended decision] . . ., and all applicable conditions of approval that can be satisfied . . . have been met." N.C. Gen. Stat. § 131E-187(b). *See also* N.C. Admin. Code tit. 10A, r. 14C.0401(a).

Applying this law to the facts in the instant case, several procedural and statutory errors are immediately apparent. First, Hoffman and a Presbyterian representative reviewed the newly submitted evidence regarding the hospital project. Hoffman disagreed with Presbyterian's position that the new evidence, in fact, satisfied all the statutory criteria or that the criteria were met by the hospital project, as referenced in the settlement, at the time of approval. Furthermore, no evidence in the record suggests Fitzgerald determined the new evidence satisfied the criteria or that the hospital project, as referenced in the settlement, complied before his approval of the hospital settlement. Nonetheless, DHHS issued the CON in violation of N.C. Gen. Stat. § 131E-183(a). Second, DHHS issued the CON immediately after approval of the hospital settlement in violation of N.C. Gen. Stat. § 131E-188(a) and its own agency rule, N.C. Admin. Code tit. 10A, r. 14C.0208, promulgated in accordance

with N.C. Gen. Stat. § 131E-188(a). Affected parties were not permitted the required thirty day time period to petition for a contested case hearing for the purpose of substantively challenging the hospital settlement prior to issuance of the CON. Third, even assuming *arguendo* DHHS determined compliance had been established, we would not be persuaded of the propriety of the hospital settlement because affected parties adverse to Presbyterian's position were excluded from presenting any argument as to non-compliance prior to issuance of the CON. *Cf. Firefighters v. Cleveland*, 478 U.S. 501, 529, 92 L. Ed. 2d 405, 428 (1986) (stating "an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree . . . ."); *State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n.*, 348 N.C. 452, 466, 500 S.E.2d 693, 703 (1998) (stating, in rate cases before the North Carolina Utilities Commission, "negotiation and settlement is subversive of due process and the legislative authority delegated to the Commission if it lacks representation of all the parties with a certified interest in the outcome of the proceeding").

In analyzing the issues in the instant case, we deem it appropriate to comment on our holding in *Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Hum. Res.*, 136 N.C. App. 103, 523 S.E.2d 677 (1999), which also addresses a settlement under the CON Act. In that case, Bio-Medical asserted all the statutory criteria were not met by a project approved pursuant to a settlement between DHHS and Dialysis Care of North Carolina, which was entered into after an initial DHHS decision to deny Dialysis Care's CON application but prior to a final agency decision. *Id.*, 136 N.C. App. at 108-09, 523 S.E.2d at 680-81. Bio-Medical appealed both the settlement between DHHS and Dialysis Care and DHHS' final decision affirming issuance of the CON pursuant to the settlement. *Id.* This Court held that DHHS erred by approving the settlement before establishing that Dialysis Care's project complied with the statutory criteria. *Id.* Nevertheless, because satisfactory evidence of compliance was provided during the subsequent contested case hearing, this Court upheld DHHS' final decision affirming issuance of the CON under the settlement because any "mistakes or omissions" under the settlement had been corrected, and there was no prejudice to Bio-Medical. *Id.* Therefore, *Bio-Medical Applications* reiterates that, in exercising its authority under the CON Act, whether via normal application procedure or settlement, DHHS remains obligated to ensure that a proposed project meets all the statutory criteria before approving the issuance of a CON. *Id.* In affirming DHHS' final decision, this Court noted the

"unusual procedural posture" of *Bio-Medical Applications* in that Bio-Medical appealed only the settlement, which dealt solely with the criteria left unresolved in the original review, and DHHS' final decision, which corrected a failure to establish compliance at the time of settlement approval. *Id.* We further note DHHS had not already rendered a final agency decision on the official record when it initially approved the settlement. *Id.* We do not deem it prudent to expand the scope of *Bio-Medical Applications* to cases where, as here, DHHS had rendered a final agency decision based on the official record denying issuance of a CON before the settlement negotiations occurred and before the settlement was approved.

[4] Furthermore, we must respectfully disagree with the dissent in that neither the statutes nor case law cited by the dissent have allowed an agency in North Carolina to effectively countermand its original final agency decision with a different final agency decision. Indeed, in order to maintain procedural consistency and coherence, a final agency decision must have finality. After an agency renders a final decision on the record before it, it is the province of the judiciary to review asserted errors in the decision, not the province of the agency to consider the matter further or anew. Moreover, the dissent notes Lake Norman "had a full and complete opportunity to litigate and challenge the settlement agreements[;]" however, we note that prior to this "review," a CON had already issued.

In sum, we hold DHHS must adhere to the procedural safeguards for application approval and initial decisions when issuing CONs pursuant to settlements. Our holding ensures compliance with the mandates of the CON Act as well as the dictates of this Court's precedent, protects the rights of affected persons, and upholds the CON Act's purpose to regulate health care facility construction for the public benefit. Accordingly, on remand, DHHS must follow the procedures outlined above in considering the hospital settlement anew.

IV. The OR Settlement

[5] Lake Norman asserts DHHS erred in its final agency decision by affirming the OR settlement. Specifically, Lake Norman argues DHHS exceeded its authority in the OR settlement by permitting the relocation of four operating rooms from a downtown Charlotte facility to a new facility in south Charlotte without a CON review. We disagree.

Under N.C. Gen. Stat. § 131E-176(16)u (2003), a CON is required to relocate "an operating room or operating rooms . . . [to a location]

separated by more than a public right-of-way adjacent to the grounds where the operating room is or operating rooms are currently located." This requirement became effective 23 June 2001 but was subject to the following "grandfather clause":

> "This act shall not apply to any project which was not a new institutional health service as defined in G.S. 131E-176(16) prior to the effective date of this act and for which there has been a capital expenditure exceeding fifty thousand dollars ($50,000) or there was a legally binding obligation for a capital expenditure exceeding fifty thousand dollars ($50,000) in effect on or before the effective date of this act and which was reasonably expected to be completed by December 31, 2002."

Id. (Editor's Note) (quoting Act of June 13, 2001, ch. 242, sec. 5, 2001 N.C. Sess. Laws 640-41). Prior to 23 June 2001, the relocation of operating rooms was not defined as "a new institutional health service" requiring issuance of a CON. *See* N.C. Gen. Stat. § 131E-176(16) (1999).

In the instant case, on or about 11 April 2001, Presbyterian entered into a binding obligation with an architectural firm for services relating to the relocation of the operating rooms for a fee of ten percent of the construction cost. Estimated fees at that time ranged from $110,000 to $130,000 and were subsequently adjusted downward to $73,500 on 14 June 2001. Furthermore, at the time of DHHS' approval of the OR settlement, the architect projected mid-December 2002 as the completion date for the relocation. Accordingly, Presbyterian's operating room relocation met the requirements of the "grandfather clause," and DHHS did not err in its final decision by affirming the OR settlement.

V. The PET Settlement

[6] Lake Norman asserts DHHS erred in its final agency decision by affirming the PET settlement. The settlement provided that DHHS would permit both Presbyterian and Forsyth's acquisition of a PET scanner "on or after 1 July 2004" regardless of whether a CON had been issued. To the extent the PET settlement forms the basis of Presbyterian and Forsyth's acquisition of PET scanners or implies permission to acquire a PET scanner irrespective of whether that acquisition is consistent with the CON Act, we summarily agree that DHHS exceeded its statutory authority and further analysis is unnecessary.

Nevertheless, Presbyterian and Forsyth may obtain PET scanners separate from the PET settlement by submitting new applications in accordance with normal CON procedure. Pursuant to motions before this Court, we take judicial notice that Presbyterian and Forsyth have, in fact, submitted new CON applications for the acquisition of PET scanners. *See Utilities Comm. v. Southern Bell Telephone Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976) (observing that appellate courts may utilize the device of judicial notice). Nothing in the record before us indicates these new CON applications or DHHS' treatment of them might be linked improperly to the PET settlement. Accordingly, the proceedings associated with these new CON applications are not before this Court in this case, and we need not consider them.

VI. Rejection of ALJ Findings of Fact in a Final Agency Decision

[7] In the interest of preventing future recurring error, we address Lake Norman's assertion that DHHS' final decision violated N.C. Gen. Stat. § 150B-34(c) by failing to provide a specific reason for its rejection of certain findings of fact by the ALJ. Under N.C. Gen. Stat. § 150B-34(c):

> The final agency decision shall recite and address all of the facts set forth in the recommended decision. For each finding of fact in the recommended decision not adopted by the agency, the agency shall state the *specific reason*, based on the evidence, for not adopting the findings of fact and the agency's findings shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31.

(Emphasis added).

DHHS' final decision adopted forty-nine of the ALJ's findings of fact and rejected fifty-two. In twenty-five of the rejections, DHHS did not provide a specific reason for the rejection as required by N.C. Gen. Stat. § 150B-34(c). For example, the rejection of finding of fact twelve stated, "I reject Finding of Fact No. 12 on the grounds that it mischaracterizes the Agency's actions. See Fitzgerald Dep., Vol. I, pp. 40-42." While this rejection indicates DHHS' determination that the finding was erroneous, no specific reason was provided for this rejection in violation of N.C. Gen. Stat. § 150B-34(c). The statutory requirement for providing a specific reason both guards against arbitrary decisions by the agency and facilitates meaningful appellate review, and we encourage DHHS to comply with the statutory requirements for rejecting findings of fact in future final agency decisions.

VII. Conclusion

For the foregoing reasons, we reverse DHHS' final decision concerning the hospital settlement and remand the case to DHHS with instructions to: (1) withdraw the CON for the hospital project issued pursuant to the settlement and (2) consider the hospital settlement anew, adhering to the procedural safeguards applying to an application approval and initial decision. Should a contested case hearing occur after DHHS' decision concerning the hospital settlement, we reiterate DHHS' duty to provide a specific reason for each finding of fact rejected in its final agency decision. We affirm DHHS' final decision concerning the OR settlement on the basis of the "grandfather clause" applicable to N.C. Gen. Stat. § 131E-176(16)u. Any final agency decision based on the PET settlement's implication of permission from DHHS to acquire a PET scanner irrespective of whether that acquisition is consistent with the CON Act must fail, but we express no opinion regarding proceedings associated with independent CON applications.

[8] As a final matter, we note Presbyterian Hospital North became fully operational during the pendency of this appeal. We are faced, therefore, with balancing a strict application of the provisions of the CON Act against maintaining health care services currently provided by the operating hospital. It would be imprudent to close the hospital due to procedural irregularities in light of the hardship to the community. This is especially true in the instant case because the new evidence submitted during negotiations contains information relevant to a determination of compliance with the required statutory criteria. Furthermore, after considering the evidence in the record, as well as the parties' lack of guidance from the statutes and from judicial precedent, it appears that DHHS and Presbyterian proceeded in good faith, albeit erroneously, in attempting to settle this matter after the original final agency decision concerning the 1999 application. Now that this Court has set forth the appropriate settlement procedure, the possibility of such good faith attempts to settle by parties in future cases is vitiated, and such considerations will not avail parties to whom a CON has been issued in violation of these procedural safeguards. In the instant case, however, Prebyterian Hospital North may continue to operate (1) until the hospital settlement has upon remand been considered anew by DHHS following the procedures outlined above and (2) in the event a contested case hearing should occur following DHHS' initial decision, until DHHS enters a final agency decision.

Affirmed in part, reversed in part, and remanded with instructions.

Judge McGEE concurs.

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

STEELMAN, Judge concurring in part and dissenting in part.

I concur in parts IV and V of the majority opinion, but must respectfully dissent as to the balance of the opinion.

N.C. Gen. Stat. § 131E-188(a) (2004) provides that:

> After a decision of the Department to issue, deny or withdraw a certificate of need or exemption or to issue a certificate of need pursuant to a settlement agreement with an applicant to the extent permitted by law, any affected person, as defined in subsection (c) of this section, shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes.

Pursuant to this provision and N.C. Gen. Stat. § 150B-22, the Department of Health and Human services (DHHS) was permitted to enter into settlement agreements with Presbyterian Hospital and Forsyth Memorial Hospital. Following these settlements, Mooresville Hospital initiated this contested case proceeding. Mooresville had a full and complete opportunity to litigate and challenge the settlement agreements. This procedure is clearly set forth in N.C. Gen. Stat. § 131E-188. The additional procedural requirements set forth in the majority opinion are not found in either Chapter 131E or Chapter 150B.

I would also hold that the findings contained in the Final Decision of DHHS are supported by the evidence, and petitioner can show no prejudice. *Bio-Medical Applications of N.C., Inc. v. North Carolina Dep't of Human Resources, Div. of Facility Servs., Certificate of Need Section*, 136 N.C. App. 103, 523 S.E.2d 677 (1999); *Britthaven, Inc. v. North Carolina Dep't of Human Resources, Div. of Facility Servs.*, 118 N.C. App. 379, 455 S.E.2d 455 (1995).

Under the provisions of N.C. Gen. Stat. § 150B-34(c), DHHS was required to "state the specific reason, based on the evidence, for not adopting the findings of fact" of the Administrative Law Judge (ALJ). This provision, applicable only to cases under Chapter 131E, sets forth a lesser standard for final agency decisions than under N.C.

Gen. Stat. § 150B-36, for rejection of the findings of fact of the ALJ. N.C. Gen. Stat. § 150B-36(b1) provides that in cases other than Chapter 131E, the final agency decision:

> shall set forth separately and in detail the following:
>
> (1) The reasons for not adopting the findings of fact.
>
> (2) The evidence in the record relied upon by the agency in not adopting the finding of fact contained in the administrative law judge's decision.

I would hold that the specific reasons cited in the Final Decision of DHHS for rejecting the findings of fact of the ALJ were sufficient. The recommended decision of the ALJ was 39 pages long, and contained 101 separate findings of fact. The final Decision of DHHS was 103 pages long. Each rejected finding of the ALJ was set out verbatim and the reason for the rejection stated. Some of the reasons stated for rejection were lengthy and some were short. Some of the reasons stated incorporated specific documents into the decision. I would hold that the Final Decision complied with the provisions of N.C. Gen. Stat. § 150B-34(c), which only require that DHHS state the specific reason for rejection of the finding of fact made by the ALJ.

Finally, the majority opinion specifically authorizes Presbyterian Hospital North to continue in operation without a CON pending DHHS' reconsideration of this matter. The majority cites no authority for this directive, and I know of none.

I would affirm the final agency decision in this matter.

STATE OF NORTH CAROLINA v. ROBERT LEWIS McCLAIN

No. COA04-938

(Filed 19 April 2005)

1. Criminal Law— competency to stand trial—mental retardation

The trial court did not abuse its discretion in a first-degree murder case by determining that defendant was competent to stand trial under the test set forth in N.C.G.S. § 15A-1001(a), because: (1) evidence that a defendant suffers from mental retar-

dation is not conclusive on the issue of competency; and (2) the evidence supported the trial court's findings that defendant was able to understand the nature and object of the proceedings against him, he comprehended his situation in regard to the trial, and defendant had the ability to assist in his defense in a rational and reasonable manner.

2. Criminal Law— denial of motion to continue—abuse of discretion standard

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion to continue made immediately following the trial court's ruling that he was competent to stand trial.

3. Homicide— first-degree murder—instructions—deliberation

The trial court did not err in a first-degree murder case by its supplemental instructions on the element of deliberation when it used the language of *State v. Ruof*, 296 N.C. 623 (1979), because: (1) the initial instructions on deliberation were proper and comported with the pattern jury instructions on first-degree murder; (2) *State v. Ruof* is a correct statement of the law and the language contained in *Ruof*, which defines deliberation, has been cited with approval by our Supreme Court on several occasions; and (3) a review of the trial court's instructions to the jury as a whole and construing them contextually reveals that the charge as a whole was correct.

4. Jury— peremptory challenge—*Batson* challenge—race neutral reasons

The trial court did not err in a first-degree murder case by allowing the prosecution to peremptorily excuse an African-American prospective juror because: (1) hesitancy on death penalty questions is a race-neutral reason for excusing a juror, and the trial court was in the best position to resolve this issue since it heard and saw the responses of the prospective juror including her facial expressions, tone of voice, reactions, and other nuances that are not subject to translation when reviewing a cold record on appeal; (2) the prospective victim's brother had previously been convicted of armed robbery, and the criminal conviction of a potential juror's relative has been recognized as a race-neutral reason for the exclusion of that juror by peremptory challenge; (3) just because some of the remarks made by the stricken juror have also been made by other potential jurors the

prosecutor did not challenge does not require a finding that the reason given by the State was pretextual since a characteristic deemed to be unfavorable by one prospective juror may in a second prospective juror be outweighed by other favorable characteristics; and (4) the trial court found that at the time defendant raised the *Batson* challenge, the State had used five peremptory challenges and none of those were against African-Americans, only the defense had peremptorily excused an African-American, and one-fourth of the jury seated at the time of the challenge was African-American.

5. Evidence— lay opinion testimony—mental retardation

The trial court did not err in a first-degree murder case by allowing a lay witness to testify that defendant was not mentally retarded, because: (1) N.C.G.S. § 8C-1, Rule 701 permits lay witness opinion if it is rationally based on the perception of the witness and helpful to a clear understanding of her testimony or the determination of a fact in issue; (2) our Supreme Court has held that the mental condition of another is an appropriate subject for lay opinion; (3) the witness had ample opportunity to observe defendant and form an opinion as to his mental condition since she lived with defendant, saw him on a daily basis, and had the opportunity to observe him in various situations; (4) this testimony was relevant as to whether defendant had the necessary mens rea for first-degree murder and helpful to a clear understanding of a fact in issue; (5) even though the witness testified that defendant was not mentally retarded, when read in context, it demonstrates that she was not giving an expert opinion but was instead using the phrase to describe defendant's ability to function on a daily basis in shorthand form; and (6) the State was not attempting to elicit expert testimony from the witness regarding defendant's mental retardation.

6. Homicide— first-degree murder—short-form indictment—constitutionality

The short-form indictment used to charge defendant with first-degree murder was constitutional.

Judge WYNN concurring.

Appeal by defendant from judgment entered 25 June 1999 by Judge Ronald K. Payne in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Mary D. Winstead, for the State.

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

STEELMAN, Judge.

Defendant, Robert Lewis McClain, appeals his conviction for first-degree murder. For the reasons discussed herein, we affirm the trial court.

The evidence at trial tended to show that defendant was mildly mentally retarded. At the time of the murder, defendant worked at TPI Commissary warehouse in Charlotte, with the victim, David Evans. The two men worked as a team, as order pullers. Defendant's responsibilities included reading orders, which contained information as to the description of the item, its number, quantity, and location in the warehouse. Defendant would locate the items and load them onto an electric pallet jack for shipment. Testimony at trial indicated Evans teased defendant at work because of defendant's mental retardation.

On 15 March 1994, defendant and Evans had an argument when Evans arrived late to work. After work that day, defendant walked out with a co-worker, Michael McFadden. They walked over to defendant's car, where defendant opened the glove compartment and showed McFadden his nine millimeter pistol. As Evans was leaving work, defendant called him over to his car and said, "What was this sh— you were talking all day?" Defendant did not point his gun at Evans, but he raised it high enough that Evans could see it. After seeing the gun, Evans went to his vehicle and left.

The next day, Evans went to work and reported to his supervisor, Frederick Cantelmo, that defendant had threatened him with a gun in the parking lot. Defendant did not go to work that day because he was in jail on unrelated charges of carrying a concealed weapon and speeding. When defendant came to work Thursday morning, Cantelmo spoke with defendant about his absence the day before. After they spoke, defendant returned to work and Cantelmo contacted the company's legal department for advice.

At approximately 11:00 a.m., Cantelmo called defendant to his office. Cantelmo told defendant he had consulted with the company attorney and was firing him because he had a weapon on company

property. Defendant became angry and asked if it was Evans who reported he was carrying a gun. Cantelmo denied that Evans told him, instead stating that several employees had reported the incident. As defendant was leaving, he saw his friend McFadden and told him he had been fired for no reason, and he had a good lawyer and was going to sue.

Defendant clocked out at approximately 11:15 a.m. He contacted a lawyer in South Carolina who had represented him regarding an automobile accident. The attorney informed defendant that he would need an attorney in North Carolina. At around 11:30 a.m., defendant drove to Shoney's where Robin Lowery (Lowery), his ex-girlfriend and the mother of his child, worked. Lowery had ended their relationship several days earlier. Defendant went inside and began following Lowery around, telling her that he wanted to talk. Lowery told defendant she would talk to him later, but defendant refused to leave. In order to lure Lowery from the restaurant, defendant told her he had a package in his car for her from a woman he worked with. Lowery followed defendant outside. Defendant pointed a sawed-off shotgun at her and threatened to kill her if she did not get in the car. Lowery got into defendant's car and he drove them down a gravel road to a yellow building in an industrial area and made Lowery get out of the car. He then made her get back into the car and drove further down the gravel road to a more secluded area. Defendant again made Lowery get out of the car, ripped off her hose and panties, and forced her to have sex with him. Defendant began walking in circles saying that Evans had caused him to lose his job and that he was going to jail for the rest of his life anyway so he was going to go all the way and kill Evans. Defendant then loaded a gun and shot Lowery in her left knee. After shooting Lowery the first time, he made her take her skirt off, saying he wanted them to find her looking like a slut. Defendant began walking around her again and shot her in the right knee. Lowery tried to get away from defendant and began to crawl towards the woods. She heard a shot ring out and a bullet grazed her head. She fell to the ground and lay still until she heard defendant drive away. Lowery was later able to drag herself to a building where she received assistance. While waiting for the ambulance to arrive, Lowery called TPI to warn Evans.

At approximately 1:15 p.m. defendant went back to TPI. Defendant went into the warehouse and called out Evans' name twice. Evans and a co-worker were returning from their lunch break when they heard defendant call out. When Evans turned around,

defendant shot him in the face at close range with the sawed-off shotgun. After defendant shot Evans, he turned and pumped his fist in the air and stated, "Yeah. I got that mother f-----[,]" and then drove off.

At 2:25 p.m., defendant called 911 and reported he just committed two crimes and wanted to turn himself in. He agreed to unload the weapon and leave it outside and go back into the house and wait for the police. While speaking to the 911 dispatcher, defendant asked if he would be harmed or shot when the police arrived. The police arrived and arrested defendant.

Defendant was diagnosed as being mentally retarded. Defendant consistently scored below 70 on IQ tests. The IQ range for mental retardation is generally below 70. Defendant has problems with adaptive behavior skills such as reading, using a telephone book, using a map, and filling out a job application.

In May 1999, the trial court held a competency hearing to determine whether defendant was competent to stand trial. The trial court heard testimony from the State's and defendant's expert witnesses. The trial court found defendant was competent to stand trial. Jury selection initially began on 20 April 1999. Three days later, one of defendant's attorneys informed the court he could not continue with the trial. As a result, the trial court replaced him and continued the trial until 24 May 1999, on which date jury selection resumed. Two days later, the trial court declared a mistrial due to contact between the victim's father and a prospective juror. Jury selection resumed with a new panel of jurors.

On 25 June 1999, a jury found defendant guilty of first-degree murder of Evans. In accordance with the jury's recommendation, the trial judge sentenced defendant to death.

Defendant filed a Motion for Appropriate Relief in the North Carolina Supreme Court contending he was retarded under the provisions of N.C. Gen. Stat. § 15A-2005. The Supreme Court remanded the case to the Mecklenburg County Superior Court for a hearing on defendant's motion. *State v. McClain*, 355 N.C. 208; 560 S.E.2d 151 (2002). On 13 April 2004, the Honorable Charles C. Lamm, Jr., found defendant was mentally retarded within the meaning of N.C. Gen. Stat. § 15A-2005(a)(1) and vacated defendant's death sentence. As a result, the Supreme Court transferred defendant's appeal of his first-degree murder conviction to this Court. *State v. McClain*, 358 N.C. 374; 599 S.E.2d 906 (2004).

[1] In his first assignment of error, defendant contends the trial court erred in determining he was competent to stand trial. We disagree.

N.C. Gen. Stat. 15A-1001(a) sets out the test for competency of a defendant to stand trial. The test is " 'whether a defendant has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel . . . .' " *State v. Pratt*, 152 N.C. App. 694, 697, 568 S.E.2d 276, 278 (2002), *appeal dismissed and cert. denied*, 357 N.C. 168, 581 S.E.2d 442 (2003) (quoting *State v. Jackson*, 302 N.C. 101, 104, 273 S.E.2d 666, 669 (1981)). The defendant bears the burden of demonstrating he is incompetent. *Id.* If the trial court's findings of fact are supported by competent evidence, they are deemed conclusive on appeal. *Id.* Furthermore, the trial court's decision that defendant was competent to stand trial will not be overturned, absent a showing that the trial judge abused his discretion. *Id.* at 698, 568 S.E.2d at 279. Evidence that a defendant suffers from mental retardation is not conclusive on the issue of competency. *See id.* at 697, 568 S.E.2d at 278. A defendant need not be "at the highest stage of mental alertness to be competent to be tried." *Id.* at 697, 568 S.E.2d at 279 (citing *State v. Shytle*, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989).

Dr. Robert Rollins, the Director of Forensic Psychiatry at Dorothea Dix Hospital, and a board certified expert in the field of forensic psychiatry, testified on behalf of the State. After interviewing defendant on three separate occasions and reviewing his records and test scores, Dr. Rollins concluded defendant was competent to stand trial. Dr. Rollins opined that although defendant suffered from "borderline intellectual functioning," and found it difficult to cope with the stress of the legal process, he was nevertheless able to understand the nature and object of the proceedings against him. He further concluded that with proper support, defendant was "certainly . . . able to cooperate with his attorneys" and assist in his own defense, although his attorneys might need to assign him very specific tasks and he would need additional time to complete the tasks given.

Dr. Mark Worthen testified for defendant as an expert in clinical and forensic psychology. Dr. Worthen testified defendant was not competent to stand trial based upon several factors. He stated that defendant's mental retardation, coupled with his inability to deal with stress, would interfere with his ability to aid his attorneys with his

defense. Dr. Worthen gave several recommendations, which he believed would improve defendant's competence if implemented. Dr. Rollins agreed that Dr. Worthen's recommendations would help, but stated it was unnecessary that they be implemented before the trial could proceed. Despite Dr. Worthen's conclusion that defendant was unable to assist in his defense, he acknowledged defendant had at least a rudimentary understanding that he was on trial for murder and was facing life in prison or the death penalty. He testified that defendant trusted his attorneys and that defendant "seemed to understand at least to some extent, the importance of working in a collaborative manner with [his attorneys]." On cross-examination, Dr. Worthen testified as to defendant's responses to questions posed as part of the CAST-MR test, which is administered to determine competency of persons with mental retardation. The trial court found that defendant's answers to the questions indicated he understood the events surrounding the shooting and murder charge.

After hearing this evidence, the trial court found defendant was competent to stand trial. The court declined to postpone the trial in order to implement some of Dr. Worthen's recommendations, but did modify the manner in which the trial was conducted to allow defendant more frequent breaks and longer breaks following the testimony of each witness so that defendant's attorneys could consult with defendant regarding witness testimony, explain anything he did not understand, and to solicit questions or relevant information from him.

There was sufficient evidence from which the trial judge could find that defendant was competent to stand trial. In defendant's answers to the CAST-MR test, he stated he was arrested for shooting Evans, he recited when and where the shooting occurred, he stated that he knew the charges against him were serious and that if convicted he faced life in prison or the death penalty. Dr. Rollins also gave his opinion that defendant's competency as it related to his ability to stand trial was not dependent upon implementation of Dr. Worthen's recommendations. The trial court found: (1) defendant was able to understand the nature and object of the proceedings against him; (2) he comprehended his situation in regard to the trial; and (3) defendant had the ability to assist in his defense in a rational and reasonable manner. These findings were supported by the evidence, which in turn supported the trial court's conclusion that defendant was competent to stand trial under the test set forth in N.C. Gen. Stat. § 15A-1001(a). We discern no abuse of discretion by the trial court in

concluding that defendant was competent to stand trial. This assignment of error is without merit.

[2] Defendant further argues that the trial court erred in denying his motion to continue, which he made immediately following the trial court's ruling that he was competent to stand trial.

A motion for a continuance is addressed to the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *State v. Boggess*, 358 N.C. 676, 685, 600 S.E.2d 453, 459 (2004). After careful review of the trial court's ruling at the competency hearing, we discern no abuse of discretion. This argument is without merit.

[3] In defendant's second assignment of error he contends the trial court's instructions on the element of deliberation were incorrect and lessened the State's burden to show this element of first-degree murder. We disagree.

In its initial charge to the jury, the trial court instructed the jury in accordance with the pattern jury instructions on the crimes of first-degree murder, second-degree murder, and on diminished capacity. At the jury charge conference, defense counsel requested the court give additional instructions on diminished capacity from *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975). The trial court declined to give the requested instructions. During its deliberations, the jury requested the "5 components of first-degree murder," and that they be in writing for them to review. The trial judge reinstructed the jury on the elements of first-degree murder and directed a written copy of those elements be given to the jury. Subsequently, the jury requested "a legal interpretation" of deliberation, one of the elements of first-degree murder. They also requested an explanation of "cool state of mind" in relation to "total absence of passion or emotion." The trial court conducted a conference with counsel outside of the presence of the jury. The judge informed counsel it was going to give an instruction on deliberation consisting of language drawn directly from the Supreme Court case of *State v. Ruof*, 296 N.C. 623, 252 S.E.2d 720 (1979). Defense counsel objected, stating "I would ask that you not read that part about satisfying revenge and all that stuff." Defense counsel further requested the court give the definition of deliberation as found in *State v. Buchanan*. The trial court declined to do so and instructed the jury from *State v. Ruof* as follows:

> Deliberation means an intention to kill executed by one while in a cool state of blood in furtherance of a fixed design to gratify a

> feeling of revenge or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause, or legal provocation.
>
> Cool state of blood, as used in connection with premeditation and deliberation, does not mean absence of passion and emotion, but means that an unlawful killing was deliberate and premeditated if executed with a fixed design to kill, notwithstanding that the Defendant was angry or in an emotional state at the time.

After further deliberation, the jury requested a copy of the definition of deliberation. The trial court returned the jury to the courtroom and reinstructed it using the language from *Ruof*. After further deliberations, the jury found defendant guilty of first-degree murder.

Defendant contends the supplemental instructions from *State v. Ruof* unconstitutionally reduced the State's burden of proof as to the element of deliberation. He asserts the instruction confused the level of provocation necessary to negate malice with that necessary to negate deliberation.

While defense counsel did object to the trial court's supplemental instruction from *Ruof*, at no time did he assert as a basis for that objection the constitutional grounds now being argued to this Court. Rather, the basis of his objection was simply that he wanted the trial court to give an instruction on deliberation from *Buchanan* because he perceived it to be more favorably worded towards defendant than the language in *Ruof*. At no time did defendant assert the language from *Ruof* impermissibly lessened the State's burden of proof as to the element of deliberation. It is well settled that constitutional issues which are not raised and ruled upon in the trial court will not be reviewed for the first time on appeal. *State v. Golphin*, 352 N.C. 364, 403-04, 533 S.E.2d 168, 197 (2000). *See also* N.C. R. App. P. 10(b)(1). Furthermore, a defendant may not " 'swap horses between courts to get a better mount' " in the reviewing appellate court. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

Assuming *arguendo* that this issue is properly before this Court, we conclude the trial court did not err in instructing the jury on the element of deliberation using language from *State v. Ruof*.

Once a jury retires to deliberate, the trial judge may give appropriate additional instructions in response to the jury's inquiries. N.C. Gen. Stat. § 15A-1234(a)(1) (2004). A trial court is not required to

instruct the jury using the exact language counsel requests, as that is a matter left to the judge's discretion. *State v. Lewis*, 346 N.C. 141, 145, 484 S.E.2d 379, 381 (1997). " 'As long as the trial court gives a requested instruction in substance, it is not error for a trial court to refuse to give a requested instruction verbatim, even if the request is based on language from [our Supreme] Court.' " *Id.* at 146, 484 S.E.2d at 382 (citations omitted). In addition, where the trial court's instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, no error will be found. *State v. Nicholson*, 355 N.C. 1, 59, 558 S.E.2d 109, 147 (2002).

Upon consideration of all of the instructions given, we conclude the trial court properly instructed the jury on the element of deliberation. First, the initial instructions on deliberation were proper and comported with the pattern jury instructions on first-degree murder. Second, *State v. Ruof* is a correct statement of the law and the language contained in *Ruof*, which defines deliberation, has been cited with approval by our Supreme Court on several occasions. *See Lewis*, 346 N.C. at 146, 484 S.E.2d at 381-82; *State v. Crawford*, 344 N.C. 65, 74, 472 S.E.2d 920, 926 (1996).

Defendant seeks to parse the words of the trial court's instruction from *State v. Ruof* solely in the light of his argument of diminished capacity. The evidence in the case demonstrated that defendant had a grudge against Evans arising out of a workplace dispute. The shooting was not the result of a suddenly aroused, violent passion, as defendant's last confrontation with Evans occurred two days prior to the shooting. Further, defendant did not kill Evans until several hours after he was discharged from his job and after he had kidnapped and assaulted Lowery. *See State v. Watson*, 338 N.C. 168, 177-78, 449 S.E.2d 694, 700 (1994) (holding the evidence failed to show the shooting was the result of a sudden and violent passion where he obtained a gun and placed it by his side in his truck before the defendant and victim ever quarreled, and the defendant had time to cool down because he returned to his truck following the argument, and only after that did he retrieve the gun, walk over to the victim, and shoot him), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569 (1995), *overruled on other grounds*, *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995).

After reviewing the trial court's instructions to the jury as a whole and construing them contextually, we conclude the charge as a whole was correct. This assignment of error is without merit.

[4] In his third assignment of error, defendant contends the trial court erred by allowing the prosecution to peremptorily excuse an African-American prospective juror, Allison Young, on the basis of her race.

The Fourteenth Amendment to the United States Constitution, as well as Article 1, § 26 of the North Carolina Constitution, prohibit litigants from exercising peremptory juror challenges on the basis of race. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986); *State v. Crandell*, 322 N.C. 487, 501, 369 S.E.2d 579, 587 (1988). The United States Supreme Court has set forth a three-step analysis for evaluating claims of racial discrimination in the use of peremptory challenges. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991).

> First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. *Id.* Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case. *Id.* Third, the trial court must determine whether the defendant has proven purposeful discrimination. *Id.*

State v. Cummings, 346 N.C. 291, 307-08, 488 S.E.2d 550, 560 (1997) (citing *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405). The trial court is in the best position to judge the prosecutor's credibility, thus its determination will not be overruled absent clear error. *Id.* at 309, 488 S.E.2d at 561.

We need not address the first step in this analysis because once a prosecutor offers a race-neutral reason for the peremptory challenge, and the trial court subsequently rules on whether there was intentional discrimination of a juror based on their race, "the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot." *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405.

To rebut a *prima facie* case of discrimination, the prosecution must " 'articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group.' " *Cummings*, 346 N.C. at 308-09, 488 S.E.2d at 560 (citations omitted). At this stage, the issue is the *facial* validity of the prosecutor's explanation, and absent a discriminatory intent, which is inherent in the reason, the explanation given will be deemed race-neutral. *State v. Hardy*, 353 N.C. 122, 128, 540 S.E.2d 334, 340 (2000).

The State articulated two reasons for the exercise of this peremptory challenge. First, the prosecutor stated that Young expressed hesitancy concerning her ability to impose the death penalty. When the prosecutor inquired whether any of the jurors had any feeling about the death penalty which would impair their ability to perform the duty of a juror, Young responded that she was "against killing whether it be legal or illegally." She further explained that her opposition was based on religious, moral, and philosophical beliefs she had held since childhood. Hesitancy on death penalty questions is a race-neutral reason for excusing a juror. *Cummings*, 346 N.C. at 310, 488 S.E.2d at 561; *State v. Best*, 342 N.C. 502, 512-13, 467 S.E.2d 45, 52 (1996).

Defendant contends Young was not hesitant in giving her answer. Hesitancy can be manifested by demeanor as well as words. The trial judge was in the best position to resolve this issue, having heard and seen the responses of the prospective juror, including her facial expressions, tone of voice, reactions, and other nuances that are not subject to translation when reviewing a cold record on appeal. *See State v. Smith*, 328 N.C. 99, 127, 400 S.E.2d 712, 727-28 (1991).

The second reason the prosecutor gave for excusing Young was that her brother had previously been convicted of armed robbery. The criminal conviction of a potential juror's relative has been recognized as a race-neutral reason for the exclusion of that juror by peremptory challenge. *See United States v. Johnson*, 941 F.2d 1102, 1109-10 (10th Cir. 1991); *United States v. Hughes*, 911 F.2d 113, 114 (8th Cir. 1990). For this reason, we afford great deference to the trial court's ruling.

Defendant argues the State accepted white jurors who gave similar responses and this demonstrates the State's discriminatory intent. Our Supreme Court rejected such an approach, stating that just because some of the remarks made by the stricken juror have also been made by other potential jurors the prosecutor did not challenge, does not require a finding that the reason given by the State was pretextual. *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 153 (1990). This is so because " '[a] characteristic deemed to be unfavorable in one prospective juror, and hence grounds for a peremptory challenge, may, in a second prospective juror, be outweighed by other, favorable characteristics.' " *Id.* (citations omitted).

The trial court concluded the State had not engaged in the "exercise of [a] peremptory challenge in a discriminatory fashion based on race." In support of its conclusion, the trial court found that: (1) at

the time defendant raised the *Batson* challenge, the State had used five peremptory challenges and none of those were against African-Americans; (2) only the defense had peremptorily excused an African-American; and (3) one-fourth of the jury seated at the time of the challenge was African-American. In light of the principles stated above and the additional findings of the trial court, the trial court's determination that there was no purposeful discrimination in the challenge of prospective juror Young was not erroneous. This assignment of error is without merit.

[5] In his fourth assignment of error, defendant contends the trial court erred in allowing Robin Lowery, a lay witness, to testify that defendant was not mentally retarded.

Rule 701 of the Rules of Evidence permits lay witness opinion if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of [her] testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2004). Our Supreme Court has held that "the mental condition of another is an appropriate subject for lay opinion." *State v. Bond*, 345 N.C. 1, 31, 478 S.E.2d 163, 179 (1996). Thus, it is proper for a lay witness to testify as to an individual's mental condition when they have had the opportunity to observe that person. *Id.*

At trial, the following relevant exchange occurred:

> Q. In terms of his mental abilities, how did the Defendant appear to you?
>
> [DEFENSE COUNSEL]: Well, objection as to how he appeared.
>
> COURT: Overruled.
>
> A. He was fine. I mean we functioned on a day-to day basis. He basically had the say over where he went and what he had to do and what he had to wear. I mean, you know, he didn't appear to be, you know, anything wrong. He would act a certain way around different people and he was kind of quiet, but when we was together, you know, he was a different person. I mean, you know, he told me what to do and, you know, we fussed and fight, stuff like that, but he wasn't mentally retarded.

Robin Lowery had ample opportunity to observe defendant and form an opinion as to his mental condition. She had lived with defendant, saw him on a daily basis, and had the opportunity to observe him in various situations. This testimony was relevant as to whether defend-

ant had the necessary *mens rea* for first-degree murder and helpful to a clear understanding of a fact in issue. Even though Lowery testified that defendant was not mentally retarded, when read in context, it demonstrates she was not giving an expert opinion. Rather, she apparently used the phrase "mentally retarded" to describe defendant's ability to function on a daily basis in shorthand form. *See State v. Goss*, 293 N.C. 147, 154, 235 S.E.2d 844, 849 (1977) (holding witness's use of the term "rape" did not constitute an opinion on a question of law, as it was merely a "convenient shorthand term, amply defined by the balance of her testimony"); *State v. Chambers*, 52 N.C. App. 713, 718, 280 S.E.2d 175, 178 (1981). Furthermore, it is clear the State was not attempting to elicit expert testimony from Lowery regarding defendant's mental retardation. Thus, the trial court did not err in permitting Lowery to give her opinion as to defendant's mental capabilities. This assignment of error is without merit.

[6] In his fifth and final assignment of error, defendant contends the indictment charging defendant with first-degree murder was invalid because it did not allege all the elements of the crime charged.

Our Supreme Court has upheld short-form indictments for murder as constitutional. *State v. Hunt*, 357 N.C. 257, 272, 582 S.E.2d 593, 603 (2003). The indictment in this case is sufficient as it meets the requirements under N.C. Gen. Stat. § 15-144. It states: "The jurors for the state upon their oath present that on or about the 17th day of March, 1994, in Mecklenburg County, Robert Lewis McClain did unlawfully, wilfully, and feloniously and of malice aforethought kill and murder David D. Evans." This assignment of error is without merit.

For the reasons discussed herein, we find defendant received a fair trial, free of error.

NO ERROR.

Judge HUDSON concurs.

Judge WYNN concurs in result in a separate opinion.

WYNN, Judge concurring.

I join in the majority opinion except on the issue of whether the trial court properly allowed that part of Robin Lowery's lay testimony expressing the opinion that Defendant "wasn't mentally retarded."

As the majority notes, at trial, Lowery stated:

> He was fine. I mean, we functioned on a day-to-day basis. He basically had the say over where he went and what he had to do and what he had to wear. I mean, you know, he didn't appear to be, you know, anything wrong. He would act a certain way around different people and he was kind of quiet, but when we was together, you know, he was a different person. I mean, you know, he told me what to do and, you know, we fussed and fight, stuff like that, but ***he wasn't mentally retarded***.

Under Rule 701 of the Rules of Evidence, lay witness opinion testimony is admissible if it is: "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-701 (2004); *State v. Braxton*, 352 N.C. 158, 206, 531 S.E.2d 428, 456 (2000) (same).

> This rule permits evidence which can be characterized as a "shorthand statement of fact." This Court has long held that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." Such statements are usually referred to as shorthand statements of facts.

Id. at 187, 531 S.E.2d at 445 (quotation omitted).

Several North Carolina statutes have defined mental retardation as "significantly subaverage general intellectual functioning existing concurrently with" other deficits and limitations. *See, e.g.*, N.C. Gen. Stat. § 122C-3(23) (2004); N.C. Gen. Stat. § 15A-2005(a)(1) (2004). This Court has previously found that this definition "represents the plain meaning of the term 'mental retardation[.]' " *In re LaRue*, 113 N.C. App. 807, 811, 440 S.E.2d 301, 304 (1994). "[S]ignificantly subaverage general intellectual functioning" has been defined as "[a]n intelligence quotient of 70 or below." N.C. Gen. Stat. § 15A-2005(a)(1).

Here, Lowery testified as to her observations of how Defendant functioned on a daily basis and how he acted in certain situations. Such testimony was clearly admissible under Rule 701. However, Lowery also stated that Defendant "wasn't mentally retarded[,]" *i.e.*, that Defendant did not have a significantly subaverage general intellectual functioning. I do not believe that Lowery's statement that

Defendant was not mentally retarded could "rationally [be] based on the perception of the witness" and therefore believe that statement constituted improper lay opinion testimony.[1]

As the majority notes, and as made clear in the *Braxton* citation above, "the mental condition of another is an appropriate subject for lay opinion." *State v. Bond*, 345 N.C. 1, 31, 478 S.E.2d 163, 179 (1996). In *Bond*, testimony of a police officer that he did not think the defendant was mentally retarded was held admissible. Notably, however, in *Bond*, the testimony was allowed into evidence at a sentencing proceeding, where, as the *Bond* court explicitly noted, the Rules of Evidence do not apply but are merely guidance. Moreover, in support of the proposition that a person's mental condition is a proper subject for lay opinion, the *Bond* court cited *State v. Strickland*, 321 N.C. 31, 361 S.E.2d 882 (1987), in which our Supreme Court stated that " '[a] lay witness, from observation, may form an opinion as to one's mental condition and testify thereto before the jury.' " *Id.* at 38, 361 S.E.2d at 886 (quoting *State v. Moore*, 268 N.C. 124, 127, 150 S.E.2d 47, 49 (1966)). However, in both *Strickland* and *Moore*, the lay opinions at issue went to whether the respective defendant was or was not "in his right mind." There is a difference in kind between a person's sanity and a person's "significantly subaverage general intellectual functioning," or mental retardation, and the admissibility of lay testimony as to the former does not indicate the admissibility of lay testimony as to the latter.

While I believe the admission of Lowery's testimony that Defendant "wasn't mentally retarded[]" was error, that error was harmless. The record reflects that it was clear that Lowery was not an expert on mental retardation, and the State proffered expert testimony that Defendant was not mentally retarded and was capable of forming a plan and specific intent. Because the trial court's error was harmless, I concur in result with the majority.

1. It is also worth noting that Lowery's statement that Defendant was not mentally retarded directly contradicted the trial court's finding, albeit made subsequent to Defendant's trial, that "the Defendant has proven by a preponderance of the evidence that he is mentally retarded[.]"

CARLISLE v. KEITH

[169 N.C. App. 674 (2005)]

WILLIAM H. CARLISLE, PLAINTIFF v. FLETCHER G. KEITH, CECILIA K. SMITH, MARGARET M.(PEGGY) KEITH, N. DEANE BRUNSON, STONEHAVEN, INC., A NORTH CAROLINA CORP., W.O.L., INC., A NORTH CAROLINA CORP., AND K&K REAL ESTATE, INC., A NORTH CAROLINA CORP., DEFENDANTS

No. COA04-819

(Filed 19 April 2005)

1. **Statutes of Limitation and Repose— fiduciary duty—attorney in real estate transaction—last act giving rise to damages**

The trial court did not err by granting defendant-Brunson's Rule 12(b)(6) motion to dismiss a claim of breach of fiduciary duty where Brunson was an attorney involved in a partnership's real estate transactions; the last act giving rise to plaintiff's damages was more that six years before Brunson was named as a defendant regarding one subdivision, and eight years before the lawsuit was filed regarding another subdivision; and both the statute of repose and the statute of limitations had long since passed.

2. **Statutes of Limitation and Repose— fraud—attorney in real estate transaction—discovery of facts—attorney-client relationship**

A claim for fraud against an attorney arising from a real estate transaction was correctly dismissed pursuant to a Rule 12(b)(6) motion for failure to meet the statute of limitations.

3. **Statutes of Limitation and Repose— *negligent* misrepresentation—attorney in real estate transaction—damages apparent**

The trial court properly concluded that a claim against an attorney for negligent misrepresentation in a real estate transaction was barred by the applicable statute of limitations. Although the statute of limitations is three years, plaintiff's damage (his sale of property to a buyer in which his partner had an ownership interest) became apparent more than five years before he began this action.

4. **Statutes of Limitation and Repose— civil conspiracy—attorney in real estate transaction**

Plaintiff's claim for civil conspiracy was time barred because it was brought more than six years and eight years after the real estate transactions involved.

5. Statutes of Limitation and Repose— constructive fraud— real estate transaction—adding defendant

A claim for constructive fraud arising from a real estate transaction was time-barred where plaintiff learned of the relationship between defendants in February 1998 and did not add this defendant until 2003, two years after the statute of limitations ran.

6. Statutes of Limitation and Repose— failure to affirmatively plead defense—plaintiff not surprised

The trial court properly considered defendant's statute of limitations defense as to plaintiff's claims for fraud, negligent misrepresentation, and civil conspiracy where plaintiff argued that defendant had not affirmatively pled the statute of limitations in his motion to dismiss and that he was surprised by defendant's statute of limitations argument, but plaintiff received defendant's brief on his statute of limitations defense prior to the hearing, argued that issue before the trial court, and did not object that the defense was identified in defendant's memorandum rather than in his motion.

7. Civil Procedure— Rule 12(b)(6) motion—legal memoranda considered—not converted to summary judgment

The trial court did not err by not converting defendant's Rule 12(b)(6) motion to dismiss into a motion for summary judgment where counsel presented memoranda on the law without exhibits and did not present any factual evidence or allegations which the trial court could only properly address with a summary judgment hearing.

Appeal by plaintiff from order filed 15 March 2004 by Judge W. Erwin Spainhour in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 February 2005.

Whitesides & Walker, L.L.P., by H.M. Whitesides, Jr. and Jennifer S. Anderson for plaintiff.

Moore & Van Allen PLLC, by Jeffrey J. Davis, for plaintiff.

Poyner & Spruill LLP, by E. Fitzgerald Parnell, III and Cynthia L. Van Horne, for defendant N. Deane Brunson.

BRYANT, Judge.

William H. Carlisle (plaintiff) appeals an order filed 15 March 2004, dismissing all causes of action against N. Deane Brunson (defendant) pursuant to Rule 12(b)(6).

Procedural History

On 22 April 2003, plaintiff filed an amended complaint against defendants Fletcher G. Keith (Keith), Cecilia K. Smith (Smith), Margaret M. (Peggy) Keith (Peggy Keith), N. Deane Brunson (Brunson), Stonehaven, Inc. (Stonehaven), W.O.L., Inc. (WOL), and K&K Real Estate, Inc. (K&K), alleging various causes of action.

Against Brunson, plaintiff asserted claims for breach of fiduciary duty, fraud, negligent misrepresentation, civil conspiracy, and constructive fraud. Each of the defendants, with the exception of WOL, filed a motion to dismiss, and in the alternative, a motion for a more definite statement. Brunson filed his motion to dismiss on 11 July 2003.

On 9 February 2004, plaintiff and Brunson served memoranda of law pertaining to the motions to dismiss, and on 10 February 2004, plaintiff filed a single page amendment to his amended complaint. This matter came for hearing at the 11 February 2004 civil session of Mecklenburg County Superior Court with the Honorable W. Erwin Spainhour presiding. By order filed 15 March 2004, the trial court granted Brunson's motion to dismiss. The trial court certified, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), that its order granting Brunson's motion was a final judgment as to Brunson and that there was no just reason for delay for the purpose of appeal.

Plaintiff filed timely notice of appeal.

Facts

The facts according to plaintiff are as follows: On 1 February 1989, defendant Keith and Ray Hollowell formed Hatteras Island Plaza Partnership (HIPP) pursuant to the North Carolina General Partnership Act for the purpose of developing property in Dare County, North Carolina. Defendant Smith became owner of a 1.5% interest in HIPP on 9 April 1992. On 15 June 1993, Hollowell resigned his interest in HIPP, and plaintiff became owner of a 49.25% interest in the partnership. Brunson, an attorney licensed to practice law in North Carolina, acted as the attorney for HIPP and represented the

partnership and its individual partners in both partnership and personal matters.

Hatteras Island Plaza

Consistent with its plan to develop property, HIPP purchased a shopping center on 16 May 1991 for $2.2 million and named the property Hatteras Island Plaza (HIP). Plans were formulated to develop the entire tract of land in several phases to compliment the existing grocery store and to include other shops, restaurants, a drug store, and cinema. Financing was arranged and an appraisal ordered by First Union National Bank. The appraiser, John McCracken, prepared two appraisals, one in February 1996 in which he valued HIP at $2.1 million and the second approximately one month later in which he valued HIP at $2.8 million.

Although Keith was aware of both appraisals, plaintiff was not informed of the second higher appraisal by Keith or by any other defendant to this action. Subsequently, Keith requested a third appraisal, which was completed in September 1996 by Raspberry & Associates (the Raspberry appraisal). Raspberry & Associates valued the property between $9.3 and $11 million once HIP was completed. Keith, Smith, and Brunson were aware of the results of the Raspberry appraisal, but neither informed plaintiff of the request for nor the results of the appraisal.

In December 1996, the partners of HIPP sought to refinance the HIPP First Union National Bank debt with BB&T Bank (BB&T) by obtaining a loan on behalf of HIPP. Keith, without notifying plaintiff, submitted only the first appraisal of $2.1 million to BB&T. Brunson wrote a title opinion letter to BB&T on behalf of HIPP, and BB&T subsequently refinanced the existing debt of HIPP.

The accounting and bookkeeping for HIPP was being conducted by Metro Management Co. (Metro) which is owned by defendant Peggy Keith, wife of defendant Keith. One of Metro's employees was Virginia Goodrum whose primary job was to handle various accounting duties for plaintiff.

One month after the refinancing in January 1997, Keith offered Virginia Goodrum $10,000.00 if she could persuade plaintiff to sell his interest in HIP. Keith advised Goodrum that plaintiff would never willingly sell his interest in the property to defendant Keith. Goodrum subsequently proposed to plaintiff that he sell his interest in HIP to

defendant Stonehaven, a North Carolina corporation incorporated on 3 February 1997. Because plaintiff believed that Keith was also selling his interest in HIP to Stonehaven, he agreed to the sale.

No one disclosed to plaintiff that Keith was a shareholder and an officer in Stonehaven, and that Smith was owner of a 1.5% interest in Stonehaven. Also, no one disclosed to plaintiff that Stonehaven and Metro maintained identical places of business, and that Metro handled the accounting and bookkeeping services for Stonehaven and even collected rents from tenants at HIP for Stonehaven before Stonehaven ever owned the HIP property.

Keith, Peggy Keith, Smith, and Brunson all failed to inform plaintiff that Keith and Smith had ownership interests in Stonehaven. In fact, plaintiff asked Brunson if he knew anything about the purchaser (Stonehaven), and Brunson replied that he did not. Notably, Brunson was acting as attorney for Stonehaven and HIPP and its partners, including plaintiff, and Brunson and Keith, Smith and Peggy Keith also withheld this information from plaintiff.

Nine days after its incorporation on 11 February 1997, Stonehaven borrowed $3.2 million from BB&T to assume the existing loan from BB&T to HIPP. With the money, Stonehaven purchased HIP from the partners of HIPP for $3.2 million, well below its estimated value of $9.3 to $11 million. Keith, Peggy Keith, Smith, and Brunson knew that the value of HIP was more than the $3.2 million purchase price but did not inform plaintiff of this information. Prior to the closing, Keith and Peggy Keith signed personal guaranties to BB&T for the loan to Stonehaven and withheld this information from plaintiff. A copy of an indemnity agreement whereby Keith absolves the president of Stonehaven from any liability was placed in Brunson's HIPP file.

From the closing proceeds, Brunson was paid $7,000.00 by Stonehaven as buyer of HIP and $3,000.00 by HIPP as seller of HIP. Settlement statements were generated by Brunson whereby Keith signed as both "seller" of his interest in HIP and "buyer" as a representative of Stonehaven. Brunson also prepared a fraudulent statement, distributed by Brunson to plaintiff, showing that real estate commissions of $128,000.00 were paid to Elm Realty.

Elm Realty, in fact, was a fictitious company and did not generate any real estate commissions for the sale of HIP. The $128,000.00 commission to Elm Realty was never paid by Brunson out of his trust

account or any other account, but instead was kept by defendant Stonehaven and later distributed to Keith.

One month later in March 1997, Stonehaven requested a loan of $3.9 million to expand HIP to include a cinema. BB&T agreed to loan Stonehaven $3.9 million only if Stonehaven could produce an appraisal of HIP valuing it at more than $6 million. Accordingly, Keith, or someone acting on behalf of Stonehaven, presented to BB&T the Raspberry appraisal that was not presented to BB&T in December 1996. Thereafter, on 13 March 1997, BB&T loaned $3.9 million to Stonehaven. BB&T further required personal guaranties from Keith and Peggy Keith, and without those guaranties, BB&T would not have loaned Stonehaven the $3.9 million. Brunson continued to represent Stonehaven in the refinancing of HIP, and once again his legal representation and information about the refinancing were withheld from plaintiff.

On 6 January 1999, Stonehaven deeded two parcels of HIP to defendant K&K, a North Carolina corporation controlled by Keith and Peggy Keith. Brunson represented Stonehaven in the transfer of the two parcels. The transfers were not made for valuable consideration but instead in anticipation of litigation in this matter.

Forrestbrook

In 1991, Keith and plaintiff each owned a 50% interest in undeveloped land known as "Forrestbrook" in Kannapolis, North Carolina through a *de facto* North Carolina partnership. On 9 October 1995, Keith and plaintiff sold their interest in Forrestbrook for $760,000.00 to defendant WOL, a North Carolina corporation. On the same day as the closing, Keith acquired a 50% interest in WOL. Keith and Brunson, however, failed to inform plaintiff of Keith's ownership interest in WOL prior to the sale. Keith and Brunson also failed to inform plaintiff that prior to the closing, a development contract had been obtained to develop the Forrestbrook property into a residential subdivision and an appraisal of Forrestbrook had been conducted, valuing the property at $1.2 million.

At the closing, Elm Realty, a fictitious company, was paid $22,000.00 for real estate commissions from the closing proceeds, which money was deposited into defendant WOL's bank account. Also on the same day as the closing, Metro and Virginia Goodrum were paid $7,600.00 and $5,000.00, respectively, although neither performed any services to generate such a commission.

Interlocutory Appeal

A judgment is either interlocutory or a final determination of the rights of parties. N.C.G.S. § 1A-1, Rule 54(a) (2003); *see Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). An order is interlocutory if it is entered during the pendency of an action and does not dispose of the case, but requires further action by the trial court to finally determine the rights of all the parties involved in the controversy. *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Generally, there is no right to appeal from an interlocutory order. *See* N.C.G.S. § 1A-1, Rule 54(b) (2003). Our courts, however, have recognized two avenues for appealing interlocutory orders.

Under Rule 54(b), when multiple parties or claims are involved in an action and the court enters a final judgment that adjudicates one or more of the parties or claims, such judgment, although interlocutory in nature, may be appealed if the trial court certifies that there is no just reason for delay. N.C.G.S. § 1A-1, Rule 54(b); *see Hoots v. Pryor*, 106 N.C. App. 397, 401, 417 S.E.2d 269, 272 (1992). In this case, the trial court certified the matter as immediately appealable pursuant to Rule 54(b); however, such certification is not dispositive. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998).

In *Hudson-Cole Development Corp. v. Beemer*, 132 N.C. App. 341, 511 S.E.2d 309 (1999), this Court stated:

> When common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "creates the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."

Hudson-Cole Development Corp., 132 N.C. App. at 345, 511 S.E.2d at 312 (quoting *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989)). The Court in *Hudson-Cole* ultimately held that the order dismissing plaintiff's claims against the defendant for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, was immediately appealable.

Accordingly, we hold the appeal in the instant case is immediately appealable.

The issues on appeal are whether the trial court erred by: (I) granting defendant's Rule 12(b)(6) motion to dismiss; (II) considering defendant's statute of limitations defense as to plaintiff's cause of action for fraud, negligent misrepresentation, and civil conspiracy when defendant did not affirmatively plead such defense in his written motion; and (III) failing to convert defendant's Rule 12(b)(6) motion into a motion for summary judgment when it considered matters outside of the pleadings during the hearing on the motion to dismiss.

I

[1] Plaintiff first argues that the trial court erred by granting defendant's Rule 12(b)(6) motion to dismiss when plaintiff stated, against defendant, claims upon which relief could be granted.

"A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Sterner v. Penn*, 159 N.C. App. 626, 628, 583 S.E.2d 670, 672 (2003). When determining whether a complaint is sufficient to withstand a Rule 12(b)(6) motion to dismiss, the trial court must discern "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Shell Island Homeowners Ass'n. Inc. v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999). "When considering a 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Locus v. Fayetteville State University*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991).

" 'Dismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure . . . when some fact disclosed in the complaint necessarily defeats the plaintiff's claim.' " *Hooper v. Liberty Mut. Ins. Co.*, 84 N.C. App. 549, 551, 353 S.E.2d 248, 250 (1987) (quoting *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)). A motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether the statutes of limitation bar plaintiff's claims if the bar is disclosed in the complaint. *Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996).

Breach of Fiduciary Duty

In his third cause of action, plaintiff asserts, among other things, "Brunson was the attorney for and represented HIPP and its partners and therefore owed a fiduciary duty of good faith, fair dealing and full

disclosure to each partner, including [plaintiff];" "Brunson wrote a title opinion letter on behalf of [the partnership];" Brunson represented Stonehaven; "Brunson was paid a legal fee for representing the seller and the buyer;" Brunson generated settlement statements for the buyer and for the seller; and he represented Stonehaven in a refinance of its associated indebtedness.

The complaint alleges that defendant is being sued "as attorney for HIPP . . . [and] its partners, one of whom was [plaintiff];" and because of such activities the plaintiff is entitled to recovery from defendant.

This Court has held that a "[b]reach of fiduciary duty is a species of negligence or professional malpractice." *Heath v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 244, 388 S.E.2d 178, 183 (1990); *See NationsBank v. Parker*, 140 N.C. App. 106, 535 S.E.2d 597 (2000). Further, the legislature has provided:

> [A] cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action:
>
> Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made:
>
> Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years.
>
> Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

N.C.G.S. § 1-15(c) (2003).

Here, plaintiff has alleged that defendant's "last act" giving rise to damages sustained by plaintiff in connection with the Stonehaven transaction occurred in February 1997—more than six years before defendant was named as a defendant on 22 April 2003. Moreover, the

Forrestbrook Subdivision transaction is alleged to have occurred two years earlier, or some eight years before Brunson was added to plaintiff's lawsuit. Whether the three-year statute of limitations or the four-year statute of repose applies is immaterial as both had long passed by the time plaintiff sued defendant.

The trial court appropriately determined that the third claim for relief should be dismissed pursuant to Rule 12(b)(6).

Fraud

[2] The statute of limitations for actions for fraud is three years pursuant to N.C. Gen. Stat. § 1-52(9). A cause of action alleging fraud is deemed to accrue upon discovery by plaintiff of facts constituting the fraud. *Id.* " 'Discovery' is defined as actual discovery or the time when the fraud should have been discovered in the exercise of due diligence." *Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d 483, 485 (2001).

The core of plaintiff's claim is that he has suffered damages by agreeing to sell his partnership interest to Keith, which he would have refused to do had he known of Keith's ownership interest in the buyer. However, plaintiff received actual notice of Keith's ownership in Stonehaven as of February 1998. Any fraud claim predicated on defendant's alleged failure to reveal or misrepresentation concerning Keith's interest in Stonehaven accrued then and had to have been brought within three years or by February 2001. Plaintiff waited until 22 April 2003 to bring his action against defendant.

Plaintiff argues the attorney-client relationship which formerly existed between plaintiff and defendant extended the time within which plaintiff had to bring an action alleging fraud. ("Because of this confidential relationship, any failure on behalf of Carlisle to discover the facts constituting Brunson's fraud may be excused."). Plaintiff's claim that he is not required to adhere to the discovery provisions of the statute of limitations because he has sued a lawyer with whom he had an attorney-client relationship simply cannot be sustained in light of recent decisions of this Court.

Whatever uncertainty may have earlier existed concerning extensions of the statute of limitations in professional liability cases, the issue was squarely addressed by this Court in *Delta Environmental Consultants, Inc. v. Wysong & Miles, Co.*, 132 N.C. App. 160, 510 S.E.2d 690 (1999), and *Sharp v. Gailor*, 132 N.C. App. 213, 510 S.E.2d 702 (1999). In *Delta Environmental*, after reviewing the evolution of

the "continuing course of treatment doctrine" in medical malpractice cases, this Court elected not to expand the doctrine's breadth to encompass negligence claims arising out of professional engineering services between sophisticated corporate parties. *Delta Environmental*, 132 N.C. App. at 172, 510 S.E.2d at 698.

In *Sharp*, decided the same day as *Delta Environmental*, this Court applied the "no extension" principle to a legal malpractice action, dating the accrual of the claim against the lawyer to the day the defendant attorney filed a brief in this Court, and not later when the plaintiff fired the defendant.

Similarly in *Teague v. Isenhower*, 157 N.C. App. 333, 579 S.E.2d 600, *review denied*, 357 N.C. 470, 587 S.E.2d 347 (2003), this Court rejected the plaintiff's argument that the defendant's continuing representation for more than a year after the defendant's last act giving rise to the cause of action should extend the statute of limitations.

Thus, plaintiff's assertion here that "[i]t is not alleged in the Complaint when Brunson stopped acting as counsel for Carlisle or Stonehaven," is of no relevance. The issues are when the last act of defendant occurred and when plaintiff learned of Keith's ownership in the buyer of the property. A review of plaintiff's allegations establishes that date to be February 1998 (at the latest)—more than three years preceding the institution of this action against defendant.

Negligent Misrepresentation

[3] The statute of limitations for negligent misrepresentation is three years pursuant to N.C. Gen. Stat. § 1-52. *Hunter v. Guardian Life Ins. Co.*, 162 N.C. App. 477, 593 S.E.2d 595, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 48, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 49 (2004). Unlike a claim for fraud, a claim for negligent misrepresentation, where it exists, "accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985). N.C. Gen. Stat. § 1-52(16), provides: "except in causes of action referred to in G. S. § 1-15(c) [such claims] shall not accrue until . . . damage to [plaintiff's] property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C.G.S. § 1-52(16) (2003).

Inasmuch as plaintiff knew of Keith's ownership interest in Stonehaven not later than February 1998, he experienced "damage" which was "apparent or reasonably ought to have become apparent

to the claimant" no later than that time. Since this action was not instituted until more than five years later, the trial court properly concluded that the claim for negligent misrepresentation was barred by the applicable statute of limitations.

Civil Conspiracy

[4] Plaintiff asserts that his claim of conspiracy against defendant is "based on breach of fiduciary duty, fraud, and negligent misrepresentation." This Court has applied the three-year limitations period of N.C. Gen. Stat. § 1-52(5) to a civil conspiracy claim. *See Norlin Indus., Inc. v. Music Arts, Inc.*, 67 N.C. App. 300, 306, 313 S.E.2d 166, 170 (1984). Because Plaintiff brought his conspiracy claim more than six years after the date of the HIP transaction and eight years after the Forrestbrook Subdivision transaction, this claim was time barred.

Constructive Fraud

[5] The statute of limitations in actions for constructive fraud is three years pursuant to N.C. Gen. Stat. § 1-52, which accrues upon discovery of the facts constituting the fraud. In *Hunter*, this Court announced "[t]he statute of limitations for fraud, constructive fraud, and negligent misrepresentation is three years. . . . Regarding claims based on fraud or mistake, the cause of action does not accrue until the injured party discovers the facts constituting the fraud." *Hunter*, 162 N.C. App. at 485, 593 S.E.2d at 601. "The Supreme Court of our State has held in numerous cases that in an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence." *Id.*

As demonstrated above, plaintiff learned that Keith was involved in the ownership of Stonehaven in February 1998. His cause of action for constructive fraud accrued then, and any claim predicated on defendant's alleged failure to reveal information about or misrepresentation concerning Keith's interest in Stonehaven had to have been brought by February 2001—two years before plaintiff added defendant to this lawsuit.

This assignment of error is overruled.

II

[6] Plaintiff next argues that the trial court erred by considering defendant's statute of limitations defense as to plaintiff's causes of action for fraud, negligent misrepresentation, and civil conspiracy

when defendant failed to affirmatively plead such defense in his written motion.

N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) states:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

N.C.G.S. § 1A-1, Rule 7(b)(1) (2003).

In his motion to dismiss filed 11 July 2003, some seven months before the hearing of the motions, defendant "move[d] the Court to dismiss the amended complaint of William H. Carlisle pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure or, in the alternative, pursuant to Rule 12(e) of the North Carolina Rules of Civil Procedure, as to certain claims, to require Plaintiff to provide a more definite statement of the factual basis for the claims alleged." Certain arguments were then set out in support of the general motion to dismiss.

Plaintiff claims in his brief that he was "surprised" regarding defendant's argument that the statute of limitations barred his allegations in his fourth, fifth and sixth causes of action. However, this is the first time such an assertion has been made in this action as the record does not reflect plaintiff presented an objection before the trial court.

In his original complaint, plaintiff alleged, "[o]n or about February 1998, he discovered Keith may have had a financial interest in Stonehaven, Inc. and W.O.L., Inc." When he amended his lawsuit to add Brunson as a defendant, plaintiff deleted the date on which he alleged he obtained knowledge of Keith's ownership interest.

However, less than a month before the hearing, counsel for defendant uncovered plaintiff's admission to Keith's request for admission number 15: "[A]dmit that you knew Keith held an ownership interest in Stonehaven no later than February 1998. Admitted." In light of the admission by plaintiff that he knew of Keith's ownership interest in Stonehaven no later than February 1998, defendant decided to pursue motions to dismiss based on statute of limitations on the fourth, fifth and sixth causes of action.

Defendant briefed his position with respect to the statutes of limitations in his memorandum served two days before the hearing, asserting defendant's position that plaintiff's claims for breach of fiduciary duty, fraud and negligent misrepresentation as well as the claim for civil conspiracy were all barred by the applicable statute of limitations.

Two days before the hearing on the motions, plaintiff served a twenty-six page memorandum in opposition to defendant's motions in which he briefed the statute of limitations on fraud actions, negligent misrepresentation, breach of fiduciary duty, and civil conspiracy.

When a plaintiff responds to a motion to dismiss on the merits, and fails to notify the trial court of an objection to a procedural irregularity, he may be held to have waived that objection. *See Thurston v. United States*, 810 F.2d 438, 444 (4th Cir. 1987). Otherwise, it is the trial court which is deprived of an opportunity to remedy any error that may have existed. *Id.*

This Court has held that a trial court may consider a statute of limitations defense, though not raised in a motion to dismiss, when "the non-movant 'has not been surprised and has full opportunity to argue and present evidence' on the affirmative defense." *Johnson v. North Carolina DOT*, 107 N.C. App. 63, 66-67, 418 S.E.2d 700, 702 (1992). By briefing and arguing before the trial court that his causes of action were not time barred, plaintiff misrepresented his current claim that he was "surprised" by the limitations defense.

The *Johnson* Court held that the plaintiff had not been "surprised" "by the defendant's reliance upon the statute of limitations defense because the trial court heard argument from both parties on the issue and "the record does not reflect that plaintiff, at any time during the proceeding, objected to [defendant's] failure to specifically allege the statute of limitation in the motion." *Johnson*, 107 N.C. App. at 67, 418 S.E.2d at 702-03. The same reasoning applies here.

Plaintiff received defendant's briefing on his statute of limitations defense prior to the hearing on the motions, presented argument on that issue before the trial court, and did not object that defendant had identified the statute of limitations defense in his memorandum rather than in his motion.

Finally, the motion met the requirements of Rule 7(b)(1) in that the motion was in writing and stated with sufficient particularity the grounds for dismissal. The trial court properly considered defend-

ant's statute of limitations defense as to plaintiff's claim for fraud, negligent misrepresentation, and civil conspiracy. This assignment of error is overruled.

III

[7] Last, plaintiff argues the trial court erred by failing to convert defendant's Rule 12(b)(6) motion to dismiss into a motion for summary judgment when it considered matters outside of the pleadings during the hearing on the motion to dismiss.

N.C. Gen. Stat. § 1A-1, Rule 12(b) states:

> If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C.G.S. § 1A-1, Rule 12(b) (2003).

In the instant case, the trial court stated in its order that it "having reviewed the pleadings, Defendant Brunson's Memorandum in Support of Motion to Dismiss, Plaintiff's Memorandum in opposition to Motion to Dismiss, and having heard arguments and statements of counsel, the Court concluded that each claim asserted by Plaintiff against Defendant Brunson fails to state a claim upon which relief can be granted." On a previous occasion, our Court has held "[t]he trial court's consideration of evidence other than the pleading is contrary to the purpose of Rule 12(b)(6)." *Kemp v. Spivey*, — N.C. App. —, —, 602 S.E.2d 686, 690 (2004) ("Based on the trial court's consideration of matters in addition to the complaint, defendant's Rule 12(b)(6) motion was thereby converted into a motion for summary judgment."). The present case, however, is distinguishable.

G. Gray Wilson clarifies:

> The final provision of Rule 12(b) is limited to a motion to dismiss for failure to state a claim upon which relief may be granted under subsection (6). If at the hearing on such a motion the court considers matters outside the pleading, the motion must be treated as one for summary judgment pursuant to Rule 56. While Rule 12(b) contemplates that a motion to dismiss for failure to state a claim is to be considered by merely reviewing the plead-

> ings, the last provision of this rule creates one exception. Whether matters outside the pleading are to be considered is left up to the discretion of the court, but the rule is explicit that a party must first present such materials to the court for review. The court may not convert the motion to dismiss to one for summary judgment by developing an evidentiary record on its own initiative. **While extraneous matter usually consists of affidavits or discovery documents, it may also consist of live testimony, stipulated facts, [or] documentary evidence in a court's file.**

G. Gray Wilson, 1 *North Carolina Civil Procedure* §12-3, at 210-11 (2nd ed. 1995) (emphasis added); *see also Eastway Wrecker Serv. v. City of Charlotte*, — N.C. App. —, —, 599 S.E.2d 410, 412 (2004) ("[I]t appears that the only documents other than the pleadings that were before the trial court in connection with the motion to dismiss were the plaintiff's exhibits to the complaint. Since the exhibits to the complaint were expressly incorporated by reference in the complaint, they were properly considered in connection with the motion to dismiss[.]"); *Baugh v. Woodard*, 56 N.C. App. 180, 287 S.E.2d 412 (1982); *Broome v. Pistolis*, 53 N.C. App. 366, 280 S.E.2d 794 (1981); *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Here, counsel for defendant presented a memorandum in support of his motion to dismiss and plaintiff presented a memorandum in opposition to the motion to dismiss. Neither memoranda contained attached exhibits for the trial court's review. Nor was the trial court asked to consider any "affidavits or discovery documents, . . . live testimony, stipulated facts, [or] documentary evidence in a court's file." G. Gray Wilson, 1 *North Carolina Civil Procedure* §12-3, at 211 (2nd ed. 1995).

Our review of the memoranda, leads this Court to the conclusion the documents did not present any factual evidence or allegations which the trial court could only properly address pursuant to a Rule 56 hearing for summary judgment. Rather, the memoranda reiterated the current status of the law, and only presented before the trial court the legal issue of whether plaintiff's claims against defendant were barred by the statute of limitations. This assignment of error is overruled. *See Coley v. North Carolina Nat'l Bank*, 41 N.C. App. 121, 126-27, 254 S.E.2d 217, 220 (1979) ("The obvious purpose of the above quoted provision contained in Rule 12(b) is to preclude any unfairness resulting from surprise when an adversary introduces extraneous material on a Rule 12(b)(6) motion, and to allow a party

a reasonable time in which to produce materials to rebut an opponent's evidence once the motion is expanded to include matters beyond those contained in the pleadings. In the present case these factors are conspicuously absent.").

Affirmed.

Judges TIMMONS-GOODSON and LEVINSON concur.

BANC OF AMERICA SECURITIES LLC, PLAINTIFF v. EVERGREEN INTERNATIONAL AVIATION, INC.; EVERGREEN INTERNATIONAL AIRLINES, INC.; EVERGREEN AGRICULTURAL ENTERPRISES, INC.; EVERGREEN AIR CENTER, INC.; EVERGREEN AIRCRAFT SALES & LEASING CO.; EVERGREEN AVIATION GROUND LOGISTICS ENTERPRISE, INC.; EVERGREEN HELICOPTERS, INC.; QUALITY AVIATION SERVICES, INC., DEFENDANTS

No. COA04-74

(Filed 19 April 2005)

1. **Appeal and Error— appealability—interlocutory order—jurisdiction—minimum contacts**

Although the order denying defendants' motion to dismiss based on lack of personal jurisdiction is an interlocutory order, defendants' appeal of the trial court's N.C.G.S. § 1A-1, Rule 12(b)(2) decision is proper under N.C.G.S. § 1-277(b) because the appeal involves minimum contacts questions.

2. **Jurisdiction— personal—minimum contacts—motion to dismiss**

The trial court did not err in a breach of contract and quantum meruit case by denying the nonresident defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) based on lack of personal jurisdiction, because: (1) defendants solicited plaintiff company in North Carolina to perform services for it, plaintiff agreed to do so in North Carolina, and the contracts were substantially performed in North Carolina; (2) the trial court could properly conclude that defendants purposefully acted in a manner so as to avail themselves of the privilege of conducting activities within the State of North Carolina and thus invoked the benefits and protections of North Carolina laws; (3) although the

parties chose New York law to apply to any dispute, choice of law clauses are not determinative of personal jurisdiction even though they express the intention of the parties and are a factor in determining whether minimum contacts exist and due process was met; (4) the record does not indicate that any one state would be more convenient to all the parties and witnesses than another; (5) it cannot be said that the factors regarding this state's interest and the convenience to the parties favor one party over the other to the extent that subjecting defendants to the jurisdiction of North Carolina's courts would be unfair; (6) once the first prong of purposeful minimum contacts is satisfied, defendant bears a heavy burden in escaping the exercise of jurisdiction based on other factors; (7) the inconclusive nature of additional factors in this case do not necessarily override the trial court's presumed finding that defendants had sufficient minimum contacts with North Carolina; and (8) since each defendant was a party to at least one of the three contracts, the North Carolina judicial system's exercise of specific personal jurisdiction is appropriate over each defendant.

Appeal by defendants from order entered 18 November 2003 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 September 2004.

Helms, Mulliss & Wicker, P.L.L.C., by Peter J. Covington and Robert A. Muckenfuss, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr., Jennifer K. Van Zant, and John S. Buford, for defendants-appellants.

GEER, Judge.

The sole issue to be decided on appeal is whether the trial court erred in denying defendants' motion to dismiss under N.C.R. Civ. P. 12(b)(2) for lack of personal jurisdiction. Because we have concluded that competent evidence supports the trial court's determination that defendants have sufficient minimum contacts with North Carolina to meet the requirements of due process, we affirm.

Plaintiff Banc of America Securities LLC ("BAS") is incorporated in Delaware, but has its principal place of business in Charlotte, North Carolina. Over the course of 2002, BAS entered into a series of

contracts to provide assistance with the restructuring of debt for defendant Evergreen International Aviation, Inc. ("Evergreen") and its subsidiaries, defendants Evergreen International Airlines, Inc. ("EIA"), Evergreen Agricultural Enterprises, Inc. ("EAE"), Evergreen Air Center, Inc. ("EAC"), Evergreen Aircraft Sales & Leasing Co. ("EASL"), Evergreen Aviation Ground Logistics Enterprise, Inc. ("EAGLE"), and Evergreen Helicopters, Inc. ("Helicopters"). A seventh subsidiary, defendant Quality Aviation Services, Inc. ("Quality"), has merged into Helicopters and no longer exists independently. Evergreen, EIA, EAE, and Helicopters are all Oregon corporations headquartered in Oregon. EAC, while incorporated in Oregon, has its principal place of business in Arizona. EASL and EAGLE are incorporated in Nevada and Delaware, respectively, with their principal places of business in Oregon.

BAS sued defendants in Mecklenburg County Superior Court for breach of contract and quantum meruit. Defendants collectively moved to dismiss the action under Rule 12(b)(2) of the Rules of Civil Procedure for lack of personal jurisdiction and under Rule 12(b)(6) for failure to state a claim for relief. Alternatively, defendants moved pursuant to N.C. Gen. Stat. § 1-75.12(a) (2003) for a stay of further proceedings based on *forum non conveniens* and, in accordance with the statute, stipulated to suit in Oregon, New York, or Washington, D.C. In support of this motion, defendants submitted the affidavit of Timothy G. Wahlberg, President of Evergreen. BAS responded by filing the affidavit of Kurt C. Brechnitz, Vice President of BAS' Restructuring Advisory Group. Mr. Wahlberg subsequently submitted a second affidavit addressing assertions made by Mr. Brechnitz. On 18 November 2003, Judge Yvonne M. Evans entered an order denying defendants' motion.

[1] Defendants appealed the denial of their motion to dismiss for lack of personal jurisdiction. Although the order denying the motion to dismiss is an interlocutory order, defendants' interlocutory appeal of the trial court's Rule 12(b)(2) decision is proper under N.C. Gen. Stat. § 1-277(b) (2003). *See Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982) ("[T]he right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1-277(b)], is limited to rulings on 'minimum contacts' questions, the subject matter of Rule 12(b)(2).").[1]

1. Defendants also filed a petition for writ of certiorari seeking review of the trial court's denial of their motion under N.C. Gen. Stat. § 1-75.12. This Court denied that petition on 6 February 2004.

Discussion

[2] A two-step analysis applies in determining whether a North Carolina court has personal jurisdiction over a nonresident defendant: "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986). Since defendants do not dispute the applicability of the long-arm statute, the sole issue before this Court is whether the trial court properly concluded that the exercise of jurisdiction over defendants did not violate due process.

A. *Standard of Review*

The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court. Typically, the parties will present personal jurisdiction issues in one of three procedural postures: (1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.

In the first category of motions, when neither party submits evidence, "[t]he allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217, *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). The trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction. *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998).

On the other hand, if the defendant supplements his motion to dismiss with an affidavit or other supporting evidence, the "allegations [in the complaint] can no longer be taken as true or controlling and plaintiff[] cannot rest on the allegations of the complaint." *Bruggeman*, 138 N.C. App. at 615-16, 532 S.E.2d at 218. In order to determine whether there is evidence to support an exercise of personal jurisdiction, the court then considers (1) any allegations in the

complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence). *Id.* at 616, 532 S.E.2d at 218 ("[I]n evaluating the appeal before us, we look to the uncontroverted allegations in the complaint and the uncontroverted facts in the sworn affidavit for evidence supporting the presumed findings of the trial court."). *See also Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 168-69, 565 S.E.2d 705, 711-12 (2002) (upholding the trial court's order granting a motion to dismiss under Rule 12(b)(2) based on uncontroverted statements in the defendant's affidavits).

In the third category of cases, the parties—as here—submit dueling affidavits. Under those circumstances, "the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions." N.C.R. Civ. P. 43(e); *see also Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217 ("If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based upon affidavits."). If the trial court chooses to decide the motion based on affidavits, "[t]he trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits] much as a juror." *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524, *disc. review denied*, 303 N.C. 314, 281 S.E.2d 651 (1981).

When this Court reviews a decision as to personal jurisdiction, it considers only "whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). Under Rule 52(a)(2) of the Rules of Civil Procedure, however, the trial court is not required to make specific findings of fact unless requested by a party. *Fungaroli*, 51 N.C. App. at 367, 276 S.E.2d at 524. When the record contains no findings of fact, " '[i]t is presumed . . . that the court on proper evidence found facts to support its judgment.' " *Id.* (quoting *Sherwood v. Sherwood*, 29 N.C. App. 112, 113-14, 223 S.E.2d 509, 510-11 (1976)).

In *Fungaroli*, this Court upheld the trial court's denial of defendant's motion to dismiss, after noting:

> Although the trial court in the instant case did not actually make findings of fact in support of its order, we will presume that the

> trial court did find facts to support its decision and order. Therefore, we must assume that the trial court after reviewing the pleadings and affidavits of both parties decided to take as true plaintiff's contentions.

Id. Likewise, in *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986), the trial court made no findings of fact in ruling on defendant's motion to dismiss for lack of personal jurisdiction. After repeating the principle that the lack of findings gives rise to a presumption that "the judge, upon proper evidence, found facts sufficient to support his ruling," this Court wrote, "[i]n the case *sub judice*, the parties presented affidavits which materially conflicted. The trial judge apparently believed the evidence of [defendant] and presumably found the facts to be as set forth and supported by his affidavit." *Id.* The Court then treated all the facts alleged in the defendant's affidavit as true in determining that it was improper for a North Carolina court to exercise jurisdiction over the defendant. *Id.*

In this case, as in *Fungaroli* and *Cameron-Brown*, the record contains no indication that the parties requested that the trial judge make specific findings of fact. We must, therefore, presume that the trial judge made factual findings sufficient to support her ruling in favor of plaintiff. It is this Court's task to review the record to determine whether it contains any evidence that would support the trial judge's conclusion that the North Carolina courts may exercise jurisdiction over defendants without violating defendants' due process rights. We are not free to revisit questions of credibility or weight that have already been decided by the trial court.

B. *Due Process Analysis*

To satisfy the requirements of the due process clause, there must exist "certain minimum contacts [between the non-resident defendant and the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158 (1945) (internal quotation marks omitted). As our Supreme Court has stated, "[i]n each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice." *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786. Instead, the "relationship between the defendant and

the forum must be 'such that he should reasonably anticipate being haled into court there.' " *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501, 100 S. Ct. 559, 567 (1980)).

The United States Supreme Court has recognized two bases for finding sufficient minimum contacts: (1) specific jurisdiction and (2) general jurisdiction. Specific jurisdiction exists when "the controversy arises out of the defendant's contacts with the forum state." *Id.* at 366, 348 S.E.2d at 786. General jurisdiction may be asserted over a defendant "even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient 'continuous and systematic' contacts between defendant and the forum state." *Replacements*, 133 N.C. App. at 145, 515 S.E.2d at 51 (quoting *Fraser v. Littlejohn*, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989)). Because our review of the record indicates that the trial judge's order is supported by evidence of specific jurisdiction, we do not address plaintiff's arguments regarding general jurisdiction.

For specific jurisdiction, "the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction." *Tom Togs*, 318 N.C. at 366, 348 S.E.2d at 786. Our courts look at the following factors in determining whether minimum contacts exist: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties. *Replacements*, 133 N.C. App. at 143, 515 S.E.2d at 49. "A contract alone may establish the necessary minimum contacts where it is shown that the contract was voluntarily entered into and has a 'substantial connection' with this State." *Williamson Produce, Inc. v. Satcher*, 122 N.C. App. 589, 594, 471 S.E.2d 96, 99 (1996) (quoting *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 786).

Specifically, in *Tom Togs*, our Supreme Court held that "[a]lthough a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this State." *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 786. The Court concluded that there was sufficient evidence of a substantial connection with this State when (1) "the defendant made an offer to plaintiff whom

defendant knew to be located in North Carolina," (2) "[p]laintiff accepted the offer in North Carolina," and (3) "[d]efendant was . . . aware that the contract was going to be substantially performed in this State." *Id.* at 367, 348 S.E.2d at 786-87. Based on this evidence, the Court ruled that the "defendant purposefully availed itself of the protection and benefits of [North Carolina's] laws." *Id.*, 348 S.E.2d at 787.

In this case, plaintiff offered evidence that would have allowed the trial judge to find the following facts pertinent to specific jurisdiction. According to Mr. Brechnitz' affidavit, defendants—through their CEO—initiated contact with BAS' Restructuring Advisory Group ("the Group"), which has a single office located in Charlotte, North Carolina. The affidavits submitted by defendants did not dispute this assertion by Mr. Brechnitz. Subsequently, defendants forwarded various corporate documents to the Group's office in North Carolina for review prior to the Group's agreeing to accept the engagement. As a result of the initial contact and the subsequent document review, BAS and defendants entered into three contracts (in April, July, and October) that were set forth in letter agreements sent from and signed by the Group in North Carolina.[2]

Defendants offered evidence in the form of Mr. Wahlberg's affidavit that "it was represented to Evergreen that all of the work in connection with that contract would be performed by BAS personnel working out of Evergreen's headquarters in McMinnville, Oregon or out of New York City . . . ." Nevertheless, Mr. Brechnitz' affidavit stated:

> To the best of my knowledge, no such representation was ever made by BAS' representatives to Defendants. More importantly, any such representation would not make sense because the Group was located in Charlotte, North Carolina, and Defendants hired Charlotte law firms to assist in the debt restructuring efforts. In fact, all of the significant work performed by BAS for Defendants was performed in Charlotte, North Carolina with Defendants' knowledge. I routinely discussed the progress of our work with Defendants' representatives by telephone or e-mail from my office in Charlotte, North Carolina. To the best of my knowledge, Defendants never complained or objected that the work was being substantially performed in North Carolina.

2. While only EIA and Evergreen were signatories to two of the contracts, all of defendants entered into the third contract.

By describing the various tasks actually performed in North Carolina, Mr. Brechnitz' affidavit also provided evidence that the Group performed the work required under the July and October contracts primarily in North Carolina.[3]

We believe that this evidence parallels the evidence found sufficient in *Tom Togs*. BAS' evidence indicates that defendants solicited the Group in North Carolina to perform services for it, BAS agreed to do so in North Carolina, and the contracts were substantially performed in North Carolina. As this Court has previously held: "Which party initiates the contact is taken to be a critical factor in assessing whether a nonresident defendant has made 'purposeful availment' [of the privilege of conducting activities within the forum State]." *CFA Med., Inc. v. Burkhalter*, 95 N.C. App. 391, 395, 383 S.E.2d 214, 216 (1989). *See also Inspirational Network*, 131 N.C. App. at 241, 506 S.E.2d at 761 (by "initiat[ing] and voluntarily enter[ing] into a contractual arrangement with [plaintiff], a North Carolina based corporation," defendant purposefully availed itself of the privileges of conducting business in North Carolina).

Defendants argue that their evidence establishes that they did not solicit the Group, the contracts were not negotiated or entered into in North Carolina, and it did not expect for the contract work to be performed in North Carolina.[4] Because we are required to presume that the trial judge made findings of fact supportive of its order, we must presume that the judge found plaintiff's evidence more credible and gave it greater weight. Under the applicable standard of review, we are not free on appeal to reach a different resolution of the conflicting evidence.

Since plaintiff's evidence in this case directly parallels the evidence found sufficient in *Tom Togs*, it necessarily meets the requirement that the contract at issue have a "substantial connection with this State." *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 786. Accordingly,

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3. The April agreement provided that BAS would be the exclusive initial purchaser in connection with a proposed private offering of senior debt securities of Evergreen. Plaintiff's evidence does not address the location of the performance of this agreement.

4. Mr. Wahlberg's affidavit contains a number of assertions regarding the contract that are made "upon information and belief." Since an affidavit, in this context, must be based upon personal knowledge, we have not considered those assertions. *Hankins v. Somers*, 39 N.C. App. 617, 620, 251 S.E.2d 640, 642 (holding that, in deciding a Rule 12(b)(2) motion, a trial court should not consider assertions in an affidavit made "upon information and belief"), *disc. review denied*, 297 N.C. 300, 254 S.E.2d 920 (1979).

the trial court could properly conclude that defendants "purposefully acted in a manner so as to avail [themselves] of the 'privilege of conducting activities' within the State of North Carolina and thus invoked 'the benefits and protections of [the North Carolina] laws.' " *Liberty Fin. Co. v. North Augusta Computer Store, Inc.*, 100 N.C. App. 279, 285, 395 S.E.2d 709, 712 (1990) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298, 78 S. Ct. 1228, 1240 (1958)) (holding that when the defendant entered its order for computer products with a North Carolina company, it invoked the benefits and protections of North Carolina laws). *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 85 L. Ed. 2d 528, 541, 105 S. Ct. 2174, 2183 (1985) ("[W]ith respect to interstate contractual obligations, we have emphasized that parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities." (internal quotation marks omitted)); *Climatological Consulting Corp. v. Trattner*, 105 N.C. App. 669, 674, 414 S.E.2d 382, 384-85 (holding that the evidence was sufficient to establish a substantial connection with this State when the defendant initially contacted plaintiff to engage its services, knowing that the majority of plaintiff's services would be performed in North Carolina, and when 80% of the services were in fact performed in this State), *disc. review denied*, 332 N.C. 343, 421 S.E.2d 145 (1992).

Even when the trial court concludes that a defendant has "purposefully established minimum contacts within the forum State," the court must also consider those contacts "in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Burger King*, 471 U.S. at 476, 85 L. Ed. 2d at 543, 105 S. Ct. at 2184 (quoting *Int'l Shoe*, 326 U.S. at 320, 90 L. Ed. at 104, 66 S. Ct. at 160). In making this determination, the North Carolina appellate courts have considered (1) the interest of North Carolina and (2) the convenience of the forum to the parties. *Replacements*, 133 N.C. App. at 143, 515 S.E.2d at 49. *See also Burger King*, 471 U.S. at 477, 85 L. Ed. 2d at 543, 105 S. Ct. at 2185 (noting that courts should consider " 'the forum State's interest in adjudicating the dispute' " and " 'the plaintiff's interest in obtaining convenient and effective relief' " (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 62 L. Ed. 2d 490, 498, 100 S. Ct. 559, 564 (1980))).

With respect to North Carolina's interest, *Tom Togs* establishes this State's interest in providing a forum for resolution of conflicts arising in North Carolina. *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 787.

In contrast to *Tom Togs*, 318 N.C. at 367-68, 348 S.E.2d at 787, however, the parties in this case provided that New York law rather than North Carolina law would apply to any dispute. This Court has held that "[w]hile choice of law clauses are not determinative of personal jurisdiction, they express the intention of the parties and are a factor in determining whether minimum contacts exist and due process was met." *Tejal Vyas, LLC v. Carriage Park, Ltd. P'ship*, 166 N.C. App. 34, 41, 600 S.E.2d 881, 887 (2004), *aff'd per curiam*, 359 N.C. 315, 608 S.E.2d 751 (2005). This factor does not, therefore, favor one party over the other.

With respect to the convenience to the parties, the evidence is also conflicting. Of course, engaging in litigation in North Carolina would not be convenient for defendants' employees located in Oregon, but, by the same token, litigation in another state would not be convenient for plaintiff's witnesses. Mr. Wahlberg's affidavit suggests that non-party individuals located in New York, California, Illinois, Connecticut, and the District of Columbia "would possess information relevant to this litigation," including documents. Mr. Brechnitz' affidavit, however, states that many of these individuals would not be necessary or critical witnesses in this case. We must presume that the trial court accepted Mr. Brechnitz' assertions. Regardless, it is apparent that this factor is inconclusive. The record does not indicate that any one State would be more convenient to all of the parties and witnesses than another. *See Climatological Consulting Corp.*, 105 N.C. App. at 675, 414 S.E.2d at 385 (holding that although three material witnesses were located in Washington, D.C., "this fact is counterbalanced by the fact that plaintiff's materials and offices are located here[;] North Carolina is a convenient forum to determine the rights of the parties").

With respect to the fairness of this State exercising jurisdiction, defendants argue that they have never set foot in North Carolina. Our courts have observed, however, that "[i]t is well settled . . . 'that a defendant need not physically enter North Carolina in order for personal jurisdiction to arise.' " *Williamson Produce*, 122 N.C. App. at 594, 471 S.E.2d at 99 (quoting *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 501, 462 S.E.2d 832, 834 (1995)). *See also Tom Togs*, 318 N.C. at 368, 348 S.E.2d at 787 ("Lack of action by defendant *in* a jurisdiction is not now fatal to the exercise of long-arm jurisdiction."). On the other hand, "defendant[s] [have not] pointed to any disparity between plaintiff and [themselves] which might render the exercise of personal jurisdiction over [them] unfair." *Id.*

In sum, we cannot say that the factors regarding the State's interest and the convenience to the parties favor one party over the other to the extent that subjecting defendants to the jurisdiction of North Carolina's courts would be unfair. We also observe that the United States Supreme Court has stressed that once the first prong of purposeful minimum contacts is satisfied, the defendant will bear a heavy burden in escaping the exercise of jurisdiction based on other factors. *Burger King*, 471 U.S. at 476-78, 85 L. Ed. 2d at 543-44, 105 S. Ct. at 2184-85. We do not believe that the inconclusive nature of these additional factors necessarily overrides the trial judge's presumed finding that defendants had sufficient minimum contacts with North Carolina.

Since each defendant was a party to at least one of the three contracts, the North Carolina judicial system's exercise of specific personal jurisdiction is appropriate over each defendant. For these reasons, we affirm the trial court's denial of defendants' 12(b)(2) motion to dismiss.

Affirmed.

Judges CALABRIA and STEELMAN concur.

IN THE MATTER OF: A.D.L., J.S.L., C.L.L.

No. COA03-1333

(Filed 19 April 2005)

1. Termination of Parental Rights— order 16 days late—not prejudicial

A termination of parental rights order was not reversed for being filed 16 days after the 30-day limit provided by N.C.G.S. § 7B-1109(e) where respondent did not show prejudice from the late filing. The General Assembly's intent in imposing the time limit was to provide a speedy resolution in juvenile custody cases; holding that adjudication and disposition orders should be reversed simply because they were untimely filed would only further delay the determination while new petitions were filed and new hearings held.

2. Termination of Parental Rights— guardian ad litem—appointment papers not filed—no prejudice

The failure of the record to disclose guardian ad litem appointment papers for the juveniles in a termination of parental rights proceeding did not necessitate reversal where it was clear that the guardian ad litem followed her statutory duties. Clerical or technical violations such as the failure to file an appointment order do not in themselves require reversal. Prejudice must be shown.

3. Termination of Parental Rights— Indian Child Welfare Act—tribe not recognized by federal government

A termination of parental rights was not reversed for failure to follow the federal Indian Child Welfare Act of 1978 where the children were Lumbee, a tribe recognized by North Carolina but not the federal government.

4. Termination of Parental Rights— allegations of neglect—sufficient

The factual allegations in a petition to terminate parental rights were sufficient to give respondent notice of the issue of neglect and the trial court did not err by considering the issue.

5. Termination of Parental Rights— neglect—leaving children in foster care

The evidence in a termination of parental rights proceeding was sufficient to establish that respondent willfully left her children in foster care without making reasonable progress to correct the conditions which led to removal of the children.

6. Termination of Parental Rights— neglect—evidence sufficient

The trial court did not abuse its discretion in terminating respondent's parental rights where DSS had received and investigated allegations of neglect involving respondent since 1997; lack of supervision of the children was established in 2000; respondent-mother and the father failed to comply with drug assessments and tested positive for drugs; both failed to obtain and maintain employment and stable housing; and both failed to take the appropriate steps toward reunification.

Appeal by respondent-mother from order filed 7 October 2002 by Judge Wendy M. Enochs in Guilford County District Court. Heard in the Court of Appeals 25 August 2004.

Guilford County Attorney Jonathan V. Maxwell, by Deputy County Attorney Michael K. Newby, for petitioner-appellee Guilford County Department of Social Services; and Attorney Advocate Joyce Terres for the Guardian at Litem Program.

Katharine Chester for respondent-appellant.

BRYANT, Judge.

J.L.[1] (respondent-mother) appeals an order filed 7 October 2002, terminating her parental rights as to A.D.L. (D.O.B. 1 November 1996), J.S.L. (D.O.B. 18 February 1998), C.L.L. (D.O.B. 23 December 2000) based on the grounds of neglect, willfully leaving the children in foster care for more than twelve months without a showing of reasonable progress, and willful failure to pay a reasonable portion of the cost of care.[2]

On 15 August 2001, Guilford County Department of Social Services (DSS) filed a petition alleging that the three children were neglected. The matter came for non-secure custody hearing and a "7-Day" hearing on 16 August 2001 and 30 August 2001, respectively. The children were in the care of their maternal grandparents at the time of the hearings; and the district court ordered care to be continued with the grandparents and for legal custody to remain with DSS.

The neglect adjudication and disposition hearing was held on 4 October 2001, and an order was filed on 2 January 2002, finding the children remained neglected. No further review hearings were held until 10 January 2002, at which time a permanency planning review hearing was held. The district court ordered care to be continued with the grandparents, basing its order on the recommendations of the guardian ad litem and social workers involved in the case. A second permanency planning review hearing was held on 7 March 2002, at which time the district court rendered an order finding that it would be in the best interest of the children for the respondent's parental rights to be terminated. The district court continued care of the children with the maternal grandparents.

On 6 May 2002, DSS filed a petition seeking the termination of respondent's parental rights based on the grounds of neglect, willfully leaving the children in foster care for more than twelve months with

1. Initials are used throughout to protect the identity of the juveniles.

2. By the same order, the respondent-father's parental rights were terminated; however, this appeal only concerns the termination of respondent-mother's parental rights.

out a showing of reasonable progress, and willful failure to pay a reasonable portion of the cost of care. This matter came for hearing at the 19 and 22 August 2002 session of Guilford County District Court with the Honorable Wendy M. Enochs presiding. The district court terminated respondent's parental rights, based on the grounds alleged, by order filed 7 October 2002. Respondent gave notice of appeal in open court and written notice of appeal on 7 October 2002.

Respondent presents several issues on appeal including whether: (I) the district court's adjudication and disposition order must be vacated because the order was filed more than 30 days following the date of hearing; (II) the district court's decision must be reversed because it failed to appoint a guardian ad litem for the children; (III) the district court's order should be reversed because DSS failed to accord any respect to the Native American heritage of the children in violation of the Indian Child Welfare Act; (IV) the district court's order must be reversed because the TPR petition did not allege the ground of neglect, and the findings were not based upon clear, cogent and convincing evidence; and (V) the district court's order must be reversed because it was not in the best interest of the children to terminate respondent's parental rights.

I

[1] Respondent first argues the district court's adjudication and disposition order must be vacated because the order was filed more than 30 days following the date of hearing.

N.C. Gen. Stat. § 7B-1109(e) provides:

> The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent. The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

N.C.G.S. § 7B-1109(e) (2002) ("Session Laws 2001-208, § 7 and 22, effective January 1, 2002, and applicable to actions pending or filed on or after that date, . . . added the last sentence of subsection (e).") N.C. Gen. Stat. § 7B-1110(a) provides:

> Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental

> rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated. Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

N.C.G.S. § 7B-1110(a) (2002) ("Session Laws 2001-208, § 23, effective January 1, 2002, and applicable to actions pending or filed on or after that date, added the last sentence of subsection (a).")

In the instant case, the termination of parental rights (TPR) petition was heard, on 19 and 22 August 2002, and was adjudicated and disposition decreed on 22 August 2002. However, the order was not filed until 7 October 2002 (more than 30 days following adjudication and disposition). While the district court's delay violated the 30-day provision of N.C. Gen. Stat. §§ 7B-1109(e), 1110 (a), we find no authority that the TPR order must be vacated as a result.

The General Assembly added the 30-day filing requirement to these statutes in 2001. *In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 171 (2004). While we have located no clear reasoning for this addition, logic and common sense lead the Court 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. *E.N.S.*, 164 N.C. App. at 153, 595 S.E.2d at 172. 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 the children's custody because juvenile petitions would have to be re-filed and new hearings conducted. *Id.*

This Court has held a party must show prejudice for a violation of either N.C. Gen. Stat. §§ 807(b)[3] or 905(a)[4]. *E.N.S.*, 164 N.C. App. at

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3. The adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing.

N.C.G.S. § 7B-807(b) (2003).

4. The dispositional order shall be in writing, signed, and entered no later than 30 days from the completion of the hearing, and shall contain appropriate findings of fact and conclusions of law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

N.C.G.S. § 7B-905(a) (2003).

153, 595 S.E.2d at 172 ("although the order was not filed within the specified time requirement, respondent cannot show how she was prejudiced by the late filing"). More on point, this Court in *In re J.L.K.*, 165 N.C. App. 311, 598 S.E.2d 387, 390-91 (2004), held the district court's violation of N.C. Gen. Stat. § 7B-1109(e), did not necessitate vacating the court TPR order. *J.L.K.*, 165 N.C. App. at 315, 598 S.E.2d at 390. ("While the trial court's delay clearly violated the 30-day provision of N.C. Gen. Stat. § 7B-1109(e), we find no authority compelling that the TPR order be vacated as a result.").

Here, respondent fails to show any prejudice to her resulting from the late filing of the TPR order. Therefore, the district court's failure to file the adjudication and disposition orders within 30 days amounted to harmless error and is not grounds for reversal. Accordingly, respondent's first assignment of error is overruled.

II

[2] Respondent next argues the district court's decision must be reversed because the court failed to appoint a guardian ad litem for the children.

N.C. Gen. Stat. § 7B-601(a) states in part, "[w]hen in a petition a juvenile is alleged to be abused or neglected, the court shall appoint a guardian ad litem to represent the juvenile. When a juvenile is alleged to be a dependent, the court may appoint a guardian ad litem to represent the juvenile." N.C.G.S. § 7B-601(a) (2003). Here, respondent argues the record fails to disclose guardian ad litem appointment papers, and accordingly, the district court's order must be reversed.

Our Supreme Court has previously held in assessing the impact of clerical or technical violations, such as failure to file an appointment order, does not in itself require the reversal of lower court orders. *See State v. Beam*, 184 N.C. 730, 742, 115 S.E. 176, 182 (1922), for a discussion of the following cases: *McKeel v. Holloman*, 163 N.C. 132, 79 S.E. 445 (1913) ("Technical errors will be considered harmless where a reversal would not result in a different verdict."); *Alexander v. Savings Bank*, 155 N.C. 124, 71 S.E. 69 (1911) ("Where a case is tried in substantial accordance with law, technical errors not prejudicial do not entitle the losing party to a reversal."); and *Rich v. Morisey*, 149 N.C. 37, 62 S.E. 762 (1908).

In order to obtain relief from an order due to a clerical or technical violation, the complaining party must demonstrate how she was prejudiced or harmed by the violation. *See Beam*, 184 N.C. 730, 742,

115 S.E. 176, 182, for a discussion of the following cases: *Penland v. Barnard*, 146 N.C. 378, 59 S.E. 1109 (1907) ("Error to warrant reversal must be prejudicial."); *Hulse v. Brantley*, 110 N.C. 134, 14 S.E. 510 (1892); *accord Carter v. R. R.*, 165 N.C. 244, 81 S.E. 321 (1914) ("Error alone is not sufficient to reverse, but there must be harm to the party who excepts, and if it appears there is none, his exception fails."). In this case, the respondent has failed to demonstrate such prejudice.

The record on appeal does not reflect a guardian ad litem appointment form was filed. However, except for the initial hearing following the entry of the non-secure order to assume custody of the juveniles in August of 2001, the guardian ad litem was noted as present at each and every hearing prior to and including the TPR hearing where she represented the interest of the children. In addition, the guardian ad litem was named in the TPR petition.

N.C. Gen. Stat. § 7B-601(a) provides:

> (a) The duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interest of the juvenile until formally relieved of the responsibility by the court.

N.C.G.S. § 7B-601(a) (2003) (emphasis added).

It is clear that the guardian ad litem followed her statutory duties under N.C. Gen. Stat. § 7B-601(a) to represent the juveniles in all actions under Chapter 7B. Since the guardian ad litem carried out her respective duties, failure of the record to disclose guardian ad litem appointment papers does not necessitate reversal of the district court's decision. This assignment of error is overruled.

III

[3] Respondent next argues the district court's order should be reversed because DSS failed to accord any respect to the Native American heritage of the children in violation of the Indian Child Welfare Act.

The Indian Child Welfare Act of 1978 (hereinafter ICWA or Act) was enacted to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C.A. § 1902 (2005). Congress acknowledged in the Act that "an alarmingly high percentage of Indian families are broken up by the removal . . . of their children," and their placement in non-Indian homes. 25 U.S.C.A. § 1901(4) (2005). The Act provides "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C.A. § 1902.

There are two prerequisites to invoking the requirements of ICWA. *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 136 Ariz. 528, 531, 667 P.2d 228, 231 (1983). First, it must be determined that the proceeding is a "child custody proceeding" as defined by the Act. 25 U.S.C.A. § 1903(1) (2005). Once it has been determined that the proceeding is a child custody proceeding, it must then be determined whether the child is an Indian child. 25 U.S.C.A. § 1903(4),(9) (2005). Most importantly, the Act only applies to Indian children of federally recognized tribes. *See* 25 U.S.C.A. § 1903(8) (2005) (" 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians."). " '[A] party to a proceeding who seeks to invoke a provision of the . . . Act has the burden to show that the Act applies in the proceedings.' " *In re Williams*, 149 N.C. App. 951, 957, 563 S.E.2d 202, 205 (2002) (citation omitted).

Respondent's children are registered members of the Lumbee Tribe. The Lumbee are a state-recognized Indian Tribe. N.C.G.S. § 71A-3 (2003). However, by respondent's own admission, the children are not part of a federally recognized tribe, and therefore, the provisions of ICWA do not apply. Thus, there is no evidence to support a finding that the child is an Indian child under ICWA, and ICWA regulations on placement are not relevant to the issue of termination in the instant case. *See* N.C.G.S. § 50A-104(a) ("A child-custody proceeding that pertains to an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., is not subject to this Article to the extent that it is governed by the Indian Child Welfare Act.") (2003). Accordingly, this assignment of error is overruled.

IV

[4] Respondent argues the district court erred in considering the issue of neglect because the petition failed to allege that respondent had neglected the child. Respondent contends that consideration of the neglect issue was unfair because it did not put her on notice that she needed to defend against the allegation of neglect.

N.C. Gen. Stat. § 7B-1104(6) (2003), states that a petition for termination of parental rights shall state "facts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." Factual allegations must be sufficient to put a respondent on notice regarding the acts, omissions, or conditions at issue in the petition. *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002).

Here, petitioner's factual allegations were sufficient to put respondent on notice regarding the issues in the petition. Specifically, the petition alleged that respondent-mother and father did not follow through with all the components of their case plan with DSS. The respondent-mother and father submitted to drug tests on 16 August 2001 and both tested positive for marijuana, cocaine, and benzodiazepines. With regard to employment, the respondent-mother failed to hold a job since the children were placed in custody, and the father failed to go to work although he was employed. Respondent-mother and father failed to obtain and maintain stable housing and take the appropriate steps towards reunification. Moreover, their visits were sporadic and they failed to pay child support while the children have been in DSS custody. The petition concluded by stating, "[t]herefore, the children continue to be neglected by their mother and father." These factual allegations were sufficient to give respondent notice regarding the issue of neglect. This assignment of error is without merit.

[5] Respondent next argues the district court's order must be reversed because the findings were not based upon clear, cogent and convincing evidence.

There are two stages of a hearing on a petition to terminate parental rights: adjudication and disposition. *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173 (2001). At the adjudication stage, the petitioner has the burden of proving by clear, cogent, and convincing evidence that at least one statutory ground for termina-

tion exists. *Id. at* 408, 546 S.E.2d at 173-74. A finding of one statutory ground is sufficient to support the termination of parental rights. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). Upon a finding that at least one statutory ground for termination exists, the district court proceeds to the disposition stage, where it determines whether termination of parental rights is in the best interest of the child. *McMillon*, 143 N.C. App. at 408, 546 S.E.2d at 174.

When reviewing an appeal from an order terminating parental rights, our standard of review is whether: (1) there is clear, cogent, and convincing evidence to support the district court's findings of fact; and (2) the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000). 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 re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984). If the decision is supported by such evidence, the district court's findings are binding on appeal even if there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988).

N.C. Gen. Stat. § 7B-1111(a)(2), provides for termination of parental rights if "the parent has willfully left the juvenile in foster case or placement outside the home for more that 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2) (2003).

Here, the TPR order contained the following findings of fact:

> 1. The Court finds pursuant to G.S. § 7B-1111(a)(1), the Respondents have neglected their Children. The Children were adjudicated neglected and dependent on or about October 4, 2001. The conditions which led to the adjudication of neglect and dependency and DSS custody of the children are as follows: the parents' unstable living conditions, the parents' continued drug use and the extensive DSS history on the family relating back to 1997 involving the same issues. The parents entered into a service agreement on 8/16/01. In this agreement the parents agreed to:
>
> 1) Obtain an ADS assessment and comply with recommendations in order to live a drug free lifestyle.

2) Submit to random drug tests.

3) Cooperate with DSS by contacting their Social Worker at least twice a month.

4) Locate and maintain employment.

5) Apply at least 3 places a week for employment.

6) Locate and maintain stable housing.

7) Attend parenting classes and demonstrate their skills learned.

Neither parent complied with the terms of this service agreement or its updated versions on March 15, 2002 and June 20, 2002. . . . Overall neither parent has made significant effort to correct or improve the conditions which led to DSS custody of the children and therefore the Respondents continue to neglect the children.

2. Incorporating the finding of fact in Paragraph 1, above, the Court finds pursuant to G.S. § 7B-1111(a)(2), the Respondent has willfully left the Children in the foster care placement outside of 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 left to the removal of the children.

3. The Court finds pursuant to G.S. § 7B-1111(a)(3), the Children have been placed in the custody of DSS and the Respondents have for a continuous period of six months next preceding the filing of the Petition, willfully failed for such period to pay a reasonable portion of the cost of care for the Children although physically and financially able to do so. . . .

4. The Court finds that it is in the best interest of the Children that the parental rights of [B.J.L.] and [J.L.] be terminated.

5. The Court finds that this Petition to Terminate Parental Rights was not filed to circumvent the provisions of Chapter 50A of the North Carolina General Statutes, the Uniform Child Custody Jurisdiction and Enforcement Act, and the Court would have jurisdiction to make a Child custody determination pursuant to G.S. § 50A-101, *et seq.*

From these findings, the district court concluded as follows:

(1) The Court has jurisdiction over the parties and subject matter.

(2) The grounds alleged in the Petition to Terminate Parental Rights filed on or about May 6, 2002 and as set forth herein, have been proven by clear and convincing evidence.

(3) It is the best interest of the Children that the parental rights of the Respondents [B.J.L.] and [J.L.] be terminated.

In reviewing the evidence, we find the evidence competent to support termination of respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). The district court made sufficient findings regarding respondent's progress or lack thereof. The children were adjudicated neglected and dependent on 4 October 2001. The TPR petitions were filed on 7 October 2002. Prior to that date, the record reflects that the children resided with their grandparents and great grandparents for six months without the parents providing any support; the parents had been using drugs; and respondent and her family had a history of involvement with DSS going back to 1997. Moreover, respondent failed to comply with the service agreement entered into on 16 August 2001. Respondent attempted to justify her non-compliance due to lack of transportation. However, she acknowledged that she could have taken the bus to look for employment and make her appointments.

We hold that the evidence is sufficient to establish that respondent willfully left her children in foster care without making reasonable progress under the circumstances to correct the conditions which led to removal of the children pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). This assignment of error is overruled.

V

[6] Respondent lastly argues the district court's order must be reversed because it was not in the best interest of the children to terminate respondent's parental rights.

N.C. Gen. Stat. § 7B-1110(a), provides that a district court shall issue an order terminating the parental rights of the respondent unless the best interest of the juvenile requires that the parental rights of the parent not be terminated. N.C.G.S. § 7B-1110(a) (2003); *see In re Parker*, 90, N.C. App. 423, 431, 368 S.E.2d 879, 884 (1998).

The district court's determination that termination of parental rights would be in the best interest of the child is reviewed applying an abuse of discretion standard. *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995).

Here, DSS received and investigated allegations of neglect involving respondent and her family since 1997. Neglect was established on 7 February 2000 for lack of supervision. Thereafter, the family briefly received treatment services until moving to Randolph County. In August 2000, another report was received establishing domestic abuse; however, the family moved once again and services were not provided this time. In August 2001, the children were taken into custody on the non-secure order at the start of this case.

Respondent-mother and father failed to comply with ADS assessments. Both respondent-mother and father submitted to drug tests on 16 August 2001 and both tested positive for marijuana, cocaine, and benzodiazepines. Respondent-mother and father failed to obtain and maintain employment since the children were placed in custody. Respondent-mother and father failed to obtain and maintain stable housing and take the appropriate steps towards reunification.

Respondent has failed to present any evidence demonstrating an abuse of discretion, and further, our review of the record failed to indicate an abuse of discretion. Therefore, the assignment of error is overruled.

Affirmed.

Judge HUDSON concurs.

Judge TYSON concurs in separate opinion.

Tyson, Judge concurring.

I concur in the result reached by the majority, but offer further discussion of the timeliness issue concerning late entry of the order terminating respondent's parental rights.

This Court recently addressed this issue involving N.C. Gen. Stat. § 7B-1109(e) and § 7B-1110(a) in *In re L.E.B. & K.T.B.*, 169 N.C. App. 375, 610 S.E.2d 424 (2005). There, the adjudication and disposition order terminating the respondents' parental rights was not

reduced to writing, signed, and entered until over 180 days after the hearing. *Id.* at 377, 610 S.E.2d at 425. The respondent-mother in *In re L.E.B. & K.T.B.* argued the delay of more than six months was excessive and "prejudiced her by adversely affecting: (1) both the family relationship between herself and the minors *and* the foster parent and the minors; (2) delaying subsequent procedural requirements; and (3) the finality of the matter." *Id.* at 379, 610 S.E.2d at 426 (emphasis in original).

This Court considered its previous decisions where delays were held error, but not reversible without a showing of prejudice. *Id.* (citing *In re J.L.K.*, 165 N.C. App. 311, 314, 598 S.E.2d 387, 390, *disc. rev. denied*, 359 N.C. 68, 604 S.E.2d 314 (2004); *In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 172, *disc. rev. denied*, 359 N.C. 189, 606 S.E.2d 903 (2004); *In re B.M., M.M., An.M., & Al.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005)). We held the delay of six months was highly prejudicial. *Id.* The respondents, the minors, and the foster parent were all adversely affected by not receiving a "speedy resolution" to the matter, as mandated by the General Assembly. *Id.*

Here, the adjudication and disposition order terminating respondent-mother's parental rights was reduced to writing, signed, and entered forty-six days after the hearing, sixteen days after the maximum time limit prescribed by N.C. Gen. Stat. § 7B-1109(e) and § 7B-1110(a). However, respondent does not argue how she or the other parties were prejudiced by the sixteen day delay. Her argument rests solely on the assertion that the delay in entering the order, in violation of N.C. Gen. Stat. § 7B-1109(e) and § 7B-1110(a), was *per se* prejudicial. I agree with the majority's holding that a sixteen day delay, standing alone, is insufficient to warrant a reversal where respondent failed to argue or show prejudice. However, our decision does not condone the delay in entering the adjudication and disposition order beyond the time limits in the statutes. *See In re B.M., M.M., An.M., and Al.M.*, 168 N.C. App. at 355, 607 S.E.2d at 702 (although this Court did not find prejudice, we stated, "[w]e strongly caution against this practice, as it defeats the purpose of the maximum time requirements specified in the statute, which is to provide parties with a speedy resolution of cases where juvenile custody is at issue."). I concur to affirm the trial court's order.

STATE OF NORTH CAROLINA v. LAWRENCE LEE ASH

No. COA04-623

(Filed 19 April 2005)

1. Confessions and Incriminating Statements— motion to suppress—videotape of interrogation—right to counsel—right to remain silent

The trial court did not err in a first-degree murder and conspiracy to commit robbery with a dangerous weapon case by denying defendant's motion to suppress the videotape of his interrogation by a detective which he contends denied his rights to counsel and to remain silent, because: (1) defendant was informed of his right to counsel and subsequently voluntarily waived his right to counsel by signing a waiver form; (2) defendant indicated his desire to answer questions without a lawyer being present and his desire to waive his rights by initialing the rights form in the proper place; (3) defendant failed to unambiguously invoke his right to remain silent; and (4) assuming arguendo that the trial court erred, the error was harmless beyond a reasonable doubt when the State presented overwhelming evidence of defendant's guilt including the testimony of two witnesses, and further, defendant failed to object during a detective's testimony regarding defendant's confession and statements made to the detective which are consistent with the videotape.

2. Criminal Law— removal of defendant from courtroom during trial—restraint of defendant at trial

The trial court did not err in a first-degree murder and conspiracy to commit robbery with a dangerous weapon case by restraining and removing defendant from the courtroom during trial, because: (1) defendant has a right to be present during each stage of his trial, but in a noncapital case, may waive that right through disruptive behavior; (2) the transcript revealed numerous outbursts by defendant during jury selection; (3) the trial court followed the requirement of N.C.G.S. § 15A-1032(b)(1) and defendant waived the instruction required under N.C.G.S. § 15A-1032(b)(2); (4) defendant failed to object to his restraint at trial and thus waived appellate review of this argument; and (5) N.C.G.S. § 15A-1031 allows the trial court to order a defendant to be subjected to physical restraint in the courtroom when it is rea-

sonably necessary to maintain order, prevent defendant's escape, or to provide for the safety of persons.

3. Constitutional Law— right of confrontation—videotaped deposition—unavailable witness—harmless error

Although the trial court violated defendant's constitutional right of confrontation in a first-degree murder and conspiracy to commit robbery with a dangerous weapon case by admitting a doctor's videotaped deposition into evidence without hearing evidence regarding the doctor's unavailability, the error was harmless because excluding the deposition testimony, the State presented other overwhelming evidence from which the jury could find that the victim died from injuries caused by a shotgun wound to the chest and that defendant fired the shotgun inflicting the wound.

Appeal by defendant from judgments entered 17 November 2003 by Judge James Floyd Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 2 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Daniel Shatz, for defendant-appellant.

TYSON, Judge.

Lawrence Lee Ash ("defendant") appeals from judgments entered after a jury found him to be guilty of first-degree murder pursuant to the felony murder rule, conspiracy to commit robbery with a dangerous weapon, and attempted robbery with a dangerous weapon. The trial court arrested judgment on the conviction of attempted robbery. We find error at trial but hold such error was harmless beyond a reasonable doubt.

I. Background

Jonathan Pruey ("Pruey") and his wife Jennifer lived in a mobile home in Cumberland County. Pruey stored marijuana in his bedroom and sold it out of his mobile home. In June 2000, two males, Corrie Cordier ("Cordier") and "Chris" were residing at Pruey's home.

A. Cordier's Testimony

Around 10:30 p.m. on 27 June 2000, Cordier heard a knock at the front door. Pruey looked out the window and asked Cordier to illu-

minate the front porch lights. Cordier observed two people dressed in all black clothing huddling in the corner of the porch. One of the men was wearing a "Jason mask," which Cordier described as a white hockey mask with small black lines, and brandishing a long metallic object, which appeared to Cordier to be a baseball bat.

Cordier stepped away from the door and yelled to Pruey. The door swung open, and the individual wearing the "Jason mask" fell through the partially-opened door. Cordier kicked the masked man as Pruey closed the door. A few seconds later, Cordier heard a loud "noise." Pruey's wife turned on some lights and observed Cordier with blood on his side. After "Chris" turned on more lights, Cordier and Pruey's wife observed Pruey lying "spread-eagled" on the floor between the kitchen and the living room bleeding profusely. Cordier attempted to administer first aid to Pruey, while "Chris" took Pruey's wife, who became hysterical, next door to Michael Grimes's ("Grimes") home.

B. Grimes's Testimony

Grimes testified that shortly before 10:30 p.m. on 27 June 2000, he heard a "slamming" noise, a shotgun blast, and someone screaming. He went outside and observed a car accelerating past Pruey's mobile home. Grimes could not identify the tag number, but noticed the car's headlights were not activated until after it reached Cumberland Road. Grimes returned inside his home and called 911.

C. Deputy Porter's Testimony

Cumberland County Deputy Sheriff Jennifer Porter ("Deputy Porter") was the first officer to arrive at the scene. Deputy Porter testified she spoke with Grimes and Cordier upon arrival. Deputy Porter found Pruey to have a faint pulse and called the 911 dispatcher regarding Pruey's condition. Emergency medical services personnel and other officers arrived and assumed the investigation.

Investigators processing the scene found a mask identified by Cordier as the "Jason mask" worn by one of the perpetrators. The mask was found on the dirt road leading from Pruey's mobile home to Cumberland Road next to tire impressions and a nylon rag. The police attempted unsuccessfully to cast a mold of the tire impressions.

Investigators collected fingerprints, but were unable to gather any useful fingerprints from the front door or the mask. Inside Pruey's home, officers recovered a shotgun shell wadding from the

kitchen floor, and removed and collected a portion of the front door containing the hole from the gun shot. Officers also recovered a metal box containing money and "green vegetable matter."

D. B.G.'s Testimony

B.G. testified that in June 2000 she was a fifteen-year-old runaway and lived with a man named "Kenny" in the Sunset Trailer Park along with her boyfriend, Craig Wissink ("Wissink") and defendant. Defendant was B.G.'s "ex-boyfriend." Approximately one week prior to 27 June 2000, B.G. observed a male named "Shawn" give Wissink a shotgun. Prior to the attempted robbery and murder, she heard Wissink and Damian Jackson ("Jackson") discuss plans to rob someone.

Around 4:00 p.m. on 27 June 2000, B.G. visited Victoria Lawson's ("Lawson") mobile home. B.G. testified that Wissink and defendant came by Lawson's home around 7:00 p.m. Wissink told B.G. to stay where she could be found. At about 10:45 p.m., she received a call at Lawson's home from Wissink, who told her to return to Kenny's mobile home alone. Upon arrival, Wissink informed B.G. he was leaving town and, if she wanted to accompany him, she should pack her things. After gathering her belongings, B.G. and Wissink left town, stopping along the way for Wissink to speak with Jackson.

B.G. and Wissink traveled to Wissink's mother's home in Kingman, Arizona, where they were subsequently arrested. Wissink carried a shotgun with them. This gun was identified by B.G. as the same gun State Bureau of Investigation Agent Ronald Marrs ("Agent Marrs") had earlier identified as the murder weapon during his testimony.

B.G. was charged with accessory after the fact to murder and entered into a plea agreement with the State. In exchange for her testimony, her charges were retained in juvenile court and she was not bound over for trial as an adult.

E. C.P.'s Testimony

C.P. testified that on 27 June 2000, he lived with his mother in Sunset Trailer Park and knew both Wissink and defendant. That morning, he was present with Wissink and defendant when Wissink stated that he was planning to rob a drug dealer on Cumberland Road to get money so he and B.G. could leave town. According to C.P., defendant stated that he also needed money, but did not say anything

about participating in Wissink's planned robbery. While Wissink was discussing the robbery, C.P. observed a twenty-gauge shotgun and a "Jason mask" similar to the one later identified by Cordier and recovered near the scene.

C.P. testified that during the day after the robbery, defendant confessed that he and Wissink had been the perpetrators and that he had shot Pruey. Defendant informed C.P. that he and Wissink drove to Pruey's home in C.P.'s mother's car, parked the car, and approached the front door. Defendant stated he was wearing the "Jason mask" and dark gloves, and Wissink was wearing a green camouflage mask. After Wissink knocked on the door, defendant attempted to kick in the door. Defendant observed a man kick Wissink in the face. Wissink stood up, and the door closed. Defendant confessed to C.P. that he shot through the door one time.

According to C.P., defendant suggested that C.P. call the police to report that Wissink committed the offense and that they would split the reward money. C.P. contacted the police and informed them that Wissink committed the offenses. C.P. did not mention defendant's involvement, but stated that someone named "Miko" had committed the crimes with Wissink that night. C.P. admitted "Miko" was a fake name.

On 29 June 2000, C.P. informed police that both Wissink and defendant had committed the offense. C.P. was charged with multiple felony charges and entered into a plea agreement. In exchange for his testimony, he received a reduction of two armed robbery charges to common law robbery, dismissal of other charges, and was sentenced to ten to twelve months imprisonment followed by probation.

F. Defendant's Arrest and Statements

On 29 June 2000, defendant was arrested and interrogated over two and one-half hours by Detective Sterling McClain ("Detective McClain"). The interrogation was videotaped. Prior to trial, defendant moved to suppress the videotape of the interrogation. The trial court denied this motion and played portions of the videotape for the jury. On the videotape, defendant initially denied any involvement but later confessed he and Wissink went to Pruey's mobile home and attempted to enter it. Defendant stated that he was attempting to get Wissink to leave when Wissink fired the shotgun.

Detective McClain acknowledged that during the interrogation he lied to defendant about finding defendant's: (1) fingerprints and his

blood on the mask; (2) hair fibers; and (3) shoes in a lake. Detective McClain also falsely informed defendant that Wissink had been arrested and had implicated defendant. Detective McClain testified that falsehoods or deceptions are an interrogation "technique" or "tactic" commonly used by investigators.

Over defendant's objections, the State also introduced a videotaped deposition of Dr. Kenneth Lidonnici ("Dr. Lidonnici"). Dr. Lidonnici testified that an autopsy revealed a large hole and three smaller holes in Pruey's chest. Internal examination showed Pruey died from a gunshot wound to the chest. Dr. Lidonnici testified he removed three projectiles, some shotgun shell "wadding," and some white "plastic sphere[s]" from Pruey's body. Agent Marrs later testified that shell wadding recovered at the scene and from Dr. Lidonnici was consistent with shells found in a 20 gauge shotgun recovered from Wissink. The white plastic styrofoam balls recovered from Pruey by Dr. Lidonnici were consistent with the material inside Pruey's front door.

Defendant did not testify or present any evidence. The jury found him to be guilty of first-degree murder, conspiracy to commit armed robbery, and attempted armed robbery. After arresting judgment on the attempted armed robbery conviction, the trial court sentenced defendant to life-imprisonment without parole for the murder conviction and twenty-nine to forty-four months for the conspiracy conviction, to run consecutive to the life sentence. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying defendant's motion to suppress the videotape of his interrogation; (2) restraining and removing defendant from the courtroom during trial; and (3) admitting Dr. Lidonnici's videotaped deposition into evidence.

III. Motion to Suppress

[1] Defendant contends the trial court erred by denying his motion to suppress the videotape of his interrogation by Detective McClain and argues he was denied his rights to counsel and to remain silent. We disagree.

Defendant's motion to suppress was heard and denied on 15 August 2003. Contrary to the State's argument that defendant failed to renew his objection, defense counsel sufficiently preserved this assignment of error for review on appeal. Upon the State's tender of

the videotape at trial, defense counsel renewed his objection to "what's been previously ruled on" and preserved the issue for appellate review.

A. Right to Counsel

It is well-settled that "during a custodial interrogation, if the accused invokes his right to counsel, the interrogation must cease and cannot be resumed without an attorney being present '*unless the accused himself initiates further communication, exchanges, or conversations with the police.*' " *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (quoting *Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 386 (1981)) (other citations omitted) (emphasis in original), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), *cert. denied*, 358 N.C. 157, 593 S.E.2d 84 (2003).

> A trial court is to make an initial determination as to whether a defendant waived his/her right to counsel. Those findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. Conclusions of law which are supported by findings of fact are binding on appeal. Further, the trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.

Golphin, 352 N.C. at 409, 533 S.E.2d at 201 (internal quotations and citations omitted). "The question is whether the suspect " 'articulate[d] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' " *Id.* at 450, 533 S.E.2d at 225 (alteration in original) (quoting *Davis v. United States*, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371 (1994)). In *Davis*, the United States Supreme Court held, "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Davis*, 512 U.S. at 461-62, 129 L. Ed. 2d at 373. The Supreme Court explained the requirement.

> We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. Full comprehension of the rights

> to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process. A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—*it is one that must be affirmatively invoked by the suspect.*

Id. at 460-61, 129 L. Ed. 2d at 372 (emphasis supplied) (internal citations and quotations omitted). The Supreme Court ruled the statement, "Maybe I should talk to a lawyer," was ambiguous and insufficient to require termination of the interrogation. *Id.* at 462, 129 L. Ed. 2d at 373.

In *State v. Hyatt*, our Supreme Court ruled that the defendant did not "unambiguously convey [his] desire to receive the assistance of . . . counsel" and "invoke his Fifth Amendment right to counsel" when he stated to two police officers that his father wanted a lawyer to be present during the interrogation. 355 N.C. 642, 656, 566 S.E.2d 61, 71 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003), *cert. denied*, 359 N.C. 284, 610 S.E.2d 382 (2005). Further, the *Hyatt* Court explained, "[d]efendant's willingness to speak to [the officers] unassisted by counsel after having his *Miranda* rights read to him, printed out for his review, and explained to him upon his ambiguous utterances regarding his father's wishes constituted a waiver of defendant's Fifth Amendment rights." 355 N.C. at 657, 566 S.E.2d at 71. The Court relied on language from *Davis*, 512 U.S. at 460, 129 L. Ed. 2d at 372, which states:

> '[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process,' and '[a] suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted.'

Hyatt, 355 N.C. at 657, 566 S.E.2d at 71 (internal quotation omitted and alteration in original).

Defendant contends the trial court erred by denying his motion to suppress and argues he invoked his right to counsel during the interrogation. Defendant admits being advised of his rights prior to

interrogation, but argues the trial court erred by finding that he "did not . . . ever ask to talk to an attorney." After being advised of his right to have an attorney present, defendant asked, "Now?" Detective McClain responded affirmatively. Defendant then asked, "Where's my lawyer at? [Inaudible] come down here?" Detective McClain replied that the lawyer who was representing defendant on a pending, but unrelated, breaking and entering charge had nothing to do "with what [he was] going to talk to [defendant] about." Defendant responded, "Oh, okay," and signed the waiver of rights form.

Although defendant carries the burden of unequivocally asserting his right to counsel, *see Davis*, 512 U.S. at 461-62, 129 L. Ed. 2d at 372-73, "the State has the burden of establishing by a preponderance of the evidence that the defendant voluntarily waived the rights afforded to [him] under *Miranda*, and that the voluntariness of a waiver is to be determined by the totality of the circumstances." *State v. Strobel*, 164 N.C. App. 310, 317, 596 S.E.2d 249, 255 (2004) (citations omitted), *appeal dismissed and disc. rev. denied*, 359 N.C. 286, 610 S.E.2d 712 (2005). Here, defendant was informed of his right to counsel and subsequently voluntarily waived his right to counsel by signing the waiver form. See *Hyatt*, 355 N.C. at 657, 566 S.E.2d at 71. Substantial evidence supports the trial court's finding that defendant did not "ask to talk to an attorney." *See State v. Barnes*, 154 N.C. App. 111, 115, 572 S.E.2d 165, 168 (2002) (this Court may not set aside or modify findings in an order denying a motion to suppress if the findings are substantiated by evidence, even if conflicting evidence exists), *disc. rev. denied*, 356 N.C. 679, 577 S.E.2d 892 (2003). The trial court further found "defendant indicated his desire to answer questions without a lawyer being present and his desire to waive his rights . . . by initialing the rights form in the proper place." Defendant does not assign error to or contest this finding. Defendant has failed to show the trial court's findings do not support its conclusion that "defendant never made a clear and unequivocal assertion of his Right to Counsel . . . ."

The trial court's order sufficiently shows defendant's statements were not "an unambiguous and unequivocal request for counsel." *Davis*, 512 U.S. at 461-62, 129 L. Ed. 2d at 373. This assignment of error is overruled.

B. Right to Remain Silent

Defendant also argues he invoked his right to remain silent during the interrogation.

In *Golphin*, our Supreme Court held, "[b]ecause [the defendant] did not *unambiguously invoke* his right to remain silent, the trial court did not err in admitting the portion of his statement . . . ." 352 N.C. at 451-52, 533 S.E.2d at 225 (emphasis supplied).

During the interrogation by Detective McClain, defendant confessed that he and others had planned to do a robbery, but ended their plan when they drove by the mobile home and observed all the interior lights illuminated in Pruey's home. After Detective McClain asked defendant whether he was "scared" when the gun "went off," defendant stated, "I don't want to talk no more 'cause you're talking some crazy s—t now." Detective McClain continued to question defendant, stating, "You didn't even know how many people was [sic] in the house, did you?" Defendant responded, "That's why the f—k I didn't stop," and the interrogation continued. Defendant continued to deny his involvement in the crime, but admitted his participation after further questioning.

The trial court found, "Notwithstanding this statement, [defendant] continued to talk without significant prompting by the officer. . . . [T]he court is unconvinced that the defendant clearly and unequivocally asserted his right to remain silent." Substantial evidence supports this finding and satisfies the *Golphin* test that defendant failed to "unambiguously invoke his right to remain silent." *Id.* at 451-52, 533 S.E.2d at 225. This assignment of error is overruled.

Accepting defendant's argument that the trial court erred by denying his motion to suppress and admitting the videotape of defendant's statements made to Detective McClain, this error is harmless beyond a reasonable doubt. The State presented other overwhelming evidence of defendant's guilt, including the testimony of B.G. and C.P. *See State v. Atkins*, 58 N.C. App. 146, 292 S.E.2d 744 (overwhelming evidence of the defendant's guilt qualifies error as harmless since it could not have affected the outcome), *cert. denied and appeal dismissed*, 306 N.C. 744, 295 S.E.2d 480 (1982).

Further, defendant failed to object during Detective McClain's testimony regarding defendant's confession and statements made to Detective McClain, which are consistent with the videotape. *State v. Wiggins*, 159 N.C. App. 252, 584 S.E.2d 303 (harmless error in the admission of the victim's written statements because the recorded 911 call and witnesses' testimony duplicated the victim's written statements), *disc. rev. denied*, 357 N.C. 511, 588 S.E.2d 472 (2003), *cert. denied*, 541 U.S. 910, 158 L. Ed. 2d 256, *reh'g denied*,

541 U.S. 1038, 158 L. Ed. 2d 726 (2004). This assignment of error is overruled.

IV. Restraint and Removal from Courtroom

[2] Defendant argues the trial court erred by restraining him and removing him from the courtroom. We disagree.

The transcript included in the record on appeal reveals numerous outbursts by defendant during jury selection. He accused jurors of lying, blurted out questions, cursed, babbled, sucked his thumb, and sang. Two jurors were excused for cause because they felt they could not be fair and impartial in light of defendant's disruptive behavior at trial.

The trial court recessed the proceedings and, outside the presence of the jury, stated that trial would resume the next day in the video courtroom, with defendant present in the adjoining judge's chambers. The trial court instructed the bailiff to employ whatever security measures were necessary, including restraining defendant. The trial court informed defendant's two attorneys that one attorney would remain with defendant and the other would be present in the courtroom. The trial court assured the defense attorneys of ample time to confer during trial and allow them to switch places as needed to cross-examine different witnesses.

A. Removal from the Courtroom

Defense counsel objected to defendant's removal from the courtroom. Under this Court's holding in *State v. Reid*, defendant has a right to be present during each stage of his trial, but, in a non-capital case, may waive that right through disruptive behavior. 151 N.C. App. 379, 386-87, 565 S.E.2d 747, 753 (citing *State v. Miller*, 146 N.C. App. 494, 499-500, 553 S.E.2d 410, 414 (2001), *appeal dismissed and disc. rev. denied*, 356 N.C. 622, 575 S.E.2d 522 (2002). N.C. Gen. Stat. § 15A-1032(a) (2003) authorizes the trial court to remove a defendant from the courtroom if the defendant's conduct is "so disruptive that the trial cannot proceed in an orderly manner." In doing so, the trial court is required to set forth an explanation on the record for the reasons to remove defendant and instruct the jury that removal is not to be a factor in weighing the evidence or determining his guilt. N.C. Gen. Stat. § 15A-1032(b)(1)-(2) (2003).

After removing defendant from the courtroom, the trial court stated,

> He has been a little bit disruptive from the beginning, although he was on fairly good behavior, particularly when he wouldn't talk to anybody. But he began to curse and speak when he wasn't supposed to and speak out of turn. Wouldn't be quiet when I asked him to and became disruptive to the point that defense counsel asked me to not inquire of the jury whether that would affect them or not. So that's why he's out of the courtroom, although he can see and hear us.

Defense counsel specifically waived the instruction required under N.C. Gen. Stat. § 15A-1032(b)(2) because they felt "it will just call more attention to the fact that he's not here." The trial court followed the requirement of N.C. Gen. Stat. § 15A-1032(b)(1) and defendant waived the instruction under N.C. Gen. Stat. § 15(A)-1032(b)(2). *See State v. Miller*, 146 N.C. App. 494, 553 S.E.2d 410 (2001). This assignment of error is dismissed.

B. Defendant's Restraint at Trial

Defendant did not object to his restraint at trial and has waived appellate review of this argument. *See State v. Thomas*, 134 N.C. App. 560, 568, 518 S.E.2d 222, 228 (" 'failure to object to the shackling, . . . waive[s] any error which may have been committed' ") (quoting *State v. Tolley*, 290 N.C. 349, 369, 226 S.E.2d 353, 370 (1976)), *appeal dismissed and cert. denied*, 351 N.C. 119, 541 S.E.2d 468 (1999). Further, under N.C. Gen. Stat. § 15A-1031 (2003), "A trial judge may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons." This assignment of error is overruled.

V. Deposition Testimony

[3] Defendant argues his constitutional right of confrontation was violated in the trial court's admission of a videotaped deposition of Dr. Lidonicci. We hold that any error was harmless beyond a reasonable doubt.

"Our review of whether defendant's Sixth Amendment right of confrontation was violated is three-fold: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (citing *Crawford v.*

Washington, 541 U.S. 36, 54, 158 L. Ed. 2d 177, 203 (2004)), *disc. rev. denied*, 358 N.C. 734, 601 S.E.2d 866, *appeal dismissed*, 359 N.C. 192, 607 S.E.2d 651 (2004).

It is undisputed that Dr. Lidonicci's deposition was testimonial in nature and defendant had an opportunity, which he availed himself of, to cross-examine Dr. Lidonicci during the deposition. The trial court failed to hear evidence to support or enter a finding of fact regarding Dr. Lidonicci's unavailability. *Clark*, 165 N.C. App. at 285-86, 598 S.E.2d at 218-19 (citing *State v. Nobles*, 357 N.C. 433, 439, 584 S.E.2d 765, 770 (2003)). Prior to playing the videotape, the trial court informed the jury, "For the convenience of the doctor you are about to see testify, we did this last week. . . ." This statement in the record is insufficient under *Clark* and *Nobles* to establish unavailability. Without receiving evidence on or making a finding of unavailability, the trial court erred in admitting Dr. Lidonicci's deposition.

As defendant's constitutional right was violated through the admission of Dr. Lidonicci's deposition, "the State has the burden of proving the error was harmless beyond a reasonable doubt to sustain defendant's conviction." *Clark*, 165 N.C. App. at 289, 598 S.E.2d at 220. Defendant argues the trial court's error in admitting the deposition testimony requires a new trial because no other evidence establishes Pruey's death and the cause of his death. We disagree.

Cordier testified that after he heard a loud bang, Pruey's wife turned on the lights and he saw Pruey lying on the floor bleeding profusely from his chest. Grimes testified that Pruey had a large, bleeding hole in his chest and "looked dead." Deputy Porter testified Pruey was lying on the floor in a pool of blood when she arrived on the scene. Upon arrival at the scene, Detective McClain was informed by Deputy Porter that Pruey was dead. The State presented photographs to the jury showing Pruey's body lying on the floor and his chest wound. Agent Marrs testified the shotgun was fired at a slight angle within inches of the front door to the mobile home. Defendant confessed to Detective McClain that he fired the shotgun through the front door.

Excluding the deposition testimony, the State presented other overwhelming evidence from which the jury could find that Pruey died from injuries caused by a shotgun wound to the chest and that defendant fired the shotgun inflicting the wound. Any error in admitting Dr. Lidonnici's deposition testimony is harmless beyond a reasonable doubt.

VI. Conclusion

The trial court did not err in denying defendant's motion to suppress the videotape of his interrogation. The trial court did not err in restraining defendant and removing him from the courtroom due to his disruptive behavior. The trial court erred in admitting the deposition testimony of Dr. Lidonnici without entering a finding of fact that Dr. Lidonnici was unavailable to testify. However, any error was harmless beyond a reasonable doubt in light of the other overwhelming evidence of defendant's guilt from which the jury could find Pruey died from a shotgun blast and defendant fired the gun inflicting the wound.

Harmless Error.

Judges McGEE and GEER concur.

IN THE MATTER OF: B.P., S.P., R.T.

No. COA04-498

(Filed 19 April 2005)

1. Appeal and Error— appealability—permanency planning review order

A permanency planning review order was not a final dispositional order and was thus not appealable by respondent mother as to two of her children, who had previously been adjudicated neglected and dependent, where it did not alter the original permanency plan for those two children but continued the guardianship plans for them. However, the permanency planning review order was a final dispositional order as to a third child and was thus immediately appealable by respondent mother where it changed the disposition for the third child from guardianship to adoption. N.C.G.S. § 7B-1001.

2. Constitutional Law— effective assistance of counsel—child neglect

The trial court did not err in a child neglect case by failing to vacate its order based on respondent mother's allegation that she received ineffective assistance of counsel, because: (1) although

respondent argues generally that counsel was difficult to contact, failed to call additional witnesses, and made no motions before the trial court, respondent failed to specify what motions should have been made and what evidence could have been, but was not, presented before the trial court; and (2) without a proper showing of counsel's deficiencies, respondent failed to set forth a claim for ineffective assistance of counsel.

3. Child Abuse and Neglect— failure to enter order within thirty days—particularity requirement

The trial court erred in a child neglect case by failing to enter the order within thirty days of the permanency planning hearing pursuant to N.C.G.S. §§ 7B-807(b) and 7B-905(a), because: (1) the dispositional order was entered six months after the hearing at the trial; (2) the trial court failed to satisfy the particularity requirement of the statute in its oral disposition by failing to state with particularity the person or agency in whom custody is vested and the duration of the order, and by adopting DSS's recommendations as findings of fact without adjudicating the evidence; and (3) the extensive delay prejudiced all parties when respondent was unable to visit the children during the six-month delay, the children were delayed in receiving a permanent family environment, and the prospective adoptive parents were prevented from moving forward with adoption proceedings.

Judge WYNN concurring in part and dissenting in part.

Appeal by respondent mother from order entered 13 August 2003 by Judge P. Gwynette Hilburn in Pitt County District Court. Heard in the Court of Appeals 25 January 2005.

Janis Gallagher, for petitioner-appellee Pitt County Department of Social Services.

Katharine Chester, for respondent-appellant.

TYSON, Judge.

Kimberly Tripp ("respondent") appeals from the trial court's permanency planning review order entered 13 August 2003, *nunc pro tunc* to 13 February 2003. We dismiss respondent's appeal as it relates to B.P. and R.T. as interlocutory. We reverse the trial court's order as it relates to S.P. and remand.

I. Background

Respondent is the mother of three minor children: B.P., S.P., and R.T. (collectively, "the children"). On 31 March 1999, the trial court adjudicated the children to be neglected and dependent. Respondent did not appeal from this order. The children were placed in foster care, received therapy, and were allowed visitation with respondent.

Following entry of the original adjudication and dispositional order, the trial court conducted several review hearings. In March 2001, the trial court entered a permanency planning review order relieving the Pitt County Department of Social Services ("DSS") from reunification efforts and ordering the "permanency plan" for the children to be with "approved caretakers." Respondent did not appeal from this order, or the subsequent continuation of the permanency plan as set forth in the review orders entered June 2001, January 2002, May 2002, and July 2002.

The trial court conducted another permanency planning hearing on 13 February 2003 and by order dated 13 August 2003, continued the permanency plans for R.T. and B.P., but changed the permanency plan of guardianship for S.P. from an approved caretaker to adoption. Respondent appeals from this order.

II. Issues

The issues presented are whether: (1) this appeal is interlocutory; (2) the trial court erred in entering permanency plans for S.P. when it failed to consider the changed circumstances of the mother; (3) respondent was provided ineffective assistance of counsel; (4) the trial court failed to enter timely orders; and (5) the findings of fact and conclusions of law do not resemble the orders rendered in open court, are not supported by competent evidence, and are insufficient as a matter of law.

III. Interlocutory Order

[1] DSS contends respondent's appeal of the 13 August 2003 order as it relates to guardianship of the children is interlocutory. We agree the order is interlocutory as it relates to B.P. and R.T., but disagree as it relates to S.P.

In order for this Court to review an interlocutory order, the appealing party carries the burden of establishing that:

> (1) the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C.G.S. § 1A-1, Rule 54(b); or (2) when the challenged order affects a substantial right that may be lost without immediate review. *Flitt v. Flitt*, 149 N.C. App. 475, 561 S.E.2d 511 (2002).

McConnell v. McConnell, 151 N.C. App. 622, 624-25, 566 S.E.2d 801, 803 (2002). We must determine whether an appeal is interlocutory on a case-by-case basis. *Id.* at 625, 566 S.E.2d at 803 (citing *McCallum v. North Carolina Coop. Extensive Serv. of N.C. State Univ.*, 142 N.C. App. 48, 542 S.E.2d 227, *appeal dismissed and disc. rev. denied*, 353 N.C. 452, 548 S.E.2d 527 (2001)).

N.C. Gen. Stat. § 7B-1001 (2003) establishes the right to appeal from a final order in a juvenile case:

> A final order shall include:
>
> (1) Any order finding absence of jurisdiction;
>
> (2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;
>
> (3) Any order of disposition after an adjudication that a juvenile is abused, neglected, or dependent; or
>
> (4) Any order modifying custodial rights.

Sections (1), (2), and (4) are inapplicable to the case at bar because the 13 August 2003 and 1 October 2003 permanency planning review orders do not find absences of jurisdiction, determine the action or prevent a judgment, or modify respondent's custody rights to her children.

As B.P. and R.T. have been adjudicated neglected and dependent, our review turns to whether the order appealed from constitutes a "disposition" or a "final order" as contemplated under the statute. DSS contends the 13 August 2003 order is not a dispositional order as to B.P. and R.T. because it does not change or alter the original permanency plan set forth in the March 2001 order. We agree.

This Court addressed whether a permanency planning review order was a dispositional order for purposes of appeal in *In re Weiler*, 158 N.C. App. 473, 581 S.E.2d 134 (2003). In *Weiler*, the petitioner argued the permanency planning review order was not a final order. *Id.* at 476, 581 S.E.2d at 136. This Court disagreed because the facts

showed the review order *changed* the permanency plan from reunification to adoption. *Id.* at 477, 581 S.E.2d at 137. We held that "[a]n order that changes the permanency plan in this manner is a dispositional order that fits squarely within the statutory language of section 7B-1001." *Id.* (citation omitted); *In re Everett*, 161 N.C. App. 475, 588 S.E.2d 579 (2003) (addressing merits of appeal regarding permanency planning order that relieved DSS from facilitating further reunification efforts).

Here, the disposition and permanency plan for B.P. and R.T. were ordered in March 2001. Subsequent permanency planning review hearings reaffirmed that plan and order. Respondent had the ability to appeal from those orders, but did not avail herself of that opportunity. *See In re Everett*, *supra* (appeal from permanency planning orders). We are bound by the findings of fact and conclusions of law set forth in the March 2001 order. *See Hayden v. Hayden*, 178 N.C. 259, 263, 100 S.E. 515, 517 (1919) ("This decree was not appealed from, and is therefore valid and binding in every respect."); *see also Kelly v. Kelly*, 167 N.C. App. 437, 443, 606 S.E.2d 364, 369 (2004) (orders not appealed from become the "law of the case") (citing *Johnson v. Johnson*, 7 N.C. App. 310, 313, 172 S.E.2d 264, 266 (1970)).

Further, the order appealed from is temporary in nature as it set a review for 14 August 2003, after the date of the order appealed from. *See Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (an order is not a final order and "is temporary if . . . it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief . . .") (citations omitted). Respondent's appeal is from a continuation order of the permanency plan for B.P. and R.T. The appeal is not from a final order and is interlocutory as to B.P. and R.T.

Because the 13 August 2003 order changed the disposition for S.P. from guardianship to adoption, it is a final order. *See In re Weiler*, *supra*. As the order is final, we address the merits of respondent's appeal regarding the order's disposition of S.P. N.C. Gen. Stat. § 7B-1001(3).

IV. Standard of Review

"If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal." *In re Weiler*, 158 N.C. App. at 477, 581 S.E.2d at 137 (citation omitted). This Court is "bound by

the trial court's findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) (citation omitted).

V. Ineffective Assistance of Counsel

[2] Respondent contends the trial court's order should be vacated because she was provided ineffective assistance of counsel. We disagree.

A parent is entitled to counsel in cases involving allegations of abuse, neglect, or dependency. N.C. Gen. Stat. § 7B-602(a) (2003). In order to prevail on a claim of ineffective assistance of counsel, a respondent " 'must show that counsel's performance was deficient and the deficiency was so serious as to deprive [him] of a fair hearing.' " *In re Faircloth*, 153 N.C. App. 565, 571, 571 S.E.2d 65, 70 (2002) (quoting *In re Bishop*, 92 N.C. App. 662, 665, 375 S.E.2d 676, 679 (1989) (alteration in original)).

In *In re Faircloth*, the respondent asserted that counsel should have issued subpoenas and filed motions. 153 N.C. App. at 572, 571 S.E.2d at 70. The respondent did not specify or identify what motions or any witnesses who should have been subpoenaed, and failed to show any prejudice resulting from counsel's alleged deficiencies. *Id.* We found no error in the counsel's performance and overruled the respondent's assignment of error.

Similarly, respondent at bar argues generally that counsel was difficult to contact, failed to call additional witnesses, and made no motions before the trial court. Respondent, however, has failed to specify what motions should have been made and what evidence could have been, but was not, presented before the trial court. Without a proper showing of counsel's deficiencies, respondent failed to set forth a claim for ineffective assistance of counsel. Further, a review of the transcript from the 13 February 2003 hearing shows that respondent's counsel had represented her in prior hearings. During the 13 February 2003 hearing, counsel participated in the hearing, cross-examined and recross-examined DSS's witnesses, and objected to portions of witnesses' testimony.

Respondent has failed to assert any credible argument to establish how such counsel's alleged deficiency deprived her of a fair hearing. Respondent was afforded an opportunity to testify, and after being called as a witness by her counsel, was able to present her tes-

timony and evidence before the trial court. This assignment of error is overruled.

VI. Entry of Order

[3] Respondent contends the trial court erred by failing to enter the order within thirty days of the permanency planning hearing pursuant to N.C. Gen. Stat. § 7B-807(b) and § 7B-905(a). As the record shows the dispositional order was entered six months after the hearing and the trial court failed to satisfy the particularity requirements in the statute in its oral disposition, we agree.

A. Timeliness of Entry

Effective 1 January 2002, N.C. Gen. Stat. § 7B-807(b) and § 7B-905(a) were revised to require that juvenile adjudication and dispositional orders shall be reduced to writing, signed, and entered by the trial court no later than thirty days following completion of the hearing. 2001 N.C. Sess. Laws ch. 208, § 17. We previously held that the order appealed from is a dispositional order and is final as it relates to S.P. Thus, N.C. Gen. Stat. § 7B-905 applies. N.C. Gen. Stat. § 7B-905(a) (2003) provides in part, "[t]he dispositional order *shall* be in writing, signed, and entered no later than 30 days from the completion of the hearing . . . ." (Emphasis supplied).

This Court addressed the timeliness issue pertaining to termination of parental rights orders in *In re L.E.B. & K.T.B.*, 169 N.C. App. 375, 610 S.E.2d 424 (2005). We held a delay of over 180 days between the termination hearing and entry of the termination order amounted to error. *Id.* at 377, 610 S.E.2d at 425. We determined the delay was in direct contradiction to the General Assembly's presumed intent to provide a "speedy resolution" to juvenile custody and termination of parental rights cases. *Id.* at 379, 610 S.E.2d at 426. We concluded the error prejudiced all parties involved: the respondent-mother, the minors, and the foster parent. *Id.*

In *In re L.E.B. & K.T.B.*, the Court examined a multitude of unreported decisions and three published opinions holding a delay beyond the statutory time limits provided in the Juvenile Code was error, but not reversible without a showing of prejudice. In *In re E.N.S.*, a dispositional order was entered over forty days after the hearing in violation of N.C. Gen. Stat. § 7B-905(a). 164 N.C. App. 146, 153, 595 S.E.2d 167, 171-72, *disc. rev. denied*, 359 N.C. 189, 606 S.E.2d 903 (2004). This Court determined that "although the order was not

filed within the specified time requirement," the "respondent [did not] show how she was prejudiced by the late filing." *Id.* at 153, 595 S.E.2d at 172. We concluded the delay "amounted to harmless error and [was] not grounds for reversal." *Id.* at 154, 595 S.E.2d at 172.

In *In re J.L.K.* this Court held that absent a showing of prejudice, the trial court's failure to reduce to writing, sign, and enter a termination order beyond the thirty day limit may be harmless error. 165 N.C. App. 311, 314, 598 S.E.2d 387, 390 (2004) (order entered eighty-nine days after the hearing), *disc. rev. denied*, 359 N.C. 68, 604 S.E.2d 314 (2004).

This analysis was further extended to petitions seeking termination of parental rights under N.C. Gen. Stat. § 7B-907(e) (2003). *See In re B.M., M.M., An.M., and Al.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005) (Although this Court found error, but not prejudice, we stated, "[w]e strongly caution against this practice, as it defeats the purpose of the time requirements specified in the statute, which is to provide parties with a speedy resolution of cases where juvenile custody is at issue.").

Here, the permanency planning hearing for S.P. was held on 13 February 2003. The trial court rendered an oral disposition in open court. The transcript from the 13 August 2003 hearing shows the trial court "absolutely remember[ed]" the order was entered prior to that date, but that the Clerk of Court failed to locate the filed order. Consequently, a subsequent dispositional order served as a "resubmitted order" was reduced to writing, signed, and entered by the trial court on 13 August 2003, over 180 days later. *See In re Pittman*, 151 N.C. App. 112, 114, 564 S.E.2d 899, 900 (2002) (" 'The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment. The entry of judgment is the event which vests this Court with jurisdiction.' "). This late entry clearly violates the thirty day time limit prescribed by N.C. Gen. Stat. § 7B-905(a) and was error.

B. Prejudice

N.C. Gen. Stat. § 7B-905(a) (2003) states:

> The dispositional order *shall* be in writing, signed, and entered no later than 30 days from the completion of the hearing, and *shall* contain appropriate findings of fact and conclusions of law. The court *shall* state with particularity, *both orally and in the written order of disposition*, the precise terms of the disposition including the kind, duration, and the person who is responsible for car-

> rying out the disposition and the person or agency in whom custody is vested.

(Emphasis Supplied).

Our review of the transcript from the 13 February 2003 hearing shows that the trial court failed to satisfy the particularity requirements of the statute in its oral disposition. Following oral arguments and testimony during the permanency planning review hearing, the trial court stated:

> Alright. And I understand [respondent's] and I understand [DSS's] position. There is no question in my mind that [respondent] loves her children incredibly much and we have been very cognizant of that over the years and have tried so hard to, and, and [sic] really, we've tried everything that I can imagine that we could try. And I'm delighted that [S.P.] might have some permanence and so I am going to adopt the recommendations and allow the department to move forward with the concept of adoption for [S.P.] . . . .

These statements constitute the entire oral disposition for S.P. and include the "kind" of disposition (adoption) and "the person who is responsible for carrying out the disposition" (the department). N.C. Gen. Stat. § 7B-905(a). However, the oral rendition fails to state with particularity the "person or agency in whom custody is vested" and the "duration" of the order. *See Id.* Further, the trial court's ruling to "adopt" DSS's recommendations is insufficient to enter the findings of fact. *See Moore v. Moore*, 160 N.C. App. 569, 571-72, 587 S.E.2d 74, 75 (2003) ("[R]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented.") (quoting *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984)).

We hold the trial court prejudiced respondent by: (1) failing to state with particularity the "person or agency in whom custody is vested" and the "duration" of the order; and (2) "adopting" DSS's recommendations as findings of fact without adjudicating the evidence. During the six month delay between the hearing and entry of the order, respondent was not provided the necessary information from which she could prepare for future proceedings. She had no notice of the particular findings of fact or conclusions of law upon which the trial court based its decision.

The order at bar contrasts with oral dispositions that are essentially transcribed later into the written dispositional order. *See In re Bullabough*, 89 N.C. App. 171, 179-80, 365 S.E.2d 642, 647 (1988) (this Court affirmed the appeal of a dispositional order that contained "certain findings and conclusions in the written order which [the trial court] did not state in open court. However, the *terms* of the disposition in the oral and written statements were the same."). Further,

> [i]t is reversible error for the trial court to enter a permanency planning order that continues custody with DSS without making proper findings as to the relevant statutory criteria. This rule applies even if the evidence and reports in this case might have supported the determination of the trial court.

In re M.R.D.C., 166 N.C. App. 693, 695, 603 S.E.2d 890, 892 (2004) (citation and quotations omitted).

In addition, respondent asserts similar effects resulting from the delay in excess of six months that we recognized as prejudicial in *In re L.E.B. & K.T.B.* Respondent was unable to visit the children during the six month delay. The children were delayed in receiving a permanent family environment. We further recognize that prospective adoptive parents are prevented from moving forward with adoption proceedings. The extensive delay prejudiced all parties. *See In re L.E.B. & K.T.B.*, 169 N.C. App. at 379, 610 S.E.2d at 425 (" 'While we have located no clear reasoning for [the thirty day time limit], 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.' " (quoting *In re E.N.S.*, 164 N.C. App. at 153, 595 S.E.2d at 172)). The trial court's failure to satisfy the statutory requirements under N.C. Gen. Stat. § 7B-905(a) requires a new hearing.

VII. Conclusion

Respondent's appeal of the permanency planning order is interlocutory as it relates to B.P. and R.T. and it is dismissed. The trial court erred in entering a dispositional order that changed the permanency plan for S.P. from guardianship to adoption without complying with the requirements under N.C. Gen. Stat. § 7B-905(a), making the required findings of fact and conclusions of law, and by adopting DSS's recommendations without reflecting "a conscious choice between the contradicting versions." *Moore*, 160 N.C. App. at 571-72, 587 S.E.2d at 75. The order is reversed as it relates to S.P. and this matter is remanded for further proceedings.

Dismissed in part; Reversed in part; and Remanded.

Judge McGEE concurs.

Judge WYNN concurs in part, dissents in part.

WYNN, Judge concurring in part and dissenting in part.

In *In re J.L.K.*, — N.C. App. —, 598 S.E.2d 387 (2004), this Court held: "While the trial court's delay clearly violated the 30-day provision of N.C. Gen. Stat. § 7B-1109(e), we find no authority compelling that the TPR order be vacated as a result." *Id.* at —, 598 S.E.2d at 390. In this appeal, respondent argues in her brief that a violation of the similar thirty-day provisions of N.C. Gen. Stat. § 7B-905(a) constitutes "prejudicial error *per se*" and does not require her "to prove specific prejudice." Because N.C. Gen. Stat. § 7B-905(a) like N.C. Gen. Stat. § 7B-1109(e), does not compel that adjudication and dispositional orders be vacated, I dissent from the majority opinion's holding to the contrary.[1]

First, contrary to Respondent's assertion, prejudice is required to be shown and N.C. Gen. Stat. § § 7B-807(b) and 7B-905(a) are not *per se* rules. In *In re E.N.S.*, 164 N.C. App. 146, 595 S.E.2d 167 (2004), this Court held that the respondent must show that she was prejudiced by the delay in order to grant a new hearing. *Id.* at 153, 595 S.E.2d at 172 (trial court's failure to file the adjudication and disposition orders, pursuant to section 7B-905(a) of the North Carolina General Statutes, within thirty days amounted to harmless error and is not grounds for reversal where respondent could not show prejudice).

Second, I disagree with Respondent's alternative contention that even if she is required to show specific prejudice, she showed prejudice in this case.

In *In re J.L.K.*, — N.C. App. —, 598 S.E.2d 387, this Court held that an eighty-nine day delay by the trial court in filing a written order, pursuant to section 7B-1109(e) of the North Carolina General Statutes, clearly violated the thirty-day provision of section 7B-1109(e) but there was "no authority compelling that the TPR order be vacated as a result." *Id.* at —, 598 S.E.2d at 390. This Court fur-

1. Section 7B-905(a) (the provision in this case) like section 7B-1109(e) (the provision in *In re J.L.K.*) requires that juvenile adjudication and disposition orders be reduced to writing, signed, and entered by the trial court no later than thirty days following completion of the hearing. N.C. Gen. Stat. § 7B-905(a) (2004).

ther concluded that "vacating the TPR order is not an appropriate remedy for the trial court's failure to enter the order within 30 days of the hearing." *Id.* at —, 598 S.E.2d at 391.[2]

Here, the written permanency planning review order was not entered until six months following the hearing. However, this delay was due to the fact that the Office of the Clerk of Court could not find the original written order and the order had to be resubmitted and signed by the judge. The trial judge "absolutely remember[ed]" the lost order and the respondent did not dispute the circumstances or object to entry of the 13 February 2003 order on 13 August 2003. When the clerk's office could not find the original order, the trial judge re-filed the order outside of the thirty-day period.

Nevertheless, the majority finds Respondent was prejudiced by not being provided the necessary information to prepare for further proceedings. But at the 13 August 2003 hearing where the trial court signed the resubmitted order from the 13 February 2003 hearing, Respondent did not object to the untimeliness of the order or the reason for the delay. Also, the order did not require anything new of Respondent and the delay in entry did not affect her ability to appeal the order.[3] *In re E.N.S.*, 164 N.C. App. at 154, 595 S.E.2d at 172.

In my opinion, if there is prejudice in this matter, it would be to the children, not the respondent. Indeed, in *In re E.N.S.*, this Court stated:

> [L]ogic and common sense lead us to the conclusion that the General Assembly's intent 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.' (sic) custody because juvenile petitions would

2. Notably, in our holding in *In re L.E.B.*, — N.C. App. —, — S.E.2d — (5 April 2005) (No. 04COA463) (delay of over 180 days between the termination hearing and the entry of the termination order amounted to error), this court did not create a bright-line rule of vacating all orders if they are not filed within the thirty-day time period. Following *In re J.L.K.*, this Court in *In re L.E.B.*, — N.C. App. —, — S.E.2d — (5 April 2005) (No. 04COA463) recognized that to prevail on the technical basis that an order was not timely filed under section 7B-1109(e) like section 7B-905(a), the respondent must show prejudice.

3. In *In Re J.L.K.*, — N.C. App. at —, 598 S.E.2d at 389, although the order was not "reduced to a written order, signed, and entered [until] 19 November 2002," this Court reviewed respondent's appeal based on a Notice of Appeal filed on 4 September 2002 from the trial court's oral grant of the TPR petition on 21 August 2002.

> 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.

164 N.C. App. at 153, 595 S.E.2d at 172 (emphasis added).

Similarly, in this case, to hold that the juvenile petitions and new hearings must be conducted in this case only aids in furthering the delay for determining the custody of this child.[4] Indeed, the facts of this case show that this child and her two siblings have been the subject of proceedings since 20 August 1998 when juvenile summonses were issued to Respondent for abuse, neglect, and dependency. Sadly, the record shows that the family had "a very extensive history with the Pitt County Department of Social Services" as three older children of Respondent had been adjudicated neglected and dependent in 1990. The allegations included sexual abuse of two of the female children by the mother's boyfriend, chronic head lice, bruising of the children, roaches and maggots in the kitchen sink, and other abuses that make it clear why this Court most often defers to the judgment of our trial judges in these cases as they see and hear the witnesses and are in a better position than appellate judges to decide these cases. Suffice it to say, the record in this case details gross abuses to these children that inescapably point to the fact that this order should not be vacated on the technical ground that it was not filed within thirty days. This matter is not about a delay in filing this order within thirty days; rather, it was best summarized by the trial court in an unchallenged finding of fact:

> 46. That over the last five years since these children have been in the custody of the Department [of Social Services], the court has tried everything possible to allow for contact between the children and respondent parents, however every attempt has failed.

These children continue to improve as they receive psychological, psychiatric, medical, education, and remedial services. It is time now to give them a permanent and stable environment. Five-and-a-half years in the legal system is enough for these children.

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4. I agree with the majority's holding dismissing Respondent's appeal as it relates to B.P. and R.T. as interlocutory and overruling Respondent's assignment of error relating to ineffective assistance of counsel. However, I disagree with the majority's result as to S.P.

STATE OF NORTH CAROLINA v. JERSELYN E. HOWELL

No. COA04-307

(Filed 19 April 2005)

1. **Appeal and Error— preservation of issues—constitutional question—failure to present to trial court**

Defendant failed to preserve for appellate review the issue of whether an accomplice's testimony that she had not been offered a charge reduction in exchange for testimony against defendant, when in fact the State had made such an offer, violated her rights to confrontation and due process where the prosecutor informed the court that he had made such an arrangement with the accomplice's attorney and had disclosed the arrangement to defendant's attorney, and defendant's attorney did not contradict the prosecutor's statement or move for a recess in order that the accomplice could be informed about the arrangement and re-examined about the matter in the presence of the jury.

2. **Appeal and Error— preservation of issues—instruction—waiver of review**

Defendant waived appellate review as to whether the trial court's instruction that a witness had testified in exchange for a charge reduction was supported by the evidence where defendant failed to object to the instruction or to assert plain error.

3. **Evidence— exhibits—drug paraphernalia—packaging materials—bus tickets—relevancy**

The trial court did not err in a trafficking heroin by possession, trafficking heroin by transportation, conspiracy to commit both trafficking heroin by possession and transportation, and possession with intent to sell or deliver heroin case by admitting State's exhibits 1 through 12 consisting of various items of drug paraphernalia, packaging materials, and bus tickets found in an accomplice's house, because the exhibits were relevant to the issue of defendant's guilt of the trafficking and conspiracy offenses.

4. **Drugs— conspiracy to traffic in heroin—transportation and possession—one crime**

There was sufficient evidence to support a finding of defendant's guilt of only conspiracy to traffic in heroin by transportation, and defendant's conviction on the additional charge of

conspiracy to traffic in heroin by possession must be arrested, where the evidence showed that defendant and an accomplice had an agreement that defendant would transport heroin from New York to Greensboro, the two of them would package it for sale in the accomplice's residence, and they would then sell the heroin, because the agreement to transport the heroin from New York to Greensboro necessarily encompassed its possession.

Appeal by defendant from judgment entered 30 May 2003 by Judge Henry E. Frye, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 31 January 2005.

Roy Cooper, Attorney General, by Scott K. Beaver, Assistant Attorney General, for the State.

Grund & Leavitt, P.C., by Martin J. Leavitt, and Clifford Clendenin O'Hale & Jones, LLP, by Walter L. Jones, for the defendant.

MARTIN, Chief Judge.

Defendant was convicted of trafficking heroin by possession, trafficking heroin by transportation, conspiracy to commit both of these offenses, and possession with intent to sell or deliver heroin. She appeals from judgments imposing two consecutive sentences of not less than 90 months and not more than 117 months of imprisonment.

The evidence at defendant's trial tended to show that on 6 August 2002, several detectives from the Greensboro Police Department conducted a narcotics surveillance at the home of Bonita Batten after receiving an anonymous tip. When a vehicle, driven by Marie Parker, stopped in front of the home, the detectives moved in to question its occupants. Defendant was sitting in the front passenger's seat. Detective Brian Williamson asked defendant to step out of the car and inquired whether she had any weapons or narcotics on her. She said that she did not and he asked if he could pat her down. Detective Williamson and Detective Steve Hollers both testified they then saw defendant remove a plastic bag from her right front pocket and conceal it underneath her blouse. When Detective Williamson forced defendant's hand from under her shirt and confiscated the bag, he noted that it contained a tannish brown substance. Detective Hollers also observed a plastic bag containing two paper envelopes of powder fall from defendant's pocket. Special Agent Mackenzie Dehan, an SBI forensic drug chemist, testified that both bags tested

positive for heroin. The bag that fell from defendant's pocket contained 2.9 grams of heroin, and the bag in defendant's hand contained 15.9 grams of heroin.

In addition to the heroin, the detectives recovered $2,355.50 in small bills from among defendant's possessions. From Bonita Batten's residence, they recovered drug paraphernalia and packaging materials. Ms. Batten testified for the State that defendant had been coming to her house from New York twice a month for a year. Defendant would pay Ms. Batten forty to sixty dollars to stay at her house, and defendant would bring heroin from New York for the two of them to sell and for Ms. Batten to use. They would package the heroin in Ms. Batten's home with bags that Ms. Batten had obtained for that purpose. The paraphernalia and packaging items introduced at defendant's trial included a small mirror, a box of metal pipes, other pipes made of metal and plastic, several small bags, end paper, a bag of balloons, a razor blade, a glass pipe, a box of rubber gloves, and two bus tickets to New York with baggage claim receipts issued to a Mr. and Mrs. Smith dated 28 July 2002. Ms. Batten admitted at trial that at the time of her arrest, she was using drugs almost every day.

On cross-examination by defendant's counsel, Ms. Batten testified, *inter alia*, as follows:

> Q. The truth be known, you've got the same charges pending right now that Ms. Howell does, don't you?
>
> A. Yeah.
>
> Q. And you've got a deal in place that if you testify against Ms. Howell, you're [sic] cases will be reduced to attempted trafficking and you will not get a mandatory minimum sentence of 90 months; isn't that true?
>
> A. No sir. They've never offered me that.
>
> Q. I'm sorry?
>
> A. I've not been offered that.
>
> Q. What have you been offered?
>
> A. Nothing.
>
> Q. So, it's your testimony that you've received no benefit of your testimony, that you've received no offer whatsoever?

A. That's right.

Q. So, you're just here out of the goodness of your heart?

A. I'm here because they subpoenaed me.

Defense counsel questioned her again later on the issue:

Q. Now, I want to make sure I understand. Is it your testimony that you don't think you're going to get anything from testifying?

A. No. I have—

Q. So, it's your understanding—

A. Let me put—I don't think I'm going to get anything because I was arrested twice for the same charge; so, what am I going to get?

Q. So, you think you're going to prison for ninety months?

A. Probably.

Detective A.J. Barwick testified that defendant gave him a statement while she was in custody after her arrest. Her statement included the following information: she lives in the Bronx, New York; she buys heroin in New York City and sells it in Greensboro; she stays at Ms. Batten's house when she comes to Greensboro; she buys the heroin from a Puerto Rican named Willis; and she usually buys about 15 grams of heroin from Willis. Defendant refused to specify how she transported the heroin from New York or provide any further information about her transactions in Greensboro.

Defendant testified in her own behalf that she came to Greensboro because her common-law husband was born and raised in Greensboro, and his father had been very sick recently so she had been coming to visit him. She also came to Greensboro to buy cheap cigarettes to re-sell in New York. She claimed the cash confiscated by the officers was for buying cigarettes. Forty cartons of cigarettes were found in the car when she was arrested. Defendant testified she had never bought, sold, or used drugs. She said she gave her earlier statement to Detective Barwick because the officers questioning her told her that if she did not help them, she would never see her children again and would go to prison for thirty years.

Prior to instructing the jury, the trial court questioned counsel outside the presence of the jury as to whether Ms. Batten had testified in exchange for a charge reduction. The prosecutor told the court

that he had offered Ms. Batten, through her attorney, a charge reduction in exchange for her testimony, but that Ms. Batten's attorney had apparently not informed Ms. Batten of the agreement before she took the stand to testify. He also told the court that he had informed defendant's counsel of the offer. Defendant did not request to re-call Ms. Batten to inquire again about the charge reduction.

In light of the information concerning the arrangement which had been offered Ms. Batten through her attorney, the trial court informed the parties that he intended to instruct the jury that Ms. Batten had testified pursuant to an agreement for a charge reduction. Neither the State nor the defendant objected to the proposed instruction. The trial court instructed the jury:

> [T]here's also evidence which tends to show that Bonita Batten was testifying under an agreement with the prosecutor for a charge reduction in exchange for her testimony. Again, if you find that she testified in whole or in part for this reason, you should examine her testimony with great care and caution in deciding whether or not to believe it. If after doing so you believe her testimony in whole or in part, you should treat what you believe the same as any other believable testimony.

Defendant did not object to the instruction as given by the trial court.

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[1] In addition to the assignments of error contained in the record, defendant has filed a Motion for Appropriate Relief in this Court in which she argues that Ms. Batten's testimony that she had not been offered a charge reduction or leniency in exchange for her testimony, when in fact the State had made such an offer, violated defendant's rights to confrontation and due process under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, as well as her rights under the North Carolina Constitution. The Motion for Appropriate Relief is properly before this Court. N.C. Gen. Stat. § 15A-1418(a) (2003). We begin by addressing this argument.

When an accomplice has been offered a charge reduction in exchange for testimony against the defendant, the prosecution must disclose the arrangement to the defense prior to trial. Under N.C. Gen. Stat. § 15A-1054 ("Charge reductions or sentence concessions in consideration of truthful testimony"):

> [w]hen a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the

> arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the court must grant a recess.

N.C. Gen. Stat. § 15A-1054(c) (2003).

Here, the record indicates that the prosecutor did make such an arrangement with Ms. Batten's attorney and that the arrangement was disclosed to defendant's attorney prior to trial. During the conference between the trial court and counsel before the jury instructions, the court asked whether Ms. Batten had testified in exchange for a charge reduction. The prosecutor replied that she had and told the court that he had "relayed that to [Ms. Batten's] attorney and that's what I told [defendant's attorney] prior to trial." Defendant's counsel did not contradict the prosecutor's statement, nor did he move for a recess in order that Ms. Batten could be informed about the arrangement and re-examined about the matter in the presence of the jury. *See State v. Cousins*, 289 N.C. 540, 544, 223 S.E.2d 338, 342 (1976) (holding the remedy for failure to comply with G.S. § 15A-1054(c) is to grant a recess upon a motion by defendant); *State v. Lester*, 294 N.C. 220, 229, 240 S.E.2d 391, 398-99 (1978). Therefore she has failed to preserve Ms. Batten's testimony for review. A constitutional question not presented and passed upon at trial will not ordinarily be considered on appeal. *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988) (citing *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)).

[2] In addition, the trial court, without objection, informed the jury that Ms. Batten had testified in exchange for a charge reduction and instructed the jurors to closely scrutinize her testimony by reason thereof, which undoubtedly undermined her credibility with the jury. Defendant argues, however, combining her first assignment of error in the record on appeal with her Motion for Appropriate Relief, that such an instruction was error because it was not supported by the evidence. This argument must also fail because defendant did not object to the instruction. A defendant may not assign error to any part of the jury instruction unless she objects to that portion at trial. *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 75 (1990). Where no objection is raised, the defendant may seek review only for "plain

error." *Id.* Defendant has not asserted plain error in either her first assignment of error or her Motion for Appropriate Relief and has, thus, waived plain error review. N.C. R. App. P. 10(c)(4) (2003); *State v. Moore*, 132 N.C. App. 197, 201, 511 S.E.2d 22, 25 (1999). Defendant's first assignment of error is overruled and her Motion for Appropriate Relief is denied.

[3] By the fourth assignment of error brought forward in her brief, defendant contends the trial court erred in admitting State's exhibits 1 through 12, consisting of various items of drug paraphernalia, packaging materials, and bus tickets found in Ms. Batten's house. She argues the State failed to establish any connection between her and the exhibits, so that the exhibits were not relevant to prove any fact at issue and should have been excluded. We disagree.

In her statement to the police, defendant admitted that she brought heroin from New York to sell and that she stayed at Ms. Batten's house on these bimonthly trips. Ms. Batten testified that she and defendant had packaged heroin for sale at her house the night before defendant's arrest. The items admitted into evidence included items used to package drugs for sale. There was no heroin found in the house, supporting a reasonable inference that the items found in the house had been used to package the heroin found on defendant's person.

Nonetheless, defendant contends Ms. Batten's testimony cannot be used to establish the nexus between defendant and the items for the same reasons set forth in her Motion for Appropriate Relief. Our ruling on the Motion for Appropriate Relief necessarily invalidates this contention as well and, in addition, we observe that neither defendant's objection at trial nor her assignment of error on appeal were based upon this ground. Where defendant relies upon one theory at trial as the ground to exclude evidence, she cannot argue a different theory for its exclusion on appeal. *State v. Sharpe*, 344 N.C. 190, 194-95, 473 S.E.2d 3, 5-6 (1996). We hold the exhibits were clearly relevant to the issue of defendant's guilt of the trafficking and conspiracy offenses and were properly admitted into evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (2003) (relevant evidence is admissible).

[4] Finally, by her second and third assignments of error, defendant contends the trial court erred by denying her motions, made at the close of all the evidence, to dismiss the charges of "trafficking by possession due to the insufficiency of the evidence presented," and

"trafficking by transportation due to the insufficiency of the evidence presented." In her appellate brief, however, defendant argues the insufficiency of the evidence to support the charges of *conspiracy to traffic* by possession and *conspiracy to traffic* by transportation. Technically, by her failure to assign error to the denial of her motions to dismiss the conspiracy charges, defendant has not preserved the denial of those motions for appellate review, N.C.R. App. P. 10(a),(c), and by failing to advance any argument in support of the assignments of error to the denial of her motions to dismiss the actual charges of trafficking, she has abandoned those assignments of error as well. N.C.R. App. P. 28(a),(b)(6). Assuming, however, that omission of the word "*conspiracy*" in each of the assignments of error was an inadvertent error and that defendant intended to assign error to the denial of her motions to dismiss the conspiracy charges for insufficiency of the evidence, we will consider her argument.

In ruling upon a motion to dismiss criminal charges, the issue is whether there is substantial evidence of defendant's guilt of each essential element of the crime. *State v. Holland*, 161 N.C. App. 326, 328, 588 S.E.2d 32, 34 (2003). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 328, 588 S.E.2d at 34-35 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). The evidence is considered in the light most favorable to the State, and the State is entitled to every reasonable inference arising from it. *Id.*

The crime of conspiracy is, essentially, an agreement to commit a substantive criminal act. *State v. Griffin*, 112 N.C. App. 838, 840, 437 S.E.2d 390, 392 (1993). No express agreement need be proved; proof of circumstances which point to a mutual implied understanding to commit the unlawful act is sufficient to prove a conspiracy. *State v. Smith*, 237 N.C. 1, 16-17, 74 S.E.2d 291, 301-02 (1953). The crime is complete when the agreement is made; no overt act in furtherance of the agreement is required. *State v. Gallimore*, 272 N.C. 528, 532, 158 S.E.2d 505, 508 (1968).

In the present case, there was substantial evidence to support a finding of defendant's guilt of conspiracy to traffic in heroin. From Ms. Batten's testimony and defendant's statement to Detective Barwick, a reasonable inference can be drawn that defendant and Batten had a mutual understanding that defendant would bring the requisite amount of heroin to Greensboro, that the two of them would package it for sale at Batten's residence, and that they would sell it.

Defendant, however, was charged with, and convicted of, engaging in two conspiracies. In the first count of the bill of indictment in 02 CRS 93484, she was charged with conspiracy to traffic by possession, and in the second count of the same bill of indictment, she was charged with conspiracy to traffic by transportation. To determine whether a single or multiple conspiracies were involved, "factors such as time intervals, participants, objectives, and number of meetings all must be considered." *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984).

Our careful review of the record in this case reveals evidence of only one agreement or mutual understanding between defendant and any other person, Batten, which encompassed both the transportation of the heroin to Greensboro and their possession and sale of the heroin once it arrived. As we have held in other cases, "[i]t is the number of separate agreements, rather than the number of substantive offenses agreed upon, which determines the number of conspiracies." *State v. Worthington*, 84 N.C. App. 150, 163, 352 S.E.2d 695, 703, *disc. rev. denied*, 319 N.C. 677, 356 S.E.2d 785 (1987) (*citations omitted*). Thus, defendant may be convicted of only one conspiracy. Since the agreement to transport the heroin from New York to Greensboro necessarily encompassed its possession, we must arrest judgment as to defendant's conviction of conspiracy to traffic in heroin by possession as alleged in the first count of the bill of indictment in 02 CRS 93484. Since the offense was consolidated for judgment with other offenses of the same class for sentencing purposes, and the trial court imposed the statutory sentence for trafficking in more than 14 grams but less than 28 grams of heroin, defendant's sentence is not affected. N.C. Gen. Stat. § 90-95(h)(4)(b) (2003).

02 CRS 93484—Count I—Judgment Arrested
Count II—No Error

02 CRS 93491—Count I—No Error

02 CRS 93495—Count I—No Error
Count II—No Error

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. CARLOS LAMONT CARMON

No. COA04-130

(Filed 19 April 2005)

1. Confessions and Incriminating Statements— postarrest statements—custodial interrogation—Miranda rights

The trial court did not err in a felonious breaking or entering, robbery with a dangerous weapon, and misdemeanor assault inflicting serious injury case by denying defendant's motion to suppress his postarrest statements even though defendant contends law enforcement officers subjected him to a custodial interrogation without advising him of his Miranda rights, because the trial court's findings of fact supported its conclusion of law that none of defendant's constitutional rights were violated by his detention and interrogation.

2. Jury— special venire panel—pretrial publicity

The trial court did not abuse its discretion in a felonious breaking or entering, robbery with a dangerous weapon, and misdemeanor assault inflicting serious injury case by ordering a special venire panel from another county for defendant's third trial, because: (1) a reasonable likelihood existed that prejudicial pretrial publicity would prevent a fair trial the third time based on the small population of the pertinent county and the massive publicity surrounding defendant's two previous mistrials; and (2) the judge who heard the State's motion for change of venue was the same judge who presided over defendant's second trial where he heard testimony that the victim and her husband owned a minimart frequented by many residents of the community.

3. Jury— peremptory challenges—*Batson* claim

The trial court did not err in a felonious breaking or entering, robbery with a dangerous weapon, and misdemeanor assault inflicting serious injury case by denying defendant's objection to the State's use of peremptory challenges to remove African-American jurors from the panel allegedly based on race, because: (1) defendant failed to establish a prima facie showing of purposeful discrimination and the State offered race neutral explanations for each peremptory challenge; and (2) three of the prospective jurors were challenged on the basis that they did not disclose prior criminal convictions or pending charges when

asked specifically to do so, the fourth prospective juror had just been released from prison, and the fifth prospective juror had a son with a criminal conviction.

4. Appeal and Error— preservation of issues—constitutional questions—evidence rules

Defendant did not preserve for appellate review the issue as to whether the victim's testimony about her perceptions of in-court demonstrations of defendant's placing a stocking over his face in defendant's two previous trials which ended in mistrials violated defendant's federal and state constitutional rights and certain rules of evidence where defendant did not apprise the trial court that he was raising constitutional issues by his objections to the victim's testimony, and defendant's brief discusses none of the rules of evidence allegedly violated.

5. Criminal Law— trial court questioning witnesses—clarification

The trial court did not err in a felonious breaking or entering, robbery with a dangerous weapon, and misdemeanor assault inflicting serious injury case by asking questions of witnesses, because: (1) defendant concedes the trial court has authority to question a witness under N.C.G.S. § 8C-1, Rule 614; (2) the trial court's questions did not exceed the boundaries of clarification; and (3) defendant failed to establish that any of the trial court's questions were prejudicial.

6. Evidence— testimony—credibility of alleged accomplice

The trial court did not err in a felonious breaking or entering, robbery with a dangerous weapon, and misdemeanor assault inflicting serious injury case by overruling defendant's objection to the admission of testimony of a police captain regarding the credibility of an alleged accomplice, because: (1) defendant's pretrial statement to police implicated a person as an accomplice in the crime; and (2) the captain's testimony regarding his impression of that person's denial of involvement was admissible not as to the alleged accomplice's general credibility and character, but rather as an explanation for why that person was not arrested.

7. Evidence— hearsay—substantially same testimony admitted without objection—harmless error

The trial court did not err in a felonious breaking or entering, robbery with a dangerous weapon, and misdemeanor assault

inflicting serious injury case by admitting hearsay testimony from an officer serving as a State's witness, because: (1) where hearsay testimony is admitted over objection but nearly identical testimony is admitted without an objection, the erroneous admission is rendered harmless; and (2) although defendant did object to the pertinent hearsay testimony, defendant elicited the same testimony during cross-examination of the officer and thus cannot now complain that the earlier admission of the nearly identical testimony was prejudicial.

Appeal by defendant from judgments entered 22 May 2003 by Judge Cy Grant in Greene County Superior Court. Heard in the Court of Appeals 30 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General Richard J. Votta, for the State.

Bowen, Berry and Powers, P.L.L.C., by Sue Genrich Berry, for defendant-appellant.

ELMORE, Judge.

Carlos Lamont Carmon (defendant) was convicted of felonious breaking and/or entering, robbery with a dangerous weapon, and misdemeanor assault inflicting serious injury and now appeals the judgment entered against him. The State's evidence tended to show that on the morning of 26 October 2001, a masked man broke into the home of Cornelia Murphrey (the victim). The man tore the kitchen door from its frame and entered the victim's home between 9:30 and 9:45 a.m., demanded money from the victim, beat her at knife point, dragged her through the home, and threatened to kill her. The man took $100.00 out of a burgundy bag the victim kept in the kitchen and tied the victim's hands and feet behind her back with part of a vacuum cord. The victim was able to get her hands free while the assailant was in another part of the house, then the victim crawled across the kitchen floor and called her husband at work. Although her husband was not able to understand the caller was his wife and hung up the phone, the victim was able to re-dial the store, and a female employee answered. The victim told the employee what was happening, and the employee relayed that information to Mr. Murphrey. Meanwhile, the assailant passed back through the kitchen and left the victim's home. Mr. Murphrey arrived home to find the victim still on the floor with her legs tied.

Captain Jeff Peele of the Greene County Sheriff's Office was the first law enforcement officer to arrive on the scene. The victim described her assailant to Captain Peele as a black male of medium height, wearing a black covering on his face, rolled cuff jeans, brown boots, and a dark blue jacket. Captain Peele also talked by phone to a friend of the victim, Danielle Harrison, who reported having seen a black male on a bicycle turn into the victim's driveway just before 8 a.m. that morning. After about an hour, Captain Peele was called to assist another officer with a suspect. The suspect, wearing blue jeans, a white shirt, and brown boots, was on a bicycle when the officer first spotted him and sped up as soon as he passed by the officer. The officer watched the suspect hide his bicycle in the tall grass behind a mini-mart owned by the Murphreys, where the suspect was finally stopped. The suspect, later identified as defendant, was arrested and patted down, and the officers found a black stocking in his front pocket.

After defendant was taken into custody following his arrest, he gave consent to search his bedroom at his residence. Officers found a blue jacket in defendant's bedroom. Captain Peele and Officer David Tyndall read defendant his Miranda rights and interviewed him. Defendant read a statement provided by Officer Tyndall and signed it without correction. In the statement, defendant said he rode a bicycle to the victim's home with an accomplice, Curtis Dixon, and got money from a burgundy bag. Defendant claimed he left the home while Dixon remained. Dixon was later questioned by another officer but was not charged.

Defendant was indicted on 25 March 2002 on charges of felonious breaking and entering, robbery with a dangerous weapon, first degree kidnapping, assault inflicting serious bodily injury, and assault with a deadly weapon inflicting serious injury. On 26 June 2002, defendant filed a motion to suppress evidence of any and all statements made by him. The trial court denied the motion, and jury selection began on 1 July 2002. The jury was not able to reach a unanimous verdict on the charges, and Judge Benjamin G. Alford declared a mistrial on 3 July 2002.

On 18 September 2002, the State sought a change of venue for defendant's second trial. Without hearing, the motion was denied. Jury selection began on 7 January 2003, and again, the jury was unable to reach a unanimous verdict on the charges. Judge Paul L. Jones declared a mistrial on 14 January 2003.

On 7 March 2003, the State again sought change of venue for defendant's third trial. In the alternative, the State sought a special venire from another county. Judge Jones denied the motion to change venue but ordered a special venire to be brought in from Wayne County, over defendant's objection.

Prior to the third trial, defendant renewed his motion, filed prior to the first trial, to suppress his statements made to law enforcement officers. The trial court declined to revisit the issue of the voluntariness of defendant's statements after arrest, and jury selection began on 17 May 2003.

The jury convicted defendant on 22 May 2003 of felonious breaking and/or entering, robbery with a dangerous weapon, and misdemeanor assault inflicting serious injury. Defendant gave notice of appeal in open court the same day.

I.

[1] By his first assignment of error, defendant argues the trial court erred by denying defendant's motion to suppress his post-arrest statements because law enforcement officers subjected him to a custodial interrogation without advising defendant of his Miranda rights. Defendant raises only a general challenge to the trial court's ruling on the motion to suppress and does not except specifically to any of the trial court's findings of fact. In such a case, we have held this Court's review is " 'limited to whether the trial court's findings of fact support its conclusions of law.' " *State v. Kornegay*, 149 N.C. App. 390, 393, 562 S.E.2d 541, 544 (quoting *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554, *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000)), *disc. review denied*, 355 N.C. 497, 564 S.E.2d 51 (2002).

Here, the trial court, after hearing from Captain Peele, Officer Tyndall, and defendant at *voir dire*, determined that defendant was taken into custody by Captain Peele during Peele's investigation of the attack on the victim. Defendant was placed in an interview room at the Greene County Sheriff's Department, and, prior to his interrogation, was advised by Captain Peele of his Miranda rights. The trial court found that defendant read and understood his rights and voluntarily signed the Miranda form given to him by Captain Peele. The court also found Captain Peele did not ask defendant any questions and defendant did not offer any information about the attack before Captain Peele's administration of the Miranda warning. The court further found that defendant read and signed the statement provided

him by Officer Tyndall and that no threats or promises were made by any law enforcement officers to induce defendant to make the statement. We conclude that the trial court's findings of fact supported its conclusion of law that none of defendant's constitutional rights were violated by his detention and interrogation. Defendant's assignment of error is overruled.

II.

[2] Next, defendant contends the trial court erred in ordering a special venire panel from Wayne County for defendant's third trial because no evidence exists in the record to support such an order. The trial court has statutory authority to order a change of venue or special venire if necessary to insure a fair trial, *see* N.C. Gen. Stat. §§ 15A-957 and 15A-958 (2003), and the court has inherent authority to order change of venue in the interest of justice. *State v. Chandler*, 324 N.C. 172, 183, 376 S.E.2d 728, 735 (1989). A motion for a change of venue or a special venire panel is left to the sound discretion of the trial court. *Id.* Our Supreme Court has held that the existence of a reasonable likelihood that prejudicial pretrial publicity will prevent a fair trial requires the trial court to order a change of venue or special venire panel. *State v. Boykin*, 291 N.C. 264, 269-70, 229 S.E.2d 914, 917-18 (1976). This standard applies to word-of-mouth publicity as well as pretrial publicity created by the media. *Id.*

Here, the trial court held, because of the small population of Greene County and the "massive publicity" surrounding defendant's two previous mistrials, that there would be a better chance of a fair trial if jurors from outside Greene County heard the case. The judge who heard the State's motion for change of venue was the same judge who presided over defendant's second trial: during jury *voir dire* for the second trial, the jury pool was limited, with only about 26 of 80 possible jurors actually available, and the court had to request additional citizens for the jury pool. Also, during the second trial, the trial court heard testimony that the victim and her husband owned a mini-mart frequented by many residents in the community. Accordingly, it was not an abuse of discretion for the trial court to determine a reasonable likelihood existed that prejudicial pretrial publicity would prevent a fair trial the third time and thus order a special venire.

III.

[3] Next, defendant contends the trial court erred in denying defendant's objection to the State's use of peremptory challenges to remove

African-American jurors from the panel solely, defendant contends, because of their race. Defendant's objection was based upon the principles set forth in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), for determining whether peremptory challenges violated a defendant's equal protection rights.

> A three-step process has been established for evaluating claims of racial discrimination in the prosecution's use of peremptory challenges. First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case. Third, the trial court must determine whether the defendant has proven purposeful discrimination.

State v. Cummings, 346 N.C. 291, 307-08, 488 S.E.2d 550, 560 (1997) (citing *Hernandez v. New York*, 500 U.S. 352, 358-59, 114 L. Ed. 2d 395, 405 (1991)), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). The trial court must make specific findings of fact at each stage of the *Batson* inquiry, and this Court must uphold these findings unless they are clearly erroneous. *State v. Cofield*, 129 N.C. App. 268, 275-76, 498 S.E.2d 823, 829 (1998).

Here, the State exercised five peremptory challenges, all against African-Americans. Two African-American jurors on the jury panel were not challenged by the State. Defendant objected to this use of peremptory challenges under *Batson*, and the trial court in each instance found that defendant failed to establish a *prima facie* showing of purposeful discrimination. Additionally, the trial court found the State offered race-neutral explanations for each peremptory challenge. In particular, three of the prospective jurors were challenged on the basis that they did not disclose prior criminal convictions or pending charges when asked specifically to do so; the fourth prospective juror had just been released from prison; and the fifth prospective juror had a son with a criminal conviction. The trial court found each explanation credible, and defendant does not challenge these findings on appeal. We uphold the trial court's rulings on defendant's *Batson* objections, as the findings that defendant failed to present a *prima facie* case of discrimination are not clearly erroneous, and the findings on the State's race-neutral explanations are unchallenged. Thus, defendant's assignment of error is without merit.

IV.

[4] Next, defendant challenges the trial court's ruling to admit the victim's testimony about her perceptions of in-court demonstrations from defendant's two previous trials. During the earlier trials, defendant was asked to place the stocking, found in his pocket immediately following his arrest, on his face. At the third trial, rather than provide an in-court demonstration, the State questioned the victim about previous demonstrations. The victim testified that she recalled the mental image of defendant with the stocking on his face and had heard defendant's voice previously in the courtroom. Defendant contends the admission of this testimony violated his Fifth Amendment rights, along with his rights under Article I, §§ 18 and 19 of the North Carolina Constitution.

"Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). Here, defendant did not apprise the trial court that he was raising a constitutional issue by his objection to the State's line of questioning about the victim's perceptions of earlier in-court demonstrations.

Defendant also contends that admission of the testimony violated N.C. Gen. Stat. § 8C-1, Rules 401, 403, and 701, but defendant's brief discusses none of these Rules. "Assignments 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." N.C.R. App. P. 28(b)(6). Therefore, defendant has failed to properly preserve his arguments on this issue.

V.

[5] In his next assignment of error, defendant contends the trial court erred by asking questions of witnesses and thereby prejudicing the defense. Yet, even defendant concedes the trial court has the authority to question a witness. *See* N.C. Gen. Stat. § 8C-1, Rule 614 (2003). The court may question witnesses to clarify confusing or contradictory testimony. *State v. Quick*, 329 N.C. 1, 21-22, 405 S.E.2d 179, 192 (1991) (citation omitted). However, the trial court "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2003). Defendant bears the burden of showing the trial court's comments were prejudicial. *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361, *disc. review denied*, 327 N.C. 143, 394 S.E.2d 183 (1990).

Defendant contends that the trial court's clarification of questions to several witnesses rose to the level of expressing an opinion that defendant was guilty. After considering the questions asked by the trial judge to several witnesses in their proper context, we conclude that the questions did not exceed the boundaries of clarification. Moreover, defendant does not establish that any of the trial court's questions were prejudicial. This assignment of error is overruled.

VI.

[6] Defendant next argues the trial court erred in overruling defendant's objection to the admission of testimony from Captain Peele regarding the credibility of an alleged accomplice. When a defendant makes pretrial statements implicating another person in the commission of the crime, testimony of police that they believed the alleged suspect's denial of involvement in the crime may not be offered as evidence of the alleged suspect's general credibility, but as an explanation for the jury of why this person was eliminated as a suspect. *See State v. Richardson*, 346 N.C. 520, 534, 488 S.E.2d 148, 156 (1997) (holding it was incumbent upon the State to explain to the jurors why a third person who defendant alleged to be the perpetrator was eliminated as a suspect), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 652 (1998); *State v. Baker*, 338 N.C. 526, 554-55, 451 S.E.2d 574, 591 (1994) (holding that police testimony about a former suspect's alibi and lack of motive to commit the crime was admissible as opinion testimony under Rule 701).

Here, defendant's pretrial statement to police implicated Curtis Dixon as an accomplice in the crime. Thus, Captain Peele's testimony regarding his impression of Dixon's denial of involvement was admissible not as to Dixon's general credibility and character, but rather as an explanation for why Dixon was not arrested. This assignment of error is overruled.

VII.

[7] Finally, defendant assigns as error the trial court's decision to admit hearsay testimony from the State's witness Officer Donald Newton. Defendant contends the State offered the out-of-court statement of Curtis Dixon that Dixon had not been with defendant at the time of the attack to prove the truth of the matter asserted, and as such, the statement was inadmissible hearsay. Where hearsay testimony is admitted over objection but nearly identical testimony is admitted without an objection, the erroneous admission is rendered

harmless. *See State v. Wright*, 270 N.C. 158, 159, 153 S.E.2d 883, 883-84 (1967) (benefit of defense objection to incompetent evidence is lost where same evidence was theretofore admitted without objection); *see also State v. Brown*, 13 N.C. App. 280, 285, 185 S.E.2d 486, 489 (1971).

Here, Officer Newton testified, on direct examination and over defendant's objection, that Dixon said he was not present with defendant at the time of the attack. However, although defendant did object to this hearsay testimony, defendant elicited the same testimony during cross-examination of Officer Newton. As defendant elicited this testimony, he cannot now complain that the earlier admission of the nearly identical testimony was prejudicial. *See Brown*, 13 N.C. App. at 285, 185 S.E.2d at 489 (where defendant elicited on cross-examination testimony substantially the same as testimony objected to on re-direct, admission of complained of testimony was not prejudicial). We find the admission of Dixon's out-of-court statement to be harmless error, and overrule defendant's final assignment of error.

No error.

Judges WYNN and HUDSON concur.

RONNIE ROGERS, EMPLOYEE, PLAINTIFF v. LOWE'S HOME IMPROVEMENT, EMPLOYER, SELF INSURED (SRS SPECIALTY RISK SERVICES, SERVICING AGENT), DEFENDANT

No. COA04-845

(Filed 19 April 2005)

Workers' Compensation— causation—medical history and testimony—credibility

There was competent evidence to support the Industrial Commission's finding of causation in a workers' compensation case where the finding was that plaintiff first injured his hamstring, then suffered a herniated disk. Although defendant challenged the testimony of plaintiff's doctor as the product of an incomplete picture of plaintiff's history, the doctor was entitled to credit his patient's account of his own symptoms, and the

Commission found that plaintiff's testimony about his medical history was credible.

Appeal by defendant from opinion and award entered 11 March 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 April 2005.

Maynard & Harris, P.L.L.C., by Celeste M. Harris, for plaintiff appellee.

Robinson & Lawing, L.L.P., by Jolinda J. Babcock, for defendant appellants.

McCULLOUGH, Judge.

Defendant appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission"), awarding temporary total disability benefits to plaintiff under the Workers' Compensation Act.

The evidence of record and the Commission's findings of fact reflect that plaintiff began working for defendant Lowe's Home Improvement on 5 May 2001 as a receiver in its Kernersville, North Carolina store. Plaintiff's job duties included unloading shipments of major appliances, windows, doors, and carpeting, as well as stocking this merchandise on the store's sales floor. As one of three employees responsible for unloading "[t]wenty trailer loads of merchandise" each day, plaintiff "went home on many occasions with a backache and other muscle soreness." Plaintiff also had "some residual" pain in his lower back and left leg resulting from a motor vehicle accident in May of 1988.

While lifting a large roll of carpet at work on 19 October 2001, plaintiff felt a pull in his lower back and left leg. He experienced soreness and cramping in the back of his leg above the knee and informed his supervisor about the incident but continued working. Plaintiff sought treatment at Piedmont Triad Family Medicine ("Piedmont Triad") on 19 October 2001, complaining of pain in the outside and back of his left thigh. Based upon the localized nature of plaintiff's pain, the tightness in the back of his leg, and the absence of pain in his lower back during straight leg raise test, Physician Assistant W. Scott Boyd diagnosed a strained left bicep femoralis muscle, or hamstring. He recommended treatment with moist heat, an anti-inflammatory and a muscle relaxant. Plaintiff returned to

Piedmont Triad on 22 October 2001, reporting continued localized pain in his left hamstring. Boyd again found that plaintiff had tightness and spasming in the back of his leg, but retained full range of motion in his left hip and his back. Boyd continued plaintiff on medication for the strained muscle but noted the possibility of an "underlying sciatic nerve problem" originating in his lumbar spine. Piedmont Triad's Physician Assistant Betsy Brais examined plaintiff for his persistent symptoms on 31 October 2001. Plaintiff told Brais that his hamstring "really bothers him when he gets up in the morning," but improved "once he starts walking around for two hours or so." He further reported "no numbness or tingling radiating down the backs of his legs." Brais diagnosed a left hamstring muscle spasm.

On the afternoon of 9 November 2001, defendant was unloading a shipment of house windows at work when he felt a pop in his "lower left hip area." Accustomed to a certain amount of soreness from the demands of his job, plaintiff finished working for the day and took a hot shower when he got home. He went to bed early but was awakened at 4:00 a.m. by "radiating sharp stabbing burning pain" in his left hip and groin. Plaintiff testified that "the problem after November 9th was completely different" than what he experienced during October. He contrasted the two injuries as follows:

> Well, it was like a cramp in October. And the pain in November was sharp stabbing—sharp stabbing burning pain radiating down my leg. And that's the most pain I've ever had . . . , and it just kept continuously, continuously hurting . . . and not going away.

Plaintiff described the pain he experienced after 9 November 2001 as "ten times as much pain . . . as I've ever had in my leg or anything else at any[]time."

Later that morning, plaintiff went to Lowe's, filled out an accident report and spoke to his manager, who sent him to PrimeCare of Kernersville for treatment. A physician assistant diagnosed plaintiff with a hamstring injury and restricted him to light duty work. Plaintiff was released by PrimeCare to return to his normal work duties on 20 November 2001, but was unable to perform them and stopped working altogether on 28 November 2001. Because his condition had not improved, plaintiff sought a referral to a specialist. Orthopaedist Dr. Christopher J. Bashore of High Point Orthopaedic and Sports Medicine examined plaintiff on 14 December 2001. Dr. Bashore ordered x-rays of plaintiff's lower back, which revealed a loss of normal lumbar lordosis. Plaintiff also exhibited, *inter alia*, a reduced

range of motion when bending at the waist and "positive straight leg raise at 35 degrees on left with pain that radiates past the knee." Diagnosing low back pain with radicular leg pain and a possible herniated nucleus pulposis, Dr. Bashore ordered a lumbar MRI exam. The MRI revealed "a left lateral disk bulge at L4-5 with impingement on the L4 nerve root, and a centralized disk bulge at L5-S1 with posterior displacement of the S1 nerve root on the left[,]" consistent with plaintiff's symptoms. On 7 January 2002, Dr. Bashore referred plaintiff to neurosurgeon Dr. Russell H. Amundson of Johnson Neurological Associates.

Dr. Amundson examined plaintiff on 24 January 2002, and made an initial diagnosis of "lumbar disk bulge[.]" A review of plaintiff's x-rays and MRI confirmed the presence of "a significant bulging disk on the left at [L]4-5[.]" After further tests, Dr. Amundson prescribed an initial treatment regimen of medication and physical therapy. When physical therapy proved unsuccessful, Dr. Amundson recommended surgery and performed a left lumbar microdiskectomy at L4-5 on 21 May 2002.

Plaintiff applied for workers' compensation benefits for the herniated disk, which he alleged was caused by the accident at work on 9 November 2001. Deputy Commissioner W. Bain Jones, Jr., held a hearing on the contested claim on 29 January 2003. In an opinion and award filed 25 June 2003, the Deputy Commissioner concluded that plaintiff's herniated disk was a "compensable injury by accident arising out of and in the course of his employment with defendant-employer" on 9 November 2001. He awarded plaintiff temporary total disability benefits from 28 November 2001 until further order of the Commission.

Defendant appealed to the Full Commission, which affirmed the Deputy Commissioner's award with modifications. In finding a causal relationship between plaintiff's 9 November 2001 accident while unloading windows for defendant and his herniated disk, the Commission relied upon Dr. Amundson's deposition testimony as well as plaintiff's hearing testimony in which he recounted the nature and course of his symptoms. In pertinent part, the Commission found as follows:

> 22. . . . Dr. Amundson opined, and the Full Commission finds as fact, that the November 9, 2001, incident when plaintiff was lifting the wooden windows was a proximate cause of the lumbar disc rupture for which he performed surgery. Dr. Amundson indi-

cated the distinct symptoms relayed by plaintiff following November 9, 2001, were not present prior to that date. Prior to November 9, 2001, plaintiff was suffering from a muscle strain and not a ruptured disc.

23. Dr. Amundson . . . gave a lengthy explanation of why he believes (1) plaintiff had pre-existing degenerative changes in his spine; (2) plaintiff was being treated for a hamstring or muscular strain prior to November 9, 2001; and (3) plaintiff's actions in lifting windows was a sufficient incident to cause plaintiff's disk herniation. The Full Commission finds as fact the three foregoing beliefs of Dr. Amundson.

. . . .

25. After reviewing the plaintiff's prior medical history, including the histories given by plaintiff to his family physician and to PrimeCare, Dr. Amundson concluded, and the Full Commission finds as fact, that the lumbar disc rupture for which he performed surgery was a proximate result of the November 9, 2001, incident when plaintiff was lifting wooden windows. Dr. Amundson explained that leg pain is a very gross description of a symptom and can confuse the practitioner, but in the end, plaintiff's overall presentation of symptoms to him on January 24, 2002, were not the same as the presentation of symptoms relayed to Triad Family Medicine in October 2001. Dr. Amundson indicated that the distinct symptoms relayed by plaintiff following November 9, 2001, were not present prior to that date. Prior to November 9, 2001, plaintiff was most likely suffering from a muscle strain. Dr. Amundson's testimony is supported by the evidence indicating that (1) plaintiff's symptoms were relieved by activity at work; (2) the burning and tightness in the posterior part of his hamstring got worse when he was resting; (3) plaintiff had a negative straight leg raise; and (4) plaintiff had full range of motion in his back. When Dr. Amundson examined plaintiff on January 24, 2002, plaintiff had a limited range of motion of his back, radiating leg pain, and could not get relief from his symptoms, particularly when active.

Based upon its findings, the Commission concluded that plaintiff was entitled to temporary total disability benefits of $254.71 per week "from 28 November 2001, and continuing until he is able to earn wages or further order of the Industrial Commission." Defendant filed timely notice of appeal.

Defendant argues on appeal that "there is no competent evidence to support a finding that plaintiff's back injury was caused by the alleged November 9, 2001 incident." Defendant challenges Dr. Amundson's opinion testimony as the product of an incomplete picture of plaintiff's medical history and as based solely on the temporal relationship between the 9 November 2001 incident and the onset of plaintiff's symptoms at some point thereafter. Defendant further faults the Commission for placing the burden upon it to disprove causation.

The scope of our review of a workers' compensation award is limited to a determination of "(1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). The appellate court " 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Moreover, we must defer to the Commission as the "sole judge of the weight and credibility" of the parties' evidence. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

In order to establish that a disabling injury is compensable within the workers' compensation system, a plaintiff must prove that a work-related accident was "a causal factor" of the injury. *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 752 (2003). Our courts have further defined a workers' compensation plaintiff's evidentiary burden by holding that, "[w]hen dealing with a complicated medical question . . ., expert medical testimony is necessary to provide a proper foundation for the Commission's findings." *Id.* at 234, 581 S.E.2d at 754. Inasmuch as " '[o]ne of the most difficult problems in legal medicine is the determination of the relationship between an injury or a specific episode and rupture of the intervertebral disc[,]' " the nature of plaintiff's claim required him to adduce expert medical testimony regarding the etiology of his disk injury. *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965) (citation omitted).

To qualify as "competent evidence" of a causal relationship between a work-related accident and a disabling injury, the expert's testimony " 'must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.' " *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (quoting *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942). Expert opinion "based merely upon speculation and conjecture" does not constitute competent evidence of causation in cases involving complex medical issues beyond the ken of laypersons. *Faison v. Allen Canning Co.*, 163 N.C. App. 755, 758, 594 S.E.2d 446, 449 (2004) (quoting *Holley*, 357 N.C. at 232, 581 S.E.2d at 753).

After a thorough review of the deposition transcripts, hearing testimony, and other evidence of record, we conclude the Commission's finding of causation is supported by competent evidence. The Commission's findings of fact accurately reflect the tenor of Dr. Amundson's testimony. Dr. Amundson opined to "a reasonable degree of medical certainty" that plaintiff's 9 November 2001 accident caused his herniated disk. He also offered a deliberative, three-part analysis establishing the basis of his opinion. *Cf. Edmonds v. Fresenius Med. Care*, 165 N.C. App. 811, 817, 600 S.E.2d 501, 505 (2004) (upholding finding of causation where the "evidence tending to show that [the expert's] testimony was the product of a reasoned medical analysis as opposed to mere speculation").

Dr. Amundson first posited, based upon plaintiff's medical records through October of 2001, that plaintiff "may well have had some degenerative disk changes" prior to 9 November 2001. He noted that plaintiff, "from [an examination on 19 October 2001], states that he has some history of some low back pain dating back—as far as 1990." He next evaluated the symptoms plaintiff presented at Piedmont Triad in October of 2001, which tended to show "a hamstring or a muscular strain" and further tended to rule out "a nerve root compression problem" or "a disk problem." Dr. Amundson contrasted these reported symptoms of localized muscular strain up through 31 October 2001, with the symptoms plaintiff presented to him after 9 November 2001, as follows:

> When I saw him, you know, he had limitation in range of motion of his back; he had radiating leg pain; he had sensory alteration. You know, those things go along more with a disk abnormality, or at least the lumbar spine abnormality and a nerve root compression problem.

In the third stage of his analysis, Dr. Amundson assessed the potential causal relationship between plaintiff's 9 November 2001 incident at work and his herniated disk as follows:

> The patient tells me that, you know, he had presented for work, he developed back and leg pain, thereafter certainly lifting windows, twisting motion is a sufficient cause to cause a disk herniation. And the disk herniation would account for the patient's radiating leg pain and the sensory abnormality that he had.

Asked to clarify whether he had "an opinion to a reasonable degree of medical certainty as to whether the November 9th, 2001 incident, described to you by [plaintiff], caused or significantly aggravated any prior condition to the extent that he required the surgery, and other treatment you provided to him[,]" Dr. Amundson responded:

> I think I came close to answering that question earlier when I said, you know, I'm really relying on what the patient tells me. And I think the description of lifting windows is a sufficient cause to injure a disk, which will result in a disk herniation. So within—within that context I would say yes.

He further affirmed that nothing contained in plaintiff's medical records from Piedmont Triad "eliminates or contradicts the opinion that I gave[.]"

Nor was Dr. Amundson's opinion affected by his review of plaintiff's medical records following the 9 November 2001 incident. Presented by defendant's counsel with plaintiff's records from PrimeCare, Dr. Amundson testified, "So, if I wanted to put all of this together in a sensible manner, I'd say, you know, he had a pulled muscle back in October. He lifted the windows [on 9 November 2001]. He aggravated the preexisting hamstring injury, and caused his disk injury." When pressed by defendant's counsel, Dr. Amundson reiterated his position, as follows:

> Q. . . . [H]ow can you causally relate the herniated disk to November 9 of 2001[?]
>
> . . . .
>
> A. . . . I think if I want to put all of this together in a sensible way, . . . I would say he had a preexisting muscular problem. He describes injuring himself. The first thing that shows is the aggravation of that preexisting muscle injury. And at least by the time

I see him, he now has persistent symptoms, and he's developed radiculopathy. You know, very often the disk herniation occurs and it takes a while for the radiculopathy to show itself. This may have been what caught his attention first.

While defendant dismisses Dr. Amundson's reasoning due to the similarity of the symptoms recorded at PrimeCare to those displayed by plaintiff at Piedmont Triad in October of 2001, we note in plaintiff's hearing testimony that his records from PrimeCare did not accurately reflect the type of pain he experienced after 9 November 2001, or his lack of improvement during the course of his treatment at PrimeCare. The Commission's opinion and award includes a finding of fact that plaintiff's testimony regarding his medical history was credible. The Commission's credibility determination is unreviewable and binding on appeal. Likewise, Dr. Amundson was entitled to credit his patient's account of his own pain symptoms in formulating his expert opinion.

Having found competent evidence to support the Commission's finding of causation, we affirm its award of benefits to plaintiff.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

HSI NORTH CAROLINA, LLC, D/B/A HUGHES SUPPLY, INC., PLAINTIFF v. DIVERSIFIED FIRE PROTECTION OF WILMINGTON, INC., JOHN W. WHEELER, III, N.C. MONROE CONSTRUCTION COMPANY, AND TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA, DEFENDANTS

No. COA04-678

(Filed 19 April 2005)

1. Public Works— state construction project—payment bond—materials supplied to second-tier subcontractor

Defendants' motion for summary judgment was properly denied where plaintiff was seeking payment for materials supplied to a second-tier subcontractor on a State Ports project. The plain language of N.C.G.S. § 44A-25, which controls payment and performance bonds for state construction contracts, includes first and second-tier subcontractors.

2. Estoppel— recovery of unpaid debt by subcontractor— timely notice

Plaintiff was not estopped from recovery of an unpaid debt for materials furnished to a subcontractor on a State Ports project where plaintiff's notice to the prime contractor of the subcontractor's failure to pay was timely given according to statutory requirements. The Legislature instituted specific time limitations for notification to provide certainty for all parties for claims upon a payment bond; less definite requirements for notification would create uncertainty and undermine the statutory scheme.

3. Estoppel— defense of collusion—not affirmatively pled

Defendants waived the defense of estoppel by collusion by not affirmatively setting it forth in their original or amended answer in an action to collect unpaid debts from material furnished to a subcontractor on a State Ports project. Even if their position was properly asserted, defendants did not show factual evidence that plaintiff acquiesced to false representations by the subcontractor (there was no abuse of discretion in the exclusion of an affidavit submitted less than two business days before the hearing).

4. Accord and Satisfaction— construction claim—debt specifically exempted

A defense of accord and satisfaction was properly rejected in a construction claim where plaintiff specifically omitted this debt in the agreement.

5. Civil Procedure— summary judgment—continuance

There was no abuse of discretion in the denial of defendants' motion to continue a summary judgment hearing on a State Ports construction claim.

Appeal by defendants N.C. Monroe Construction Company and Travelers Casualty & Surety Company of America from an order entered 15 December 2003 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 27 January 2005.

Vann & Sheridan, L.L.P., by James W. Sprouse, Jr. and James R. Vann, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Michael D. Meeker, Clinton R. Pinyan, and Caroline R. Heil, for defendant-appellants N.C. Monroe Construction Company and Travelers Casualty & Surety Company of America.

HUNTER, Judge.

N.C. Monroe Construction Company ("defendant-Monroe"), Travelers Casualty & Surety Company of America ("defendant-Travelers"), and Diversified Fire Protection of Wilmington, Inc. ("defendant-Diversified") appeal from an order entered 15 December 2003 granting summary judgment to HSI North Carolina, LLC ("plaintiff") and denying summary judgment to defendants.

The issues in this case are whether the trial court erred in: (1) granting summary judgment to plaintiff and denying summary judgment to defendants as a matter of law, (2) finding plaintiff was entitled as a matter of law to the awarded damages, (3) failing to find plaintiff's claim was barred by equitable estoppel, (4) rejecting defendants' defense of accord and satisfaction, and (5) denying defendants' motion for continuance. As we find no error, we affirm the trial court's decision.

On 10 June 2001, defendant-Monroe entered into a prime contract with the North Carolina State Ports Authority for the Transit Shed T-6 Expansion Project ("Port Project"). The Port Project was bonded, as required by N.C. Gen. Stat. § 44A-26 (2003), by defendant-Travelers. Defendant-Monroe subcontracted with defendant-Diversified to install a fire protection system for the Port Project. Defendant-Diversified assigned the project to another corporation also owned by the owner of defendant-Diversified ("Wilmington"), for performance of the fire protection installation. Wilmington, after approval of a credit application, purchased materials needed for the project from plaintiff beginning 4 September 2001 and continuing until 10 January 2002. Plaintiff was not paid by Wilmington for the materials. On 15 March 2002, within 120 days of last furnishing materials, plaintiff gave written notice to defendant-Monroe of the payment bond claim as required by N.C. Gen. Stat. § 44A-27(b) (2003).

Plaintiff brought suit against defendants to recover payment for materials used in the Port Project. After a period of discovery, both parties moved for summary judgment. On 15 December 2003, the trial

court granted summary judgment in plaintiff's favor, awarded damages in the amount of $91,676.09 plus interest, and denied defendants' motion for summary judgment. Defendants appeal from this order.

I.

[1] Defendants first contend the trial court erred in granting summary judgment to plaintiff and denying summary judgment to defendants as a matter of law. Defendants argue the definition of subcontractor in N.C. Gen. Stat. § 44A-25(6) (2003), which governs the relevant act, does not encompass a second-tier subcontractor, and therefore plaintiff, who contracted with a second-tier subcontractor, has no claim under the statute.

N.C. Gen. Stat. §§ 44A-25-35 (2003) control payment and performance bonds for state construction contracts. For the purposes of this Act, commonly known as the Little Miller Act, the term subcontractor is defined in § 44A-25(6) as "any person who has contracted to furnish labor or materials to, or who has performed labor for, a contractor or another subcontractor in connection with a construction contract." *Id.* Under § 44A-27(b), the statute specifies that:

> Any claimant who has a direct contractual relationship with any subcontractor but has no contractual relationship, express or implied, with the contractor may bring an action on the payment bond only if he has given written notice to the contractor within 120 days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment[.]

Id.

Our Supreme Court has held that:

> "In resolving issues of statutory construction, we look first to the language of the statute itself." It is a well-established rule of statutory construction that " '[w]here 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, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' "

Walker v. Bd. of Trustees of the N.C. Local Gov't. Emp. Ret. Sys., 348 N.C. 63, 65-66, 499 S.E.2d 429, 430-31 (1998) (citations omitted). Here, the language is clear and unambiguous. The legislature has specifically defined the term in question, subcontractor, to include both

individuals who have contracted to provide materials directly to the contractor, as well as those who have contracted with subcontractors, sometimes referred to as first- and second-tier subcontractors, under the construction contract. The language of § 44A-27, further, specifically provides that a claimant who has a direct contractual relationship with any subcontractor may bring an action on the payment bond. *Id.* By its plain language, therefore, the statutory definition includes first and second-tier subcontractors to the construction contract.

Here, plaintiff contracted to furnish materials to Wilmington, a second-tier subcontractor, who had subcontracted with defendant-Diversified, a first-tier subcontractor, to install the fire protection system under defendant-Diversified's contract with defendant-Monroe, the prime contractor. Under the statutory definition in § 44A-25(6), defendant-Diversified qualifies as a subcontractor, that is a party who had contracted to perform labor for a contractor, defendant-Monroe, in connection with a construction contract. Likewise, Wilmington also qualifies as a subcontractor, that is a party who had contracted to perform labor for a subcontractor, defendant-Diversified, in connection with a construction contract.[1] Plaintiff, therefore, under the plain language of the statute, is a claimant with a direct contractual relationship with a subcontractor, but with no contractual relationship, express or implied, with the contractor. Thus, under the terms of § 44A-27(b), plaintiff is entitled to bring an action on the payment bond if notice to the contractor is given within the requisite 120 days.

Defendants contend that as our courts have not previously interpreted this provision of the Little Miller Act, federal precedent must control. Such is not the case. Our courts have previously noted that guidance can be obtained from federal interpretations of the Miller Act, on which our corresponding state act is modeled, but have not held such interpretations to be binding. *Syro Steel Co. v. Hubbell Highway Signs, Inc.*, 108 N.C. App. 529, 534, 424 S.E.2d 208, 211 (1993). Further, in this case, such federal precedent would be of no use. Unlike the federal Miller Act, which provides no definition of subcontractor, *MacEvoy v. United States*, 322 U.S. 102, 108, 88 L. Ed. 1163, 1168 (1944), as noted *supra*, our state statute specifically

1. We note, however, that although we find Wilmington, a second-tier subcontractor, to qualify under the terms of the statute, we do not reach the question as to whether a third-tier subcontractor would qualify under the statute, as this question is not presently before us.

defines subcontractor in the context of the statute. N.C. Gen. Stat. § 44A-25(6).

As plaintiff has a statutory right to seek payment from defendants under N.C. Gen. Stat. § 44A-27, we therefore find the trial court did not err in denying defendants' motion for summary judgment as a matter of law.

II.

In related assignments of error, defendants contend that the trial court erred in failing to find that estoppel barred plaintiff's claim for both failure to mitigate damages and falsification of information, and that, therefore, the trial court erred in finding plaintiff was entitled as a matter of law to the awarded damages. We disagree.

[2] Defendants first argue plaintiff had a duty to mitigate damages, and that in failing to notify defendant-Monroe immediately as to Wilmington's failure to pay, plaintiff is barred from recovery of the unpaid debt.

As our courts have not yet addressed the issue of whether a claimant under a payment bond has a duty to mitigate damages through notification prior to the statutory requirements of § 44A-27, we look to interpretations of the parallel federal statute for guidance. *See McClure Estimating Co. v. H. G. Reynolds Co.*, 136 N.C. App. 176, 181, 523 S.E.2d 144, 147 (1999). In *United States v. Greene Electrical Serv. of Long Island, Inc.*, 379 F.2d 207, 210 (2d Cir. 1967), similar to the facts of the instant case, the plaintiff supplied materials to a subcontractor, who had falsified proof of payment to the contractor under a government contract. *Id.* The plaintiff timely notified the contractor of its claim as required by statute. *Id.* The defendant alleged that the plaintiff was estopped from collecting the debt due to its failure to notify the defendant of the lack of payment from the subcontractor when the issue had first arisen. *Id.* The *Greene* Court held that to estop the plaintiff "under these circumstances from asserting its claim for payment would destroy the effectiveness of the statutory scheme by imposing an additional, judicially-created requirement on claimants." *Greene*, 379 F.2d at 210.

Such an argument is persuasive to this Court. Our legislature has instituted specific time limitations for notification to provide certainty for all parties as to claims for payments upon a payment bond. To require other, less definite requirements for notification would

create uncertainty and undermine our statutory scheme. As plaintiff's notice was timely given according to the statutory requirements, the trial court therefore properly found no estoppel for failure to mitigate in plaintiff's lack of earlier notification.

[3] Defendants further contend that plaintiff, through its silence, colluded with Wilmington, who falsified affidavits to defendant-Monroe that plaintiff had been paid, and that plaintiff is estopped from recovery as a result.

The North Carolina Rules of Civil Procedure require a party to affirmatively set forth any matter constituting an avoidance or affirmative defense, N.C. Gen. Stat. § § 1A-1, Rule 8(c) (2003), and our courts have held the failure to do so creates a waiver of the defense. *See Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998). Neither defendants' original nor amended answer include an affirmative defense of estoppel as to plaintiff's collusion with Wilmington to falsify payments. Defendants therefore have waived this defense by failing to affirmatively assert estoppel as to plaintiff.

However, even if properly asserted, defendants fail to show factual evidence that supports such a position. Estoppel may be asserted for false representations or acquiescence to false representations made by the claimant under the Miller Act. *See United States v. Monaco and Son, Inc.*, 336 F.2d 636, 639 (4th Cir. 1964), *Greene*, 379 F.2d at 210. However, in a motion for summary judgment, "the question before the Court is whether the pleadings, discovery documents, and affidavits support a finding that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Stanley v. Walker*, 55 N.C. App. 377, 378, 285 S.E.2d 297, 298 (1982). "The burden is upon the movant to establish the absence of any issue of fact, and once satisfied, the opposing party must come forward with facts, rather than mere allegations, which controvert the moving party's case." *Id.*

Here, defendants presented no evidence to the trial court which showed plaintiff's acquiescence to false representations by defendant-Wilmington. Defendants contend that admission of an affidavit ("May affidavit") submitted on 26 November 2003 would provide such evidence. However, the trial court excluded the May affidavit from the record, as it was submitted less than two business days before the hearing on the motion. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003) requires that if an

> opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require.

Id.

> A decision to admit and consider evidence offered at a summary judgment hearing is committed to the trial court's discretion . . . [and] will not be disturbed on appeal absent a showing that the decision was manifestly unsupported by reason, or "that it was so arbitrary that it could not have been the result of a reasoned decision."

Pierson v. Cumberland County Civic Ctr. Comm'n, 141 N.C. App. 628, 634, 540 S.E.2d 810, 814-15 (2000) (citations omitted). Here, as there is no showing of an abuse of discretion on the part of the trial court, the decision to refuse admittance of the May affidavit will not be disturbed.

As plaintiff is not estopped from recovery by failure to notice defendants beyond the statutory requirements, and as defendants failed to properly plead the affirmative defense of estoppel as to plaintiff's alleged falsification of information, and further provided no factual evidence of such falsification, we find the trial court did not err in granting plaintiff summary judgment and in awarding damages.

III.

[4] In their next assignment of error, defendants contend the trial court erred in rejecting defendants' defense of accord and satisfaction. Defendants argue that plaintiff's settlement with Wilmington constituted an accord and satisfaction for the debt as to the Port Project materials and, therefore, plaintiff may not seek recovery on the extinguished debt. We disagree.

Plaintiff executed a settlement agreement which settled all claims between plaintiff and Wilmington, with the exception that plaintiff would continue to pursue its claim against defendant-Monroe and defendant-Travelers for the Port Project account, and that if such suit were unsuccessful, Wilmington would remain liable for the remainder of the debt.

Defendants rely on a Pennsylvania case where the plaintiff had settled all debts with the subcontractor, then sought to exercise its statutory remedy and recover on the same debt from the contractor. *See City of Philadelphia v. Joseph S. Smith Roofing, Inc.*, 599 A.2d 222, 230 (Pa. Super. 1991). Here, however, plaintiff omitted the debt owed under the Port Project from the settlement agreement with Wilmington, specifying that such debt would be discharged only to the extent that plaintiff recovered from defendant-Monroe and defendant-Travelers in the lawsuit already commenced against those parties. As plaintiff had a statutory right to pursue a claim against defendants under § 44A-27, as established *supra* in Part 1, and as plaintiff specifically did not extinguish the underlying debt as to the Port Project in its settlement agreement, we find the trial court properly rejected this defense.

IV.

[5] In their final assignment of error, defendants contend the trial court erred in denying defendants' motion for continuance. "Motions to continue pursuant to Rule[] 56(f) . . . of our Rules of Civil Procedure are granted in the trial court's discretion. . . . Absent an abuse of discretion, the court's ruling will not be disturbed on appeal." *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 721, 496 S.E.2d 607, 611 (1998) (citations omitted). As a review of the record fails to reveal an abuse of discretion on the part of the trial court in denying defendants' motion for continuance, this assignment of error is overruled.

In summary, we find the trial court properly denied summary judgment to defendants and granted summary judgment and awarded damages to plaintiff as a matter of law. We further find the trial court did not err in rejecting arguments that plaintiff's claim was barred by equitable estoppel or by the doctrine of accord and satisfaction, and in denying defendants' motion for continuance.

Affirmed.

Judges BRYANT and JACKSON concur.

CAROL IADANZA, PLAINTIFF v. ROBERT N. HARPER JR., MD. AND DIGESTIVE DISEASES DIAGNOSTIC CENTER, P.A., DEFENDANTS

No. COA04-801

(Filed 19 April 2005)

1. Damages and Remedies— compensatory—pain and suffering

The trial court erred by awarding summary judgment for defendants on compensatory damages arising from a nonprofessional relationship, of disputed degree, between a doctor and patient. Although plaintiff did not offer proof of physical pain, that is only one aspect of pain and suffering. Emotional suffering may be included, and there is no support for the contention that the psychological part of pain and suffering damages must meet the same standard as the essential element of severe emotional distress in a claim for infliction of emotional distress. The question of the sufficiency of the evidence of emotional distress was not raised below and was not addressed on appeal.

2. Libel and Slander— slander per se—statute of limitations—unsigned letters

The trial court properly dismissed a counterclaim for slander per se in a claim arising from a nonprofessional relationship between a doctor and patient where the one-year statute of limitations barred claims from all communications but unsigned letters, which cannot constitute slander.

3. Damages and Remedies— punitive—underlying claim dismissed

The trial court should have dismissed a counterclaim for punitive damages where the underlying counterclaims were properly dismissed. Punitive damages do not exist as an independent cause of action.

Appeal by plaintiff and defendant-counterclaimant from order entered 13 February 2004 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 3 February 2005.

Kuniholm Law Firm, by Elizabeth F. Kuniholm, Lucy N. Inman, and Ashley Browning Scruggs, for plaintiff-appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Mark E. Anderson, Charles George, and Tobias S. Hampson, for defendants-cross appellees.

Bailey & Dixon, L.L.P., by Gary S. Parsons, David S. Wisz, and Phillip A. Collins, for counter defendant-cross appellees.

Brotherton, Ford, Yeoman & Worley, PLLC, by Richard D. Yeoman for defendant Digestive Diseases Diagnostic Center, P.A.

LEVINSON, Judge.

Plaintiff (Carol Iadanza) appeals the trial court's order for partial summary judgment in favor of defendants (Dr. Robert N. Harper, Jr., and Digestive Diseases Diagnostic Center, P.A.). Defendant (Dr. Robert N. Harper, Jr.) appeals from the trial court's dismissal of his counterclaims. We affirm in part and reverse in part.

The relevant factual and procedural background is summarized as follows: On 7 January 2000 plaintiff Carol Iadanza (Iadanza) consulted defendant Dr. Robert Harper (Harper), for treatment of gastrointestinal symptoms. Thereafter, Harper provided medical care to plaintiff; the parties agree they had a physician-patient relationship, but disagree on its duration. The parties also agree that there were non-professional interactions between them. However, plaintiff and defendants are in sharp disagreement on key issues, including: who initiated the non-professional contacts; their respective personal hopes for a romantic or sexual relationship; the extent of their interactions; and which of them "pursued" the other. Iadanza generally alleges that during the time she was Harper's patient he persistently sought a sexual relationship with her, as demonstrated by his phone calls; his insistence on private meetings; his sexual advances and remarks; and his giving plaintiff a glass of drugged wine. Harper admits that the two had a "friendly non-professional relationship," but denies any romantic interest in Iadanza, and asserts that she was the one who pursued a sexual relationship, which he consistently rebuffed.

On 27 February 2003, Iadanza filed suit against defendants seeking compensatory and punitive damages for professional negligence, breach of fiduciary duty, and intentional and negligent infliction of emotional distress. On 10 March 2003, defendants filed an answer denying the material allegations of Iadanza's complaint. Harper also asserted counterclaims against Iadanza and her husband Anthony Iadanza seeking compensatory and punitive damages for slander *per se*, unfair and deceptive trade practices, civil conspiracy, facilitation of fraud, malicious prosecution, and abuse of process. Plaintiff replied, denying all material allegations and moving for dismissal of

defendant's counterclaims. Thereafter, defendants moved for partial summary judgment on the issue of actual damages.

On 13 February 2004 the trial court ruled on the parties' pretrial motions, in an order stating in relevant part that:

> [1] Defendant's Motion for Partial Summary judgment on the issue of actual damages with respect to each and every claim for relief set forth in the Plaintiff's Amended Complaint is ALLOWED.
>
> [2] Counter Defendants' Motion to Dismiss Counterclaimant's Robert N. Harper, Jr., M.D. counterclaims is ALLOWED as follows:
>
> [a] The counterclaim for slander *per se* is dismissed as barred by the one year statute of limitations.
>
> [b] The counterclaim for unfair and deceptive trade practice is dismissed pursuant to Rule 12(b)(6).
>
> [c] The counterclaim for malicious prosecution is dismissed pursuant to Rule 12(b)(6) for failure to allege special damages.
>
> [d] The counterclaim for abuse of process is dismissed pursuant to Rule 12(b)(6) for failure to allege a wrongful act was committed by the Counter Defendants.
>
> [e] The counterclaim for civil conspiracy is dismissed because said counterclaim is a derivative claim and fails as the underlying tort claims fail.
>
> . . . .
>
> [f] The counterclaim for facilitation of fraud is dismissed pursuant to Rule 12(b)(6).

From this order the parties appeal.

Plaintiff's Appeal from Partial Summary Judgment

[1] Plaintiff Carol Iadanza appeals from the trial court's award of summary judgment in favor of defendants on her claim for compensatory damages. She argues that the trial court erred in ordering summary judgment because the evidence raises genuine issues of material fact on the issue of compensatory damages. We agree.

Summary judgment is properly granted 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.G.S. § 1A-1, Rule 56(c) (2003). In ruling on summary judgment:

> a court does not resolve questions of fact but determines whether there is a genuine issue of material fact. . . . Thus a defending party is entitled to summary judgment if he can show that claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Ward v. Durham Life Insurance Co., 325 N.C. 202, 209, 381 S.E.2d 698, 702 (1989) (citation omitted). "On appeal, this Court's standard of review involves a two-step determination of whether (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law." *Guthrie v. Conroy*, 152 N.C. App. 15, 21, 567 S.E.2d 403, 408 (2002) (citations omitted).

Plaintiff herein appeals the court's order of summary judgment for defendants on plaintiff's claim for actual, or compensatory, damages. Accordingly, we first review pertinent legal principles governing the award of damages in civil cases.

"We define actual damage to mean some actual loss, hurt or harm resulting from the illegal invasion of a legal right." *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474-75 (1991). Compensatory damages include both general and special damages. "According to our Supreme Court, 'general damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case.' " *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 671, 464 S.E.2d 47, 62 (1995) (quoting *Penner v. Elliott*, 225 N.C. 33, 35, 33 S.E.2d 124, 126 (1945)). Further:

> General damages . . . include such matters as mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms[.] . . . [S]pecial damages are usually synonymous with pecuniary loss. Medical and hospital expenses, as well as loss of earnings . . . are regarded as special damages in personal-injury cases.

22 Am. Jur. 2d *Damages* § 42 (2003). In the instant case, Iadanza did not allege "special damages" such as medical expenses, lost wages, or other direct financial injury. Defendant argues that, for this reason, the trial court properly granted summary judgment on her claim for actual damages. We disagree.

Defendant contends that plaintiff is not entitled to general damages because she did not offer proof of "physical pain and suffering." "Compensatory damages provide recovery for, *inter alia*, mental or physical pain and suffering, lost wages and medical expenses." *Schenk v. HNA Holdings, Inc.*, 167 N.C. App. 47, 55, 604 S.E.2d 689, 694 (2004) (citation omitted). Thus, "pain and suffering" may be a discrete basis for recovery. *See Sharpe v. Pugh*, 270 N.C. 598, 602, 155 S.E.2d 108, 111 (1967) (court erred by striking parent's "separate claim for personal injuries . . . based solely on [child's] pain and suffering"). Moreover, **physical** injury is only one aspect of "pain and suffering," which also may include emotional suffering:

> If plaintiffs prove their claim of negligence at trial, they would be entitled to all damages which proximately flow from this negligence including all physical and mental injuries and pain and suffering. As to the element of damages for pain and suffering: **Pain and suffering damages are intended to redress a wide array of injuries ranging from physical pain to anxiety, depression, and the resulting adverse impact upon the injured party's lifestyle**.

Connelly v. Family Inns of Am., Inc., 141 N.C. App. 583, 595-96, 540 S.E.2d 38, 43 (2000) (citing *David A. Logan and Wayne A. Logan*, North Carolina Torts § 8.20 (d) at 178 (1996)) (emphasis added).

Defendant also argues that plaintiff cannot recover general damages for pain and suffering without proof of "severe emotional distress." This argument confuses the "severe emotional distress" that is an essential **element** of a claim for negligent or intentional infliction of emotional distress, with the emotional suffering that may be part of a claim seeking damages for general "pain and suffering." Defendant cites no cases in support of the proposition that the psychological component of **damages** for "pain and suffering" must meet the same standard as the **element** of "severe emotional distress" that is part of claims for infliction of emotional distress, and we find none. Accordingly, we reject defendant's argument.

Finally, defendant argues that the trial court's entry of summary judgment on plaintiff's claim for damages should be upheld on the

grounds that plaintiff failed to produce sufficient evidence of "severe emotional distress" such as could withstand a summary judgment motion. This issue is not properly before this Court. Defendants moved for partial summary judgment only on plaintiff's claim for compensatory damages, and the trial court's order was confined to a ruling on that issue. The adequacy of plaintiff's complaint to state claims for infliction of emotional distress was neither raised at the trial level nor assigned as error on appeal. "[Defendant] raise[s] th[ese] issue[s] for the first time on appeal to this Court. This Court has long held that issues and theories of a case not raised below will not be considered on appeal, and th[ese] issue[s are] not properly before this Court." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). As this issue is not properly before us, we do not address it.

We conclude that the trial court erred by granting partial summary judgment on the issue of damages, and that the order for partial summary judgment must be reversed.

Defendant's Appeal From Dismissal of Counterclaims

[2] Defendant appeals from the trial court's dismissal of his counterclaims for slander *per se*, unfair and deceptive trade practices, civil conspiracy, and malicious prosecution.[1]

We first consider the trial court's dismissal of defendant's claim for slander *per se*. "The term defamation includes two distinct torts, libel and slander. In general, libel is written while slander is oral." *Tallent v. Blake*, 57 N.C. App. 249, 251, 291 S.E.2d 336, 338 (1982) (citation omitted). Specifically:

> Slander has been defined by this Court as '**oral defamation,' or 'the speaking [as opposed to the writing]** of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood.' . . . [W]e **reaffirm the historical distinction between libel and slander.**

Donovan v. Fiumara, 114 N.C. App. 524, 526, 536, 442 S.E.2d 572, 574 and 580 (1994) (quoting *Morrow v. Kings Department Stores*, 57 N.C. App. 13, 20, 290 S.E.2d 732, 736 (1982), and citing *Tallent*, 57 N.C. App. at 251, 291 S.E.2d at 338 (1982)) (emphasis added). Moreover, if

1. Defendant did not assign error to the court's dismissal of his other claims, for facilitation of fraud and abuse of process, and any issues pertaining to those dismissals are deemed abandoned. N.C.R. App. Proc. 10.

a complaint alleges only one of the two defamation torts, *e.g.*, slander but not libel, this Court's review is likewise confined to that tort:

> [The] plaintiff's case was tried solely on the theory of slander; no issue as to libel was submitted. . . . The theory upon which the case was tried must prevail in considering the appeal, [and] interpreting the record[.] . . . This case was tried on the theory of slander, and plaintiff has not appealed or assigned as error the trial judge's failure to submit an issue as to libel. Therefore, plaintiff may not argue the law of libel on appeal.

Tallent, 57 N.C. App. at 252, 291 S.E.2d at 339 (citing *Paul v. Neece*, 244 N.C. 565, 94 S.E.2d 596 (1956)). In the instant case, defendant's counterclaim sought damages for slander *per se*, and did not assert a claim for damages based on libel. Accordingly, we determine the propriety of the trial court's ruling only as it pertains to the alleged tort of slander *per se*.

The trial court dismissed defendant's claim of slander *per se* "as barred by the one year statute of limitations." We conclude that the trial court ruled correctly.

Under N.C.G.S. § 1-54(3) (2003), the statute of limitations for a claim of slander or libel is one year. " 'To escape the bar of the statute of limitations, an action for libel or slander must be commenced within one year from the time the action accrues, G.S. 1-54(3), and the action accrues at the date of the publication of the defamatory words, regardless of the fact that plaintiff may discover the identity of the author only at a later date.' " *Gibson v. Mutual Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 287, 465 S.E.2d 56, 58 (1996) (quoting *Price v. Penney Co.*, 26 N.C. App. 249, 252, 216 S.E.2d 154, 156 (1975)).

In the instant case, because defendant's counterclaim was filed on 10 March 2003, any slanderous statements made before 10 March 2002 are barred by the statute of limitations. Review of defendant's counterclaim reveals no allegations of any **oral** defamation, or slander, occurring after 10 March 2002. Indeed, the counterclaim includes only one allegation of behavior that is arguably within the statute of limitations:

> 32. In the fall of 2002, Dr. Harper's partner began receiving unsigned letters advising him that he had made a mistake entering into a partnership with Dr. Harper and should reconsider that partnership.

The parties have presented arguments about whether other paragraphs of defendant's counterclaim sufficiently attribute the anonymous letter-writing to the Iadanzas, and on whether the written statement, that Harper's partner had "made a mistake" by going into business with Harper, can be considered defamatory. We conclude that there is no need to address these issues. Paragraph 32 refers **only** to "unsigned letters" and not to **any** spoken or oral communication. Regardless of their content, "unsigned letters" cannot constitute **slander** because they are written rather than spoken. Accordingly, we conclude the trial court properly dismissed defendant's complaint for slander *per se* as barred by the statute of limitations.

Defendant also argues that the trial court erred by dismissing his other counterclaims for unfair and deceptive trade practices, civil conspiracy, and malicious prosecution. We have considered each of defendant's arguments and find them to be without merit. These assignments of error are overruled.

Plaintiff's Appeal from Order on Defendant's Counterclaims

[3] Plaintiff has cross-appealed from the trial court's order dismissing defendant's counterclaims. Plaintiff argues first that the trial court erred by not ruling that counterclaim defendant Anthony Iadanza was not properly made a party to this action. As we are upholding the trial court's dismissal of defendant's counterclaims, we have no occasion to rule on this issue.

Plaintiff also argues that the trial court erred by not dismissing defendant's "counterclaim" for punitive damages. We agree. "As a general rule, '[p]unitive damages do not and cannot exist as an independent cause of action, but are mere incidents of the cause of action[.] . . . If the injured party has no cause of action independent of a supposed right to recover punitive damages, then he has no cause of action at all.' North Carolina follows this general rule of law." *Hawkins*, 101 N.C. App. at 532, 400 S.E.2d at 474 (quoting J. Stein, *Damages and Recovery* § 195 at 389 (1972)). In the instant case, the trial court properly dismissed defendant's counterclaims. Accordingly, defendant has no basis on which to claim punitive damages. We conclude the trial court's order should be reversed and remanded for dismissal of defendant's "counterclaim" for punitive damages.

We conclude the trial court erred by granting partial summary judgment in favor of defendants on the issue of compensatory dam-

ages; that the trial court did not err by dismissing defendant's counterclaims; and that the trial court erred by not dismissing defendant's claim for punitive damages. Accordingly, the trial court's order is

Affirmed in part, and reversed and remanded in part.

Judges TIMMONS-GOODSON and HUDSON concur.

NORFOLK SOUTHERN RAILWAY COMPANY, PLAINTIFF v. WAYNE SMITH, DEFENDANT

No. COA04-404

(Filed 19 April 2005)

1. **Railroads— right-of-way easement—presumed statutory grant**

The trial court did not err by granting plaintiff railway company's motion for summary judgment based on the conclusion that plaintiff has a right-of-way easement across defendant's property one hundred feet on each side of the center line of the railroad's track, because: (1) there is a presumed statutory grant when there are no records of purchase of the land, a taking by eminent domain, or an action by the landowner for compensation within two years of track completion; (2) easements run with the land and are not personal to the landowner; and (3) in addition to the statutory presumption of one hundred feet, there is record evidence recognizing that width.

2. **Easements— railroad—restraint or enjoinment of servient estate**

The trial court did not err by granting plaintiff railway company's motion for summary judgment based on the conclusion that the pertinent easement's servient estate can be restrained or enjoined for the benefit of the easement owner, because: (1) injunctive relief is an appropriate means for preventing servient landowners from creating risks or other interferences on a railroad's right-of-way; (2) the trial court's permanent injunction preventing defendant from construction or grading work within twenty-five feet of the center line is reasonable since a railroad has the duty, even in the absence of a statute, to keep its cross-

ings safe; (3) the injunction addresses legitimate risks related to the safe maintenance of the roadbed and the management of such risks is within the sound business judgment of the railroad; and (4) the mandatory injunctions were proper to protect the enjoyment of plaintiff's easement since defendant's actions created foreseeable risks to plaintiff's safe operation of the railroad.

Appeal by defendant from judgment entered 10 October 2003 by Judge James U. Downs in Jackson County Superior Court. Heard in the Court of Appeals 31 January 2005.

Adams Hendon Carson Crow & Saenger, P.A., by E. Thomison Holman, for plaintiff-appellee.

McLean Law Firm, P.A., by Russell L. McLean, III, for defendant-appellant.

MARTIN, Chief Judge.

Defendant-appellant bought adjoining parcels of land in Jackson County in 1995 and 1996. Plaintiff-appellee's railroad bisects the two parcels. In February of 2002, plaintiff brought this action alleging that defendant was performing construction work close to the tracks, including grading work and excavation on the land adjacent to the tracks, which could threaten the structural integrity of the roadbed and the safe operation of plaintiff's trains. Plaintiff also alleged that defendant was placing mobile home utility hook-ups immediately adjacent to the tracks for the purpose of developing a mobile home park on the land and had obstructed the sight distance of vehicular traffic using the State Road 1432 automobile crossing. Plaintiff alleged that it had a right-of-way of 100 feet on each side of the center of the track and sought injunctive relief. A temporary restraining order, and subsequently a preliminary injunction, were issued, restraining defendant from engaging in further construction activities pending trial.

Defendant filed an answer denying plaintiff's right-of-way and asserting that he had a right to use his property and perform the work. Defendant also asserted a counterclaim seeking a determination of the existence of any right-of-way and its width, and seeking compensation therefor. Both parties engaged in discovery, and in October, 2002 plaintiff amended its complaint to allege that defendant had installed a water line underneath the track roadbed which further threatened the structural integrity of the roadbed. After a

hearing, defendant was further enjoined, pending trial, from using the water line.

Plaintiff moved for partial summary judgment establishing the existence and scope of its right-of-way and permanently enjoining defendant from conducting further construction or using the water line. The trial court granted summary judgment holding that the plaintiff had a right-of-way one hundred feet from the centerline on each side of the track and granting a permanent injunction preventing defendant from using the water line or continuing with any construction within twenty-five feet of the track center line, and requiring defendant to construct a chain link fence between the mobile home park and the railroad track. Defendant appeals.

Defendant argues on appeal that the trial court erred in granting plaintiff's motion for summary judgment. "[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-Terminex Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). If the moving party satisfies its burden, the burden shifts to the nonmovant to set forth specific facts showing there exists a triable issue of fact. *Id.*

[1] Two principal issues are presented in this appeal: (1) whether the trial court erred in concluding that plaintiff has a right-of-way easement across defendant's property one hundred feet on each side of the center line of the railroad's track; and (2) whether the easement's servient estate can be restrained or enjoined for the benefit of the easement owner.

Section twenty-nine of "An Act to Incorporate the Western North Carolina Railroad Company" (the Act), Private Laws of North Carolina 1854-'55, Chapter 228, § 29, provided the Western North Carolina Railroad Company (WNC), plaintiff's predecessor in interest, with three methods of acquiring property for building its road. The first method was by purchase of land in fee simple from an owner. The second method was through State condemnation of the land by eminent domain and providing the land in fee simple to the railroad. The third method was by statutory presumption, which

required the railroad to build a track in the absence of a contract with the landowner and then allowed the landowner to call for a land assessment to be paid within two years from the completion of the track. If the landowner did not apply for compensation in that period, the statutory presumption provided the railroad with a right-of-way one hundred feet to either side of the tracks as long as it continued to be used for a railroad. The first two methods are inapplicable in this case. The chain of title for defendant's property discloses no record of WNC ownership of the land in fee simple, nor is there any record of State condemnation of defendant's land.

To establish its right-of-way by statutory presumption, plaintiff had the burden of showing, by a preponderance of the evidence, that there had been no contract between its predecessor and defendant's predecessor in title, and that the landowner at the time had not applied for compensation within two years after the track was built. *Keziah v. R.R.*, 272 N.C. 299, 307, 158 S.E.2d 539, 545 (1968). At trial, plaintiff presented evidence that the WNC railroad through Jackson County was completed between 1882 and 1884, that there was no record of a contract with the landowner during that time, and that there was no application by the landowner for compensation within the two years. Defendant did not refute this evidence.

Instead, defendant argues that the Act did not provide for the extension of the WNC railroad through Jackson County, where his land is located, therefore plaintiff cannot rely on the Act's methods for acquiring property in Jackson County. This argument is without merit. The Act originally authorized the railroad to construct a railway to a point beyond the French Broad River. Private Laws of North Carolina 1854-'55, Chapter 228, § 29; *see also Railroad v. Rollins*, 82 N.C. 523, 524 (1880). The legislature subsequently passed "An Act to Amend an Act Entitled an Act to Incorporate the Western North-Carolina Railroad Company, Passed at the Session of 1854-'55, and also an Act Amendatory Thereof Passed at the Session of 1856-'57," Private Laws of North Carolina 1858-'59, Chapter 170, § 3, providing for survey work to the Tennessee state line which would run through Jackson County. Successive amendments such as "An Act to Aid in the Completion of the Western Division of the Western North Carolina Railroad," Public Laws of North Carolina 1871-'72, Chapter 150, tend to show survey approval by the legislature.

Defendant also suggests that the lapse of the WNC Railroad's corporate existence necessarily eliminated the easement gained by statutory presumption. This position, too, is untenable. Easements

run with the land and are not personal to the landowner. *Brown v. Weaver-Rogers Assoc.*, 131 N.C. App. 120, 123, 505 S.E.2d 322, 324 (1998), *disc. rev. denied*, 350 N.C. 92, 532 S.E.2d 523 (1999). Plaintiff, as WNC's successor in interest, properly succeeded to all the rights that WNC had in the right-of-way on defendant's land.

Defendant further argues the trial court erred in finding the scope of the right-of-way measures one hundred feet on either side of the track. In addition to the statutory presumption of one hundred feet, there is record evidence recognizing that width. In 1924, plaintiff purchased an easement from a predecessor in title to defendant's land. The deed granted plaintiff an easement to lay a pipeline across unencumbered property outside the right-of-way. The owner described the location of the new easement by relation to plaintiff's right-of-way "which is 100 feet in width on either side of the center line of its main track." The physical presence of the railroad track gave defendant notice that a right-of-way existed, and the 1924 deed recorded with the county registrar gave additional notice of the right-of-way's width.

The trial court correctly ruled that plaintiff is entitled to a right-of-way of one hundred feet on each side of the center of the track to be occupied and used for railroad purposes. There is a presumed statutory grant when there are no records of purchase of the land by WNC, a taking by eminent domain, or an action by the landowner for compensation within two years of track completion. *R.R. v. Manufacturing Co.*, 229 N.C. 695, 699, 51 S.E.2d 301, 305 (1949). Subsequent acts of the legislature to complete the railroad line running across defendant's land verify legislative approval of the track surveys. We find no genuine issue of material fact regarding the existence of plaintiff's right-of-way one hundred feet from either side of the track's centerline. There is no genuine issue as to the existence and extent of plaintiff's right-of-way, and the trial court properly granted summary judgment in favor of plaintiff as to that issue.

[2] The existence and extent of the right-of-way having been established, the issue remains as to whether defendant's use of the servient estate may be restrained or enjoined for the benefit of the easement owner. Areas of a right-of-way not required for railroad purposes may be used by the servient owner in manners not inconsistent with the right-of-way. *Bivens v. R.R.*, 247 N.C. 711, 716, 102 S.E.2d 128, 132-33 (1958); *Tighe v. R.R.*, 176 N.C. 239, 244, 97 S.E. 164, 166 (1918); *R.R. v. Sturgeon*, 120 N.C. 225, 227-28, 26 S.E. 779, 780 (1897). However, the owner's use is subject to the railroad's easement. "[F]urther

appropriation and use by [the railroad] of the right of way for necessary railroad business may not be destroyed or impaired by reason of the occupation of it by the owner or any other person." *Keziah*, 272 N.C. at 308, 158 S.E.2d at 546 (citing N.C. Gen. Stat. § 1-44). The railroad may expand its use of the right-of-way, to the extent of its statutory right, for any legitimate purpose as determined by the railroad's sound business judgment. *Manufacturing Co.* at 701, 51 S.E.2d at 306.

"Use" by the railroad includes managing safety risks on its right-of-way. A railroad is held accountable for the condition of the right-of-way, *R.R. v. Olive*, 142 N.C. 257, 275, 55 S.E. 263, 269 (1906), therefore a servient landowner may not unilaterally create risks that interfere with the railroad's maintenance of the right-of-way. In *Olive*, our Supreme Court observed:

> It would seem clear that when, as in the case of a railroad company, a right-of-way is acquired by any of the statutory methods, or by grant, for the purpose of enabling it to perform its duty to the public, such easement will be protected by injunction. It would be unreasonable to permit a railroad company to acquire a right-of-way for the purpose of constructing its tracks and necessary buildings and, when it is invaded or its enjoyment interfered with, confine the company to an action for damages. In this way the operation of railroads might be so much hindered that they would not be able to discharge their public duties, the primary object for which they are chartered.

Id. at 264, 55 S.E. at 265. Therefore, injunctive relief is an appropriate means for preventing servient landowners from creating risks or other interferences on a railroad's right-of-way.

The trial court's permanent injunction preventing defendant from construction or grading work within twenty-five feet of the center line is reasonable. As we have noted, a railroad has the duty, even in the absence of a statute, to keep its crossings safe. *Harris v. Southern Railway Co.*, 100 N.C. App. 373, 378-79, 396 S.E.2d 623, 626 (1990). The close proximity of buildings or grading work to the tracks may obstruct the view of the automobile crossing, making it unsafe and interfering with the railroad's duty to maintain safe crossings.

Similarly, the trial court properly enjoined excavation near the tracks and use of the water pipe beneath the tracks. Excavation and unapproved pipe installation may damage the track bed and create

risks to railroad operation. The injunction, therefore, addresses legitimate risks related to the safe maintenance of the roadbed, and the management of such risks is within the sound business judgment of the railroad. *Manufacturing Co.* at 701, 51 S.E.2d at 306.

Injunctions may be mandatory as well as preventive. The trial court ordered defendant to construct a safety fence to separate the mobile home community from plaintiff's track and to cap the water lines running underneath the railroad bed. Because defendant's actions created foreseeable risks to plaintiff's safe operation of the railroad, these mandatory injunctions were proper to protect the enjoyment of plaintiff's easement. *See Manufacturing Co., supra*; *R.R. v. R.R.*, 237 N.C. 88, 94, 74 S.E.2d 430, 434 (1953) (stating that "[a] mandatory injunction based on sufficient allegations of wrongful invasion of an apparent right may be issued to restore the original situation").

The order from which defendant appeals is affirmed.

AFFIRMED.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. WILLIAM MICHAEL DOWNING, DEFENDANT

No. COA04-928

(Filed 19 April 2005)

Search and Seizure— investigatory stop—drugs—motion to suppress—pat down

The trial court did not err in a trafficking in cocaine by possession and transportation case by denying defendant's motion to suppress evidence obtained from the search of his motor vehicle, because: (1) officers had a reasonable articulable suspicion that defendant was involved in illegal activity at the time they made the investigatory vehicle stop; (2) the police lawfully stopped a vehicle fitting a description given by a reliable confidential informant, lawfully entered and moved the vehicle with defendant's consent, and smelled cocaine upon entering the vehicle; (3) an officer does not need to obtain a warrant or have probable

cause to enter a vehicle if the owner of the vehicle gives consent; (4) a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a public roadway or in a public vehicular area may take place; (5) plain smell of drugs by an officer is evidence to conclude there is probable cause for a search; and (6) although defendant contends the pat down of his person violated his constitutional rights, this argument is irrelevant when neither the pat down nor the evidence of marijuana found on defendant's person factored into the legality of the vehicular stop, entry and movement of the vehicle, and search of the vehicle leading to the cocaine charges.

Appeal by Defendant from judgment entered 18 February 2004 by Judge Cy Anthony Grant, Sr. in Superior Court, Dare County. Heard in the Court of Appeals 22 March 2005.

Attorney General Roy Cooper, by Assistant Attorney General Rudy Renfer, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Terri W. Sharp, for defendant-appellant.

WYNN, Judge.

Under North Carolina law, a search warrant is not required to conduct a lawful search based on probable cause of a motor vehicle in a public roadway or in a public vehicular area. *State v. Isleib*, 319 N.C. 634, 638, 356 S.E.2d 573, 576 (1987). In this case, the record shows that the police lawfully stopped a vehicle fitting a description given by a reliable confidential informant, lawfully entered and moved the vehicle with Defendant's consent, and smelled cocaine upon entering and moving the vehicle. Because we hold that these facts show that probable cause existed to search the vehicle, we affirm the order of the trial court denying Defendant's motion to suppress evidence obtained from the search.

At trial, Defendant pled no contest to the charges of trafficking cocaine by possession and trafficking in cocaine by transporation. This appeal arises from his reservation of the right to appeal from the denial of his motion to suppress evidence obtained by police officers from the search of his vehicle.

The evidence at the motion to suppress hearing tended to show the following: On 1 March 2003, Sergeant Norman Johnson, supervisor of the Dare County narcotics unit, received a phone call from a

confidential informant concerning Defendant William Downing. The confidential informant had previously provided reliable information in three other narcotics-related cases; Sergeant Johnson had spoken with the informant several times before; Sergeant Johnson had corroborated the informant's prior information, and each time it proved accurate; and the confidential informant was not receiving any compensation for this information.

In December 2002, the confidential informant told Sergeant Johnson that Defendant and another man, Jamie, were picking up cocaine from the Petersburg/Richmond, Virginia area and bringing it to Dare County. Investigator Kevin Duprey, a member of the Dare County narcotics unit, had an open narcotics investigation concerning Jamie and his residence on Loblolly Court. On a previous occasion, the informant told Sergeant Johnson that he had seen Defendant bring cocaine and marijuana to Jamie's house on Loblolly Court.

Before 1 March 2003, Sergeant Johnson had observed a white Ford Aerostar van at Defendant's residence in Kill Devil Hills, North Carolina. After running the license plate number, Sergeant Johnson learned the van was registered to Defendant. The informant also gave a physical description of Defendant that matched his photograph from the Department of Motor Vehicles.

On 1 March 2003 at around 4:30 p.m., the informant called Sergeant Johnson and informed him that he had been in the Loblolly Court residence earlier that day and overheard a conversation between Defendant and Jamie. The informant stated that Defendant was leaving for the Petersburg/Richmond, Virginia area at approximately 3:00 p.m. that day to pick up cocaine and would be returning to Dare County at approximately 8:00 p.m. The informant stated that Defendant would be alone, driving a white Ford Aerostar van.

Investigator Duprey drove by Defendant's residence and observed that the white Ford Aerostar van was not parked at the residence. Sergeant Johnson knew the direct route of travel from Peterburg/Richmond to Dare County would be to cross the Currituck Sound using Highway 158. At approximately 6:30 p.m., Sergeant Johnson and Investigator Duprey sat in a vehicle on the side of Highway 158 just as the highway comes off the Currituck Sound Bridge into Dare County. About two hours later, a white Ford Aerostar van passed the officers' location heading south into Dare County on Highway 158. The officers pulled behind the van and confirmed that the license plate number on the van matched that of the

vehicle registered to Defendant. It appeared to the officers that there was only one person in the van.

The officers activated their blue lights, and the van pulled into the main two-lane entrance for a complex of stores. Deputy Ethridge pulled in front of the van, and Investigator Duprey parked behind the van. Defendant, who was alone in the van, produced his driver's license confirming that he was in fact the person they were looking for.

The officers asked Defendant to step out of the vehicle. Defendant said he had just come from Petersburg. Deputy Etheridge patted Defendant down for weapons and found a small amount of marijuana and a pipe in one of his pockets. Investigator Duprey informed Defendant that the officers needed to move the van because it was creating a traffic hazard and for investigative purposes. Defendant told officers that he would move the van. But the officers explained he could not get in the van unless he rode with an officer and told them "where the drugs were[.]" At this point, Defendant was not under arrest or "Mirandized." Defendant was handcuffed for officer safety reasons and Sergeant Johnson moved the van after Defendant consented.

While moving the van, Sergeant Johnson "smelled a strong odor of what smelled like cocaine." Officers then searched the vehicle, although Defendant did not consent, and located a Wendy's restaurant food bag between the driver's seat and front passenger seat. Inside the food bag was a plastic bag containing approximately six ounces of cocaine. The officers then placed Defendant under arrest.

Following the trial court's denial of his Motion to Suppress all evidence seized from the stop of the van, Defendant reserved his right to appeal the ruling and pled no contest to the charges. Defendant was sentenced to two consecutive sentences of thirty-five to forty-two months imprisonment and a $100,000 fine. Defendant appealed the denial of the motion to suppress.

Defendant argues that the trial court erred in denying his motion to suppress because his constitutional rights were violated by the illegal (1) stopping of his vehicle; (2) movement and search of his vehicle; and (3) pat down of his person. We disagree.

"The standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are con-

clusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (citation omitted). If the trial court's conclusions of law are supported by its factual findings, we will not disturb those conclusions on appeal. *State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001).

Where an appellant fails to assign error to the trial court's findings of fact, the findings are "presumed to be correct." *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998). As Defendant failed to assign error to any findings of fact, our review is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment. *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587 591-92, 525 S.E.2d 481, 484 (2000).

Defendant argues that the stop of his vehicle violated his constitutional rights under the Fourth, Fifth, and Sixth Amendments of the United States Constitution and Article I, Section 20 of the North Carolina Constitution. We disagree.

The Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures. These constitutional provisions apply to "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, 70 (1994) (citation omitted). An investigatory stop must be based upon a reasonable articulable suspicion the person is, was, or will be involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); *State v. Thompson*, 296 N.C. 703, 252 S.E.2d 776, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143, 100 S. Ct. 220 (1979). In determining the validity of the stop, the reviewing court must consider the totality of the circumstances known to the officer at the time of the stop, and determine whether a "reasonable and cautious" police officer would have had a reasonable articulable suspicion that criminal activity was afoot. *State v. Jones*, 96 N.C. App. 389, 395, 386 S.E.2d 217, 221 (1989).

Here, officers had a reasonable articulable suspicion that Defendant was involved in illegal activity at the time they made the investigatory vehicle stop. The uncontested findings of fact show: (1) a confidential informant told police that Defendant would be transporting cocaine that day; (2) Defendant was driving a vehicle that matched the description given by the informant; (3) the tag num-

bers on the vehicle matched that of the vehicle registered to Defendant; (4) Defendant was driving on the suspected route for drug transportation; and (5) Defendant crossed into Dare County at the approximate time indicated by the informant. The totality of the circumstances gave police a reasonable articulable suspicion that Defendant was transporting drugs. *Jones*, 96 N.C. App. at 395, 386 S.E.2d at 221. Therefore, the vehicle stop did not violate Defendant's federal or state constitutional rights.

Defendant next argues that the subsequent entry and movement of his vehicle violated his constitutional rights under the Fourth, Fifth, and Sixth Amendments of the United States Constitution and Article I, Section 20 of the North Carolina Constitution. We disagree.

An officer does not need to obtain a warrant or have probable cause to enter a vehicle if the owner of the vehicle gives consent. *State v. Barden*, 356 N.C. 316, 340-41, 572 S.E.2d 108, 125 (2002); *State v. Jones*, 161 N.C. App. 615, 618-19, 589 S.E.2d 374, 376 (2003). The findings of fact explicitly state ". . . [Defendant] gave Sgt. Johnson permission to move the van . . . ." As Defendant did not assign error to this finding of fact, it is presumed correct. *Inspirational Network, Inc.*, 131 N.C. App. at 235, 506 S.E.2d at 758. As consent was given, Defendant's federal and state constitutional rights were not violated when Sergeant Johnson entered and moved the vehicle.

Defendant next argues that the officers searched Defendant's vehicle without a search warrant and without probable cause to search the vehicle in violation of his constitutional rights under the Fourth, Fifth, and Sixth Amendments of the United States Constitution and Article I, Section 20 of the North Carolina Constitution. We disagree.

It is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a public roadway or in a public vehicular area may take place. *United States v. Ross*, 456 U.S. 798, 809, 72 L. Ed. 2d 572, 583-84 (1982); *Isleib*, 319 N.C. at 638, 356 S.E.2d at 576. " 'Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.' " *State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999) (quoting *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984)). "In utilizing an informant's tip, probable cause is deter-

mined using a 'totality-of-the-circumstances' analysis which 'permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip.' " *Earhart*, 134 N.C. App. at 133, 516 S.E.2d at 886 (quoting *Illinois v. Gates*, 462 U.S. 213, 234, 76 L. Ed. 2d 527, 545, *rehearing denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983)).

As stated earlier, the uncontested findings of fact show: (1) a confidential informant told police that Defendant would be transporting cocaine that day; (2) Defendant was driving a vehicle that matched the description given by the informant; (3) the tag numbers on the vehicle matched that of the vehicle registered to Defendant; (4) Defendant was driving on the suspected route for drug transportation; and (5) Defendant crossed into Dare County at the approximate time indicated by the informant. Also, the informant had provided accurate narcotics information to Sergeant Johnson on three prior occasions.

Moreover, upon lawfully entering and moving the vehicle, Sergeant Johnson "smelled a strong odor of what smelled like cocaine." Plain smell of drugs by an officer is evidence to conclude there is probable cause for a search. *State v. Trapper*, 48 N.C. App. 481, 484-85, 269 S.E.2d 680, 682, *appeal dismissed*, 301 N.C. 405, 273 S.E.2d 450 (1980), *cert. denied*, 451 U.S. 997, 68 L. Ed. 2d 856 (1981) (affidavit containing a statement that a strong odor of marijuana was noticed was evidence from which a magistrate could conclude there was probable cause to issue a search warrant).

In sum, the totality of the circumstances of Defendant's vehicle and identity match to the informant's tip along with the odor of cocaine gave the officers probable cause that an offense was being committed. *Earhart*, 134 N.C. App. at 133, 516 S.E.2d at 886. Therefore, the officers did not violate Defendant's federal or state constitutional rights when searching the vehicle. *Isleib*, 319 N.C. at 638, 356 S.E.2d at 576.

Finally, Defendant argues that the pat down of his person violated his constitutional rights under the Fourth, Fifth, and Sixth Amendments of the United States Constitution and Article I, Section 20 of the North Carolina Constitution. Regardless of whether the pat down was illegal, this argument is irrelevant. Neither the pat down nor the evidence of marijuana found on Defendant's person factored in our analysis of the legality of the vehicular stop, entry and movement of the vehicle, and search of the vehicle leading to the cocaine

charges against Defendant. Indeed, the officers found only marijuana on Defendant's person during the pat down search. Defendant was never charged with any drug offense for the possession of marijuana. Therefore, even if the marijuana should have been excluded from evidence, it would have been harmless error for the transportation of cocaine charges.

The trial court's denial of the motion to suppress was proper and we therefore affirm the order of the trial court.

Affirmed.

Judges TYSON and ELMORE concur.

STATE OF NORTH CAROLINA v. DAVID KINNARD STEVENSON, DEFENDANT

No. COA04-288

(Filed 19 April 2005)

Evidence— prior crimes or bad acts—intent, knowledge, or common plan—remoteness

The trial court did not abuse its discretion in a possession with intent to sell cocaine case by allowing evidence of defendant's prior criminal activities under N.C.G.S. § 8C-1, Rule 404(b), because: (1) evidence of other drug violations is often admissible under Rule 404(b); (2) notable similarities and temporal proximity exist between the offense being appealed and the prior incidents when the incidents all occurred on the same premises, the incidents all involved crack cocaine, in each instance an officer approached defendant, and in each instance defendant attempted to flee when approached by police; (3) it is proper to exclude time defendant spent in prison when determining whether prior acts are too remote; (4) the trial court guarded against the possibility of prejudice by instructing the jury to consider the officer's testimony only for the limited purposes of knowledge, intent, and common plan; and (5) although defendant contends the 1996 incident was committed prior to his eighteenth birthday and was thus not admissible under Rule 404(b), defendant failed to raise this issue before the trial court and cannot show that absent admission of the 1996 incident, he would not have been convicted.

Appeal by Defendant from conviction entered 15 October 2003 by Judge Lindsay R. Davis, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 1 March 2005.

Attorney General Roy Cooper, by Assistant Attorney General Sonya M. Allen, for the State.

Gilda C. Rodriguez, for the defendant-appellant.

WYNN, Judge.

Under Evidence Code Rule 404(b), evidence of prior incidents is admissible to show *inter alia*, motive, opportunity, intent, knowledge, and common plan or scheme if the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing act of Evidence Code Rule 403. *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). In this appeal from his convictions on possession of cocaine and being an habitual felon, Defendant David Kinnard Stevenson contends that evidence of prior incidents was not sufficiently similar or proximate to the present offense to show intent, knowledge, or a common plan under Rule 404(b). Because we find that notable similarities and temporal proximity exist between the offense being appealed and the prior incidents, we affirm Defendant's convictions.

The record reflects that, on 12 November 2002, Defendant stood with several other men, including Nathaniel Galloway, on premises of the Winston-Salem Housing Authority. Noticing the men, Winston-Salem police officers patrolling the area in an unmarked vehicle exited their vehicle to speak to the men. But upon seeing the officers approach them, the men ran, leading the officers to chase Defendant and Galloway, with whom they were "very familiar" and who were on a list of persons banned from Winston-Salem Housing Authority property. During the chase, the officers observed Galloway throw something to Defendant. They also observed that Defendant had a plastic bag in his hands, which he ripped open while running. Ultimately, the officers apprehended Defendant and found on his person, a bag of marijuana, a bag with cocaine residue, and $304 in cash. The officers then traced Defendant's path and found a plastic bag and crack cocaine on the ground. The record reflects that Defendant, after having been given his Miranda warning, confessed that the marijuana and plastic bag found on his person were his, but he denied that the materials found on the ground were his.

Defendant was indicted and tried for possession with intent to sell or deliver cocaine and being an habitual felon. At trial, the court held a hearing on a motion *in limine* regarding the admissibility of proposed testimony by Officer Delray Anthony about Defendant's prior criminal activities. The State sought to admit the testimony to show "modus operandi, intent, knowledge of the substance, and probably common plan or scheme[.]" Defense counsel argued that the prior incidents were not sufficiently similar to the offense for which Defendant was being tried, that the prior incidents did not demonstrate sale of cocaine and thus could not show intent to sell, and that, even if the prior incidents were sufficiently similar to be admissible, their probative value was outweighed by their prejudicial effect. The trial court held that the testimony was admissible and gave the jury a limiting instruction that the testimony regarding the prior incidents could be used only to show intent, knowledge, and existence of a common plan involving the crime charged in this case.

On 15 October 2003, a jury found Defendant guilty of possession with intent to sell, and Defendant was sentenced to 120 to 153 months imprisonment. Defendant appeals.

On appeal, Defendant contends that the trial cour erred in admitting testimony by Officer Delray Anthony regarding two incidents of Defendant's prior criminal activities. First, Officer Anthony testified that on 28 August 1996, he saw Defendant on premises of the Winston-Salem Housing Authority; Defendant ran, was chased, and was apprehended; Defendant was found to have approximately thirty rocks of crack cocaine on his person. Second, Officer Anthony testified that on 23 July 1997, he observed Defendant on premises of the Winston-Salem Housing Authority, where he had been banned. When Officer Anthony approached Defendant, Defendant ran and threw something in a trash can; Defendant was apprehended, and in Defendant's path, a bag containing rocks of crack cocaine and a handgun were found.

Defendant argues that the prior incidents were irrelevant and not sufficiently similar to the present offense to show intent, knowledge, or a common plan under North Carolina General Statute section 8C-1, Rule 404(b).

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). Rule 404(b) is one of inclusion, "subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). As long as the prior acts provide "substantial evidence tending to support a reasonable finding *by the jury* that the defendant committed a similar act or crime and its probative value is not limited *solely* to tending to establish the defendant's propensity to commit a crime such as the crime charged," the evidence is admissible under Rule 404(b). *State v Stager*, 329 N.C. 278, 303-04, 406 S.E.2d 876, 890 (1991) (citations omitted). In drug cases, evidence of other drug violations is often admissible under Rule 404(b). *State v. Montford*, 137 N.C. App. 495, 501, 529 S.E.2d 247, 252, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000).

Where evidence of prior conduct is relevant to an issue other than the defendant's propensity to commit the charged offense, "the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *Boyd*, 321 N.C. at 577, 364 S.E.2d at 119; *see also, e.g., State v. Bidgood*, 144 N.C. App. 267, 271, 550 S.E.2d 198, 201 ("The use of evidence under Rule 404(b) is guided by two [further] constraints: similarity and temporal proximity." (quotation omitted)), *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001). The determination of similarity and remoteness is made on a case-by-case basis, and the required degree of similarity is that which results in the jury's "*reasonable* inference" that the defendant committed both the prior and present acts. *Stager*, 329 N.C. at 304, 406 S.E.2d at 891. The similarities need not be "unique and bizarre." *Id.* (quotation omitted). Finally, once a trial court has determined the evidence is admissible under Rule 404(b), the court must still decide whether there exists a danger that unfair prejudice substantially outweighs the probative value of the evidence. N.C. Gen. Stat. § 8C-1, Rule 403 (2003). "That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have

resulted from a reasoned decision." *Bidgood*, 144 N.C. App. at 272, 550 S.E.2d at 202.

Here, notable similarities exist between the offense being appealed and the prior incidents about which Officer Anthony testified. First, the incidents all occurred on premises of the Winston-Salem Housing Authority, from which Defendant was banned. Second, the incidents all involved crack cocaine. Third, in each instance Officer Anthony approached Defendant. Fourth, in each instance Defendant attempted to flee when approached by the police. These similarities allowed the jury to make a "*reasonable* inference" that Defendant committed both the prior and present acts. *Stager*, 329 N.C. at 304, 406 S.E.2d at 891.

With regard to temporal proximity, the 1996 and 1997 incidents took place six and five years, respectively, prior to the offense charged here. The record indicates that Defendant spent part of the time between the 1996 and 1997 incidents and the 2002 incident in prison. "It is proper to exclude time defendant spent in prison when determining whether prior acts are too remote." *State v. Berry*, 143 N.C. App. 187, 198, 546 S.E.2d 145, 154, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 439 (2001); *see also, e.g., State v. Lloyd*, 354 N.C. 76, 91, 552 S.E.2d 596, 610 (2001) (quoting *Berry* in finding it "proper to exclude time defendant spent in prison when determining whether prior acts are too remote[]"). Moreover, remoteness is a less significant factor in determining Rule 404(b) admissibility when the prior acts go to prove something other than a common plan or scheme, such as knowledge or intent. " '[R]emoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility.' " *Lloyd*, 354 N.C. at 91, 552 S.E.2d at 610 (quoting *Stager*, 329 N.C. at 307, 406 S.E.2d at 893). Here, while the 1996 and 1997 incidents were admitted to show a common plan or scheme, for which purpose their remoteness may be problematic, they were also admitted to show intent and knowledge. The 1996 and 1997 incidents were thus not too remote to be admissible.

Defendant also asserts that, even if Officer Anthony's testimony was admissible under Rule 404(b), the evidence should have been excluded under Rule 403 of the North Carolina Rules of Evidence. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2003). The exclusion of evidence

under Rule 403 is a matter generally left to the sound discretion of the trial court, *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986), which we leave undisturbed unless the trial court's ruling "is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision[,]" *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Here, the trial court did not abuse its discretion by admitting evidence of Defendant's prior criminal activities otherwise admissible under Rule 404(b). Rather, the trial court guarded against the possibility of prejudice by instructing the jury to consider Officer Anthony's testimony only for the limited purposes of knowledge, intent, and common plan. *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 75 (2002) (prior misconduct not unduly prejudicial under Rule 403 where trial court gave limiting instruction regarding permissible uses of 404(b) evidence).

Lastly regarding this assignment of error, Defendant contends that, because the 1996 incident was committed prior to Defendant's eighteenth birthday, evidence regarding that incident was not admissible under Rule 404(b). "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make[.]" N.C. R. App. P. 10(b)(1). "Since defendant[] failed to raise this issue before the trial court our review is limited to plain error. The plain error rule only applies in truly exceptional cases. To constitute plain error the appellate court must be convinced that absent the error, the jury probably would have reached a different verdict."[1] *State v. Walker*, 167 N.C. App. 110, 117, 605 S.E.2d 647, 653 (2004) (citing *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (internal citations omitted)); *State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986) (same).

Here, we are not convinced that, absent the admission of the 1996 incident, Defendant would not have been convicted in this case. As stated above, Defendant attempted to flee when approached by the police. Once apprehended, he was found to have a bag of marijuana, a bag with cocaine residue, and a large amount of cash on his person. Moreover, the police testified that they saw Defendant rip open a bag while he was running. The police then found crack cocaine on the ground in Defendant's path. Additionally, Defendant confessed that

1. We note that Defendant specifically argued plain error, in the alternative, in his assignments of error.

the marijuana and plastic bag found on his person were his (though he denied that the materials found on the ground belonged to him).

In sum, we find no prejudicial error regarding the admission of Officer Anthony's testimony and overrule Defendant's assignment of error.

Defendant did not argue his remaining assignments of error. They are therefore deemed abandoned. N.C. R. App. P. 28(b).[2]

For the foregoing reasons, we affirm Defendant's convictions.

Affirmed.

Judges HUDSON and STEELMAN concur.

IN THE MATTER OF: B.D., MINOR CHILD

No. COA03-1599

(Filed 19 April 2005)

Termination of Parental Rights— during appeal of prior adjudication—same evidence

A termination of parental rights was vacated where it occurred during the pendency of the appeal in a previous abuse and neglect adjudication, relied upon the same evidence, and was not based on independent grounds.

Appeal by respondents from judgment entered 20 January 2003 by Judge Patricia Kaufmann Young in Buncombe County District Court. Heard in the Court of Appeals 20 September 2004.

Renae S. Alt, attorney for petitioner-appellee.

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, attorney for respondent-appellant mother.

David A. Perez, attorney for respondent-appellant father.

Judy N. Rudolph, attorney for guardian ad litem appellee.

2. For the reasons set forth in *State v. Jones*, 358 N.C. 473, 476, 598 S.E.2d 125, 126 (2004), we summarily reject Defendant's contention that possession of cocaine is a misdemeanor and should not be counted as a felony to support an habitual felon indictment and conviction.

TIMMONS-GOODSON, Judge.

Respondent mother and respondent father appeal an order of the trial court terminating their parental rights to their adopted son. After deliberate consideration, we vacate the trial court's order.

This Court, in an unpublished opinion, recently decided respondents' appeal from an abuse and neglect adjudication judgment and dispositional order. *In Re Derreberry*, 160 N.C. App. 252, 584 S.E.2d 892 (2003) ("*B.D. I*"). The factual history of petitioner's involvement with the child through entry of the adjudication judgment and dispositional order are fully set forth in our previous opinion, and we incorporate as necessary only those facts germane to the present appeal.

The procedural history of the instant case is as follows: On 8 November 2000, the Buncombe County Department of Social Services ("DSS") filed a juvenile petition and summons alleging that the child, who was then five years old, was physically abused and neglected. Following an adjudication and dispositional hearing on 19 February 2001, the trial court entered an order on 20 March 2001 adjudicating the child neglected and granting custody of the child to DSS. On 19 June 2001, DSS filed a second petition and summons alleging that the child was sexually abused and neglected. Following adjudication and dispositional hearings in September and November 2001, the trial court entered an adjudication judgment and dispositional order on 20 February 2002 wherein the trial court adjudicated the child neglected and sexually abused.

In *B.D. I*, respondents appealed the 20 February 2002 order to this Court, arguing in pertinent part that the trial court's findings of fact were not supported by the evidence. Specifically, respondents challenged petitioner's evidence regarding (1) sightings of respondent father transporting the child to school in his lap on a motorized wheelchair while riding on a busy highway in the dark, (2) reports of sexual abuse, and (3) reports that respondents withdrew the child from school for the purpose of home-schooling him although respondents had few educational materials in their home. The case was to be heard in the Court of Appeals on 23 April 2003.

While *B.D. I* was pending, DSS filed a petition to terminate respondents' parental rights dated 1 November 2002 on grounds of neglect and that respondents willfully left the child in foster care for more than twelve months without showing any reasonable progress to correct the conditions which led to the child's removal from the

home. The trial court conducted the termination of parental rights ("TPR") hearing in February 2003. On 19 May 2003, the trial court entered an order terminating respondents' parental rights. In the adjudicatory portion of the TPR order, the trial court acknowledged that respondents' appeal of the 20 February 2002 adjudication judgment and dispositional order was pending:

> THE COURT FINDS AS FACTS BY CLEAR, COGENT, AND CONVINCING EVIDENCE AS FOLLOWS:
>
> . . . .
>
> 36. That [respondent father] filed timely Notice of Appeal [of the adjudication judgment and dispositional order] on February 27, 2002 and [respondent mother] filed timely Notice of Appeal on March 1, 2002. To date, the appeals are still pending.

Nevertheless, in the dispositional portion of the TPR order, the trial court incorporated by reference the findings of fact contained in the adjudication judgment and dispositional order:

> THE COURT FINDS AS FACT THE FOLLOWING:
>
> 1. That the previous findings of the Court are incorporated as though fully set out herein. In addition to the previous findings set out above the Court makes further findings.

The trial court terminated respondents' parental rights on grounds of neglect, and that respondents willfully left the child in foster care for more than twelve months without showing reasonable progress to correct the conditions that led to the child's removal from the home. Almost four months later, on 2 September 2003, this Court issued a ruling in *B.D. I* which affirmed the trial court's 20 February 2002 adjudication judgment and dispositional order.

Respondents now appeal the trial court's TPR order, raising many issues pertaining to the conduct of the TPR hearing and the findings of fact and conclusions of law contained in the TPR order. However, the dispositive issue on appeal is whether the TPR order was based on grounds independent of those challenged in *B.D. I*, as required by *In Re Stratton*, 159 N.C. App. 461, 583 S.E.2d 323 (2003).

The issue of whether the trial court can enter an order terminating parental rights while an underlying order is pending appeal has been raised before this Court several times since 2003. We have

addressed the issue in many unpublished opinions and in the following published opinions: *In Re Stratton*; *In Re Hopkins*, 163 N.C. App. 38, 592 S.E.2d 22 (2004); *In Re N.B.*, 163 N.C. App. 182, 592 S.E.2d 597 (2004); *In Re J.C.S.*, 164 N.C. App. 96, 595 S.E.2d 155 (2004); and *In Re V.L.B.*, 164 N.C. App. 743, 596 S.E.2d 896 (2004). In *Stratton* and *N.B.*, the trial court entered a TPR order while this Court was reviewing an adjudication order on appeal. In *V.L.B.*, the trial court entered a TPR order while this Court was reviewing a permanency planning order on appeal. In all three cases, the Court of Appeals held that the trial court did not err by entering the TPR order while the underlying order was on appeal, because the grounds upon which the trial court terminated parental rights were independent of those found in the adjudication orders and permanency planning order, respectively. *Stratton*, 159 N.C. App. at 463-64, 583 S.E.2d at 324-25; *N.B.*, 163 N.C. App. at 183-84, 592 S.E.2d at 597-98; *V.L.B.*, 164 N.C. App. at 745-46, 596 S.E.2d at 897-98. According to this line of cases, we have held that the appeal of an underlying order is rendered moot by an intervening TPR order if the trial court finds evidence of independent grounds to terminate parental rights. *Id.*

Such is not the situation before the Court of Appeals this day. In the instant case, unlike *Stratton*, *N.B.* and *V.L.B.*, the termination of parental rights is not based on independent grounds as contemplated by *Stratton*. In the instant case, the trial court terminated respondents' parental rights on grounds supported by the same evidence challenged in *B.D. I*. Specifically, in *B.D. I* the respondents argued that (1) "the trial court erred in admitting evidence of [the child's] statements to social workers, the guardian ad litem, and a nurse practitioner, arguing that this testimony constituted inadmissible hearsay;" (2) "the trial court erred by admitting unreliable expert opinion evidence" in the form of testimony by Dr. Cynthia Brown; and (3) there was no evidence to support the finding of fact regarding the child's inappropriate behavior at school. Although this Court was reviewing the admissibility of the evidence and its sufficiency to support the trial court's findings of fact and resulting abuse and neglect adjudication, the trial court relied on the evidence as a basis for terminating respondents' parental rights. In the TPR order, the trial court stated the following:

> THE COURT FINDS AS FACTS BY CLEAR, COGENT, AND CONVINCING EVIDENCE AS FOLLOWS:
>
> 7. That the Buncombe County Department of Social Services received a Child Protective Services complaint on November

3, 2000. The report alleged that a driver had almost hit a child on Highway 70 in the dark early morning. The child was sitting on the lap of a man who was running his motorized wheelchair on the road, facing traffic, with no reflectors on the chair. . . .

17. That [Social Worker Bob Cummings] and the Guardian ad Litem attempted to assist in the placement of [the child] in school, but [respondent father] yelled that [the child] would "go to public school over my dead body[."] [The child] was enrolled in school in McDowell County for a period of four days, but could not stay because the [respondents] were not residents of McDowell County. Other than that one time, [the child] was never enrolled in school during the time Mr. Cummings was involved in this case. The [respondents] stated that they were home schooling [the child]. Mr. Cummings did see computer games of an educational nature but saw no other evidence that he was being home schooled. The Guardian ad Litem, Ms. Krebbs[,] was told by [respondent father] that [the child] was removed from the school because of her big mouth and that she was never to see [the child] again whether at the school or at their house.

33. That on or about May 30, 2001, the Buncombe County Department of Social Services received a report that [the child] had been sexually abused by both parents. . . .

37. That Naomi Kent, Social Worker, . . . met with [the child] on or about May 29, 2001 at his foster parents home. She interviewed [the child] in his bedroom alone. [The child] talked with her about the [allegations of sexual abuse]. During the interview, [the child] crawled under the bed for approximately ten minutes. Ms. Kent interviewed [the child] at the Boys' Club. During the interview [the child] displayed inappropriate behavior. At one point during the interview, he jumped out of the chair and pulled his pants down exposing his genitals to Ms. Kent.

40. That Beth Osbahr, certified as an expert witness in pediatric nursing trained in sexual abuse involving juveniles performed a [child medical evaluation]. After the examination her diagnostic impression of [the child] was child sex abuse, bruising on his lower legs, and behavioral concerns. The determinative factors she used to formulate her opinion was the historical information she received from the Guardian ad Litem and

Social Worker, what [the child] discussed during the interview, [the child's] behavior during the interview, [the child's] lack of social boundaries that he exhibited during the interview and his medical problems with enuresis and encopresis. There was no physical evidence of sexual abuse.

41. Dr. Cynthia Brown, certified as an expert witness in pediatric medicine, collaborated with Ms. Osbahr in writing the CME report. Dr. Brown noted many characteristics exhibited by [the child] fit those of a child who has been sexually abused. Dr. Brown concurred with Nurse Osbahr's impressions of child sexual abuse and behavioral concerns.

42. [The child] was exhibiting sexualized behavior [] prior to the involvement of the Buncombe County Department. While at W.D. Williams School he was "peeing" on other children and exposing himself. Ms. Krebbs, the Guardian ad Litem had two disturbing incidences with [the child]. On one occasion, [the child] called her into the bathroom and exposed himself to her. On another occasion, while Ms. Krebbs was driving [the child] to an appointment, [the child] had exposed himself to a sixteen-month-old baby whispering "look at me[."] This behavior has continued since [the child] has been in the custody of the Department. At summer camp during the summer of 2001 [the child] was asked not to return because he was urinating on other children, exposing himself and talking to the counselors about "raping" them. That behavior continued in summer camp during 2002, and after school began he was suspended from the bus for exposing himself.

These findings of fact, as well as the trial court's previous findings incorporated by reference in the TPR order, are based on the same evidence that this Court was reviewing in *B.D. I* at the time the TPR was entered. The evidence of neglect challenged in *B.D. I* is the same evidence of neglect presented at the TPR hearing. There was no evidence of an independent basis for a finding of neglect as required by *Stratton*. Thus, we conclude that the trial court erred by terminating respondents' parental rights while the same grounds challenged in *B.D. I* were on appeal.

The trial court also terminated respondents' parental rights on the ground that respondents left the child in foster care for more than twelve months without showing any reasonable progress to correct the conditions leading to removal. In the instant case, the

condition of continued neglect which led to the child's removal from the home was established in part by the evidence challenged in *B.D. I.* Because the evidence which demonstrates that respondents have failed to correct the condition of neglect is inextricably linked to the evidence challenged in *B.D. I*, we conclude that the trial court also erred by terminating respondents' parental rights on the foster care ground.

We recognize that this Court affirmed the adjudication judgment and dispositional order in *B.D. I.* However, based on *Stratton* and its progeny, we are compelled to vacate the underlying TPR order.

VACATED.

Chief Judge MARTIN and Judge HUDSON concur.

MCC OUTDOOR, LLC D/B/A FAIRWAY OUTDOOR ADVERTISING TRIANGLE EAST, PETITIONER APPELLANT v. THE TOWN OF FRANKLINTON BOARD OF COMMISSIONERS, RESPONDENT APPELLEE

No. COA04-444

(Filed 19 April 2005)

Zoning— billboards—special use permit denied—arbitrary and capricious

Two special use permits for billboards were wrongfully denied for failure to be compatible with the neighborhood and failure to conform with state law where petitioner agreed to move the one sign to comply with environmental regulations and neighborhood evidence focusing on whether the other could be seen from certain properties was speculative and irrelevant to compatibility. An applicant producing evidence demonstrating compliance with the ordinance is entitled to the special use permit unless substantial competent evidence is introduced to support denial.

Appeal by petitioner from order entered 18 November 2003 and amended order entered 25 November 2003 by Judge Robert H. Hobgood in Franklin County Superior Court. Heard in the Court of Appeals 31 January 2005.

Waller, Stroud, Stewart & Araneda, LLP, by Betty Strother Waller, for petitioner appellant.

Battle, Winslow, Scott, & Wiley, P.A., by M. Greg Crumpler, for respondent appellee.

McCULLOUGH, Judge.

Petitioner applied for two special use permits to erect billboards for advertising. The Town's Board of Commissioners voted to deny these applications. A court ordered the Board to make findings of fact to support its decision. The Board held a second public hearing and once again denied the requests for the permits. The trial court affirmed this decision and then amended its order rejecting petitioner's claim that the decisions were arbitrary, capricious, and violated its due process rights. Petitioner appealed to this Court. On appeal petitioner asserts that (1) the trial court erred in its conclusion that petitioner was denied due process, (2) the trial court erred in concluding that respondent's decision is supported by adequate findings of fact, and (3) the trial court erred in concluding that respondent's decisions were not arbitrary and capricious.

Petitioners argue that respondent Board denied its special use permit for two off-site advertising signs (billboards) and that the denial was arbitrary, capricious and unsupported by substantial evidence.

The standard of review for both the trial court and this Court was succinctly stated in *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 513 S.E.2d 70 (1999), where the Court stated:

> When reviewing the decision of such a board, 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. Our task, in reviewing a superior court order entered after a review of a board decision is two-fold: (1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review.

Id. at 468, 513 S.E.2d at 73 (citations omitted). As the Board's denial was challenged for being arbitrary, capricious and not based on substantial evidence, the reviewing court conducts a "whole record test" to determine whether the Board's findings are supported by substantial evidence. *Id.*

Substantial evidence has been defined as:

> " 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' It 'must do more than create the suspicion of the existence of the fact to be established. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' "

Refining Co. v. Board of Aldermen, 284 N.C. 458, 470-71, 202 S.E.2d 129, 137 (1974) (citations omitted).

When a Board action is unsupported by competent substantial evidence, such action must be set aside for it is arbitrary. *Id.* at 468, 202 S.E.2d at 135-36. The issue of whether substantial competent evidence is contained in the record is a conclusion of law and reviewable by this Court *de novo*. *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 591, 513 S.E.2d 812, 816 (1999).

Thus, when an applicant produces evidence which demonstrates it has complied with the ordinance, the petitioner is entitled to have the permit issued unless substantial competent evidence is introduced to support its denial. *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 625, 265 S.E.2d 379, 382, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

The Zoning Code for the Town of Franklinton contained the following provision at the time of petitioner's application:

> **§ 154.098 OFF-SITE ADVERTISING SIGNS.**
>
> Off-site advertising signs (billboards) shall be permitted only as a special use in the C-3 and IL districts. The conditions in §§ 154.055 through 154.076 of this chapter are not applicable to off-site advertising signs. A special use permit shall be granted providing the following conditions are met:
>
> (A) The property on which the sign is to be located must be adjacent to an interstate or federal aid primary highway.

(B) The sign must be located within 660 feet of the edge of the right-of-way of such highway.

(C) The sign shall comply with all regulations of the North Carolina Department of Transportation and with the North Carolina General Statutes.

(D) No two such structures shall be place[d] less than 500 feet apart. Distance shall be measured as specified in the North Carolina Administrative Code T19A:02E.0200.

(E) The sign will be compatible with the general neighborhood in which it is located and will not have a detrimental effect on adjoining properties.

(Ord. passed 12-2-88) Penalty, see § 154.999

It is uncontested that the signs in the case *sub judice* complied with provisions (A), (B) and (D), and are in an area zoned to allow billboards. The issue before the Board concerned whether the signs violated subparagraphs (C) and (E).

In support of its decision to deny the permits, the Board, sitting as a quasi-judicial body, *Refining Co.*, 284 N.C. at 469, 202 S.E.2d at 136-37, made the following Findings of Fact at their meeting on 17 September 2002:

Findings of Fact

1. The proposed billboard sign to be placed on property at 4085 US Highway #1, north of Franklinton would be incompatible with the neighborhood because it would be visible from residential areas, specifically 4 different subdivisions enter and exit across the road in both the north and south directions of US #1 at the proposed site.

. . . .

3. The proposed billboard sign to be located at 4085 US #1 Hwy has the great potential to be a safety issue. I have concerns that the sign would detract the attention of drivers away from the highway in front of a business that has a high volume of customers and there being no turn off lane that allows for drivers to slow down before entering the business creates the potential for being an extremely dangerous situation.

4. The proposed billboard sign to be located at 4085 US #1 Hwy is incompatible with the surrounding neighborhood because it is across the street from a church and adjacent to a Head Start DayCare Center and directly south from the new Usher Associations National Headquarters. There is no way of regulating objectionable material from being placed as advertisements on these boards. This sign would be in an area predominantly surrounded by residential single family dwellings and places of learning and worship.

5. The citizens of Franklinton have participated in the special use process and have expressed opposition to the proposed permit.

6. The maintenance of existing Fairway Advertising Signs along the US #1 Corridor is of an inferior quality and is not in keeping with the standards set by the Code of Ordinances which we strive to enforce.

7. There are concerns regarding the sign that is proposed on the property located at 2845 US #1 South. The major concern is that the sign will conflict with the rules established and governed by the Environmental Management Commission of the State of North Carolina. That rule[] states that if there is a stream within 50 feet on the map, there can be no new impervious area introduced into that area without a major variance or a minor variance, depending on which zone, from the state. According to the drawings submitted the pole would be located less than 50 feet from a stream. This is a violation of the law.

8. The proposed sign to be located at 2845 US #1 South raises several safety concerns. The sign would detract driver's attention from the highway and increase the chance of a possible accident in front [of] Steven Hayes' business. There is no turning lane into these establishments. Also, the intersection located directly south of the proposed site is an area of great concern as well. The angle in which traffic has to turn when coming from US #1A and crossing over this intersection places individuals in close proximity to oncoming traffic. Any interference would certainly increase the chance of an accident.

As can be seen from the Findings of Fact, many of the findings have nothing to do with subparagraphs (C) and (E) of the Town Ordinance and cannot be relied on to support the Board's decision.

For example, Finding of Fact No. 6 deals with maintenance of other signs located elsewhere. The Town has an ordinance that addresses this issue in a section which deals with General Sign Regulations and requires any sign permitted within the Town of Franklinton to be maintained in good repair. Town Ordinance § 154.896(E). Likewise, distracting signs are prohibited by § 154-097 and would not be approved by the North Carolina Department of Transportation.

The Board denied petitioner a special use permit to erect a billboard at 4085 US #1, finding that the sign would be "incompatible with the surrounding neighborhood" (Findings of Fact Nos. 1 and 4) and thus a violation of subparagraph (E). The inclusion of a use as a conditional use in a particular zoning district establishes a *prima facie* case that the permitted use is in harmony with the general zoning plan. *Humane Soc'y of Moore Cty., Inc. v. Town of Southern Pines*, 161 N.C. App. 625, 630, 589 S.E.2d 162, 166 (2003); *Vulcan Materials Co. v. Guilford County Bd. of Comrs.*, 115 N.C. App. 319, 324, 444 S.E.2d 639, 643, *disc. review denied*, 337 N.C. 807, 449 S.E.2d 758 (1994). Competent evidence is required to prove that the permitted use is not in harmony with the surrounding area. *Id.*

A review of the evidence presented[1] shows that the witnesses and the Board focused on whether the proposed billboards would be visible from certain properties. None of the witnesses testified as to how a billboard is incompatible with the business located in the zone and on whose property the sign would be located. The uncontradicted testimony, which included photographic evidence, showed several businesses in this commercially zoned area. The photographs showed the businesses each had signs located on their property identifying the business. An active rail line also ran parallel to U.S. #1, which is a four-lane divided highway in the area under consideration.

Testimony that a billboard could be seen from a particular location is simply irrelevant as to whether or not the billboard is incompatible with the neighborhood. Anyone who could see the billboard could also see the commercial businesses (which had signage) as well. The Board just assumed the billboard was incompatible with the neighborhood when in actuality the presumption is that the permitted use is compatible with the zoning scheme. *Humane Soc'y*, 161 N.C. App. at 632, 589 S.E.2d at 167. Thus the evidence failed to overcome

1. All of the evidence appears to be by unsworn statements; however, a party waives any objection to the receipt of such evidence by participating in the hearing. *Craver v. Board of Adjustment*, 267 N.C. 40, 147 S.E.2d 599 (1966).

the presumption and the permit should have been issued as the record does not contain substantial evidence that the proposed billboard is incompatible with the surrounding areas. The evidence was merely an unsubstantiated opinion which is incompetent.[2] *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 533 S.E.2d 525 (speculative assertions or expressions of opinion are insufficient to support the findings of a quasi-judicial body), *disc. review denied, cert. denied*, 353 N.C. 280, 546 S.E.2d 397 (2000). The Board then denied a permit for a billboard proposed for 2845 U.S. #1 on the basis that the billboard as situated would be too close to a stream in violation of N.C. Environmental Management Commission rules. (Finding of Fact No. 7).

Pursuant to Town Ordinance § 154.098(C), billboards must comply with all state laws. During the hearing, petitioner agreed to re-site the billboard a distance of some 7 feet in order to comply with the EMC regulation at issue.

Instead of denying the permit, the Town should have issued the permit subject to a condition that the billboard comply with EMC rules and its location be approved by that agency.

This Court has regularly upheld conditions attached to the issuance of special use permits such as in the case at bar. *See Clark v. City of Asheboro*, 136 N.C. App. 114, 524 S.E.2d 46 (1999).

To summarize, the Town Board, when acting in a quasi-judicial mode, must accord a petitioner due process which includes making decisions which are not arbitrary and capricious but which are supported by substantial competent evidence. Speculative assertions and mere opinion evidence do not constitute competent evidence.

In the case *sub judice* the petitioner produced evidence of its *prima facie* entitlement to the issuance of a special use permit for both billboards. Neither petition was properly denied as the record does not contain competent evidence that the billboard at 4085 US #1 is incompatible with the surrounding neighborhood. The second petition was improperly denied when the petitioner agreed to relocate the billboard to comply with EMC rules regarding stream protection which could have been attached as a condition.

Accordingly, the Town of Franklinton is directed to issue the permits and the ruling of the trial court is

2. The *Vulcan Materials* case contains a good example of the type of evidence required to demonstrate that a proposed use is incompatible with the neighborhood.

Reversed.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. EBERARDO LOPEZ, DEFENDANT, AND AEGIS SECURITY INSURANCE COMPANY, SURETY

No. COA04-565

(Filed 19 April 2005)

1. **Bail and Pretrial Release— bond forfeiture—sufficiency of notice**

The trial court did not abuse its discretion by denying the surety's motion to vacate the judgment on 2 December 2003 regarding a bond forfeiture based on alleged insufficient notice, because: (1) N.C.G.S. § 15A-544.4 provides that notice is effective when mailed as long as the other requirements are met, and appellee introduced the bond forfeiture notice with the certificate of mailing showing it was mailed within the required time period and to the correct parties and addresses; (2) official actions by public officers in North Carolina are accorded the presumption of regularity, including the actions of clerks of court; and (3) although the surety introduced evidence that it did not receive notice, this did not compel the court to decide in favor of the surety, but merely created a factual issue for the court to resolve.

2. **Appeal and Error— preservation of issues—failure to argue—failure to cite authority**

Although the surety contends the trial court erred in a bond forfeiture case when it failed to make a factual finding regarding whether the program administrator for the surety received notice of the bond forfeiture, this argument is deemed abandoned, because: (1) the surety cites no cases in support of this argument; and (2) in this portion of the brief, the surety does not argue the point made in the assignment of error, but instead again argues that there was inadequate notice and a denial of due process.

Appeal by the Surety from Order entered 5 January 2004 by Judge Kenneth C. Titus in Alamance County Superior Court. Heard in the Court of Appeals 12 January 2005.

Ridge & Holley, by David K. Holley, for appellee Alamance-Burlington Board of Education.

Andresen & Vann, by Kenneth P. Andresen and Christopher M. Vann, for the surety appellant.

HUDSON, Judge.

After Surety/Appellant ("the Surety") posted a $500,000 secured bond for defendant Lopez for his arrest on drug offenses in June 2002, Lopez failed to appear for his court date on 17 December 2002. The superior court entered a bond forfeiture notice to the Surety and the State subsequently dismissed the charges against defendant, with leave, because it believed defendant could not be readily found. Because defendant was not produced for the court nor surrendered by the Surety, and the Surety did not move to set aside the forfeiture within the time allowed by law, the forfeiture became a judgment against the Surety on 9 June 2003. The Surety filed a motion to vacate the judgment on 2 December 2003, which the trial court denied on 5 January 2004 after an evidentiary hearing. The Surety appealed. For the reasons discussed below, we affirm.

The Surety moved to vacate on the grounds that it did not receive notice of bond forfeiture. At the hearing, Ms. Kelly Fitzpatrick, an assistant risk manager with Capital Bonding (the program administrator for the Surety), testified that her company never received notice regarding bond forfeiture for defendant Lopez. Ms. Fitzpatrick testified that her department receives all forfeiture notices for Capital Bonding, that she opens all of this mail, and then enters forfeiture notices into the company's computer system, changing defendants' status in the system from "active" to "forfeiture." She also stated that Capital Bonding maintains two files for each defendant, a risk management and an agent file, and a copy of the forfeiture notice is placed in each.

Here, after the Department of Insurance informed Ms. Fitzpatrick that the bond forfeiture for Lopez had become a final judgment, ripe for collection, she checked Lopez's status in the computer system and saw it had not been changed from "active" to "forfeiture." She then checked the risk management and agent files and found no notice of forfeiture in either of them. When presented with the bond forfeiture notice from Lopez's court file, Ms. Fitzpatrick testified that she had not seen it before. She also stated that Capital Bonding had not lost a forfeiture notice during her four-and-a-half-year tenure with them.

At the hearing, an attorney for the Alamance County Board of Education ("Board") appeared, insofar as the Board is the ultimate recipient of the forfeited bond, per N.C. Gen. Stat. § 115C-457.2 (2003). The Board presented no evidence other than the forfeiture notice in the court file. The forfeiture notice includes a "Certificate of Service" section at the end of the form, which was completed by Debbie Harrison of the Alamance County Clerk of Superior Court's Office. Ms. Harrison's name appears in the signature box following the statement: "I certify that on this date I gave notice of the above Forfeiture to the defendant and each surety named above by mailing a copy of this Notice by first class mail, to each person at the address of record shown above." Next to Ms. Harrison's name, 10 January 2003 appears as the "Date Notice Given."

[1] The Surety first contends that the trial court erred in denying its motion to vacate because there was no evidence that Capital Bonding received the notice of forfeiture as required by statute. A trial court may set aside a judgment of forfeiture if "[t]he person seeking relief was not given notice as provided in G.S. 15A-544.4," or if "[o]ther extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief." N.C. Gen Stat. § 15A-544.8 (b) (2003). Here, the Surety argues that because it presented evidence that it did not receive notice, it was entitled to relief per N.C. Gen Stat. § 15A-544.8 (b). We disagree.

N.C. Gen Stat. § 15A-544.4 (2003) defines how notice of forfeiture must be given:

> (a) The court shall give notice of the entry of forfeiture by mailing a copy of the forfeiture to the defendant and to each surety whose name appears on the bail bond.
>
> (b) The notice shall be sent by first-class mail to the defendant and to each surety named on the bond at the surety's address of record.
>
> . . . .
>
> (d) Notice given under this section is effective when the notice is mailed.
>
> (e) Notice under this section shall be mailed not later than the thirtieth day after the date on which the forfeiture is entered . . .

Idi. (emphasis added). The Surety argues that here there was clear, uncontradicted evidence that Capital Bonding did not receive notice.

However, this argument ignores the plain language of the statute, which says that notice is effective when mailed, as long as the other requirements are met. At the hearing, appellee introduced the bond forfeiture notice, with the certificate of mailing showing it was mailed within the required time period and to the correct parties and addresses.

Official actions by public officers in North Carolina are accorded the presumption of regularity, including the actions of clerks of court. *Town of Winton v. Scott*, 80 N.C. App. 409, 415, 342 S.E.2d 560, 564 (1986); *Henderson County v. Osteen*, 297 N.C. 113, 118, 254 S.E.2d 160, 163 (1979). However, the presumption of regularity of official acts is rebuttable. *Id.* "Evidence of nonreceipt of the letter by the addressee . . . is *some evidence* that the letter was not mailed and raises a question of fact for the trier of fact." *Wilson v. Claude J. Welch Builders Corp.*, 115 N.C. App. 384, 386, 444 S.E.2d 628, 629 (1994) (internal citation omitted, emphasis added). Although the Surety put on evidence that it did not receive notice, this did not compel a finding in favor of the Surety, but rather, was "some evidence" which created an issue of fact for the court. As the trier of fact, the court weighs the evidence and finds the facts, and its order is conclusive on appeal if there is any evidence to support it. *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 218-19 (1983). We conclude that the certificate of service offered was sufficient evidence here to support the court's order.

The Surety cites cases from other jurisdictions for the proposition that the State bears the burden of proving compliance with the forfeiture statutes. However, our Supreme Court has held that because of the presumption of regularity, the party attacking the validity of notice bears the burden of proof. *See Henderson*, 297 N.C. at 118, 254 S.E.2d at 163. Again, although the Surety introduced evidence that it did not receive notice, this did not compel the court to decide in favor of the Surety, but merely created a factual issue for the court to resolve.

Furthermore, whether to grant relief pursuant to N.C. Gen. Stat. § 15A-544.8 is entirely within the discretion of the court:

> (b) The court may grant the defendant or any surety named in the judgment relief from the judgment, for the following reasons, and none other:
>
> (1) The person seeking relief was not given notice as provided in G.S. 15A-544.4.

(2) Other extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief.

Id. (emphasis added). This Court has held that this language, which also appeared in the predecessor statute (N.C. Gen. Stat. § 15A-544 (e) and (h)), requires that we review such decisions for abuse of discretion. *State v. Horne*, 68 N.C. App. 480, 483, 315 S.E.2d 321, 323 (1984). We conclude that the trial court here did not abuse its discretion in deciding not to grant relief to the Surety.

[2] In its final assignment of error, the Surety contends that the trial court erred when it failed to make a factual finding regarding whether Capital Bonding received notice of the bond forfeiture and requests that we remand the matter for a factual finding. The Surety cites no cases in support of this argument and, in this portion of its brief, does not argue the point made in this assignment of error, but instead again argues that there was inadequate notice, and that this was a denial of due process. "Issues raised in defendant's brief, but not supported by argument or authority, are deemed abandoned." *Pharmaresearch Corp. v. Mash*, 163 N.C. App. 419, 428, 594 S.E.2d 148, 154 (2003) (citing N.C.R. App. P. 28(b)(6)). Thus, the Surety's argument here is deemed abandoned.

Affirmed.

Judges TIMMONS-GOODSON and STEELMAN concur.

BEACHCOMBER PROPERTIES, L.L.C., PLAINTIFF v. STATION ONE, INC., MILTON M. FAULK, AND WIFE, ANGELA P. FAULK, RICHARD F. CODY AND WIFE, JANET B. CODY, DEFENDANTS

No. COA03-1443

(Filed 19 April 2005)

Declaratory Judgments; Housing— standing—conversion of condo to time share—no existing purchase contract or ownership

The trial court properly granted defendant-Station One's motion to dismiss for failure to state a claim upon which relief may be granted where plaintiff had entered into a contract to purchase a Station One condo, with the intent to convert the

property to a timeshare; Station One amended its Homeowner's Declaration to prohibit time share ownership; the contract to purchase the condo was terminated; and plaintiff subsequently filed this complaint seeking a declaratory judgment. At the time this complaint was filed, plaintiff was neither a property owner nor a party to a contract to purchase, had no legally protected interest, and lacked standing.

Appeal by plaintiff from an order filed 22 August 2003 by Judge Russell J. Lanier in New Hanover County Superior Court. Heard in the Court of Appeals 16 June 2004.

Shipman & Associates, L.L.P., by Gary K. Shipman and William G. Wright for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffrey H. Blackwell and Shelley W. Coleman, for defendant-appellee Station One, Inc.

BRYANT, Judge.

Beachcomber Properties, L.L.C. (plaintiff) appeals from an order filed 22 August 2003 granting a motion to dismiss in favor of Station One Homeowners Association (Station One, defendant[1]).

Plaintiff filed an action for declaratory judgment and damages for tortious interference with contractual relations, arising out of Station One's adoption of an "Amendment to the Declaration of the Home Owners Association" (amendment). The amendment prohibits the transfer of "any or all of [an] interest in a Unit in the form of a Time Share or permit [a] Unit to be a part of a Time Share Program." Plaintiff contends that Station One unlawfully imposed a restraint on alienation and transfer of real property and therefore, the amendment should be void and unenforceable.

Defendants Richard F. Cody and wife Janet B. Cody (defendant Codys) are residents of Frederick County, Maryland who own Station One Condominium Unit 8-J, located in the Town of Wrightsville Beach, New Hanover County, North Carolina (the property). Station One is a North Carolina non-profit corporation, operating as the homeowners association of the property owners of Station One

1. In addition to Station One, Milton M. and Angela P. Faulk, and Richard F. and Janet B. Cody were named defendants in plaintiff's 30 July 2003 Amended Declaratory Judgment Complaint.

Condominium and Town Home Complex (the Complex) located at Wrightsville Beach.

On 26 December 2002, the Codys entered into an offer to purchase and contract with plaintiff to sell the property. On 21 January 2003, plaintiff informed Station One it intended to purchase the property and offer the same for sale to multiple parties, and thus convert the property to a timeshare. Plaintiff also informed Station One that it had prospective purchasers who were willing and able to purchase timeshares once the Cody sale was completed.

Thereafter, Station One through its general manager, circulated a letter dated 21 January 2003 to its members advising the owners of properties of the following:

> A matter has arisen which is of great urgency to Station One. The Board has received information that a unit, the sale of which is pending, is to be converted to a time-share. The Board is concerned that this may be a first move towards the conversion of additional units to time-shares as well, which could adversely affect the value of your unit. Conversion of Station One units to time-shares could create real problems with the management and quality of your property.
>
> The Board has adopted a proposed amendment to the Declaration of Condominium for the purpose of preventing Station One units from being converted to time-share units. To amend the Declaration requires a vote of at least 2/3 of the total vote that may be cast, either by proxy or in person. A special meeting has been called specifically to vote on adopting the amendment. The meeting will be held Saturday, February 8, 2003 at 4:00 in the Social Room.
>
> Please complete and return the attached proxy, either by fax . . . or by mail in the enclosed stamped envelope, immediately. Time is of the essence. You should return the proxy even if you plan to attend the meeting. . . .

On 8 February 2003, Station One held its meeting of homeowners with knowledge of the contract between plaintiff and defendant Codys. The Station One homeowners voted to amend the Declaration to prohibit any unit holder from transferring "any or all of his or her interest in a Unit in the form of a Time Share or permit his or her Unit to be a part of a Time Share Program." Station One recorded the

amendment to the Declaration at the New Hanover County Register of Deeds on or about 10 February 2003.

On 14 February 2003, the contract between the Codys and the plaintiff was terminated due to prohibited use of the property as a timeshare unit. Plaintiff contends it intended to fulfill its contractual obligations with the Codys, but for the acts of Station One. Further, plaintiff contends it would have purchased or would have been actively seeking to purchase other condominiums within the complex to convert them into timeshares, but for the actions of Station One.

On 20 March 2003, plaintiff filed a complaint against Station One and the Faulks. On 27 May 2003, Station One responded by filing a motion to dismiss. On 30 July 2003, plaintiff amended its complaint by adding the Codys as defendants to the action. On 6 August and 18 August 2003, plaintiffs took a voluntary dismissal without prejudice as to the Faulks and Codys, respectively.

On 22 August 2003 the trial court entered an order granting Station One's motion to dismiss. Plaintiff appealed.

The sole issue we address is whether plaintiff had standing to bring an action for declaratory judgment against Station One.

"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." *Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) (quoting *Am. Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 574 S.E.2d 55, 57 (2002)). A party seeking standing has the burden of proving three necessary elements:

> (1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002), *review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 364 (1992)). Here, plaintiff has the burden of proving standing exists. *Am. Woodland Indus., Inc.*, 155 N.C. App. at 627, 574 S.E.2d at 57. A party has standing to initiate a lawsuit if he

is a real party in interest. *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (citations omitted). A real party in interest is one who benefits from or is harmed by the outcome of the case and by substantive law has the legal right to enforce the claim in question. *Id.*

In the present case, plaintiff has no legally protected interest, or "injury in fact," and therefore lacks standing to bring this declaratory action against defendant. On 20 March 2003, at the filing of this complaint, plaintiff was neither a party to a contract to purchase the Codys' condominium, nor the property owner. "Absent an enforceable contract right, an action for declaratory relief to construe or apply a contract will not lie." *Terrell v. Lawyers Mut. Liab. Ins. Co.*, 131 N.C. App. 655, 661, 507 S.E.2d 923, 926 (1998) (citations omitted). Plaintiff had no legally protected right to challenge the amendment which prevented units within Station One's complex from being converted into timeshares. Although plaintiff had entered into an offer to purchase contract for the Codys' condominium, intending to convert the unit into a timeshare, the record indicates the contract was terminated on 14 February 2003. Thereafter, on 20 March 2003, plaintiff commenced this action. Perhaps the Codys, who at all times owned the condominium, had standing to bring a declaratory action against Station One. However, plaintiffs, as potential purchasers, did not have standing.

N.C. Gen. Stat. § 47A-28(b) provides "[a]ll agreements, decisions and determinations lawfully made by the association of [condominium] unit owners in accordance with the voting percentages established in the Article, declaration or bylaws, shall be deemed to be binding on all unit owners." N.C.G.S. § 47A-28(b) (2003).

> The rights and duties of condominium unit owners under Chapter 47A of the North Carolina General Statutes are not the same as those of real property owners at common law. Recognizing the interest that all unit owners have in the operation of their mutually owned enterprise, the Chapter permits restrictions to be imposed by the declaration or recorded instrument which submits the property to the provisions of the Chapter and permits the unit owners to amend the declaration by following the procedures prescribed and makes the rules so adopted binding upon all owners involved.

McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 629, 386 S.E.2d 435, 436 (1989), *aff'd per curiam*, 328 N.C. 84, 399 S.E.2d

112 (1991). Furthermore, a duly adopted declaration amendment in a condominium complex is binding upon owners who bought their units before the amendment was adopted. *Id.* Therefore, despite plaintiff's argument to the contrary, without a legally protected interest in the property, plaintiff cannot achieve the relief it now seeks. Consequently, plaintiff has failed to satisfy its burden of showing it had standing to bring an action against Station One for the amendment prohibiting timeshare units on the property. The trial court properly granted Station One's motion to dismiss for failure to state a claim upon which relief may be granted.

Affirmed.

Judges McCULLOUGH and STEELMAN concur.

CRABTREE AVENUE INVESTMENT GROUP, LLC, PLAINTIFF v. STEAK AND ALE OF NORTH CAROLINA, INC., DEFENDANT

No. COA04-786

(Filed 19 April 2005)

Landlord and Tenant— breach of lease—ejectment—notice—default

The trial court did not err in a breach of lease and ejectment action by granting summary judgment in favor of plaintiff landlord, because: (1) the lease in the instant case did not require any notice of termination; (2) the only written notice required prior to lease termination was the 10-day advance notice of rent nonpayment, and plaintiff had no subsequent obligation to declare in writing that the lease was in default prior to effecting termination; and (3) defendant's alleged inability to tender payment without having record of a Form W-9 signed by plaintiff was in fact due to an internal company policy which was not an event beyond defendant's control.

Appeal by defendant from an order entered 9 March 2004 by Judge Shelley H. Desvousges in Wake County District Court. Heard in the Court of Appeals 12 January 2005.

Hutson Hughes & Powell, P.A., by James H. Hughes and James S. Staton, for defendant-appellant.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellee.

ELMORE, Judge.

Steak and Ale of North Carolina, Inc. (defendant) appeals an order of summary judgment entered in favor of Crabtree Avenue Investment Group, LLC (plaintiff). We affirm.

Defendant owns and operates a restaurant located at 4420 Creedmoor Road in Raleigh. Defendant has been in possession of the property since the execution of a commercial lease with the landlord in December 1977, and plaintiff is a successor-in-interest to this lease.

Prior to plaintiff's acquisition of the property, defendant paid its September 2003 monthly rent. The previous landlord, David E. Rodger, sold the property to plaintiff on 15 September 2003. On this same day, Mr. Rodger mailed a letter to defendant informing it that he had conveyed the property to plaintiff. The letter requested that defendant send future rent checks to plaintiff's address at "8410 Falls of the Neuse Road, Suite C, Raleigh, NC 27615." This letter did not contain a contact telephone or fax number for plaintiff.

On 19 September 2003, defendant mailed two letters to plaintiff at the address stated in Mr. Rodger's letter. In this correspondence, defendant requested that plaintiff fill out an attached IRS Form W-9 and provide a copy of the document transferring the interest in the property to plaintiff. Both letters were returned to defendant unopened, with a notation of "F.O.E." (forwarding order expired) on the envelope. Defendant did not pay October 2003 rent to either Mr. Rodger or plaintiff.

On 30 October 2003, plaintiff mailed a letter via certified mail, return receipt requested, to defendant. In this letter, plaintiff stated that October rent had not been received; that November rent was currently due; and that pursuant to the lease agreement, rents are due on the first of the month. The letter provided a contact phone and fax number and specified plaintiff's address as "8410 Falls of Neuse Road—Suite C, Raleigh, NC 27615." Defendant received this letter on 4 November 2003.

On 5 November 2003, defendant transmitted by fax a request for a signed Form W-9 and a copy of the deed transferring title of the

property to plaintiff. Defendant stated that it needed this information in order to process the payments due.[1] Plaintiff responded to defendant's fax request in a letter dated 7 November 2003 and attached a copy of the deed granting title to plaintiff and a completed Form W-9. When defendant failed to pay rent by 17 November 2003, more than 10 days after notice of non-receipt, plaintiff terminated the lease on this day via a letter from its legal counsel.

On 26 November 2003, defendant tendered rental payments for the months of October, November, and December. Plaintiff returned these checks to defendant and filed a complaint in summary ejectment in the district court of Wake County on 4 December 2003. In the complaint, plaintiff alleged the breach of defendant as, "Failure to pay rent after demand within ten days. Lease terminated on November 17, 2003." The district court entered judgment for plaintiff in the amount of $7,235.01, the amount of rent due for the months of October, November, and December. Defendant filed notice of appeal from this judgment and order of ejectment, and plaintiff filed a motion for summary judgment with respect to defendant's appeal. The district court heard the summary judgment motion on 20 February 2004, and the court issued an order granting the motion on 5 March 2004.

Summary judgment is appropriate 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 judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2004). In reviewing the grant of a motion for summary judgment, this Court must review the evidence in the light most favorable to the non-moving party. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

Defendant challenges the summary judgment order on the basis that the notice of default was insufficient for termination of the parties' lease. After reviewing the lease terms and the substance of plaintiff's notice to defendant, we cannot agree.

The leasing contract between defendant and plaintiff provides that "[u]pon the occurrence of any Event of Default, Landlord shall

1. Defendant did not assert, nor does it argue on appeal, that the W-9 taxpayer identification information was legally required prior to defendant's tender of rent monies. Defendant is not required to report plaintiff's taxpayer information prior to making payments, but must report the rent payments made to plaintiff and plaintiff's Taxpayer Identification Number when it files an information return for that taxable year. *See* 26 U.S.C. § 6041 (2004).

have the option to pursue any one or more of the following remedies *without any notice or demand whatsoever . . .*" (emphasis added). The remedies include, *inter alia*, termination of the lease agreement. One of the events listed as an "Event of Default" is the tenant's failure to pay rent past due within 10 days of written notice from the landlord. The contract specifies that the notice is deemed to be delivered "when deposited in the United States mail, postage prepaid, certified or registered, return receipt requested[.]" In the 30 October letter, sent by certified mail with return receipt requested, plaintiff informed defendant that October rent was past due and that rents are due on the first of the month and must be paid within 10 days of notice of non-receipt.

In support of its argument that plaintiff's 30 October letter failed to provide adequate notice of default, defendant relies upon *ARE-100/800/801 Capitola, LLC v. Triangle Labs, Inc.*, 144 N.C. App. 212, 550 S.E.2d 31 (2001). However, that case is distinguishable on its facts. There, the parties' lease contract provided that an event of default included the tenant's failure to pay rent within three business days of receiving notice that rent was past due. *Id.* at 214, 550 S.E.2d at 33. Upon the occurrence of an event of default, the landlord could exercise one of the following options under the contract: re-entering the property, terminating the lease, or terminating the tenant's possession of the property. Notably, the lease agreement required that the landlord give written notice of which remedy it was pursuing prior to taking the action. However, plaintiff-landlord's written notice to defendant-tenant following default did not specify *which* remedy plaintiff was pursuing. Instead, plaintiff merely stated that it would be initiating "curative remedies under the Lease and the law." *Id.* at 215, 550 S.E.2d at 33. This Court held that the notice of lease termination was insufficient under the contract because plaintiff failed to indicate which of the three options it had chosen to exercise. The Court emphasized that written notification of the termination of a lease must be given "in strict compliance with the [leasing] contract as to both time and contents." *Id.* at 219, 550 S.E.2d at 35 (quoting *Stanley v. Harvey*, 90 N.C. App. 535, 539, 369 S.E.2d 382, 385 (1988)).

In contrast, the lease in the instant case did not require *any* notice of termination. Rather, plaintiff could effectively terminate the lease *without notice* following defendant's failure to pay rent within 10 days of written demand for rent past due. Thus, the only written notice required prior to lease termination was the 10-day advance notice of rent non-payment. Plaintiff has no subsequent obligation to declare in writing that the lease is in default prior to effecting termi-

nation. Therefore, this Court's analysis in *Capitola* of the specificity of a termination notice is inapplicable here.

Defendant also asks this Court to consider that it did not have plaintiff's W-9 tax documentation prior to the time when October and November rents became due. Defendant points to the "force majeure" provision in the parties' lease, which allows an extension of time for performance by the tenant when the tenant's ability to perform its obligations under the lease are delayed due to a cause beyond the tenant's control. Defendant contends that the delay in receiving the W-9 information from plaintiff constituted an event beyond defendant's control which resulted in its inability to make timely rent payments in accordance with the contract.

Our review of the record establishes that defendant's alleged inability to tender payment without having record of a Form W-9 signed by plaintiff is in fact due to an internal company policy. An internal accounting policy of defendant mandating receipt of this information prior to releasing the rent monies is not an event beyond defendant's control.

As there is no genuine issue of material fact and plaintiff is entitled to judgment as a matter of law, we affirm the court's order granting summary judgment to plaintiff.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

STATE OF NORTH CAROLINA *EX REL.* CITY OF SALISBURY, AN INCORPORATED MUNICIPALITY, PLAINTIFF v. FRED M. CAMPBELL AND WIFE, CRISTITA P. CAMPBELL, DEFENDANTS

No. COA04-904

(Filed 19 April 2005)

1. Nuisance— leasing house for drug sales—evidence not sufficient

Plaintiff did not establish a nuisance under N.C.G.S. § § 19-1(a) and 19-1.2 at a rental house owned by defendants where the evidence showed some drug activity, but did not establish that the

purpose of leasing the property was to conduct illegal drug sales in the regular course of business.

2. Nuisance— ongoing breaches of peace—rental house—evidence not sufficient

Plaintiff did not establish a nuisance for ongoing breaches of the peace under N.C.G.S. § 19-1(b) at a rental house owned by defendants where some of the trips to the house by officers involved service of misdemeanor warrants, with no evidence of a threat to citizens or disturbance of the public order; some were in response to domestic disturbances, with no evidence of an assault or other unlawful activity breaching the peace; and the three instances which were breaches of the peace occurred over two and a half years and did not meet the statutory standard of repeated acts.

Appeal by plaintiff from order entered 6 April 2004 by Judge Christopher M. Collier in Rowan County Superior Court. Heard in the Court of Appeals 8 March 2005.

Woodson, Sayers, Lawther, Short, Parrott & Walker, LLP, by Sean C. Walker, for plaintiff-appellant.

No brief for defendant-appellees.

ELMORE, Judge.

On 25 March 2003, the City of Salisbury (plaintiff) commenced a nuisance abatement action against Fred M. Campbell (defendant) and his wife, Cristita P. Campbell (Cristita).[1] In its complaint, plaintiff alleged that defendants rented property in Salisbury that constituted a nuisance. Plaintiff sought a permanent injunction and order of abatement barring defendants and their tenants from continuing the nuisance. The Rowan County Superior Court heard evidence concerning the request for abatement on 16 March 2004. After both parties presented their cases, the court ruled in favor of defendant. The court subsequently filed an order on 6 April 2004 denying plaintiff's request for abatement.

The property at issue in this case is a duplex rental house located on Main Street in Salisbury, North Carolina. Plaintiff argues that the property was a nuisance because of drug trafficking activities and

1. A clerk of Rowan County Superior Court entered default against Cristita following her failure to timely file an answer or other pleading.

breaches of the peace that occurred on the property. The trial court found that between November 1998 and January 2004, officers from the Salisbury Police Department went to defendant's property 24 times. In particular, officers arrived at the property to serve misdemeanor warrants, respond to domestic disturbance calls, and investigate suspected drug activity. Nevertheless, the court in its order determined that plaintiff failed to establish that the property, "**as a regular course of business**, was used for the **purposes** of lewdness or the illegal possession of controlled substances[.]"

I.

[1] We note at the outset that plaintiff does not assign error to any of the trial court's findings. Thus, the findings are "presumed to be supported by competent evidence and are binding on appeal." *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). Plaintiff argues, however, that the evidence of drug activity and domestic disturbances that occurred on defendant's property conform with the requirements of N.C. Gen. Stat. § 19-1 *et. seq.* establishing a nuisance.

Pursuant to N.C. Gen. Stat. § 19-1, a public nuisance includes the "use, ownership or leasing of any building or place for the purpose of . . . illegal possession or sale of controlled substances . . . ." N.C. Gen. Stat. § 19-1(a) (2003). Section 19-1.2 of our Statutes, entitled "Types of Nuisances," provides that where conduct prohibited in Section 19-1(a) is involved, a nuisance may be declared at "[e]very place which, as a *regular course of business*, is used for the purposes of . . . the illegal possession or sale of controlled substances . . . and every such place in or upon which . . . the illegal possession or sale of controlled substances . . . are held or occur." N.C. Gen. Stat. § 19-1.2(6) (2003) (emphasis added).

This Court has stated that "[s]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each. . . . The various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency, so as to render the statute a consistent and harmonious whole." *Huntington Props., LLC v. Currituck Cty*, 153 N.C. App. 218, 224, 569 S.E.2d 695, 700 (2002) (internal quotations omitted). Thus, the requirement of "regular course of business" in Section 19-1.2(6), although not set forth in Section 19-1(a), is to be given effect and interpreted as consistent with the requirement of the owner's purpose. Indeed, this Court has

indicated, in the context of prostitution, that evidence of the illegal activity being conducted in the regular course of business is relevant to the court's determination of whether the defendant owner is using the property for the purpose of this proscribed activity. *See Gilchrist, District Attorney v. Hurley*, 48 N.C. App. 433, 450, 269 S.E.2d 646, 656 (1980), *disc. review denied*, 301 N.C. 720, 274 S.E.2d 233 (1981).

Based upon reading Sections 19-1(a) and 19-1.2(6) together then, in order to establish a nuisance, plaintiff must show that defendant leased or used his property *for the purpose of* the illegal possession and sale of drugs. As a means of showing defendant's purpose in leasing or operating the building, plaintiff may present evidence that the sale of controlled substances occurred regularly. Defendant would then be permitted to offer evidence of a lawful business purpose in order to negate the inference that drug transactions were the sole purpose of the leasing or use of the property. *See id.* (noting that defendants failed to present evidence that the property was used for any lawful business purpose).

Here, the trial judge concluded that the property was not used in the regular course of business for the purpose of illegal drug activities. The record establishes that confirmed drug activity occurred on the property three times since the year 2000: police officers executed a controlled buy of cocaine from one of defendant's tenants in August 2000; in September 2000, this same tenant was arrested after cocaine and marijuana were found on his person; and during a search of the property in July 2001, police officers found 12 rocks of cocaine.[2] Although these events establish that some drug activity occurred at or near defendant's property, they are not sufficient to establish that drug possession and sales occurred as a regular course of business. Plaintiff points to no other evidence tending to show that the purpose of defendant's leasing the property was to conduct illegal drug sales. Therefore, plaintiff has not established a nuisance under N.C. Gen. Stat. §§ 19-1(a) and 19-1.2.

II.

[2] Plaintiff also argues that ongoing breaches of the peace on defendant's property constitute a nuisance. N.C. Gen. Stat. § 19-1(b) (2003) provides that "[t]he . . . use, ownership or leasing of any building or place wherein or whereon are carried on, conducted, or per-

2. We note that plaintiff and the State could have addressed the drug activity directly in a criminal action against defendant's tenant for possession and sale of cocaine in violation of N.C. Gen. Stat. § 90-95.

mitted repeated acts which create and constitute a breach of the peace shall constitute a nuisance." Accordingly, plaintiff must establish that repeated breaches of the peace occurred on defendant's property.

The term "breach of the peace" is defined as "repeated acts that disturb the public order including, but not limited to, homicide, assault, affray, communicating threats, unlawful possession of dangerous or deadly weapons, and discharging firearms." N.C. Gen. Stat. § 19-1.1(1) (2003). Although the definition is not confined to these examples, each individual example is a crime. Therefore, in order to determine if a breach of the peace has occurred, the nature of the incident will be determinative.[3]

Plaintiff argues that the two-dozen trips to defendant's property by police officers satisfy the requirements of N.C. Gen. Stat. § 19-1(b). A careful review of the record, however, indicates that the requirements of the statute have not been met. First, out of the 24 trips by police officers, seven involved service of misdemeanor warrants and one involved a search warrant. There is no evidence that these events involved any threats to other citizens or disturbed the public order.

Second, six of the police officers' trips were in response to phone calls reporting domestic disturbances. Based on the definition of "breach of the peace," domestic disturbances, without more, should not be considered in determining whether the property is a nuisance. The nature of a domestic disturbance call is ambiguous, and the evidence does not establish that these disturbances involved an assault or any other unlawful activity that might be considered a breach of the peace.

Third, of the remaining trips, two involved assaults and one involved a disturbance with shots fired. Under Section 19-1.1, these unlawful acts constitute breaches of the peace. However, these three instances occurred over the course of approximately two and a half years. The most recent of these instances happened in August 2001, nearly a year and a half before this action was filed. Pursuant to N.C. Gen. Stat. § 19-1(b), only repeated acts that disturb the public order constitute a nuisance. We do not believe that three incidents over the

3. Our General Assembly has chosen to provide specific examples within the definition of breach of the peace. In contrast, Black's Law Dictionary defines "breach of the peace" more broadly as "[t]he criminal offense of creating a public disturbance or engaging in disorderly conduct, particularly by an unnecessary or distracting noise." *Black's Law Dictionary* 201 (8th ed. 2004).

course of two and a half years meets the standard of "repeated acts" set forth in N.C. Gen. Stat. § 19-1(b). As such, plaintiff has not established that defendant's property constitutes a nuisance under N.C. Gen. Stat. § 19-1(b).

For the foregoing reasons, the order of the trial court denying plaintiff's request for abatement is affirmed.

Affirmed.

Judges WYNN and TYSON concur.

COHEN SCHATZ ASSOCIATES, INC., PLAINTIFF v. ANTHONY BRYAN PERRY, SR., PATRICIA T. PERRY, RICHARD G. BERENT, JOHN BERENT, AND STERLING RIDGE PARTNERS, L.L.C., DEFENDANTS

No. COA04-631

(Filed 19 April 2005)

1. **Compromise and Settlement— agreement not signed— summary judgment not mooted**

Plaintiff's motion for summary judgment was not mooted by a settlement agreement where the only alleged agreement between the parties was a handwritten document from a mediated settlement conference which plaintiff never signed.

2. **Compromise and Settlement— agreement not enforced— not signed—enforcement not requested**

The trial court did not err by not enforcing a settlement agreement where plaintiff neither signed the agreement nor asked that it be enforced.

Appeal by plaintiff from judgment entered 13 November 2003 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 12 January 2005.

Everett, Gaskins, Hancock & Stevens, L.L.P., by Paul C. Ridgeway and K. Matthew Vaughn, for plaintiff-appellant.

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

HUDSON, Judge.

Cohen Schatz Associates, Inc., is a licensed real estate brokerage firm. Sterling Ridge Partners, LLC, is a real estate development firm owned by defendants-appellants Richard G. Berent and John Berent (Sterling Ridge or the Sterling Ridge defendants). Claims against the (remaining) Perry defendants are not at issue in this appeal. Plaintiff filed this action against defendants in October 2002 and it was ordered to mediation in February 2003. The parties reached a settlement at mediation, which took place on 13 June 2003. On 17 September 2003, Sterling Ridge filed a motion for summary judgment, which came on for hearing on 4 November 2003. The trial court granted Sterling Ridge's motion for summary judgment on 13 November 2003. Plaintiff appeals. We affirm the trial court.

This dispute arose from a real estate transaction between the Perry defendants, as sellers, and Sterling Ridge, as buyers. In April 2002, the Perry defendants sold a piece of property in Fuquay-Varina, North Carolina, to Sterling Ridge. Plaintiff alleges that defendants wrongfully refused to pay them a commission on the transaction. Plaintiff claims that on or about February 2002, the Perry defendants entered into an agreement entitling plaintiff to a six percent commission upon the sale of their Fuquay-Varina property. According to plaintiff, the Perry and Sterling Ridge defendants conspired to conduct the sale of the property so as to avoid paying plaintiff a commission. In its lawsuit, plaintiff asserted that the Sterling Ridge defendants formed Sterling Ridge Partners, LLC, in furtherance of this alleged conspiracy, which also constitutes an unfair and deceptive trade practice. The Sterling Ridge defendants deny these allegations.

On 18 February 2003, the trial court ordered the case to a mediated settlement conference. Mediation occurred on 13 June 2003, after which mediator E. Yvonne Pugh reported that a partial settlement had been reached between plaintiff and Sterling Ridge. At the settlement conference, a document titled "agreement" (the agreement) was signed by the Sterling Ridge defendants and their counsel. However, nobody signed the document for plaintiff. The purported settlement provided that the Sterling Ridge defendants would pay $21,075 to plaintiff; that Richard and John Berent would provide affidavits to plaintiff consistent with the representations made by them to the mediator; and that plaintiff would dismiss its claims against the Sterling Ridge defendants with prejudice. The document stated that counsel for Sterling Ridge would prepare a more formal agreement,

but also that the document was a "binding contract *between signatories* in lieu of [a] formal agreement" (emphasis added).

On 17 September 2003, Sterling Ridge moved for summary judgment. In its affidavit in opposition to defendants' motion for summary judgment, plaintiff stated that:

> On June 13, 2003, I participated in court-ordered mediation . . . At the mediation, [Sterling Ridge defendants] executed and submitted the handwritten agreement attached hereto as Exhibit A to [plaintiff]. [Sterling Ridge defendants] have not complied with the handwritten agreement.

Plaintiff did not, and does not, dispute that it never signed the proposed agreement and that it never moved to have the agreement enforced. The trial court granted summary judgment to Sterling Ridge on 13 November 2003.

[1] Plaintiff contends that the trial court erred in reaching and granting defendants' motion for summary judgment. Plaintiff claims that the settlement agreement reached by the parties in court-ordered mediation rendered moot any claims against Sterling Ridge defendants. Plaintiff argues that the trial court should have dismissed the claims as moot rather than reaching the issue of summary judgment, or, in the alternative, that the court should have entered an order enforcing the settlement agreement. We disagree.

Plaintiff correctly asserts that when parties to a lawsuit settle their dispute, the claims asserted between those parties become moot. *Sutton v. Sutton*, 18 N.C. App. 480, 197 S.E.2d 9 (1973). However, in *Sutton*, the parties' claims were mooted by the trial court's order that acknowledged the parties' settlement. *Id.* at 481, 197 S.E.2d at 10. The order in *Sutton*, consented to by both parties, decreed that the parties had compromised and settled all matters at issue and that both parties had entered into a deed of separation which set forth the terms of their settlement agreement. *Id.* at 480, 197 S.E.2d at 10.

Here, the only alleged agreement between the parties is the handwritten document from the mediated settlement conference, which plaintiff never signed. A written settlement agreement arising out of a mediated settlement conference will not be enforced unless it has been "reduced to writing and signed by the parties." N.C.G.S. § 7A-38.1(l) (2003). Indeed, the terms of the agreement here state that

it is a "binding contract *between signatories* in lieu of [a] formal agreement" and that "*[s]ignatories* otherwise release any and all claims against each other arising out of [the] transactions alleged in the complaint." Plaintiff, who now urges that the settlement was valid and should have barred summary judgment, was not a signatory to the agreement. We conclude that plaintiff's argument that defendants' motion for summary judgment was mooted by the settlement agreement is without merit and that the trial court did not err in reaching defendants' motion.

[2] Similarly, plaintiff argues that the trial court should have entered an order enforcing the settlement agreement, rather than reaching defendants' motion for summary judgment. We first note that plaintiff never moved the court to enforce the agreement. Plaintiff mentioned the agreement only once, in its Response to Defendant's Motion for Summary Judgment, asserting that there was an agreement and that defendants were not in compliance. Plaintiff is correct that a trial court may enter an order enforcing a settlement agreement without conducting a plenary hearing. *Petty v. Timken Corp.*, 849 F.2d 130, 132 (4th Cir. 1988). However, we conclude that the trial court did not err in not enforcing the purported settlement agreement where plaintiff neither signed the document, nor asked the court to enforce it.

In its assignments of error, plaintiff argues that the trial court erred in not only reaching, but in granting the summary judgment motion. However, in its brief, plaintiff only discusses the trial court's decision to reach the summary judgment issue and neither cites any authority nor present any argument regarding the court granting summary judgment. "Issues raised in defendant's brief, but not supported by argument or authority, are deemed abandoned." *Pharmaresearch Corp. v. Mash*, 163 N.C. App. 419, 428, 594 S.E.2d 148, 154 (2004) (citing N.C.R. App. P. 28(b)(6)). Thus, defendant's argument here is deemed abandoned.

Affirmed.

Judges WYNN and STEELMAN concur.

TOWN OF HERTFORD, PLAINTIFF v. JESSIE L. HARRIS, OWNER, ELIZABETH CLARK HARRIS, OWNER, AND COUNTY OF PERQUIMANS, LIENHOLDER, DEFENDANTS

No. COA04-603

(Filed 19 April 2004)

1. **Municipal Corporations— minimum housing standards—condemned dwellings—cost of removal—proceeds of personal property or appurtenances**

The trial court erred by granting summary judgment in favor of plaintiff town in an action to enforce a lien against defendants' real property to cover the costs of removing condemned mobile homes because, while the town's ordinance is not necessarily inconsistent with N.C.G.S. §160A-443(6)(c), issues of fact remain as to whether the town's actions were inconsistent with the statute's requirement that any personal property or appurtenances be salvaged and the proceeds applied to the cost of removal or demolition.

2. **Costs— attorney fees—enforcement of lien**

The trial court erred by awarding attorney fees to plaintiff in an action to enforce a lien against defendants' real property to cover the costs of removing condemned dwellings, because it cannot be determined whether any lien existed when the town may have improperly failed to salvage personal property and appurtenances from defendants' property and credit their value toward the costs incurred.

Appeal by defendants from judgment entered 2 February 2004 by Judge Grafton G. Beaman in Perquimans County District Court. Heard in the Court of Appeals 26 January 2005.

Hornthal, Riley, Ellis & Maland, L.L.P., by Donald I. McRee, Jr., for plaintiff-appellee.

Boxley, Bolton & Garber, L.L.P., by Kenneth C. Haywood, for defendant-appellants.

HUDSON, Judge.

On 2 January 2001, plaintiff the Town of Hertford ("the town") filed suit seeking a judgment allowing it to sell the real property of defendants Harris to satisfy a statutory lien. The town alleged that

defendants Harris owed for the cost of demolition of two mobile homes it found in violation of the town's minimum housing standards ordinance. Defendants Harris denied the lien and counterclaimed for conversion. Plaintiff moved for summary judgment, and by judgment filed 2 February 2004, the court granted the motion on claims for costs, interest and fees. Defendants appeal. As explained below, we reverse and remand.

Mr. Harris purchased land in the town in the 1950s and owned two mobile homes on the property which he had used for storage since 1964. Pursuant to the town's housing standards ordinance, effective 8 April 1996 ("the 1996 ordinance"), the town building inspector filed a complaint and notice of hearing against defendants Harris. Following a hearing which defendants Harris did not attend, the building inspector entered an order on 2 June 1999 that the mobile homes were not reparable and must be demolished or removed. Defendants Harris did not appeal this order to the town's zoning board of adjustment or to the superior court as provided for by the 1996 ordinance or N.C. Gen. Stat. § 160A-446(c) and (f). On 13 September 1999, the town's board of commissioners adopted an ordinance which specifically declared the Harris' property unfit for human habitation, that defendants Harris had failed to comply with the building inspector's order after a reasonable opportunity, and ordered the structures removed or demolished. The town served defendants Harris with a copy of this ordinance. Thereafter, the town removed the mobile homes, incurring a cost of $3,284. Defendants Harris failed to pay the town for these costs and the town instituted this action.

[1] Defendants first argue that the court erred in granting summary judgment for the town. We agree.

When reviewing a grant of summary judgment, we review whether there is a genuine issue of material fact and whether the movant 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), *affirmed*, 358 N.C. 137, 591 S.E.2d 520 (2004), *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004). Because defendants have stipulated that the facts here are not at issue, we consider only whether the court properly found the town was entitled to judgment as a matter of law. "Any error made in interpreting a statute is an error of law." *Savings & Loan League v. Credit Union Comm.*, 302 N.C. 458, 464, 276 S.E.2d 404, 409 (1981).

N.C. Gen. Stat. § 160A-441 *et seq.* codifies the powers of municipalities to regulate minimum housing standards. N.C. Gen. Stat. § 160A-443 authorizes a municipality to collect from a property owner the cost of repair or removal and demolition of a dwelling found unfit for human habitation. Specifically, the statute provides:

> If the dwelling is removed or demolished by the public officer, he shall sell the materials of the dwelling, and any personal property, fixtures or appurtenances found in or attached to the dwelling, and shall credit the proceeds of the sale against the cost of the removal or demolition and any balance remaining shall be deposited in the superior court by the public officer, shall be secured in a manner directed by the court, and shall be disbursed by the Court to the persons found to be entitled thereto by final order or decree of the court.

N.C. Gen. Stat. § 160A-443(6)(c) (2001).

Pursuant to N.C. Gen. Stat. § 160A-441 *et seq.*, the town adopted its own ordinance establishing minimum housing standards. Section 17 of the town's ordinance concerns the sale of personal property to satisfy the cost of repairs, removal or demolition of condemned properties and provides:

> That the amount of the cost of repairs, alterations or improvements, or vacating and closing, or removal or demolition by the public officer shall be a lien against the real property upon which the cost was incurred . . . . If the dwelling is removed or demolished by the public officer, he shall sell the materials of the dwelling, and shall credit the proceeds of the sale against the cost of the removal or demolition and any balance remaining shall be deposited in the superior court by the public officer, shall be secured in a manner directed by the court, and shall be disbursed by the court the persons found to be entitled thereto by final order or decree if [sic] the court.

Defendants contend that the town's ordinance violates the enabling statute quoted above because it fails to include language requiring the sale of personal property, fixtures and appurtenances. We disagree. The ordinance is not inconsistent with the provisions of N.C. Gen. Stat. § 160A-443(6)(c). *Greene v. City of Winston-Salem*, 287 N.C. 66, 73, 213 S.E.2d 231, 236 (1967). Section 2(5) of the town's ordinance defines the term "dwelling" in the ordinance as including "any outhouses and appurtenances belonging thereto or usually

enjoyed therewith." Construed together, these sections are not inconsistent with the requirements of N.C. Gen. Stat. § 160A-443(6)(c). *Greene*, 287 N.C. at 73, 213 S.E.2d at 236.

However, while the town's ordinance is not necessarily inconsistent with the enabling statute, issues of fact remain as to whether the town's actions were, so that summary judgment was not appropriate here. Regardless of the specific wording of the town's ordinance, the town must comply with the statute's requirement that any personal property or appurtenances be salvaged and the proceeds applied to the cost of removal or demolition. Defendants alleged in their complaint and in an affidavit from Jessie Harris that the removed mobile homes and their contents had a value in excess of $5000. In its brief, the town contends that there was no salvageable material on defendants property when the mobile homes were removed. Because the existence and value of any personal property and appurtenances on defendants' property are genuine issues of material fact, summary judgment for the town was not proper, and we vacate the judgment and remand for further proceedings consistent with this opinion.

[2] Defendants also argue that the court erred in awarding attorney fees to plaintiff. We agree. The town brought its action to enforce a lien against defendants' real property to cover the costs of removing the condemned dwellings. Because the town may have improperly failed to salvage personal property and appurtenances from defendants' property and credit their value toward the costs incurred, we cannot determine whether any lien existed. Thus, we vacate the award of attorney fees as well.

Reversed and remanded.

Judges TIMMONS-GOODSON and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 APRIL 2005

GRIER v. EARL TINDOL FORD, INC. No. 04-815	Gaston (02CVS705)	Affirmed
GUILFORD CTY. ex rel. WRIGHT v. MASON No. 04-618	Guilford (97CVD2494)	Reversed
IN RE B.N., M.N., T.N., N.N. & M.L.N. No. 04-531	Harnett (02J23) (02J24) (02J25) (02J26) (02J27)	Affirmed
IN RE B.P., S.P., R.T. No. 04-509	Pitt (98J169) (98J170) (98J171)	Dismissed in part; Reversed in part
IN RE C.A.A. & S.Y.C. No. 04-640	Caldwell (02J14) (02J15)	Affirmed
IN RE J.D. No. 04-906	Robeson (04J26)	Affirmed
IN RE K.E.C. No. 04-1036	Henderson (02J02)	Affirmed
IN RE K.F. & M.F. No. 04-360	Wilkes (01J159) (01J160)	Affirmed
IN RE K.L. No. 04-82	Rutherford (02J107)	Affirmed
IN RE L.M.B.L., S.V.L.L. No. 04-505	Robeson (03J194) (03J195)	Affirmed
IN RE S.D. No. 04-903	Guilford (04J19)	Affirmed
IN RE S.O.B-B., S.U.B-B. No. 03-1360	Robeson (02J248) (02J249)	Reversed
LASHANI v. HANHAN No. 04-988	Guilford (03CVD10117)	Affirmed

LUCAS v. N.C. DEP'T OF CORR. No. 04-198	Ind. Comm. (I.C. TA-16861)	Affirmed in part, vacated and remanded in part
McKINNEY v. BENNETT No. 04-1023	Stokes (03CVS721)	Affirmed
MILLS v. SPRINT MID-ATLANTIC No. 04-667	Ind. Comm. (I.C. 163034)	Affirmed
MOORE v. TWIN HARBOR ASS'N No. 03-1671	Montgomery (01CVS175)	Affirmed
NAGS HEAD CONSTR. & DEV., INC. v. TOWN OF NAGS HEAD No. 04-954	Dare (03CVS495)	Affirmed
STATE v. BLOUNT No. 04-754	Person (02CRS51585) (02CRS51587) (02CRS51588)	No error
STATE v. BOWENS No. 04-921	Pitt (01CRS63335)	Vacated and remanded
STATE v. BROWN No. 04-384	Moore (01CRS51438)	No error
STATE v. COOLEY No. 04-778	Davie (02CRS50450)	No error
STATE v. CUMMINGS No. 04-543	Rockingham (03CRS1915) (03CRS1916)	No error
STATE v. FARRIS No. 04-1069	Lenoir (03CRS52468)	Dismissed
STATE v. LIGHTNER No. 04-686	Mecklenburg (02CRS233127) (02CRS233128)	No error
STATE v. MURPHY No. 04-681	Scotland (02CRS2634) (02CRS51268) (02CRS2633) (02CRS51857) (02CRS4418) (02CRS51856) (02CRS4417)	No error in part, reversed in part
STATE v. RIGGS No. 04-663	Durham (03CRS05666) (03CRS12321) (03CRS13568)	Affirmed

	(03CRS13569) (03CRS44383) (03CRS45801) (03CRS45889) (03CRS51560) (03CRS51561)	
STATE v. RODRIGUEZ No. 04-566	Alamance (02CRS57713) (02CRS57714)	Affirmed
STATE v. SIMMONS No. 04-1042	Rowan (02CRS8888) (02CRS53424) (02CRS55616) (02CRS55729) (03CRS8069) (03CRS54928) (03CRS59686) (03CRS59857) (03CRS59860) (04CRS6)	Affirmed
TRANSLAND FIN. SERV., INC. v. POMPEII No. 04-724	Mecklenburg (02CVS15910)	Reversed and remanded
TRINITY PRESBYTERIAN CHURCH, INC. v. CITY OF WILMINGTON No. 04-305	New Hanover (03CVS2156)	Reversed

APPENDIXES

ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

THE CHIEF JUSTICE'S ACTUAL INNOCENCE COMMISSION

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

I. Rule 3 of the North Carolina Rules of Appellate Procedure is amended as described below:

Rule 3(b) is amended to read:

(b) Special Provisions. Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and appellate rules sections noted:

(1) ~~Termination of Parental Rights, G.S. 7B-1113.~~ Juvenile matters, G.S. 7B-2602.

(2) ~~Juvenile matters, G.S. 7B-1001 or 7B-2602.~~ Appeals pursuant to G.S. 7B-1001 shall be subject to the provisions of N.C. R. App. P. 3A.

For appeals filed pursuant to these provisions and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced by the use of initials only in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). Appeals filed pursuant to these provisions shall specifically comply, if applicable, with Rules 9(b), 9(c), 26(g), 28(d), 28(k), 30, 37, 41 and Appendix B.

II. Rule 3A is added to the North Carolina Rules of Appellate Procedure as described below:

Rule 3A is added to read:

Rule 3A. APPEAL IN QUALIFYING JUVENILE CASES—HOW AND WHEN TAKEN, SPECIAL RULES

(a) Filing the Notice of Appeal. Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of

the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the special provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) Special Provisions. For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(1) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) **Transcripts.** Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcriptionist to the case. Within thirty-five days from the date of the assignment, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the office of the Clerk of the Court of Appeals and provide copies to the respective parties to the appeal at the addresses provided. Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) **Record on Appeal.** Within twenty days after the notice of appeal has been filed, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9, except there shall be no requirement to

set out references to the transcript under the assignments of error. Trial counsel for the appealing party, together with appellate counsel if separate counsel is appointed or retained for the appeal, shall have joint responsibility for preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties: (1) a notice of approval of the proposed record; (2) specific objections or amendments to the proposed record on appeal, or (3) a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within thirty days after notice of appeal has been filed, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after notice of appeal has been filed, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement: (1) the appellant shall file his or her proposed record on appeal, and (2) an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals as provided herein.

(3) **Briefs.** Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the Clerk of the

Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(c) Calendaring priority. Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 1st day of March, 2006.

Adopted by the Court in Conference this the 3rd day of November, 2005. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

s/Lake, C.J.
For the Court

THE CHIEF JUSTICE'S ACTUAL INNOCENCE COMMISSION

IN THE SUPREME COURT OF NORTH CAROLINA
BY ORDER OF THE COURT

In recognition of the need to provide a continuing forum for education and dialogue regarding the causes of wrongful conviction of the innocent and, where appropriate, to recommend and assist in the implementation of justice system enhancements which will increase the reliability of convictions in North Carolina, the Court hereby establishes, as successor to the North Carolina Actual Innocence Commission, THE CHIEF JUSTICE'S ACTUAL INNOCENCE COMMISSION.

SECTION 1: STRUCTURE AND COMPOSITION OF THE COMMISSION

The structure and composition of the Commission shall be:

1.1. Commission Membership and Officers:

The Commission shall consist of no more than thirty members. The officers of the Commission shall include a Chair, an Executive Director, and a Secretary. The Chair of the Commission shall be the Chief Justice or his or her designee. The remaining officers shall be considered upon recommendation of the Chair and shall be elected by a majority of the Commission members.

1.2. Selection and Term of Members:

The Chair shall appoint the Commission's other members in his or her discretion, but representation shall include at least two members from each of the following constituencies: (a) district attorneys, (b) defense attorneys, (c) trial court judges, (d) appellate court judges, (e) police, (f) sheriffs, (g) legal scholars, (h) legislators, (i) the office of the Attorney General, (j) the SBI, and (k) victim advocates.

Persons currently serving on the North Carolina Actual Innocence Commission when this Order is promulgated shall constitute the initial membership of the Commission. Additional members shall be appointed by the Chair as necessary.

The members of the Commission shall serve a term of two years, except for the Executive Director, who shall serve at the discretion of the Chair. Initial terms shall begin at the time this order is promulgated. The term of any member may be extended for one additional year in the discretion of the Chair.

SECTION 2: RESPONSIBILITIES OF THE COMMISSION

The Commission's major responsibilities shall include raising awareness of the issues surrounding wrongful convictions and studying and providing recommendations regarding the following:

2.1. Causes of Conviction of the Innocent:

The Commission shall seek to identify the common causes of conviction of the innocent, both nationally and in North Carolina.

2.2. Implicated Procedures:

The Commission shall seek to identify law enforcement, prosecutorial, and trial and judicial procedures which may cause or increase the likelihood of the conviction of the innocent.

2.3. Remedial Strategies and Procedures:

The Commission shall work to implement remedial strategies designed to reduce or lessen the possibility of conviction of the innocent, including, but not limited to, procedural and educational remedies; and to develop procedures to identify and expedite release of persons wrongly convicted.

2.4. Implementation Plans:

The Commission shall develop plans to implement remedial strategies, such plans to include, but not be limited to, analysis of implementation expenses, ongoing costs, projected effectiveness of proposed plans, and any potential negative impact of proposed plans on the conviction of guilty persons.

SECTION 3: ADDITIONAL RESPONSIBILITIES OF THE COMMISSION

The Commission shall provide periodic interim reports of its findings and recommendations to the Chief Justice and shall provide annual reports to the Chief Justice and the North Carolina Judicial Council not later than 31 December of each year.

This Order shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This Order shall also be published on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Adopted by the Court in Conference this the 6th day of October, 2005.

s/I. Beverly Lake, Jr.
I. BEVERLY LAKE, JR.
Chief Justice
For the Court

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Judicial review of agency decision—standard of review—whole record and de novo—The superior court properly employed both de novo review and the whole record test in reviewing an OSHA citation where petitioner alleged that the Department of Labor's decision was affected by error of law and was unsupported by substantial evidence. **N.C. Comm'r of Labor v. Weekley Homes, L.P., 17.**

Operations Manual statement—rule-making not required—The multi-employer OSHA citation policy is not invalid because it has not been promulgated as a rule. The multi-employer policy is from the North Carolina Operations Manual, which is a nonbinding interpretative statement, not a rule requiring formal rule-making procedures. **N.C. Comm'r of Labor v. Weekley Homes, L.P., 17.**

AGRICULTURE

Lease of farms and tobacco allotments—duration—There was testimony in a bench trial supporting the trial court's finding that a consent judgment reflected the agreement of the parties that a lease of two farms and tobacco allotments would terminate by 1 December 1999 and not extend into 2000. **Hemric v. Groce, 69.**

Lease of farms and tobacco allotments—marketing cards—expiration of lease—The trial court erred by concluding that defendants breached their contract arising out of the consent judgment regarding the lease of two farms and

AGRICULTURE—Continued

tobacco allotments by not delivering the year 2000 marketing cards. Although these parties clearly contemplated the possible sale of tobacco grown on defendants' lands after 1 December 1999, nothing in the consent judgment or lease agreement suggests an intention of the parties to agree that defendants accepted any responsibility or obligation to turn over their 2000 marketing cards to plaintiffs to procure the sale of the overproduced tobacco after expiration of the lease in 1999. **Hemric v. Groce, 69.**

Lease of farms and tobacco allotments—overproduction of tobacco—In a bench trial involving the lease of two farms and tobacco allotments, there was evidence supporting a finding that plaintiffs had overproduced 11,500 pounds of tobacco on one of the farms. Defendant did not take exception to that finding and it is binding on appeal. **Hemric v. Groce, 69.**

APPEAL AND ERROR

Appealability—denial of summary judgment—liability of County for sheriff and jail staff—not an immunity claim or substantial right—A portion of defendants' appeal from the denial of summary judgment was dismissed as interlocutory where defendants argued that Robeson County could not be held liable for the negligence of its sheriff and other jail staff and that plaintiff failed to present sufficient evidence that the sheriff and detention officers were negligent in their official capacities. These arguments do not involve any claim of immunity and defendants have made no other showing as to how this aspect of the trial court's ruling affected a substantial right. **Boyd v. Robeson Cty., 460.**

Appealability—denial of summary judgment—res judicata—immediate appeal—The denial of a motion for summary judgment on the basis of res judicata affects a substantial right and entitles a party to an immediate appeal. **Moody v. Able Outdoor, Inc., 80.**

Appealability—interlocutory order—civil rights claim—sheriff as person—qualified immunity—The question of whether a governmental entity is a "person" under 42 U.S.C. § 1983 is analogous to the public duty doctrine and to claims of immunity and therefore involves a substantial right permitting an interlocutory appeal. **Boyd v. Robeson Cty., 460.**

Appealability—interlocutory order—jurisdiction—minimum contacts—Although the order denying defendants' motion to dismiss based on lack of personal jurisdiction is an interlocutory order, defendants' appeal of the trial court's N.C.G.S. § 1A-1, Rule 12(b)(2) decision is proper under N.C.G.S. § 1-277(b) because the appeal involves minimum contacts questions. **Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 690.**

Appealability—interlocutory order—order compelling discovery—Petitioners' appeal from an order compelling discovery in an annexation case is an appeal from an interlocutory order and is not immediately appealable. **Arnold v. City of Asheville, 451.**

Appealability—interlocutory order—sufficiency of evidence to support immunity—The denial of a motion for summary judgment is an interlocutory order that generally cannot be the basis for an immediate appeal. Here, the argument that the trial court erred by determining that plaintiff had presented suffi-

APPEAL AND ERROR—Continued

cient evidence of a constitutional violation by the individual defendants addresses the merits of plaintiff's claim rather than an immunity defense and this portion of the appeal is dismissed. **Boyd v. Robeson Cty., 460.**

Appealability—permanency planning review order—A permanency planning review order was not a final dispositional order and was thus not appealable by respondent mother as to two of her children, who had previously been adjudicated neglected and dependent, where it did not alter the original permanency plan for those two children but continued the guardianship plans for them. However, the permanency planning review order was a final dispositional order as to a third child and was thus immediately appealable by respondent mother where it changed the disposition for the third child from guardianship to adoption. N.C.G.S. § 7B-1001. **In re B.P., S.P., R.T., 728.**

Appealability—political advertisement—defamation and unfair trade practices—denial of motion for judgment on the pleadings—An appeal was dismissed as interlocutory where the trial court had denied a motion for judgment on the pleadings under N.C.G.S. § 1A-1, Rule 12(c). The complaint arose from a television advertisement broadcast during a political campaign and alleged defamation and unfair trade practices, while the answer raised constitutional defenses. Although the Court of Appeals dissent adopted per curiam in *Priest v. Sobeck*, 357 N.C. 159, was relied upon for the contention that constitutional defenses in a defamation case affect a substantial right and are immediately appealable, that case involved a different motion (summary judgment) and different facts which make it distinguishable. There is nothing here to suggest an immediate loss of First Amendment rights. **Boyce & Isley, PLLC v. Cooper, 572.**

Argument not raised at trial—not considered on appeal—An argument concerning the grounds for considering an affidavit in a summary judgment hearing was not addressed on appeal where plaintiffs objected at the hearing on different grounds. A contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court. **Hultquist v. Morrow, 579.**

Assignments of error—required—appendixes—statutes, rules, regulations—The Court of Appeals considered certain arguments, in its discretion, even though the questions did not refer to the pertinent assignments of error, as required. Respondent's motion to strike certain appendixes to petitioner's brief was denied, even though they were not part of the printed record on appeal nor offered into evidence, because appendixes were relevant portions of statutes, rules, or regulations, as permitted by N.C.R. App. P. 28 (d)(1)(c). An appendix consisting of an excerpt from S.B. 575 was stricken. **N.C. Comm'r of Labor v. Weekley Homes, L.P., 17.**

Bench trial—standard of review—In reviewing the findings from a bench trial, the Court of Appeals reviews matters of law de novo and reviews matters of fact for any competent supporting evidence, whether or not there is contradictory evidence of any one fact. **Hemric v. Groce, 69.**

Failure to cite authority—dismissal of argument—The failure to cite authority resulted in the dismissal of an appellate argument concerning jurisdiction of a dispute arising in a casino owned by the Eastern Band of the Cherokee Indians. **Hatcher v. Harrah's N.C. Casino Co., LLC, 151.**

APPEAL AND ERROR—Continued

Notice of appeal—third-party defendants—The third-party defendants' motion to dismiss an appeal was granted in an action arising from a church group ski accident where neither plaintiff nor defendants filed a notice of appeal from the 31 October summary judgment order granted in favor of the third-party defendants, although plaintiff filed a notice of appeal from a 30 October order granting summary judgment in favor of defendants and dismissing plaintiff's claims with prejudice. **Frank v. Funkhouser, 108.**

Preservation of issues—assignments of error—arguments required—Assignments of error not supported by argument or authorities were abandoned. **Ellis-Don Constr., Inc. v. HNTB Corp., 630.**

Preservation of issues—clerical errors—failure to object—Plaintiff failed to preserve for appeal the omission from a child support and visitation order of the time of day when the minor child would be picked up for visitation where plaintiff failed to object or make any motion to add the visitation pick-up time to the order and explicitly approved of the order. **Young v. Young, 31.**

Preservation of issues—constitutional question—evidence rules—Defendant did not preserve for appellate review the issue as to whether the victim's testimony about her perceptions of in-court demonstrations of defendant's placing a stocking over his face in defendant's two previous trials which ended in mistrials violated defendant's federal and state constitutional rights and certain rules of evidence where defendant did not apprise the trial court that he was raising constitutional issues by his objections to the victim's testimony, and defendant's brief discusses none of the rules of evidence allegedly violated. **State v. Carmon, 750.**

Preservation of issues—constitutional question—failure to present to trial court—Defendant failed to preserve for appellate review the issue of whether an accomplice's testimony that she had not been offered a charge reduction in exchange for testimony against defendant, when in fact the State had made such an offer, violated her rights to confrontation and due process where the prosecutor informed the court that he had made such an arrangement with the accomplice's attorney and had disclosed the arrangement to defendant's attorney, and defendant's attorney did not contradict the prosecutor's statement or move for a recess in order that the accomplice could be informed about the arrangement and re-examined about the matter in the presence of the jury. **State v. Howell, 741.**

Preservation of issues—failure to argue—failure to cite authority—Although the surety contends the trial court erred in a bond forfeiture case when it failed to make a factual finding regarding whether the program administrator for the surety received notice of the bond forfeiture, this argument is deemed abandoned, because: (1) the surety cites no cases in support of this argument; and (2) in this portion of the brief, the surety does not argue the point made in the assignment of error, but instead again argues that there was inadequate notice and a denial of due process. **State v. Lopez, 816.**

Preservation of issues—failure to argue in brief—Although respondent specifically assigned error to three findings of fact, respondent abandoned her appeal of those findings of fact because she failed to specifically argue in her brief that they were unsupported by evidence. **In re P.M., 423.**

APPEAL AND ERROR—Continued

Preservation of issues—failure to argue or set out in brief—Defendant's assignments of error numbers one, five, six, seven, eight, nine, and ten are deemed abandoned because they are not set out or argued in defendant's brief. **State v. Houston, 367.**

Preservation of issues—failure to assign error—failure to present issue at trial—Although the surety contends that N.C.G.S. § 15A-544.8(b)(1) requires the trial court to set aside a forfeiture judgment if the surety demonstrates that it did not actually receive notice and that any construction or application of N.C.G.S. § 15A-544.4 not requiring forfeiture notices to be actually received by sureties would constitute a violation of due process, these assignments of error are dismissed because the surety did not assert the first issue as a ground for relief in its assignments of error or assign error to the pertinent conclusions of law, and the argument on the second issue did not correspond to any assignments of error and was not presented to the trial court. **State v. Belton, 350.**

Preservation of issues—instruction—waiver of review—Defendant waived appellate review as to whether the trial court's instruction that a witness had testified in exchange for a charge reduction was supported by the evidence where defendant failed to object to the instruction or to assert plain error. **State v. Howell, 741.**

Preservation of issues—questions not raised at trial—Issues and theories not raised at trial were not reviewed on appeal. **Ellis-Don Constr., Inc. v. HNTB Corp., 630.**

Standard of review—appeals from Rule 12 and Rule 60—Appeals under Rule 12(b)(2), (4), and (5) are reviewed de novo, except that findings are binding on appeal if supported by competent evidence. A ruling under Rule 60(b) is left to the sound discretion of the trial court. **Autec, Inc. v. Southlake Holdings, LLC, 232.**

Standard of review—denial of summary judgment—The standard of review for a superior court order denying a motion for summary judgment is de novo. **Moody v. Able Outdoor, Inc., 80.**

ARBITRATION AND MEDIATION

Denial of motion to compel—findings required—The denial of a motion to stay and compel arbitration in a construction dispute was reversed and remanded for further findings where the court's order contained neither factual findings that would allow review, nor a determination of whether an arbitration agreement exists between the parties. **Ellis-Don Constr., Inc. v. HNTB Corp., 630.**

ASSAULT

Deadly weapon with intent to kill inflicting serious injury—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury because an intent to kill may be inferred from evidence that defendant repeatedly stabbed the victim in the chest and back, and the victim attempted to disengage from the argument with defendant. **State v. Nicholson, 390.**

ATTORNEYS

Breach of contract—discharged attorney—costs—summary judgment—The trial court did not err in an action arising out of a contingency fee contract to perform legal services and for representation during a caveat proceeding by awarding summary judgment in favor of defendants on plaintiff discharged law firm's claim for breach of contract and by denying plaintiff's motion for summary judgment on this claim because defendants were not contractually obligated to pay plaintiffs a percentage of a settlement when the written settlement agreement was never executed by defendants. **Pritchett & Burch, PLLC v. Boyd, 118.**

Discipline—motion to continue show cause hearing—abuse of discretion standard—The Disciplinary Hearing Commission of the North Carolina State Bar (DHC) did not abuse its discretion by denying defendant's motion to continue the show cause hearing resulting from defendant's failure to provide the State Bar with documentation showing he had paid his taxes in compliance with a consent order arising out of defendant's prior willful failure to timely file federal individual income tax returns with the Internal Revenue Service for the calendar years 1992 through 1996. **N.C. State Bar v. McLaurin, 144.**

Suspension of law license—whole record test—severity of punishment—The whole record test revealed that the Disciplinary Hearing Commission of the North Carolina State Bar's (DHC) suspension of defendant's license for ninety days was not excessive, did not fail to account for evidence from which conflicting inferences could be drawn, and was not beyond the appropriate measure of discipline as defined by the provisions of 27 N.C.A.C. § 1B.0114(x). **N.C. State Bar v. McLaurin, 144.**

BAIL AND PRETRIAL RELEASE

Bond forfeiture—sufficiency of notice—The trial court did not abuse its discretion by denying the surety's motion to vacate the judgment on 2 December 2003 regarding a bond forfeiture based on alleged insufficient notice where appellee introduced a certificate of mailing showing that the notice was timely mailed to the correct parties and addresses. **State v. Lopez, 816.**

CHILD ABUSE AND NEGLECT

Dependency—availability of alternative childcare arrangements—The trial court erred in a child abuse, neglect, and dependency case by concluding that the minor child was dependent without addressing the availability of appropriate alternative childcare arrangements. **In re P.M., 423.**

Failure to enter order within thirty days—particularity requirement—The trial court erred in a child neglect case by failing to enter the order within thirty days of the permanency planning hearing because all parties were prejudiced by the six-month delay. **In re B.P., S.P., R.T., 728.**

Neglect—lives in home where another juvenile subjected to neglect—The trial court did not err in a child abuse, neglect, and dependency case by concluding that the minor child was neglected where the child lives in a home where another child has been subjected to neglect by an adult who regularly lives in the home. **In re P.M., 423.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Agreement between parties incorporated into order—improper limitation on authority of court—The trial court erred by including in its order a provision based upon the parties' agreement at the hearing that precluded plaintiff mother from seeking an increase in child support from defendant father based upon an increase in defendant's income, reduction in defendant's income, or reduction in the time that defendant is allotted for summer visitation within two years, and the provision is deemed void. **Young v. Young, 31.**

Child Support Guidelines—combined gross monthly income—The trial court did not err by using the child support guidelines where there was no merit to plaintiff's contention that the parents' combined gross income was greater than $20,000.00 per month. **Francis v. Francis, 442.**

Civil contempt—failure to comply with visitation order granting rights to grandparents—The trial court did not err by finding plaintiff mother in willful civil contempt for failing to comply with the terms of a consent order concerning the visitation rights of her minor daughter's paternal grandparents. **Young v. Young, 31.**

Custody—motion for new trial—The trial court did not abuse its discretion in a child custody case by awarding sole custody of the children to defendant father and by denying plaintiff mother's motion for a new trial where no evidence contradicted the court's finding that her adulterous relationship placed stress upon the children and was the primary cause of the older child's emotional problems, and plaintiff depended solely on evidence that did not exist at the time of trial in her motion for a new trial. **Faulkenberry v. Faulkenberry, 428.**

Custody—primary residence—The trial court did not abuse its discretion by granting the parties joint legal custody of their children, with the children's primary residence with plaintiff father. **Evans v. Evans, 358.**

Equal access to records of minor child—The trial court did not err in a child support and visitation case by including in its order matters that were allegedly not before the court, including the parties' agreement that plaintiff mother share with defendant father all school and medical records of the minor child and copies of all school records, that defendant be notified prior to medical appointments of the child unless it is an emergency, that the parties inform one another of each other's physical address where they reside and a current telephone number, and that plaintiff provide defendant with copies of all order forms for defendant to purchase school pictures of the child. **Young v. Young, 31.**

Support—allocation of medical expenses—Where a child support award was remanded on other grounds, the award of attorney fees and the allocation of uninsured medical or dental expenses was remanded as well. The fact that the Child Support Guidelines include a generalized, cursory instruction concerning how the court "may" structure the responsibility for uninsured medical or dental expenses does not in any way alter the trial court's discretion to apportion these expenses. **Holland v. Holland, 564.**

Support—amount—The trial court did not abuse its discretion by requiring defendant wife to pay $379.80 per month in child support which was based upon the presumptive guidelines. **Evans v. Evans, 358.**

Support—award in excess of Guidelines—findings insufficient—The trial court made insufficient findings to support an award in excess of the Child Sup-

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

port Guidelines where the Court of Appeals could only speculate on how the trial court reached its figure and whether it was supported by competent evidence. **Beamer v. Beamer, 594.**

Support—determining income—depreciation—The trial court erred in determining the self-employed plaintiff's income in a child support action by treating all depreciation as accelerated and failing to exercise its discretion in ruling on the deductibility of straight-line depreciation as a reasonable and necessary business expense. **Holland v. Holland, 564.**

Support—findings—determining income—A child support order was remanded for further findings on plaintiff's income where the trial court based its amended order in January of 2003 on plaintiff's 2001 income. Although it would have been difficult to compute plaintiff's 2002 income accurately in January of 2003 due to the nature of his farming business, the necessary findings were not made. **Holland v. Holland, 564.**

Support—modification—children's reasonable needs—findings not sufficient—A child support modification was reversed and remanded where the court did not make the necessary findings about the children's reasonable needs. Although the court found that the needs of the children had not changed, the court made no finding, and the record contained no indication, of what those expenses had been. It is not enough that the court received testimony and documentation from which sufficient findings could have been made. **Beamer v. Beamer, 594.**

CIVIL PROCEDURE

Default judgment—excusable neglect—waiting to be informed of hearing time—The trial court did not err by denying a motion for relief from a default judgment under N.C.G.S. § 1A-1, Rule 60(b)(1) based on excusable neglect where defendant did not contact an attorney until after the default judgment because it was under the impression that it would be informed of a hearing time by plaintiff. **JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 199.**

Denial of Rule 60 motion—findings—The trial court made sufficient findings which addressed the issue of excusable neglect in denying defendant's Rule 60 motion for relief from a default judgment. **JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 199.**

Rule 12 motion to dismiss—after default judgment—Rule 60 motion as remedy—The trial court did not err by denying defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b) on the ground that plaintiff did not comply with all of the requirements for service by publication. As defendant never submitted an answer nor made any motion before entry of default and default judgment, the defenses of lack of jurisdiction over the person, insufficiency of process, and insufficiency of service are deemed waived. Defendant can seek relief under Rule 60, but an appeal from Rule 12(b) decision is not interchangeable with that of a Rule 60(b) decision because different standards of review apply. **Autec, Inc. v. Southlake Holdings, LLC, 232.**

Rule 12(b)(6) motion—legal memoranda considered—not converted to summary judgment—The trial court did not err by not converting defendant's Rule 12(b)(6) motion to dismiss into a motion for summary judgment where

CIVIL PROCEDURE—Continued

counsel presented memoranda on the law without exhibits and did not present any factual evidence or allegations which the trial court could only properly address with a summary judgment hearing. **Carlisle v. Keith, 674.**

Summary judgment—consideration of allegedly inadmissible affidavit—other evidence—no error—There was no error in the consideration of an affidavit at a summary judgment hearing where the affidavit may have constituted parol evidence. There is no indication that the court based its ruling solely on the affidavit and the court's decision is supported by competent evidence in the record. **Hultquist v. Morrow, 579.**

Summary judgment—continuance—There was no abuse of discretion in the denial of defendants' motion to continue a summary judgment hearing on a State Ports construction claim. **HSI N.C., LLC v. Diversified Fire Protection of Wilmington, Inc., 767.**

CIVIL RIGHTS

42 U.S.C. § 1983—detention officers—failure to obtain medical aid—qualified immunity—The trial court properly denied a motion by detention officers for summary judgment on a 42 U.S.C.§ 1983 claim on the issue of qualified immunity. The threshold inquiry for a court in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation. A reasonable officer in 1998 would have had fair warning that ignoring an inmate's requests for medical care to address severe pain, vomiting, and nausea over two full days would violate clearly established constitutional law. The fact that plaintiff may have received some care when her requests for assistance were finally acknowledged does not relieve defendants from their responsibility. **Boyd v. Robeson Cty., 460.**

42 U.S.C. § 1983—sheriff as person—The trial court properly concluded that a sheriff in North Carolina is a "person" under 42 U.S.C. § 1983 and North Carolina sheriffs can be sued in their official capacities under that statute. **Boyd v. Robeson Cty., 460.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Defensive collateral estoppel—mutuality of parties—consideration of criminal results in civil action—Defensive collateral estoppel no longer requires mutuality of parties in North Carolina, and the trial court properly considered plaintiff's criminal convictions for assault in granting summary judgment for defendants on plaintiff's civil claims arising from the same incident. **Mays v. Clanton, 239.**

Sale of business—prior actions—res judicata—Prior judgments in two earlier cases and res judicata barred plaintiff from bringing the current action against the PNE defendants arising from the sale of a business, a lease agreement, and the failure to maintain fire insurance. Summary judgment should have been granted for defendants. **Moody v. Able Outdoor, Inc., 80.**

COMPROMISE AND SETTLEMENT

Agreement not signed—enforcement not requested—The trial court did not err by not enforcing a settlement agreement where plaintiff neither signed

COMPROMISE AND SETTLEMENT—Continued

the agreement nor asked that it be enforced. **Cohen Schatz Assocs. v. Perry, 834.**

Agreement not signed—summary judgment not mooted—Plaintiff's motion for summary judgment was not mooted by a settlement agreement where the only alleged agreement between the parties was a handwritten document from a mediated settlement conference which plaintiff never signed. **Cohen Schatz Assocs. v. Perry, 834.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Motion to suppress—videotape of interrogation—The trial court did not err in a first-degree murder and conspiracy to commit robbery with a dangerous weapon case by denying defendant's motion to suppress the videotape of his interrogation by a detective which he contends denied his rights to counsel and to remain silent. **State v. Ash, 715.**

Postarrest statements—custodial interrogation—Miranda rights—The trial court did not err in a felonious breaking or entering, robbery with a dangerous weapon, and misdemeanor assault inflicting serious injury case by denying defendant's motion to suppress his postarrest statements even though defendant contends law enforcement officers subjected him to a custodial interrogation without advising him of his Miranda rights where the trial court found that none of defendant's constitutional rights were violated by his detention and interrogation. **State v. Carmon, 750.**

Post-Miranda statements—voluntariness—The trial court did not err in a trafficking in cocaine by possession of more than 200 but less than 400 grams case by allowing the introduction of defendant's incriminating post-Miranda statements because a suggestion of hope created by statements of officers that they would talk to the District Attorney regarding defendant's cooperation did not render the statements involuntary. **State v. Houston, 367.**

CONSTITUTIONAL LAW

Effective assistance of counsel—child neglect—The trial court did not err in a child neglect case by failing to vacate its order based on respondent mother's allegation that she received ineffective assistance of counsel where she failed to specify what motions counsel should have made and what evidence could have been, but was not, presented to the trial court. **In re B.P., S.P., R.T., 728.**

Effective assistance of counsel—dismissal of claim without prejudice—Although defendant contends he received ineffective assistance of counsel in a first-degree rape, first-degree burglary, and second-degree kidnapping case, this assignment of error is dismissed without prejudice for defendant to move for appropriate relief in the superior court and request a hearing to determine whether he received ineffective assistance of counsel. **State v. Blizzard, 285.**

Effective assistance of counsel—failure to request recordation—failure to request limiting instruction—Defendant did not receive ineffective assistance of counsel in a first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury case based on his trial attorney's failure to request recordation of jury selection, opening statements, and closing arguments, as well as his attorney's

CONSTITUTIONAL LAW—Continued

failure to request a limiting instruction regarding evidence that defendant was arrested for carrying a knife. **State v. Sutton, 90.**

Effective assistance of counsel—untimely motion to suppress—Although defendant contends he received ineffective assistance of counsel in a second-degree kidnapping case based on defense counsel's untimely motion to suppress an alleged impermissibly suggestive identification procedure resulting from a show-up, this assignment of error is overruled because the record is insufficient for the appellate court to consider this claim. **State v. Harrison, 257.**

Habitual Felon Act—separation of powers—double jeopardy—cruel and unusual punishment—The Habitual Felon Act does not violate the separation of powers clause, subject defendant to double jeopardy, or constitute cruel and unusual punishment. **State v. McIlwaine, 397.**

Overbreadth—child pornography statutes—case-by-case analysis of fact situations—N.C.G.S. §§ 14-190.17A(a) and 14-190.13 which protect against child pornography are not overbroad even though they extend to images of minors which do not require a live minor for their production and even though defendant contends they allegedly criminalize material that does not violate community standards. **State v. Howell, 58.**

Possession of firearm by convicted felon—amendment of statute—not bill of attainder—The 1995 amendment to N.C.G.S. § 14-415.1 regarding possession of a firearm by a convicted felon did not constitute an unconstitutional bill of attainder even though defendant contends it stripped him of his restored right to possess a handgun. **State v. Johnson, 301.**

Possession of firearm by convicted felon—amendment of statute—not ex post facto law—Defendant's conviction for possession of a firearm by a convicted felon under N.C.G.S. § 14-415.1, as amended in 1995, does not violate the constitutional prohibitions against ex post facto laws even though defendant asserts that at the time of his prior felony conviction in 1983 the statute permitted him to possess a firearm five years after the date of discharge of the conviction. **State v. Johnson, 301.**

Possession of firearm by convicted felon—due process—vested right—right to bear arms—The 1995 amendment to N.C.G.S. § 14-415.1 regarding possession of a firearm by a convicted felon did not have the effect of unconstitutionally stripping defendant of a vested right to bear arms in violation of due process. **State v. Johnson, 301.**

Right to confront witnesses—defendant's voluntary and unexplained absence from trial—waiver—The trial court did not err in a driving while impaired case by proceeding with trial in defendant's absence because defendant's voluntary and unexplained absence from court subsequent to commencement of trial constituted a waiver of the right to confront witnesses. **State v. Tedder, 446.**

Right to confront witnesses—interrogation—unavailable witness—excited utterance—The trial court did not commit plain error or violate defendant's Sixth Amendment right to confront witnesses against him in a first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury case when it allowed one of the

CONSTITUTIONAL LAW—Continued

victim's statements to police to be admitted into evidence as an excited utterance when she did not testify at trial. **State v. Sutton, 90.**

Right to confront witnesses—videotaped deposition—unavailable witness—harmless error—Although the trial court violated defendant's constitutional right of confrontation in a first-degree murder and conspiracy to commit robbery with a dangerous weapon case by admitting a doctor's videotaped deposition into evidence without hearing evidence regarding the doctor's unavailability, the error was harmless in light of the other overwhelming evidence of defendant's guilt. **State v. Ash, 715.**

Right to counsel—gunshot residue test—While it was error to fail to advise defendant of his right to have counsel present during a gunshot residue test, the error was not prejudicial because defendant did not assign error to the admission of statements made during the test. The physical evidence would have been seized even if counsel had been present. **State v. Page, 127.**

Right to counsel—right to remain silent—motion to suppress videotape of interrogation—The trial court did not err in a first-degree murder and conspiracy to commit robbery with a dangerous weapon case by denying defendant's motion to suppress the videotape of his interrogation by a detective which he contends denied his rights to counsel and to remain silent. **State v. Ash, 715.**

Right to speedy trial—pre-indictment delay—The trial court did not err in a second-degree sexual offense, second-degree rape, and taking indecent liberties with a minor case by denying defendant's motion to dismiss the charges based on the fifteen-year delay that the victim took in reporting the incidents prior to the indictment being issued. **State v. Stanford, 214.**

Silence by defendant—incidental—not prejudicial—There was no plain error by admitting testimony that defendant had declined to make a statement to an officer. The testimony about defendant's silence was incidental to the entire testimony of the officer and it is doubtful that the jury assigned heavy weight to defendant's silence in light of the evidence against defendant. **State v. Watkins, 518.**

CONTEMPT

Civil—failure to comply with visitation order granting rights to grandparents—The trial court did not err by finding plaintiff mother in willful civil contempt for failing to comply with the terms of a consent order concerning the visitation rights of her minor daughter's paternal grandparents. **Young v. Young, 31.**

CORPORATIONS

Attorney fees—access to corporate records—no court order—Plaintiff shareholder was not entitled to an award of attorney fees under N.C.G.S. § 55-16-04(c) where there was no court order enforcing plaintiff's statutory right to inspection and copying of defendant's corporate records at defendant's expense. The parties had signed a consent order that plaintiff would have access, but that order contained no findings or conclusions and was not an adjudication of rights. **Carswell v. Hendersonville Country Club, Inc., 227.**

COSTS

Assistants and support staff—not allowed—The trial court did not err by denying a successful plaintiff costs for legal assistants and administrative support staff. These are not listed as recoverable expenses under N.C.G.S. § 7A-305(d) and there is no logical reason to find that these costs are recoverable when attorney fees are not generally recoverable. **Cunningham v. Riley, 600.**

Attorney fees—access to corporate records—no court order—Plaintiff shareholder was not entitled to an award of attorney fees under N.C.G.S. § 55-16-04(c) where there was no court order enforcing plaintiff's statutory right to inspection and copying of defendant's corporate records at defendant's expense. The parties had signed a consent order that plaintiff would have access, but that order contained no findings or conclusions and was not an adjudication of rights. **Carswell v. Hendersonville Country Club, Inc., 227.**

Attorney fees—alimony—child support—The trial court in an alimony and child support case did not fail to award adequate attorney fees where plaintiff wife received one-third of her total attorney fees, which the trial court determined was reasonable based on the nature and scope of the legal services rendered. **Francis v. Francis, 442.**

Attorney fees—authority to award—consent order—A provision in a consent order giving the court the authority to award attorney fees in a dispute over access to corporate records was not valid in the absence of statutory authority. **Carswell v. Hendersonville Country Club, Inc., 227.**

Attorney fees—civil assault—favorable verdict—attorney fees—The trial court did not err by denying plaintiff's motion for attorney fees following a favorable jury verdict in a civil assault case. Absent a separate authorizing statute, not found here, a successful litigant cannot recover attorney fees. **Cunningham v. Riley, 600.**

Attorney fees—enforcement of lien—The trial court erred by awarding attorney fees to plaintiff in an action to enforce a lien against defendants' real property to cover the costs of removing condemned dwellings because the existence of a lien could not be determined when the town improperly failed to salvage personal property and appurtenances. **Town of Hertford v. Harris, 838.**

Prejudgment interest—compensatory damages—accrual during pendency of appeal—The trial court did not err in a trespass, nuisance, and violation of the North Carolina Sedimentation Pollution Control Act case by awarding prejudgment interest for the time between the first and second trials from 16 March 2000 to 7 November 2003. **Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 209.**

COURTS

Jurisdiction—district court—driver's license reinstatement—The district court did not have jurisdiction to exempt defendant from the ignition interlock requirement where defendant was seeking reinstatement of her driver's license after having it revoked for driving with an alcohol concentration of 0.16. Although defendant had obtained an exemption for her limited driving privilege because medical conditions prevented her use of the device, N.C.G.S. § 20-17.8 does not provide any exceptions to the requirement for license reinstatement. **State v. Benbow, 613.**

CRIMINAL CONVERSATION

Statute of limitations—three years—discovery rule—not applicable—Plaintiff's criminal conversation claim was barred by the statute of limitations, and the trial court erred by denying defendant's motion for a directed verdict, where the alleged affair began in 1991 and ended in 1994 or 1995, plaintiff began to suspect the affair in 1996, and he did not file the complaint until 2000. The discovery exception to statutes of limitation for certain latent causes of action does not apply here since criminal conversation is specifically identified in the three-year statute of limitations. N.C.G.S. § 1-52(5). **Misenheimer v. Burris, 539.**

CRIMINAL LAW

Competency to stand trial—mental retardation—The trial court did not abuse its discretion in a first-degree murder case by determining that defendant was competent to stand trial. **State v. McClain, 657.**

Denial of motion to continue—abuse of discretion standard—The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion to continue made immediately following the trial court's ruling that he was competent to stand trial. **State v. McClain, 657.**

Felony stalking—constitutionality of statute—The felony stalking statute is not unconstitutionally vague either on its face or as applied to defendant. **State v. Watson, 331.**

Insanity defense—prosecutor's improper arguments—Defendant is entitled to a new trial in a prosecution for first-degree murder and other offenses because of the prosecutor's improper argument that, if defendant was found not guilty by reason of insanity, it was 99 percent certain that a judge will some day release defendant, and the prosecutor's argument comparing defendant's acts to those of the September 11 terrorists. **State v. Millsaps, 340.**

Instruction—flight—The trial court did not commit plain error in a first-degree murder case by giving an instruction on flight where defendant left the scene and took steps to avoid apprehension, and defendant failed to render assistance to the victim. **State v. Rios, 270.**

Mistrial—failure to object—A trial court judge appropriately entered a mistrial (in effect) when he discovered that he had personal knowledge of an impaired driving case after the State began its evidence, recessed, and rescheduled the trial before another judge. Defendant made no objection at the time, despite being given the opportunity, and so waived the objection on appeal. **State v. Cummings, 249.**

Removal of defendant from courtroom during trial—restraint of defendant at trial—The trial court did not err in a first-degree murder and conspiracy to commit robbery with a dangerous weapon case by restraining and removing defendant from the courtroom during trial. **State v. Ash, 715.**

Trial court questioning witnesses—clarification—The trial court did not err in a felonious breaking or entering, robbery with a dangerous weapon, and misdemeanor assault inflicting serious injury case by asking questions of witnesses because the questions did not exceed the boundaries of clarification. **State v. Carmon, 750.**

CRIMINAL LAW—Continued

Trial court questioning witnesses—no impression court working with prosecution—The trial court did not abuse its discretion in a first-degree murder case by questioning witnesses and the court's questions did not give the jury the impression that the trial court and the prosecution were working together. **State v. Rios, 270.**

Trial court response to jury question—no prejudice—The trial court did not abuse its discretion in a drug case by responding to a jury question about the amount of cocaine found in a cooler. **State v. Cardenas, 404.**

DAMAGES AND REMEDIES

Compensatory—pain and suffering—The trial court erred by awarding summary judgment for defendants on compensatory damages arising from a nonprofessional relationship, of disputed degree, between a doctor and patient. Although plaintiff did not offer proof of physical pain, that is only one aspect of pain and suffering. Emotional suffering may be included, and there is no support for the contention that the psychological part of pain and suffering damages must meet the same standard as the essential element of severe emotional distress in a claim for infliction of emotional distress. The question of the sufficiency of the evidence of emotional distress was not raised below and was not addressed on appeal. **Iadanza v. Harper, 776.**

Punitive—underlying claim dismissed—The trial court should have dismissed a counterclaim for punitive damages where the underlying counterclaims were properly dismissed. Punitive damages do not exist as an independent cause of action. **Iadanza v. Harper, 776.**

DECLARATORY JUDGMENTS

Standing—conversion of condo to time share—no existing purchase contract or ownership—The trial court properly granted defendant-Station One's motion to dismiss for failure to state a claim upon which relief may be granted where plaintiff had entered into a contract to purchase a Station One condo, with the intent to convert the property to a timeshare; Station One amended its Homeowner's Declaration to prohibit time share ownership; the contract to purchase the condo was terminated; and plaintiff subsequently filed this complaint seeking a declaratory judgment. At the time this complaint was filed, plaintiff was neither a property owner nor a party to a contract to purchase, had no legally protected interest, and lacked standing. **Beachcomber Props., L.L.C. v. Station One, Inc., 820.**

DIVORCE

Alimony—consideration of investment portfolio—The trial court did not err by denying alimony payments for a period of 22 months and considering plaintiff wife's investment portfolio when calculating the amount of alimony that the trial court awarded. **Francis v. Francis, 442.**

Divorce from bed and board—postseparation support—indignities—The trial court did not err by granting plaintiff husband's request for divorce from bed and board and by denying defendant wife's claim for postseparation sup-

DIVORCE—Continued

port based upon the wife's subjection of the husband to indignities. **Evans v. Evans, 358.**

Incorporated separation agreement—military retirement pay—The trial court did not err by awarding defendant wife a portion of plaintiff husband's military retirement pay based on the parties' incorporated separation agreement subsequent to entry of divorce. **Brenenstuhl v. Brenenstuhl, 433.**

Separation agreement—contract principles—vague provisions—void—A separation agreement was correctly declared void where it had not been ratified by the court and was governed by the general principles of contracts. This agreement lacked the required certainty and specificity in eight areas ranging from child support and alimony to insurance and retirement benefits. **Jackson v. Jackson, 46.**

Separation agreement—vague provisions—entire agreement voided—The trial court did not err by voiding an entire separation agreement where the deficiencies in the agreement were such that merely striking portions of it was not feasible. Moreover, plaintiff failed to object or otherwise dissent from the trial court's decision. **Jackson v. Jackson, 46.**

DRUGS

Conspiracy to traffic in heroin—transportation and possession—one crime—There was sufficient evidence to support a finding of defendant's guilt of only conspiracy to traffic in heroin by transportation, and defendant's conviction on the additional charge of conspiracy to traffic in heroin by possession must be arrested. **State v. Howell, 741.**

Methamphetamine—instructions—knowing possession—The trial court did not err in a felonious trafficking of methamphetamine by possessing more than four hundred grams and possession with intent to sell and deliver methamphetamine case by instructing the jury that the State is not required to prove defendant had knowledge of the weight or amount of methamphetamine which he knowingly possessed. **State v. Cardenas, 404.**

EASEMENTS

Railroad—restraint or enjoinment of servient estate—The trial court did not err by granting plaintiff railway company's motion for summary judgment based on the conclusion that the pertinent easement's servient estate can be restrained or enjoined for the benefit of the easement owner. **Norfolk S. Ry. Co. v. Smith, 784.**

EMPLOYER AND EMPLOYEE

OSHA—violations by subcontractors—general contractor's duty to inspect job site—A general contractor had a duty to inspect the job site to detect safety violations committed by its subcontractors as well as its own employees. Under N.C.G.S. § 95-129(2), the general contractor's duty extends to employees of subcontractors on job sites, but only to violations that could reasonably be detected by inspecting the job site. **N.C. Comm'r of Labor v. Weekley Homes, L.P., 17.**

ENVIRONMENTAL LAW

Silt deposition into creek and lake—trespass—nuisance—future injury—cost of repairs—The jury did not err in a trespass, nuisance, and violation of the North Carolina Sedimentation Pollution Control Act case by submitting issue 2 to the jury even though defendant contends the trial court's instructions allowed the jury to recompense plaintiff for future injuries arising from a recurring temporary trespass or nuisance because jplaintiff's recovery under issue 2 was for the cost of repairs, necessitated by defendant's actions, required to forstall further silt deposition into a creek and lake on plaintiff's property. **Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 209.**

ESTOPPEL

Defense of collusion—not affirmatively pled—Defendants waived the defense of estoppel by collusion by not affirmatively setting it forth in their original or amended answer in an action to collect unpaid debts from material furnished to a subcontractor on a State Ports project. Even if their position was properly asserted, defendants did not show factual evidence that plaintiff acquiesced to false representations by the subcontractor (there was no abuse of discretion in the exclusion of an affidavit submitted less than two business days before the hearing). **HSI N.C., LLC v. Diversified Fire Protection of Wilmington, Inc., 767.**

Judicial estoppel—inconsistent legal contentions on child support—The doctrine of judicial estoppel precluded defendant father from challenging the service of process of the civil summons and complaint in the mother's action for divorce from bed and board and child support, and thus, the trial court's denial of defendant's motion to dismiss the child support complaint based on insufficient service of process is affirmed. **Price v. Price, 187.**

Recovery of unpaid debt by subcontractor—timely notice—Plaintiff was not estopped from recovery of an unpaid debt for materials furnished to a subcontractor on a State Ports project where plaintiff's notice to the prime contractor of the subcontractor's failure to pay was timely given according to statutory requirements. The Legislature instituted specific time limitations for notification to provide certainty for all parties for claims upon a payment bond; less definite requirements for notification would create uncertainty and undermine the statutory scheme. **HSI N.C., LLC v. Diversified Fire Protection of Wilmington, Inc., 767.**

EVIDENCE

Convenience store videotape—proper foundation—The trial court did not err by admitting a convenience store videotape for illustrative purposes in an armed robbery prosecution. A person working at the store during the robbery testified that the tape was taken out of the camera on the night of the robbery, that the tape accurately represented the incident, explained a discrepancy in the date and time, and deputies testified about the chain of custody. A proper foundation was laid. **State v. Ayscue, 548.**

Convenience store videotape—substantive evidence—no plain error—There was no plain error in an armed robbery prosecution in the introduction as substantive evidence of a convenience store videotape. The tape depicted the

EVIDENCE—Continued

events of the robbery, corroborated the testimony of workers in the store, and there is no indication that the videotape was suggestive, confusing, or misleading, or that it provided an improper basis for the jury's verdict. The record does not reflect that the probative value of the videotape was outweighed by undue prejudice. **State v. Ayscue, 548.**

Credibility of alleged accomplice—failure to arrest—explanation—Testimony of a police captain regarding the credibility of an alleged accomplice was admissible as an explanation for why that person was not arrested. **State v. Carmon, 750.**

Door not opened on cross-examination—witness interjecting answer—The trial court did not err by refusing to allow plaintiff's expert to testify in an unfair and deceptive trade practices action arising from a bridal show survey and tip sheet where the court ruled that plaintiff had not properly disclosed the expert's opinion in discovery. Although plaintiff argued that defendant opened the door on cross-examination, the witness interjected the information and defendant was not the first to raise the issue. **Castle McCulloch, Inc. v. Freedman, 497.**

Exhibits—drug paraphernalia—packaging materials—bus tickets—relevancy—The trial court did not err in a trafficking in heroin, conspiracy to traffick in heroin, and possession with intent to sell or deliver heroin case by admitting State's exhibits 1 through 12 consisting of various items of drug paraphernalia, packaging materials, and bus tickets found in an accomplice's house. **State v. Howell, 741.**

Expert testimony—rape victim believable—not plain error—Although a medical expert's testimony that the victim was "believable" in her allegation that defendant raped her was an impermissible comment on the credibility of the victim, the admission of this testimony was not plain error in light of the corroborative testimony and physical evidence offered by the State because it did not have a probable impact on the jury's finding of guilt. **State v. Blizzard, 285.**

Hearsay—opening the door—The trial court did not err in a felonious trafficking of methamphetamine and possession with intent to sell and deliver methamphetamine case by admitting a detective's testimony describing the conversation he had with a witness that led to defendant's arrest because defendant opened the door to this testimony by his cross-examination of the detective. **State v. Cardenas, 404.**

Hearsay—substantially same testimony admitted without objection—harmless error—The trial court did not err in a felonious breaking or entering, robbery with a dangerous weapon, and misdemeanor assault inflicting serious injury case by admitting hearsay testimony from an officer serving as a State's witness where nearly identical testimony was admitted without objection. **State v. Carmon, 750.**

Intercepted sexually explicit emails—stored on home computer—The trial court did not err in an action for divorce from bed and board, postseparation support, and child custody and support by overruling objections to the admission into evidence of intercepted sexually explicit emails between defendant wife and another man. **Evans v. Evans, 358.**

EVIDENCE—Continued

Lay opinion testimony—mental retardation—The trial court did not err in a first-degree murder case by allowing a lay witness to testify that defendant was not mentally retarded. **State v. McClain, 657.**

Officer's testimony about defendant's statement—subsequent testimony—no prejudice—There was no prejudicial error in excluding an officer's testimony about an armed robbery defendant's statement where any error was cured by subsequent testimony. **State v. McMillian, 160.**

Officer's testimony—precautions taken when arrestee's saliva comes into contact with officer—The trial court did not commit prejudicial error by overruling defendant's objection to and motion to strike an officer's testimony concerning the precautions normally taken when an arrestee's saliva comes into contact with an officer's eyes or mouth or an open wound. **State v. Crouse, 382.**

Parol evidence rule—not used to add terms—vague separation agreement—The parol evidence rule prohibited the trial court from allowing the introduction of parol evidence to add to the terms of a vague and uncertain separation agreement. Parol evidence is allowed when the writing is not a full integration of the terms of the contract or to make certain the intention behind an ambiguous contract. **Jackson v. Jackson, 46.**

Poem—corroboration—The trial court did not abuse its discretion in a first-degree rape, first-degree burglary, and second-degree kidnapping case by admitting a poem written by the victim's boyfriend as a State's exhibit because the evidence corroborated the victim's testimony that she did not consent to sexual intercourse with defendant due to being in a relationship with another man. **State v. Blizzard, 285.**

Prior arrest for impaired driving and resulting photograph—admission not prejudicial—There was no prejudicial error in an attempted armed robbery prosecution where the court erred by allowing an officer to testify that he had arrested defendant for driving while impaired and the resulting photograph was used in identifying defendant. The testimony about the DWI was not sufficiently similar to the attempted armed robbery to be offered for any permissible purpose; however, defendant took the stand in his own behalf, which allowed the State to proffer evidence regarding the defendant's criminal record, and defendant revealed his prior record during his direct examination. **State v. McMillian, 160.**

Prior convictions—not prejudicial—In light of the entire record in an armed robbery prosecution, including identification testimony, there was no prejudice from the State cross-examining defendant about his prior out-of-state conviction for possession of stolen property. **State v. Ayscue, 548.**

Prior crimes or bad acts—intent, knowledge, or common plan—remoteness—The trial court did not abuse its discretion in a possession with intent to sell cocaine case by allowing evidence of defendant's prior criminal activities to show knowledge, intent, and common plan, and it was proper for the court to exclude time defendant spent in prison when determining whether the prior acts were too remote. **State v. Stevenson, 797.**

Prior crimes or bad acts—uncharged drug dealings—The trial court did not err in a trafficking in cocaine by possession of more than 200 but less than 400

EVIDENCE—Continued

grams case by allowing a confidential police informant's testimony as to prior uncharged drug dealings with defendant. **State v. Houston, 367.**

Statements by defendant's girlfriend—admitted through officer's testimony—not prejudicial—There was no plain error in the admission of statements by defendant's girlfriend through the testimony of investigating officers. While the statements may have been admissible as corroboration of earlier testimony, the absence of the statements would not have changed the verdict in light of the other admitted evidence. **State v. Watkins, 518.**

Testimony about victim's identification—rebuttal—admissible—The trial court did not err in an attempted armed robbery prosecution by allowing an officer to testify about a witness's conversation with him regarding the identification of defendant. The witness with whom the officer talked had testified for defendant, the officer was called in rebuttal, and his testimony was relevant because it concerned the circumstances surrounding the parties, was probative of his investigation of defendant as the perpetrator, and aided the jury in understanding the circumstances surrounding the investigation. **State v. McMillian, 160.**

Victim's identification of defendant—personal knowledge—There was no plain error in the admission of testimony from the victim of an attempted murder and assault that it was defendant who had shot him where the victim did not see defendant and based his testimony on what he perceived as the shooting occurred, particularly what he heard. The victim was defendant's uncle, had heard defendant's voice frequently, and had sufficient personal knowledge to identify defendant. **State v. Watkins, 518.**

Witnesses' denial of prior statements—impeachment—extrinsic evidence—The trial court erred in a first-degree statutory sex offense, indecent liberties, sexual activity by a substitute parent, felony child abuse, and statutory rape case by permitting the State to impeach three witnesses who denied making prior allegations about defendant's prior sexual abuse of his own children when they were younger with extrinsic evidence. **State v. Mitchell, 417.**

FALSE IMPRISONMENT

Contempt to enforce consent judgment—insufficient evidence—The findings supported the trial court's conclusion that defendants failed to prove a cause of action for false imprisonment arising from a show cause order to enforce a consent judgment concerning farm leases and tobacco allotments. The trial court's finding that defendant Donald Groce consented to his imprisonment by failing to deliver to plaintiffs the year 2000 tobacco marketing cards, unsupported by the evidence, was not necessary to support the trial court's conclusion that defendants failed to prove an intentional or unlawful detention by plaintiffs. **Hemric v. Groce, 69.**

FIREARMS AND OTHER WEAPONS

Possession of firearm by convicted felon—amendment of statute—not bill of attainder—The 1995 amendment to N.C.G.S. § 14-415.1 regarding possession of a firearm by a convicted felon did not constitute an unconstitutional bill of attainder even though defendant contends it stripped him of his restored right to possess a handgun. **State v. Johnson, 301.**

FIREARMS AND OTHER WEAPONS—Continued

Possession of firearm by convicted felon—amendment of statute—not ex post facto law—Defendant's conviction for possession of a firearm by a felon under N.C.G.S. § 14-415.1, as amended in 1995, does not violate the constitutional prohibitions against ex post facto laws even though defendant asserts that at the time of his prior felony conviction in 1983 the statute permitted him to possess a firearm five years after the date of discharge of the conviction. **State v. *Johnson*, 301.**

Status as convicted felon—prayer for judgment continued—A defendant who pled guilty to felony sale and delivery of a controlled substance and felony conspiracy to sell a controlled substance and received a prayer for judgment continued for those charges was a convicted felon for purposes of N.C.G.S. § 14-404 and was thus not entitled to obtain a permit to purchase a handgun. **Friend v. State, 99.**

GOVERNOR

Budgetary powers—suspension of payments to local governments—Summary judgment in favor of defendant-Secretary of Revenue was affirmed where defendant relied on an Executive Order in suspending payments to local governments of local government tax reimbursements and local government tax-sharing funds. The North Carolina Constitution clearly gives the Governor a duty to balance the budget and prevent a deficit, that must be done through expenditures, and expenditures are here interpreted to be payments, disbursements, allocations, or otherwise, budgeted to be paid out of State receipts within a fiscal period. Separation of powers was not violated because the Governor was exercising powers constitutionally committed to his office, and language in the Constitution limiting the use of taxes to stated special objects is directed toward the General Assembly. **County of Cabarrus v. Tolson, 636.**

HOMICIDE

Attempted murder—defendant as shooter—sufficiency of evidence—The evidence in an assault and attempted murder prosecution was sufficient for the jury to determine that defendant was the one who shot the victim. **State v. Watkins, 518.**

Attempted murder—evidence of premeditation and deliberation—sufficient—There was sufficient evidence of premeditation and deliberation in an attempted murder prosecution where defendant entered the victim's house without permission, a fight resulted when defendant broke the victim's television, defendant pulled a knife, he was seen later leaving his house with a gun in his truck, and he later yelled that he had "gotten one" after shooting the victim in the shoulder. **State v. Watkins, 518.**

Attempted murder—short-form indictment—Defendant's short form indictment for attempted murder was fatally defective in that it failed to allege that defendant acted with the specific intent to kill. The application of N.C.G.S. § 15-144 (authorizing short form indictments for murder or manslaughter) to attempted murder goes beyond the plain language of the statute. **State v. Watkins, 518.**

First-degree murder—failure to instruct on second-degree murder—failure to instruct on voluntary intoxication—The trial court did not err in a

HOMICIDE—Continued

first-degree murder case by failing to instruct the jury on second-degree murder based on voluntary intoxication. **State v. Rios, 270.**

First-degree murder—instructions—deliberation—The trial court did not err in a first-degree murder case by its supplemental instructions on the element of deliberation when it used the language of *State v. Ruof*, 296 N.C. 623 (1979). **State v. McClain, 657.**

First-degree murder—short-form indictment—constitutionality—The short-form indictment used to charge defendant with first-degree murder was constitutional. **State v. Rios, 270.**

First-degree murder—short-form indictment—constitutionality—The short-form indictment used to charge defendant with first-degree murder was constitutional. **State v. McClain, 657.**

Second-degree murder—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge of second-degree murder where, resolving all inconsistencies in favor of the State, defendant admitted being at the scene when the victim was shot, did not render assistance in reviving the victim or contact emergency personnel regarding the shooting, defendant's hands contained gunshot residue, and defendant's inconsistent statements regarding his location during the shooting is circumstantial evidence of defendant's guilt. **State v. Page, 127.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—PET settlement—DHHS exceeded its statutory authority in affirming a PET scanners settlement regardless of whether a certificate of need had been issued; however, the two hospitals could obtain PET scanners by submitting new applications in accordance with normal CON procedure (which they had done and of which the Court of Appeals took judicial notice). **Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't of Health & Human Servs., 641.**

Certificate of need—procedural violations—hospital allowed to operate—A hospital that opened under a certificate of need settlement agreement improperly approved after the final agency decision was allowed to continue operations pending remand because closing the hospital would cause hardship to the community and because the parties had acted in good faith. **Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't of Health & Human Servs., 641.**

Certificate of need—relocation of operating rooms—grandfather clause—DHHS did not err in a certificate of need case by affirming an operating room settlement where the relocation of operating rooms met the requirements of the grandfather clause in a change in the certificate of need statutes. N.C.G.S. § 131E-176(16)u. **Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't of Health & Human Servs., 641.**

Certificate of need—review of ALJ recommendation—new evidence—A DHHS decision upholding a settlement in a hospital certificate of need dispute was remanded where DHHS heard new evidence after receiving the ALJ's recommended decision. The consideration of new evidence clearly violated N.C.G.S. § 150B-51(a). **Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't of Health & Human Servs., 641.**

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

Certificate of need—settlement—procedures—On remand, DHHS must follow the procedural safeguards for approval of applications and for initial decisions when issuing a certificate of need pursuant to a settlement after a final agency decision. **Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't of Health & Human Servs., 641.**

Certificate of need—standard of review—The exclusion of the Certificate of Need Act from the standard of review in N.C.G.S § 150B-34(c), as well as the retention of the term "recommended decision," leaves undisturbed the scope and standard of review under N.C.G.S. § 150B-51 for appellate review of DHHS action under the CON Act. **Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't of Health & Human Servs., 641.**

HOUSING

Standing—conversion of condo to time share—no existing purchase contract or ownership—The trial court properly granted defendant-Station One's motion to dismiss for failure to state a claim upon which relief may be granted where plaintiff had entered into a contract to purchase a Station One condo, with the intent to convert the property to a timeshare; Station One amended its Homeowner's Declaration to prohibit time share ownership; the contract to purchase the condo was terminated; and plaintiff subsequently filed this complaint seeking a declaratory judgment. At the time this complaint was filed, plaintiff was neither a property owner nor a party to a contract to purchase, had no legally protected interest, and lacked standing. **Beachcomber Props., L.L.C. v. Station One, Inc., 820.**

IMMUNITY

Sovereign—waiver—loss exceeding $250,000—The claims of a plaintiff who alleged that he was assaulted by a deputy while an inmate in the Mecklenburg County jail were barred by sovereign immunity unless the total loss exceeded a self-insured retention of $250,000. Mecklenburg County had purchased insurance for a total loss exceeding $250,000, including the verdict, plaintiff's costs, and defendant's costs. **Cunningham v. Riley, 600.**

INDECENT LIBERTIES

Motion to dismiss—sufficiency of evidence—The trial court erred by denying defendant's motion to dismiss the charge of indecent liberties where the evidence suggested only an accidental encounter when his hand brushed against his niece's breast. **State v. Stanford, 214.**

IDENTIFICATION OF DEFENDANTS

Photographic lineup—illustrative of pretrial identification—Evidence about a photographic lineup and the victim's identification of defendant was admissible where the evidence was admitted to illustrate the pretrial identification of defendant. The officer explained the methods used in the creation of the lineup, and both the officer and the victim testified that the victim's response was not prompted. **State v. McMillian, 160.**

INDIANS

Jurisdiction—Eastern Band of Cherokees—casino gambling—civil actions—The North Carolina State Courts did not have jurisdiction over an unfair trade practices claim arising from a disputed prize at a casino owned by the Eastern Band of the Cherokee Indians. The provision of the Compact between the Eastern Band of Cherokee Indians and the State of North Carolina allowing State courts to apply and enforce criminal and regulatory laws does not grant jurisdiction over civil actions of this sort. **Hatcher v. Harrah's N.C. Casino Co., LLC, 151.**

Jurisdiction—Eastern Band of Cherokees—casino gambling dispute—The trial court correctly concluded that it did not have subject-matter jurisdiction over a dispute concerning the payment of a prize won at casino owned by the Eastern Band of the Cherokee Indians. While the trial court erred by concluding that it lacked jurisdiction because gambling violated North Carolina public policy, the Cherokees have a greater interest than the State in resolving patron disputes with the casino, have policies and procedures for resolving such disputes, and the exercise of state court jurisdiction would unduly infringe on the self-governance of the Cherokees. **Hatcher v. Harrah's N.C. Casino Co., LLC, 151.**

INDICTMENT AND INFORMATION

Amendment—habitual driving while impaired—no substantial alteration—The trial court did not err in a habitual driving while impaired case by allowing the State to amend the indictment after the State rested to allege the date of a prior conviction rather than the date of the offense. **State v. Winslow, 137.**

INSURANCE

Liability insurance—synthetic stucco—timing of coverage—acts or omissions before policy date—The trial court did not err by ordering summary judgment for defendant in a declaratory judgment action between insurance companies arising from synthetic stucco provided by RGS Builders, which was insured by plaintiff previously and by defendant when the complaint was filed. Any acts or omissions by the insured (RGS) occurred prior to the effective date of defendant's policy. **Harleysville Mut. Ins. Co. v. Berkley Ins. Co. of the Carolinas, 556.**

JUDGES

Overruling one another—double jeopardy—A district court judge could not dismiss an impaired driving case on double jeopardy grounds following a mistrial where another judge had already denied the motion. The rule that one superior court judge may not modify, overrule, or change the judgment or order of another also applies to district court judges. **State v. Cummings, 249.**

JUDGMENTS

Compulsory counterclaims—summary ejectment—breach of contract—negligence—res judicata—Plaintiff tenants' claims against defendant landlords for breach of contract, negligence and unfair and deceptive trade practices were not compulsory counterclaims in defendants' prior summary ejectment

JUDGMENTS—Continued

action and were thus not barred by the doctrine of res judicata. **Murillo v. Daly, 223.**

Default judgment—motion to set aside—failure to exercise due diligence—excusable neglect—The trial court did not abuse its discretion in a breach of lease agreement, conversion, and unfair and deceptive trade practices case by denying defendant's motion to set aside entry of default judgment under N.C.G.S. § 1A-1, Rule 60(b) based on defendant's failure to exercise due diligence and the finding that his failure to answer the complaint was not due to excusable neglect. **Scoggins v. Jacobs, 411.**

Default judgment—sum certain—The trial court abused its discretion by not setting aside a default judgment where there was nothing from which damages could be determined other than plaintiff's bare assertion of the amount owed and the clerk lacked authority to enter the default judgment. **Basnight Constr., Co. v. Peters & White Constr., Co., 619.**

Default judgment—validity—lien enforcement not ordered—No portion of a default judgment entered by the clerk of court in favor of a subcontractor was void where plaintiff sought a lien under N.C.G.S. Ch. 44A in its complaint but did not move for enforcement of a lien in its motion for default judgment, and the clerk of court did not order enforcement of a lien in the default judgment. **JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 199.**

Findings—bench trial—consent order—subsequent petition for attorney fees—The trial court did not err by failing to enter findings pursuant to N.C.G.S. § 1A-1, Rule 52(a)(1) in ruling on a petition for attorney fees. That rule applies only to "actions" tried before the trial court without a jury; here, the action had been addressed in a consent order. **Carswell v. Hendersonville Country Club, Inc., 227.**

Motion to set aside default—no reason for failure to timely file—The trial court did not abuse its discretion by denying defendant's motion to set aside an entry of default where the trial court found that defendant was careless and negligent in failing to obtain an extension of time for filing an answer. There was no dispute that defendant's Virginia counsel told its North Carolina office to file an extension of time, but no explanation was included in the record for the failure to do so, whether it was oversight, case load, clerical error, or otherwise. **Basnight Constr. Co. v. Peters & White Constr. Co., 619.**

JURISDICTION

Personal—*minimum contacts*—motion to dismiss—The trial court did not err in a breach of contract and quantum meruit case by denying the nonresident defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) based on lack of personal jurisdiction because defendants had sufficient minimum contacts with this state, and a choice of law clause in the parties' contracts was not determinative of personal jurisdiction. **Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 690.**

JURY

Peremptory challenges—*Batson* claim—The trial court did not err in a felonious breaking or entering, robbery with a dangerous weapon, and misdemeanor

JURY—Continued

assault inflicting serious injury case by denying defendant's objection to the State's use of peremptory challenges to remove African-American jurors from the panel allegedly based on race. **State v. Carmon, 750.**

Peremptory challenge—*Batson* claim—race neutral reasons—The trial court did not err in a first-degree murder case by allowing the prosecution to peremptorily excuse an African-American prospective juror. **State v. McClain, 657.**

Special venire panel—pretrial publicity—The trial court did not abuse its discretion in a felonious breaking or entering, robbery with a dangerous weapon, and misdemeanor assault inflicting serious injury case by ordering a special venire panel from another county for defendant's third trial. **State v. Carmon, 750.**

KIDNAPPING

First-degree—motion to dismiss—sufficiency of evidence—rape—The trial court did not err by denying defendant's motion to dismiss the first-degree kidnapping charge because defendant's forcible movement of the victim from the front of her home to a bedroom was sufficient asportation to support kidnapping in addition to rape. **State v. Blizzard, 285.**

Second-degree—instruction—false imprisonment—The trial court did not err in a second-degree kidnapping case by denying defendant's motion to instruct the jury on the lesser-included offense of false imprisonment. **State v. Harrison, 257.**

Second-degree—motion to dismiss—sufficiency of evidence—terrorizing victim—The trial court did not err by denying defendant's motion to dismiss the charge of second-degree kidnapping based on defendant's intent to terrorize the victim. **State v. Harrison, 257.**

LANDLORD AND TENANT

Breach of lease—ejectment—notice—default—The trial court did not err in a breach of lease and ejectment action by granting summary judgment in favor of plaintiff landlord because the lease did not require any notice of termination and defendant's alleged inability to tender payment without having a Form W-9 signed by plaintiff was due to an internal company policy and not beyond defendant's control. **Crabtree Ave. Inv. Grp., LLC v. Steak & Ale of N.C., Inc., 825.**

Summary ejectment action—change of ownership—no agreement with new owner—The trial court erred by ordering defendants to surrender possession of the property in a summary ejectment action where the property had changed hands and there was no evidence that defendants had entered into any lease with plaintiff, the new owner. Plaintiff's remedy is a trespass action. **Adams v. Woods, 242.**

LIBEL AND SLANDER

Slander per se—statute of limitations—unsigned letters—The trial court properly dismissed a counterclaim for slander per se in a claim arising from a

LIBEL AND SLANDER—Continued

nonprofessional relationship between a doctor and patient where the one-year statute of limitations barred claims from all communications but unsigned letters, which cannot constitute slander. **Iadanza v. Harper, 776.**

LIENS

Default judgment—jurisdiction—clerk of court—The clerk of court had jurisdiction to rule on a lien pursuant to N.C.G.S. § 1A-1, Rule 55(b)(1) where plaintiff sought a lien pursuant to Chapt. 44A of the General Statutes, but did not move for enforcement of the lien in its motion for a default judgment and no enforcement was ordered by the clerk. **JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 199.**

Default judgment—validity—lien enforcement not ordered—No portion of a default judgment entered by the clerk of court in favor of a subcontractor was void where plaintiff sought a lien under N.C.G.S. Ch. 44A in its complaint but did not move for enforcement of a lien in its motion for default judgment, and the clerk of court did not order enforcement of a lien in the default judgment. **JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 199.**

MOTOR VEHICLES

Driving while impaired—motion to dismiss—sufficiency of evidence—diabetic attack—The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired even though defendant contends there was insufficient evidence of impairment when she was allegedly suffering from a diabetic attack. **State v. Tedder, 446.**

Driving while impaired—voluntary dismissal—The trial court had jurisdiction to enter judgment against defendant for driving while impaired even though the State had entered a voluntary dismissal of the charge against defendant after the original trial began where the State filed a dismissal when defendant failed to appear for the second day of trial and thereafter filed a reinstatement of the case pursuant to N.C.G.S. § 15A-932. **State v. Tedder, 446.**

Habitual DWI—indictment—date of prior conviction—amendment—Rule of Lenity—The indictment used to charge defendant with habitual DWI was not fatally defective even though it originally alleged that one of defendant's prior DWI convictions occurred on 1 April 1993, which was actually the date of the offense and eight days outside the seven-year limitation of the habitual DWI statute, N.C.G.S. § 20-13805(a), where the trial court allowed the prosecutor's motion to amend the indictment to reflect the date of conviction on 11 August 1993. The Rule of Lenity did not require that the date of the offense rather than the date of conviction be used in the interpretation of the DWI statute because the statute clearly refers to prior convictions, and there is no ambiguity in the statute. **State v. Winslow, 137.**

Jurisdiction—district court—driver's license reinstatement—The district court did not have jurisdiction to exempt defendant from the ignition interlock requirement where defendant was seeking reinstatement of her driver's license after having it revoked for driving with an alcohol concentration of 0.16. Although defendant had obtained an exemption for her limited driving privilege because medical conditions prevented her use of the device, N.C.G.S. § 20-17.8

MOTOR VEHICLES—Continued

does not provide any exceptions to the requirement for license reinstatement. **State v. Benbow, 613.**

MUNICIPAL CORPORATIONS

Minimum housing standards—condemed dwellings—cost of removal—proceeds of personal property or appurtenances—The trial court erred by granting summary judgment in favor of plaintiff town in an action to enforce a lien against defendants' real property to cover the costs of removing condemned mobile homes. **Town of Hertford v. Harris, 838.**

NEGLIGENCE

Carbon monoxide poisoning—causation—mere speculation or conjecture—The trial court did not err in a negligence action arising out of the release of carbon monoxide from gas boilers installed at a public housing development where plaintiffs were residents by granting summary judgment in favor of defendant Housing Authority. **Anderson v. Housing Auth. of City of Raleigh, 167.**

Safety manuals—not distributed—not proximate cause—The trial court erred by denying defendants' motion for judgment notwithstanding the verdict on plaintiff's claim that Little League, Inc. was liable under a direct negligence theory for an accident which occurred during a pop fly drill at a baseball practice. Plaintiffs' evidence did not show that the minor plaintiff's injuries would not have occurred if Little League had distributed its safety publications to individual coaches. **Loftis v. Little League Baseball, Inc., 219.**

Skiing accident—failure to take ski lesson—The trial court properly granted summary judgment for defendants under West Virginia law in an action arising from a church group ski accident. Plaintiff's argument that the adult defendants placed a dangerous instrumentality (skis) in the hands of their son was not raised in the trial court and is precluded on appeal; the failure to take a ski lesson prior to skiing for the first time does not constitute negligence; and plaintiff did not present sufficient evidence to overcome the rebuttable presumption that a twelve-year-old was incapable of negligence. **Frank v. Funkhouser, 108.**

NUISANCE

Leasing house for drug sales—evidence not sufficient—Plaintiff did not establish a nuisance under N.C.G.S. § § 19-1(a) and 19-1.2 at a rental house owned by defendants where the evidence showed some drug activity, but did not establish that the purpose of leasing the property was to conduct illegal drug sales in the regular course of business. **State ex rel. City of Salisbury v. Campbell, 829.**

Ongoing breaches of peace—rental house—evidence not sufficient—Plaintiff did not establish a nuisance for ongoing breaches of the peace under N.C.G.S. § 19-1(b) at a rental house owned by defendants where some of the trips to the house by officers involved service of misdemeanor warrants, with no evidence of a threat to citizens or disturbance of the public order; some were in response to domestic disturbances, with no evidence of an assault or other

NUISANCE—Continued

unlawful activity breaching the peace; and the three instances which were breaches of the peace occurred over two and a half years and did not meet the statutory standard of repeated acts. **State ex rel. City of Salisbury v. Campbell, 829.**

NURSES

Supervision of nursing personnel involved in anesthesia activities—certified registered nurse anesthetist—The trial court did not err by denying respondent Board of Nursing's motion for enforcement of a 1994 consent order seeking primarily an order from the trial court directing petitioner Medical Board to remove language from a Medical Board position statement that anesthesia administered in an office-based surgical setting should either be administered by an anesthesiologist or by a certified registered nurse anesthetist (CRNA) under the supervision of a physician. **N.C. Med. Soc'y v. N.C. Bd. of Nursing, 1.**

PENALTIES, FINES, AND FORFEITURES

Appearance bond forfeiture—notice—The trial court did not err by denying the surety's appeal from an order entered on 30 January 2004 denying its motion for relief from final judgment of forfeiture of an appearance bond even though surety contends the clerk of court failed to provide notice of the entry of forfeiture as required by N.C.G.S. § 15A-544.4 where an assistant clerk placed the notice in a bin for outgoing mail. **State v. Belton, 350.**

PHYSICIANS AND SURGEONS

Supervision of nursing personnel involved in anesthesia activities—certified registered nurse anesthetist—The trial court did not err by denying respondent Board of Nursing's motion for enforcement of a 1994 consent order seeking primarily an order from the trial court directing petitioner Medical Board to remove language from a Medical Board position statement that anesthesia administered in an office-based surgical setting should either be administered by an anesthesiologist or by a certified registered nurse anesthetist (CRNA) under the supervision of a physician. **N.C. Med. Soc'y v. N.C. Bd. of Nursing, 1.**

PLEADINGS

Compulsory counterclaims—summary ejectment—breach of contract—negligence—res judicata—Plaintiff tenants' claims against defendant landlords for breach of contract, negligence and unfair and deceptive trade practices were not compulsory counterclaims in defendants' prior summary ejectment action and were thus not barred by the doctrine of res judicata. **Murillo v. Daly, 223.**

Detention officers—sued in individual and official capacities—Detention officers were properly sued in both their individual and official capacities for negligence in obtaining medical care for an inmate. Whether a plaintiff's allegations relate to actions outside the scope of defendant's official duties is relevant in determining immunity, but is not relevant to determining whether the defendant is being sued in his or her official or individual capacity. **Boyd v. Robeson Cty., 460.**

PLEADINGS—Continued

Motion to amend—42 U.S.C. § 1983—requirements—The trial court did not abuse its discretion by denying plaintiff's motion to amend the pleadings after the verdict to add a claim under 42 U.S.C. § 1983 where plaintiff alleged that he had been assaulted by a deputy while an inmate in the Mecklenburg County jail. The claim against the deputy in his official capacity constituted a respondeat superior suit against the county and local government liability under 42 U.S.C. § 1983 cannot be based on a theory of respondeat superior. Moreover, a 42 U.S.C. § 1983 claimant must show that the local government had in effect a policy or custom to which the injury could be attributed, which this plaintiff did not do. Nor was this issue submitted to the jury. **Cunningham v. Riley, 600.**

Motion to dismiss—affidavit not attached—Plaintiffs did not show an abuse of discretion in the trial court's refusal to strike an affidavit by a mailroom employee who received service of process where defendant filed the affidavit in support of its motion to dismiss. By postponing the hearing on the motion, the trial court cured any prejudice caused by defendant's failure to serve the affidavit with its motion to dismiss. **Lane v. Winn-Dixie Charlotte, Inc., 180.**

Motion to dismiss—particularity—grounds for relief—Defendant's N.C.G.S. § 1A-1, Rule 12(b)(4) and (b)(5) motions to dismiss were stated with sufficient particularity as to the grounds alleged and sufficiently set forth the relief sought. Defendant's motion to dismiss cited Rule 12(b)(4) and 12(b)(5), specified that plaintiffs failed to properly serve the defendant, and specified that the process issued by the plaintiffs was not proper. **Lane v. Winn-Dixie Charlotte, Inc., 180.**

Motion to dismiss—underlying grounds—Defendant's motion to dismiss was not a nullity and the defenses contained therein were not waived where plaintiff's arguments were decided in defendant's favor elsewhere in this opinion. **Lane v. Winn-Dixie Charlotte, Inc., 180.**

PRISONS AND PRISONERS

Malicious conduct by prisoner—failure to instruct on misdemeanor assault on law enforcement officer as lesser-included offense—The trial court did not err by denying defendant's request to submit misdemeanor assault on a law enforcement officer as a lesser-included offense of malicious conduct by a prisoner. **State v. Mitchell, 417.**

Malicious conduct by prisoner—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of malicious conduct by a prisoner arising from defendant spitting on an officer even though defendant contends there was insufficient evidence that she acted knowingly and willfully. **State v. Mitchell, 417.**

PROBATION AND PAROLE

Indecent liberties—special condition of probation—defendant cannot reside in home with minor child—N.C.G.S. § 15A-1343(b2)(4), which mandates a special condition of probation that defendant may not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor, was a valid condition for defendant's probation arising out of multiple convictions for taking indecent liberties with a child based upon his sexual

PROBATION AND PAROLE—Continued

contact with his thirteen-year-old sister-in-law. Further, the trial court did not err by activating defendant's sentence based on a violation of this special condition of probation based on defendant residing in a home with his wife and minor son. **State v. Strickland, 193.**

Probation revocation—improperly allowing victim to give opinion—The trial court erred in a probation revocation case by allowing the victim to give his opinion as to whether defendant's probation should be revoked and in basing its decision to revoke probation on that opinion. **State v. Arnold, 438.**

PROCESS AND SERVICE

Summons—failure to designate person to receive for corporation—A summons was defective on its face and a presumption of service would not exist even upon a showing that the item was received by registered mail. Plaintiffs failed to designate any person authorized by N.C.G.S. § 1A-1, Rule 4 (j)(6) to be served on behalf of the corporate defendant. **Lane v. Winn-Dixie Charlotte, Inc., 180.**

PUBLIC WORKS

State construction project—payment bond—materials supplied to second-tier subcontractor—Defendants' motion for summary judgment was properly denied where plaintiff was seeking payment for materials supplied to a second-tier subcontractor on a State Ports project. The plain language of N.C.G.S. § 44A-25, which controls payment and performance bonds for state construction contracts, includes first and second-tier subcontractors. **HSI N.C., LLC v. Diversified Fire Protection of Wilmington, Inc., 767.**

QUANTUM MERUIT

Contingency fee contracts between attorney and client—attorney discharged—attorney fees—The trial court erred in an action arising out of a contingency fee contract to perform legal services and for representation during a caveat proceeding by awarding summary judgment in favor of plaintiff law firm on its quantum meruit claim for attorney fees, and the case is remanded for entry of summary judgment in favor of defendants. **Pritchett & Burch, PLLC v. Boyd, 118.**

Contingency fee contracts between attorney and client—attorney discharged—costs and expenses—The trial court did not err in an action arising out of a contingency fee contract to perform legal services and for representation during a caveat proceeding by awarding summary judgment in favor of plaintiff law firm on its quantum meruit claim for costs and expenses advanced by plaintiff to defendants. **Pritchett & Burch, PLLC v. Boyd, 118.**

RAILROADS

Crossing accident—Amtrack train—warnings and unobstructed view—no negligence—Summary judgment was affirmed for plaintiffs in a railroad crossing case where the evidence did not create a genuine issue of fact as to whether defendants had a duty to maintain gates or other mechanical warnings. The trial judge found as a matter of law that the conditions existing at the crossing did not

RAILROADS—Continued

render it peculiarly and unusually hazardous; while plaintiffs point to the surprise of a train approaching at between 65 and 70 miles per hour when other trains approached at less than 10 miles per hour, the variable speeds of other trains is not a condition existing at the crossing at the time a motorist must determine whether a train is approaching. Defendants' duty is to warn a motorist of an approaching railroad crossing and train, and that duty is met when a motorist stopped safely behind a stop sign at the crossing has an unobstructed view of an approaching train. **Loredo v. CSX Transp., Inc., 508.**

Right-of-way easement—presumed statutory grant—The trial court did not err by granting plaintiff railway company's motion for summary judgment based on the conclusion that plaintiff has a right-of-way easement across defendant's property one hundred feet on each side of the center line of the railroad's track. **Norfolk S. Ry. Co. v. Smith, 784.**

RAPE

First-degree—instruction—serious personal injury—The trial court did not err by submitting a jury instruction on serious personal injury for the charge of first-degree rape based on both mental and physical harm. **State v. Blizzard, 285.**

REAL PROPERTY

Restrictive covenant—placement of septic system—The trial court did not err by construing a restrictive covenant in favor of defendants and granting summary judgment for them in an action between lot owners involving the placement of an above-ground septic system. Both the covenant and the septic system permit were filed prior to plaintiffs' closing the sale of their lot. While the language of the covenant was ambiguous, the circumstances and timing of the submission of the septic system application and the filing of the covenants suggests that the covenant was written with the intent to prevent lot owners from constructing residences within 400 feet of either existing or applied-for locations of septic systems. **Hultquist v. Morrow, 579.**

SEARCH AND SEIZURE

Gunshot residue test—consent—The trial court's finding of fact supports its conclusion that defendant consented to a gunshot residue test and, even if defendant had objected to this finding, it was supported by properly admitted testimony from officers who participated in administering the test. **State v. Page, 127.**

Gunshot residue test—no court order—exigent circumstances—The trial court's findings supported its conclusion that, under the circumstances, exigent circumstances and probable cause existed to conduct a gunshot residue test without a nontestimonial identification or other order. The results of the test were correctly admitted. **State v. Page, 127.**

Investigatory stop—drugs—motion to suppress—pat down—The trial court did not err in a trafficking in cocaine by possession and transportation case by denying defendant's motion to suppress evidence obtained from the search of his

SEARCH AND SEIZURE—Continued

motor vehicle where officers made a lawful investigatory stop, lawfully entered and moved the vehicle with defendant's consent, and an officer smelled cocaine upon entering the vehicle. **State v. Downing, 790.**

Motion to suppress evidence—contents of safe in bedroom—voluntariness of consent—The trial court did not err in a trafficking in cocaine by possession case by denying defendant's motion to suppress evidence found in the safe in his bedroom because defendant voluntarily consented to the search, and physical evidence obtained as a result of statements by defendant made prior to receiving Miranda warnings need not be excluded. **State v. Houston, 367.**

Permission by live-in girlfriend—constitutional—A search of a shop outside a home was constitutional where defendant's live-in girlfriend (Riley) gave permission for the search. The court found that Riley had been defendant's girlfriend for thirteen years and had lived in defendant's home the entire time; her status as a resident of the home had been known by the officers seeking permission for the search for three or four years before the search; the officers had no reason to suspect that she did not have control over the premises, including the shop; and Riley's consent was voluntary and without hesitation. **State v. Watkins, 518.**

Standing to challenge—car not owned by defendant—left open at scene of crime—The trial court erred by granting defendant's motion to suppress drugs seized from a car which defendant did not own or lease and where defendant left the car open as he fled from police at the scene of an assault. Defendant did not have a legitimate expectation of privacy and lacked standing. **State v. Boyd, 204.**

SECURITIES

Purchase of shares in merger—dissenter's demand for appraisal—statute of limitations—The trial court erred by dismissing an action for judicial appraisal of stock for being outside the required time period under N.C.G.S. § 55-13-30(a) where defendants did not include the required information with their tendered payment, so that the payment was not complete. The proper time for determination of plaintiff's filing date was the date of her dissenter's demand for payment, and plaintiff began this action within sixty days of that date, as required. **Foard v. Avery Cty. Bank, 625.**

Purchase of shares in merger—tender of payment—required information—A purchasing bank's tender of payment for shares in the purchased bank was incomplete where it lacked required information as to how the fair value of the stocks was calculated. The clear legislative intent of N.C.G.S. § 55-13-25 is to adequately inform shareholders of their rights and provide sufficient information for shareholders to assess the necessity of a judicial appraisal of the shares. **Foard v. Avery Cty. Bank, 625.**

SENTENCING

Aggravating factors—taking advantage of position of trust—The trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury case by finding as an aggravating factor that defendant took advantage of a position of trust, and the case is remanded for resentencing where the find-

SENTENCING—Continued

ing was based on the victim's mother dating defendant's father and the mother's parental relationship with the adult victim. **State v. Nicholson, 390.**

Aggravating factors—two prior DWI convictions—The trial court did not err by sentencing defendant for driving while impaired based upon its finding of two grossly aggravating factors which were not submitted to the jury. **State v. Tedder, 446.**

Consecutive probationary sentences—sexual exploitation of minor—The trial court did not impose consecutive probationary sentences in violation of N.C.G.S. § 15A-1346 in a multiple third-degree sexual exploitation of a minor case where the court sentenced defendant to six consecutive terms of imprisonment, and those sentences were suspended and defendant was placed on probation for 60 months. **State v. Howell, 58.**

Habitual felon—sufficiency of indictment—notice—An habitual felon indictment was not defective because it alleged that one of the prior felony convictions was for possession with intent to manufacture, sell or deliver a "Schedule I controlled substance" in violation of N.C.G.S. § 90-95 without specifically naming the controlled substance. **State v. McIlwaine, 397.**

Prior record level—New York conviction—The trial court erred in determining defendant's prior record level when sentencing him for armed robbery. The State failed to produce sufficient evidence that defendant's prior New York conviction for possession of stolen property in the fifth degree was substantially similar to a Class 1 misdemeanor in North Carolina. **State v. Ayscue, 548.**

Prior record level—State's failure to meet burden of proof—The trial court erred by sentencing defendant as an habitual felon where the State failed to meet its burden of proving defendant's prior record level and defendant is entitled to a new sentencing hearing where defendant did not disagree with statements made by the prosecutor and the trial court as to his prior convictions, but defendant did not stipulate to his prior convictions and the State provided no other proof of prior convictions. **State v. McIlwaine, 397.**

Verdict sheet—request to list "not guilty" first—The trial court did not err in a multiple felony stalking case by denying defendant's request that the verdict sheet list the possible verdict of "not guilty" first. **State v. Watson, 331.**

SEXUAL OFFENSES

Third-degree sexual exploitation of minor—motion to dismiss—multiplicity of convictions—The trial court did not err in a multiple third-degree sexual exploitation of a minor case by denying defendant's motion to dismiss some or all of the charges on grounds of double jeopardy and by denying his motion to arrest judgment on all but one count arising from 43 child pornography images on defendant's computer hard drive. **State v. Howell, 58.**

STATUTES OF LIMITATION AND REPOSE

Civil conspiracy—attorney in real estate transaction—Plaintiff's claim for civil conspiracy was time barred because it was brought more than six years and eight years after the real estate transactions involved. **Carlisle v. Keith, 674.**

STATUTES OF LIMITATION AND REPOSE—Continued

Constructive fraud—real estate transaction—adding defendant—A claim for constructive fraud arising from a real estate transaction was time-barred where plaintiff learned of the relationship between defendants in February 1998 and did not add this defendant until 2003, two years after the statute of limitations ran. **Carlisle v. Keith, 674.**

Failure to affirmatively plead defense—plaintiff not surprised—The trial court properly considered defendant's statute of limitations defense as to plaintiff's claims for fraud, negligent misrepresentation, and civil conspiracy where plaintiff argued that defendant had not affirmatively pled the statute of limitations in his motion to dismiss and that he was surprised by defendant's statute of limitations argument, but plaintiff received defendant's brief on his statute of limitations defense prior to the hearing, argued that issue before the trial court, and did not object that the defense was identified in defendant's memorandum rather than in his motion. **Carlisle v. Keith, 674.**

Fiduciary duty—attorney in real estate transaction—last act giving rise to damages—The trial court did not err by granting defendant-Brunson's Rule 12(b)(6) motion to dismiss a claim of breach of fiduciary duty where Brunson was an attorney involved in a partnership's real estate transactions; the last act giving rise to plaintiff's damages was more that six years before Brunson was named as a defendant regarding one subdivision, and eight years before the lawsuit was filed regarding another subdivision; and both the statute of repose and the statute of limitations had long since passed. **Carlisle v. Keith, 674.**

Fraud—attorney in real estate transaction—discovery of facts—attorney-client relationship—A claim for fraud against an attorney arising from a real estate transaction was correctly dismissed pursuant to a Rule 12(b)(6) motion for failure to meet the statute of limitations. **Carlisle v. Keith, 674.**

Negligent misrepresentation—attorney in real estate transaction—damages apparent—The trial court properly concluded that a claim against an attorney for negligent misrepresentation in a real estate transaction was barred by the applicable statute of limitations. Although the statute of limitations is three years, plaintiff's damage (his sale of property to a buyer in which his partner had an ownership interest) became apparent more than five years before he began this action. **Carlisle v. Keith, 674.**

TERMINATION OF PARENTAL RIGHTS

Allegations of neglect—sufficiency—The factual allegations in a petition to terminate parental rights were sufficient to give respondent notice of the issue of neglect and the trial court did not err by considering the issue. **In re A.D.L., J.S.L., C.L.L., 701.**

Appeal of prior adjudication—same evidence—A termination of parental rights was vacated where it occurred during the pendency of the appeal in a previous abuse and neglect adjudication, relied upon the same evidence, and was not based on independent grounds. **In re B.D., 803.**

Failure to enter order within thirty days from date of hearing—The trial court erred by failing to enter the order terminating respondent mother's parental rights over the minors within thirty days from the date of the hearing as required

TERMINATION OF PARENTAL RIGHTS—Continued

by N.C.G.S. §§ 7B-1109(e) and 7B-1110(a), and the case is remanded for a new hearing because a delay of more than six months was prejudical to all parties. **In re L.E.B., K.T.B., 375.**

Guardian ad litem—appointment papers not filed—no prejudice—The failure of the record to disclose guardian ad litem appointment papers for the juveniles in a termination of parental rights proceeding did not necessitate reversal where it was clear that the guardian ad litem followed her statutory duties. Clerical or technical violations such as the failure to file an appointment order do not in themselves require reversal. Prejudice must be shown. **In re A.D.L., J.S.L., C.L.L., 701.**

Indian Child Welfare Act—tribe not recognized by federal government—A termination of parental rights was not reversed for failure to follow the federal Indian Child Welfare Act of 1978 where the children were Lumbee, a tribe recognized by North Carolina but not the federal government. **In re A.D.L., J.S.L., C.L.L., 701.**

Lack of jurisdiction—insufficient notice of motion to terminate rights—The trial court lacked jurisdiction to terminate respondent mother's parental rights, and the case is remanded for a rehearing based on insufficient notice of the motion to terminate parental rights where only the first requirement of N.C.G.S. § 7B-1106.1 (the names of the juveniles) was included in the notice served on respondent. **In re D.A., Q.A., & T.A., 245.**

Neglect—evidence sufficient—The trial court did not abuse its discretion in terminating respondent's parental rights where DSS had received and investigated allegations of neglect involving respondent since 1997; lack of supervision of the children was established in 2000; respondent-mother and the father failed to comply with drug assessments and tested positive for drugs; both failed to obtain and maintain employment and stable housing; and both failed to take the appropriate steps toward reunification. **In re A.D.L., J.S.L., C.L.L., 701.**

Neglect—leaving children in foster care—The evidence in a termination of parental rights proceeding was sufficient to establish that respondent willfully left her children in foster care without making reasonable progress to correct the conditions which led to removal of the children. **In re A.D.L., J.S.L., C.L.L., 701.**

Order 16 days late—not prejudicial—A termination of parental rights order was not reversed for being filed 16 days after the 30-day limit provided by N.C.G.S. § 7B-1109(e) where respondent did not show prejudice from the late filing. The General Assembly's intent in imposing the time limit was to provide a speedy resolution in juvenile custody cases; holding that adjudication and disposition orders should be reversed simply because they were untimely filed would only further delay the determination while new petitions were filed and new hearings held. **In re A.D.L., J.S.L., C.L.L., 701.**

TORT CLAIMS ACT

Specific performance—not authorized—The Industrial Commission has only the authority to award money damages under the Tort Claims Act, and lacked jurisdiction to order the Department of Correction to recalculate plaintiff's release date. **Bryson v. N.C. Dep't of Corr., 252.**

TRIALS

Denial of objection and motion to strike consent order—failure to show reliance on incompetent evidence—The trial court did not err by denying respondent's objection and motion to strike the submission of, and by admitting, considering, and basing its order on the consent order issued by the Medical Board in the matter captioned *In re Peter Loren Tucker, M.D.*, or any related material. **N.C. Med. Soc'y v. N.C. Bd. of Nursing, 1.**

Pro hac vice motion for counsel—amicus brief—failure to show reliance on incompetent evidence—The trial court did not err by failing to rule on, or in implicitly overruling respondent's objection to, the pro hac vice motion for counsel for the American Society of Anesthesiology (ASA), and in considering the amicus brief tendered by counsel for ASA. **N.C. Med. Soc'y v. N.C. Bd. of Nursing, 1.**

UNFAIR TRADE PRACTICES

Competitor's survey—damages not shown—The trial court did not err by granting defendant's motion for a directed verdict in an action for unfair and deceptive trade practices arising from a bridal show survey and tip sheet by a competitor where plaintiff failed to present evidence that it suffered actual injury as a proximate result of defendant's conduct. There was no evidence from which a jury could calculate lost profits from vendors or payroll damages with a reasonable certainty. **Castle McCulloch, Inc. v. Freedman, 497.**

Costs and attorney fees—frivolous action—discretionary finding—The trial court did not abuse its discretion by awarding costs and attorney fees to defendant in an unfair and deceptive trade practices action arising from a bridal show survey and tip sheet where it found the action to be frivolous. The court's decision was not manifestly unsupported by reason; moreover, where the court has taxed costs in its discretion, that decision is not reviewable. **Castle McCulloch, Inc. v. Freedman, 497.**

VENDOR AND PURCHASER

Land sale—insufficient description—reformation—issue of fact—The trial court erred by reforming a land sale agreement through the selection one of three surveys drawn from the agreement's general description where the discovery of unknown improvements on the property created a question of fact. Such actions in equity by the trial court at the summary judgment stage are not permissible when there are issues of fact. **Wolfe v. Villines, 483.**

Land sale—sufficiency of description—latent ambiguity—The legal description of property in a land sale agreement was latently ambiguous, and the trial court erred by granting summary judgment for plaintiff where there was an issue of material fact as to the precise parcel to be conveyed. **Wolfe v. Villines, 483.**

Land sale—survey completed late—time not of essence—A land sale agreement was not vitiated by the failure to complete a survey within the required time where time was not of the essence in the contract. There was no evidence that plaintiff delayed or tarried in completion of the contract, and the trial court properly found that the delay was not unreasonable. **Wolfe v. Villines, 483.**

WORKERS' COMPENSATION

Attorney fees—findings—An award of attorney fees in a workers' compensation case was remanded for additional findings of fact and conclusions of law on attorney fees and a statement of the specific statute relied upon in making the award. **Swift v. Richardson Sports, Ltd., 529.**

Causation—medical history and testimony—credibility—There was competent evidence to support the Industrial Commission's finding of causation in a workers' compensation case where the finding was that plaintiff first injured his hamstring, then suffered a herniated disk. Although defendant challenged the testimony of plaintiff's doctor as the product of an incomplete picture of plaintiff's history, the doctor was entitled to credit his patient's account of his own symptoms, and the Commission found that plaintiff's testimony about his medical history was credible. **Rogers v. Lowe's Home Improvement, 759.**

Causation—reasonable degree of medical certainty—The Industrial Commission erred in a workers' compensation case by awarding plaintiff compensation benefits when no competent evidence showed that plaintiff's symptoms were proximately caused by her injury where plaintiff's treating physician testified only that plaintiff's injury was a possible cause of her symptoms. **Gutierrez v. GDX Auto., 173.**

Compensable injury—professional football player—The Industrial Commission did not err by finding that a professional football player sustained a compensable injury by accident arising out of and in the course of his employment where his leg was broken and ankle tendons torn when other players fell on the back of his leg during a game. There was evidence to support the Commission's findings that the injury was unusual. **Swift v. Richardson Sports, Ltd., 529.**

Credibility—inconsistent testimony—Although defendants contend the Industrial Commission erred in a workers' compensation case by finding that a specific traumatic incident occurred on 11 February 1999 based on plaintiff employee's inconsistent reports of when his injury occurred, this assignment of error is dismissed because this argument goes only to the credibility of the testimony which is determined by the Commission. **Crane v. Berry's Clean-Up & Landscaping, Inc., 323.**

Credibility—reassessment by full Commission—The full Industrial Commission did not err in a workers' compensation case by reassessing the evidence and finding that plaintiff's 28 August 2001 fall was related to her prior accident because the full Commission is entitled to reverse a deputy commissioner's determination of credibility even if that reversal is based upon an examination of the cold record. **Brown v. Kroger Co., 312.**

Deposition costs—express abandonment of request for costs—Although defendant contends the full Industrial Commission erred in a workers' compensation case by failing to rule on the propriety the deputy commissioner's assessment of the costs of a witness deposition, the Court of Appeals declines to address the merits of this argument and the case is remanded to the full Commission with instructions to amend its opinion and award to strike the assessment of costs for the deposition because plaintiff in her brief expressly abandoned her request for costs associated with the deposition. **Brown v. Kroger Co., 312.**

WORKERS' COMPENSATION—Continued

Disability—injured professional football player—return with another team—eventual release—The Industrial Commission did not err in a workers' compensation case by awarding compensation to a professional football player who was injured while playing with defendant, then returned to play with another team. While plaintiff did try out for and make the other team, he was released from that team because of injuries suffered with defendant. **Swift v. Richardson Sports, Ltd., 529.**

Disability—professional football player—dollar-for-dollar credits—The Industrial Commission did not abuse its discretion in a worker's compensation disability case by awarding a time credit rather than a dollar-for-dollar credit for payments made by defendants to plaintiff, a professional football player, after he was injured. Dollar-for-dollar credits are precluded by North Carolina law. **Swift v. Richardson Sports, Ltd., 529.**

Disability—professional football player—reason for being released from team—personal knowledge—The trial court did not err by allowing plaintiff, a football player, to testify about the reason for his termination from a team. Plaintiff offered personal knowledge about why he was released and his testimony was not hearsay. **Swift v. Richardson Sports, Ltd., 529.**

Disability—sufficiency of evidence—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff has been totally disabled as a direct result of her occupational injury since 5 February 2001. **Gutierrez v. GDX Auto., 173.**

Facial disfigurement—Commission's failure to personally view—The Industrial Commission erred in a workers' compensation case arising out of plaintiff's injury sustained from a dog bite arising out of her employment as a dog groomer by awarding plaintiff compensation for facial disfigurement where the Commission failed to personally view plaintiff's disfigurement as required by its rules. **Ray v. Pet Parlor, 236.**

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COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina