NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 170

3 MAY 2005

7 JUNE 2005

RALEIGH
2006

CITE THIS VOLUME
170 N.C. APP.

TABLE OF CONTENTS

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

Judges

JAMES A. WYNN, JR.
LINDA M. McGEE
PATRICIA TIMMONS-GOODSON
ROBERT C. HUNTER
J. DOUGLAS McCULLOUGH
ROBIN E. HUDSON
JOHN M. TYSON
WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
SANFORD L. STEELMAN, JR.
MARTHA GEER
ERIC L. LEVINSON
BARBARA A. JACKSON

Emergency Recalled Judges

DONALD L. SMITH
JOSEPH R. JOHN, SR.
JOHN B. LEWIS, JR.

Former Chief Judges

R. A. HEDRICK
GERALD ARNOLD
SIDNEY S. EAGLES, JR.

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
JAMES M. BALEY, JR.
DAVID M. BRITT
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
RICHARD C. ERWIN
EDWARD B. CLARK
HARRY C. MARTIN
ROBERT M. MARTIN
CECIL J. HILL
E. MAURICE BRASWELL
WILLIS P. WHICHARD
JOHN WEBB
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
CLIFTON E. JOHNSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG

Administrative Counsel
FRANCIS E. DAIL

Clerk
JOHN H. CONNELL

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
Daniel M. Horne, Jr.

Staff Attorneys
John L. Kelly
Shelley Lucas Edwards
Bryan A. Meer
David Alan Lagos
Kathleen Naggs Bolton

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ralph A. Walker

Assistant Director
David F. Hoke

APPELLATE DIVISION REPORTER
Ralph A. White, Jr.

ASSISTANT APPELLATE DIVISION REPORTERS
H. James Hutcheson
Kimberly Woodell Sieredzki

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	J. Richard Parker	Manteo
	Jerry R. Tillett	Manteo
2	William C. Griffin, Jr.	Williamston
3A	W. Russell Duke, Jr.	Greenville
	Clifton W. Everett, Jr.	Greenville
6A	Alma L. Hinton	Halifax
6B	Cy A. Grant, Sr.	Windsor
7A	Quentin T. Sumner	Rocky Mount
7B	Milton F. (Toby) Fitch, Jr.	Wilson
7BC	Frank R. Brown	Tarboro
	Second Division	
3B	Benjamin G. Alford	New Bern
	Kenneth F. Crow	New Bern
	John E. Nobles, Jr.	Greenville
4A	Russell J. Lanier, Jr.	Kenansville
4B	Charles H. Henry	Jacksonville
5	Ernest B. Fullwood	Wilmington
	W. Allen Cobb, Jr.	Wilmington
	Jay D. Hockenbury	Wilmington
8A	Paul L. Jones	Kinston
8B	Jerry Braswell	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith III	Yanceyville
10	Donald W. Stephens	Raleigh
	Narley L. Cashwell	Raleigh
	Abraham P. Jones	Raleigh
	Howard E. Manning, Jr.	Raleigh
	Michael R. Morgan	Raleigh
	Ripley Eagles Rand	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	A. Leon Stanback, Jr.	Durham
	Ronald L. Stephens	Durham
	Kenneth C. Titus	Durham
15A	J. B. Allen, Jr.	Burlington
	James Clifford Spencer, Jr.	Burlington

DISTRICT	JUDGES	ADDRESS
15B	Carl Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill
	Fourth Division	
11A	Franklin F. Lanier	Buies Creek
11B	Knox V. Jenkins, Jr.	Smithfield
12	E. Lynn Johnson	Fayetteville
	Gregory A. Weeks	Fayetteville
	Jack A. Thompson	Fayetteville
	James F. Ammons, Jr.	Fayetteville
13	William C. Gore, Jr.	Whiteville
	Ola M. Lewis	Southport
16A	B. Craig Ellis	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	Gary L. Locklear	Pembroke
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Richard W. Stone	Wentworth
17B	A. Moses Massey	Mt. Airy
	Andy Cromer	King
18	Catherine C. Eagles	Greensboro
	Henry E. Frye, Jr.	Greensboro
	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig III	Greensboro
	R. Stuart Albright	Greensboro
19B	Vance Bradford Long	Asheboro
21	Judson D. DeRamus, Jr.	Winston-Salem
	William Z. Wood, Jr.	Winston-Salem
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	Winston-Salem
23	Michael E. Helms	North Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	Larry G. Ford	Salisbury
19D	James M. Webb	Whispering Pines
20A	Michael Earle Beale	Wadesboro
20B	Susan C. Taylor	Monroe
	W. David Lee	Monroe
22	Mark E. Klass	Lexington
	Kimberly S. Taylor	Hiddenite
	Christopher Collier	Mooresville
	Seventh Division	
25A	Beverly T. Beal	Lenoir
	Robert C. Ervin	Morganton
25B	Timothy S. Kincaid	Hickory
	Nathaniel J. Poovey	Hickory
26	Robert P. Johnston	Charlotte

DISTRICT	JUDGES	ADDRESS
	W. Robert Bell	Charlotte
	Richard D. Boner	Charlotte
	J. Gentry Caudill	Charlotte
	David S. Cayer	Charlotte
	Yvonne Evans	Charlotte
	Linwood O. Faust	Charlotte
27A	Jesse B. Caldwell III	Gastonia
	Timothy L. Patti	Gastonia
27B	Forrest Donald Bridges	Shelby
	James W. Morgan	Shelby
	Eighth Division	
24	James L. Baker, Jr.	Marshall
	Charles Phillip Ginn	Marshall
28	Dennis Jay Winner	Asheville
	Ronald K. Payne	Asheville
29A	Laura J. Bridges	Marion
29B	Zoro J. Guice, Jr.	Rutherfordton
30A	James U. Downs	Franklin
30B	Janet Marlene Hyatt	Waynesville

SPECIAL JUDGES

Karl Adkins	Charlotte
Steve A. Balog	Burlington
Albert Diaz	Charlotte
Richard L. Doughton	Sparta
Thomas D. Haigwood	Greenville
James E. Hardin, Jr.	Durham
D. Jack Hooks, Jr.	Whiteville
Jack W. Jenkins	Morehead City
John R. Jolly, Jr.	Raleigh
John W. Smith	Wilmington
Ben F. Tennille	Greensboro
Gary E. Trawick	Burgaw

EMERGENCY JUDGES

W. Douglas Albright	Greensboro
Henry V. Barnette, Jr.	Raleigh
Anthony M. Brannon	Durham
Stafford G. Bullock	Raleigh
C. Preston Cornelius	Mooresville
Howard R. Greeson, Jr.	High Point
Clarence E. Horton, Jr.	Kannapolis
Donald M. Jacobs	Goldsboro
Joseph R. John, Sr.	Raleigh
Charles C. Lamm, Jr.	Boone
James E. Lanning	Charlotte

DISTRICT	JUDGES	ADDRESS
	JOHN B. LEWIS, JR.	Farmville
	JERRY CASH MARTIN	King
	PETER M. MCHUGH	Reidsville
	JAMES E. RAGAN III	Oriental
	DONALD L. SMITH	Raleigh
	RUSSELL G. WALKER, JR.	Asheboro

RETIRED/RECALLED JUDGES

GILES R. CLARK	Elizabethtown
JAMES C. DAVIS	Concord
MARVIN K. GRAY	Charlotte
ROBERT D. LEWIS	Asheville
F. FETZER MILLS	Wadesboro
HERBERT O. PHILLIPS III	Morehead City
JULIUS ROUSSEAU, JR.	North Wilkesboro
THOMAS W. SEAY	Spencer

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Grafton G. Beaman (Chief)	Elizabeth City
	C. Christopher Bean	Edenton
	J. Carlton Cole	Hertford
	Edgar L. Barnes	Manteo
	Amber Davis	Wanchese
2	James W. Hardison (Chief)	Williamston
	Samuel G. Grimes	Washington
	Michael A. Paul	Washington
	Regina Rogers Parker	Williamston
3A	David A. Leech (Chief)	Greenville
	Patricia Gwynett Hilburn	Greenville
	Joseph A. Blick, Jr.	Greenville
	G. Galen Braddy	Greenville
	Charles M. Vincent	Greenville
3B	Jerry F. Waddell (Chief)	New Bern
	Cheryl Lynn Spencer	New Bern
	Paul M. Quinn	Morehead City
	Karen A. Alexander	New Bern
	Peter Mack, Jr.	New Bern
4	Leonard W. Thagard (Chief)	Clinton
	James L. Moore, Jr.	Jacksonville
	Paul A. Hardison	Jacksonville
	William M. Cameron III	Richlands
	Louis F. Foy, Jr.	Pollocksville
	Sarah Cowen Seaton	Jacksonville
	Carol A. Jones	Kenansville
	Henry L. Stevens IV	Kenansville
5	John J. Carroll III (Chief)	Wilmington
	J. H. Corpening II (Interim Chief)	Wilmington
	Shelly S. Holt	Wilmington
	Rebecca W. Blackmore	Wilmington
	James H. Faison III	Wilmington
	Sandra Criner	Wilmington
	Richard Russell Davis	Wilmington
	Phyllis M. Gorham	Wilmington
6A	Harold Paul McCoy, Jr. (Chief)	Halifax
	W. Turner Stephenson III	Halifax
6B	Alfred W. Kwasikpui (Chief)	Jackson
	Thomas R. J. Newbern	Aulander
	William Robert Lewis II	Winton
7	William Charles Farris (Chief)	Wilson
	Joseph John Harper, Jr.	Tarboro
	John M. Britt	Tarboro
	Pell C. Cooper	Tarboro
	Robert A. Evans	Rocky Mount
	William G. Stewart	Wilson
	John J. Covolo	Rocky Mount
8	Joseph E. Setzer, Jr. (Chief)	Goldsboro
	David B. Brantley	Goldsboro
	Lonnie W. Carraway	Goldsboro

DISTRICT	JUDGES	ADDRESS
	R. Leslie Turner	Kinston
	Rose Vaughn Williams	Goldsboro
	Elizabeth A. Heath	Kinston
9	Charles W. Wilkinson, Jr. (Chief)	Oxford
	H. Weldon Lloyd, Jr.	Henderson
	Daniel Frederick Finch	Oxford
	J. Henry Banks	Henderson
	John W. Davis	Louisburg
	Randolph Baskerville	Warrenton
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry	Pelham
10	Joyce A. Hamilton (Chief)	Raleigh
	James R. Fullwood	Raleigh
	Anne B. Salisbury	Raleigh
	Robert Blackwell Rader	Raleigh
	Paul G. Gessner	Raleigh
	Kristin H. Ruth	Raleigh
	Craig Croom	Raleigh
	Jennifer M. Green	Raleigh
	Monica M. Bousman	Raleigh
	Jane Powell Gray	Raleigh
	Shelly H. Desvouges	Raleigh
	Jennifer Jane Knox	Raleigh
	Debra Ann Smith Sasser	Raleigh
	Donna S. Stroud	Raleigh
	Vinston M. Rozier, Jr.	Raleigh
11	Albert A. Corbett, Jr. (Chief)	Smithfield
	Jacquelyn L. Lee	Sanford
	Jimmy L. Love, Jr.	Sanford
	Addie M. Harris-Rawls	Clayton
	George R. Murphy	Lillington
	Resson O. Faircloth II	Lillington
	James B. Ethridge	Smithfield
	Robert W. Bryant	Lillington
12	A. Elizabeth Keever (Chief)	Fayetteville
	John S. Hair, Jr.	Fayetteville
	Robert J. Stiehl III	Fayetteville
	Edward A. Pone	Fayetteville
	C. Edward Donaldson	Fayetteville
	Kimbrell Kelly Tucker	Fayetteville
	John W. Dickson	Fayetteville
	Cheri Beasley	Fayetteville
	Dougald Clark, Jr.	Fayetteville
13	Jerry A. Jolly (Chief)	Tabor City
	Napoleon B. Barefoot, Jr.	Supply
	Thomas V. Aldridge, Jr.	Whiteville
	Nancy C. Phillips	Elizabethtown
	Douglas B. Sasser	Whiteville
	Marion R. Warren	Exum
14	Elaine M. Bushfan (Chief)	Durham
	Richard G. Chaney	Durham
	Craig B. Brown	Durham
	Ann E. McKown	Durham

DISTRICT	JUDGES	ADDRESS
	Marcia H. Morey	Durham
	James T. Hill	Durham
15A	James K. Roberson (Chief)	Graham
	Ernest J. Harviel	Graham
	Bradley Reid Allen, Sr.	Graham
	G. Wayne Abernathy	Graham
15B	Joseph M. Buckner (Chief)	Hillsborough
	Alonzo Brown Coleman, Jr.	Hillsborough
	Charles T. L. Anderson	Hillsborough
	M. Patricia DeVine	Hillsborough
16A	Warren L. Pate (Chief)	Raeford
	William G. McIlwain	Wagram
	Richard T. Brown	Laurinburg
16B	J. Stanley Carmical (Chief)	Lumberton
	Herbert L. Richardson	Lumberton
	John B. Carter, Jr.	Lumberton
	William Jeffrey Moore	Pembroke
	James Gregory Bell	Lumberton
17A	Fredrick B. Wilkins, Jr. (Chief)	Wentworth
	Stanley L. Allen	Wentworth
17B	Otis M. Oliver (Chief)	Dobson
	Charles Mitchell Neaves, Jr.	Elkin
	Spencer Gray Key, Jr.	Elkin
	Mark Hauser Badget	Elkin
18	Joseph E. Turner (Chief)	Greensboro
	Lawrence McSwain	Greensboro
	Wendy M. Enochs	Greensboro
	Susan Elizabeth Bray	Greensboro
	Patrice A. Hinnant	Greensboro
	A. Robinson Hassell	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	Greensboro
	Theresa H. Vincent	Greensboro
	William K. Hunter	Greensboro
	Linda Valerie Lee Falls	Greensboro
	Sherry Fowler Alloway	Greensboro
19A	William G. Hamby, Jr. (Chief)	Concord
	Donna G. Hedgepeth Johnson	Concord
	Martin B. McGee	Concord
	Michael Knox	Concord
19B	William M. Neely (Chief)	Asheboro
	James P. Hill, Jr.	Asheboro
	Michael A. Sabiston	Troy
	Jayrene Russell Maness	Carthage
	Lee W. Gavin	Asheboro
	Scott C. Etheridge	Asheboro
	James P. Hill, Jr.	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	William C. Kluttz, Jr.	Salisbury
	Kevin G. Eddinger	Salisbury
20A	Tanya T. Wallace (Chief)	Albemarle
	Kevin M. Bridges	Albemarle

DISTRICT	JUDGES	ADDRESS
	Lisa D. Thacker	Wadesboro
	Scott T. Brewer	Monroe
20B	Christopher W. Bragg (Chief)	Monroe
	Joseph J. Williams	Monroe
	Hunt Gwyn	Monroe
21	William B. Reingold (Chief)	Winston-Salem
	Chester C. Davis	Winston-Salem
	William Thomas Graham, Jr.	Winston-Salem
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lisa V. L. Menefee	Winston-Salem
	Lawrence J. Fine	Winston-Salem
	Denise S. Hartsfield	Winston-Salem
	George Bedsworth	Winston-Salem
22	Wayne L. Michael (Chief)	Lexington
	James M. Honeycutt	Lexington
	Jimmy L. Myers	Mocksville
	L. Dale Graham	Taylorsville
	Julia Shuping Gullett	Statesville
	Theodore S. Royster, Jr.	Lexington
	April C. Wood	Statesville
	Mary F. Covington	Mocksville
	H. Thomas Church	Statesville
23	Edgar B. Gregory (Chief)	Wilkesboro
	David V. Byrd	Wilkesboro
	Jeanie Reavis Houston	Wilkesboro
	Mitchell L. McLean	Wilkesboro
24	Alexander Lyerly (Chief)	Banner Elk
	William A. Leavell III	Bakersville
	Kyle D. Austin	Pineola
	R. Gregory Horne	Newland
25	Robert M. Brady (Chief)	Lenoir
	Gregory R. Hayes	Hickory
	L. Suzanne Owsley	Hickory
	C. Thomas Edwards	Morganton
	Buford A. Cherry	Hickory
	Sherrie Watson Elliott	Newton
	John R. Mull	Morganton
	Amy R. Sigmon	Newton
26	Fritz Y. Mercer, Jr. (Chief)	Charlotte
	H. William Constangy	Charlotte
	Jane V. Harper	Charlotte
	Phillip F. Howerton, Jr.	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Lisa C. Bell	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Regan A. Miller	Charlotte
	Nancy Black Norelli	Charlotte
	Hugh B. Lewis	Charlotte
	Nathaniel P. Proctor	Charlotte
	Becky Thorne Tin	Charlotte
	Ben S. Thalheimer	Charlotte
	Thomas Moore, Jr.	Charlotte

DISTRICT	JUDGES	ADDRESS
	Hugh B. Campbell, Jr.	Charlotte
	N. Todd Owens	Charlotte
	Christy Townley Mann	Charlotte
27A	Dennis J. Redwing (Chief)	Gastonia
	Angela G. Hoyle	Gastonia
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Ralph C. Gingles, Jr.	Gastonia
	Thomas Gregory Taylor	Belmont
27B	Larry James Wilson (Chief)	Shelby
	Anna F. Foster	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
28	Gary S. Cash (Chief)	Asheville
	Shirley H. Brown	Asheville
	Rebecca B. Knight	Asheville
	Marvin P. Pope, Jr.	Asheville
	Patricia A. Kaufmann	Asheville
	Sharon Tracey Barrett	Asheville
29A	C. Randy Pool (Chief)	Marion
	Athena F. Brooks	Cedar Mountain
	Laura Anne Powell	Rutherfordton
	J. Thomas Davis	Rutherfordton
29B	Robert S. Cilley (Chief)	Pisgah Forest
	Mark E. Powell	Hendersonville
	David Kennedy Fox	Hendersonville
30	Danny E. Davis (Chief)	Waynesville
	Steven J. Bryant	Bryson City
	Richlyn D. Holt	Waynesville
	Bradley B. Letts	Sylva
	Monica Hayes Leslie	Waynesville

EMERGENCY DISTRICT COURT JUDGES

Philip W. Allen	Reidsville
E. Burt Aycock, Jr.	Greenville
Sarah P. Bailey	Rocky Mount
Ronald E. Bogle	Raleigh
Donald L. Boone	High Point
James Thomas Bowen III	Lincolnton
Samuel Cathey	Charlotte
William A. Christian	Sanford
J. Patrick Exum	Kinston
J. Keaton Fonvielle	Shelby
Thomas G. Foster, Jr.	Greensboro
Earl J. Fowler, Jr.	Asheville
Rodney R. Goodman	Kinston
Lawrence Hammond, Jr.	Asheboro
James A. Harrill, Jr.	Winston-Salem
Resa Harris	Charlotte
Robert E. Hodges	Morganton

DISTRICT	JUDGES	ADDRESS
	ROBERT W. JOHNSON	Statesville
	WILLIAM G. JONES	Charlotte
	LILLIAN B. JORDAN	Asheboro
	ROBERT K. KEIGER	Winston-Salem
	DAVID Q. LABARRE	Durham
	WILLIAM C. LAWTON	Raleigh
	C. JEROME LEONARD, JR.	Charlotte
	JAMES E. MARTIN	Ayden
	EDWARD H. MCCORMICK	Lillington
	DONALD W. OVERBY	Raleigh
	J. LARRY SENTER	Raleigh
	MARGARET L. SHARPE	Winston-Salem
	RUSSELL SHERRILL III	Raleigh
	CATHERINE C. STEVENS	Gastonia
	J. KENT WASHBURN	Graham

RETIRED/RECALLED JUDGES

ABNER ALEXANDER	Winston-Salem
CLAUDE W. ALLEN, JR.	Oxford
JOYCE A. BROWN	Otto
DAPHENE L. CANTRELL	Charlotte
SOL G. CHERRY	Boone
WILLIAM A. CREECH	Raleigh
T. YATES DOBSON, JR.	Smithfield
SPENCER B. ENNIS	Graham
ROBERT T. GASH	Brevard
HARLEY B. GASTON, JR.	Gastonia
ROLAND H. HAYES	Gastonia
WALTER P. HENDERSON	Trenton
CHARLES A. HORN, SR.	Shelby
JACK E. KLASS	Lexington
EDMUND LOWE	High Point
J. BRUCE MORTON	Greensboro
STANLEY PEELE	Hillsborough
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton
JOHN L. WHITLEY	Wilson

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

General Counsel
J. B. KELLY

Senior Policy Advisor
JULIA WHITE

Chief Deputy Attorney General
GRAYSON G. KELLEY

Solicitor General
CHRIS BROWNING, JR.

Senior Deputy Attorneys General

JAMES J. COMAN
ANN REED DUNN
JAMES C. GULICK
WILLIAM P. HART
JOSHUA H. STEIN
REGINALD L. WATKINS

Assistant Solicitor General
JOHN F. MADDREY

Special Deputy Attorneys General

DANIEL D. ADDISON
STEVEN M. ARBOGAST
JOHN J. ALDRIDGE III
HAL F. ASKINS
JONATHAN P. BABB
ROBERT J. BLUM
WILLIAM H. BORDEN
HAROLD D. BOWMAN
JUDITH R. BULLOCK
MABEL Y. BULLOCK
JILL LEDFORD CHEEK
LEONIDAS CHESTNUT
KATHRYN J. COOPER
FRANCIS W. CRAWLEY
NEIL C. DALTON
MARK A. DAVIS
GAIL E. DAWSON
LEONARD DODD
ROBERT R. GELBLUM
GARY R. GOVERT
NORMA S. HARRELL
ROBERT T. HARGETT
RICHARD L. HARRISON
JANE T. HAUTIN
E. BURKE HAYWOOD
JOSEPH E. HERRIN
JILL B. HICKEY
KAY MILLER-HOBART
J. ALLEN JERNIGAN
DANIEL S. JOHNSON
DOUGLAS A. JOHNSTON
FREDERICK C. LAMAR
CELIA G. LATA
ROBERT M. LODGE
KAREN E. LONG
JAMES P. LONGEST
AMAR MAJMUNDAR
T. LANE MALLONEE, JR.
GAYL M. MANTHEI
RONALD M. MARQUETTE
ALANA D. MARQUIS
ELIZABETH L. MCKAY
BARRY S. MCNEILL
W. RICHARD MOORE
THOMAS R. MILLER
ROBERT C. MONTGOMERY
G. PATRICK MURPHY
DENNIS P. MYERS
LARS F. NANCE
SUSAN K. NICHOLS
SHARON PATRICK-WILSON
ALEXANDER M. PETERS
THOMAS J. PITMAN
DIANE A. REEVES
LEANN RHODES
GERALD K. ROBBINS
CHRISTINE M. RYAN
BUREN R. SHIELDS III
RICHARD E. SLIPSKY
TIARE B. SMILEY
VALERIE B. SPALDING
W. DALE TALBERT
DONALD R. TEETER
MELISSA L. TRIPPE
VICTORIA L. VOIGHT
JOHN H. WATTERS
KATHLEEN M. WAYLETT
EDWIN W. WELCH
JAMES A. WELLONS
THEODORE R. WILLIAMS
THOMAS J. ZIKO

Assistant Attorneys General

DAVID J. ADINOLFI II
MERRIE ALCOKE
JAMES P. ALLEN
STEVEN A. ARMSTRONG
KEVIN ANDERSON
KATHLEEN BALDWIN
GRADY L. BALENTINE, JR.
JOHN P. BARKLEY
DANA BARKSDALE
JOHN G. BARNWELL, JR.
AMY Y. BASON
VALERIE L. BATEMAN
SCOTT K. BEAVER
MARC D. BERNSTEIN
ERICA C. BING
BARRY H. BLOCH
KAREN A. BLUM
RICHARD H. BRADFORD
DAVID P. BRENSKILLE
CHRISTOPHER BROOKS
ANNE J. BROWN
JILL A. BRYAN
STEVEN F. BRYANT
BETHANY A. BURGON
HILDA BURNETTE-BAKER
SONYA M. CALLOWAY-DURHAM
JASON T. CAMPBELL

Stacy T. Carter
Lauren M. Clemmons
John Congleton
Scott A. Conklin
Lisa G. Corbett
Douglas W. Corkhill
Allison S. Corum
Laura E. Crumpler
William B. Crumpler
Joan M. Cunningham
Robert M. Curran
Tracy C. Curtner
Lisa B. Dawson
Clarence J. DelForge III
Kimberly W. Duffley
Patricia A. Duffy
Brenda Eaddy
Letitia C. Echols
Larissa Ellerbee
David L. Elliott
John C. Evans
Caroline Farmer
June S. Ferrell
Bertha L. Fields
Spurgeon Fields III
Joseph Finarelli
William W. Finlator, Jr.
Margaret A. Force
Nancy L. Freeman
Virginia L. Fuller
Edwin L. Gavin II
Laura J. Gendy
Jane A. Gilchrist
Lisa Glover
Christine Goebel
Michael David Gordon
Lisa H. Graham
Richard A. Graham
Angel E. Gray
Leonard G. Green
Mary E. Guzman
Patricia Bly Hall
Kathryne Hathcock
Richard L. Harrison
Jennie W. Hauser
Clinton C. Hicks
Alexander M. Hightower
Tina L. Hlabse
Charles H. Hobgood
Mary C. Hollis
James C. Holloway
Susannah P. Holloway
Creecy C. Johnson
Linda J. Kimbell
Anne E. Kirby
David N. Kirkman
Brent D. Kiziah
Tina A. Krasner
Amy C. Kunstling
Donald W. Laton
Philip A. Lehman
Rebecca E. Lem
Anita Leveaux-Quigless
Floyd M. Lewis
Amanda P. Little
Susan R. Lundberg
Martin T. McCracken
J. Bruce McKinney
Gregory S. McLeod
Michelle B. McPherson
John W. Mann
Quinita S. Martin
Ann W. Matthews
Sarah Y. Meacham
Thomas G. Meacham, Jr.
Mary S. Mercer
Derick Mertz
Anne M. Middleton
Emery E. Milliken
Vaughn S. Monroe
Thomas H. Moore
Katherine Murphy
John F. Oates
Daniel O'Brien
Jane L. Oliver
Jay L. Osborne
Roberta A. Ouellette
Elizabeth L. Oxley
Sondra C. Panico
Elizabeth F. Parsons
Brian Paxton
John A. Payne
Cheryl A. Perry
Donald K. Phillips
Ebony J. Pittman
Allison A. Pluchos
William M. Polk
Diane M. Pomper
Kimberly D. Potter
Dorothy A. Powers
Newton G. Pritchett, Jr.
Robert K. Randleman
Asby T. Ray
Rudolph E. Renfer
Leann Rhodes
Yvonne B. Ricci
Charlene B. Richardson
Joyce S. Rutledge
Kelly Sandling
Gary A. Scarzafava
John P. Scherer II
Nancy E. Scott
Barbara A. Shaw
Chris Z. Sinha
Scott T. Slusser
Belinda A. Smith
Donna D. Smith
Robert K. Smith
Marc X. Sneed
M. Janette Soles
Richard G. Sowerby, Jr.
James M. Stanley
Iain M. Stauffer
Mary Ann Stone
LaShawn L. Strange
Elizabeth N. Strickland
Scott Stroud
Kip D. Sturgis
Sueanna P. Sumpter
Kathryn J. Thomas
Jane R. Thompson
Douglas P. Thoren
Judith L. Tillman
Vanessa N. Totten
Brandon L. Truman
Lee A. Vlahos
Richard James Votta
Ann B. Wall
Sandra Wallace-Smith
Gaines M. Weaver
Margaret L. Weaver
Elizabeth J. Weese
Hope M. White
Brian C. Wilks
Christopher H. Wilson
Mary D. Winstead
Donna B. Wojcik
Thomas M. Woodward
Patrick Wooten
Harriet F. Worley
Claude N. Young, Jr.
Michael D. Youth

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	Frank R. Parrish	Elizabeth City
2	Seth H. Edwards	Washington
3A	W. Clark Everett	Greenville
3B	W. David McFadyen, Jr.	New Bern
4	Dewey G. Hudson, Jr.	Jacksonville
5	Benjamin Russell David	Wilmington
6A	William G. Graham	Halifax
6B	Valerie M. Pittman	Murfreesboro
7	Howard S. Boney, Jr.	Tarboro
8	C. Branson Vickory III	Goldsboro
9	Samuel B. Currin	Oxford
9A	Joel H. Brewer	Roxboro
10	C. Colon Willoughby, Jr.	Raleigh
11	Thomas H. Lock	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Rex Gore	Bolivia
14	Michael Nifong	Durham
15A	Robert F. Johnson	Graham
15B	James R. Woodall, Jr.	Chapel Hill
16A	Kristy McMillan Newton	Raeford
16B	L. Johnson Britt III	Lumberton
17A	Belinda J. Foster	Wentworth
17B	Clifford R. Bowman	Dobson
18	J. Douglas Henderson	Greensboro
19A	Roxann L. Vaneekhoven	Concord
19B	Garland N. Yates	Asheboro
19C	William D. Kenerly	Salisbury
20	Michael Parker	Monroe
21	Thomas J. Keith	Winston-Salem
22	Garry N. Frank	Lexington
23	Thomas E. Horne	Wilkesboro
24	James T. Rusher	Boone
25	David T. Flaherty, Jr.	Lenoir
26	Peter S. Gilchrist III	Charlotte
27A	Michael K. Lands	Gastonia
27B	William Carlos Young	Shelby
28	Ronald L. Moore	Asheville
29	Jeff Hunt	Hendersonville
30	Charles W. Hipps	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
1	Andy Womble	Elizabeth City
3A	Donald C. Hicks III	Greenville
3B	Debra L. Massie	Beaufort
10	George Bryan Collins, Jr.	Raleigh
12	Ron D. McSwain	Fayetteville
14	Robert Brown, Jr.	Durham
15B	James E. Williams, Jr.	Carrboro
16A	Regina McKinney Joe	Laurinburg
16B	Angus B. Thompson	Lumberton
18	Wallace C. Harrelson	Greensboro
21	George R. Clary III	Winston-Salem
26	Isabel S. Day	Charlotte
27A	Kellum Morris	Gastonia
28	J. Robert Hufstader	Asheville

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

CONSTITUTION OF UNITED STATES CITED

CONSTITUTION OF NORTH CAROLINA CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

PATRICIA MCCUTCHEN, PLAINTIFF v. DEBORAH T. MCCUTCHEN, DEFENDANT

No. COA03-1630

(Filed 3 May 2005)

1. Appeal and Error— appealability—summary judgment—substantial right—alienation of affections—criminal conversation

Although plaintiff's appeal from the trial court's grant of summary judgment for defendant as to plaintiff's claim for alienation of affections is an appeal from an interlocutory order, a substantial right is affected where the trial court granted plaintiff's motion for summary judgment on her claim for criminal conversation but reserved the issue of damages for further hearing, because the elements of damages are so closely related between this claim and the claim for criminal conversation that they do not support separate awards for each case.

2. Alienation of Affections; Statutes of Limitation and Repose— preseparation conduct—summary judgment

The trial court did not err by granting defendant's motion for summary judgment as to plaintiff's claim for alienation of affections, because: (1) the statute of limitations under N.C.G.S. § 1-52(5) provides a three-year limit for criminal conversation or for any other injury to the person or rights of another not arising on contract or otherwise enumerated, and absent other specific

limitations this statute applies to all causes of action for personal injuries not elsewhere specified by statute including the cause of action for alienation of affections; (2) plaintiff has conceded the acts complained of occurred preseparation more than three years prior to filing her complaint; and (3) an alienation of affections claim must be based on preseparation conduct.

Judge TYSON dissenting.

Appeal by plaintiff from order filed 6 August 2003 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 15 September 2004.

The Mueller Law Firm, P.A., by Colby L. Hall, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Lynn P. Burleson and Suzanne R. Ladd, for defendant-appellee.

BRYANT, Judge.

Patricia McCutchen (plaintiff) appeals an order filed 6 August 2003, granting Deborah T. McCutchen's (defendant) motion for summary judgment as to plaintiff's claim for alienation of affections.

Plaintiff and Byron McCutchen were married on 1 June 1968, separated on 9 September 1998, and divorced on 30 May 2002. Their marriage produced three children who are all now adults.

Defendant became acquainted with Byron through her membership with Greenwood Forest Baptist Church, where Byron was a deacon. Defendant and Byron began a sexual relationship in September 1998, and after plaintiff and Byron were divorced, defendant and Byron married.

Plaintiff commenced an action for alienation of affections and criminal conversation on 25 April 2003. On 21 July 2003, plaintiff's motion for summary judgment was granted as to the criminal conversation claim, with damages to be reserved for further hearing. By order filed 6 August 2003, defendant's motion for summary judgment as to the claim for alienation of affections was granted. Plaintiff filed notice of appeal on 26 August 2003.

Interlocutory Appeal

[1] The trial court's ruling on a motion for summary judgment, leaving the issue of damages remaining for review, is not a final judgment,

but instead interlocutory in nature, and therefore is not immediately appealable. *See Schuch v. Hoke*, 82 N.C. App. 445, 446, 346 S.E.2d 313, 314 (1986) (stating that an order granting a party's motion for summary judgment, reserving for later determination the issue of damages, is an interlocutory order not immediately appealable). N.C. Gen. Stat. § 1A-1, Rule 54(b) states in pertinent part:

> In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.

N.C.G.S. § 1A-1, Rule 54(b) (2003); *see also Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). "Even if the lower court's ruling . . . was considered a final judgment as to the issue presented, no appeal of right will lie unless the decree is certified for appeal by the trial court pursuant to . . . Rule 54(b) . . . . As that is not the case, here, plaintiffs' appeal is premature." *Munden v. Courser*, 155 N.C. App. 217, 218, 574 S.E.2d 110, 112 (2002).

In certain instances, this Court may review interlocutory appeals pursuant to N.C. Gen. Stat. § 1-277(a) and 7A-27(d)(1), which allow for review of interlocutory appeals if "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). For this Court to review the appeal on its merits, "the 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).

Pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure, appellant's brief must contain a statement of the grounds for appellate review containing therein "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4). In the instant case, plaintiff failed to comply with this requirement, as plaintiff's brief does not contain a statement regarding whether a substantial right would be affected if this appeal were not immediately reviewed. During oral arguments, however, plaintiff did state that if this appeal

is deemed to be interlocutory, a substantial right is affected, subjecting the trial court's ruling to immediate appeal. In addition, defendant did brief and present at oral arguments, statements that this appeal is an interlocutory appeal and reasons the trial court's ruling is immediately appealable.

Notwithstanding the fact that no final judgment was entered as to the issue of damages for the tort of criminal conversation, nor was Rule 54 certification granted, we conclude that this appeal does affect a substantial right which would be lost absent immediate review. Specifically, as both parties acknowledged at oral argument and defendant contended in her brief, "[s]ince the elements of damages are so closely related, they do not support separate awards for each tort." 1 Suzanne Reynolds, *Lee's North Carolina Family Law* §5.48(A), at 415 (5th ed.); *see Sebastian v. Kluttz*, 6 N.C. App. 201, 220, 170 S.E.2d 104, 116 (1969) ("the two causes of action [alienation of affections and criminal conversation] and the elements of damages . . . are so connected and intertwined, only one issue of compensatory damages and one issue of punitive damages should [be] submitted to the jury").

---

[2] The sole issue on appeal is whether the trial court erred in granting defendant's motion for summary judgment as to the alienation of affections claim.

Pursuant to Rule 56(c) of the Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2003). The moving party has the burden of establishing the absence of any genuine issue of material fact, and the trial court should view the evidence in the light most favorable to the nonmoving party. *Norris v. Zambito*, 135 N.C. App. 288, 293, 520 S.E.2d 113, 116 (1999).

In North Carolina, civil actions may only be commenced within time periods specified in Chapter 1 of the North Carolina General Statutes, except where, in special cases, a different limitation is specified by statute. N.C.G.S. § 1-15(a) (2003) ("Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute."). Accrual of a cause of action is the point at which we determine when the limitation period begins to

run. N.C.G.S. § 1-15(a) (2003); *see Hoyle v. City of Charlotte*, 276 N.C. 292, 307 172 S.E.2d 1, 11 (1970). A cause of action accrues and the statute of limitations begins to run at the time in which a party becomes liable. *Sebastian*, 6 N.C. App. at 210, 170 S.E.2d at 109. The statute of limitations does not begin to run until the plaintiff is entitled to sue. *Willetts v. Willetts*, 254 N.C. 136, 145, 118 S.E.2d 548, 554 (1961). Rather, once the cause of action accrues and the statute of limitations begins to run, the statute of limitations continues to run uninterrupted unless stayed by judicial process. *Travelers Ins. Co. v. Rushing*, 36 N.C. App. 226, 228, 243 S.E.2d 420, 421-22 (1978).

Pursuant to N.C. Gen. Stat. § 1-52(5), the statute of limitations is 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.G.S. § 1-52(5) (2003). Absent other specific limitations, subdivision (5) of N.C. Gen. Stat. § 1-52, appears to apply to all causes of action for personal injuries not elsewhere specified by statute, including the cause of action for alienation of affections. *See Smith v. Cessna Aircraft Co.*, 571 F. Supp. 433 (M.D.N.C. 1983). "[If] the plaintiff's claim is barred by the running of the statute of limitations[] . . . defendant [is] entitled to judgment as a matter of law, and summary judgment . . . [is] appropriate." *Brantley v. Dunstan*, 10 N.C. App. 706, 706, 179 S.E.2d 878, 878 (1971); *see also Yancey v. Watkins*, 17 N.C. App. 515, 519, 195 S.E.2d 89, 92 (1973) ("[W]here the [bar] is properly pleaded and all facts with reference thereto are admitted, the question of limitations becomes a matter of law.").

In *Pharr v. Beck*, 147 N.C. App. 268, 554 S.E.2d 851 (2001), plaintiff-wife was awarded damages based on the alienation of her husband's affections by defendant-mistress. The trial court denied the mistress's motion for directed verdict and judgment notwithstanding the verdict. The mistress appealed.

On appeal, the mistress argued that the merits of the alienation of affections claim should have been determined solely based on the events occurring prior to the date of separation. The wife contended that her claim was properly founded on events not only occurring prior to divorce, but including a period of time after the spouses separated. This Court held that the pre-separation evidence revealed that the mistress engaged in intentional conduct that probably affected the husband's marital relationship with his wife, and this conduct was the effective cause of the husband's loss of affections for his wife. This Court also held that it was inconsistent to permit a spouse to recover damages in an alienation of affections claim against a third

party for conduct post-separation while prohibiting consideration of conduct post-separation in an alimony claim. Accordingly, this Court concluded "an alienation of affection[s] claim must be based on pre-separation conduct, and post-separation conduct is admissible only to the extent it corroborates pre-separation activities resulting in the alienation of affection[s]." *Pharr*, 147 N.C. App. at 273, 554 S.E.2d at 855. This Court ultimately held the trial court correctly denied the mistress's motions for directed verdict and judgment notwithstanding the verdict.

Plaintiff argues that *Pharr* is not a statute of limitations case and cannot be interpreted so as to stay a cause of action founded upon post-separation activities. Rather, plaintiff relies on *Darnell v. Rupplin*, 91 N.C. App. 349, 371 S.E.2d 743 (1988), as authority for the proposition that the statute of limitations was tolled as the extramarital conduct constituted an ongoing violation.

In *Darnell*, defendant-mistress appealed an order in favor of plaintiff-wife in her action for alienation of affections. The husband, who worked with the mistress, developed a romantic relationship with the mistress which resulted in sexual encounters. Several of these sexual encounters occurred in North Carolina but also included sexual encounters occurring out of state. Ultimately, the mistress moved in with the husband at his residence in Maryland.

On appeal, the mistress contended that an issue of fact existed as to which state the claim for alienation of affections accrued. The mistress further argued that the trial court committed prejudicial error by refusing to submit this issue to the jury. The trial court held that the mistress's answer to the complaint contended that her actions occurred primarily out of state. This Court held the question of where the tort occurred, giving rise to the mistress's liability, was an issue of fact material to both the substantive law applicable to the wife's cause of action and the mistress's defense. In addition this Court held the mistress's answer demanded a trial by jury on all issues of fact.

The issue presented in *Darnell* is distinguishable from the issue presented in the instant case. Specifically, plaintiff has not contended that any of the acts constituting the cause of action occurred out of state. Moreover, plaintiff has conceded the acts complained of occurred pre-separation more than three years prior to filing her complaint. Based on the clear mandate of *Pharr*—"an alienation of affection[s] claim must be based on pre-separation conduct"—we must conclude that the trial court properly granted summary judg-

ment in favor of defendant as to the alienation of affections claim. *See Pharr*, 147 N.C. App. 268, 554 S.E.2d 851. Accordingly, this assignment of error is overruled.

Affirmed.

Judge HUDSON concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion affirms the trial court's grant of summary judgment in defendant's favor dismissing plaintiff's claim of alienation of affections. This interlocutory appeal is not properly before this Court and should be dismissed. Plaintiff also failed to comply with the North Carolina Rules of Appellate Procedure. I respectfully dissent.

I. Appellate Review of Interlocutory Appeals

The majority's opinion correctly determines plaintiff's appeal is interlocutory as it was " 'made during the pendency of an action which [did] not dispose of the case, but instead [left] 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)); *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993) ("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."). Their opinion further recognizes there is generally no right of immediate appeal from an interlocutory order. *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). The trial court did not certify its order as immediately appealable and plaintiff did not assert in her brief a "substantial right" would be lost absent immediate review.

Finally, the majority's opinion correctly cites Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure to require 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). 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, if the appeal is interlocutory. *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 invoke our jurisdiction and to warrant appellate review. *Id.*

Plaintiff included a "statement of the grounds for appellate review," but did not address the interlocutory nature of her appeal. Further, plaintiff did not assert in her brief any "substantial rights" that will be adversely affected if this Court does not immediately review the trial court's interlocutory order. Despite plaintiff's failure to either address the interlocutory nature of her appeal or argue in her brief the substantial right that will be lost without immediate appeal, the majority's opinion finds and sets forth that plaintiff asserts a substantial right to invoke our jurisdiction and warrant our review.

The majority's opinion bases its improper decision to reach the merits on plaintiff's oral argument of a substantial right that will be lost without immediate review. Contentions presented at oral argument, but not supported in the written briefs, will not be considered. *Mitchem v. Mitchem*, 169 N.C. 48, 52, 85 S.E. 146, 147-48 (1915). Parties are not permitted to cite or discuss authority not presented in their briefs or in memoranda of additional authority filed with the Court. *State v. Faison*, 330 N.C. 347, 362, 411 S.E.2d 143, 152, n.1 (1991); N.C.R. App. P. 28(g) (2004). A party's oral argument cannot extend beyond those arguments in their written briefs. The majority's holding permits parties at oral argument to salvage otherwise dismissible appeals or to assert additional arguments, second chance luxuries not available to those who comply with the rules and whose cases are decided upon the written briefs alone.

"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); *Shook v. County of Buncombe*, 125 N.C.

App. 284, 286, 480 S.E.2d 706, 707 (1997) ("[T]he rules are not merely ritualistic formalisms, but are essential to our ability to ascertain the merits of an appeal. Furthermore, the appellate rules promote fairness by alerting both the Court and appellee to the specific errors appellant ascribes to the court below."). "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dept. of Transportation*, 359 N.C. 400, 402, —— S.E.2d ——, —— (April 2, 2005) (No. 109A04). "[I]n fairness to all who come before this Court, [the appellate rules] must be enforced uniformly." *Shook*, 125 N.C. App. at 287, 480 S.E.2d at 708. "[O]therwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar*, 359 N.C. at 402, —— S.E.2d at —— (citation omitted). Our appellate Courts have long held that appeals should be dismissed for "failure to comply with the rules." *Pruitt v. Wood*, 199 N.C. 788, 792, 156 S.E. 126, 128 (1930); *In re Lancaster*, 290 N.C. 410, 424, 226 S.E.2d 371, 380 (1976) ("Ordinarily our legal system operates in an adversary mode. One incident of this mode is that only those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions. This can be a strict requirement.") (citation omitted).

Plaintiff's attempts at oral argument to amend her arguments to avoid dismissal does not allow review of the merits of her appeal. This appeal should be dismissed due to both its interlocutory nature and plaintiff's failure to argue in her brief any substantial rights that will be adversely affected without this Court's immediate review.

II. Alienation of Affections

The majority holds on the merits the statute of limitations *per se* accrues upon the date of separation for a claim of alienation of affections. I disagree. The date of actual accrual is when the tortfeasor's alienation is fully accomplished. Plaintiff proffered substantial evidence and facts to raise a genuine issue of material fact whether the alienation of her husband's affections was not fully accomplished until February 2001. Her complaint was filed on 25 April 2003, well within the three year statute of limitations. The trial court improperly granted summary judgment in defendant's favor.

A. Standards of Review

We review a trial court's conclusions of law under the *de novo* standard. *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002) (citing *State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993)

("conclusions are questions of law which are fully reviewable by this Court on appeal"), *cert. denied*, 512 U.S. 1239, 129 L. Ed. 2d 865 (1994)), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003).

The standard of review of a grant of summary judgment is well-established.

> The standard of review on appeal from the granting of a motion for summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. The moving party has the burden of establishing the lack of any triable issue of fact. A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> 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. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 705, 707-08, 582 S.E.2d 343, 345 (2003) (internal citations and quotations omitted) (alterations in original), *aff'd*, 358 N.C. 137, 591 S.E.2d 520, *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004).

1. *De Novo* Review of Alienation of Affections

The majority's opinion correctly states that the statute of limitations for asserting a claim for alienation of affections is three years. N.C. Gen. Stat. § 1-52(5). The issue before this Court is when this cause of action accrues and the statute of limitations begins to run.

a. Accrual of Statute of Limitations

This Court indirectly referred to this issue in *Sharp v. Teague*, 113 N.C. App. 589, 596-97, 439 S.E.2d 792, 796-97, *reh'g granted*, 336 N.C. 317, 445 S.E.2d 397-98 (1994), *rev. dismissed*, 339 N.C. 730, 456

S.E.2d 771 (1995). *Sharp* concerned claims brought by a client against her former attorneys. *Id.* One of the plaintiff's claims alleged negligence against the former attorney for failure to file an alienation of affections claim against a third party. *Id.* This Court cited 41 Am. Jur. 2d, Husband and Wife § 481 (1968) to state an "alienation of affection claim accrues at the time of the loss of affection." *Id.*

This ruling on accrual of the claim is supported by other jurisdictions which have considered the issue. *Overstreet v. Merlos*, 570 So.2d 1196, 1198 (Miss. Sup. Ct. 1990) ("The claim accrues when the alienation or loss of affection is finally accomplished.") (citation omitted); *Dobrient v. Ciskowski*, 195 N.W.2d 449, 451 (Wisc. Sup. Ct. 1972) ("Ordinarily, the alienation of affection is the gradual result of a series of wrongful acts over a substantial period of time culminating in a loss of consortium. The cause of action accrues when the alienation or loss of affection is finally accomplished." (citations omitted)); 41 Am. Jur. 2d, Husband and Wife § 284 (1995) (The statute of limitations generally commences to run against a cause of action for alienation of affections when the alienation is fully accomplished.).

b. The Elements

The elements of alienation of affections are: (1) a marriage; (2) a genuine love and affection existed between the spouses; (3) the love and affection existing between the spouses was alienated and destroyed; and (4) the wrongful and malicious acts of the defendant caused the loss and alienation of such love and affection. *Litchfield v. Cox*, 266 N.C. 622, 623, 146 S.E.2d 641 (1966) (citations omitted). The second element of existing love and affection may be satisfied in less than stable marriages. *See* 1 Suzanne Reynolds, *Lee's North Carolina Family Law* § 5.46(A), at 394-95 (5th ed 1998) (citing *Sebastian v. Kluttz*, 6 N.C. App. 201, 208, 170 S.E.2d 104, 108 (1969) ("Although plaintiff's life with her husband apparently had not been as happy and tranquil as some marriages are, she was entitled to possess and enjoy all of her legally protected marital interests free from interference by the defendant.")); *see also Brown v. Hurley*, 124 N.C. App. 377, 380-81, 477 S.E.2d 234, 237 (1996) ("The plaintiff does not have to prove that his spouse had no affection for anyone else or that their marriage was previously one of 'untroubled bliss;' he only has to prove that his spouse had *some* genuine love and affection for him and that love and affection was lost as a result of defendant's wrongdoing.")) (citation omitted).

Unlike the related claim of criminal conversation: (1) there need not be a definitive act which triggers liability, *see Brown*, 124 N.C. App. at 380, 477 S.E.2d at 237 (criminal conversation is defined as "actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture"); and (2) the intruding third party is not always a paramour, *see* Reynolds, *supra*, § 5.46(A), at 396-97 (alienation of affection actions arise against in-law parties and near relatives, but plaintiffs may face the doctrine of family privilege as an obstacle). Alienation of affections develops from "a series of wrongful acts over a substantial period of time" resulting in an aggrieved party's loss of their loved one's affection. *See Dobrient*, 195 N.W.2d at 449.

Defendant and the majority's opinion cite *Pharr v. Beck* to hold that a claim of alienation of affections must be based upon evidence of pre-separation conduct, and post-separation conduct is admissible only as corroborative evidence. 147 N.C. App. at 273, 554 S.E.2d at 855. *Pharr* addressed whether events occurring after the date of separation may be used as evidence to *support a claim* of alienation of affections. *Id.* In contrast, the issue before us involves the *date of accrual* of the tort. The majority's opinion extends *Pharr* to hold the date of separation is the *per se* date of accrual to assert an alienation of affections claim. While *Pharr* controls the evidentiary basis for the cause of action, it does not support the majority's notion that the statute of limitations period begins to run from the date of separation *per se*.

All precedents examining this issue hold the action accrues and the statute of limitations begins to run when the loss of affection is complete. *See* Reynolds, *supra*, § 5.46(A), at 395 ("Since the spouses could have reconciled, the plaintiff has a claim when the defendant ends that opportunity.") (citing 1 H. Clark, Law of Domestic Relations § 12.2, at 656-57 (2d ed. 1987) ("The rationale is that even though the spouses are living apart, there is always a chance of reconciliation, and if the defendant's conduct has ended that chance, the action will lie.")); *see also Brown*, 124 N.C. App. at 381, 477 S.E.2d at 238 ("while a husband and wife separating appears to contradict any assertions of a 'happy marriage,' this Court has held that the mere fact of separation does not establish a lack of 'genuine love and affection' as a matter of law") (citing *Cannon v. Miller*, 71 N.C. App. 460, 468-69, 322 S.E.2d 780, 787 (1984), *vacated on other grounds*, 313 N.C. 324, 327 S.E.2d 888 (1985)). The total loss of affections and consortium may occur months or years after the date the parties separated. The exist-

ence of love and affection, whether before or after separation, "affects the credibility of his evidence, but it still remains a question for the jury." *Litchfield*, 266 N.C. at 623, 146 S.E.2d at 642.

The statute of limitations for a claim of alienation of affections is tolled until the alienation is complete, when the injury is fully realized. When this event occurs is an issue for the fact-finder to determine. *Snyder v. Freeman*, 300 N.C. 204, 208, 266 S.E.2d 593, 596 (1980) (when a cause of action accrues is a question of fact). The trial court and the majority's opinion disregards substantial evidence of the parties' numerous attempts to reconcile while separated.

Many spouses may live separate and with strained affections, but attempt to reconcile over the course of months or several years before seeking a divorce. By holding the date of separation *per se* begins the statute to run, the aggrieved party is punished for foregoing legal action during attempts to reconcile with their loved one. The ominous presence of a ticking clock from the date of separation will no doubt adversely affect any efforts towards reconciliation. Under the majority's holding, potential claims against the persistent intruder may become stale before reconciliation cease and the alienation of affections is complete.

b. Analysis

Plaintiff proffered evidence showing her husband, Byron, and defendant met at church and began a relationship resulting from their mutual involvement there. Their relationship became intimate in September 1998. Plaintiff and Byron separated that month. Following the initial date of separation, plaintiff and Byron attempted to reconcile by attending counseling sessions, both jointly and individually. On three separate occasions, Byron expressed his desire to reconcile with plaintiff and avoid divorce. After separating, plaintiff and Byron purchased a vehicle together, paid for from a joint account. Byron told plaintiff that he had ended his relationship with defendant and planned to return to the marriage. Byron asked plaintiff to refrain from commencing legal action during this period. Plaintiff agreed, "because I wanted to save my marriage." The evidence shows these and other attempts towards the parties reconciling continued until February 2001.

Further evidence of the parties' attempts towards reconciliation beyond 9 September 1998 are shown by Byron's decision to not involve the judicial system during separation. The record is devoid of

any evidence of a separation agreement between plaintiff and Byron or attempts by Byron to seek a judicial decree of separation or divorce from bed and board. In addition, Byron did not file for divorce from plaintiff until 26 September 2000, one year and seventeen days after the date he was permitted to do so under N.C. Gen. Stat. § 50-6.

The trial court ruled and the majority's opinion affirms that plaintiff's claim against defendant for alienation of affections *per se* accrued on 9 September 1998, the date of separation. Consequently, the statute of limitations for plaintiff to assert a claim for alienation of affections would expire on 9 September 2001, three years later. Plaintiff and Byron jointly attempted to reconcile their marriage from 9 September 1998 until February 2001. These efforts included plaintiff refraining from taking legal action against defendant *at Byron's request*.

Applying the majority's holding to plaintiff's situation, her claim against defendant for alienation of affections would have expired in September 2001. As plaintiff and Byron attempted to reconcile until February 2001, plaintiff would have only six months to file her claim before the statute of limitations would have run. This holding is an unfair and punitive limitation placed upon an aggrieved party seeking to reconcile with his or her spouse, after forbearing on legal action against defendant "because [she] wanted to save her marriage." Parties whose affections are truly alienated would not have engaged in the many attempts and actions that plaintiff and her husband completed towards reconciliation. Plaintiff was not dilatory in filing her present action. This action was filed less than one year after plaintiff and Byron divorced.

Accrual of a claim for alienation of affections after the last attempts of reconciliation comports with North Carolina's demonstrated interest in the importance of protecting marriage. N.C. Gen. Stat. § 50-6 (2003) (no fault separation and wait time of a year); 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."); *see* Lee, *supra*, § 5.46(A), at 395 (neither a separation agreement nor divorce decree prevent a plaintiff from filing an action against a defendant for alienation of affections) (citations omitted); *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*, 313 N.C. 324, 327 S.E.2d 888 (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.' ") (quotation omitted), *aff'd*, 313 N.C. 322, 327 S.E.2d 879, 879-80 (1985).

Defendant's intrusion into plaintiff's marriage spanned several years prior to the date of separation. Defendant's interloping continued during plaintiff and Byron's repeated reconciliation efforts after their initial separation and eventually culminated with Byron's divorce from plaintiff and subsequent marriage to defendant. Plaintiff's injury accrued when Byron's affections were not decreased, but "alienated" upon the cessation of reconciliation efforts in February 2001. A decrease in affections as shown by the single fact of separation does not *per se* equal accrual of the claim. Plaintiff filed her complaint on 25 April 2003, within the three year statute of limitations after all reconciliation efforts ceased, and less than one year after her divorce became final.

B. Summary Judgment

"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." *Draughon*, 158 N.C. App. at 708, 582 S.E.2d at 345. The determination of when a spouse's affections are completely alienated and the cause of action accrues is a question of fact. *See Snyder*, 300 N.C. at 208, 266 S.E.2d at 596 (when a cause of action accrues is a question of fact); *see also Litchfield*, 266 N.C. at 623, 146 S.E.2d at 642 (the existence of love and affection, whether before or after separation, "affects the credibility of . . . evidence, but it still remains a question for the jury."). The date of separation is not the *per se* end of affections and a bright line point of accrual.

Plaintiff presented sworn testimony that she and Byron attempted to reconcile until February 2001, two and a half years after they separated. Byron's own actions indicate his initial intentions to reconcile after separating from plaintiff on 9 September 1998. This creates a genuine issue of a material fact for a fact-finder to consider. Defendant was not entitled to a judgment as "a matter of law." N.C.

Gen. Stat. § 1A-1, Rule 56. The trial court erred in granting summary judgment to defendant.

III. Conclusion

I vote to dismiss this appeal due: (1) to its interlocutory nature; (2) no trial court certification; (3) the absence of a proper assertion of a substantial right; and (4) plaintiff's failure to abide by the North Carolina Rules of Appellate Procedure. *Viar*, 359 N.C. at 402, ––– S.E.2d at –––. Plaintiff should not be afforded a second opportunity to address the interlocutory nature of her appeal solely because the case was orally argued. *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.").

In the alternative and in response to the majority's opinion addressing the merits of plaintiff's appeal, the trial court erred in granting defendant's motion for summary judgment. The date of separation is not the *per se* date of accrual for claims of alienation of affections. The cause of action accrues when the spouse's affections have been completely alienated from the aggrieved party by the defendant. This date is a question of fact for the jury.

The majority's holding punishes those attempting to reconcile their relationship and to save their injured marriages by rewarding tortious conduct by intruding third parties. Future defendants will be rewarded with an affirmative defense to an aggrieved party's desire and attempts to reconcile.

Plaintiff here is punished for working for two and a half years to save her marriage by now requiring her to have filed her claim in six months after reconciliation efforts ended. Plaintiff proffered substantial and uncontradicted evidence to show she and her husband attempted to reconcile until February 2001. Genuine issues of material fact, which a fact-finder must consider, preclude summary judgment for defendant. I respectfully dissent.

MICHELLE L. SAWYERS, F/K/A MICHELLE L. TURNER, PLAINTIFF v. FARM BUREAU INSURANCE OF N.C., INC., DEFENDANT

No. COA04-758

(Filed 3 May 2005)

1. Insurance— Florida uninsured motorist claim—insurer served in North Carolina—voluntary dismissal

Summary judgment should not have been granted for defendant-insurer on an uninsured motorist claim where the accident occurred in Florida, defendant was served in North Carolina in the resulting Florida action, and defendant was voluntarily dismissed from the Florida action. N.C.G.S. § 20-279.21(b)(3) is clear and unambiguous: upon being served, the insurer shall be a party to the action. It is not clear that the voluntary dismissal in Florida was effectual; viewing the evidence in the light most favorable to the non-moving party and interpreting the statute to provide the fullest possible protection, in keeping with legislative intent, Farm Bureau failed to demonstrate that there was no genuine issue of material fact and that it was entitled to a judgment as a matter of law.

2. Civil Procedure— voluntary dismissal—subsequent claims

A voluntary dismissal as to an insurance company in a Florida automobile tort case did not bar North Carolina claims for contract and unfair insurance practices. The actions were not based on the same claim. N.C.G.S. § 1A-1, Rule 41(a).

Judge STEELMAN dissenting.

Appeal by Plaintiff from order entered 9 March 2004 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. Heard in the Court of Appeals 1 February 2005.

Ruff, Bond, Cobb, Wade & Bethune, L.L.P., by Robert S. Adden, Jr., for plaintiff-appellant.

Caudle & Spears, P.A., by Harold C. Spears and C. Grainger Pierce, Jr., for defendant-appellee.

WYNN, Judge.

Section 20-279.21(b)(3) of the North Carolina Motor Vehicle Safety and Financial Responsibility Act provides that an "insurer

shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with a copy of summons, complaint or other process . . . .” N.C. Gen. Stat. § 20-279.21(b)(3) (2003). Here, Plaintiff Michelle L. Sawyers contends that because she served Defendant Farm Bureau Insurance of N.C., Inc. with the summons and complaint of her Florida uninsured motorist action, Farm Bureau is bound by the Florida judgment. Because Section 20-279.21(b)(3) plainly states that an insurance company is bound if the insured effectuates service of process on an insurer in an uninsured motorist action, genuine issues of fact exist as to whether Farm Bureau is bound by the judgment in this action. Accordingly, we remand this matter for trial.

The record on appeal tends to show that in August 1996, Ms. Sawyers was a passenger in a vehicle owned and operated by Steven Sawyers, her then fiancé and later husband, when it was involved in an automobile accident in Florida. The driver of the other vehicle involved in the accident, Reginald T. Bembow, Jr., was an alleged uninsured motorist. Ms. Sawyers had uninsured motorist coverage with Progressive Southeastern and, through Steven Sawyers, with Farm Bureau.

On 28 May 1999, Ms. Sawyers filed suit in Brevard County, Florida, naming Bembow, Farm Bureau Mutual Insurance Company,[1] and Progressive Southeastern as defendants. A summons was issued to Farm Bureau on 28 May 1999. On 8 June 1999, L. Becky Powell, Special Deputy for Service of Process to the North Carolina Commissioner of Insurance accepted service of the summons and complaint, and sent the summons and complaint, along with a letter, to Farm Bureau on 9 June 1999. The summons and complaint were stamped “Received June 10, 1999 Farm Bureau Ins. Group.”

On or around 23 June 1999, A. Craig Cameron, an attorney, made a Special Notice of Appearance and Motion to Dismiss for Farm Bureau. The basis of the motion to dismiss was that the Florida court “lacks jurisdiction over the person of the Defendant corporation . . . .” On 10 August 1999, a default was entered against Bembow and a copy of the default entry was sent to Mr. Cameron. On or around 20 September 1999, Ms. Sawyers and Farm Bureau executed a Joint Motion for Order of Dismissal. The text of the joint motion read:

1. Farm Bureau has raised defenses related to service and naming of parties. However, for the purposes of Farm Bureau’s motion for summary judgment only, Farm Bureau stipulated to proper naming.

> The Plaintiff, MICHELLE SAWYERS, and Defendant NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, by and through their undersigned attorneys, jointly move this Honorable Court for an Order dismissing this case without prejudice as to Defendant NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY only. This motion is brought pursuant to F.R.C.P. 1.420 and N.C. R. Civ. P. 41(a)(1), as the Plaintiff intends to re-file the action in a court of competent jurisdiction in North Carolina.

On 1 October 1999, the Florida trial court entered the order of dismissal without prejudice. The text of the order read:

> THIS CAUSE came on before me upon the above Joint Motion of the parties for an Order dismissing this cause without prejudice as to Defendant NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY only. The Court having reviewed the file and being otherwise duly advised in the premise herein, it is hereby ORDERED AND ADJUDGED that: 1. This case, be and the same, is hereby dismissed without prejudice pursuant to F.R.C.P. 1.420 and N.C.R. Civ. P.41(a)(1), with each party to bear her own costs. 2. Defendant NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY will be removed from the case style for all prospective matters.

The record reflects that on 17 October 2000, Ms. Sawyers received a final judgment in the amount of $200,000.00, plus $188.00 in costs, against Bembow. On 1 November 2000, Ms. Sawyers' attorney notified Farm Bureau of the final judgment and requested payment of the policy limit of $25,000; Farm Bureau declined. On 11 April 2002, Ms. Sawyers instituted an action in North Carolina for breach of contract by failing to pay the $25,000 maximum toward the judgment against Bembow and for unfair and deceptive insurance practices. On 12 December 2002, Ms. Sawyers voluntarily dismissed the suit, which she then refiled on 23 June 2003. Farm Bureau filed an answer on 4 August 2003, and a motion for summary judgment on 23 December 2003. Ms. Sawyers filed a motion for summary judgment on 2 February 2004. The trial court granted Farm Bureau's motion for summary judgment, denied Ms. Sawyers' motion for summary judgment, and Ms. Sawyers appealed to this Court.

On appeal, Ms. Sawyers contends that the trial court erred in granting Farm Bureau's motion for summary judgment and denying

her motion for summary judgment. "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 a judgment as a matter of law.' " *Hooks v. Eckman*, 159 N.C. App. 681, 684, 587 S.E.2d 352, 354 (2003) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001)). "The movant must clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 324 (1999). In reviewing a motion for summary judgment, we must view the evidence in the light most favorable to the non-moving party. *Id.*

[1] Ms. Sawyers first argues that the trial court erred in granting Farm Bureau's motion for summary judgment because Farm Bureau is bound by the Florida judgment against the uninsured motorist. We agree.

North Carolina General Statutes has a Motor Vehicle Safety and Financial Responsibility Act, the purpose of which "is to compensate the innocent victims of financially irresponsible motorists. It is a remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (internal citations omitted) (citing *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 346, 338 S.E.2d 92, 96 (1986); *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 604 (1977); *Moore v. Hartford Fire Ins. Co. Group*, 270 N.C. 532, 535, 155 S.E.2d 128, 130-31 (1967)). Section 20-279.21(b)(3) of the Act states that every North Carolina automobile insurance policy covering bodily injury:

> shall be subject to the following provisions which need not be contained therein.
>
> a. A provision that the insurer ***shall be bound*** by a final judgment taken by the insured against an uninsured motorist ***if the insurer has been served with copy of summons, complaint or other process*** in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law[.]

N.C. Gen. Stat. § 20-279.21(b)(3) (emphasis added); *see also Grimsley v. Nelson*, 342 N.C. 542, 548, 467 S.E.2d 92, 96 (1996)

("[A]ll insurance policies in the State will be deemed to include a provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist, providing the insurer is served with a copy of summons and complaint." (quotation and emphasis omitted)).

"Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (quotation omitted); *see also*, *e.g.*, *McNally v. Allstate Ins. Co.*, 142 N.C. App. 680, 682, 544 S.E.2d 807, 809 (2001) ("Where the language of a statute is unambiguous, the language of the statute controls.").

Here, North Carolina General Statute section 20-279.21(b)(3) is clear and unambiguous, and we therefore must give effect to the plain and definite meaning of its language. *Carolina Power & Light*, 358 N.C. at 518, 597 S.E.2d at 722. Dictionaries may be used to determine the plain meaning of language. *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970). The plain meaning of the word "shall" is "imperative or mandatory." *Black's Law Dictionary* 1541 (4th ed. 1968) ("As used in statutes, contracts, or the like, this word is generally imperative or mandatory."); *see also*, *e.g.*, *Gilbert's Pocket Size Law Dictionary* 307 (1997) ("Denoting obligation or mandatory action."). Moreover, this Court has previously stated that "[t]he word 'shall' is defined as 'must' or 'used in laws, regulations, or directives to express what is mandatory.' " *Internet E., Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 405-06, 553 S.E.2d 84, 87 (2001) (quoting *Webster's Collegiate Dictionary* 1081 (9th ed. 1991)).

Under North Carolina General Statute section 20-279.21(b)(3), once an insured effectuates service of process on an insurance company in an uninsured motorist claim, it is "imperative or mandatory" that the insurer be bound to a final judgment taken by the insured against an uninsured motorist. Therefore, if Ms. Sawyers served Farm Bureau by registered or certified mail, return receipt requested, or another manner provided by law, with copy of the summons, complaint, or other process in her Florida action against Bembow, Farm Bureau is bound by the final judgment Ms. Sawyers took against Bembow.[2]

2. We note that, even under the terms of the insurance contract at issue here, Farm Bureau indicated its being bound by a judgment upon service of process: "Any judgment for damages arising out of a suit is not binding on us unless we have been

Even if we found the statute unclear, we would still reach the same result. "[W]here a statute is ambiguous, judicial construction must be used[.]" *McKinney v. Richitelli*, 357 N.C. 483, 487-88, 586 S.E.2d 258, 262 (2003) (citing *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E.2d 797 (1948)). The primary rule of construction "is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Id.* (citation omitted). "Protection of innocent victims who may be injured by financially irresponsible motorists has repeatedly been held to be the fundamental purpose of [North Carolina's Motor Vehicle Safety and Financial Responsibility Act." *Hartford Underwriters Ins. Co. v. Becks*, 123 N.C. App. 489, 492, 473 S.E.2d 427, 429 (1996) (citing *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 493, 467 S.E.2d 34, 41 (1996)). "This purpose is best served when the statute is interpreted to provide the innocent victim with the fullest possible protection." *Id.* (citation omitted); *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763 (the FRA is a "remedial statute [which must be] liberally construed so that the beneficial purpose intended by its enactment may be accomplished.").

Interpreting section 20-279.21(b)(3) to provide Ms. Sawyers with the fullest possible protection from a financially irresponsible uninsured motorist, we hold that, if service of process on Farm Bureau was effectuated in the Florida action, Farm Bureau is bound by the judgment in that action.

The contention, proffered by Farm Bureau and seemingly endorsed by the dissent, that Ms. Sawyers needed to file suit against Farm Bureau in North Carolina seems untenable and inconsistent with the stated policy that the statute is remedial and should be interpreted to provide the victim of a financially irresponsible motorist with the fullest possible protection. In *Grimsley*, our Supreme Court held that where a trial court lacked personal jurisdiction over an uninsured motorist, claims against the uninsured motorist insurance carrier, whose liability is only derivative, failed. *Grimsley*, 342 N.C. at 547-48, 467 S.E.2d at 95-96 (citing, *inter alia*, *Brown v. Lumbermens Mut. Cas. Co.*, 285 N.C. 313, 319, 204 S.E.2d 829, 834 (1974) ("[p]laintiff's right to recover against his intestate's insurer under the uninsured motorist endorsement is derivative and conditional[]"); *Spivey v. Lowery*, 116 N.C. App. 124, 126, 446 S.E.2d 835, 837 (holding that because plaintiff released the tort-feasor, plaintiff may

served with a copy of the summons, complaint or other process against the uninsured motorist." The issue of whether service was properly effectuated in this case is not before us; we therefore do not address it.

not assert a claim against the UIM carrier because of the derivative nature of the UIM carrier's liability), *disc. review denied*, 338 N.C. 312, 452 S.E.2d 312 (1994); *Buchanan v. Buchanan*, 83 N.C. App. 428, 350 S.E.2d 175 (1986) (same), *disc. review denied*, 319 N.C. 224, 353 S.E.2d 406 (1987)).

Here, as surely in many interstate vehicular accident cases, the courts of this State would not have had personal jurisdiction over the uninsured motorist. This accident did not occur in North Carolina, and nothing in the record indicates that Bembow, the uninsured motorist, was present or domiciled in North Carolina, or engaged in substantial activity in North Carolina. N.C. Gen. Stat § 1-75.4 (2003). Because the courts of this State would have lacked personal jurisdiction over Bembow, Ms. Sawyers would not have been able to bring suit against Farm Bureau here. *Grimsley*, 342 N.C. at 547-48, 467 S.E.2d at 95-96. Therefore, the contention that Ms. Sawyers could not have sued Farm Bureau in Florida, together with the law of this State indicating that Ms. Sawyers also could not have sued Farm Bureau here, would leave Ms. Sawyers with no venue for seeking recovery from Farm Bureau.

Nonetheless, Farm Bureau argues that, because it was dismissed as a party from the Florida action, it cannot be bound by the Florida judgment. It is unclear to this Court that Farm Bureau was not a party to the Florida action. Farm Bureau correctly states that our Supreme Court has held that an uninsured motorist and an insurance company are separate and distinct parties to an action brought by an insured against an uninsured motorist. *Grimsley*, 342 N.C. at 546, 467 S.E.2d at 95 (insurance company "is a separate party to the action between the insured plaintiffs and defendant [], an uninsured motorist[]").[3] Nevertheless, North Carolina General Statute section 20-279.21(b)(3) states that "[t]he insurer, upon being served as herein provided, *shall* be a party to the action between the insured and the uninsured motorist . . . ." N.C. Gen. Stat. § 20-279.21(b)(3). The statute is clear and unambiguous, and we therefore must give effect to the plain and definite meaning of its language. *Carolina Power & Light*, 358 N.C. at 518, 597 S.E.2d at 722. As stated earlier, the plain meaning of the word "shall" is "imperative or mandatory." Because it was "mandatory" or

3. Both Ms. Sawyers and Farm Bureau cite *Reese v. Barbee*, 129 N.C. App. 823, 501 S.E.2d 698 (1998), for this proposition. However, the *Reese* decision was affirmed by an evenly divided Supreme Court, which expressly stated that, while the Court of Appeals' decision was left undisturbed, it "stands without precedential value." *Reese v. Barbee*, 350 N.C. 60, 510 S.E.2d 374 (1999).

"imperative," upon service of process, for Farm Bureau to be a party to the Florida action, it is unclear that the voluntary dismissal of Farm Bureau as a party to the action was effectual if Farm Bureau received service of process.

In support of its argument that it is not bound by the Florida judgment because of the dismissal, Farm Bureau cites to *State Farm Fire & Cas. Ins. Co. v. Terry*, 230 Ga. App. 12, 495 S.E.2d 66 (1997). Not only is this Georgia case in no way binding, it is also distinguishable in crucial ways. In *Terry*, as here, the insurance company was served in the insured's action against an uninsured motorist. Also as here, the insurance company received consent to be dismissed from the case, in *Terry* because it appeared as if the defendant motorist was indeed insured. However, in contrast to this case, and, as the *Terry* court emphasized "most importantly," the *Terry* dismissal, which was signed by the insured's counsel, expressly stated that "[s]tipulations and defaults by, or Judgments against, [the uninsured motorist] will not be binding upon or create exposure by [the insurance company.]" *Id.* at 14, 495 S.E.2d at 69-70 (emphasis omitted). The dismissal also explicitly stated that the insurance company would "have a full right to defend [against the insured's claims] on liability and damages . . . ." *Id.* The dismissal benefitted the insured by "(1) saving him the time and expense of litigating with [the insurance company] at a time when it was apparent his action did not involve an uninsured motorist and (2) affording him the ability to re-serve State Farm at a later date without fear that the statute of limitation had expired." *Id.* at 16, 495 S.E.2d at 70. After judgment against the motorist had been obtained and it became clear that the motorist's insurance coverage had "vanished," the insured sought satisfaction from the insurance company. The *Terry* court found that the insurance company was not bound by the prior judgment against the uninsured motorist. Nevertheless, the resolution in *Terry* was to reverse the trial court's grant of summary judgment for the insured but affirm the denial of the insurance company's motion for summary judgment. *Id.* at 19, 495 S.E.2d at 72. Thus even under the significantly more compelling facts in *Terry*, the court did not find that the insurance company was entitled to judgment as a matter of law.

Here, in contrast to *Terry*, it appeared from the beginning of the Florida action that Bembow was an uninsured motorist. When Farm Bureau argued that the Florida trial court lacked personal jurisdiction over it, Ms. Sawyers consented to a voluntary dismissal of Farm Bureau. Crucially, that dismissal did not state that Farm Bureau

would not be bound to any judgment against the uninsured motorist in the Florida suit, nor did it state that Farm Bureau reserved its right to defend on liability and damages at a later point. In further contrast to *Terry*, Ms. Sawyers did not reap the benefits of savings in a suit against a driver who appeared to be insured, nor was Ms. Sawyers afforded the ability to re-serve Farm Bureau at a later date without fear of a statute of limitations defense, which Farm Bureau has indeed raised.

In further support of its argument that it is not bound by the Florida judgment, Farm Bureau also cites to *Vaught v. Dairyland Ins. Co.*, 131 Idaho 357, 956 P.2d 674 (1998). This case, too, is in no way binding precedent and is also distinguishable. In *Vaught*, the insureds brought suit against an uninsured motorist in federal court. While providing little detail, the *Vaught* court made clear that, in contrast to this case, the insureds not only did not join the insurance company as a party to the suit, they requested that the insurance company not intervene, making a strategic decision not to include the insurance company in the federal suit. *Id.* at 361, 956 P.2d at 678. Moreover, the *Vaught* court did not emphasize an avowed public policy similar to North Carolina's Motor Vehicle Safety and Financial Responsibility Act, which is intended "to compensate the innocent victims of financially irresponsible motorists" and is to be "liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763 (citations omitted).

In sum, viewing the evidence in the light most favorable to the non-moving party, Farm Bureau has failed to demonstrate that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. We therefore reverse the trial court's granting Farm Bureau's motion for summary judgment.[4]

[2] Ms. Sawyers also contends that the trial court erred in denying her motion for summary judgment. An order denying summary judgment is generally interlocutory, does not affect a substantial right, and is not immediately appealable. *Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 122 N.C. App. 449, 456, 470 S.E.2d 556, 560 (1996) (citing *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d

4. In its answer, Farm Bureau raised defenses that neither party addressed on appeal and that we therefore also do not address. *See* N.C. R. App. P. 28(a) ("The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon.").

767, 769 (1991)). Because the denial of Ms. Sawyer's motion for summary judgment is interlocutory and does not affect a substantial right, we refrain from addressing this argument on its merits and dismiss this assignment of error.

However, we note that as part of its argument regarding Ms. Sawyers' motion for summary judgment, Farm Bureau asserted that because Ms. Sawyers had already voluntarily dismissed claims against Farm Bureau twice, the case *sub judice* is barred under North Carolina General Statute section 1A-1, Rule 41(a). While we otherwise refrain from engaging the denial of Ms. Sawyers' motion for summary judgment because it is interlocutory, we briefly address this argument, which applies with equal force to Farm Bureau's argument that it was entitled to summary judgment.

Under Rule 41(a), a voluntary dismissal "operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim." N.C. Gen. Stat. § 1A-1, Rule 41(a) (2003).

Here, Ms. Sawyers' first suit was based in tort and arose from the automobile accident with Bembow. The first and second North Carolina actions were/are based in contract and unfair insurance practices and arose from Farm Bureau's failure to satisfy the Florida final judgment against Bembow. Because the Florida and North Carolina actions are not based on the same claim, this action is not barred. *See*, *e.g.*, *Richardson v. McCracken Enters.*, 126 N.C. App. 506, 509, 485 S.E.2d 844, 846-47 (1997), *aff'd*, 347 N.C. 660, 496 S.E.2d 380 (1998) (where the "asserted claims [are] based upon the same core of operative facts" and "all of the claims could have been asserted in the same cause of action," two previously dismissed actions were "based on or including the same claim" and the third action was barred under Rule 41(a)(1)); *Centura Bank v. Winters*, 159 N.C. App. 456, 459, 583 S.E.2d 723, 725 (2003) (same).

For the foregoing reasons, we reverse the trial court's grant of Farm Bureau's motion for summary judgment and dismiss as interlocutory the trial court's denial of Ms. Sawyers' motion for summary judgment.

Reversed in part, dismissed in part.

Judge HUDSON concurs.

Judge STEELMAN dissents.

STEELMAN, Judge, dissenting.

I respectfully dissent from the majority opinion.

I. Statutory Background

The parties acknowledge that the provisions of N.C. Gen. Stat. § 20-279.21(b)(3) apply to this case. These provisions are mandatory and are a part of every policy of motor vehicle insurance containing uninsured motorist coverage issued in North Carolina. The portions of that statute relevant to this appeal are as follows:

> A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name.

N.C. Gen. Stat. § 20-279.21(b)(3) (2004). The 1999 action filed in Brevard County, Florida, sued the alleged tortfeasor, Bembow, and also sued Farm Bureau directly based upon plaintiff's insurance contract with Farm Bureau, seeking to recover damages directly from Farm Bureau and seeking a determination that Bembow, the operator of the other vehicle, was uninsured. This action was in direct contravention of the provisions of N.C. Gen. Stat. § 20-279.21(b)(3), as set forth above.[5]

II. Issues Presented

The majority opinion holds that based upon the first sentence of N.C. Gen. Stat. § 20-279.21(b)(3) Farm Bureau was bound by the judgment of the Circuit Court of Brevard County, Florida, and reverses the trial court's granting of summary judgment in favor of Farm

5. It also contravened the provisions of N.C. Gen. Stat. § 20-279.21(b)(3)a, which provide that "the determination of whether a motorist is uninsured may be decided only by action against the insurer alone."

Bureau. On the particular, undisputed, and peculiar facts of this case, I would affirm the trial court based upon four theories, each which was pled before the trial court and argued before this court: (1) Farm Bureau was not a party to the action at the time the judgment was entered; (2) the statute of limitations had expired before plaintiff instituted this action; (3) Farm Bureau is not bound by the doctrine of *res judicata*; and (4)equitable estoppel.

III. Farm Bureau was not a Party to the Florida Action

The majority opinion holds that for an insurer to be bound by a judgment in an action between its insured and an uninsured motorist, all that is required is that the insurer be served with a copy of the summons and complaint, and that it is not necessary for the insurer to be a party to the action.

In construing a statute, this Court is required to look at the entire statute, and construe it *in pari materia*, giving effect, if possible, to all provisions contained in the statute. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004) (noting that "this Court does not read segments of a statute in isolation. Rather, we construe statutes *in pari materia* giving effect, if possible, to every provision."); *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990) (holding that "[a]ll parts of the same statute dealing with the same subject are to be construed together as a whole . . . and [individual expressions] be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." (internal citations omitted)). The second sentence of N.C. Gen. Stat. § 20-279.21(b)(3) makes it clear that the General Assembly intended that the insurer be a party to the action between its insured and the uninsured motorist and fully participate in the litigation. The uninsured motorist carrier "shall be a party to the action" and has the option of defending the action either in the name of the uninsured motorist or in its own name.

Upon being served with a copy of the summons and complaint in the Florida action, Farm Bureau moved to dismiss for lack of personal jurisdiction. Plaintiff and Farm Bureau then filed a joint motion seeking the dismissal of Farm Bureau from the Florida lawsuit, stating as the basis for the motion that "the plaintiff intends to re-file the action in a court of competent jurisdiction in North Carolina." The reference to North Carolina as a court of competent jurisdiction implicitly states that the Florida court lacked competent jurisdiction. If this were not so, there would have been no reason to use the words

"in a court of competent jurisdiction." The motion further stated that it was brought pursuant to Fla. R. Civ. Pro. 1.420 (1)(1) (2004) and N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2004). This motion, signed by plaintiff's Florida counsel, constitutes an acknowledgment by plaintiff that the courts of Florida lacked jurisdiction over Farm Bureau.[6]

Thus, while plaintiff served Farm Bureau with a copy of the summons and complaint in the Florida action as dictated by the statute, Farm Bureau was not a party to the action as required by N.C. Gen. Stat. § 279.21(b)(3) because the Circuit Court of Brevard County, Florida did not have jurisdiction over Farm Bureau. It is fundamental that any judgment rendered against a party over which a court has no jurisdiction is void. *Southern Athletic/Bike v. House of Sports, Inc.*, 53 N.C. App. 804, 805-6, 281 S.E.2d 698, 699 (1981). As the Circuit Court of Brevard County, Florida had no jurisdiction over Farm Bureau, Farm Bureau was not a party to the action and cannot be bound by that court's judgment.

The majority argues that affirming the trial court would result in plaintiff having "no venue for seeking recovery from Farm Bureau." I disagree with this conclusion. By consenting to the dismissal of Farm Bureau from the Florida action, plaintiff abandoned her rights to proceed in that forum. Clearly, at the time the Florida action was dismissed plaintiff had a viable cause of action against Farm Bureau in the North Carolina courts. However, despite plaintiff's representations that she would be filing an action in North Carolina, none was filed until after the expiration of the statute of limitations. Plaintiff's unfortunate position in this matter is due to her own actions.

IV. Statute of Limitations

Thomas v. Washington holds that there is a three year statute of limitations for asserting a claim against an uninsured motorist carrier. 136 N.C. App. 750, 754, 525 S.E.2d 839, 842 (2000). This statute of limitations begins to run on the date of the accident. In this matter, the accident took place on 10 August 1996. The order dismissing Farm Bureau from the Florida action was entered on 1 October 1999. Had plaintiff instituted an action against Farm Bureau in North Carolina within one year from the date of dismissal of the Florida

6. Plaintiff explicitly acknowledged that the courts of Florida lacked jurisdiction over Farm Bureau in its correspondence with Farm Bureau's counsel dated 3 September 1999. Plaintiff's Florida counsel stated in that letter that "it appears that the Florida Court lacks jurisdiction over the person of the Defendant North Carolina Farm Bureau Mutual Insurance Company," and that plaintiff "intends to re-file in North Carolina."

action, it would have been timely filed. N.C. Gen. Stat. § 1A-1, Rule 41(a)(2). However, plaintiff first filed a complaint against Farm Bureau in North Carolina on 11 April 2002 and then voluntarily dismissed that complaint on 12 December 2002. The action before this Court was instituted 23 June 2003, over three and one-half years after the dismissal of Farm Bureau from the Florida action. Plaintiff's claims against Farm Bureau are barred by the applicable statute of limitations.

V. Res Judicata

Under *res judicata*, also known as claim preclusion, "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). It precludes relitigation of issues that were determined in the prior act as well as litigation of issues that should have been raised in support or defense of the claim raised in the prior action. *Id.* at 436, 349 S.E.2d at 561 (Billings, J., concurring). Under the companion doctrine of collateral estoppel, also referred to as issue preclusion, "parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973). For either doctrine to apply, the prior action must have been a final judgment on the merits in a court of competent jurisdiction. *McInnis*, 318 N.C. at 428, 349 S.E.2d at 556-57; *King*, 284 N.C. at 355, 200 S.E.2d at 804-5.

Res judicata and collateral estoppel can be used defensively or offensively. A defendant can raise the defense of *res judicata* to bar a plaintiff from litigating a claim that was or should have been raised in a prior action between the parties. Conversely, a plaintiff can offensively bind a defendant to a judgment obtained in a prior action. Traditionally, the courts in North Carolina limited the application of the doctrines by requiring "mutuality of estoppel," that is, both the parties involved must be bound by the prior judgment. *McInnis*, 318 N.C. at 429, 249 S.E.2d at 557. In *McInnis*, the North Carolina Supreme Court held that it would no longer require mutuality of estoppel where collateral estoppel is used defensively; that is, "as long as the party to be collaterally estopped had a full and fair opportunity to litigate the issue in the earlier action," there is no requirement of mutuality. *Id.* at 432-35, 249 S.E.2d at 559-60. However, the

mutuality requirement still applies when collateral estoppel is used offensively and for all applications of *res judicata*.[7]

In the present case, plaintiff seeks to employ the doctrine of *res judicata* offensively to bind Farm Bureau to the Florida judgment. Since the statute of limitations has expired—barring plaintiff from instituting a new action against Farm Bureau—plaintiff asserts that Farm Bureau is bound by the Florida judgment and that Farm Bureau is now barred from raising any issues that were actually litigated or could have been litigated in the Florida action. Under the common law, plaintiff would not be able to assert that *res judicata* applies because the requirements for its application have not been met: (1) Farm Bureau was not a party or in privity with a party to the action at the time the judgment was entered; and (2) the Florida court was not a court of competent jurisdiction because it did not have personal jurisdiction over Farm Bureau.

However, plaintiff attempts to bind Farm Bureau to the Florida judgment by arguing that N.C. Gen. Stat. § 20-279.21(b)(3) allows the application of offensive *res judicata* so long as Farm Bureau was provided with service of process, thereby superceding the common law requirements for the application of the doctrine. A more reasonable construction of the statute is that it is merely an extension of the common law doctrines of *res judicata* and collateral estoppel. It is evident that the statute requires Farm Bureau to be a party in order to be bound by a judgment, just as the common law would require. This statutory requirement is intended to reiterate the common law understanding of *res judicata* and the need for mutual estoppel. It does not supercede the common law and allow the mere providing of notice of the action to be sufficient to bind a person as a party. Since Farm Bureau was not a party at the time the judgment was entered, and the Florida court did not have jurisdiction over Farm Bureau, neither *res judicata* nor N.C. Gen. Stat. § 20-279.21(b)(3) can bind Farm Bureau to the Florida judgment.

VI. Plaintiff is Estopped from Asserting that Farm Bureau is Bound by the Florida Judgment

The doctrine of equitable estoppel applies:

> when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through

7. The Court in *McInnis*, in discussing the national trend to abandon the requirement of mutuality for defensive applications of collateral estoppel, notes that aban-

> culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004) (internal citations omitted).

In the Florida lawsuit, plaintiff and Farm Bureau filed a joint motion for dismissal, acknowledging that the Circuit Court of Brevard County, Florida had no jurisdiction over Farm Bureau and requesting that Farm Bureau be dismissed as a party to that action. The motion for dismissal stated: "the plaintiff intends to re-file the action in a court of competent jurisdiction in North Carolina."

Based upon this representation, Farm Bureau rightfully assumed its involvement in the Florida lawsuit was completely over. However, plaintiff now seeks to bind Farm Bureau with the judgment from the Florida court after consenting to the dismissal of Farm Bureau as a party. I would hold that Farm Bureau reasonably relied upon the express representations of plaintiff that her claims against Farm Bureau would be litigated at a later date in North Carolina. Based upon this reasonable reliance, Farm Bureau took no further action in the Florida court. It would be unconscionable to allow plaintiff to make these representations to the Florida court and to Farm Bureau, and then assert in this case that Farm Bureau is bound by the Florida judgment. Based upon the particular facts of this case, I would hold that plaintiff is estopped from asserting that Farm Bureau is bound by the Florida judgment.

VII. Conclusion

I would affirm the trial court's granting of summary judgment against plaintiff in favor of Farm Bureau. Because I would affirm this ruling, it is not necessary to address plaintiff's remaining assignments of error.

---

doning the requirement of mutuality for *res judicata* would accomplish little. "Because a plaintiff is generally regarded as having a separate cause of action against each obligor even when the subject matter of the claims is identical, the requirement of identity of cause of action would render *res judicata* unavailable to one not a party or privy in any case." 318 N.C. at 432, n.4, 349 S.E.2d at 559.

STATE OF NORTH CAROLINA v. WILLIAM VAN TRUSELL

No. COA04-704

(Filed 3 May 2005)

1. Indictment and Information— amendment—no substantial alteration of charge—attempted robbery with dangerous weapon to robbery with dangerous weapon

The trial court did not err by amending an indictment for attempted robbery with a dangerous weapon (ARDW) to robbery with a dangerous weapon (RDW), because: (1) both crimes are governed by N.C.G.S. § 14-87(a); (2) our Court of Appeals and Supreme Court have found the elements of ARDW to be the same as RDW; (3) the indictment sufficiently apprised defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense since a showing of a taking is not a necessary element of the crime of RDW; (4) an amendment to the indictment did not deprive the court of knowledge as to the judgment to pronounce in the event of conviction since the classifications and punishments of the crimes of ARDW and RDW are identical; and (5) the indictment did not substantially alter the charge.

2. Criminal Law— sua sponte entering of prayer for judgment continued—no conditions imposed on defendant

The trial court did not abuse its discretion in an armed robbery case by sua sponte entering a prayer for judgment continued (PJC) as to one charge of robbery with a dangerous weapon and as to the charge of assault with a deadly weapon, because: (1) our Supreme Court has affirmed that North Carolina courts have the power to continue prayer for judgment without defendant's consent so long as no conditions are imposed upon defendant; and (2) the trial court did not impose any conditions on defendant when it entered the PJC, and defendant did not object to entry of PJC.

3. Criminal Law— prayer for judgment—no presumption of judicial or prosecutorial vindictiveness

The trial court did not err by granting the State's prayer for judgment for a second charge of robbery with a dangerous weapon after defendant's appeal of his conviction of first-degree

kidnapping and subsequent resentencing to a lesser sentence for second-degree kidnapping, because: (1) there is no presumption of vindictiveness when a trial court sentences on a prayer for judgment continued following appeal of a separate conviction; and (2) defendant failed to demonstrate actual vindictiveness even though the record indicated some spurious motivation on the part of the prosecutor to correct his own error in sending the wrong appellate record for review to the Court of Appeals since the trial court articulated a legitimate reason for sentencing defendant on the robbery with a dangerous weapon charge.

Appeal by defendant from judgment entered 10 May 2001 by Judge J. B. Allen, Jr. in Lee County Superior Court. Heard in the Court of Appeals 27 January 2005.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General William P. Hart and Assistant Attorney General Karen A. Blum, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

HUNTER, Judge.

William Van Trusell ("defendant") appeals from a judgment entered consistent with a jury verdict for armed robbery on the basis that the trial court: (1) erred in amending an indictment from attempted robbery with a dangerous weapon to robbery with a dangerous weapon; (2) abused its discretion in *sua sponte* entering a prayer for judgment continued; and (3) erred in granting the State's prayer for judgment. We conclude there was no error in defendant's trial, prayer for judgment continued, or sentencing on the motion praying judgment.

The evidence tends to show that on the evening of 27 December 1996, several individuals were gathered at the apartment of Joyce Williams ("Williams"), including Darius Lucas ("Lucas") and Jimmy McLean ("McLean"). During the course of the evening, defendant came to Williams' apartment, inquiring as to the whereabouts of a Walter Bethea ("Bethea"). Defendant left, but returned in the early morning hours of 28 December 1996 with Clifton Martin ("Martin").

Upon his return, defendant confronted the group at the apartment, demanding to know the whereabouts of a sum of money and of

Bethea. When told Bethea was not there, defendant and Martin drew guns and told everyone to empty their pockets. Although McLean originally told police defendant took nothing, he testified at trial that defendant took six or seven dollars from him. Lucas testified that Martin took a pager and thirty dollars. Defendant led McLean through the apartment at gunpoint, and threatened to kill McLean if he did not tell defendant Bethea's whereabouts. McLean suggested Bethea might be at the neighboring apartment of Lorenzo Armstrong ("Armstrong"). Defendant and McLean then left Williams' and went to Armstrong's apartment. Armstrong told defendant that Bethea was no longer there, and McLean ran from the apartment. Defendant fired seven bullets, but did not hit McLean.

The record shows that defendant was indicted on 3 February 1997 for robbery with a dangerous weapon of Lucas, attempted robbery with a dangerous weapon of McLean, first degree kidnapping, and assault with a deadly weapon. The case came to trial on 28 April 1997. At the close of the State's evidence, the district attorney made a motion to amend the indictment to conform to the evidence presented at trial, amending "attempted robbery with a dangerous weapon" for the robbery of McLean to "robbery with a dangerous weapon." This motion was granted.

On 30 April 1997, the jury returned verdicts of guilty as to both charges of robbery with a dangerous weapon, first degree kidnapping, and assault with a deadly weapon. For the charge of robbery with a dangerous weapon of Lucas, defendant was sentenced to 77 to 102 months imprisonment. For the charge of first degree kidnapping, defendant was sentenced to 100 to 129 months, plus a sixty to eighty-one month firearm enhancement to begin at the expiration of the 100 to 129 month sentence. The trial court *sua sponte* continued judgment on the second charge of robbery with a dangerous weapon of McLean and assault with a deadly weapon.

Defendant appealed his convictions of first degree kidnapping and robbery with a dangerous weapon of Lucas. In *State v. Trusell*, 351 N.C. 347, 524 S.E.2d 804 (2000), the North Carolina Supreme Court reversed this Court's decision, 133 N.C. App. 446, 525 S.E.2d 243 (1999), finding that the trial court committed plain error in instructing the jury on a different theory than that stated in the indictment for first degree kidnapping. Defendant's case was remanded for resentencing for second degree kidnapping.

On 14 April 2000, defendant was resentenced to 89 to 116 months for second degree kidnapping, including a sixty month firearm enhancement. Defendant appealed the sentence in *State v. Trusell*, 144 N.C. App. 445, 548 S.E.2d 560 (2001), and this Court affirmed the sentence.

On 3 May 2001, the State filed a Motion Praying Judgment for the robbery with a dangerous weapon of McLean. On 10 May 2001, defendant was sentenced to sixty-nine to ninety-two months for the charge of robbery with a dangerous weapon, with sentence to begin at the expiration of all sentences being served by defendant. Defendant was granted a writ of certiorari, filed with this Court 8 January 2004, as to the conviction and sentencing for the robbery with a dangerous weapon of McLean.

I.

[1] Defendant first contends the trial court erred in amending the indictment for attempted robbery with a dangerous weapon to robbery with a dangerous weapon. We disagree.

N.C. Gen. Stat. § 15A-923(e) (2003) states that "[a] bill of indictment may not be amended." Our Supreme Court has interpreted this statute to mean "only that an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.' " *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (citations omitted). An indictment has been held to be constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense, to protect him from subsequent prosecution for the same offense, and to enable the court to know what judgment to pronounce in the event of conviction. *See State v. Snyder*, 343 N.C. 61, 65-66, 468 S.E.2d 221, 224 (1996). Defendant contends amendment of the indictment from attempted robbery with a dangerous weapon to robbery with a dangerous weapon is a substantial alteration.

The crimes of both attempted robbery with a dangerous weapon and robbery with a dangerous weapon are governed by N.C. Gen. Stat. § 14-87(a) (2003):

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence

> or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

Id. Our courts have held that the essential elements of the crime of robbery with a dangerous weapon are: "(1) the unlawful taking *or attempted taking* of personal property from another; (2) the possession, use or threatened use of 'firearms or other dangerous weapon, implement or means'; and (3) danger or threat to the life of the victim." *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978) (emphasis added). The essential elements of the crime of attempted robbery with a dangerous weapon are:

> "(1) the unlawful *attempted taking* of personal property from another;
>
> (2) the possession, use or threatened use of a firearm or other dangerous weapon, implement or means; and
>
> (3) danger or threat to the life of the victim."

State v. Rowland, 89 N.C. App. 372, 376, 366 S.E.2d 550, 552 (1988) (emphasis added) (citation omitted). Further, our Supreme Court has held that "[a]n attempt to take money or other personal property from another under the circumstances delineated by G.S. 14-87 constitutes, by the terms of that statute, an *accomplished* offense, and is punishable to the same extent as if there was an actual taking." *State v. Spratt*, 265 N.C. 524, 525, 144 S.E.2d 569, 571 (1965). Thus, our Courts have found the elements of attempted robbery with a dangerous weapon to be the same as robbery with a dangerous weapon.

As a showing of a taking is not a necessary element of the crime of robbery with a dangerous weapon, an indictment amended from attempted robbery with a dangerous weapon to robbery with a dangerous weapon sufficiently apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense, and to protect him from subsequent prosecution for the same offense. Further, as the classifications and punishments of the crimes of attempted robbery with a dangerous weapon and robbery with a dangerous weapon are identical, such an amendment to an indictment does not deprive the court of knowledge as to the judgment to pronounce in the event of conviction. Therefore, as the indictment did not substantially alter the charge, we find that the

trial court did not err in amending the indictment for robbery with a dangerous weapon.

II.

[2] Defendant next contends the trial court abused its discretion in *sua sponte* entering a prayer for judgment continued. Defendant argues that such a practice is archaic and a violation of defendant's rights under numerous provisions of both the United States and North Carolina Constitutions, and as such, constitutes an abuse of discretion. We disagree.

Our Supreme Court has affirmed that North Carolina courts have the power to continue prayer for judgment without the defendant's consent, so long as no conditions are imposed upon the defendant. *See State v. Griffin*, 246 N.C. 680, 682, 100 S.E.2d 49, 51 (1957). This Court is bound by prior decisions of our Supreme Court. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993).

Here, the trial court entered a prayer for judgment continued as to one charge of robbery with a dangerous weapon and as to the charge of assault with a deadly weapon. The trial court imposed no conditions on defendant in entering the prayer for judgment continued. Further, we note defendant did not object to entry of the prayer for judgment continued. As determined by our Supreme Court, such an action by the trial court does not constitute an abuse of discretion. *See Griffin*, 246 N.C. at 682, 100 S.E.2d at 51. Therefore, this assignment of error is without merit.

III.

[3] Defendant finally contends the trial court erred in granting the State's prayer for judgment, as such entry of judgment penalized defendant for exercising his right of appeal and constituted both judicial and prosecutorial vindictiveness. We disagree.

Our courts have not yet addressed the question of when a motion praying judgment may constitute judicial or prosecutorial vindictiveness which violates a defendant's rights to due process.

We therefore briefly review the jurisprudence of the United States Supreme Court with regard to these issues.

In *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656 (1969), the United States Supreme Court established that:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction

> must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

Id. at 725, 23 L. Ed. 2d at 669 (footnote omitted). As a result, the Court established a prophylactic rule, creating a rebuttable presumption of vindictiveness when a judge imposed a more severe sentence upon a defendant after a new trial. *Id.* at 726, 23 L. Ed. 2d at 670.

Following *Pearce*, the United States Supreme Court also addressed the context of prosecutorial vindictiveness in *Blackledge v. Perry*, 417 U.S. 21, 40 L. Ed. 2d 628 (1974), and similarly concluded that a rebuttable presumption of vindictiveness on the part of the prosecutor existed when a more serious charge was substituted for the original charge from which the defendant had appealed and received a trial *de novo*. *Id.* at 28-29, 40 L. Ed. 2d at 634-35.

The holdings in the *Pearce* line of progeny, however, have been severely limited in subsequent jurisprudence of the Supreme Court. In *Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989), the Court noted that, "[w]hile the Pearce opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.' " *Smith*, 490 U.S. at 799, 104 L. Ed. 2d at 872 (quoting *Texas v. McCullough*, 475 U.S. 134, 138, 89 L. Ed. 2d 104, 110 (1986)). As recognized in *Chaffin v. Stynchcombe*, 412 U.S. 17, 36 L. Ed. 2d 714 (1973), the *Pearce* presumption was not designed to prevent imposition of an increased sentence on retrial "for some valid reason associated with the need for flexibility and discretion in the sentencing process," but rather was "premised on the apparent need to guard against *vindictiveness* in the resentencing process." *Id.* at 25, 36 L. Ed. 2d at 723. As a result, in *Smith*, the United States Supreme Court held that the *Pearce* presumption is limited to circumstances where there is a " 'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness[.]" *Smith*, 490 U.S. at 799, 104 L. Ed. 2d at 873 (citations omitted). Further, in *United States v. Goodwin*, 457 U.S. 368,

73 L. Ed. 2d 74 (1982), the Court held that such a presumption of vindictiveness is warranted only when applicable in all cases. *See Goodwin*, 457 U.S. at 381, 73 L. Ed. 2d at 85.

In *Pearce*, the Court found a presumption necessary. The Court stated that it would be " 'unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice' " as to whether to pursue an appeal, because of the possibility a retaliatory motive would lead to an increased sentence on the conviction if a new trial was received. *Pearce*, 395 U.S. at 724, 23 L. Ed. 2d at 669 (citations omitted). Likewise, in *Blackledge*, the Court noted that a prosecutor had a considerable stake in discouraging appeals to obtain a trial *de novo*, because of the increased expenditure of resources before a conviction became final and the possible result of a defendant going free. *Blackledge*, 417 U.S. at 27, 40 L. Ed. 2d at 634. As a result, the Court concluded the "opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." *Id.*

In *Smith*, however, the United States Supreme Court found a presumption inappropriate "when a greater penalty is imposed after trial than was imposed after a prior guilty plea, [as] the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge." *Smith*, 490 U.S. at 801, 104 L. Ed. 2d at 873-74. The Court noted that "in the course of proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged[,]" and that "after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present." *Smith*, 490 U.S. at 801, 104 L. Ed. 2d at 874. As a result, the Court found those factors distinguished *Smith* from cases such as *Pearce* and *Blackledge*, and found there were enough "justifications for a heavier second sentence that it cannot be said to be more likely than not that a judge who imposes one is motivated by vindictiveness." *Smith*, 490 U.S. at 802, 104 L. Ed. 2d at 874.

In light of this precedent, we therefore examine the instant case to determine whether a presumption of vindictiveness would be proper, under the now limited holding in *Pearce*, when a prosecutor moves for and a trial court grants a prayer for judgment following a successful appeal as to a separate conviction. As noted in *Smith* and *Goodwin*, there must be a reasonable likelihood that such a prayer for judgment is the result of actual vindictiveness in all cases for such

a presumption to arise. *See Smith*, 490 U.S. at 799, 104 L. Ed. 2d at 873; *Goodwin*, 457 U.S. at 381, 73 L. Ed. 2d at 85.

We find that imposition of a sentence on a conviction where a prayer for judgment continued was originally granted by the trial court in its discretion presents a situation more analogous to that of *Smith* than to *Pearce* and *Blackledge*. The factors frequently considered by the trial court in granting a prayer for judgment continued, such as the length and severity of sentences for other convictions entered at the same time, may be altered by a successful appeal of other convictions. In so concluding, we note that our courts have previously affirmed the imposition of a sentence from a prayer for judgment continued following an appeal of a separate conviction. In *State v. Graham*, 225 N.C. 217, 34 S.E.2d 146 (1945), our Supreme Court considered the imposition of a sentence on a conviction for possession of an intoxicating liquor following an appeal vacating a separate conviction for manufacturing an intoxicating liquor, when a prayer for judgment continued had been entered as to the possession charge. There the Court noted that "[i]t is familiar learning that a judge may suspend judgment over a criminal *in toto* until another term." *Graham*, 225 N.C. at 219, 34 S.E.2d at 147. *Graham* stated that entry of such a sentence was without error as:

> The defendant has been duly convicted of a violation of the criminal law of the State. This Court has found no error in the trial on the count charging unlawful possession of liquor for the purpose of sale. He may not complain that there has been some delay in exacting the penalty, for he cannot in this manner discharge the debt he owes society for the breach of its rules of good conduct.

Graham, 225 N.C. at 220, 34 S.E.2d at 147-48. Similarly, in *State v. Lea*, 156 N.C. App. 178, 576 S.E.2d 131 (2003), this Court found no prejudice in sentencing the defendant on assault convictions five years after a prayer for judgment continued was entered, when the defendant's original sentence for attempted second degree murder was vacated. *See Lea*, 156 N.C. App. at 178-80, 576 S.E.2d at 132-33. The *Lea* Court noted that by praying judgment when the defendant's active sentences were set aside, "the State sought to ensure that defendant suffered some consequences for his criminal conduct." *Lea*, 156 N.C. App. at 181, 576 S.E.2d at 133.

Thus, as there are sufficient justifications for entry of a sentence on a conviction where judgment was continued when a separate con-

viction is set aside, it cannot be said to be more likely than not that a prosecutor who moves for, or a judge who imposes the sentence is motivated by vindictiveness. We therefore decline to recognize a presumption of vindictiveness when a trial court sentences on a prayer for judgment following appeal of a separate conviction.

The United States Supreme Court has recognized that when a presumption of vindictiveness does not exist, actual vindictiveness may be found on the individual facts of the case. *See Smith*, 490 U.S. at 803, 104 L. Ed. 2d at 875; *Goodwin*, 457 U.S. at 384, 73 L. Ed. 2d at 87-88. The Supreme Court in *Goodwin* stated that a finding of no presumption "do[es] not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's . . . decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." *Goodwin*, 457 U.S. at 384, 73 L. Ed. 2d at 87 (footnote omitted). The Court noted, however, that " 'only in a rare case would a defendant be able to overcome the presumptive validity of the prosecutor's actions through such a demonstration.' " *Id.* at 384, n19, 73 L. Ed. 2d at 87, n19. Our state courts have also recognized the difficulty of proof in such a showing. " 'A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.' " *State v. Lane*, 39 N.C. App. 33, 38, 249 S.E.2d 449, 452-53 (1978) (citations omitted).

We therefore examine the record for evidence that the decisions of the prosecutor and trial court, in moving for and entering sentence on the prayer for judgment for the robbery with a dangerous weapon, were improperly motivated by a desire to punish defendant for appeal of his conviction of first degree kidnapping and subsequent resentencing to a lesser sentence for second degree kidnapping.

In the State's Motion Praying Judgment, the stated ground for entry of sentence as to the second charge of robbery with a dangerous weapon was an alleged error in the record in defendant's prior appeal for conviction of kidnapping. The State contended in its motion that the reversal and remand for resentencing on the kidnapping charge was based on the faulty record compiled by the prosecutors. The motion stated:

> The basis of the reversal of the First Degree Kidnapping charge was the failure of the indictment for First Degree Kidnapping to

> state that the victim was not released in a safe place. In fact, the indictment used at trial did state this, but due to the prosecutors failure to adequately review the record of appeal, the indictment that went up on appeal—which had been superseded by the indictment used at trial—did not have the required wording. . . .

At the hearing on the matter, the prosecutor stated that, by his mistake, the appellate record used contained the original indictment for kidnapping, rather than the superseding indictment used by the trial court to properly instruct the jury as to first degree kidnapping. The prosecutor stated that as a result, the State prayed judgment as to defendant's conviction for robbery with a dangerous weapon to "recover the time that was lost due to the state's mistake on kidnapping."

The trial court stated at the hearing that he recalled the case in question, and that a superseding indictment was obtained before trial which properly alleged the elements of first degree kidnapping. The trial court also stated that the appellate court was not privy to the proper record in rendering its decision. After inquiry as to the difference between the sentence defendant originally received prior to the appeal and the sentence received after remand for resentencing as to the kidnapping charge, the trial court sentenced defendant on the robbery with a dangerous weapon charge to a term of sixty-nine to ninety-two months, to be served at the conclusion of his other sentences. This sentence effectively equaled the difference in time between defendant's original sentence and his subsequent reduced sentence after appeal. The trial court specifically noted that one reason he had "PJC'd th[e] armed robbery conviction was I felt like he got enough time at that time[.]"

In the sentencing order, the trial court further confirmed that the reversal of the prior appeal formed the basis for the resentencing, noting:

> 10. That the defendant is now facing a sentence of 168 months minimum and 218 months maximum. Again, noting that at the original trial the defendant had a sentence of 237 months minimum and 312 months maximum.
>
> 11. That had the proper bill of indictment 97CRS197A been sent up on appeal, that there is a very good case that this matter would have never been sent back for resentencing, and the defendant would be facing that sentence given in May of 1997 of 237 months minimum and 312months [sic] maximum.

12. That the court vividly remembers this case, being the trial Judge, and has now reviewed all the evidence. And the Court will put on the record that the undersigned Judge in May of 1997 entered a prayer for judgment continued on the armed robbery charge in 97CRS198 because the court in its discretion and in sentencing felt that 237 months minimum and 312 months maximum was an appropriate judgment.

Although the record indicates some spurious motivation on the part of the prosecutor to correct his own error in sending the wrong appellate record for review by this Court, the trial court articulated a legitimate reason for sentencing defendant on the robbery with a dangerous weapon charge. The trial court stated at both the hearing and in the written order that the prayer for judgment continued was entered because the trial court, in its discretion, believed at the original sentencing hearing that defendant's sentence was appropriate without the additional time from the robbery charge. However, due to the remand for resentencing for second degree rather than first degree kidnapping, which resulted in a lesser sentence for that offense, the trial court reconsidered the appropriateness of the prayer for judgment continued as to the robbery with a dangerous weapon conviction and, it its discretion, sentenced defendant on that conviction. As the record reveals some legitimate reason for the entry of judgment, we therefore find defendant failed to demonstrate actual vindictiveness.

As a presumption of vindictiveness in sentencing on a prayer for judgment following defendant's successful appeal of another conviction does not exist, and as defendant fails to surmount the high bar to demonstrate actual vindictiveness, no due process violation occurred in defendant's sentencing for robbery with a dangerous weapon.

For the reasons stated herein, we find no error in the amendment of the charge of robbery with a dangerous weapon, nor in defendant's sentence as to that charge.

Affirmed.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. MANUEL GONZALEZ-FERNANDEZ, A/K/A ANGEL LUIS SANCHEZ-PIZARRO

No. COA04-433

(Filed 3 May 2005)

1. Bail and Pretrial Release— failure to appear—federal incarceration—not extraordinary circumstances

A bail bond company was not relieved from liability on a bond for extraordinary circumstances where defendant was incarcerated in a federal facility in New York. Defendant was not in federal custody until the day after he was scheduled to appear in court, so that the bonding company was remiss in its custody of defendant, and defendant's federal incarceration resulted from his own misdeeds, from which neither he nor his surety may profit.

2. Bail and Pretrial Release— failure to appear—efforts by bond company to return defendant—insufficient for extraordinary circumstances

A bail bond company's efforts to return defendant to North Carolina did not rise to the level of extraordinary circumstances relieving it of liability on the bond.

3. Bail and Pretrial Release— failure to appear—lack of diligence by bond company—extraordinary circumstances

A bail bond company's lack of diligence obviated a finding of extraordinary circumstances which would relieve it from liability on the bond.

4. Bail and Pretrial Release— failure to appear—federal custody—copy of arrest order—not extraordinary circumstances

A bail bond company was not relieved of liability on a bond for extraordinary circumstances where the Forsyth County Clerk of Court refused to issue a copy of an arrest warrant to be served on defendant in a New York federal detention facility.

5. Appeal and Error— record on appeal—materials not presented to the trial court—certiorari denied

A bail bond company's petition for a writ of certiorari to include additional materials in the record on appeal was denied where the documents were not presented to the trial court until after it entered its order settling the record. An abuse of discre-

tion review cannot be conducted where the materials were not presented to the court before its order.

6. Appeal and Error— record on appeal—materials excluded—certiorari denied—no judicial notice

The Court of Appeals could not take judicial notice of materials excluded from the record on appeal after the denial of a petition for certiorari to include the material. The settling of the record on appeal is final and cannot be reviewed except on motion for certiorari.

Appeal by surety from order entered 31 December 2003 by Judge Lawrence J. Fine in District Court, Forsyth County. Heard in the Court of Appeals 11 January 2005.

Andresen & Vann, by Kenneth P. Andresen and Christopher M. Vann, for surety-appellant.

Steven A. McCloskey and Drew H. Davis for Winston-Salem/Forsyth County Schools, judgment creditor-appellee.

McGEE, Judge.

Capital Bonding Corporation (Capital Bonding) appeals the trial court's order denying its motion for relief from final judgment of forfeiture (motion for relief).

Manuel Gonzalez-Fernandez, a/k/a Angel Luis Sanchez-Pizarro (defendant), was charged with multiple drug offenses on 23 January 2003. Defendant was released on 28 March 2003 on a $500,000 bond for which Capital Bonding acted as surety. Defendant failed to appear for his scheduled court date in Forsyth County District Court on 10 April 2003. The Forsyth County Clerk of Court filed a bond forfeiture notice on 22 April 2003. The forfeiture became a final judgment of forfeiture on 19 September 2003.

Capital Bonding filed a motion for relief on 22 September 2003, along with an affidavit of Capital Bonding employee Timothy Fitzpatrick (Fitzpatrick). Fitzpatrick stated in his affidavit that Capital Bonding learned defendant had fled the jurisdiction "the minute" defendant was released from Forsyth County Jail on the bond.

A hearing on Capital Bonding's motion for relief was held on 16 October and 4 November 2003. Walter Smith (Smith), testified at the

16 October 2003 hearing. Smith stated that he was an employee of Southeast Bail Bonds, the managing body for Capital Bonding's North Carolina bail agents. Smith testified that Fitzpatrick notified Smith of the bond forfeiture on 22 April 2003, the day the clerk of court filed the bond forfeiture notice.

Smith did not take any further action on the matter until 6 May 2003, when he spoke to Fitzpatrick for a second time. Fitzpatrick told Smith that defendant may have been in the custody of the United States Drug Enforcement Administration in San Juan, Puerto Rico. Smith spoke to Fitzpatrick again on 8 May 2003, when Fitzpatrick informed Smith that defendant may have actually been in United States Border Patrol custody in Champlain, New York. Smith then contacted the United States Border Patrol in Champlain. Smith discovered that the United States Marshal in Buffalo, New York took defendant into custody on 11 April 2003 for giving false information. Smith learned from the United States Attorney's Office in Albany, New York that defendant was scheduled to be sentenced to fifty-seven months in federal prison on 6 August 2003. Smith then obtained documentation on 9 May 2003 indicating that defendant attempted to enter Canada, was refused entry, and upon reentry to the United States, was detained by United States Border Patrol in Champlain.

Smith took no further action for almost three months. Smith spoke to the United States Attorney in Albany on 6 August 2003 and learned that defendant had been convicted and sentenced to six months in federal prison, three years of supervised probation, and a one hundred dollar fine.

Smith again refrained from acting on the case until approximately 1 October 2003, two weeks prior to the hearing on Capital Bonding's motion for relief. Smith contacted the United States Marshal and asked to have a North Carolina order for arrest served in New York. A supervisor told Smith that an order for arrest could be served pending extradition. Smith unsuccessfully attempted to obtain a copy of an order for arrest from Forsyth County officials. Smith then learned that upon defendant's release from federal prison in fourteen days, the Immigration and Naturalization Service (INS) would be taking defendant into custody. Smith contacted the Forsyth County Clerk of Court and requested that a copy of the order for arrest be sent to the INS. Smith was again informed that this was possible pending extradition. Smith then had defendant's name placed in the National Crime Information Center database on 9 October 2003 to hold defendant for

extradition. Capital Bonding never produced defendant in Forsyth County District Court.

In an order announced in open court on 4 November 2003 and entered 31 December 2003, the trial court found that Capital Bonding was not entitled to relief from the final judgment of forfeiture. The trial court made the following pertinent findings of fact:

> 16. [Capital Bonding] had no apparent understanding of how to go about obtaining a Governor's Warrant, or the appropriate steps to be taken to secure [defendant's] appearance pursuant to an extradition proceeding.
>
> 17. There was a lack of effort by [Capital Bonding] between the time [Capital Bonding] learned in May, 2003 that [defendant] was in federal custody, and learning of [defendant's] actual sentence in October, 2003.
>
> 18. The efforts by [Capital Bonding] and its agents do not rise to the level of extraordinary measures so as to allow the [trial court] to set aside the forfeiture of the bond.
>
> 19. There was no evidence that defendant . . . is being held for extradition or that defendant is still in federal custody.
>
> 20. Defendant . . . is not within this State's jurisdiction to answer the charges from which he fled.
>
> 21. Defendant's misdeeds, which have caused him to be incarcerated in another jurisdiction, do not in and of themselves exonerate [Capital Bonding] from its obligations under the bond.

The trial court then made the following conclusion of law:

> [Capital Bonding] has not demonstrated extraordinary circumstances or efforts sufficient to set aside Defendant's bond forfeiture pursuant to N.C. Gen. Stat. § 15A-544.8.

I.

Bail bond forfeiture in North Carolina is governed by N.C. Gen. Stat. §§ 15A-544.1-544.8 (2003). When a defendant is released on a bail bond and fails to appear for a required court date, the trial "court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a). A forfeiture becomes a final judgment

of forfeiture on the 150th day after notice of forfeiture is given, unless a motion to set aside the forfeiture is either entered on or before or is pending on that date. N.C. Gen. Stat. § 15A-544.6. Relief from final judgment of forfeiture is governed by N.C. Gen. Stat. § 15A-544.8, which states:

> (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 [N.C. Gen. Stat. §] 15A-544.4.
>
> (2) Other extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief.

In this case, Capital Bonding admits that it was properly given notice of the bond forfeiture under N.C. Gen. Stat. § 15A-544.4. Therefore, Capital Bonding may only obtain relief from the final judgment of forfeiture if extraordinary circumstances exist.

We review a trial court's decision whether to grant a motion for relief from final judgment of forfeiture for an abuse of discretion. N.C. Gen. Stat. § 15A-544.8(b); *see also State v. Coronel*, 145 N.C. App. 237, 243, 550 S.E.2d 561, 566 (2001), *disc. review denied*, 355 N.C. 217, 560 S.E.2d 144 (2002).[1] An abuse of discretion occurs when the trial court's act is " ' "done without reason." ' " *State v. McCarn*, 151 N.C. App. 742, 745, 566 S.E.2d 751, 753 (2002) (citations omitted).

"Extraordinary circumstances" in the context of bond forfeiture has been defined as " 'going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee.' " *State v. Vikre*, 86 N.C. App. 196, 198, 356 S.E.2d 802, 804, *disc. review denied*, 320 N.C. 637, 360 S.E.2d 103 (1987) (alter-

1. We note that, effective 1 January 2001, the previous bond forfeiture statute, N.C. Gen. Stat. § 15A-544 (1999), upon which *Coronel* was decided, was repealed. We also recognize that the time limitations and procedures under the former statute differ from the current N.C. Gen. Stat. § 15A-544.8. Nevertheless, we find the case law interpreting the former statutory terms instructive. Furthermore, in oral argument to this Court, Capital Bonding admitted that the case law interpreting the former statute applies to this case.

ation in original) (quoting *Webster's Third New International Dictionary* (1968)). A determination by our Court of whether circumstances are "extraordinary" is a "heavily fact-based inquiry and therefore, should be reviewed on a case by case basis." *Coronel*, 145 N.C. App. at 244, 550 S.E.2d at 566.

We begin by noting that North Carolina case law has long been clear that the foremost goal of the bond system is the production of the defendant in court. *See, e.g.*, *State v. Robinson*, 145 N.C. App. 658, 661, 551 S.E.2d 460, 462 (2001) (stating that securing the appearance of a defendant "is the primary purpose of the bond system"); *Coronel*, 145 N.C. App. at 247, 550 S.E.2d at 568 ("the court system's paramount concern is ensuring the return of the criminal defendant for prosecution"); *Vikre*, 86 N.C. App. at 199, 356 S.E.2d at 804 ("[t]he purpose of a bail bond is to secure the appearance of the principal in court as required"); *State v. Locklear*, 42 N.C. App. 486, 489, 256 S.E.2d 830, 832 (1979) ("[t]he goal of the bonding system is the production of the defendant"); *State v. Pelley*, 222 N.C. 684, 688, 24 S.E.2d 635, 638 (1943) ("The very purpose of the bond [is] . . . to make the sureties responsible for the appearance of the defendant at the proper time.").

To achieve this goal, bondsmen are vested with broad powers to bring their principals to court. In a landmark decision on the bond system, the United States Supreme Court stated:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. . . . It is likened to the rearrest by the sheriff of an escaping prisoner. In 6 Modern it is said: "The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge."

Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371-72, 21 L. Ed. 287, 290 (1873) (citations omitted). Our Supreme Court, in setting forth its modern case law, has echoed the tenets espoused in *Taintor*:

> Today's commercial bondsmen have retained the same broad common law powers sureties have always enjoyed regarding the custody, control and recapture of the principal.
>
> . . . .
>
> The comprehensive powers of the bondsman recognized in *Taintor* are based on the underlying source of the bondsman's authority to recapture the principal which derives from the contractual relationship between the surety and the principal. Essentially, the bond agreement provides that the surety post the bail, and in return, the principal agrees that the surety can retake him at any time, even before forfeiture of the bond.

State v. Mathis, 349 N.C. 503, 509-10, 509 S.E.2d 155, 159 (1998).

With these principles in mind, we now consider Capital Bonding's assignments of error.

II.

[1] Capital Bonding first argues it should be relieved from liability under the bond because defendant had been in continuous federal custody. Capital Bonding argues that once defendant was in federal custody, Capital Bonding had no means by which to produce defendant in court, and therefore extraordinary circumstances exist justifying relief from forfeiture.

A defendant's imprisonment in another jurisdiction that results in that defendant's failure to appear in a North Carolina court does not relieve a surety from liability on the bond. *Pelley*, 222 N.C. at 689, 24 S.E.2d at 638; *see also Vikre*, 86 N.C. App. at 199-200, 356 S.E.2d at 804-05. In *Pelley*, the defendant had been taken into federal custody three days before he was scheduled to appear in court in North Carolina. 222 N.C. at 685-86, 24 S.E.2d at 636. As a result, the defendant failed to appear for his North Carolina court date and forfeited on his bond. *Id.* at 686, 24 S.E.2d at 636. Our Supreme Court held that the defendant's detention in federal custody did not relieve the surety of liability under the bond. *Id.* at 692-93, 24 S.E.2d at 640. The Court found that, due to the defendant's own wrongdoing, neither the defendant nor the surety should be entitled to relief from the bond:

> It matters not whether [the defendant] left the jurisdiction of this State with or without the permission of his sureties, he was entrusted to their custody. His conduct while in their custody set

> in motion the machinery of the law in other jurisdictions which made his appearance in [court in North Carolina] on 27 July, 1942, impossible. Had [the defendant] not committed the offenses for which he was tried and convicted in Indiana, and for which he is now imprisoned, he doubtless could have answered to the call of the Superior Court . . . at the proper time. He alone is responsible for his inability to appear in the North Carolina court at the time required in his bail bond. He cannot avail himself of his own wrong and thereby escape the penalty of his bond; and, as stated in *Taylor v. Taintor*, . . . "What will not avail him, cannot avail his sureties."

Id. at 692-93, 24 S.E.2d at 640 (quoting *Taintor*, 83 U.S. (16 Wall.) at 374, 21 L. Ed. at 291). *See also Vikre*, 86 N.C. App. at 200-01, 356 S.E.2d at 804-05 (holding that the defendant's incarceration in Mexico resulting in his failure to appear in court in North Carolina did not relieve the surety of liability under the bond, since the defendant's failure to appear was the result "of his own criminal acts rendering him subject to imprisonment pursuant to the criminal laws of another jurisdiction").

We hold that, under *Pelley*, defendant's federal incarceration is not evidence of extraordinary cause meriting Capital Bonding relief from liability under the bond. We first note that defendant, unlike the defendant in *Pelley*, was not in federal custody on the date that he was scheduled to appear in Forsyth County District Court. Rather, defendant was not in federal custody until the day *after* his failure to appear. Therefore, Capital Bonding was remiss in its custody of defendant even prior to defendant's detention in federal custody. Fitzpatrick's affidavit states that Capital Bonding was aware that defendant had left Forsyth County as soon as defendant was released on bond: "In monitoring . . . defendant we learned that the minute that . . . defendant was bonded out of the Forsyth County Jail [defendant] fled the [country][.]" With this information, Capital Bonding had advance notice of its need to exercise its powers and apprehend defendant. By choosing not to act, Capital Bonding consequently risked forfeiture on the bond. Furthermore, like in *Pelley*, defendant's federal incarceration was the result of defendant's own misdeeds, and " '[w]hat will not avail [defendant], cannot avail his suret[y].' " *Pelley*, 222 N.C. at 693, 24 S.E.2d at 640 (quoting *Taintor*, 83 U.S. (16 Wall.) at 374, 21 L. Ed. at 291). Defendant's incarceration in federal prison is not an extraordinary circumstance justifying Capital Bonding relief from the bond forfeiture.

[2] We also find that Capital Bonding's efforts in attempting to bring defendant to North Carolina after defendant's failure to appear do not rise to the level of extraordinary circumstances. A surety's efforts to bring a defendant to North Carolina to appear in court are not extraordinary if it was foreseeable that the surety would have to expend those efforts to produce the defendant in court. *Vikre*, 86 N.C. App. at 199, 356 S.E.2d at 804. In *Vikre*, the sureties sought to avoid liability for a bond when the defendant's incarceration in Mexico resulted in his failure to appear for his North Carolina court date. *Id.* at 197, 356 S.E.2d at 803. The sureties argued that they had demonstrated extraordinary cause, since they had sponsored trips to Texas and Mexico looking for the defendant, had "incurr[ed] substantial expenses," and had offered to pay for the defendant's extradition from Mexico to the United States. *Id.* at 197, 356 S.E.2d at 803. Our Court disagreed with the sureties and held that these efforts did not rise to the level of extraordinary cause. *Id.* at 199, 356 S.E.2d at 804. We found that the defendant's out-of-state residency and employment as a pilot made it "entirely foreseeable . . . that the sureties would be required to expend considerable efforts and money to locate [the defendant] in the event he failed to appear." *Id.* at 199, 356 S.E.2d at 804. We also found that extraordinary cause did not exist, despite the sureties' efforts, since the efforts did not ultimately lead to the defendant's appearance in court, "the primary goal of the bonds." *Id.* at 199, 356 S.E.2d at 804.

Under *Vikre*, Capital Bonding's efforts to return defendant to North Carolina are not evidence of extraordinary cause. The Forsyth County District Court's condition of release and release order states that defendant had only resided in the Forsyth County community for three weeks and had previously resided in New York. In addition, defendant's immigration status and previous deportation should have put Capital Bonding on notice that defendant had ties outside of the country. As in *Vikre*, it was entirely foreseeable that Capital Bonding could potentially incur much expense and effort in ensuring that defendant would appear in court. Moreover, Capital Bonding did not expend any efforts in an attempt to bring defendant to court until well after defendant's failure to appear, and the majority of these efforts did not occur until after final judgment of forfeiture on the bond. Finally, like in *Vikre*, Capital Bonding's efforts did not result in defendant's appearance in court in North Carolina. Capital Bonding's efforts do not rise to the level of "extraordinary circumstances."

[3] Similarly, Capital Bonding's overall lack of diligence in its efforts to bring defendant before the Forsyth County District Court precludes us from finding that extraordinary circumstances exist. To that end, we find *Coronel* instructive. In *Coronel*, the sureties appealed an order denying their motion to remit judgment of forfeiture. *Coronel*, 145 N.C. App. at 238, 550 S.E.2d at 563. The defendants had failed to appear in court after they had fled to Mexico and had died there in an automobile accident eight months after their failure to appear. *Id.* at 239-40, 550 S.E.2d at 563-64. Our Court found that extraordinary cause did not exist to merit remission of the forfeiture, since the "sureties' pursuit was simply not diligent":

> The key to this conclusion is a complete lack of evidence demonstrating that the sureties were concerned with defendants' 14 December appearance [the date of the failure to appear]. They did not attend court on that date and acknowledged that they had no method of knowing whether defendants attended court. Moreover, they offered no explanation as to why defendants were not in attendance.
>
> Furthermore, sureties subsequently located defendants in Mexico, apparently on trips that did not commence until July 1999. It appears that sureties could have detected defendants' whereabouts much earlier . . . .

Id. at 249, 550 S.E.2d at 569.

As in *Coronel*, Capital Bonding has failed to explain why defendant did not appear in court on 10 April 2003, and instead only offers an explanation for defendant's whereabouts *after* this date. Additionally, Capital Bonding made little effort to bring defendant to court until after final judgment of forfeiture was entered, almost six months after defendant failed to appear in court. Capital Bonding's lack of diligence obviates a finding of extraordinary circumstances in this case.

Since defendant's presence in federal custody, Capital Bonding's efforts to obtain defendant, and its lack of diligence do not justify a finding of extraordinary circumstances, we cannot find that the trial court's order denying Capital Bonding's motion for relief was an abuse of discretion.

[4] Capital Bonding argues that once defendant was in federal custody, it could have avoided liability under the bond by obtaining a certified copy of the order for arrest and serving it on defendant in the

New York federal facility. Capital Bonding avers that its request for such an order for arrest was denied by Forsyth County officials. Capital Bonding argues that these are extraordinary circumstances meriting relief from liability under the bond.

Capital Bonding's argument is without merit. Under N.C. Gen. Stat. § 15A-544.5(b)(4), a surety may obtain relief from a bond forfeiture, *not* a final judgment of forfeiture, when the defendant has been served with an order for arrest. In this case, Capital Bonding did not attempt to obtain an order for arrest until 1 October 2003, clearly after the final judgment of forfeiture was entered on 19 September 2003. Capital Bonding's argument must therefore fail.

Furthermore, even if appellant's attempts to obtain an order for arrest had been timely, the Forsyth County Clerk of Court properly denied Capital Bonding's request for an order for arrest. N.C. Gen. Stat. § 15A-301(b) (2003) provides that "[w]arrants for arrest and orders for arrest must be directed to a particular officer, a class of officers, or a combination thereof, having authority and territorial jurisdiction to execute the process." For the purposes of this statute, "officer" is defined as "law-enforcement officer." N.C. Gen. Stat. § 15A-101(6) (2003). The record reveals that Capital Bonding's attorney, Lawrence Grayson (Grayson), made the request for an order for arrest. The Forsyth County Clerk of Court therefore complied with the statutory mandate in denying Capital Bonding's request, since Grayson was not a law enforcement officer.

III.

[5] We next consider Capital Bonding's petition for writ of certiorari to include additional material in the record on appeal. Specifically, Capital Bonding seeks to include the following documents in the record: a 28 October 2003 indictment from the Middle District of North Carolina, indicting defendant on the federal counterparts to the state drug offenses defendant was originally charged with on 23 January 2003; the Forsyth County District Attorney's dismissal of the state charges against defendant, dated 6 November 2003; and a recall of defendant's order for arrest dated 6 November 2003. Capital Bonding had originally included these materials in its proposed record on appeal, but the trial court sustained Winston-Salem/Forsyth County Schools' objection to these materials, in accordance with the Rules of Appellate Procedure in effect at the time.[2]

2. Former N.C.R. App. P. 11(c), which permitted an appellant to request that the trial court settle a record on appeal when the parties were unable to agree on the con-

We recognize that "a challenge to the trial court's settlement [of a record] may be preserved by an application for certiorari *made incidentally* with the perfection of the appeal upon what record there is." *Craver v. Craver*, 298 N.C. 231, 237, n. 6, 258 S.E.2d 357, 361, n. 6 (1979). However, the documents that Capital Bonding seeks to include in the record were never presented to the trial court until after it entered its order. We cannot conduct an abuse of discretion review of a trial court's order based on materials that were never made available to the trial court. We also recognize that Capital Bonding had the opportunity to bring these materials to the trial court's attention while the case was still within the trial court's jurisdiction. The indictment was filed 28 October 2003, prior to the trial court's announcement of its order denying Capital Bonding's motion for relief on 4 November 2003. The dismissal and recall of order for arrest are dated 6 November 2003, just two days after the trial court's announcement of its order and well before both this order was entered on 31 December 2003 and Capital Bonding's notice of appeal was given on 2 January 2004. Capital Bonding did not make a motion pursuant to either North Carolina Rule of Civil Procedure 59 or 60 to bring this material to the trial court's attention, but rather sought to bring this material to light for the first time while this case was already pending on appeal. *See* N.C. Gen. Stat. § 1A-1, Rules 59 and 60 (2003). We find that this is further evidence of Capital Bonding's lack of diligence and deny Capital Bonding's petition for writ of certiorari.

[6] Finally, we note that in its petition for writ of certiorari, Capital Bonding asserts that this Court can take judicial notice of the indictment, dismissal of charges, and recall of order for arrest. However, we have held that this "Court may not take [judicial] notice of matters *excluded* from the record [on appeal], since the order settling the record on appeal is final and cannot be reviewed on appeal except on motion for certiorari." *Coiner v. Cales*, 135 N.C. App. 343, 346, 520 S.E.2d 61, 63 (1999) (citing *State v. Johnson*, 298 N.C. 355, 372, 259 S.E.2d 752, 763 (1979)). Since this material was excluded from the record and we have denied Capital Bonding's petition for writ of certiorari to include this material in the record, we may not take judicial notice of this material.

---

tents of the record, was in effect on 19 March 2004, when the trial court entered an order settling the record on appeal in this case. However, this provision has been superseded by the new N.C.R. App. P. 11(c), effective 12 May 2004.

Capital Bonding has failed to present any argument in support of its remaining assignments of error. They are therefore deemed abandoned. N.C.R. App. P. 28(b).

Affirmed.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. SHON WILLIAM PRICE, DEFENDANT

No. COA04-816

(Filed 3 May 2005)

1. Indictment and Information— superior court—misdemeanor offenses—failure to include offenses in indictment

The trial court did not have jurisdiction over the misdemeanor charges against defendant for harboring a fugitive, possession of one half ounce of marijuana, possession of drug paraphernalia, resisting a public officer, and maintaining a dwelling place to keep controlled substances, and the judgments entered on those charges are vacated because: (1) although defendant's misdemeanor charges could properly be joined with the felony charges pending in superior court under N.C.G.S. § 15A-926 as they arose from the same series of acts or transactions as the felony charges, charges must be before the superior court on presentment, information, or indictment; and (2) these misdemeanor charges were never included in an indictment and were before the superior court on warrants only.

2. Courts— criminal trial during civil session—erroneous designation on transcript

The trial court did not err as a matter of law by conducting defendant's criminal trial during a civil session of court because in spite of the erroneous designation on the cover page of the official court transcript, there was ample evidence in the record to show the session of court during which defendant's trial took place was both a criminal and civil session.

3. Judges— trial judge's commission to conduct criminal court

Although defendant contends for the first time on appeal in a drug case that the trial judge did not have a commission to conduct criminal court in Henderson County for the 15 September 2003 session of court, defendant presents no evidence to suggest the judge did not have such a commission and the judge explained at trial that the Chief Justice of the North Carolina Supreme Court had assigned him to hold court in Henderson County that week as permitted by N.C. Const. art. IV, § 11.

4. Drugs— delivery of methamphetamine—delivery of marijuana—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motions made at the close of the State's evidence and again at the close of all evidence to dismiss the felony charges of delivery of methamphetamine and delivery of marijuana, because: (1) the State presented evidence of defendant's delivery of controlled substances at trial through the testimony of two females who were found in possession of the drugs that defendant allegedly had given them to conceal; and (2) the credibility and the weight given to the testimony of these witnesses is a matter for the jury.

5. Evidence— recordings of telephone calls—pretrial detainee—wiretapping

The trial court did not err in a drug case by denying defendant's motion to suppress evidence of recordings of telephone calls made by defendant to his mother that were intercepted while defendant was a pretrial detainee, because: (1) under both our state and federal wiretapping laws, the interception of telephone calls does not violate the statutory prohibitions so long as at least one party to the communication consents; (2) both parties to the conversation heard the recorded warning that the call was subject to monitoring and recording and thus they consented, at least impliedly, by continuing with the conversation in the face of that warning; and (3) defendant's constitutional arguments have not been properly preserved for appeal.

6. Evidence— motion to suppress—recorded phone conversations—Rule 403

The trial court did not err in a drug case by failing to suppress statements contained in the recorded phone conversations between defendant and his mother allegedly in violation of N.C.G.S. § 8C-1, Rule 403, because: (1) there is no evidence in the

record that defendant ever identified to the trial court the specific statements he contends are unduly prejudicial or that he requested the trial court to suppress the allegedly prejudicial statements after the trial court denied his motion to suppress the evidence in its entirety; and (2) defendant never raised Rule 403 as a basis for his motion to suppress the phone call evidence in the motion itself or in his oral arguments before the court regarding the motion.

7. Criminal Law— recordation of trial—jury selection—arguments of counsel—bench conferences

Jury selection in noncapital cases and the opening and closing arguments of counsel must be recorded upon the motion of either party or on the judge's own motion. However, routine private bench conferences between the trial judge and attorneys are not required to be recorded. N.C.G.S. § 15A-1241(b).

Appeal by defendant from judgments entered 18 September 2003 by Judge E. Penn Dameron in Henderson County Superior Court. Heard in the Court of Appeals 2 February 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

M. Alexander Charns, for defendant-appellant.

JACKSON, Judge.

Shon Price (defendant) was charged on warrants with the misdemeanor offenses of: harboring a fugitive; possession of up to one half ounce of marijuana; possession of drug paraphernalia; resisting a public officer and maintaining a dwelling place to keep controlled substances and was indicted on the felony charges of: delivery of methamphetamine; delivery of marijuana and habitual felon. All charges against the defendant resulted from a series of activities on 4 February 2003. Defendant waived his preliminary hearing on both the felony and misdemeanor charges in district court and the court issued orders transferring the misdemeanor charges to superior court with the felonies as related offenses. Defendant was indicted on the felony charges, but the misdemeanor charges contained in the warrants were never included in an indictment. At a jury trial conducted in superior court defendant was found guilty of possession of marijuana; possession of drug paraphernalia; resisting a public officer; maintaining a dwelling place to keep controlled substances; delivery

of methamphetamine and delivery of marijuana. Defendant admitted to the habitual felon charge after his conviction of these charges. The court dismissed the harboring a fugitive charge at the close of the State's evidence.

At trial the State's evidence tended to show that on 4 February 2003 officers went to defendant's mother's house looking for a fugitive. Defendant lived in a shed behind his mother's house. Defendant confronted the officers and ordered them off the property at which time he was handcuffed and patted down. Rolling papers and a marijuana roach were found on defendant's person. Defendant gave two women at the scene, both admitted methamphetamine addicts, drugs to conceal from the police. Defendant gave one woman ten grams of marijuana and the other a pill bottle containing methamphetamine which the women secreted on their persons. When the women discovered that they would be searched and a drug dog was en route, they voluntarily gave the drugs to the officers and stated that defendant had given them the drugs to hide. No drugs were found in defendant's shed. The only evidence presented at trial linking defendant to the drugs found on the women was their testimony that defendant gave the drugs to them.

While in pretrial confinement at the Henderson County detention facility, defendant placed telephone calls to his mother. These calls were recorded, as were all inmate calls at the facility. The evidence presented at trial showed the facility's Evercom system plays a recording to recipients of calls from inmates which states:

> Hello, this is a collect call from [Shon] an inmate at the county jail. To accept charges press 0 to refuse charges press . . . This call is subject to monitoring and recording. Thank you for using Evercom.

In his calls defendant used profanity, made erroneous statements regarding the length of the sentence he was facing, and made disparaging remarks regarding his appointed counsel. Prior to trial, defendant filed a motion to suppress the recordings of his calls from jail. Defendant's motion was heard and denied by the trial court.

[1] Defendant's first argument is that the trial court lacked jurisdiction to try the misdemeanor charges against him as they had not been tried in district court and subsequently appealed to superior court, nor had they been included in an indictment. The North Carolina Constitution provides in part, "[e]xcept in misdemeanor cases initi-

ated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const., art. I, § 22. A criminal case may be tried in superior court on a warrant only on an appeal from a conviction at trial in a lower court with jurisdiction over the offense. *State v. Guffey*, 283 N.C. 94, 194 S.E.2d 827 (1973).

Jurisdiction over misdemeanor offenses is set forth in N.C. Gen. Stat. § 7A-271 which states in part:

> (a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has jurisdiction to try a misdemeanor:
>
> (1) Which is a lesser included offense of a felony on which an indictment has been returned, or a felony information as to which an indictment has been properly waived; or
>
> (2) When the charge is initiated by presentment; or
>
> (3) Which may be properly consolidated for trial with a felony under G.S. 15A-926;
>
> (4) To which a plea of guilty or nolo contendere is tendered in lieu of a felony charge; or
>
> (5) When a misdemeanor conviction is appealed to the superior court for trial de novo, to accept a guilty plea to a lesser included or related charge.
>
> (b) Appeals by the State or the defendant from the district court are to the superior court. The jurisdiction of the superior court over misdemeanors appealed from the district court to the superior court for trial de novo is the same as the district court had in the first instance, and when that conviction resulted from a plea arrangement between the defendant and the State pursuant to which misdemeanor charges were dismissed, reduced, or modified, to try those charges in the form and to the extent that they subsisted in the district court immediately prior to entry of the defendant and the State of the plea arrangement.
>
> (c) When a district court is established in a district, any superior court judge presiding over a criminal session of court shall order transferred to the district court any pending misdemeanor which does not fall within the provisions of subsec-

> tion (a), and which is not pending in the superior court on appeal from a lower court.

Additionally, however, N.C. Gen. Stat. § 15A-922(g) provides, "[w]hen the prosecution of a misdemeanor is initiated in the superior court as permitted by G.S. 7A-271, the prosecution *must* be upon information or indictment." (Emphasis added).

Here, defendant's misdemeanor charges properly could be joined with the felony charges pending in superior court under N.C. Gen. Stat. § 15A-926 as they arose from the same series of acts or transactions as the felony charges. This allows the misdemeanor charges to be tried in superior court rather than district court, however, as discussed *supra*, charges must be before the superior court on presentment, information or indictment. These misdemeanor charges never were included in an indictment and were before the superior court on warrants only. This precluded the superior court from exercising jurisdiction over the misdemeanor charges. Because the trial court did not have jurisdiction over the misdemeanor charges against defendant we vacate the judgments entered on those charges.

[2] Defendant next contends the trial court erred as a matter of law by conducting his criminal trial during a "civil session" of court. "For sessions of court designated for the trial of civil cases only, no grand juries shall be drawn and no criminal process shall be made returnable to any civil session." N.C. Gen. Stat. § 7A-49.2(b) (2004).

Defendant's argument is based solely on the cover page of the official court transcript which indicates it is a transcript of proceedings which occurred during the "September 15th, 2003 Civil Session . . . ." In spite of this designation there is ample evidence in the record to show the session of court during which defendant's trial took place was both a criminal and civil session. The Master Court Calendar for the Fall Sessions 2003 published by the Administrative Office of the Courts (AOC) designates the 15 September 2003 session of Superior Court of Henderson County as criminal and civil, a point conceded by defendant in his brief. Also, in his introduction to the jury pool, the trial judge stated "Good afternoon, ladies and gentlemen, I'd like to welcome you to your jury service for this—part of this week here in Henderson County Criminal Superior Court." Accordingly, we find it clear that the transcript cover sheet designation of the session as civil was simply a scrivener's error. This assignment of error has no merit and therefore is overruled.

[3] Defendant also asserts that the trial judge, the Honorable E. Penn Dameron, did not have a commission to conduct criminal court in Henderson County for the 15 September 2003 session of court. Although defendant failed to object to Judge Dameron's commission status at trial his assertion constitutes a jurisdictional issue which may be raised for the first time on appeal. N.C.R. App. P. 10(a). The defendant also failed to assign error to this issue. However, even in the absence of an assignment of error, our Supreme Court has continued to apply the old rule of appellate procedure allowing the issue of lack of subject matter jurisdiction to be raised for the first time on appeal. *See State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 498 (2000) (allowing amendment to the record on appeal adding an assignment of error regarding lack of subject matter jurisdiction that had not been assigned as error in the Court of Appeals).

Defendant presents no evidence to suggest Judge Dameron did not have such a commission, however. The Administrative Office of the Court's Master Court Calendar for the Fall 2003 sessions of court shows that the 15 September 2003 session of superior court in Henderson County was to be conducted by a judge "to be assigned." In his opening remarks to the jury Judge Dameron also explained that, although he actually was assigned to a different district, the Chief Justice of the North Carolina Supreme Court had assigned him to hold court in Henderson County that week. The North Carolina Constitution provides that: "[t]he Chief Justice of the Supreme Court, acting in accordance with rules of the Supreme Court, shall make assignments of Judges of the Superior Court . . . ." N.C. Const. art. IV, § 11. Accordingly, we hold there was no error.

[4] Defendant further assigns as error the denial of the motions he made at the close of the State's evidence and again at the close of all evidence to dismiss the felony charges due to insufficient evidence. In reviewing the denial of a criminal defendant's motion to dismiss for insufficient evidence we must determine whether the State has offered substantial evidence to show the defendant committed each element required to be convicted of the crime charged. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620 (2002). Our Supreme Court has defined substantial evidence as relevant evidence sufficient to persuade a rational juror to accept a conclusion. *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899, *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459, 121 S. Ct. 487 (2000). Evidence must be considered in the light most favorable to the State in deciding a motion

to dismiss for insufficient evidence. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

The North Carolina Controlled Substances Act defines " '[d]eliver' or 'delivery' " to mean "the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." N.C. Gen. Stat. § 90-87(7) (2004). We have held the crime of delivery of a controlled substance under N.C. Gen. Stat. § 90-95(a)(1) to be complete upon the transfer of a controlled substance from one person to another. *State v. Pevia*, 56 N.C. App. 384, 387, 289 S.E.2d 135, 137, *cert. denied*, 306 N.C. 391, 294 S.E.2d 218 (1982).

The State presented evidence of defendant's delivery of controlled substances at trial through the testimony of the two females who were found in possession of the drugs that defendant allegedly had given them to conceal. The credibility and the weight given to the testimony of these witnesses is a matter for the jury. *State v. Upright*, 72 N.C. App. 94, 100, 323 S.E.2d 479, 484 (1984), *cert. denied*, 313 N.C. 610, 332 S.E.2d 82 (1985). Their testimony that defendant had given them the controlled substances, if believed by the jury, was sufficient to establish the elements required for conviction of the offense of delivery of a controlled substance. Consequently, we find no error in the trial court's denial of defendant's motions to dismiss the felony charges.

[5] Defendant next assigns as error the trial court's allowing evidence of recordings of telephone calls made by defendant to his mother. These calls were intercepted while he was a pre-trial detainee. Defendant filed a motion to suppress this evidence prior to trial. The trial court heard defendant's motion to suppress and denied that motion. The standard of review in evaluating a trial court's ruling on a motion to suppress is whether the court's findings of fact are supported by competent evidence and if those findings of fact support the trial court's conclusions of law. *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000).

Defendant has made only one assignment of error pertaining to the intercepted phone calls as follows:

> The trial court erred in allowing evidence of the recording and interception of defendant's phone calls while he was a pre-trial detainee, in violation of the Due Process Clause of the Fourteenth Amendment, U.S. Constitution, and parallel provisions of the N.C.

> Constitution, including Art. I, Sec.s 18, 19, 20, 21, 22, 23, 24, 35 and 36, and state and federal electronic surveillance statutes.

This argument fails to assign error to any of the trial court's findings of fact. If error is not assigned to any of the trial court's particular findings of fact, those findings are presumed to be supported by competent evidence and are therefore binding on appeal. *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). Consequently, our review in this case is limited to whether the trial court's findings of fact support its conclusions of law. *Pulliam*, 139 N.C. App. at 439-40, 533 S.E.2d at 282 (2002).

In his ruling from the bench on defendant's motion to suppress the recordings of his intercepted phone calls, the trial judge found as fact the following pertinent information:

(1) That there was a system in place on the Henderson County Jail telephones which automatically records all outgoing telephone calls;

(2) the system automatically gave notice to the persons participating in the telephone calls from jail;

(3) the notice was in the form of a statement given prior to accepting a call which states (in part) "This call is subject to monitoring and recording. Thank you for using Evercom.";

(4) the warning was given before the conversation in question;

(5) the parties that participated in the call (defendant and his mother) consented, at least impliedly, to the recording of the call.

Based on these findings of fact, the trial court concluded as a matter of law there were no violations of applicable North Carolina or federal wiretapping laws and the recordings of the telephone conversations were admissible.

The North Carolina and federal wiretapping laws, which are substantially similar, generally prohibit the interception of other parties telephone conversations. 18 U.S.C. § 2511 (2004); N.C. Gen. Stat. § 15A-287 (2004). Both statutory schemes provide certain exceptions, however. N.C. Gen. Stat. § 15A-287(a) provides a person is guilty of a class H felony if that person intercepts the wire or electronic communications of another in any of several ways "without

the consent of at least one party to the communication." The federal statute provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(c). Therefore, it is clear, under both the law of our State and federal law, that the interception of telephone calls does not violate the statutory prohibitions so long as at least one party to the communication consents. Here, the trial court found that both parties to the conversation heard the recorded warning that the call was subject to monitoring and recording and that they consented, at least impliedly, by continuing with the conversation in the face of that warning.

In his assignment of error on this issue defendant also assigned error as to the admission of this evidence on the basis it violated his constitutional rights under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and its parallel provisions of the North Carolina Constitution. However, in his brief, the only constitutional argument defendant raises is a violation of his Fourth Amendment rights. Generally a constitutional question not raised at trial and ruled upon by the trial court will not be considered on appeal. *State v. Cooke*, 306 N.C. 132, 136, 291 S.E.2d 618, 620-21 (1982). At trial the sole basis for defendant's motion to suppress evidence regarding the intercepted phone calls was a violation of N.C. Gen. Stat. § 15A-286. Consequently, defendant's constitutional arguments have not been properly preserved for appeal and are not considered.

Accordingly, we find the trial court's findings of fact to support its conclusions of law and hold no error in the admission of the recordings of defendant's telephone conversations.

[6] Next, defendant argues the trial court erred in not suppressing unduly prejudicial statements contained in the recorded phone conversations with his mother in violation of Rule 403 of the N.C. Rules of Evidence. There is no evidence in the record, however, that defendant ever identified to the trial court the specific statements he contends are unduly prejudicial or requested the trial court to suppress the allegedly prejudicial statements after the trial court denied his motion to suppress the evidence in its entirety. In fact, defendant

never raised Rule 403 as a basis for his motion to suppress the phone call evidence in the motion itself or in his oral arguments before the court regarding the motion. Defendant's only mention of the allegedly inflammatory statements was:

> There also, your Honor, are many inflammatory aspects about this evidence. And I would ask you to consider whether its probative value can outweigh its prejudicial effects. There are many, many aspects of it which are not relevant, and which are nothing more than inflammatory.

This clearly refers to the evidence as a whole, does not specify what is contended to be inflammatory and unduly prejudicial and does not request that the trial court suppress anything other than the evidence in its entirety. As defendant did not make a motion to suppress only those portions of the evidence that were allegedly inflammatory or object to the introduction of the evidence on the basis that it violated Rule 403, this assignment of error was not properly preserved for appeal and therefore, is overruled.

[7] Finally, defendant argues the trial court erred as a matter of law by not ensuring there was a complete recordation of jury selection, the verbatim jury instructions from the court, bench conferences and arguments of counsel. It is the trial judge's responsibility to ensure the court reporter makes a true, complete, and accurate record of all statements from the bench and other proceedings except for (1) jury selection in noncapital cases; (2) opening and closing statements of counsel to the jury; and (3) arguments of counsel on questions of law. N.C. Gen. Stat. § 15A-1241(a). Jury selection in noncapital cases and the opening and closing arguments of counsel to the jury must be recorded upon the motion of either party or on the judge's own motion. N.C. Gen. Stat. § 15A-1241 (b). Routine, private bench conferences between the trial judge and attorneys are not "statements from the bench" and are not required to be recorded. *State v. Cummings*, 332 N.C. 487, 497-8, 422 S.E.2d 692, 697-8 (1992).

Defendant correctly concedes in his brief that the law does not presently support his argument and that he is unable to show prejudice from this alleged error. Therefore this assignment of error is overruled.

Judgments on misdemeanor charges are vacated for lack of subject matter jurisdiction in the trial court. No error on the remaining issues.

Vacated in part; no error in part.

Judges HUNTER and CALABRIA concur.

STATE OF NORTH CAROLINA v. RICKY ANDREWS

No. COA02-691

(Filed 3 May 2005)

1. Homicide— first-degree murder—short-form indictment—constitutionality

The short-form indictment used to charge defendant with first-degree murder was constitutional and sufficient to support defendant's conviction of felony murder.

2. Confessions and Incriminating Statements— Miranda rights—mentally retarded defendants

The trial court did not err in a first-degree felony murder and conspiracy to commit robbery case by denying defendant's motion to suppress his statement to the police allegedly obtained in violation of his Miranda rights even though defendant had an IQ of 61, because the findings all support the conclusion that the statement was voluntarily given and that defendant knowingly waived his Miranda rights.

3. Evidence— exhibit—enlargement of defendant's statement

The trial court did not abuse its discretion in a first-degree felony murder and conspiracy to commit robbery case by permitting the State to display to the jury an enlarged image of defendant's statement to the police, because: (1) defendant's statement was already held to be admissible; and (2) the enlarged version was permissible for illustrative purposes.

4. Conspiracy— robbery—instructions—diminished capacity

The trial court did not commit plain error by failing to instruct the jury on diminished capacity regarding the conspiracy to commit robbery charge, because: (1) defendant's evidence concerning his low IQ, smoking marijuana, and sharing Hennessy over the course of the evening was not so overwhelming as to render the lack of a voluntary intoxication instruction prejudicial;

(2) a voluntary intoxication instruction is not required even where there is testimony that defendant consumed intoxicating beverages or controlled substances; (3) there was testimony that defendant did not appear intoxicated; (4) finding defendant not guilty of first-degree murder based on premeditation and deliberation does not necessarily imply the jury concluded defendant had a diminished capacity to form any intent; (5) considering defendant's confession, a witness's testimony, the victim's statement regarding the shooting, and the forensic evidence, the jury had sufficient basis for its verdicts; and (6) it cannot be said that the jurors would have reached a different result had they been given this instruction.

5. Constitutional Law— effective assistance of counsel—failure to request instruction

Defense counsel's failure to request an instruction on diminished capacity regarding the conspiracy to commit robbery charge did not amount to ineffective assistance of counsel, because the Court of Appeals already determined that there was no plain error in the failure to provide this instruction to the jury.

6. Criminal Law— instruction by trial court—defendant confessed to crimes

The trial court did not commit plain error in a first-degree felony murder and conspiracy to commit robbery case by instructing the jury that the evidence tended to show that defendant confessed to the crimes, because: (1) the instruction given by the trial court was verbatim from pattern jury instruction N.C.P.I.—Crim. 104.70; (2) the Supreme Court has held that this instruction makes it clear that even though there was evidence tending to show that defendant had made an admission, it was solely for the jury to determine whether defendant in fact had made any admission; and (3) the instruction was based on a reasonable view of the evidence.

7. Homicide— instruction—voluntary manslaughter based on imperfect self-defense

The trial court did not commit plain error in a first-degree felony murder case by failing to instruct sua sponte on voluntary manslaughter based on imperfect self-defense, because: (1) defendant was not found guilty of first-degree murder based on a theory of premeditation and deliberation, which could be mitigated by imperfect self-defense to voluntary manslaughter; and

(2) the jury found defendant guilty based on the felony murder rule, and imperfect self-defense is not available as a defense to the underlying robbery.

Appeal by defendant from judgment entered 8 August 2001 by Judge Michael E. Helms in Edgecombe County Superior Court. Originally heard in the Court of Appeals 24 March 2003. Remanded for further evidentiary hearing by order entered 8 July 2003, and heard in the Court of Appeals 11 April 2005.

Roy A. Cooper, III, Attorney General, by C. Norman Young, Jr., Assistant Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged with first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. At trial, the evidence tended to show that on 15 November 1999, defendant and Lynn Downy had discussed committing robbery while they were drinking and smoking marijuana. They went to Winshell Harris's (Harris) house, to purchase additional marijuana. When they arrived, Harris was not at home, but his brother, Michael Wilson (Wilson), told them to return in a half an hour. Upon their return, Wilson directed them to a side entrance, in order for him to visit with his friend in the living room, while Harris visited defendant and Downy in the kitchen. Wilson testified that at one point he entered the kitchen to get a glass of water and the conversation between Harris, defendant and Downy stopped. He also stated that he noticed Harris sitting at the table, which had Harris's nine millimeter gun and $800 on it.

Downy testified that while they were waiting on Harris's marijuana supplier, other customers came and went. He did not notice either Harris or defendant with a gun, nor did he see money on the table. He stated that after waiting for five minutes or so, Harris informed them the supplier was unable to come, so Downy decided to leave. A minute or two after leaving he heard shots, but he did not look back. Downy also testified that he asked defendant if he had shot Harris, but that defendant swore he did not.

Wilson testified that he heard five shots and, before he could enter the kitchen, Harris entered the living room, bleeding pro-

fusely. Harris told Wilson that "Little Rick", whom Wilson knew as defendant, had shot him. Wilson helped his brother to a chair and returned to the kitchen to see if defendant and Downy were still there. The back door was open and the money and gun were gone from the table.

When Officer L.C. Peele arrived on the scene, he observed Harris bleeding, and Harris informed him he had been shot. Peele accompanied Harris to the hospital, noting that Harris was conscious and alert, but Harris subsequently suffered cardiac arrest and died.

Based on the statements made by Wilson, defendant was arrested and his residence was searched. No evidence of the crime was found on his person or at his residence. While defendant was in the patrol car, Detective Michael Lewis read him his *Miranda* rights. He did not assert his rights and agreed to speak with Lewis. Lewis testified that defendant seemed agitated and that while there was a moderate odor of alcohol, defendant did not have difficulty speaking or walking, glassy eyes, or slurred speech. Initially, defendant denied involvement in the shooting, but on further questioning at the police station, he began crying and confessed that he and Harris were friends and that "it was not supposed to happen like that."

Defendant's statement explained that he and Downy were together when Downy said he needed money, and that Harris had some, so they planned a robbery and walked to Harris's house. According to the statement, Downy planned to trade his .45 caliber handgun for half an ounce of cocaine. When meeting with Harris, Harris handed Downy a nine millimeter pistol to look at, and Downy grabbed the gun and the cash from the table. Defendant stated that he thought Harris was reaching for a gun, so he pulled his .38 revolver from his pants and shot at Harris. According to this statement, defendant hid his gun under some leaves behind a shed at 406 Carolina Avenue, burned the clothes he was wearing, and Downy kept Harris's pistol and the money from the table. A .38 caliber revolver was found at the Carolina Avenue location.

At defendant's request, Lewis wrote out this statement and went over it line by line with him. This statement was read to the jury at trial, and enlarged on a poster entitled, "Confession of Ricky Andrews." On cross-examination, Lewis admitted that he did not write down every word that defendant said and did write down words defendant did not actually say.

Crime scene investigator Sandra Kay Rose testified that she recovered one projectile from the wall of Harris's home, and several from his body. Forensic firearms expert Carol Ann Marshburn testified that the projectile recovered from the residence and two of the projectiles recovered from Harris were fired from the .38 caliber revolver discovered at the location indicated in defendant's statement. The two other projectiles came from the same class type of firearm as defendant's but lacked "enough individual characteristics" to be positively identified as being from defendant's revolver.

Defendant presented a court-appointed expert witness, Dr. Gary H. Bachara, who testified that the defendant had an I.Q. of 61, equivalent to the mental age of an eight-year-old. He explained that his test results were consistent with defendant's school records. Dr. Bachara opined that people with I.Q.'s of 61 are impulsive and lack an ability to form the intent to plan "even hours in the future." He also stated that he did not believe defendant would understand some of the words used in his written statement.

The jury convicted defendant of first-degree felony murder, conspiracy to commit robbery, and robbery with a firearm. Defendant was sentenced to life imprisonment without parole for the first-degree murder and conspiracy to commit robbery offenses, and the judgment on the robbery with firearm was arrested. From these judgments, defendant appealed.

On appeal, by order dated 8 July 2003, this Court remanded for "an evidentiary hearing concerning the admissibility of the statements made by defendant to police following his arrest." This evidentiary hearing was held on 23 September 2004, after which the court found facts and concluded:

> 1. That there was no offer of hope, reward or inducement to the defendant to make a statement.
>
> 2. That there was no threat or suggestive violence or show of violence to persuade or induce the defendant to make a statement.
>
> 3. That any statement made by the defendant to Detective Mike Lewis of the Rocky Mount Police Department on December 16, 1999 was made voluntarily, knowingly and understandingly.
>
> 4. That the defendant was in full understanding of his constitutional rights to remain silent and rights to counsel.

5. That he purposely, freely, knowingly and voluntarily waived each of those rights and, thereupon, made a statement to Detective Lewis.

6. That the warning given by Detective Lewis was in all respects in compliance with the requirements of "Miranda."

7. That the defendant's admission was voluntarily and made understandingly and without any evidence of coercion.

8. That Dr. Bachara never said the defendant could not understand his rights.

9. That defendant had the capacity to knowingly and understandingly waive his rights under Miranda.

Defendant argues it was: 1) error to try defendant and sentence him for felony murder based on a short form indictment; 2) a violation of defendant's *Miranda* rights to admit defendant's statement to police; 3) error to admit an enlargement of this statement for illustrative purposes; 4) plain error for the trial court to fail to instruct the jury regarding diminished capacity to form specific intent necessary for the underlying felony of robbery or conspiracy to commit robbery; 5) a violation of defendant's right to effective assistance of counsel to fail to request these instructions; 6) error to instruct the jury "that the evidence tended to show the defendant confessed;" and 7) error not to instruct on voluntary manslaughter based on imperfect self-defense. After careful consideration of his arguments, we hold defendant received a fair trial, free from prejudicial error.

[1] Defendant first argues that the short-form indictment does not allege all the elements of first-degree murder as is required by *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and applied to state statutes in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). Our Supreme Court has "held that the short-form indictment is sufficient to charge first-degree murder on the basis of any of the theories . . . set forth in N.C.G.S. § 14-17." *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). N.C. Gen. Stat. § 14-17 defines first and second degree murder, including murder "committed in the perpetration or attempted perpetration of any . . . robbery . . . or other felony committed or attempted with the use of a deadly weapon." N.C. Gen. Stat. § 14-17 (2003). The indictment in this case alleged first-degree

murder and referenced section 14-17; accordingly, this assignment of error is overruled.

[2] In defendant's second argument he maintains the trial court erred in denying his motion to suppress his statement to the police because it was obtained in violation of his *Miranda* rights. On appeal the findings of fact made by a trial court "following a voir dire hearing on the voluntariness of a confession are conclusive" as long they are supported by competent evidence. *State v. Massey*, 316 N.C. 558, 573, 342 S.E.2d 811, 820 (1986). Our Supreme Court has "consistently held that a defendant's subnormal mental capacity is a factor to be considered when determining whether a knowing and intelligent waiver of rights has been made" but lack of intelligence alone does not "render an in-custody statement incompetent if it is in all other respects voluntary and understandingly made." *State v. Jones*, 153 N.C. App. 358, 366, 570 S.E.2d 128, 135 (2002) (quoting *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983)); *see also Massey*, 316 N.C. at 575, 342 S.E.2d at 821 (mildly mentally retarded 18-year-old defendant with a mental age of ten or eleven gave voluntary confession); *State v. Thompson*, 287 N.C. 303, 319, 214 S.E.2d 742, 752 (1975) (finding a 19-year-old defendant with an I.Q. of 55 capable of waiving his rights). We examine "the totality of the circumstances, and in the case of mentally retarded defendants, we pay particular attention to the defendant's personal characteristics and the details of the interrogation." *State v. Brown*, 112 N.C. App. 390, 396, 436 S.E.2d 163, 167 (1993), *aff'd*, 339 N.C. 606, 453 S.E.2d 165-66 (1995).

At the evidentiary hearing on this issue, the trial court reviewed the evidence and made findings examining the totality of the circumstances. The hearing included re-examinations of the arresting and questioning officer and the psychologist that examined the defendant. The court found that the warnings given by the officer complied with the requirements of *Miranda* and that defendant was not threatened, physically coerced, or offered a reward, and he did not appear to be under the influence of alcohol or drugs. At defendant's trial, during the initial voir dire on the motion to suppress, the trial court found that defendant indicated that he understood his rights; that during the interview at the police station, after about thirty minutes, the defendant "broke down" and made a statement; and that he was not denied food, water or an opportunity to use the bathroom. The trial court also noted that defendant recounted details of his involvement in the shooting and had a prior record. These findings all support the conclusion that the statement was voluntarily given and that

defendant knowingly waived his *Miranda* rights. Therefore it was not error for the trial court to admit defendant's confession, and this assignment of error is overruled.

[3] Defendant's third argument is that it was prejudicial error for the trial court to permit the State to display to the jury an enlarged image of his statement. Presentation of evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *State v. Waddell*, 351 N.C. 413, 423, 527 S.E.2d 644, 651 (2000). Because we have already concluded that the defendant's statement was admissible, it was not error for the trial court to permit the State to display the enlarged version for illustrative purposes. *See State v. Thompson*, 149 N.C. App. 276, 283, 560 S.E.2d 568, 573, *disc. review denied*, 355 N.C. 499, 564 S.E.2d 231 (2002) (no error to admit defendant's confession after concluding it was voluntary); *see also State v. Harris*, 315 N.C. 556, 562, 340 S.E.2d 383, 387 (1986) (distributing copies of the handwritten statement to each juror did not prejudice defendant). Accordingly, this assignment of error is overruled.

Defendant's remaining arguments all relate to the trial court's instructions to the jury. He maintains that 1) it was plain error not to instruct on diminished capacity regarding the underlying robbery for felony murder or for conspiracy, and counsel's failure to request this instruction amounts to ineffective assistance; 2) the trial court erred when it instructed that the evidence tended to show defendant confessed; and 3) there was error in the trial court's failure to instruct on voluntary manslaughter based on a theory of imperfect self-defense. We will address each of these arguments in turn.

As an initial matter, we note that defendant did not request or propose any of these instructions at trial, and thus has not preserved his right to review. *See* N.C.R. App. P. 10(b)(2) (2004); *State v. Gay*, 334 N.C. 467, 486, 434 S.E.2d 840, 851 (1993). Therefore, we review using the plain error standard. Plain error is error that either amounts to the denial of a fundamental right or is "so lacking in its elements that justice cannot have been done." *State v. Carpenter*, 147 N.C. App. 386, 397, 556 S.E.2d 316, 323 (2001), *cert. denied*, 536 U.S. 967, 153 L. Ed. 2d 851 (2002) (internal citations omitted). In order to prevail under the plain error analysis, the defendant must show 1) there was error, and 2) that absent the error, the jury would have reached a different result. *Id.*

[4] Defendant contends the jury's verdict finding defendant not guilty of first-degree murder by premeditation and deliberation indicates

the jurors determined that defendant lacked sufficient mental capacity to form specific intent for either armed robbery or conspiracy to commit robbery. Had they been properly instructed by the trial court regarding diminished capacity in terms of these charges, defendant maintains the jury would have been unable to find the specific intent for those charges as well. We disagree.

Defendant's arguments regarding instructions about the underlying robbery are not properly before us. Defendant's assignments of error do not plainly "specifically and distinctly" allege plain error regarding the robbery charge. N.C.R. App. P. 10(c)(4) (2004); *State v. Dennison*, 359 N.C. 312, 313, 608 S.E.2d 756, 757 (2005). Therefore, we only examine the diminished capacity instruction in relationship to the conspiracy charge.

Reviewing for plain error, we conclude that defendant's evidence concerning his low I.Q., smoking marijuana, and sharing Hennessy over the course of the evening was not so overwhelming as to render the lack of a voluntary intoxication instruction prejudicial. It is "well established" that a voluntary intoxication instruction is not required even where there is testimony that defendant consumed "intoxicating beverages or controlled substances." *State v. Cheek*, 351 N.C. 48, 74, 520 S.E.2d 545, 560 (1999), *cert. denied*, —— U.S. ——, 160 L. Ed. 2d 137 (2004) (internal citation omitted). Moreover, there was testimony that defendant did not appear intoxicated. Finding defendant not guilty of first-degree murder based on premeditation and deliberation does not necessarily imply the jury concluded defendant had a diminished capacity to form any intent. Additionally, considering the defendant's confession, the testimony of Downy, and the victim's statement regarding the shooting and the forensic evidence, the jury had sufficient basis for its verdicts. We cannot say that had the jurors been given this instruction, they would have reached a different result. This assignment of error is overruled.

[5] Defendant further maintains that the failure of defense counsel to request this instruction constitutes ineffective assistance of counsel. We disagree. When raising a claim of ineffective assistance of counsel, a defendant has to satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674 (1984) to show counsel's performance failed to meet an objective standard of reasonableness. *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). This burden requires showing that 1) counsel erred so seriously so as

not to function as counsel and 2) the deficient performance deprived defendant of a fair trial. Because we have determined that there was no plain error in the failure to provide this instruction to the jury, "defendant's assertion of ineffective assistance of counsel with respect thereto must also fail." *State v. Seagroves*, 78 N.C. App. 49, 54, 336 S.E.2d 684, 688 (1985), *disc. review denied*, 316 N.C. 384, 342 S.E.2d 905 (1986).

[6] Defendant next contends that the trial court erred when it instructed the jury that the evidence tended to show that defendant confessed to the crimes charged. The judge instructed the jury, in pertinent part:

> There's evidence which tends to show that the defendant confessed that he committed the crime charged in this case.
>
> If you find that the defendant made that confession, then you should consider all of the circumstances under which it was made in determining whether it was a truthful confession and the weight you will give to it.

Again, we review for plain error since defendant did not object to this instruction at trial. This instruction is verbatim from the pattern jury instruction. N.C.P.I.—Crim. 104.70 (1970). Our Supreme Court has held that this instruction makes it clear "that even though there was evidence tending to show that the defendant had made an admission, it was solely for the jury to determine whether the defendant in fact had made any admission." *State v. McKoy*, 331 N.C. 731, 734, 417 S.E.2d 244, 246-47 (1992). We conclude that since the instruction was based upon a reasonable view of the evidence, it was not erroneous. *State v. Cannon*, 341 N.C. 79, 90, 459 S.E.2d 238, 245 (1995).

[7] Finally, defendant argues the trial court erred in failing to instruct on voluntary manslaughter based on imperfect self-defense. "[S]elf-defense, perfect or imperfect, is not a defense to first-degree murder under the felony murder theory, and only perfect self-defense is applicable to the underlying felonies." *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995). If imperfect self-defense applied to felony murder, it would defeat the purpose of the felony murder rule, which is "to deter even accidental killings from occurring during the commission of a dangerous felony." *Id.*

In this case, defendant was not found guilty of first-degree murder based on a theory of premeditation and deliberation, which can

be mitigated by imperfect self-defense to voluntary manslaughter. *See State v. Bush*, 307 N.C. 152, 159, 297 S.E.2d 563, 568 (1982) (noting that the exercise of imperfect self-defense leaves defendant guilty of at least voluntary manslaughter). Instead, the jury found the defendant guilty based on the felony murder rule, and imperfect self-defense is not available as a defense to the underlying robbery. The failure of the trial court to instruct *sua sponte* on imperfect self-defense and voluntary manslaughter, therefore, does not rise to the level of plain error. We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges HUNTER and CALABRIA concur.

IN THE MATTER OF: I.S.

No. COA04-1091

(Filed 3 May 2005)

1. Appeal and Error— notice of appeal—timeliness—mistaken reference to prior motion

Certiorari was granted to review a termination of parental rights where the notice of appeal was within the time constraint from the termination order, but referred to a much earlier order continuing the case and was untimely on its face; it is clear from the record that the reference to the earlier order was merely a scrivener's error; the consequence of termination of parental rights is quite serious; and there was no objection to certiorari.

2. Termination of Parental Rights— motion to dismiss—not considered—not prejudicial

The trial court's failure to hear respondent's motion to dismiss a termination of parental rights petition did not constitute prejudicial error. Given the nature of the proceedings, it is quite important that the grounds for plaintiff's motion be considered, but there is no evidence in the record that the court specifically considered respondent's motion to dismiss and declined to hear it. Moreover, contrary to DSS's contention, respondent

was not responsible for calendaring the motion under Eighth Judicial District Family Court Rules. However, the court clearly considered the issues upon which respondent's petition was based and found them unpersuasive, and there is no reasonable possibility that a different result would have been reached without the error.

3. Termination of Parental Rights— stipulation—scope

The trial court erred in a termination of parental rights case by finding that respondent's stipulation encompassed elements not intended by respondent. When construing a stipulation, a court must attempt to effectuate the intent of the party making the stipulation.

4. Termination of Parental Rights— required findings—misconstrued stipulation

The trial court in a termination of parental rights case must make specific findings as to all four subsections of N.C.G.S. § 7B-1111(a)(5); here, having erroneously found that respondent had stipulated to all four of the subsections when he had stipulated only to subsection (b), the court did not make the necessary findings and erred by concluding that grounds existed for termination.

5. Termination of Parental Rights— means to legitimate child—findings sufficient

There was sufficient evidence to support the trial court's finding in a termination of parental rights proceeding that respondent had the means and ability to legitimate the child or establish paternity despite incarceration.

6. Termination of Parental Rights— best interest of child—discretion of court

Although the trial court must find that at least one ground for the termination of parental rights exists based on clear, cogent and convincing evidence, the determination of whether it is in the best interest of the child to terminate parental rights is in the discretion of the trial court.

Appeal by respondent father from an order entered 29 April 2004 by Judge Rose V. Williams in Wayne County District Court. Heard in the Court of Appeals 27 January 2005.

E.B. Borden Parker, for petitioner-appellee Wayne County Department of Social Services.

Timothy I. Finan, for petitioner-appellee Guardian Ad Litem.

Peter Wood, for respondent father-appellant.[1]

JACKSON, Judge.

Respondent father appeals from the order entered by the Wayne County District Court terminating his parental rights with respect to I.S., a minor child.

I.S was born 24 December 1997 to Jessica S. and Eddie M. (respondent). At the time of I.S.'s birth, respondent was incarcerated in the North Carolina Department of Corrections where he remained until 24 May 2004. Respondent was unable to sign I.S.'s birth certificate due to his incarceration.

I.S. was removed from the custody of Jessica S. on 26 September 2002 into the Department of Social Services' ("DSS") custody and placed with respondent's sister. On 2 October 2002 a non-secure custody hearing on dependency and neglect was held. Respondent was not present at the hearing, but was represented by counsel. An adjudication hearing on the dependency and neglect petition was heard on 21 November 2002. Respondent was not present at the hearing but was represented by counsel. At the hearing I.S. was found to be both dependent and neglected and supervised visitation between respondent and I.S. was approved.

On 27 February 2003 respondent's sister asked that I.S. be removed from her home due to ongoing verbal confrontations with Jessica S. I.S. was removed from the home of respondent's sister and placed with a foster family unrelated to either biological parent. Permanency planning hearings were held and continued on two occasions, once to allow the child's mother to be present at the hearing and a second time to allow the court to receive a drug screening report on the mother of the child. Respondent was not present at either of these hearings, however, respondent was represented by counsel at both. Another permanency planning hearing was held on 5 June 2003 with respondent being represented by counsel. At that hearing respondent's counsel was removed, on counsel's motion, based on the fact he had not had any recent contact with respondent.

1. No brief was filed by Kimberly Connor, for respondent-mother.

Respondent was not present at a subsequent permanency planning review hearing on 4 September 2003, nor was he represented by counsel at that hearing.

On 19 September 2003, Wayne County DSS filed a petition for the Termination of Parental Rights of both respondent and Jessica S. Jessica S. signed a relinquishment of her paternal rights with respect to I.S. Respondent filed a Petition for Hearing/Attendance and Appointment of Counsel on 16 October 2003. Counsel was appointed on 24 October 2003. Through counsel, respondent moved to dismiss the Petition to Terminate Parental Rights on 10 February 2004. The motion was never calendared for hearing and the trial court never ruled on the motion directly.

The Petition for Termination of Parental Rights was heard on 18 March 2004 with both respondent and his counsel present. At the hearing, respondent's counsel made the following stipulation on behalf of respondent:

> Judge, I'll be glad to stipulate that there were grounds on the mom, that the mom has relinquished that my client has been incarcerated since prior to the child's birth and that he hasn't filed any judicial documents related to paternity in the Clerk of Court's office in Wayne County. And I don't think he has an objection to that. He understands that the alternative would be that we sit here and listen to the grounds on mom, and we really don't have any grounds to contest that. He has been incarcerated since 1997, due to be released in May. But we do—we'd like to present evidence.

After respondent's counsel made that stipulation, counsel for Wayne County DSS stated to the court that respondent's counsel had just stipulated to the grounds alleged against him. Respondent's counsel made no response to that assertion.

At the hearing, respondent testified his contact with I.S. had been limited to three visits during 1998 while he was in Bunn Correctional Center and two more visits in 2000 while he was in Wayne Correctional Center. Respondent did not have any telephone contact with I.S. either because: his access to the use of a telephone was extremely limited; he was only able to place collect calls; and Jessica S. did not have a telephone. Respondent testified he kept informed regarding I.S.'s welfare primarily through conversations with his (respondent's) mother.

Respondent's testimony further showed that while incarcerated he earned from between three dollars and fifty cents ($3.50) to nine dollars ($9.00) per week for doing various jobs in the prison. With the money earned, respondent had to purchase personal hygiene items, stamps, envelopes, paper, etc. Respondent did not send any money for the support of I.S.

Based on the evidence presented at the hearing the court made the following pertinent findings of fact:

10. That the respondent, Eddie Ray M[ ], through his attorney, stipulated that the juvenile was born out of wedlock and that he, Eddie Ray M[ ], has not prior to the filing of this petition to terminate his parental rights established paternity judicially, or by affidavit which has been filed in a central registry maintained by the Department of Human Resources or legitimated the child pursuant to the North Carolina General Statutes 49-10, or filed a petition for this specific purpose; or legitimated the child by marriage to the mother of the child; or provided substantial financial support or consistent care with respect to the child and the mother.

11. That the respondent father is allowed to work jobs in the Department of Correction and has earned money in those jobs in the prison system.

12. That the respondent has used money he has earned in the prison system to buy stamps to mail letters to the mother of the child at issue in this case.

13. That the respondent father has mailed correspondence to this file on his own from prison. Copies of documents mailed from the respondent father have been marked filed by the Clerk of Court and are part of the Termination of Parental Rights file in this case.

14. That the respondent father has stipulated grounds exist to terminate the rights of the mother of the child and that he has not done the things set forth above to legitimate the juvenile and establish paternity.

25. That except for several visits with the father in prison the juvenile has no relationship with the father.

26. That the respondent was only brought to Court once from prison on the underlying neglect and dependency files and was not sent copies of Court reports.

27. That the respondent was aware of the Wayne County Department of Social Services involvement in the life of the juvenile, however, and was properly served in the underlying file.

28. That the respondent was aware that the juvenile had been placed in foster care, yet did not correspond with the Wayne County Department of Social Services regarding the well being of the juvenile or even send a portion of the wages he earned in prison for the support of the juvenile.

30. That the respondent father has failed to take advantage of programs available to him in prison that would allow him to further his education or learn a trade such a [sic] carpentry or welding.

31. That the respondent father testified he did not take part in those programs because he was called to preach the word of God in 1992 and wishes to make his living in this way after his release.

34. That the juvenile has been in foster care since February, 2003.

35. That the juvenile need [sic] permanence. Having the juvenile continue to wait to see if the father will be able to parent him is too speculative.

36. That the Court has taken judicial notice of the file in the underlying neglect and dependency case, including the orders entered therein and the documents incorporated in those orders by reference.

37. That the grounds to terminate the parental rights of the respondent father exist in that the father had the means and ability to legitimate the juvenile or to establish paternity even though he was incarcerated before the birth of the juvenile as shown by his ability to earn money and purchase stamps and mailing correspondence to this Court and to the mother of the juvenile.

40. That the Court cannot find from clear, cogent and convincing evidence that it is not in the best interest of the minor child to terminate the parental rights of the father of the juvenile.

[1] As a preliminary matter we must address respondent's failure to file a timely notice of appeal of the order terminating his parental rights. Rule 3 of the North Carolina Rules of Appellate procedure provides that the time and manner for appeals in termination of parental rights cases are governed by the North Carolina General Statutes section 7B-1113. N.C.R. App. P. 3(b)(1) (2005). The North Carolina General Statutes section 7B-1113 requires that written notice of appeal be given within ten days of the entry of the order terminating parental rights. N.C. Gen. Stat. § 7B-1113(2003). The entry of an order is treated in the same manner as entry of a judgment under North Carolina General Statutes section 1A-1, Rule 58. N.C. Gen. Stat. § 7B-1113 (2003).

The order terminating respondent's parental rights was entered on 29 April 2004. The notice of appeal, filed 10 May 2004, states that the appeal was from entry of an order on 21 January 2004. The order entered in this matter on 21 January 2004 was an order continuing the matter until 30 January 2004. Consequently, no proper notice of appeal of the order terminating respondent's parental rights was ever given.[2] However, all arguments presented by respondent and petitioner in their briefs have addressed issues raised by the order entered 29 April 2004 terminating respondent's parental rights. The appointment of appellate counsel filed one day after the notice of appeal indicated that the appeal pertained to the 29 April order. It is clear from the record before this Court that respondent intended to appeal the order entered on 29 April 2004 and that the use of the 21 January 2004 date was a mere scrivener's error.

Failure to comply with the requirements of Rule 3 of our Rules of Appellate Procedure requires the dismissal of the appeal as this rule is jurisdictional. *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997); *Foreman v. Sholl*, 113 N.C. App. 282, 291, 439 S.E.2d 169, 175 (1994). However, under appropriate circumstances this Court is authorized to issue a writ of certiorari to review the orders of a trial tribunal when the right of appeal has been lost due to failure to take timely action. N.C.R. App. P. 21(a)(1) (2005). This Court can exercise its discretion and treat an appellant's appeal as a petition for a writ of certiorari. *Cox v. Steffes*, 161 N.C. App. 237, 587 S.E.2d 908 (2003); *State v. Jarman*, 140 N.C. App. 198, 201, 535 S.E.2d 875, 877 (2000). In light of the serious consequences of the termination of parental rights, the lack of objection to this error by appellees

2. As noted *infra*, the notice of appeal was timely filed from the 29 April 2004 order.

and the fact that the order referenced in the notice of appeal was clearly an error, we choose to exercise our discretion and grant certiorari in this case and review the order terminating respondent's rights on the merits.

[2] Respondent's first argument is that the trial court committed prejudicial error by failing to rule on his motion to dismiss. Prejudicial error is defined as whether "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." N.C. Gen. Stat. § 15A-1443(a) (2003). Defendant bears the burden of proving prejudicial error. *Id.*

Wayne County DSS argues respondent was responsible for calendaring the motion for hearing and because respondent failed to do so, the court was not required to hear the motion. However, Rule 3.9 of the Eighth Judicial District Family Court Rules specifies motions will be set for hearing by the case manager. Therefore DSS's argument is without merit. In light of the nature of these proceedings it is extremely important that the grounds for respondent's motion at least have been considered, if not heard, by the trial court prior to terminating respondent's parental rights. There is no evidence in the record showing the trial court specifically considered respondent's motion to dismiss and then declined to hear it.

Respondent's motion to dismiss was based on the fact he had not been present at the adjudication or reviews in the underlying file upon which this termination proceeding was based. In its termination order the trial court made findings of fact addressing this issue. The trial court found that respondent had been brought to court from prison on only one occasion regarding a matter in the underlying file, but had been served properly. It is also notable, however, that respondent was represented by counsel at all but one of the hearings in the underlying matter. As the trial court clearly considered the issues upon which respondent's petition was based and found them unpersuasive, there is not a reasonable possibility that a different result would have been reached if the error had not been made. Accordingly, we hold that the trial court's failure to hear respondent's motion to dismiss does not constitute prejudicial error.

[3] Respondent next argues the trial court committed prejudicial error in finding he had stipulated, through his attorney:

> [T]hat the juvenile was born out of wedlock and that he, Eddie Ray M[ ], has not prior to the filing of this petition to terminate

> his parental rights established paternity judicially, or by affidavit which has been filed in a central registry maintained by the Department of Human Resources or legitimated the child pursuant to the North Carolina General Statutes 49-10, or filed a petition for this specific purpose; or legitimated the child by marriage to the mother of the child; or provided substantial financial support or consistent care with respect to the child and the mother.

Respondent contends that the trial court's finding constituted prejudicial error because this finding was not the stipulation made by his attorney. We agree that the stipulation made by respondent's attorney did not encompass all of the elements attributed to it by the trial court.

"[S]tipulations are judicial admissions and are therefore binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish an admitted fact." *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981) *(citing Smith v. Beasley*, 298 N.C. 798, 259 S.E.2d 907 (1979)). If respondent's attorney had, in fact, stipulated to all of the facts the trial court found her to have stipulated to, there would have been no need for further findings of fact on the issue of whether grounds existed to terminate respondent's parental rights. However, the actual stipulation made by respondent's attorney was far more limited:

> Judge, I'll be glad to stipulate that there were grounds on the mom, that the mom has relinquished that my client has been incarcerated since prior to the child's birth and that he hasn't filed any judicial documents related to paternity in the Clerk of Court's office in Wayne County. And I don't think he has an objection to that. He understands that the alternative would be that we sit here and listen to the grounds on the mom, and we really don't have any grounds to contest that. He has been incarcerated since 1997, due to be released in May. But we do—we'd like to present evidence.

This stipulation spoke only to respondent's failure to legitimate, or attempt to legitimate, the child as provided under N.C. Gen. Stat. § 49-10 (2003), which provides in part:

> The putative father of any child born out of wedlock, whether such father resides in North Carolina or not, may apply by a ver-

ified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate.

When construing a stipulation a court must attempt to effectuate the intention of the party making the stipulation as to what facts were to be stipulated without making a construction giving the stipulation the effect of admitting a fact the party intended to contest. *Rickert v. Rickert*, 282 N.C. 373, 380, 193 S.E.2d 79, 83 (1972). The actual stipulation in this case clearly was intended to stipulate only to respondent's failure to legitimate I.S. under the provisions of N.C. Gen. Stat. § 49-10 and cannot properly be construed as it was by the trial court without admitting facts respondent clearly did not intend to admit. Accordingly, this assignment of error is sustained.

[4] Respondent's next assignment of error is that the trial court committed prejudicial error when it concluded as a matter of law grounds existed for the termination of respondent's parental rights as that conclusion was not supported by sufficient evidence. The ground upon which respondent's parental rights were terminated was N.C. Gen. Stat § 7B-1111(a)(5) (2003), which provides:

(a) The court may terminate the parental rights upon a finding of one or more of the following:

(5) The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights:

a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or

b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or

c. Legitimated the juvenile by marriage to the mother of the juvenile; or

d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

When basing the termination of parental rights on this statutory provision the court must make specific findings of fact as to all four subsections and the petitioner bears the burden of proving the father has failed to take any of the four actions. *In re Harris*, 87 N.C. App. 179, 360 S.E.2d 485, 490 (1987).

Here the trial court found respondent had stipulated to all four of the subsections of N.C. Gen. Stat. § 7B-1111(a)(5). As discussed *supra*, only subsection (b) was stipulated to and, consequently, the trial court was required to make specific findings of fact as to each of the remaining subsections.

The petitioner bears the burden of proving a father has failed to take any of the four actions enumerated under N.C. Gen. Stat. § 7B-1111(a)(5). *In re Harris*, 87 N.C. App. at 188, 360 S.E.2d at 490. The trial court did make specific findings of fact, supported by competent evidence, regarding respondent's failure to provide substantial support to I.S. when it found respondent had not sent any portion of the wages he earned in prison for the support of the juvenile. The trial court did not, however, make any findings of fact, nor was there any evidence in the record, regarding respondent's marital status to the mother of I.S. nor whether any inquiry was made of the Department of Health and Human Services as to whether respondent had filed an affidavit with it to establish paternity. We hold, therefore, that petitioner failed to meet its burden of proof and the trial court committed prejudicial error in concluding grounds existed for terminating respondent's parental rights.

[5] Respondent further argues the trial court erred in its finding of fact that respondent had the means and ability to legitimate the child or establish paternity as this was not supported by the facts and evidence. Evidence was presented that showed respondent earned wages while incarcerated which were sufficient to purchase postage and writing materials and respondent had sent correspondence while in prison to the child's mother as well as to the Clerk of Court in this matter. Respondent had the ability to file an affidavit with the Department of Health and Human Services or a petition with the court to establish paternity just as he had filed correspondence with the clerk of court in this action. We find this evidence sufficient to support the trial court's finding of fact that respondent had the means and ability to establish paternity or legitimate the child in spite of his incarceration.

[6] Although we need not reach respondent's final argument regarding the disposition phase of the proceedings, we feel it important to note the proper standard for the determination of whether the termination of the parental rights is in the best interest of the child. Here, the trial court stated that it was unable to find by clear, cogent and convincing evidence that it was not in the best interest of the child to terminate respondent's parental rights. Although the trial court must find that at least one ground for the termination of parental rights under N.C. Gen. Stat. § 7B-1111 exists based on clear, cogent and convincing evidence, the determination of whether it is in the best interest of the child to terminate parental rights is in the discretion of the trial court. *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001).

Because the court's findings are insufficient to terminate respondent's parental rights the order is reversed.

Reversed.

Judges HUNTER and BRYANT concur.

WENDY ANN FORD, PLAINTIFF v. TIMOTHY OWEN WRIGHT, DEFENDANT

No. COA04-694

(Filed 3 May 2005)

1. Child Support, Custody, and Visitation— custody—appellate review—standard

In reviewing a motion for modification of child custody, an appellate court must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. The trial courts have broad discretion in child custody matters; if there is substantial evidence to support the trial court's findings, those findings are conclusive on appeal even if contrary findings might be supported from the same record.

2. Child Support, Custody, and Visitation— custody—change of circumstances—parents' communication

The evidence in a change of custody proceeding that the parents were not communicating successfully about their child's

welfare was not sufficiently substantial to support findings that the parents' failure to communicate had jeopardized the success of the prior joint custodial arrangement. There was ample evidence that plaintiff and defendant had disagreements and verbal disputes, but had developed ways to communicate regarding their son's welfare. Furthermore, as the court had already considered the parties' past domestic troubles and communications difficulties in a prior order, modification was not in order without findings of additional changes in circumstances or conditions.

3. Child Support, Custody, and Visitation— custody—change of circumstances—emotional trauma to child

In a change of custody proceeding, the evidence was not substantial that unresolved issues and disagreements resulted in emotional trauma or harm to the child. Other than plaintiff's testimony regarding the child's normal reaction to a parental disagreement, no testimony was offered which supported a finding of emotional harm, and there was ample evidence supporting a finding that the child was happy.

4. Child Support, Custody, and Visitation— custody—change of circumstances—alcohol use by parent

The trial court in a custody proceeding did not make findings on the impact of the father's alcohol use on the welfare of the child, even though the evidence supported the court's finding about the father's alcohol use, and the finding on alcohol use did not demonstrate a substantial change of circumstances warranting a modification of custody. Although a specific finding on the welfare of the child is not necessary when it is self-evident, the findings here do not permit such a conclusion.

5. Child Support, Custody, and Visitation— support—father's income from trades—evidence sufficient

The testimony in a child support case supported findings about the father's employment in a variety of trades.

6. Child Support, Custody, and Visitation— support—findings—insufficient

The trial court's conclusion about child support was not supported by the findings where the court made no findings about the father's present earnings, no findings about a reduction in income in bad faith that would support application of the earnings capacity rule, and no findings about a substantial

change in defendant's income compared to findings in the previous order.

Appeal by defendant from an order entered 16 December 2003 by Judge Marvin P. Pope, Jr. in Buncombe County District Court. Heard in the Court of Appeals 27 January 2005.

Ingrid Friesen, P.A., by Ingrid Friesen, for plaintiff-appellee.

Mary Elizabeth Arrowood for defendant-appellant.

HUNTER, Judge.

Timothy Owen Wright ("defendant") appeals from an order modifying child custody and support entered 16 December 2003. As we find the trial court erred in its findings of fact and conclusions of law as to modification of custody and conclusions of law as to the award of support, we reverse the order for the reasons stated herein.

Wendy Ann Ford ("plaintiff") and defendant are the parents of a minor child ("J.J.W."), born 13 May 2000. Plaintiff and defendant were unmarried, but lived together prior to and for a short time following J.J.W.'s birth. Following their separation, plaintiff filed for custody of J.J.W. and child support on 6 November 2000, and defendant counterclaimed for custody and child support. The trial court, in an order dated 29 March 2001, made findings of fact which included incidents of domestic violence that had occurred between the parties, potential substance abuse problems on the part of defendant, and difficulties between the parties in communication due to the domestic violence. The trial court also found that both parties were "caring and concerned parents" and that it was in the best interest of the child that custody be shared jointly between the parties. The order also specified a physical custodial arrangement wherein J.J.W. would reside primarily with plaintiff, with defendant having custodial time weekly on Monday, Wednesday, and Friday from 6:30 a.m. until 4:30 p.m., and every other weekend from 6:00 p.m. on Saturday until 3:00 p.m. on Sunday. Finally, the trial court ordered defendant to pay child support to plaintiff in the amount of $357.00 per month.

The parties briefly attempted an unsuccessful reconciliation after the entry of the March 2001 custody order. Following their failed reconciliation, the parties' relations continued to be strained, resulting in verbal disputes when exchanging the child. Despite these disagreements, the parties mutually modified the custody order so that

defendant consistently received more weekend time with J.J.W. than mandated by the custody order for several months. After continued deterioration of the parties' ability to communicate, and changes to the voluntary modifications of the custody order, defendant filed a motion, on 30 May 2002, seeking modification of child custody and support. On 11 December 2002, plaintiff filed a motion for protection from domestic violence and to modify custody.

Despite their friction, the parties again mutually modified the terms of the order and increased J.J.W.'s placement time in day care, as well as modified respective custody schedules and child support obligations. These changes were memorialized in a memorandum of judgment on 29 January 2003 and a consent order was entered on 7 April 2003. Defendant withdrew his consent to the order on 2 September 2003, and the memorandum was set aside by the trial court after a determination that defendant did not fully understand the terms and conditions of the memorandum, which gave plaintiff sole custody of J.J.W. The parties agreed, however, that the terms of the consent order would remain in place until the pending motions for modification were heard in December 2003, and a consent judgment to that effect was entered on 14 November 2003.

On 16 December 2003, an order was entered which granted plaintiff sole legal and physical custody of J.J.W., and liberal visitation with defendant. The order established a visitation schedule, including holidays, and increased defendant's child support payments to $762.00 per month. Defendant appeals.

I.

In related assignments of error, defendant first contends the trial court erred in (1) finding facts of a substantial change of circumstances unsupported by the evidence, and (2) concluding that a substantial change of circumstances affecting the welfare of the minor child had occurred which justified modification of the prior order. We agree.

[1] N.C. Gen. Stat. § 50-13.7(a) (2003) states in pertinent part: "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[.]" In *Tucker v. Tucker*, 288 N.C. 81, 216 S.E.2d 1 (1975), the Supreme Court noted the rationale for this requirement.

> " 'A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests,

> unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.'["]
>
> " 'We hold that there must be a finding of fact of changed conditions before an order may be entered modifying a decree of custody. . . .' "

Tucker v. Tucker, 288 N.C. at 87, 216 S.E.2d at 5 (citations omitted). Our courts have held that "the modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances." *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974). In reviewing a motion for modification of child custody, an appellate court "must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Shipman v. Shipman* 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citations omitted). "Our trial courts are vested with broad discretion in child custody matters. . . . Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence ' "might sustain findings to the contrary." ' " *Id.* at 474-75, 586 S.E.2d at 253-54 (citations omitted).

A. Failure to Communicate

[2] Here the trial court found the parties' failure to communicate constituted a substantial change of circumstances necessitating alteration of the joint custody arrangement. The trial court made findings that the parties had attempted an unsuccessful reconciliation after the entry of the 2001 order, and that subsequent to their efforts to reunite, communication between the parties had been unsuccessful. The trial court also found that issues relating to domestic violence had not been effectively resolved and had resulted in emotional trauma to the minor child. The trial court further found that the par-

ents' failure to communicate regarding issues with the minor child had jeopardized the success of the joint custodial arrangement of the previous order.

A review of the record on appeal shows a lack of substantial evidence to support these findings. The trial court did not make specific findings of instances where the parties' failure to communicate subsequent to the prior custody order had affected the welfare of the child. A review of the record showed ample evidence that although plaintiff and defendant had disagreements and verbal disputes, they had developed ways to communicate regarding the welfare of their son. Both parties testified that they communicated about the child's health, and that upon request by plaintiff, defendant had delivered medicine to the child's pre-school and had cared for the child at unscheduled times. Plaintiff testified that she and defendant had discussed the child's best interest with regard to childcare, both as to choice of daycare and as to the number of days per week which the child would attend. Plaintiff also testified that the parties had discussed holiday arrangements, had split every holiday, and for Mother's and Father's Day had consented to allow the appropriate party keep the child overnight.

Following entry of the consent order in April 2003, defendant and plaintiff both testified that, as a result of past disputes, they primarily limited their contact to telephone conversations and to exchanges of notes passed through the child's bookbag. Defendant testified that on occasions when he and plaintiff had met to exchange the child at the police station, their communication was direct and with no problems. Plaintiff testified that she believed that the process of notes and telephone contact, although not the best way for parents to communicate generally, was the best way for the parties in this case. Thus, we fail to find substantial evidence of unsuccessful communication by the parties as to the welfare of the child.

[3] Substantial evidence also fails to support the trial court's finding that the unresolved issues and disagreements resulted in emotional trauma or harm to the child.

Plaintiff testified that a disagreement occurred regarding weekend visitation during an exchange of the child, and that defendant began yelling expletives at her. Plaintiff stated that she did not recall on that occasion how J.J.W. reacted. Upon further questioning about an earlier disagreement in the Bi-Lo parking lot while exchanging the child, plaintiff stated she "believe[d J.J.W.] got very upset. He

repeated that to me that evening, the words that he heard [defendant] use." When asked what she meant by upset, plaintiff testified that J.J.W. had cried. Such a statement alone fails to provide evidence a reasonable mind might accept as adequate to support the conclusion that the child had experienced emotional trauma. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

Other than plaintiff's testimony regarding the child's normal reaction to a parental disagreement, no testimony was offered which supported a finding of emotional harm. Indeed, the trial court made a specific finding of fact as to the current condition of the minor child:

> The minor child . . . is a very smart child with a good vocabulary, very inquisitive and very happy. That the Plaintiff-Mother and Defendant-Father are both involved in the care, education and welfare of the minor child. . . . The minor child loves both his parents.

Ample testimony by daycare workers, grandparents, individuals who knew the parties, and both parents supported this latter finding. Therefore, we fail to find substantial evidence of emotional harm to the child.

[2] We further note, that even assuming *arguendo* that the evidence was sufficient to support the finding as to the parties' difficulties in communication, such findings fail to support the conclusion that a substantial change had occurred since entry of the previous order. In the 29 March 2001 custody order, the trial court found:

> 5. There have been several incidents of domestic violence by the Defendant against the Plaintiff[.]
>
> . . .
>
> 9. Defendant testified that the Plaintiff had a violent temper, and that he was concerned that Plaintiff might unintentionally harm the child. . . .
>
> . . .
>
> 10. As a result of the history of domestic violence, the parties have difficulties communicating with each other.

The trial court's findings in the 16 December 2003 order reveal no substantial change from the prior order. There, the trial court found that:

b. The parties have attempted communication with each other however this has been unsuccessful.

c. The parties have modified and changed the visitation set forth by the Court in the previous Order to accommodate their individual needs which has lead [sic] to further communication difficulties between the parents.

d. The issues pertaining to domestic violence have not been effectively resolved between the parties resulting in emotional trauma to the minor child.

The trial court's findings reflect no substantial changes in the parties' communication difficulties from the prior order. As the trial court had already considered the parties' past domestic troubles and communication difficulties in the prior order, without findings of additional changes in circumstances or conditions, modification of the prior custody order was in error. *See Tucker*, 288 N.C. at 87, 216 S.E.2d at 5.

B. Alcohol Usage

[4] The trial court also made a finding regarding defendant's alcohol use.

8. ALCOHOL USAGE: That the Defendant-Father has continued to use alcohol and has had the odor of alcohol on his person on at least four occasions when observed by independent day care workers. That although the day care workers did not contact the Department of Social Services for Buncombe County, North Carolina, since the Defendant-Father was not transporting the minor child, they did write the incidents in the child's file on August 24, 2001, February 19, 2002, September 29, 2003 and September 29, 2003. Jennifer Garett, Day Care Center Manager, confronted the Defendant-Father about the odor of alcohol on his person and the Defendant became angry and walked away. That the Plaintiff-Mother has also smelled the odor of Listerine and alcohol on the Defendant-Father since the March 29, 2001 Order. The Defendant-Father admits to social drinking of alcohol. The Plaintiff-Mother observed the Defendant-Father drink on a daily basis during their period of reconciliation during the summer of 2001.

Competent evidence supports this finding, however, the trial court made no further findings of fact as to the impact of this fact on

the welfare of the child. Our courts have held that "[t]he welfare of the children is the determining factor in the custody proceedings[.]" *In re Poole*, 8 N.C. App. 25, 29, 173 S.E.2d 545, 548 (1970). Although our Supreme Court has held that in some circumstances a trial court's order will not be found incomplete for failure to include a specific finding as to how a change of circumstances affects the welfare of the child, when such circumstances are self-evident, the Court has also recognized that "the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child[.]" *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255.

Here, the trial court's findings regarding defendant's use of alcohol do not permit a self-evident conclusion as to the effect of such behavior on the welfare of the child, particularly in light of the trial court's additional findings that the defendant-father is very involved in the care, education, and welfare of the child and that he is a fit and proper person to have care and custody of the child. Therefore the trial court's finding as to defendant's alcohol usage fails to demonstrate a substantial change of circumstances warranting modification of custody.

As the record fails to show competent evidence that a substantial change of circumstances affecting the welfare of the child occurred, we find the trial court erred in its findings as to modification of joint custody.

II.

In his next related assignments of error, defendant contends the trial court erred in (1) finding facts concerning defendant's employment which were unsupported by the evidence, and (2) imputing income to defendant for the purposes of modifying child support. We find no error in the trial court's findings of fact, however, we agree there was error in the conclusion of law.

A. Findings of Fact as to Defendant's Employment

[5] As noted *supra*, the trial court's findings "are conclusive on appeal, even if record evidence ' "might sustain findings to the contrary." ' " *Shipman*, 357 N.C. at 474-75, 586 S.E.2d at 254.

The trial court here found that defendant was self-employed as a landscaper, mason, carpenter, welder, and mover, and earned between $10.00 and $35.00 per hour. Testimony by witnesses for both defendant and plaintiff provided evidence that defendant was self-

employed and engaged in a variety of trades, including those found by the trial court. Further, testimony as to defendant's hourly wages was offered which supports the trial court's findings as to the monetary amounts. Therefore the trial court did not err in its findings of fact regarding defendant's employment.

B. Imputation of Income

[6] Defendant contends the trial court improperly imputed income to him in estimating his annual gross income as $31,200.00. Modification of child support, as well as child custody, requires a showing of a substantial change of circumstances affecting the welfare of the child. *See Blackley*, 285 N.C. at 362, 204 S.E.2d at 681. In the 29 March 2001 custody order, the trial court made the following factual findings as to defendant's income:

> Defendant is self-employed primarily in landscaping but he also does other construction jobs. He works 25 to 35 hours per week, and charges between $15 and $35 per hour. It appears from his 1999 tax return that in his business his gross earnings were $20,435, and that after deduction of expenses he showed a new profit of $3064 for the year. However Plaintiff testified that during the two years they were together he always had money for groceries, utilities, recreation, eating out, as well as other necessary items. The court finds that for purposes of calculating child support, the Defendant's gross income is $1200 per month.

Based on these findings, the trial court awarded child support in the amount of $357.00 per month.

In the 16 December 2003 order, the trial court made similar findings as to the father's employment and wages, but imputed additional earnings to defendant.

> That the Defendant is self-employed as a landscaper, mason[], carpenter, welder, mover of antique furniture and earns between $10 per hour to $35.00 per hour with his truck. The Court finds that an average reasonable average income for the Defendant-Father is $15.00 per hour for a 40 hour week based upon his age, experience, work ethic, work experience, skills, knowledge and job performance as testified to by the witnesses for the Defendant and the Plaintiff. . . .

Despite his testimony that his actual gross income was $4,916, the trial court imputed to defendant an annual gross income of $31,200.

The trial court made no additional findings as to defendant's income, but awarded child support in the amount of $762.70.

Ordinarily, gross income for self-employed individuals is determined under the North Carolina Child Support Guidelines, AOC-A-162, Rev. 10/02, as "gross receipts minus ordinary and necessary expenses required for self-employment[.]" "In determining the ability of the father to support the child, the court ordinarily should examine the father's present earnings[.]" *Holt v. Holt*, 29 N.C. App. 124, 126, 223 S.E.2d 542, 544 (1976) (emphasis omitted). This Court has held that in determining whether income should be imputed for child support obligations, the primary issue is "whether a party is motivated by a desire to avoid his reasonable support obligations" by "intentionally depressing his income to an artificial low[.]" *Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002). To apply the earnings capacity rule, the court must have sufficient evidence of proscribed intent. *Id.*

Here, the trial court made no findings as to defendant's present earnings, nor as to defendant's reduction of income in bad faith that would support application of the earnings capacity rule. *See Holt*, 29 N.C. App. at 127, 223 S.E.2d at 544. Further, the trial court made no findings as to a substantial change in defendant's income compared to the findings in the previous order. Therefore the trial court's conclusion and order that defendant pay $762.70 per month in child support is not supported by the findings.

In conclusion, the trial court erred in its findings of fact that a substantial change of circumstances affecting the welfare of the child had occurred, and further erred in imputing income with no finding of bad faith on the part of defendant. The trial court's order is therefore reversed.

Reversed.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. LEE EDWARD NETTLES

No. COA04-583

(Filed 3 May 2005)

1. Drugs— possession with intent to manufacture, sell, or deliver cocaine—motion to dismiss—constructive possession

The State presented sufficient evidence that defendant constructively possessed cocaine, because: (1) although defendant did not physically possess the cocaine, the evidence tended to show he constructively possessed the cocaine found in the pertinent car by exercising some control and dominion over the cocaine; and (2) although defendant's control over the car and residence was not exclusive, the evidence suggests incriminating circumstances, other than defendant's control of the premises, sufficient to permit the jury to infer constructive possession.

2. Drugs— possession with intent to manufacture, sell, or deliver cocaine—motion to dismiss—intent to sell or deliver drugs

The trial court erred by denying defendant's motion to dismiss the charge of possession with intent to manufacture, sell, or deliver cocaine based on insufficient evidence to show defendant intended to manufacture, sell, or deliver the cocaine found on the premises, and the case is remanded for resentencing on the lesser-included charge of possession of cocaine, because: (1) a controlled substance's substantial amount may be determined by comparing the amount possessed to the amount necessary to constitute a trafficking offense, and N.C.G.S. § 90-95(h)(3) provides that in order to be guilty of trafficking cocaine, an individual must possess at least twenty-eight grams or more of cocaine or any derivative thereof; (2) defendant possessed four to five crack cocaine rocks which weighed 1.2 grams, or .04% of the requisite amount for trafficking, and thus it cannot be inferred that defendant had an intent to sell or distribute from such a de minimus amount alone; (3) the State was required to present either direct or circumstantial evidence of an intent to sell, and there was no testimony that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs; (4) defendant's actions were not similar to the actions of a drug dealer when he was home sick with a cold, the drugs were found outside his home in a parked car, and there was not a large amount of cash

found; (5) although officers testified that they found a safety pin that is typically used by crack users to clean a crack pipe, there were no other drugs or drug paraphernalia typically used in the sale of drugs found on the premises; (6) viewed in the light most favorable to the State, the evidence tended to indicate that defendant was a drug user instead of a drug seller; and (7) a deputy's opinion testimony about the four to five rocks of crack cocaine, without other circumstantial evidence of defendant's intent, is insufficient to submit the issue of intent to sell and deliver to the jury.

3. Sentencing— habitual felon—possession of cocaine a felony

The trial court did not lack jurisdiction to consider the habitual felon indictment even though defendant contends his prior conviction of possession of cocaine was a misdemeanor under N.C.G.S. § 90-95, because: (1) our Supreme Court has held that possession of cocaine is a felony and therefore can serve as an underlying felony to an habitual felon indictment; and (2) defendant was previously convicted of three felony offenses, including the offense of felony possession of cocaine.

4. Appeal and Error— preservation of issues—failure to raise or argue issues

Defendant abandoned his remaining four assignments of error under N.C. R. App. P. 28(b)(6) based on his failure to bring forward or argue these issues.

Appeal by defendant from judgment entered 29 October 2003 by Judge Edwin G. Wilson, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 16 February 2005.

Attorney General Roy A. Cooper III, by Assistant Attorney General Angel E. Gray, for the State.

Ligon and Hinton by Lemuel W. Hinton, for defendant-appellant.

JACKSON, Judge.

On 24 October 2003, a jury found defendant guilty of possession with intent to manufacture, sell, or deliver cocaine. As a level three offender, defendant pled guilty to obtaining habitual felon status and was sentenced to the North Carolina Department of Correction for ninety-three months minimum and 121 months maximum.

On 16 January 2002, Randolph County Sheriff's Department executed a search warrant at defendant's home, which was owned jointly by defendant and his siblings. Deputy Timothy James ("Deputy James") searched the living room and bedroom of defendant's home and seized a safety pin in the living room. The State Bureau of Investigation (the "SBI") later determined the head of the safety pin contained a residual amount of cocaine. Deputy James also seized a Certificate of Title for a Mercedes Benz registered to Charles Nettles ("Nettles"), defendant's deceased nephew, an expired insurance policy for the Mercedes Benz insured in defendant's name, and four hundred and eleven dollars from defendant's pocket.

Defendant consented to a search of four vehicles in the yard, including the Mercedes Benz. Deputy James Martin ("Deputy Martin") searched the Mercedes Benz, using one key defendant gave to him from his pant's pocket to open the vehicle, and found 1.2 grams of cocaine under the floor mat rolled in a napkin and a registration card for the Mercedes Benz. Photographs taken of the vehicle also showed that the passenger side window was rolled down about one to two inches. Defendant testified that the window to the vehicle could not be rolled up, the windows always stayed halfway open, and people occasionally slept in the vehicles. Defendant also testified that his niece had cashed his social security check, used an amount to purchase medication, and returned the remaining four hundred and eleven dollars to him. Earl Kimes ("Kimes") testified that within three days of the search, other people visited defendant's home and that the windows on the Mercedes Benz were not rolled up.

At the close of the evidence, the trial court denied defendant's motion to dismiss the charge of possession with intent to sell, deliver, or manufacture cocaine. Defendant was convicted under N.C. Gen. Stat. § 90-95(a)(1) (2003), which prohibits possession with intent to sell or deliver a controlled substance. The elements of the crime of possession with intent to manufacture, sell, or deliver cocaine are: (1) illegal possession of cocaine, and (2) intent to sell or deliver the cocaine. N.C. Gen. Stat. § 90-95(a)(1); *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985). Defendant contends the trial court erred when it allowed the State to submit the charge of possession with intent to sell or deliver a controlled substance to the jury. We disagree.

A trial court properly denies a defendant's motion to dismiss if it finds the State presented substantial evidence of: (1) each essential

element of each offense defendant was charged with; and (2) defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002) (*quoting State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)), *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002); *see also 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." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585 (1984) (*citing State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)). When ruling on a defendant's motion to dismiss, the trial court must: (1) determine whether the evidence presented is substantial, which is a question of law for the court, and (2) consider the evidence in the light most favorable to the State. *State v. Turner*, 168 N.C. App. 152, 154-55, 607 S.E.2d 19, 22 (2005); *State v. Tisdale*, 153 N.C. App. 294, 296, 569 S.E.2d 680, 682 (2002). "If the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *Id.* at 297, 569 S.E.2d at 682 (*quoting State v. Grigsby*, 351 N.C. 454, 456-57, 526 S.E.2d 460, 462 (2000)).

[1] Defendant contends the trial court erred when it determined the State presented substantial evidence that defendant constructively possessed cocaine. " ' "Possession of controlled substances may be either actual or constructive." ' " *State v. Boyd*, 154 N.C. App. 302, 306, 572 S.E.2d 192, 195 (2002) (*quoting State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996)). ' "Where contraband is found on premises under the control of the defendant, that in itself is sufficient to go to the jury on the question of constructive possession." ' *Id.* *(quoting State v. Peek*, 89 N.C. App. 123, 126, 365 S.E.2d 320, 322 (1988)); *see also State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (defendant constructively possessed narcotics when he had the "intent and capability to maintain control and dominion over the narcotics") (*citing State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983)). In addition, our Supreme Court has stated that the State must show " 'other incriminating circumstances before constructive possession may be inferred.' " *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001) (*quoting State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)).

This Court previously has stated that an inference of constructive possession arises when the State's evidence shows a defendant was the "custodian of the vehicle where the controlled substance was

found." *Tisdale*, 153 N.C. App. at 297-98, 569 S.E.2d at 682 (2002) (*citing State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984)). Here, Defendant gave police officers permission to search the Mercedes Benz and a key to the Mercedes Benz from his front pants pocket. An auto registration card for the vehicle and auto insurance policy for the Mercedes Benz listed defendant as the owner. Defendant also placed a license plate on the Mercedes Benz from defendant's previous vehicle.

When a defendant is charged with possession of a contraband, the State is not required to show defendant had actual possession of the contraband. *Tisdale*, 153 N.C. App. at 297, 569 S.E.2d at 682 (*citing State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986)). Our Supreme Court explicitly has held that the "prosecution is not required to prove actual physical possession of the [contraband] materials." *Id.* (*citing State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986)). A defendant can be charged with constructively possessing contraband when the defendant has the intent and ability to exhibit control and dominion over the contraband. *Tisdale*, 153 N.C. App. at 297, 569 S.E.2d at 682 (*citing State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)).

In the instant case, although defendant did not physically possess the cocaine, the evidence presented at trial tended to show he constructively possessed the cocaine found in the Mercedes Benz by ' "exercis[ing] [some] control and dominion over" ' the cocaine. *State v. Matias*, 143 N.C. App. 445, 448, 550 S.E.2d 1, 3 (2001), *aff'd*, 354 N.C. 549, 556 S.E.2d 269 (2001); *Boyd*, 154 N.C. App. at 306, 572 S.E.2d at 195 (2000) (*quoting Peak*, 89 N.C. App. at 126, 365 S.E.2d at 322). And though his control over the Mercedes Benz and residence was not exclusive, "the evidence . . . suggests incriminating circumstances, other than defendant's control of the premises, sufficient to permit the jury to infer constructive possession." *State v. Alston*, 91 N.C. App. 707, 710, 373 S.E.2d 306, 309 (1988).

Here, only defendant was present during the search of the premises, and he consented to that search. During the search, police officers found on the premises four hundred and eleven dollars in cash on defendant's person, 1.2 grams of cocaine rolled in a napkin under the floor mat in the Mercedes Benz, a safety pin with cocaine residue on its tip in the living room of the home, and letters, papers, and registration forms with defendant's name on them in the Mercedes Benz, the living room, and defendant's bedroom.

"Our appellate courts have previously held that similar circumstances involving close proximity to the controlled substance . . . are sufficient to permit a jury to find constructive possession." *Turner*, 168 N.C. App. at 156, 607 S.E.2d at 22. "These circumstances, coupled with defendant's nonexclusive control of the premises, were sufficient to allow the jury to infer defendant had constructive possession of the cocaine." *Alston*, 91 N.C. App. at 711, 373 S.E.2d at 310. Accordingly, this assignment of error is overruled.

[2] We now turn to the issue of whether defendant intended to manufacture, sell, or deliver the cocaine found on the premises. Defendant contends that neither case law nor the legislature has set forth the minimum amount of a controlled substance required for this offense, but that it is clear from case law that the amount of controlled substance must be "substantial." Defendant further asserts that the cocaine amount of 1.2 grams did not exceed the traffic amount of twenty-eight grams, as required by state statute, and he only possessed the cocaine broken down into four to five crack-rocks for personal use. We agree.

The offense of possession with intent to sell or deliver has three elements: (1) possession of a substance; (2) the substance must be a controlled substance; and (3) there must be intent to sell or distribute the controlled substance. N.C. Gen. Stat. § 90-95(a)(1); *State v. Fletcher*, 92 N.C. App. 50, 55, 373 S.E.2d 681, 685 (1988). While intent may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred. *State v. Jackson*, 145 N.C. App. 86, 90, 550 S.E.2d 225, 229 (2001). Although "quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver," it must be a substantial amount. *State v. Morgan*, 329 N.C. 654, 659-60, 406 S.E.2d 833, 835-36 (1991). In examining the quantity of a controlled substance, our Supreme Court previously has stated:

> In discussing what quantity of controlled substance might suffice alone to support the inference that a defendant intended to transfer it to others, [the Supreme Court] has construed N.C.G.S. § 90-98 *in pari materia* with other provisions of the Controlled Substances Act, N.C.G.S. §§ 90-86 through 90-113.8 (1990), particularly those provisions governing trafficking under N.C.G.S. § 90-95 (1990). In [*State v. Williams*, 307 N.C. 452, 298 S.E.2d 372 (1983)] [the Supreme Court] noted that the amount of contraband seized "was over two-thirds the amount required to support a conviction of the crime of trafficking in . . . heroin," a fact satis-

> fying [the Supreme Court] that the amount seized was "a substantial amount and was more than an individual would possess for his personal consumption." *Williams*, 307 N.C. at 457, 298 S.E.2d at 376.

Morgan, 329 N.C. at 659-60, 406 S.E.2d at 836. In *Williams*, the defendant possessed 2.7 grams of heroin and, under North Carolina General Statutes, section 90-95(h)(4), the possession of at least four grams of heroin is required for trafficking in heroin. *Id.* Accordingly, a controlled substance's substantial amount may be determined by comparing the amount possessed to the amount necessary to constitute a trafficking offense. The North Carolina General Statutes provide that in order to be guilty of trafficking cocaine, an individual must possess at least twenty-eight grams or more of cocaine or any derivative thereof. *See* N.C. Gen. Stat. § 90-95(h)(3) (2003).

In the instant case, defendant possessed four to five crack cocaine rocks which weighed 1.2 grams, or .04% of the requisite amount for trafficking. Therefore, under our Supreme Court's holding in *Morgan*, it cannot be inferred that defendant had an intent to sell or distribute from such a de minimus amount alone. The State was required to present either direct or circumstantial evidence of an intent to sell. *See Morgan*, 329 N.C. at 659, 406 S.E.2d at 835 ("a jury can reasonably infer from the amount of the controlled substance found within a defendant's constructive or actual possession and from the manner of its packaging an intent to transfer, sell, or deliver that substance").

Based on North Carolina case law, the intent to sell or distribute may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia. *See State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996) (indicating an intent to sell or deliver cocaine could be inferred from observations of defendant conversing through car windows with known drug users and the discovery of two pill bottles with nine rocks of crack cocaine [weight not provided in opinion] in the defendant's possession); *State v. Alston*, 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988) (finding no error in the defendant's conviction for possession with intent to sell where there was 4.27 grams of cocaine in separate envelopes along with large rolls of currency); *State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31, 35 (2004) (indicating an intent to sell cocaine was established where there was 5.5 grams of crack cocaine, individually packaged in twenty-two pieces, placed in the corner of a paper bag).

None of these factors were present in this case. There was no testimony that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs. Defendant's actions were not similar to the actions of a drug dealer. Indeed, defendant was in his home sick with a cold and the drugs were found outside his home in a parked car. A large amount of cash was not found. The police officers found four hundred and eleven dollars on defendant's person, which defendant stated was part of the money he received from his five hundred and forty-seven dollar social security check. The police could not state with any certainty whether the money was in defendant's pocket or wallet and, after initially finding the money, they returned the money to defendant until after the drugs were found outside in the car. Also, the officers did not discover any other money on the premises. The officers found four to five crack rocks in the parked car. Although the officers testified that a safety pin typically is utilized by crack users to clean a crack pipe, there were no other drugs or drug paraphernalia typically used in the sale of drugs found on the premises. *See State v. Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (1987) (indicating an intent to sell or deliver drugs was established where twenty grams of cocaine was found along with a chemical used for diluting cocaine and one hundred small plastic bags in close proximity to the cocaine). Viewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller.

In *Turner*, this Court further rejected the use of opinion testimony, without more, as a basis for finding sufficient evidence of an intent to sell or deliver drugs. *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 23-24. In *Turner*, this Court looked to whether the defendant presented any evidence of "statements by defendant relating to his intent, of any sums of money found on defendant, of any drug transactions at that location or elsewhere, of any paraphernalia or equipment used in drug sales, of any drug packaging indicative of an intent to sell the cocaine, or of any other behavior or circumstances associated with drug transactions." *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24. The State argued there was sufficient evidence of the defendant's intent to sell in *Turner* based solely on a police officer's testimony that the street value of the ten crack cocaine rocks was between one hundred and fifty dollars to two hundred dollars, which was allegedly more than an amount a drug user would possess for personal consumption. *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 21, 23-24. In rejecting this testimony as a basis for affirming the denial of the motion to dismiss, this Court explained that without more, this

evidence, "raises only a suspicion . . . that defendant had the necessary intent to sell and deliver." *Id.* at 159, 607 S.E.2d at 24.

In the instant case, the State presented testimony by a police officer that the four to five crack rocks found in this case were the equivalent of twelve dosage units of .1 gram—each selling for twenty dollars per dose on the street. However, this testimony was identical to that which was rejected in *Turner.* Also, in contrast to *Turner*, the police officer did not testify that defendant possessed an amount that was more than a drug user normally would possess for personal use. This Court has rejected this type of evidence as the sole basis for finding an intent to sell. As explained in *Turner*,

> The State, for example, presented no evidence of statements by defendant relating to his intent, . . ., of any drug transactions at that location or elsewhere [by defendant], of any paraphernalia or equipment used in drug sales, of any drug packaging indicative of an intent to sell the cocaine, or of any other behavior or circumstances associated with drug transactions. The State's entire case rests only on a deputy's opinion testimony about what people "normally" and "generally" do. The State has cited no authority and we have found none in which such testimony—without any other circumstantial evidence of a defendant's intent—was found sufficient to submit the issue of intent to sell and deliver to the jury.

Id. at 158, 607 S.E.2d at 24.

Therefore there was insufficient evidence of defendant's intent to sell or deliver crack cocaine. This assignment of error is sustained, and it is therefore ordered by this Court that defendant's conviction be reversed for possession with intent to sell or distribute cocaine and remanded for resentencing, on the lesser included felony offense of possession of cocaine. *See State v. Battle*, 167 N.C. App. 733-34, 606 S.E.2d 418, 421 (*citing State v. Simmons*, 165 N.C. App. 685, 688, 599 S.E.2d 109, 112 (2004) ("recognizing possession of cocaine as a lesser-included offense of possession of cocaine with intent to sell")).

[3] Defendant also contends the trial court lacked jurisdiction to consider the habitual felon indictment because his prior conviction of possession of cocaine was a misdemeanor under N.C. Gen. Stat. § 90-95 (2003).

The Habitual Felons Act states, in pertinent part:

> Any person who has been convicted of or pled guilty to three felony offenses in any federal or state court in the United States or combination thereof is declared to be an habitual felon.

N.C. Gen. Stat. § 14-7.1(2003). Our Supreme Court has held that "possession of cocaine is a felony and therefore can serve as an underlying felony to an habitual felon indictment." *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125, 127 (2004). Defendant previously was convicted of three felony offenses, including the offense of felony possession of cocaine. Because our Supreme Court recently has held that defendant's offense of felonious possession of cocaine is a felony and can be included in defendant's habitual felon indictment, this assignment of error is overruled. *Jones*, 358 N.C. at 487, 598 S.E.2d at 134.

[4] Defendant failed to bring forward or argue the remaining four assignments of error. We deem these assignments of error abandoned. N.C. R. App. P. 28(b)(6) (2004).

Affirmed in part; reversed and remanded in part.

Judges HUNTER and CALABRIA concur.

GRANVILLE FARMS, INC., PLAINTIFF v. COUNTY OF GRANVILLE, DEFENDANT

No. COA04-234

(Filed 3 May 2005)

Environmental Law— local regulation of biosolids applications—preemption by state law

Granville County's biosolid application ordinance was preempted by state statutes and regulations and summary judgment was granted correctly for plaintiff biosolids application company. The state regulation is comprehensive and leaves no room for further local regulation. N.C.G.S. § 143-211(c).

Appeal by defendant from judgment entered 17 December 2003 by Judge Kenneth C. Titus in Granville County Superior Court. Heard in the Court of Appeals 13 October 2004.

Parker, Poe, Adams & Bernstein, LLP, by John J. Butler, for plaintiff-appellee.

Hopper & Hicks, LLP, by William L. Hopper and James C. Wrenn, Jr., for defendant-appellant.

North Carolina Association of County Commissioners, by General Counsel James B. Blackburn, III, amicus curiae.

STEELMAN, Judge.

Defendant, Granville County (County), appeals the trial court's entry of summary judgment in favor of plaintiff, Granville Farms, Inc. For the reasons discussed herein, we affirm the trial court.

Plaintiff, Granville Farms, is a farming and biosolids application company located in Granville County, North Carolina. It applies biosolids to land. Biosolids, also known as residuals, consist of the sludge generated from the treatment of domestic sewage in wastewater treatment plants. The predominant use of biosolids is land application to farms for fertilizer. At the time plaintiff instituted this lawsuit, it was applying biosolids to lands in Granville County including, but not limited to its own lands, pursuant to a permit issued by the North Carolina Department of Environment and Health (DENR). On 6 October 2003, the County adopted the Granville County Sludge and Septage Ordinance (ordinance). This ordinance imposed an additional layer of regulation, which required those in the business of land application of residuals to: (1) obtain a permit from the county in addition to the state permit; (2) pay substantial permitting fees; (3) record a warning in the chain of title of the property that biosolids had been applied to the land; (4) keep more extensive records than required by state regulations; and (5) provide additional and more detailed notice of the application of biosolids to local authorities. On 7 November 2003, plaintiff filed this action seeking to have the ordinance declared unlawful. Although the complaint contained eight separate claims for relief, plaintiff moved for summary judgment only as to its first claim, which alleged the ordinance was preempted by the existing scheme of comprehensive regulation by the State of North Carolina. The County also filed a motion for summary judgment relating only to plaintiff's first claim. The trial court granted plaintiff's motion for summary judgment, declaring the ordinance invalid and enjoining the County from enforcing it against plaintiff. Granville County appeals.

Summary judgment is proper when the pleadings, considered together with depositions, answers to interrogatories, admissions on file, and supporting affidavits show there to be no genuine issue regarding any material fact and that a party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2004). The trial court may grant a party's motion for summary judgment in cases requiring the interpretation of ordinances and statutes. *See Craig v. County of Chatham*, 356 N.C. 40, 565 S.E.2d 172 (2002). As with all matters involving the granting or denial of summary judgment, an appellate court reviews the trial court's decision *de novo*, with the evidence to be viewed in the light most favorable to the non-movant. *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713 (2004).

The sole issue before this Court is whether the ordinance was preempted because it purports to regulate a field for which a state or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation. *Accord Craig*, 356 N.C. at 45, 565 S.E.2d at 176.

We first review the state rules, regulations, and permit requirements pertaining to the land application of biosolids. Before a person or entity can apply sludge resulting from the operation of a treatment works to land, it must obtain a permit issued by the state. N.C. Gen. Stat. § 143-215.1(a)(9) (2004). The state agency responsible for issuing the permit and promulgating the rules for such application is the North Carolina Department of Environment and Natural Resources (DENR). The General Assembly created DENR to "administer a program of water and air pollution control and water resource management." N.C. Gen. Stat. § 143-211(c) (2004). By this statute, the General Assembly vested DENR with the authority "to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions." *Id.* The legislature also gave the North Carolina Environmental Management Commission (EMC) the authority to adopt rules necessary to fulfill the purposes of Article 21, which governs water and air resources. *See* N.C. Gen. Stat. § 143-215.3(a)(1) (2004). The state regulations involved in this case were not imposed directly by statute, but were promulgated by two state agencies, DENR and EMC. However, it is not necessary that state regulations preempting a county ordinance be imposed directly by the legislature in the form of a statute as long as the government agency imposing the regulations is authorized to

do so. *See Greene v. City of Winston—Salem*, 287 N.C. 66, 75, 213 S.E.2d 231, 237 (1975). Nor is it required that this authority be vested solely in one agency. *Id.*

Counties enjoy the power and authority to enact ordinances and by-laws relating to the "health, safety, or welfare of its citizens," N.C. Gen. Stat. § 153A-121 (2004). This power is limited where the ordinance is inconsistent with state or federal law. N.C. Gen. Stat. § 160A-174(b) (2004).[1] Although this statute is found in the statutes dealing with cities and towns, its provisions are also applicable to counties. *Craig*, 356 N.C. at 45, 565 S.E.2d at 176. An ordinance is deemed inconsistent where it "purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation[.]" N.C. Gen. Stat. § 160A-174(b)(5). If local ordinances are deemed inconsistent or conflict with state or federal laws, the ordinance will be deemed invalid. *Craig*, 356 N.C. at 44, 565 S.E.2d at 175. Ordinances and the laws of the state need to be in accord to avoid confusion among the state's citizens and to avoid dual regulation. *Id.*

In determining whether the General Assembly intended to provide statewide regulation of the land application of biosolids to the exclusion of local regulation, this Court must ascertain if the General Assembly "has shown a clear legislative intent to provide a 'complete and integrated regulatory scheme.' " *Id.* at 45, 565 S.E.2d at 176 (referring to N.C. Gen. Stat. § 160A-174(b)(5)).

Plaintiff's permit states that its activities are regulated pursuant to "the provisions of Article 21 of Chapter 143" of the General Statutes. The statement of purpose in Article 21 reads as follows:

> It is the purpose of this Article to create an agency which shall administer a program of water and air pollution control and water resource management. It is the intent of the General Assembly, . . . to confer such authority . . . as shall be necessary to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions.

---

1. Although the trial court's order held the County's ordinance invalid because it was "contrary to state law," there is no evidence in the record or the facts to suggest the court based its decision on any of the provisions listed in N.C. Gen. Stat. § 160A-174(b) other than subsection (b)(5). Both parties' briefs focus their arguments solely on the application of this subsection to the ordinance.

N.C. Gen. Stat. § 143-211(c). This statement of intent to provide a "complete program" strongly indicates the legislature intended to create a "complete and comprehensive statute." *See e.g.*, *Craig*, 356 N.C. at 48-9, 565 S.E.2d at 178 (finding statement that legislature intended to "promote a cooperative and coordinated approach to animal waste management among the agencies of the State" showed "an intention to cover the entire field of swine farm regulation in North Carolina"); *State v. Williams*, 283 N.C. 550, 553-54, 196 S.E.2d 756, 758-59 (1973) (finding the statement of purpose "to establish a uniform system of control" exhibited the legislature's intent to pre-empt local regulation).

If each county were free to create its own particularized regulations regarding land application of biosolids, the coordinated effort which the General Assembly referred to in the statute would fail. There can be no coordinated program if there exists a patchwork of local regulations governing the application of biosolids. The County's ordinance imposes a number of additional requirements upon an entity seeking to apply biosolids to farm lands. The state statute caps the annual fee for a permit to dispose of biosolids on 300 or more acres of land at $1,090.00. N.C. Gen. Stat. § 143-215.3D(a)(6) (2004). The ordinance requires an additional permit fee of $10.00 per acre. Plaintiff applies biosolids to 2774 acres in Granville County, which includes 515 acres of its own land. In order for plaintiff to obtain a county permit it would have to pay a total of $27,740.00 each year. In addition, the state regulations require the permit holder to give general notice to the local governmental agency (*i.e.* county manager, city manager, etc.) at least twenty-four hours *prior to* the application to any *new* land application site, and such notice need not be in writing. However, the County's ordinance requires the permittee to give written notice within four hours *after any* application of biosolids to *any* land in Granville County. The County's notice requirement also requires that the permit holder's written notice include the following information, which the state does not:

(a) The type of sludge or septage applied.

(b) The source of the sludge or septage land applied, including the address of the generator and the name and telephone number of the contact person for the generator.

(c) The fields or other areas to which the sludge or septage were applied.

(d) The volume of sludge or septage applied.

Craig points out that the problem with conflicting regulations is that it is possible an entity engaging in business in more than one county in North Carolina could conceivably have to conform to the regulations established by the state as well as those established by various counties. *Craig*, 356 N.C. at 48, 565 S.E.2d at 178 ("Ultimately, such [businesses] could be forced to adapt to differing, even conflicting, regulations. Any such dual regulation would present an excessive burden on [such businesses]") *Id.* Further, the effect of the County's substantial fees and additional regulations will be to drive this type of operation from Granville County into adjoining counties. This was clearly not contemplated by the General Assembly's comprehensive regulation of the land application of residuals.

The County next contends the reference in N.C. Gen. Stat. § 143-211(c) to a "complete program" at the beginning of the sentence is qualified by other language referencing the achievement of "a coordinated effort of pollution abatement and control with *other jurisdictions*." (emphasis added). The County asserts "other jurisdictions" means other counties and municipalities within the state. We disagree. Neither of these phrases can be read in isolation to garner the intent of the legislature, but must be read in their totality. It is more logical that achieving "a coordinated effort" with "other jurisdictions" refers to other state or federal agencies because these agencies are charged with the regulation of pollution. Even assuming *arguendo* that "other jurisdictions" refers to counties and municipalities, when read in context with the intent to create a "complete program" and a "coordinated effort," it strongly indicates the General Assembly intended DENR to be the agency in charge of efforts to safeguard the environment.

Further, a careful reading of Article 21 reveals that the General Assembly provided for two specific areas where local government would be allowed to regulate in the environmental area. Significantly, both of the local government exceptions require certification and approval of the local regulation by the EMC. *See* N.C. Gen. Stat. § 143-215.3(a)(14) (2004) (allowing local governments to administer and enforce wastewater pretreatment programs only if certified by the EMC); N.C. Gen. Stat. § 143-215.112(a) (2004) (allowing local air pollution programs only if reviewed and certified by the EMC). To aid in statutory construction, the maxim *expressio unius est exclusio alterius* applies. *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987). This means that the express mention of specific exceptions in a statute implies the exclusion of all others.

Id. The fact that the General Assembly provided in Article 21 for certain specific local government pollution control programs, but only if those specific programs were certified by the EMC, demonstrates the "complete program" of pollution control the legislature called for in Article 21 did not intend for local governments to enact their own uncertified ordinances for regulation of land application activities.

We conclude N.C. Gen. Stat. § 143-211(c) evidences an intent to create a complete and integrated regulatory scheme to the exclusion of local regulation.

In addition to the legislature's express statement of purpose and the provisions reflecting its intent to create an agency to expressly oversee water and resource conversation and the abatement of pollution, we also review "the breadth and scope of the applicable general statutes in determining whether the overall regulatory scheme was designed to be preemptive." *Craig*, 356 N.C. at 49, 565 S.E.2d at 178.

EMC established rules listing the requirements necessary to secure a permit for the land application of residuals. 15A N.C.A.C. 2H.0205(d)(6) (2005). Those requirements include submission of a soil scientist's recommendations for application rates, an agronomist's evaluation concerning cover crops and their ability to accept proposed application rates, information on nearby wells, and a soil evaluation by a soil scientist. DENR is then authorized to "issue a permit containing such conditions as are necessary to effectuate the purposes of Article 21, Chapter 143, N.C. General Statutes." 15A N.C.A.C. 2H.0209(b)(1).

The state permit issued to plaintiff covers all aspects of the land application of residuals. It contains extensive rules and requirements which the permittee must comply with in order to retain a valid permit. Both the source of the biosolids and the land application site are subject to preapproval by DENR in the permit, and no unapproved sources or sites may be used. The permit contains detailed rules on how land application is to be performed, including requirements for a certified operator and application at agronomic rates. It contains detailed requirements regarding the notice and reporting that must be made to state and local governments. It also requires a permittee to maintain extensive records of land application events and to test both the source material and soil on which it has been applied. The permit provides for buffer zones and prohibits nuisance conditions. It further contains extensive and detailed requirements on how the land

may be used after the residuals have been applied. For example, virtually all farming activities are prohibited for thirty days following application, and then activities are gradually allowed depending on conditions until thirty-eight months have passed, at which time all restrictions on use of the land are lifted. The permit authorizes inspection of the property where residuals have been applied and requires the permittee to keep a detailed log regarding its own monitoring activities. To ensure compliance with the requirements of the permit, the permittee is further required to have landowner agreements with each receiving site landowner, prohibiting the landowner from using land on which residuals have been applied in a manner inconsistent with the permit.

We conclude from the foregoing that the statute, coupled with the permit requirements set forth in the applicable regulations, are so comprehensive in scope that they were intended to comprise a "complete and integrated regulatory scheme" on a statewide basis, thus leaving no room for further local regulation.

The County further contends there is language in the permit which specifically contemplates the enactment of local ordinances. The portions of the permit cited by the County states:

> The issuance of this permit does not preclude the Permittee from complying with any and all statutes, rules, regulations, or ordinances that may be imposed by other government agencies (i.e., local, state, and federal) which have jurisdiction, including, but not limited to, applicable river buffer rules in 15A N.C.A.C. 2B .0200, soil erosion and sedimentation control requirements in 15A N.C.A.C. Chapter 4 and under the Division's General Permit NCG010000, and any requirements pertaining to wetlands under 15A N.C.A.C. 2B .0200 and 15A N.C.A.C. .0500.

The fact the permit states that it "does not preclude" compliance with the rules of local governments "which have jurisdiction" does not necessarily provide jurisdiction to a local government to enact regulations that duplicate and conflict with a comprehensive state regulatory scheme. The permit lists several specific types of regulations applying to river buffers, sedimentation control, and wetlands. There is no reference to the regulation of land application activities. While the list set forth in the permit is not exclusive, the general statement that other laws may apply must be interpreted in accordance with the rule of statutory construction known as *ejusdem generis*. That is, the " 'meaning of the general words will ordinarily be

presumed to be, and construed as . . . including only things of the same kind, character and nature as those specifically enumerated.' " *Knight v. Town of Knightdale*, 164 N.C. App. 766, 769, 596 S.E.2d 881, 884 (2004) (quoting *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970)). By listing the type of other governmental rules that may apply, it demonstrates that DENR envisioned compliance with rules issued pursuant to programs that do not specifically regulate land application, but generally apply to all land disturbing activities. The type of laws mentioned in the permit which may govern a permittee's conduct are of a type of regulation separate and distinct from that provided by Article 21 and the permits issued thereunder. The ordinance at issue is not that type of regulation. It only applies to the disposal of residuals, which is the type of activity already regulated by Article 21 and the permit issued to Granville Farms. Therefore, under the doctrine of *ejusdem generis*, the ordinance cannot be included in the permit's general reference to other laws since it is not the type of regulation listed after the general reference.

The County also points to the provision in the permit regarding landowner agreements as contemplating local involvement, because it authorizes local officials, as well as state officials to inspect the land application site prior to, during, and after any biosolids have been applied and to take soil and water samples. The County contends its ordinance does not regulate the land application of biosolids, but only serves to monitor the application of biosolids pursuant to a state permit. This assertion is contradicted by the County's own regulatory provisions which impose substantial fees for obtaining a permit, contain provisions for filings with the register of deeds, and contain extensive notice requirements. Further, the County's ordinance is duplicative, in that the provisions of the permit already provide that the local government may monitor land application of biosolids. It is therefore unnecessary for the County to enact a separate ordinance.

Because the state regulation of the land application of residuals is comprehensive, constituting a complete and integrated regulatory scheme, the County does not have authority to enact ordinances that also purport to specifically regulate that conduct. This assignment of error is without merit.

AFFIRMED.

Judges CALABRIA and GEER concur.

WILLIAM KENNEDY AND HERBIE'S STEAK HOUSE AND OYSTER BAR, INC., PLAINTIFFS v. BARBARA A. GARDNER AND CYNTHIA H. DAVIS, TRUSTEES OF THE HANNER FAMILY TRUST AND TRUSTEES OF THE HANNER MARITAL TRUST, DEFENDANTS

No. COA04-975

(Filed 3 May 2005)

Landlord and Tenant— lease agreement—option to extend

The trial court did not err in an action concerning a lease agreement by granting summary judgment in favor of defendants even though plaintiffs contend defendants were estopped from requiring written notice of intent to exercise the option to extend the pertinent lease, because: (1) assuming arguendo that defendants were estopped from requiring written notice per the lease provisions for the option to extend to be validly exercised, plaintiffs still cannot overcome the fact that they had no right to exercise any lease extension when the sole right to exercise the option at the time the lease expired was with a company called Sun Ja which took no action either through written or oral communication to exercise the lease extension; (2) the purported reassignment to plaintiffs was not executed until almost a month after the lease term had expired and almost two weeks after the complaint was filed; and (3) plaintiff individual's affidavit did not show there was any issue of material fact as to whether the lease had expired by its stated terms as it presented no facts showing that a party with a right to exercise the option to extend had made any attempt to do so at any time prior to the expiration of the lease.

Appeal by plaintiffs from final order and judgment entered 7 May 2004 by Judge Judson D. Deramus, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 2 February 2002.

Smith, James, Rowlett & Cohen, LLP by Norman B. Smith, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P. by S. Leigh Rodenbough IV, Teresa DeLoatch Bryant, and Alexander Elkan, for defendant-appellees.

JACKSON, Judge.

Plaintiffs appeal from the order granting defendants' motion for summary judgment entered in Guilford County Superior Court.

Plaintiffs seek a reversal of the trial court's order granting summary judgment and remand of the case for jury trial.

On 26 August 1983 Ruby Hanner ("Hanner") entered into a lease agreement with Spartan Food Systems, Inc. ("Spartan") for the real property that is the subject of the instant case. The original lease was for a term of fifteen years and provided for two five year options to extend the lease for a total of ten years beyond its original term. The lease explicitly required that the options to extend must be exercised upon written notice to the landlord of intent to do so at least 180 days prior to the expiration of the current lease term.

Subsequent to the execution of the original lease, Spartan was succeeded as tenant under the lease by Flagstar Enterprises, Inc. ("Flagstar") and Quincy's Restaurants, Inc. ("Quincy's"). In accordance with the terms of the lease, Flagstar exercised the option for the first five year extension in writing on 22 January 1998.

On 16 June 2000 Quincy's assigned all of its right, title and interest under the lease to plaintiff William Kennedy ("Kennedy") with Hanner's consent. At this point the first five year extension had been exercised and the lease was scheduled to expire on 26 August 2003.

In June 2000, shortly after Quincy's assigned its interest in the lease to him, Kennedy had a conversation with Hanner, her husband and her daughter, defendant Barbara Gardner. Kennedy discussed his possible plans for the property with the Hanners and Gardner and told them he was considering opening a steakhouse and that doing so would require a large investment on his part to renovate the property. With that in mind, he informed the Hanners and Gardner orally that he intended to exercise the second five year extension of the lease and inquired whether Hanner would consider granting him an additional five year extension after the expiration of the remaining extension included in the original lease agreement. Hanner told Kennedy to go ahead and open the steakhouse and see how he did and that if his business did well she would consider favorably an additional five year extension of the lease. This additional extension would have resulted in the lease concluding in 2013.

Kennedy proceeded with the required renovations at a cost of one-hundred fifty-four thousand dollars ($154,000). The renovations were completed in late 2000. On 6 October 2000 Kennedy assigned his interest in the lease to plaintiff Herbie's Steak House and Oyster Bar, Inc. ("Herbie's") with Hanner's consent. Herbie's was a corporation in

which Kennedy was the sole shareholder, president and CEO. After several months of operation plaintiffs decided to close the steakhouse and dispose of their interest in the property.

In an effort to dispose of their interest in the property plaintiffs began discussions with O'Charley's, Inc. about the possibility of taking over the lease and negotiating an additional lease term with defendants. In the negotiations between O'Charley's and Hanner, a proposed "First Amendment of Lease Agreement" was drafted and provided O'Charley's would have the option to extend the lease for one ten year period followed by options for three additional five year options to extend beyond the two five year options to extend contained in the original lease. The document contemplated plaintiffs would assign the remaining term of the original lease to O'Charley's, however this amendment was never executed by Hanner and O'Charley's.

Ultimately, Herbie's assigned its interest in the lease to Sun Ja, Incorporated ("Sun Ja") on 12 September 2001 and Hanner consented to the assignment on 24 January 2002. By virtue of this assignment, Sun Ja had the exclusive right to exercise the option to extend the lease. Sun Ja retained this right throughout the remainder of the current lease term including 28 February 2003—the date by which written notice must have been given to Hanner in order to exercise the remaining five year option to extend the lease. Sun Ja took no action to exercise its option to extend the lease.

In June 2003, approximately sixty days prior to the expiration of the lease, plaintiffs' attorney sent a fax to the real estate broker who represented Hanner in the original lease negotiation attempting to exercise the final five year option to extend the lease. This attempt to exercise the final option to extend the lease came in response to a letter that Kennedy received from the landlord's counsel demanding that the property be vacated.

In a document dated 23 September 2003, Sun Ja purportedly reassigned its rights under the lease to plaintiffs notwithstanding the fact that the current term had expired on 26 August 2003. The document stated that the reassignment was effective 1 January 2003. Prior to this assignment, Hanner had passed away and her interest in the property had transferred to the Hanner Family Trust and the Hanner Marital Trust. The landlords' consent with respect to this reassignment was neither sought nor obtained.

The trial court granted defendants' motion for summary judgment, dismissing the claim and dissolving plaintiffs' notice of *lis pendens*. Plaintiffs timely appealed.

Plaintiffs argue that the trial court erred in granting defendants' motion for summary judgment on the ground that defendants were estopped from requiring written notice of intent to exercise the option to extend the lease. Plaintiffs further argue they had the right to exercise the option by virtue of the retroactive assignment of the lease to them by Sun Ja.

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). After the party moving for summary judgment demonstrates that no genuine issue of material fact exists, the burden then shifts to the non-moving party to show, through specific facts, that a genuine issue of material fact does exist. *Lexington State Bank v. Miller*, 137 N.C. App. 748, 751, 529 S.E.2d 454, 455-56 (2000). Evidence must be viewed in the light most favorable to the non-moving party when reviewing a trial court's grant of summary judgment. *Craven County Bd. of Educ. v. Boyles*, 343 N.C. 87, 90, 468 S.E.2d 50, 52 (1996).

In support of their motion for summary judgment defendants submitted a copy of the original lease between Ruby Hanner and Spartan Food Systems, dated 26 August 1983; the consent to assign the original lease to plaintiff Kennedy, executed in 2000; the assignment of lease and consent to assign the lease from plaintiff Kennedy to plaintiff Herbie's Steakhouse, dated 6 October 2000; the memorandum of assignment of lease from Herbie's Steakhouse to Sun Ja, Incorporated, dated 12 September 2001; a guaranty by Sun Ja Incorporated in favor of the estate of Ruby Hanner, dated 22 January 2002; and the consent to assignment of lease from plaintiff Herbie's Steakhouse to Sun Ja Incorporated, dated 24 January 2002.

An "assignment" of a lease is "a conveyance of the lessee's entire interest in the demised premises, without retaining any reversionary interest in the term himself." *Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 162, 356 S.E.2d 912, 915 (1987) (quoting Hetrick, *Webster's Real Estate Law in North Carolina*, § 241 at 251 (Rev. ed. 1981)). The memorandum of assignment of lease from Herbie's to Sun Ja contains the following clause:

> Assignor [Herbie's] hereby assigns, sets over and transfers to Assignee [Sun Ja] all of Assignor's right, title, and interest in and to the above-referenced lease for the premises located at 2913 Battleground Avenue, Greensboro, North Carolina, including any and all addendums, amendments, *extensions*, rights of first refusal, options to purchase and modifications (the "Lease"). The premises which are the subject of the Lease and the Assignment of the Lease are located at 2913 Battleground Avenue, Greensboro, North Carolina and are more particularly described in the Lease. The initial term of the lease was for fifteen (15) years, with two possible extensions of five (5) years each, beginning August 26, 1983. The provisions set forth in the Lease and the Assignment of the Lease and the Memorandum of Lease are hereby incorporated into this Memorandum of Assignment of Lease.

(emphasis added). This is an absolute assignment as it leaves Herbie's with no interest in the assigned property. BLACK'S LAW DICTIONARY 128 (8th ed. 2004). "Covenants to renew are not personal. They run with the land, and are binding upon the legal successors of the lessee as well as the lessor. They are entitled to the benefits and are burdened with the obligations which such covenants confer on the original parties." *Bank of Greenville v. Gornto*, 161 N.C. 277, 279, 77 S.E. 222, 223 (1913). This necessarily means that Sun Ja had the exclusive right to exercise the option to extend the lease. When the terms of a lease provide for extension of the lease term by giving notice in a prescribed manner and within a specific time, giving notice according to those requirements is a condition precedent to the exercise of the option and if the lessee fails to give notice as prescribed the right to extend is lost and cannot be revived by the unilateral act of the lessee. *Kearney v. Hare*, 265 N.C. 570, 574, 144 S.E.2d 636, 639 (1965).

The supporting documentation established that Sun Ja had the exclusive right to exercise the option to extend the lease for the final five year extension. Defendants' documents in support of their motion for summary judgment also showed that neither plaintiff had any rights or interests in the leasehold estate from the time Herbie's interest was assigned to Sun Ja to the expiration of the lease term. Consequently, if Sun Ja failed to give any notice purporting to extend the lease, the right to extend would be lost and the lease would expire by its stated terms on 26 August 2003.

As defendants, the moving party, had established that no genuine issue of material fact existed, the burden then shifted to plaintiffs to

demonstrate that a genuine issue of material fact did exist. *Lexington State Bank*, 137 N.C. App. 751, 529 S.E.2d 455-56. In opposition to defendants' motion for summary judgment, plaintiffs presented the affidavit of plaintiff Kennedy in which he stated that, based on a conversation with Hanner, he believed that there was no longer a need for formal written notice to exercise the option to extend the lease. Kennedy does not contend that he believed that the lease would be extended automatically upon the expiration of the current term—only that formal written notice was no longer required. *Cf. Wachovia Bank & Trust Co., N.A. v. Rubish*, 306 N.C. 417, 293 S.E.2d 749 (1982) (evidence existed from which a jury reasonably could infer that lessor had not insisted on written notice to effect prior lease extensions). Kennedy's statement to Hanner that he "planned" to exercise the option was simply a statement of future intent, not a statement that he was exercising his right to extend the lease at the time the statement was made. That statement did not obligate Kennedy to the final five year extension. Hanner's statement that she would consider favorably an additional extension of the lease after the expiration of the lease under the original provisions, similarly, did not obligate her to agree to such an extension.

Assuming *arguendo* that defendants were estopped from requiring written notice per the lease provisions for the option to extend to be validly exercised, Plaintiffs still cannot overcome the simple fact that they had no right to exercise *any* lease extension. The sole right to exercise the option at the time the lease expired was with Sun Ja and Sun Ja took no action—either through written or oral communication to exercise the lease extension.

Kennedy attempts to overcome this fatal flaw by stating in his affidavit that the lease in question had been reassigned to himself and plaintiff Herbie's by an instrument dated 23 September 2003, with an effective date of 1 January 2003. This purported reassignment was not executed until almost a month after the lease term had expired and almost two weeks after the complaint was filed. Kennedy's affidavit did not show that there was any issue of material fact as to whether the lease had expired by its stated terms as it presented no facts showing that a party with a right to exercise the option to extend had made any attempt to do so at any time prior to the expiration of the lease.

Even when viewed in the light most favorable to plaintiffs, the evidence shows that plaintiffs have failed to carry their burden of showing the existence of a genuine issue of material fact. Con-

sequently, we affirm the trial court's order granting summary judgment in favor of defendants.

Affirmed.

Judges HUNTER and CALABRIA concur.

CASWELL COUNTY, PLAINTIFF v. TOWN OF YANCEYVILLE, CITY OF ROXBORO, AND PERSON COUNTY, DEFENDANTS

No. COA04-472

(Filed 3 May 2005)

1. Cities and Towns— taking by town in county—no consent from county—regional water system

Condemnation of property by defendant Town of Yanceyville in Caswell County for a regional water system without the consent of Caswell County was not invalidated by N.C.G.S. § 153A-15, which applies when a local government unit attempts to acquire land in another county. Yanceyville is within Caswell County, and summary judgment was correctly granted for defendants. Any claim that Yanceyville is merely undertaking the condemnation on behalf of other counties or towns outside Caswell County is obviated by the real and substantial benefits accruing to Yanceyville.

2. Cities and Towns— regional water system—property condemned by town within county—no leaseholder interest by town in different county

The Town of Roxboro did not acquire a leasehold in real property located in Caswell County in violation of N.C.G.S. § 153A-15 through the condemnation of land for a regional water system by Yanceyville, a town within Caswell County. The parties have mutually and cooperatively utilized the subject property, and Yanceyville has not surrendered to Roxboro the occupation and profits of the land.

3. Public Works— interlocal water agreement—formalities for water system not skirted

The defendants did not use an interlocal water agreement and the pertaining statutory provisions to skirt the formalities

required for the creation of a water authority under N.C.G.S. Chapter 162A. The provisions on which plaintiff relies are permissive, and nothing in Chapter 162A indicates that it was designed to restrict the broad grant of authority to local government units for interlocal cooperation.

Appeal by plaintiff from order entered 11 December 2003 by Judge Ripley E. Rand in Caswell County Superior Court. Heard in the Court of Appeals 1 December 2004.

Caswell County Attorney Robert V. Shaver, Jr., for plaintiff-appellant.

Brough Law Firm, by G. Nicholas Herman, Ramsey, Ramsey & Long, by James A. Long, and R. Lee Farmer, for defendant-appellees.

CALABRIA, Judge.

Caswell County appeals the trial court's entry of summary judgment in favor of the Town of Yanceyville ("Yanceyville"), the City of Roxboro ("Roxboro"), and Person County (collectively, "defendants") on issues involving defendants' proposed water supply and distribution facility to draw water from a portion of the Dan River that runs from Virginia through Caswell County. We affirm.

Caswell and Person Counties are adjoining counties. Yanceyville, a municipal corporation located in Caswell County, owns and operates a public enterprise water supply distribution system currently capable of treating approximately 1.0 million gallons per day ("MGD"). Yanceyville currently supplies water to its citizens from Farmer Lake, which is located within Caswell County, pursuant to an agreement with Caswell County. Yanceyville's current water need is 0.4 MGD, and its projected water need in twenty years is 1.0 MGD. Farmer Lake has the capacity to supply approximately 6.3 MGD of water.

Roxboro, a municipal corporation located in Person County, also owns and operates a public enterprise water supply distribution system. Person County does not operate a public enterprise water supply distribution system but has an agreement with Roxboro for future extension of Roxboro's system to provide water to residents located within Person County but outside of Roxboro's boundaries. Roxboro currently supplies water to its citizens from Lake Isaac Walton and

Lake Roxboro, having respective capacities for water supply of 3.2 MGD and 7.8 MGD. Current peak demand of usage for Roxboro is 3.7 MGD of water, and the latest water study by Roxboro and Person County indicated the current supply would be sufficient for projected needs for twenty years.

In September of 2001, Dominion Energy ("Dominion"), a Virginia-based power company, expressed an interest in constructing a natural gas fired electrical generation plant in Person County. To service the proposed plant, Dominion required peak raw water supplies in the amount 8.0 MGD. As a result of this need, Roxboro and Person County began investigating alternative sources of water to ensure supply for future growth. Ultimately, Roxboro and Person County identified the Dan River, which flows out of Virginia and through Caswell County, as the most viable alternative source of water. On 1 March 2002, Roxboro submitted an application to request reclassification of the Dan River to allow it to be used as a drinking water supply source as well as an application for a permit to withdraw water from the Dan River at a proposed intake facility to be located along the Dan River in Caswell County. Although Dominion withdrew its plans regarding the construction of an electrical plant in Person County in February of 2003, Roxboro and Person County elected to proceed with the applications based on the expenditure of approximately $500,000.00 on the project at that time.

At all times relevant to the issues on appeal, Caswell County opposed the applications regarding the Dan River; nonetheless, on 25 March 2003, defendants executed an interlocal agreement (the "agreement") to establish a public enterprise water supply distribution system. The stated purpose of the agreement was "to establish a . . . regional and inter-governmental approach for supplying raw water services to Yanceyville, Roxboro, Person County, and other areas of Caswell County" by utilizing the water supply capacity of the Dan River. The planned interconnected and regional water supply and distribution system (the "supply system") was intended to

> (1) serve the current and long-term water supply needs of Yanceyville, other areas of Caswell County, and Roxboro and Person County; (2) accommodate industrial, commercial, and residential development within the jurisdiction of those units of local government; (3) provide Yanceyville with the revenue to operate, maintain, and repair a water supply system for the benefit of users in Caswell County; and (4) be financed by Yanceyville, Roxboro, and Person County.

The supply system consists of five segments. Segment 1 consists of a raw water intake, a raw water pump station, a pretreatment facility, and a meter vault with water line connection points (the "Point of Connection"). Segment 2 consists of a raw water line in Caswell County extending from the Point of Connection to the Caswell County-Person County line and traversing existing easements. Segment 3 consists of a raw water line in Person County extending from Segment 2 at the Caswell County-Person County line to Roxboro's water facility at Lake Isaac Walton and traversing existing easements. Segment 4 consists of a raw water line in Caswell County from the Point of Connection to Yanceyville's water treatment plant. Segment 5 consists of a water treatment unit and high service pump station at the raw water intake site and a finish water line from the water treatment unit to the water distribution system located in the Town of Milton.

The agreement details the parties' responsibilities with respect to each segment. Regarding construction, maintenance, associated costs, and other costs for regulatory approvals, Roxboro is responsible for segments 1, 2, and 3, and Yanceyville is responsible for segments 4 and 5. With respect to holding title to the physical improvements to the real property, Roxboro and Person County hold title to segments 1, 2, and 3, and Yanceyville holds title to segments 4 and 5. As to the real property on which the physical improvements are located for segments 1, 2, 4, and 5, title is held by Yanceyville alone; however, the agreements provides that

> [i]f, at any time during the [forty-year, renewable] term of this Agreement, it becomes lawful under G.S. 153-15A or other law for Roxboro to hold title to the Raw Water Intake Site and the real property or interests in real property by way of easements or right-of-ways necessary for the Segment 1 and Segment 2 facilities, title to the Raw Water Intake Site will be held in the joint names of Yanceyville and Roxboro, and title to the real property or interests in real property necessary for the Segment 2 facilities will be held in the sole name of Roxboro . . . [without] any monetary or other consideration for such transfers of title.

Title to the real property upon which segment 3 is located is held jointly by Roxboro and Person County.

Other pertinent provisions in the agreement include (1) how the water drawn from the Dan River is allocated between Roxboro and Yanceyville, (2) that Roxboro pay three cents to Yanceyville for each 1,000 gallons of raw water Roxboro draws from the Dan River

through the Point of Connection, (3) provisions for liquidated damages in favor of Roxboro and Person County in the event of breach by Yanceyville, (4) the parties' respective responsibilities for acquiring the necessary real property for the five segments, and (5) Yanceyville's right to draw water, at operating cost, from Lake Isaac Walton via segments 2 and 3 during times of need when the Dan River cannot supply the necessary water, provided that Roxboro has sufficient water capacity to supply such volume.

Pursuant to the agreement, Yanceyville instituted a condemnation action against a Caswell County property owner to take land on which the proposed water intake facility would be located. Plaintiff subsequently filed a declaratory judgment action requesting the trial court determine the applicability of N.C. Gen. Stat. § 153A-15 to the condemnation action. Both plaintiff and defendants moved for summary judgment, and on 11 December 2003, the trial court entered summary judgment in favor of defendants after hearing arguments and concluding "that the provisions of N.C. Gen. Stat. § 153A-15 do not invalidate the condemnation action initiated by Yanceyville or otherwise prevent the proposed use of the land pursuant to the 'Interlocal Agreement' presented . . . ." Plaintiff appeals, asserting the trial court "erred by granting summary judgment to defendants and denying summary judgment to plaintiff when defendants failed to obtain the consent of the Caswell County Board of Commissioners pursuant to N.C. Gen. Stat. § 153A-15 before acquiring real property in Caswell County."

"[S]ummary judgment is an appropriate procedure in an action . . . for a declaratory judgment." *Tucker v. City of Kannapolis*, 159 N.C. App. 174, 178, 582 S.E.2d 697, 699 (2003). Our appellate review examines the whole record to determine "(1) whether 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) whether the moving party was entitled to judgment as a matter of law." *Id.* In the instant case, the facts are undisputed; therefore, the only question is whether the trial court properly entered summary judgment in favor of defendants.

[1] North Carolina General Statues § 160A-240.1 (2003) authorizes a city to acquire an interest in real property for use by the city through the exercise of eminent domain procedures as provided in Chapter 40A of the General Statutes. Under N.C. Gen. Stat. § 40A-3(b)(2) (2003), the governing body of a city is granted the power of eminent domain, for the public use or benefit, to acquire property, "either

inside or outside its boundaries," for the purpose of "[e]stablishing, extending, enlarging, or improving" public enterprises listed in N.C. Gen. Stat. § 160A-311. North Carolina General Statutes § 160A-311 (2003) expressly includes water supply and distributions systems within the term "public enterprise." Authority is expressly granted to a city to operate a public enterprise "outside its corporate limits, within reasonable limitations . . . ." N.C. Gen. Stat. § 160A-312(a) (2003). In addition, this Court has noted that the "broad language . . . in G.S. § 160A-312 . . . evidence[s] [the Legislature's] intent to give cities . . . comprehensive authority to own and operate public enterprises outside their boundaries . . . [and] grant[s] a city the absolute authority, without limitation or restriction, to establish and conduct a public enterprise for itself and its citizens." *Davidson County v. City of High Point*, 85 N.C. App. 26, 41, 354 S.E.2d 280, 288 (1987). Nonetheless, Caswell County contends Yanceyville's condemnation action cannot be sustained due to operation of N.C. Gen. Stat. § 153A-15 (2003). We disagree.

North Carolina General Statutes § 153A-15(b) provides, in pertinent part, as follows:

> Notwithstanding the provisions of [N.C. Gen. Stat. § 160A-240.1], or any other general law or local act conferring the power to acquire real property, before any . . . city . . . which is located wholly or primarily outside another county acquires any real property located in the other county by exchange, purchase or lease, it must have the approval of the county board of commissioners of the county where the land is located.

This statute operates when a unit of local government located in one county attempts to acquire land located in another county. *See*, *e.g.*, *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 525 S.E.2d 826 (2000). In such cases, the unit of local government undertaking to acquire the realty is required to first obtain approval from the board of commissioners of that county where the land is located. N.C. Gen. Stat. § 153A-15(b). However, in the instant case, both Yanceyville and the land being condemned are located within Caswell County. Accordingly, Yanceyville's condemnation action does not implicate this statutory provision.

Caswell County alternatively contends Yanceyville is condemning the property on behalf of Roxboro and Person County and is merely a token title-holder allowing Roxboro and Person County to obtain an interest in real property located in Caswell County without the necessary consent. Given the numerous and material benefits afforded

Yanceyville under the terms of the agreement, we must disagree. First, Yanceyville's sole source of water currently is Farmer Lake. Thus, the addition of another independent source of water is beneficial should conditions cause Farmer Lake to become unusable. Second, Yanceyville is acquiring an additional water treatment unit and pump station to utilize the new water source in addition to their current facilities. Third, the Dan River is less susceptible to local drought conditions than Farmer Lake. Fourth, the additional source of water allows for greater future growth and expansion even in the absence of an immediate need. Finally, the interconnected system allows Yanceyville to obtain water from Lake Isaac Walton should the need arise in the future paying only the cost of operating Roxboro's intake facility provided Roxboro has sufficient capacity. These real and substantial benefits accrue to Yanceyville and obviate any claim that this is an unwanted taking by another government or that Yanceyville is merely undertaking the condemnation action solely on behalf of and in favor of granting Roxboro or Person County an interest in Caswell County property.

[2] Caswell County separately argues Roxboro, through the agreement, has acquired a leasehold interest in real property located in Caswell County in violation of N.C. Gen. Stat. § 153A-15. "A lease for a term of years is a contract, by which one agrees, for a valuable consideration, to let another have the occupation and profits of land for a definite time." *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 143, 139 S.E.2d 362, 366 (1964). In the instant case, however, the parties have mutually and cooperatively utilized the subject property. Yanceyville has not surrendered to Roxboro "the occupation and profits of the land" under the agreement. To the contrary, Yanceyville has paid for and owns the land, and Roxboro has paid for and owns the facilities for the purpose of harvesting water for the benefit of both from the Dan River. Moreover, Caswell County's reliance on the provision within the agreement requiring Roxboro to pay three cents for every 1,000 gallons of water it draws from the Dan River is misplaced. This payment does not constitute rent; rather, the payment to Yanceyville is, by the agreement's express terms, to purchase water for Roxboro which will "provide Yanceyville with revenue to operate, maintain, and repair" their portion of the interconnected water supply system. We are not persuaded that the instant agreement represents a lease.

[3] Next, Caswell County asserts defendants used the interlocal agreement and the pertaining statutory provisions in an effort to "skirt the formalities required for creation of a water authority under

G.S. § 162A while making their endeavor sound similar in scope." We disagree. First, the provisions on which Caswell County relies are permissive in nature. *See*, *e.g.*, N.C. Gen. Stat. §§ 162A-3 to 162A-4; 162A-5.1 (2003). Second, nothing in Chapter 162A indicates it was designed to restrict the broad grant of authority to local governmental units for interlocal cooperation. *See* N.C. Gen. Stat. § 160A-461 (2003) (permitting "[a]ny unit of local government in this State and any one or more other units of local government in this State or any other state (to the extent permitted by the laws of the other state) [to] enter into contracts or agreements with each other *in order to execute any undertaking*") (emphasis added).

In summary, neither N.C. Gen. Stat. § 153A-15 nor Chapter 162A of the North Carolina General Statutes prohibits the interlocal agreement between defendants under the facts of the instant case. We have carefully considered plaintiff's remaining arguments and find them to be without merit.

Affirmed.

Judges HUNTER and LEVINSON concur.

STATE OF NORTH CAROLINA v. FERRER, DEFENDANT, AND AEGIS SECURITY INSURANCE CO., SURETY

No. COA04-935

(Filed 3 May 2005)

1. Bail and Pretrial Release— bond forfeiture—motion to vacate—notice

The trial court did not err by denying the surety's motion to vacate a bond forfeiture judgment even though the surety contends there was insufficient evidence that the clerk of court mailed the notice of bond forfeiture to the surety, because: (1) where a clerk of court is charged with providing notice of a court action, there is a presumption that notice properly addressed and mailed is delivered to the addressee; (2) the record on appeal contains a copy of the bond forfeiture notice for defendant which is dated 13 March 2003 and signed electronically by a deputy clerk of court, thus supporting the trial court's finding that the deputy clerk of court mailed the notice in compliance with N.C.G.S. § 15A-544.4; (3) N.C.G.S. § 15A-544.4 states that notice is

effective when the notice of bond forfeiture is mailed, and the statute does not require that the surety receive the notice of bond forfeiture for notice to be effective; and (4) while an assistant risk manager from the surety's program administrator testified that notice was not received, this evidence merely created an issue of fact for the trial court.

2. Appeal and Error— preservation of issues—failure to set out assignment of error

Although a surety contends that the North Carolina notice of bond forfeiture statute under N.C.G.S. § 15A-544.4 violates the notice requirements of substantive due process, the surety failed to preserve this issue for review because: (1) the assignment of error listed by the surety in its brief does not correspond to the issue of whether the notice of bond forfeiture statute violates the notice requirements of the substantive due process doctrine; and (2) none of the assignments of error provided in the record make reference to the substantive due process issue or the trial court's failure to address an issue raised at trial.

Appeal by surety from judgment entered 9 March 2004 by Judge John O. Craig, III, in Randolph County Superior Court. Heard in the Court of Appeals 24 March 2005.

Gavin, Cox, Pugh & Wilhoit, LLP, by Robert E. Wilhoit and Alan V. Pugh, for the State.

Andresen & Vann, by Kenneth P. Andresen and Christopher M. Vann, for surety.

No brief filed for defendant.

TIMMONS-GOODSON, Judge.

Surety Aegis Security Insurance Co. ("Aegis" or "surety") appeals an order of the trial court denying Aegis's motion to vacate a bond forfeiture judgment. For the reasons provided herein, we affirm the order of the trial court.

The factual and procedural history of this case is as follows: On 12 March 2002, Mario Ferrer[1] ("Ferrer") was arrested in Randolph County on drug charges. On 10 May 2002, Aegis secured Ferrer's release from jail by posting a $100,000 surety appearance bond for pretrial release. Ferrer was called upon to appear in court on 3 March

1. Defendant Mario Ferrer is not a party to this appeal.

2003, but failed to make his court appearance. The trial court entered a Bond Forfeiture Notice, which listed Aegis as the surety and provided the address of Aegis's program administrator, Capital Bonding, in Reading, Pennsylvania. The Bond Forfeiture Notice also provided the name of a bail agent and the bail agent's address in Lillington, North Carolina. The Bond Forfeiture Notice indicated that the bond forfeiture would become a final judgment on 10 August 2003 unless Aegis surrendered Ferrer to the sheriff's department or met one of the other conditions provided therein. Aegis failed to meet any of the conditions required to prevent the bond forfeiture, and the trial court entered a forfeiture judgment on 12 August 2003. On 26 November 2003, Aegis filed a motion to vacate the judgment pursuant to N.C. Gen. Stat. § 15A-544.8(b)(1), arguing that it "did not receive notice of the forfeiture as required by statute." The matter was called for hearing together with the case of *State v. Landaver & Aegis Security Insurance Co.* (appealed at COA04-934) on 1 March 2004. Kelly Fitzpatrick ("Fitzpatrick"), assistant risk manager at Capital Bonding, Carolyn Comer ("Comer") and Wanda Simpson ("Simpson"), deputy clerks of court for Randolph County Superior Court, testified at the hearing.

Comer testified that her job responsibilities included processing bond forfeitures. She stated that when the trial court entered a bond forfeiture notice, it was customary that a copy of the notice be sent via first-class mail to the defendant, the surety, and the bail agent. She further testified that if a bond forfeiture notice was returned by the post office as undeliverable, the returned envelope would be placed in the defendant's case file.

Simpson testified that her job responsibilities included placing bond forfeiture notices into envelopes and placing the envelopes in a bin to be taken to a United States Postal Service mailbox by another deputy clerk of court. She further testified that she specifically remembered mailing a bond forfeiture notice for Ferrer.

Fitzpatrick testified that upon receipt of a bond forfeiture notice, Capital Bonding's custom was to (1) change the defendant's file in the computer database system from active status to forfeiture status, (2) give a copy of the bond forfeiture notice to the recovery department, which is charged with locating the defendant, and (3) place copies of the bond forfeiture notice in the defendant's risk management file and the file for the bail agent to whom the defendant is assigned. Fitzpatrick testified that she receives and processes all of the bond

forfeiture notices mailed to Capital Bonding. She further testified that Ferrer's file in the computer database system had not been changed from active status to forfeiture status, and that there were no copies of a bond forfeiture notice in Ferrer's risk management file or in the agent's file, which indicated that Capital Bonding did not receive the bond forfeiture notice.

After considering the evidence, the trial court entered an order on 9 March 2004 containing the following pertinent findings of fact:

5. Following the entry of the forfeiture and pursuant to N.C.G.S. § 15A-544.4, the Clerk of Superior Court, through its employee Wanda Simpson . . . mailed to Aegis the Notice of Hearing on the Forfeiture on March 13, 2003. The notice was sent by first-class mail not later than thirty (30) days after the date on which the forfeiture was entered.

6. As of March 1, 2004 the Defendant has not been arrested nor surrendered by Aegis, and the bond is still outstanding.

7. Aegis presented no evidence of extraordinary cause to support its Motion to Vacate.

The order also contained the following conclusions of law:

1. The Court shall give notice of the entry of forfeiture by mailing a copy of the forfeitures [sic] to the Defendant and to each Surety named on the bond by first class mail. Notice given under this North Carolina law is effective when notice is mailed.

2. Aegis has failed to establish that it did not receive notice as required by law.

3. Aegis failed to establish any valid statutory reasons to set aside the forfeiture in this action.

The trial court denied Aegis's motion to vacate the judgment and ordered Aegis to pay $100,000 to satisfy the judgment. It is from this order that Aegis appeals.

The issues presented by Aegis on appeal are whether (I) there was sufficient evidence for the trial court to find that the clerk of court mailed the notice of bond forfeiture to Aegis; and (II) the North Carolina notice of bond forfeiture statute violates the notice requirements of the Substantive Due Process doctrine.

[1] Aegis first argues that there was not sufficient evidence for the trial court to find that the clerk of court mailed the notice of bond forfeiture to Aegis. We disagree.

N.C. Gen. Stat. § 15A-544.4 provides the following guidelines for mailing a notice of bond forfeiture:

> (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.

(2003) (emphasis added).

"It is well-settled that 'the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, *even though the evidence might sustain findings to the contrary*.' " *Mark IV Beverage, Inc. v. Molson Breweries USA*, 129 N.C. App. 476, 485, 500 S.E.2d 439, 445 (1998) (quoting *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991)). Where a clerk of court is charged with providing notice of a court action, there is a presumption that notice properly addressed and mailed is delivered to the addressee. *York v. York*, 271 N.C. 416, 420, 156 S.E.2d 673, 675-76 (1967); *see e.g. State v. Teasley*, 9 N.C. App. 477, 485-86, 176 S.E.2d 838, 845 (1970). To establish this presumption the clerk of court does not have to prove that he physically and personally carried the mailing to the post office. *York*, 271

N.C. at 420, 156 S.E.2d at 675-76. Where "he, or one in his office, authorize[d] the mailing of a notice, and there is proof by the person to whom the mailing is entrusted that it was mailed, . . . this constitutes compliance with the statute." *Id.* The presumption of regularity is "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.' " *Huntley v. Potter*, 255 N.C. 619, 628, 122 S.E.2d 681, 687 (1961) (quoting *Construction Co. v. Electrical Workers Union*, 246 N.C. 481, 488, 98 S.E.2d 852, 857 (1957)).

In the present case, Simpson testified on direct examination as follows:

Q: And tell me, tell the Court what procedure you go through in issuing that notice.

A: After the defendant is called and failed in the courtroom and they are put into a process stack, and then another deputy clerk will issue the order for arrest, and then the file is put in a supervisor's office, and I go in there and get the files and issue the forfeiture, and enter it into the V-Cap Civil system, and then it's mailed out first-class mail on the same day.

Q: And during what time period do you issue this notice?

A: Within the thirty-day period, usually a couple of days after the order for arrest goes out or the very next day.

Q: Do both of these notices indicate that they were issued within the thirty-day period?

A: Yes, sir.

Q: And where are these notices mailed?

A: One goes to the defendant, one to the insurance company, and one to the agent. And then the clerk keeps one.

Q: Okay. Now, are these notices delivered to—how are they put into the mail system?

A: I personally put them in the envelopes and take them over to the mail bucket that we have in our clerk's office, and then another deputy clerk will pick up that bucket and take it out to the mailbox and put the mail in.

Simpson further testified on cross-examination as follows:

Q: Okay. Now, do you have a personal recollection of [the Landaver and Ferrer bond forfeiture] notices?

A: I do remember doing them, issuing the forfeitures.

Q: Okay. So you remember these specific forfeitures being printed off of your computer?

A: Yes, sir.

Through Simpson's testimony, the State established that the clerk of court produced and mailed a notice of bond forfeiture to Aegis. Furthermore, the record on appeal contains a copy of the bond forfeiture notice for Ferrer, which is dated 13 March 2003 and signed electronically by Simpson. This evidence is sufficient to support the trial court's finding that the deputy clerk of court mailed the notice in compliance with N.C. Gen. Stat. § 15A-544.4. While we recognize that this evidence is contradicted by Fitzpatrick's testimony at trial and by affidavit that Aegis did not receive the notice of bond forfeiture, we note that § 15A-544.4(e) states that notice is effective when the notice of bond forfeiture is *mailed*. The statute does not require that the surety *receive* the notice of bond forfeiture for notice to be effective.

Furthermore, while Fitzpatrick's testimony constitutes "some evidence" that notice was not mailed, this evidence did not compel a finding in favor of surety, but rather created an issue of fact for the trial court. "It is within the trial court's discretion to determine the weight and credibility given to all evidence presented during a non-jury trial." *Department of Transp. v. Elm Land Co.*, 163 N.C. App. 257, 264, 593 S.E.2d 131, 136 (2004) (citing *Kirkhart v. Saieed*, 98 N.C. App. 49, 54, 389 S.E.2d 837, 840 (1990)). "The findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if, *arguendo*, there is evidence to the contrary." *Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983). For the reasons discussed *supra*, we conclude that the trial court's findings of fact are supported by competent evidence. In turn, the findings of fact support the trial court's conclusions of law. The trial court did not err in denying Aegis's motion to vacate.

[2] Aegis next argues that the North Carolina notice of bond forfeiture statute violates the notice requirements of the Substantive Due Process doctrine. This issue is not preserved for appellate review.

"[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal." N.C.R.

App. P. 10(a) (2005). In the appellant's brief, immediately following each question presented on appeal, the appellant must provide "a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." N.C.R. App. P. 28(b)(6) (2005).

In the present case, immediately following the presentation of this issue, Aegis identifies Assignment of Error No. 6 as the pertinent assignment of error. Assignment of Error No. 6 is provided in the record on appeal as follows: "Appellant Aegis Security Insurance Co. assigns as error . . . [t]he court's denial of Appellant's Motion to Vacate Judgment on the ground that such denial is not supported by the evidence in the record." This assignment of error does not correspond to the issue of whether the notice of bond forfeiture statute violates the notice requirements of the Substantive Due Process doctrine. We recognize that Aegis raised this constitutional issue at trial and the trial court declined to rule on the matter. However, none of the assignments of error provided in the record make reference to the Substantive Due Process issue or the trial court's failure to address an issue raised at trial. Because this issue is not set out in an assignment of error, we hold that it is not preserved for appellate review.

We have considered all of appellant's assignments of error properly brought forward and for the reasons provided herein, we affirm the order of the trial court.

AFFIRMED.

Judges CALABRIA and GEER concur.

JAMES HOOK, PLAINTIFF v. DANA HOOK (NOW SCHWENZFEIER), DEFENDANT

No. COA04-683

(Filed 3 May 2005)

Divorce— foreign judgment—alimony—continuing exclusive jurisdiction over support orders

The trial court did not err by registering and enforcing the parties' New Jersey judgment of divorce and by denying plaintiff husband's request to modify or terminate the alimony provisions

contained therein pursuant to N.C.G.S. § 50-16.9, because: (1) under both North Carolina and New Jersey's UIFSA statutory scheme, the issuing state retains continuing exclusive jurisdiction over a spousal support order throughout the existence of the support obligation regardless of whether either party continues to reside in the issuing state; (2) pursuant to UIFSA, New Jersey is the issuing state of the spousal support order and retains continuing exclusive jurisdiction over the judgment of divorce throughout the existence of the support obligation; (3) although UIFSA provides that a state loses continuing exclusive jurisdiction over a child support order when the obligor and obligee no longer reside in that state, there is no parallel exception for spousal support orders; (4) defendant's registration of the parties' judgment of divorce in North Carolina had no effect on New Jersey's status as the issuing state with continuing exclusive jurisdiction over the spousal support order; (5) New Jersey is the only state with jurisdiction to modify or terminate plaintiff's alimony obligation pursuant to the parties' judgment of divorce; and (6) N.C.G.S. §§ 52C-2-205(f) and 52C-2-206(c) regarding modification of spousal support orders issued in another state control over any conflict created by N.C.G.S. § 50-16.9(c).

Appeal by plaintiff from order entered 24 February 2004 by Judge Regina R. Parker in Tyrrell County District Court. Heard in the Court of Appeals 8 December 2004.

Prichett & Burch, P.L.L.C., by Lloyd C. Smith, Jr., Lars P. Simonsen and Maria Misse, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Lynn P. Burleson and Jill Schnabel Jackson, for defendant-appellee.

ELMORE, Judge.

James Hook (plaintiff) and Dana Schwenzfeier (defendant), formerly Dana Hook, were married on 18 June 1965 in New Jersey. The two divorced on 7 October 1996, and entered into a settlement agreement, including alimony; that agreement was then incorporated into a judgment of divorce entered by the appropriate court in New Jersey. Following their divorce, both plaintiff and defendant moved out of New Jersey, plaintiff moving to North Carolina and defendant to Massachusetts. Neither party had significant contacts with New Jersey after their respective moves.

On 31 December 1999, plaintiff lost his job and sought to terminate the alimony provisions of the New Jersey court's judgment. Prior to the hearing on the motion, defendant filed a motion seeking to enforce the alimony provision. On 20 August 2002, the New Jersey court, *sua sponte*, dismissed plaintiff's motion to modify and defendant's motion to enforce the judgment of divorce. The court determined that New Jersey no longer had subject matter or personal jurisdiction over the parties because neither was domiciled in New Jersey at that time. Neither party appealed that determination.

After the New Jersey court's order dismissing the case, plaintiff ceased making alimony payments to defendant. Defendant then filed a notice of registration of a foreign support order with the Tyrrell County Clerk's Office. A hearing on the matter was scheduled due to the fact that defendant opposed the filing and enforcement of the original New Jersey judgment, and in his written response included a motion that under the judgment the alimony should be modified or terminated. After the hearing, Judge Parker entered an order registering the New Jersey judgment and ordering plaintiff to pay the accrued arrears and monthly alimony payments according to the judgment. The trial court also denied plaintiff's motion to modify the judgment of divorce, determining that North Carolina lacked jurisdiction to do so. From this order, plaintiff appeals.

Plaintiff argues that the trial court erred in making findings of fact and conclusions of law that, pursuant to the Uniform Interstate Family Support Act (UIFSA), New Jersey retains continuing, exclusive jurisdiction to modify or terminate plaintiff's alimony obligation and that North Carolina's jurisdiction in this matter is limited to registration and enforcement of the parties' judgment of divorce. We affirm the trial court's order.

UIFSA has been enacted by all fifty states and is codified in North Carolina as Chapter 52C of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 52C-1-100 *et seq*. (2003); *see also* N.J. Stat. § 2A:4-30.65 *et seq*. (2005). UIFSA establishes a procedural mechanism through which an obligee (here, defendant) who resides in another state may use the North Carolina courts to enforce a support order entered by a court in another state (New Jersey) against an obligor who resides in North Carolina (plaintiff). *See* N.C. Gen. Stat. § 52C-3-301 (2003). UIFSA procedures apply to both child support orders and spousal support orders. *See* N.C. Gen. Stat. §§ 52C-1-101(18) and (21) and 52C-2-205(f) (2003).

Under UIFSA, a support order is first entered by the "issuing tribunal" in the "issuing state." N.C. Gen. Stat. § 52C-1-101(9) and (10) (2003). If an obligee wishes to enforce a support order against an obligor who resides in a different state, the obligee may "register" the order in the state where the obligor resides. *See* N.C. Gen. Stat. §§ 52C-6-601 and 52C-6-602 (2003). Unless the responding state, North Carolina in this matter, has "continuing, exclusive jurisdiction" over a registered foreign support order, the jurisdiction of a responding state is limited to the ministerial function of enforcing the registered order. *See* N.C. Gen. Stat. § 52C-1-101(16) (2003) (defining responding state); N.C. Gen. Stat. § 52C-3-305(a) (2003) (official commentary characterizes the listing of duties in subsection (a) as "ministerial."); *see also Welsher v. Rager*, 127 N.C. App. 521, 527, 491 S.E.2d 661, 664 (1997) (citing to N.C. Gen. Stat. § 52C-2-205, the Court determined that without 1) both parties' consent to a modification of a support order or 2) the issuing state having lost continuing, exclusive jurisdiction, North Carolina may not modify a support order).

N.C. Gen. Stat. § 52C-2-205 and N.J. Stat. § 2A:4-30.72, discussing continuing, exclusive jurisdiction over support orders, provide that

> [a] tribunal of this State issuing a support order consistent with the law of this State has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation. A tribunal of this State may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state.

N.C. Gen. Stat. § 52C-2-205(f) (2003); N.J. Stat. § 2A:4-30.72(f) (2005) (Subsection (f) in New Jersey is identical, save the second sentence where New Jersey inserted a comma after "spousal support" and added "custody visitation, or non-child support provisions of an" before "order."). Under both North Carolina and New Jersey's UIFSA statutory scheme, the issuing state retains "continuing, exclusive jurisdiction over a *spousal* support order throughout the existence of the support obligation," regardless of whether either party continues to reside in the issuing state. *See id.* (emphasis added). Pursuant to UIFSA, New Jersey is the "issuing state" of the spousal support order and retains continuing, exclusive jurisdiction over the judgment of divorce throughout the existence of the support obligation. Although UIFSA provides that a state loses continuing, exclusive jurisdiction over a *child* support order when the obligor and obligee no longer

reside in that state, there is no parallel exception for *spousal* support orders. *See* N.C. Gen. Stat. § 52C-2-205 (a) and (f) (2003). Instead, UIFSA specifically provides that the issuing state retains continuing, exclusive jurisdiction over a *spousal* support order throughout the existence of the support obligation. *See* N.C. Gen. Stat. § 52C-2-205(f) (2003).

We are persuaded that the statute's differing treatment regarding continuing, exclusive jurisdiction of spousal support orders and child support orders is purposeful, as evidenced by the official commentary to section 52C-2-205.

> Spousal support is treated differently; the issuing tribunal retains continuing, exclusive jurisdiction over an order of spousal support throughout the entire existence of the support obligation. Sections 205(f) and 206(c) state that the procedures of UIFSA are not available to a responding tribunal to modify the existing spousal support order of the issuing State. This marks a radical departure from RURESA, which treated spousal and child support orders identically. . . . The prohibition of modification of spousal support by a nonissuing State tribunal under UIFSA is consistent with the principle that a tribunal should apply local law to such cases to insure efficent handling and to minimize choice of law problems. Avoiding conflict of law problems is almost impossible if spousal support orders are subject to modification in a second State.
>
> * * *
>
> A wavier of continuing, exclusive jurisdiction and subsequent modification of spousal support by a tribunal of another State simply is not authorized under the auspices of UIFSA.

N.C. Gen. Stat. § 52C-2-205 official commentary (2003).

Defendant's registration of the parties' judgment of divorce in North Carolina had no effect on New Jersey's status as the issuing state with continuing, exclusive jurisdiction over the spousal support order. New Jersey is the only state, therefore, with jurisdiction to modify or terminate plaintiff's alimony obligation pursuant to the parties' judgment of divorce.

Plaintiff next argues that North Carolina has obtained jurisdiction over the parties' judgment of divorce and that the trial court erred by

failing to modify or terminate his alimony obligation pursuant to N.C. Gen. Stat. § 50-16.9. We disagree.

Section 50-16.9 of the North Carolina General Statutes provides:

> When an order for alimony has been entered by a court of another jurisdiction, a court of this State may, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted.

N.C. Gen. Stat. § 50-16.9(c) (2003). The language of section 50-16.9(c) is consistent with the provisions of UIFSA's predecessor statute, the Uniform Reciprocal Enforcement of Support Act (URESA), which allowed courts of this State to modify support orders of other states. When the North Carolina General Assembly enacted UIFSA, which severely curtailed the authority of a responding state to modify a foreign support order, it did not amend or repeal section 50-16.9(c).

It is evident that sections 52C-2-205(f) and 52C-2-206(c) are in conflict with section 50-16.9(c), that section allowing courts of this State to accomplish exactly what the provisions of Chapter 52C prohibit. As such, we hold that sections 52C-2-205 and 52C-2-206, regarding modification of spousal support orders issued in another state, control over any conflict created by section 50-16.9(c). We do not believe the General Assembly set out to make a radical departure from prior law, by adopting UIFSA and repealing URESA, simply to have its effect undone by then-existing section 50-16.9(c). *See* Sally B. Sharp, *Step by Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C. L. Rev. 2017, 2105-2106 (1998) ("[Section 50-16.9(c)] is in direct conflict with the federally mandated Uniform Interstate Family Support Act . . . . Thus, any attempt by any court in North Carolina to modify a spousal support award from another state would thus be unenforceable in this, or any other, state.").

While we are confident that this reconciliation is consistent with the intent of the General Assembly, we are guided to the same result by our own principles of statutory construction.

> Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should

> be read together and harmonized . . .; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute[.]

McIntyre v. McIntyre, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (quoting *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)). Furthermore, when there are conflicting provisions in statutes that cannot be reconciled, the older statute must yield to the most recent provision because "the later statute represents the latest expression of legislative will and intent." *Adair v. Burial Assoc.*, 284 N.C. 534, 541, 201 S.E.2d 905, 910 (1974) (citations omitted).

UIFSA is a detailed, comprehensive statutory scheme adopted by all fifty states to create uniformity in enforcement procedures. *See* N.C. Gen. Stat. § 52C-1-100 *et seq* (2003). UIFSA was enacted to take effect in North Carolina on 1 January 1996 by the 1995 session of the General Assembly. 1995 N.C. Sess. Laws ch. 538, § 7(c) (adding Chapter 52C, while section 7(a) of the Session Law repealed Chapter 52A). UIFSA specifically sets forth in great detail the necessary jurisdictional requirements for modification of a foreign support order. *See id.* In contrast, section 50-16.9(c) is part of a general statute authorizing modification of alimony orders. Additionally, section 50-16.9 was enacted well before UIFSA, making UIFSA the more current will of the legislature. *See* 1967 N.C. Sess. Laws ch. 1152 § 2. Therefore, since UIFSA is the more specific and more recent statute, any conflict between it and section 50-16.9(c) must be resolved in accordance with the provisions of UIFSA.

Accordingly, we affirm the order of the trial court registering and enforcing the parties' judgment of divorce and denying plaintiff's request to modify or terminate the alimony provisions contained therein.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

RAYMOND CLIFTON PARKER, PLAINTIFF v. FIGURE "8" BEACH HOMEOWNERS' ASSOCIATION, INC., AND THE COUNTY OF NEW HANOVER, DEFENDANTS

No. COA04-661

(Filed 3 May 2005)

1. Deeds— restrictive covenants—assessment for dredging waterway

The trial court did not err by granting defendants' motion for summary judgment in an action by a member of a coastal homeowner's association challenging the association's authority to levy a special assessment for dredging and maintaining a waterway. The standards for interpreting covenants imposing affirmative obligations include the identification of the property to be maintained with particularity and the existence of sufficient standards by which to measure liability for assessments. The language involved here clearly provides that assessments may be used for channel dredging, maintenance of marshes and waterways, and payment of governmental charges, and the covenants included maps. The court reasonably construed the covenants to include an area not covered by the maps and not adjacent to the island because it directly affects the island's boating community. Additionally, the members who voted were informed of the location of the area to be maintained, the cost, and the duration of the commitment.

2. Appeal and Error— failure to pursue remedy at trial—not heard on appeal

Plaintiff could not pursue on appeal the issue of access to ballots in a homeowner's association assessment election where he was granted bifurcated access to protect the secrecy of the vote, he agreed to review the ballots at a break on the assumption that he could raise the issue again, and he did neither.

Appeal by plaintiff from judgment entered 16 May 2003 by Judge Kenneth F. Crow in the Superior Court in New Hanover County. Heard in the Court of Appeals 15 February 2005.

Johnson & Johnson, P.A., by Rebecca J. Davidson, for plaintiff-appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Stuart L. Egerton, for defendant-appellee Figure "8" Beach Homeowners' Association, Inc.

E. Holt Moore, III, for defendant-appellee New Hanover County.

HUDSON, Judge.

This case concerns a dispute between a coastal homeowner's association and one of its members about the association's authority to levy a special assessment for dredging and maintenance of a waterway. On 21 February 2002, plaintiff Raymond Clifton Parker sued for judgment declaring that a vote on the assessment, the assessment itself, and a contract between defendant New Hanover County ("the county") and defendant Figure "8" Beach Homeowners' Association, Inc. ("HOA") were *ultra vires*, inappropriately obtained, and null and void. Both defendants moved for summary judgment, and by consent of all parties, plaintiff was deemed to have moved for summary judgment. The court denied plaintiff's motion and granted defendants' motions by order entered 16 May 2003. Plaintiff appeals. We affirm.

Plaintiff owns property on Figure 8 Island ("Figure 8"), a privately owned island of 563 lots in New Hanover County. Mason Inlet runs along the south end of the island, separating it from the Town of Wrightsville Beach. Figure 8 is governed pursuant to the HOA bylaws and applicable restrictive covenants. Figure 8 property owners, including plaintiff, are members of the HOA. On 29 January 1993, the covenants were amended to add "channel dredging; beach renourishment" as purposes for which annual assessments could be used. Until 12 April 1993, there were three versions of restrictive covenants on Figure 8 lots, based on their date of sale. On 12 April 1993, the HOA made the 1978 version of the restrictive covenant applicable to all lots. This covenant obligates property owners to pay an annual assessment in an amount fixed by the HOA board, which can also levy additional assessments as it deems necessary. Any assessment for new capital improvements costing more than $60,000 requires approval by a majority of HOA members eligible to vote.

In 1999, the county, the HOA, and several other homeowner associations in the Wrightsville Beach area had been considering measures to deal with erosion, channel dredging and other beach-related maintenance matters. The homeowner associations formed a coalition called the Mason Inlet Preservation Group ("MIPG"), which undertook a project to relocate Mason Inlet. The sand dredged from the project would be used to renourish Figure 8's beaches. The

county commissioners voted to sponsor the project and pay for it through a special assessment on the property owners of Wrightsville Beach and Figure 8. Over the next two years, the project moved through the permitting and planning process, and in November 2001, the county obtained from the U.S. Army Corps of Engineers a permit to relocate Mason Inlet. The permit required that the county maintain the relocated inlet for thirty years through regular dredging. On 5 November 2001, the county commission voted 3-2 against the project based on concerns about the cost of maintaining the relocated inlet.

The Figure 8 HOA board quickly developed a plan to seek reversal of the commissioners' vote. Having determined that the costly maintenance was a capital improvement, the board approved immediate solicitation of a vote by HOA members to approve a special assessment covering the maintenance costs of the relocated inlet. On 14 November 2001, the board mailed letters and ballots to all eligible HOA voters. A majority of the ballots returned voted in favor of the special assessment associated with the project.

[1] Plaintiff first argues that the court erred in denying plaintiff's motion for summary judgment and in allowing defendants' motion for summary judgment. We disagree.

"The test to be applied by the trial court in ruling on a motion for summary judgment [is] whether the pleadings, depositions, answers to interrogatories, admissions of file or affidavits established a genuine issue as to any material fact." *McGinnis Point Owners Ass'n v. Joyner*, 135 N.C. App. 752, 754, 522 S.E.2d 317, 319 (1999) (citing N.C.R. Civ. P. 56(c)). "If no such issue exists, the trial court must then determine whether the moving party is entitled to judgment as a matter of law." *Id.* This Court has set forth the following standard for interpreting covenants imposing affirmative obligations:

> Covenants that impose affirmative obligations on property owners are strictly construed and unenforceable unless the obligations are imposed in clear and unambiguous language that is sufficiently definite to assist courts in its application. To be enforceable, such covenants must contain some ascertainable standard by which a court can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant. Assessment provisions in restrictive covenants (1) must contain

> a sufficient standard by which to measure . . . liability for assessments, . . . (2) must identify with particularity the property to be maintained, and (3) must provide guidance to a reviewing court as to which facilities and properties the . . . association . . . chooses to maintain.

Allen v. Sea Gate Assn., 119 N.C. App. 761, 764, 460 S.E.2d 197, 199 (1995) (internal quotation marks omitted) (citing *Figure Eight Beach Homeowners' Ass'n, Inc. v. Parker and Laing*, 62 N.C. App. 367, 376, 303 S.E.2d 336, 341 (1983) and *Beech Mountain Property Owners Assoc. v. Seifart*, 48 N.C. App. 286, 295-96, 269 S.E.2d 178, 183-84 (1980), *disc. review denied*, 309 N.C. 320, 307 S.E.2d 170 (1983)).

We first consider whether the covenants "contain a sufficient standard by which to measure" the HOA's liability for assessments, and whether the covenants "identify with particularity the property to be maintained," and provide us guidance as to which facilities and properties are to be maintained. Regarding annual assessments, the covenant provides:

> 8(c) The funds arising from such assessment or charges or additional assessment may be used for any or all of the following purposes: Maintaining, operating, improving or replacing the bridges; protection of the property from erosion; collecting and disposing of garbage, ashes, rubbish and the like; *maintenance, improvement* and lighting *of* the streets, roads, drives, rights of way, community land and facilities, tennis courts, *marsh and waterways*; employing watchmen; enforcing these restrictions; paying taxes, indebtedness to the Association, insurance premiums, *governmental charges of all kinds and descriptions* and, in addition, doing any other things necessary or desirable in the opinion of the Association to keep the property in neat and good order and to provide for the health, welfare and safety of owners and residents of Figure Eight Island.

(Emphasis supplied). The 29 January 1993 amendment added the language "channel dredging; beach renourishment" to paragraph 8(c). Taken together, the language of this paragraph provides for assessments to be used for channel dredging and maintenance of marshes and waterways and for payment of governmental charges of all kinds and descriptions. Maps included in the covenants depict and refer to several of the areas which the assessment would be used to dredge and maintain.

One area covered by the assessment which is not immediately adjacent to Figure 8, and thus not depicted in the maps, is that where the to-be-opened Mason Creek would flow into the Atlantic Intracoastal Waterway ("AIW"). This area was of concern to the Army Corp of Engineers and the HOA because the planned relocation of Mason Inlet and the reopening of Mason Creek could create problems with sand build up at this juncture with the AIW. Plaintiff contends that because this area is neither named nor depicted in the covenants, it is not specifically identified and could not have been intended for inclusion in the covenants' maintenance provisions. Our courts have stated that "[r]estrictive 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.' " *Hultquist v. Morrow*, 169 N.C. App. 579, 582, —— S.E.2d ——, —— (2005) (quoting *Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 521, 581 S.E.2d 94, 97 (2003)).

Concerning this location the trial court noted in finding 14:

> 14. Figure Eight Island has a boating community, with a marina near its main clubhouse and with several private docks on the back, or "sound side," of the island. Boating access to the AIW has been enhanced for residents on the southern back side of the island with the dredging and reopening of Mason's Creek, and the entire island's boating community is benefitted by once again having a navigable inlet on the southern end to the Atlantic Ocean. Periodic dredging of shoaling sands within the intersection of Mason's Creek and the AIW, occurring at a location some 4,500 feet from the southern end of the island proper, nevertheless directly benefits the navigability of channels for the Figure Eight Island boating community and the boaters' access to Mason Inlet, Wrightsville Beach and points both south and north on the AIW.

This finding is supported by the exhibits before the trial court, such as the aerial photo of the island and the environmental assessment report created by the U.S. Army Corp. of Engineers. As several aspects of the overall Mason Inlet relocation plan would have an impact on the confluence of AIW and Mason Creek, we believe that the court's construction of the covenants was reasonable and that the evidence adequately supports this finding, which in turn supports the legal conclusion that the "authority of the Figure 8 HOA to assess its property owners/members upon a vote of the membership is lawfully authorized."

In addition, the HOA ballot clearly specified the possible cost involved and the period of time dredging maintenance could be required. The ballot states, in pertinent part:

> The Board of Directors of the Figure "8" Beach Homeowners' Association, Inc. proposes a Special Assessment to be submitted to a vote of the members. The Assessment is for the purpose of funding the costs of maintenance dredging of the Atlantic Intracoastal Waterway (AIW) in the vicinity of the confluence of the AIW and Mason Creek, but only at times when maintenance of this area is required to be done by New Hanover County as a condition of federal or state permits authorizing the relocation of Mason Inlet. The assessment is not to be used when dredging of this area is being done in connection with the Mason Inlet Relocation Project by New Hanover County. The assessment will not be levied if the Mason Inlet Relocation Project is not constructed by July 1, 2003. The Board is authorized to assess up to $350,000 in any year. The assessment may be levied at such times and in such amounts as the Board deems appropriate for up to thirty years from the date of approval.

HOA members who voted were informed of the location of the area to be maintained as well as the cost involved and the duration of the commitment upon which they were voting.

[2] Plaintiff also argues that rulings at the hearing and in settling the record prejudiced plaintiff in his appeal. We disagree.

Plaintiff contends that he was prejudiced by his inability to review the actual ballots submitted by HOA members during the vote on the special assessment. Plaintiff alleged that some of the signatures on ballots might be fraudulent. However, the transcript of the hearing on the parties' summary judgment motions reveals that plaintiff was not denied such access. Defendants' counsel stated:

> We are not wanting to deny access to the entire ballots to Mr. Parker and his attorney. We simply want to maintain the secrecy of how the members voted and we've offered some means by which—I've already folded 55 no votes where we could first let them count the no votes without seeing the names, the names are folded under. Mr. Parker's name is among these. We could also allow them to inspect the ballots which were determined to be invalid. Most of them simply weren't marked. People signed their names and then forgot to vote on the top half of the page.

The trial court then undertook an *in camera* inspection of the ballots to look for signs of tampering. After this inspection, the court told plaintiff he could examine the ballots in a bifurcated process in order to preserve the secrecy of HOA members' votes. Plaintiff could see all of the signatures first, then could see the portion of the ballots indicating the vote cast. Plaintiff's counsel objected to this process, stating that he believed there was no expectation of privacy regarding the ballots, but then stated:

> I will review the ballots at a break and . . . . And then we'll move forward. And I assume that at some point in time, if I feel like we need to open this issue up, we can do it.

Plaintiff's counsel never raised the issue again. Having failed even to avail himself of the opportunity to review the ballots as described at the hearing and to raise this issue further with the trial court, plaintiff may not now complain that the access he was granted was insufficient and unduly prejudicial to him.

Affirmed.

Judges TIMMONS-GOODSON and STEELMAN concur.

REID A. PAGE, JR. AND WIFE, MARY ANN PAGE, PLAINTIFFS v. BALD HEAD ASSOCIATION, JAMES E. WILSON, JUDY BRAWNER, KAREN CHRISTIAN, DALE GEORGIADE, JACK NICHOLS, AND BILL WADDELL, SR., IN THEIR OFFICIAL CAPACITY AS DIRECTORS OF BALD HEAD ASSOCIATION, DEFENDANTS

No. COA04-649

(Filed 3 May 2005)

1. Deeds— challenge to homeowner's assessment—necessary parties—all members of association

The trial court did not err by dismissing a challenge to an assessment by a homeowner's association for failure to join all of the property owners in the association. Under *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, all property owners affected by a residential use restrictive covenant were necessary parties to an action to invalidate that covenant.

2. Deeds— restrictive covenants—challenge to sign restriction—no issue of fact

Summary judgment for defendants was proper in an action challenging changes to homeowner's covenants involving "for sale" signs and new assessment provisions. Unambiguous standards were established for the size and style of signs to be approved for use by all residents, enforcement of the restrictions against plaintiffs required no exercise of discretionary authority, and there was no issue of material fact as to the validity of the covenants or the reasonableness of their application to plaintiffs.

Appeal by plaintiffs from an order entered 27 February 2003 and judgment entered 27 January 2004 by Judges D. Jack Hooks, Jr. and Gregory A. Weeks, respectively, in Brunswick County Superior Court. Heard in the Court of Appeals 27 January 2005.

Bruce T. Cunningham, Jr. for plaintiff-appellants.

Hedrick & Morton, L.L.P., by G. Grady Richardson, Jr., for defendant-appellees.

HUNTER, Judge.

Reid A. Page, Jr. and Mary Ann Page ("plaintiffs") appeal from (1) an order of dismissal without prejudice dated 27 February 2003 of their action for a declaratory judgment, and (2) a summary judgment dated 27 January 2004 on their action for damages against the Bald Head Association and its individual directors ("defendants"). As we find the trial courts' actions to be proper as to the dismissal and the grant of summary judgment, we affirm for the reasons stated herein.

Bald Head Island is an island community located off the coast of southeastern North Carolina in Brunswick County. Development in the community is regulated by both a municipal government and defendants' non-profit property owners' association. Properties on Bald Head Island are subject to certain covenants, conditions, and restrictions. Many of these provisions, which are enforced by defendant association, impose restrictions on the development and use of property units on the island. Others contain guidelines for computing and levying general and special assessments against property owners.

Plaintiffs have operated a real estate business on Bald Head Island for nearly thirty years, listing and selling properties located on

the island. During that time, plaintiffs obtained approval from defendants and the Village of Bald Head Island to use twelve-inch by twelve-inch signs to identify properties for sale. In July 1998, defendants adopted an addendum to its sign guidelines that limited the size of "for sale" signs to seven and a half (7 1/2) inches in width and three and three quarter (3 3/4) inches in height. In addition, all signs were required to conform to a standard "Bollard Cap Design" and were to be constructed of grey-stained weathered wood with a top painted in light blue. The addendum stated that as of 23 July 1998, all new twelve-inch by twelve-inch signs would no longer be approved by the Bald Head Association Architectural Review Board.

In February 2000, defendants recorded an amended declaration of covenants. The revised covenants provided for a general assessment to be levied against all units "at a level which is reasonably expected to produce total income for the Association equal to the total budgeted Common Expenses, including reserves." This provision replaced the earlier covenant, which had provided that assessments could not exceed one point five percent (1.5%) of the taxable value of the property without a vote of the membership.

After the new sign regulations were passed, defendants provided plaintiffs with notice that their existing signs violated the new guidelines. Plaintiffs refused to remove their existing signs, leading defendants to assess and levy fines against them. Beginning in 2000, plaintiffs ceased paying annual dues on several lots, resulting in liens being placed on each of the subject properties.

In July 2002, plaintiffs filed an action for (1) a declaratory judgment to have the new assessment provisions declared null and void, (2) injunctive relief to prevent defendants from removing plaintiffs' "for sale" signs, and (3) damages for unfair and deceptive business practices and tortious interference with their business relationships.

On 2 August 2002, defendants filed an answer denying the allegations in the complaint, moving for dismissal for failure to join all necessary parties, and counterclaiming for (1) payment of annual homeowners dues and annual assessments, (2) payment of special assessments for violations of the sign ordinance, and (3) attorneys' fees and expenses. In February 2003, the Brunswick County Superior Court dismissed without prejudice the portion of plaintiffs' complaint seeking to invalidate the assessment provisions for failure to join all necessary parties. Defendants then moved for summary judgment in favor of their counterclaims and denying plaintiffs' remaining claims.

In January 2004, the Brunswick County Superior Court granted defendants' motions. Thereafter, plaintiffs gave notice of appeal to this Court from both (1) the order dismissing plaintiffs' challenge of the assessment provision, and (2) the grant of summary judgment as to the validity and enforceability of defendants' sign restrictions.

I.

[1] In their first assignment of error, plaintiffs argue that the trial court erred in dismissing the assessment claim for failure to join all property owners on Bald Head Island. We disagree.

In *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 527 S.E.2d 40 (2000), the Supreme Court of North Carolina ruled that all property owners affected by a residential use restrictive covenant were necessary parties to an action to invalidate that covenant. *Id.* at 438-40, 527 S.E.2d at 43-44 (discussing the applicability of N.C. Gen. Stat. § 1A-1, Rule 19 regarding joinder of parties). Plaintiffs acknowledge that *Karner* is controlling in this case and concede that this Court is bound by prior decisions of our Supreme Court. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Accordingly, we find this assignment of error to be without merit and affirm the trial court's dismissal.

II.

[2] Plaintiffs next contend summary judgment was improper in this case as there was a material issue of fact as to whether the actions taken by defendants pursuant to the amended sign restrictions were valid and within defendants' authority to act. For the reasons stated herein, we disagree.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file tend to show that there is no genuine issue as to any material fact, such that a party is entitled to a judgment as a matter of law. *Wall v. Fry*, 162 N.C. App. 73, 76, 590 S.E.2d 283, 285 (2004) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001)). A party may prevail on summary judgment if (1) it can prove that an essential element of the opposing party's claim is nonexistent, or (2) it can demonstrate through discovery that the opposing party has failed to produce evidence supporting an essential element of its claim. *Id.* Once the moving party satisfies its burden of proof, the burden then shifts to the nonmoving party to set forth specific facts showing a genuine issue of material fact, or to provide a valid excuse for not doing so. *Id.* If the nonmoving party does

not take affirmative steps to defend its position with additional proof and instead rests on mere allegations or a denial of the pleadings, that party risks having judgment entered against it. *Id.* at 76-77, 590 S.E.2d at 285.

Restrictive covenants are considered contractual in nature and acceptance of a valid deed incorporating the covenants implies the existence of a valid contract. *See Rodgerson v. Davis*, 27 N.C. App. 173, 178, 218 S.E.2d 471, 475 (1975). Restrictive covenants, "clearly and narrowly drawn," are recognized as a valid tool for achieving a common development scheme. *Hobby & Son v. Family Homes*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981). Parties to a restrictive covenant may use almost any means they see fit to develop and enforce the restrictions contained therein. *Wise v. Harrington Grove Comty. Ass'n*, 357 N.C. 396, 401, 584 S.E.2d 731, 736 (2003).

Judicial enforcement of a covenant will occur as it would in an action for enforcement of "any other valid contractual relationship." *Sheets v. Dillon*, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942). Because they infringe upon the unrestrained use of land, however, restrictive covenants are only valid "so long as they do not impair the enjoyment of the estate and are not contrary to the public interest." *Karner*, 351 N.C. at 436, 527 S.E.2d at 42. Restrictive covenants are to be strictly construed and "all ambiguities will be resolved in favor of the unrestrained use of land." *Hobby & Son*, 302 N.C. at 70, 274 S.E.2d at 179. Nonetheless, a restrictive covenant "must be reasonably construed to give effect to the intention of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction." *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 85, 362 S.E.2d 619, 621 (1987). Thus, judicial enforcement of a restrictive covenant is appropriate at the summary judgment stage unless a material issue of fact exists as to the validity of the contract, the effect of the covenant on the unimpaired enjoyment of the estate, or the existence of a provision that is contrary to the public interest.

The record before us indicates that plaintiffs are owners of several properties on Bald Head Island. All properties on Bald Head Island are subject to restrictive covenants imposed by the developer of the island. Defendants contend that plaintiffs, by acquiring properties on the island, became bound to these restrictive covenants. Indeed, defendants contend that by obtaining properties on Bald Head Island, plaintiffs became members of defendant association and become obligated to pay annual assessments and any special assess-

ments, dues or fines authorized by the restrictive covenants. Plaintiffs do not dispute these allegations.

Articles 3 and 10 of defendants' Declaration of Covenants, Conditions and Restrictions state that all property owners are obligated to abide by certain rules and regulations as developed and passed by defendant association. These rules and regulations include guidelines for the use of real estate signs. The amended "for Sale Bollard Cap" guidelines adopted by defendants' architectural review board on 22 July 1998 were imposed on all real property owners subject to defendants' restrictive covenants, including plaintiffs. Plaintiffs, however, contend that the sign restrictions are unreasonable and thus invalid and unenforceable at law.

Plaintiffs fail to show the existence of any material issue of fact as to the validity of the restrictive covenants and the unreasonableness of their enforcement as to plaintiffs. Nowhere do plaintiffs make any argument or cite any authority supporting the proposition that these regulations impair the enjoyment of the estate or violate the public interest. Similarly, plaintiffs do not argue against the covenant's validity as a contract or that defendants failed to conform to required procedure in adopting the amended guidelines. Instead, plaintiffs rely solely on this Court's decision in *Smith v. Butler Mtn. Estates Property Owners Assoc.*, 90 N.C. App. 40, 367 S.E.2d 401 (1988), for the proposition that the restrictive covenants at issue here are invalid and unenforceable because they are not reasonable. *Id.* Specifically, plaintiffs contend that genuine issues of material fact exist as to the reasonableness of these restrictions as applied to them, sufficient to preclude an award of summary judgment.

Plaintiffs' reliance on *Butler Mtn.* is misplaced. In the present case, the covenants lay out explicit standards governing the size and style of approved signs. In contrast, the covenants at issue in *Butler Mtn.* provided broad discretion to the defendant homeowners' association to approve or deny home construction plans based on conformance with the existing development scheme. *See id.* at 41-42, 367 S.E.2d at 402 (describing the approval authority granted to the defendant property owners association). The *Butler Mtn.* Court relied on *Boiling Spring Lakes v. Coastal Services Corp.*, 27 N.C. App. 191, 218 S.E.2d 476 (1975), in stating that approval of building plans could not be arbitrary, but must be based on some standards, either contained within the covenants themselves, or otherwise clearly established. *Id.* Thus, covenants granting broad approval authority are enforceable "only if the exercise of the power in a par-

ticular case is reasonable and in good faith." *Id.* at 196, 218 S.E.2d at 479. In the present case, unambiguous standards were established as to the size and style of signs to be approved for use by all residents of the island. Enforcement of the sign restriction as to plaintiffs required no exercise of discretionary authority. We find, therefore, no merit to plaintiffs' contention that an issue of material fact existed as to the enforcement of the sign restrictions.

In sum, we conclude the trial court properly dismissed plaintiffs' action to invalidate defendants' revised assessment covenants for failure to join all property owners subject to the covenants as necessary parties. We also find that as plaintiffs have failed to present any genuine issues of material fact concerning the validity or enforcement of the defendants' sign restrictions, the trial court did not err in granting summary judgment to the defendants on this issue.

Affirmed.

Judges BRYANT and JACKSON concur.

IN THE MATTER OF: B.N.H., A MINOR CHILD

No. COA04-846

(Filed 3 May 2005)

1. Appeal and Error— appealability—initial permanency planning order

Respondent mother's appeal from an initial permanency planning order directing that the permanent plan for her son who had been adjudicated neglected and dependent be adoption is dismissed as an appeal from an interlocutory order, because the planning order was not an "order of disposition" subject to immediate appeal within the meaning of N.C.G.S. § 7B-1001(3).

2. Appeal and Error— appealability—prior decision of another panel of same court—initial permanency planning order

The holding of *In re Weiler*, 158 N.C. App. 473 (2003), does not control the outcome of DSS' motion to dismiss the present

appeal from an initial permanency planning order, and the holding of Weiler is limited to the specific facts of that case because: (1) the order on appeal in this case does not change the plan from reunification to adoption like in *Weiler*; and (2) the order in this case is an initial permanency planning order that repeats the previous directives of the court that reunification be ceased.

Appeal by respondent from order entered 4 March 2003 by Judge C. Thomas Edwards in Catawba County District Court. Heard in the Court of Appeals 12 January 2005.

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

Carlton, Rhodes and Carlton, by Gary C. Rhodes for respondent mother.

LEVINSON, Judge.

Respondent-mother appeals from an initial permanency planning order directing that the permanent plan for her son, B.N.H., be adoption. For the reasons that follow, we dismiss this appeal.

B.N.H. was born 17 June 2003. Petitioner Catawba County Department of Social Services (DSS) filed a petition on 20 June 2003, alleging that the child was neglected and dependent. A nonsecure custody order was issued, placing legal custody with DSS and physical placement with the child's maternal grandmother. Shortly thereafter, respondent was appointed a guardian *ad litem*. Following a hearing on 29 July 2003, the trial court on 5 September 2003 entered an order adjudicating B.N.H. neglected and dependent. Custody was continued with DSS, and placement was continued with B.N.H.'s grandmother.

In October 2003, a review order was entered that continued placement with the child's grandmother, and directed DSS to continue making efforts to reunify B.N.H. with respondent. The next review hearing was held 13 January 2004. Following this review hearing, the court entered an order directing "DSS . . . [to] cease . . . mak[ing] efforts to return the minor child to his mother's home." Respondent did not attempt to appeal from this order.

On 10 February 2004 an initial permanency planning hearing was conducted. The trial court continued placement of the child with his

grandmother and ordered that the permanent plan for B.N.H. be adoption. From this order, respondent appeals.

---

[1] Petitioner's motion to dismiss respondent's appeal as interlocutory is dispositive of this matter. N.C.G.S. § 7B-1001 (2003), provides that appeal may be taken from "any final order of the court in a juvenile matter[.]" The statute defines a "final order" to 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.

N.C.G.S. §§ 7B-1001(1)-(4) (2003).

In its motion to dismiss, DSS asserts that not all permanency planning review orders and review orders are "final orders" subject to appellate review. Specifically, DSS asserts that a permanency planning order that does not modify "custodial rights" as contemplated by G.S. § 7B-1001(4) is not appealable and, further, that an initial permanency planning order is not an "order of disposition after an adjudication that a juvenile is abused, neglected, or dependent" within the meaning of G.S. § 7B-1001(3).

In *In re Weiler*, 158 N.C. App. 473, 581 S.E.2d 134 (2003), respondent appealed from a permanency planning review order changing the permanent plan from reunification to termination of parental rights. Speaking of subsection (3) of G.S. § 7B-1001, this Court held:

> The present order again changed the disposition from reunification with the mother to termination of parental rights. An order that changes the permanency plan in this manner is a dispositional order that fits squarely within the statutory language of section 7B-1001. . . . Thus, the appeal is properly before us and petitioner's motion to dismiss is denied.

Id. at 477, 581 S.E.2d at 136-37. Thus, this Court essentially held that a "permanency planning order" was a species of "dispositional order" subject to immediate appeal. This is a very broad interpretation of the term "order of disposition" in G.S. § 7B-1001(3). Such an expansive interpretation of G.S. § 7B-1001(3) could arguably permit appeal from

every review order, permanency planning order, or other genre of court order that follows an adjudication and disposition. For the following reasons, we respectfully disagree with the *Weiler* court's interpretation of the term "dispositional order" in G.S. § 7B-1001(3).

Our Juvenile Code contemplates distinct types of court orders, including, *e.g.*, "adjudication" orders, N.C.G.S. § 7B-807 (2003); "dispositional" orders, N.C.G.S. § 7B-905 (2003); "review" orders, N.C.G.S. § 7B-906 (2003); "permanency planning" orders, N.C.G.S. § 7B-907 (2003); orders on "termination of parental rights", N.C.G.S. § 7B-1109, *et seq.* (2003); and post-termination of parental rights review orders, N.C.G.S. § 7B-908 (2003). Each category of orders addresses a different objective in the larger context of a juvenile proceeding. Further, the varying names that the legislature gave these orders lead us to the inescapable conclusion that the General Assembly did not intend that every juvenile court order be a "final order" subject to immediate appeal. In our view, the statutory language of G.S. § 7B-1001(3), referring to an "order of disposition after an adjudication that a juvenile is abused, neglected, or dependent", means the dispositional order that is entered after an adjudication under G.S. § 7B-905, and **does not** mean every permanency planning, review, or other type of order entered at some unspecified point following such a disposition.

This interpretation results in a logical application of G.S. § 7B-1001(3) for numerous reasons. First, the express goal of G.S. § 7B-907(a) is "to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." Thus, the General Assembly did not intend to allow a party to frustrate and delay a trial court's ability to achieve permanency for children by means of endless appeals. Second, an examination of our Juvenile Code and its practical application reveals **awareness** by the General Assembly that some juvenile court actions might evade appellate review as a matter of right, or might be appealable only at some later juncture. *See In re Laney*, 156 N.C. App. 639, 577 S.E.2d 377 (2003) (appeal from temporary disposition order after adjudication dismissed). Thirdly, we disagree with any suggestion that a permanency planning order that changes the goal from reunification to adoption "should" be tantamount to a "final order" and therefore appealable under G.S. § 7B-1001(3). Although such an order may trigger changes in the actions of DSS, it nonetheless makes no change to that which is of central import to parents, DSS and other persons interested in a juvenile proceeding—**custodial rights**. Additionally, the language of G.S.

§ 7B-1001 does **not** indicate that such an order is immediately appealable. Fourth, repeated interim appeals unnecessarily delay resolution of juveniles' cases, thus fostering an extended period of uncertainty and instability—again in sharp conflict with "develop[ing] a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." *See* G.S. § 7B-907(a). Fifth, the fact our Juvenile Code prescribes **time targets** for hearings suggests the legislature believed that persons' appellate rights would be fairly protected by allowing appeals only at the discrete junctures set forth in G.S. §§ 7B-1001 and 7B-1113 **because** the juvenile court would be required to act within such deadlines. *See, e.g.*, N.C.G.S. § 7B-506 (2003) (nonsecure custody); N.C.G.S. § 7B-801(c) (2003) (adjudication); N.C.G.S. § 7B-906 (review hearings); G.S. § 7B-907 (permanency planning hearings); N.C.G.S. § 7B-907(e) (2003) (when petition for termination of parental rights must be filed); and N.C.G.S. § 7B-908(b) (2003) (post-termination of parental rights hearings). Finally, intermittent juvenile appeals will inevitably **prolong** the involvement of the courts in most cases, something abhorrent to many parents who appeal the orders of the juvenile court. This is because the majority of our appellate decisions do not preclude further assertions of jurisdiction over the juvenile by the district court.

In sum, the suggestion that parents have an immediate appeal of right from every review order, or every initial and subsequent permanency planning order, because of the language in G.S. § 7B-1001(3): (1) contradicts the language and plain meaning of the statute; (2) frustrates the stated legislative purpose of achieving permanency for children in a timely manner; (3) does not serve the interests of children within the jurisdiction of our juvenile court; (4) is not essential to protect the rights and interests of parents; and (5) frustrates our courts' ability to meet the needs of children. We respectfully disagree with the holding in *Weiler*, and express our concern that an expansive interpretation and application of G.S. § 7B-1001(3) may paralyze our juvenile courts' ability to function.

[2] We next consider whether *Weiler* controls the outcome of DSS' motion to dismiss the present appeal. *See In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court."). In *Weiler*, the permanency planning order on appeal changed the plan

from reunification to adoption. The order on appeal here is not such an order, not only because it was an initial permanency planning order but also because it repeats the previous directives of the court that reunification be ceased. We therefore limit the holding of *Weiler* to the specific facts of that case, and decline to extend its reasoning further.

The present appeal is dismissed because the order on appeal is not a final order under G.S. § 7B-1001.

Dismissed.

Judges McCULLOUGH and ELMORE concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. M.M. FOWLER, INC., DEFENDANT

No. COA04-73

(Filed 3 May 2005)

Eminent Domain— partial taking—access restricted—lost profits—admissibility

The trial court did not err by permitting testimony about loss of profits in a case involving a partial taking for a highway. Although the condemnor is required to pay compensation only for the diminished value of the land and not for lost profits, there is an exception where access to property is restricted or denied. Evidence of lost profits is then admissible to show diminution in the value of remaining property which is rendered less fit for any use to which it has been adapted.

Appeal by plaintiff from judgment entered 8 October 2003 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 1 November 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood and Assistant Attorney General Richard M. Graham, for the State.

Huston Hughes & Powell, P.A., by James H. Hughes, for defendant-appellee.

STEELMAN, Judge.

On 6 July 1999, plaintiff, the Department of Transportation (DOT), filed its complaint and declaration of taking pursuant to its authority under Chapter 136, Article 9 of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 136-103 (2004). Plaintiff sought to acquire portions of property owned by defendant and used as a gasoline service station. The subject property, which totals 47,933 square feet (1.1. acres) is located in the northeast quadrant of the intersection of Garrett Road and Chapel Hill Road in Durham County, North Carolina. The taking encompassed 13,039 square feet for a new right of way along both Garrett and Chapel Hill Roads. The taking also included slope easements totaling 1,664 square feet and a temporary construction easement totaling an additional 6,166 square feet. Plaintiff estimated the just compensation for the taking to be $166,850.00, which it deposited with the Clerk of Superior Court of Durham County.

Prior to trial, plaintiff filed a motion *in limine* to exclude from evidence numerous matters which it contended were irrelevant to the issue of just compensation, including evidence concerning loss of profits or income, loss of business, loss of goodwill, or interruption of business. The trial court allowed the motion to exclude business income until it should rule otherwise, and the case proceeded to trial. Prior to the testimony of defendant's first witness Marvin Barnes, the president of M.M. Fowler, Inc., the court revisited the issue of the admission of evidence concerning the loss of business income for the purposes of calculating just compensation. Following the *voir dire* of Barnes, the trial court reversed its earlier ruling and denied plaintiff's motion *in limine* as it related to business income. The trial judge did, however, state he would give the jury a limiting instruction taken from *Kirkman v. Highway Comm'n*, 257 N.C. 428, 126 S.E.2d 107 (1962), which it did give before Barnes testified. Barnes testified the gasoline sales had diminished by $90,000.00 since the completion of the construction. Barnes arrived at this figure by multiplying the number of gallons of gasoline sold and the amount of profit per gallon. Barnes admitted that he based his opinion of the property's fair market value after the taking solely on the loss in business income. Defendant's expert, Frank Ward, testified that he used the income approach to appraise the value of the property, in which he took into account the loss of profit in gasoline sales of $90,000.00.

The jury returned two verdicts awarding compensation to defendant as follows: (1) for the taking of the property, $375,000.00; and (2)

for the temporary construction and slope easement, $75,000.00. Plaintiff does not appeal the verdict for the temporary construction and slope easement, but does appeal the takings verdict for the permanent taking of defendant's property.

The sole issue presented on appeal is whether the trial court erred in admitting evidence concerning loss of profits.

The measure of damages for a partial taking of real property in a highway condemnation case is the "difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking . . . ." N.C. Gen. Stat. § 136-112(1) (2004). The general rule is that loss of profits from the operation of a business conducted on the property is not an element of recoverable damages in an award for the taking done under the authority of eminent domain. *Kirkman v. Highway Comm'n*, 257 N.C. 428, 432, 126 S.E.2d 107, 110 (1962). This is so because the "condemner is not required to pay compensation for a loss of business but only for the diminished value of land which results from the taking." *Id.* However, an exception exists to the general rule. In certain circumstances, "when the taking renders the remaining land unfit or less valuable for any use to which it is adapted, that fact is a proper item to be considered in determining whether the taking has diminished the value of the land itself." *Id.*

In *Kirkman*, the landowners operated a motel and restaurant located on a highway. The entrance to the highway was barricaded, eliminating access to the motel from the highway. The landowners brought an action to recover just compensation for the taking of their access and for damage caused the remainder of their property by reason of the taking. The landowner's appraiser testified that in arriving at his valuation of the property after the taking, he took into consideration the fact the property was less valuable for motel and restaurant purposes after the taking because there was no access to the highway, which resulted in loss of business. *Id.* at 431-32, 126 S.E.2d at 110. It was undisputed that the highest and best use of the property at the time of the taking was as a motel and restaurant. *Id.* at 432, 126 S.E.2d at 111. The property's highest and best use had been damaged as a result of the taking, rendering the remainder less valuable. *Id.* Thus, it was proper for the appraiser to testify regarding his use of loss of income in his valuation of the property after the taking. *Id.* The holding in *Kirkman* is not limited to instances where rental property is involved, as it was not a case involving rental property.

The Supreme Court held it was appropriate for the appraiser to testify to loss of profits where the limitation on the access to the property diminished the value of the remaining land. *Id.* at 432, 126 S.E.2d at 110-11. Although the general rule is that loss of profits from the operation of a business conducted on the property is not an element of recoverable damages, it follows from *Kirkman* that where the taking results in access to the property being restricted or denied, which in turn diminishes the value of the remaining property, that fact is a proper item to be considered in determining the fair market value of the property after the taking. *See id. See also Barnes v. Highway Comm'n*, 257 N.C. 507, 513, 126 S.E.2d 732, 737 (1962) (holding that the items to be considered when calculating the difference between the fair market value of the property before the taking less the fair market value after the taking includes compensation for injury to the remaining portion of property). Other cases have also permitted the introduction of lost profits to show a diminution in value of the remaining property. *See Raleigh Durham Airport Authority v. King*, 75 N.C. App. 121, 330 S.E.2d 618 (1985) (parking lot); *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 415 S.E.2d 111 (1992) (dairy farm); *City of Fayetteville v. M. M. Fowler, Inc.*, 122 N.C. App. 478, 470 S.E.2d 343 (1996) (sales of gasoline at a convenience store).

We conclude that *Kirkman* creates a limited exception in cases where access to property that is being taken through eminent domain is restricted or denied. In such instances, evidence of lost profits is admissible to show diminution in the value of the remaining property where the taking renders the property less fit for any use to which it has been adapted, as well as to show the fair market value of the property after the taking.

This case is factually similar to *Kirkman*. Here, defendant took a portion of plaintiff's property in order to widen the highway, which resulted in access to the service station being limited from two entrances to one. The remaining property was rendered less valuable for the use to which it was adapted due to the limited access, resulting in a decrease in the profits from the sale of gasoline of $90,000.00. We conclude this case falls under the restricted access exception from *Kirkman*. It was proper for Barnes, as the owner of the gas station, to testify regarding the $90,000.00 reduction in gas sales in order to show damage to the remaining parcel of land. *See also Fowler*, 122 N.C. App. at 481, 470 S.E.2d at 345 (holding it was permissible for the owner of the service station to testify that the closing of one of the

entrances to the service station would dramatically lower the value of the property, as it was offered to support defendant's position that the elimination of the driveway would diminish the market value of the property). As a result, we hold that evidence regarding loss of profits was admissible to calculate the fair market value of the property after the taking.

Our holding is further supported by the fact defendant's appraiser did an economic analysis of the value of the property based on the rental value of similar property in similar locations. This indicates the traditional analysis could not be performed, therefore it was proper for the trial court to admit evidence of lost profits. The income approach is a proper method of valuation when no comparable sales data are available and a determination of the value of the land is directly attributable to the land. *Cloaninger*, 106 N.C. App. at 16, 415 S.E.2d at 115.

For the reasons discussed herein, we affirm the judgment of the trial court and conclude it did not err in permitting Barnes to testify to loss of profits or to use that amount in calculating the fair market value of the property after the taking.

NO ERROR.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA v. WILBERT DONNELL QUICK

No. COA04-365

(Filed 3 May 2005)

1. Appeal and Error— appealability—nolo contendere plea—no motion to withdraw plea—failure to petition for writ of certiorari

Defendant's appeal in a possession of cocaine case of those assignments of error not related to the sentence imposed at trial are dismissed, because: (1) a defendant who has entered a plea of nolo contendere is not entitled to appellate review as a matter of right unless defendant is appealing sentencing issues or the denial of a motion to suppress, or defendant has made an un-

successful motion to withdraw the no contest plea; (2) defendant has not made a motion to withdraw the no contest plea; and (3) as to appeal of other issues, defendant must petition the Court of Appeals for review by writ of certiorari which defendant failed to do.

2. Sentencing— prior record level—failure to prove prior convictions

The trial court erred in a possession of cocaine case by sentencing defendant as a prior record level III offender based on prior convictions which were not proven at trial, and the judgment is vacated and remanded to the superior court for resentencing.

3. Sentencing— habitual felon—constitutionality

Defendant's habitual felon sentence is constitutional and does not violate the Eighth Amendment prohibition against cruel and unusual punishment, because: (1) our habitual felon statute is the result of a deliberate policy choice by the legislature that those who repeatedly commit felonious criminal offenses should be segregated from the rest of society for an extended period of time; and (2) nothing in the Eighth Amendment prohibits our legislature from enhancing punishment for habitual offenders.

Appeal by defendant from judgment entered 5 November 2003 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 2 December 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General William P. Hart, for the State.

Anne Bleyman for the defendant-appellant.

TIMMONS-GOODSON, Judge.

Wilbert Donnell Quick ("defendant") appeals his convictions of possession of cocaine and attaining habitual felon status. For the reasons stated herein, we dismiss the appeal in part, vacate defendant's habitual felon sentence and remand this case for resentencing.

The State's evidence presented at trial tends to show the following: On or around 1 January 2003, police officers in Raleigh, North Carolina, went to the residence of Erin Walls in response to a call from defendant's sister expressing concern about defendant's welfare

and possible drug activity. Walls granted the police permission to search his apartment. Each person present, including defendant, consented to be searched. A search of defendant and the area nearby disclosed drug paraphernalia and a small amount of crack cocaine.

Defendant was arrested for possession of cocaine. On 24 February 2003, the Wake County grand jury indicted defendant for possession of cocaine and attaining habitual felon status. Pursuant to a plea agreement, defendant subsequently entered a plea of *nolo contendere* to both charges. The plea agreement provided that defendant would be sentenced to 70-93 months imprisonment. The trial court accepted defendant's plea, and defendant stipulated to the State's presentation of the facts that gave rise to his arrest. Defendant further stipulated that he plead guilty to three prior felony charges, which were used by the State to prove defendant's habitual felon status. The trial court entered judgment on defendant's plea, and in accordance with the terms of the plea agreement, sentenced defendant to 70-93 months imprisonment, with credit for 274 days served while defendant awaited trial. It is from this judgment and sentence that defendant appeals.

The issues presented on appeal are (1) whether the charge of possession of cocaine was sufficient to trigger an indictment for attaining habitual felon status; (2) whether the trial court erred by allowing an amendment of the habitual felon indictment at trial; (3) whether defendant's prior record level sentencing was supported by the evidence; and (4) whether defendant's habitual felon sentence is unconstitutional.

[1] At the outset we note that a defendant who has entered a plea of *nolo contendere* is not entitled to appellate review as a matter of right unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the no contest plea. N.C. Gen. Stat. § 15A-1444(a1), (a2), (e) (2003). To appeal other issues, the defendant must petition this Court for review by writ of certiorari.

In the present case, our review of the record on appeal indicates that defendant has not made a motion to withdraw the no contest plea. We also note that defendant has not petitioned this Court for writ of certiorari. Thus, we dismiss defendant's appeal as to those assignments of error not related to the sentence imposed at trial. We limit our review of this case to defendant's sentencing issues, which are the only issues properly before this Court.

[2] To that end, we move to defendant's argument that his prior record level calculation was not supported by the evidence. G.S. 15A-1340.13(b) provides, that "[b]efore imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14." N.C. Gen. Stat. § 15A-1340.13(b) (2003). G.S. 15A-1340.14(a) instructs, "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2003). As detailed in G.S. 15A-1340.14(f),

> A prior conviction shall be proved by any of the following methods:
>
> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.
>
> The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists.

N.C. Gen. Stat. § 15A-1340.14(f)(1)-(4) (2003); *see also* N.C. Gen. Stat. § 14-7.4 (2003). G.S. 14-7.6 prohibits the use of the convictions used to establish a defendant's status as habitual in determining his prior record level. N.C. Gen. Stat. § 14-7.6 (2003).

Though defendant did enter his plea of *nolo contendere* pursuant to a plea agreement, which provided for a specific sentence at the lowest end of the mitigated range of sentences, that sentence must still be authorized by G.S. 15A-1340.17 for the class of offense and prior record level. In the present case, defendant's prior record level worksheet lists eight prior convictions. Of these eight convictions, three of them were used by the trial court to establish defendant's habitual felon status: one count of common law robbery, one count of larceny of chose in action, and one count of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant stipulated to these three convictions during the entry of plea. The remaining five crimes were used to calculate defendant's prior record level.

Significantly, however, with the exception of the 1982 conviction of crimes against nature, which was initially used to charge defendant with attaining habitual felon status, the record is devoid of any proof of the remaining five prior convictions. The State failed to prove any of the convictions as required by G.S. 15A-1340.14(f). We, therefore, conclude that the trial court erred by sentencing defendant as a prior record level III offender, based on these prior convictions which were not proven at trial. Accordingly, we must vacate the trial court's judgment and remand this matter to the superior court for resentencing. At that time, the State may make a proper showing of defendant's prior convictions, which were not used in charging him as an habitual felon.

[3] Defendant next argues that his habitual felon sentence is cruel and unusual punishment in violation of his Eighth Amendment rights. We disagree.

Our Supreme Court has rejected Eighth Amendment challenges to "legislation which is designed to identify habitual criminals and which authorizes enhanced punishment." *State v. Todd*, 313 N.C. 110, 119, 326 S.E.2d 249, 254 (1985). In *Todd*, the Supreme Court stated, " 'only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment.' " *Id.* (quoting *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983)).

Our habitual felon statute is the result of a deliberate policy choice by the legislature that those who repeatedly commit felonious criminal offenses should be segregated from the rest of society for an extended period of time. *State v. Aldridge*, 76 N.C. App. 638, 640, 334 S.E.2d 107, 108 (1985) (quoting *Rummel v. Estelle*, 445 U.S. 263, 284, 63 L. Ed. 2d 382, 397 (1980)). "This segregation *and its duration* are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." *Id.* Moreover, nothing in the Eighth Amendment prohibits our legislature from enhancing punishment for habitual offenders. For these reasons, we conclude that defendant's habitual felon sentence is not unconstitutional.

Having considered all of defendant's assignments of error properly brought forward, we dismiss defendant's appeal on the entry of his plea, but vacate the judgment of the trial court and

remand this matter for resentencing proceedings not inconsistent with this opinion.

DISMISSED in part, VACATED in part, and REMANDED.

Judges TYSON and GEER concur.

STATE OF NORTH CAROLINA v. SAMUEL CLINT BLANCHER

No. COA04-260

(Filed 3 May 2005)

1. Criminal Law— mental capacity—retrospective competency hearing

The trial court did not abuse its discretion in a common law robbery case by proceeding with trial when defendant had not been evaluated to determine if he was competent to proceed, because: (1) despite the fact that the first ordered evaluation was not completed, defendant did not inform the court of the refused admission at Dorothea Dix hospital, request an additional order, or raise the lack of evaluation prior to the start of the common law robbery trial when the trial court inquired about unresolved pretrial matters; (2) no questions about defendant's mental capacity were raised during the trial; (3) despite raising pretrial the issue of competence, defendant failed to assert this statutory right before or during the trial and there was no evidence that defendant was not capable of assisting in his own defense other than the statement of defense counsel in the motion for an evaluation; (4) the court held a retrospective competency hearing before defendant's habitual felon trial, found defendant competent, and noted that he had not been hearing voices or had suicidal thoughts as stated in the original motion; and (5) at the competency hearing, defendant's first attorney testified that defendant was competent in aiding his defense and understood the proceedings against him.

2. Appeal and Error— preservation of issues—motion for mistrial—failure of juror to disclose prior felony conviction

Although defendant contends the trial court erred in a common law robbery case by failing to declare a mistrial when one of

the deliberating jurors failed to disclose during voir dire that she had a prior felony conviction, defendant failed to preserve this issue for appellate review because: (1) the information was acquired after the jury retired to deliberate, the trial court questioned the juror out of the presence of the other jurors, and the trial court permitted the juror to resume deliberations with the other jurors without objection by defendant; and (3) defendant did not move for a mistrial.

Appeal by defendant from judgments entered 12 September 2002 by Judge James W. Morgan in Lincoln County Superior Court. Heard in the Court of Appeals 7 March 2005.

Roy A. Cooper, III, Attorney General, by Fred Lamar, Assistant Attorney General, for the State.

Eric A. Bach for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted for common law robbery and for being an habitual felon. Prior to trial, an order was entered committing defendant to Dorothea Dix Hospital for examination with respect to his capacity to proceed. This evaluation was not completed prior to trial because Dix would not accept defendant for evaluation, and he was returned to the Lincoln County Jail.

At trial, the evidence tended to show that on 16 May 2001, while paramedics were assisting defendant at the scene of an automobile accident, they discovered a large amount of cash in small bills when they cut open his pant leg. An additional fifty dollar bill was found in a prescription pill bottle in defendant's automobile and transported to the hospital. Earlier in the day, a convenience store had been robbed and the cashier testified a fifty dollar bill, twenty-four five dollar bills, five twenty dollar bills and two packages of one dollar bills had been stolen. The cashier positively identified defendant as the robber in a photo line-up. Defendant offered evidence tending to show that he was at Chad Varner's house at the time of the robbery and that he was carrying a large amount of cash to pay a traffic fine the next day.

The jury returned a verdict of guilty of common law robbery. After the verdict was read, defendant accused his trial counsel of ineffective assistance of counsel. The court permitted counsel to withdraw and appointed new counsel for the habitual felon charge. Upon counsel's motion, another order for a forensic evaluation was

entered on 27 March 2002, which appropriately requested that defendant be evaluated at Central Prison by Dix authorities. On 11 September 2002, prior to the commencement of trial on the habitual felon charge, a competency hearing was held and the court found the defendant was and had been capable of proceeding. The jury convicted defendant of being an habitual felon and defendant was sentenced to a minimum term of 125 months and a maximum term of 159 months. Defendant appeals.

On appeal defendant argues that the trial court erred by: 1) proceeding with the common law robbery trial when he had not been evaluated to determine if he was competent to proceed; and 2) failing to declare a mistrial when one of the deliberating jurors failed to disclose that she had a prior felony conviction.

[1] A defendant is considered incapable of proceeding to trial if "he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." *State v. King*, 353 N.C. 457, 465-66, 546 S.E.2d 575, 584 (2001), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002) (quoting N.C. Gen. Stat. § 15A-1001(a)). The question of a defendant's capacity may be raised at anytime on motion by the prosecutor, defense counsel, defendant, or the court, and, if raised, the trial court is required to hold a hearing to determine the defendant's capacity to proceed. N.C. Gen. Stat. § 15A-1002 (2003). This benefit, however, may be waived by a defendant. *See State v. Young*, 291 N.C. 562, 567, 231 S.E.2d 577, 580 (1977) (waiving defendant's statutory right to a hearing to determine capacity to proceed due to his failure to raise it).

The motion to have defendant evaluated for capacity to proceed was based on a history of closed head injuries, trouble focusing or retaining information, and defendant's statement that he heard voices and had suicidal thoughts. Despite the fact that the first ordered evaluation was not completed, defendant did not inform the court of the refused admission at Dorothea Dix, request an additional order, or raise the lack of evaluation prior to the start of the common law robbery trial, when the trial court inquired about unresolved pre-trial matters. Our review of the record reveals that no questions about defendant's mental capacity were raised during the trial.

Despite raising, pre-trial, the issue of competence, defendant failed to assert this statutory right before or during the trial. While the failure to assert the right to a competency hearing does not eliminate

a trial court's statutory duty to hold a competency hearing where the court has before it substantial evidence of a defendant's mental incapacity, *Young*, 291 N.C. at 568, 231 S.E.2d at 581, other than the statement of defense counsel in the motion for an evaluation, there was no evidence before the trial court that defendant was not capable of assisting in his own defense.

Moreover, the court held a retrospective competency hearing before defendant's habitual felon trial. Defendant argues that this did not adequately protect his rights. We disagree. Although a retrospective competency hearing is disfavored, "the ultimate issue of defendant's competency to stand trial, the court's findings of fact on this issue, if supported by competent evidence, are then conclusive on appeal." *State v. McRae*, 163 N.C. App. 359, 368, 594 S.E.2d 71, 78, *disc. review denied*, 358 N.C. 548, 599 S.E.2d 911 (2004). In *McRae*, almost three years passed before the trial court conducted the retrospective competency hearing. 163 N.C. App. at 367, 594 S.E.2d at 77. In contrast, the competency evaluation here was completed four months after trial, and the competency hearing was conducted nine months after defendant's common law robbery conviction and prior to the habitual felony conviction and sentencing. The evaluation found defendant competent and noted that he had not been hearing voices nor had suicidal thoughts as stated in the original motion.

Furthermore it is well established that the court gives significant weight to defense counsel's representation that a client is competent, since counsel is usually in the best position to determine if his client is able to understand the proceedings and assist in his defense. *McRae*, 163 N.C. App. at 369, 594 S.E.2d at 78. At the competency hearing, defendant's first attorney testified that at the time of the common law robbery trial, his client was competent in aiding his defense and understood the proceedings against him. Counsel invoked attorney-client privilege when questioned about why he did not re-apply for a competency evaluation. Defendant also testified that his condition was "worse now" than it ever was. The trial court did not abuse its discretion by determining that a meaningful competency hearing could be held and its conclusion that defendant had the capacity to proceed was supported by competent evidence.

[2] In his second argument, defendant maintains that a mistrial should have been declared when a seated juror did not reveal her felony conviction during the voir dire of the jury. When moving for a

new trial based on juror misrepresentation, the movant "must show: (1) the juror concealed material information during *voir dire*; (2) the moving party exercised due diligence during *voir dire* to uncover the information; and (3) the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party." *State v. Buckom*, 126 N.C. App. 368, 381, 485 S.E.2d 319, 327, *cert. denied*, 522 U.S. 973, 139 L. Ed. 2d 326 (1997). N.C. Gen. Stat. § 9-3 states that convicted felons are subject to be challenged for cause but does not automatically disqualify a convicted felon from serving as a juror. N.C. Gen. Stat. § 9-3 (2003).

Here, after the jury retired to deliberate, the prosecutor received information that one of the jurors had been convicted of felony embezzlement. He requested a recess to examine the State's options. Defense counsel, after speaking with defendant off the record, declined to interrupt the deliberations, and did not object to the recess. The next morning, the State decided it did not wish to examine the juror; after conferring with his client, defense counsel requested a bench conference, after which the trial court questioned the juror out of the presence of the other jurors. During this questioning, the juror admitted she had been convicted ten years ago, served her sentence, and stated that she honestly did not understand how to answer to the question when asked at voir dire. Without objection by defendant, the trial court permitted the juror to resume deliberations with the other jurors. Defendant did not move for a mistrial. We do not believe defendant has preserved the issue for appellate review. *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600, *cert. denied*, —— U.S. ——, 157 L. Ed. 2d 382 (2003).

We hold that the defendant received a fair trial free from prejudicial error.

No error.

Judges HUDSON and JACKSON concur.

EDITH MILTON, PLAINTIFF v. TONY DALE THOMPSON, STANDARD TOOLS AND EQUIPMENT COMPANY, AND STANDARD TOOLS ACQUISITION CORP., DEFENDANTS

No. COA04-991

(Filed 3 May 2005)

Appeal and Error— appealability—denial of motion to enforce settlement

An appeal from the denial of a motion to enforce a settlement agreement in a personal injury action was dismissed as interlocutory even though the parties had agreed that a substantial right was affected. The Court must determine whether the appeal is premature, and the right to settle a claim has been held not to affect a substantial right. Defendants may appeal the denial of their motion once there is a final judgment.

Appeal by Defendants from order entered 8 March 2004 by Judge Andy Cromer in Superior Court, Guilford County. Heard in the Court of Appeals 12 April 2005.

Kelly & West Attorneys, by J. David Lewis, and The Law Offices of David Hartley, by David V. Hartley, for plaintiff-appellee.

Pinto, Coates, Kyre & Brown, PLLC, by Richard L. Pinto and Brady A. Yntema, for defendants-appellants.

WYNN, Judge.

Interlocutory orders that have not been certified by the trial court and do not affect a substantial right are not immediately appealable. *Liggett Group Inc. v. Sunas*, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993). In this case, Defendants appeal from an order denying a Motion to Enforce Settlement in a personal injury action. Because this Court has previously held that an appeal from a denial to enforce a settlement agreement in a workers' compensation case did not affect a substantial right, we likewise must conclude that an appeal from a denial to enforce a settlement agreement in a personal injury action does not affect a substantial right. *Ledford v. Asheville Hous. Auth.*, 125 N.C. App. 597, 600, 482 S.E.2d 544, 546, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 550 (1997). Accordingly, we dismiss this appeal.

Defendants (Tony Dale Thompson, Standard Tools and Equipment Company, and Standard Tools Acquisition Corporation),

do not contest any of the findings of fact in the trial court's order denying their motion to enforce a settlement agreement. Summarily, the findings of fact state that Plaintiff Edith Milton was involved in an automobile accident and hired attorney David Hartley and the law firm of Kelly & West to represent her in her claim for personal injuries against Defendants. Attorneys J. Thomas West and J. David Lewis were both members of the law firm Kelly & West and were involved in the handling of Ms. Milton's case.

On 11 April 2003, an unsuccessful mediated settlement conference was held with Ms. Milton, her husband (James Milton), and all attorneys present. However, sometime afterward, Ms. Milton authorized her husband to contact her attorneys "to authorize settlement negotiations with Defendant to a minimum of $450,000.00." In turn, Mr. Milton "telephoned Attorney Lewis at the firm of Kelly & West and advised Attorney Lewis that [Ms. Milton] was interested in settling her personal injury case, that they would like to receive the maximum amount they could get, but that $450,000.00 would be the 'floor' or minimum amount" that Ms. Milton would accept for settlement. Mr. Milton informed Mr. Lewis that they did not want to leave a $450,000.00 offer "on the table" if they could get it. Mr. Lewis relayed this conversation to Mr. West and Mr. Hartley.

On 18 July 2003, Mr. Lewis telephoned counsel for Defendants and left a voicemail message advising Defendants' counsel of a new settlement demand of $553,698.00. Mr. Lewis requested that Defendants' counsel contact either him or Mr. West.

On 21 July 2003, Mr. West contacted Defendants' counsel to resume settlement negotiations. Ultimately, counsel for Defendants offered $460,000.00 in settlement which Mr. West accepted and confirmed by letter. A copy of the confirmation letter was sent to Ms. Milton. Defendants' counsel confirmed this settlement by letter dated 24 July 2003.

On 29 July 2003, Mr. Milton called Mr. Lewis and advised him that at a recent family reunion several family members thought Ms. Milton deserved more money. Mr. Milton acknowledged that he had authorized settlement with a "floor" of $450,000.00, but Ms. Milton no longer wanted to settle her case for that amount.

On 7 October 2003, Defendants' counsel sent a settlement check in the amount of $460,000.00 to Ms. Milton's attorneys and on 16

October 2003, sent Releases and Dismissals to be executed by Ms. Milton. Ms. Milton neither endorsed the check nor signed the release or dismissal.

On 23 October 2003, Defendants filed a Motion to Enforce Settlement. Following a hearing, the trial court denied the motion concluding that Mr. West "did not have legal capacity to settle the case on behalf of [Ms. Milton], and therefore there is no settlement that this Court can enforce." Defendants appealed from the denial of their motion to enforce the settlement agreement.

The dispositive issue is whether this appeal is premature. An order is interlocutory if it is 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 rights of all parties involved in the controversy. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002). Generally, there is no right to immediate appeal from an interlocutory order. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2004); *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. In the instant case, the trial court's order did not resolve Ms. Milton's personal injury claim. We conclude that the order from which Defendants appeal was interlocutory.

There are two instances where a party may appeal interlocutory orders: (1) when there has been a final determination as to one or more of the claims and the trial court certifies that there is no just reason to delay the appeal, and (2) if delaying the appeal would prejudice a substantial right. *See Liggett Group Inc.*, 113 N.C. App. at 23-24, 437 S.E.2d at 677. Here, the trial court made no such certification. Thus, Defendants are limited to the second route of appeal, namely where "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). In such cases, we may review the appeal under sections 1-277(a) and 7A-27(d)(1) of the North Carolina General Statutes. N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (2004). "The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party." *Flitt*, 149 N.C. App. at 477, 561 S.E.2d at 513. "Whether an interlocutory appeal affects a substantial right is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002).

Although both parties stipulate that this appeal affects a substantial right, this Court must determine that a substantial right does in fact exist or the appeal is premature. *See Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980) (Court of Appeals should *sua sponte* address if appeal is interlocutory). We find that no substantial right is affected by this appeal.

Defendants argue in their brief that "the right to settle a disputed claim is a substantial right of the parties in this case which will be prejudiced should this matter be allowed to proceed without immediate appellate review." (Appellant's Brief p. 9). But Defendants fail to cite any authority supporting their argument.

Indeed, the outcome of this issue is controlled by a prior decision of this Court holding that an appeal from a denial to enforce a settlement agreement in a workers' compensation case did not affect a substantial right nor would injury result if the appeal were not immediately heard. *Ledford*, 125 N.C. App. at 600, 482 S.E.2d at 546; *see also Ratchford v. C.C. Mangum Inc.*, 150 N.C. App. 197, 200, 564 S.E.2d 245, 248 (2002) (appeal from Industrial Commission's opinion that the "clincher" settlement agreement was void was not shown to affect a substantial right).

As in *Ledford*, this appeal does not affect a substantial right. 125 N.C. App. at 600, 482 S.E.2d at 546. Defendants may still appeal the denial of their Motion to Enforce Settlement once there is a final judgment; this right will not be lost. *Flitt*, 149 N.C. App. at 477, 561 S.E.2d at 513. In light of *Ledford*, we must hold that this appeal is interlocutory in nature and does not affect a substantial right; accordingly, it is dismissed.

Dismissed.

Judges TYSON and ELMORE concur.

EDA HOFSTEAD CABANISS, JAMES AND KALEN HAUN, AND ELIZABETH WANDERS, TRUSTEE, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE D.B. ALEX. BROWN EXCHANGE FUND I, L.P., PLAINTIFFS V. DEUTSCHE BANK SECURITIES, INC. D/B/A DEUTSCHE BANK ALEX. BROWN, ALEX. BROWN MANAGEMENT SERVICES, INC., DC INVESTMENT PARTNERS, LLC, AND D.B. ALEX. BROWN EXCHANGE FUND, I, L.P., DEFENDANTS

No. COA04-530

(Filed 3 May 2005)

1. Partnerships— limited partner claims—misrepresentation—fraudulent nondisclosure—individual claims

Under Delaware law, plaintiff limited partners could assert individual claims for misrepresentation and fraudulent nondisclosure directly against the general partner, its parent bank which acted as placement agent for the partnership, and the partnership managers. The determination of whether a partner's claim should be brought directly or derivatively turns on who suffered the alleged harm and who would receive the benefit. Defendants concede that the alleged harm here was suffered by the individual limited partners and any remedy or recovery would benefit those individual partners.

2. Partnerships— limited partner claims—breach of contract—negligence—breach of fiduciary duty—derivative claims—demand upon general partner

Under Delaware law, plaintiff limited partners' claims for breach of contract, negligence, and breach of fiduciary duty against the general partner, its parent bank which acted as placement agent for the partnership, and the partnership managers were derivative claims that could be asserted by plaintiffs on behalf of the limited partnership only after the general partner refused to do so or it was shown that a demand on the general partner to bring the action would be futile. Although plaintiffs contend that making a demand on the general partner would have been futile because it would in essence have been asking the general partner to sue itself, this reason is not a sufficient excuse for failure to make a demand.

Appeal by plaintiffs from judgment entered 17 October 2003 by Judge W. Erwin Spainhour, Jr. in the Superior Court of Forsyth County. Heard in the Court of Appeals 26 January 2005.

Kilpatrick Stockton L.L.P., by David C. Smith, for plaintiff-appellants.

Bell, Davis & Pitt, P.A., by William K. Davis, and Brooks Pierce, by Mack Sperling, and Smith Moore, L.L.P., by J. Donald Cowan, Jr., for defendant-appellees.

HUDSON, Judge.

This action arises from a complaint filed against defendants Deutsche Bank Securities, Inc. ("Deutsche Bank") d/b/a Deutsche Bank Alex. Brown, Alex. Brown Management Services, Inc. ("Alex. Brown"), DC Investment Partners, LLC ("DCIP"), and D.B. Alex. Brown Exchange Fund, I, L.P. ("Exchange Fund"), by plaintiffs Eda Hofstead Cabaniss ("Mrs. Cabaniss"), James and Kalen Haun ("the Hauns"), and Elizabeth Wanders ("Mrs. Wanders") as trustee, alleging, both as individuals and derivatively on behalf of the Exchange Fund, breach of contract, negligence, misrepresentation, and breach of fiduciary duty, and individual claims for fraudulent non-disclosure. On 28 July 2003, defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 17 October 2003, the court entered an order dismissing the complaint. Plaintiffs appeal. As discussed below, we affirm in part and reverse and remand in part.

In 1997, each of the plaintiffs owned or controlled a large number of shares of highly-appreciated stock and wished to diversify their holdings without triggering significant capital gains tax liability. Deutsche Bank, an investment advisor to plaintiffs, created the Exchange Fund, a Delaware limited partnership, as a solution to plaintiffs' investment quandary. Deutsche Bank acted as the placement agent for the Exchange Fund, while Alex. Brown, a wholly-owned subsidiary of Deutsche Bank, served as the Exchange Fund's general partner and investment advisor responsible for management. Alex. Brown employed DCIP to handle the day-to-day management and administration of the Exchange Fund. The management committee of the Exchange Fund consisted of six members, five of whom were Deutsche Bank executives.

Plaintiffs became limited partners in the Exchange Fund. In 2000, the value of the Exchange Fund's limited partnership units fell dramatically. After plaintiffs filed their complaint, defendants moved to dismiss on the ground that the claims could only be asserted derivatively, and that derivative claims could not be pursued in court in the absence of a prior demand on the management committee.

[1] Plaintiffs first argue that the court erred in dismissing plaintiffs' complaint on the ground that they could not assert individual claims against defendants. We agree with respect to the misrepresentation and fraudulent non-disclosure claims, but disagree with respect to plaintiffs' other claims.

It is well-established that:

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Block v. County of Person, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000) (internal citations and quotation marks omitted).

Here, because the Exchange Fund is a Delaware limited partnership, Delaware law controls. N.C. Gen. Stat, § 59-901 (1999); 6 Del. Co. § 17-901 (1999). The determination of whether a stockholder's claim should be brought directly or derivatively

> must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?

Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (emphasis omitted). Defendants concede that under this analysis, the claims for fraudulent non-disclosure and misrepresentation are properly brought as direct actions, as the alleged harm was suffered by the individual stockholders and any remedy or recovery would benefit the individual stockholders. Thus, we reverse the dismissal of these claims.

[2] The remaining claims are for breach of contract, negligence, and breach of fiduciary duty. In answering the first question of the *Tooley* test, we must determine if "the plaintiff [has] demonstrated that he or she can prevail without showing an injury to the corporation." *Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004). Here, we believe that the answer must be no. Each of these claims is at its

heart, based on allegations of mismanagement of the Exchange Fund's assets. Where the "injury suffered by plaintiff, a devaluation of his stock, was a natural and expected consequence of the injury initially borne by the Company[,] the injury . . . is not individual in nature." *Id.* at 1124. Plaintiffs allege that by failing to screen adequately contributions to the Exchange Fund and to manage properly and diversify the investments, and by engaging in self-dealing, defendants caused the Fund's assets to decline and thus financially damaged plaintiffs in proportion to their investments in the Fund. Thus, we conclude that plaintiffs' claims for breach of contract, negligence, and breach of fiduciary duty are derivative claims.

Plaintiffs also argue that they were not required to make demand upon Alex. Brown before asserting their derivative claims because such demand would have been futile. We disagree.

"[T]he determination of whether a fiduciary duty lawsuit is derivative or direct in nature is substantially the same for corporate cases as it is for limited partnership cases." *Litman v. Prudential-Bache Properties, Inc.*, 611 A.2d 12, 15 (Del. Ch. 1992). Under Delaware law, a plaintiff may not bring a derivative claim in the right of a limited partnership unless the general partner has refused to do so, or any demand that the general partner do so would be futile:

> A limited partner or an assignee of a partnership interest may bring an action in the Court of Chancery in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.

6 Del. C. § 17-1001 (2001). In addition, in derivative actions, the complaint must state with particularity what effort plaintiffs made to get a general partner to initiate an action by a general partner or explain why it has not done so. *Litman*, 611 A.2d at 17. "This rule is one of substantive right—not simply a technical rule of pleading." *Haber v. Bell*, 465 A.2d 353, 357 (Del. Ch. 1983). The purpose of this rule is to allow the general partner, on behalf of the limited partnership, "the opportunity to rectify the alleged wrong without suit or to control any litigation brought for its benefit." *Id.* Plaintiffs contend that making demand on Alex. Brown would have been futile because the majority of its current and former management committee members were employed by Deutsche Bank and its affiliates and that a demand would in essence be asking the managers of the general partner to

sue themselves. However, as the court pointed out in *Haber*, "[t]his is not a sufficient excuse for failure to make a demand." *Id.* at 360.

Further, when a plaintiff accepts the terms of a partnership agreement which discloses conflicts of interest or self-dealing, he or she is precluded from bringing a derivative claim based on facts disclosed in that agreement. *Goodman v. Futrovsky*, 213 A.2d 899, 902-03 (Del. 1965), *cert. denied*, 383 U.S. 946, 16 L. Ed. 2d 209, 86 S. Ct. 1197 (1966) (holding that a plaintiff could not bring a derivative claim regarding a conflict of interest when this information had been disclosed in previous prospectuses). "A stockholder cannot complain of corporate action in which he has concurred." *Schreiber v. Bryan*, 396 A.2d 512, 517 (Del. Ch. 1978). Because plaintiffs failed to make demand on Alex. Brown or excuse such demand as futile as required by 6 Del. C. § 17-1001, they have no standing to bring these derivative actions.

Finally, plaintiffs argue that the trial court wrongly considered documents outside the scope of the second amended complaint which were attached to the motion to dismiss. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60-1, 554 S.E.2d 840, 847 (2001). However, given plaintiffs' failure to comply with the demand requirements as discussed above, the court's consideration of the letter in making its ruling, while improper, was not prejudicial.

Reversed and remanded in part, affirmed in part.

Judges WYNN and STEELMAN concur.

CAROLYN GRANT, PLAINTIFF v. R. BRADLEY MILLER; THE BRADLEY MILLER CONGRESSIONAL CAMPAIGN, ET AL., DEFENDANTS

No. COA04-979

(Filed 3 May 2005)

Appeal and Error— appealability—denial of motion to dismiss—defamation action—concluded political campaign

An appeal from the denial of a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) was itself dismissed as interlocutory where the action arose from a television advertisement during a political campaign. This case is governed by

Boyce v. Cooper, 169 N.C. App. 572 (2005), from which it is indistinguishable.

Appeal by defendant from judgment entered 20 April 2004 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 9 March 2005.

Marshall Hurley for plaintiff-appellee.

Parker, Poe, Adams & Bernstein, L.L.P. by Robert W. Spearman and Aretha V. Blake, and Everett, Gaskins, Hancock & Stevens, by Hugh Stevens, for defendants-appellants.

STEELMAN, Judge.

Defendants appeal the trial court's denial of their motion to dismiss plaintiff's defamation claim. For the reasons discussed herein, we dismiss the appeal as interlocutory.

In the fall of 2002, plaintiff Carolyn Grant (Grant) and defendant Bradley Miller (Miller) were opponents in an election for a new seat in the United States House of Representatives. During the campaign, defendants ran a political campaign advertisement containing certain statements and opinions with regard to Grant's fitness as a candidate for that office.

Grant instituted this action against defendants, asserting claims for declaratory judgment, conspiracy to violate her rights under N.C. Gen. Stat. § 163-274 *et seq*, libel *per se*, slander *per se*, and unfair and deceptive trade practices. Defendants moved for dismissal pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. The trial court expressly refused to consider Grant's affidavit, and elected in its discretion not to convert defendants' motion into a motion for summary judgment as allowed under Rule 12(b). Defendants' motion to dismiss was granted, with the exception of plaintiff's claims for libel *per se* and slander *per se*, based upon the following statement contained in an October 2002 television advertisement: "Carolyn Grant even admitted in court that she took $40,000 of her son's college money because she wanted to buy a new car."

Defendants appeal the denial of their motion to dismiss as to this one advertisement. The trial court's dismissal of Grant's remaining claims is not before this Court.

We first address whether defendants' appeal is interlocutory. Ordinarily, a trial court's denial of a motion to dismiss pursuant to

Rule 12(b)(6) of the Rules of Civil Procedure is an interlocutory order from which there is no right of appeal. *Bolton Corp. v. T. A. Loving Co.*, 317 N.C. 623, 629, 347 S.E.2d 369, 373 (1986). However, an interlocutory order is immediately appealable when the order being challenged affects a substantial right of the appellant, which would be lost absent immediate appellate review. N.C. Gen. Stat. § 1-277(a) (2004); *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 3, 527 S.E.2d 328, 330 (2000). The question of whether an interlocutory appeal affects a substantial right must be considered in light of the " 'particular facts of that case and the procedural context in which the order from which appeal is sought was entered.' " *Sharpe v. Worland*, 351 N.C. 159, 162-63, 522 S.E.2d 577, 579 (1999) (citations omitted).

The reason for these rules is to prevent fragmentary and unnecessary appeals by permitting the trial division to dispose of a case fully before it is presented to an appellate court. *Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). In *Veazey v. Durham*, the landmark case on interlocutory appeals, Justice Ervin wrote "[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950).

In *Boyce v. Cooper*, 169 N.C. App. 572, 611 S.E.2d 175 (2005) (COA03-1542) (*Boyce II*), the plaintiff brought suit against the defendant for defamation related to a political television advertisement broadcast during the 2000 election for the office of North Carolina Attorney General. The defendant moved for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure. The trial court denied the motion and defendant appealed. Defendant contended the appeal was not interlocutory under the holding in *Priest v. Sobeck*, 357 N.C. 159, 579 S.E.2d 250 (2002) (*per curiam* adoption of the dissent at 153 N.C. App. 662, 670-71, 571 S.E.2d 75, 80-81 (2003) (Greene, J., dissenting)). After considering the particular facts of the case and the procedural posture in which the case arose, this Court held the denial of defendant's motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure did not affect a substantial right, and determined the appeal was interlocutory. *Boyce II*, 169 N.C. App. at 578, 611 S.E.2d at 178-79. The Court found *Priest* distinguishable from the facts and procedural context of *Boyce II* because in *Priest* the trial court granted defendant's motion for summary judgment, whereas *Boyce II* dealt with the denial of a 12(c)

motion. *Id.* at 576, 611 S.E.2d at 177. This Court found the difference in the procedural posture to be significant, stating:

> 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.

Id. at 577, 611 S.E.2d at 178.

"Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). The facts of this case are indistinguishable from those in *Boyce II*. Both cases involve: (1) a suit for defamation in which one candidate for North Carolina political office ran a television advertisement against their opponent, which that opponent contends was defamatory and made with actual malice; (2) litigation over a political ad that had already been run in an election, but which does not involve an injunction preventing the defendant from running the ad in an upcoming election; and (3) implications concerning the First Amendment right of free speech. Most importantly, both cases came to this Court in the same procedural posture. The appeal in *Boyce II* stemmed from the denial of a 12(c) motion for judgment on the pleadings, and this case arose from a denial of a 12(b)(6) motion for failure to state a claim upon which relief can be granted. A Rule 12(b)(6) motion for failure to state a claim is more akin to a 12(c) motion for judgment on the pleadings than a motion for summary judgment. *See Boyce II*, 169 N.C. App. at 576, 611 S.E.2d at 177-78. This is so because "at the time of filing typically no discovery has occurred, no evidence or affidavits are submitted, and a ruling is based on the [complaint], along with any properly submitted exhibits." *Id.* Thus, "[a]ny defenses or arguments that plaintiff[] cannot actually prove [her] allegations in the complaint due to lack of evidence regarding malice will not be immediately lost if this case proceeds." *Id.* at 578, 611 S.E.2d at 178.

Further, the same reasons the panel in *Boyce II* gave for finding *Priest* inapplicable apply equally to this case. Defendants rely solely upon *Priest* for their assertion that their constitutional defenses will be lost due to the trial court's denial of their 12(b)(6) motion, thus requiring an immediate appeal. *Accord id.* We are bound by the holding of the prior panel of this Court in *Boyce II*, and conclude defendants' appeal from the denial of their 12(b)(6) motion does not affect a substantial right which will be lost absent immediate appellate review. Since defendants' appeal is interlocutory and is not properly before this Court, it must be dismissed.

DISMISSED.

Judges McGEE and BRYANT concur.

JOHN RUPE, Plaintiff v. ANTHONY G. HUCKS-FOLLIS, M.D. and PINEHURST SURGICAL CENTER, P.A., Defendants

No. COA04-1105

(Filed 3 May 2005)

Judges; Medical Malpractice— Rule 9(j) certification—erroneous grant of relief from another superior court judge's order—Rule 60(b)

A superior court judge lacked authority in a negligent medical treatment case to grant relief from another superior court judge's order that denied defendants' motion to dismiss plaintiff's claim for failure to comply with N.C.G.S. § 1A-1, Rule 9(j), because: (1) N.C.G.S. § 1A-1, Rule 60(b) has no application to interlocutory judgments, orders, or proceedings from the trial court; (2) the first judge's order denying defendants' motion to dismiss was an interlocutory order, and therefore, the second judge lacked the authority to grant relief from it under Rule 60(b); and (3) even assuming arguendo that the second judge did have the authority to grant relief from the first judge's interlocutory order, she erred by concluding that the revival of Rule 9(j) by a Supreme Court decision necessitated the dismissal of plaintiff's action when plaintiff's action proceeded as if the Rules of Civil Procedure existed without Rule 9(j) after the Court of Appeals had ruled it unconstitutional and the Supreme Court had not yet reversed

that decision, and plaintiff could not subsequently be faulted for failing to comply with its certification requirement.

Appeal by plaintiff from judgment entered 4 May 2004 by Judge Ola M. Lewis in Robeson County Superior Court. Heard in the Court of Appeals 24 March 2005.

The Law Offices of William S. Britt, by William S. Britt, for plaintiff appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Mark E. Anderson and Katherine E. Downing, for defendant appellees.

McCULLOUGH, Judge.

In the order now on appeal, the superior court granted relief from a previous denial of defendants' motion to dismiss and dismissed plaintiff's complaint for failure to comply with N.C. Gen. Stat. § 1A-1, Rule 9(j) (2004). We reverse.

On 21 December 2001, plaintiff filed an action against defendants for allegedly negligent medical treatment. Plaintiff's suit was initiated after a panel of this Court filed a 2 October 2001 decision, which held that N.C. Gen. Stat. § 1A-1, Rule 9(j) was unconstitutional. The North Carolina Supreme Court filed a 22 November 2002 decision vacating this holding. *Anderson v. Assimos*, 146 N.C. App. 339, 343-50, 553 S.E.2d 63, 67-69 (2001), *vacated in part and appeal dismissed*, 356 N.C. 415, 417, 572 S.E.2d 101, 103 (2002). No stay of this Court's decision was pending at the time plaintiff filed his action. Accordingly, plaintiff's complaint did not contain the certification required by N.C. Gen. Stat. § 1A-1, Rule 9(j) that, *inter alia*, his claims had been reviewed by an expert who was willing to testify that plaintiff's medical treatment did not comply with the applicable standard of care.

The statute of limitations for plaintiff's suit expired on 3 December 2001; however, on that date, plaintiff received a 20-day extension of time to file his complaint under N.C. Gen. Stat. § 1A-1, Rule 3. Plaintiff never requested the 120-day extension of time permitted by Rule 9(j) for the purpose of complying with the rule's certification requirement.

On 2 January 2002, plaintiff filed an amended complaint, pursuant to N.C. Gen. Stat. § 1A-1, Rule 15, in which he contended that he was not required to comply with Rule 9(j); however, he asserted

> [o]ut of an abundance of precaution, and without waiving any objections, . . . that the care and treatment of [him] by [d]efendants [had] been reviewed by physicians who [were] willing to testify that the care and treatment . . . breached the appropriate standards of care, and that such experts [were] expected to qualify under Rule 702 of the North Carolina Rules of [Evidence].

As of the filing of plaintiff's amended complaint, the Supreme Court had neither stayed nor vacated this Court's constitutional discussion in *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 63.

On 21 February 2002, defendants filed a motion to dismiss in which they argued that plaintiff's claims against them were time barred because the 21 December 2001 complaint failed to contain a Rule 9(j) certification, and the complaint was not amended to contain such a certification until after the expiration of the 20-day extension of time granted to plaintiff for the filing of his lawsuit, which expired on 24 December 2001. After consulting with the Institute of Government, Judge Robert F. Floyd, Jr., determined that the Supreme Court had not stayed this Court's decision in *Anderson v. Assimos*, and that, therefore, Rule 9(j) remained void and unconstitutional. Accordingly, in an order entered 5 July 2002, Judge Floyd ruled that "[p]laintiff was entitled to file an Amended Complaint . . . and have it relate back to the original filing, pursuant to [N.C. Gen. Stat. § 1A-1, Rule 15(a), (c)]," and he denied defendants' motion to dismiss. Defendants' appeal from this order was dismissed as interlocutory on 22 November 2002.

On 2 April 2004, after the Supreme Court had vacated this Court's constitutional analysis in *Anderson*, defendants filed a motion for relief from Judge Floyd's order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(5) and (6). In an order entered 4 May 2004, Judge Ola M. Lewis concluded that plaintiff's original complaint was defective under Rule 9(j)'s revived certification requirement and that the amended complaint did not relate back. She granted defendants' motion for relief from Judge Floyd's order, and dismissed plaintiff's complaint with prejudice. Plaintiff now appeals.

In his first argument on appeal, plaintiff contends that Judge Lewis lacked authority to grant relief from Judge Floyd's order. We agree.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2004) provides, in pertinent part, that

> [o]n motion and upon such terms as are just, the [trial] court may relieve a party . . . from **a final judgment, order, or proceeding** for the following reasons:
>
> . . . .
>
> (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.

(Emphasis added.) "Rule 60(b) . . . has no application to *interlocutory* judgments, orders, or proceedings of the trial court. It only applies, by its express terms, to *final* judgments." *Sink v. Easter*, 288 N.C. 183, 196, 217 S.E.2d 532, 540 (1975) (citation omitted); *see also Pratt v. Staton*, 147 N.C. App. 771, 775, 556 S.E.2d 621, 624 (2001).

In the instant case, Judge Floyd's order denying defendants' motion to dismiss was an interlocutory order. Therefore, Judge Lewis lacked the authority to grant relief from it under Rule 60(b). As such, Judge Lewis' order must be reversed.

We note that, even assuming *arguendo* that Judge Lewis did have the authority to grant relief from Judge Floyd's interlocutory order, she erred by concluding that the revival of Rule 9(j) necessitated the dismissal of plaintiff's action. When plaintiff filed his original and amended complaints, this Court's decision in *Anderson v. Assimos* had not been stayed or reversed by our Supreme Court. Thus, plaintiff's action proceeded as if the Rules of Civil Procedure existed without Rule 9(j), and plaintiff could not subsequently be faulted for failing to comply with its certification requirement. *See MacDonald v. University of North Carolina*, 299 N.C. 457, 463, 263 S.E.2d 578, 581-82 (1980) ("When the law has received a given construction by a court of last resort, and contracts have been made and rights acquired under and in accord with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision."); *Williamson v. Rabon*, 177 N.C. 303, 305, 98 S.E. 830, 831 (1919) (noting that a case interpreting a statute "may become a precedent sufficiently authoritative to protect rights acquired during its continuance"); 16A AM. JUR. 2D *Constitutional Law* § 205 (1998)

("Rights acquired under the particular adjudications holding [a] statute [to be] invalid are not affected by the subsequent decision that the statute is constitutional.").

For the reasons set forth above, the trial court's 4 May 2004 order is

Reversed.

Judges HUNTER and LEVINSON concur.

IN RE: M.A.B.

No. COA04-859

(Filed 3 May 2005)

Juveniles— disposition and restitution—delegation of authority

The trial court did not impermissibly delegate its authority when determining the dispositional alternatives for a delinquent juvenile by ordering that the juvenile pay restitution, but left the amount to be determined, and ordered participation in a residential treatment program, but left the specifics of the day-to-day program to be directed by the Juvenile Court Counselor or Mental Health Agency.

Appeal by Juvenile from order entered 23 February 2004 by Judge Mitchell L. McLean in District Court, Yadkin County. Heard in the Court of Appeals 12 April 2005.

Attorney General Roy Cooper, by Director Victims and Citizens Services William M. Polk, for the State.

James N. Freeman, Jr., for juvenile-appellant.

WYNN, Judge.

Under section 7B-2506 of the North Carolina General Statutes "the court, and the court alone, must determine which dispositional alternatives to utilize with each delinquent juvenile." *In re Hartsock*,

158 N.C. App. 287, 292, 580 S.E.2d 395, 399 (2003). In this matter, the juvenile contends that the trial court impermissibly delegated its authority by allowing others to determine the amount of restitution and the specifics of a residential treatment program. Because the trial court ordered restitution and participation in the residential treatment program, albeit without specifics, we affirm the order of the trial court.

This matter arose from an incident involving an eleven-year-old student, M.A.B., who struck another student on the head with his fist, causing swelling on the side and back of the student's head. Following M.A.B.'s admission in court to the substance of the allegations, the trial court adjudicated M.A.B. delinquent on the count of misdemeanor assault inflicting serious injury in an adjudication/disposition order dated 1 March 2004. The trial court ordered M.A.B. to: (1) pay restitution "in an amount to be determined," for the student's medical bills; (2) be placed on juvenile probation for twelve months under the supervision of a Juvenile Court Counselor; (3) be evaluated for counseling and receive a psychological evaluation and comply with their recommendations for further treatment; (4) write a letter of apology to the other student; and (5) "cooperate and participate in a residential treatment program as directed by court counselor or mental health agency." M.A.B. appealed from that order.

On appeal, M.A.B. argues that the trial court impermissibly delegated its authority by ordering M.A.B. to "pay restitution in an undetermined amount to be decided by the Juvenile Court Counselor" and "cooperate and participate in a residential treatment program as directed by the Court Counselor or Mental Health Agency." We disagree.

As this matter was a Level I, Community Disposition under section 7B-2508 of the North Carolina General Statutes, the trial court could consider various alternatives for punishment listed in section 7B-2506(1) through (13), and (16) of the North Carolina General Statutes. N.C. Gen. Stat. § 7B-2508(c) (2004). Section 7B-2506 provides in pertinent part:

> (3) Order the juvenile to cooperate with . . . a residential or nonresidential treatment program. Participation in the programs shall not exceed 12 months.
>
> (4) Require restitution, full or partial, up to five hundred dollars ($500.00), payable within a 12-month period to any person who

> has suffered loss or damage as a result of the offense committed by the juvenile. *The court may determine the amount, terms, and conditions of the restitution.* . . .

N.C. Gen. Stat. § 7B-2506(3), (4) (2004) (emphasis added).

M.A.B. cites *In re Hartsock*, 158 N.C. App. 287, 580 S.E.2d 395, to support his argument that the trial court improperly delegated its authority. In *Hartsock*, the "court ordered juvenile to 'cooperate with placement in a residential treatment facility *[i]f deemed necessary by MAJORS counselor or Juvenile Court Counselor*.' " *Id.* at 291, 580 S.E.2d at 398. This Court held that "[t]he statute does not contemplate the court vesting its discretion in another person or entity, therefore, the court, and the court alone, must determine which dispositional alternatives to utilize with each delinquent juvenile." *Id.* at 292, 580 S.E.2d at 399. This Court went on to note that "a judge could order certain dispositional alternatives apply upon the happening of a condition, since *the court*, and not another person or entity, would be exercising its discretion." *Id.*

Here, unlike *Hartsock*, the adjudication/disposition order did not impermissibly delegate authority. Instead, the trial court in this matter ordered M.A.B. to pay restitution, but left the amount, which is subject to the statutory limitation of $500.00, to be determined until medical bills were provided to the court. Thus, the trial court did not delegate whether restitution would be paid, but only left the amount undetermined. This interpretation comports with the statute which only provides that the "court *may* determine the amount . . . of the restitution." N.C. Gen. Stat. § 7B-2506(4) (emphasis added). The statute does not make it mandatory for the trial court to determine the amount of restitution.

Moreover, the trial court's order for participation in a residential treatment program differs from the order in *Hartsock*. In *Hartsock*, the decision of whether the juvenile would be placed in a residential treatment facility was left to the determination of the MAJORS or Juvenile Court Counselor. 158 N.C. App. at 291, 580 S.E.2d at 398. Here, the trial court ordered M.A.B. to "cooperate and participate in a residential treatment program *as directed* by court counselor or mental health agency." (emphasis added). The determination of whether M.A.B. would participate in a residential treatment program was made by the trial court, but the specifics of the day-to-day program were to be directed by the Juvenile Court Counselor or Mental

Health Agency. Thus, the trial court, and not another person or entity, exercised its discretion. *Id.* at 292, 580 S.E.2d at 399.

As the trial court did not impermissibly delegate its authority, we affirm the decision of the trial court.

Affirmed.

Judges TYSON and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 3 MAY 2005

GIBBS v. COBB No. 04-464	Wake (02CVS11389)	Affirmed in part and reversed in part
GRAHAM v. HOUSE No. 04-605	Dare (04CVD34)	Reversed and remanded
IN RE A.M.H. No. 04-188	Cumberland (02CVD1259)	Affirmed
IN RE E.L.L. No. 04-1121	Wake (03J71)	Affirmed
IN RE J.N. No. 04-1017	Mecklenburg (99J344)	Reversed and remanded
IN RE T.C. No. 04-1360	Wilkes (02J193)	Reversed and remanded
NORRIS v. COASTAL TRANSP., INC. No. 04-669	Ind. Comm. (I.C. 921410)	Reversed
ROLLINS v. TOWN OF CLEVELAND No. 04-997	Rowan (03CVS1681)	Dismissed
STATE v. ARTIS No. 04-1269	Lenoir (01CRS51372)	Affirmed
STATE v. BAILEY No. 04-612	Beaufort (01CRS53805) (01CRS53806)	No error
STATE v. BALDWIN No. 04-658	Alamance (03CRS56308)	Affirmed
STATE v. BARTLETT No. 04-1122	Gaston (02CRS63069)	No error
STATE v. BEATTY No. 04-540	Durham (01CRS47875)	No error
STATE v. BECTON No. 04-1076	Wake (98CRS64472) (99CRS13) (99CRS1280) (99CRS63109) (99CRS63110)	Vacated and remanded
STATE v. BERKLEY No. 04-1145	Wayne (03CRS57194)	No error

STATE v. COSTON No. 04-458	Perquimans (98CRS1094) (03CRS59)	Reversed
STATE v. FENNELL No. 04-898	Sampson (02CRS54238)	No error
STATE v. FLORES No. 04-1106	Greene (02CRS50445)	Affirmed
STATE v. FULTON No. 04-869	Forsyth (02CRS61619)	No error
STATE v. HILTON No. 04-210	Caldwell (02CRS6688)	No error
STATE v. JOHNSON No. 04-468	Beaufort (02CRS052221)	No error
STATE v. LANDAVER No. 04-934	Randolph (02CRS051879)	Affirmed
STATE v. LANGLEY No. 04-1028	Pitt (03CRS56615)	No error
STATE v. MACKEY No. 04-1173	Pitt (02CRS65042)	No error
STATE v. MAYNOR No. 04-379	Robeson (01CRS54907)	No error
STATE v. McCLAIN No. 04-378	Cumberland (99CRS18947) (99CRS18948)	Affirmed
STATE v. MILLER No. 04-1219	Buncombe (03CRS60869) (03CRS61665) (03CRS61666) (03CRS61874) (03CRS61875) (03CRS61876) (03CRS61877) (03CRS61878) (03CRS62042) (03CRS62043) (03CRS62044) (03CRS62045) (03CRS62894) (03CRS62895) (03CRS62896) (03CRS62950)	No error
STATE v. MOORE No. 04-1107	Harnett (01CRS53465)	Vacated and remanded

STATE v. MORRIS No. 04-676	Harnett (01CRS51767) (01CRS51966) (03CRS420)	No error
STATE v. MORRISON No. 04-985	Harnett (02CRS52699) (03CRS4766) (03CRS4767)	No error
STATE v. OCAMPO No. 04-607	Stanly (02CRS4211) (02CRS4212) (02CRS4213) (02CRS4214) (02CRS4215) (02CRS4216) (02CRS4217) (02CRS4218) (02CRS4219) (02CRS4220) (02CRS4221) (02CRS4222) (02CRS4223) (02CRS4224) (02CRS4225) (02CRS4226)	No error
STATE v. OCHOA No. 04-939	Randolph (03CRS50140)	Affirmed
STATE v. OVERTON No. 04-327	Hertford (03CRS50202)	No error
STATE v. PEARCY No. 04-880	Buncombe (03CRS55840) (03CRS13109) (03CRS55837) (03CRS55838) (03CRS55839)	No error in part; reversed in part as to defendant's conviction for driving while license revoked in case number 03CRS55837
STATE v. PETERSON No. 04-573	New Hanover (02CRS18448) (02CRS18449) (02CRS18450) (02CRS18451) (02CRS18452) (02CRS20446) (02CRS20447)	No error
STATE v. RASCOE No. 04-1318	Northampton (03CRS1149) (03CRS50499)	No error

STATE v. SLADE No. 04-632	Alamance (03CRS056314)	No error
STATE v. THOMAS No. 04-1239	Forsyth (03CRS53858)	Remanded for resentencing
STATE v. WHITLEY No. 04-920	Hoke (02CRS51832) (02CRS51833) (03CRS1510)	No error
WILKERSON v. SANDHILL PROPERTIES, INC. No. 04-519	Richmond (03CVS1056)	Reversed and remanded

STATE OF NORTH CAROLINA v. MARKEITH RODGERS LAWRENCE

No. COA03-1038

(Filed 17 May 2005)

1. Sexual Offenses— first-degree sexual offenses—fatal variance between indictment and evidence

The judgments entered on each of defendant's six first-degree sexual offense convictions must be vacated due to a fatal variance between the offense alleged in each indictment and the evidence presented at trial, because: (1) none of the six indictments for first-degree sexual offense utilized the short-form indictment language authorized by N.C.G.S. § 15-144.2(b) to charge defendant with first-degree sexual offense pursuant to N.C.G.S. § 14-27.4(a)(1) on the theory that the alleged sexual offenses were committed against a victim under the age of thirteen years old; (2) the trial court instructed the jury regarding the first-degree sexual offense charges on the theory that the minor child was under the age of thirteen at the time of the alleged offenses, and not on the theory that the offenses were forcible as alleged in the indictments; (3) the State did not present any evidence that the alleged offenses were forcible as alleged in the indictments; and (4) defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment.

2. Constitutional Law— right to unanimous jury—multiple sexual crimes

Defendant's judgments for three counts of indecent liberties and five counts of statutory rape are reversed and remanded for a new trial on those charges based on the risk of a nonunanimous jury verdict, because: (1) no jury instructions, indictment, or verdict sheet distinguished which incidents served as the bases of the jury's eight verdicts; and (2) there was evidence of more incidents presented than the respective charges.

Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from judgments entered 16 January 2003 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 28 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Everett & Hite, L.L.P., by Stephen D. Kiess, for defendant-appellant.

ELMORE, Judge.

Defendant appeals from judgments entered upon jury verdicts finding him guilty of six counts of first-degree sexual offense, five counts of statutory rape, and three counts of taking indecent liberties with a child. After careful consideration, and for the reasons stated herein, we vacate the six judgments entered on convictions of first-degree sexual offense, reverse the remainder of the judgments entered against defendant, and remand for a new trial on the statutory rape and indecent liberties charges.

I. Evidentiary Background

Since application of the evidence presented by the State is crucial to our analysis of the issues presented, our discussion of the evidence presented against defendant is detailed. The State's evidence presented at trial tended to show that over a period of approximately eighteen months in 1999 and 2000, defendant engaged in a variety of sexual acts with the victim, L.D. (Lucy)[1], beginning while Lucy was eleven years old. Defendant was living with, and later married to, Lucy's sister Sharlena during the period in which these acts occurred. Lucy resided with defendant and Sharlena after Lucy's mother died in August 2000, but spent many days and nights there prior to her mother's death.

A. Indecent Liberties

Lucy testified that defendant's inappropriate conduct began in the summer of 1999, prior to the death of her mother, when she and defendant played a game in which defendant exposed himself to her and she lifted up her shirt for defendant. Lucy testified that later that summer, while spending the night with defendant and Sharlena in their home, she was lying on the sofa in the living room when defendant told her to lay down, got on top of her, pulled down his shorts, moved her nightgown and underwear to the side, and "tried to stick his private part into [her]." Lucy testified that no penetration occurred on this occasion because "[she] kept scooting up the couch

1. In consideration of this Court's priority of protecting the identity of minor children, any children are identified by their initials and the use of a pseudonym.

so he wouldn't." Lucy testified that she did not tell anyone about either of these incidents.

Lucy also testified that on one occasion during the summer of 1999, she and her younger sister D.D. (Debbie), then eight years old, were about to go swimming when defendant called them into his bedroom. Defendant, who was sitting on the bed with a towel wrapped around his waist, kissed Lucy and Debbie while masturbating. Defendant then laid down on the bed, removed the towel, and told Lucy to sit on top of him. She complied, and they simulated having sex, although defendant did not move Lucy's bathing suit out of the way. Debbie testified at trial and corroborated Lucy's testimony regarding this incident, as well as testifying that she once witnessed defendant put his hand up Lucy's shirt while they were watching a pornographic movie.

B. Rape

Lucy further testified that she and defendant had sexual intercourse a total of thirty-two times. The first incident of possible penetration happened in the living room during an evening in December 1999 when Lucy was staying with defendant and Sharlena because her mother was in the hospital. Sharlena was not at home that evening and at the time defendant was twenty-four years old while Lucy had just turned twelve. Lucy said that while her younger brother and sister were in another room,

> [defendant] told me to lay down. And I was at the edge of the couch and he told me to lay down and he tried it again. And as he was trying he stuck it—he almost did, and it was hurting so I was scooting on the couch and then I ran out of the room.

Following this incident in the living room, and later the same evening, defendant came into Lucy's room that she shared with Debbie and Sharlena's three-year-old son C.D. (Caleb). All three children were now asleep, but defendant awakened Lucy and told her to lay down on the couch in Caleb's room.

> LUCY: [A]nd he did it.
>
> . . .
>
> STATE: And what do you mean when you say "he did it"?
>
> LUCY: He had sex with me.
>
> STATE: Did any of his body ever enter any of your body?

LUCY: Yes, sir.

STATE: Please tell the ladies and gentlemen of the jury when you say he had sex with you, what do you mean? What did he do?

LUCY: He stuck his private part into mine.

STATE: Into your private part?

LUCY: Yes.

. . .

STATE: And that was the first time y'all actually had sex; is that right?

LUCY: Yes, sir.

Lucy testified that the next time she remembered that she had sex with defendant it took place in the living room, and that about half the time the two engaged in sex, "about fifteen times," it occurred in the living room, when Sharlena was "usually in her room asleep or gone to work."

STATE: Tell—please tell the jury anything you remember about having sex with [defendant] in the living room. Do you remember where in the living room it was?

LUCY: Most of the time it was on the couch and then sometimes on the floor.

STATE: Most of the time on the couch?

LUCY: (Nodded affirmatively.)

. . .

STATE: Do you remember any of the times that were on the couch specifically?

LUCY: Just one time I can remember.

STATE: That you remember specifically?

LUCY: Yes, sir.

STATE: Okay. Why do you remember that time?

LUCY: (Shrugged shoulders.) I don't know.

STATE: You just do?

LUCY: Yes sir.

. . .

STATE: Were there any other times that you all had sex on the couch in the living room?

LUCY: Not that I can remember.

STATE: Do you remember having sex in the living room any other times at all?

LUCY: Yes, sir.

Lucy also testified that immediately following a sex act involving a screwdriver, she and defendant had intercourse. Further, she testified of one specific incident of sex with defendant on the floor of the room she shared with Caleb. This incident was distinctive in part due to the fact that Sharlena nearly saw them in the act.

C. Sexual Offense

Lucy testified to four separate occasions in which defendant penetrated her vagina with a broom, a cucumber, a hairbrush, and a screwdriver, respectively. Each of these incidents occurred on different days, each while Lucy was twelve. She said defendant inserted the broom because "[h]e said he wanted to see how far it would go[;]" that he inserted the hairbrush "[t]o make him hard[;]" and that defendant "told [her] to play with [her]self" with the screwdriver. Lucy testified that almost every time they had sex, fellatio was also involved, and that on one occasion defendant partially inserted his penis into her anus.

STATE: Other than the times that you have described that [defendant] had sex with you, put his private in your private or put his penis in your vagina the times that you have described, did he ever put his penis in any other part of your body?

LUCY: Yes, sir.

STATE: What other parts of you body did he put his penis is [sic]?

LUCY: My mouth and my butt.

STATE: Do you remember how many times he put his penis in your butt?

LUCY: Only once but it wasn't the whole thing.

. . .

STATE: When did he—do you recall how many times he put his penis in your mouth?

LUCY: Almost every time we had sex.

COURT: Say it again.

LUCY: Almost all the time we had sex.

D. Supplemental Evidence

On 5 January 2001, Lucy's neighbor T.B. (Taylor), then twelve, spent the night with Lucy, who had been living with defendant and Sharlena since her mother's death in August 2000. Lucy testified that she fell asleep while watching television on the couch in the living room with defendant and Taylor. Lucy said that at some point she was awakened by "sucking noises" and became upset because she thought defendant was making "[Taylor] suck him like he did [Lucy]." Taylor testified at trial, and denied performing oral sex on defendant at any time.

Lucy then went to the home of her aunt, Jannis King, who the next day overheard her talking to defendant on the telephone and crying. Ms. King suspected that defendant had been "messing" with Lucy and shared her suspicions with Lucy's father, who together with Ms. King, took Lucy to Nash General Hospital to be examined on 7 January 2001.

At Nash General Hospital, Lucy spoke to a nurse, a police officer, and a victim's advocate. She denied having sex with defendant to each of them. When questioned as to the denials, Lucy testified that she did this because she was scared of defendant, and also because she loved defendant and did not want him to go to jail. Lucy told the victim's advocate that her father had touched her inappropriately when she was eight years old, and she told the police officer that she had had sex before, although she did not specify with whom. The findings from Lucy's physical examination were consistent with someone who had engaged in consensual sex.

At trial, three personnel from Lucy's school testified as well as the officer who investigated her case. A written statement by Lucy made during the officer's investigation was introduced. The statement was materially consistent with her trial testimony, although there was

some discrepancy as to whether she and defendant began having intercourse in the summer of 1999, when Lucy was eleven, or after she turned twelve in December 1999.[2]

Defendant presented evidence at trial, although he did not testify. Defendant's wife Sharlena testified that she never worked at night, that defendant took her to work every day before going to work himself, and that as a result, defendant was never alone with Lucy in their home. Sharlena testified that the walls in their home were very thin and that she was a very light sleeper, such that defendant and Lucy could not have had sex in their home without her being aware of it. Sharlena also testified that the couch, on which Lucy testified she and defendant first had intercourse, had been removed from Caleb's bedroom by December 1999. Defendant presented four other witnesses who each testified that Lucy told them she had never had sex with defendant, as well as Lucy's friend Taylor, who testified that defendant did not touch her on 5 January 2001, the night she slept at defendant's house.

E. Result at Trial

After deliberations, the jury returned verdicts of guilty on all charges. The trial court then found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit these offenses and sentenced defendant to consecutive sentences from the aggravated range on each offense, for a total of a minimum of 3360 and a maximum of 4131 months imprisonment, or 280 to just over 344 years. From the judgments entered upon these convictions, defendant now appeals.

II.

[1] By his first assignment of error, defendant contends that the judgments entered on each of defendant's six first-degree sexual offense convictions must be vacated due to a fatal variance between the offense alleged in each indictment and the evidence presented at trial, along with the jury instructions. The State concedes that under controlling precedent these judgments must be vacated.

The crime of first-degree sexual offense is set forth, in pertinent part, in N.C. Gen. Stat. § 14-27.4 as follows:

2. Lucy was allowed to read a statement she wrote with a detective on 29 January 2001 into the record. Although an objection was made and an unrecorded bench conference occurred, the trial court allowed the entire statement into the record. It appears it was admitted for substantive purposes; no limiting instruction was given. The statement, while consistent with her trial testimony, was remarkably more accurate as to the number of incidents and alleged timing of each incident.

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or
>
> (2) With another person by force and against the will of the other person . . .

N.C. Gen. Stat. § 14-27.4(a) (2003). Defendant was indicted on six counts of first-degree sexual offense, with each indictment being identical, save the case number, and all bearing the dates of "May 1, 1999 thru December 6, 2000."

> The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did engage in a sex offense with [Lucy], *by force and against the victim's will*. This act was in violation of [N.C. Gen. Stat. § 14-27.4(a)].

Each of the six indictments for first-degree sexual offense utilized the short-form indictment language authorized by N.C. Gen. Stat. § 15-144.2(a) to charge defendant with first degree sexual offense, on the theory that the alleged sexual offenses were committed by force and against the victim's will. None of the six indictments for first degree sexual offense utilized the short-form indictment language authorized by N.C. Gen. Stat. § 15-144.2(b) to charge defendant with first degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(1), on the theory that the alleged sexual offenses were committed against a victim under the age of thirteen years old.

Further, our review of the record indicates that the trial court instructed the jury regarding the first degree sexual offense charges on the theory that Lucy was under the age of thirteen at the time of the alleged offenses, not on the theory that the alleged offenses were forcible. Moreover, the State did not present any evidence that the alleged offenses were forcible.

" 'It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment.' " *State v. Miller*, 137 N.C. App. 450, 458, 528 S.E.2d 626, 631 (2000) (holding that jury instructions allowing a conviction pursuant to N.C. Gen. Stat. § 14-27.7A would be different

than the crime charged in the indictment, which was an offense against N.C. Gen. Stat. § 14-27.4(a)(2)) (quoting *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986) (dealing with a variance in the indictment and instructions on first-degree rape the Court noted that "[t]he failure of the trial court to submit the case to the jury pursuant to the crime charged in the indictment amounted to a dismissal of that charge and all lesser included offenses."). Accordingly, we vacate the judgments entered upon each of defendant's six first-degree sexual offense convictions: 01 CRS 09511 through 01 CRS 09515 and 01 CRS 51630.

III.

[2] By other assignments of error, defendant argues that the five indictments charging him with first-degree rape and the three indictments charging him with indecent liberties did not specify the particular underlying act supporting the charge; subjected him to double jeopardy; span too broad a time period; and deprive him of a unanimous jury verdict. We find defendant's unanimity argument to be dispositive, and therefore do not reach his other assignments of error.[3]

Our state Constitution and statutes vest defendants with a right to only be convicted of crimes by a unanimous jury. *See* N.C. Const. art. I, § 24 ("No person shall be convicted of any crime but by the unanimous verdict of a jury in open court."); N.C. Gen. Stat. § 15A-1237(b) (2003) ("The verdict must be unanimous, and must be returned by the jury in open court."). "To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged." *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982) (citing *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368 (1970)). Stated differently, the jury must unanimously agree to each element that supports the crime charged. *Id.*; *State v. Baldwin*, 330 N.C. 446, 454, 412 S.E.2d 31, 36 (1992) (quoting *State v. Denning*, 316 N.C. 523, 524, 342 S.E.2d 855, 856 (1986)).

---

3. Defendant did not argue the issue of unanimity to the trial court, nor did he object to the verdict sheets or jury instructions. However, our Court has held that a defendant cannot waive his right to raise a jury unanimity issue on appeal. *See State v. Lawrence*, 165 N.C. App. 548, 556, 599 S.E.2d 87, 94, *temp. stay granted*, 359 N.C. 73, 603 S.E.2d 885 (2004), *disc. review allowed*, 359 N.C. 413, —— S.E.2d —— (No. 457PA04, filed 6 April 2005); *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004); *State v. Holden*, 160 N.C. App. 503, 506-07, 586 S.E.2d 513, 516 (2003), *aff'd without precedential value*, 359 N.C. 60, 602 S.E.2d 360 (2004).

When reviewing the indictments, evidence presented, and jury instructions, a court must be satisfied that a jury was unanimous in its verdict as to each element of the crime; otherwise the risk of a nonunanimous verdict arises and the judgment on the verdict may have to be reversed to protect the defendant's rights. *See State v. Foust*, 311 N.C. 351, 317 S.E.2d 385 (1984), *overruled by State v. Diaz*, 317 N.C. 545, 555, 346 S.E.2d 488, 495 (1986), *overruling abrogated by State v. Hartness*, 326 N.C. 561, 565-66, 391 S.E.2d 177, 180 (1990); *State v. Lawrence*, 165 N.C. App. 548, 599 S.E.2d 87, *temp. stay granted*, 359 N.C. 73, 603 S.E.2d 885 (2004), *disc. review allowed*, 359 N.C. 413, —— S.E.2d —— (No. 457PA04, filed 6 April 2005); *State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004); *State v. Holden*, 160 N.C. App. 503, 586 S.E.2d 513 (2003), *aff'd without precedential value*, 359 N.C. 60, 602 S.E.2d 360 (2004); *State v. Petty*, 132 N.C. App. 453, 512 S.E.2d 428, *disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999).

Issues regarding a unanimous verdict have been previously raised in many sexual crimes cases. The vast majority of these cases questioned the constitutionality of using disjunctive jury instructions,[4] instructions which conceivably allow the jury to convict a person of a single first-degree sexual offense or a single indecent liberty with a minor without being unanimous as to which prohibited act satisfied the sexual act element, *see* N.C. Gen. Stat. §§ 14-27.4(a) and 14-27.1(4), or the immoral, improper, or indecent act element, *see Hartness*, 326 N.C. at 567, 391 S.E.2d at 180-81, of the respective crimes. *See, e.g.*, *State v. Carrigan*, 161 N.C. App. 256, 589 S.E.2d 134 (2003); *State v. Yearwoood*, 147 N.C. App. 662, 556 S.E.2d 672 (2001); *State v. Haywood*, 144 N.C. App. 223, 550 S.E.2d 38 (2001); *State v. Youngs*, 141 N.C. App. 220, 540 S.E.2d 794 (2000); *State v. Green*, 124 N.C. App. 269, 477 S.E.2d 182 (1996); *State v. Hughes*, 114 N.C. App. 742, 443 S.E.2d 76 (1994); *State v. Speller*, 102 N.C. App. 697, 404 S.E.2d 15 (1991). Still others have dealt with the question of whether the evidence might support more separate offenses than the number of verdict sheets submitted to the jury, thus creating a risk of lack of unanimity. *See, e.g.*, *Lawrence*, 165 N.C. App. at 558-60, 599 S.E.2d at

4. A full exploration of our appellate courts' holdings on why the use of a disjunctive jury instruction in sexual offense cases is constitutional is not necessary to this decision. This discussion is sufficiently conveyed in *State v. Lyons*, 330 N.C. 298, 301-09, 412 S.E.2d 308, 311-16 (1991); *State v. Hartness*, 326 N.C. 561, 563-67, 391 S.E.2d 177, 178-81 (1990); *State v. McCarty*, 326 N.C. 782, 784, 392 S.E.2d 359, 360 (1990); and *Lawrence*, 165 N.C. App. at 557-58, 599 S.E.2d at 94-95.

95-96; *Wiggins*, 161 N.C. App. at 592-93, 589 S.E.2d at 408-09; *Holden*, 160 N.C. App. at 506-08, 586 S.E.2d at 516-17.

Here, the question presented is whether a risk of a nonunanimous verdict arises in a multiple count offense case where no instruction is given to the jury that they must agree on each incident represented by each verdict sheet *and* the State presents evidence of a greater number of incidents than there are counts. After reviewing the indictments, evidence, instructions, and verdict sheets, we hold that it does. *See Lawrence*, 165 N.C. App. at 556, 599 S.E.2d at 94; *Holden*, 160 N.C. App. at 506-08, 586 S.E.2d at 516-17; *see also Wiggins*, 161 N.C. App. at 592-93, 589 S.E.2d at 408-09.

From our Supreme Court opinions in *Hartness* and *McCarty*, to this Court's opinions in *Petty*, *Holden*, *Wiggins*, and *Lawrence*, no Court has determined that permitting alternative sexual *acts* to serve as the basis for a single criminal offense—the permissible disjunctive instruction—also obviates the requirement that the jury unanimously find distinct and separate sexual *incidents* supporting however many counts of the same offense are presented to them.

> We note that our Supreme Court's determination that first-degree sexual offense is a single wrong for unanimity purposes requires us to conclude that charging a defendant with a separate count of first-degree sexual offense for each alternative sexual act performed in a single transaction would result in a multiplicious indictment. If the defendant engages in alternative sexual acts in separate transactions, however, each separate transaction may properly form the basis for charging the defendant with a separate count of first-degree sexual offense.

Petty, 132 N.C. App. at 463, 512 S.E.2d at 435. Thus, this Court, for issues of unanimity, recognizes that multiple counts of the same offense cannot arise from one criminal transaction, only from "separate transactions," or incidents. This presents two avenues of concern for our question of whether the jury was unanimous: one, being able to distinguish separate incidents from that of mere alternative acts, *see Lawrence*, 165 N.C. App. at 556-62, 599 S.E.2d 94-97, and two, a determination of whether the number of incidents or transactions of a given offense presented by the evidence matches the number of counts charged. *See Wiggins*, 161 N.C. App. at 592-93, 589 S.E.2d at 408-09.

By way of example, consider a defendant that is charged with four counts of indecent liberties with a minor. The State presents

evidence of several separate occasions of indecent liberties, but on *one occasion* the defendant fondled the child and also took pornographic pictures of her. *See State v. Kistle*, 59 N.C. App. 724, 727, 297 S.E.2d 626, 628 (1982) (holding that taking pictures of a child in a sexually provocative pose is the evil the statute sought to protect against). Without some guidance from the trial court in its instructions, we are not convinced that the jury will not decide defendant is guilty of two "counts" of indecent liberties, sexual fondling and pornographic pictures, when only one offense was committed with two alternative acts forming the element of an immoral act. Likewise, if the number of clearly separate incidents of indecent liberties presented by the State is six, but the jury is given four identical verdict sheets with no specification of which sheet relates to which incident, then a unanimity issue arises. Neither of these concerns are presented in a case that involves only one count of first-degree sexual offense or indecent liberties.

Notably then, the unanimity of a verdict is jeopardized in multiple count trials for first-degree sexual offense, indecent liberties, and first-degree rape if more incidents of the offenses are presented than the number charged, and the jury receives no guidance from the trial court or indication from the State as to which offenses are to be considered for which verdict sheets. *See Lawrence*, 165 N.C. App. at 556-62, 599 S.E.2d at 94-97; *Wiggins*, 161 N.C. App. at 592-93, 589 S.E.2d at 408-09 (where evidence presents an equal number of incidents as the number of counts then no risk of a nonunanimous verdict is created).

A review of our case law demonstrates potentially how easily a jury unanimity issue can be avoided in multiple count sexual crime cases. After noting that the defendant is charged with multiple counts, simply instructing the jury that for each count of a specific offense they must unanimously find that the State has proven a separate and distinct transaction or occurrence would remove any risk of a nonunanimous verdict. This Court's discussion in *Lawrence*, 165 N.C. App. at 559-60, 599 S.E.2d at 95-96, also indicates several ways in which a defendant's right to a unanimous jury verdict can be secured. *Id.* at 559, 599 S.E.2d at 96 ("[W]hen there is evidence of a greater number of separate criminal offenses than the number of counts submitted to the jury, **either** the State must elect one offense per charge, **or** the trial court must instruct the jury that they are required to agree unanimously on the offense committed.") (emphasis in original).

In *Petty*, the defendant was found guilty of two counts of indecent liberties, one count of attempted first-degree sexual offense, and one count of first-degree sexual offense. However, no unanimity issue was presented by the multiple counts because the State specified the separate and distinct time frame associated with each offense. *See Petty*, 132 N.C. App. at 458, 512 S.E.2d at 432.

Also facing multiple counts, and absent an instruction on being unanimous as to which incidents supported the verdicts, this Court in *Wiggins* was able to match the number of incidents of sexual offense and rape found in the evidence with the same number of counts of sexual offense and rape presented to the jury. The number of incidents presented coincided with the number of counts, and when that occurs the risk that the jury was not unanimous does not arise. *Wiggins*, 161 N.C. App. at 592-93, 589 S.E.2d at 408-09.

Accordingly, with these methods of prevention or correction in mind, we undertake a review of the record in the case *sub judice* to determine whether a risk of a nonunanimous jury verdict arose.

IV.

A. Review of jury instructions, indictments, and verdict forms

Foremost, it is evident from the record and transcripts that no method was employed by either the trial court or State to specify which incidents of rape or indecent liberties were the basis of the indictments and verdicts. The indictments were short-form indictments, all bearing the same 18 month time frame, all lacking any language linking them to any one incident. Likewise, the verdict forms were all identical, all without any indication as to which offense, other than the case number, the verdict form related.

Finally, the jury instructions do not reveal any guidance offered by the trial court regarding the jury's need to unanimously agree on which three incidents of indecent liberties and which five incidents of rape served the basis of their eight verdicts. In its instructions the trial court only noted that defendant "has been accused of three counts of taking an indecent liberty with a child" and "has also been charged with five counts of first degree rape" before explaining the elements of the respective crimes. Then, in explaining the unanimity requirement, the court simply stated: "I instruct you that a verdict is not a verdict until all twelve jurors agree unanimously as to what your decision shall be. You may not render a verdict by a majority vote." There was thus no instruction 1) on the need for unanimity on each

specific sexual incident, 2) not to return more than one verdict based on generic testimony[5] of numerous other incidents, and 3) on the need to not consider various sex acts occurring in one incident as separate counts of the same criminal offense, but only as an alternate means of establishing the sex act necessary for one count. *See Lawrence*, 165 N.C. App. at 559-60, 599 S.E.2d at 95-96.

Since there was no instruction by the trial court or election by the State from which we can determine that the jury necessarily unanimously agreed on separate transactions for this multiple count case, we must review the evidence and determine if it aligns with the number of counts. *See Wiggins*, 161 N.C. App. at 593, 589 S.E.2d at 409.

B. Review of evidence for incidents of indecent liberties

Defendant was charged with three counts of taking indecent liberties with a minor.

> A person is guilty of taking indecent liberties with children if . . . he either:
>
> > (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child . . . for the purpose of arousing or gratifying sexual desire; or
> >
> > (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child . . .

N.C. Gen. Stat. § 14-202.1(a) (2003). While some action on the part of the defendant is necessary, what acts are immoral, improper, or indecent is not statutorily defined.

---

5. Testifying as to precise incidents of rape or sexual offense has always been difficult for children who are repeatedly violated over an extended period of time. *See State v. Stewart*, 353 N.C. 516, 518, 546 S.E.2d 568, 569 (2001). Accordingly, testimony of multiple incidents of rape, sexual offense, or indecent liberties with no real detail to distinguish precise incidents has been termed "generic evidence" or "generic testimony." *See Lawrence*, 165 N.C. App. at 557, 599 S.E.2d at 94; *Wiggins*, 161 N.C. App. at 592-94, 589 S.E.2d at 408-09.

> However, there is no apparent statutory or common law authority that would permit the return of more than one indictment based on the same generic testimony. That is, there are no cases upholding two or more convictions, all based on generic testimony that, *e.g.*, "he sexually assaulted me at least once a week for several months."

Lawrence, 165 N.C. App. at 557, 599 S.E.2d at 94. Nonetheless, generic evidence is admissible and can support conviction on a single count of rape or sexual offense. *Wiggins*, 161 N.C. App. at 593, 589 S.E.2d at 409.

> [T]he crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts. The evil the legislature sought to prevent in this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child "for the purpose of arousing or gratifying sexual desire." Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.

Hartness, 326 N.C. at 567, 391 S.E.2d at 180. Further, indecent liberties do not merge with or are not lesser included offenses of sexual offense or rape; evidence of one incident of rape or sexual offense may support a conviction for indecent liberties as well. *State v. Swann*, 322 N.C. 666, 370 S.E.2d 533 (1988) (sexual offense); *State v. Manley*, 95 N.C. App. 213, 381 S.E.2d 900 (sexual offense), *disc. review denied*, 325 N.C. 712, 388 S.E.2d 467 (1989); *State v. Hewett*, 93 N.C. App. 1, 376 S.E.2d 467 (1989) (rape); *State v. Allen*, 92 N.C. App. 168, 374 S.E.2d 119 (1988) (rape), *cert. denied*, 324 N.C. 544, 380 S.E.2d 772 (1989).

Defendant was charged with three counts of indecent liberties, yet the State ended up presenting evidence of more than three incidents of indecent liberties. Indeed, there was: 1) the incident where defendant exposed himself, 2) the incident on the couch in the living room where defendant pushed aside Lucy's nightgown and tried to have sex with her, and 3) the incident in which defendant simulated having sex with Lucy while she was wearing a bathing suit. Prior to deliberations, the State made no election that these three incidents were the basis of defendant's three charges, but on appeal argue as much.

We do not disagree that these incidents do support the charges, but cannot also overlook the fact that there was evidence of numerous incidents of rape as well as multiple incidents of sexual offense in the first degree. There was also evidence of at least one additional isolated incident of an immoral act standing by itself: Debbie's testimony that defendant stuck his hand up Lucy's shirt while they were watching a pornographic film. If several jurors in voting guilty to three counts of indecent liberties were relying on one, two, or even more incidents where rape or sexual offense occurred, while others focused on the three incidents the State suggests or some combination altogether different, all of the incidents would have supported a finding of guilty but potentially none of the jurors were unanimous in

which incidents supported which verdicts. *See Lawrence*, 165 N.C. App. at 561-63, 599 S.E.2d at 97-98.

Further, there is no way to tell that the jury did not incorrectly decide that alternative acts during one sexual incident supported multiple counts of the crime charged. The incident of simulated sex on the bed where both girls were wearing their bathing suits contained potentially three immoral acts: defendant's masturbating in front of Lucy, his kissing her under the circumstances, and the simulated sex itself.

With no instruction from the trial court or election by the State, we are not convinced that the risk of a nonunanimous verdict was avoided in this case. According to our appellate decisions, during the eighteen month span that the State presented evidence on, the jury could have found defendant guilty of more than fifteen counts of indecent liberties with a minor. Since he was charged with only three, we cannot tell from the record or evidence presented which three the jury found him guilty of and therefore must reverse judgments 01 CRS 09508, 01 CRS 09509, and 01 CRS 09510.

C. Review of evidence for first-degree rape

"A person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . [w]ith a victim who is a child under the age of 13 years . . . ." N.C. Gen. Stat. § 14-27.2(a)(1) (2003). It has long been determined that rape is not a continuous offense, and therefore each incident of intercourse is a separate offense. *State v. Small*, 31 N.C. App. 556, 559, 230 S.E.2d 425, 427 (1976), *disc. review denied*, 291 N.C. 715, 232 S.E.2d 207 (1977); *State v. Owen*, 133 N.C. App. 543, 551-52, 516 S.E.2d 159, 165 (1999). To constitute intercourse, there only needs to be "[e]vidence of the slightest penetration of the female sex organ by the male sex organ . . . ." *Owen*, 133 N.C. at 551-52, 516 S.E.2d at 165 (quoting *State v. Midyette*, 87 N.C. App. 199, 201, 360 S.E.2d 507, 508 (1987)).

Defendant was charged with five counts of first-degree rape on the basis of the victim's age. On appeal, the State argues that there were five incidents of rape: 1) one of partial penetration on the couch in the living room, and 2) another incident of penetration following that night on the couch in Caleb's room; 3) an additional specific incident of sex on the couch in the living room; 4) sex after the incident with the screwdriver; and 5) one incident of sex on the floor in Caleb's room, the incident which Sharlena almost witnessed.

Again, we do not disagree with these incidents supporting five counts of rape; but there is still ambiguity in which incidents support which verdicts.

First, the State overlooks the fact that Lucy testified she and defendant had intercourse thirty-two times. Without more, this testimony does not support thirty-two counts but indeed does support one count of rape, under the theory of generic testimony. *See supra*, n.5. Further, the jury was not told that they could find only one count from this testimony. Some of the jurors may have relied on this testimony in determining the number of incidents of rape, some may not have. Second, despite testimony that the dates in Lucy's written statement were inaccurate, her statement placed the first incident of sex at an earlier date, summer of 1999, rather than the first descriptive incident in December 1999. As such, the jury may have found Lucy's statement supported evidence of a separate count of rape not included in the State's calculations. Third, at trial, while the State offered no indication as to which incidents of rape supported the five counts, it did reference the occasion defendant had intercourse with Lucy on the couch in Caleb's room as "the first time [the two] actually had sex." If the State represented to the jury that that incident was first, on appeal it is now argued as the *second* incident the two had intercourse.

By any calculation the risk of a nonunanimous verdict arises. Adding the generic testimony of intercourse occurring thirty-two times and the potential reliance on Lucy's statement into the State's contention on appeal provides the jury with the ability to find defendant guilty of seven counts of rape. Following the State's argument at trial may actually give rise to five counts of rape, but only if the generic testimony is included as one and the characterized "partial penetration" on the couch in the living room and statement that sex occurred in summer of 1999 are not. It remains evident, however, that absent any additional instruction, we cannot be assured there was no ambiguity or nonunanimity in the verdict. *See Lawrence*, 165 N.C. App. at 563, 599 S.E.2d at 98; *Wiggins*, 161 N.C. App. at 592-93, 589 S.E.2d at 408-09. As such, we reverse defendant's remaining convictions of rape: 01 CRS 09516, 01 CRS 09517, 01 CRS 09518, 01 CRS 09520, and 01 CRS 51631.

V.

Defendant was charged with six counts of first-degree sexual offense, five counts of first-degree rape, and three counts of taking

indecent liberties with a minor. Due to a fatal variance in defendant's indictments for first-degree sexual offense and jury instructions, we vacate defendant's judgments entered upon those charges. We also reviewed the indictments, instructions, evidence, and verdict sheets in defendant's remaining charges for rape and indecent liberties. Since no jury instruction, indictment, or verdict sheet distinguished which incidents of the respective crimes the jury was finding defendant guilty of, *and* there was evidence of more incidents presented than the respective charges, the risk of a nonunanimous jury verdict arose. Therefore we must reverse defendant's judgments for indecent liberties and statutory rape and remand for a new trial on those charges. *See Diaz*, 317 N.C. at 555, 346 S.E.2d at 495 (defendants deprived of their constitutional right to be convicted by a unanimous jury are entitled to a new trial).

Vacated in part; Reversed in part; remanded.

Judge GEER concurs.

Judge Bryant concurs in part and dissents in part.

BRYANT, Judge, concurring in part and dissenting in part.

I concur in the portion of the majority opinion vacating the judgment entered in the convictions for First Degree Sexual Offense as I agree the variance between the indictments and the evidence is fatal.

However, I strongly disagree and therefore dissent from the majority opinion remanding for a new trial the five counts of first degree rape and three counts of taking indecent liberties with a minor. The majority relies almost solely on *State v. Gary Lee Lawrence, Jr.*, 165 N.C. App. 548, 599 S.E.2d 87 (2004), *stay granted*, 359 N.C. 73, 603 S.E.2d 885 (2004) and *disc. review granted*, 359 N.C. 413, (Apr. 6, 2005) (No. 457PA04) and *State v. Holden*, 160 N.C. App. 503, 506-07, 586 S.E.2d 513, 516 (2003), *aff'd without precedential value*, 359 N.C. 60, 602 S.E.2d 360 (2004), a major case upon which *Lawrence* relies. Considering the current posture of those two cases, and for the reasons which follow, I respectfully dissent.

Taking Indecent Liberties with a Minor

The North Carolina Constitution and North Carolina statutory law require a unanimous jury verdict in a criminal jury trial. See N.C.

Const. art.1, § 24; N.C.G.S. § 15A-1237(b) (1997). Two lines of cases, *Diaz* and *Hartness*, have developed in our jurisprudence regarding whether certain disjunctive instructions result in an ambiguous or uncertain verdict such that it might violate a defendant's right to a unanimous verdict. *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986); *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990).

There is a critical difference between the line of cases represented by *Diaz* and *Hartness*.

> The [*Diaz*] line establishes that a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. The [*Hartness*] line establishes that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will satisfy an element of the offense*, the requirement of unanimity is satisfied.

State v. Lyons, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991) (emphasis supplied).

In *Hartness* the Supreme Court made clear that the reasoning of *Diaz*, a drug trafficking case, did not apply to cases involving indecent liberties. *Hartness*, 326 N.C. at 564, 391 S.E.2d at 179. Sex offense and indecent liberties cases involve situations in which a single wrong can be established using various alternative acts such that a danger of lack of unanimity does not arise. Indeed, in the instant case the majority opinion acknowledges the long-standing line of cases in which jurors were "conceivably allow[ed][ ] to convict a person of a single first degree sexual offense or a single indecent liberty with a minor without being unanimous as to which prohibited act satisfied the sexual act element . . . or the immoral, improper or indecent act element."

> Furthermore, our Supreme Court has expressly determined that disjunctive jury instructions do not risk nonunanimous verdicts in first-degree sexual offense [and taking indecent liberties] cases. *State v. McCarty*, 326 N.C. 782, 784, 392 S.E.2d 359, 360 (1990) (upholding jury instructions that defendant could be found guilty of first degree sexual offense "if [the jury] found [the] defendant [had] engaged in either fellatio or vaginal penetration")

State v. Petty, 132 N.C. App. 453, 462, 512 S.E.2d 428, 434 (1999). See also *State v. Brothers*, 151 N.C. App. 71, 564 S.E.2d 603 (2002); *State v. Yearwood*, 147 N.C. App. 662, 556 S.E.2d 672 (2001).

Many of the above-referenced cases discuss the "gravamen" or "gist" of the statutes involved. The gravamen of the indecent liberties statute (N.C.G.S. § 14-202.1) is to criminalize the performance of a sexual act with a child.

> The evil the legislature sought to prevent in this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child 'for the purpose of arousing or gratifying sexual desire.' Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.

Hartness, 326 N.C. at 567, 391 S.E.2d at 180. In other words, the particular act or conduct is not the gravamen of the offense, but only one of several alternative ways to establish a single wrong. The indecent liberties statute proscribes "any immoral, improper or indecent liberties." Therefore, "even if some jurors found that the defendant engaged in one kind of sexual misconduct, while others found that he engaged in another, 'the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties.' " *State v. Lyons* at 305-06, 412 S.E.2d at 313.

In the instant case defendant was charged and convicted by a jury of *inter alia*, three counts of Taking Indecent Liberties with a Minor. At trial the victim testified to three specific acts which constituted Taking Indecent Liberties with a Minor: (1) "the game" where defendant exposed his private parts and victim lifted her shirt; (2) where defendant touched his private part to the victim's private part; and (3) where defendant masturbated in front of victim and her sister. The three acts testified to by the victim were the three acts the jury relied upon in reaching their guilty verdicts as to Taking Indecent Liberties. While it is not readily apparent from the record, the majority opinion mentions that some jurors *may* have relied upon a fourth act—defendant's hand under the victim's shirt—as a basis for their verdict. Regardless, such reliance does not present a unanimity problem. As our case law clearly holds, where the jury found sexual conduct which constitutes an immoral, improper or indecent act, such is sufficient for a unanimous verdict of the whole jury. *Lyons* at 305-06, 412 S.E.2d at 313. Therefore, with respect to the convictions of Taking

Indecent Liberties, as in *Hartness*, I would find "[t]he risk of a nonunanimous verdict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive. . . ." *Hartness*, 326 N.C. at 567, 391 S.E.2d at 179.

The majority also states that because there were multiple incidences of rape, the jury could have used such incidences to support a conviction of indecent liberties, and then further states that because there was "no instruction from the trial court or election by the State [they, (the majority) were] not convinced that the risk of a nonunanimous verdict was avoided in this case." This type of analysis the majority puts forth *sua sponte* on appeal is troubling because it extends the concept of unanimity far beyond what the law requires and beyond what is reasonable for child sexual abuse cases in North Carolina. No election by the state nor further instruction by the trial court is required under our law. Therefore, failure to further instruct the jury or to have the state elect which incidences to use to support the charges of Taking Indecent Liberties is not error, and cannot serve as the basis for overturning a unanimous jury verdict.

First Degree Statutory Rape

The disjunctive analysis used in first degree sexual offense and taking indecent liberties cases does not apply to rape cases. Here, the majority says there is ambiguity as to which incidents support which verdicts of rape. At trial the victim testified, describing five very specific instances of rape: (1) partial penetration on the couch; (2) penetration on couch in Casper's room; (3) penetration on couch in living room; (4) penetration following incident with screwdriver; (5) penetration on floor in Casper's room. After hearing all the testimony, five separate verdict sheets as to the rape offenses were presented to the jury[6] and the jury returned verdicts of guilty on five counts of rape. Based on *State v. Wiggins*, this, without more, is sufficient to defeat a unanimity argument. See *State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003) (holding where the number of qualifying incidents testified to by the victim at trial was the same as the number of qualifying incidents on the verdict sheets submitted, there was no danger of lack of unanimity).

---

6. The jury evaluated a total of 14 separate verdict sheets: Indecent Liberties (3); First Degree Sexual Offense (6); and First Degree Rape (5). Each of the First Degree Rape verdict sheets contained the following language: "We, the jury, return as our **unanimous** verdict that the defendant, Markeith Rodgers Lawrence, is: . . . Guilty of first degree statutory rape . . ." All five verdict sheets are marked Guilty.

Moreover, defendant in the instant case raises the unanimity argument out of thin air. There was no objection at trial because nothing objectionable occurred. The evidence was presented. The jury was instructed on all issues, including unanimity[7]. There were no questions or other indications from the jury to suggest any confusion as to their duty in the trial. The jury deliberated and reached a decision on all counts submitted to them in less than 1 and 1/2 hours. Upon return of the verdicts, all jurors indicated assent to their verdict. In fact, all jurors were polled individually, the charges read to them using the applicable CRS number, and each juror affirmed their unanimous verdict in open court, as to each charge submitted.

Clearly, the verdicts in this case do not raise a danger of lack of unanimity. Is there any rational basis upon which the jury could have found defendant committed one act of rape but not another? The defendant's defense was simply "I did not do it." In the instant case, where nothing occurred during the course of trial nor during jury deliberations to raise a concern, where is the showing of error in the court's instructions or a lack of unanimity?

The courts properly presume that jurors pay close attention to the instructions of the trial judge in criminal cases and that they "undertake to understand, comprehend, and follow the instructions as given." *State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002) (citation omitted). As our Supreme Court has stated, "these instructions, when read as a whole, required a verdict of not guilty if all twelve jurors were not satisfied beyond a reasonable doubt that the defendant engaged in an unlawful sexual act . . . [and there is] nothing in the record indicat[ing] any confusion, misunderstanding, or disagreement among the members of the jury which would indicate a lack of unanimity." *Hartness*, 326 N.C. at 565, 391 S.E.2d at 179.

As a practical matter, albeit subject to concerns of invading the province of the jury, I agree with the majority that in cases involving multiple acts of child sexual assault the better practice *might* be for the state to draft indictments and use verdict sheets which specify the act that is the basis for the charge. However, and most importantly, under our law, failure to do so is not reversible error.

---

7. "I instruct you that a verdict is not a verdict until all twelve jurors agree unanimously as to what your decision shall be . . . [W]hen you have reached a unanimous verdict . . . please have your foreperson write your verdict on the verdict forms . . ."

> [Our] statutes do not specify what constitutes a proper verdict sheet, . . . [n]or have our Courts required the verdict forms to match the specificity expected of the indictment." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240-241 (2002). A verdict is deemed sufficient if it "can be properly understood by reference to the indictment, evidence and jury instructions."

State v. Connard, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986), *aff'd*, 319 N.C. 392, 354 S.E.2d 238 (1987) (per curiam).

In the instant case defendant has failed to show a lack of unanimity in the jury verdicts. There must be more than a "possibility of a non-unanimous verdict" to overturn a unanimous jury verdict. We cannot decide cases based on speculation of what might have been. Perhaps the greatest danger posed by the majority opinion is that it would allow a convicted defendant to speculate on appeal, as to what a jury might have done during the course of deliberations at trial and with no indication the jury struggled with unanimity issues, grant defendant a new trial based on speculation. The burden is on defendant to show prejudicial error in order to have his conviction reversed and a new trial granted. Here, the evidence of record shows the jury was instructed on the law by the trial court, the jury was presented with a total of 14 separate verdicts sheets as to three specific types of sexual crimes, the jury had no questions or concerns during the course of deliberations, and in a fairly short time the jury convicted defendant in unanimous verdicts.

In my opinion, this defendant received a fair trial, free from prejudicial error as to his convictions of Taking Indecent Liberties with a Minor and First Degree Statutory Rape rendered by a unanimous jury in open court.

STATE OF NORTH CAROLINA v. ROY PURNELL SHEARIN

No. COA04-394

(Filed 17 May 2005)

1. Search and Seizure— car stop—frisk—protection of officer—totality of circumstances

Under the totality of the circumstances, it is reasonable for a police officer at a traffic stop to suspect that a person is armed and dangerous when that person appears agitated, is reluctant to

answer when asked if he is armed, refuses to be searched, and flees rather than submit to a search. The officer's search of defendant in this case was a reasonable means of protecting himself, and defendant's motion to suppress the resulting evidence was correctly denied.

2. Search and Seizure— detention at traffic stop—protection of officer

It was reasonable for an officer to require a passenger to remain in a vehicle during a lawful traffic stop where the totality of the evidence demonstrated that the officer was taking precautions for his own safety. The trial court correctly denied defendant's motion to dismiss evidence subsequently discovered.

3. Arrest— instructions—variance from indictment—resisting arrest and resisting search—no plain error

An instruction on resisting arrest was not plain error where the indictment was for resisting an officer attempting a search. While defendant objected to the instruction at trial, he did not present to the trial judge his argument that the instruction was inconsistent with the indictment, and he did not specifically allege plain error in his assignments of error. Moreover, the difference between the instruction and the indictment would not have changed the verdict.

4. Drugs— instructions—variance from indictment—purpose of drug paraphernalia—same underlying theory of guilt

The theories of guilt underlying an indictment for possession of drug paraphernalia for "packaging" controlled substances and an instruction for possession of drug paraphernalia for possession of controlled substances are the same, and there was no plain error in the instruction.

5. Arrest— resisting—motion to dismiss—evidence sufficient

The evidence of resisting an officer was sufficient to survive defendant's motion to dismiss, even though defendant argued that the officer acted unlawfully, where the officer observed defendant passenger during a traffic stop, told him to remain within his vehicle, and asked to search him when defendant answered a question about weapons reluctantly, and defendant ran from the officer. The State is entitled to every reasonable inference on a motion to dismiss, and the facts in this case support the inference that the officer was acting within his

official duties. It was also concluded elsewhere in this opinion that the officer's detention and search of defendant did not violate the Fourth Amendment.

6. Sentencing— marijuana possession—erroneous class—consolidated with other offenses

A marijuana possession charge was remanded for resentencing where defendant was sentenced for Class 1 possession even though the evidence supported only Class 3 possession. Although the State argued that remand was unnecessary because the charge had been consolidated with others for sentencing and the result was consistent with the Structured Sentencing Act, the Court of Appeals was not convinced that the sentencing was not affected by the treatment of the marijuana possession charge.

Judge WYNN concurring.

Appeal by defendant from judgments entered 14 November 2003 by Judge W. Russell Duke, Jr. in Superior Court, Halifax County. Heard in the Court of Appeals 7 December 2004.

Attorney General Roy A. Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Russell J. Hollers, III for defendant.

McGEE, Judge.

Roy P. Shearin (defendant) was convicted of possession of marijuana, possession of cocaine, possession of drug paraphernalia, and resisting, obstructing, and delaying a public officer. He was sentenced to ten to twelve months in prison plus 180 days. Defendant assigns as error the trial court's denial of defendant's motion to suppress, jury instructions on resisting arrest and possession of drug paraphernalia, denial of defendant's motion to dismiss, and entry of judgment as a Class 1 misdemeanor possession of marijuana. We find no error at trial but remand for imposition of judgment and sentencing as a Class 3 misdemeanor possession of marijuana.

Defendant was a passenger in a vehicle that was stopped by a sheriff's deputy on 3 September 2002 at approximately 10:45 p.m. because the license plate light was not working. The deputy smelled alcohol on the driver and began administering sobriety tests. Roanoke Rapids Police Officer Norton was patrolling in the area, saw the deputy's emergency lights, and drove up to assist the deputy. The

vehicle was stopped in an area that was lit only by a single street light. Standing about twenty-five feet away from the stopped vehicle, Officer Norton used a flashlight to observe defendant, who remained in the passenger seat of the vehicle. Defendant asked Officer Norton if he could leave. Officer Norton told defendant to stay in the vehicle for a few more minutes. Defendant again asked Officer Norton whether he could leave, and Officer Norton approached the vehicle. Officer Norton testified that defendant "was very agitated and appeared intoxicated at the time." Officer Norton smelled alcohol on defendant and saw a black plastic bag at defendant's feet, with what Officer Norton believed to be a beer bottle, sticking out of the bag. Officer Norton asked defendant what was in the bag, and defendant tried to push the bag under the seat with his foot.

Officer Norton asked defendant to exit the vehicle. He then asked defendant if he had any weapons. Defendant did not respond. Officer Norton asked defendant three more times if defendant had any weapons. Defendant finally responded that he did not. Officer Norton testified that defendant was originally calm when first asked to exit the vehicle, but again became agitated and boisterous after being asked if he had any weapons. Defendant asked why he was being held. Officer Norton told defendant to move his hands away from his pockets so Officer Norton could frisk defendant. Defendant refused, and "took off running."

Officer Norton chased defendant into an enclosed parking lot. He told defendant to come out of hiding. Defendant complied and the officer ordered defendant onto the ground. Officer Norton handcuffed and patted down defendant. Officer Norton found marijuana, cocaine, scales for measuring drugs, and a pocket knife on defendant.

The State's evidence showed that defendant appeared agitated from the beginning of the stop. Defendant, however, asserts that he was fully compliant with the police and was not "agitated" until defendant realized that he was not free to leave.

I.

[1] Defendant first assigns as error the trial court's denial of defendant's motion to suppress. Defendant asserts that his Fourth Amendment right to be free from unreasonable searches and seizures was violated. Defendant argues that the items found on his person, namely marijuana, cocaine, and drug paraphernalia, should have been suppressed as they were "fruits of the poisonous tree."

The fundamental inquiry under the Fourth Amendment is whether the governmental intrusion into a private individual's liberty and property was reasonable. *See Terry v. Ohio*, 392 U.S. 1, 19, 20 L. Ed. 2d 889, 904 (1968). It is well-established that a law enforcement officer may temporarily detain a person for investigative purposes without violating the Fourth Amendment. *Id.* at 22, 20 L. Ed. 2d at 906-07. To make such a stop, an officer must have a reasonable suspicion of criminal activity based on articulable facts. *Id.* at 21, 20 L. Ed. 2d at 906. Similarly, an officer may frisk a person where the officer reasonably suspects that "criminal activity may be afoot and that the [person] with whom he is dealing may be armed and presently dangerous[.]" *Id.* at 30, 20 L. Ed. 2d at 911. The scope of this search is protective in nature and is limited to the person's outer clothing and to the search for weapons that may be used against the officer. *Id.* "Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken." *Terry*, 392 U.S. at 31, 20 L. Ed. 2d at 911. Evidence of contraband, plainly felt during a pat-down or frisk, may also be admissible, provided the officer had probable cause to believe that the item was in fact contraband. *Minnesota v. Dickerson*, 508 U.S. 366, 375-77, 124 L. Ed. 2d 334, 346-47 (1993). When determining whether an officer had "a reasonable suspicion to make an investigatory stop" or had reason to believe that a defendant was armed and dangerous, trial courts must consider the totality of the circumstances. *State v. Willis*, 125 N.C. App. 537, 541, 481 S.E.2d 407, 410 (1997).

Defendant argues that he was subjected to a stop and a frisk that exceeded the scope of what is permissible under *Terry*. Specifically, defendant argues that he was illegally detained because he repeatedly asked if he could leave and was told to remain where he was. Defendant also argues that he was illegally searched because Officer Norton did not have a reasonable articulable suspicion that defendant was armed and dangerous. Defendant argues that while evidence suggested that defendant was being obnoxious to Officer Norton, there was no evidence that defendant was threatening Officer Norton, or otherwise indicating that he would be violent. Defendant also points to Officer Norton's testimony acknowledging that defendant was "calm when he exited the vehicle" and that Officer Norton had not observed any weapon or "any type of bulge" that might indicate that defendant had a weapon. Defendant further contends that he had told Officer Norton that he did not want to be searched and that he only ran away "[w]hen it became obvious that [Officer Norton] was going

to go through with the illegal frisk[.]" Thus, defendant asserts that because he was illegally detained and illegally searched, the trial court erred in not granting his motion to suppress the items found on his person as a result of the search and seizure. We disagree.

"Our review of a motion to suppress is limited to a determination of whether the trial court's findings of fact are supported by competent evidence, and whether those findings are in turn supported by legally correct conclusions of law." *Willis*, 125 N.C. App. at 540, 481 S.E.2d at 410. In the present case, the trial court found the following:

> 8. That the defendant became agitated when Officer Norton told him that he needed to remain in the car until Deputy Rooks completed his investigation.
>
> 9. That Officer Norton observed a strong odor of alcohol coming from the defendant who appeared to be intoxicated.
>
> 10. That while speaking with the [d]efendant Officer Norton noticed a beer bottle neck sticking out of a black plastic bag in the floorboard of the vehicle.
>
> 11. That when Officer Norton questioned the defendant about the bag and its contents the defendant attempted to push the bag under the seat with his feet not responding to the officer's questions.
>
> 12. That Officer Norton asked the [d]efendant to exit the vehicle so that he could secure said bag [and] its contents as evidence.
>
> 13. That upon defendant exiting the vehicle Officer Norton had to ask the defendant three or four times if he had any weapons on him before he answered no.
>
> 14. That the defendant was standing with his hands at his pockets and would not move his hands away from his pockets despite officer's repeated requests.
>
> 15. That during this time the defendant became increasingly agitated.
>
> 16. That up to this point Officer Norton had not touched the defendant.
>
> 17. That upon Officer Norton telling the defendant he wanted to pat his pockets for weapons in order to assure both his

and Deputy Rooks' safety the defendant refused and ran from Officer Norton.

Despite defendant's contentions to the contrary, the State's evidence competently supports these findings of fact which in turn support the trial court's conclusions of law:

1. That looking at the totality of the circumstances surrounding the search of the defendant Officer Norton had reasonable grounds to believe that criminal activity might be afoot, justifying his temporary detention of the defendant.

2. That during and after Officer Norton's detention of the defendant his personal observations confirmed his apprehension that criminal activity might be afoot and indicated that the defendant might have been armed.

3. That Officer Norton was entitled to frisk defendant as a matter of self-protection.

4. That the defendant was searched only after he had run from Officer Norton who had informed the defendant that he was not free to leave.

In looking at the totality of the circumstances, it is reasonable for a police officer to suspect that someone is armed and dangerous when that person appears agitated, is reluctant to answer when asked whether he is armed, and not only refuses to be searched for weapons, but also flees when he is about to be searched. Officer Norton's search of defendant was thus reasonable as a means of protecting himself from being assaulted by defendant.

[2] Similarly, Officer Norton's detention of defendant at the scene was not unreasonable under the circumstances, and thus did not violate defendant's Fourth Amendment rights. Defendant concedes that Officer Norton's suspicions might have been raised after the detention continued, but argues that the initial detention, when Officer Norton told defendant to "stay seated for a few minutes" after defendant asked if he could leave the scene, was unlawful. Defendant argues that at the time Officer Norton told defendant to remain in the car, Officer Norton "did not have any suspicion that [defendant] had committed a crime[.]" However, as defendant points out, the United States Supreme Court has held that a police officer may order a passenger to exit a vehicle, as a safety precaution, without any suspicion that the individual has committed a crime. *Maryland v. Wilson*, 519 U.S.

408, 412-15, 137 L. Ed. 2d 41, 46-48 (1997). The same rationale may be applied when an officer orders an individual to remain in a vehicle.

Inherent to assessing the reasonableness of a seizure is the need to balance public safety and the safety of the officer with the individual's right to be free from arbitrary governmental interference. *Pennsylvania v. Mimms*, 434 U.S. 106, 109, 54 L. Ed. 2d 331, 336 (1977). The United States Supreme Court has held that public safety and the safety of an officer justify directing a driver or passenger to exit the vehicle during a traffic stop, and that the intrusion to an individual's liberty in such circumstances is minimal. *See id.* at 110-11, 54 L. Ed. 2d at 336-37 (holding that asking the driver to step outside of the vehicle is a *de minimis* intrusion to the driver's liberty, which is outweighed by the concern for officer safety); *Wilson*, 519 U.S. at 413-15, 137 L. Ed. 2d at 47-48 (extending the holding in *Mimms* to passengers as well as drivers). The facts of the case before us differ from *Mimms* and *Wilson* in that defendant was asked to remain in the vehicle, rather than exit the vehicle. Though neither the United States Supreme Court nor our Courts have specifically addressed whether commanding a passenger to remain in the vehicle during a traffic stop unreasonably intrudes on an individual's personal liberty, other courts have considered this issue and two lines of cases have developed. *See People v. Forbes*, 728 N.Y.S.2d 64, 66 (N.Y. App. Div. 2 Dept. 2001).

The first line of cases holds that requiring a passenger to remain in the vehicle for the duration of a legal automobile stop is a *de minimis* intrusion on that individual's personal liberty. *See id.*; *People v. Gonzalez*, 704 N.E.2d 375, 382-83 (Ill. 1998) (stating that "it is reasonable for a police officer to immediately instruct a passenger to remain at the car, when that passenger, of his own volition, exits the lawfully stopped vehicle at the outset of the stop"), *cert. denied*, 528 U.S. 825, 145 L. Ed. 2d 63 (1999); *State v. Webster*, 824 P.2d 768, 770 (Ariz. App. 1991) (holding that for safety purposes, a passenger may be ordered back into the vehicle during a lawful traffic stop); *see also Rogala v. District of Columbia*, 161 F.3d 44, 53 (D.C. Cir. 1998) (concluding "that it was reasonable for [the officer] to order [the defendant] to stay in the car in order to maintain control of the situation and that [the officer] therefore did not violate [the defendant's] Fourth Amendment rights"); *United States v. Moorefield*, 111 F.3d 10, 13 (3rd Cir. 1997) (holding that it is constitutional for police officers to order a vehicle's occupants to remain in the vehicle with their hands in the air during a traffic stop).

Another line of cases holds that the Fourth Amendment is violated when a police officer detains a passenger in a vehicle during a traffic stop, unless the officer has an independent articulable suspicion that the passenger is dangerous or involved in criminal activity. *State v. Mendez*, 970 P.2d 722, 728 (Wash. 1999) (holding that under the Washington Constitution, which affords greater privacy rights than the Fourth Amendment of the U.S. Constitution, a police officer must "articulate an objective rationale predicated specifically on safety concerns . . . for ordering a passenger to stay in the vehicle or to exit the vehicle"); *Wilson v. State*, 734 So.2d 1107, 1113 (Fla. App. 4 Dist. 1999), *cert. denied*, 529 U.S. 1124, 146 L. Ed. 2d 820 (2000) (holding that an officer "should be able to identify objective circumstances" to support ordering a passenger to return to or remain in a vehicle during a traffic stop).

We recognize that, for reasons of public safety and personal safety of an officer, a police officer needs to be able to keep reasonable control over a situation. As the United States Supreme Court acknowledged in both *Mimms* and *Wilson*, the potential for danger to an officer during a traffic stop is high. *Mimms*, 434 U.S. at 109, 54 L. Ed. 2d at 336-37 (citing a study as indicating that "approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile"); *Wilson*, 519 U.S. at 413, 137 L. Ed. 2d at 47 (citing a crime report from the Federal Bureau of Investigation as saying that "[i]n 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops").

In addition to this inherent risk of danger during a traffic stop, the totality of the evidence in the present case was sufficient to demonstrate that Officer Norton was taking precautions for his own safety. The stop occurred at 10:45 p.m. in a poorly lit area. The officer making the stop asked Officer Norton to remain at the scene and to assist the officer by watching defendant while the officer administered sobriety tests to the driver. Officer Norton stood twenty-five feet away from the vehicle where defendant was a passenger. Defendant appeared generally agitated to Officer Norton from the beginning. Under these circumstances, it is reasonable for an officer to decide that it is safer to have an occupant of a vehicle remain temporarily in the vehicle for the short duration of a lawful traffic stop. To the extent that the first line of cases discussed above holds that such a detention is a minimal intrusion on an individual's rights and does not violate the Fourth Amendment, we agree.

We thereby affirm the trial court's denial of defendant's motion to suppress because competent evidence showed that the search and temporary detention of defendant were consistent with a *Terry* stop and frisk, and were reasonable under the circumstances. *See Terry*, 392 U.S. 1, 20 L. Ed. 2d 889.

II.

[3] Defendant next argues that the trial court erred in instructing the jury on resisting *arrest* when the theory alleged in the indictment was resisting while the police officer was "attempting to search . . . defendant for officer safety after a car stop." As defendant asserts, "where the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory." *State v. Taylor*, 304 N.C. 249, 275, 283 S.E.2d 761, 778 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). The grand jury returned an indictment against defendant on 31 March 2003, stating that defendant "unlawfully and willfully did resist, delay and obstruct [a public officer], by running from the officer. At the time, the officer was discharging and attempting to discharge a duty of his office, attempting to search . . . defendant for officer safety after a car stop." The trial court instructed the jury on the elements of resisting an officer and included as one of the elements "that the [public officer] was attempting to make a lawful arrest." Defendant asserts that this instruction was in error because it did not comport with the evidence or the indictment.

Defendant further asserts that he objected to this instruction at trial and that the issue is properly preserved. Defense counsel did object but stated only: "in regard to the resisting arrest charge and [the trial court's] description of this being a lawful arrest, that pursuing a person after he was running was a lawful arrest. We would make an objection to that." Defendant did not present to the trial court his argument that the instruction was inconsistent with the theories in the indictment. To preserve an issue regarding jury instruction for appeal, a defendant must not only object to the instruction "before the jury retires to consider its verdict," but must also state "distinctly that to which he objects and the grounds of his objection[.]" N.C.R. App. P. 10(b)(2). Defendant failed to distinctly state the grounds for his objection that he now argues on appeal. Though an issue not properly preserved at trial may be reviewed as plain error, N.C.R. App. P. 10(c)(4), defendant did not specifically allege plain error in his assignments of error and therefore waives his right to plain error review. *See State v. Matthews*, 166 N.C. App. 281, ——, —— S.E.2d ——,

—— (COA03-1354) (filed 7 September 2004) (quoting *State v. Moore*, 132 N.C. App. 197, 201, 511 S.E.2d 22, 25, *disc. review denied*, 350 N.C. 103, 525 S.E.2d 469 (1999)).

We note, however, that even if defendant had properly asserted plain error, there was no plain error in the challenged jury instruction. It is well established that:

> [t]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Cummings, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000) (citations omitted), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). To prevail on a plain error claim, a "defendant must establish not only that the trial court committed error, but that 'absent the error, the jury probably would have reached a different result.' " *State v. Sierra*, 335 N.C. 753, 761 (1994), *cert. denied*, 544 S.E.2d 242 (2000) (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697, 440 S.E.2d 791, 796 (1993)). In reviewing the entire record, we fail to see how an instruction that included as an element that the officer was "attempting to search . . . defendant for officer safety after a car stop," rather than "attempting to make a lawful arrest" would change the jury's verdict.

III.

[4] Defendant similarly asserts that the trial court erred in its jury instruction on possessing drug paraphernalia, because the jury instruction was inconsistent with the theory alleged in the indictment. Defendant failed to object at trial and therefore did not properly preserve this issue. Defendant assigned as plain error the trial court's instruction on possessing drug paraphernalia, but he failed to argue plain error in his brief. Pursuant to N.C.R. App. P. 28(b)(6), this assignment of error is deemed abandoned.

We note nonetheless that there is no plain error in this instruction to the jury. The indictment stated that defendant "unlawfully, willfully did knowingly possess with intent to use drug paraphernalia, SCALES FOR PACKAGING A CONTROLLED SUBSTANCE, which it would be unlawful to possess[.]" The trial court instructed the jury: "that the defendant did [knowingly possess drug paraphernalia] with the intent to use said drug paraphernalia in order to possess a controlled substance which would be unlawful to possess." The subsequent mandate charged the jury to return a guilty verdict if they found beyond a reasonable doubt that "defendant unlawfully and knowingly possessed with intent to use certain drug paraphernalia in order to unlawfully use marijuana or cocaine, both being controlled substances which would be unlawful to possess." The only substantial difference in the language of the indictment and the jury instruction is the description of the drug paraphernalia: "scales for packaging a controlled substance." The underlying theory being presented to the jury is the same theory that supported the indictment for possession of drug paraphernalia. Contrary to what defendant appears to argue, "packaging" as used in the indictment is not a different theory of guilt. Even if defendant had properly argued plain error, there was no plain error.

IV.

[5] Defendant further argues that the trial court erred in denying defendant's motion to dismiss the charge of resisting an officer. A defendant's motion to dismiss should be denied when "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." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is such "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Fletcher*, 301 N.C. 709, 712, 272 S.E.2d 859, 861 (1981). In ruling on a defendant's motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference that can be drawn from the evidence. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. The elements of resisting an officer are that a person "willfully and unlawfully resist[ed], delay[ed] or obstruct[ed] a public officer in discharging or attempting to discharge a duty of his office." N.C. Gen. Stat. § 14-223 (2003).

In the present case, defendant asserts that the State did not present substantial evidence of these essential elements. Specifi-

cally, defendant contends that since Officer Norton's detention and attempted search of defendant were unlawful, Officer Norton was "not discharging a duty of his office when [defendant] ran away." We disagree. Even without concluding, as we did above, that Officer Norton's detention and search of defendant were reasonable under the circumstances and did not violate the Fourth Amendment, in considering the motion to dismiss, the State was entitled to every reasonable inference that could be drawn from the facts. Certainly, the facts of this case, when viewed in the light most favorable to the State, support the inference that Officer Norton was discharging official duties by observing defendant, telling defendant to remain in the vehicle, and asking to search defendant after defendant reluctantly answered that defendant did not have any weapons. This evidence was sufficiently substantial to survive defendant's motion to dismiss.

V.

[6] Defendant argues that the trial court erred in entering judgment on the crime of Class 1 misdemeanor possession of marijuana. Defendant asserts, and the State concedes, that the evidence did not support this judgment. A Class 1 misdemeanor for possessing marijuana arises when an individual possesses more than one-half ounce but less than one and one-half ounces of marijuana. N.C. Gen. Stat. § 90-95(d)(4) (2003). Possession of less than one-half ounce of marijuana constitutes a Class 3 misdemeanor. *Id*. The evidence presented at trial only supported a judgment for a Class 3 misdemeanor, and the trial court erred in entering judgment for a Class 1 misdemeanor.

While the State agrees that the evidence only supported a Class 3 misdemeanor for the possession of marijuana conviction, the State argues it was a clerical error and that "remand for imposition of judgment is unnecessary." The State argues that the trial court did not err in imposing the sentence because it had consolidated for sentencing the convictions of possession of marijuana and possession of drug paraphernalia, and possession of drug paraphernalia is a Class 1 misdemeanor. *See* N.C. Gen. Stat. § 90-113.22 (2003). As the State asserts, under our Structured Sentencing Act,

> when separate offenses of different class levels are consolidated for judgment, the trial judge is required to enter judgment containing a sentence for the conviction at the highest class. Accordingly, the trial judge is limited to the statutory sentencing guidelines, set out at N.C.G.S. § 1340.17(c), for the class level of

the most serious offense, rather than any of the lesser offenses in that same consolidated judgment.

State v. Tucker, 357 N.C. 633, 637, 588 S.E.2d 853, 855 (2003). The State contends that since possession of drug paraphernalia is a Class 1 misdemeanor, when the trial court consolidated this conviction with the Class 3 misdemeanor possession of marijuana charge, the trial court had a duty to sentence defendant within the range established by our Structured Sentencing Act for a Class 1 misdemeanor. Defendant has a prior record level of III, for which, pursuant to N.C. Gen. Stat. § 15A-1340.23(c), the appropriate sentencing range is 1-120 days. The trial court sentenced defendant to 120 days, and thus the State contends that the trial court did not err because the sentence imposed was consistent with the Structured Sentencing Act. However, we are not convinced that the sentencing was unaffected by the trial court's treatment of defendant's possession of marijuana as a Class 1 misdemeanor, as opposed to a Class 3 misdemeanor. We remand for imposition of judgment and sentencing on the Class 3 misdemeanor conviction of possession of less than one-half ounce of marijuana.

No error at trial; vacated and remanded for imposition of judgment and sentencing.

Judge TYSON concurs.

Judges WYNN concurs in the result with a separate opinion.

WYNN, Judge concurring.

While I concur in the majority's result, I disagree with the majority opinion to the extent that it holds that commanding a passenger in a vehicle subject to a stop to remain in the vehicle is *per se* permissible. In my opinion, allowing police officers arbitrarily to detain passengers in vehicles stopped for traffic violations without any reason to believe the passenger poses a threat to safety or is involved in criminal activity violates the constitutionally guaranteed privacy rights of our citizens.

I.

The majority posits a dichotomy between two lines of cases, one holding that requiring a passenger to remain in a vehicle during a legal automobile stop is a *de minimis* intrusion on that individual's

personal liberty and thus *per se* permissible, the other holding that a passenger's constitutional rights are violated when an officer detains a passenger in a vehicle during a traffic stop without articulable suspicion that the passenger is dangerous or engaged in criminal activity.

The cases cited by the majority for the proposition that detaining a passenger in a vehicle during a traffic stop is *per se* constitutional do not provide a strong foundation for the majority opinion to the extent that it deems such detentions permissible as a matter of course.

In the first case cited by the majority, *People v. Gonzalez*, 184 Ill.2d 402, 418, 704 N.E.2d 375, 382-83 (1998), *cert. denied*, 528 U.S. 825, 145 L. Ed. 2d 63 (1999), *superseded on other grounds*, *People v. Sorenson*, 752 N.E.2d 1078 (2001), the majority of the Illinois Supreme Court held that

> because the public interest in officer safety outweighs the potential intrusion to the passenger's liberty interests, it is reasonable for a police officer to immediately instruct a passenger to remain at the car, when that passenger, of his own volition, exits the lawfully stopped vehicle at the outset of the stop. We find that because the . . . risk of harm to officers . . . is present where a passenger unexpectedly exits a lawfully stopped vehicle, the officer's need to exercise " 'unquestioned command of the situation' " is likewise present. See *Wilson*, 519 U.S. at 414, 137 L. Ed. 2d at 48, 117 S. Ct. at 886, quoting *Michigan v. Summers*, 452 U.S. 692, 702-03, 69 L. Ed. 2d 340, 350, 101 S. Ct. 2587, 2594 (1981).

Notably, however, three of the seven Illinois Supreme Court justices joined in a blistering dissent stating, *inter alia*:

> The fundamental purpose of the fourth amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. At the heart of the protections afforded by the fourth amendment is the requirement of individualized suspicion. Even in cases where obtaining a warrant based on probable cause is impractical, the police must have knowledge of sufficient facts to create a reasonable suspicion that the person in question has committed, or is about to commit, a crime. A showing of individualized suspicion is constitutionally required except in the rare case where the privacy interest implicated by the search or seizure is minimal and an important government interest furthered by the intrusion would be placed in jeopardy by

a requirement of individualized suspicion. The majority's abandonment of the individualized suspicion standard in this case is wholly unwarranted.

The majority gratuitously asserts that the intrusion on the passenger's liberty is minimal because the car in which the passenger is traveling has already been stopped. In so ruling, however, the majority trivializes the liberty interest at stake in this case. The only encounter many citizens of this state will ever have with the police will be a routine traffic stop. Allowing police officers to arbitrarily detain passengers in vehicles stopped for traffic violations without any reason to believe the passenger has committed a crime or threatens the safety of the police officer ensures that this encounter will be annoying, frightening, and perhaps a humiliating experience. The thousands upon thousands of petty indignities legitimized by the majority opinion will have a substantial impact on the liberty and freedom of the citizens of this state.

* * *

The right to be free from unreasonable searches and seizures is one of our most precious constitutional rights. The exercise of this right does not depend on the grace of law enforcement officials. This opinion trashes the protections of the fourth amendment.

* * *

The majority fails to articulate any reason why a police officer would be safer if a passenger in a vehicle stopped for a traffic violation is detained at the scene rather than allowed to walk away. A police officer must have a reasonable suspicion that a passenger in a vehicle stopped for a traffic violation has committed or is about to commit a crime. This standard is more than sufficient to protect officer safety. It does no disservice to police officers to insist upon exercise of reasoned judgment.

* * *

Those who cherish their right to be free from arbitrary invasions of privacy can only hope that a more enlightened court in a future case will restore our citizens' constitutional rights which this court has today taken away.

Id. at 425-28, 704 N.E.2d at 385-87 (quotations and citations omitted) (Heiple, J., Harrison, J., and Nickels, J., dissenting).

Moreover, the *Gonzalez* majority, to support its holding, noted "a trend of decisions" reaching similar results and cited several cases with similar holdings. The very first case cited is *State v. Mendez*, 88 Wash. App. 785, 947 P.2d 256 (1997), a case overturned by the Washington Supreme Court in 1999 on the grounds that "[a]n officer must . . . be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle . . . . This articulated objective rationale prevents groundless police intrusions on passenger privacy." *State v. Mendez*, 137 Wash. 2d 208, 220, 970 P.2d 722, 728 (1999). *Mendez* therefore ultimately evidences, if anything, a trend in the direction directly opposed to that taken by the majority in *Gonzalez*.

The majority here next cites *State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (1991), wherein the majority in that case, engaging in only brief analysis, held that:

> If a passenger can be ordered out of a vehicle for the officer's safety, he can also be ordered back inside the vehicle for safety purposes. In fact, it may be even less of a privacy intrusion to order him back inside the car which is where he was prior to the stop. We cannot allow the officer's safety to depend on how fast the driver and passenger can get out of the vehicle after it has been stopped. Ordering the occupants back into the vehicle does no more than establish the status quo at the time of the stop. To hold otherwise could well lead to the unnecessary death of an officer, gunned down by those walking away who suddenly turn and fire or who circle behind the officer, either assaulting or killing him while he is talking to the driver.

Notably, however, as in *Gonzalez*, the *Webster* majority of two was countered by a dissent, authored by the chief judge of the Court of Appeals of Arizona, Division Two, and stating:

> Implicit in the court's ruling is the proposition that in every case in which police may stop a person, even for something as minor as driving with a broken taillight, they may seize anyone with the person stopped. Of course, any time a car is stopped everyone within it is stopped. It does not seem to me to follow, though, that those incidentally stopped are powerless to leave if they wish to and instead must remain involuntarily under police control until the police decide otherwise. Their detention is not supported by reasonable suspicion. The detention, if justified by considera-

> tions of officer safety, has to be premised on the notion that any stop creates a significant risk that those associated with the person stopped will attempt to harm the officer. That may be true when the reason for the stop is serious criminal activity. It cannot, it seems to me, be seriously argued that because danger exists sometimes, it must be assumed always to exist so as to justify the seizure of everyone present when anyone is stopped for whatever reason. No argument is made, specific to the facts of this case, that the officer felt the seizure was necessary for his safety. He testified otherwise. Instead it is justified on the broad rule that routine seizures may occur for officer safety regardless of the facts of the case. That rule, permitting wholesale seizures without individual justification, conflicts with the fourth amendment.

Id. at 374-75, 824 P.2d at 770-71 (footnote omitted) (Livermore, C.J., dissenting).

In the third case cited by the majority here, *Rogala v. D.C.*, 161 F.3d 44, 53 (D.C. Cir. 1998), the officer who ordered a passenger to remain in a vehicle during a traffic stop did so explicitly on the grounds that "she was blocking traffic and interfering with the field sobriety test that [the officer] was conducting . . . ." The court therefore "conclude[d] that in the circumstances presented, it follows . . . that a police officer has the power to reasonably control the situation by requiring a passenger to remain *in* a vehicle during a traffic stop, particularly where, as here, the officer is alone and feels threatened." *Id.* *Rogala* does not stand for the proposition that requiring a passenger in a car subject to a traffic stop to remain in the vehicle is *per se* permissible. Indeed, in a case the majority cites for its second line of cases, *Wilson v. Florida*, 734 So. 2d 1107, 1112-13, *disc. review denied*, 749 So. 2d 504 (1999), *cert. denied*, 529 U.S. 1124, 146 L. Ed. 2d 820 (2000), the Court of Appeal of Florida, Fourth District, explicitly included *Rogala* as a case meeting the criteria of the second line of cases, which requires objective circumstances supporting the reasonableness of ordering a passenger to remain in a vehicle. *Rogala* therefore is misplaced in the majority's first line of cases.

In the final case cited by the majority, *U.S. v. Moorefield*, 111 F.3d 10, 13 (3rd Cir. 1997), the United States Court of Appeals for the Third Circuit, in a brief opinion, held that:

> In view of the Supreme Court's ruling in *Wilson*, we have no hesitancy in holding that the officers lawfully ordered Moorefield to

> remain in the car with his hands in the air. We follow the Court's analysis in *Wilson*. The only change in Moorefield's circumstances resulting from the order to remain in the car and put his hands in the air, was that he remained inside of the stopped car with his hands in view, rather than inside of the stopped car with his hands lowered into a passenger compartment that could potentially contain a concealed weapon. Just as the Court in *Wilson* found ordering a passenger out of the car to be a minimal intrusion on personal liberty, we find the imposition of having to remain in the car with raised hands equally minimal. We conclude that the benefit of added officer protection far outweighs this minor intrusion.

Notably, however, our own Fourth Circuit has emphasized the incompatibility of bright-line tests, such as that established in *Moorefield*, with the Fourth Amendment. *See*, *e.g.*, *Alvarez v. Montgomery County*, 147 F.3d 354, 358 (4th Cir. 1998) ("The textual touchstone of the Fourth Amendment is reasonableness. When applying this basic principle, the Supreme Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." (internal quotations omitted)).

In sum, the majority opinion's first line of cases does not provide a strong foundation on which to hold that North Carolinians who happen to be passengers in vehicles stopped by law enforcement may lawfully be detained as a matter of course.

II.

The majority here states that the second line of cases it cites holds that "the Fourth Amendment is violated when a police officer detains a passenger in a vehicle during a traffic stop, unless the officer has an independent articulable suspicion that the passenger is dangerous or involved in criminal activity." I believe this overstates the holdings of the cases cited.[1]

In the first case cited by the majority, *Mendez*, 137 Wash. 2d at 220, 970 P.2d at 728, the Washington State Supreme Court does not hold that an officer must have "an independent articuable suspicion that the passenger is dangerous or involved in criminal activity" but that the officer "must . . . be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occu-

1. I also note that both opinions cited for the second line of cases are straight concurrences.

pants, or other citizens, for ordering a passenger to stay in the vehicle . . . ." Indeed, the *Mendez* court made clear that the *Terry* standard of reasonable suspicion is *not* required:

> To satisfy this objective rationale, we do not mean that an officer must meet *Terry's* standard of reasonable suspicion of criminal activity. Terry must be met if the purpose of the officer's interaction with the passenger is investigatory. For purposes of controlling the scene of the traffic stop and to preserve safety there, we apply the standard of an objective rationale. Factors warranting an officer's direction to a passenger at a traffic stop may include the following: the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants.

Id. at 220-21, 970 P.2d at 728.

In *Wilson*, 734 So. 2d at 1113, the second case cited by the majority, the court held that:

> a police officer conducting a lawful traffic stop may not, as a matter of course, order a passenger who has left the stopped vehicle to return to and remain in the vehicle until completion of the stop. The officer must have an articulable founded suspicion of criminal activity or a reasonable belief that the passenger poses a threat to the safety of the officer, himself, or others before ordering the passenger to return to and remain in the vehicle.

The *Wilson* court made clear that suspicion of criminal activity was one ground for ordering a passenger to remain in a vehicle. However it also made clear, not least by endorsing *Rogala*, discussed above, that, for example, a passenger's posing a traffic hazard constitutes an objective ground for detaining the passenger in the vehicle. This holding cannot be equated with the *Terry* stop "reasonable suspicion of criminal activity" standard the majority here implies *Wilson* and *Mendez* require.

Moreover, the two cited cases are not alone in holding that officers may not, as a matter of course, order passengers in cars lawfully stopped to remain in the vehicles. *See*, *e.g.*, *Castle v. State*, 999 P.2d 169 (Alaska Ct. App. 2000) (reversing the defendant's conviction of misconduct involving controlled substances and suppressing cocaine evidence where the defendant was a passenger in a stopped vehicle and was seized without justification); *Dennis v. State*, 345 Md. 649,

693 A.2d 1150 (1997) (reversing the defendant's disorderly conduct conviction where there was no basis for detaining a passenger who ignored an officer's command to remain in the vehicle), *cert. denied*, 522 U.S. 928, 139 L. Ed. 2d 255 (1997).

III.

In the case *sub judice*, the majority's endorsement of the first line of cases renders anyone who simply happens to be a passenger in a car stopped by law enforcement for any reason powerless to leave the vehicle until law enforcement, at its discretion, decides otherwise. This holding does not comport with the Fourth Amendment or United States Supreme Court case law, which dictate that some objective reason and the availability of judicial review are required for a seizure to be lawful:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Cf. Carroll v. United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925); Beck v. Ohio, 379 US 89, 96-97, 13 L Ed 2d 142, 147, 148, 85 S Ct 223, 229 (1964). Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, e. g., Beck v. Ohio, supra; Rios v. United States, 364 US 253, 4 L Ed 2d 1688, 80 S Ct 1431 (1960); Henry v. United States, 361 US 98, 4 L Ed 2d 134, 80 S Ct 168 (1959).

Terry v. Ohio, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968) (footnote omitted). Moreover, the United States Supreme Court has instructed us that the application of privacy rights to our citizens under the Fourth Amendment is not a matter that this country leaves to the unfettered discretion of law enforcement:

> And simple " 'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the pro-

> tections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." Beck v. Ohio, supra, at 97, 13 L Ed 2d at 148.

Id.

Further, while it is true that when a vehicle is stopped, passengers are by definition also stopped, it does not flow from that that the detention of passengers in the vehicle potentially for the duration of the traffic stop is a "minimal intrusion." In *Maryland v. Wilson*, 519 U.S. 408, 414, 137 L. Ed. 2d 41, 47 (1997), the United States Supreme Court held that ordering a passenger in a stopped vehicle to step out of the vehicle was a *de minimis* intrusion because the passenger was already stopped and thus "[t]he only change in [the passenger's] circumstances which will result from ordering [him/her] out of the car is that [he/she] will be outside of, rather than inside of, the stopped car." Here, in contrast, law enforcement is being empowered to dictate, at its discretion, not only the location of the passenger but also the detention and length of detention of the passenger.

I agree with the majority that officer safety must be prioritized where safety concerns exist. In this case, such concerns did exist: The traffic stop occurred relatively late at night, in a poorly lit area, and Defendant appeared agitated from the beginning. I agree with the majority that, under these circumstances, it was reasonable for the officer to decide that it was safer to have Defendant remain in the vehicle for the duration of the traffic stop.

However, the existence of threats to officer safety in some cases, as in this one, does not warrant issuing to law enforcement a carte blanche for seizing anyone present when any vehicle is stopped for any reason. Requiring law enforcement to be able to articulate some objective rationale predicated on safety concerns for officers, vehicle occupants, or others to justify ordering a passenger to remain in a vehicle during a traffic stop erects a relatively low hurdle.[2] Once law enforcement meets this hurdle, I agree that the intrusion on passenger privacy is *de minimis* when balanced against safety concerns. And where the hurdle is not met, it protects North Carolinians from groundless seizures.

---

2. Clearly, if law enforcement has reasonable suspicion that the passenger is engaged in criminal activity, an investigatory detention is constitutional.

IN RE: J.D.S., A MINOR CHILD

No. COA04-213

(Filed 17 May 2005)

1. Appeal and Error; Jurisdiction— subject matter jurisdiction—raised ex mero motu

Subject matter jurisdiction may be raised at any time by the parties or by the court ex mero motu, and may be reviewed on appeal even if not raised below.

2. Termination of Parental Rights— subject matter jurisdiction—statement that petition not filed to circumvent statute

There was no prejudice from a termination of parental rights petition which omitted the statutorily required statement that the petition had not been filed to circumvent the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act. N.C.G.S. § 7B-1104(7).

3. Termination of Parental Rights— subject matter jurisdiction—statement of child's address and location

The trial court had subject matter jurisdiction over a termination of parental rights proceeding even though petitioner did not file an affidavit stating the child's address and location as required by N.C.G.S. § 50A-209.

4. Appeal and Error— preservation of issues—assignments of error—sufficiency of evidence to support findings

Respondent's assignments of error were not sufficient to preserve for appellate review the issue of whether the evidence supported the findings in a termination of parental rights proceeding. The legal basis of an assignment of error should not be confused with record or transcript references; moreover, assigning error to a conclusion of law on the generalized basis of insufficient evidence does not preserve the issue of sufficiency of the evidence supporting the findings.

5. Termination of Parental Rights— order—statement of standard of review

There would have been no reason to review the question of whether the clear, cogent and convincing standard of proof was adequately stated in a termination of parental rights order, even if

respondent had sought appellate review of the issue, because the evidence supports the trial court's findings, the court stated on the record that its findings were based on clear and convincing evidence, and the findings supported the conclusion that respondent had willfully failed to pay for the care, support, and education of the child for one year as required by decree.

6. Termination of Parental Rights— failure to provide support—findings—ability to pay

While a finding regarding ability to pay is required by *In re Ballard*, 311 N.C. 708, that case concerned N.C.G.S. § 7B-1111(a)(3) and is not authority for the assertion that the trial court erred by not making that finding for termination under N.C.G.S. § 1111(a)(4) or (5)d.

7. Termination of Parental Rights— failure to provide support—findings—no justification for not paying

There was no error in a termination of parental rights order concerning the finding that respondent's failure to pay was without justification. The court in fact concluded that respondent's failure to pay was without justification; moreover, it has been held that termination with respect to a failure to pay support pursuant to a decree does not require a finding of ability to pay.

8. Termination of Parental Rights— lack of support—ability to pay

A showing that a termination of parental rights respondent had the ability to pay is not required; the statutory requirement is a showing that respondent did not provide substantial support or consistent care to the child or mother. Moreover, this issue was raised in the dissent rather than by respondent and it is not the role of the appellate courts to create an appeal.

Judge TYSON concurring in part and dissenting in part.

Appeal by respondent father from order entered 8 October 2003 by Judge John W. Smith in New Hanover County District Court. Heard in the Court of Appeals 21 October 2004.

Lea, Rhine & Rosbrugh, by James W. Lea, III and Lori W. Rosbrugh, for petitioner appellee.

Susan J. Hall, for respondent father-appellant.

Jana Lucas, for Guardian ad Litem.

LEVINSON, Judge.

Respondent father appeals from an order terminating his parental rights over J.D.S. We affirm.

Respondent and petitioner are the biological parents of J.D.S., born 23 July 1998. Petitioner and respondent were living together as an unmarried couple when J.D.S. was born, but later ended their relationship.

On 14 September 1999 an order was entered in Clark County, Nevada, in respondent's absence, granting petitioner sole legal and physical custody of the child. The order granted respondent supervised visitation, ordered him to pay attorney's fees, and required him to pay 18% of his income as child support.

Six weeks later, petitioner requested permission from the Nevada court to relocate to California. On or about 19 January 2000 an order was entered in Nevada allowing petitioner to relocate to California. In this order, the Nevada court reiterated that respondent should have supervised visitation "at the discretion of petitioner", pay attorneys' fees, and pay 18% of his income as child support.

On 23 March 2001, petitioner married a man who was serving as a U.S. Marine. When petitioner's husband was transferred to North Carolina, she requested permission from the Nevada Court to relocate here. She also requested that respondent's child support be changed to a specific dollar amount. On 25 April 2001, the Nevada court entered an order allowing petitioner to relocate to North Carolina with the child, and allowing respondent supervised visitation. The court also ordered respondent to pay $400.00 per month in child support, which included an amount representing an arrears schedule for unpaid child support.

Respondent neither appeared at any of the court proceedings in Nevada, nor appealed any of the Nevada state court's judgments or orders.

Petitioner and the child have resided in North Carolina since March 2001. Respondent, who lives in California, has never visited the child in North Carolina. In February, 2002, petitioner instituted an action in Onslow County, North Carolina, seeking termination of respondent's parental rights in J.D.S. Respondent filed a *pro se* objection to the petition and averred he was never notified regarding any of the court proceedings in Nevada. The trial court entered an order

on 31 January 2003, *nunc pro tunc* for 28 June 2002, denying petitioner's motion and concluding:

> While it is undisputed that the Respondent has not paid any child support to the Petitioner since March 1999, because the Petitioner cannot prove that the Respondent was ever served with the Clark County, Nevada action, the Court can only conclude that the Respondent, through his own testimony, has had knowledge since January 2002 of a legal obligation to pay child support for the minor child, and thus has failed to pay child support for six months rather than more than twelve as alleged by Petitioner.

In July 2002, both parties received notification of the trial court's decision not to terminate respondent's parental rights.

Respondent did not make any child support payments during the months of July, August, or September 2002. In August, respondent sent petitioner an ATM card that was to allow access to an account with approximately $90.00. Petitioner attempted to use the ATM card, but was unable to remove money from the account. On 22 November 2002, respondent mailed petitioner a check for sixty dollars ($60.00). Petitioner never cashed this check, but respondent testified at trial that he believed the check had been deposited into petitioner's account. Respondent did not send any further direct child support to petitioner, although he testified he maintains a savings account for the child. Since June 2002, respondent has called and spoken with the child numerous times and also mailed him gifts.

On 10 February 2003, petitioner filed a second petition seeking to terminate respondent's parental rights. Following a hearing on 21 July 2003, the trial court granted the petition on the grounds that respondent "willfully failed without justification to pay for the care, support and education" of the child "as required by . . . [a] decree" pursuant to N.C.G.S. § 7B-1111(a)(4), and had not "[p]rovided substantial financial support or consistent care" pursuant to N.C.G.S. § 7B-1111(a)(5)d. From this order, respondent appeals.

The issues presented on appeal are: (1) whether the trial court had subject matter jurisdiction over the termination proceeding; (2) whether the trial court properly concluded that respondent had "willfully failed without justification to pay for the care, support, and education" of the child pursuant to N.C.G.S. § 7B-1111(a)(4) (2003), and had not "[p]rovided substantial financial support or consistent care

with respect to" the child pursuant to N.C.G.S. § 7B-1111(a)(5)d (2003); and (3) whether the trial court abused its discretion by concluding that termination of parental rights was in the child's best interests.

[1] Respondent first argues that the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding. We disagree.

Although this issue was not presented to the trial court, subject matter jurisdiction may be raised at any time by the parties or by the court *ex mero motu*. *See* N.C.R. App. P. 10(a) ("[U]pon any appeal duly taken from a final judgment any party . . . may present for review . . . whether the court had jurisdiction of the subject matter[.]"); *see also In re: N.R.M.*, 165 N.C. App. 294, 297, 598 S.E.2d 147, 149 (2004) ("[R]egardless of whether subject matter jurisdiction is raised by the parties, this Court may review the record to determine if subject matter jurisdiction exists[.]") (citation and internal quotation marks omitted).

[2] Jurisdiction over termination of parental rights proceedings is governed by N.C.G.S. § 7B-1101 (2003), which provides:

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. . . . Provided, that before exercising jurisdiction under this Article, the court shall find that it would have jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204.

Respondent does not contest that these requirements were met. He contends, however, the trial court lacked subject matter jurisdiction because petitioner failed to comply with a **different** statute, N.C.G.S. § 7B-1104(7) (2003), which requires that a petition to terminate parental rights state that it "has not been filed to circumvent the provisions of Article 2 of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act."

Respondent is correct that the petition in the instant case does not include a statement that complies with the requirement of G.S. § 7B-1104(7). However, as regards a petitioner's violation of G.S. § 7B-1104(7), this Court has held:

> [W]e find no authority that compelled dismissal of the action solely because petitioner failed to include this statement of fact in the petition. While it is a better practice to include the factual statement as stated in the statute, under the facts in this case we find that respondent has failed to demonstrate that she was prejudiced as a result of the omission.

In re Humphrey, 156 N.C. App. 533, 539, 577 S.E.2d 421, 426 (2003). As in *Humphrey*, respondent has failed to demonstrate any prejudice arising from petitioner's omission.

[3] Respondent also challenges the trial court's subject matter jurisdiction on the grounds that petitioner failed to file an affidavit stating the child's address and location, as required under N.C.G.S. § 50A-209 (2003). While petitioner did not file such an affidavit, we disagree the trial court was deprived of jurisdiction as a result: "Although it remains the better practice to require compliance with section 50A-209, failure to file this affidavit does not, by itself, divest the trial court of jurisdiction." *In re Clark*, 159 N.C. App. 75, 79, 582 S.E.2d 657, 660 (2003); (citing *Pheasant v. McKibben*, 100 N.C. App. 379, 382, 396 S.E.2d 333, 335 (1990) (failure to comply with former section 50A-9 did not defeat otherwise proper subject matter jurisdiction)). Moreover, the trial court's findings and conclusions regarding jurisdiction are supported by the record. This assignment of error is overruled.

In his second and third assignments of error, respondent contends the trial court erred by concluding (1) that he "willfully failed without justification to pay for the care, support, and education" of the child pursuant to N.C.G.S. § 7B-1111(a)(4) (2003), and (2) that he has not "[p]rovided substantial financial support or consistent care with respect to the juvenile" pursuant to N.C.G.S. § 7B-1111(a)(5)d (2003). We disagree.

"An order terminating parental rights will be upheld if there is clear, cogent, and convincing evidence to support the findings of fact and those findings of fact support the trial court's conclusions of law." *In re Clark*, 159 N.C. App. at 83, 582 S.E.2d at 662 (citation omitted).

[4] Preliminarily, we note that to preserve the issue of the sufficiency of evidence to support the findings of fact, the respondent must comply with N.C.R. App. P. 10(c)(1), which provides in pertinent part:

> Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned[, and] . . . direct[] the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.

"Under this rule, an appellant is required to specifically assign error to each finding of fact that it contends is not supported by competent evidence." *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 660, 606 S.E.2d 389, 392 (2005). "Findings of fact to which a respondent did not object are conclusive on appeal . . . . A finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. § 7B-1111 is sufficient to support a termination." *In re Humphrey*, 156 N.C. App. at 540, 577 S.E.2d at 426 (citations omitted).

Respondent assigns error to the following:

> 1. Lack of subject matter jurisdiction for failure of the petitioner to allege the statutory grounds as defined in N.C. Gen. Stat. Section 7B-1104 (2003) and that grant the trial court jurisdiction over the proceedings.
>
> > Record pp. 5-8; pp. 59-65, Findings of Facts 1-25 and Conclusion of Law 1.
>
> 2. The court's Conclusion of Law #2 concluding Respondent has without justification failed to pay for the care, support, and education of the Juvenile as required by Court decree due to insufficiency of the evidence.
>
> > Record p. 65. Findings of Fact 5-24.
>
> 3. The court's Conclusion of [L]aw #3 concluding Respondent has not provided substantial financial support or consistent care with respect to the minor child due to insufficiency of the evidence.
>
> > Record p. 65. Findings of Fact 5-24.
>
> 4. The court's Conclusion of Law #4 concluding it is in the minor child's best interest that the Respondent's parental rights be terminated.
>
> > Record p. 65. Findings of Fact 5-24.
>
> [5]. The court's termination of Respondent's parental rights.
>
> > Record p. 65. Findings of Fact 5-25.

> [6]. The court's abuse of discretion by accepting into evidence any exhibit dated prior to 29 June 2002 in that they are *res judicata* and cannot now be accepted by this trial court. The Clark County, Nevada, Court failed to terminate Respondent's parental rights by order entered 31 January 2003.
>
> > Record pp. 59-65, Findings of Facts 1-25 and Conclusions of Law 1-4.

Contrary to the dissent's conclusion that respondent has preserved the issue of whether the evidence supports the trial court's findings, respondent has not done so. Respondent did not assign error to any of the trial court's findings of fact. The record shows unequivocally that none of respondent's assignments of error challenge the sufficiency of the evidence to support any of the findings of fact. Following each of respondent's assignments of error, respondent lists the corresponding record or transcript references required by N.C. R. App. P. 10(c)(1). Each of these includes a reference to the trial court's findings of fact. However, the legal basis of an assignment of error should not be confused with its accompanying record or transcript references. These are two distinct requirements and are separately evaluated by our appellate courts. *See*, *e.g.*, *State v. Walters*, 357 N.C. 68, 95, 588 S.E.2d 344, 360 (2003) (where defendant assigned error to her trial counsel's assistance as ineffective but "failed to provide transcript references under the assignment of error [as required by] N.C.R. App. P. 10(c)(1)" this Court held that "the ineffective assistance of counsel argument is not properly before this Court"); *Marketplace Antique Mall, Inc. v. Lewis*, 163 N.C. App. 596, 599, 594 S.E.2d 121, 124 (assignment of error deemed abandoned due to "plaintiffs' omission of the relevant record and transcript references"), *disc. review denied*, 358 N.C. 544, 599 S.E.2d 399 (2004).

Moreover, assigning error to a conclusion of law on the generalized basis of "insufficiency of the evidence" does not preserve the issue of the sufficiency of evidence supporting the findings of fact on which the conclusion was based:

> Plaintiff brings forward one assignment of error: 'The Court's Conclusion of Law Number 3, on the ground that the facts as found by the court and the applicable law do not support the Conclusion.' Much of plaintiff's argument, however, is dedicated to another question—whether or not the evidence supports the findings. This **question is not properly before us**. Plaintiff did not assign error to any of the trial judge's findings. When no

> assignment of error is made to particular findings, they are 'presumed to be supported by competent evidence and are binding on appeal.' Even if the assignment of error could be read as challenging the sufficiency of the evidence, it would be ineffective to support plaintiff's argument. An **assignment of error generally challenging the sufficiency of evidence to support numerous findings of fact is broadside and ineffective.**

First Union National Bank v. Bob Dunn Ford, Inc., 118 N.C. App. 444, 446, 455 S.E.2d 453, 454 (1995) (quoting *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982)) (emphasis added).

Our review is limited to the assignments of error and grounds set forth in appellant's brief. N.C.R. App. P. 10(a) and 28(a). Respondent herein failed to preserve for appellate review the sufficiency of the evidence to support the trial court's findings of fact. Accordingly, the trial court's findings of fact are conclusively established on appeal.

[5] Respondent likewise does not assign as error the trial court's failure to transcribe into the written order the "clear, cogent, and convincing" evidence standard. Nonetheless, the dissent would reverse the order on this basis.

> It is not the role of the appellate courts . . . to create an appeal for an appellant. As this case illustrates, the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.

Viar v. North Carolina Department of Transportation, No. 109A04, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (citing *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913)). While we cannot disagree with the principles set forth in *In re Church*, 136 N.C. App. 654, 655, 525 S.E.2d 478, 479 (2000), the case upon which the dissent relies, it is noteworthy that, unlike the circumstances presented herein, respondent-appellant in *Church* **specifically assigned as error** "the trial court's failure to recite the standard of proof relied upon in terminating parental rights." *In re Church*, 136 N.C. App. at 655, 525 S.E.2d at 479.

Even assuming *arguendo* that Rule 2 gives us the authority to address the absence of the "clear and convincing" standard in the present order notwithstanding respondent's failure to seek reversal

on this basis, we discern no reason to do so because (1) the evidence manifestly supports the trial court's findings of fact in that respondent's failure to support the minor child cannot be seriously questioned, and (2) the trial court stated on the record that its findings of fact were based on "clear and convincing" evidence. Indeed, in rendering its decision in open court, the trial court stated:

> After [the first order denying petitioner's motion to terminate parental rights], not one single penny has come out of [respondent's] account . . . for the support of [the] child.
>
> . . . .
>
> I asked [respondent] to clarify the business about doing this card and this account to try to figure out what his motives could have been, but all of his actions are totally inconsistent with a man wanting to get money to the mother of a child for support.
>
> . . . .
>
> And I conclude, by clear, cogent and convincing evidence that after the second notice that he's got to support this child, his total failure to do so constitutes the grounds . . . . [B]ased on what I've heard, I'm clearly entirely convinced that his rights should be terminated and the child should be given a permanent home.

As discussed above, the trial court's findings of fact are deemed conclusively established on appeal. These findings include, in relevant part, that:

> 13. On or about April 25, 2001, the District Court for Clark County, Nevada, entered an Order which allowed the Petitioner and the minor child to relocate to the State of North Carolina. Again, the Court provided that the Respondent would have supervised visitation only at the discretion of the Petitioner, awarded another $750.00 in attorney's fee [sic] and set child support retroactively at $400.00 a month from September of 1999 forward. The Court further found that the Respondent's arrearage at that time was $9,100.00.
>
> 14. The Defendant did not appear at any of [the] court proceedings aforementioned nor did he appeal any of the Judgments of the Court.

15. The Petitioner and the minor child have resided in the State of North Carolina since March of 2001. Since that time, the Respondent has not seen or visited with the minor child and has had no physical contact with the minor child.

16. In or about February 2002, the Petitioner herein instituted an action to terminate the Respondent's parental rights. At that time, the Respondent filed an objection to Petition to Terminate Parental Rights and indicated that he was not notified to appear at any of the court proceedings occurring in the State of Nevada. On or about January 31, 2003, *nunc pro tunc* for the 28th day of June, 2002, the Court entered an Order denying the Petitioner's request to terminate the Respondent's parental rights. The Court apparently based its determination on the Respondent's contention that he was never served with the Clark County, Nevada action and did not have knowledge that he had a legal obligation to support the minor child until January of 2002. The Court made the following Conclusion of Law:

    While it is undisputed that the Respondent has not paid any child support to the Petitioner since March 1999, because the Petitioner cannot prove that the Respondent was ever served with the Clark County, Nevada action, the Court can only conclude that the Respondent, through his own testimony, has had knowledge since January 2002 of a legal obligation to pay child support for the minor child, and thus has failed to pay child support for six months rather than more than twelve as alleged by Petitioner.

17. In early July of 2002, both parties were notified of the Court's decision not to terminate the Respondent's parental rights.

18. Thereafter, Respondent failed to pay any child support for the months of July, August and September in any amount whatsoever. In late August, the Respondent sent the Petitioner an ATM card. Records at the trial indicate that at the time the card was sent he had approximately $90.00 in the account. The Respondent attempted to use this card and was unable to remove money from the account indicated to be used by the Petitioner.

19. Thereafter, on November 22, 2002, Respondent sent the only child support check he has ever sent to the Petitioner in this

action in the amount of $60.00. Although this amount was not cashed by the [Petitioner] based on the advise [sic] of her counsel that it was not in compliance with the Court's Order, the Respondent testified in open court that h[e] believed the money had been cashed and deposited into the Petitioner's account. Thereafter, the Respondent did not send any further direct child support to the Petitioner and has not paid any child support through the date of this hearing. Respondent has maintained that he has maintained a savings account for the minor child but the records produced by him at this proceeding indicate that he had only $294.69 in the account as of February 28, 2003. No withdrawals have been made from that account. The Respondent has made numerous phone calls to the minor child and has spoken with the minor child since the previous hearing on Termination of Parental Rights in June of 2002 and has sent some presents to the minor child.

20. As of the date of this hearing, Respondent has paid no support for the minor child since September of 1999 except as set forth above.

21. . . . [T]he Court's Order denying the Petition to Terminate Rights gave the Respondent a second opportunity to comply with the Court's Orders and establish a relationship with the minor child.

[22]. Since notification of the Court's previous Order denying the Petition to Terminate Parental Rights, the Respondent has failed in all respects to comply with the Court's Order, has made no attempt to amend that Order or reduce his child support obligation, and appears before this Court with no plan to address the substantial arrearages that now exist or his future child support obligations.

[23]. The Respondent has clearly failed to comply with the Clark County, Nevada child support Order in any respect since 1999, and has now clearly failed to comply with the Order since January 2002, when the previous Court held that he had notice of his obligation [to] pay child support and has not complied with the Nevada Orders for more than one year prior to the filing of the Petition.

[24]. In addition, the Respondent has failed to maintain consistent contact with the minor child and has indicated by his

own testimony that he has never had any overnight visitation with the minor child outside of the presence of his parents and has only visited with the minor child occasionally. The Respondent has had no physical contact with [the] minor child since the Spring of 2001.

[25]. The minor child is now almost five years of age and will be entering Kindergarten in New Hanover County. The Petitioner and her current husband are both stably employed. In addition, the Petitioner is attending school at the University of North Carolina at Wilmington. The parties have bought a home and are providing a safe and secure environment for the minor child. The Petitioner's husband has testified that he has established a close and loving relationship with the minor child and regards the minor child as his own son and best friend.

These findings of fact support the trial court's conclusion, pursuant to G.S. § 7B-1111(a)(4), that respondent had, "for a period of one year or more next preceding the filing of the [TPR] petition . . . willfully failed without justification to pay for the care, support, and education" of the child "as required by . . . [a] decree. . . ." Because we have sustained termination of parental rights under G.S. § 7B-1111(a)(4), we need not address respondent's further argument that the findings of fact do not support the termination ground pursuant to G.S. § 7B-1111(a)(5)d. *See In re Stewart Children*, 82 N.C. App. 651, 655, 347 S.E.2d 495, 498 (1986) (where one statutory ground is established, this Court need not address assignments of error challenging other grounds).

The dissent would also reverse the order on appeal because of the trial court's (1) failure to make a finding that Respondent had the "ability to provide support" with respect to G.S. § 7B-1111(a)(3); (2) failure to find that respondent's failure to pay was "without justification" when utilizing the ground set forth in G.S. § 7B-1111(a)(4); and (3) failure to find "ability to pay" with respect to the ground set forth in G.S. § 7B-1111(a)(5)d.

[6] As to the first of the dissent's concerns, the trial court did not utilize the ground set forth in G.S. § 7B-1111(a)(3) to terminate. Nonetheless, we observe that G.S. § 7B-1111(a)(3), formerly codified as G.S. § 7A-289.32(4), authorizes the court to terminate parental rights when the child has been placed in DSS custody and the parent, "for a continuous period of six months next preceding the

filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." The statute itself expressly includes references to one's ability to pay. It is not surprising, then, that this Court has required findings concerning "ability to pay" when the trial court utilizes this ground to terminate. See *In re Ballard*, 311 N.C. 708, 716-17, 319 S.E.2d 227, 233 (1984). Put simply, *Ballard* is not authority for an assertion that the trial court errs by failing to make a finding of "ability to pay" where the grounds to terminate are those set forth in G.S. §§ 7B-1111(a)(4) or 7B-1111(a)(5)d. And, again, the trial court in the present matter did not utilize subsection G.S. § 7B-1111(a)(3) as a ground to terminate.

[7] As to the dissent's second concern, the trial court did, indeed, conclude that respondent's failure to pay was "without justification" when utilizing the ground set forth in G.S. § 7B-1111(a)(4). Moreover, with respect to termination of parental rights based on a failure to pay support pursuant to a decree, this Court, in *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990), held that a termination under N.C.G.S. § 7A-289.32(5), now codified as G.S. § 7B-1111(a)(4), did not require a finding of ability to pay on the part of respondent. This Court explained:

> Respondent . . . argues that the trial judge erred in finding and concluding that respondent's admitted failure to pay support during the relevant time period was willful because the order does not contain a finding of fact on respondent's ability to make support payments. In a termination action pursuant to this ground, petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed. . . . Because a proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, . . . there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period.

Id.; accord 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 17.42, at 17-59 n.294, (5th ed. 2002) (with respect to G.S. § 7B-1111(a)(4), "[t]he petitioner does not have to prove that the respondent had the ability to pay support if there is proof of a valid court order or support agreement. . . ."). And, just as the *Robserson* court observed of the respondent in that case, respondent herein "could have rebutted petitioner's evidence of his ability to pay by presenting evidence that he was in fact unable to pay support, but he

did not do so." *Roberson*, 97 N.C. App. at 281, 387 S.E.2d at 670. Instead, as the evidence and findings amply demonstrate about the present appeal, respondent chose to provide *de minimis* financial support notwithstanding his ability to do otherwise.

[8] As to the dissent's third concern, that the trial court did not find that respondent had an "ability to pay" pursuant to the ground set forth in G.S. § 7B-1111(a)(5)d, formerly codified as N.C.G.S. § 7A-289.32(6)(d), this Court has held that such a finding is not required. *In re Hunt*, 127 N.C. App. 370, 374, 489 S.E.2d 428, 430 (1997). Rather, as *Hunt* explained, "[t]he statute only requires a showing that he in fact did not provide substantial support or consistent care to the child or the mother." *Id.*

Again, this Court's review is limited to respondent's assignments of error and the associated arguments contained in his brief. The alleged omission of miscellaneous findings of fact and/or the trial court's alleged failure to make a finding that respondent "had the ability to provide support" are not mentioned or argued by respondent. It is, again, "not the role of the appellate courts . . . to create an appeal for an appellant." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361.

This assignment of error is overruled.

Respondent's remaining argument on appeal, that the trial court abused its discretion by concluding that it was in the child's best interests that respondent's parental rights be terminated, is without merit. *See In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 174 (2001) (abuse of discretion is standard of review of decision to terminate parental rights once grounds for termination are established). This assignment of error is overruled.

Affirmed.

Judge BRYANT concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge concurring in part, dissenting in part.

I concur in that portion of the majority's opinion finding that North Carolina's courts have jurisdiction over respondent. Respondent properly preserved his assignments of error to the trial

court's findings of fact and order and argued these assignments in his brief. The trial court's order does not show the standard of proof it utilized and failed to make findings on respondent's ability to pay. The order should be vacated and this cause remanded. I respectfully dissent.

I. Assignments of Error

As stated in the majority's opinion, respondent's assignments of error numbers 2 through 5 challenge:

> 2. The court's Conclusion of Law #2 concluding Respondent has without justification failed to pay for the care, support, and education of the Juvenile as required by Court decree due to *insufficiency of the evidence*.
>
> Record p. 65. Findings of Fact 5-24.
>
> 3. The court's Conclusion of [L]aw #3 concluding Respondent has not provided substantial financial support or consistent care with respect to the minor child due to *insufficiency of the evidence*.
>
> Record p. 65. Findings of Fact 5-24.
>
> 4. The court's Conclusion of Law #4 concluding it is in the minor child's best interest that the Respondent's parental rights be terminated.
>
> Record p. 65. Findings of Fact 5-24.
>
> [5]. The court's termination of Respondent's parental rights.
>
> Record p. 65. Findings of Fact 5-24.

(Emphasis supplied). Respondent sufficiently complied with the applicable rules of appellate procedure. N.C.R. App. P. 10(a) (2004); N.C.R. App. P. 28 (2004). His appeal and arguments are properly before this Court. The discussion of "Rule 2" in the majority's opinion is inapplicable to an appeal, as here, where a respondent's assignments of error challenge specifically list findings of fact and the sufficiency of the evidence as required by a petitioner's burden of proof to support those findings.

II. Clear, Cogent, and Convincing Evidence

The majority's opinion correctly quotes our standard of review: "An order terminating parental rights will be upheld if there is clear, cogent, and convincing evidence to support the findings of fact and

those findings of fact support the trial court's conclusions of law." *In re Clark*, 159 N.C. App. 75, 83, 582 S.E.2d 657, 662 (2003) (citation omitted). "[I]n the adjudication stage, the petitioner must prove by clear, cogent, and convincing evidence the existence of one or more of the grounds for termination." *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). A trial court's order terminating parental rights to a child must be based on clear, cogent, and convincing evidence. *In re Church*, 136 N.C. App. 654, 657, 525 S.E.2d 478, 480 (2000).

This Court has held:

> Although the termination statute does not specifically require the trial court to affirmatively state in its order terminating parental rights that the allegations of the petition were proved by clear and convincing evidence, without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized. . . . Accordingly, *we read section 7A-289.30(e) (now section 7B-1109(f)) to require the trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding.*

Id. at 657, 525 S.E.2d at 480 (emphasis supplied). In *In re Church*, we remanded to "the trial court to determine whether the evidence satisfie[d] the required standard of proof of clear and convincing evidence." 136 N.C. App. at 658, 525 S.E.2d at 481. That same result is required here.

Our review of respondent's assignments of error is well-established. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000). We must determine: (1) "whether the [trial] court's 'findings of fact are based upon clear, cogent[,] and convincing evidence;' " and (2) "whether the 'findings support the conclusions of law' " in the order. *Id.* (*quoting In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996) (citation omitted)), *disc. rev. denied and appeal dismissed*, 353 N.C. 374, 547 S.E.2d 9 (2001). We review the trial court's conclusions of law *de novo*. *Scott v. Scott*, 157 N.C. App. 382, 385, 579 S.E.2d 431, 433 (2003) (trial court's conclusions of law are reviewable *de novo*); *see also Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97-98 (2000).

The trial court's order fails to state its findings of fact are based upon "clear, cogent, and convincing evidence" and does not state the standard of proof upon which the trial court's findings are based. *In*

re Montgomery, 311 N.C. at 110, 316 S.E.2d at 252. This Court cannot presume this error to be harmless. *In re Church*, 136 N.C. App. at 658, 525 S.E.2d at 480.

The order appealed from fails to indicate the standard of proof the trial court applied. As the order fails to show the standard of proof the trial court applied and to include an affirmative statement regarding application of the proper standard of proof the trial court used, we are "unable to determine if the proper standard of proof was utilized" and review respondent's assignments of error regarding the findings of fact. *In re Church*, 136 N.C. App. at 657, 525 S.E.2d at 480. The majority's opinion acknowledges that it "cannot disagree with the principles set forth in *In re Church*."

III. Ability to Pay

The trial court terminated respondent's parental rights by concluding respondent "willfully failed without justification to pay for the care, support, and education" of the child.

In *In re Roberson*, this Court stated:

> to hold a supporting parent in contempt for willful failure to pay support, the following definitions of the word "willful" were cited with approval: "disobedience which imports knowledge and a stubborn resistance," "doing the act . . . without authority—careless whether he has the right or not—in violation of law." *Jones v. Jones*, 52 N.C. App. 104, 110, 278 S.E.2d 260, 264 (1981). (Citations omitted.) In proceedings conducted under former N.C. Gen. Stat. § 48-5, the predecessor of N.C. Gen. Stat. § 7A-289.32(8), which allows termination based upon a finding of "willful abandonment," the word "willful" implied doing an act purposely and deliberately. *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 513-14 (1986). "Willful intent . . . is a question of fact to be determined from the evidence." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

97 N.C. App. 277, 280-81, 387 S.E.2d 668, 670 (1990).

No evidence in the record shows and no findings of fact were made regarding respondent's ability to pay under any of the statutory grounds asserted to terminate respondent's parental rights. Without such evidence and findings of fact, the trial court erred by concluding respondent "willfully failed without justification to pay for the care, support, and education" of his child.

> A finding that a parent has ability to pay support is essential to termination for nonsupport on this ground. *See In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981). No such finding was made in this case. Therefore, that part of the opinion of the Court of Appeals affirming the action of the trial court in terminating the respondent's parental rights on this ground also must be reversed.

In re Ballard, 311 N.C. 708, 716-17, 319 S.E.2d 227, 233 (1984) (referring to subdivision (4) of former N.C. Gen. Stat. § 7A-289.32, now N.C. Gen. Stat. § 7B-1111(a)(3)).

Citing *In re Roberson*, the majority's opinion holds, that N.C. Gen. Stat. § 7B-1111(a)(4) does "not require a finding of ability to pay on the part of father-respondent." However, unlike here and as noted above, the trial court in *In re Roberson* found and stated that "petitioner had shown by clear, cogent, and convincing evidence that respondent's failure to pay was willful." 97 N.C. App. at 281, 387 S.E.2d at 670. In *In re Roberson*, we reiterated, "[a]t the adjudication stage, petitioner carries the burden of proving the existence of grounds for termination by clear, cogent and convincing evidence." 97 N.C. App. at 282, 387 S.E.2d at 670 (citing *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38, *cert. denied*, 318 N.C. 283, 347 S.E.2d 470 (1986)). The trial court's order does not affirmatively state petitioner met its burden of proof or that respondent's failure to pay was "without justification" as required by the statute. N.C. Gen. Stat. § 7B-1111(a)(4). The trial court must find respondent's ability to comply in order to find his failure to comply was "without justification." *Id.*

The majority's opinion also cites *In re Hunt*, to hold that N.C. Gen. Stat. § 7B-1111(a)(5)d does not require the trial court to find an "ability to pay on the part of the respondent." However, this Court in *In re Hunt* stated, "[m]ore importantly, the order entered shows the trial court *did* find that respondent had the means and ability to support his child and did not." 127 N.C. App. 370, 374, 489 S.E.2d 428, 430 (1997).

Under neither ground to terminate respondent's right for failure to support the juvenile did the trial court find by clear, cogent, and convincing evidence that respondent either: (1) "willfully failed . . . to pay a reasonable portion of the cost of care for the juvenile *although physically and financially able to do so*," N.C. Gen. Stat. § 7B-1111(a)(3) (emphasis supplied); or (2) "willfully failed *without justification* to pay for the care, support, and education of the juve-

nile," N.C. Gen. Stat § 7B-1111(a)(4) (emphasis supplied); or (3) for "a juvenile born out of wedlock has not . . . [p]rovided substantial financial support or *consistent care* with respect to the juvenile and mother," N.C. Gen. Stat § 7B-1111(a)(5)d (emphasis supplied); or (4) "had the means and ability to support his child and did not," *In re Hunt*, 127 N.C. App. at 374, 489 S.E.2d at 430.

Without findings of fact regarding respondent's ability to pay or an affirmative statement of the required "standard of proof utilized in the termination proceeding," the trial court's conclusions of law are not supported. *In re Church*, 136 N.C. App. at 657, 525 S.E.2d at 480; *see also In re Huff*, 140 N.C. App. at 291, 536 S.E.2d at 840. The order appealed from should be vacated and remanded. *See In re Church*, 136 N.C. App. at 658, 525 S.E.2d at 481.

IV. Conclusion

While North Carolina courts have subject matter jurisdiction over petitioner's action, the trial court erred in failing to "affirmatively state in its order" whether it applied the required clear, cogent, and convincing evidence standard of proof to support its findings of fact that respondent willfully failed to pay for the care of the child. *In re Church*, 136 N.C. App. at 657, 525 S.E.2d at 480. The trial court also failed to make any findings of fact of whether: (1) respondent had the "means and ability" to pay support, *In re Hunt*, 127 N.C. App. at 374, 489 S.E.2d at 430; or (2) respondent failed to provide "consistent care," N.C. Gen. Stat. § 7B-1111(a)(5)d; or (3) respondent's failure to pay was "without justification," N.C. Gen. Stat. § 7B-1111(a)(4). *See also In re Roberson*, 97 N.C. App. at 281, 387 S.E.2d at 670; *In re Church*, 136 N.C. App. at 657, 525 S.E.2d at 480.

I vote to vacate the order and remand for entry of findings of fact based on clear, cogent, and convincing evidence on whether respondent has the means and ability to pay support for his child and whether respondent's failure to pay was "without justification." N.C. Gen. Stat. § 7B-1111(a)(4). I respectfully dissent.

STATE OF NORTH CAROLINA v. HERMAN ELLIS BREWINGTON

No. COA03-1654

(Filed 17 May 2005)

1. Search and Seizure— *Terry* stop—motion to suppress—probable cause—detention of passenger of car

The trial court did not err in an assault on a governmental officer with a deadly weapon and reckless driving case by denying defendant passenger's motion to suppress evidence of an alleged unlawful stop and detention by a police officer on 10 September 2002, because: (1) the trial court properly concluded that there was probable cause to stop the vehicle when the officer observed that the driver was not wearing a seatbelt in violation of N.C.G.S. § 20-135.2A(a); (2) although defendant had not been observed violating any laws at the time of the stop, it is not unreasonable under the Fourth Amendment of the United States Constitution to detain a passenger when a vehicle has been stopped due to a traffic violation committed by the driver of the car; (3) once the original purpose of the stop had been addressed, the trial court correctly determined that there was a reasonable articulable suspicion to require defendant to remain at the scene when defendant's behavior, combined with the discovery of narcotics on the driver during a consensual pat-down search, created a reasonable articulable suspicion which permitted the officer to detain defendant passenger to address the deputy's concerns; and (4) the police had probable cause to search the car based upon the discovery of illegal narcotics upon the driver's person, and even assuming the deputy did not have any authority to detain defendant at the scene, he possessed authority to detain the car at the scene.

2. Criminal Law— instruction—right to resist unlawful arrest

The trial court did not err in an assault on a governmental officer with a deadly weapon and reckless driving case by denying defendant's request for a jury instruction on the right to resist an unlawful arrest, because: (1) upon discovering illegal narcotics on the driver's person, the police had probable cause to search the stopped vehicle in which defendant was a passenger; and (2) at the moment defendant slid into the driver's seat of the stopped vehicle, tried to start the car, and ignored the officer's command to stop, a violation of N.C.G.S. § 14-223 occurred and defendant was subject to arrest.

3. Assault— assault on governmental officer with deadly weapon—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of assault on a governmental officer with a deadly weapon even though defendant contends he was unlawfully seized by the officer and rightfully asserted his right to resist such a seizure, because the officer had authority to arrest defendant when defendant's actions constituted a violation of N.C.G.S. § 14-223, a class 2 misdemeanor.

4. Criminal Law— instruction—defendant not arrested as a matter of law—plain error analysis

The trial court did not commit plain error in an assault on a governmental officer with a deadly weapon and reckless driving case by instructing the jury that defendant had not been arrested as a matter of law, because: (1) an arrest requires either physical force or, where that is absent, submission to the assertion of authority; and (2) neither occurred in this case.

5. Criminal Law— instruction—self-defense—failure to instruct on lawfulness of arrest or defendant's right to resist arrest

The trial court did not err by instructing the jury on the law of self-defense without instructing on the lawfulness of defendant's arrest and his right to resist it, because: (1) defendant was not arrested as he did not submit to the officer's show of authority and any physical force applied did not restrain defendant's liberty; (2) as the officer was being dragged by the car defendant was driving, the officer hit defendant with the butt of his gun in his attempt to free himself; and (3) defendant was not resisting an unlawful arrest as his attempt to remove the driver's vehicle from the scene was a violation of N.C.G.S. § 14-223.

6. Criminal Law— instructions—no expression of opinion by trial court

The trial court in a prosecution for assaulting a governmental officer with a deadly weapon did not impermissibly explain the application of the law to the jury or express an opinion on the evidence in violation of N.C.G.S. § 15A-1232 by instructing the jury that the law was violated if a driver was not wearing a seatbelt while driving on a public street, that a deputy would have a right to detain the car for a search if he found cocaine on the driver, and that defendant contended that he acted in self-defense.

7. Evidence— prior crimes or bad acts—warrant for arrest from another state for probation violation

The trial court did not err in an assault on a governmental officer with a deadly weapon and reckless driving case by admitting evidence of a warrant for defendant's arrest from the State of Virginia for a probation violation, because: (1) the outstanding warrant was admissible under N.C.G.S. § 8C-1, Rule 404(b) since it provided a possible explanation or motive for defendant's actions on 10 September 2001; and (2) although defendant contends the trial court did not instruct the jury that the evidence was admitted for a limited purpose only, defendant did not request a limiting instruction.

8. Evidence— prior crimes or bad acts—traffic stop for possession of drug paraphernalia

The trial court did not err in an assault on a governmental officer with a deadly weapon and reckless driving case by allowing an Ohio police officer to testify regarding a traffic stop that occurred about one month after the incident in this case, during which defendant was arrested for the possession of drug paraphernalia, because: (1) the officer's testimony that a substance found during the stop was similar to cocaine was properly allowed even though the officer was not qualified as an expert because the officer did not testify that the substance was definitely cocaine, and the officer clarified that he was expressing an opinion satisfactory to himself based upon his training and experience in law enforcement; (2) evidence of the circumstances surrounding the stop was admissible under N.C.G.S. § 8C-1, Rule 404(b) since it was evidence of defendant's modus operandi, i.e., he fled a crime scene in another person's car since he was involved in a drug offense, defendant's actions were substantially similar in both cases, and the evidence showed defendant's motive or intentions in this case to flee the scene in order to avoid arrest on outstanding warrants or to prevent the discovery of drugs or drug paraphernalia in the car or on his person; (3) even assuming the admission of the circumstances regarding defendant's arrest in Ohio was erroneous, the evidence that defendant was arrested on the outstanding warrant in Ohio and extradited to North Carolina was relevant and admissible; and (4) the admission of defendant's actions during the Ohio traffic stop was nonprejudicial error as the State presented evidence that defendant assaulted a New Hanover deputy by dragging the officer with his car.

9. Sentencing— habitual felon—evidentiary hearing without motion from either party—not an advisory opinion

The trial court did not issue an impermissible advisory opinion or commit plain error by conducting an evidentiary hearing prior to the beginning of the habitual felon phase when no motion for such a hearing had been properly made before the court, because: (1) the trial court has the inherent authority to conduct an evidentiary hearing outside the presence of a jury sua sponte to clarify questions of admissibility and to prevent undue delay in the proceedings; and (2) by conducting the hearing out of the presence of the jury and prior to the presentation of evidence during the habitual felon phase, the trial court was able to resolve any arguments and concerns regarding the evidence and the habitual felon proceedings before the jury proceeded without any delay.

10. Sentencing— habitual felon—felonious possession of cocaine

The trial court did not commit plain error by allowing a felonious possession of cocaine charge to be a predicate felony for the habitual felon indictment, because the possession of cocaine under N.C.G.S. § 90-95(d)(2) is a felony and a proper basis for an habitual felon indictment.

11. Sentencing— habitual felon indictment—sufficiency of evidence—facsimile copy of prior conviction

The trial court did not err by failing to dismiss the habitual felon indictment even though defendant contends the State allegedly failed to produce sufficient evidence of the third felony listed in the habitual felon indictment when the State submitted a facsimile of the prior crime indicating that defendant was found guilty of unarmed robbery in a federal court in Ohio, because: (1) a faxed, certified copy of a court record is a reliable source of a defendant's prior conviction for habitual felon purposes; (2) regardless of the fact that the possibility of receiving an unconditional discharge and having the underlying conviction set aside was part of the sentence imposed upon defendant for his felonious unarmed bank robbery conviction, defendant was convicted of a felony for habitual felon purposes; and (3) although defendant makes an argument that he may have received an unconditional discharge under 19 U.S.C.A. § 5021, thus meaning his unarmed robbery conviction was set aside, he did not present

any evidence proving with any certainty that the conviction has been set aside.

Appeal by defendant from judgments entered 17 December 2002 by Judge Anthony Brannon in New Hanover County Superior Court. Heard in the Court of Appeals 12 October 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David J. Adinolfi II, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant-appellant.

HUNTER, Judge.

Hermal[1] Ellis Brewington ("defendant") presents the following issues for our consideration: Did the trial court erroneously (I) deny his motion to suppress evidence of an unlawful stop and detention by the police; (II) deny a request for a jury instruction on the right to resist an unlawful arrest; (III) admit evidence of other wrong acts and crimes in violation of Rule 404(b); and (IV) deny his motion to dismiss all charges. Defendant also presents three issues arising from the habitual felon phase of his trial: (I) Should the habitual felon indictment have been dismissed by the trial court because one of the alleged felonies was possession of cocaine; (II) did the trial court erroneously conduct an evidentiary hearing without a motion from either party; and (III) did the State produce competent evidence to prove his prior felony convictions listed in the habitual felon indictment. After careful review, we find no prejudicial error occurred in defendant's trial.

The evidence tends to indicate that at approximately noon on 10 September 2001, Deputy Michael Howe ("Deputy Howe"), a member of the New Hanover County Sheriff's Department Emergency Response Team, observed a car in which the driver was not wearing his seatbelt. Defendant was a passenger in this car. Deputy Howe ini-

1. We note that defendant was indicted under the name Hermal Ellis Brewington. The transcript, several trial motions and memoranda, several documents in the record on appeal, and the State's brief on appeal refer to defendant as Hermal Brewington. However, the arrest warrant and the judgments of conviction in this case refer to defendant as Herman Brewington. As we use the name on the judgment in the captions of appellate opinions, defendant's name appears as Herman Brewington on the caption. Neither party has raised any issues related to the discrepancy in the names. We do encourage the parties, however, to ensure a defendant's correct name is placed on all court documents to help facilitate appellate review.

tiated a traffic stop and the car pulled into a driveway. Deputy Howe parked his police vehicle on the street in a manner that blocked the driveway. Deputy Howe approached the car and told the driver that he had been stopped due to a seatbelt violation. The driver acknowledged he was not wearing his seatbelt and produced his driver's license and registration.

Deputy Howe looked at the passenger while talking to the driver. Deputy Howe testified the passenger was vigorously chewing on a straw, starting to sweat, making jerking and quick movements with his neck and hand, and attempting to go into his left front pocket. Deputy Howe observed a bulge in that pocket and became concerned that it could be a weapon. After observing the passenger's actions, Deputy Howe asked the driver to exit the vehicle. He did not remove the passenger from the car; rather, he instructed the passenger to remain calm, to not go into his pockets, and asked the passenger his name. The passenger gave the fictitious name of Michael Allen; however, it was later determined the passenger was Hermal Brewington, the defendant in this case.

After removing the driver from the car, Deputy Howe and the driver walked to the police vehicle at the end of the driveway on the street. Deputy Howe conducted a consensual pat-down frisk of the driver to determine if he had any weapons and discovered a user's amount of crack cocaine. Intending to place the driver under arrest, he placed handcuffs on the driver and called for police back-up. He placed the evidence on the trunk of the police vehicle, placed the driver into the passenger seat of the police vehicle, and began placing a seatbelt on the driver. The defendant was still sitting on the passenger side of the driver's car. However, as Deputy Howe was placing the seatbelt on the driver, he saw defendant slide into the driver's seat of the stopped car.

Deputy Howe testified that he ran to the stopped car in order to detain the car as he did not want defendant to flee the area or drive away with the car. By the time Deputy Howe got to the front of the stopped car, defendant had started the car. The driver's side window was open. Deputy Howe told defendant "[d]on't do it" several times, meaning don't flee the scene. He then called police dispatch for further assistance and drew his weapon with his right hand. Prior to this, Deputy Howe had not drawn his weapon. He continued to give defendant verbal commands to turn the vehicle off; however, defendant continued trying to move the gear shift from park. As a result, Deputy Howe reached into the car with his left hand and reached in

between the steering wheel to grab the key. Defendant turned the steering wheel, lifting Deputy Howe's arm and body into the air. Deputy Howe's arm was stuck in the vehicle. Deputy Howe continued to request defendant to stop the car; however, defendant placed the car in reverse and started going backwards. The car hit the police vehicle. Defendant then put the car into drive and started going forward. Deputy Howe's arm remained stuck in the steering wheel and he was forced to move with the car. Deputy Howe regained his footing and began running alongside the car. Deputy Howe took his pistol, pressed it against defendant's left cheek, and told defendant he was going to shoot him. Deputy Howe then hit defendant with the gun, and after he felt like he was going under the car, he started firing his pistol. After he started shooting, his arm was freed from the car, but he continued firing his weapon. Deputy Howe fired five rounds from his pistol in approximately two seconds. Defendant was able to drive away from the scene. The testimony of two Wilmington Police Department officers that responded to the scene corroborated Deputy Howe's testimony that he was dragged by the car.

Jonathan Barfield ("Barfield"), a former New Hanover County Commissioner, was across the street showing a home for a possible rental on the day of the incident. In regards to what transpired between defendant and Deputy Howe, Barfield testified that Deputy Howe did not have his weapon drawn as he ran to the car. When he got to the side of the car, he drew his weapon and said "[g]et out from under that wheel[.]" While at the side of the car, Deputy Howe stated "[t]urn the engine off. Turn the engine off. Get out of the car. If you don't get out of the car, I'm going to shoot you." After Deputy Howe threatened to shoot defendant, the car backed up, hit Deputy Howe, and knocked him into a bush. The car hit the police vehicle, traveled between a bush and the sidewalk, and then traveled down the street. As the car was traveling between the bush and the sidewalk, Deputy Howe began firing his weapon. According to Barfield, Deputy Howe had both of his hands on the gun and never leaned into the car. Barfield also testified that he never saw Deputy Howe dragged by the car and that Deputy Howe was not in the path of the car. According to Barfield, no other officers were present when Deputy Howe was shooting.

After defendant left the scene, he attempted to sell the car at a local junkyard. The junkyard owner testified the car was "shot up" and the man was bleeding. The junkyard owner told defendant to leave and he later identified defendant from a photographic lineup.

The car was located a few days later on a highway south of Brunswick County. Analysis of the car revealed a large amount of blood saturating the front area of the car, dents on the driver's side, a broken back window, and a bullet hole in the driver's seat headrest. A trajectory expert testified that the four shots fired were consistent with a shooter firing as he was falling down.

Defendant was arrested on 10 October 2001 in Ottawa Hills, Ohio. Defendant informed the arresting officer that he had a gunshot injury that had not been treated. The officer observed an area on defendant's left shoulder that appeared to be healing and X-rays revealed defendant had a broken left arm. Defendant received medical treatment and was taken to jail. He was indicted on 25 February 2002 for felony larceny, reckless driving, driving with a revoked license, injury to personal property, and assault on a governmental officer with a deadly weapon. The State also indicted defendant as being a habitual felon. Defendant was found guilty of assault on a governmental officer with a deadly weapon and reckless driving. A mistrial was entered as to the larceny of a motor vehicle charge because the jury was unable to reach a unanimous verdict. After defendant was found guilty of having attained habitual felon status, he was sentenced to a minimum of 100 and a maximum of 129 months on the assault charge. He was sentenced to forty-five days in jail for reckless driving to run concurrently with the assault sentence. Defendant appeals.

[1] Defendant first contends the trial court erroneously denied his motion to suppress evidence of his stop and detention by Deputy Howe on 10 September 2002. Defendant argues Deputy Howe did not properly keep and detain him during his investigative stop of the driver and that defendant was free to leave the scene without interference from Deputy Howe.

"In reviewing a trial judge's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000). "Further, 'the trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence.' " *State v. Castellon*, 151 N.C. App. 675, 677, 566 S.E.2d 696, 697 (2002) (citation omitted). Defendant does not challenge the trial court's findings of fact in the suppression order. Thus, we review the trial court's conclusions of law.

The trial court concluded that (1) there was probable cause to stop the vehicle, (2) defendant, a passenger in the vehicle, could be detained as the driver had been lawfully stopped for a traffic violation, and (3) Deputy Howe had a reasonable articulable suspicion to require defendant to remain at the scene and not remove the vehicle after narcotics had been found on the driver.

First, the trial court correctly concluded there was probable cause to stop the vehicle. " 'A traffic stop made on the basis of a readily observed traffic violation such as speeding or running a red light is governed by probable cause.' " *State v. Wilson*, 155 N.C. App. 89, 94, 574 S.E.2d 93, 97 (2002) (citation omitted), *disc. review denied*, 356 N.C. 693, 579 S.E.2d 98 (2003). Prior to stopping the vehicle, Deputy Howe observed the driver not wearing a seatbelt, a violation of N.C. Gen. Stat. § 20-135.2A(a) (2003). Although defendant had not been observed violating any laws at the time of the stop, it is not unreasonable under the Fourth Amendment of the United States Constitution to detain a passenger when a vehicle has been stopped due to a traffic violation committed by the driver of the car. *See Maryland v. Wilson*, 519 U.S. 408, 415, 137 L. Ed. 2d 41, 48 (1997) (footnote omitted) (stating "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop"). However, a passenger may not be detained indefinitely. " 'Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay.' " *Castellon*, 151 N.C. App. at 680, 566 S.E.2d at 699 (citation omitted).

We conclude the trial court correctly determined there was a reasonable articulable suspicion to require defendant to remain at the scene. Based upon Deputy Howe's testimony during the *voir dire* hearing, the trial court found defendant was "acting in a suspicious manner. The defendant was obsessively chewing on a straw and aggressively rubbing his leg and moving his hands toward a bulge near his pants pocket. Deputy Howe asked the defendant several times for the defendant to put his hands where he could see them." Defendant's behavior combined with the discovery of narcotics on the driver during a consensual pat-down search created a reasonable articulable suspicion which permitted Deputy Howe to detain defendant to address the deputy's concerns. *See State v. McClendon*, 350 N.C. 630, 636-38, 517 S.E.2d 128, 132-34 (1999) (stating "nervousness is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists" and that "[a]fter a lawful stop,

an officer may ask the detainee questions in order to obtain information confirming or dispelling the officer's suspicions").

Additionally, the police had probable cause to search the car based upon the discovery of illegal narcotics upon the driver's person. *See State v. Isleib*, 319 N.C. 634, 638, 356 S.E.2d 573, 576-77 (1987) (stating "no exigent circumstances other than the motor vehicle itself are required in order to justify a warrantless search of a motor vehicle if there is probable cause to believe that it contains the instrumentality of a crime or evidence pertaining to a crime and the vehicle is in a public place"). "[W]here probable cause exists to search an automobile, it is reasonable (1) to seize and hold the automobile before presenting probable cause issue to a magistrate or (2) to carry out an immediate search without a warrant." *State v. Jordan*, 277 N.C. 341, 344, 177 S.E.2d 289, 291 (1970) (discussing *Chambers v. Maroney*, 399 U.S. 42, 26 L. Ed. 2d 419 (1970)). Thus, even assuming Deputy Howe did not have any authority to detain defendant at the scene, he possessed authority to detain the car at the scene, as there was probable cause to search the car. Accordingly, we conclude the trial court properly denied defendant's motion to suppress.

[2] Defendant next contends the trial court erroneously denied his request for a jury instruction regarding his right to resist an unlawful arrest. As stated, upon discovering illegal narcotics on the driver's person, the police had probable cause to search the stopped vehicle. After seeing the driver being placed under arrest after the discovery of the narcotics, defendant attempted to remove the driver's vehicle from the scene by sliding into the driver's seat and trying to start the engine. Deputy Howe commanded defendant to stop, however, defendant proceeded to start the car and began driving the car while dragging Deputy Howe. Defendant drove the car away from the scene. Defendant's actions were in violation of N.C. Gen. Stat. § 14-223 (2003), which states: "If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." At the moment defendant slid into the driver's seat of the stopped vehicle, tried to start the car, and ignored Deputy Howe's command to stop, a violation of N.C. Gen. Stat. § 14-223 occurred and defendant was subject to arrest. Therefore, defendant was not resisting an unlawful arrest, and the trial court properly declined to instruct the jury as to this defense.

[3] Defendant also contends the trial court should have dismissed the felonious assault on a governmental officer charge because he

was unlawfully seized by Deputy Howe and rightfully asserted his right to resist such a seizure. As previously stated, Deputy Howe had authority to arrest defendant because defendant's actions constituted a violation of N.C. Gen. Stat. § 14-223, a class 2 misdemeanor. Therefore, the trial court did not erroneously deny defendant's motion to dismiss on this basis.

[4] Defendant also contends the trial court committed plain error in instructing the jury that defendant had not been arrested as a matter of law. Specifically, the trial court instructed:

> [T]he United States Supreme Court has ruled as a matter of constitutional law—they did that in 1991—that a police officer only arrests or seizes a person when, one, an officer has applied actual physical force to the person, that is, by touching or tackling a person by way of examples; or two, that person actually submits to the officer's show of authority.
>
> So an arrest does not occur, for example, when an officer shouts "Stop in the name of the law" and the person flees on. Whereas an arrest or seizure would occur if the person submitted or stopped as a result of the officer's verbal command.

This instruction by the trial court is a correct statement of the United States Supreme Court's holding in *California v. Hodari D.*, 499 U.S. 621, 626, 113 L. Ed. 2d 690, 697 (1991). In *Hodari D.*, the United States Supreme Court held: "An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority." *Id.* The holding in *Hodari D.* has not been overruled. Thus, the trial court did not commit plain error in instructing in accordance with United States Supreme Court precedent.

[5] Defendant also argues the trial court erroneously instructed the jury on the law of self-defense, without instructing on the lawfulness of defendant's arrest and his right to resist it. First, under the United States Supreme Court's holding in *Hodari D.*, defendant was not arrested as he did not submit to Deputy Howe's show of authority and any physical force applied did not restrain defendant's liberty. *Id.* at 625-26, 113 L. Ed. 2d at 696-97. Rather, as Deputy Howe was being dragged by the car defendant was driving, Deputy Howe hit defendant with the butt of his gun in his attempt to free himself. Moreover, as previously explained, defendant was not resisting an unlawful arrest as his attempt to remove the driver's vehicle from the scene was a violation of N.C. Gen. Stat. § 14-223.

[6] Next, defendant contends the trial court committed plain error by summarizing the evidence and applying the law to the facts of the case. Specifically, defendant contends the trial court impermissibly explained the application of the law to the jury or expressed an opinion regarding a fact by stating (1) the law authorized Deputy Howe to stop the driver's car and to detain his car, (2) that as a matter of constitutional law, a person cannot be arrested until he has actually submitted to a police officer's show of authority, and (3) that it was defendant's contention that he was using self-defense in this matter.

> "The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant."

State v. Riddle, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986) (citations omitted). N.C. Gen. Stat. § 15A-1232 (2003) provides: "In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence."

Regarding the traffic stop for the seatbelt violation, the trial court instructed:

> On September 10th, 2001, *if* Officer Michael Howe saw [the driver] operating a motor vehicle on a public street in Wilmington without wearing a seat belt, *then* that, not wearing the seat belt, would be a violation of the North Carolina motor vehicle law, and the officer would have had the full legal right to stop the vehicle and give a citation to the driver.
>
> The officer would thereafter have had the right to have a conversation with the driver and to have further roadside involvement with him. *If* Officer Howe found what, in his opinion, based on his training and experience, was the controlled substance cocaine, the officer would have had full legal right to arrest, that is, to take into custody the driver, Nathaniel Williams, for possession of cocaine.
>
> At that time point, the officer would have had the legal right to detain the driver [sic], Nathaniel William's automobile, . . . , and

> he could do that in order to secure the car for a full law enforcement search as part of investigating a controlled substance act violation which would be a duty of his office as a law enforcement officer.

(Emphasis added.) This jury instruction neither expresses an opinion as to whether or not a fact has been proven nor summarizes the evidence. Indeed, the trial court gave conditional instructions, *i.e.*, *if* the driver was not wearing a seatbelt while driving on a public street, *then* a motor vehicle law would have been violated and, *i.e.*, *if* Deputy Howe found the controlled substance cocaine on the driver, *then* he would have a right to detain the car for a search. Moreover the trial court's instruction was a correct statement of the law. Second, merely stating that defendant's contention was that he acted in self-defense is not an expression of an opinion and does not summarize the evidence. Furthermore, no plain error was committed because the self-defense jury instruction would not "tilt the scales" and lead to a guilty verdict. Third, we have already addressed defendant's contentions in reference to the trial court's instructions regarding when an arrest has been effectuated. The trial court's explanation of the law of arrest did not violate N.C. Gen. Stat. § 15A-1232. Accordingly, we conclude the trial court did not commit plain error in its jury instructions.

[7] Next, defendant argues the trial court erroneously allowed the State to present evidence of a warrant for his arrest from the State of Virginia for a probation violation. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003) provides in pertinent part:

> 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.

Id.

> This rule is "a clear general 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." The list of permissible purposes for admission of "other crimes" evidence is not exclusive, and such evidence is admissible as long as it is relevant

to any fact or issue other than the defendant's propensity to commit the crime.

State v. White, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995) (emphasis omitted) (citations omitted). In this case, the outstanding warrant for defendant's arrest due to a probation violation was admissible under Rule 404(b) because it provided a possible explanation or motive for defendant's actions on 10 September 2001. Indeed, the testimony indicated defendant was acting nervous, gave the officer a fictitious name, and then fled the scene upon seeing the driver's arrest. Defendant also stated the trial court did not instruct the jury that the evidence of the outstanding arrest warrant was admitted for a limited purpose only. However, defendant did not request a limiting instruction. " '[T]he admission of evidence, competent for a restricted purpose, will not be held error in the absence of a request by defendant for a limiting instruction. Such an instruction is not required to be given unless specifically requested by counsel.' " *State v. Williams*, 355 N.C. 501, 562, 565 S.E.2d 609, 645 (2002) (citation omitted).

[8] Next, defendant argues the trial court erroneously allowed an Ohio police officer to testify regarding a traffic stop during which defendant was arrested for the possession of drug paraphernalia. Officer John Wenzlick ("Officer Wenzlick") of the Ottawa Hills, Ohio Police Department testified that defendant was a passenger in a car that was stopped for window tint and registration violations one month after the incident with Deputy Howe. The two police officers removed the driver from the stopped car and asked defendant to exit the vehicle as they were going to tow the car. As defendant exited the vehicle, Officer Wenzlick observed on the passenger's floorboard a short red straw that had one end cut at a forty-five degree angle which contained a white powdery substance similar to cocaine on one end. Defendant gave the officer a false name, date of birth, and social security number, and was arrested for falsification, giving a false name to a police officer while the police officer is conducting his official duties. Defendant was also arrested for possession of drug paraphernalia.

Defendant contends this testimony was erroneously allowed under Rule 404(b) and that Officer Wenzlick was erroneously allowed to testify that the substance was cocaine without having been qualified as an expert. First, we note that Officer Wenzlick did not testify that the substance was definitely cocaine; rather, he only testified that it was similar to cocaine. Moreover, the officer clarified that he was expressing an opinion satisfactory to himself based upon his

training and experience in law enforcement. Thus, under these facts, we find no error in this portion of Officer Wenzlick's testimony.

As to defendant's argument that the circumstances surrounding the Ohio traffic stop and arrest should not have been admitted under Rule 404(b), the State contends the testimony was evidence of defendant's *modus operandi*, *i.e.*, defendant fled a crime scene in another person's car because he was involved in a drug offense.

As previously stated, N.C. Gen. Stat. § 8C-1, Rule 404(b) governs the admissibility of evidence regarding " 'other crimes, wrongs, or acts[.]' " *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991). "That is, the evidence must be offered for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant, and, if requested, must be coupled with a limiting instruction." *Id.* N.C.R. Evid. 404(b) provides that relevant evidence of other crimes, wrongs or acts may be admissible for other purposes, such as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* To be relevant in a particular case, evidence of prior bad acts must be sufficiently similar to the crime charged and be temporally proximate to that crime. *See State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). This Court has, however, noted "[t]he similarities between the crime charged and the prior acts . . . need not ' "rise to the level of the unique or bizarre" ' in order to be admissible." *State v. Brothers*, 151 N.C. App. 71, 76, 564 S.E.2d 603, 607 (2002) (citations omitted).

In this case, we conclude the circumstances surrounding the traffic stop and defendant's actions in Ohio were substantially similar to defendant's actions in this case, and therefore admissible. In both traffic stops, defendant was a passenger in a car, gave fictitious information to the police, had outstanding arrest warrants at the time of each traffic stop, and the police officers noticed a straw in close proximity to defendant. In this case, defendant was observed vigorously chewing on a straw and had a large bulge in his pants pocket. Defendant was also acting nervously. In the Ohio traffic stop, the officer observed a red straw on the passenger floor that contained a white powdery substance similar to cocaine. Unlike this case, defendant neither attempted to flee nor assaulted an officer. However, the presence of two officers during the Ohio traffic stop and the untreated gunshot wound in defendant's arm may have created a situation conducive to cooperation, and not flight. Thus, the evidence of the circumstances surrounding the Ohio traffic stop was admissible

under Rule 404(b) as it was evidence of defendant's motive or intentions in this case, *i.e.*, to flee the scene in order to avoid arrest on outstanding warrants or to prevent the discovery of drugs or drug paraphernalia in the car or on his person.

Moreover, even assuming the admission of the circumstances regarding defendant's arrest in Ohio was erroneous, the evidence that defendant was arrested on the outstanding warrant in Ohio and extradited to North Carolina to face the charges in this case was relevant and admissible. We also conclude the admission of defendant's actions during the Ohio traffic stop was non-prejudicial error. Under N.C. Gen. Stat. § 15A-1443(a) (2003):

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States 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 under this subsection is upon the defendant. . . .

Id. Under the facts of this case, in order to convict defendant of N.C. Gen. Stat. § 14-34.2 (2003), assault upon a governmental officer with a deadly weapon, the State only had to prove assault with a deadly weapon upon an officer of a political subdivision of this State. *Id.* Defendant's motive in fleeing the scene was not an element of the crime. As the State presented evidence that defendant assaulted a New Hanover deputy sheriff by dragging the officer with his car, any error committed in admitting the Ohio traffic stop evidence would have been non-prejudicial error.

[9] Next, defendant contends the trial court committed plain error by conducting an evidentiary hearing prior to the beginning of the habitual felon phase as no motion for such a hearing had been properly made before the court. Thus, defendant contends the trial court's actions constituted an impermissible advisory opinion.

Under N.C. Gen. Stat. § 8C-1, Rule 104(a) (2003), "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court[.]" *Id.* Any hearings concerning the admissibility of evidence shall be conducted outside the hearing of the jury when the interests of justice require. *See* N.C. Gen. Stat. § 8C-1, Rule 104(c). Furthermore, the Rules of Evidence "shall be construed to secure fairness in administration [and the] elimination of unjustifiable expense and delay . . . ." N.C. Gen. Stat. § 8C-1, Rule 102(a) (2003). Therefore, based upon these rules of evidence, we conclude the trial

court has the inherent authority to conduct an evidentiary hearing outside the presence of a jury *sua sponte* to clarify questions of admissibility and to prevent undue delay in the proceedings.

In this case, none of the convictions listed in the habitual felon indictment were from the State of North Carolina. Two of the convictions were from the State of Virginia and the third conviction was a federal conviction from the Northern District of Ohio. During the evidentiary hearing, the State called several witnesses to present proof of the prior convictions to the trial court. These witnesses explained how they obtained the documents, testified regarding corroborating evidence, and the attorneys for the State and defendant made arguments to the trial court regarding the competency of the proffered evidence. By conducting this hearing out of the presence of the jury and prior to the presentation of evidence during the habitual felon phase, the trial court was able to resolve any arguments and concerns regarding the evidence and the habitual felon proceedings before the jury proceeded without any delay. Moreover, it should be noted that the habitual felon phase began on the seventh day of trial. Under these facts, we conclude the trial court did not commit plain error in conducting an evidentiary hearing prior to the beginning of the habitual felon phase of defendant's trial in order to expedite the proceedings.

[10] Next, defendant contends the trial court committed plain error by allowing a felonious possession of cocaine charge to be a predicate felony for the habitual felon indictment in light of this Court's opinions in *State v. Sneed*, 161 N.C. App. 331, 588 S.E.2d 74 (2003), and *State v. Jones*, 161 N.C. App. 60, 588 S.E.2d 5 (2003). However, the holdings in *Sneed* and *Jones* were reversed by our Supreme Court in *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004), and *State v. Sneed*, 358 N.C. 538, 599 S.E.2d 365 (2004), in which our Supreme Court held the possession of cocaine under N.C. Gen. Stat. § 90-95(d)(2) is a felony and a proper basis for a habitual felon indictment.

[11] Finally, defendant contends the habitual felon indictment should have been dismissed because the State failed to produce sufficient evidence of the third felony listed in the habitual felon indictment. N.C. Gen. Stat. § 14-7.4 (2003) states:

> In all cases where a person is charged under the provisions of this Article with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evi-

> dence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

Id. In *State v. Wall*, 141 N.C. App. 529, 533, 539 S.E.2d 692, 695 (2000), this Court held that the terms of N.C. Gen. Stat. § 14-7.4 were permissive and do not exclude other methods of proving prior convictions for determining habitual felon status. Therefore, this Court held that a faxed, certified copy of a court record was a reliable source of a defendant's prior conviction for habitual felon purposes. *Id.*

In the case *sub judice*, the habitual felon indictment listed as the third felony: "On or about August 22, 1979 Hermal E. Brewington did commit the felony of Armed Bank Robbery and that on or about October 12, 1979 Hermal E. Brewington was convicted of the felony of Armed Bank Robbery in the District Court of for [sic] the Northern District of Ohio."[2] To prove this prior conviction, the State submitted a facsimile of a judgment and probation order from the United States District Court, Northern District of Ohio, Western Division. The facsimile indicated that a defendant, "Herman Brewington" pled guilty on 10/12/1979 to "unarmed bank robbery," a "violation of Title 18, Section 2113(a)."[3] The facsimile also contained a seal, which stated: "I hereby certify that this instrument is a true and correct copy of the original." The seal was signed by a deputy clerk of the United States District Court in the Northern District of Ohio. During the *voir dire* proceeding, the State presented defendant's criminal record check which indicated he had been convicted of the unarmed bank robbery in 1979. In light of this Court's holding in *State v. Wall*, we conclude the introduction of the facsimile copy of the judgment and probation

---

2. The trial court allowed the State to amend the habitual felon indictment to state defendant was convicted of the felony of unarmed bank robbery instead of armed bank robbery. Although defendant objected to the indictment amendment, he does not present any arguments on appeal related to the indictment amendment.

3. Defendant does not argue on appeal that there was insufficient proof of the third predicate felony because the judgment and probation order stated the defendant's name as "Herman Brewington" and not "Hermal Brewington." Thus, we treat the document as defendant's judgment and probation order.

order, which was stamped as a true copy, to prove defendant's third felony for habitual felon purposes was not error.

Defendant also argues the State could not use the 1979 federal conviction for unarmed bank robbery for habitual felon purposes because it is unclear whether this conviction was a final judgment. Under the North Carolina Habitual Felons Act:

> Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon. For the purpose of this Article, a felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed. . . .

N.C. Gen. Stat. § 14-7.1 (2003). In the case *sub judice*, the judgment and probation order indicates defendant pled guilty to unarmed bank robbery, a felony. However, the judgment and probation order also states defendant was placed in the custody of the United States Attorney General "for treatment and supervision pursuant to 18 U.S.C.A. Sec. 5010(b) until discharged by the Federal Youth Correction Division of the Board of Parole as provided in 18 U.S.C.A. Sec. 5017(c)." Therefore, defendant was sentenced as a youth offender under 18 U.S.C.A. § 5005 *et seq.* (repealed 12 October 1984). According to 18 U.S.C.A. § 5010(b) (1982):

> If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter[.]

Id. Pursuant to 18 U.S.C.A. § 5017(c) (1982):

> A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

Id. Under 18 U.S.C.A. § 5021(a) (1982),

> Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

Id. Pursuant to these provisions, if defendant was unconditionally discharged on or before six years from the date of his conviction, then his conviction would have been automatically set aside. The United States Congress' purpose in providing for the automatic set aside of the conviction under 18 U.S.C.A. § 5021 was to provide "a substantial incentive for positive behavior while serving a sentence under the [Youth Corrections Act]." *Tuten v. United States*, 460 U.S. 660, 664, 75 L. Ed. 2d 359, 364 (1983) (footnote omitted). The automatic set aside of a conviction "enables an eligible youth offender to reenter society and conduct his life free from the disabilities that accompany a criminal conviction[,]" such as increased penalties for subsequent convictions. *Id.* at 665, 75 L. Ed. 2d at 364.

According to the habitual felon indictment and the evidence presented by the State in this case, defendant was convicted of unarmed bank robbery on 12 October 1979 in Ohio. Four years later, defendant was convicted of malicious wounding/maiming in Virginia on 19 October 1983. Thus, defendant was in the State of Virginia within six years of his federal conviction. Whether defendant received an unconditional discharge is not clear from the record.

As stated under N.C. Gen. Stat. § 14-7.1, for habitual felon purposes, "a felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned *regardless of the sentence actually imposed.*" (Emphasis added.) In this case, the possibility of receiving an unconditional discharge and having the underlying conviction set aside was part of the sentence imposed upon defendant for his felonious unarmed bank robbery conviction. For habitual felon purposes, defendant was convicted of unarmed bank robbery, a felony.

However, if a conviction has been set aside, reversed, or vacated, it is a defense to the State's allegation that a defendant has attained habitual felon status. The burden of showing a conviction has been set aside, vacated, or reversed is upon the defendant. *Cf.* N.C. Gen. Stat. § 14-7.1 (stating the burden of proving a felony offense has been pardoned shall rest with the defendant and the State is not required

to disprove a pardon). Although defendant makes an argument that he may have received an unconditional discharge under 18 U.S.C.A. § 5021, and therefore, his unarmed robbery conviction had been set aside, he did not present any evidence proving with any certainty that the conviction had been set aside.[4]

In sum, we conclude defendant received a trial free of prejudicial error.

Affirmed.

Judges WYNN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. JUSTIN EVERETT ROSE, DEFENDANT

No. COA04-353

(Filed 17 May 2005)

1. Appeal and Error— preservation of issues—failure to renew objection—amendment to Rule 103

Although the State contends defendant waived his right to argue on appeal the denial of his motion to suppress evidence based on his failure to renew his objection when the evidence was actually offered at trial in a drug case, our legislature recently amended N.C.G.S. § 8C-1, Rule 103 to provide that 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.

2. Search and Seizure— checkpoint stop—motion to suppress evidence—sufficiency of findings of fact—primary programmatic purpose—reasonableness of checkpoint

The trial court erred in a possession with intent to manufacture, sell, and deliver marijuana, felony manufacturing marijuana, possession of drug paraphernalia, and possession of a firearm by a convicted felon case by denying defendant's motion to suppress

4 If the unarmed bank robbery conviction was set aside, defendant would be entitled to file a motion for appropriate relief under N.C. Gen. Stat. § 15A-1415(b)(8) and (c) (2003).

evidence uncovered during a checkpoint stop based on the trial court's erroneous consideration of the constitutionality of the checkpoint, and the case is remanded for further findings of fact because: (1) the trial court failed to make findings of fact regarding the primary programmatic purpose of the checkpoint as required by *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); (2) even if the checkpoint was for a permissible programmatic purpose such as checking licenses and registrations, the trial court failed to conduct the separate analysis of the reasonableness of the checkpoint as mandated by *Illinois v. Lidster*, 540 U.S. 419 (2004), including the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty; and (3) the evidence would permit the trial court to find that there was no plan, no time frame, no supervision, and no direction from anyone (oral or written) about how to conduct these wholly spontaneous checkpoints.

Judge TIMMONS-GOODSON concurring in result only in a separate opinion.

Appeal by defendant from judgments entered 12 December 2003 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 18 November 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General William P. Hart, for the State.

Samuel L. Bridges for defendant-appellant.

GEER, Judge.

Defendant Justin Everett Rose appeals his convictions for (1) possession with intent to manufacture, sell, and deliver marijuana, (2) felony manufacturing of marijuana, (3) possession of drug paraphernalia, and (4) possession of a firearm by a convicted felon. On appeal, defendant contends that the trial court should have granted his motion to suppress evidence uncovered during a checkpoint stop on the grounds that the stop violated his Fourth Amendment rights. We hold that the trial court, in considering the constitutionality of the checkpoint, failed to make findings of fact regarding the "primary programmatic purpose" of the checkpoint required by *City of Indianapolis v. Edmond*, 531 U.S. 32, 148 L. Ed. 2d 333, 121 S. Ct. 447 (2000) and failed to conduct the separate analysis of the reasonable-

ness of the checkpoint mandated by *Illinois v. Lidster*, 540 U.S. 419, 157 L. Ed. 2d 843, 124 S. Ct. 885 (2004). Accordingly, we reverse the order of the trial court and remand for further findings of fact in accordance with *Edmond* and *Lidster*.

Facts

On the evening of 24 April 2003, several members of the Onslow County Sheriff's Department conducted a checkpoint on Queens Haven Road in Hubert, North Carolina. Four of the five officers participating in the checkpoint were members of the Sheriff's Department's Narcotics Division. The checkpoint commenced at approximately 9:15 p.m.

A half-hour later, defendant arrived at the checkpoint, driving a car also occupied by Kevin Davis and Richard Wilson, who is a paraplegic. Deputy Anthony Horne approached defendant's vehicle and asked for his driver's license and registration. From the driver's side of defendant's car, Sgt. Richard Baumgarner scanned the interior of the car. Sgt. Baumgarner noticed that Davis, who was sitting on the rear seat along with a two- to three-foot mounted marlin and a small cooler, had his feet on top of a green backpack and "seemed nervous." Sgt. Baumgarner testified that he believed Davis "was trying to hide the bag with his feet."

Sgt. Baumgarner asked Davis, through the driver's window, what was in the backpack, but Davis simply "looked away." Sgt. Baumgarner then walked around the car to the rear passenger side window where Davis was sitting. Sgt. Baumgarner asked Davis to roll down the window and again asked what was inside the backpack. Defendant, sitting in the front driver's seat, said that the backpack contained "dirty clothes." Davis agreed that the bag contained dirty clothes. Sgt. Baumgarner then again asked, "[W]hat do you have in the backpack, can I check it?" Defendant replied that they needed "to get going" because Wilson, the front-seat passenger, needed to use the bathroom. Sgt. Baumgarner responded, "this will only take a second" and again asked, "Can I see what's in the bag?" According to Sgt. Baumgarner, Davis reluctantly "opened the bag slowly" and let Sgt. Baumgarner see inside.

Inside the backpack were various articles of clothing and a black garbage bag. Sgt. Baumgarner was able to observe a clear plastic bag inside the black garbage bag that contained two bags of what Sgt. Baumgarner believed to be marijuana. At that point, Sgt. Baumgarner

reached inside defendant's vehicle and retrieved the green backpack from Davis. Sgt. Baumgarner asked Davis to step out and walk to the rear of the car. While holding the backpack, Sgt. Baumgarner felt what he believed to be a gun. After he notified the other officers at the checkpoint of that fact, they approached defendant's car and took defendant, Davis, and Wilson into custody. Upon searching the backpack, Sgt. Baumgarner found a loaded .38 caliber revolver and approximately 1 1/2 pounds of marijuana. Defendant stated that the gun and the marijuana was his.

Following the discovery of the weapon and the marijuana, the officers searched defendant's car. Inside the vehicle, the officers found a black backpack containing defendant's passport, defendant's North Carolina driver's license, and several bags of marijuana seeds. The officers arrested defendant, Davis, and Wilson. A search of defendant's pants pockets incident to his arrest yielded 4.8 grams of marijuana, a package of rolling papers, and $883.00 in cash.

On 8 July 2003, defendant was indicted for possession with intent to manufacture, sell, and deliver marijuana; possession of a firearm by a felon; manufacturing marijuana; possession of drug paraphernalia; maintaining a vehicle for the keeping and selling of controlled substances; and carrying a concealed weapon. Prior to trial, defendant filed a motion to suppress the evidence seized in connection with the stop of his vehicle. In an order entered 3 December 2003, the trial court denied defendant's motion, and defendant was tried the week of 8 December 2003. On 12 December 2003, the jury found defendant guilty of possession with intent to manufacture, sell, and deliver marijuana; manufacturing marijuana; possession of drug paraphernalia; and possession of a firearm by a felon. The trial court sentenced defendant to 16 to 20 months imprisonment and six to eight months supervised probation. Defendant timely appealed to this Court.

Discussion

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress.[1] "Our review of a denial of a motion to suppress by the trial court is 'limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's

1. Defendant included another assignment of error regarding the sufficiency of the evidence, but he failed to bring forth that argument in his brief. Pursuant to N.C.R. App. P. 28(b)(6), the omitted assignment of error is deemed abandoned.

ultimate conclusions of law.' " *State v. Barden*, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074, 123 S. Ct. 2087 (2003).

I

[1] As an initial matter, the State argues that defendant waived his right to argue this issue on appeal because following the trial court's denial of the motion to suppress, defendant did not renew his objection when the evidence was actually offered at trial. While this contention would have once been valid, *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999), our legislature has recently amended Rule 103 of the Rules of Evidence to provide: "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." N.C.R. Evid. 103(a)(2).

This amendment was effective 1 October 2003 and is applicable to rulings on evidence made on or after that date. Since the trial in this case occurred two months following the effective date of the amendment, once the trial court denied defendant's motion to suppress, he was not required to object again at trial in order to preserve his argument for appeal.

II

[2] As our Supreme Court acknowledged in *State v. Mitchell*, 358 N.C. 63, 66, 592 S.E.2d 543, 545 (2004), "[p]olice officers effectuate a seizure when they stop a vehicle at a checkpoint." As with all seizures, checkpoints conform with the Fourth Amendment only "if they are reasonable." *Id.* It is well-established that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 148 L. Ed. 2d 333, 340, 121 S. Ct. 447, 451 (2000).

The Supreme Court has, however, allowed brief, suspicionless seizures at fixed checkpoints designed to intercept illegal aliens, *United States v. Martinez-Fuerte*, 428 U.S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976); sobriety checkpoints, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990); and checkpoints to verify drivers' licenses and vehicle registrations, *Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979). The Supreme Court has also recently upheld a checkpoint "where police stopped motorists to ask them for information about a

recent hit-and-run accident." *Illinois v. Lidster*, 540 U.S. 419, 421, 157 L. Ed. 2d 843, 849, 124 S. Ct. 885, 888 (2004).

On the other hand, the Supreme Court has held: "We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *Edmond*, 531 U.S. at 44, 148 L. Ed. 2d at 345, 121 S. Ct. at 455. The Court further ruled that "[b]ecause the *primary purpose* of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment." *Id.* at 48, 148 L. Ed. 2d at 347-48, 121 S. Ct. at 458 (emphasis added).

A. Determination of the Programmatic Purpose

As the State acknowledges, in considering the constitutionality of a checkpoint, a trial court must first "examine the available evidence to determine the primary purpose of the checkpoint program." *Id.* at 46, 148 L. Ed. 2d at 347, 121 S. Ct. at 457. The Supreme Court has stressed, however, that a trial court may not "simply accept the State's invocation" of a proper purpose, but instead must "carr[y] out a close review of the scheme at issue." *Ferguson v. City of Charleston*, 532 U.S. 67, 81, 149 L. Ed. 2d 205, 218, 121 S. Ct. 1281, 1290 (2001) (internal quotation marks omitted). The Court must "consider all the available evidence in order to determine the relevant primary purpose." *Id.*, 149 L. Ed. 2d at 219, 121 S. Ct. at 1290. The trial court's order in this case does not reflect that the court conducted this review in reaching its decision.

In *Edmond*, the Supreme Court emphasized "that the purpose inquiry in this context is to be conducted only at the *programmatic level and is not an invitation to probe the minds of individual officers acting at the scene*." *Edmond*, 531 U.S. at 48, 148 L. Ed. 2d at 347, 121 S. Ct. at 457 (emphasis added). In this case, however, the trial court simply accepted, without comment, the field officers' label of the checkpoint as a license and registration checkpoint. There is no finding as to the programmatic purpose—as opposed to the field officers' purpose—for the checkpoint at issue. *See People v. Jackson*, 99 N.Y.2d 125, 131-32, 782 N.E.2d 67, 71, 752 N.Y.S.2d 271, 275 (2002) ("Under the holding in *City of Indianapolis*, the People have the burden of establishing that the primary *programmatic* objec-

tive (not the subjective intent of the participating officers) for initiating a suspicionless vehicle stop procedure was not merely to further general crime control . . . ."). Nor does the record or the transcript indicate that the trial court conducted "a close review" of "all the available evidence" prior to accepting the officers' labeling of this checkpoint as a license and registration checkpoint. *Ferguson*, 532 U.S. at 81, 149 L. Ed. 2d at 218-19, 121 S. Ct. at 1290 (internal quotation marks omitted).

Further, the Supreme Court has held that a trial court cannot avoid making a determination of the primary programmatic purpose simply by finding that a checkpoint had at least one lawful purpose, such as "keeping impaired motorists off the road and verifying licenses and registrations." *Edmond*, 531 U.S. at 46, 148 L. Ed. 2d at 346-47, 121 S. Ct. at 457. As the Court explained, "[i]f this were the case . . ., law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check." *Id.*, 148 L. Ed. 2d at 347, 121 S. Ct. at 457. As a leading commentator has written: "Surely an illegal multipurpose checkpoint cannot be made legal by the simple device of assigning 'the primary purpose' to one objective instead of the other, especially since that change is unlikely to be reflected in any significant change in the magnitude of the intrusion suffered by the checkpoint detainee." 4 Wayne R. LaFave, *Search and Seizure* § 9.7(b), at 709 (4th ed. 2004).

This is not a case in which all of the evidence suggests that the checkpoint was for the constitutional purpose of examining licenses and registrations. The State offered the testimony of three of the five field officers conducting the checkpoint. There was no evidence of purpose offered other than that of the "individual officers acting at the scene." *Edmond*, 531 U.S. at 48, 148 L. Ed. 2d at 347, 121 S. Ct. at 457. One of those officers confirmed that the checkpoint was requested by Deputy Ides, a uniformed patrol officer assigned to the area who also participated in conducting the checkpoint. Deputy Ides did not testify and, therefore, the State did not even offer evidence of his purpose in requesting the checkpoint. The evidence that was presented would support a finding that the programmatic purpose—to the extent one existed at all—may well have been general crime detection with an emphasis on narcotics interdiction.

Four of the five officers conducting the checkpoint were detectives with the Narcotics Division. The fifth officer was Deputy Ides, who requested this checkpoint. The testimony of the Narcotics

Division detectives reveals that the Narcotics Division is responsible for these checkpoints on their own:

> Q. Officer Baumgarner, on this date do you remember when the request was made for a driver's license check point set up on Queen's Haven Road?
>
> A. No, I don't remember the exact date. He asked us numerous times.
>
> Q. Do you know when that was approved and set up and planned?
>
> A. We don't do it that way. We get a request from one of the officers in a township, and we just go out there whenever we're available.
>
> . . . .
>
> Q. What time was your—and I guess when y'all made the plan to go out and do a driver's license check point, what time were y'all suppose [sic] to arrive that night?
>
> A. Actually, we were all together at the time when we decided to go out there.
>
> Q. What time were y'all planning to go out there?
>
> A. *There was no plan prior to that. We just decided to throw one up while we were out that way.*
>
> Q. What do you mean "just decided to throw one up"?
>
> A. *These check points are spontaneous*. They are not planned, they are not put in the newspaper or anything like that. We just spontaneously throw them up.
>
> . . . .
>
> Q. How often do y'all set up check points like this at different spots?
>
> A. On a regular basis. *Whenever we're inbetween* [sic] *cases or whatever, when we're out patrolling certain areas. We do them all over the county, and like I said, there's no plan to it. They're just spontaneous.*

(Emphasis added.) No one explained why there was a particular need for a checkpoint in this particular area of the county. It seems unlikely that one part of Onslow County was having a larger problem

with unlicensed or unregistered drivers than another part, although on remand the trial court should inquire into the particular need for a checkpoint in this area. On the other hand, different neighborhoods might well have different difficulties with drug trafficking.

We also know that at this particular checkpoint one officer would approach the driver to ask for the license and registration, while a second officer would scan the inside of the vehicle and walk around it. The testimony does not explain why a second officer was necessary to check licenses and registrations. In this case, it appears that the function of the second officer may have been to scan for possible criminal activity.

Other courts have concluded that such evidence supported a finding that the checkpoint had an impermissible purpose of general law enforcement. In *Baker v. State*, 252 Ga. App. 695, 698-99, 556 S.E.2d 892, 897 (2001), *cert. denied*, 2002 Ga. LEXIS 423 (Ga. May 13, 2002), the State relied only on the testimony of one of the officers conducting the roadblock, who asserted that his purpose was to perform DUI checks. In holding that the State had failed to meet its burden of proving the constitutionality of the roadblock, the Georgia Court of Appeals reasoned:

> [T]he decision of the United States Supreme Court in *Edmond* has elevated proof of the supervisor's "primary purpose" to a constitutional prerequisite of a lawful checkpoint. We do not know from the transcript whether "DUI checks" were the purpose of the supervisor who decided to implement the roadblock or were the purpose of the officers in the field. The burden was on the state to prove that the seizure, i.e., the stopping of [defendant's] vehicle, was constitutionally valid. Under the guidance of *Edmond*, the required proof included evidence of the supervisor's primary purpose in implementing the roadblock. We will not presume from a silent record that constitutional requirements have been satisfied.
>
> . . . .
>
> [W]hat we hold is that the state must present some admissible evidence, testimonial or written, of the supervisor's purpose, i.e., purpose at the "programmatic level," in the words of *Edmond*.

Id. at 699 and 701, 556 S.E.2d at 897-98 and 899. *See also Jackson*, 99 N.Y.2d at 132, 782 N.E.2d at 71, 752 N.Y.S.2d at 275 (affirming the suppression of evidence seized at a roadblock after noting that the State

offered as evidence only the testimony of the officers who set up and manned the roadblock and that "[n]ever did the officers unequivocally point to a primary programmatic objective that would qualify under *City of Indianapolis*").

We, therefore, remand for the trial court to make findings of fact regarding the primary programmatic purpose of the checkpoint at issue, as required by *Edmond*. If the primary programmatic purpose of the checkpoint is not within one of the narrow exceptions to the prohibition against suspicionless seizures, but rather is for general crime control purposes, such as narcotics detection, then the "*Edmond*-type presumptive rule of unconstitutionality" applies. *Lidster*, 540 U.S. at 426, 157 L. Ed. 2d at 852, 124 S. Ct. at 890. If, however, the trial court finds that the primary programmatic purpose was constitutionally permissible, then the court must proceed to analyze the reasonableness of the checkpoint.

B. The Reasonableness of the Checkpoint

Even if the trial court on remand finds that the primary programmatic purpose was checking licenses and registration, its inquiry does not end with that finding. In its most recent opinion addressing checkpoints, the United States Supreme Court held that even if a checkpoint is for one of the permissible purposes, "[t]hat does not mean the stop is automatically, or even presumptively, constitutional. It simply means that we must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances." *Id.* *See United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) (holding that a DUI checkpoint, which is a permissible purpose for a checkpoint under *Sitz*, was unreasonable in how it was conducted and, therefore, unconstitutional).

To determine whether a seizure at a checkpoint is reasonable requires a balancing of the public's interest and an individual's privacy interest. *Brown v. Texas*, 443 U.S. 47, 50, 61 L. Ed. 2d 357, 361, 99 S. Ct. 2637, 2640 (1979) ("The reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." (internal citations and quotation marks omitted)). The Court in *Lidster* reaffirmed the *Brown* three-part test for determining reasonableness: "[I]n judging reasonableness, we look to '[1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with indi-

vidual liberty.' " *Lidster*, 540 U.S. at 427, 157 L. Ed. 2d at 852, 124 S. Ct. at 890 (quoting *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362, 99 S. Ct. at 2640).

The first *Brown* factor—the gravity of the public concerns served by the seizure—analyzes the importance of the purpose of the checkpoint. *Id.*, 157 L. Ed. 2d at 852, 124 S. Ct. at 891. This factor is addressed by first identifying the primary programmatic purpose as required by *Edmond* and then assessing the importance of the particular stop to the public. In *Lidster*, the Supreme Court found "[t]he relevant public concern was grave." *Id.* The Court explained: "Police were investigating a crime that had resulted in a human death. No one denies the police's need to obtain more information at that time. And the stop's objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort." *Id.*

In considering the second factor—the degree to which the seizure advances the public interest—the Court in *Lidster* stressed that "[t]he police *appropriately tailored* their checkpoint stops to fit important criminal investigatory needs." *Id.* (emphasis added). The Court pointed to the police's selection of a time and location most likely to elicit information about the accident being investigated. *Id.* ("The stops took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night.").

In this case, even though the Supreme Court has previously suggested that license and registration checkpoints advance an important purpose, the trial court was required, and failed, to make findings whether the checkpoint was appropriately tailored to meet that purpose. The evidence currently in the record raises a serious question whether there was any tailoring at all. As mentioned above and as repeatedly stressed by one of the officers, these checkpoints were "spontaneous," without any prior agreement as to a starting time or finishing time. The officers apparently conducted a checkpoint whenever they felt like it. In addition, while the officers testified that the Narcotics Division officers and Deputy Ides jointly decided to set up the checkpoint on Queen's Haven Road, no evidence was presented to show why that road was picked or why they chose that particular stretch of road. This evidence, or lack thereof, raises serious questions whether the checkpoint was sufficiently tailored. Without tailoring, "it is possible that a roadblock purportedly established to check licenses would be located and conducted in such a way as to facilitate the detection of crimes unrelated to licensing. That risk can

be minimized by a requirement that the location of such a roadblock be determined by a supervisory official, considering where license and registration checks would likely be effective." 5 LaFave, *supra* § 10.8(a), at 347-48.

With respect to the third factor—the severity of the interference with individual liberty—the Supreme Court has focused on how the officers conducted the checkpoint, including the amount of discretion afforded the field officers. Specifically, as Chief Justice Burger wrote in *Brown*—a decision reaffirmed and applied by the Supreme Court in 2004 in *Lidster*—a checkpoint "must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362, 99 S. Ct. at 2640.[2] There must be orderly procedures to limit the "unfettered discretion of officers in the field" in order to avoid the "arbitrary invasion" of motorists' privacy interests. *Id.* The Supreme Court has stressed that "standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Prouse*, 440 U.S. at 661, 59 L. Ed. 2d at 672, 99 S. Ct. at 1400.

In this case, the only factor found by the trial court relating to a neutral limitation on the field officers is the fact that the officers stopped all oncoming traffic at the checkpoint, a circumstance that by itself is not enough to uphold a checkpoint. Whether the police stop every automobile is merely one factor in evaluating the reasonableness of a checkpoint: while stopping every car does eliminate discretion as to who the officers stop, it does not eliminate the discretion as to the officers' conduct during the stop. The issue is not just who is stopped, but what the field officers choose to do after the stop. *See* George C. Thomas III, *Terrorism, Race and a New Approach to*

---

2. In addition, the Court in *Lidster* relied heavily upon the holdings and analysis of *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990) (sobriety checkpoint) and *United States v. Martinez-Fuerte*, 428 U.S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976) (border check). Both cases found the degree of intrusion on the privacy of motorists acceptable because of the constraints imposed on field officers. *Sitz*, 496 U.S. at 453, 110 L. Ed. 2d at 422, 110 S. Ct. at 2487 ("Here, checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle."); *Martinez-Fuerte*, 428 U.S. at 559, 49 L. Ed. 2d at 1129, 96 S. Ct. at 3083 ("The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class.")

Consent Searches, 73 Miss. L.J. 525, 542 (2003) ("At a roadblock, or following a traffic stop, police can use race and only race to decide which cars merit further attention or which drivers to ask for consent to search their cars.").

The record contains evidence that suggests a lack of any limitation on the officers' discretion in the field apart from the requirement that they stop every car. In addition to the testimony quoted above—describing a lack of any prior plan for the "spontaneous" checkpoint—the officers also testified as follows:

> Q. Does [sic] any of your supervisors come together for a meeting and say these are the people assigned to check driver's license check points on Queen's Haven Road, and give that assignment out?
>
> A. No.
>
> Q. Have they ever advised you of a plan of how far down the road it's going to be set up so everybody can see it?
>
> A. No. We don't have those types of meetings. The only time we do anything like that is if we're assisting the State or something like that—one of the highway patrol check points.
>
> . . . .
>
> Q. You were in charge of this check point?
>
> A. No.
>
> Q. Who was in charge of the check point?
>
> A. No one was really in charge. We're all detectives conducting the check point. No one individual officer was placed in charge.

There was also no evidence offered of any oral or written guidelines governing any aspect of Onslow County Narcotics Division checkpoints.

Additionally, the testimony of the officers described how this checkpoint was conducted without any form of supervision:

> Q. Okay. When you mean by "spontaneously put them up", do your supervisors or any of the department heads, do they know there's a check point going on out there?
>
> A. Not necessarily, no.

Q. Did they know on this evening?

A. No.

Q. They did not know there was a check point going on this evening?

A. Not—no, to my knowledge, anyway.

Neither of the other two witnesses testified to the contrary. There is testimony in the transcript that "the area first sergeant or the area deputy responsible for that area" would request checkpoints, but one would hardly expect a patrol sergeant or patrol deputy responsible for a particular geographic area to be supervisory to Narcotics Division detectives, including Detective Sergeants. Regardless, this is a factual question that should not be resolved by this Court—and provides a very slim reed for affirming the trial court below, especially when it never considered the question.[3]

In short, the evidence as it currently stands would permit the trial court to find that there was no plan, no time frame, no supervision, and no direction from anyone (oral or written) about how to conduct these wholly spontaneous checkpoints. Indeed, there was not even anyone in charge. If the trial court on remand finds this is in fact the case with the Onslow County checkpoint, it is difficult to imagine more unfettered discretion. *See Huguenin*, 154 F.3d at 562-63 (DUI checkpoint held unreasonable under *Brown* because the lack of orderly procedures meant field officers would be free to decide which motorists would be detained for further questioning with "the potential for randomly targeting individual motorists . . . great"); *State v. DeBooy*, 2000 UT 32, § 23, 996 P.2d 546, 551-52 (2000) ("According to testimony of the officers at the suppression hearing, there were no guidelines as to how their inquiry was to be conducted; it was left entirely to the discretion of the officers in the field. . . . Such unbridled discretion for the officers is inherently unreasonable under the Fourth Amendment . . . .").

The State, however, argues that *State v. Mitchell*, 358 N.C. 63, 592 S.E.2d 543 (2004) supports the trial court's order. The question before the Court in *Mitchell* was whether "the Fourth Amendment prohibits officers from conducting checkpoints without written guidelines." *Id.* at 67, 592 S.E.2d at 545. The Court, in answering this question, held

3. While there was evidence that the officers' captain "came out" to the checkpoint at some time, Sgt. Baumgarner confirmed, however, that the captain arrived after the arrest had occurred.

that "checkpoints conducted without written guidelines are [not] per se unconstitutional." *Id.* at 67, 592 S.E.2d at 546.

The Court in *Mitchell* upheld the checkpoint because "constitutionally sufficient restraints" on the officers' discretion were in place. *Id.* at 68, 592 S.E.2d at 546. After observing that "[h]ere adequate internal guidelines were testified to and implemented," *Id.* at 67, 592 S.E.2d at 546, the Court held that:

> [Officer] Falls' standing permission to set up checkpoints pursuant to Captain Jonas' oral guidelines and Officer Falls' call to his supervisor before creating the checkpoint at issue are constitutionally sufficient restraints to keep Falls from abusing his discretion. Because police officers are not constitutionally mandated to conduct driver's license checkpoints pursuant to written guidelines; because Officer Falls received sufficient supervisory authority to conduct the checkpoint; and because the officers stopped all oncoming traffic at the checkpoint, we conclude that the checkpoint was constitutional.

Id. Thus, when looking at the totality of the checkpoint's circumstances, the Court found sufficient restraints on the field officer's discretion to uphold the checkpoint. *Id.*

While our Supreme Court suggested in *Mitchell* that a lack of supervisory permission might not "merit a constitutionally mandated reversal in a roadblock case such as the one *sub judice*," *id.*, the case currently before this Court is not necessarily a case "such as the one" before the Supreme Court in *Mitchell*. Nothing in *Mitchell* indicates that our Supreme Court intended to authorize spontaneous, roving, unplanned, unsupervised, and unbounded checkpoints. We believe that *Mitchell* stands for the proposition that supervisory permission—like written guidelines, stopping every vehicle, and other factors—is not a "lynchpin," but instead is a circumstance to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint. As the Court mandated in *Lidster*, a trial court must examine the checkpoint as a whole and "judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances" present with that checkpoint. *Lidster*, 540 U.S. at 426, 157 L. Ed. 2d at 852, 124 S. Ct. at 890.

Based on our review of the trial court's order, it appears that the trial court concluded that the checkpoint was reasonable based solely on the purpose of the checkpoint and the fact that the officers stopped every car. In doing so, the court addressed the first prong of

the *Lidster* analysis and part of the third prong. The court made no findings regarding the tailoring of the checkpoint to the purpose (the second prong) and failed to consider all of the circumstances relating to the discretion afforded the officers in conducting the checkpoint (the third prong). Accordingly, we remand for further findings as to each of the *Lidster* factors and a weighing of those factors to determine whether the checkpoint was reasonable.[4]

Reverse and remand.

Judge TYSON concurs.

Judge TIMMONS-GOODSON concurs in the result only in a separate opinion.

TIMMONS-GOODSON, Judge, concurring in the result.

"The scope of review on appeal of the denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law." *State v. Corpening*, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993). In the instant case, because I believe the trial court's findings of fact are insufficient to support its ultimate conclusions of law, I agree with the holding reached by the majority.

STATE OF NORTH CAROLINA v. JOSE MANUEL HERNANDEZ

No. COA04-849

(Filed 17 May 2005)

1. Appeal and Error— preservation of issues—denial of motion to suppress—sufficiency of notice

Defendant preserved for appeal after a guilty plea the denial of his motion to suppress evidence of cocaine found after a traffic stop. Defendant's motion to suppress explicitly stated a reser-

4. Because of our disposition of this appeal, we need not decide whether the officers possessed a reasonable and articulable suspicion to prolong the defendant's detention at the roadblock.

vation of the right to appeal, the hearing on this motion preceded the plea and oral notice of appeal by only one day, and neither the court nor the State indicated that it had not been notified of a potential appeal.

2. Appeal and Error— denial of motion to suppress—scope and standards

Appellate review of the denial of a motion to suppress is strictly limited to a determination of whether the findings are supported by competent evidence and whether the findings support the ultimate conclusion. However, the conclusions are reviewed de novo and must reflect a correct application of applicable legal principles.

3. Criminal Law— denial of motion to dismiss—unsupported finding

An unsupported finding concerning the odor of alcohol at a traffic stop did not affect the court's conclusions in denying defendant's motion to suppress cocaine seized at the stop, and the denial of the motion was not overturned.

4. Search and Seizure— expanded traffic stop—probable cause and reasonable suspicion

Defendant was not subjected to an unlawful seizure where a Highway Patrol Trooper saw him remove his seat belt while the vehicle was moving; stopped defendant to issue a citation; expanded the detention based on defendant's nervousness in the patrol car, his inconsistent answers to questions, and the officer's observation of a strong scent of air freshener in defendant's car; and cocaine was eventually found in defendant's car. The evidence supported the finding of an observed seat belt violation, which supported the conclusion that the Trooper had probable cause to stop the vehicle, and specific articulable facts supported the expansion of the detention.

5. Search and Seizure— consent to search automobile—voluntary and knowing

Defendant's consent to a search of his vehicle was voluntary under the totality of the circumstances where defendant was read a consent to search form, he understood English, he gave verbal and written consent to search, he understood his right to refuse consent, and he was free to leave.

Appeal by Defendant from order entered 13 May 2004 by Judge W. Russell Duke, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 12 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for the defendant-appellant.

WYNN, Judge.

A law enforcement officer who observes a traffic law violation has probable cause to detain the motorist, and the scope of that detention may be expanded where the officer has a reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot. *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999); *State v. Hamilton*, 125 N.C. App. 396, 399-400, 481 S.E.2d 98, 100, *disc. review denied*, 345 N.C. 757, 485 S.E.2d 302 (1997). Here, Defendant Jose Manuel Hernandez, who pled guilty to trafficking in cocaine, contends that he was illegally seized when a highway patrolman stopped him for a seat belt law infraction, and then asked him whether his vehicle contained contraband or weapons and whether he could search Defendant's vehicle. Because any seizure of Defendant that went beyond the scope of the initial lawful traffic stop was also lawful due to the patrolman's reasonable suspicion of criminal activity, we hold that Defendant was not unconstitutionally seized.

The record reflects that, on 29 January 2003, Trooper Jonathan Whitley of the North Carolina Highway Patrol was on routine patrol when Defendant pulled out in front of him. Defendant then made a left turn onto a side street, where he removed his seat belt while still driving. When Trooper Whitley noticed that Defendant had removed his seat belt, he initiated a stop. Highway Patrol Sergeant Brian Lisenby pulled in behind Trooper Whitley to observe the traffic stop. Trooper Whitley asked Defendant to have a seat in his patrol car while he issued a citation for the seat belt violation. While Defendant was seated next to Trooper Whitley in the front seat of his patrol car, Trooper Whitley noticed that Defendant was extremely nervous and that his heart was beating so hard his shirt was moving. Trooper Whitley asked Defendant where he was headed. Defendant responded that his tires needed air, so he had pulled up to the gas station where he was stopped. Defendant's tires appeared properly inflated to Trooper Whitley, so he again asked Defendant where he was headed,

and Defendant told him he was going to meet a friend. When Trooper Whitley pointed out the inconsistency in Defendant's responses, Defendant looked down at the floor and did not say anything further. Trooper Whitley also asked Defendant if he had any contraband or weapons in his vehicle and for consent to search his vehicle. Defendant gave verbal consent to the search. Trooper Whitley then asked Defendant to sign a form acknowledging his consent to the search. After Trooper Whitley read the form aloud to Defendant, he had Defendant read and sign the form.

Trooper Whitley advised Sergeant Lisenby that Defendant had consented to the search of his vehicle and asked Sergeant Lisenby to perform the search. Approximately six minutes elapsed between Defendant's being stopped and the vehicle search. Sergeant Lisenby almost immediately noticed a large bundle of paper towels in the center console of the vehicle. When he moved the paper towels to the side, he found a large white ball of powder. Sergeant Lisenby suspected the powder was cocaine and notified Trooper Whitley that he had located suspected contraband. Trooper Whitley then removed Defendant from the passenger side of the patrol car and placed him under arrest. As he was being handcuffed, Defendant exclaimed in English that someone had given him $250 to "just drop the [expletive] off and leave." After being read his Miranda rights, Defendant also stated his desire to make a deal and give Trooper Whitley "the big guy," to which Trooper Whitley replied that Defendant was under arrest and that he had no authority to make deals.

On 2 December 2003, Defendant filed a motion to suppress "[a]ll items seized from defendant's person, presence and vehicle, and all statements made by the defendant" pursuant to the stop and ensuing search. The motion also stated "[n]otice is given that defendant reserves the right to appeal if this motion is denied and there is a subsequent plea of guilty." On 16 February 2004, Defendant's motion was heard and denied by oral ruling. Defendant's attorney advised the trial court that Defendant had chosen to plead guilty to trafficking in cocaine, and that Defendant and the State had agreed beforehand that if Defendant's motion to suppress was denied, he would accept a plea. The parties returned the following day for a plea colloquy. Defendant's plea was accepted, and Defendant was ordered incarcerated for a term of seventy to eighty-four months, to be followed by deportation. Defendant appeals the trial court's denial of his motion to suppress.

[1] Preliminarily, we note that North Carolina General Statute section 15A-979(b) provides that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2004). Our Supreme Court has held that where a defendant intends to appeal from the denial of a suppression motion pursuant to this section, he must specifically give notice of his intention to the prosecutor and the court before plea negotiations are finalized. *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990) (stating that "when a defendant intends to appeal from the denial of a suppression motion pursuant to this section, he must give notice of his intention to the prosecutor and to the court before plea negotiations are finalized; otherwise, he will waive the appeal of right provisions of the statute[]") (citing *State v. Reynolds*, 298 N.C. 380, 259 S.E.2d 843 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980)).

Here, the State alleges that "[i]n this case, defendant failed to notify the court, and arguably the prosecutor, that he was purportedly reserving his right to appeal the results of the suppression motion and has therefore waived his right to appeal this issue." We disagree.

Defendant's motion to suppress, one page of text, explicitly stated "[n]otice is given that defendant reserves the right to appeal if this motion is denied and there is a subsequent plea of guilty." The hearing on this motion preceded the plea colloquy, entry of judgment, and oral notice of appeal by only one day. Moreover, when Defendant gave notice of appeal in open court, neither the trial court nor the State indicated that they had not been notified of a potential appeal. Indeed, when the trial court stated that, in light of Defendant's appeal, it would enter more detailed written findings, the State responded "I think you were thorough yesterday[,]" when oral findings were made. Additionally, in its written order denying the suppression motion, the trial court made no findings indicating that Defendant failed to give notice of his reserving his right to appeal. *See State v. Atwell*, 62 N.C. App. 643, 303 S.E.2d 402 (1983) (the trial court made findings that the defendant had failed to give notice, but this Court found the record to be ambiguous and granted review). Because Defendant preserved the denial of his suppression motion for appeal, we now review this issue.

[2] "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of

the witnesses) and to weigh and resolve any conflicts in the evidence." *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) and *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971)). " 'Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether it's [sic] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion.' " *State v. Reynolds*, 161 N.C. App. 144, 146-47, 587 S.E.2d 456, 458 (2003) (quoting *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829 (2002)). However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct. *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) ("[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.") (citing *State v. Payne*, 327 N.C. 194, 209, 394 S.E.2d 158, 166 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991)).

[3] Defendant first argues that the portion of the trial court's eighth finding of fact, stating "Trooper Whitley noticed a strong odor of alcohol[,]" is not supported by any competent evidence. We agree.

At the hearing on the suppression motion, Trooper Whitley was asked the following:

> Q: And you didn't at any point smell any alcohol on [Defendant]?
>
> A: No.
>
> Q: Or form any opinion that he was impaired from alcohol?
>
> A: No.
>
> Q: And you didn't smell any marijuana on him or form an opinion that he was impaired from marijuana?
>
> A: No, sir.

Trooper Whitley neither retracted this testimony nor offered conflicting testimony indicating that Defendant smelled of alcohol. There is, therefore, no competent evidence to support the trial court's finding that "Trooper Whitley noticed a strong odor of alcohol."

However, we disagree with Defendant's contention that because the trial court's conclusions of law are based on the findings of fact, including this finding that is not supported by competent evidence, the "unsupported finding of fact taints the conclusions of law and ren-

ders the judge's conclusions invalid." Defendant cites no authority for this contention, and this Court has previously held that an order "will not be disturbed because of . . . erroneous findings which do not affect the conclusions." *Black Horse Run Prop. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987) (citations omitted). Moreover, "irrelevant findings in a trial court's decision do not warrant a reversal of the trial court." *Goodson v. Goodson*, 145 N.C. App. 356, 360, 551 S.E.2d 200, 204 (2001) (citations omitted).

Here, as discussed in more detail below, the trial court's finding that "Trooper Whitley noticed a strong odor of alcohol[]" was not needed for the trial court to conclude, based on other supported findings of fact, that:

> 1. That Trooper Whitley had probable cause to stop the Defendant's vehicle.
>
> 2. That the Defendant understood English sufficiently well as to be able to knowingly, freely and voluntarily consent to a search of his vehicle.
>
> 3. That the Defendant did in fact knowingly, freely and voluntarily consent both orally and in writing to the search of his vehicle.
>
> 4. That the length of seizure was not too long as to be unconstitutional.
>
> 5. That the Defendant does not set forth grounds upon which relief can be granted in accordance with the General Statutes of North Carolina, the North Carolina Constitution, nor the United States Constitution.[1]

Moreover, the unsupported finding does not affect these conclusions. The trial court's order denying Defendant's suppression motion will therefore not be overturned on the basis of the unsupported finding.

[4] Defendant next argues that the trial court's conclusion that Defendant was not unconstitutionally seized is unsupported by the evidence and is erroneous as a matter of law. We disagree.

"The Fourth Amendment of the United States Constitution . . . protects 'the right of the people to be secure in their persons, houses,

1. The trial court made both oral and written findings and conclusions, and Defendant explicitly excepted to both the oral and written orders on his suppression motion. The finding that "Trooper Whitley noticed a strong odor of alcohol[]" was made only in the written order, which post-dated the oral ruling. We therefore look only to the effects of the unsupported written finding on the written conclusions.

papers, and effects, against unreasonable searches and seizures.' " *State v. Mitchell*, 358 N.C. 63, 72, 592 S.E.2d 543, 548-49 (2004) (quoting U.S. Const. amend. IV and citing N.C. Const. art. I, § 20 ("General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.")).

However, "[t]he United States Supreme Court has recently held that the temporary detention of a motorist upon probable cause to believe that he has violated a traffic law is not inconsistent with the Fourth Amendment's prohibition against unreasonable seizures . . . ." *Hamilton*, 125 N.C. App. at 399, 481 S.E.2d at 100 (footnote omitted) (citing *Whren v. U.S.*, 517 U.S. 806, 135 L. Ed. 2d 89 (1996)). "Probable cause exists if 'the facts and circumstances within [the] knowledge [of the officer] were sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing the offense.' " *Id.* (quoting *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973)). "In North Carolina an officer may stop and issue a citation to any motorist who 'he has probable cause to believe has committed a misdemeanor or infraction.' " *Id.* at 400, 481 S.E.2d at 100 (quoting N.C. Gen. Stat. § 15A-302(b)). Moreover, in North Carolina

> Each front seat occupant who is 16 years of age or older and each driver of a passenger motor vehicle manufactured with seat belts shall have a seat belt properly fastened about his or her body at all times when the vehicle is in forward motion on a street or highway in this State.

N.C. Gen. Stat. § 20-135.2A(a) (2004). "Any driver or passenger who fails to wear a seat belt as required by this section shall have committed an infraction . . . ." N.C. Gen. Stat. § 20-135.2A(e) (2004); *Hamilton*, 125 N.C. App. at 400, 481 S.E.2d at 100.

Here, the trial court found, in its fifth written finding of fact, that "Trooper Whitley observed [Defendant] remove his seat belt while the vehicle was moving in a forward direction." This finding is supported by competent evidence, particularly Trooper Whitley's testimony that "[w]hen [Defendant's vehicle] made the left turn on Daughtry, I was directly behind the vehicle . . . and noticed that the driver removed his seat belt while on Daughtry Street, and then I initiated a traffic stop for the seat belt." The finding that Trooper Whitley saw Defendant

commit a seat belt law infraction supported the trial court's conclusion of law "[t]hat Trooper Whitley had probable cause to stop the Defendant's vehicle." *Hamilton*, 125 N.C. App. at 399-400, 481 S.E.2d at 100.

In a case with similar facts, *State v. Wilson*, 155 N.C. App. 89, 94-96, 574 S.E.2d 93, 97-99 (2002) , *disc. review denied*, 356 N.C. 693, 579 S.E.2d 98 (2003), a highway patrolman stopped the defendants for speeding and tailgating, asked the driver defendant to accompany him to his patrol car for issuance of the traffic citation, received permission to search the defendant's vehicle, and therein found cocaine. In *Wilson*, the driver defendant alleged that his detention was unconstitutional. This Court, however, disagreed, finding:

> Defendant Wilson's violation of Section 20-152(a) established the probable cause needed to initially stop the vehicle . . . . Once stopped, defendants were detained long enough for Trooper Mountain to ask Defendant Wilson questions about the vehicle and his travel plans, as well as check Defendant Wilson's license and the vehicle registration, both of which were out-of-state. While in the patrol car, Trooper Mountain observed that Defendant Wilson was extremely nervous. Once Trooper Mountain completed the required checks, he issued Defendant Wilson a warning ticket, and Wilson was free to leave. This process took approximately seven to eight minutes. Thus, these questions and actions were all reasonably related to Trooper Mountain's underlying justification of issuing a warning ticket.

Id. at 96, 574 S.E.2d at 98-99; *see also State v. McClendon*, 130 N.C. App. 368, 502 S.E.2d 902 (1998) (detention held constitutional where the defendant was stopped for a traffic law violation, the patrolman requested that the defendant accompany him to his patrol car, and the patrolman asked the defendant a moderate number of questions), *aff'd*, 350 N.C. at 636, 517 S.E.2d at 132 (1999); *State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990) (finding, in the context of a traffic stop where the defendant claimed he was illegally detained in a patrol car while an officer prepared a consent-to-search form, that the defendant's detention was voluntary and in the spirit of cooperation and that the officer's polite conversation with the defendant during the stop was permissible).

Here as in *Wilson*, Trooper Whitley's detaining Defendant, requesting that Defendant accompany him to his patrol car, running

checks on Defendant's license and registration, issuing him a citation, and questioning Defendant during that time about his travel plans were reasonably related to the stop based on the seat belt infraction. Moreover, the length of Defendant's detention was approximately six minutes, *i.e.*, even shorter than the detention in *Wilson*. Further, the record reflects that, upon issuing the citation, Defendant was free to leave: When Trooper Whitley was asked "Did you, when he first sat down in the patrol car to have the ticket written, did you consider that he was free to walk away and leave at that point?" he responded "After I wrote him the seatbelt ticket he was." Moreover, in response to the question "Did you feel that you could leave at any moment if you wanted to?" Defendant testified "Yes, I felt free. I felt that way because my plates were, because the ticket was just for the, [sic] I did not felt [sic] I had any other problem."

While Trooper Whitley expanded the scope of Defendant's detention based on the seat belt law infraction, particularly by asking Defendant if his vehicle contained any contraband or weapons, the detention was still constitutional.

"Generally, 'the scope of the detention must be carefully tailored to its underlying justification.' " *McClendon*, 130 N.C. App. at 375, 502 S.E.2d at 906 (quoting *Morocco*, 99 N.C. App. at 427-28, 393 S.E.2d at 549). To expand the scope of a lawful detention, "an officer must have reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot." *McClendon*, 350 N.C. at 636, 517 S.E.2d at 132 (citation omitted). The specific and articuable facts, and the rational inferences drawn from them, are to be "viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citations omitted). In determining whether the further detention was reasonable, the court must consider the totality of the circumstances. *State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222, *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001). Facts giving rise to a reasonable suspicion include nervousness, sweating, failing to make eye contact, conflicting statements, and strong odor of air freshener. *See, e.g.*, *McClendon*, 350 N.C. at 637, 517 S.E.2d at 133; *Wilson*, 155 N.C. App. at 96-97, 574 S.E.2d at 99. "After a lawful stop, an officer may ask the detainee questions in order to obtain information confirming or dispelling the officer's suspicions." *McClendon*, 350 N.C. at 636, 517 S.E.2d at 132-33 (citations omitted).

Here, specific articulable facts supporting a reasonable suspicion of criminal activity existed.[2] The trial court found that "Defendant was very nervous and Trooper Whitley could see the Defendant's shirt move as his heart was beating." This finding is supported by competent evidence, particularly Trooper Whitley's testimony that:

> [Defendant] was extremely nervous. He appeared to me to [sic] very nervous. When we talked he was looking around, his eyes darting, shifting. He wouldn't look directly at me. I also noticed his shirt was, his heart was beating and his shirt was moving. That seemed unusual to me, making a traffic stop or a seat belt [sic], people are generally not that nervous.

The trial court also found that "Trooper Whitley asked Defendant where he was going and the Defendant stated that his tire needed air. Based on Trooper Whitley's observations all tires looked inflated." This finding is supported by competent evidence, namely Trooper Whitley's testimony, indicating that Defendant gave Trooper Whitley conflicting statements:

> I just asked him what he was doing, where he was headed to. And he told me that his tires needed some air so he pulled up to the gas station. As I noticed his vehicle it didn't appear to me that either [sic] one of the four tires needed any air, they were all properly inflated. I started writing the citation out and asked him again where he was headed to. He told me that he was going to meet a friend. I said, 'Well, you just told me you were going to get some air in your tires.' At this point he just looked down at the floor and didn't say anything else to me.

Moreover, the trial court found that Trooper Whitley noticed Christmas tree air fresheners emanating a strong odor in Defendant's vehicle. This finding is supported by competent evidence: Trooper Whitley testified that "I noticed there were several of these Christmas trees, air fresheners in the vehicle. I noticed a strong odor coming from the vehicle."

---

2. We note that the trial court did not expressly conclude that a reasonable suspicion of criminal activity existed here. The trial court did, however, make a number of findings of fact, discussed below, that support such a conclusion, there is no material conflict in the evidence, and the trial court did conclude that Defendant's constitutional rights were not violated and that Defendant was not entitled to relief under North Carolina's General Statutes, or the North Carolina and United States Constitutions. Under these circumstances, an explicit conclusion as to the existence of reasonable suspicion was not necessary. *Cf. Johnston*, 115 N.C. App. at 714, 446 S.E.2d at 137 ("Where there is no material conflict in the evidence, findings and conclusions are not necessary . . . .") (quotation omitted).

In sum, because both probable cause and a reasonable suspicion existed here, the trial court did not err in concluding that Defendant was not subject to an unlawful seizure and was not entitled to relief under the North Carolina or United States Constitutions.

[5] Defendant next contends that the trial court's conclusion of law that Defendant consented to the search of his vehicle is not supported by the evidence and is erroneous as a matter of law. We disagree.

> The consent needed to justify a [vehicle] search may be given by the "person in apparent control of [a vehicle's] operation and contents at the time the consent is given." N.C. Gen. Stat. § 15A-222 (2001). When seeking to rely on the consent given to support the validity of a search, the State has "the burden of proving that the consent was voluntary." *State v. Morocco*, 99 N.C. App. at 429, 393 S.E.2d at 549. In determining whether this burden has been met, the court must look at the totality of the circumstances. *State v. Steen*, 352 N.C. 227, 240, 536 S.E.2d 1, 9 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

Wilson, 155 N.C. App. at 97, 574 S.E.2d at 99. "At a hearing to determine the voluntariness of a defendant's consent to a search of his property, the weight to be given the evidence is peculiarly a determination for the trial court, and its findings are conclusive when supported by competent evidence." *State v. Aubin*, 100 N.C. App. 628, 633, 397 S.E.2d 653, 656 (1990) (citing *State v. Long*, 293 N.C. 286, 237 S.E.2d 728 (1977) and *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983)), *disc. review denied*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied*, 502 U.S. 842, 116 L. Ed. 2d 101 (1991).

Here, the trial court found that "Defendant was read a 'consent to search' form. The Defendant understood English and gave verbal and written consent to search his vehicle." The trial court also found that

> The Defendant gave a verbal and written consent to search, after the Defendant was read the consent to search by the State Highway Patrolman. The Defendant then signed the Consent to Search and it was the officer's impression that Defendant understood English.
>
> The Defendant testified and the Court finds that the Defendant understood his rights not to consent to the search and that the Defendant felt that he was "free to leave" after the citation had been written."

> . . . The Court finds that the consent to search was given understandingly and voluntarily and freely given [sic].

These findings are supported by competent evidence, particularly Trooper Whitley's testimony that:

> I then asked [Defendant] for consent to search his vehicle, and [Defendant] gave me verbal and written consent to search his vehicle.
>
> Q: Did you in fact get a written consent to search?
>
> A: I did.
>
> * * *
>
> Q: Did you tell Mr. Hernandez that you wanted to search his vehicle?
>
> A: Yes, ma'am. I asked him could I search his vehicle.
>
> Q: What did he say?
>
> A: He said okay.
>
> Q: And then you subsequently asked him to sign this consent to search his vehicle, is that correct?
>
> A: Actually I read it to him out loud and then I handed it to him. I said 'It is okay now for me to look in your vehicle?' He said 'That's okay.' I asked him, 'Will you sign?' and he did.
>
> Q: And he appeared to understand what you were saying to him?
>
> A Yes, ma'am.
>
> Q: Did he ever tell you he didn't speak English and that he needed an interpreter?
>
> A: He never told me that.
>
> * * *
>
> COURT: Were you speaking English?
>
> A: Yes, sir.
>
> COURT: He understood it?
>
> A: Yes, sir.

There was also competent evidence that, upon the issuance of the citation, Defendant was free to leave: When Trooper Whitley was asked "Did you, when he first sat down in the patrol car to have the

ticket written, did you consider that he was free to walk away and leave at that point?" he responded "After I wrote him the seatbelt ticket he was." In response to the question "Did you feel that you could leave at any moment if you wanted to?" Defendant testified "Yes, I felt free. I felt that way because my plates were, because the ticket was just for the, [sic] I did not felt [sic] I had any other problem."

The trial court's findings, which are supported by competent evidence, in turn support the trial court's conclusions that: "the Defendant understood English sufficiently well as to be able to knowingly, freely and voluntarily consent to a search of his vehicle[,]" and "the Defendant did in fact knowingly, freely and voluntarily consent both orally and in writing to the search of his vehicle." The State therefore met its burden of proving that Defendant's consent to the search of his vehicle was voluntary under the totality of the circumstances.

For the reasons stated herein, we affirm the order of the trial court.

Affirmed.

Judges TYSON and ELMORE concur.

STATE OF NORTH CAROLINA v. ARTHUR HAMES

No. COA04-968

(Filed 17 May 2005)

1. Evidence— statements at scene of shooting—admissibility limited—no prejudice

In light of the evidence introduced by defendant during his case-in-chief about his statements at the scene of a shooting tending to show that he acted in self-defense, there was no prejudice from the limitation of defendant's questioning of law enforcement officers about those statements during the State's case-in-chief.

2. Evidence— witness's statement at scene—not trustworthy—not excited utterance

There was no abuse of discretion in excluding a witness's statement, claimed to be an excited utterance, where an officer

testified that the witness had appeared intoxicated and that she had changed her story while talking to him. The rationale for the excited utterance exception is trustworthiness; moreover, the testimony would only have corroborated other evidence.

3. Criminal Law— inconsistent verdicts—manslaughter and assault—intent to kill

A new trial was awarded where the offenses of which defendant was found guilty were mutually exclusive and the jury's verdicts were logically inconsistent. Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury and attempted murder of the same victim, and found guilty of assault with a deadly weapon inflicting serious injury and voluntary manslaughter. The jury necessarily found intent to kill for the manslaughter but not for the assault.

Appeal by defendant from judgment entered 4 December 2003 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 March 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Fred Lamar, for the State.

Miles & Montgomery, by Lisa Miles, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Arthur Hames ("defendant") appeals his convictions for voluntary manslaughter of his brother, assault with a deadly weapon inflicting serious injury upon Stephanie Marzette ("Marzette"), and attempted voluntary manslaughter of Marzette. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error with respect to the voluntary manslaughter conviction. However, because we conclude that the offenses of assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter are mutually exclusive, we hold that defendant is entitled to a new trial with respect to the shooting of Marzette.

The facts and procedural history pertinent to the instant appeal are as follows: On 21 April 2002, Charles Kenneth Hames ("Hames") and Marzette were driving through Charlotte in search of a store where they could buy sewing thread. Hames and Marzette decided to drive to a residence shared by Hames and defendant, his younger brother. Shortly after they arrived at the residence, an argument

ensued between Hames and defendant. While Hames and Marzette were in Hames' bedroom, defendant entered the room and shot Hames with a handgun. Defendant subsequently approached Marzette and shot her as well.

After law enforcement officers arrived at the residence, defendant accompanied two officers inside the residence. Defendant told the officers where the handgun was located, and the officers secured it. The officers thereafter searched the residence and found Hames laying on the floor of his bedroom and Marzette laying in the closet of the bedroom.

Defendant was arrested and medical personnel transported Hames and Marzette to Carolinas Medical Center. Hames subsequently died from his gunshot wounds. Although she survived the shooting, Marzette was hospitalized for several days.

On 13 May 2002, defendant was indicted for first-degree murder of Hames and assault with a deadly weapon with intent to kill inflicting serious injury upon Marzette. On 17 March 2003, defendant was also indicted for attempted murder of Marzette. At trial, defendant testified that he shot Hames and Marzette by accident and in self-defense. The jury found defendant guilty of voluntary manslaughter of Hames, guilty of assault with a deadly weapon inflicting serious injury upon Marzette, and guilty of attempted voluntary manslaughter of Marzette. The trial court thereafter sentenced defendant to a total of 163 to 215 months incarceration. Defendant appeals.

We note initially that defendant's brief contains arguments supporting only three of the original thirteen assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the ten 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 whether the trial court erred by: (I) excluding statements made by defendant to law enforcement officers following the shootings; (II) excluding statements made by Izella Miller ("Miller") to law enforcement officers following the shootings; and (III) entering judgment against defendant for attempted voluntary manslaughter.

[1] Defendant first argues that the trial court erred by excluding statements he made to law enforcement officers following the shoot-

ings. Defendant asserts that his statements should have been admitted as excited utterances, and that he was prejudiced by their exclusion. We disagree.

For a statement to qualify as an excited utterance, the statement must be in response to "a sufficiently startling experience suspending reflective thought and . . . a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985). However, "statements or comments made in response to questions do not necessarily rob the statements of spontaneity." *State v. Boczkowski*, 130 N.C. App. 702, 710, 504 S.E.2d 796, 801 (1998). Instead, "[t]he critical determination is whether the statement was made under conditions which demonstrate that the declarant lacked the 'opportunity to fabricate or contrive' the statement." *State v. Wright*, 151 N.C. App. 493, 497, 566 S.E.2d 151, 154 (2002) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 164 (3d ed. 1988)).

In the instant case, Charlotte-Mecklenburg Police Department Officer Scott A. Sharp ("Officer Sharp") filed a report following his investigation of the shootings. The report contains the following pertinent narration:

> As Officer Buchanan assessed the victim[s], I looked back to the front of the home and asked the black male, identified as Arthur Lee Hames, who shot the victim[s]. He immediately responded "I f[*****]g shot the m[****]r f[*****]s!" I ordered Mr. Hames to turn around and place his hands behind his back, which he did, and secured him with handcuffs. While I was securing the suspect he said the male victim, identified as his brother Charles Hames, approached him with a gun and that he shot him in self defense.

Charlotte-Mecklenburg Police Department Officer W.L. Guild ("Officer Guild") interviewed defendant the night of the shootings. Officer Guild's report of the interview contains the following pertinent narration:

> 4:05 a.m. I entered the interview room with Arthur Hames [who] was seated at the back of the room . . . . I advised him that his brother was dead. He became extremely upset. . . . He stated "Lord Jesus. I didn't want to get rid of my brother. He jumped on me and pushed me. He came off on me like he always do."

Prior to trial, the trial court allowed the State's motion *in limine* regarding these statements. The trial court ruled that because defend-

ant was a party in the trial, his statements to the law enforcement officers were self-serving declarations that could be introduced by defendant for corroborative or impeachment purposes during his own case, but not for substantive purposes during the State's case. The trial court concluded that "what is before me now would not qualify as an excited utterance[,]" and the trial court agreed that those officers testifying for the State should be held under subpoena in order to provide corroborative information during defendant's case. Defendant contends that the trial court's determination limited his ability to present self-defense evidence.

We note that "[i]f a statement fits an exception, then it is admissible even if self-serving, unless the particular exception prohibits it." *State v. Harper*, 51 N.C. App. 493, 497, 277 S.E.2d 72, 75 (1981); *see State v. Moore*, 41 N.C. App. 148, 151, 254 S.E.2d 252, 254 (1979) ("If testimony is otherwise admissible, it is not to be excluded merely because it is 'self-serving.' "). However, while it is true that the trial court may admit corroborative evidence prior to the testimony of a witness, *State v. Hinson*, 310 N.C. 245, 256, 311 S.E.2d 256, 263, *cert. denied*, 469 U.S. 839, 83 L. Ed. 2d 78 (1984), "[t]here is no right to corroboration in advance of the testimony of a witness." *State v. Ball*, 344 N.C. 290, 307, 474 S.E.2d 345, 355 (1996).

In the instant case, the statements defendant gave to Officers Sharp and Guild would only have corroborated the testimony given by defendant during his case-in-chief. Defendant repeatedly testified at trial that Hames was verbally abusive to him the night of the shootings, stating that Hames "went off on" him when a male named Roosevelt arrived at the residence. Defendant testified that Hames "got in my face and started cussing, cursing me, calling me all kind of this and that." Defendant stated that he was "afraid to sit down with him standing on top of me[,]" and that "[t]he way he would talk and the rage he was in, I—I thought he was getting ready to kill me." Defendant further testified that

> Then he got to—he got to running off the mouth about I didn't have no—no business there, it was his house too, and all this punk, sissy sucker, and all this mother, you know, he was saying anything else in the book, and spitting in my face and he pulled something out and stuck it to my head.

Defendant testified that the object "looked" and "feeled" like a handgun, and that he thought it was a handgun. Defendant testified that Hames then "said man, I'll blow your m****r-f*****g brains out if you

say one d**n word. He said,—then he showed me it again and said do you think I'm lying? Say something and I'll blow your—I'll blow your d**n brains out."

Defendant further testified that as he attempted to retrieve his own weapon, Hames continued to call him names and yell at him out the window of the residence. Defendant testified that when he returned to the residence and entered Hames' bedroom, Hames pointed an object "right between" his eyes. Defendant testified that he knew the barrel of a gun when he saw a barrel pointed at his eyes.

After testifying that the gun "kicked back up" and "double shot [Hames] twice[,]" defendant asserted that he and Marzette attempted to call 9-1-1, but were unsuccessful. Defendant testified that he then returned to Hames' bedroom, where Marzette "said Lee, you m****r f****r, and she reached down on the floor to pick up something off the floor." Defendant further testified that he "was still thinking it was a gun in that room" and that Marzette was going to shoot him. Defendant stated that "I thought my life was—my life was in danger, then I fired the gun right behind her legs." Defendant also stated that he was "distraught" after the shootings, and that he "never had any intent of hurting" Hames or Marzette. Defendant testified that he was "frightened" by Hames' threats, and that he felt it was necessary to protect himself from Hames. Although defendant did not call Officer Guild to testify, Officer Sharp testified during defendant's case-in-chief and stated that defendant was agitated and upset following the shootings. Officer Sharp testified that while he was handcuffing defendant, defendant told him that Hames had approached him with a gun and defendant had shot Hames in self-defense.

"Not every erroneous ruling on the admissibility of evidence will result in a new trial." *State v. Knox*, 78 N.C. App. 493, 496, 337 S.E.2d 154, 157 (1985). Instead, "[t]he burden is on [the] appellant to show both error and a reasonable possibility 'that had the error in question not been committed, a different result would have been reached at the trial.' " *Id.* (quoting N.C. Gen. Stat. § 15A-1443). In the instant case, assuming *arguendo* that the trial court erred by limiting defendant's questioning of law enforcement officers during the State's case-in-chief, in light of the evidence introduced by defendant during his case-in-chief, we conclude that the alleged error by the trial court was not prejudicial. As detailed above, defendant testified on his own behalf regarding his statements and intentions during the shootings, and Officer Sharp corroborated portions of defendant's testimony.

Defendant has failed to demonstrate that a different result would have been reached had the trial court allowed him to question the law enforcement officers further during the State's case-in-chief. Accordingly, defendant's first argument is overruled.

[2] Defendant next argues that the trial court erred by excluding Miller's statements to law enforcement officers following the shootings. Defendant asserts that Miller's statements to Officer Sharp were admissible as excited utterances, and that he was prejudiced by their exclusion. We disagree.

Officer Sharp's report of the shootings contains the following pertinent narration:

> I spoke to the witness Izella Miller, and asked her what happened. She told me the male victim and the suspect had been arguing and the male victim approached the suspect with what appeared to be a silver handgun and pointed it at him. The suspect then went outside to his car and returned with a gun and shot the male victim. The female victim, who had not been shot yet, told her to call 911. She said that when she tried from her home, her phone wasn't working and she went to her next door neighbor[']s house . . . and called 911. She said when she came back to the home, she found out the suspect had shot the female victim while she was gone, and she called 911 again from her home. She also said the suspect went outside to the back of the house and fired at least one shot . . . . I asked Ms. Miller to clarify her story about the suspect going outside, and she recanted her story and said he had gone to the padlocked closet in the bedroom and gotten the gun from in there. When asked why she had two different stories, she did not answer.

During direct examination by the State, Officer Sharp testified that he spoke to Miller at the scene, but that she was "upset" and "appeared to be intoxicated." During cross-examination, defendant attempted to elicit from Officer Sharp Miller's statements regarding the shootings. The trial court sustained the State's objection to the presentation of such evidence, noting that "[t]here's nothing about . . . these circumstances that indicate an excited utterance. She was answering his query. And there's nothing about this that appears to meet any of the qualifications of something stated in spur of the moment . . . . He's asking her what happened and then [she] changed her story."

Defendant contends that the trial court erred in finding that Miller's statements to Officer Sharp were inadmissible because they

were in response to questioning, and he asserts that the statements were made following the shooting of two people in close proximity to Miller. However, we note that "[t]he rationale for the admissibility of an excited utterance is its trustworthiness." *State v. Wingard*, 317 N.C. 590, 598, 346 S.E.2d 638, 644 (1986). In *State v. Reid*, 335 N.C. 647, 662, 440 S.E.2d 776, 784 (1994), our Supreme Court explained the doctrine of excited utterance as follows:

> The reason for allowing this exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces "spontaneous and sincere" utterances. "[T]he trustworthiness of this type of utterance lies in its spontaneity . . . ." There is simply no time to "fabricate or contrive" statements spontaneously made during the excitement of an event. For a statement to qualify as an "excited utterance," "there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication."

(citations omitted) (alteration in original).

"A trial court 'has broad discretion over the scope of cross-examination' and its 'rulings regarding the scope of cross[-] examination will not be held in error in the absence of a showing that the verdict was improperly influenced by the limited scope of the cross-examination.' " *State v. Johnson*, 164 N.C. App. 1, 11, 595 S.E.2d 176, 182 (2004) (citation omitted). In the instant case, Officer Sharp testified at trial that Miller was "intoxicated" and "upset," and that he did not take a written statement from her but was able to "get an idea of . . . her account[]" of the shootings. During *voir dire*, Officer Sharp testified that Miller changed part of her story while talking to him, and when he asked her why she had two different stories, Miller did not respond. Miller's statements regarding Hames' possession of what appeared to be handgun as well as her statements regarding the argument between defendant and Hames tend only to corroborate testimony provided by defendant and Officer Sharp during defendant's case-in-chief. In light of the foregoing, we conclude that defendant has failed to demonstrate that the trial court abused its discretion by not admitting Miller's statements. Accordingly, we overrule defendant's second argument.

[3] Defendant's final argument is that the trial court erred by entering judgment against him for both assault with a deadly weapon

inflicting serious injury upon Marzette and attempted voluntary manslaughter of Marzette. Because we conclude that these offenses are mutually exclusive, we order a new trial with respect to the shooting of Marzette.

We note initially that N.C.R. App. P. 10(b)(1) (2005) provides that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." In the instant case, following the jury's verdicts, the State requested that the trial court sentence defendant to concurrent forty-six to sixty-five month sentences for attempted voluntary manslaughter of Marzette and assault with a deadly weapon inflicting serious injury upon Marzette. Defendant thereafter requested that "with regard to the two charges of assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter, since they arise out of the very same conduct, . . . the Court particularly should consider consolidation of those charges." The trial court initially addressed "the question of whether or not the Court should arrest judgment on the attempted voluntary [manslaughter]" conviction by noting that "the law is just evolving on that, but it would appear that attempted voluntary [manslaughter] is an alter[n]ative theory to [assault with a deadly weapon with intent to kill inflicting serious injury]." Both parties thereafter provided argument to the trial court on the issue, with defendant contending that concurrent sentences for the two convictions created "a double jeopardy problem" that required him to "request the Court not to sentence on both." Following argument from both parties, the trial court determined that "it is not double jeopardy and the defendant could be sentenced consecutively[,]" but "under the circumstances of this case the Court in its discretion should run those [convictions' sentences] concurrently."

Defendant contends on appeal that the trial court erred by failing to arrest judgment on either the attempted voluntary manslaughter conviction or the assault with a deadly weapon inflicting serious injury conviction because the offenses are mutually exclusive. However, we note that because defendant did not assert this precise contention at trial, defendant's theory on appeal does not reflect the same "specific grounds" as those provided to the trial court, and therefore his argument seemingly violates N.C.R. App. P. 10. Nevertheless, in our discretion pursuant to N.C.R. App. P. 2 (2005), we

have chosen to review defendant's argument on appeal, and, as discussed below, we find it persuasive.

The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault; (2) with a deadly weapon; (3) an intent to kill; and (4) infliction of a serious injury not resulting in death. *State v. Grigsby*, 351 N.C. 454, 456, 526 S.E.2d 460, 462 (2000). "A specific intent to kill is an essential element of assault with a deadly weapon with intent to kill inflicting serious injury." *State v. Daniel*, 333 N.C. 756, 763, 429 S.E.2d 724, 729 (1993).

This Court has previously held that "attempted voluntary manslaughter is (1) a crime in North Carolina, and, (2) a lesser-included offense of attempted first-degree murder[.]" *State v. Rainey*, 154 N.C. App. 282, 283, 574 S.E.2d 25, 26, *disc. review denied*, 356 N.C. 621, 575 S.E.2d 520 (2002). Although voluntary manslaughter had previously been considered a general intent crime, s*ee State v. McCoy*, 122 N.C. App. 482, 485, 470 S.E.2d 542, 544, *disc. review denied*, 343 N.C. 755, 473 S.E.2d 622 (1996), in *Rainey*, we recognized that "in North Carolina, heat of passion voluntary manslaughter is essentially a first-degree murder, where the defendant's reason is temporarily suspended by legally adequate provocation." 154 N.C. App. at 289, 574 S.E.2d at 29. Therefore, we concluded that

> [t]he specific intent to kill does exist in the mind of [a defendant charged with attempted voluntary manslaughter]; however, the defendant is only legally culpable for the general intent because the "specific intent" is not based on "cool reflection." The specific intent is based on an "adequate provocation" that would cause an individual with an ordinary firmness of mind . . . to commit an act spawned by provocation rather than malice.

Id.

In the instant case, defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury upon Marzette, and attempted murder of Marzette. The jury subsequently found defendant guilty of assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter. Defendant contends that the jury's determination that defendant did not commit assault with a deadly weapon with intent to kill inflicting serious injury upon Marzette excluded the possibility that defendant committed attempted voluntary manslaughter against her. We agree.

"Where several offenses charged allegedly arise from the same transaction, and the offenses are mutually exclusive, a defendant may not be convicted of more than one of the mutually exclusive offenses." *State v. Hall*, 104 N.C. App. 375, 386, 410 S.E.2d 76, 82 (1991). In *State v. Speckman*, 326 N.C. 576, 391 S.E.2d 165 (1990), the defendant was convicted of one count of embezzlement and one count of obtaining property by false pretenses, both of which arose from a single transaction involving the sale of a waterslide operation. On appeal, our Supreme Court noted that because "property cannot be obtained simultaneously pursuant to both lawful and unlawful means, guilt of either embezzlement or false pretenses necessarily excludes guilt of the other." *Id.* at 578, 391 S.E.2d at 167. Therefore, the Court held that although it was not improper for the State to bring both charges against the defendant or for the trial court to submit both charges to the jury, because the offenses were mutually exclusive, the trial court was required to instruct the jury that it may convict the defendant of only one of the offenses or the other, but not both. *Id.* at 579, 391 S.E.2d at 167.

Similarly, in *Hall*, defendants Hall and Shoats were charged with three counts of conspiracy to traffick in cocaine, the first count covering a period from 10 April 1989 through 15 April 1989, the second count covering a period of 23 April 1989 through 31 May 1989, and the third count covering a period of 10 April 1989 through 31 May 1989. The jury convicted the defendants of each charge. The trial court subsequently arrested judgment on the third charge and sentenced the defendants for the remaining two convictions. On appeal, this Court concluded that the three offenses were mutually exclusive, in that the determination that the defendants entered into one agreement to commit a series of unlawful acts over a period of time was inconsistent with the determination that multiple agreements to commit the same series of acts over the same period of time were also made. 104 N.C. App. at 386, 410 S.E.2d at 82. We noted that "either one agreement was made or two agreements were made. Both views cannot exist at the same time." *Id.* Accordingly, we vacated the defendants' convictions on the separate offenses.

In the instant case, by finding defendant guilty of the lesser-included offense of assault with a deadly weapon inflicting serious injury, the jury necessarily found that defendant did not have the "intent to kill" Marzette required to convict defendant of the greater offense of assault with a deadly weapon with intent to kill inflicting serious injury. However, by subsequently finding defendant guilty of

attempted voluntary manslaughter, the jury also necessarily found that defendant *had* the intent to kill Marzette, but that "heat of passion, arising from sudden provocation, *negated* the element of malice and made [defendant's] mind incapable of 'cool' premeditation and deliberation." *Rainey*, 154 N.C. App. at 288, 574 S.E.2d at 29. These two verdicts are logically inconsistent, in that defendant either did or did not have the intent to kill Marzette when he shot her. Because "[b]oth views cannot exist at the same time[,]" *Hall*, 104 N.C. App. at 386, 410 S.E.2d at 82, we conclude that the trial court erred by entering judgment on both convictions.

Although we note that the trial court imposed the same sentence for both convictions and ordered that they run concurrent, our courts have previously held that separate convictions for mutually exclusive offenses, even though consolidated for a single judgment, have potentially severe adverse collateral consequences. *See Ball v. United States*, 470 U.S. 856, 865, 84 L. Ed. 2d 740, 748 (1985); *State v. Barnes*, 324 N.C. 539, 540, 380 S.E.2d 118, 119 (1989) (per curiam). Furthermore, "[w]here the trial court fails to instruct the jury that it may convict the defendant of only one of the mutually exclusive offenses, the jury returns guilty verdicts on the mutually exclusive offenses, and the trial court consolidates the offenses for a single judgment, the defendant is entitled to a new trial." *Hall*, 104 N.C. App. at 387, 410 S.E.2d at 82 (citing *Speckman*, 326 N.C. at 580, 391 S.E.2d at 167-68). Therefore, in light of the foregoing, we are compelled to hold that the trial court's error in the instant case was not harmless, and, accordingly, we order a new trial with respect to the shooting of Marzette.

In conclusion, we hold that defendant received a trial free of prejudicial error with respect to the voluntary manslaughter of Hames. However, with respect to the shooting of Marzette, we order a new trial.

No error in part; new trial in part.

Judges CALABRIA and GEER concur.

IN THE MATTER OF THE ESTATE OF JOHN L. REDDING, INCOMPETENT, THROUGH HIS GENERAL GUARDIAN, THOMAS GARY REDDING; THOMAS GARY REDDING, INDIVIDUALLY; BLANCHE REDDING; AND REBECCA REDDING; PLAINTIFFS-APPELLANTS V. THOMAS A. WELBORN, ALSO KNOWN AS (AKA) AND DOING BUSINESS AS (DBA) WELBORN AND ASSOCIATES, AND AKA AND DBA WELBORN AND ASSOCIATES, INC.; AKA AND DBA SELECT MARKETING PLANS, INC.; AKA AND DBA NORTHWEST GENERAL INSURANCE AGENCY; ROGER RUSSELL; SELECT MARKETING PLANS, INC.; FINANCIAL INDEPENDENCE GROUP, INC.; LIFEUSA INSURANCE COMPANY; AND ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA (AKA ALLIANZ LIFE, AND LIFEUSA), ALL OF THE ABOVE DBA LIFEUSA; DEFENDANTS-APPELLEES

No. COA04-529

(Filed 17 May 2005)

1. Appeal and Error— appealability—partial summary judgment—one of several defendants—vicarious liability—substantial right

A substantial right was affected and a summary judgment for one of several defendants was immediately appealable where the claims against this defendant were based on vicarious liability for the actions of other defendants, many of the same factual issues apply, and inconsistent verdicts could result.

2. Employer and Employee— sale of annuities—independent contractors

An annuity company was not vicariously liable for agents which sold its policies, and summary judgment was correctly granted for that company, where the evidence supported only the conclusion that the agents were independent contractors and not employees of the company.

3. Agency— actual or apparent authority—investment sales—knowledge of purchaser

Agents who sold an annuity were not the actual or apparent agents of defendant-annuity company, and summary judgment was properly granted for the annuity company, where the undisputed evidence was that plaintiffs knew that the agents were not acting as representatives of the annuity company when they made the bad investment with which this case is concerned.

4. Agency— statutory agency—abusive insurance practices not involved

Chapter 58 of the North Carolina General Statutes did not create a "statutory agency" in two agents who sold an annuity, and

summary judgment was correctly granted for the annuity company, because the dispute did not involve the application for or solicitation of insurance and the annuity company was not attempting to avoid payment of benefits.

5. Insurance— annuities—"negligent servicing"

An annuity company was not liable for the "negligent servicing" of its annuities, and summary judgment was correctly granted for it, where the only support for the claim was an unpublished federal opinion from Texas that plaintiff misinterpreted.

Appeal by plaintiffs-appellants from order entered 12 August 2003 by Judge Russell G. Walker, Jr. in Superior Court, Yadkin County. Heard in the Court of Appeals 25 January 2005.

George Francisco, PC, by George Francisco, for plaintiffs-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Brian J. McMillan; Leonard, Street & Deinard, P.A., by Donald T. Campbell, for defendants-appellees.

McGEE, Judge.

Plaintiffs appeal from the trial court's order entering summary judgment in favor of defendants LifeUSA Insurance Company and Allianz Life Insurance Company of North America (collectively LifeUSA[1]).

LifeUSA, an insurance and securities broker, offers a variety of insurance products, including fixed annuities. LifeUSA sold its products through state-licensed independent insurance agents (agents) with whom LifeUSA entered into agent agreements. The agent agreements authorized agents to solicit applications for LifeUSA's products.

Defendant Select Marketing Plans, Inc. (SMP) was engaged in the business of serving as a field representative for several insurance companies. SMP selected agents to market various insurance prod-

1. LifeUSA Insurance Company became a wholly-owned subsidiary of Allianz Life Insurance Company of North America (Allianz Life) in July 1999. LifeUSA Insurance Company merged into Allianz Life in July 2002, with Allianz Life as the surviving entity. The transactions at issue in this case occurred between plaintiffs and LifeUSA Insurance Company. We therefore refer to defendants LifeUSA Insurance Company and Allianz Life, collectively, as LifeUSA.

ucts, including insurance products offered by LifeUSA. Defendant Thomas Welborn (Welborn) was an officer, director, and shareholder of SMP. Welborn also acted as an independent agent of SMP, and sold insurance products from companies represented by SMP. Defendant Roger Russell (Russell) acted as a subagent for SMP and Welborn.

Welborn and Russell entered into agent agreements with LifeUSA. The agent agreements contained the following provisions:

> 2. AGENT RIGHTS AND RESPONSIBILITIES
>
> a. INDEPENDENCE. As an independent contractor, you are free to exercise your discretion and judgment as to time, place, and means of performing all acts hereunder. Nothing in this AGREEMENT is intended to create a relationship of employer and employee between us and you.
>
> b. FREEDOM OF CHOICE. You are free to contract with other insurance companies.
>
> . . . .
>
> d. AUTHORITY. We authorize you, subject to the provisions of this AGREEMENT:
>
> 1. to solicit personally and through your properly licensed agents, who have entered into an Agent Agreement with us at your request (your agents), applications for policies described in the SCHEDULE OF COMMISSIONS and commission guidelines and promptly to forward the applications to us for our consideration,
>
> 2. to collect the full initial premium for policies to be issued and promptly to submit all premium[s] collected to the Company,
>
> 3. to deliver policies in accordance with any delivery requirements of the Company on a timely basis, and
>
> 4. to make reasonable efforts to maintain your and the Company's policies in force and to provide reasonable assistance to your and the Company's policyholders.
>
> e. COMMISSIONS. We will pay you, as full compensation for all services rendered and expenses incurred by you, first year and renewal commissions at the rates provided and subject to the terms and conditions contained in the

attached SCHEDULE OF COMMISSIONS and commission guidelines. These commissions will accrue on premiums paid in cash to us for policies issued from applications procured by you while this AGREEMENT is in effect.

. . . .

3. COMPANY RIGHTS AND RESPONSIBILITIES

a. RESERVATION OF AUTHORITY. The Company reserves and retains the exclusive authority, and your authority does not permit you to:

. . . .

10. exercise any authority on our behalf other than as authorized by paragraph 2(d)[.]

Russell began selling the LifeUSA annuities that are the subject of this action to plaintiffs in 1993. The applications for the annuities contained the following provision:

Full or Partial Surrender—Prior to the Annuity Date, you may request a full surrender of this policy for its Cash Value. A partial surrender of the Cash Value may also be requested. A table of Cash Surrender Values is included in the policy.

The Annuitization Value will be reduced proportionately to the reduction in the Cash Value as a result of any partial surrenders.

Plaintiffs contacted Russell in 1997 and inquired about alternative investments that would yield a higher rate of return than the LifeUSA annuities. Russell put plaintiffs in contact with Welborn. Both Welborn and Russell met with plaintiffs and Welborn talked with plaintiffs about investing in ETS Payphones, Inc. (ETS). Under the terms of this investment, plaintiffs purchased payphones from BEE Communications, LLC, and then leased the payphones back to ETS. Plaintiffs made five investments in ETS, as follows: $84,000 on 3 October 1997; $54,000 on 2 December 1997; $6,000 on 15 July 1998; $196,000 on 10 February 1999; and $196,000 on 17 March 1999. Plaintiffs obtained the funds for the last two investments by surrendering their LifeUSA annuities.

When plaintiffs opted to surrender their LifeUSA annuities, they received "Conservation Letters" from LifeUSA, which stated in relevant part:

> [W]e have enjoyed servicing your annuity needs. We are disappointed to learn of your recent request to terminate your policy.
>
> We feel it is important for you to know what you will **forfeit** by surrendering your policy.
>
> You may decide to surrender this policy at any time. However, if you decide to annuitize this contract for at least a [five or ten] year period, you will receive the much higher **Annuitization Value**.
>
> . . . .
>
> If you wish to keep your policy, contact us at [telephone number]. If we don't hear from you, your check will be mailed in approximately three weeks.

Each letter stated the dollar value penalty for the early surrender of the annuity policies.

ETS filed for bankruptcy in September 2000. As a result, ETS stopped making lease payments to plaintiffs and plaintiffs' investments in the payphones became worthless. Plaintiffs filed suit against, *inter alia*, Welborn, Russell, and LifeUSA. The causes of action against Welborn and Russell relevant to this appeal are negligence, negligent misrepresentation, and unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 58-63-15(1) (2003). Plaintiffs sought recovery against LifeUSA on the theory that LifeUSA was vicariously liable for Welborn's and Russell's tortious actions. In an order entered 12 August 2003, the trial court granted LifeUSA's motion for summary judgment disposing of all claims against LifeUSA.

I.

[1] We must first determine whether this case is properly before this Court. An appeal from a trial court's order of summary judgment for less than all the defendants in a case is ordinarily interlocutory, and therefore untimely. *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 211, 580 S.E.2d 732, 734 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). However, an order is immediately appealable when it affects a substantial right. *State ex rel. Easley v. Rich Food Servs., Inc.*, 139 N.C. App. 691, 695, 535 S.E.2d 84, 87 (2000). A substantial right is affected when "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dept. of Transportation v. Page*,

119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995); *see also Camp v. Leonard*, 133 N.C. App. 554, 558, 515 S.E.2d 909, 912 (1999).

In this case, the trial court granted LifeUSA's motion for summary judgment disposing of all claims against LifeUSA. However, claims still existed against the remaining defendants, including Welborn and Russell. Since plaintiffs' theory of LifeUSA's liability is that LifeUSA is vicariously liable for Welborn's and Russell's actions, many of the same factual issues would apply to the claims against defendants and inconsistent verdicts could result from separate trials. Therefore, we find that a substantial right is affected and that this appeal is properly before this Court.

II.

In order to prevail on a motion for summary judgment, the movant has the burden of proving that "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); *Livingston v. Adams Kleemeier Hagan Hannah & Fouts*, 163 N.C. App. 397, 402, 594 S.E.2d 44, 48, *disc. review denied*, 359 N.C. 190, 607 S.E.2d 275 (2004). This burden can be met "(1) by showing an essential element of the opposing party's claim is nonexistent or cannot be proven, or (2) by showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004).

Once a party has come forward with a forecast of evidence tending to support the party's motion for summary judgment, the burden shifts to the opposing party to show that the opposing party "will be able to make out at least a prima facie case at trial." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). In addition, the party "must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2003). "An issue is deemed genuine 'if it is supported by substantial evidence,' and 'a fact is material if it would constitute or would irrevocably establish any material element of a claim or a defense.' " *Finley Forest Condo. Ass'n v. Perry*, 163 N.C. App. 735, 738, 594 S.E.2d 227, 230 (2004) (citations omitted). When evaluating a motion for summary judgment, the trial court must take the evidence in the light most favorable to the non-moving party, and "[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant."

Roumillat v. Simplistic Enterprises, Inc., 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

III.

[2] Plaintiffs argue that the trial court erred in granting summary judgment in favor of LifeUSA because a genuine issue of material fact existed regarding whether LifeUSA was vicariously liable for the actions of Welborn and Russell.

When an employee commits a tort while acting within the scope of employment, the tort can be imputed to the employer under the doctrine of *respondeat superior*. *MGM Transport Corp. v. Cain*, 128 N.C. App. 428, 430-31, 496 S.E.2d 822, 824 (1998). However, "the rule is well settled in North Carolina" that the torts committed by an independent contractor are not imputed to the employer. *Market America, Inc. v. Christman-Orth*, 135 N.C. App. 143, 152, 520 S.E.2d 570, 577 (1999), *disc. review denied*, 351 N.C. 358, 542 S.E.2d 213 (2000); *see also* David A. Logan & Wayne A. Logan, *North Carolina Torts* 233 (1996). Although a contract may designate that an employer-independent contractor, rather than an employer-employee, relationship exists, the terms of the contract are not controlling. *Johnson v. News & Observer Pub. Co.*, 167 N.C. App. 86, 89, 604 S.E.2d 344, 347 (2004). Rather, "[w]hether a party is an independent contractor is a mixed question of law and fact." *Id.* at 88, 604 S.E.2d at 346. While determining the terms of the agreement is a question of fact, whether or not that agreement establishes an independent contractor relationship is a question of law. *Yelverton v. Lamm*, 94 N.C. App. 536, 538, 380 S.E.2d 621, 623 (1989). " '[W]here the facts are undisputed or the evidence is susceptible of only a single inference and a single conclusion, the court must determine whether a party is an employee or an independent contractor as a matter of law.' " *Johnson*, 167 N.C. App. at 88, 604 S.E.2d at 346 (alteration in original) (citation omitted).

Our Supreme Court has established the factors that must be considered when determining whether an employee is an independent contractor:

> [Whether] [t]he person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is

> not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Hayes v. Elon College, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944). In addition, we have held that "[a] life insurance agent who is employed solely to bring about contractual relations between his principal and others on his own initiative, without being subject to the principal's direction as to how he shall accomplish results, is ordinarily held to be an independent contractor." *Little v. Poole*, 11 N.C. App. 597, 602, 182 S.E.2d 206, 209-10 (1971).

We find that the evidence in this case only supports the conclusion that Welborn and Russell were independent contractors, and not employees, of LifeUSA. The facts are undisputed that Welborn and Russell acted with complete autonomy and used their independent skills when selling products for LifeUSA. Welborn and Russell were independently licensed by the State of North Carolina as insurance agents and were not paid a salary, but rather commissions based "upon a quantitative basis." *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140. Welborn and Russell were permitted to sell the products of any other insurance company, and indeed testified at their depositions that they did sell other insurance companies' products. Welborn also had full autonomy in recruiting, supervising, training and supporting his subagents. Therefore, even assuming *arguendo* that Welborn and Russell committed torts, LifeUSA cannot be vicariously liable for these torts because Welborn and Russell were independent contractors of LifeUSA.

[3] Plaintiffs argue that even if Welborn and Russell are determined to be independent contractors of LifeUSA, LifeUSA is nevertheless vicariously liable for their actions because Welborn and Russell were LifeUSA's actual or apparent agents. Again, even assuming *arguendo* that Welborn and Russell committed torts, we find that plaintiffs have failed to present sufficient evidence to establish a genuine issue of material fact of whether Welborn and Russell were LifeUSA's actual or apparent agents. A third party acquires no rights against a principal when the third party has either actual or constructive knowledge of what the principal has authorized his agent to do. *Branch v. High Rock Lake Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 253 (2002), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003); *Rollins v. Miller Roofing Co.*, 55 N.C. App. 158, 161, 284 S.E.2d 697,

700 (1981); *see also Investment Properties v. Allen*, 283 N.C. 277, 285-86, 196 S.E.2d 262, 267 (1973).

In this case, the evidence is undisputed that plaintiffs knew that Welborn and Russell were not acting as representatives of LifeUSA when plaintiffs invested in ETS. Plaintiff Blanche Redding gave the following testimony at her deposition:

> Q. You understand that ETS—ETS and LifeUSA are not the same, correct?
>
> A. Yes.
>
> Q. You agree with me that they are completely different companies?
>
> A. Yes.
>
> Q. You understand that LifeUSA does not sell pay phones, correct?
>
> A. Yes.
>
> Q. Did you—were you ever presented with any documentation from Mr. Welborn or from Mr. Russell that would suggest—that suggested to you that LifeUSA and ETS or BEE Communications were affiliated in any way?
>
> A. No.
>
> Q. And did either [Mr. Welborn or Mr. Russell] make any representations to you that LifeUSA and BEE Communications or ETS were affiliated in any way?
>
> A. No.

Similarly, plaintiff Rebecca Redding's testimony shows an understanding that Welborn and Russell were not acting within their scope as LifeUSA agents when plaintiffs purchased the ETS investments:

> Q. So you knew that LifeUSA was a completely different entity than ETS pay phones, correct?
>
> A. Oh, yes.
>
> . . . .
>
> Q. [A]t the meeting that you attended Mr. Russell and Mr. Welborn weren't conducting business on behalf of LifeUSA, were they?

A. No, sir.

Q. In fact, they were selling ETS pay phones?

[ATTORNEY FOR RUSSELL]: Object to the form.

. . . .

Q. Is that your understanding?

A. Yes.

Q. And you understand ETS and LifeUSA are not the same thing?

A. That's correct.

Q. Now, do you have any idea why it would be in LifeUSA's benefit to have their agents surrendering their policies? What benefit would they derive from that?

A. I would say they have no benefit.

Furthermore, the "Conservation Letters" sent by LifeUSA to plaintiffs clearly gave plaintiffs notice that Welborn and Russell were not acting within any authority conferred by LifeUSA when they helped plaintiffs surrender the annuities to invest in the payphones. Blanche Redding admitted receiving these letters and understanding their content:

Q. And would you agree that these letters from LifeUSA are advising you that they're disappointed to learn of your decision to terminate the policy and they explain to you what the damages or the potential loss will be if you decide to forfeit these policies?

A. Yes, uh-huh.

Q. Do you . . . as you sit here recall receiving these letters?

A. Yes.

Q. And would you also agree with me that the last paragraph of . . . each of those seven letters indicates that if you should change your mind, if you wish to keep the policy, to please contact them at the 1-800 number?

A. Yes.

. . . .

Q. After you received these letters, . . . apparently you didn't change your mind on your decision to surrender those annuities?

A. No.

Q. You still went forward with the surrender?

A. Yes.

Since plaintiffs knew that Welborn and Russell were not acting as LifeUSA agents when plaintiffs purchased the payphones, we find that there is no genuine issue of material fact as to whether plaintiffs had knowledge that Welborn and Russell's actions were outside the scope of what LifeUSA had authorized them to do. As a result, plaintiffs can acquire no rights against LifeUSA.

[4] We also reject plaintiffs' argument that Welborn and Russell were LifeUSA's "statutory agents" by virtue of Chapter 58 of the North Carolina General Statutes. N.C. Gen. Stat. § 58-33-20(a) (2003) states:

> Every agent or limited representative who *solicits or negotiates an application for insurance of any kind*, in any controversy between the insured or his beneficiary and the insurer, is regarded as representing the insurer and not the insured or his beneficiary. *This provision does not affect the apparent authority of an agent.*

(emphases added). Similarly, N.C. Gen. Stat. § 58-58-30 (2003) provides: "A person who solicits an application for insurance upon the life of another, in any controversy relating thereto between the insured or his beneficiary and the company issuing a policy upon such application, is the agent of the company and not of the insured."

In interpreting these statutory provisions, we find our Supreme Court's interpretation of N.C. Gen. Stat. § 58-197, the predecessor to N.C. Gen. Stat. § 58-58-30, instructive:

> We note that a majority of states have a statute similar to [N.C.]G.S. 58-197. Many of those statutes were enacted in the early part of this century to curb abusive practices on the part of insurance companies which would issue policies but avoid paying benefits provided under the terms of the policies by finding technical defects in agents' authority to bind the companies.

Northern Nat'l Life Ins. v. Miller Machine Co., 311 N.C. 62, 71, 316 S.E.2d 256, 262 (1984) (citations omitted). We also note that the

only reported case interpreting N.C. Gen. Stat. § 58-33-20 involved a dispute over an insurance company's obligation to pay benefits when the agent filled out the application for insurance. *Webster Enterprises, Inc. v. Selective Insurance Co.*, 125 N.C. App. 36, 45, 479 S.E.2d 243, 249 (1997). In the present case, LifeUSA is not attempting to avoid paying benefits under an insurance policy, nor does the dispute involve the application or solicitation of insurance. Therefore, we find that Chapter 58 does not create a "statutory agency" whereby LifeUSA would be vicariously liable for Welborn's or Russell's actions.

IV.

[5] Finally, we consider plaintiffs' argument that the trial court erred in entering summary judgment for LifeUSA because the separate cause of action "negligent servicing of annuities" exists against LifeUSA. We disagree. Plaintiffs have failed to support this argument with any North Carolina case law, but rather rely on an unpublished opinion from the United States District Court for the Northern District of Texas. *American Automobile Insurance Co. v. Grimes* (No. Civ.A.5:02-CV066-C) (10 February 2004). Furthermore, we disagree with plaintiffs' interpretation of *Grimes*. In *Grimes*, the plaintiff insurance provider sought a declaratory judgment for a determination of whether the plaintiff was obligated to defend and indemnify an insurance agent under the agent's "Life Insurance Agents Errors and Omissions Liability Insurance Policy." The insurance agent had been successfully sued for negligently advising his clients to transfer the clients' annuity funds into a payphone leasing scheme and for negligently and fraudulently misrepresenting the nature of the payphone scheme. However, the annuity provider was never made a party to any of the lawsuits, nor did the court consider any possibility of liability that the annuity provider may have had. Therefore, *Grimes* does not support the proposition that LifeUSA may be liable for the negligent servicing of its annuities, and we reject plaintiffs' argument.

Affirmed.

Judges HUDSON and TYSON concur.

STATE OF NORTH CAROLINA v. STEVE LAWRENCE BERRYMAN, DEFENDANT

No. COA04-560

(Filed 17 May 2005)

1. Evidence— chain of custody—crack pipe—rocks of crack cocaine—SBI report

The trial court did not err in a common law robbery and felony possession of cocaine case by allowing into evidence a crack pipe, two rocks of crack cocaine, and a State Bureau of Investigation (SBI) report even though defendant contends the State failed to establish proper chain of custody, because: (1) the arresting officer testified that the crack pipe introduced as evidence at trial was the same pipe he recovered from defendant and that it was in substantially the same condition; (2) the same officer also testified that the rocks of crack cocaine were the same ones that he removed from defendant at the scene, and that they were in substantially the same condition except a small portion of one of the rocks appeared to have been removed; (3) the officer testified that he followed standard procedure for identifying and submitting these two items to the SBI; (4) an SBI agent testified from his review of the report that he could determine that the crack cocaine had been tested following all the proper procedures, that the proper procedures for documenting chain of custody at the lab had been followed, and that the report showed that the substance tested was crack cocaine; and (5) any weak links in the chain of custody pertain only to the weight to be given to the evidence and not to its admissibility.

2. Robbery— common law robbery—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the common law robbery charge, because: (1) the evidence taken in the light most favorable to the State shows that defendant took a bottle of beer and a fifth of wine from the convenience store, hid the items in his clothing, and attempted to walk away without paying for them; and (2) in the process of attempting to elude capture from two store employees, defendant pulled a screwdriver and came at one of the employees in a threatening manner and the employee testified that he feared for his safety as a result of defendant's actions.

3. Sentencing— habitual felon—possession of cocaine

The trial court did not err by denying defendant's motion to dismiss the habitual felon charge, because possession of cocaine can be used as a predicate felony.

4. Constitutional Law— right to speedy appeal—meaningful and effective appellate review—delay in providing transcript

Defendant's constitutional and statutory rights to meaningful and effective review in a common law robbery and felony possession of cocaine case were not violated by the State's alleged failure to provide a transcript of the proceedings in a timely fashion, because: (1) although a nearly six-year delay in the production of the trial transcript constitutes a sufficient delay to trigger consideration of the other three factors identified as a necessary or sufficient condition to the finding of a deprivation of the right of speedy appeal, its significance in the balance is not great; (2) the record is devoid of any indication as to why the extensive delay took place, and the State has no role in the appeal process until defendant serves the State with the record on appeal; (3) it was not the duty of the State to contact the court reporter or the court concerning the preparation of the transcript since the duty rested exclusively with defendant and his counsel; (4) the record is devoid of any indication that defendant, personally, ever asserted any right to a speedy appeal; (5) the delay in perfecting defendant's appeal has not led to any unwarranted incarceration since defendant's appeal is otherwise without merit; (6) the record is devoid of any evidence that defendant has suffered any anxiety or concern over the delay in his appeal; and (7) defendant has offered no evidence that the delay in production of the transcript has impaired his appeal in any way.

Justice TIMMONS-GOODSON dissenting.

Appeal by defendant from judgment entered 19 February 1998 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 12 January 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, for the State.

The Kelly Law Firm, by George E. Kelly, III, for the defendant.

STEELMAN, Judge.

About 10:30 on the night of 30 October 1997 the defendant, Steve Lawrence Berryman, entered a convenience store. Store clerk Salah Yousif (Yousif) became suspicious of defendant and began to monitor his movements in the store. Yousif observed defendant take a bottle of beer and a fifth of wine from the cooler and hide them in his clothing. As defendant started to leave the store, Yousif pressed an alarm to warn Louie Claami (Claami), who was working in the back of the store, that he needed assistance. When Claami appeared, Yousif, speaking in Arabic, told him defendant was stealing some beer and instructed him to stop defendant from leaving the store. As Claami moved to block his exit, defendant rushed through the door. Yousif then leaped over the counter and helped Claami grab the defendant and force him back into the store. Once they had pushed the defendant back into the store, Yousif told him they were calling the police and instructed Claami to restrain the defendant. The defendant then reached into his pocket and pulled out a screwdriver and came at Yousif. At that point, Yousif testified, the issue changed from being about the beer and wine to being about his personal safety, and Yousif punched defendant. The defendant fell but recovered and rushed at Yousif again. Yousif managed to restrain the defendant, and Claami grabbed a baseball bat from behind the counter and came to Yousif's assistance until the police arrived. Once the police had handcuffed defendant, Yousif told them that he had a screwdriver in his pocket. The officers found the screwdriver on the floor of the store, within five feet of where the defendant had been lying. When the officers searched defendant, they found him in possession of two rocks of crack cocaine and a pipe used for smoking crack cocaine.

Defendant testified that on the night of the crime he was at the home of a friend named Edward Sanders when they decided defendant would buy some beer. Defendant put on Sanders' jacket and went to the convenience store. Defendant had two dollars, which was only enough money to purchase one beer. Defendant admitted that when he got to Yousif's store he shoplifted the bottle of beer and the fifth of wine. Defendant testified that, when he realized that Yousif had seen him shoplifting the alcohol, "I think my intentions then was to probably put the beer back." At that moment, he saw Claami coming toward him and Yousif behind the counter with a baseball bat. When he attempted to flee the store Yousif rushed at him and hit him from behind with the baseball bat. Defendant claimed that he threw his hands up and surrendered but that Yousif and Claami started hitting

him with their fists. Defendant fell to the floor. He then jumped up and tried to run from the store but was prevented from doing so by Yousif. According to defendant, the screwdriver in his pocket "came from work that day," he never pulled the screwdriver out of his pocket and the screwdriver was still in his pocket when the police found it.

Defendant claimed that the cocaine and crack pipe were not his, and that he had no idea they were in the coat. Defendant was indicted on charges of robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87(a) and felony possession of cocaine in violation of N.C. Gen. Stat. § 90-95. The jury found defendant guilty of common law robbery and felony possession of cocaine. Following the return of those verdicts, the jury found defendant guilty of being an habitual felon. All charges were consolidated into one judgment and defendant received an active sentence of 133 to 169 months. Defendant appeals.

[1] In defendant's second assignment of error he argues that the trial court erred in allowing into evidence the crack pipe, two rocks of crack cocaine, and a State Bureau of Investigation report because the State failed to establish proper chain of custody. We disagree.

> Before real evidence may be received into evidence, the party offering the evidence must first satisfy a two-pronged test. "The item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change." Determining the standard of certainty required to show that the item offered is the same as the item involved in the incident and that it is in an unchanged condition lies within the trial court's sound discretion. "A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." Any weak links in the chain of custody pertain only to the weight to be given to the evidence and not to its admissibility.

State v. Fleming, 350 N.C. 109, 131, 512 S.E.2d 720, 736 (1999) (internal citations omitted). In the instant case, the arresting officer testified that the crack pipe introduced as evidence at trial was the same pipe he recovered from defendant and that it was in substantially the same condition. He further testified that the rocks of crack cocaine were the same ones that he removed from the defendant at the scene, and that they were in substantially the same condition excepting a

small portion of one of the rocks which appeared to have been removed. Thus proper foundations were laid for the admission of these two items of evidence.

The arresting officer testified that he followed standard procedure for identifying and submitting these two items of evidence to the State Bureau of Investigation laboratory. Special Agent Wagner of the SBI testified at trial and was tendered as an expert in the fields of chemistry, analysis and identification of narcotics, and forensic chemistry, without objection. Special Agent Wagner testified that from his review of the report, he could determine that the crack cocaine had been tested following all the proper procedures, that the proper procedures for documenting chain of custody at the laboratory had been followed, and that the report clearly showed that the substance tested was crack cocaine. "If the evidence is sufficient to reasonably support the conclusion that the substance analyzed is the same as that obtained from defendant, then both the substance and the results of the analysis are admissible." *State v. Callahan*, 77 N.C. App. 164, 168, 334 S.E.2d 424, 427 (1985). As any "weak links in the chain of custody pertain only to the weight to be given to the evidence and not to its admissibility[,]" *Fleming*, 350 N.C. at 131, 512 S.E.2d at 736, the report was properly admitted and any weakness in the chain of custody was for the jury to weigh. This assignment of error is without merit.

[2] In defendant's third assignment of error, he argues that the trial court erred in denying his motion to dismiss the robbery with a dangerous weapon charge for insufficiency of the evidence. We disagree.

"In reviewing the denial of a defendant's motion to dismiss, this Court determines only whether the evidence adduced at trial, when taken in the light most favorable to the State, was sufficient to allow a rational juror to find defendant guilty beyond a reasonable doubt on each essential element of the crime charged." *State v. Cooper*, 138 N.C. App. 495, 497, 530 S.E.2d 73, 75, *aff'd per curiam*, 353 N.C. 260, 538 S.E.2d 912 (2000) (citation omitted). "The State is entitled to all inferences that may be fairly derived from the evidence." *Id.* Contradictions and discrepancies must be resolved in favor of the State. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). "In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citation omitted).

Defendant was not found guilty of robbery with a dangerous weapon. Defendant was found guilty of common law robbery, and thus we only address the sufficiency of the evidence to support that charge. "Common law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270 (1982). The evidence at trial, taken in the light most favorable to the State, shows that the defendant took a bottle of beer and a fifth of wine from the convenience store, hid the items in his clothing, and attempted to walk away without paying for them. In the process of attempting to elude capture by Yousif and Claami, defendant pulled a screwdriver and came at Yousif in a threatening manner. Yousif testified that he feared for his safety as a result of defendant's actions. We hold that the evidence was sufficient to go to the jury on the charge of common law robbery. This assignment of error is without merit.

[3] In defendant's fourth assignment of error he argues that the trial court erred in denying his motion to dismiss the habitual felon charge because possession of cocaine is a misdemeanor. We disagree.

Defendant relies on *State v. Jones*, 161 N.C. App. 60, 588 S.E.2d 5 (2003). The relevant holding in that opinion was reversed by *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004). This assignment of error is without merit.

[4] In defendant's first assignment of error, he argues that "The State's failure to provide a transcript of the proceedings in a timely fashion has deprived [him] of his constitutional and statutory rights to meaningful and effective appellate review." We disagree.

Judgment in this case was entered 19 February 1998. The transcript of these proceedings was not mailed by the court reporter until 2 February 2004, nearly six years after Judgment was entered. In this case, the court reporter should have delivered the transcript within 60 days from the date the clerk of the trial court served the order "upon the person designated to prepare the transcript." N.C. R. App. P. Rule 7(b)(1). The order issued pursuant to Rule 7 was delivered to the court reporter on 20 February 1998, and thus the transcript should have been delivered within 60 days thereafter absent a request for an extension of time. Defendant, through his attorney, first inquired about the transcript on 13 January 1999, then made several additional inquiries through 1 June 2000. Defendant then waited over three years

before again making inquiry on 19 November 2003. Defendant received the completed transcript on 10 February 2004.

This Court recognizes that " 'undue delay in processing an appeal *may* rise to the level of a due process violation.' " *State v. Hammonds*, 141 N.C. App. 152, 164, 541 S.E.2d 166, 175 (2000) (*quoting United States v. Johnson*, 732 F.2d 379, 381 (4th Cir. 1984) (citations omitted) (emphasis in original)). Determination of whether delay in processing an appeal rises to a due process violation is determined by the same factors used to determine whether pre-trial delay amounts to a denial of a defendant's right to a speedy trial under the Sixth Amendment of the United States Constitution. *Id.* Those factors are: "(1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay." *Hammonds*, 141 N.C. App. at 158, 541 S.E.2d at 172 (*citing Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972)). "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.*

Length of the Delay

"[T]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Hammonds*, 141 N.C. App. at 159, 541 S.E.2d at 172. A nearly six year delay in the production of the trial transcript constitutes a sufficient delay to trigger consideration of the other three factors. However: "Because the length of delay is viewed as a triggering mechanism for the speedy trial issue, 'its significance in the balance is not great.' " *Id.* (*citing State v. Hill*, 287 N.C. 207, 211, 214 S.E.2d 67, 71 (1975)). This Court has previously held that standing alone, a seven year delay in a defendant's appeal did not constitute a violation of his due process rights. *State v. China*, 150 N.C. App. 469, 564 S.E.2d 64 (2002).

Reason for the Delay

"The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort." *Hammonds*, 141 N.C. App. at 160, 541 S.E.2d at 173, *citing State v. Johnson*, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969). " 'The

burden is on an *accused* who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution.' " *Id.*

The record is devoid of any indication as to why the extensive delay took place. The court reporter was ordered by the trial court to prepare the transcript. This order was served on the court reporter on 20 February 1998. Defendant's attorney made several inquiries as to the status of the transcript over the following years, and it was finally received on 10 February 2004. Though defendant argues in his brief that "[t]hroughout this time, the State is aware of the situation and makes no effort to obtain the transcript . . ." there is absolutely nothing in the record to support this claim. The order for preparation of the transcript was entered by the trial court. The State has no role in the appeal process until defendant serves the State with the record on appeal. N.C. R. App. P. Rule 11. It was not the duty of the State to contact the court reporter or the court concerning the preparation of the transcript. This duty rested exclusively with the defendant and his counsel, as it is defendant's "duty and responsibility to see that the record is in proper form and complete. Rule 9(b)(3)(v) and (vii)" *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983). We are "unable to find that the delay is attributable to the prosecution." *Hammonds*, 141 N.C. App. at 164, 541 S.E.2d at 176.

Defendant's Assertion of His Right to a Speedy Appeal

The record is devoid of any indication that defendant, personally, ever asserted any right to a speedy appeal. According to the affidavit of defendant's attorney, he made several inquiries in the first two years following the appeal, then there is a period of nearly three years during which no inquiries were made. Defendant's attorney finally reinitiated contact with the court reporter on 19 November 2003 and received the transcript about three months later.

> Defendant could have contacted his attorney, the trial court, or the Clerk of this Court to determine the status of his appeal at any time between the time he gave notice of appeal and filed a petition for a writ of *certiorari* with our Court. In the speedy trial context, our Supreme Court has stated: "defendant's failure to assert his right to a speedy trial sooner in the process does not foreclose his speedy trial claim, *but does weigh against his contention that he has been denied his constitutional right to a speedy trial.*"

China, 150 N.C. App. at 474, 564 S.E.2d at 68 (citations omitted). Defendant's attorney, working on his behalf, should have sought an order from the trial court compelling the court reporter to produce the transcript in a timely manner. Defendant's failure to assert his right to a speedy appeal weighs against his contention that this right has been violated.

Prejudice

There are three recognized interests protected by a speedy appeal: 1) prevention of oppressive incarceration; 2) minimization of anxiety and concern of the defendant; and 3) limiting the possibility that the defense will be impaired. *See China*, 150 N.C. App. at 475, 564 S.E.2d at 69; *United States v. Johnson*, 732 F.2d 379, 382 (4th Cir., 1984). First, because we have held that defendant's appeal is otherwise without merit, the delay in perfecting his appeal has not led to any unwarranted incarceration. Second, defendant argues in his brief that he has "felt increased anxiety and an increased sense of hopelessness and loss of faith in our judicial system." However, the record is devoid of any evidence that defendant has suffered any anxiety or concern over the delay in his appeal. "Defendant has failed to show that he suffered any more anxiety than any other appellant." *China*, 150 N.C. App. at 475, 564 S.E.2d at 69. Finally, defendant has offered no evidence that the delay in production of the transcript has impaired his appeal in any way.

Although the delay of nearly six years in producing the trial transcript is inexcusable, after carefully weighing the four *Barker* factors we find no deprivation of defendant's due process rights.

NO ERROR.

Judge HUDSON concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

Although I believe that the majority applies the correct caselaw to the facts of the instant case, because I reach a different conclusion, I dissent.

As the majority correctly notes, none of the factors identified by our courts is dispositive of the issue of whether the delay in process-

ing a defendant's appeal rises to a due process violation. *State v. Hammonds*, 141 N.C. App. 152, 158, 541 S.E.2d 166, 172 (2000), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002). Instead, the factors should be considered together, along with " 'such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.' " *Id.* (quoting *Barker v. Wingo*, 407 U.S. 514, 533, 33 L. Ed. 2d 101, 118 (1972)).

In the instant case, the majority opinion describes the delay of defendant's appeal as "inexcusable," a description I find fitting considering the circumstances of the case. As detailed by the majority, due to the court reporter's inability to deliver a proper transcript to him, defendant was unable to properly appeal his conviction until six years after judgment was entered. In fact, at the time defendant eventually received the transcript, he had been imprisoned for six years—more than half the minimum amount of his sentence. During the delay, defendant's appellate counsel made approximately ten inquiries regarding the status of the trial transcript, at one point even hand-delivering a request to the court reporter's mailbox. I question whether an imprisoned defendant could or should be required to do more.

I note that where a pre-trial delay is challenged on appeal, a showing of a "particularly lengthy delay" establishes a *prima facie* case that the delay was caused by the neglect or willfulness of the prosecution. *State v. Chaplin*, 122 N.C. App. 659, 663, 471 S.E.2d 653, 655 (1996). In the instant case, I recognize that the delay was not due to the fault of the prosecutor. Nevertheless, I believe that where a six-year delay is accompanied by approximately ten status-requests by the appellant, at the very least the inability of the court reporter to comply with those requests should be characterized as neglectful. Therefore, I conclude that the length of the delay and the disregard of defendant's assertions of his right to a speedy appeal produced a due process violation in the instant case. Accordingly, I dissent.

THE CITY OF CHARLOTTE, A MUNICIPALITY, PLAINTIFF v. THOMAS ERTEL AND CANDICE ERTEL, DEFENDANTS

No. COA04-1110

(Filed 17 May 2005)

1. Eminent Domain; Evidence— fair market value—lay witnesses—opinion testimony

The trial court did not abuse its discretion in an airport expansion eminent domain case by preventing appellants from offering the testimony of four lay witnesses regarding the fair market value of appellants' property, because: (1) one witness's voir dire testimony tended to show that his opinion was based upon prior condemnation proceedings involving either his own property or other properties in the area which is an improper basis for valuing property in a current condemnation proceeding, and the noncondemnation property transfers of which he was aware or involved in occurred more than eight years prior to appellants' condemnation proceedings which the trial court found too remote to establish relevancy; (2) a second witness's testimony was excluded since his testimony would have to be intertwined with the condemnation overshadowing the process, and it would be fundamentally difficult for him to testify without something being said about the airport condemnation; (3) with respect to the third witness, his prior condemnation sale was unrelated to the airport expansion project and his two acre portion of the property was not being sold under threat of condemnation; and (4) even assuming arguendo that the fourth witness's testimony should have been included, appellants failed to demonstrate prejudice arising from the alleged error when the jury awarded more money than the value given by this witness.

2. Trials— motion for new trial—abuse of discretion standard

The trial court did not abuse its discretion in an eminent domain case by awarding appellants $680,000 plus interest for their property and by denying their motion for a new trial.

Appeal by defendants-appellants from judgment and order entered 19 May 2004 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 April 2005.

Christa C. Pratt and John P. Barringer for plaintiff-appellee.

Thomas D. Windsor for defendants-appellants.

TIMMONS-GOODSON, Judge.

Thomas Ertel ("Mr. Ertel") and Candice Ertel ("Ms. Ertel") (collectively, "appellants") were awarded $680,000.00 plus interest for the taking by eminent domain of their 7.18 acre tract of property and improvements in Mecklenburg County. Following the jury's verdict, appellants filed a motion for a new trial. On 19 May 2004, the trial court entered judgment and denied appellants' motion. For the reasons discussed herein, we affirm the judgment and order of the trial court.

The facts and procedural history pertinent to the instant appeal are as follows: In 2002, appellants were the owners of 7.18 acres of property situated in Mecklenburg County, North Carolina. On 18 April 2002, the City of Charlotte ("City") filed a declaration of taking regarding the property, whereby City exercised its eminent domain power to take and condemn the property in order to expand Charlotte-Douglas International Airport. City estimated the value of the property and its improvements, and, as full compensation for the taking, City deposited the sum of $650,000.00 with the Mecklenburg County Superior Court. On 17 May 2002, appellants filed an answer and demanded a jury trial on the issue of compensation, contending that the fair market value of the property exceeded the sum estimated and offered by City.

The case proceeded to trial the week of 12 January 2004. Prior to trial, City moved the trial court to prevent appellants from offering testimony regarding the fair market value of the property from witnesses who based their opinion on the fair market value of other condemned property in the area. The trial court reserved its ruling on the issue until it had an opportunity to determine the admissibility of each witness's testimony. At trial, City offered testimony regarding the fair market value of the property from four witnesses: three expert witnesses in the area of real estate and one lay witness. Appellants offered testimony regarding the fair market value of the property from five witnesses: three expert witnesses in the area of real estate, one lay witness, and Mr. Ertel. The trial court prevented appellants from offering testimony from the following four lay witnesses: Paul Norman ("Norman"), William Thorne ("Thorne"), Leonard Horne, Jr. ("Horne"), and Wade Goines ("Goines").

The only issue submitted to the jury was the fair market value of appellants' property. On 15 January 2004, the jury returned a verdict establishing the fair market value of the property at $680,000.00. The trial court thereafter entered judgment in favor of appellants and denied appellants' motion for a new trial. On 7 June 2004, appellants filed notice of appeal with this Court.

The issues on appeal are whether the trial court erred by: (I) excluding the testimony of Norman, Thorne, Horne, and Goines; and (II) denying appellants' motion for new trial.

[1] Appellants first argue that the trial court erred by excluding the testimony of Norman, Thorne, Horne, and Goines. Appellants assert that the witnesses should have been allowed to testify because of their familiarity with the property. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 701 (2003) provides as follows:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences 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.

N.C. Gen. Stat. § 8C-1, Rule 403 (2003) provides as follows:

> 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.

"[T]he balance struck by the trial court [regarding the admissibility of evidence] will not be disturbed on appeal absent a clear showing the court abused its discretion by admitting, or excluding, the contested evidence. A trial court abuses its discretion when its decision 'lack[s] any basis in reason.' " *Warren v. Jackson*, 125 N.C. App. 96, 99, 479 S.E.2d 278, 280 (1997) (quoting *Judkins v. Judkins*, 113 N.C. App. 734, 740, 441 S.E.2d 139, 142, *disc. review denied*, 336 N.C. 781, 447 S.E.2d 424 (1994)) (internal citations omitted).

In the instant case, during *voir dire* direct examination, Norman provided his opinion regarding the fair market value of appellants' property and explained that he was basing his opinion on previous sales of properties located in the area. On cross-examination,

Norman testified that some of these properties had been sold for the airport expansion project and under the threat of condemnation. Norman further testified that he had recently sold property of his own under threat of condemnation. On redirect examination, Norman testified that he had other personal experience in property sales, but that those sales had occurred between eight and fifteen years ago. The trial court thereafter excluded Norman from testifying during the trial, concluding that Norman's familiarity with appellants' property was limited, that his "experience with sales of other property himself other than his involving the airport authority is remote in time . . . [,]" and that "[t]he danger exists . . . of [Norman] drawing upon his experience in regard to the existence of the Airport Authority's expansion in regard to forming an opinion." The trial court thus determined that the probative value of Norman's testimony was "outweighed by the confusion of the issues and the prejudicial effect because evidence about sales to the condemning party would not be admissible." Appellants contend that the trial court should have allowed Norman to testify because he was familiar with appellants' property and any improper basis for his valuation of the property was a credibility issue to be explored by City on cross-examination. We disagree.

In *State v. Johnson*, 282 N.C. 1, 191 S.E.2d 641 (1972), our Supreme Court examined the admissibility of evidence regarding prior condemnation sales in a later condemnation proceeding. In *Johnson*, after the State declared its intent to condemn over 268 acres of property owned by the respondents, the trial court held a hearing to determine the fair market value of the respondents' property. During the hearing, the trial court allowed the respondents to introduce evidence of the purchase price of three similarly-situated parcels of property also acquired by the State through condemnation. On appeal, our Supreme Court held that it was prejudicial error for the trial court to allow such evidence into the record. *Id.* at 23, 191 S.E.2d at 656. The Court noted as follows:

> The majority rule is "that evidence as to the price paid by the same or another condemning agency for other real property which, although subject to condemnation, was sold by the owner without the intervention of eminent domain proceedings, is rendered inadmissible to prove the value of the real property involved merely because the property was sold to a prospective condemnor." The rationale is that a sale to a prospective condemnor is in effect a forced sale; that at best it represents a compromise and consequently furnishes no true indication of the

> price at which the property could be sold in the open market to a "willing buyer"; that the condemnor may pay more in order to avoid the expense and uncertainty of the condemnation proceeding, while the seller may accept less in order to avoid the same or similar burdens. This reasoning also applies to amounts paid by a condemnor for neighboring land taken for the same project—however similar the lands may be—whether the payment was made as the result of a voluntary settlement, an award, or the verdict of a jury.
>
> In some jurisdictions it is held that evidence of a sale otherwise competent is not necessarily inadmissible because the purchaser had the power of eminent domain. However, the burden is upon the party who offers such evidence to establish as a preliminary fact not only that the respective properties are comparable but also that the purchase was not so influenced by compromise or compulsion as to influence the price and therefore to destroy its usefulness as a standard of value. . . . [I]t is said that the burden of establishing the admissibility of evidence as to the price paid by a condemnor for other similar property "is a heavy one."
>
> . . . .
>
> It is our opinion that any sale to a prospective condemnor is highly unlikely to be a fair test of market value, and that a preliminary determination by the trial judge that the sale was not tainted by compulsion or compromise cannot establish it as a reliable standard. As the Court of Appeals of Kentucky said . . ., "We think that such an inquiry into matters of motivation ventures too far into the realm of speculation and is not a satisfactory substitute for the rule of no admissibility. We therefore adhere to the latter rule."

Id. at 22-23, 191 S.E.2d at 655-56 (citations omitted).

In the instant case, Norman's *voir dire* testimony tended to show that his opinion was based upon prior condemnation proceedings involving either his own property or other properties in the area. Those non-condemnation property transfers of which Norman was aware or involved in occurred more than eight years prior to appellants' condemnation proceedings, a time period the trial court found too remote to establish relevancy. Thus, were Norman to testify, the probative value of the evidence he offered regarding the fair market value of appellants' land would be based upon prior condemnation sales which, in light of *Johnson*, are an improper basis for valuing

property in a current condemnation proceeding. *See also Light Co. v. Sloan*, 227 N.C. 151, 154, 41 S.E.2d 361, 364 (1947) ("The market value of property is the price it will bring when it is offered by one who desires, but is not compelled to sell it, and is purchased by one who is under no necessity to buy it."). Furthermore, because our Supreme Court has noted that "[c]ross-examination as to prices paid by [a] condemnor for other tracts for the same project is improper[,]" *Barnes v. Highway Commission*, 250 N.C. 378, 395, 109 S.E.2d 219, 233 (1959), we are not persuaded by appellants' contention that the propriety of the basis of Norman's testimony goes to its credibility rather than its admissibility. Therefore, in light of the foregoing, we conclude that the trial court did not abuse its discretion by excluding Norman's opinion regarding the fair market value of appellants' property.

We note that the trial court similarly excluded Thorne from testifying at trial after concluding "that his testimony would have to be intertwined with the condemnation overshadowing the process[,]" and that "it would be fundamentally difficult for him to testify without something being said about the airport condemnation and the cross-examination would be so limited . . . ." During *voir dire* direct examination, Thorne testified that he believed appellants' property was worth $100,000.00 an acre, and he explained that he reached this conclusion after examining seven "comparable properties" during a transfer of his own property in 2002. However, Thorne also testified he "talked to people at other airports that owned property that was going through this process[,]" and that he "tried to sell [his] property [but] couldn't because everybody knew that it was going to be taken so [he] couldn't sell it." During cross-examination, Thorne testified that although he "started considering the value of [his] land when [he] bought it[,]" the 2002 appraisal of his own property was in response to condemnation proceedings brought by City in order to obtain property for the airport expansion project. Thorne further testified that he obtained the appraisal because his property was under the threat of condemnation, and he had since "settled" his "property situation" with City. In light of the foregoing, we also conclude that the trial court did not abuse its discretion by excluding Thorne's testimony.

With respect to Horne, the trial court found that four years prior to appellants' condemnation trial, Horne was involved in a condemnation sale to the Department of Transportation. The trial court further found that a two acre portion of Horne's property was currently under contract for sale at $700,000.00. Although the trial court noted

that the prior condemnation sale was unrelated to the airport expansion project and that Horne's two acre portion of property was not being sold under threat of condemnation, the trial court nevertheless prohibited Horne from testifying at trial, concluding that appellants had failed to provide a proper foundation "to show the similarity in the nature, location, and condition of the . . . other properties with which [] Horne is familiar to the land involved." We conclude that the trial court did not err.

"It is the rule in this State that the price paid at voluntary sales of land, similar in nature, location, and condition to the condemnee's land, is admissible as independent evidence of the value of the land taken if the prior sale was not too remote in time." *Johnson*, 282 N.C. at 21, 191 S.E.2d at 655. However, "the land must be similar to the land taken, else the evidence is not admissible on direct examination. . . . Only such parcels may be compared where the dissimilarities are reduced to a minimum and allowance is made for such dissimilarities." *Barnes*, 250 N.C. at 394, 109 S.E.2d at 231.

> Whether property involved in a voluntary sale is sufficiently similar in nature, location and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property is a question to be determined by the trial judge in the exercise of his sound discretion.

Highway Commission v. Coggins, 262 N.C. 25, 28, 136 S.E.2d 265, 267 (1964).

In the instant case, during *voir dire* direct examination, Horne testified that he had knowledge of the value of appellants' property and that appellants were entitled to "between eighty and a hundred thousand an acre for property like that." However, on cross-examination, Horne was unable to locate his own property on a map of the airport expansion area, and he admitted that his property was "off the map" of the airport expansion area. Horne further testified that he had not sold property on or near the road upon which appellants' property was located. Although Horne testified that he was basing his opinion regarding the fair market value of the property upon "what all the property in the neighborhood is bringing[,]" Horne further testified that his neighbors' property was also "at the same location" his property was located—"just off the map." When asked whether he knew of any property located on the same road and in the same area as appellants' that had sold for $80,000.00 to $100,000.00 an

acre, "in a private sale not under threat of condemnation[,]" Horne replied, "No, ma'am; I do not." In light of the foregoing, we conclude that the trial court did not abuse its discretion by excluding Horne's testimony because of the dissimilarities between the property he based his opinion upon and appellants' property.

With respect to Goines, although the trial court noted that Goines was familiar with appellants' property as well as other property values, the trial court nevertheless concluded that Goines' familiarity with the property values was insufficient "to provide competent evidence in regard to the opinion on this particular property." Appellants contend that Goines was "the best qualified of any witness offered" because of his "extensive business dealings" in real estate matters. However, we note that Goines concluded that appellants' property "would be worth seventy to eighty thousand dollars an acre[,]" a value significantly *less* than the approximately $95,000.00 an acre ultimately awarded by the jury. Therefore, assuming *arguendo* that the trial court erred in excluding Goines' testimony, we nevertheless conclude that appellants have failed to demonstrate prejudice arising from the alleged error.

In light of the foregoing conclusions, we hold that the trial court did not err in excluding the testimony of Norman, Thorne, Horne, and Goines. Accordingly, appellants' first argument is overruled.

[2] Appellants next argue that the trial court erred by denying their motion for a new trial. In support of this argument, appellants reassert their contentions regarding the exclusion of testimony from Norman, Thorne, Horne, and Goines.

"A trial judge's discretionary order made pursuant to Rule 59 for or against a new trial may be reversed only when an abuse of discretion is clearly shown." *Hanna v. Brady*, 73 N.C. App. 521, 525, 327 S.E.2d 22, 24, *disc. review denied*, 313 N.C. 600, 332 S.E.2d 179 (1985). "[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "During review, we accord 'great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for new trial.' " *Burgess v. Vestal*, 99 N.C. App. 545, 550, 393 S.E.2d 324, 327 (quoting *Bynum*, 305 N.C. at 487, 290 S.E.2d

at 605), *disc. review denied*, 327 N.C. 632, 399 S.E.2d 324 (1990). In the instant case, we have reviewed the record and we conclude that the trial court did not abuse its discretion by denying appellants' motion for a new trial. Accordingly, appellants' final argument is overruled.

In light of the foregoing conclusions, we affirm the trial court judgment awarding appellants $680,000.00 for their property and the trial court order denying appellants' motion for new trial.

Affirmed.

Judges CALABRIA and GEER concur.

IN THE MATTER OF: S.D.A., R.G.A., V.P.M., AND J.L.M., MINOR CHILDREN

No. COA04-54

(Filed 17 May 2005)

Child Abuse and Neglect— subject matter jurisdiction—investigation did not indicate abuse or neglect

The trial court lacked subject matter jurisdiction in a child abuse and neglect case based on the failure of Rutherford County DSS to follow its statutorily imposed duties under N.C.G.S. § 7B-302 prior to filing the petitions, and the trial court's orders are vacated, because: (1) following an investigation and follow-up investigation at the request of Rutherford County DSS, Lincoln County DSS stated its investigation revealed no evidence the children were neglected or abused by their legal custodians or any other member of the pertinent church; (2) nothing in the record indicates any additional reports were made or additional investigations conducted by Rutherford County DSS indicating that abuse or neglect had occurred; and (3) Rutherford County DSS's contention that the abuse and neglect alleged in the petitions involved reports of abuse and neglect by the mother and not the legal custodians conflicts with the central allegation in the petitions that the mother abused and neglected the children by leaving them in the care of the legal custodians at the church where they were allegedly subjected to harmful practices.

Appeal by Intervenors from orders entered 7 October 2003 by Judge C. Randy Pool in District Court, Rutherford County. Heard in the Court of Appeals 11 February 2005.

Dameron Burgin & Parker, P.A., by Phillip T. Jackson; and Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., by Eric M. Lieberman, David B. Goldstein, and Roger Bearden, pro hac vice, for intervenor-appellants.

Marshall & Roth, P.L.L.C., by Philip J. Roth, for S.D.A. and R.G.A.

Hamrick, Bowen, Mebane, Greenway & Lloyd, LLP, by Bradley K. Greenway, for Rutherford County Department of Social Services.[1]

Smathers & Norwood, by E. Robert Hensley, Jr., for the mother.[2]

WYNN, Judge.

It is axiomatic that a trial court must have subject matter jurisdiction over a case to act in that case. *In re N.R.M., T.F.M.*, 165 N.C. App. 294, 598 S.E.2d 147 (2004). Here, S.D.A., R.G.A., and the Covingtons contend that because the Lincoln County Department of Social Services (DSS) found no evidence of abuse and neglect, Rutherford County DSS, which referred the matter to the Lincoln County DSS for investigation due to a conflict, lacked the power to invoke the jurisdiction of the trial court under sections 7B-302(c) and (d) of the North Carolina General Statutes. We agree and therefore vacate the trial court's orders.

The record reflects that in 2000, a Florida court removed the four minor children in this matter from the custody of their mother due to neglect and substance abuse. The mother eventually moved from Florida to Spindale, North Carolina to reside with her sister, and soon thereafter the Florida court allowed the children to move to North Carolina as well.

In North Carolina, the mother and the children began attending religious services at the Word of Faith Fellowship ("Word of Faith"), an evangelical Christian church. The children were enrolled in the Word of Faith Christian School, a private Christian day school. At

1. The only writing filed by the Rutherford County Department of Social Services was a response to S.D.A., R.G.A., and Intervenors' motions to dismiss.

2. No brief was filed by the mother of the minor children.

the church and school, the children participated in religious practices, including "strong prayer," or "blasting," and "discipleship," or "isolation." Strong prayer refers to a strong demonstration of God and driving out of devils through screaming prayer. Discipleship refers to a practice where church members spend time alone, during which they may pray and listen to/watch tapes containing religious teachings. The record indicates that discipleship is also used for behavior modification and involves moving disruptive children from the regular classroom setting into another room where they may receive religious instruction.

The mother obtained employment with Kent Covington, a Word of Faith leader. Mr. Covington and his wife, Brooke, became involved with the mother and her children in February 2001.

In September 2002, the mother chose to leave Spindale because she felt that continuing as a member of Word of Faith was abusive and neglectful of the children. After meeting resistence at Word of Faith, the mother sought the assistance of the Rutherford County Sheriff's Department and was referred to Rutherford County DSS. Rutherford County DSS completed an assessment and recorded that the mother admitted to inappropriate discipline and a history of drug abuse that affected her ability to supervise and care for the children. The mother agreed voluntarily to place her children with the Covingtons until Rutherford County DSS deemed it appropriate to return the children. The mother then signed an agreement giving the Covingtons custody of the children. However, in December 2002, the mother appeared unannounced at the Covingtons' residence and demanded custody of the children. Her request was denied.

On 23 December 2002, the Covingtons filed an action in District Court, Rutherford County to confirm their status as legal custodians of the children. The court entered an *ex parte* order, confirmed by a temporary order of custody on 31 December 2002, granting the Covingtons custody.

On 23 December 2002 and 4 January 2003, Rutherford County DSS received reports alleging that the children were being abused and/or neglected through, *inter alia*, corporal punishment and religious practices, particularly "blasting" and "isolation." Rutherford County DSS referred the reports to Lincoln County DSS for an unbiased investigation into the allegations. Lincoln County DSS investigated the reports and, in March 2003, upon request by Rutherford County DSS due to new allegations, conducted additional investigation into particular Word of Faith practices. On 3 April 2003, Lincoln

County DSS closed its investigation and sent its decision by letter to Rutherford County DSS, stating: "[We] have completed our out-of-county investigation. The team decision was to unsubstantiate neglect. During the investigation there has been no evidence that [the four children] are neglected/abused by Brooke and Kent Covington or by any other member of Word of Faith."

Notwithstanding Lincoln County DSS's unsubstantiation of the abuse and neglect allegations, on 16 May 2003, Rutherford County DSS filed four petitions alleging that the minor children were abused and neglected from "June 2000 through present" because, *inter alia*, "[b]y returning her children to [Word of Faith's] influence . . . and surrendering custody to the Covingtons, the mother knowingly and willfully exposed her children to continued improper discipline and neglect." The petitions contained detailed allegations of "blasting" and "isolation."

By order filed 9 July 2003, the Covingtons were allowed to intervene as parties, the trial court finding "it is in the best interests of said minor children that [the Covingtons] should be subject to any court order entered in this case, and that [the Covingtons] are necessary parties to this action . . . ." On 21 August 2003, the trial court concluded that the children were abused and neglected and entered four separate orders on 7 October 2003 adjudicating abuse and neglect, ordering the removal of the children from the Covingtons' custody, and placing them in Rutherford County DSS custody. The Covingtons appeal from these orders.

The dispositive issue on appeal is whether the trial court lacked subject matter jurisdiction over this matter because Rutherford County DSS failed to follow its statutorily imposed duties prior to filing the petitions.[3] The issue of subject matter jurisdiction may be

3. "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (citing 1 Restatement (Second) of Judgments § 11, at 108 (1982)), *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citing W. Shuford, *N.C. Civil Practice and Procedure* § 12-6 (1981)).

In re N.R.M., T.F.M., 165 N.C. App. at 294, 598 S.E.2d at 149 (quoting *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003)).

raised at any time, and may be raised for the first time on appeal. *In re J.B.*, 164 N.C. App. 394, 396, 595 S.E.2d 794, 795 (2004); *McCombs v. N.C. Dep't of Human Res.*, 98 N.C. App. 402, 404, 390 S.E.2d 761, 762 (1990). Here, the issue of subject matter jurisdiction was brought to this Court's attention by counsel for two of the children and the Covingtons. However, "a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking.' " *In re N.R.M., T.F.M.*, 165 N.C. App. at 297, 598 S.E.2d at 149 (quoting *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 428 (2000)).

District courts have exclusive jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent. N.C. Gen. Stat. § 7B-200 (2003). However, "a trial court's general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action." *In re McKinney*, 158 N.C. App. at 447, 581 S.E.2d at 797 (citation omitted). " 'Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.' " *Id.* at 444, 581 S.E.2d at 795 (quoting *In re Transp. of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 558 (1991)).

North Carolina General Statutes section 7B-302(a) mandates that when a department of social services receives a report of abuse or neglect, "the director of the department of social services shall make a prompt and thorough investigation . . . ." N.C. Gen. Stat. § 7B-302(a) (2003). A referral to another county is permissible "[w]hen in the professional judgment of the county director the agency would be perceived as having a conflict of interest . . . ." 10A N.C.A.C. 70A.0103(b).[4] If the investigation indicates abuse or neglect, North Carolina General Statutes section 7B-302 provides two possible avenues through which the director of the department may invoke the jurisdiction of the court. If abuse or neglect is indicated by the investigation, but immediate removal does not appear necessary, the director must immediately provide or arrange for protective services. N.C. Gen. Stat. § 7B-302(c) (2003). If the parent or custodian refuses the protective services, then the department may invoke the court's juris-

4. We note that the North Carolina Division of Social Services Family Services Manual also permits referral to a sister county when a conflict of interest exists. Though the manual states that when an investigation is referred, the sister county is "solely responsible for the case decision," it also states that the counties should seek assistance in resolving any disagreements about the decision. North Carolina Division of Social Services Family Services Manual § 1410(V)(A)(7).

diction for the protection of the child(ren). *Id*. However, if immediate removal seems necessary, then the director shall sign a complaint alleging the applicable facts to invoke the jurisdiction of the court. N.C. Gen. Stat. § 7B-302(d) (2003). Under this statutory scheme, the two avenues for invoking the court's jurisdiction are available only when an investigation indicates that abuse or neglect has occurred.

The statute is silent on DSS's appropriate course of action if the investigation does not indicate abuse or neglect, and it may be inferred that no further steps are to be taken. This inference is supported by the North Carolina Administrative Code pertaining to DSS investigations, which states: "When a thorough investigation does not reveal abuse, neglect or dependency, the county director, shall . . . communicate to [any parent or caretaker who was alleged to have abused or neglected the child or children, any parent or other individual with whom the child or children resided at the time the county director initiated the investigation, and any agency with whom the court has vested legal custody] that the Department shall no longer be involved with the child or children on a non-voluntary basis."[5] 10A N.C.A.C. 70A.0108. Moreover, in *In re Stumbo*, 357 N.C. 279, 286-89, 582 S.E.2d 255, 258-61 (2003), an informative if not analogous case, our Supreme Court held a trial court's order must fail where a report did not legally constitute a report of abuse or neglect sufficient to invoke the investigatory power of DSS under North Carolina General Statutes section 7B-302(a). The Court held: "Having concluded that the investigative mandate of N.C.G.S.§ 7B-302 was not properly invoked, it follows that the trial court's order based upon the petition filed pursuant to N.C.G.S. § 7B-303 charging the parents with interference with or obstruction of an investigation must fail." *Id*. at 289, 582 S.E.2d at 261.

Here two reports of abuse and neglect were received by Rutherford County DSS; these reports contained allegations of, *inter alia*, "blasting" and "isolation." The two reports triggered Rutherford County DSS's statutory duty to conduct an investigation. N.C. Gen. Stat. §7B-302(a). Due to concern regarding a conflict, Rutherford County DSS referred the reports to Lincoln County DSS. 10A N.C.A.C. 70A.0103(b). Following an investigation and follow-up investigation

5. This is further substantiated by the North Carolina Division of Social Services Family Services Manual, which states: "If the case decision is to unsubstantiate, a determination should be made as to what agency services or outside resources, if any, would be helpful. These services can be offered and referrals suggested, but the family may refuse." North Carolina Division of Social Services Family Services Manual § 1408(III)(C)(II)(b).

at the request of Rutherford County DSS, Lincoln County DSS decided to unsubstantiate the allegations, stating their investigation revealed no evidence the children were neglected or abused by the Covingtons or any other member of Word of Faith and noting "no concerns for the [] children."

In its response to the motions to dismiss,[6] Rutherford County DSS stated "the investigation by the Rutherford County Department of Social Services' [sic] involved reports of abuse and neglect by the Respondent mother and not the Intervenor-Appellants." Rutherford County DSS failed, however, to cite anything in the record indicating that additional reports were made or additional investigations conducted. Nothing in the record indicates any additional reports of abuse and/or neglect or a new investigation by Rutherford County DSS indicating that abuse and/or neglect occurred.[7] Indeed the record supports the conclusion that no further reports or investigations occurred: A 19 September 2003 guardian *ad litem* report stated that Rutherford County DSS "later filed the Petitions regarding the minor children despite Lincoln County's failure to substantiate[;]" in contrast to the lengthy testimony by Lincoln County DSS investigators, no Rutherford County DSS investigators testified at the hearings; and a Lincoln County DSS investigator testified that "To my knowledge, the two reports that we received . . . those two reports were made on these children, and to my knowledge, there was not any other reports [sic] made on these children." Moreover, Rutherford County DSS's contention that the abuse and neglect alleged in the petitions involved reports of abuse and neglect by the mother and not the Covingtons conflicts with the central allegation in the petitions that the mother abused and neglected the children by leaving them in the care of the Covingtons at Word of Faith, where they were subjected to harmful practices.[8]

---

6. We note that, in violation of Rule 37 of the Rules of Appellate Procedure, Rutherford County DSS's response to the motions to dismiss was filed on 22 July 2004, more than ten days after the motions to dismiss were filed on 6 May 2004 and 8 July 2004.

7. The only suggestion of additional investigation, but not of additional reports of abuse or neglect, was an assertion by the mother's counsel that "it's my understanding that Rutherford County continued the investigation."

8. We also note that the trial court, in its order deeming the Covingtons necessary parties to the action, found that:

> Petitioner alleges that these said minor children are abused juveniles, in that Respondent mother . . . voluntarily returned physical possession of the children to [the Covingtons], and later she gave [the Covingtons] the permanent care, custody and control of said minor children, and that [the Covingtons] (by implication)

Rutherford County DSS thus lacked the power to invoke the jurisdiction of the court under North Carolina General Statutes sections 7B-302(c) or (d) because the investigation did not indicate that abuse or neglect had occurred. Consequently, non-voluntary involvement should have ceased with regard to the 23 December 2002 and 4 January 2003 reports of abuse and neglect following Lincoln County DSS's unsubstantiation. Because the proper procedure under North Carolina General Statutes section 7B-302 was not followed to invoke the jurisdiction of the court, the trial court lacked subject matter jurisdiction in the underlying cases.

Accordingly, we vacate the orders and remand the four underlying cases to the trial court for dismissal.

Vacated and remanded.

Judges CALABRIA and JACKSON concur.

MONA LISA SMYTHE, EMPLOYEE, PLAINTIFF v. WAFFLE HOUSE, EMPLOYER, AND OSTEEN ADJUSTING SERVICES, INC., SERVICING AGENT, DEFENDANTS

No. COA04-225

(Filed 17 May 2005)

1. Workers' Compensation— settlement agreement—approval—biographical and vocational information—fairness

The Industrial Commission may not approve a workers' compensation settlement agreement without the biographical and vocational information required by statute and without a determination of the agreement's fairness. This record lacked medical evidence. N.C.G.S. § 97-17 and N.C.G.S. § 97-82.

2. Workers' Compensation— settlement agreement—approval—fairness

The issue of whether a workers' compensation settlement should have been set aside for insufficient information upon which to determine fairness as required by Industrial Commission Rule 502 was properly raised below.

---

have the said minor children involved in the harmful practices of the Word of Faith Fellowship Church, and that Respondent mother has willfully exposed these said minor children to "continued additional abuse" by allowing cruel and grossly inappropriate devices or procedures to modify behavior to be used upon said minor juveniles by returning said minor children to [the Covingtons].

3. Workers' Compensation— settlement agreement—approval—required information

It is impermissible for the Industrial Commission to make a determination regarding the fairness of a settlement agreement without the information required by Industrial Commission Rule 502(2)(h) where plaintiff had not returned to work for the same or greater wages and she was unrepresented by counsel when she entered the settlement agreement. Here, there was no mention of plaintiff's age, education, training, or experience.

4. Workers' Compensation— accord and satisfaction—settlement agreement—not properly approved

There could be no accord and satisfaction of a workers' compensation claim based on a settlement which was not properly approved and was therefore not a final agreement.

Appeal by plaintiff from opinion and award entered by the North Carolina Industrial Commission on 15 May 2003. Heard in the Court of Appeals 2 November 2004.

Ganly & Ramer, by Thomas F. Ramer, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Shelley W. Coleman, for defendant-appellees.

HUDSON, Judge.

Acting *pro se*, plaintiff filed a Form 33 with the Industrial Commission on 30 October 2001, requesting to set aside her previously approved settlement agreements with defendants, signed in May and amended in September of 2001. After a hearing at which plaintiff represented herself, Deputy Commissioner Edward Garner issued an opinion and award on 24 June 2002 setting aside the settlement agreements based on findings of misrepresentation. Defendants appealed to the Full Commission, which reversed the Commissioner's opinion and award on 15 May 2003. Plaintiff appeals. For the reasons discussed below, we reverse.

The evidence tends to show that on 26 August 1999, while employed as a waitress by defendant employer, plaintiff slipped and fell, sustaining an admittedly compensable injury to her left knee. She was diagnosed with a left ACL tear and a medial meniscus tear and began treatment with Dr. Greg Motley, an orthopedic surgeon. On 22 October 1999, Dr. Motley operated on plaintiff's knee. He released plaintiff to return to work in January 2000 in a light duty position.

Dr. Andrew Rudins examined plaintiff on 11 January 2000 and determined that unless plaintiff had ACL reconstruction, she had reached maximum medical improvement. Dr. Rudins believed plaintiff had a permanent partial impairment rating of 29% to her left knee. Plaintiff continued with treatment while working in a light duty position, until Dr. Motley performed a second surgery on 19 October 2000. In December of 2000, plaintiff's physicians again recommended ACL reconstruction and plaintiff agreed. Defendants had paid for most of plaintiff's medical procedures to this point. Plaintiff was admitted to the hospital 21 March 2001 for the recommended ACL surgery which was postponed. The surgery was rescheduled twice, and ultimately not performed, because of defendants' refusal to authorize payment. The record before us contains no evidence that plaintiff returned to any form of wage-earning activity after 19 October 2000.

Plaintiff was represented by counsel in her workers' compensation case from March 2000 until April 2001, when she released her attorney. During this period, plaintiff's attorney communicated with defendants and the Commission. However, once she discharged her attorney, plaintiff began contacting defendants directly and discussing settlement of her claim for specific sums of money. After several rounds of negotiation, plaintiff agreed to accept $24,000 to settle her workers' compensation claim. On 15 May 2001, she met with defense counsel at their offices, where she signed a "Release of Employment Claims" for $2,000, as well as a separate workers' compensation settlement ("clincher") agreement for $24,000. Plaintiff signed the Release of Employment Claims agreement first, and before plaintiff signed the clincher agreement, a hospital called requesting authorization for plaintiff's rescheduled knee surgery. Defendant denied this request. On or about 31 May 2001, Deputy Commissioner Richard B. Ford issued an order approving the settlement. Defendants then paid plaintiff pursuant to the agreement and she cashed the $24,000 check.

On 26 September 2001, the attorney who represented plaintiff in her Social Security Disability claim contacted defendants and requested that they execute an amended settlement agreement which included language to address the offset of those benefits due to the worker's compensation settlement. Counsel for defendants agreed and the revised, executed agreement was approved by a Deputy Commissioner on 17 October 2001. Still *pro se* in her workers' compensation claim, plaintiff filed her Form 33 on 30 October 2001.

Defendants contend in their brief that the appeal should be dismissed due to violations of the Rules of Appellate Procedure, including failure to provide all necessary documents in the Record on Appeal (Rule 18) and failure to serve unpublished authority (Rule 30(e)(3)). However, defendants also filed a separate motion to dismiss, raising the same issues. By order, 14 July 2001, this Court denied defendants' motion to dismiss before the case was assigned to this panel. As we are bound by this ruling, we need not address these arguments.

[1] Plaintiff argues that the Commission erred by failing to undertake a full investigation to determine if the settlement agreement here was fair and just, as required by N.C. Gen. Stat. §§ 97-17 and 97-82. We agree.

The Industrial Commission must review all compromise settlement agreements to make sure they comply with the Workers' Compensation Act and the Rules of the Industrial Commission, and to ensure that they are fair and reasonable. *Vernon v. Mabe Builders*, 336 N.C. 425, 444 S.E.2d 191 (1994); *Biddix v. Rex Mills*, 237 N.C. 660, 75 S.E.2d 777 (1953). Pursuant to N.C. Gen Stat. § 97-17 (a) (2000), all workers' compensation settlement agreements must be filed with and approved by the Commission. This statute also states that "[t]he Commission *shall not approve* a settlement agreement . . . unless . . . [it] is deemed by the Commission to be *fair and just*." N.C. Gen Stat. § 97-17 (b)(1) (emphasis added). N.C. Gen Stat. § 97-82 (2000) permits memoranda of agreement, subject to approval of the Commission, in certain cases and addresses payment and enforceability of such agreements. The Courts have applied these requirements to clincher agreements as well as those entered in ongoing cases, such as those involving Form 26. *See Vernon*, 336 N.C. 425 at 433, 444 S.E.2d 191 at 195.

The Commission is the "sole judge of the weight and credibility of the evidence." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). This Court thus limits its review to determining whether "any competent evidence" supports the Commission's findings of fact and whether these findings support the Commission's conclusions of law. *Id.* However, we review the Commission's legal conclusions *de novo*. *Hilliard*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). "[W]hen the findings are insufficient to determine the rights of the parties, the court may remand to the Industrial Commission for additional findings." *Id.*

Here, the plaintiff does not take issue with any of the Commission's findings of fact. Indeed, the Commission did not make any findings of fact regarding the fairness of the agreement or whether it complied with N.C. Gen. Stat. §§ 97-17 and 97-82, or Industrial Commission Rule 502. Although the Commission found that there was no evidence of fraud, misrepresentation, undue influence, or mistake of fact, it did not address whether the agreement was fair or whether the Commission possessed sufficient information upon which to base a determination of fairness. By its own terms, N.C. Gen. Stat. § 97-17 (b) is mandatory and the Commission may not approve a settlement without addressing the fairness of the agreement. The Supreme Court in *Vernon* held that:

> [T]he statute requires, on the part of the Commission, a full investigation and a determination that a Form 26 compensation agreement is fair and just, in order to assure that the settlement is in accord with the intent and purpose of the Act that an injured employee receive the disability benefits to which he is entitled, and, particularly, that an employee qualifying for disability compensation under both sections 97-29 and -31 have the benefit of the more favorable remedy.

336 N.C at 432-33, 444 S.E.2d at 195. Similarly, in *Atkins v. Kelly Springfield Tire Co.*, this Court set aside a compensation agreement approved by the Industrial Commission because it was submitted to the Commission without complete medical records, as required per N.C. Gen. Stat. § 97-82 (a) and Rule 501(3). 154 N.C. App. 512, 571 S.E.2d 865 (2002), *disc. review granted*, 357 N.C. 61, 579 S.E.2d 284 (2003), *disc. review improvidently granted*, 358 N.C. 540, 597 S.E.2d 128 (2004). The Court concluded that it was "statutorily impermissible" for the Commission to determine that the agreement was "fair and just" without a review of the full medical records. *Id.* at 514, 571 S.E.2d at 867.

In this record, it appears that plaintiff did not return to employment after October 2000, and was not working at the time of the settlement. We are unable to determine, which, if any, medical records were before the Commission when the agreement was approved, or during the subsequent litigation to set it aside, since no medical evidence at all appears in the record. As such, we see no evidence from which the Commission could have determined the fairness of the agreement. Thus, we hold that the Commission's conclusion that "[t]here is insufficient evidence to justify setting aside the Compromise Settlement Agreements in this case" is not supported by

competent evidence or necessary findings. As in *Atkins*, we conclude that it was statutorily impermissible for the Commission here to approve the settlement agreement without the required biographical and vocational information, and the Commission should have set aside its order of approval.

[2] Plaintiff also contends that the Commission erred by not setting aside the agreement for failure to comply with Industrial Commission Rule 502(2). Defendant argues that plaintiff failed to properly raise this issue below and thus that it is not properly before this Court. However, we conclude that plaintiff's Form 33 and the assertion in her brief to the Full Commission, that the settlement agreement should be set aside because it "does not contain sufficient information upon which to base a determination regarding it's [sic] fairness," sufficiently raised the issue below.

[3] Industrial Commission Rule 502 provides that all settlement agreements must be submitted to the Commission for approval and will only be approved if "deemed fair and just and in the best interest of all parties." Rule 502(1). This requirement is in accordance with N.C. Gen. Stat. § 97-17 and the discussion above. Rule 502(2)(h) further provides that:

> (2) No compromise agreement will be approved unless it contains the following language or its equivalent:
>
> . . .
>
> h. Where the employee has not returned to a job or position at the same or greater average weekly wage . . . the agreement shall summarize the employee's age, educational level, past vocational training, past work experience, and any impairment . . . which predates the current injury . . . . This subsection of the Rule shall not apply where employee is represented by counsel . . .

Here, the face of the compromise agreement indicates that plaintiff had not returned to work for the same or greater wages and it is undisputed that plaintiff was unrepresented when she entered the agreement in May 2001. Thus, these more specific requirements of Rule 502(2)(h) apply to the agreement here. However, the settlement agreement here does not contain any of the information required under Rule 502(2)(h). It contains no mention of plaintiff's age, educational level, past vocational training, or past work experience. As

mentioned above, this Court held in *Atkins* that it is impermissible for the Commission to determine that a settlement agreement was "fair and just" without the medical records required by Rule 503. 154 N.C. App. at 514, 571 S.E.2d at 867. Likewise, we conclude that is impermissible for the Commission to make a determination regarding the fairness of a settlement agreement without the information required by Rule 502 (2)(h).

[4] Defendant also asserts that plaintiff's appeal is barred by the doctrine of accord and satisfaction, as she cashed defendant's check after signing the settlement agreement.

> An 'accord' is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim . . . arising either from contract or tort, something other than or different from what he is, or considered himself entitled to; and a 'satisfaction' is the execution or performance, of such agreement.

Zanone v. RJR Nabisco, Inc., 120 N.C. App. 768, 772, 463 S.E.2d 584, 587 (1995) (internal citation omitted). However, because we have concluded that the settlement agreement was not properly approved by the Commission, as required by the Workers' Compensation Act, it thus was not a final agreement. We conclude that there could be no accord and satisfaction of an agreement which has not been properly finalized. We do not address whether defendant is entitled to a credit for the amount of the settlement.

Because the Commission lacked information to make a determination of the agreement's fairness, as required by N.C. Gen. Stat. § 97-17 and Rule 502, we reverse and remand to the Full Commission to enter an order vacating the approval of the settlement agreement, and for further proceedings as necessary.

Reversed and remanded.

Judges WYNN and ELMORE concur.

IN RE: J.J.L., E.F.L., S.A.L.

No. COA04-1025

(Filed 17 May 2005)

Child Abuse and Neglect— permanency planning—concurrent adoption and reunification plans

A concurrent plan for the adoption of neglected children and reunification with their parents did not conflict with the requirement of N.C.G.S. § 7B-907(a) that permanent placement be obtained within a reasonable time and was affirmed where the court found at a permanency planning hearing that reunification would not then be in the best interests of the children, but that the mother had complied with court orders and that reunification should remain a part of the plan. The plain meaning of the relevant statutory language provides the courts with the option of implementing reunification efforts concurrently with other permanent placement plans, including adoption, and the plan in this case complies with statutory requirements. N.C.G.S. § 7B-507(d).

Appeal by respondent-father from order entered 29 January 2004 and corrected order entered 25 March 2004 by Judge L. Suzanne Owsley in Burke County District Court. Heard in the Court of Appeals 23 March 2005.

Leslie C. Rawls for respondent.

Stephen M. Schoeberle for petitioner Burke County Department of Social Services.

Attorney Advocate Mary R. McKay for J.J.L., E.F.L., and S.A.L.

BRYANT, Judge.

E.L.[1] (respondent) appeals from a permanency planning order continuing reunification efforts and adopting a concurrent plan of adoption. For the reasons herein discussed, we affirm the order of the court.

Facts

On or about 29 March 2000, Burke County Department of Social Services (DSS) filed petitions alleging that the three children who are

1. Initials have been used throughout to protect the identity of the juveniles.

the subject of this appeal were neglected. The children were thereafter adjudicated neglected.

On 29 January 2004, a permanency planning hearing was conducted in Burke County District Court with the Honorable L. Suzanne Owsley presiding. Reports from both the Guardian *ad litem* (GAL) and DSS recommended termination of any reunification efforts as being in the best interest of the children and that the court adopt a plan of adoption. The court found that reunification with the parents would currently not be in the best interest of the children, but because of the mother's compliance with court orders, reunification was to remain part of the concurrent plan, along with adoption. The court entered a permanency planning order adopting concurrent plans of reunification and adoption. Respondent-father appeals[2].

The sole issue before this Court is the proper interpretation of N.C. Gen. Stat. § 7B-507(d); specifically, whether the provisions allowing a plan of adoption to be made concurrently with a plan of reunification conflict with the statutory requirement that a permanent placement plan "achieve a safe, permanent home for the juvenile *within a reasonable time*." N.C.G.S. § 7B-907(a) (2003) (emphasis added)[3].

" 'The primary rule of statutory construction is that the intent of the legislature controls the interpretation of the statute.' " *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (citation omitted). " 'The will of the legislature must be found from the plain language of the act, its legislative history and the circumstances surrounding adoption.' " *Whitman v. Kiger*, 139 N.C. App. 44, 46, 533 S.E.2d 807, 808 (2000) (citation omitted), *aff'd*, 353 N.C. 360, 543 S.E.2d 476 (2001). "If the language of the statute is clear, this Court must implement the statute according to the plain meaning of its terms." *Roberts v. Young*, 120 N.C. App. 720, 724, 464 S.E.2d 78, 82 (1995).

Respondent concedes in his brief that concurrent plans of reunification and adoption are authorized by N.C. Gen. Stat. § 7B-507(d) but argues that in this case, concurrent plans do not comply with the requirement of N.C. Gen. Stat. § 7B-907(a) that permanent placement be achieved within a reasonable period of time. We disagree.

---

2. Respondent-mother does not appeal.

3. Respondent failed to address assignment of error number 2. Pursuant to N.C. R. App. P. 28(b), this assignment of error is therefore deemed abandoned.

N.C. Gen. Stat. § 7B-907 provides in pertinent part:

> (a) . . . The purpose of the permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable time. . . .
>
> . . .
>
> (c) At the conclusion of the hearing, the judge shall make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time. . . .
>
> If the court continues the juvenile's placement in the custody or placement responsibility of a county department of social services, *the provisions of G.S. 7B-507 shall apply to any order entered under this section.*

N.C.G.S. § 7B-907(a), (c) (2003) (emphasis added).

N.C. Gen. Stat. § 7B-507 provides:

> (a) An order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order:
>
> > (1) Shall contain a finding that the juvenile's continuation in or return to the juvenile's own home would be contrary to the juvenile's best interest;
> >
> > (2) Shall contain findings as to whether a county department of social services has made reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined under subsection (b) of this section that such efforts are not required or shall cease;
> >
> > (3) Shall contain findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile[.]
> >
> > . . .
>
> (d) In determining reasonable efforts to be made with respect to a juvenile and in making such reasonable efforts, the juvenile's health and safety shall be the paramount concern. *Reasonable efforts to preserve or reunify families may be made concur-*

> *rently with efforts to plan for the juvenile's adoption*, to place the juvenile with a legal guardian, or to place the juvenile in another permanent arrangement.

N.C.G.S. § 7B-507(a),(d) (2003) (emphasis added). The plain meaning of the above statutory language provides courts with the option of implementing other permanent placement plans, including adoption, concurrently with reunification efforts. "Where the language of the statute is clear, the courts must give the statute its plain meaning." *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999).

In addition, the concurrent plan of reunification and adoption as ordered in this case complies with N.C. Gen. Stat. § 7B-907(b) which states:

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

N.C.G.S. § 7B-907(b) (2003).

In its correction to the original order, the court made findings regarding the possibility of the children returning home within six months, where the children were to be placed during that time, and whether adoption should be pursued and any barriers to adoption. The court's relevant findings are as follows:

> (6) Due to the juveniles' fears, it is not possible to return the juveniles to their parents immediately or within 6 months. Reunification if it is to occur will be the result of a long process.
>
> (7) The juveniles remain placed with [JJ], who previously was married to Mr. L's stepbrother, and they appear to be doing well there. No other appropriate relatives are available for possible placement. [JJ] would like to adopt the juveniles should they become free for adoption. The only barrier to adoption is that the parents' parental rights have not been terminated.

Therefore, the court made written findings concerning relevant factors as required by N.C. Gen. Stat. § 7B-907(b). Further, by adopting a concurrent placement plan of reunification and adoption the court complied with the provisions of N.C. Gen. Stat. § 7B-507 as required by N.C. Gen. Stat. § 7B-907(c) ("If the court continues the juvenile's placement in the custody or placement responsibility of a county department of social services, *the provisions of G.S. 7B-507 shall* apply to any order entered under this section."). N.C.G.S. § 7B-907(c) (emphasis added).

N.C. Gen. Stat. § 7B-507, reiterates the well established principle that the main factor in determining placement issues is the welfare of the child. *See* N.C.G.S. § 7B-507(d) ("the juvenile's health and safety shall be the paramount concern"); *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984) ("the best interest of the child is the polar star"); *Wilson v. Wilson*, 269 N.C. 676, 678, 153 S.E.2d 349, 351 (1967) ("welfare of the child is always to be treated as the paramount consideration"). Here, the court concluded that the best interest of the children would not be served by returning the children to either parent. Instead, the court concluded that it would be best for the children to remain in their current placement with JJ. However, because the mother had attended counseling, was employed, submitted to random drug testing and was not involved in inappropriate or criminal activity, the court continued reunification efforts despite the recommendations of DSS and GAL.

As for respondent, the court found that he had not fully complied with court orders. Respondent had not completed either substance

abuse treatment or psychological or anger management assessments. Also, respondent submitted to a drug test two days after it was requested.

Respondent's contention that the concurrent plan of reunification and adoption makes the responsibilities of the parents and DSS unclear is without merit. The court in its order set out specifically what each party was to do in the effort to establish permanent placement for the children. The court ordered that respondent continue his NA/AA classes, submit to two (2) random drug screening tests before the next hearing, provide current contact information to DSS, comply with the recommendations of his psychological evaluation and enroll within 14 days in an anger management or domestic violence program and attend every scheduled session. The mother was to continue cooperation with DSS. Also, the court ordered the children to continue therapy and allowed limited supervised visitation with the mother. Custody was continued with DSS and placement with JJ was specifically approved. The order provided for respondent, the mother, and DSS to move towards reunification. Also, the order established the terms for DSS to move towards adoption. The parties' responsibilities were clearly stated in the order.

Furthermore, the concurrent plan did not place the children in "limbo" as respondent claims. The children were to remain with JJ, with whom they had been currently placed. JJ stated she was willing to adopt the children and DSS was ordered to move towards adoption creating at least one option that provided stability for the children. Continuing placement with JJ, a person the children were familiar with, gave some sense of permanency to the children.

It is a forgone conclusion that concurrent placement plans are allowed under the statute as evidenced by this Court affirming numerous cases adopting concurrent placement plans. *See In re Derreberry*, No. COA02-1238, 160 N.C. App. 252, 2003 N.C. App. LEXIS 1763 (unpublished opinion) (concurrent plan of placement with relative and adoption or reunification affirmed); *In re Hensley*, No. COA02-1371, 157 N.C. App. 716, 2003 N.C. App. LEXIS 969 (unpublished opinion) (concurrent plan of guardianship and adoption affirmed); *In re Brown*, No. COA-03-346, 162 N.C. App. 547, 2004 N.C. App. LEXIS 214 (unpublished opinion) (affirming concurrent plan of reunification, termination of parental rights, and adoption). In *In re Brown*, this Court held "the . . . order . . . establishing a permanent care plan of reunification with respondents with a concurrent plan of

termination of parental rights and adoption did not violate the Juvenile Code's purposes and policies." *Id.*

Based on the foregoing, we hold that a concurrent permanent placement plan of reunification and adoption as allowed under N.C. Gen. Stat. § 7B-507(d) does not conflict with the requirement of N.C. Gen. Stat. § 7B-907(a) to obtain permanent placement within a reasonable period of time.

Affirmed.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. KENNY EDWARD BUFF, JR.

No. COA04-549

(Filed 17 May 2005)

1. Evidence— videotape recordings—authentication

The trial court did not err in a second-degree rape and attempted second-degree sex offense case by permitting the showing of video images, because: (1) the video was properly authenticated by a witness who testified that he was present for all of the video, that it accurately depicted the events he personally witnessed, and that the camera appeared to be in good working order, and an officer testified that he confiscated the videotape pursuant to a search warrant and that the tape had not been changed or altered since it was seized; and (2) as the portions of the tape defendant contends were inflammatory were not shown at trial, defendant's contentions regarding a violation of N.C.G.S. § 8C-1, Rule 403 are without merit.

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

Although defendant contends the trial court erred in a second-degree rape and attempted second-degree sex offense case by permitting hearsay evidence to be admitted in a statement read to the jury by an SBI agent, this issue was not properly preserved for review because: (1) defendant made a general

objection as to the statement, and he failed to make any additional objection after the trial court gave a limiting instruction that the statement was to be considered solely for corroborative purposes; and (2) defendant does not allege plain error in his assignment.

3. Rape— second-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree rape, because taken in the light most favorable to the State: (1) the victim's testimony established that defendant engaged in sexual intercourse with her and that she never consented; (2) a witness testified that he observed defendant engaging in sexual intercourse with the victim; (3) sufficient evidence was offered as to the victim's physical helplessness based on the large quantity of alcohol that she had consumed, her lack of experience with intoxicating beverages, her subsequent illness, and her repeated loss of consciousness; (4) another witness testified that the victim appeared to be sleeping or passed out when she checked on the victim throughout the party; and (5) although defendant challenges the victim's credibility, such a question is properly for the jury to resolve.

4. Sexual Offenses— attempted second-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of attempted second-degree sexual offense, because taken in the light most favorable to the State, the evidence revealed that defendant committed several overt acts including touching the victim's breast and vaginal area while the victim was physically helpless, demonstrating intent to commit a sexual act against the victim's will and without her consent.

Appeal by defendant from judgments entered 24 September 2003 by Judge Ronald K. Payne in Rutherford County Superior Court. Heard in the Court of Appeals 16 February 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Karen A. Blum, Special Deputy Attorney General Lars F. Nance, and Certified Legal Intern Kerry Lynn Adams, for the State.

William D. Auman for defendant-appellant.

HUNTER, Judge.

Kenny Edward Buff, Jr. ("defendant") appeals from judgments dated 24 September 2003 entered consistent with jury verdicts finding him guilty of second degree rape and attempted second degree sex offense. After careful consideration of defendant's arguments, we find no error.

The evidence tends to show that on 11 January 2003, L.W., thirteen years old at that time, went to the home of defendant's grandmother with her fourteen-year-old cousin, K.S. After a few hours, L.W., K.S., and defendant went to Andrew Bradley's ("Bradley") home and joined a group of teenagers already there. A home video camera operated by Bradley was used to tape L.W., defendant, and others present at Bradley's home for part of the evening.

Various types of liquor were present, and L.W. drank four shots of liquor poured for her by defendant and Bradley. L.W. testified that she became increasingly dizzy and laid down on a mattress in a corner of Bradley's bedroom after drinking the shots. L.W. further stated that she blacked out for portions of the remainder of the night.

After the videotaping ended, L.W., defendant, and Bradley remained in Bradley's bedroom together, along with Daniel Toms ("Toms") and Grady Alan Waters ("Waters"), while others watched videos in another room. L.W. testified that she blacked out while lying on the mattress in the corner of the room, and that when she came to, defendant had removed her pants and was on top of her. He then began having sexual intercourse with her. L.W. testified Bradley put his hand over her mouth to keep her from crying out during the incident, and when defendant was finished, Bradley had sex with her. L.W. stated she again lost consciousness and did not wake up until the following morning. Toms and Waters also testified that defendant engaged in sexual intercourse with L.W.

Defendant was charged with second degree rape and attempted second degree sex offense and was found guilty by a jury of both charges. Defendant was sentenced to 100 to 129 months for the crime of second degree rape, and a concurrent sentence of 82 to 108 months for the crime of attempted second degree sex offense. Defendant appeals.

I.

[1] Defendant first contends the trial court erred in permitting the showing of video images as they were not properly authenticated and as the evidence was more prejudicial than probative. We disagree.

"Videotape recordings may be admitted into evidence where they are relevant and have been properly authenticated." *State v. Billings*, 104 N.C. App. 362, 371, 409 S.E.2d 707, 712 (1991); *see* N.C. Gen. Stat. § 8-97 (2003). "The video tape should be admissible under the rules and for the purposes, then, of any other photographic evidence." *State v. Johnson*, 18 N.C. App. 606, 608, 197 S.E.2d 592, 594 (1973). "Such evidence may be admitted to illustrate the testimony of a witness or as substantive evidence." *Billings*, 104 N.C. App. at 371, 409 S.E.2d at 712. The proper foundation for a videotape may be shown 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. Smith, 152 N.C. App. 29, 38, 566 S.E.2d 793, 800 (2002) (citations omitted).

Here, the trial court conducted a *voir dire* concerning the admission of the tape. K.S. and Toms testified that for the portions of the tape for which they were present, the video accurately depicted the events they personally witnessed and the camera appeared to be in good working order. Waters testified he was present for all of the video, though not for all other events occurring that evening, the video accurately depicted the events he personally witnessed, and the camera appeared to be in good working order. Officer Will Sisk ("Officer Sisk") testified that he confiscated the videotape from the home of Bradley pursuant to a search warrant, and that the tape had not been changed or altered since it was seized. We therefore find the portions of the videotape showing the events of the night of 11 January 2003 were properly authenticated and admitted for illustrative purposes.

Defendant further contends that even if properly authenticated, the tape was improperly admitted as it was inflammatory. Defendant alleges that the tape contained depictions of events other than the night of 11 January 2003 which were offered at trial only to excite prejudice and inflame the jury.

Here, trial counsel for both defendant and the State have stipulated that only the portions of the tape showing the events of the party on 11 January 2003 were shown to the jury, not the tape in its entirety. Thus, as the portions of the tape defendant contends were inflammatory were not shown at trial, defendant's contentions regarding a violation of Rule 403 are without merit.

II.

[2] Defendant next contends the trial court erred in permitting hearsay testimony to be admitted. Defendant argues that the statement read to the jury by SBI Agent Steve Modlin ("Agent Modlin"), and admitted for corroborative purposes of Toms' testimony, included statements attributable to other parties, and therefore improperly admitted hearsay. We find this issue was not properly preserved for our review.

" '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*.' " *State v. Frye*, 341 N.C. 470, 495, 461 S.E.2d 664, 676-77 (1995) (quoting N.C.R. App. P. 10(b)(1)).

Here, defendant made a general objection as to the statement. Defendant's objection was overruled by the trial court, who then gave a limiting instruction that the statement was to be considered solely for corroborative purposes. Defendant made no additional objection to the alleged hearsay within the statement offered by Agent Modlin. As defendant objected to the evidence on only one ground, he therefore failed to preserve the additional grounds presented on appeal. *See State v. Williams*, 355 N.C. 501, 565, 565 S.E.2d 609, 646 (2002). Further, defendant does not allege plain error in his assignment. Our Supreme Court has recently held that when a defendant fails to " 'specifically and distinctly' allege plain error as required by North Carolina Rule of Appellate Procedure 10(c)(4), defendant is not entitled to plain error review of this issue." *State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 757 (2005). We therefore are precluded from review of this issue.

III.

[3] Defendant finally contends that the trial court erred in denying his motion to dismiss all charges for insufficient evidence. We disagree.

> The standard of review for a "motion to dismiss based on insufficiency of the evidence is the substantial evidence test." "The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense."

State v. Locklear, 159 N.C. App. 588, 591, 583 S.E.2d 726, 729 (2003) (citations omitted).

> In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve.

State v. Earnhardt, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982) (citations omitted). "The court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State." *Id.* at 67, 296 S.E.2d at 653.

Here, defendant was charged with the crime of second degree rape. A person is guilty of second degree rape if

> "the person engages in vaginal intercourse with another person: (1) By force and against the will of the other person; or (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless."

State v. Strickland, 153 N.C. App. 581, 594, 570 S.E.2d 898, 907 (2002) (quoting N.C. Gen. Stat. § 14-27.3). Taken in the light most favorable to the State, the testimony of L.W. established that defendant engaged in sexual intercourse with her, as she stated that defendant "put his penis inside my vagina." Toms also testified that he observed defendant engaging in sexual intercourse with L.W. Further, sufficient evidence was offered as to L.W.'s physical helplessness. L.W. testified as

to the large quantity of alcohol she had consumed and her lack of experience with intoxicating beverages, and as to her subsequent illness, resulting in repeated loss of consciousness. K.S. also testified that L.W. appeared to be sleeping or passed out when she checked on her throughout the course of the party. L.W. further testified that she awoke to find defendant removing her pants, but continued blacking out during the act, that she said "[o]w" as the intercourse was causing her pain, that defendant directed Bradley to put his hand over her mouth to keep her quiet and that she bit Bradley's hand when he did so before passing out again. L.W. stated that she never consented to any type of sexual conduct with defendant or Bradley. Although defendant challenges L.W.'s credibility, such a question is properly for the jury to resolve. *See Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 653. We, therefore, find sufficient evidence as to all elements of second degree rape was presented to survive a motion to dismiss.

[4] "The elements of second-degree sexual offense are: (1) a person engages in a sexual act; (2) with another person; and (3) the act is by force and against the person's will." *State v. Tucker*, 154 N.C. App. 653, 655, 573 S.E.2d 197, 199 (2002); *see* N.C. Gen. Stat. § 14-27.5(a) (2003). A sexual act, for the purposes of § 14-27.5 means "the penetration, however slight, by any object into the genital or anal opening of another person's body[,]" but does not include sexual intercourse. N.C. Gen. Stat. § 14-27.1(4) (2003). In order to convict a defendant of attempted second degree sexual offense, the State must show that (1) the defendant had the specific intent to commit a sexual act against the victim; and (2) that the defendant committed overt acts showing intent to commit the sexual act, going beyond mere preparation but falling short of the completed offense of second degree sexual offense. *See State v. Mangum*, 158 N.C. App. 187, 192, 580 S.E.2d 750, 754 (2003) (discussing the elements of attempted rape).

Here, Waters testified that he observed defendant "[go] down her pants" while fondling L.W.'s breast. He then observed defendant remove L.W.'s pants and touch her "private," which was clarified to mean between her legs, but did not observe him insert anything inside her private. As noted previously, L.W. testified that she never consented to any type of sexual conduct with defendant, and sufficient evidence as to L.W.'s physical helplessness was offered. Therefore, when taken in the light most favorable to the State, the evidence presented showed defendant committed several overt acts, including touching L.W.'s breast and vaginal area, demonstrating intent to commit a sexual act against L.W.'s will and without her consent. The evi-

dence, therefore, was sufficient to reach the jury as to the charge of attempted second degree sexual offense.

As we find the video evidence to be properly authenticated and admitted, and sufficient evidence presented as to both charges to survive a motion to dismiss, we find no error.

No error.

Judges CALABRIA and JACKSON concur.

STATE OF NORTH CAROLINA v. ROGER WAYNE EDWARDS

No. COA04-668

(Filed 17 May 2005)

1. Evidence— prior crimes or bad acts—driving convictions—malice

The trial court did not err in a second-degree murder case by admitting into evidence defendant's prior driving convictions for driving while impaired (DWI) and driving while license revoked (DWLR) as evidence of malice to support the second-degree murder charge, because: (1) prior driving convictions of a defendant are admissible to show malice and the showing of malice in a second-degree murder case is a proper purpose within the meaning of N.C.G.S. § 8C-1, Rule 404(b); (2) although our Supreme Court agreed in *State v. Wilkerson*, 356 N.C. 418 (2002), that evidence of prior convictions could only be considered as probative of knowledge and intent, our appellate courts have consistently treated driving convictions offered to prove the requisite state of mind for a second-degree murder conviction separately when interpreting Rule 404(b); and (3) although defendant contends the DWLR convictions were insufficiently similar to be relevant under Rule 404(b), prior convictions for traffic offenses other than DWI are admissible to establish malice in a prosecution of a defendant for DWI resulting in the death of another person.

2. Evidence— empty prescription pill bottle—circumstantial evidence of impairment

The trial court did not err in a hit and run and second-degree murder case by admitting into evidence an empty prescription pill

bottle, testimony of an officer identifying the pills from the label, and a pharmacist's testimony about the interaction between these pills and alcohol, because: (1) the pill bottle and the testimony concerning the drug "Alprazolom" was circumstantial evidence of defendant's impairment on the day of the collision; and (2) defendant failed to show plain error or how exclusion of this evidence would have resulted in a different outcome at trial given the facts that defendant admitted he was taking pills, that defendant possessed an empty prescription pill bottle which was discovered by an officer during the search incident to his arrest, and defendant acted surprised when the officer informed him that the bottle was empty.

Appeal by defendant from judgment entered 14 November 2003 by Judge Dennis Winner in Gaston County Superior Court. Heard in the Court of Appeals 12 January 2005.

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

Don Willey for defendant-appellant.

ELMORE, Judge.

Roger Wayne Edwards (defendant) was indicted on charges of driving while impaired (DWI), hit and run, and second degree murder. The events giving rise to these charges occurred on 16 November 2002. At approximately 11:15 a.m. that morning, defendant arrived at a Great Clips hair salon in Gastonia. Kim Snell, a stylist at the salon, testified that defendant's eyes were red and glassy, he was unsteady on his feet, and his speech was slurred. While Ms. Snell was cutting defendant's hair, defendant told her that he had a fruit juice bottle with him that had vodka in it. Ms. Snell testified that defendant offered her a drink from this bottle and also offered her pills which he said he was taking. When defendant stood up, he was still walking unsteadily, "staggering and kind of bumping into things, walking side to side." Defendant walked outside towards a green SUV in the parking lot, but then reentered the store and complained to Ms. Snell about his haircut. Rita Sue Cloniger, a customer, had entered the store and observed defendant as he walked back in. She testified that defendant appeared very disoriented. After defendant again walked out of the store, Ms. Cloniger read the tag number from his vehicle and reported it to Ms. Snell, who called 911.

Defendant drove off from the parking lot towards a nearby intersection. Another motorist, Larry Grier, was stopped at this intersection when he noticed a green SUV coming up behind him at a high rate of speed. Mr Grier eased off his brake and moved forward into the intersection, but the green SUV hit him from behind. Both Mr. Grier and defendant got out of their vehicles to inspect the damage, and defendant asked Mr. Grier about the damage. During this time, Mr. Grier noticed a strong odor of alcohol on defendant's breath. Mr. Grier returned to his vehicle to call the police, but defendant then left the scene. Officer Aaron R. Wurster of the Gastonia Police Department responded to this call at approximately 12:50 p.m. and, based upon the description of defendant's vehicle provided by Mr. Grier, ordered a broadcast notification to other law enforcement officers.

Officer Wurster received another call at approximately 2:26 p.m. that same afternoon. He was dispatched to a collision involving a green SUV vehicle, a black passenger vehicle, and a pickup truck. Mr. Riverro Burns was driving this black passenger vehicle accompanied by two passengers, Ms. Sherrice Burns and Ms. Burns' daughter Jasmine. Mr. Burns began to turn left onto New Hope Road from an I-85 exit, but his vehicle was suddenly hit hard from behind and spun around.

Mr. Burns was knocked unconscious and Ms. Burns observed that Jasmine's head was dangling and blood was coming from her nose and mouth. After medical assistance arrived for Jasmine, Officer Wurster approached defendant's vehicle and spoke to defendant through the driver's side window. Officer Wurster testified that he immediately observed a strong odor of alcohol and that defendant's eyes were red and glassy. Defendant stumbled as he stepped out of his vehicle, and defendant handed over his entire wallet when asked for his driver's license. Officer Wurster arrested defendant and then conducted a search of defendant's outer clothing, during which he found an empty prescription bottle in defendant's jacket pocket. Officer Wurster transported defendant to a treatment room at a nearby hospital, where he read defendant his chemical analysis rights. Defendant was combative and refused to give a blood sample.

Jasmine was eventually air-lifted to Carolinas Medical Center in Charlotte and treated in the pediatric intensive care unit. Dr. Edwin S. Young testified that Jasmine suffered severe blunt trauma to her head with swelling of the brain. Despite surgery the day following the collision, Jasmine died several days later on 23 November 2002.

Defendant's trial began on 10 November 2003 in Gaston County Superior Court. On 14 November 2003 the jury returned guilty verdicts on all charges. The trial court sentenced defendant to 120 days imprisonment for the hit and run; sentenced defendant to 248 months to 307 months for the second degree murder, to begin at the expiration of the sentence imposed on the hit and run conviction; and arrested judgment on the DWI conviction. Defendant gave notice of appeal from these judgments in open court.

[1] First, defendant argues that the trial court erred in admitting into evidence defendant's prior driving convictions. Over objection from defendant, the court admitted a certified copy of defendant's DMV driving record listing his prior convictions for DWI and driving while license revoked (DWLR). The court also admitted, again over defendant's objection, testimony of the Gaston County Deputy Clerk of Superior Court establishing defendant's convictions on file. Defendant did not testify, and thus the State did not offer the convictions as impeachment under Rule 609. Rather, the State argued that the evidence of defendant's driving convictions was relevant to show malice to support the second degree murder charge. Defendant contends that the convictions alone, without evidence of the facts and circumstances supporting them, are not relevant to malice under Rule 404(b).

Our Supreme Court addressed the admissibility of driving convictions as evidence of malice in a second degree murder prosecution in *State v. Goodman*, 357 N.C. 43, 577 S.E.2d 619 (2003) (*per curiam*) (reversing the opinion of the Court of Appeals based upon reasons stated in the dissenting opinion). There, the trial court admitted the defendant's driving record, which contained prior driving convictions dating back to 1962. This Court found that the trial court erred in admitting the entire driving record because several of the convictions were too remote in time to satisfy the temporal proximity requirement of Rule 404(b). *See Goodman*, 149 N.C. App. 57, 68, 560 S.E.2d 196, 203 (2002), *rev'd*, 357 N.C. 43, 577 S.E.2d 619 (2003). Nonetheless, the Court held that the error "did not prejudice defendant to the extent required under a plain error analysis" because there was ample evidence from which the jury could find the defendant acted with malice. *Id.* Judge Greene dissented, arguing that the admission of the driving record containing stale convictions constituted plain error. *Id.* at 72-73, 560 S.E.2d at 206 (Greene, J., dissenting). Only one of the defendant's six prior DWI convictions occurred within sixteen years of the crime, the longest time period approved by

this Court as consistent with the temporal proximity restriction. *See State v. Miller*, 142 N.C. App. 435, 440, 543 S.E.2d 201, 205 (2001) (driving conviction sixteen years from time of incident not too remote under Rule 404(b)).

In reversing the majority opinion, the Supreme Court did not criticize *Miller*, or any other previous cases where driving convictions were admitted under Rule 404(b). *See*, *e.g.*, *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000) (trial court properly admitted driving record of defendant containing previous convictions because this evidence was relevant to establish defendant's "depraved heart" on night of collision). Rather, by adopting the dissent by Judge Greene, the Supreme Court agreed that "prior driving convictions of a defendant are admissible to show malice, and the showing of malice in a second-degree murder case is a proper purpose within the meaning of Rule 404(b)." *Goodman*, 149 N.C. App. at 72, 560 S.E.2d at 206 (Greene, J., dissenting).

Defendant argues, nonetheless, that the admissibility of his prior convictions is governed by *State v. Wilkerson*, 356 N.C. 418, 571 S.E.2d 583 (2002) (*per curiam*) (reversing opinion of Court of Appeals based upon the reasons stated in the dissent). In *Wilkerson*, the Deputy Clerk of Court testified that the defendant had prior convictions on file for possession of cocaine and sale or delivery of cocaine, and two law enforcement officers testified to the circumstances of these prior crimes. *See Wilkerson*, 148 N.C. App. 310, 311, 559 S.E.2d 5, 6, *rev'd*, 356 N.C. 418, 571 S.E.2d 583 (2002). The trial court instructed the jury that evidence of prior convictions could only be considered as probative of knowledge and intent, and a majority of this Court found no error. *Id.* at 314, 559 S.E.2d at 8. In dissent, Judge Wynn concluded that the testimony of the law enforcement officers was properly admitted, but that the admission of testimony by the Deputy Clerk was reversible error:

> Under Rule 404(b), 'evidence of other crimes' may be admitted for certain purposes; thus, in this case the 'evidence of other crimes' testimony of [law enforcement officers] was properly admitted in proof of an enumerated purpose under 404(b). In contrast, the bare testimony of [the Deputy Clerk] establishing only that defendant had been convicted of a prior crime, is not admissible under 404(b) as that bare conviction meets none of the enumerated purposes under that rule. Rather, Rule 609 allows evidence of 'prior convictions' to impeach a testifying defendant.

> Since the defendant in this case did not testify, I believe that the trial court committed prejudicial error in allowing [the Deputy Clerk's] testimony of defendant's prior convictions under Rule 404(b), and that the majority's opinions blurs the distinction between Rule 404(b) and Rule 609.

Id. at 319, 559 S.E.2d at 11 (Wynn, J., dissenting).

As our Supreme Court agreed with the dissent's analysis without providing any further explanation, the interpretation of Rule 404(b) in Judge Wynn's dissent is the generally applicable standard in reviewing the admissibility of convictions offered under this Rule. *See id.* However, this Court, and our Supreme Court in *Goodman*, have consistently treated driving convictions offered to prove the requisite state of mind for a second degree murder conviction separately when interpreting Rule 404(b). *See, e.g.*, *Rich*, 351 N.C. at 400, 527 S.E.2d at 306-07; *Miller*, 142 N.C. App. at 440, 543 S.E.2d at 205; *State v. Fuller*, 138 N.C. App. 481, 486, 531 S.E.2d 861, 865, *disc. review denied*, 353 N.C. 271, 546 S.E.2d 120 (2000); *State v. McAllister*, 138 N.C. App. 252, 258-59, 530 S.E.2d 859, 863 (2000); *State v. Grice*, 131 N.C. App. 48, 53, 505 S.E.2d 166, 169-70 (1998), *disc. review denied*, 350 N.C. 102, 533 S.E.2d 473 (1999); *State v. McBride*, 109 N.C. App. 64, 69, 425 S.E.2d 731-34 (1993). *Wilkerson* did not alter this Court's precedent involving traffic convictions in second degree murder cases. *See Wilkerson*, 148 N.C. App. at 327-28, 559 S.E.2d at 16 (Wynn, J., dissenting).

Defendant argues in the alternative that, even if the DWI convictions were admissible, the DWLR convictions were insufficiently similar to be relevant under Rule 404(b). This argument also fails, as our appellate courts have held that prior convictions for traffic offenses other than driving while impaired are admissible to establish malice in a prosecution of a defendant for driving while impaired resulting in the death of another person. *See Rich*, 351 N.C. at 400, 527 S.E.2d at 307 (prior convictions for speeding probative of malice in second degree murder prosecution where State produced evidence of defendant's impairment at time of collision); *Miller*, 142 N.C. App. at 439-40, 543 S.E.2d at 204 (prior convictions for careless and reckless driving admissible to show malice in second degree murder prosecution based upon defendant's driving while impaired); *Fuller*, 138 N.C. App. at 484, 531 S.E.2d at 864 (prior convictions for reckless driving, speeding, and *driving while license revoked* relevant to malice where State's evidence tended to show defendant's impairment at time of incident). Accordingly, we find no error in admitting defendant's driving record and the Deputy Clerk's testimony concerning defendant's

prior convictions for DWI and DWLR. Defendant's assignment of error is overruled.

[2] Next, defendant contends that the trial court committed plain error in admitting evidence of: an empty prescription pill bottle, testimony by Officer Wurster identifying the pills from the label, and testimony by pharmacist Billy Wease about the interaction between these pills and alcohol. Defendant asserts that this evidence was irrelevant and immaterial. We disagree. The pill bottle and the testimony concerning the drug "Alprazolom" identified on the label was circumstantial evidence of defendant's impairment on the day of the collision. Moreover, although defendant cites the correct standard for plain error review, he fails to argue how exclusion of this evidence would have resulted in a different outcome at trial. Indeed, the evidence at trial established that defendant admitted to Ms. Snell that he was taking pills; that defendant possessed an empty prescription pill bottle which was discovered by Officer Wurster during the search incident to defendant's arrest; and that defendant acted surprised when Officer Wurster informed him that the bottle was empty. Thus, defendant has failed to show plain error. *See State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983).

No error.

Judges McCULLOUGH and LEVINSON concur.

GBASAY ROGERSON, Plaintiff v. HUGH E. FITZPATRICK, ALTON R. TYNDALL, JR., and LINDA S. BECK, jointly and severally in their individual official capacities and the CITY OF DURHAM, Defendants

No. COA04-696

(Filed 17 May 2005)

1. Appeal and Error— appealability—denial of summary judgment—qualified immunity—substantial right

Although an appeal from the denial of a motion for summary judgment is an appeal from an interlocutory order, an order denying police officers the benefit of qualified immunity, as in this case, affects a substantial right and is thus subject to immediate appeal.

2. Civil Rights— § 1983 violations—qualified immunity

The trial court did not err in a case alleging 42 U.S.C. § 1983 violations by denying defendant police officers' motion for summary judgment on the basis of qualified immunity, because there are disputed questions of fact concerning the officers' conduct, the role of plaintiff's expired license plate in an officer's decision to pull defendant over, whether plaintiff was placed under arrest, whether there was reasonable suspicion to stop plaintiff's vehicle, and whether the search of the vehicle was incident to arrest.

3. Appeal and Error— appealability—interlocutory order—discretion of appellate court

The Court of Appeals declined to address the additional issue in an interlocutory appeal concerning plaintiff's conspiracy claim.

Appeal by defendants from order entered 16 February 2004 by Judge A. Leon Stanback in Durham County in Superior Court. Heard in the Court of Appeals 1 February 2005.

Irving Joyner and Tracy Barley, for plaintiff-appellee.

Faison & Gillespie, by Reginald B. Gillespie, Jr., and Keith D. Burns, for defendant-appellants.

HUDSON, Judge.

Plaintiff filed this suit against defendants jointly, severally and individually in 1991, asserting a claim pursuant to 42 U.S.C. § 1983 for alleged violations of his Fourth Amendment rights by defendants, who were all police officers at the time. In November 2003, defendants filed a motion for summary judgment. Plaintiff filed a cross motion for summary judgment in December 2003. On 16 February 2004, the trial court denied the motions for summary judgment. Defendants appeal. For the reasons below, we affirm.

On 17 February 1990 at approximately 11:30 p.m., plaintiff, an African-American male, was driving his 1984 Porsche sports car to a party; Ms. Ida Page was a passenger. As neither plaintiff nor Ms. Page were familiar with their destination, plaintiff was driving slowly. Officer Fitzpatrick, of the Durham Police Department, observed plaintiff traveling slowly and began following in his marked patrol car. Shortly thereafter, plaintiff made a U-turn and then turned into the entrance to an apartment complex, where Officer Fitzpatrick

pulled him over. Plaintiff's car bore temporary license plates from Wisconsin, where he had purchased the car while on a temporary teaching assignment. However, these plates had expired in November 1989 and when plaintiff returned home to Durham in January 1990, he failed to replace the expired Wisconsin temporary plates or register the car in North Carolina. Officer Fitzpatrick claims that he pulled defendant over because he observed the temporary tag and because of the slow driving, which is consistent with a driver who is under the influence of alcohol.

After he pulled plaintiff over, Officer Fitzpatrick approached plaintiff's car and asked if he had been drinking and to see his license and registration. Plaintiff produced his license, but no registration. At that point, Officer Fitzpatrick directed plaintiff out of the Porsche, searched him, and then placed him in the back seat of his patrol car. Officer Fitzpatrick contends that he arrested plaintiff, but plaintiff contends that he was not arrested and that defendants' affidavits, stating that plaintiff was arrested, conflict with defendants' earlier statements.

Officers Linda Beck and Alton Tyndall arrived at the scene and Officer Beck asked Ms. Page to locate the registration. When Ms. Page could not find the registration, Officer Beck ordered her to exit the car and stand behind it. Officer Beck contends that Page attempted to open the door to the patrol car where plaintiff was seated and that she thus searched Page and directed her to the back seat of Officer Tyndall's car. The three officers then searched plaintiff's car, including checking the Vehicle Identification Number under the hood, looking through the glove compartment, and searching through papers and documents in the car's trunk. The defendants contend that Officer Beck accidentally tripped the trunk latch, which opened the trunk to the hatchback, when she was searching the interior of the car.

According to Officer Fitzpatrick, after his inquiry regarding the vehicle's status revealed that the car was not reported as stolen, but also that it was not registered in North Carolina, he reconsidered his decision to arrest plaintiff and issued citations for displaying an expired license plate and for failure to have current registration and insurance. Plaintiff was convicted of driving with an expired license plate and failure to register the car in Durham County District Court. Plaintiff appealed his convictions to Superior Court, where the District Attorney dismissed the charges.

[1] Defendants argue that the doctrine of qualified immunity bars plaintiff's claims and that the trial court erred in denying their motion for summary judgment. Usually, the trial court's denial of a motion for summary judgment is not immediately appealable, as it is interlocutory. *Rousselo v. Starling*, 128 N.C. App. 439, 443, 495 S.E.2d 735, 728 (1998). However, where a substantial right is affected, an interlocutory order may be immediately appealable. *Id.* In their statement of grounds for appellate review, defendants have correctly pointed out that this Court has held that where an order denies Officers the benefit of qualified immunity, as here, it affects a substantial right and is thus subject to immediate appeal. *Id.*

[2] Plaintiff's claims against the individual defendants are based upon legal theories to which the doctrine of qualified immunity may apply. This protects police officers from liability for money damages unless they are "plainly incompetent" or "knowingly violate the law." *Anderson v. Creighton*, 483 U.S. 635, 638, 97 L. Ed. 2d 523, 530 (1987) (internal citation omitted). More specifically, the doctrine protects public officials unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person in their position would be aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982). Thus, a police officer is not liable even if he violated a plaintiff's rights, if those rights were not clearly established at the time, or if a reasonable person in the officer's position would have thought his actions were consistent with established law. *Tarantino v. Baker*, 825 F.2d 772, 774 (4th Cir. 1987).

We review *de novo* the order of a superior court order denying a motion for summary judgment. *Falk Integrated Techs., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). "Summary 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).

Defendants argue that whether an officer is entitled to immunity is purely a question of law for the court. In support of this proposition, defendants cite *Pachaly v. City of Lynchburg*, 897 F.2d 723, 726 (4th Cir. 1990), and *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988). While these cases do state that the question of immunity is for the judge and not the jury to decide, they do not preclude factual inquiry. In *Pachaly*, the Court cites the United States Supreme Court decision in *Mitchell v. Forsyth*, for support of the proposition that

when a court looks at qualified immunity, "[a]ll it need determine is a question of law." *Pachaly*, 897 F.2d at 727, *citing Mitchell*, 472 U.S. 511, 528, 86 L. Ed. 2d 411, 426 (1985). In *Mitchell*, though, the Court also says: "[t]o be sure, the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief." *Id.* Similarly, in *Jones*, the United States Court of Appeals for the Seventh Circuit relies on another case from that Circuit, *Rakovich v. Wade*, which states: "[a]lthough the qualified immunity determination is a legal question it is not answered in the abstract but in reference to the particular facts of the case." *Jones*, 856 F.2d at 994, *citing Rakovich*, 850 F.2d 1180, 1201-02 (7th Cir. 1988).

Likewise, this Court has concluded that when ruling on the defense of qualified immunity, we must:

> (1) identify the specific right allegedly violated; (2) determine whether the right allegedly violated was clearly established at the time of the violation; and (3) if the right was clearly established, determine whether a reasonable person in the officer's position would have known that his actions violated that right. The first two determinations are questions of law. However, the third question is one of fact, and requires a factfinder to resolve disputed aspects of the officer's conduct. *Summary judgment is not appropriate if there are disputed questions of fact concerning the officer's conduct.*

Rousselo, 128 N.C. App. at 445, 495 S.E.2d at 729-30 (emphasis added) (internal quotation marks and citations omitted). Here, because we conclude that there are disputed questions of fact concerning the officers' conduct, we hold that summary judgment was not appropriate.

Defendants argue that plaintiff failed to establish that any violations of his Fourth Amendment rights occurred. Defendants contend that the traffic stop was based on reasonable articulable suspicion, that plaintiff was arrested based on probable cause, and that the search of his vehicle was a lawful search incident to arrest. However, our review of the record reveals factual disputes regarding, at the least: (1) the role of plaintiff's expired license plate in Officer Fitzgerald's decision to pull plaintiff over; and, (2) whether plaintiff was placed under arrest. Defendants gave different explanations of the facts regarding these issues in their initial answers to plaintiff's complaint and interrogatories than in their affidavits from 2003. What Officer Fitzgerald noticed about the condition of plaintiff's license

plate (how dirty it was, that it looked expired, etc.) bears upon whether there was reasonable suspicion to stop plaintiff's vehicle. Whether plaintiff was arrested is central to the issue of whether the search of the vehicle was incident to arrest. Accordingly, summary judgment was not appropriate and the trial court did not err in denying defendants' motion for summary judgment. Because this conclusion is dispositive, we need not address further defendants' arguments regarding whether plaintiff's rights were violated and whether any rights which may have been violated were clearly established.

[3] Defendants also request that we review plaintiff's conspiracy claim, even though there is no right to immediate appeal on this issue. Although we may exercise our discretion to address an additional issue in an interlocutory appeal in the interest of judicial economy, *Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 678 (1993), here we decline to do so.

Affirmed.

Judges WYNN and STEELMAN concur.

JUANITA HARDING, JOSEPH HENRY HARDING, MARGARET BORDNER, PAT SAWYER, JESSE GENTRY AND MADELYN GENTRY, AND C.E. WHITAKER, PETITIONERS V. THE BOARD OF ADJUSTMENT OF DAVIE COUNTY, RESPONDENT, AND HIGH PERFORMANCE HOLDINGS, LLC, INTERVENOR

No. COA04-708

(Filed 17 May 2005)

1. Zoning— special use permit—burden of proof

The Davie County Board of Adjustment correctly placed the burden of proof on the applicant under a Davie County special use ordinance, although the Board did not specify the burden of proof it applied, and the Superior Court order affirming the Board cited an opinion to the contrary.

2. Zoning— special use permit—go-cart track—evidence considered

Board of Adjustment proceedings are quasi-judicial and the board, not being bound by the rules of evidence, may consider all of the evidence offered. Here, there was substantial evidence on

which the Davie County Board of Adjustment could base its findings and conclusions in ruling on a special use permit for a go-cart tract at a drag strip, even if the evidence would have supported contrary findings.

3. Zoning— special use permit—go-cart track—sufficiency of evidence

Under the whole record test, the Davie County Board of Adjustment's decision to grant a special use permit for a go-cart track at a drag strip was not arbitrary or capricious.

Appeal by petitioners from judgment and order entered 13 January 2004 by Judge Mark Klass in Superior Court in Davie County. Heard in the Court of Appeals 12 January 2005.

Henry P. Van Hoy, II, for petitioner-appellants.

Price Law Office, by Robert E. Price, Jr., for respondent-appellee.

Bell, Davis & Pitt, P.A., by James R. Fox and Donald M. Nielsen, for intervenor-appellee.

HUDSON, Judge.

On 13 January 2003, High Performance Holdings, LLC, (HPH) filed an application for a special use permit with the Davie County Board of Adjustment (the Board), seeking to build and operate a go-cart track. On 5 May 2003, after four nights of public hearings, the Board approved the permit, over the opposition of petitioners, all of whom live near the proposed site. The petitioners filed a writ of certiorari in Superior Court in Davie County on 8 September 2003, which the court granted. HPH filed a motion to intervene on 22 September 2003, which the court also granted. After a hearing on 15 December 2003, the court affirmed the Board's decision and entered judgment accordingly on 13 January 2004. Petitioners appeal. For the reasons discussed below, we affirm.

The evidence tends to show that HPH owns a 134-acre tract of land in rural Davie County. HPH intends to build and operate a go-cart track on approximately 35 acres of its property as part of its operation called "Farmington Motorsports Park." This 35-acre tract is zoned Residential-Agricultural (R-A), and a go-cart track is a permitted use in Davie County R-A zoning districts, subject to the granting of a special use permit by the Board. The proposed go-cart track site

is adjacent to an already existing dragstrip. The property where the dragstrip is located is zoned Highway-Business (H-B). The dragstrip has been there since at least 1961, and predates Davie County zoning ordinances, and is thus a non-conforming use within the meaning of the zoning code. The petitioners all live near the proposed go-cart track site and allege that they have been damaged by the Board's decision to allow the go-cart track.

[1] Petitioners contend first that the Board of Adjustment erred by placing the burden of proof on them to prove that the health and safety requirements of the special use permit statute had not been met, and that the superior court erred in affirming. We disagree.

Davie County Ordinance § 155.236 (C) states, in pertinent part, that a special use permit shall not be granted unless:

> The Board of Adjustment finds that in the particular case in question, the use for which the special use permit is sought will not adversely affect the health or safety of persons residing or working the neighborhood of the proposed use and will not be detrimental to the public welfare . . .

Petitioners argue that our Courts have distinguished between ordinances with specific and general requirements. They assert that the burden of proof of specific requirements rests with the applicant, *Mann Media Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 565 S.E.2d 9 (2002), but that the burden of proof of general requirements is on the opponent. *Woodhouse v. Bd. of Comm'rs of Nags Head*, 299 N.C. 211, 261 S.E.2d 882 (1980). Petitioners contend that the ordinance here includes a specific requirement, and thus, the burden of proof should have fallen on the applicant to show that there would be no adverse affect on health or safety and no detriment to the public welfare.

Here, the Board's decision does not specify what burden of proof it applied, and the petitioners base their argument that the Board placed the burden on them on the Superior court's citation to *Woodhouse* in its order. The Superior court's order does cite *Woodhouse*, stating in one of its conclusions of law that:

> The burden of proving or disproving general considerations, involving an assessment of the use's impact on 'health, safety and welfare of the community falls upon those who oppose the issuance of a [special use permit].'

However, the court goes on to state that,

> [i]n any event, the Court finds, upon a review of the whole record that HPH met any arguably applicable burdens of production and persuasion and that its evidence satisfied the specific and general requirements of the Davie County Zoning Code.

Also, in another conclusion of law, the court states that for an applicant to make out a *prima facie* case, he or she must "produce[] competent, material and substantial evidence tending to establish the existence of facts and conditions which the ordinance requires for the issuance of a special use permit" (quoting *Refining Co. v. Bd. of Alderman*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974)). Thus, we conclude that in spite of the Superior court's mention of *Woodhouse*, the rest of the record shows that the Board did in fact place the burden on the applicant. Accordingly, we overrule this assignment of error.

[2] In their second argument, petitioners contend that the Board's and superior court's findings of fact and conclusions of law are not supported by competent, material, and substantial evidence in the record as a whole. The superior court in this case reviewed the Board's decision pursuant to N.C. Gen. Stat. § 153A-345 (e) (2003). On appeal from a superior court's review of a municipal zoning board of adjustment, this Court's standard of review is limited to "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 162 N.C. App. 603, 609, 592 S.E.2d 205, 209 (2004) (internal citations and question marks omitted); *but see, Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment*, 355 N.C. 269, 559 S.E.2d 547 (2002) (Superior court's failure to set forth standard of review does not necessitate reversal). In our review of a Superior court's order regarding a zoning board of adjustment's decision, "[t]he scope of our review is the same as that of the trial court." *Fantasy World*, 162 N.C. App. at 609, 592 S.E.2d at 209 (citing *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 627, 265 S.E.2d 379, 383 (1980)).

The reviewing court applies the "whole record" test when the petitioner alleges that the decision was not supported by substantial evidence or was arbitrary and capricious. *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218, 488 S.E.2d 845, 849 (1997) (internal citation omitted). Here, as the superior court applied the correct standard of review—the whole

record test—we review whether it did so properly. In reviewing a superior court's order we must determine " 'not whether the evidence before the superior court supported that court's order[,] but whether the evidence before the Town Council supported the Council's action.' " *William Brewster Co., Inc. v. Town of Huntersville*, 161 N.C. App. 132, 134, 588 S.E.2d 16, 19 (2003) (internal citation omitted). "The court must examine all competent evidence to determine if the record supports the board's findings and conclusions." *Id.* We must determine whether the Board's decision is supported by "substantial evidence.' " *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (internal citation omitted). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 707, 483 S.E.2d at 393 (internal citation omitted). The whole record test "does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). Under the whole record test, the Board's decision must stand unless it is arbitrary and capricious. *Mann*, 356 N.C. at 14, 565 S.E.2d at 19.

Petitioners contend that there was not substantial evidence to support the Board's findings regarding noise. Specifically, they object to the following findings:

> 3) The go-cart track . . . will not adversely affect the health or safety of persons residing or working in the neighborhood of the go-cart track. This is based upon sworn testimony and evidence submitted during the hearing which shows the following:
>
> * * *
>
> (c) A landscaped berm will be installed adjoining the Harding property . . . to reduce the sound and provide a screen from activities on the site.
>
> * * *
>
> (g) Sound levels from the co-cart track will not exceed those already existing in the neighborhood, primarily generated by the drag racing course. Evidence provided by the petitioner's sound expert, S&ME, far out weighed the evidence offered by the opponents. It is the Board's opinion that if the proposed

> go-cart track stood alone, that the noise generated by the go-cart track would not be of any material significance so as to be detrimental to the neighborhood.

After careful review of the record, we conclude that these findings are supported by substantial evidence. Dwayne Rakestraw, a civil engineer, testified that because dragsters typically run at 110 decibels (dB), they would "completely drown out everything else." Rakestraw also testified that the level of noise at Petitioner Harding's house would be similar to that generated by a passing car. Likewise, test results of the engineering firm S&ME indicated that "noise levels generated by the carts would be expected to add 1 to 2dB to the overall noise levels generated by the operation of the dragster measured at the eastern property line."

Furthermore, in a presentation made to the Board by HPH, the Board heard evidence that the go-carts would be subject to strict equipment regulations to reduce noise and that the proposed landscaped berm and natural barriers would achieve a 5-10dB reduction, while proposed plants and trees would achieve another 1-2dB reduction. This presentation also suggested that at normal distances the carts produce noise in the range of conversation or passenger cars and that as distance increases, so does the perceived sound level. The calculations were prepared by Rakestraw and were based on the average noise produced by 30 running carts. According to these calculations, the nearest neighbor, residing 300 feet from the track, would be expected to have a noise level of approximately 74dB with the barriers in place—a noise level falling in between that of a passenger car and a dishwasher. The next closest neighbor, 700 feet from the track, would be expected to have a level of 69dB, which is about the same as a passenger car. Neighbors living 1500 feet and farther from the track would experience 63dB and less, only somewhat above the level of normal conversation, which is about 60dB.

Petitioners assert that the SM&E test results and HPH's presentation to the Board are incompetent evidence because they are hearsay and too general and speculative. Similarly, petitioners contend that Rakestraw's testimony was not competent because he was not properly qualified as a sound expert. However, Board proceedings are quasi-judicial in nature and the Board is not bound by the rules of evidence, but may consider all of the evidence offered. *Humble Oil & Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974).

> Local boards, such as municipal boards of adjustment, are not strictly bound by formal rules of evidence, as long as the party whose rights are being determined has the opportunity to cross-examine adverse witnesses and to offer evidence in support of his position and in rebuttal of his opponent's.

Burton v. New Hanover County Zoning Bd. of Adjustment, 49 N.C. App. 439, 442, 271 S.E.2d 550, 552 (1980). Here, petitioners do not assert that they never had the opportunity to cross-examine witnesses or offer evidence in support of their position in rebuttal. Furthermore, during the hearings, they neither challenged Mr. Rakestraw's qualifications to testify on noise and sound, nor offered any contradictory expert evidence.

Although petitioners presented evidence about the adverse effects of sound, we conclude that there was substantial evidence on which the Board could base its findings of fact and conclusions of law regarding the effect of the noise generated by the proposed go-cart track on the surrounding community. Even if the evidence in the record would have supported contrary findings and conclusions, this Court will not substitute its judgment for that of the Board where there is substantial evidence to support the Board's decision.

[3] In their final argument, petitioners contend that the findings of fact and conclusions of law made by the Board, and affirmed by the court, are arbitrary and capricious. We disagree.

> The arbitrary or capricious standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate [] any course of reasoning and the exercise of judgment.

Mann, 356 N.C. at 16, 565 S.E.2d at 19 (internal citations and quotation marks omitted). Petitioners assert that the Board's decision was whimsical and lacked fair and careful consideration. We use the whole record test to determine whether a Board's decision is arbitrary or capricious. *CG&T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 411 S.E.2d 655 (1992). Our review of the whole record here does not indicate that the Board's decision was whimsical or lacked fair and careful consideration. As such, we overrule this assignment of error.

Affirmed.

Judges WYNN and STEELMAN concur.

THE CURRITUCK ASSOCIATES-RESIDENTIAL PARTNERSHIP, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFF V. RAY E. HOLLOWELL, JR., D/B/A SHALLOWBAG BAY DEVELOPMENT COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF V. KITTY HAWK ENTERPRISES, INC., THIRD-PARTY DEFENDANT

SHALLOWBAG BAY DEVELOPMENT COMPANY, LLC, PLAINTIFF V. THE CURRITUCK ASSOCIATES-RESIDENTIAL PARTNERSHIP, DEFENDANT

No. COA04-377

(Filed 17 May 2005)

1. Appeal and Error— appeal bond—sufficiency of supporting evidence

A $1 million appeal bond under N.C.G.S. § 1-292 was not supported by sufficient evidence, and was remanded, where the affidavit on which the court relied for determining construction costs did not include any basis for inferring that the affiant had personal knowledge of the project construction costs.

2. Appeal and Error— appeal bond—purpose, calculation, scope

The purpose of an appeal bond is to protect the appellee during appeal and the only reasonable interpretation of N.C.G.S. § 1-292 is that the court must determine the loss of use of the disputed property to the appellee. Whether the appellant uses or doesn't use the property is beside the point. Also, because the appellee appealed all of the underlying orders, the court in setting the bond may consider the loss of use of all sections of the land involved in the transaction even though appellee was relieved by the orders of any obligation to sell some of the sections.

Appeal by defendant Hollowell and plaintiff Shallowbag Bay Development Company from orders entered 31 October 2003 by Judge Dwight L. Cranford in Dare County Superior Court. Heard in the Court of Appeals 10 January 2005.

Poyner & Spruill, LLP, by J. Nicholas Ellis, for plaintiff-appellee and defendant-appellee The Currituck Associates Residential Partnership.

Ragsdale Liggett, PLLC, by George R. Ragsdale and Walter L. Tippett, Jr., for defendant-appellant Ray E. Hollowell, Jr. and plaintiff-appellant Shallowbag Bay Development Company, LLC.

GEER, Judge.

Appellants Ray E. Hollowell, Jr. and Shallowbag Bay Development Company, LLC appeal the trial court's orders setting the amount of an appeal bond under N.C. Gen. Stat. § 1-292 (2003).[1] While we agree with appellants that the record currently contains insufficient evidence to support the $1 million bond ordered by the trial court, we disagree with appellants that an appropriate bond would be $1.00. Accordingly, we remand to the trial court for further proceedings to determine the amount of the bond required under N.C. Gen. Stat. § 1-292.

This appeal arises out of real estate transactions between The Currituck Associates Residential Partnership ("appellee") and Ray E. Hollowell, Jr. and Shallowbag Bay Development Company (collectively "appellants"). The original contract entered into by the parties required appellee to sell and appellants to buy certain real property located in Currituck County. Appellants planned to develop the land with residential condominiums called Windswept Ridge Villas. The property was to be conveyed over time in phases; the property associated with each phase was called a "pad." Appellants purchased the first three pads, but failed to close on the acquisition of the fourth pad.

A dispute arose among the parties, and both appellants and appellee filed actions in Dare County Superior Court. Appellee claims that the parties subsequently reached a settlement and that appellants failed to comply with the terms of that agreement. Appellee, therefore, filed motions in both actions to enforce the settlement agreement.

---

1. The trial court entered two identical orders in No. 01-CVS-318 and No. 01-CVS-551. This opinion will refer to those orders collectively as "the order." The complete facts of this case are set forth in *Currituck Assocs.-Residential P'ship v. Hollowell*, 166 N.C. App. 17, 601 S.E.2d 256 (2004), a prior appeal involving the same parties currently pending before the Supreme Court. That appeal involved the actual merits of the claims between the parties, whereas this appeal concerns only the trial court's order setting the bond required for a stay pending appeal.

On 22 May 2003, Judge W. Russell Duke, Jr. entered orders finding that the parties had in fact reached a settlement agreement. As part of its ruling, the trial court (1) "relieved [appellee] of any obligation to sale [sic] Pads 4-6 of Windswept Ridge Villas to [appellants]" and (2) ordered that "[appellee] shall have 60 days . . . in which to exercise an option to purchase Pad 3 of Windswept Ridge Villas from [appellant Hollowell] for $585,000."

After filing their notices of appeal from Judge Duke's orders, appellants filed a motion under N.C. Gen. Stat. § 1-292 asking the trial court to set a bond for a stay pending appeal. In support of this motion, appellants filed an affidavit by Ray E. Hollowell, Jr., "a member and manager of Shallowbag Development Company, LLC," suggesting that a bond in the amount of $1.00 would be adequate. In response, appellee submitted the affidavit of Charles J. Hayes who was described solely as "attorney-in-fact for The Currituck Associated Residential Partnership." Mr. Hayes stated that appellee would be damaged in the approximate amount of $1,369,040 per year if appellee was delayed in developing the property. Following a hearing on 15 October 2003, the trial court ordered appellants to post a bond in the amount of $1 million in order to stay execution on the court's previous judgment and to cover "all costs and damages [appellee] may sustain by reason of the delay associated with the appeal should [appellants] not prevail." Appellants timely appealed from the bond order.

---

[1] Appellants first contend that the trial court erred by failing to specify what evidence it relied upon in determining the bond amount. Phrased differently, this argument challenges the trial court's failure to make specific findings of fact in support of its ruling. Under Rule 52(a)(2) of the North Carolina Rules of Civil Procedure, however, a trial court is not required to make specific findings of fact when ruling upon a motion unless such findings are requested by a party. N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2003). Appellants have not pointed to any place in the record where they requested that the trial court make findings of fact. When, as here, a trial court does not make specific findings of fact, "proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18, *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000).

N.C. Gen. Stat. § 1-292 provides in pertinent part:

> If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking.

While the amount of the bond lies within the discretion of the trial court, *see Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 456, 481 S.E.2d 349, 358 (finding that the plain language of N.C. Gen. Stat. § 1-285 (1996) places the amount of the surety bond within the "sole discretion of the trial court"), *disc. review denied*, 346 N.C. 281, 487 S.E.2d 551 (1997), we must determine whether the record contains evidence to support the trial court's decision.

Mr. Hayes' affidavit stated the following in support of appellee's request for a substantial bond:

a. Upon information and belief, the construction cost for building the 60 condominium units will be approximately $10,708,000. Historically, construction costs at the Outer Banks area increases approximately 10% per year and I believe the construction costs associated with developing Pads 3-6 at Windswept Ridge Villas would increase annually by 10%. Therefore, if CARP is delayed one year while Hollowell appeals the Order, CARP will incur increased construction costs of approximately $1,070,800.

b. Upon information and belief, CARP would make a profit of $3,728,000 on the sale of the 60 condominium units it would build on Pads 3-6 at Windswept Ridge Villas. If CARP is delayed one year while Hollowell appeals the Order, CARP will be delayed in having the use of the profit it would make from developing Pads 3-6 at Windswept Ridge Villas. Applying the legal rate of interest of 8% to the delay in use of the profit CARP would make, CARP will be damaged in the amount of $298,240 per year.

It appears that the trial court may have determined the $1 million amount of the bond by rounding off the increased construction costs. The record contains no other evidence that could be the basis for the court's bond amount.

The Hayes affidavit itself is an insufficient basis for the trial court to order a $1 million bond. Rule 43(e) of the Rules of Civil Procedure provides:

> *Evidence on motions.*—When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

The trial court in this case chose to decide the bond motion based on affidavits. This Court has held that "the N.C. R. Civ. Pro. 56(e) requirement that affidavits must be based upon personal knowledge applies to Rule 43(e)." *Lemon v. Combs*, 164 N.C. App. 615, 621, 596 S.E.2d 344, 348 (2004). Indeed, "it is a general legal principle that affidavits must be based upon personal knowledge." *Id.* at 622, 596 S.E.2d at 348. Further,

> "[t]he affidavit must in some way show that the affiant is personally familiar with the facts so that he could personally testify as a witness. The personal knowledge of the facts asserted in an affidavit is not presumed from a mere positive averment of facts but rather the court should be shown how the affiant knew or could have known such facts and if there is no evidence from which an inference of personal knowledge can be drawn, then it is presumed that such does not exist."

Id., 596 S.E.2d at 349 (quoting 3 Am. Jur. 2d, *Affidavits* § 14).

Mr. Hayes' affidavit does not contain any basis for inferring that he has personal knowledge of the project's construction costs or the likely increase in those costs that would result from a delay in construction. The affidavit simply states that Mr. Hayes is the "attorney-in-fact" for appellee with no explanation as to why that status provides him with knowledge of construction costs.[2] Even the affidavit states that Mr. Hayes' knowledge of construction costs is based

2. *Black's Law Dictionary* 138 (8th ed. 2004) defines an "attorney-in-fact" as "one who is designated to transact business for another; a legal agent." On the other hand, N.C. Gen. Stat. § 32A-2 (2003) provides that an "attorney-in-fact" is someone who has been named in a power of attorney.

"[u]pon information and belief." Our appellate courts have repeatedly held that statements made "upon information and belief"—or comparable language—"do not comply with the 'personal knowledge' requirement . . . ." *Hylton v. Koontz*, 138 N.C. App. 629, 634, 532 S.E.2d 252, 256 (2000) (citing cases), *disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001). While appellee argues that the phrase "upon information and belief" was used because the assertions relate to future events that cannot be predicted with certainty, this intention is not apparent from the affidavit and, in any event, does not address whether Mr. Hayes in fact has personal knowledge of the likely future construction costs. The affidavit is, therefore, not competent evidence to support the $1 million bond requirement.

[2] We do not, however, agree with appellants that an appropriate bond is $1.00. Appellants argue that the property is currently vacant, generates no rent, and has no foreseeable use while the appeal is pending such that the "value of the use and occupation" of the property is nominal. This argument assumes N.C. Gen. Stat. § 1-292's requirement that the bond be sufficient to cover "the value of the use and occupation of the property" refers to appellants'—and not appellee's—current use and occupation of the property. This construction of the statute is incorrect. Since the purpose of the bond is to protect the appellee from losses incurred during an appeal, the only reasonable interpretation is that the trial court must determine the value of the loss *to the appellee* of the use and occupancy of the property during the appeal. *See Nugent v. Beckham*, 43 N.C. App. 703, 707, 260 S.E.2d 172, 175 (1979) ("N.C. Gen. Stat. § 1-292 clearly contemplates that the seller must compensate the buyer for the buyer's loss of use and occupation of the property pending an appeal in which a judgment and decree ordering sale and possession to buyer is affirmed."). Appellants' affidavit asserting that the bond should be $1.00 because they do not intend to use or occupy the property is, therefore, beside the point.

In order for execution on the trial court's judgment to be stayed, a bond must be posted pursuant to N.C. Gen. Stat. § 1-292. *Venture Properties I, LLC v. Anderson*, 120 N.C. App. 852, 856, 463 S.E.2d 795, 797-98 (1995) (under N.C. Gen. Stat. § 1-292, the judgment was not stayed when defendant did not request the setting of a bond and did not post a bond), *disc. review denied*, 342 N.C. 898, 467 S.E.2d 908 (1996). Accordingly, we must remand to the trial court for a new determination of the proper bond amount based on competent evidence. Necessarily, the parties will have to produce sufficient evi-

dence to support their contentions regarding the proper amount. *See Iverson v. TM One, Inc.*, 92 N.C. App. 161, 167, 374 S.E.2d 160, 164 (1988) (remanding for determination of the amount of an injunction bond and directing that "[i]f the parties desire to present new evidence, the trial court should consider that evidence").

Because the question is likely to recur on remand, we must address appellants' contention that the trial court, in setting a bond, should only consider the value of the loss of use and occupancy for Pad 3 and not Pads 4 through 6. While the trial court's order only directed appellants to convey Pad 3 to appellee, the order also provided that appellee was "relieved of any obligation to sale [sic] Pads 4-6" to appellants. Appellants appealed all portions of the underlying orders, not just the portion concerning the conveyance of Pad 3. Thus, the trial court may properly consider the loss of use and occupancy for Pads 3 through 6 in setting the appeal bond.

Remanded.

Chief Judge MARTIN and Judge CALABRIA concur.

AMANDA GAY HAYES, EMPLOYEE, PLAINTIFF v. TRACTOR SUPPLY COMPANY, EMPLOYER AND KEMPER INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA04-553

(Filed 17 May 2005)

Workers' Compensation— occupational disease—chemical sensitivity—injury—speculative causation

The Industrial Commission did not err in a workers' compensation case arising from a claim for an occupational disease under N.C.G.S. § 97-53 for chemical sensitivity by finding no compensable injury, because: (1) an individual's personal sensitivity to chemicals does not result in an occupational disease compensable under our workers' compensation scheme, and there was competent evidence as to plaintiff's personal sensitivities predating her naphthalene exposure; and (2) the expert testimony failed to establish a causal connection between plaintiff's disease and defendant when it relied on mere speculation or possibility in concluding that plaintiff's exposure to naphtha-

lene at defendant's workplace was the cause of her subsequent symptoms.

Appeal by plaintiff from an opinion and award entered 8 January 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 February 2005.

Edwards & Ricci, P.A., by Kenneth R. Massey, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Maura K. Gavigan and Bettina Mumme, for defendant-appellees.

HUNTER, Judge.

Amanda Gay Hayes ("plaintiff") appeals an order from the Full Industrial Commission entered 8 January 2004 finding no compensable injury. As we find no error in the Commission's findings, we affirm this order.

The evidence presented to the Commission tended to show that plaintiff was employed by Tractor Supply Company ("defendant") from August 1992 through 8 October 1999. Plaintiff began work at defendant's Rocky Mount location in 1995, and remained there until 1999. Beginning in the fall of 1998, plaintiff began experiencing a significant increase in headaches, sinusitis, and bronchitis, for which she sought treatment. Her physicians at that time diagnosed the problem as hormonal.

In late September and early October of 1999, plaintiff was absent from work due to vacation. During that period, the area in which the store was located was affected by Hurricane Floyd. This weather event led to the store stocking a product known as Snake-A-Way, an odoriferous product containing the chemical naphthalene, for the first time since plaintiff had been in defendant's employ. The displays of Snake-A-Way were located in the vicinity of plaintiff's work area when she returned to work on 8 October 1999. Plaintiff complained about the smell to her manager and reported watery eyes and a scratchy throat.

On 9 October 1999, plaintiff discovered an outbreak of severe urticaria, commonly known as hives, and sought medical treatment from the Nash General Emergency Room several times within a twenty-four hour period. Plaintiff was ultimately hospitalized due to the severity of the hives. After review by several physicians, plaintiff was diagnosed as having chemical sensitivity.

Plaintiff continued to experience outbreaks of hives of varying severity over the following months. Plaintiff attempted to work in an elementary school program, but developed a reaction to cleaning supplies kept in a janitor's closet. Plaintiff also attempted employment at a veterinary clinic, but developed a reaction while using a flea and tick shampoo for dogs which contained pytherins.

Plaintiff filed a workers' compensation claim against defendant for two matters, one of which involved a knee injury unrelated to this appeal. Plaintiff's claim as to her occupational disease was heard by the deputy commissioner on 6 March 2001, who found plaintiff suffered from an occupational disease and awarded her temporary total disability for her condition. Defendant appealed the order to the Full Commission. The Full Commission reversed the deputy commissioner on 8 January 2004, finding plaintiff had failed to establish an occupational disease within the requirements of N.C. Gen. Stat. § 97-53(13) (2003). Plaintiff appeals from this order.

We first note the standard of review for appeals from the North Carolina Industrial Commission. It is well settled that "[i]n reviewing a decision of the Commission, this Court is 'limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.' " *Craven v. VF Corp.*, 167 N.C. App. 612, 615-16, 606 S.E.2d 160, 162 (2004) (citations omitted). Such findings supported by competent evidence are conclusive on appeal, even if there is plenary evidence for contrary findings. *See Jarrett v. McCreary Modern, Inc.*, 167 N.C. App. 234, 238, 605 S.E.2d 197, 200 (2004). " 'An 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." ' " *Allen v. SouthAg Mfg.* 167 N.C. App. 331, 334, 605 S.E.2d 209, 211-12 (2004) (citations omitted).

Plaintiff contends that the Commission erred in finding plaintiff failed to meet her burden of proof in her claim of an occupational disease, chemical sensitivity, under N.C. Gen. Stat. § 97-53(13). We disagree.

A claim for an occupational disease not otherwise recognized in N.C. Gen. Stat. § 97-53 of our workers' compensation statutes may be established under the provision of § 97-53(13). *See James v. Perdue Farms, Inc.*, 160 N.C. App. 560, 561-62, 586 S.E.2d 557, 559 (2003). A plaintiff bears the burden of proof in showing she meets the require-

ments of the statute. *Id.* In *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983), our Supreme Court held that:

> For a disease to be occupational under G.S. 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

Id. at 93, 301 S.E.2d at 365 (citations omitted).

A. Disease Characteristics and Exposure

Plaintiff contends the Commission erred in finding plaintiff failed to show her condition met the first two prongs of the *Rutledge* test. The Commission concluded plaintiff had failed to prove "that her employment with defendant-employer placed her at an increased risk of contracting the present condition" due to her personal sensitivities. We find no merit in plaintiff's contention.

Our courts have held that an individual's personal sensitivity to chemicals does not result in an occupational disease compensable under our workers' compensation scheme. *See Sebastian v. Hair Styling*, 40 N.C. App. 30, 32, 251 S.E.2d 872, 874 (1979). In *Nix v. Collins & Aikman Co.*, 151 N.C. App. 438, 566 S.E.2d 176 (2002), this Court upheld the Full Commission's finding that the plaintiff had failed to show an occupational disease. *Id.* at 444, 566 S.E.2d at 180. In *Nix*, competent evidence was presented that the plaintiff's personal sensitivities caused his reaction to chemicals at work. *Id.* at 443-44, 566 S.E.2d at 179-80. The Commission's finding that the plaintiff failed to show he was placed at an increased risk by his exposure to chemicals at work, as compared to the general public, was upheld by this Court, even though there was evidence to the contrary. *Id.* at 444, 566 S.E.2d at 180.

Here, the Commission found:

> 24. In the years prior to October 8, 1999, plaintiff experienced a myriad of reactions to various substances. Plaintiff's medical records indicate she has had long-standing allergic reactions to diesel fuel, gasoline, "prowl", a chemical pesticide used on rural farmland in plaintiff's community, cigarette smoke, perfume and other substances. In the one year prior to October 8,

> 1999, plaintiff received extensive medical treatment for migraine headaches including treatment at Cedar Healthcare in Raleigh and Boice Willis Clinic in Rocky Mount. Plaintiff also complained of continuous and consistent migraine headaches prior to October 8, 1999 to family physician Dr. David Browder.

The testifying experts all opined that plaintiff's employment with defendant, which stocked various chemicals, pesticides, and farming supplies, put her at a greater risk than members of the general public for developing chemical sensitivity. However, the experts also testified that plaintiff had a heightened peculiar susceptibility to chemicals and that her personal sensitivity predated the exposure to naphthalene on 8 October 2003. Thus, as there is competent evidence as to plaintiff's personal sensitivities pre-dating her naphthalene exposure, despite evidence to the contrary, it cannot be said as a matter of law that the Commission erred in its findings and conclusion.

B. Causal Connection

Plaintiff further contends the Commission erred in finding that the expert testimony presented failed to establish a causal connection between plaintiff's disease and defendant. We disagree.

In *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000), our Supreme Court spoke to the issue of competent evidence for proof of causation of injuries in a workers' compensation claim. *Young* acknowledged that expert testimony was necessary to provide competent evidence of the cause of an injury, when complicated medical questions far removed from the experience and knowledge of laymen were involved. *Id.* at 230, 538 S.E.2d at 915. However, *Young* further held that:

> [W]hen such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation. Indeed, this Court has specifically held that "an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility."

Id. (citations omitted). Evidence of a speculative nature includes conclusions which rest on the reasoning of the maxim " '*post hoc, ergo propter hoc*,' " that is, the fallacy of confusing sequence with consequence. *Id.* at 232, 538 S.E.2d at 916. "In a case where the threshold question is the cause of a controversial medical condition,

the maxim of '*post hoc*, *ergo propter hoc*,' is not competent evidence of causation." *Id.*

Here, the Commission considered the testimony of three physicians who evaluated plaintiff: Dr. Lieberman, Dr. Meggs, and Dr. Bretsel. The Commission found Dr. Lieberman's characterization of plaintiff's condition was predicated on the basis of the "temporal relationship between plaintiff's exposure history and the onset of her condition." The Commission further found that Dr. Brestal "base[d] his causation opinion regarding plaintiff's present condition solely upon the temporal relationship between plaintiff's alleged exposure to Snake-A-Way and subsequent urticaria breakout[.]" Finally, the Commission found Dr. Meggs testified that "plaintiff's present condition is a result of her personal chemical sensitivities" and that she "did not have an increased susceptibility to naphthalene, but instead had a hyperactivity to respiratory irritants." As a result, the Commission concluded that the expert testimony relied on mere speculation or possibility in concluding, *post hoc*, *ergo propter hoc*, that plaintiff's exposure to naphthalene at defendant's workplace was the cause of her subsequent symptoms. Thus, the Commission concluded such evidence was insufficient to establish the causal connection necessary to conclude plaintiff suffered a compensable occupational disease.

A review of the record reveals competent evidence to support the findings of the Commission. All of plaintiff's experts testified plaintiff had an unusually heightened chemical sensitivity. Further, Dr. Brestal testified he had not seen other patients manifest hives in reaction to naphthalene prior to plaintiff. Finally, both Dr. Brestal and Dr. Lieberman testified that the temporal sequence of events had formed the basis of their assessment. Thus, as there was competent evidence in the record to support the Commission's findings that expert testimony was speculative as to the issue of causation, the Commission properly found insufficient evidence of causation was presented by plaintiff to establish a compensable occupational disease.

We, therefore, decline to reach plaintiff's additional assignments of error.[1] As the evidence was sufficient to support the trial court's

1. Plaintiff contends the Commission erred in taking judicial notice of expert opinions rendered in previous unrelated cases before the Commission in making a finding that chemical sensitivity is not an occupational disease. Although we need not reach this issue as plaintiff failed to carry her burden of proof, as discussed *supra*, in showing she suffered from an occupational disease, we would remind the Industrial Commission to be cautious in taking judicial notice of matters of continuing scientific research.

finding that plaintiff failed to meet her burden of proof in showing she suffered from an occupational disease, the Commission's order is affirmed.

Affirmed.

Judges CALABRIA and JACKSON concur.

UNITED STATES COLD STORAGE, INC., PETITIONER v. CITY OF LUMBERTON, RESPONDENT

No. COA04-857

(Filed 17 May 2005)

1. Cities and Towns— annexation—judicial review—standards

A party challenging an annexation may seek judicial review in superior court and then appellate review, during which the findings made below are binding if supported by the evidence, even if the evidence is conflicting. Conclusions of law drawn by the trial court are reviewable de novo on appeal.

2. Cities and Towns— annexation—contiguity—sub-areas

The annexation of a sub-area (A) not itself contiguous with municipal boundaries was affirmed where the total area was contiguous and the contiguous sub-area (B) was annexed first. There is no authority for the proposition that each sub-area must be individually contiguous.

3. Cities and Towns— annexation—ordinance—sub-area not stated as part of total area

An annexation ordinance's failure to explicitly state that a sub-area was part of a total area did not rise to the level of substantial lack of compliance with annexation statutes and did not materially prejudice petitioner's rights.

Appeal by petitioner from order entered 2 April 2004 by Judge Ola M. Lewis in Robeson County Superior Court. Heard in the Court of Appeals 3 March 2005.

The Brough Law Firm, by Robert E. Hornik, Jr., for petitioner-appellant.

Holt, York, McDarris & High, LLP, by Charles F. McDarris and Kevin W. Whiteheart, for respondent-appellee.

LEVINSON, Judge.

Petitioner (United States Cold Storage) appeals the denial of its petition challenging an annexation by respondent City of Lumberton ("the city"). We affirm.

Petitioner is a New Jersey corporation that does business in Robeson County, North Carolina, where it owns 132 acres. On 21 October 1998 the city passed a Resolution of Intent to involuntarily annex approximately 255 acres, including all of petitioner's 132 acre tract. An annexation report was filed in November, and a public hearing conducted in December, 1998. On 22 February 1999 the city adopted an amended annexation report which reduced the annexation area to about 56 acres, and divided the area to be annexed into two sub-areas, 'A' and 'B.' Sub-area A included 28.5 acres of petitioner's land; Sub-area B was owned by other parties. On 23 February 1999 the city passed two annexation ordinances annexing sub-areas A and B.

Albert Graham, Jr., a landowner in sub-area B, petitioned for review of the 1999 annexation of sub-area B. Graham reached a settlement with the city, and a consent judgment was entered on 9 June 2000. Pursuant to the terms of the settlement, the annexation of sub-area B became effective on 31 March 2002.

Meanwhile, petitioner herein filed a petition in Superior Court, challenging the 1999 annexation of sub-area A. Petitioner's petition was granted on 20 July 2000, and the annexation proceeding was remanded to the city with instructions to redefine the area to be annexed, issue a new report, and conduct a new hearing. Following remand, the city redefined sub-area A to include 56 acres of petitioner's property, and on 19 October 2000 the city passed an ordinance annexing sub-area A. Petitioner again sought review of the sub-area A annexation; when the relief it sought was denied, petitioner appealed to this Court.

On 4 March 2003, about a year after the effective date of the sub-area B annexation, this Court issued its opinion in *United States Cold Storage, Inc. v. City of Lumberton*, 156 N.C. App. 327, 576 S.E.2d 415

(2003) (*Cold Storage I*). The Court reversed the trial court's denial of petitioner's petition, and remanded to superior court for "entry of an order remanding the ordinance to the Council for further proceedings in accordance with this opinion." *Cold Storage I*, 156 N.C. App. at 335, 576 S.E.2d at 419. On remand, the city filed a revised annexation report, reducing sub-area A to 32.63 acres, including 28.5 acres owned by petitioner. Following another public hearing, the city on 8 September 2003 adopted an ordinance annexing sub-area A. Petitioner sought review of the 2003 annexation ordinance and, when the superior court affirmed the governing board's actions, petitioner appealed to this Court.

Petitioner argues that the trial court erred by finding that sub-area A meets the contiguity requirements for annexation set forth in N.C.G.S. § 160A-48 (2003). We disagree.

[1] "Preliminarily, we note that under N.C. Gen. Stat. § 160A-50, a party challenging an annexation ordinance may seek judicial review in Superior Court and, thereafter, in the Court of Appeals and Supreme Court." *Briggs v. City of Asheville*, 159 N.C. App. 558, 560, 583 S.E.2d 733, 735, *disc. review denied*, 357 N.C. 657, 589 S.E.2d 887 (2003). Judicial review:

> is limited to deciding (1) whether the annexing municipality complied with the statutory procedures; (2) if not, whether the petitioners will suffer material injury as a result of any alleged procedural irregularities; and (3) whether the area to be annexed meets the applicable statutory requirements. Where the annexation proceedings show *prima facie* that the municipality has substantially complied with the requirements and provisions of the annexation statutes, the burden shifts to the petitioners to show by competent evidence a failure on the part of the municipality to comply with the statutory requirements or an irregularity in the proceedings that materially prejudices the substantive rights of the petitioners.

Hayes v. Town of Fairmont, 167 N.C. App. 522, 523-24, 605 S.E.2d 717, 718-19 (2004) (citing *In re Annexation Ordinance*, 278 N.C. 641, 647, 180 S.E.2d 851, 855 (1971), and N.C.G.S. § 160A-38 (2003)), *disc. review denied*, 359 N.C. App. 410, ––– S.E.2d ––– (filed 6 April 2005) (other citations omitted). Moreover, " '[o]n appeal, the findings of fact made below are binding on this Court if supported by the evidence, even where there may be evidence to the contrary.' However,

'conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.' " *Briggs*, 159 N.C. App. at 560, 583 S.E.2d at 735 (quoting *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980), and *Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 217, 447 S.E.2d 471, 473 (1994)).

[2] Because petitioner challenges an involuntary annexation by a city of more than 5000, we first review certain constraints on such annexations. " '[C]ontiguity is an essential precondition to the involuntary annexation of outlying territories by cities.' " *Town of Spencer v. Town of East Spencer*, 351 N.C. 124, 132, 522 S.E.2d 297, 303 (1999) (quoting *Hawks v. Town of Valdese*, 299 N.C. 1, 5, 261 S.E.2d 90, 93 (1980)). This requirement is found in N.C.G.S. § 160A-48(b)(1), which provides in pertinent part that the **"total area to be annexed** must . . . be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun[.]" (emphasis added).

Relevant terms in G.S. § 160A-48 have been interpreted or defined. "Contiguous" is defined by statute to "mean any area which, at the time annexation procedures are initiated, either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right-of-way, a creek or river, the right-of-way of a railroad or other public service corporation, lands owned by the municipality or some other political subdivision, or lands owned by the State of North Carolina." N.C.G.S. § 160A-41(1) (2003). Additionally, the phrase "the time the annexation proceeding is begun" has been construed to mean the date of a city's resolution of intent: "[A]nnexation proceedings begin when a municipality takes 'the first mandatory public procedural step in the statutory process' of annexation; the passing of a resolution of intent has been determined to be that first step." *Spencer*, 351 N.C. at 129, 522 S.E.2d at 301 (quoting *City of Burlington v. Town of Elon College*, 310 N.C. 723, 728, 314 S.E.2d 534, 537 (1984)). Thus, a tract is "contiguous" to the annexing municipality if it is contiguous as of the date of the resolution of intent. "Contiguity with the boundaries of the annexing municipality at the time of the adoption of a resolution of intent pursuant to N.C.G.S. § 160A-31(g) is without question an essential requirement[.]" *City of Kannapolis v. City of Concord*, 326 N.C. 512, 517, 391 S.E.2d 493, 496 (1990).

Several other annexation requirements are pertinent to this case. N.C.G.S. § 160A-49 (2003) requires that, after passing a resolution of intent, a municipality must conduct a public hearing on the proposed annexation. Under N.C.G.S. § 160A-47 (2003), the city must

adopt an annexation report for public scrutiny prior to the public meeting. After the public hearing, a municipality "shall take into consideration facts presented at the public hearing and shall have authority to amend the report required by G.S. 160A-47 to make changes in the plans for serving the area proposed to be annexed[.]" G.S. § 160A-49(e). Such an amendment may reduce the area to be annexed. *See, e.g.*, *Cold Storage I*, 156 N.C. App. at 333, 576 S.E.2d at 418 (holding that trial court's "order that 'the area to be annexed be re-defined' was an instruction to re-draw the boundaries of the area to exclude the vacant acres that frustrated compliance with G.S. § 160A-48(c)(3)"); *Bowers v. City of Thomasville*, 143 N.C. App. 291, 293, 547 S.E.2d 68, 70 (2001).

We also note that, for administrative or other practical reasons, cities sometimes divide the total annexation area into "sub-areas" during the annexation proceedings. Appellate cases have upheld annexations wherein this practice occurred. *See, e.g.*, *Chapel Hill Country Club, Inc. v. Town of Chapel Hill*, 97 N.C. App. 171, 174-75, 388 S.E.2d 168, 170-71 (1990) (city first "approved an annexation report . . . for a tract of land, designated Area 1," but later "passed a resolution that . . . divided Area 1 into four subareas"); *Adams-Millis Corp. v. Kernersville*, 6 N.C. App. 78, 90, 169 S.E.2d 496, 504 (1969) ("had Area 3 and Area 4 been consolidated as one area, it still would have qualified for annexation. The reason for two separate areas is not apparent from the record, nor do we think the motive therefor material.").

To summarize: (1) annexation proceedings are initiated when a city passes a resolution of intent to annex an area; (2) the resolution must identify the area proposed for annexation; (3) the total area proposed for annexation must be contiguous with existing city limits as of the date the city passes its resolution; (4) the city must prepare an annexation report and hold a public meeting; (5) if appropriate, the city then may amend its initial annexation report to reduce the area being annexed; and (6) the city also may divide the area proposed for annexation into sub-areas.

In the instant case, annexation procedures were initiated on 21 October 1998, when the city filed its resolution of intent. It is undisputed that (1) the area identified in the resolution of intent was contiguous to the city limits as of that date, and (2) the total area ultimately annexed, consisting of sub-areas A and B, also is contiguous with the city limits as they were on the date the resolution of intent was passed. Moreover, the sub-area that adjoins the 1998 city lim-

its (sub-area B), was annexed **before** the sub-area that is not contiguous with the 1998 city limits (sub-area A). Thus, on the facts of this case, the city's division of the area initially proposed for annexation into sub-areas A and B did not result in annexation of an "island" not contiguous with city limits as of the date of the resolution of intent.

However, the boundaries of sub-area A, **if considered in isolation**, rather than as a sub-part of the area identified in the resolution of intent and of the total area eventually annexed, are not contiguous with the city limits on 21 October 1998. On this basis, petitioner argues that the annexation is invalid and should be declared void. Petitioner basically contends that, although the area identified in the resolution of intent, as well as the total area finally annexed, are both contiguous with the 1998 city limits, there is an **ultimately additional** requirement that the boundaries of each sub-area in the area annexed be, individually and separately, contiguous with the city limits. Petitioner cites no authority for this proposition, and we find none.

[3] Finally, we note that the 8 September 2003 ordinance annexing sub-area A, which was passed long after the effective date of the sub-area B annexation, did not explicitly state that sub-area A was part of the larger total area originally proposed for annexation in the 21 October 1998 Resolution of Intent. However, even assuming *arguendo* this constituted error, it does not rise to the level of substantial lack of compliance with annexation statutes, and did not materially prejudice petitioner's rights.

This assignment of error is overruled.

We have carefully considered petitioner's other arguments, and find them to be without merit.

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

CHARLES MORRIS, PLAINTIFF-APPELLEE v. ROCKINGHAM COUNTY, ROCKINGHAM COUNTY EMERGENCY MEDICAL SERVICES, A DIVISION OF ROCKINGHAM COUNTY, JOHN CARTER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMERGENCY MEDICAL TECHNICIAN FOR ROCKINGHAM COUNTY EMERGENCY MEDICAL SERVICES, A DIVISION OF ROCKINGHAM COUNTY, JOHN MURPHY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMERGENCY MEDICAL TECHNICIAN FOR ROCKINGHAM COUNTY EMERGENCY MEDICAL SERVICES, A DIVISION OF ROCKINGHAM COUNTY, DEFENDANTS-APPELLANTS

No. COA04-548

(Filed 17 May 2005)

1. Appeal and Error— appealability—denial of change of venue

The denial of a motion to transfer venue is immediately appealable because it affects a substantial right.

2. Venue— action against paramedics—actions at hospital in another county

A motion for change of venue to Rockingham County from Forsyth County was correctly denied in an action which arose when plaintiff's stretcher fell several feet to the ground while Rockingham County paramedics were unloading him at Baptist Hospital in Forsyth County. Although defendants argued that the action was local in nature because it was against a county and its public officers in the performance of an official duty, the acts and omissions constituting the basis of the action occurred in Forsyth County.

Appeal by defendants from order entered 29 January 2004 by Judge William Z. Wood, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 11 January 2005.

Frazier & Frazier, L.L.P., by Torin L. Fury, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by James R. Morgan, Jr. and Andrew L. Fitzgerald, for defendants-appellants.

MCGEE, Judge.

John Carter and John Murphy, paramedics for Rockingham County Emergency Medical Services, transported Charles Morris (plaintiff) by ambulance from Eden Morehead Hospital in

Rockingham County to North Carolina Baptist Hospital (Baptist Hospital) in Forsyth County. At Baptist Hospital, while the paramedics were removing the stretcher carrying plaintiff, the head of the stretcher bounced off a stair of the ambulance and hit the ground.

Plaintiff filed an action for negligence and medical malpractice in Forsyth County. Plaintiff named as defendants the two paramedics, Rockingham County, and Rockingham County Emergency Medical Services (collectively defendants). Specifically, plaintiff alleged that he suffered multiple cervical disc ruptures and required surgery as a result of the stretcher being dropped by defendant paramedics. Defendants filed a motion for change of venue to Rockingham County. In an order entered 29 January 2004, the trial court denied the motion. Defendants appeal.

[1] Although defendants' appeal is interlocutory, we have previously held that "a denial of a motion to transfer venue affects a substantial right." *Hyde v. Anderson*, 158 N.C. App. 307, 309, 580 S.E.2d 424, 425 (citing *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121-22, 535 S.E.2d 397, 401 (2000)), *disc. review denied*, 357 N.C. 459, 585 S.E.2d 759 (2003). The trial court's order is immediately appealable and properly before us.

[2] An action "[a]gainst a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer[,]" must be filed "in the county where the cause, or some part thereof, arose[.]" N.C. Gen. Stat. § 1-77 (2003). In considering such actions, the following two questions must be addressed: "(1) Is defendant a 'public officer or person especially appointed to execute his duties'? [and] (2) In what county did the cause of action in suit arise?" *Coats v. Hospital*, 264 N.C. 332, 333, 141 S.E.2d 490, 491 (1965). In the present case, plaintiff and defendants only dispute in which county the cause of action arose, and accordingly, in which county venue is proper.

Defendants argue that the proper venue in this case is Rockingham County. Defendants assert that because the action is against a county and its public officers for the performance of an official duty, the action is local in nature, and the proper venue is the county in which the public officials perform their official duties. *See Powell v. Housing Authority*, 251 N.C. 812, 816, 112 S.E.2d 386, 389 (1960) ("[A]ll public officers, when sued about their official acts, should be sued in the county where they transact their official busi-

ness."). Defendants emphasize that the purpose underlying N.C.G.S. § 1-77 "is to avoid requiring public officers to 'forsake their civic duties and attend the courts of a distant forum.' " *Wells v. Cumberland Cty. Hosp. Sys., Inc.*, 150 N.C. App. 584, 587, 564 S.E.2d 74, 76 (2002) (quoting *Coats*, 264 N.C. at 333, 141 S.E.2d at 491). Defendants contend the paramedics were acting in their official capacity as emergency medical technicians for Rockingham County Emergency Medical Services, which is a Rockingham County agency. Defendants thus argue that Rockingham County is the only proper venue because all of the parties are citizens or entities residing solely in Rockingham County.

However, in the cases cited by defendants, the cause of action arose and occurred within the county that was being sued. By contrast, in the present case, the cause of action arose not in the county being sued, but in Forsyth County. Our Supreme Court has held that venue is proper outside of the county sued when, as is the case here, the cause of action arose in another county. *Murphy v. High Point*, 218 N.C. 597, 12 S.E.2d 1 (1940).[1] In *Murphy*, landowners in Davidson County sued the City of High Point, a Guilford County municipality that was operating a sewage disposal plant in Davidson County. *Id.* at 598, 12 S.E.2d at 1. The landowners filed their action in Davidson County because the City of High Point was allowing raw sewage to pass into a Davidson County stream. *Id.* Defendants argue that *Murphy* is factually and legally distinguishable from the present case. First, defendants argue that rather than involving a personal injury, as in the present case, *Murphy* involved real property in Davidson County, and the venue was properly in the county where the land affected was situated. Second, defendants argue that in *Murphy*, venue was in Davidson County because the City of High Point had a significant presence in Davidson County, as it was operating the sewage disposal plant there. Whereas, in the present case, defendants argue that Rockingham County does not have any buildings or other significant connection to Forsyth County.

Defendants' arguments, however, are not supported by our Supreme Court's rationale in *Murphy*. The Court noted that an offi-

1. In the sixty-five years since *Murphy* was decided, the North Carolina General Assembly has not amended or modified N.C.G.S. § 1-77 to indicate that public officers may not be sued outside of their home county when, while performing their official duties, they commit a tort outside of their home county. *See Hicks v. Clegg's Termite & Pest Control, Inc.*, 132 N.C. App. 383, 385-86, 512 S.E.2d 85, 87 (discussing the legislature's option to amend a statute), *disc. review denied*, 350 N.C. 831, 538 S.E.2d 196 (1999).

cer's acts are no longer confined to the county in which he is an officer and that official conduct of public officers are "not necessarily inherently local." *Murphy*, 218 N.C. at 599, 12 S.E.2d at 2 (internal quotations omitted). The Court further stated:

> When public utilities are constructed and maintained outside the corporate limits of a city such plant must be operated and controlled. The agents and officials of the city who operate these utilities are acting for and in behalf of the city. Their acts are the acts of the municipality. When their conduct in respect thereto gives rise to a cause of action the cause of action arises where the act is committed.

Id. at 600, 12 S.E.2d at 3. In the case before us, defendants were fulfilling their duty under N.C. Gen. Stat. § 147-517 (2003) that "[e]ach county shall ensure that emergency medical services are provided to its citizens" by transporting plaintiff to a hospital outside Rockingham County. The paramedics, as officers of Rockingham County, were carrying out official duties, and were acting on behalf of Rockingham County. The paramedics' official duties brought them to Forsyth County, and their acts or omissions gave rise to a cause of action in Forsyth County.

"[A] cause of action may be said to accrue, within the meaning of a statute fixing venue of actions, when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested." *Smith v. State*, 289 N.C. 303, 333, 222 S.E.2d 412, 432 (1976) (quoting 77 Am. Jur. 2d Venue § 37 (1975)). In a negligence action, the right to sue is vested when a person fails "to exercise that degree of care which a reasonable and prudent [person] would exercise under similar conditions and which proximately causes injury or damage to another." *Williams v. Trust Co.*, 292 N.C. 416, 422, 233 S.E.2d 589, 593 (1977). In the present case, any negligence on the part of defendants was not actionable until plaintiff was injured. Plaintiff alleges that he was injured when the paramedics failed to properly remove the stretcher, allowing "the head of the stretcher containing [plaintiff] to bounce off the center step of the ambulance and slam to the ground some three to four feet below." Thus, the injury occurred and the cause of action arose in Forsyth County.

Moreover, " '[a] broad, general rule . . . is that the cause of action arises in the county where the acts or omissions constituting the basis of the action occurred.' " *Coats*, 264 N.C. at 334, 141 S.E.2d at 492 (quoting Annot., Venue of actions or proceedings against public

officers, 48 A.L.R. 2d 423, 432). Defendants argue that Rockingham County is the proper venue because plaintiff's complaint demonstrates that most of the acts or omissions of alleged negligence occurred in Rockingham County. We disagree with defendants' reading of the complaint. Plaintiff makes five specific allegations concerning how defendants breached their duty of care to plaintiff. Only one of these allegations involves acts or omissions that occurred in Rockingham County, that defendants failed to inspect and maintain the ambulance. The other alleged acts and omissions, which form the basis of plaintiff's negligence claim, occurred in Forsyth County. Plaintiff asserted in his complaint that defendants breached their duty of care when they:

> a. failed to exercise ordinary care in the removal of a stretcher from an ambulance;
>
> b. failed to release the handle at the foot of the stretcher or otherwise failed to lock the undercarriage in a down position thereby allowing the stretcher to safely position outside of the ambulance;
>
> . . . .
>
> d. failed to otherwise properly secure the stretcher in a position so that it would not fall from the ambulance;
>
> e. failed to secure in an upright position the center step so that the stretcher would clear the step on removal[.]

The cause of action arose in Forsyth County because "the acts [and] omissions constituting the basis of the action occurred" in Forsyth County. *See Coats*, 264 N.C. at 334, 141 S.E.2d at 492.

For the foregoing reasons, we affirm the trial court's denial of defendants' motion for change of venue.

Affirmed.

Judges WYNN and TYSON concur.

TONYA McGUIRE, PLAINTIFF v. MOLLIE D. DRAUGHON, AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANTS

No. COA04-716

(Filed 17 May 2005)

Insurance— automobile—regular use exception

Mollie Draughon's use of her mother-in-law's automobile was within the "regular use" exception of an insurance policy issued by defendant-Farm Bureau to Mollie Draughon, and summary judgment was correctly granted for Farm Bureau on the question of Farm Bureau's coverage of Ms. Draughon's automobile accident. "Regular" use does not imply daily use.

Appeal by plaintiff from judgment entered 13 January 2004 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 March 2005.

Wallace and Graham, P.A., by Marc P. Madonia, for plaintiff-appellant.

Caudle & Spears, P.A., by C. Grainger Pierce, Jr. and L. Cameron Caudle, Jr., for defendant-appellee North Carolina Farm Bureau Mutual Insurance Company.

MARTIN, Chief Judge.

On 6 October 2001, defendant Mollie Draughon was operating a 1993 Ford Explorer belonging to her mother-in-law, Betty Draughon, when she was involved in a collision with a motorcycle operated by plaintiff. Plaintiff was injured as a result of the collision.

The Ford Explorer belonging to Betty Draughon was insured by Travelers Indemnity Insurance Company, along with a 1988 Dodge Colt, also owned by Betty Draughon. The policy carried limits of liability of $50,000 per person. At the time of the accident, Mollie Draughon and her husband, Theodore, owned two vehicles, a 1992 Suzuki and a 1988 Honda. Those vehicles were insured by Farm Bureau Mutual Insurance Company, Inc. (Farm Bureau) under a policy which had limits of $250,000 per person. The policy specifically excluded coverage for any other vehicle furnished for the Draughon's "regular use," stating in pertinent part:

B. We do not provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle, other than your covered auto, which is

   a. owned by you; or

   b. furnished for your regular use.

Travelers tendered its policy limits of $50,000 to plaintiff; Farm Bureau denied coverage based upon the exclusion in its policy. Plaintiff brought this action seeking a declaratory judgment that Farm Bureau provided coverage to Mollie Draughon for her liability to plaintiff. Defendant Farm Bureau filed its answer, denying that it provided coverage based upon the "regular use" exclusion in its policy. Farm Bureau subsequently moved for summary judgment.

The evidence before the trial court showed that Mollie and Theodore Draughon live next door to Betty Draughon, Theodore's mother, in Lewisville, North Carolina. Their two houses are on a single lot that measures an acre and a half, with a shared driveway between the houses. Betty Draughon regularly drove the 1988 Dodge Colt; the 1993 Ford Explorer had belonged to her husband, Billy Draughon, prior to his death in November, 1999. Betty Draughon stated in her deposition that she had only driven the Explorer once or twice, and when it was not being used, it was parked between her house and her son's house in the shared driveway.

In 1998, Mollie and Theodore Draughon's son took the 1988 Honda away with him to college, leaving them with one car, the 1992 Suzuki, between them. When they needed a second car, they used the Explorer. Betty paid the property taxes on the Explorer and kept the title and other vehicle records, but the Explorer was available for the Draughons' use at any time. Betty placed no restrictions on its use, and the Draughons did not have to seek her permission before driving it. The Draughons had one set of keys and two spare keys for the Explorer, and they paid for the Explorer's gas and emissions inspections. Mollie stated in her deposition that she could not close the front driver's side door of the Explorer without assistance. However, she also testified that from November of 1999 to October of 2001 she drove the Explorer an average of two to three times per week. Theodore verified this estimate in his deposition. Mollie stated she used the Explorer to run errands, to drive Betty to various places, and occasionally to drive to work. Mollie and Theodore Draughon also used the Explorer for most trips out of town because it was larger and

more reliable than their Suzuki. Indeed, the accident giving rise to this litigation happened when Mollie and Theodore were using the Explorer to vacation in Myrtle Beach, South Carolina.

The trial court granted Farm Bureau's motion for summary judgment. Plaintiff appeals.

"The 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, 289 S.E.2d 363, 366 (1982); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). If the moving party satisfies its burden, the burden shifts to the non-movant to set forth specific facts showing there exists a triable issue of fact. *Lowe*, 305 N.C. at 369-70, 289 S.E.2d at 366.

The only issue presented by this appeal is whether defendant Draughon's use of the Explorer constituted "regular use" according to North Carolina law. First, plaintiff argues there were genuine issues of material fact which should have been presented to a jury as to whether Mollie Draughon's use of the vehicle was such as to be "regular." We disagree.

In response to an interrogatory asking her to describe the "frequency of [her] use of the vehicle," Mollie Draughon stated she "[o]ccasionally used [it] for trips and taking Betty Draughon places." In her deposition, however, Mollie Draughon said she used the Explorer an average of two to three times per week to run errands, go to work, and take Betty Draughon places. Plaintiff contends these answers are inconsistent and therefore present genuine issues of material fact regarding the frequency of defendant's use of the vehicle and her credibility as a witness. We disagree.

Defendant Draughon stated in her deposition that by "occasionally" she meant two to three times per week. Thus, by her own definition of "occasional," her response to the interrogatory and her deposition testimony are not inconsistent, but are actually corroborative of each other. Because these statements can be readily reconciled, the trial court did not err in finding no conflict between them. The facts in this case, therefore, are not in dispute. When the facts of a case are undisputed, construction and application of an insurance policy's provisions to those facts is a question of law. *Nationwide*

Mut. Ins. Co. v. Walters, 142 N.C. App. 183, 189, 541 S.E.2d 773, 776 (2001). Because the trial court was only required to apply the law to the undisputed facts in this case, this case is appropriately resolved by summary judgment.

When a liability policy does not define the term "regular use," no "absolute definition" can be established, and a determination of coverage under the policy must be based on the particular facts and circumstances of that case. *Id.* at 188, 541 S.E.2d at 776 (quoting *Whaley v. Insurance Co.*, 259 N.C. 545, 552, 131 S.E.2d 491, 496-97 (1963)). In *Whaley*, our Supreme Court set out two factors for analyzing whether the use of a vehicle constitutes regular use: (1) the availability of the vehicle to the insured, and (2) the frequency of its use by the insured. *Whaley*, *supra* at 554, 131 S.E.2d at 498.

In this case, the evidence established that Betty Draughon "furnished" the vehicle for Mollie and Theodore's use by leaving it in the shared driveway between their houses and placing no restrictions on its use. She did not require them to ask her permission before using it, and she did not drive it herself. She allowed them to take it out of town, the Draughons possessed three keys for the Explorer, and the vehicle was clearly available for Mollie's use on almost any given day for a period of nearly two years, regardless of whether she needed assistance to close the driver's side door. The fact that Betty Draughon retained possession of the title is of no consequence to the issue of whether the car was unavailable to Mollie. "Where an insured driver has the unrestricted use and possession of an automobile, the certificate of title for which is retained by another, the car is 'furnished for the regular use of' the insured driver." *Gaddy v. Insurance Co.*, 32 N.C. App. 714, 717, 233 S.E.2d 613, 615 (1977). Because Betty in no way restricted Mollie's use of the vehicle, we find no genuine issue of material fact regarding the availability of the Explorer for Mollie's use.

Plaintiff contends, however, that the frequency of Mollie's use of the Explorer does not constitute "regular use" under our case law. Our Supreme Court has established that the regular use exclusion does not apply to the "casual," "occasional," or "infrequent" use of another vehicle, *see Whaley*, 259 N.C. at 552, 131 S.E.2d at 496; *Whisnant v. Insurance Co.*, 264 N.C. 195, 199, 141 S.E.2d 268, 270 (1965), and plaintiff argues that our case law is drifting towards a definition of regular use as meaning daily use. Mollie's use of the Explorer, however, was consistent as well as continuing. Both Mollie and her husband estimated that she drove the Explorer an average of

two to three times per week for almost two years. "The rules of construction of insurance contracts are well established. Language must be given its ordinary, plain meaning unless a word is ambiguous.' " *Strickland v. State Farm Mut. Auto. Ins. Co.*, 133 N.C. App. 71, 72, 514 S.E.2d 304, 304 (1999). The plain meaning of "regular" does not imply "daily," and we decline to create such a bright line rule. *See N.C. Farm Bureau Mutual Ins. Co. v. Warren*, 326 N.C. 444, 448, 390 S.E.2d 138, 140-41 (1990) (using a *Webster's* dictionary definition of "regular" as "steady or uniform . . . in practice or occurrence; . . . returning or recurring at stated or fixed times or uniform intervals" to support a finding that a recurring pattern of a vehicle's use constituted regular use). Mollie's consistent and recurring use of the Explorer was sufficient to satisfy the frequency prong of the analysis. The trial court properly applied both the availability and frequency prongs to the facts of this case and properly granted summary judgment in defendants' favor.

The order from which plaintiff appeals is affirmed.

Affirmed.

Judges HUDSON and JACKSON concur.

NICOLE L. BENNETT, FORMERLY NICOLE HAWKS, PLAINTIFF v. WESLEY OTTO HAWKS, DEFENDANT v. CARLENE HAWKS AND DENNIS HAWKS, INTERVENORS

No. COA04-703

(Filed 17 May 2005)

Child Support, Custody, and Visitation— custody—nonparent—clear and convincing evidentiary standard—constitutionally protected status as natural parent

The trial court erred in a child custody case by awarding joint legal custody to plaintiff mother, defendant father, and intervenor paternal grandparents, and by placing primary physical custody of the child with the grandparents without applying the clear and convincing evidentiary standard to its decision that plaintiff's conduct was inconsistent with her constitutionally protected status as a natural parent, and the case is remanded for the pertinent findings of fact.

Appeal by plaintiff from judgment entered 17 October 2003 by Judge Spencer G. Key, Jr., in Surry County District Court. Heard in the Court of Appeals 12 January 2005.

Gus L. Donnelly for the plaintiff.

Karen Adams for the defendant.

Sarah Stevens for the intervenors.

TIMMONS-GOODSON, Judge.

Nicole Bennett ("plaintiff") appeals an order of the trial court awarding joint legal custody of her daughter, Brittany Hawks ("Brittany"), to plaintiff, Wesley Hawks ("defendant"), and Carlene and Dennis Hawks ("intervenors"), and placing primary physical custody of Brittany with intervenors. Because the trial court failed to apply the clear and convincing evidentiary standard in making its decision, we reverse and remand the case for findings of fact consistent with this standard of evidence.

The factual and procedural history of this case is as follows: Plaintiff and defendant were married from August 1994 to March 2000. Brittany was born 27 June 1995. At the time of their separation in 1996, plaintiff and defendant placed Brittany in the care of defendant's parents while they dealt with the dissolution of their marriage. The parties agreed that the grandparents would keep Brittany until plaintiff could "get on her feet." The period after the divorce was a transitional time for plaintiff as she changed residences and employment quite often.

On 13 June 2001, plaintiff filed the underlying complaint seeking permanent primary custody of Brittany, and child support from defendant. The grandparents filed a motion to intervene in the custody suit, seeking legal and physical custody of Brittany. They alleged and plaintiff denied, *inter alia*, that plaintiff had not had sufficient contact with Brittany or provided financial support for Brittany since Brittany began living with them. Plaintiff and defendant consented to the grandparents joining the custody action as intervenors. Upon hearing the evidence presented at trial, the trial court issued an order containing several findings of fact and the following pertinent conclusions of law:

2. All parties are fit and proper persons to exercise legal custody of the minor child. The Plaintiff and Defendant have acted

inconsistently with their constitutionally protected status as parents.

3. The best interest of the minor child will be served by residing primarily with the Intervenors.

The trial court therefore ordered joint legal custody of Brittany to all parties, and granted primary physical custody to intervenors with liberal visitation rights for plaintiff. It is from the trial court's order that plaintiff appeals.

The dispositive issue in this case is whether the trial court applied the clear and convincing standard of proof in deciding that plaintiff's conduct was inconsistent with her constitutionally protected status as a natural parent. Because the trial court's order is unclear about the standard of proof, we reverse and remand the trial court's order.

"[N]atural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children." *Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997). This "constitutionally protected paramount interest . . . is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." *Price*, 346 N.C. at 79, 484 S.E.2d at 534 (citing *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614 (1983) *and In re Hughes*, 254 N.C. 434, 119 S.E.2d 189 (1961)). The parent's interest "rises to the level of a liberty interest and is protected by the Due Process Clause of the Fourteenth Amendment." *Penland v. Harris*, 135 N.C. App. 359, 362, 520 S.E.2d 105, 107 (1999) (citing *Price*). However, "the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child." *Price*, 346 N.C. at 79, 484 S.E.2d at 534. Conduct inconsistent with the presumption includes, but is not limited to, unfit behavior, neglect and abandonment. *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

In the recent case of *David N. v. Jason N.*, 359 N.C. 303, 608 S.E.2d 751 (2005), our Supreme Court held as follows:

> It is clear from the holdings of *Petersen* [*v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994)], *Price*, and *Adams* [*v. Tessener*, 354 N.C. 57, 550 S.E.2d 499 (2001)] that a natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or

(2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status.

359 N.C. at 307, 608 S.E.2d at 753. Therefore, where the trial court finds that a parent is fit to have custody, it does not preclude the trial court from granting joint or paramount custody to a nonparent where the trial court finds that the parent's conduct was inconsistent with her constitutionally protected status. *Id.*

"[T]he decision to remove a child from the custody of a natural parent must not be lightly undertaken. Accordingly, a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48, 71 L. Ed. 2d 599, 603 (1982)). Our Supreme Court reaffirmed in *David N.* that "a determination that a natural parent has acted in a way inconsistent with his constitutionally protected status must be supported by clear and convincing evidence." 359 N.C. at 307, 608 S.E.2d at 753. Ultimately, the Court reversed the order in *David N.* granting custody to a nonparent, and remanded the case because the trial court "failed to apply the clear and convincing evidence standard as set forth in *Adams*." 359 N.C. at 307, 608 S.E.2d at 754.

The order in the instant case does not indicate which standard of proof the trial court applied in consideration of plaintiff's constitutionally protected status as a natural parent. This is critical because while the general standard of proof in child custody cases is by a preponderance of the evidence, *Speagle v. Seitz*, 354 N.C. 525, 533, 557 S.E.2d 83, 88 (2001), our Supreme Court announced in *Adams* and reiterated in *David N.* that where the natural parent's constitutionally protected status is at issue, the standard of proof is clear and convincing evidence.

In light of *Adams* and *David N.*, we hold that the trial court must apply the clear and convincing standard of proof in determining plaintiff's constitutionally protected status as a natural parent. Absent an indication that the trial court applied the clear and convincing standard in this case, we reverse the order of the trial court and remand this case for findings of fact consistent therewith.

REVERSED and REMANDED.

Judges HUDSON and STEELMAN concur.

IN THE MATTER OF: T.L.T.

No. COA04-1084

(Filed 17 May 2005)

Termination of Parental Rights— failure to file order within time period—juvenile custody

The trial court erred by failing to enter its order terminating respondent mother's parental rights within the time period required by N.C.G.S. §§ 7B-1109 and 7B-1110 and the case is remanded for a new trial, because: (1) the trial court did not enter the termination order until seven months after the conclusion of the termination hearing, and respondent was prevented from filing a proper appeal with the Court of Appeals during that time; (2) the trial court's delay of its entry of the order ran counter to the legislative intent in enacting the thirty-day requirement which was to provide for the quick and speedy resolution of juvenile cases where juvenile custody is an issue; and (3) the failure to enter the order in a timely manner affected not only respondent, but also the minor child, his foster parents, and his potential adoptive parents.

Appeal by respondent from order entered 10 June 2003 by Judge William C. Kluttz, Jr., in Rowan County District Court. Heard in the Court of Appeals 14 April 2005.

E. Blake Evans and David B. Wilson for petitioner-appellee Rowan County Department of Social Services.

Paul F. Herzog for respondent-appellant.

TIMMONS-GOODSON, Judge.

Respondent-mother appeals the trial court order terminating her parental rights to her minor son, Thomas.[1] Because we conclude that the trial court erred by failing to enter its order within the time period required by N.C. Gen. Stat. §§ 7B-1109 and 7B-1110, we reverse the trial court order and remand the case for a new trial.

The facts and procedural history pertinent to the instant appeal are as follows: On 12 February 2002, Rowan County Department of

1. For the purposes of this opinion, we will refer to the minor child by the pseudonym "Thomas."

Social Services ("petitioner") filed a petition to terminate respondent's parental rights to Thomas. The petition alleged that sufficient grounds exist to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), (6), and (8). On 15 November 2002, the trial court held a hearing on the matter. After receiving evidence and hearing argument from both parties, the trial court concluded that sufficient grounds exist to terminate respondent's parental rights to Thomas, and that it was in Thomas' best interests to do so. The trial court thereafter entered an order terminating respondent's parental rights to Thomas on 10 June 2003. Respondent appeals.

The dispositive issue on appeal is whether the trial court erred by failing to enter its order within the time period prescribed by N.C. Gen. Stat. §§ 7B-1109 and 7B-1110. N.C. Gen. Stat. § 7B-1109 (2003) provides as follows:

> (e) 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.

Similarly, N.C. Gen. Stat. § 7B-1110 (2003) provides as follows:

> (a) 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.

This Court has previously declined to vacate a trial court order entered outside these statutory time frames, concluding that no compelling reason exists to vacate the order where the respondent is unable to demonstrate that he has "suffered any prejudice by the trial court's delay." *In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391 (2004). However, noting that the above-detailed provisions of N.C. Gen. Stat. §§ 7B-1109 and 7B-1110 were drafted to protect the rights

of each party to a termination proceeding, we have more recently found prejudice and reversed a trial court's termination order where the order was entered approximately six months after the conclusion of the termination hearing. *In re L.E.B.*, 169 N.C. App. 375, —— S.E.2d —— (April 5, 2005) (No. COA04-463).

In the instant case, as detailed above, the trial court entered its order approximately seven months after the conclusion of the termination hearing. Respondent argues that she was prejudiced by this delay in that during the time period following the hearing but prior to the entry of the termination order, she had no right to seek visitation with her child or pursue her appeal of the trial court's determination. We note that respondent gave oral notice of appeal on 15 November 2002, following the trial court's bench determination that sufficient grounds exist to terminate respondent's parental rights. However, we also note that N.C. Gen. Stat. § 7B-1113 (2003) provides that a party to a termination proceeding may appeal from an adjudication or disposition order only if "notice of appeal is given in writing within 10 days after entry of the order." Thus, respondent was prevented from filing a proper appeal with this Court until seven months after the conclusion of the termination hearing. Furthermore, we also note that the trial court's delay of its entry of the order ran counter to the legislative intent in enacting the thirty-day requirement: to provide for the quick and speedy resolution of juvenile cases where juvenile custody is at issue. *L.E.B.*, 169 N.C. App. at 380, —— S.E.2d at ——. In the instant case, pending this Court's determination of the appeal, Thomas remained in petitioner's custody, and subsequent court proceedings involving Thomas were limited to those "temporary" orders authorized by N.C. Gen. Stat. § 7B-1113. Therefore, as we recognized in *L.E.B.*, the trial court's failure to enter its termination order in a timely manner affected not only respondent, but also Thomas, his foster parents, and his potential adoptive parents.

In light of the foregoing, we hold that the trial court erred by failing to enter its termination order within the prescribed time period. Accordingly, we reverse the trial court order and remand the case for a new trial.

Reversed and remanded.

Judges CALABRIA and GEER concur.

LTC DONALD SULLIVAN AND SP4 JEFFREY S. SULLIVAN, PLAINTIFFS V. STATE OF NORTH CAROLINA, MICHAEL F. EASLEY, AND MAJOR GENERAL WILLIAM E. INGRAM, DEFENDANTS

No. COA04-600

(Filed 17 May 2005)

Armed Services— standing—military deployment

The trial court did not err by dismissing plaintiffs' claim for an injunction to rescind orders of deployment for United States military forces, withdrawal of current deployed troops, and estoppel of future deployments based on lack of standing, because such relief is not within the power of the North Carolina state courts to grant since deployment of federal troops is entirely within the control of the federal government.

Appeal by plaintiffs from an order entered 1 March 2004 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 16 February 2005.

Jeffrey S. Sullivan and Donald Sullivan, plaintiff-appellants, pro se.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General W. Dale Talbert, for defendant-appellees.

HUNTER, Judge.

Lt. Col. Donald Sullivan and Specialist Jeffery S. Sullivan (collectively "plaintiffs") appeal from a dismissal of their claim for injunctive relief entered 1 March 2004. As we find plaintiffs lacked standing to bring this claim, we affirm the trial court's dismissal.

Plaintiffs are former members of the United States Armed Services. Specialist Sullivan is a current member of the North Carolina National Guard and was deployed in August 2003 to the current United States military operation ongoing in Afghanistan.

On 3 October 2003, plaintiffs sought a temporary restraining order and preliminary injunction against the State of North Carolina, Governor Michael F. Easley, and Major General William E. Ingram, Adjutant General of the North Carolina National Guard (collectively "defendants"), to: (1) rescind orders of deployment for members of

the military forces of North Carolina engaged in actions in Iraq and Afghanistan, (2) recall those troops already deployed, and (3) estop defendants from further deployment. Plaintiffs contend such actions violate the state and federal Constitutions.

Defendants moved to dismiss the action, contending that the claim was not justiciable and failed to state a claim on which relief could be granted. The trial court granted defendants' motion to dismiss on 1 March 2004, finding plaintiffs lacked standing, that defendants were protected by sovereign immunity, and that the complaint presented political questions not justiciable by the court. Plaintiffs contend the trial court erred in dismissing their claims on these grounds. We disagree.

> Standing is among the "justiciability doctrines" developed by federal courts to give meaning to the United States Constitution's "case or controversy" requirement. U.S. Const. Art. 3, § 2. The term refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter.

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002) (citation omitted). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002).

In order to establish standing to bring a justiciable claim before the court, a plaintiff must show an:

> " '(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.' "

Estate of Apple v. Commercial Courier Exp., 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005) (citations omitted).

Plaintiffs' requested relief in this action is an injunction to rescind orders of deployment for United States military forces, withdrawal of currently deployed troops, and estoppel of future deployments. Such relief is not within the power of the North Carolina state courts

to grant.[1] A member of a state national guard is simultaneously a member of the Army National Guard of the United States. *See* 10 U.S.C. § 101(c) (1998). Further, a guard member ordered to active duty is relieved from duty in the National Guard of his State. *See* 32 U.S.C. § 325(a) (1959). Plaintiffs' remedy of withdrawal of federal troops and estoppel of further deployment is not within the power of the State of North Carolina to provide, as such deployments of federal troops are entirely within the control of the federal government. *See* U.S. Const. art 1, § 8, cl. 16 (stating Congress shall govern the militia when employed in the service of the United States), U.S. Const. art 2, § 2, cl. 1 (stating President is commander in chief of the militia of the several states), U.S. Const. art. 6, § 2 (stating the Constitution is the supreme law of the land and binding on the judges of every state). Therefore the trial court properly found plaintiffs lacked standing to proceed with their claim.

As both plaintiffs have failed to establish standing, the trial court properly dismissed the action for lack of jurisdiction. We therefore decline to address plaintiffs' additional assignments of error.

Affirmed.

Judges CALABRIA and JACKSON concur.

---

1. We note that plaintiffs have previously sought virtually identical injunctive relief in our federal courts. Those claims were also dismissed for lack of standing and as political questions. See *Sullivan v. United States*, No. 7:03-CV-39-F1, (E.D.N.C. Apr. 15, 2003), *aff'd*, No. 03-1611 (4th Cir. Sept. 29, 2003) (*per curiam*).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 MAY 2005

ARH INT'L CO. v. TOWN OF CARY No. 03-1017	Wake (02CVS13632)	Reversed and remanded
BERSIN v. GOLONKA No. 04-695	Mecklenburg (99CVD7786-LCB)	Affirmed
GARNER v. GARNER No. 04-552	Rowan (99CVD177)	Affirmed
HARRIS v. HARRIS No. 04-370	Nash (00CVD369)	Affirmed in part; remanded in part
IN RE K.D., S.D., D.D. No. 04-799	Lee (02J53) (02J54) (02J55)	Affirmed
IN RE MURRAY No. 04-1056	Cabarrus (02E501)	Dismissed
IN RE S.W. No. 04-892	Buncombe (03J245)	Affirmed
IN RE ZOLLICOFFER No. 04-411	Granville (03SPC247)	Reversed
JOHNSON v. HARNETT CTY. PLANNING BD. No. 04-961	Harnett (04CVS00111)	Affirmed
LOWE v. LOWE No. 04-482	Mecklenburg (01CVD16558)	Affirmed in part, reversed in part, and remanded
ROBBINS v. POLK CTY. No. 04-766	Polk (02CVS145)	Affirmed
SIGNATURE DISTRIB'N SERVS., INC. v. WRIGHT No. 04-645	Mecklenburg (02CVS19415)	Affirmed
SMITH v. BARBOUR No. 04-792	Wake (01CVD2256)	Affirmed
SMITH v. BARBOUR No. 04-1144	Wake (01CVD2256)	Affirmed in part, vacated in part, and remanded
SNUGGS v. POSTON No. 04-629	Gaston (02CVS2875)	Vacated and remanded

STATE v. CAMPBELL No. 04-322	Robeson (99CRS3306) (99CRS3066)	No error
STATE v. CHEEK No. 04-998	Randolph (01CRS56902)	No error
STATE v. CRAWFORD No. 04-461	Moore (01CRS50286)	No error
STATE v. EVERHART No. 04-739	Rowan (02CRS56911) (02CRS56912)	New trial
STATE v. MILES No. 04-345	New Hanover (01CRS14075) (01CRS14076)	No error
STATE v. SMITH No. 04-1033	Wake (03CRS49691) (03CRS49692) (03CRS49693) (03CRS49694) (03CRS56350)	Reversed in part and remanded
STATE v. SMITH No. 04-376	Greene (02CRS50869) (03CRS204)	No error
STATE AUTO. MUT. INS. CO. v. IADANZA No. 04-1230	Wake (03CVS11796)	Appeal dismissed
STINSON v. NANNEY No. 04-1078	Rutherford (02CVS1138)	Dismissed
WILSON v. BELCO, INC. No. 04-578	Guilford (01CVS12724)	No error
WOODARD v. VAN HARREVELD No. 04-1104	Wake (00CVS11122)	Affirmed

JOHN ANDREW CLAYTON, III, PLAINTIFF v. T.H. BRANSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, THE GREENSBORO POLICE DEPARTMENT AND THE CITY OF GREENSBORO, DEFENDANTS

No. COA04-884

(Filed 7 June 2005)

1. Police Officers— gross negligence—law of the case—willful and wanton conduct

The trial court erred in an action arising out of the transporting of plaintiff from his home to the city magistrate's office in a patrol car by denying defendants' motion for judgment notwithstanding the verdict on plaintiff's claim against defendant police officer for gross negligence or willful and wanton conduct, because: (1) although plaintiff contends the prior ruling in this case became the law of the case which forecloses this issue, the only issue decided by the Court of Appeals in this prior case was whether plaintiff's claims were barred by the defense of governmental immunity and it did not analyze the strength of plaintiff's evidence to determine whether it was strong enough to make out a prima facie case; and (2) plaintiff's claim that defendant drove 30 or 35 miles above the legal speed limit although he knew plaintiff was not wearing a seat belt and that defendant had to brake suddenly and swerve the patrol car to avoid a collision is sufficient to establish simple negligence but falls short of gross negligence.

2. Civil Rights; Immunity— § 1983 action—governmental immunity—procedural due process—substantive due process—equal protection

The trial court erred in a 42 U.S.C. § 1983 action arising out of the transporting of plaintiff from his home to the city magistrate's office in a patrol car by denying defendants' motion for judgment notwithstanding the verdict on plaintiff's constitutional claims alleging essentially that the city asserted governmental immunity against him but waived this defense for other tort claimants similarly situated to plaintiff and that defendants' policies and practices for determining whether to settle with tort claims are unconstitutional, because: (1) the city did not waive governmental immunity except to the extent of its purchase of liability insurance since the execution of settlement contracts between a municipality and tort claimants do not constitute waivers of the

affirmative defense of governmental immunity; (2) the city did not violate plaintiff's right to procedural due process when plaintiff failed to show that he has a constitutionally protected property right to recover tort damages from the city by means of a lawsuit or settlement; (3) the city did not violate plaintiff's right to substantive due process when plaintiff has not demonstrated any right to a monetary recovery or settlement with the city and thus cannot possibly have a fundamental right to do so, the factors the city uses to determine whether to offer a monetary settlement bear a rational relationship to legitimate governmental goals, and the city's policies for settling claims against it do not shock the conscience and are neither arbitrary nor unrelated to any conceivable governmental goal; and (4) plaintiff failed to produce evidence that his right to equal protection was violated when he did not present evidence of either the existence of any similarly situated claimant who was treated differently from him or that the treatment by the city was arbitrary or irrational.

Appeal by plaintiff and defendants from order entered 12 February 2004 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 3 March 2005.

Greeson Law Offices, by Harold F. Greeson, and Smith James Rowlett & Cohen, by Seth R. Cohen, for plaintiff-appellant and cross-appellee.

Smith Moore LLP, by Alan W. Duncan, Allison O. Van Laningham, and Patti W. Ramseur; and Fred T. Hamlet, for defendant-appellee and cross-appellant.

LEVINSON, Judge.

The parties appeal from post-trial orders entered following a verdict and judgment in favor of plaintiff. We reverse in part and dismiss as moot in part.

This case arises out of events occurring 20 December 1994, when defendant-Officer, T.H. Branson of the Greensboro, North Carolina Police Department, transported plaintiff (John Clayton) from plaintiff's home in Greensboro to the city magistrate's office. On 19 December 1997 plaintiff filed suit against Branson, both individually and in his official capacity, and against defendants Greensboro Police Department and City of Greensboro ("the city"). Plaintiff's complaint was voluntarily dismissed in 1999, but later refiled on 28 April 2000.

The complaint alleged, *inter alia* that: (1) when plaintiff was taken to the magistrate's office, Branson placed him in the back seat of a patrol car equipped with a metal safety screen between the front and back seats; (2) the screen made the back seat too cramped for plaintiff to use a seat belt; (3) on the drive downtown Branson drove 60-70 miles per hour in a 35 mph zone; (4) when another driver stopped on the road in front of them, Branson "slammed on his brakes and jerked his patrol vehicle to the right and then to the left in order to avoid a collision"; (5) Branson's maneuvers to avoid a collision "propelled [plaintiff] forward into the metal screen . . . with great force and violence"; and (6) as a result of this incident, he "[had] undergone three surgeries on his back and continue[d] to suffer excruciating and intractable pain to this day."

On the basis of these and other factual allegations, plaintiff brought claims against (1) Branson in his individual and official capacity for negligence, gross negligence, and willful and wanton misconduct; and (2) the Greensboro Police Department and the City of Greensboro on the theory of *respondeat superior*, and for negligent construction and installation of the metal screen in the patrol car. Plaintiff later amended his complaint to add a third claim against the city (the constitutional claim), seeking damages under 42 U.S.C. § 1983 for violation of his rights to "substantive due process and equal protection of the laws" under the North Carolina and U.S. constitutions. The defendants denied the material allegations of plaintiff's complaint, and raised the defense of governmental immunity. Defendants also moved for summary judgment, which the trial court denied.

Defendants appealed from the denial of their summary judgment motion, and on 15 October 2002 this Court issued its opinion in *Clayton v. Branson*, 153 N.C. App. 488, 570 S.E.2d 253 (2002) ("*Clayton I*"). The Court held that governmental immunity precluded plaintiff's negligence claims against Branson, the Greensboro Police Department, and the city of Greensboro, and reversed the trial court's denial of summary judgment on these claims. The Court also held that governmental immunity did not bar plaintiff's *gross negligence* claim against Branson individually, and upheld the court's denial of summary judgment on that claim. Finally, the Court upheld the trial court's denial of summary judgment on plaintiff's § 1983 constitutional claim, on the basis that "defendants have no defense of governmental immunity against the § 1983 claim." *Clayton I*, 153 N.C. App. at 494, 570 S.E.2d at 257.

Plaintiff's surviving claims, against Branson for gross negligence, and against the city for violating his constitutional rights, were tried before a jury in September, 2003. After presentation of evidence, four issues were submitted to the jury:

1. Was the plaintiff, John A. Clayton, III, injured by the willful or wanton negligence of the defendant T.H. Branson?

   Answer: Yes.

2. What amount is the plaintiff, John A. Clayton, III, entitled to recover for personal injury from the defendant T.H. Branson individually?

   Answer: $100.00

3. Did the City of Greensboro, acting under color of law, violate the plaintiff's Constitutional rights to equal protection of the law and due process of law by asserting the defense of governmental immunity in order to deny the plaintiff the right to seek compensation for his damages?

   Answer: Yes.

4. What amount is the plaintiff, John A. Clayton, III, entitled to recover from the defendant City of Greensboro for deprivation of a Constitutional right?

   Answer: $1,500,000.00.

The verdicts were returned on 26 September 2003, and the trial court entered judgment accordingly on 13 October 2003. On 23 October 2003 defendants filed a motion for judgment notwithstanding the verdict (JNOV), or in the alternative for a new trial, remittitur, or an order denying plaintiff prejudgment interest. On 12 February 2004 the trial court entered an order denying defendants' motion for JNOV, and awarding defendants a new trial. The order stated, in pertinent part that:

> [T]he Court finds that the verdict returned by the jury is internally irreconcilable, inconsistent and inexplicable, that the award of $1,500,000.00 is excessive and against the greater weight of the evidence, and . . . is inconsistent with the evidence presented[.] . . . A new trial is warranted on all issues, pursuant to [N.C.G.S. § 1A-1,] Rule 59. . . . The Court DENIES defendants' Motion for Judgment Notwithstanding the Verdict . . . [The Court] orders that the defendants' Motion for New Trial . . . [be] GRANTED . . .

The parties have appealed from this order; plaintiff appeals the award of a new trial, and defendants cross-appeal the denial of their motions for directed verdict and JNOV.

Standard of Review

We note initially that the trial court's award of a new trial, as well as its denial of JNOV, are both properly before this Court for appellate review. "When a motion for judgment notwithstanding the verdict is joined with a motion for a new trial, it is the duty of the trial court to rule on both motions." *Graves v. Walston*, 302 N.C. 332, 339, 275 S.E.2d 485, 489 (1981) (citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 85 L.Ed. 147, 153 (1940)). Thus, the trial court correctly entered an order with respect to both of defendants' motions. In the interests of judicial economy, we first address the court's denial of defendants' motion for JNOV, as the resolution of this issue may obviate the need to review the trial court's award of a new trial. *See Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 252, 565 S.E.2d 248, 253 (2002) ("Since we affirm the trial court's order granting defendants' motion for [JNOV], it is unnecessary for us to address plaintiff's arguments regarding the trial court's conditional grant of a new trial."), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003).

When considering a motion for JNOV:

> all the evidence must be considered in the light most favorable to the nonmoving party. The nonmovant is given the benefit of every reasonable inference . . . from the evidence and all contradictions are resolved in the nonmovant's favor. If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for . . . judgment notwithstanding the verdict should be denied.

Ace Chemical Corp. v. DSI Transports, Inc., 115 N.C. App. 237, 242, 446 S.E.2d 100, 103 (1994) (citations omitted).

Gross Negligence Claim

[1] Defendants argue that the trial court erred by denying their motion for JNOV on plaintiff's claim against Branson for gross negligence or willful and wanton conduct. We agree.

"Aside from allegations of wanton conduct, a claim for gross negligence requires that plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages." *Toomer v. Garrett*, 155 N.C. App. 462, 482, 574 S.E.2d 76, 92

(2002) (citing *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 562 S.E.2d 887 (2002)), *disc. review denied*, 357 N.C. 66, 579 S.E.2d 576 (2003). In the instant case, the dispositive issue is whether there was sufficient evidence of gross negligence.

Preliminarily, we reject plaintiff's assertion that review of this issue is foreclosed by this Court's opinion in *Clayton I*. Plaintiff contends that in *Clayton I* this Court "decide[d] whether Plaintiff's forecast of evidence on the issue of willful or wanton negligence against Defendant Branson was sufficient" and that this ruling became the "law of the case." We disagree.

Regarding the doctrine of "law of the case":

> "As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case." The law of the case doctrine, however, only applies to points actually presented and necessary for the determination of the case and not to dicta.

Kanipe v. Lane Upholstery, 151 N.C. App. 478, 484-85, 566 S.E.2d 167, 171 (2002) (quoting *Creech v. Melnik*, 147 N.C. App. 471, 473, 556 S.E.2d 587, 589 (2001) (citations omitted)).

Clayton I presented this Court with defendants' appeal from the trial court's denial of their motion for summary judgment. "Generally, a denial of summary judgment, because it does not dispose of the case, 'is an interlocutory order from which there is ordinarily no right of appeal.' " *Neill Grading & Constr. Co., Inc. v. Lingafelt*, 168 N.C. App. 36, 41, 606 S.E.2d 734, 738 (2005) (quoting *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993)). In *Clayton I*, the Court applied this rule in delineating its scope of review:

> The denial of a motion for summary judgment is interlocutory and is not generally appealable. Where the summary judgment motion was based on a substantial claim of immunity, a party may immediately appeal the denial of summary judgment. Defendants assert a claim of sovereign immunity. **We address only the issue of whether these claims are barred by sovereign immunity**.

Clayton I, 153 N.C. App. at 491-92, 570 S.E.2d at 256 (citing *Slade v. Vernon*, 110 N.C. App. 422, 425, 429 S.E.2d 744, 745-46 (1993))

(emphasis added). The Court then held that governmental immunity was unavailable as a defense to claims of gross negligence or willful misconduct outside the scope of Branson's duties, and "affirm[ed] the trial court's denial of summary judgment against Branson in his individual capacity for actions allegedly outside the scope of his duties and which go beyond mere negligence." *Id.* at 493, 570 S.E.2d at 256. We conclude that the only issue decided by this Court in *Clayton I* was whether plaintiff's claims were barred by the defense of governmental immunity.

Additionally, the instant case is easily distinguished from *Sloan v. Miller Bldg. Corp.*, 119 N.C. App. 162, 458 S.E.2d 30 (1995) (*Sloan I*), and *Sloan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 493 S.E.2d 460 (1997) (*Sloan II*), cited by plaintiff. In *Sloan I*, this Court undertook an extensive review of the evidence and assessed its strength, before concluding that "reasonable jurors could differ on the question of whether the conduct of defendant in the present case constituted willful or wanton misconduct[.]" *Sloan I*, 119 N.C. App. at 169, 458 S.E.2d at 34. Consequently, the Court in *Sloan II* concluded that it was bound by *Sloan I's* holding on the sufficiency of plaintiff's evidence of gross negligence. However, in *Clayton I*, the Court did not analyze the strength of plaintiff's evidence to determine whether it was strong enough to make out a *prima facie* case. To the contrary, the Court expressly held that the issue was interlocutory.

We next review the record to "determine whether there is sufficient evidence which, considered in the light most favorable to the plaintiff, would establish facts sufficient to constitute willful and wanton negligence. If the facts are such that reasonable persons could differ as to whether the evidence amounts to willful or wanton conduct, the question is properly preserved for the jury." *Wilburn v. Honeycutt*, 135 N.C. App. 373, 375-76, 519 S.E.2d 774, 776 (1999) (citing *Siders v. Gibbs*, 39 N.C. App. 183, 186, 249 S.E.2d 858, 860 (1978)). However, if the evidence taken in the light most favorable to the plaintiff fails to establish "gross negligence on the part of Officer [Branson], an essential element of [plaintiff's] claim is nonexistent and defendants are entitled to judgment as a matter of law." *Norris v. Zambito*, 135 N.C. App. 288, 296, 520 S.E.2d 113, 118 (1999).

Although Branson is a law enforcement officer, resolution of the issue of gross negligence is not governed by N.C.G.S. § 20-145 (2003), which addresses emergency situations such as an officer's high speed chase of an escaping felon. In the instant case, there is no indication that Branson was involved in any emergency. Also, the issue here is

gross negligence and, even under N.C.G.S. § 20-145, an officer is liable for his gross negligence.

"Our Supreme Court has defined 'gross negligence' as 'wanton conduct done with conscious or reckless disregard for the rights and safety of others.' " *Bray v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 281, 284, 564 S.E.2d 910, 912 (2002) (quoting *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988)).

> "[T]he difference between ordinary negligence and gross negligence is substantial. Negligence, a failure to use due care, *be it slight or extreme*, connotes inadvertence. . . . ." *Hinson* [*v. Dawson*], 244 N.C. [23, 28], 92 S.E.2d [393, 396 (1956)] (emphasis added). . . . [G]ross negligence [occurs] when the *act* is done purposely and with . . . a *conscious* disregard of the safety of others. . . . In the area of motor vehicle negligence, . . . the gross negligence issue has been confined to circumstances where . . . (1) defendant is intoxicated; (2) defendant is driving at excessive speeds; or (3) defendant is engaged in a racing competition[.]

Yancey v. Lea, 354 N.C. 48, 53-54, 550 S.E.2d 155, 158 (2001) (additional citations omitted). Our appellate courts have generally restricted their findings of gross negligence to cases with evidence of one or more of the factors mentioned in *Yancey*, or equivalent indicia of conduct that is "willful, wanton, or done with reckless indifference." *Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 403, 549 S.E.2d 867, 870 (2001). *See, e.g.*, *Brewer v. Harris*, 279 N.C. 288, 182 S.E.2d 345 (1971) (defendant had .31 blood alcohol level and was driving "well over" 100 mph, despite entreaties by his passengers to slow down); *Headley v. Williams*, 162 N.C. App. 300, 590 S.E.2d 443 (defendant crossed center line, causing collision: evidence showed defendant had empty beer cans in her car and was not wearing her eyeglasses), *disc. review denied*, 358 N.C. 375, 598 S.E.2d 136 (2004); *Eatmon v. Andrews*, 161 N.C. App. 536, 588 S.E.2d 564 (2003) (defendant causes collision after drinking, then flees scene to avoid taking Breathalyzer test); *Byrd v. Adams*, 152 N.C. App. 460, 568 S.E.2d 640 (2002) (defendant consumed alcohol and prescription drugs, fell asleep while driving on interstate highway, causing collision); *Siders v. Gibbs*, 39 N.C. App. 183, 249 S.E.2d 858 (1978) (while extremely intoxicated and driving at speeds up to 80 mph, defendant crossed center line, causing collision). Thus, "[o]rdinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act. Wanton and will-

ful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results." *Wagoner v. North Carolina R. Co.*, 238 N.C. 162, 168, 77 S.E.2d 701, 706 (1953) (citation omitted).

In the instant case, the evidence, taken in the light most favorable to plaintiff, tends to show that: (1) Branson directed plaintiff to sit in the back of the patrol car, even after plaintiff told Branson the back seat was too cramped to use a seat belt; (2) on the way to the magistrate's office, Branson exceeded the 35 mph speed limit and drove at speeds over 60 mph; and (3) when another car stopped in front of Branson's patrol car, Branson avoided a collision by braking abruptly and swerving the car from side to side. However, there was no evidence that, for example, Branson wove across lanes of travel, lost control of the vehicle, or struck any object or person with the patrol car. There was no evidence that Branson was intoxicated, or was racing another vehicle. Although he drove above the legal speed limit, Branson successfully avoided a collision without leaving the roadway or causing other vehicles to collide. Also, there was no evidence of unusual weather or road conditions.

Plaintiff's claim essentially rests upon evidence that Branson drove 30 or 35 miles above the legal speed limit although he knew plaintiff was not wearing a seat belt, and that he had to brake suddenly and swerve the car to avoid a collision. This evidence is sufficient to establish simple negligence. *See Bray v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 281, 564 S.E.2d 910 (no gross negligence where officer drove over 80 mph, crossed center line, and lost control of vehicle); *Roary v. Bolton*, 150 N.C. App. 193, 563 S.E.2d 21 (2002) (evidence that defendant drove at speeds up to 120 mph in 45 mph zone; case tried on simple negligence). Plaintiff cites no precedent finding gross negligence under circumstances similar to those in the present case, and we find none. We also note that in the order on appeal, the trial court explained that it had been "inclined to find as a matter of law that Officer Branson's conduct could not amount to willful and wanton negligence" but nevertheless declined to do so. And, during a pretrial hearing, plaintiff's attorney acknowledged that "most people are going to think, well, big deal, so he went fast and he swerved. So what?"

We conclude that the evidence, although sufficient to establish negligence, falls far short of the threshold of gross negligence. We further conclude that the trial court erred by denying defendants' motion for JNOV on plaintiff's gross negligence claim against Branson.

Accordingly, the trial court's denial of defendants' motion for JNOV must be reversed.

Constitutional Claim

[2] We next address the trial court's denial of defendants' motion for JNOV on plaintiff's constitutional claims. Plaintiff's complaint alleged, in pertinent part, that:

> 33A. . . . The City of Greensboro . . . has treated Plaintiff arbitrarily and capriciously by asserting governmental immunity as to Plaintiff, when the Defendant City had a custom or policy of waiving governmental immunity as to certain other claimant[s], similarly situated to Plaintiff, thereby denying this Plaintiff substantive due process and equal protection of the law in violation of both the North Carolina and United States constitutions and of 42 U.S.C. § 1983.
>
> 33B. . . . [Defendants] had a custom and policy of waiving governmental immunity and paying claims for damages to tort claimants similarly situated to this Plaintiff while asserting immunity and refusing to pay this Plaintiff's claims, thereby subjecting Plaintiff to the deprivation of rights, privileges or immunities secured to him by the Constitution and laws of the United States of America.
>
> 33C. Defendants' acts in asserting governmental immunity to avoid payment of Plaintiff's claim while waiving governmental immunity with respect to the claims of others similarly situated to Plaintiff constitutes arbitrary and capricious treatment of Plaintiff in violation of Plaintiff's rights to substantive due process and equal protection of the laws under both the Constitution of the United States and the Constitution of the State of North Carolina[.] . . .

Reduced to its essentials, plaintiff alleges that: (1) the city asserted governmental immunity against him, but "waived" governmental immunity for other tort claimants "similarly situated" to plaintiff; and (2) defendants' policies and practices for determining whether to settle with tort claimants are unconstitutional. Plaintiff sought damages under 42 U.S.C. § 1983 for violation of his constitutional rights.

Scope of Review

Preliminarily, we address plaintiff's characterization of the issues before us. Plaintiff asserts that the city's liability is conclusively

established, leaving the dollar amount of his damages as the only issue before us. We disagree.

Plaintiff first contends that, on appeal, defendants have "conceded" liability and admitted violating plaintiff's constitutional rights. However, although defendants' appellate brief focuses on the issue of damages, defendants' arguments are consistently couched in terms of the city's "**alleged** assertion of immunity" or its "**alleged** constitutional violation." (emphasis added). Defendants nowhere admit to or concede any violation of plaintiff's constitutional rights.

Plaintiff also argues that the "narrow issue" of his entitlement to "substantial damages" was "raised and decided" in *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000). *Dobrowolska* dealt with a different plaintiff in a different factual and evidentiary context. We are bound by this Court's holdings on all **legal** issues that were necessary to the decision in *Dobrowolska*, *see In re: Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). However, our determination of what **facts** are supported by this plaintiff's evidence, and our analysis of the nature and extent of that evidence, is not governed by *Dobrowolska.* Since this evaluation of the evidence is a necessary part of our legal ruling, the issue of the city's liability for constitutional violations is properly part of our review of the trial court's denial of defendants' motion for JNOV in plaintiff's constitutional claim.

Governmental Immunity and Waiver of Immunity

The premise of plaintiff's constitutional claims is that the city asserted the affirmative defense of governmental immunity in response to his lawsuit, but has "waived" governmental immunity for other claimants by executing settlement agreements with them. Accordingly, we first review the legal principles governing governmental immunity.

"Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (citations omitted). Consequently, "municipalities in North Carolina are immune from liability for their negligent acts arising out of governmental activities unless the municipality waives such immunity by purchasing liability insurance." *Anderson v. Town of Andrews*, 127 N.C. App. 599, 600, 492 S.E.2d 385, 386 (1997). Governmental immunity applies to claims

alleging negligence by a law enforcement officer while he was engaged in official business. *See Galligan v. Town of Chapel Hill*, 276 N.C. 172, 175, 171 S.E.2d 427, 429 (1970) ("A police officer in the performance of his duties is engaged in a governmental function.").

The city's authority to waive governmental immunity is governed by N.C.G.S. § 160A-485(a) (2003), which provides in relevant part:

> Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. . . . Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. . . . [N]o city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance.

Clayton I upheld the trial court's conclusion that the city "has purchased liability insurance for liability of more than $2 million but less than $4 million and has therefore waived its governmental immunity as to liability falling within that range, but has not waived its governmental immunity for amounts of liability less than $2 million dollars by the purchase of liability insurance." *Clayton I*, 153 N.C. App. at 491, 570 S.E.2d at 255. Plaintiff does not dispute the accuracy of this conclusion as regards the amount of liability insurance purchased by the city. Plaintiff contends, however, that by executing settlement contracts with certain claimants, the city waived the defense of governmental immunity altogether. We disagree.

First, as a complete bar to liability, governmental immunity constitutes an affirmative defense. *See Roberts v. Heffner*, 51 N.C. App. 646, 649, 277 S.E.2d 446, 448 (1981) ("A defense which introduces new matter in an attempt to avoid [plaintiff's claim], regardless of the truth or falsity of the allegations in the [complaint], is an affirmative defense."). As a **defense,** governmental immunity **cannot**, by definition, be raised **until** there is a lawsuit to defend against. Affirmative defenses are raised by a party's responsive pleading. N.C.G.S. § 1A-1, Rule 8(c) (2003) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . [any] affirmative defense."). *See*, *e.g.*, *Fowler v. Valencourt*, 334 N.C. 345, 346, 435 S.E.2d 530, 531 (1993) ("Defendants' answer . . . asserted the affirmative defense of governmental immunity on the part of the City[.]").

Secondly, "N.C.G.S. § 160A-485 provides that the only way a city may waive its governmental immunity is by the purchase of liability insurance." *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324,

420 S.E.2d 432, 435 (1992). In *Blackwelder*, plaintiff argued that defendant City violated his constitutional rights by forming a corporation (RAMCO) to resolve claims against the City for less than $1,000,000. The North Carolina Supreme Court held that, because RAMCO did not constitute liability insurance, the city's use of RAMCO to settle with certain claimants did not waive the city's governmental immunity:

> [P]laintiff contends that the City has violated the Equal Protection Clause of the Fourteenth Amendment . . . because the City, through RAMCO, can pick and choose what claims it will pay, thus depriving the plaintiff of the equal protection of the law. . . . If we were to hold the City has acted unconstitutionally . . . it would not mean the City had waived its governmental immunity.

Blackwelder, 332 N.C. at 325, 420 S.E.2d at 436-37. The logic of *Blackwelder's* holding, that a municipality's voluntary settlement with a claimant is not a waiver of governmental immunity, becomes clear when we consider the nature of settlement agreements.

A settlement agreement is a contract resolving a dispute without a trial. " 'Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts.' " *Bolton Corp. v. T. A. Loving Co.*, 317 N.C. 623, 628, 347 S.E.2d 369, 372 (1986) (quoting *Casualty Co. v. Teer Co.*, 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959)).

"A waiver is a voluntary and intentional relinquishment of a known right or benefit." *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E.2d 190, 195 (1975). Defendants assert that "[i]n settling tort claims, neither . . . the adjuster, nor the Legal Department waived governmental immunity." Plaintiff has offered no evidence of a settlement agreement whose terms contradict the defendants' contention. A waiver of governmental immunity would mean the city allowing a claimant to try his case, exposing itself to liability, and paying damages in an amount determined by a judge or jury. Plaintiff herein does not allege that the city has allowed any tort claimants to do so. In fact, plaintiff argues that the city's practice of making settlement offers in some cases is unfair precisely **because** the claimant must "take it or leave it" without the option of going to trial.

For the reasons discussed above, we conclude that the execution of settlement contracts between a municipality and tort claimants do not constitute waivers of the affirmative defense of governmental immunity. Accordingly, the city did not waive governmental immunity except to the extent of its purchase of liability insurance.

Due Process and Equal Protection

The record suggests that the city denied plaintiff's claim and did not offer him a monetary settlement, although it has executed settlement contracts with certain other tort claimants. Plaintiff alleges that this violated his constitutional rights to substantive and procedural due process and equal protection as guaranteed by the U.S. Const. amend. XIV, and by the N.C. Const., Art. I., § 19. We disagree.

The Fourteenth Amendment states that the government shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Our state courts generally treat the corresponding section of the N.C. Constitution as the functional equivalent of its federal counterpart:

> "The term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution."

Rhyne v. K-Mart Corp., 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quoting *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976)). Plaintiff properly bases his claim for damages for alleged 14th Amendment violations by the city on the provisions of 42 U.S.C. § 1983:

> Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. . . . [L]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . 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. Department of Social Servs., 436 U.S. 658, 690, 56 L. Ed. 2d 611, 635 (1978). Thus, "unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983. In short, a municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom

caused the constitutional injury." *Leatherman v. Tarrant County*, 507 U.S. 163, 166, 122 L. Ed. 2d 517, 523 (1993).

However, § 1983 does not create constitutional rights, and is available only to enforce constitutional rights whose source may be identified:

> We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States.

Gonzaga Univ. v. Doe, 536 U.S. 273, 283, 153 L. Ed. 2d 309, 321 (2002). "42 U. S. C. § 1983 . . . is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144, n.3, 61 L. Ed. 2d 433, 442 , n.3 (1979). Accordingly, identification of a constitutionally protected right is a prerequisite of plaintiff's right to sue under § 1983. *See*, *e.g.*, *Camastro v. City of Wheeling*, 49 F. Supp. 2d 500, 505 (N.D.W.V. 1998) ("plaintiff's claim for a violation of 42 U.S.C. § 1983 must be dismissed because plaintiff has no property right in a zoning variance; thus, plaintiff cannot state a claim for relief on the allegation that he has been deprived of a property right without due process of law"); *Ware v. Fort*, 124 N.C. App. 613, 616-17, 478 S.E.2d 218, 220-21 (1996) ("[P]laintiff rests his § 1983 claim on notions of substantive and procedural due process. . . . This argument fails because plaintiff simply had no property right in the position[.]").

In the instant case, determination of the constitutionality of the city's policies and practices for settling with tort claimants requires us to decide whether the city violated plaintiff's constitutional right either to (1) procedural due process; (2) substantive due process; or (3) equal protection.

Procedural Due Process

"Procedural due process restricts governmental actions and decisions which 'deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.' " *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 31 (1976)). However:

> A [plaintiff] must initially demonstrate a "property" interest . . . in order to invoke procedural due process protection. State law determines whether an individual [plaintiff] does or does not possess a constitutionally protected "property" interest[.]

Peace, 349 N.C. at 321, 507 S.E.2d at 278 (citations omitted). Thus, "[n]ot every property interest requires procedural due process. A protected property interest arises when one has a legitimate claim of entitlement as decided by reference to state law." *Dyer v. Bradshaw*, 54 N.C. App. 136, 139, 282 S.E.2d 548, 550 (1981) (citing *Bishop v. Wood*, 426 U.S. 341, 48 L. Ed. 2d 684 (1976)). The leading United States Supreme Court case on this issue held that:

> [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 561 (1972).

Plaintiff herein claims a constitutionally protected property interest in his right to recover damages from the city. A claimant can recover damages for personal injury either in a lawsuit or by means of a settlement between the parties; we will consider both of these possibilities.

As discussed above, absent a waiver of governmental immunity by the purchase of liability insurance, plaintiff is barred from maintaining a lawsuit against the city. As plaintiff has no right to maintain a suit against the city, under the facts set forth in this opinion, he cannot have a "constitutionally protected" property right to do so.

We next determine whether plaintiff produced evidence of a right, or "legitimate claim of entitlement" to a settlement offer from the city. "Such an interest can arise from or be created by statute, ordinance, or express or implied contract, the scope of which must be determined with reference to state law." *Presnell v. Pell*, 298 N.C. 715, 723, 260 S.E.2d 611, 616 (1979) (citing *Bishop*, 426 U.S. 341, 48 L. Ed. 2d 684) (other citation omitted). In the instant case, plaintiff

identifies no statute, ordinance, or other source of any right or entitlement to recover damages from the city.

Moreover, it is undisputed that settlement offers, if any, are in the discretion of the city. Simple logic dictates that a party cannot have a right or entitlement to a benefit whose dispensation rests entirely in the discretion of the city:

> If an official has unconstrained discretion to deny the benefit, a prospective recipient of that benefit can establish no more than a "unilateral expectation" to it. . . . Therefore, in order to assert a property interest . . . [plaintiff] must point to some policy, law, or mutually explicit understanding that both confers the benefit and limits the discretion of the City to rescind the benefit.

Med Corp., Inc. v. City of Lima, 296 F.3d 404, 409-10 (6th Cir. 2002) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 561 (1972)). Accordingly, the city's discretion to choose whether to settle with a claimant is not a constitutional violation of procedural due process; instead, it is some evidence that a tort claimant may not have a constitutionally protected right to a settlement offer from a municipality in North Carolina. In this regard, settlement decisions are analogous to discretionary employment decisions:

> To assess a candidate's accomplishments . . . necessarily involves subjective judgment and the substantial exercise of discretion. The regulations and guidelines [for doing so] in no way create the type of clear, nondiscretionary "entitlement" . . . that the Supreme Court has found to be necessary to establish a constitutionally protected property interest.

Harel v. Rutgers, 5 F. Supp. 2d 246, 273 (D.C.N.J. 1998).

In sum, plaintiff herein identifies no basis or source for a "property right" to a monetary settlement with the city. Further, on this record, the city's decisions about offering settlement monies are discretionary, and thus cannot give rise to more than an "unilateral expectation" of relief. Consequently, we conclude that plaintiff failed to produce evidence that he has a constitutionally protected property right to recover tort damages from the city by means of a lawsuit or a settlement.

Because plaintiff herein failed to produce evidence of a right to recover damages from the city, the issue of procedural safeguards is not presented. "Where there is no property interest, there is no en-

titlement to constitutional protection." *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 678, 446 S.E.2d 332, 344 (1994) (citing *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134 (4th Cir. 1990)).

For the reasons discussed above, we conclude that the city did not violate plaintiff's right to procedural due process.

Substantive Due Process

Plaintiff also claims that the city's policies and practices for settling claims against it violate his right to substantive due process. We disagree.

" 'Substantive due process' protection prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' " *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quoting *Rochin v. California*, 342 U.S. 165, 172, 96 L. Ed. 183, 190 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L. Ed. 288, 292 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707 (1969)). "Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained." *State v. Joyner*, 286 N.C. 366, 371, 211 S.E.2d 320, 323 (1975). However:

> "[u]nless legislation involves a suspect classification or impinges upon fundamental personal rights," . . . the mere rationality standard applies and the law in question will be upheld if it has "any conceivable rational basis." . . . Moreover, "[t]he deference afforded to the government under the rational basis test is so deferential that . . . a court can uphold the regulation if the court can *envision* some rational basis for the classification."

Huntington Props., LLC v. Currituck Cty., 153 N.C. App. 218, 229-30 and 231, 569 S.E.2d 695, 703 and 704 (2002) (quoting *Treants Enterprises, Inc. v. Onslow County*, 83 N.C. App. 345, 351, 350 S.E.2d 365, 369 (1986), and *Guerra v. Scruggs*, 942 F.2d 270, 279 (4th Cir. 1991)).

As discussed above, the plaintiff has not demonstrated any right to a monetary recovery or settlement with the city, and thus cannot possibly have a **fundamental** right to do so. Nor is any other right implicated that might be "fundamental." We therefore apply the

"rational relationship" test to the city's policies. The evidence at trial establishes that the city's decisions about whether to offer a monetary settlement to a tort claimant are generally based on the following factors:

a. Whether there was a negligent act by an employee of the City;

b. Whether there was an intentional tort by a City employee;

c. What, if any, defenses are available for the City, including the defenses of governmental immunity and contributory negligence;

d. Whether any defenses, including governmental immunity, are available for the employee in his individual capacity;

e. Whether the employee of the City violated any departmental regulation;

f. The cost of defending the case;

g. Goodwill on behalf of the citizens; and

h. The best use of taxpayer's money in a cost effective manner.

We conclude that each of these factors, standing alone or considered collectively, clearly bear a rational relationship to legitimate governmental goals.

We further conclude that the city's policies for settling claims against it do not "shock the conscience," *Rochin*, 342 U.S. at 172, 96 L. Ed. at 190, and are neither arbitrary nor unrelated to any conceivable governmental goal. We therefore conclude that the plaintiff's right to substantive due process is not violated by the city's policies for determining whether to offer a settlement to a tort claimant.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The United States Supreme Court has "explained that 'the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' " *Willowbrook v. Olech*, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 1063 (2000) (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445, 67 L. Ed. 340, 342 (1923)).

Thus, while the principle of substantive due process protects citizens from arbitrary or irrational laws and government policies, the right to equal protection guards against the government's use of invidious classification schemes. However:

> **most** laws differentiate in some fashion between classes of persons. The Equal Protection Clause . . . simply keeps governmental decisionmakers from treating differently persons who **are in all relevant respects alike**.

Nordlinger v. Hahn, 505 U.S. 1, 10, 120 L. Ed. 2d 1, 12, (1992) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 64 L. Ed. 989, 990 (1920)) (emphasis added). Our state courts apply the same standard to equal protection claims brought under the North Carolina constitution:

> When resolving challenged classifications under the equal protection clause of the State Constitution, this Court applies the same test used by federal courts under the parallel clause in the United States Constitution.

Bacon v. Lee, 353 N.C. 696, 719, n.11, 549 S.E.2d 840, 856, n.11 (2001).

In the instant case, plaintiff does not identify any "classification" upon which he was denied equal protection. Also, plaintiff does not allege that the city's decisions about settlement offers included the use of any inherently suspect criteria, such as race, religion, or disability status. Instead, plaintiff "attempts to save [his] equal protection claim by arguing that [he] was treated differently from other 'similarly situated' persons[.]" *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 439 (4th Cir. 2002). As *Ashe* held further:

> The Supreme Court [has] made clear . . . that a party can bring an equal protection claim by alleging it has 'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'

Id. (quoting *Village of Willowbrook*, 528 U.S. at 564, 145 L. Ed. 2d at 1063 (2000)).

For purposes of equal protection analysis, "persons who are in all relevant respects alike" are "similarly situated." *Nordlinger*, 505 U.S. at 10, 120 L. Ed. 2d at 12. We therefore consider whether plaintiff produced evidence that the city arbitrarily treated him differently from "similarly situated" claimants by offering monetary settlements to

other claimants whose cases were "in all relevant respects" the same as plaintiff's, but not offering a settlement to plaintiff.

To support his claim, plaintiff submitted a list of more than 400 incidents occurring in the city between 1992 and 1995. All of these involved a claim for damages caused by a city employee who, at the time of the incident, was operating a vehicle owned by the city and was engaged in a governmental function. For each incident, the list identifies only: (1) the department involved, *e.g.*, "City Sanitation truck" or "Greensboro police officer"; (2) the general nature of the incident, *e.g.*, "allegedly struck claimant's parked vehicle" or "allegedly damaged claimant's mailbox"; and (3) the outcome, *e.g.*, "settled without a lawsuit for X amount" or "claim was denied as there was no negligence."

Plaintiff's claim essentially suggests that any two claimants are "similarly situated" as long as their claims both involve damage caused by a city employee's operation of a city vehicle. But plaintiff offers no support for the premise that the city, or any other party, would ever make decisions about the proper response to a claim based only on bare-bones information such as "a garbage truck allegedly struck a parked car." Indeed, the city's own list of factors for making such determinations is far more nuanced and detailed than that.

Moreover, plaintiff's list provides no information about, *e.g.*,: the claimants' specific factual allegations; the results of any investigation or physical tests that were performed; the availability of credible witnesses for either the claimants or the city employees; whether the claimants were able to document their damages; personal data that could be relevant in equal protection discrimination claims, such as the claimants' age, race, or religion; the availability of defenses such as contributory negligence; the city investigator's subjective opinion on the credibility of the claimants or the city employees; the violations of traffic or criminal laws by either the city employees or the claimants; settlement demands or offers between the parties; or any other factors that might have played a part in the city's decision about whether to offer to settle with the claimants. Without this type of information, no court or jury can possibly determine whether two claimants were "similarly situated" with respect to all relevant factors in a settlement decision, or whether the city used an invidious classification scheme in its decisions.

Furthermore, discretionary decisions such as whether to make a settlement offer necessarily implicate a host of subjective factors

rightfully reserved for city administrators and elected officials, and it is almost inevitable that any two claimants will be dissimilar as regards one or more factors relevant to settlement offers. Thus, as a practical matter, it would be exceedingly difficult for a plaintiff to show disparate treatment of "similarly situated" claimants absent evidence of reliance on an "inherently suspect criteria."

We conclude that the plaintiff did not present evidence of either (1) the existence of any "similarly situated" claimants who were treated differently from him, or (2) treatment by the city that was arbitrary or irrational. Accordingly, we conclude that plaintiff failed to produce evidence that his right to equal protection was violated.

For the reasons discussed above, we conclude the plaintiff failed to produce evidence that the city's policies or practices for settling with tort claimants violated his constitutional rights to either substantive or procedural due process or to equal protection.

We note that this conclusion does not contradict the holding of *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000). Regarding procedural due process, *Dobrowolska* correctly noted that " '[o]nly after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process.' " *Dobrowolska*, 138 N.C. App. at 11-12, 530 S.E.2d at 598 (quoting *American Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 59, 143 L. Ed. 2d 130, 149 (1999)). The Court cited several rights whose source can easily be identified in the relevant enabling legislation (*e.g.*, the right of a qualified applicant to welfare benefits, or the right of a criminal defendant to appeal from conviction). The Court also observed that the generalized right "implicated" by the case was the right "to recover damages," which is, of course, true of **all** tort claims. The *Dobrowolska* Court further held that, **if** plaintiff were able to show a constitutionally protected property right to recover damages from a municipality, the city's enumerated factors would not provide the structure and predictability required for procedural due process.

Significantly, however, *Dobrowolska* does not consider, analyze, or determine whether the plaintiff (1) had produced evidence of a constitutionally protected right to recover damages from a North Carolina municipality; (2) had identified a statutory or other legal source of such a right; or (3) had offered evidence of an entitlement, as opposed to a "unilateral expectation," of a settlement offer from the city.

Nor did *Dobrowolska* hold that the policies and factors that the city used to make settlement determinations were inherently irrational, that they had no relationship to a valid governmental goal, or that they otherwise violated plaintiff's right to substantive due process.

Finally, as regards the right to equal protection, we note that the list of other claims that plaintiff submitted in the instant case was also a part of the evidence offered by the plaintiff in *Dobrowolska*. However, the *Dobrowolska* Court did not hold that this list, without more, automatically constituted *prima facie* evidence that plaintiff's right to equal protection had been violated. Further, in *Dobrowolska*, the Court reviewed a different evidentiary record and assessed it in relation to a different claimant. The evidence found in this record does not demonstrate that **this** plaintiff was treated differently from similarly situated claimants.

Given that a city can assert governmental immunity as an affirmative defense to tort claims, cities admittedly have greater bargaining power than claimants when negotiating a settlement. However, it is axiomatic that any change to the law in this area must come from the legislature, not the courts. "The plaintiff asks us either to abolish governmental immunity or to change the way it is applied. . . . [A]ny change in this doctrine should come from the General Assembly." *Blackwelder*, 332 N.C. at 324, 420 S.E.2d at 435-36.

We conclude that the trial court erred by denying defendants' motion for JNOV, on both the claim of gross negligence and also the constitutional claim. Our conclusion renders moot the issues pertaining to the trial court's award of a new trial. *See, e.g.*, *Snider v. Dickens*, 293 N.C. 356, 359, 237 S.E.2d 832, 834 (1977) ("defendant's motion for judgment notwithstanding the verdict . . . should have been granted. Our decision on this issue renders it unnecessary for us to consider . . . [the trial court's] failure to grant [a] new trial"). We remand for entry of JNOV on both claims, and dismiss plaintiff's appeal as moot.

Reversed in part and dismissed in part.

Judges TIMMONS-GOODSON and BRYANT concur.

STATE OF NORTH CAROLINA v. WILLIAM BEACH SMITH

No. COA04-587

(Filed 7 June 2005)

Rape— second-degree—instruction—force and lack of consent implied in law—victim asleep or similarly incapacitated

The trial court erred in a second-degree rape case by its instruction to the jury that force and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated, and defendant is entitled to a new trial, because: (1) the trial court could not instruct that force and lack of consent was implied in law as the evidence regarding whether the alleged victim was asleep was contradictory; (2) the instruction was unconstitutional as it conclusively prejudged the existence of two of the elements of second-degree rape; (3) assuming arguendo that the trial court could instruct the jury on a presumption in this case, the jury was not properly instructed when the challenged instruction did not indicate that defendant could rebut the mandatory conclusive presumption and that the State still had the burden of persuasion; (4) the instruction did not let the jury know that the basic fact that the victim was asleep, unconscious, or similarly incapacitated had to be proven beyond a reasonable doubt; (5) the trial court did not explain to the jury how to use the presumption and there is a reasonable likelihood the jury understood the trial court's instruction as establishing the victim was asleep notwithstanding any evidence to the contrary; and (6) upon the introduction of rebutting evidence, the mandatory presumption disappeared and the jury could only have been given a permissive inference instruction.

Judge BRYANT dissenting.

Appeal by defendant from judgment entered 15 January 2004 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 13 January 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John G. Barnwell, for the State.

Bruce T. Cunningham, Jr., George Hughes, and Joseph Blount Cheshire, V, for defendant-appellant.

HUNTER, Judge.

William Beach Smith ("defendant") contends the trial court unconstitutionally relieved the State of its burden to prove all elements of second degree rape beyond a reasonable doubt by instructing the jury: "Force and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated." After careful review, we conclude the trial court's instruction did not comport with constitutional standards. Accordingly, defendant's conviction is reversed and we remand for a new trial.

The evidence tended to show that defendant, a pilot and flight instructor, met the alleged victim when she took several flight lessons. Defendant and the victim became friends, and then became roommates when defendant allowed the victim to live in his home during the summer of 2001 after the victim's mother would no longer allow her to live in the family residence. The victim had recently graduated from high school, and in August 2001, she moved to Illinois to attend college.

During the weekend of 20 October 2001, the victim returned home for a visit. That Saturday evening she consumed eight malt liquor beverages and a glass of Jack Daniels whiskey while at a friend's home. On the same evening, defendant was celebrating a friend's birthday with a group of at least six individuals. After patronizing a local bar, the group returned to defendant's home to eat, socialize, and go to bed. The victim was not a part of this group.

Defendant and the victim each testified differently as to what occurred between them on Saturday evening and Sunday morning. The victim testified that defendant called her cell phone several times on Saturday evening and early Sunday morning to invite her over to his home for a cookout. She drove to defendant's home, knocked on the front door, and rang the doorbell. After defendant and his friend John opened the door, the victim entered the house, talked a few minutes in the foyer, and was informed that the party was over and that everyone had gone to bed. She indicated that she was too tired to drive home, so she went upstairs to go to sleep for a few hours in defendant's room. Defendant, his friend John, and the victim all slept in defendant's bed, with the victim in the middle. The victim testified that defendant began rubbing her arm and kissing her. She told him no and informed him that she was going to sleep. She went to sleep and then awoke with defendant on top of her. John was no longer in the room. Her pants and underwear had been removed, defendant

had her hands pinned down above her head, and was having sexual intercourse with her. She told him to stop, but he continued. She then used her feet to push defendant off of her. Defendant left the room, and John returned and began touching her. She then told him to stop, he left the room, and the victim went back to sleep. She awoke at approximately 9:45 a.m. and left the residence. She testified that she had to pack and prepare to leave for the airport at 11:00 a.m. in order to return to Illinois. The victim did not inform anyone in North Carolina what had occurred; however, upon returning to her dormitory, she told two friends, sought medical treatment, and spoke to a college police officer a few days later.

Defendant testified that he did not know the victim was in town visiting from college, and that he did not call the victim several times that evening. He testified that he was celebrating a friend's birthday with a group of friends, and that the group returned to his home to cookout and sit in the hot tub. The victim called his cell phone at 4:30 a.m. and left a message. He returned her phone call approximately twenty minutes later, and told her who was at his house, but that they were getting ready to go to bed. Approximately forty minutes later, the victim called defendant and told him she was on her way over. He told her that everyone was in bed. To corroborate his testimony, defendant provided his cell phone bill which indicated he only called the victim at 4:52 a.m., and not several times. He also called two witnesses who had been with him that evening who testified that they did not call the victim from their cell phones, nor had they mentioned calling the victim as they did not know she was in town.

Defendant then testified that he did not know how she got into his home, and that he first encountered her when he got up to investigate a noise he had heard. Defendant called a witness who had been sleeping on defendant's couch downstairs that evening. This individual testified that he heard the kitchen door slam and heard someone bump into the trash can. He looked up and saw the victim in the kitchen. He watched her as she walked into the foyer and went upstairs. Defendant then testified that the victim got into his bed, and they began kissing. He indicated the kissing and touching was mutual and that the victim never went to sleep.

In a telephone conversation that the victim recorded without defendant's knowledge, defendant stated that he thought the sexual intercourse was mutual because they had been kissing and touching. He stated that she had touched him in certain places and that he decided to try and take it to another level. He indicated that because

of the mutual kissing and touching, he felt she was aware of what was occurring and was awake. Defendant was very apologetic during the conversation, and he testified that he kept apologizing because the victim was a friend and was upset about what had happened between them. However, he reiterated that he felt the sexual intercourse was mutual and consensual.

The trial court instructed the jury on the elements of second degree rape. In the portion of the instruction regarding consent, the trial court stated: "And third, that the victim did not consent and it was against her will. Force and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated." Defendant was convicted of second degree rape, and was sentenced to a minimum of seventy-three and a maximum of ninety-seven months imprisonment. Defendant appeals.

Defendant contends the trial court's instruction that "[f]orce and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated[]" was erroneous. This instruction was based upon the Supreme Court of North Carolina's holding in *State v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987). In *Moorman*, the defendant knocked on the door of his friend's dormitory room, but did not receive a response. *Id.* at 390, 358 S.E.2d at 504. After he heard music playing in the room, he opened the door and saw a girl lying on the bed with her face down. *Id.* He went up to the girl, kissed her on her neck, and engaged in sexual intercourse with her twice. *Id.* After they had finished, he realized the girl was not his friend. *Id.* The victim testified that she was asleep in her dorm room and dreamed she was engaging in sexual intercourse. *Id.* at 389, 358 S.E.2d at 504. She awoke to find a stranger on top of her engaging in vaginal intercourse. *Id.* The defendant was indicted for, *inter alia*, second degree rape, and the State alleged that the defendant " 'unlawfully, willfully and feloniously did ravish and carnally know [the victim] by force and . . . against her will, in violation of N.C.G.S. 14-72.3.' " *Id.* at 389, 358 S.E.2d at 504. The defendant argued there was a fatal variance between this indictment and the proof presented at trial because the indictment alleged he utilized force to commit the rape, and the evidence presented at trial did not establish the use of force. *State v. Moorman*, 82 N.C. App. 594, 596, 347 S.E.2d 857, 858 (1986), *overruled by* 320 N.C. 387, 358 S.E.2d 502. Rather, the evidence only indicated the victim was asleep, which indicated physical helplessness, and not force. *Id.* at 597, 347 S.E.2d at 859. This Court determined there was a fatal variance between the

indictment allegations and the proof because the indictment did not allege the victim was physically helpless. *Id.* at 598, 347 S.E.2d at 859. Specifically, this Court stated,

> we hold that the proper indictment for the rape of a person who is asleep is one alleging rape of a "physically helpless" person. In the present case, penetration and the initiation of sexual intercourse was achieved while the prosecutrix was asleep and unable to communicate an unwillingness to submit to the act. Thus, there is a fatal variance between the indictment's allegations that defendant carnally knew the prosecutrix by force and against her will and the proof the State presented at trial. The trial court should have granted the motion to dismiss the second degree rape charge, and the judgment as to that offense must be arrested.

Id. The Supreme Court of North Carolina reversed, and held that in the crime of rape, the elements of force and lack of consent are implied in law upon the showing of sexual intercourse with a person who was asleep, unconscious, or otherwise incapacitated and therefore unable to resist or give consent. *Moorman*, 320 N.C. at 391-92, 358 S.E.2d at 505. Thus, in *Moorman*, our Supreme Court concluded there was not a fatal variance between the indictment and the evidence offered at trial, and affirmed the defendant's conviction for second degree rape. *Id.* at 391-92, 358 S.E.2d at 505-06.

In this case, the trial court deviated from the pattern jury instructions and attempted to incorporate the holding in *Moorman* into the jury instructions. In pertinent part, the pattern jury instructions provide:

> The defendant has been charged with second degree rape.
>
> For you to find the defendant guilty of this offense, the state must prove three . . . things beyond a reasonable doubt:
>
> First, that the defendant engaged in vaginal intercourse with the victim. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. (The actual emission of semen is not necessary.)
>
> Second, that the defendant used or threatened to use force sufficient to overcome any resistance the victim might make. (The force necessary to constitute rape need not be actual physical force. Fear or coercion may take the place of physical force.)

> And Third, that the victim did not consent and it was against her will. (Consent induced by fear is not consent in law.)
>
> . . .
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in vaginal intercourse with the victim and that he did so by force or threat of force and that this was sufficient to overcome any resistance which the victim might make, and that the victim did not consent and it was against her will . . . it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

1 N.C.P.I.—Crim. 207.20 (2002) (footnote omitted). After instructing on the third element, the trial court gave the following instruction based upon the holding in *Moorman*: "Force and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated."

The Supreme Court of North Carolina did not discuss in *Moorman* how its holding could be properly incorporated into a jury instruction. Rather, the analysis in *Moorman* focused upon the indictment allegations and the proof required to prove the allegations. In North Carolina, there is a fatal variance between the indictment allegations and the proof where the evidence tends to show the commission of an offense not charged in the indictment. *State v. Williams*, 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981). Thus, in *Moorman*, the appellate courts were reviewing the indictment and the evidence presented, not whether the jury was properly instructed on the law regarding second degree rape. In this case, defendant argues the trial court's instruction that "[f]orce and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated[,]" impermissibly shifted the burden of proof to defendant and allowed the jury to presume force and lack of consent. Defendant's argument presents an issue of first impression before our appellate courts.

First, under the facts of this case, we conclude the trial court could not instruct that force and lack of consent was implied in law as the evidence regarding whether the alleged victim was asleep was contradictory. By analogy, we consider cases involving the use of a dangerous or deadly weapon, as our appellate courts have discussed

on several occasions the propriety of instructing that a particular instrument is a dangerous or deadly weapon as a matter of law. In the context of whether an instrument is a dangerous or deadly weapon:

> It has long been the law of this state that "[w]here the alleged deadly weapon and the manner of its use *are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring.*"

State v. Torain, 316 N.C. 111, 119, 340 S.E.2d 465, 470 (1986) (quoting *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924)) (emphasis added and emphasis in original). In contrast, " 'where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury.' " *See id.* at 120, 340 S.E.2d at 470 (quoting *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373 (1978)).

Therefore, in the case *sub judice*, if the uncontroverted facts could only lead to but one conclusion, i.e., that the alleged victim was asleep when nonconsensual sexual intercourse occurred, then the trial court could instruct that force and lack of consent was implied in law based upon our Supreme Court's decision in *State v. Moorman*. However, the facts of this case were in dispute with the alleged victim testifying she was asleep, and the defendant testifying she was awake. In the recorded phone conversation, the defendant stated that he initiated sexual contact because of the mutual kissing and touching and he decided to take "it to one other level." Defendant also stated in the recorded conversation that he thought the alleged victim was awake and fully aware of what was occurring because of how the alleged victim was touching him. The facts of this case did not lead to only one conclusion regarding whether the alleged victim was asleep, and therefore the trial court could not determine force and lack of consent as a matter of law. As the trial court's instruction conclusively prejudged the existence of two of the elements of second degree rape, the instruction was unconstitutional. *See State v. Reynolds*, 307 N.C. 184, 189, 297 S.E.2d 532, 535 (1982) (citation omitted) (stating " '[m]andatory presumptions which conclusively prejudge the existence of an elemental issue . . . violate the Due Process Clause' ").

Moreover, assuming arguendo the trial court could instruct the jury on a presumption in this case, we conclude the jury was not

properly instructed. "The threshold inquiry in ascertaining the constitutional analysis applicable to . . . [a] jury instruction is to determine the nature of the presumption it describes." *Sandstrom v. Montana*, 442 U.S. 510, 514, 61 L. Ed. 2d 39, 45 (1979). We must carefully examine the actual words spoken to the jury by the trial judge in light of whatever definition of the presumption may be provided by applicable statute or case law. *State v. White*, 300 N.C. 494, 506, 268 S.E.2d 481, 489 (1980). We also inquire

> " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the [United States] Constitution." To satisfy this "reasonable likelihood" standard, a defendant must show more than a "possibility" that the jury applied the instruction in an unconstitutional manner, but need not establish that the jury was "more likely than not" to have misapplied the instruction.

State v. Jennings, 333 N.C. 579, 621, 430 S.E.2d 188, 209 (1993) (quoting and discussing *Estelle v. McGuire*, 502 U.S. 62, 72-73, 116 L. Ed. 2d 385, 399 (1991) and *Boyde v. California*, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 329 (1990)).

In this case, the trial court instructed:

> The Defendant has been charged with second degree rape. For you to find the Defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that the Defendant engaged in vaginal intercourse with the victim. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. The actual emission of semen is not necessary.
>
> Second, that the Defendant used or threatened to use force sufficient to overcome any resistance the victim might make.
>
> And third, that the victim did not consent and it was against her will. *Force and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated.*
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant engaged in vaginal intercourse with the victim and that he did so by force and that this was sufficient to overcome any resistance which the victim might make, and that the victim did not consent and it

> was against her will, it would be your duty to return a verdict of guilty.

(Emphasis added.) The trial court's instruction that "[f]orce and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated[,]" was a correct statement of law under the facts of *State v. Moorman*; however, the manner in which the trial court instructed the jury in this case was unconstitutional.

Although the trial court does not use the term "presume" in the instruction, we conclude the instruction was a presumption.

> "A presumption, or deductive device, is a legal mechanism that allows or requires the factfinder to assume the existence of a fact when proof of other facts is shown. The fact that must be proved is called the basic fact; the fact that may or must be assumed upon proof of the basic fact is the presumed fact."

State v. Reynolds, 307 N.C. at 188-89, 297 S.E.2d at 535 (citation omitted). The trial court's instruction stated that if the victim was asleep or similarly incapacitated when sexual intercourse occurred (the basic fact), then force and lack of consent (the presumed facts) are implied in law.

There are two types of presumptions: a mandatory presumption or a permissive inference. *Ulster County Court v. Allen*, 442 U.S. 140, 157 n.16, 60 L. Ed. 2d 777, 792 n.16 (1979). "A mandatory presumption instructs the jury that it must infer the presumed fact if the state proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." *Francis v. Franklin*, 471 U.S. 307, 314, 85 L. Ed. 344, 353 (1985) (footnote omitted). In this case, the challenged instruction did not inform the jury that it could, but was not required, to draw the conclusion that force and lack of consent were established if the victim was asleep. Thus, the challenged instruction was a mandatory presumption. *See id.* at 316, 85 L. Ed. 2d at 354-55 (emphasis omitted) (indicating a challenged instruction was mandatory because "[t]he jurors 'were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it' ").

> A mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the State has proven the predicate facts giving

> rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted.

Id. at 314 n.2, 85 L. Ed. 2d at 353 n.2 (citing *Sandstrom v. Montana*, 442 U.S. 510, 517-18, 61 L. Ed. 2d 39, 46-47). If the mandatory rebuttable presumption or the mandatory conclusive (also referred to as irrebuttable) presumptions have the effect of shifting the burden of persuasion to the defendant, the presumption violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution because the burden of persuasion is shifted to the defendant. *Id.* at 317, 85 L. Ed. 2d at 355. As explained in *Sandstrom v. Montana*, 442 U.S. at 522, 61 L. Ed. 2d at 49-50 (citations omitted and emphasis omitted), " '[a] conclusive presumption which testimony could not overthrow would effectively eliminate [the element] as an ingredient of the offense.' "

The challenged instruction in this case was a mandatory conclusive presumption because the trial court did not instruct that the defendant could rebut the presumption that force and lack of consent is implied in law if the victim was asleep, unconscious, or similarly incapacitated. Moreover, the use of the phrase "implied in law" indicates the challenged jury instruction was a conclusive presumption. The term "implied in law" means "[i]mposed by operation of law and not because of any inferences that can be drawn from the facts of the case." Black's Law Dictionary 770 (8th ed. 2004). Therefore, the trial court was essentially stating that force and lack of consent are established as a matter of law if at the time of the vaginal intercourse the victim was sleeping or similarly incapacitated. As the challenged instruction did not indicate the defendant could rebut the mandatory conclusive presumption and that the State still had the burden of persuasion, the jury instruction was unconstitutional.

A second problem with the challenged instruction is the trial court did not instruct the jury that the basic fact—the alleged victim was asleep, unconscious, or similarly incapacitated—had to be proven beyond a reasonable doubt. " '[A] State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant' by means of a presumption." *Sandstrom*, 442 U.S. at 524, 61 L. Ed. 2d at 51. In the challenged instruction in this case, the trial court did not instruct the jury that it must find the basic fact beyond a reasonable doubt.

However, if a portion of a jury instruction is unconstitutional because it shifts the burden of persuasion to the defendant, if the jury charge as a whole explains or cures the error, then the charge as a whole is not unconstitutional. *Francis v. Franklin*, 471 U.S. at 318-19, 85 L. Ed. 2d at 356-57. Other instructions might explain the erroneous language to the extent that there was not a reasonable likelihood the jury applied the instruction in an unconstitutional manner. *Id.* at 315, 85 L. Ed. 2d at 354.

In this case, at the beginning of the trial court's instructions, it stated:

> Under our system of justice, when a Defendant pleads not guilty, he is not required to prove his innocence, he is presumed to be innocent. The State must prove to you beyond a reasonable doubt that the Defendant is guilty.
>
> A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that had been presented or lack of insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the Defendant's guilt.

In *Francis*, the United States Supreme Court indicated that

> general instructions on the State's burden of persuasion and the defendant's presumption of innocence are not "rhetorically inconsistent with a conclusive or burden-shifting presumption," because "[t]he jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt . . . could be satisfied. . . ." These general instructions as to the prosecution's burden and the defendant's presumption of innocence do not dissipate the error in the challenged portion of the instruction.[1]

Francis, 471 U.S. at 319-20, 85 L. Ed. 2d at 356-57.

1. Initially, the test to determine the constitutionality of a jury instruction regarding a presumption was whether a reasonable juror could have understood the jury instruction in an unconstitutional manner. *See Francis v. Franklin*, 471 U.S. at 315, 85 L. Ed. 2d at 354. The United States Supreme Court rejected the "reasonable juror" test in *Boyde v. California*, and adopted the "reasonable likelihood" test for assessing the constitutionality of a jury instruction on a presumption. *See Boyde*, 494 U.S. at 380, 108 L. Ed. 2d at 329 (indicating the reasonable juror standard has been rejected and replaced with a reasonable likelihood standard); *see also Estelle v. McGuire*, 502 U.S. at 72-73, 116 L. Ed. 2d at 399. Under the reasonable likelihood test, a defendant must show more than a possibility that the jury applied the instruction in an unconstitutional manner, but need not establish that the jury was more likely than not to have

Immediately after instructing on the elements of second degree rape and giving the challenged instruction, the trial court stated to the jury:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant engaged in vaginal intercourse with the victim and that he did so by force and that this was sufficient to overcome any resistance which the victim might make, and that the victim did not consent and it was against her will, it would be your duty to return a verdict of guilty.
>
> If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

This instruction also does not cure the error. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis*, 471 U.S. at 322, 85 L. Ed. 2d at 358 (footnote omitted).

A third problem with the challenged instruction is the trial court did not explain to the jury how to use the presumption. As explained in *Sandstrom v. Montana*, without qualifying instructions as to the legal effect of a presumption, the jury may conclude the presumption was (1) a direction by the trial court to find force and lack of consent upon proof that the alleged victim was asleep, or (2) the jury may have interpreted the instruction as a direction to find force and lack of consent upon proof the alleged victim was asleep unless the defendant proved the contrary by some quantum of proof considerably greater than "some evidence," thus shifting the burden of persuasion on the element. *Sandstrom*, 442 U.S. at 516-17, 61 L. Ed. 2d at 46.

In this case, there is a reasonable likelihood the jury misapplied the instruction because it was not informed it had to find the basic fact beyond a reasonable doubt, that the State still had the ultimate burden of persuasion, and that upon proof of the basic fact, the defendant only had to come forward with some evidence. Furthermore,

---

misapplied the instruction. *State v. Jennings*, 333 N.C. at 621, 430 S.E.2d at 209. Although in *Francis v. Franklin*, the United States Supreme Court utilized the reasonable juror standard, we conclude its analysis is still correct under a reasonable likelihood test.

there is a reasonable likelihood the jury understood the trial court's instruction as establishing the victim was asleep notwithstanding any evidence to the contrary. As explained in *Franklin*,

> "The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' This 'bedrock, "axiomatic and elementary" [constitutional] principle[]' prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime."

Francis, 471 U.S. at 313, 85 L. Ed. 2d at 352 (citation omitted).

Another problem with the challenged instruction is that if the defendant produces some evidence rebutting the connection between the basic fact (victim is asleep) and the presumed fact (force and lack of consent), the mandatory presumption disappears and only a permissive inference arises. As explained in *Reynolds*, if the defendant comes forward with some evidence to rebut the connection between the basic and presumed facts, the mandatory presumption disappears, leaving only a mere permissive inference. *Reynolds*, 307 N.C. at 189, 297 S.E.2d at 535. In this case, defendant testified that (1) the alleged victim was not asleep, and (2) he initiated sexual intercourse based upon the mutual kissing and touching between defendant and the alleged victim. The alleged victim testified, however, that after sexual intercourse was initiated, she told defendant to stop but defendant continued. The transcript of the recorded phone conversation supports both versions. Thus, whether there was consent and whether the alleged victim was asleep was controverted and presented a jury question. Under these facts, a mandatory presumption does not arise.

Therefore, the question becomes what would have been a permissible and constitutional instruction under the facts of this case. As the evidence regarding whether the alleged victim was asleep during the sexual intercourse was disputed by the parties, the trial court could not incorporate a mandatory presumption into the jury instruction. *See Reynolds*, 307 N.C. at 189, 297 S.E.2d at 535. Rather, the trial court could only instruct on a permissive inference. *See id.* (indicating that if the defendant comes forward with some evidence to rebut the connection between the basic and presumed facts, the mandatory presumption disappears, leaving only a mere permissive inference).

In *State v. Holder*, 331 N.C. 462, 418 S.E.2d 197 (1992), the Supreme Court of North Carolina discussed whether the trial court properly instructed the jury on a permissive inference in a first degree murder case. *Id.* at 486-87, 418 S.E.2d at 210-11. Specifically, the defendant argued in *Holder* that the trial court improperly instructed on the inference that "the law implies malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death[.]" *Id.* at 487, 418 S.E.2d at 211. In *Holder*, our Supreme Court held the following jury instruction properly instructed the jury on the permissive inference, including how to use it in the jury's deliberations:

> "If the State proved beyond a reasonable doubt that the defendant killed the victim with a deadly weapon, or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the victim's death, you may infer, first, that the killing was unlawful, and second, that it was done with malice, but you're not compelled to do so. You may consider this, together with all the other facts and circumstances, in determining whether the killing was unlawful and whether it was done with malice. And, of course, a firearm is a deadly weapon."

Id. at 486, 418 S.E.2d at 210. Our Supreme Court held this instruction was permissible and not unconstitutional because

> "the trial court did not instruct the jury that malice should be *presumed*. On the contrary, the trial court instructed the jury that it 'may infer' that the killing was unlawful and committed with malice, but that it was not compelled to do so. The trial court properly instructed the jury that it should consider this permissive inference along with all the other facts and circumstances . . . in deciding whether the State had proven malice beyond a reasonable doubt."

Id. at 487, 418 S.E.2d at 211 (citation omitted). Unlike the instruction in *Holder*, by using the phrase "implied in law," the trial court instructed the jury in this case that it had to find force and lack of consent was established if the alleged victim was asleep. Indeed, "instructions, where the word 'implied' or phrase 'implied in law' were used, have consistently been held to have created mandatory presumptions." *Bush v. Stephenson*, 669 F.Supp. 1322, 1332 (E.D.N.C. 1986) (discussing an unconstitutional jury instruction used in a North Carolina first degree murder trial and citing *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975); *Engle v. Koehler*, 707 F.2d 241

(6th Cir. 1983), *affirmed by an equally divided court*, 466 U.S. 1, 80 L. Ed. 2d 1 (1984); *Harless v. Anderson*, 664 F.2d 610 (6th Cir. 1981), *rev'd on other grounds*, 459 U.S. 4, 74 L. Ed. 2d 3 (1982); *Rook v. Rice*, 783 F.2d 401, 405 (4th Cir.), *cert. denied*, 478 U.S. 1022, 92 L. Ed. 2d 745 (1986)). The trial court should have instructed the jury in this case that it *may infer* force and lack of consent instead of stating "[f]orce and lack of consent are implied in law . . . ."

The dissent states, however, the jury instruction in this case was not unconstitutional, impermissible, and prejudicial because the jury had to make credibility findings in order to determine whether there was force and lack of consent. Specifically, the dissent emphasizes the portion of the challenged jury instruction beginning with "if": "[f]orce and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping . . . ." However, the trial court failed to instruct the jury that it had to find the victim was asleep *beyond a reasonable doubt*. *See Holder*, 331 N.C. at 486, 418 S.E.2d at 210 (holding the instruction " '[i]f the State proved beyond a reasonable doubt that the defendant killed the victim with a deadly weapon . . .' " was constitutional and permissible); *see also Reynolds*, 307 N.C. at 189, 297 S.E.2d at 535. The trial court also failed to instruct the jury that " 'it should consider [the] permissive inference along with all the other facts and circumstances[,]' " including defendant's evidence tending to indicate the alleged victim was not asleep. *Holder*, 331 N.C. at 487, 418 S.E.2d at 211 (citation omitted).

Third, the trial court failed to instruct the jury that *it was not compelled* to infer the elements of force and lack of consent even if they determined beyond a reasonable doubt the victim was asleep. *See id.*; *see also Ulster County Court*, 442 U.S. at 157, 60 L. Ed. 2d at 792.

In sum, the trial court's jury instruction on force and lack of consent was unconstitutional and impermissible because (1) it utilized mandatory presumption language instead of permissive inference language, (2) it did not inform the jury it was free to reject the permissive inference, (3) the jury was not informed it had to consider the defendant's evidence countering the State's evidence that the alleged victim was asleep, and (4) the jury was not instructed it had to find the victim was asleep beyond a reasonable doubt.

However, in *Rose v. Clark*, 478 U.S. 570, 92 L. Ed. 2d 460 (1986), the United States Supreme Court indicated the harmless-error test applies to jury instructions that violate the principles of *Sandstrom v.*

Montana, 442 U.S. 510, 61 L. Ed. 2d 39 and *Francis v. Franklin*, 471 U.S. 307, 85 L. Ed. 2d 344. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2003); *see also Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710-11 (1967) (stating "before a federal constitutional error can be held harmless, the court must . . . declare a belief that it was harmless beyond a reasonable doubt").

Defendant was indicted and tried for second degree rape, which consists of the following elements: "the defendant (1) engage[d] in vaginal intercourse with the victim; (2) by force; and (3) against the victim's will." *State v. Scercy*, 159 N.C. App. 344, 352, 583 S.E.2d 339, 344 (2003); N.C. Gen. Stat. § 14-27.3. In this case, whether the parties engaged in vaginal intercourse was not at issue as both defendant and the alleged victim testified that sexual intercourse occurred. Thus, the only elements to be resolved were force and against the victim's will. The State and defendant presented contradictory evidence on these elements. Whereas the victim testified that after she said no, the defendant engaged in sexual intercourse with her while she was asleep, the defendant testified that the sexual intercourse was consensual and that the victim was awake and aware of what was occurring because she and the defendant were engaged in mutual touching and kissing prior to the initiation of sexual intercourse. The recorded telephone conversation supports both versions of the events. Thus, there were issues of fact and credibility to be resolved by the jury. However, the trial court impermissibly instructed the jury that two elements—force and lack of consent—were established as a matter of law. Under the facts of this case, whether those elements had been established beyond a reasonable doubt was a jury question. Even assuming the trial court could instruct on the presumption, the trial court's jury instruction created a reasonable likelihood that the jury did not deliberate upon the contradictory evidence, but rather understood the trial court's instruction to mean force and lack of consent had been established. Moreover, there is a reasonable likelihood the jury concluded the victim was asleep by a standard less than beyond a reasonable doubt. Finally, upon the introduction of rebutting evidence, the mandatory presumption disappeared and the jury could only have been given a permissive inference instruction. Accordingly, we conclude the erroneous jury instruction was not harmless beyond a reasonable doubt. Thus, defendant is entitled to a new trial.

As we have concluded defendant is entitled to a new trial, it is unnecessary to resolve defendant's second issue.

New trial.

Judge JACKSON concurs.

Judge BRYANT dissents in a separate opinion.

BRYANT, Judge dissenting.

The majority holds the trial court's instructions, which allowed the jury to infer lack of consent to penetration if the jury found victim was sleeping, were prejudicial and therefore entitled defendant to a new trial. Because I believe the trial court did exactly as the law requires in instructing the jury, and defendant received a fair trial free from any error, prejudicial or otherwise, I dissent from the majority opinion.

Defendant was convicted by a jury of second degree rape.

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) by force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.3 (2003).

The majority states the trial court's instruction to the jury on second degree rape created a mandatory presumption and thereby impermissibly shifted the burden of proof to defendant. In other words, based on *State v. White*, the jury instruction given "prejudge[d] the existence of an elemental issue or actually shift[ed] to defendant the burden to disprove the existence of an elemental fact[.]" See *State v. White*, 300 N.C. 494, 507, 268 S.E.2d 481, 489 (1980) (detailed discussion of difference between mandatory and permissive presumptions). The elemental issue in question is whether the offense was committed by the use of force and without the consent of the victim. Jury instructions are generally controlling in deciding what type of inference or presumption might be involved in a case. *Id.*

The recommended Pattern Jury Instruction for Second Degree Rape, most of which the trial court gave verbatim, reads as follows:

> N.C.P.I.—Crim. 207.20 states:
>
> The defendant has been charged with second degree rape. For you to find the defendant guilty of this offense, the state must prove three . . . things beyond a reasonable doubt: First, that the defendant engaged in vaginal intercourse with the victim. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. (The actual emission of semen is not necessary.) Second, that the defendant used or threatened to use force sufficient to overcome any resistance the victim might make. **(The force necessary to constitute rape need not be actual physical force. Fear or coercion may take the place of physical force.)** And Third, that the victim did not consent and it was against her will. **(Consent induced by fear is not consent in law.)** If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in vaginal intercourse with the victim and that he did so by force or threat of force and that this was sufficient to overcome any resistance which the victim might make, and that the victim did not consent and it was against her will . . . it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

N.C.P.I.—Crim. 207.20 (2003) (emphasis added).

The one exception to the pattern jury instructions occurred when the trial court substituted the phrase "Consent induced by fear is not consent in law" with the following language: "Force and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated." Here the trial court based its instruction in part, on prior case law which held that force and lack of consent are implied in law upon the showing of sexual intercourse with a sleeping person. *See State v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987). *Moorman* is clearly applicable and on point. The majority, however, attempts to distinguish *Moorman* from this case by stating that "in *Moorman*, the appellate courts were reviewing the indictment and the evidence presented, not whether the jury was properly instructed on the law regarding second degree rape." Notwithstanding, *Moorman* states:

> In the case of a sleeping, or similarly incapacitated victim, it makes no difference whether the indictment alleges that the vaginal intercourse was by force and against the victim's will or whether it alleges merely the vaginal intercourse with an incapacitated victim. In such a case sexual intercourse with the victim is *ipso facto* rape because the force and lack of consent are implied in law.

Moorman at 392, 358 S.E.2d at 506.

In *Moorman*, the court was merely restating what was firmly rooted in the common law from which our statutes on sexual offenses developed. The phrase, "by force and against the will of another person," found in our state's rape and sexual offense statutes "means the same as it did at common law when it was used to describe some of the elements of rape." *State v. Locklear*, 304 N.C. 534, 539, 284 S.E.2d 500, 503 (1981); *see* N.C.G.S. §§ 14-27.2 to -27.5 (1988). Force and lack of consent for the crime of rape were implied in law at common law if it was shown that the intercourse was with a person who was sleeping or unconscious or otherwise incapacitated. *Moorman* at 392, 358 S.E.2d at 506; *See also State v. Dillard*, 90 N.C. App. 318, 322, 368 S.E.2d 442, 445 (1988) (force and lack of consent implied in law when sexual offense perpetrated upon a victim who is sleeping or similarly incapacitated); *State v. Brown*, 332 N.C. 262, 420 S.E.2d 147 (1992). This developed, not as a means to determine how to charge in a rape indictment, but to state as a matter of substantive law, that a sleeping victim does not consent. Therefore, the trial court's instructions were based on the law as it has developed in our jurisprudence.

As to the element or elemental issue of force and lack of consent, the jurors heard evidence from the victim that she was asleep, then woke up while defendant was sexually penetrating her and that she never gave him permission to do so. They also heard evidence from the defendant that the victim was awake and that she consented to the penetration. The jury could have believed the victim's testimony and found she was sleeping and therefore could not consent, and that upon awakening she struggled with defendant and still did not give consent. On the other hand, the jury could have believed the defendant's testimony that the victim was not asleep, did not resist and did indeed consent to the sexual intercourse. The trial court's instruction that "force and lack of consent are implied in law **if** at the time of sexual intercourse the victim is sleeping. . ." is no more impermissible and prejudicial than the portion of the Pattern Jury Instruction—

"consent induced by fear is not consent in law"—that was substituted. Neither of these instructions impermissibly shift the burden to defendant. Under either version, the jury would have to make credibility findings (e.g. was the victim asleep; was the victim afraid) in order to determine whether there was force and lack of consent. Defendant was not required to come forth with any more evidence and therefore I would find there was no constitutional violation based on the court's instructions. If the trial court's instruction on force and lack of consent which was given pursuant to *Moorman* can be considered a presumption, it should be considered permissive, not mandatory.

Moreover, on appeal, it is defendant's burden to show, under the reasonable likelihood test of *Boyde v. California*, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 329 (1990), more than a possibility that the jury applied the instruction in an unconstitutional manner. *State v. Jennings*, 333 N.C. 579, 621, 430 S.E.2d 188, 209 (1993). In other words, the harmless error test applies to jury instructions that violate *Sandstrom v. Montana* [442 U.S. 510, 61 L. Ed. 2d 39 (1979) (holding mandatory presumptions violate due process because the burden of persuasion is shifted to defendant)]. *Rose v. Clark*, 478 U.S. 570, 92 L. Ed. 2d 460 (1986); *See also Delaware v. Van Arsdall*, 475 U.S. 673, 681, 89 L. Ed. 2d 674, 471 (1986) (constitutional errors may be harmless "in terms of their effect on the factfinding process at trial") (emphasis added); *See also Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 711 *overturned on other grounds*, *r'hrg denied*, 386 U.S. 987, 18 L. Ed. 2d 241 (1967) (error is harmless if, beyond a reasonable doubt, it "did not contribute to the verdict obtained") (emphasis added).

In summary, because I believe the trial court properly instructed the jury according to law, and without violating any of defendant's constitutional rights, I would find defendant received a fair trial free from error.

JOHNNY E. WORKMAN, EMPLOYEE, PLAINTIFF v. RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, EMPLOYER, SELF INSURED (FEDERATED RURAL ELECTRIC INSURANCE EXCHANGE, THIRD PARTY ADMINISTRATOR), DEFENDANT

No. COA04-491

(Filed 7 June 2005)

1. Workers' Compensation— disability—discharge for misconduct

Workers' compensation benefits are barred if an employee's loss of wages is attributable to a wrongful act resulting in loss of employment, but the employee is entitled to benefits if the loss of wages is due to the employee's work-related disability. The elements required for payment to be barred include a showing that the same misconduct would result in the termination of a nondisabled employee. The plaintiff in this case, frustrated at not being assigned work within his medical limitations, repeated a joke from a lawyer, but committed no act of physical violence. The Commission found that there was no evidence that another employee who made similar statements would have been terminated.

2. Workers' Compensation— affidavit—opportunity to rebut—corroborative

The trial court did not abuse its discretion in a workers' compensation case in the admission and consideration of an affidavit from an attorney who told plaintiff a joke, which was interpreted as a threat when plaintiff repeated it and for which plaintiff was fired. Although defendant contended that the Commission should have allowed it the opportunity to rebut or discredit the evidence, it was only corroborative of other testimony and was not prejudicial even if erroneously admitted because the remaining findings support the Commission's conclusion.

3. Workers' Compensation— disability—factors in determining—findings

An Industrial Commission conclusion that a workers' compensation plaintiff was disabled was remanded where the Commission made no findings regarding one of the four factors indicating disability and whether plaintiff had met that burden.

4. Workers' Compensation— discharge for misconduct— Employment Security Commission decision—not res judicata

A workers' compensation determination of whether plaintiff was terminated for misconduct, which would bar benefits, was not prevented by the Employment Security Commission's decision on the subject. Defendant did not cite authority for application of res judicata or collateral estoppel, and, while the factual determination is similar, the different interests at stake distinguish the ESC's determination from the issue before the Industrial Commission.

5. Workers' Compensation— causation—findings—medical testimony—more than speculation

The Industrial Commission's finding of fact in a workers' compensation case that plaintiff's urological condition was caused by his accident was supported by competent evidence in the record. The testimony of plaintiff's medical expert was not without equivocation, but it was more than speculation, and the Commission is the sole judge of the credibility of witnesses.

6. Workers' Compensation— causation—expert testimony—more than conjecture

Competent evidence supported the Industrial Commission's finding of fact in a workers' compensation case that plaintiff's depression is causally related to his work-related accident. A psychologist's testimony of "a very strong linkage" between the development of plaintiff's psychological condition and his accident is sufficient to take the case beyond conjecture and remote possibility.

7. Appeal and Error— preservation of issues—assignments of error—sufficiency of supporting authority

An assignment of error concerning medical expenses in a workers' compensation case was dismissed where defendant cited (incorrectly) only the definitions portion of the Workers' Compensation Act and did not argue how the statute applied to the assignment of error.

Judge WYNN concurring.

Appeal by defendant from opinion and award entered 18 November 2003 by Commissioner Christopher Scott for the North Carolina Industrial Commission. Heard in the Court of Appeals 7 December 2004.

Daniel Law Firm, P.A., by Stephen T. Daniel and Warren T. Daniel, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by J. Matthew Little and Tara Davidson Muller, for defendant-appellant.

TYSON, Judge.

Rutherford Electric Membership Corporation ("REMC") and Federated Rural Electric Insurance Exchange ("agent") (collectively, "defendant") appeal from opinion and award entered by the Full Commission of the North Carolina Industrial Commission ("the Commission") that awarded Johnny E. Workman ("plaintiff") total disability compensation. We affirm in part and remand for further findings of fact.

I. Background

Plaintiff was employed by REMC as a first-class lineman. His job included repairing damaged electrical power lines, which required him to climb utility poles. On 21 February 1997, plaintiff was injured during the course and scope of his employment when an electrical utility pole fell and landed across his abdominal area. Plaintiff suffered injuries to various parts of his body during the accident, which REMC immediately accepted as compensable. Defendant promptly began paying plaintiff temporary total disability benefits pursuant to Form 60 at the weekly rate of $512.00.

Plaintiff underwent two surgeries for internal injuries and digestive complications. In August 1997, he underwent surgery to remove a parathyroid gland. In November 1998, his gall bladder was removed and a hiatal hernia was repaired.

On 7 January 1998, plaintiff returned to work for REMC as an assistant staking technician earning an average weekly wage of $220.70. Due to the salary reduction, defendant paid plaintiff temporary partial disability benefits pursuant to Form 62 at varying rates depending on the number of hours plaintiff worked. Plaintiff was assigned physically demanding and difficult tasks. His job description, as written by REMC and submitted to plaintiff's doctors for

approval, did not include the strenuous physical tasks that plaintiff was actually assigned to do, which included chopping right-of-ways with a bush axe and moving large quantities of dirt with a shovel. These physically demanding tasks aggravated plaintiff's medical condition and caused him to accumulate blood in his urine. As a result, plaintiff was hospitalized and diagnosed with recurrent gross hematuria.

After plaintiff was released, he returned to work and was assigned similar work duties. Plaintiff requested less strenuous jobs and was told none were available. On 9 September 1999, Dr. Leon Dickerson ("Dr. Dickerson") restricted plaintiff's employment to lifting no greater than thirty pounds occasionally, no prolonged bending, stooping, squatting, or climbing on ladders and no working on rough terrain. On 7 January 2000, Dr. Dickerson continued these work restrictions. Plaintiff was never assigned to light-duty work. According to Dr. Anthony H. Wheeler ("Dr. Wheeler"), plaintiff's treating physician, if plaintiff continued to perform on-the-job tasks, such as using a shovel and a bush axe, he would "eventually become unemployable."

Plaintiff became frustrated with the status of his employment and contacted Sean C. Cobourn, Esquire ("Cobourn"), a South Carolina attorney, regarding legal representation. Plaintiff testified Coburn told him a "joke" during a telephone conversation:

> I asked the lawyer if there was anything that he could do with workmen's comp because they wasn't paying my doctor bills, they wasn't paying me—they was behind paying me and I was behind on my house payment and everything else. I said, "I need somebody to do something now." He [the attorney] laughed and he said, "Well," he said, "the only thing I know you can do is whip his ass and it will cost you five hundred dollars to do that."

Both plaintiff and Coburn laughed at this remark, and testified it was a "joke." Plaintiff's wife recalled plaintiff retelling the lawyer's "joke" to others.

During plaintiff's return to work, he became increasingly frustrated with his treatment by defendant. He expressed his discontent regarding medical treatment being denied, receipt of numerous medical collection letters, and difficult working conditions.

In response to plaintiff's increasing frustration, nurse case-worker, Kay Galvin ("Nurse Galvin"), submitted a request to the

adjuster to approve psychological treatment for plaintiff on 18 January 2000. On 1 February 2000, plaintiff and Nurse Galvin were present at a doctor's office waiting for an appointment when plaintiff repeated the lawyer's "joke." Nurse Galvin reported plaintiff's remarks to REMC. On 7 February 2000, REMC terminated plaintiff for "workplace violence."

On 18 December 2000, plaintiff requested a hearing on claims of a changed medical condition, an inability to agree on the amount of benefits due, defendant's denial of certain medical treatment, and improper termination. After a hearing on 11 April 2003, the Commission entered its opinion and award on 18 November 2003 that: (1) awarded plaintiff total disability compensation "at the rate of $512.00 per week from 8 February 2000 and continuing until plaintiff returns to work or until further order of the Commission; (2) ordered defendant to pay for "medical expenses incurred as a result of the compensable injury as may reasonably be required to [provide treatment for] . . . right knee condition, [] impotence, blood in urine, and problems with urination . . . and [] depression;" and (3) ordered defendant to provide plaintiff with vocational rehabilitation services. Defendant appeals.

II. Issues

Defendant contends the Commission erred by: (1) finding and concluding defendant's decision to terminate plaintiff's employment violated the test set forth in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996); (2) finding plaintiff to be totally disabled; (3) not applying the doctrine of collateral estoppel with regard to plaintiff's termination; (4) finding that plaintiff's urological condition is causally related to his work accident and compensable; (5) finding that plaintiff's psychological condition is causally related to his work accident and compensable; and (6) ordering defendant to pay all of plaintiff's medical costs related to his work accident.

III. Standard of Review

> On appeal from the Commission in a workers' compensation claim, our standard of review requires us to consider: 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' testimony entirely if warranted by disbelief of that witness. 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.

Bass v. Morganite, Inc., 166 N.C. App. 605, 608-09, 603 S.E.2d 384, 386-87 (2004). "The Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony . . . ." *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. rev. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980) (citation omitted).

IV. Termination of Employment

Defendant contends the trial court erred in finding and concluding that REMC's decision to terminate plaintiff was not based upon plaintiff's misconduct or fault. We disagree.

A. *Seagraves* Test

[1] According to *Seagraves*, the lawful termination of an employee for a reason unrelated to his disability and under circumstances justifying termination of any other employee constitutes a refusal to work. 123 N.C. App. 228, 472 S.E.2d 397. An employee who actually or constructively refuses suitable employment is barred from receiving benefits by N.C. Gen. Stat. § 97-32. *Id.* at 230, 472 S.E.2d at 399. The pertinent test is "whether the employee's loss of . . . wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss . . . is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability." *Id.* at 234, 472 S.E.2d at 401.

"[U]nder the *Seagraves*' test, to bar payment of benefits, an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004). The employer carries the initial burden to demonstrate all three elements by a greater weight of the evidence. *Id.* at 499, 597 S.E.2d at 702.

In *McRae*, our Supreme Court approved the *Seagraves* test:

> In our view, the test provides a forum of inquiry that guides a fact finder through the relevant circumstances in order to resolve the ultimate issue: Is a former employee's failure to procure comparable employment the result of his or her job-related injuries or the result of the employee's termination for misconduct? In disputes like the one at bar, the critical area of inquiry into the circumstances of an injured employee's termination is to determine from the evidence whether the employee's failure to perform is due to an *inability* to perform or an *unwillingness* to perform.

Id. at 494, 597 S.E.2d at 700. Our Supreme Court further noted

> the pertinent inquiry under *Seagraves* is not focused on determining whether an employer may fire an injured employee for misconduct unrelated to his injuries; it is clear that an employer may do so. *See*, *e.g.*, N.C.G.S. § 95-241(b) (2003). Rather, the relevant question is determining whether, upon firing an injured employee for such misconduct, an employer can nevertheless be held responsible for continuing to pay injury benefits to the terminated employee.

Id. at 494, 597 S.E.2d at 699.

Defendant contends the Commission erred by finding, "Defendant has presented no evidence that a worker who said what plaintiff did would have been terminated as plaintiff was. The case presented regarding the fired worker who committed assault presents a completely different factual paradigm." Competent evidence in the record supports this finding. The only evidence defendant presented regarding termination of an employee for workplace violence was testimony that a right-of-way crew foreman with REMC was fired for engaging in "a fight at a store on company time." That employee was not a workers' compensation claimant at the time of his termination and was subsequently rehired by employer.

The Commission distinguished the instance wherein that employee engaged in actual physical violence. If plaintiff had engaged in physical violence on the job, the result here may well have been different. According to defendant, plaintiff was fired for making "threats" towards other employees. However, no evidence was presented to show that an employee who made "threats" similar to the statements made by plaintiff would have been terminated. *See id.*; *see*

also Frazier v. McDonald's, 149 N.C. App. 745, 562 S.E.2d 295 (2002), *cert. denied*, 356 N.C. 670, 577 S.E.2d 117 (2003).

Defendant presented some evidence towards showing REMC had a bonafide reason for firing plaintiff. However, REMC failed to satisfy its burden of proving the same misconduct would have resulted in termination of a non-disabled employee. Defendant failed to establish the requirements set forth in *Seagraves*, 123 at 234, 472 S.E.2d at 401, and approved in *McRae*, 358 N.C. at 493, 597 S.E.2d at 699. Further, it is the duty of the Commission and not this Court to weigh the evidence. *Harrell*, 45 N.C. App. at 205, 262 S.E.2d at 835. This assignment of error is overruled.

B. Admission of Cobourn's Affidavit

[2] Defendant argues the Commission erred by admitting and considering the affidavit from Cobourn who participated in the conversation with plaintiff regarding the "lawyer's joke."

Defendant cites *Allen v. K-Mart* which held, "where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence." 137 N.C. App. 298, 304, 528 S.E.2d 60, 64-65 (2000). In *Cummins v. BCCI Constr. Enters.*, we distinguished *Allen* and stated, "In *Allen*, the employee attempted to submit evidence of independent medical examinations by a psychiatrist and a physician with experience in diagnosing and treating *fibromyalgia*. The employee did not consult a fibromyalgia specialist prior to the hearing before the deputy commissioner." 149 N.C. App. 180, 185, 560 S.E.2d 369, 372, *disc. rev. denied*, 356 N.C. 611, 574 S.E.2d 678 (2002). In *Cummins*, we held that the Commission did not manifestly abuse its discretion in denying the defendants' motion to depose a doctor after the plaintiff presented into evidence medical reports prepared by the doctor. *Id.* This Court ruled, "Evidence of [the doctor's] report is merely an update of plaintiff's continued problems for the same injury. Thus, it is not 'significant new evidence' as in *Allen*." *Id.*

We find the reasoning in *Cummins* persuasive and *Allen* to be distinguishable. Here, Cobourn's affidavit only corroborated the evidence presented through plaintiff's and his wife's testimony. Defendant fails to show the affidavit disclosed any "significant new evidence." *Id.*

Presuming, as defendant argues, that the admission of Cobourn's affidavit was error, defendant has failed to demonstrate that any error

was prejudicial. "Where, after erroneous factual findings have been excluded, there remain sufficient findings of fact based on competent evidence to support the Commission's conclusions, its ruling will not be disturbed." *Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 576, 340 S.E.2d 111, 114 (1986) (citing *Wachovia Bank and Trust Co. v. Bounous*, 53 N.C. App. 700, 281 S.E.2d 712 (1981)). Here, even striking those portions of the Commission's findings of fact regarding Cobourn's affidavit, the remaining findings of fact and our previous holding support the Commission's conclusion that defendant failed to show that plaintiff was terminated for misconduct or fault. This assignment of error is overruled.

V. Disability

[3] Defendant contends the Commission erred by concluding plaintiff was disabled. We agree and remand for further findings of fact.

> The employee bears the burden of proving each and every element of compensability. *Harvey v. Raleigh Police Dep't*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553 (1989). The employee can prove that he is disabled in one of four ways by production of: (1) medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) evidence that he is capable of some work, but has after a reasonable effort been unsuccessful in his efforts to obtain employment; (3) 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) evidence that he has obtained other employment at a wage less than that earned prior to the injury. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

Springer v. McNutt Serv. Grp., Inc., 160 N.C. App. 574, 577, 586 S.E.2d 554, 556 (2003).

Here, the Commission made no findings of fact regarding plaintiff's burden to establish one of the four factors and whether plaintiff met his burden. The findings of fact show:

> 19. Anthony H. Wheeler, a neurologist and pain management doctor, testified that plaintiff was unable to do the job of assistant staking technician, and that requiring plaintiff to do this job would probably cause him to "eventually become unemployable."

20. Dr. Alan F. Jacks, a general surgeon, testified that using a bush axe or shovel, and walking over rough terrain, would cause "significant strain within the abdomen," and "may create symptoms of pain and significant exertion."

21. Dr. Leon A. Dickerson, an orthopaedic surgeon, testified that plaintiff would be unable to do a job that required him to do repetitive lifting, and that doing work such as using a bush axe or shovel would cause considerable pain.

22. Dr. Wheeler testified as follows regarding plaintiff's ability to return to work:

    ". . . My opinion is that he needs guidance and training and he needs a lighter job activity that would include, you know, no lifting over, say, ten pounds occasionally and the ability to change position as necessary, no static forward bending postures, limit reaching postures, and I wouldn't want him crawling, bending or squatting on a frequent basis or even on an occasional basis."

23. Plaintiff has been temporarily totally disabled since 7 February 2000, the day his employment was terminated.

These findings show plaintiff, although limited in the work he can perform, is capable of performing some work. The Commission is required to determine whether competent evidence exists to support a finding of disability based on the presentation of: "(2) evidence that he is capable of some work, but has after a reasonable effort been unsuccessful in his efforts to obtain employment; [or] (3) evidence that he is capable of some work but that it would be futile because of preexisting conditions . . . to seek other employment." *Id.*

Here, the Commission made no findings regarding either of these two factors. Plaintiff argues he presented evidence that he sought employment, but was unsuccessful in obtaining a job. The Commission entered no findings of fact on this evidence. Further, if plaintiff satisfied his burden of proof to establish one of the elements under *Russell*, the burden shifts to defendant to "come forward with evidence to show not only that suitable jobs are available, *but also that the plaintiff is capable of getting one . . . .*" *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994). Presuming without holding competent evidence satisfies plaintiff's burden, the Commission also failed to enter findings of fact regarding whether defendant satisfied its burden of proof. Without proper find-

ings under *Russell*, no competent evidence supports the Commission's conclusion awarding plaintiff's total disability. We remand to the Commission to make findings of fact, based on competent evidence, to determine whether plaintiff is totally disabled.

VI. Collateral Estoppel

[4] Defendant contends the Commission erred in failing to address its argument that the issue of REMC's decision to terminate plaintiff's employment had already been litigated and decided by the North Carolina Employment Security Commission ("ESC"). We disagree.

In *Roberts v. Wake Forest University*, this Court ruled on a similar argument. 55 N.C. App. 430, 436, 286 S.E.2d 120, 124, *disc. rev. denied*, 305 N.C. 586, 292 S.E.2d 571 (1982). The plaintiff in *Roberts* argued, "the ruling of the Employment Security Commission that plaintiff was entitled to unemployment benefits is *res judicata* in this action, because an employee is disqualified for benefits if he (1) left work voluntarily without good cause attributable to the employer, or if he (2) was discharged for misconduct connected with his work. G.S. 96-14(1) and 96-14(2)." *Id.* In response, this Court held, "We find no merit in this argument because the issue before the Commission and the issue before the court in this action for breach of contract are not the same. Too, the doctrine of *res judicata* is inapplicable to adjudication by unemployment compensation agencies." *Id.* (citing 76 Am. Jur. 2d Unemployment Compensation § 93 (1975)).

In *Goins v. Cone Mills Corp.*, this Court held the deceased employee's wife was not estopped to litigate the issue of total permanent disability because she was not a party to the claim for the employee's lifetime benefits and was not in privity with a party to that claim. 90 N.C. App. 90, 92-93, 367 S.E.2d 335, 336-37, *disc. rev. denied*, 323 N.C. 173, 373 S.E.2d 108 (1988).

> Under the principle of collateral estoppel, "parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973). A companion doctrine to *res judicata*, which bars every ground of recovery or defense which was actually presented or which could have been presented in the previous action, collateral estoppel bars only those issues actually decided which were necessary to the prior finding or verdict. *Id.* Like *res judicata*,

> collateral estoppel only applies if the prior action involved the same parties or those in privity with the parties and the same issues. *Id.* In the context of collateral estoppel and *res judicata*, the term privity indicates a mutual or successive relationship to the same property rights. *Moore v. Young*, 260 N.C. 654, 133 S.E.2d 510 (1963). An exception to the general requirement of privity exists where one not actually a party to the previous action controlled the prior litigation and had a proprietary interest in the judgment or in the determination of a question of law or facts on the same subject matter.

Id. In *Goins*, we distinguished between the property rights at issue and reasoned the employee had previously filed a claim for lifetime disability benefits, while the wife was pursuing a claim for death benefits. 90 N.C. App. at 93-94, 367 S.E.2d at 337. Although the determination of "disability" was common to both actions, the wife was entitled to a separate determination and was "not collaterally estopped to litigate the issue of total permanent disability." *Id.* at 93, 367 S.E.2d at 337.

On 14 July 2000, the ESC issued its Appeals Decision by Appeals Referee Charles M. Brown, Jr., which disqualified plaintiff from unemployment benefits because plaintiff had "made threatening remarks about other employees of the employer." The ESC concluded that plaintiff "was discharged for misconduct connected with his work." Plaintiff did not appeal this decision.

Defendant argues this determination by the ESC's Appeals Decision prevented re-litigation of the same issue before the Commission, but fail to cite any cases or other authority where *res judicata* or collateral estoppel were applied in workers' compensation cases to support their argument. Although this factual determination of plaintiff's misconduct is similar, the different interests at stake, namely whether unemployment benefits and compensation for disability should be awarded to plaintiff, distinguish ESC's determination from the issue before the Commission. This assignment of error is overruled.

VII. Findings of Fact Regarding Other Conditions

[5] Defendant argues the Commission erred by finding that plaintiff's urological and psychological conditions are compensable and the findings of fact regarding the compensability of these conditions are not supported by competent evidence. We disagree.

A. Urological Condition

Defendant contends no evidence supports the Commission's finding of fact which states:

> Upon consideration of the testimony of Dr. Wheeler, Dr. Dominick Carbone, and the record as a whole, the greater weight of the evidence establishes that plaintiff's impotence, blood in urine, and problems with urination including a burning sensation upon urination and inability to control urination, were caused by the accident on February 21, 1997.

In his deposition dated 5 April 2002, plaintiff's counsel questioned Dr. Wheeler, who testified as follows:

> Q: In your opinion, is [plaintiff's pain from the injury] more likely to have caused the impotency than a pack a day or smoking habit that [plaintiff] may have had for 20 years?
>
> A: Again, I see patients with post-traumatic injuries . . . and my opinion in regard to Mr. Workman is that his cigarettes could or might have caused his impotence and that his low back pain could or might have contributed as well to his impotence . . . .

Under our Supreme Court's holding in *Holley v. ACTS, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003), "could or might" testimony is insufficient to establish medical causation in a workers' compensation claim. *Edmonds v. Fresenius Med. Care*, 165 N.C. App. 811, 818, 600 S.E.2d 501, 506 (2004) (J. Steelman, dissenting), *rev'd per curiam*, 359 N.C. 313, 608 S.E.2d 755 (2005).

> [O]nly an expert can give competent opinion evidence as to the cause of the injury. However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation. The evidence 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 (internal citations and quotations omitted).

The following month after deciding *Edmonds*, our Supreme Court in *Alexander v. Wal-Mart Stores, Inc.*, reiterated "the role of the Court of Appeals is 'limited to reviewing whether any competent evi-

dence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.' " 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (J. Hudson, dissenting) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)), *rev'd per curiam*, 359 N.C. 403, 610 S.E.2d 374 (2005). Our Supreme Court reversed and adopted the dissenting opinion in *Alexander*, holding the greater weight of the evidence standard was met through a medical expert's testimony "establish[ing] that it was 'likely' that [plaintiff's injury] occurred *during* the accident . . . ." 166 N.C. App. at 573, 603 S.E.2d at 558 (emphasis supplied).

Attached to Dr. Wheeler's deposition as Exhibit 4 is a treatment note dated 1 February 2001, wherein Dr. Wheeler stated that plaintiff's "impotence is, more likely than not, related to his injury."

When later asked if plaintiff's impotence was "more likely" caused by back pain resulting from plaintiff's fall, Dr. Wheeler testified that the work-related injuries "could or might have . . . contributed" to plaintiff's impotence.

Our Supreme Court has held "that the entirety of causation evidence" must "meet the reasonable degree of medical certainty standard necessary to establish a causal link between plaintiff's" accident and their injury. *Holley*, 357 N.C. at 234, 581 S.E.2d at 754. "Although medical certainty is not required, an expert's 'speculation' is insufficient to establish causation." *Id.*

The doctor in *Alexander* expressed her causation opinion "repeatedly and without equivocation" that plaintiff's injury "likely . . . occurred during the accident." 166 N.C. App. at 573, 603 S.E.2d at 558. While plaintiff's expert did not testify plaintiff's impotence "likely . . . occurred during" the work-related accident, his treatment note opined that plaintiff's "impotence is, more likely than not, related to his injury." *Id.* Although Dr. Wheeler's later testimony used the terms " 'could' or 'might,' " *Holley*, 357 N.C. at 232, 581 S.E.2d at 753, and was not "without equivocation" as shown by Dr. Wheeler's conflicting testimony and his medical notes, the Commission is the "sole judge" of Dr. Wheeler's credibility, *Alexander*, 166 N.C. App. at 573, 603 S.E.2d at 558. Credibility issues caused by any variance in Dr. Wheeler's treatment notes and his later testimony was for the Commission to decide. *Harrell*, 45 N.C. App. at 205, 262 S.E.2d at 835 ("[T]he Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony . . . .").

In both *Edmonds* and *Alexander*, our Supreme Court reaffirms the holding in *Holley* that "mere possibility has never been legally competent to prove causation. Although medical certainty is not required, an expert's 'speculation' is insufficient to establish causation." *Holley*, 357 N.C. at 234, 581 S.E.2d at 754 (internal citation omitted); *Edmonds*, 165 N.C. App. at 818, 600 S.E.2d at 506; *Alexander*, 166 N.C. App. at 573, 603 S.E.2d at 558. In reversing the Commission, the *Holley* Court noted, "plaintiff's doctors were unable to express an opinion to any degree of medical certainty as to the cause of plaintiff's [injury]." *Id.*

Plaintiff's expert evidence of causation exceeded "speculation." Dr. Wheeler's testimony of "could or might," together with his impression recorded in his treatment notes that plaintiff's injury "more likely than not [was] related to his injury" is competent evidence to sustain the Commission's conclusion of law that plaintiff's impotence and urination conditions were caused by the accident. *Id.* at 234, 581 S.E.2d at 754; *Edmonds*, 165 N.C. App. at 818, 600 S.E.2d at 506; *Alexander*, 166 N.C. App. at 573, 603 S.E.2d at 558. The Commission's finding of fact is supported by competent evidence in the record. Its conclusion of law awarding compensation for plaintiff's urological condition is affirmed.

B. Psychological Condition

[6] Defendant contends the Commission erred by finding:

> Dr. Brian A. Simpson, a psychologist, testified that there is a "very strong linkage" between plaintiff's development of depression, the accident on February 21, 1997, and "the other events that precipitated, such as chronic pain, such as functional limitations, such as occupation loss . . . ." Dr. Simpson further testified[,] "it would be very improbable" that plaintiff's depression began only after he was terminated, and that in his opinion plaintiff's termination aggravated his depression, which "pre-existed the termination from work." The greater weight of the evidence establishes that plaintiff's depression is causally related to the accident on February 21, 1997.

Dr. Simpson's deposition expert testimony supports this finding of fact. Dr. Simpson testified, that in his expert opinion, "a very strong linkage" exists between the injury and plaintiff's development of depression. He also opined, "I think it would be very improbable that [plaintiff] did not suffer depression until his termination in February

of 2000 and then, as a result of that termination, develop depression. . . . It is my opinion though that the termination of his employment did aggravate his depression." Further, Dr. Simpson testified:

> It was my opinion though and based upon the sequence of events that occurred from the time of his injury that—that the development of depression pre-existed the termination from work and pre-existed the marriage rupture, but did develop subsequent to and related to his injury and chronic pain and the other events that occurred following that
>
> . . . .
>
> I would submit that in reconstructing the sequence of events that his falling as a work injury and the medical complications of that, that it would be reasonable to believe that depression then developed rather rapidly following that injury.

Dr. Simpson's testimony of "a very strong linkage" regarding the causation of plaintiff's psychological condition to his accident is sufficient "to take the case out of the realm of conjecture and remote possibility . . . ." *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)). Competent evidence supports the Commission's finding of fact. This assignment of error is overruled.

VIII. Medical Expenses

[7] Defendant argues the Commission erred by requiring them to pay all medical expenses, not just related medical expenses, on behalf of plaintiff. We disagree.

Defendant argues the Commission's opinion and award is overly broad by ordering defendant to pay for a "comprehensive evaluation of all of plaintiff's medical conditions" and then pay for "any treatment recommended by it." In support of this assignment of error, defendant fails to cite any authority for this proposition other than their cite to "N.C. Gen. Stat. § 97(2)" and the broad assertion that "the Order violates the Workers' Compensation Act." N.C. Gen. Stat. § 97-2, which we presume is the statute defendant attempts to cite as authority, is the section entitled "Definitions" of the Workers' Compensation Act. Defendant fails to argue how this statute applies to their assignment of error or which portions of this statute are applicable. Under Rule 28 of the North Carolina Rules of Appellate Procedure, "[a]ssignments of error . . . 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); *see also Bass*, 166 N.C. App. at 612, 603 S.E.2d at 388. We do not reach the merit of this assignment of error and it is dismissed.

IX. Conclusion

The Commission did not err in finding defendant failed to satisfy their burden under *Seagraves* to show plaintiff was terminated for misconduct and not as a result of his compensable injury. The Commission did not err in considering attorney Cobourn's affidavit, despite the fact defendant did not have an opportunity to cross-examine him. The affidavit contained no "significant new evidence" and plaintiff and his wife had testified to those facts. *Cummins*, 149 N.C. App. at 185, 560 S.E.2d at 372. Collateral estoppel does not bar plaintiff's claim for workers' compensation before the Commission even though the ESC reached a different disposition on plaintiff's unemployment benefits. Competent evidence in the record supports the Commission's finding of fact that plaintiff's injury at work caused his psychological condition.

Competent evidence in the record supports the Commission's finding of fact that plaintiff's impotence and urological condition were caused by his accident on 21 February 1997.

The Commission failed to make adequate findings of fact to show plaintiff proved his total disability or is "capable of some work." *Springer*, 160 N.C. App. at 577, 586 S.E.2d at 556. We remand for entry of findings of fact on this issue.

The opinion and award is affirmed in part and remanded for further findings of fact on plaintiff's total disability.

Affirmed in part and Remanded.

Judge McGEE concurs.

Judge WYNN concurs in the result only by separate opinion.

WYNN, Judge concurring with separate opinion.

I respectfully concur in the result from the majority's decision to affirm the Commission's finding of fact on causation of Mr. Workman's urological condition. Following our Supreme Court's decision in *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 571,

603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting), *rev'd per curiam*, 359 N.C. 403, 610 S.E.2d 374 (2005), since there was competent evidence that Mr. Workman's urological condition was "more likely than not" caused by his work-place injury, and all of the evidence supports a conclusion of total disability, I would affirm the Commission's Opinion and Award.[1] Furthermore, while it is appropriate to remand for entry of findings of fact on the issue of total disability, under the facts of this case, such a remand is unnecessary and does not promote judicial economy.

Causation under the Workers Compensation Act

In North Carolina, the underlying purpose of the North Carolina Workers' Compensation Act is to provide compensation to workers whose earning capacity is diminished or destroyed by injury arising from their employment. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004). A longstanding rule of construction is that the Workers' Compensation Act should be liberally construed so that the benefits under the Act will not be denied by narrow, technical, or strict interpretation. *Hollman v. City of Raleigh, Pub. Util. Dep't*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968); *Cates v. Hunt Constr. Co., Inc.*, 267 N.C. 560, 563, 148 S.E.2d 604, 607 (1966).

After thoroughly reviewing the depositions and medical notes of Dr. Anthony Wheeler and Dr. Dominick Carbone, I conclude that there is competent evidence to support the Commission's finding of fact. The finding states in part, "[u]pon consideration of the testimony of Dr. Wheeler, Dr. Dominick Carbone, and the record as a whole, the greater weight of the evidence establishes that plaintiff's impotence, . . . [was] caused by the accident on February 21, 1997."

Where, as here, medical opinion testimony is required, "medical certainty is not required, [but] an expert's 'speculation' is insufficient to establish causation." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). In the instant case, there was competent evidence to allow the Commission to determine that the accident at work caused Plaintiff's injury. And under *Adams*, even in determining causation, the Commission's finding of fact must stand if supported

1. I agree with the majority's holding in that it finds that the Commission did not err in finding and concluding that the employer's decision to terminate Plaintiff was not for misconduct or fault; the Commission did not err in considering Cobourn's affidavit; collateral estoppel does not bar Plaintiff's claim for workers' compensation; and competent evidence in the record supports the Commission's finding of fact that Plaintiff's injury at work caused his psychological condition.

by any competent evidence. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). Indeed, the record shows that Dr. Wheeler stated that it was "more likely than not" that the impotence was related to Mr. Workman's injury. This is more than mere speculation, it is a preponderance of the evidence; thus, it is competent evidence of causation. *See Holley*, 357 N.C. at 232-33, 581 S.E.2d at 753; *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541, 463 S.E.2d 259, 261 (1995) (the plaintiff must prove causation by a "greater weight" of the evidence or a "preponderance" of the evidence), *aff'd*, 343 N.C. 302, 469 S.E.2d 552 (1996). Therefore, there is competent evidence to support the finding of fact.

I write separately to further point out that under the standard of review the record need not show that *all* of the evidence shows the doctor expressed his or her causation opinion "without equivocation." *See Alexander*, 166 N.C. App. at 573, 603 S.E.2d at 558. Under our standard of review, our Supreme Court has stated many times that the role of this Court is limited to determining "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). Our review " 'goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted). The Commission's findings of fact "are conclusive on appeal when supported by competent evidence," even if there is evidence to support a contrary finding, *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), and may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). Further, all evidence must be taken in the light most favorable to the plaintiff, and the plaintiff "is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Deese*, 352 N.C. at 115, 530 S.E.2d at 553.

In *Alexander*, our Supreme Court reiterated the role of this Court by adopting Judge Hudson's dissent stating, "I do not believe it is the role of this Court to comb through the testimony and view it in the light most favorable to the defendant . . . this Court's role is not to engage in such a weighing of the evidence." *Alexander*, 166 N.C. App. at 573, 603 S.E.2d at 558. The majority states that, "The doctor in *Alexander* expressed her causation opinion 'repeatedly and without equivocation' . . . ." But to be sure, the complete statement

from *Alexander* was that "*much* of the evidence reveals that the doctor expressed her opinions repeatedly and without equivocation." *Id.* (emphasis supplied). Thus, *Alexander* does not require that *all* of the evidence must show that the doctor expressed his opinion "without equivocation."

Here, where the records of Dr. Wheeler support the Commission's finding, when viewed in light of the standard of review, the finding should be upheld. *See Alexander*, 166 N.C. App. at 573, 603 S.E.2d at 558; *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (holding that the decision concerning what weight to give expert evidence is a duty for the Commission and not this Court).

As the record shows competent testimony on causation by Dr. Wheeler that is not speculative, but expresses a competent expert opinion, I would conclude that under our caselaw the Commission's finding is supported by competent evidence. Accordingly, the opinion and award of the Commission should be affirmed.

Remand for Findings on Disability

"Ordinarily, when an agency fails to make a material finding of fact or resolve a material conflict in the evidence, the case must be remanded to the agency for a proper finding." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 674, 599 S.E.2d 888, 904 (2004) (citation omitted). But further proceedings are neither necessary nor advisable when all evidence in the record points to only one conclusion. *Id.* at 675, 599 S.E.2d at 904. *See State v. Daughtry*, 340 N.C. 488, 514, 459 S.E.2d 747, 760 (1995) (trial court erred by failing to make a finding of fact that a statement possessed the requisite trustworthiness, however, the record sustained the trial court's conclusion making the error harmless). Because the evidence in this matter pointed to only one conclusion, and Defendant offered no evidence in rebuttal, I would find it unnecessary to remand this matter to the Commission for administrative entry of the proper findings.

The Commission is required to determine whether competent evidence exists to support a finding of disability based on the presentation of evidence that he is capable of some work, but has after a reasonable effort been unsuccessful in his efforts to obtain employment; or evidence that he is capable of some work but that it would be futile because of preexisting conditions to seek other employment. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Once the plaintiff satisfies his burden of proof to

establish one of the elements under *Russell*, the burden shifts to the defendant to "come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one . . . ." *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (emphasis omitted).

While, the Commission failed to make findings of fact on this evidence, the record shows, and the majority agrees, that Plaintiff presented evidence that he sought employment but was unsuccessful in obtaining a job. However, there is no evidence in the record that Defendants rebutted Plaintiff's evidence.

Like in *Carroll*, further proceedings are unnecessary as the record points to only one conclusion: That Plaintiff sought employment but was unable to obtain a job and Defendants failed to rebut Plaintiff's evidence. Therefore, it is unnecessary to remand to the Commission for further findings. *Carroll*, 358 N.C. at 675, 599 S.E.2d at 904.

GAIL M. MYERS, ANCILLARY ADMINISTRATRIX OF THE ESTATE OF DARRYL MYERS, PLAINTIFF v. SHIRLEY McGRADY, THOMAS W. HIGGINS, MICHAEL P. MURPHY, JAMES F. FOUST, WILLIAM A. SPENCER, JR., AND VERIAN LADSON, SUCCESSOR REPRESENTATIVE FOR THE ESTATE OF J.C. MYERS, JR., DEFENDANTS, AND SHIRLEY McGRADY, THOMAS W. HIGGINS, JAMES F. FOUST, WILLIAM A. SPENCER, JR., AND VERIAN LADSON, SUCCESSOR REPRESENTATIVE FOR THE ESTATE OF J.C. MYERS, JR., THIRD-PARTY PLAINTIFFS v. N.C. DIVISION OF FOREST RESOURCES, A DIVISION OF N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, THIRD-PARTY DEFENDANTS

No. COA04-973

(Filed 7 June 2005)

1. Appeal and Error— appealability—interlocutory order—sovereign immunity and public duty doctrine—substantial right

An interlocutory order involving sovereign immunity and the public duty doctrine affects a substantial right sufficient to warrant immediate appellate review.

2. Negligence— public duty doctrine—car wreck in forest fire smoke—State forestries activities

The public duty doctrine was not extended to the activities of the Division of Forest Resources in an action arising from a car wreck that occurred in the smoke from a forest fire.

3. Appeal and Error— preservation of issues—issues not raised at trial

Arguments not raised at trial were not addressed on appeal.

4. Parties— State as third-party defendant—exception to Tort Claims Act

Third-party claims against the State in superior court are allowed when those claims arise from the same occurrence as the original claims. The trial court here did not err by denying the motion of the Division of Forest Resources to dismiss a suit against it where the original and third-party claims arise from the same occurrence, an automobile wreck that occurred in the smoke from a forest fire.

Judge TYSON concurring in part and dissenting in part.

Appeal by Third-Party Defendants from orders entered 24 February and 23 March 2004 by Judges Donald W. Stephens and Abraham P. Jones in Superior Court, Durham County. Heard in the Court of Appeals 22 March 2005.

Attorney General Roy Cooper, by Assistant Attorney General Richard L. Harrison, for third-party-defendant-appellants.

Kennedy Covington Lobdell & Hickman, L.L.P., by F. Fincher Jarrell, for defendant-third-party-plaintiff-appellees James F. Foust and William A. Spencer, Jr.

Douglas F. DeBank, for defendant-third-party-plaintiff-appellee Verian Ladson, Successor Representative for the Estate of J.C. Myers.

Twiggs, Beskind, Strickland & Rabenau, P.A., by Donald R. Strickland and Jerome P. Trehy, Jr., for defendant-third-party-plaintiff-appellee Gail Myers.

The Derrick Law Firm, by Dirk J. Derrick, for defendant-third-party-plaintiff-appellee Gail Myers.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio and Jamal A. Rhinehardt, for defendant-third-party-plaintiffs Shirley McGrady and Thomas W. Higgins.[1]

Yates, McLamb & Weyher, LLP, by Rodney E. Pettey, for defendant Michael P. Murphy.[2]

WYNN, Judge.

The public duty doctrine is an exception to the Tort Claims Act and shields the State from liability for negligence claims arising from the alleged failure of law enforcement to prevent misconduct by a third party and the alleged failure of a state agency to detect and prevent misconduct of a third party through improper inspections. Here, Third-Party Defendants North Carolina Division of Forest Resources and North Carolina Department of Environment and Natural Resources (hereinafter referred to collectively as "Division of Forest Resources") argue that the public duty doctrine shields them from liability for claims of negligence arising from a forest ranger's alleged actions and inactions in dealing with a forest fire. Because this case fits into neither established category of the public duty doctrine's application, we affirm the trial court's holding that the public duty doctrine does not shield the Division of Forest Resources.

The record reflects that, on 9 June 2002, a multiple-vehicle accident occurred on I-95 in Northhampton County, North Carolina, resulting in the death of Darryl Myers, who was a passenger in a vehicle driven by J. C. Myers, also killed in the accident. According to the complaint filed by Gail M. Myers as administratrix of the estate of Darryl Myers, at the time of the accident, a forest fire produced smoke which, combined with fog, obscured the vision of travelers.

Ms. Myers alleged that the accident occurred as a result of the following facts: Upon driving into the I-95 area obscured by smoke and fog, Shirley McGrady "negligently stopped" a vehicle to switch seats with the owner and passenger in the vehicle, Thomas W. Higgins. Ms. Myers alleged that Higgins "negligently failed to instruct [Ms. McGrady] to get the vehicle out of the travel lane and into the emergency lane." Thereafter, a chain-reaction of rear-end collisions occurred when Michael P. Murphy drove his vehicle into the rear of

1. No brief was filed on behalf of Shirley McGrady and Thomas W. Higgins.

2. No brief was filed on behalf of Michael P. Murphy.

the stopped Higgins vehicle; John Foust, driving a tractor-trailer, struck the rear of Murphy's vehicle; and J. C. Myers, driving the vehicle in which Darryl Myers rode as a passenger, rear-ended the tractor-trailer. Ms. Myers alleged that Foust's liability was imputed to William A. Spencer, Jr., the owner of the tractor-trailer. She alleged the negligence of all Defendants proximately caused Darryl Myers' death.

Thereafter, Defendants brought third-party complaints against the Division of Forest Resources and its employee, Michael Bennett. The third-party complaints alleged that Bennett, a county forest ranger, negligently failed to extinguish a forest fire, left a still smoldering forest fire, and failed to protect motorists and warn motorists of the danger of reduced visibility caused by smoke and fog. Third-Party Plaintiffs (Defendants to Ms. Myers' action) further alleged that any negligence on their part was "secondary to the primary and active negligence" of the Division of Forest Resources, which entitled them to indemnification.

In response, the Division of Forest Resources and Bennett moved for dismissal of the third-party claims. On 24 February 2004, the trial court denied the motion as to the Division of Forest Resources but granted the motion as to Bennett. In March 2004, the trial court allowed Ms. Myers to amend her complaint to add claims against the Division of Forest Resources and denied the Division of Forest Resources' motion to dismiss the amended complaint.

This appeal follows from the orders denying dismissal of the claims against the Division of Forest Resources.

---

[1] Preliminarily, we note that the Division of Forest Resources appeals from orders denying motions to dismiss. These orders are interlocutory, *i.e.*, "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." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999); *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (same). Generally, there is no right of immediate appeal from interlocutory orders. *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992); *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, we take this appeal pursuant to North Carolina General Statute section 7A-27(d)(1), allowing review of interlocutory orders affecting a "sub-

stantial right," because the appeal of an interlocutory order raising issues of sovereign immunity and the public duty doctrine affects a substantial right sufficient to warrant immediate appellate review. N.C. Gen. Stat. § 7A-27(d)(1) (2004); *Derwort v. Polk County*, 129 N.C. App. 789, 790-91, 501 S.E.2d 379, 380 (1998) (a substantial right was affected where Polk County asserted the public duty doctrine); *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 (1996) ("[W]e have held that orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right.").

[2] On appeal, the Division of Forest Resources argues that the trial court erroneously failed to find that the complaints against it were barred by the public duty doctrine.

Under North Carolina law, the State Tort Claims Act waives sovereign immunity by permitting actions against the State for negligence committed by State employees in the course of their employment. N.C. Gen. Stat. § 143-291 (2004); *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 117 (1987) ("By enactment of the Tort Claims Act, . . . the General Assembly partially waived the sovereign immunity of the State to the extent that it consented that the State could be sued for injuries proximately caused by the negligence of a State employee acting within the scope of his employment." (citation omitted)). However, in 1991, our Supreme Court adopted the public duty doctrine, which provides an exception to the Tort Claims Act.

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

Braswell v. Braswell, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991) (citations omitted); *Lassiter v. Cohn*, 168 N.C. App. 310, 315-16, 607 S.E.2d 688, 692 (2005) (same). In *Braswell*, the decedent's son sued his father, who killed his mother, as well as the county sheriff. The plaintiff's claims against the county sheriff included negligent failure to protect the decedent, a claim the Supreme Court held was barred by the public duty doctrine.

In 1998, our Supreme Court applied the public duty doctrine to state agencies required to conduct inspections for the public's general protection. *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711 (1998). In *Stone*, decedents' estates brought suit, alleging the Department of Labor breached its statutory duty to inspect a food products plant where, *inter alia*, exits were inadequate and blocked, and decedents were unable to escape a plant fire. Our Supreme Court held that "[j]ust as we [in *Braswell*] 'refused to judicially impose an overwhelming burden of liability [on law enforcement] for failure to prevent every criminal act,' we now refuse to judicially impose an overwhelming burden of liability on defendants for failure to prevent every employer's negligence that results in injuries or deaths to employees." *Id.* at 481, 495 S.E.2d at 716. The Supreme Court applied this same reasoning again in *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998). In that case, the plaintiff sought damages for injuries received on an amusement park go-kart. A Department of Labor inspector had approved the go-karts although the seatbelts were not in compliance with State rules and regulations. The Supreme Court held that "[t]o hold contrary to our holding in *Stone*, in which we held that the defendants' failure to inspect did not create liability, would be tantamount to imposing liability on defendant in this case solely for inspecting the go-karts and not discovering them to be in violation of the Code[,]" and the Department of Labor "would become a virtual guarantor of the safety of every go-kart subject to its inspection, thereby, exposing it to an overwhelming burden of liability for failure to detect every code violation or defect." *Id.* at 198-99, 499 S.E.2d at 751 (quotation omitted).

After *Braswell*, this Court interpreted the public duty doctrine to apply to public duties beyond those related to law enforcement protection. *See Moses v. Young*, 149 N.C. App. 613, 616, 561 S.E.2d 332, 334-35 (providing extensive review of the application of the public duty doctrine), *disc. review denied*, 356 N.C. 165, 568 S.E.2d 199 (2002).[3]

In response to this expansion, in *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654, our Supreme Court stated that "we have never expanded the public duty doctrine to any local government agencies

3. We note that one such case, *Davis v. Messer*, 119 N.C. App. 44, 457 S.E.2d 902 (1995), extended the public duty doctrine's application to a town fire department and fire chief, a scenario similar to the case at bar. However, in light of *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000), *Davis* was explicitly overruled. *Willis v. Town of Beaufort*, 143 N.C. App. 106, 544 S.E.2d 600 (2001).

other than law enforcement departments when they are exercising their general duty to protect the public" and made clear that "the public duty doctrine, as it applies to local government, is limited to the facts of *Braswell*."[4] *Lovelace* did not concern state agencies or departments but nevertheless noted that "this Court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection . . . ." *Id.* The Supreme Court underscored its *Lovelace* holding in *Thompson v. Waters*, 351 N.C. 462, 526 S.E.2d 650 (2000), filed the same day as *Lovelace*, by refusing to extend the application of the public duty doctrine to a county for alleged negligent inspection of a private home.

Thus, after *Lovelace*, it appears that the public duty doctrine applies where plaintiffs allege negligence through (a) failure of law enforcement to provide protection from the misconduct of others, and (b) failure of state departments or agencies to detect and prevent misconduct of others through improper inspections.

The instant case fits into neither of these applications. As to the first application, law enforcement officers have been defined as: "Any officer of the State of North Carolina or any of its political subdivisions authorized to make arrests . . .[,]" N.C. Gen. Stat. § 14-288.1 (2004), and "[a]n employee or volunteer of an employer who possesses the power of arrest, who has taken the law enforcement oath . . ., and who is certified as a law enforcement officer under the provisions of Chapter 17C of the General Statutes or certified as a deputy sheriff under the provisions of Chapter 17E of the General Statutes." N.C. Gen. Stat. § 115B-1(3) (2004); N.C. Gen. Stat. § 128-21(11b) (2004) (same).

Here, the third-party complaints assert claims against the Division of Forest Resources based on the alleged negligence of its employee, a county forest ranger. Under North Carolina General Statute section 113-55, which enumerates the powers and authority of forest rangers, a forest ranger is expressly not granted authority to make arrests and is expressly not a criminal justice officer. N.C. Gen. Stat. § 113-55 (2004) ("This subsection may not be interpreted to confer the power of arrest on forest rangers, and does not make them

4. In a recent case, *Lassiter v. Cohn*, 168 N.C. App. 310, 318, 607 S.E.2d 688, 693-94 (2005), this Court applied the public duty doctrine to a law enforcement official's alleged negligent failure to prevent third-party misconduct not as to criminal acts, as in *Braswell*, but regarding a traffic accident.

criminal justice officers within the meaning of G.S. 17C-2.").[5] Because the employee subjecting the Division of Forest Resources to potential liability was not a law enforcement officer, the application of the public duty doctrine to allegations of negligent failure of a law enforcement officer to provide protection from the misconduct of others is not applicable.

Moreover, the bases of the claims here are the forest ranger's alleged failure to extinguish a forest fire, failure to protect motorists and warn motorists of reduced visibility due to smoke and fog, and negligently leaving a still smoldering forest fire. There are no allegations of negligence due to the forest ranger's failure to detect and prevent misconduct of others through improper inspections, and the statutes enumerating forest ranger duties do not indicate that inspection duties akin to the duties in *Stone* and *Hunt* exist. *See* N.C. Gen. Stat. § 113-54 (2004); N.C. Gen. Stat. § 113-55.

In sum, after *Lovelace*, the cases in which the public duty doctrine applies are those in which plaintiffs allege negligence through (a) failure of law enforcement to provide protection from the misconduct of others, and (b) failure of state departments or agencies to detect and prevent misconduct of others through improper inspections. The instant case falls into neither of those categories. Moreover, because our Supreme Court in "*Lovelace* [] sought to reign in the expansion of the public duty doctrine's application to other government agencies[,]" *Lassiter*, —— N.C. App. at ——, 607 S.E.2d at 692, even if the sought extension in *Lovelace* was as to local government rather than the State, we decline to extend the public duty doctrine to the Division of Forest Resources in this case. We therefore find the Division of Forest Resources' argument that the trial court erred when it denied its motion to dismiss the complaints because the complaints were barred by the public duty doctrine to be without merit.

[3] The Division of Forest Resources next argues that the trial court erred when it failed to dismiss complaints made under the Tort

5. Under North Carolina General Statute section 17C-2, criminal justice officers are:

> The administrative and subordinate personnel of all the departments, agencies, units or entities comprising the criminal justice agencies who are sworn law-enforcement officers, both State and local, with the power of arrest; State correctional officers; State probation/parole officers; State probation/parole officers-surveillance; officers, supervisory and administrative personnel of local confinement facilities; State juvenile justice officers; chief court counselors; and juvenile court counselors.

N.C. Gen. Stat. § 17C-2 (2004).

Claims Act by Third-Party Plaintiffs where the complaints against the forest ranger individually had been dismissed.

Where "[t]he record does not contain anything in the pleadings, transcripts, or otherwise, to indicate that [an] issue . . . was presented to the trial court . . . we refuse to address the issue for the first time on appeal." *Bell v. Nationwide Ins. Co.*, 146 N.C. App. 725, 728, 554 S.E.2d 399, 402 (2001) (citing N.C. R. App. P. 10(b)); *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002) ("A contention not raised in the trial court may not be raised for the first time on appeal." (citations omitted)). Here, the record reflects that the Division of Forest Resources did not raise this argument before the trial court. Indeed, when, at the hearing, the trial court declined to dismiss as to the Division of Forest Resources but dismissed the claims against the forest ranger individually, the trial court explicitly asked the Division of Forest Resources if they would like to be heard. The only response was, "Thank you, Your Honor." Because the Division of Forest Resources has not preserved its second argument for appellate review, we do not address it.

The Division of Forest Resources further argues that the trial court erred when it failed to dismiss complaints against it where the complaints failed to allege waiver of sovereign immunity.

As discussed above, where "[t]he record does not contain anything in the pleadings, transcripts, or otherwise, to indicate that [an] issue . . . was presented to the trial court . . . we refuse to address the issue for the first time on appeal." *Bell*, 146 N.C. App. at 728, 554 S.E.2d at 402. Here, the record reflects that the Division of Forest Resources raised this argument neither in its motions to dismiss nor at the hearing. Because the Division of Forest Resources has not preserved its third argument for appellate review, we do not address it.[6]

6. The dissent concedes that the Division of Forest Resources failed specifically to state failure to allege waiver of sovereign immunity as a grounds for dismissal in its motions to dismiss and at the hearing. Nevertheless, the dissent deems this issue preserved for appellate review. We disagree. Our courts have made clear that new legal theories may not be raised on appeal. *See*, *e.g.*, *State v. Wiley*, 355 N.C. 592, 624, 565 S.E.2d 22, 44 (2002) (Where the defendant, in his pretrial motion to suppress and again prior to sentencing, contended that his plea was not entered freely, voluntarily, and knowingly and did not make arguments based on due process, the defendant "abandoned his due process position at trial and cannot now revitalize it on appeal." (citing N.C. R. App. P. 10; *State v. Larrimore*, 340 N.C. 119, 149, 456 S.E.2d 789, 805 (1995); *Weil v. Herring*, 207 N.C. 6, 6, 175 S.E. 836, 838 (1934) ("[T]he record discloses that the cause was not tried upon [the defendant's] theory, and the law does not permit parties to swap horses between courts to get a better mount in the Supreme Court."))). Moreover, North Carolina General Statutes section 1A-1, Rule 46, quoted and discussed

[4] Lastly, the Division of Forest Resources argues that the trial court erred when it denied its motion to dismiss Ms. Myers' complaint against it where the North Carolina General Assembly has failed to waive the State's immunity from suit for negligence except in the Industrial Commission. The Division of Forest Resources contends that, while the other defendants may be able to bring it in as a third party, Ms. Myers, the original plaintiff, is required to pursue her claim in the Industrial Commission. We disagree.

As this Court recently stated in *Batts v. Batts*, 160 N.C. App. 554, 557-58, 586 S.E.2d 550, 552-53 (2003):

> Under the clear language of Rule 14(a), once a third-party defendant is added to a lawsuit, a plaintiff may assert claims directly against the third-party defendant, subject only to the limitation that the claim arose out of the same transaction or occurrence as the plaintiff's original claim against the original defendant.
>
> The Tort Claims Act waives sovereign immunity. By the addition of Rule 14(c), the General Assembly created an exception to the general rule that claims against the State under the Tort Claims Act must be pursued before the Industrial Commission as to third-party claims. The 1975 amendment to Rule 14 does not place any limitations on the application of Rule 14(a) to claims against the State. Rule 14 must be construed as a whole and not in separate parts. By adding subsection (c) to Rule 14, the General Assembly waived the State's immunity to claims brought by a plaintiff under Rule 14(a), subject to the express limitations contained therein. "It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658-59, 174 S.E.2d 793, 804-05 (1970). Since the claims asserted by plaintiff against NCDOT are identical to those asserted by defendant Batts against NCDOT, and since these claims arise out of the same transaction and occurrence that is the subject matter of plaintiff's original claim, plaintiff is permitted to assert its claims against NCDOT under the provisions of Rule 14.

Similarly, here, Ms. Myers' allegations as to the Division of Forest Resources are identical to those made by Third-Party Plaintiffs, and

---

by the dissent, requires that a party "make[] known" not only the action the party desires the court to make, but also "the party's grounds for its position." N.C. Gen. Stat. § 1A-1, Rule 46(b) (2004). Here, the Division of Forest Resources failed to make this ground known prior to its appeal, for which it is not preserved.

the claims arise out of the same transaction and occurrence that was the subject matter of Plaintiff's original claim. Ms. Myers, like Third-Party Plaintiffs, alleges negligence for failing to extinguish a forest fire, leaving a still smoldering forest fire, and failing to protect motorists and warn motorists of the danger of reduced visibility caused by smoke and fog. Ms. Myers contends this negligence proximately caused the death by vehicular accident of Darryl Myers, the transaction and occurrence out of which her original claim arose. We therefore find the Division of Forest Resources' argument that the trial court erred in denying its motion to dismiss Plaintiff's complaint to be without merit.

For the foregoing reasons, we affirm the orders of the trial court.

Affirmed.

Judge ELMORE concurs.

Judge TYSON concurs in part and dissents in part.

Tyson, Judge concurring in part, dissenting in part.

The majority's opinion holds: (1) the Division of Forest Resources failed to properly preserve for appellate review its assignment of error concerning third-party plaintiffs failure to allege waiver of immunity; (2) the public duty doctrine does not shield the Division of Forest Resources from liability resulting from claims of negligence against a forest ranger; (3) the North Carolina Division of Forest Resources failed to properly preserve for appellate review its assignment of error concerning the dismissal of individual claims against Michael Bennett; and (4) Ms. Myers may pursue her claims against the State in Superior Court. I concur with the determination of issues three and four above in the majority's opinion. However, I respectfully dissent from the analysis and holding regarding issues one and two above in the majority's opinion.

I. Sufficiency of Complaint

"It has long been the established law of North Carolina that the State cannot be sued except with its consent or upon its waiver of immunity." *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998) (citing *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983)). A plaintiff asserting causes of action against the State must allege in their complaint the State

waived its sovereign immunity. *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citing *Clark v. Burke County*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994)), *disc. rev. denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). Without an "allegation of waiver in the plaintiff's complaint, the plaintiff is absolutely barred from suing the State . . . in an action for negligence." *Vest v. Easley*, 145 N.C. App. 70, 74, 549 S.E.2d 568, 573 (2001).

The majority's opinion dismisses the Division of Forest Resources' assignment of error concerning the sufficiency of third-party plaintiffs' complaint for failure to raise the issue at the trial court level. It asserts "the Division of Forest Resources raised this argument neither in its motions to dismiss nor at the hearing." I disagree.

It is undisputed that third-party plaintiffs failed to include in their complaint alleging negligence against the Division of Forest Resources: (1) an assertion of waiver of immunity by the State (the State stipulated third-party plaintiffs Foust and Spencer asserted waiver of immunity); or (2) made any mention of the Tort Claims Act. In response to this complaint, the Division of Forest Resources filed a motion to dismiss "pursuant to Rule 12(b)(1), (2), (6), and 12(c) of the N.C. Rules of Civil Procedure." The majority's opinion holds the State's motion was not sufficient to preserve the issue for appellate review. I disagree.

A. Essential Elements

When a plaintiff asserts negligence against the State, *five* elements must be alleged. The first four comprise common law negligence. *See Tise v. Yates Construction Co., Inc.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997) (a legal duty, breach of that duty, and injury proximately caused by the breach). The fifth is the waiver of immunity by the State. *Paquette*, 155 N.C. App. at 418, 573 S.E.2d at 717; *Vest*, 145 N.C. App. at 74, 549 S.E.2d at 573. The complaints at bar fail to include an allegation of waiver by the Statute. Under a 12(b)(6) motion for failure to state a claim upon which relief may be granted, third-party plaintiffs' complaint must be dismissed for failure to allege all the necessary elements of their claim. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (On a motion to dismiss, the standard of review is "whether as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory."); *Lynn v. Overlook Development*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)

(whether allegations sufficient to state a claim upon which relief can be granted under some legal theory).

B. Preservation of Error

Under Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1) (2004). A party may not raise a new theory to the case for the first time on appeal. *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).

N.C. Gen. Stat. § 1A-1, Rule 46(b) (2003) states:

> With respect to pretrial rulings, interlocutory orders, trial rulings, and other orders of the court not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. In order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court the party's objection to the action of the court or makes known the action that the party desires the court to take and the party's grounds for its position. If a party has no opportunity to object or except to a ruling or order at the time it is made, the absence of an objection or exception does not thereafter prejudice that party.

This Court held in *Barbour v. Little*:

> Under G.S. 1A-1, Rule 46(b), with respect to rulings and orders of the trial court not directed to admissibility of evidence, no formal objections or exceptions are necessary, it being sufficient to preserve an exception that the party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court or makes known the action which he desires the court to take and his ground therefor. *This the defendants did when they filed their motion to dismiss under Rule 12(b)(6). No further action by defendants in the trial court was required to preserve their exception.* In the record on appeal defendants properly set out their exception to [the trial court's] order, as they were expressly permitted to do by Rule 10(d) of the Rules of

> Appellate Procedure. We find that the question of the validity of [the trial court's] order denying defendants motion to dismiss under Rule 12(b)(6) has been properly preserved by defendants' cross assignment of error and is before us on this appeal.

37 N.C. App. 686, 692-93, 247 S.E.2d 252, 256 (emphasis supplied), *cert. denied*, 295 N.C. 733, 248 S.E.2d 862 (1978); *see also Inman v. Inman*, 136 N.C. App. 707, 711-12, 525 S.E.2d 820, 823 (pursuant to Rule 46(b) of the North Carolina Rules of Civil Procedure, defendants who filed a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) were not required to take further action in the trial court in order to preserve their exception), *cert. denied*, 351 N.C. 641, 543 S.E.2d 870 (2000).

The Division of Forest Resources properly preserved the assigned error for our review and stated the State's "grounds for its position." N.C. Gen. Stat. § 1A-1, Rule 46(b); *Barbour*, 37 N.C. App. at 693, 247 S.E.2d at 256; *Inman*, 136 N.C. App. at 711-12, 525 S.E.2d at 823. The State moved the trial court to dismiss third-party plaintiffs' complaint for lack of "subject matter jurisdiction, personal jurisdiction, and [failure] to state a claim for which relief may be granted pursuant to the public duty doctrine . . . ." The State is not required by statute or case law to further *specifically* state in its pleadings or during the motion hearing that third-party plaintiffs failed to allege waiver of immunity. *Id.* The assigned error was preserved for appellate review. Without an allegation of waiver of immunity, third-party plaintiffs "failed to state a claim" against the State by asserting all five required elements to allege negligence against the State. The trial court should have granted the State's motion.

II. The Public Duty Doctrine

Following a discussion of our Supreme Court's decisions on the subject, the majority's opinion holds, "it appears that the public duty doctrine applies where plaintiffs allege negligence through (a) failure of law enforcement to provide protection from the misconduct of others, and (b) failure of state departments or agencies to detect and prevent misconduct of others through improper inspections." I disagree with the analysis and holding in the majority's opinion on the merits.

A. *Stone v. N.C. Dept. of Labor*

In *Braswell*, our Supreme Court initially recognized the public duty doctrine as an exception to the Tort Claims Act for municipali-

ties, political subdivision, and their agents. 330 N.C. at 370-71, 410 S.E.2d at 901-02 (applied to a county sheriff). In *Stone*, the Court extended the doctrine's scope to "state agencies" and "governmental functions other than law enforcement." 347 N.C. at 481, 495 S.E.2d at 716. The Court's analysis in reaching that holding demonstrates *Stone's* applicability to the issue at bar. *See id.* ("The policies underlying recognition of the public duty doctrine in *Braswell* support its application here.").

Extending the public duty doctrine to claims against the State under the Tort Claims Act was predicated upon three elements. First, the Court considered the legislative intent of the Tort Claims Act to determine whether the public duty doctrine applied to claims brought under the Act against the State. *Id.* at 478-79, 495 S.E.2d at 714 ("[O]ur primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." (quotation omitted)). Our Supreme Court held "the plain words of the statute indicate an intent that the doctrine apply to claims brought under the Tort Claims Act." *Id.* at 479, 495 S.E.2d at 714 ("Acts, such as the Tort Claims Act, that permit suit in derogation of sovereign immunity should be strictly construed." (citation omitted)). A plaintiff must show the governmental entity owed "a special relationship" or "a special duty" to a particular individual to avoid the public duty doctrine defense. *Id.* (citing *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902).

Second, the Court "recognize[d] the limited resources of [the state agency] . . . . [and] refuse[d] to judicially impose an overwhelming burden of liability on defendants for failure to prevent every employer's negligence that results in injuries or deaths to employees." *Id.* at 481, 495 S.E.2d at 716 (" '[A] government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all.' " (citation omitted)).

Third, our Supreme Court considered the legislative intent in establishing the Occupational Safety and Health Division of the Department of Labor. *Id.* at 482, 495 S.E.2d at 716. A review of Chapter 95 of the General Statutes showed "the most the legislature intended was the Division prescribe safety standards and secure some reasonable compliance" by employers. *Id.* No private individual could initiate a cause of action against the State "to assure compliance." *Id.*

B. *Hunt v. N.C. Dept. of Labor*

Our Supreme Court returned to and addressed this issue again in *Hunt*, 348 N.C. 192, 499 S.E.2d 747. There, the plaintiff alleged a common law negligence action against the State under the Tort Claims Act. *Id.* at 195, 499 S.E.2d at 749. The Department of Labor "contend[ed] that the public duty doctrine bars this action against the State." *Id.* The Court followed the analysis set forth in *Stone* and reiterated "the public duty doctrine can apply to actions against state agencies brought under the Tort Claims Act." *Id.*

Our Supreme Court next considered whether a "distinct duty to any specific individual" existed that would except from the general rule "that a governmental entity acts for the benefit of the general public, not for a specific individual, and, thus, cannot be held liable for a failure to carry out its duties to an individual." *Id.* at 196, 499 S.E.2d at 749-50 (citations omitted). The Court cited *Braswell* in recognizing the two instances that would create the exception to the general rule: (1) "where there is a special relationship between the injured party and the governmental entity;" and (2) "when the governmental entity creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered." *Id.* at 197, 499 S.E.2d at 750.

Applying these exceptions to the facts in *Hunt*, our Supreme Court determined the statutes and administrative rules cited by the plaintiff did "not explicitly prescribe a standard of conduct for this defendant as to individual[s]" as required under the first exception to the general rule. *Id.* at 198, 499 S.E.2d at 751. Further, the plaintiff did not allege "an actual promise" by the State to satisfy the second exception. *Id.* at 199, 499 S.E.2d at 751. The Court concluded "the claim fails unless it fits into one of the two exceptions." *Id.*

C. The Majority

The majority's opinion contends the public duty doctrine bars *only* negligence claims involving: (a) failure of law enforcement to provide protection from the misconduct of others; and (b) failure of State departments or agencies to detect and prevent misconduct of others through improper inspections. It cites *Braswell*, *Stone*, *Hunt*, *Lovelace*, and *Thompson* as authority in support of this notion.

My analysis of *Stone* and precedents it relies upon shows our Supreme Court based its application of the public duty doctrine to the

State agency due to the underlying principles of the doctrine and sovereign immunity, *not* the status of the State agency to conduct inspections. 347 N.C. at 481, 495 S.E.2d at 716. The Court followed this analysis in *Hunt*. 348 N.C. at 196, 499 S.E.2d at 749. The Division of Forest Resources is a *State* agency. Despite the majority's opinion stating otherwise, Bennett is a *State* employee. N.C. Gen. Stat. § 113-51 through § 113-55 (2003). *Lovelace*, *Thompson*, and their progeny were *solely* limited to claims against *local* government, do not bear upon, and are inapplicable to the facts at bar. *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654; *Thompson*, 351 N.C. at 465, 526 S.E.2d at 652; *Wood v. Guilford County*, 355 N.C. 161, 167, 558 S.E.2d 490, 495 (2002) (public duty doctrine barred claim against County agency that provided security to the courthouse).

D. Division of Forest Resources

Applying our Supreme Court's analysis in *Stone* and *Hunt* to the facts here shows: (1) this action against the Division of Forest Resources falls within the scope of the public duty doctrine; and (2) neither exception under *Braswell* to the general rule precluding State liability applies.

Third-party plaintiffs' complaint against the Division of Forest Resources alleges it acted *negligently* with its handling of the forest fire. If third-party plaintiffs are permitted to pursue their claim despite failure to assert a waiver of immunity or the Tort Claims Act, the public duty doctrine bars this claim pursuant to *Stone* and *Hunt*.

Third-party plaintiffs do not assert and my review of the General Statutes does not indicate that: (1) a special relationship existed between them and the Division of Forest Resources; or (2) the Division of Forest Resources owes a statutory special and individual duty to each claimant.

N.C. Gen. Stat. § 113-51, Powers of Department of Environment and Natural Resources, states "[t]he Department of Environment and Natural Resources may take such action as it may deem necessary to provide for the prevention and control of forest fires in any and all parts of this State . . . ." N.C. Gen. Stat. § 113-54 provides, "[f]orest rangers shall have charge of measures for controlling forest fires . . . [and] shall post along highways and in other conspicuous places copies of forest fire laws and warnings against fires . . . ." N.C. Gen. Stat. § 113-55(a) begins, "[f]orest rangers shall prevent and extinguish forest fires and shall have control and direction of all persons and

equipment while engaged in the extinguishing of forest fires." These statutes, individually or collectively, do not promulgate a special duty to specific individuals or recognize any special relationships. Third-party plaintiffs failed to show the deceased was "promised" any special duty or relationship by the State that he relied upon to his detriment. *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. Rather, the Division of Forest Resources' duty to abide by the statutes is owed to the general public alone and not to any of the claimants here.

III. Conclusion

The Division of Forest Resources properly preserved for appeal its assignment of error by asserting a motion to dismiss and addressing third-party plaintiffs failure to allege a waiver of immunity by the State. The public duty doctrine applies to the facts at bar. Neither exception to the general rule of sovereign immunity and no liability to the State was asserted by third-party plaintiffs and no waiver exists in the record before us.

The trial court erred by not dismissing third-party plaintiffs' complaint for failure to state a claim upon which relief can be granted. I respectfully dissent.

DONALD ARNDT, PLAINTIFF v. FIRST UNION NATIONAL BANK, FIRST UNION CORPORATION AND WACHOVIA CORPORATION, DEFENDANTS

No. COA04-807

(Filed 7 June 2005)

1. Employer and Employee— bank vice president—annual bonus—oral contract

Evidence presented by both parties presented an issue of fact for the jury as to whether an oral contract existed between plaintiff bank vice president and defendant bank under which plaintiff would receive an annual bonus of twenty percent of all net income he generated for the bank in the "structured products group."

2. Employer and Employee— Wage and Hour Act—modification of annual bonus—failure to give notice

The evidence supported the jury's finding that defendant bank modified plaintiff bank vice president's annual bonus for-

mula without giving plaintiff notice of the change in violation of N.C.G.S. § 95-25.13(3) of the N.C. Wage and Hour Act. Although defendant bank gave plaintiff notice of the bank's incentive compensation program (ICP) which began and ended each calendar year, these notices did not apply to plaintiff because the evidence showed that plaintiff's bonus and compensation structure was unique to him and different from the generic ICP plans applicable to defendant bank's other employees.

3. Employer and Employee— breach of contract—instructions—existence of contract—acquiescence—estoppel—spoliation

The trial court did not err in a breach of contract and violation of the North Carolina Wage and Hour Act case by its instruction to the jury on the existence of a contract, by instructing that defendant was required to prove plaintiff acquiesced to the bonus formal change, by failing to instruct the jury on estoppel, and by instructing the jury on spoliation of the evidence.

4. Employer and Employee— liquidated damages—North Carolina Wage and Hour Act

The trial court did not abuse its discretion in a breach of contract and violation of the North Carolina Wage and Hour Act (NCWHA) case by awarding plaintiff liquidated damages pursuant to N.C.G.S. § 95-25.22, because: (1) even if an employer shows that it acted in good faith and with the belief that its action did not constitute a violation of the NCWHA, the trial court may still in its discretion award liquidated damages in any amount up to the amount due for unpaid wages; (2) defendants neither offer evidence showing nor argue how the trial court's decision to award liquidated damages was so arbitrary that it could not have been the result of a reasoned decision; and (3) a review of the record did not indicate the trial court's decision to impose liquidated damages was manifestly unsupported by reason.

Appeal by defendants from orders and judgment entered 31 October 2003 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 February 2005.

Robert M. Elliot and J. Griffin Morgan, for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by Charles E. Johnson and Daniel F. Basnight, for defendants-appellants.

TYSON, Judge.

First Union National Bank ("First Union"), First Union Corporation, and Wachovia Corporation ("Wachovia") (collectively, "defendants") appeal the trial court's orders and judgment filed 31 October 2003 finding: (1) Donald Arndt ("plaintiff") and First Union entered into a contract where First Union would pay plaintiff an annual bonus; (2) First Union modified plaintiff's bonus formula without his consent; (3) First Union breached its contract with plaintiff concerning his bonus formula; (4) First Union failed to give plaintiff notice of the change in the bonus formula; and (5) Wachovia owes plaintiff $837,243.40 plus interest and costs. We find no error.

I. Background

Plaintiff worked as a senior vice president in the "Structured Products Group" for First Union from 3 June 1996 to 9 February 2001. Plaintiff's initial compensation was $90,000.00 per year in salary plus a "guaranteed minimum incentive payment of $90,000.00." After starting employment, plaintiff and Brian Simpson ("Simpson"), manager of the Structured Products Group, orally agreed plaintiff would be paid twenty percent of all net income he earned for First Union. The formula to compute the bonus was not discussed. In 1996, 1997, and 1998, plaintiff was paid twenty percent of the income he generated for First Union.

In 1998, First Union decided to change its bonus formula to a more "subjective" determination. Despite this change, plaintiff's bonus for year 1999 remained at twenty percent of the net income he produced for First Union. However, plaintiff's bonus for year 2000 fell to roughly ten percent, half of the usual amount. Simpson contended the decrease was due to a financial loss First Union suffered on a project upon which plaintiff was working on, and his poor ratings in "teamwork . . . leadership . . . [and] inability to work well with others."

Plaintiff contacted Deidre Bradshaw ("Bradshaw") in First Union's Human Resources Department, to discuss the decrease in his compensation. When it became apparent that First Union would not pay plaintiff according to the prior bonus structure, plaintiff informed Bradshaw that he would seek "appropriate remedies."

Plaintiff filed a complaint against defendants on 12 March 2002 for: (1) breach of contract; (2) violation of the North Carolina Wage and Hour Act ("NCWHA"); and (3) fraud. Defendants answered on 28 May 2002 and simultaneously filed a motion to dismiss the claim for

fraud. Plaintiff voluntarily dismissed without prejudice his fraud claim. Throughout the discovery process, Bradshaw "represented the company" as the person on "point" and assisted defendants' counsel in responding to discovery requests.

The case was tried by jury from 22 to 26 September 2003 and 29 September to 1 October 2003. The jury found: (1) plaintiff and First Union entered into a contract where First Union would pay plaintiff an annual bonus; (2) First Union modified plaintiff's bonus formula without his consent; (3) First Union breached its contract with plaintiff concerning payment of his bonus compensation; (4) First Union failed to give plaintiff notice of the change in the bonus formula; and (5) Wachovia owes plaintiff $837,243.40 plus interest and costs.

Plaintiff moved the trial court for liquidated damages, attorneys' fees, costs, and interest. Defendants moved the trial court for judgment notwithstanding the verdict or new trial. The trial court ordered: (1) "Wachovia shall pay to Plaintiff the amount of $837,243.40 in liquidated damages;" (2) "Plaintiff shall recover interest on the amount awarded by jury in its verdict at the rate of 8% *per annum* from February 15, 2001, until the Judgment is satisfied;" and (3) "Wachovia shall pay to Plaintiff the amount of $5,377.31 in costs." The trial court denied plaintiff's motion for attorneys' fees and defendants' motion for judgment notwithstanding the verdict or new trial. Defendants appeal.

II. Issues

Defendants argue the trial court erred in: (1) denying defendants' motion for directed verdict and judgment notwithstanding the verdict or new trial; (2) its instructions to the jury; and (3) abusing its discretion in awarding plaintiff liquidated damages.

III. Directed Verdict and Judgment Notwithstanding the Verdict

Defendants argue the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict after plaintiff failed to offer sufficient evidence to establish: (1) an enforceable contract or subsequent breach; and (2) a violation of the NCWHA. We disagree.

A. Standard of Review

Our Supreme Court has set forth the standard of review of a trial court's ruling on motions for a directed verdict and judgment notwithstanding the verdict.

> The standard of review of directed verdict is whether the evidence, *taken in the light most favorable to the non-moving party*, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, *the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury.* Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, *this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions.*

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (internal citations and quotations omitted) (emphasis supplied).

B. Analysis

1. Breach of Contract

[1] In *Overall Co. v. Holmes*, our Supreme Court stated, "[a] contract is 'an agreement, upon sufficient consideration, to do or not to do a particular thing.' " 186 N.C. 428, 431, 119 S.E. 817, 818 (1923). The contract may be "express or implied, executed or executory, [and] results from the concurrence of minds of two or more persons . . . [I]ts legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree." *Id.* at 431-32, 119 S.E. at 818-19 (quoting *Prince v. McRae*, 84 N.C. 675 (1881)). "In the construction of a contract, the parties' intentions control, *Cordaro v. Singleton*, 31 N.C. App. 476, 229 S.E.2d 707 (1976)[,] and their intentions may be discerned from both their writings and actions." *Walker v. Goodson Farms, Inc.*, 90 N.C. App. 478, 486, 369 S.E.2d 122, 126 (1988) (citing *Bank v. Supply Co.*, 226 N.C. 416, 38 S.E.2d 503 (1946); *Zinn v. Walker*, 87 N.C. App. 325, 361 S.E.2d 314 (1987); *Heater v. Heater*, 53 N.C. App. 101, 280 S.E.2d 19 (1981)), *disc. rev. denied*, 323 N.C. 370, 373 S.E.2d 556 (1988).

Plaintiff offered evidence that: (1) when initially hired, he and Simpson orally agreed that plaintiff would receive twenty percent of the Structured Product Group's net income; (2) the agreement did not include an expiration date; (3) this agreement was separate from incentive plans offered to other employees; (4) defendants paid plaintiff's bonuses from 1997 to 1999 according to the terms of the agreement; (5) at no time did defendants modify the agreement, orally or in

writing; and (6) defendants breached this agreement by retroactively reducing plaintiff's year 2000 bonus. This evidence was presented to the jury through plaintiff's testimony and exhibits, including email correspondence between plaintiff and Simpson.

Plaintiff contends that the oral agreement with Simpson and the subsequent performance by defendants was evidence that "by both their words and actions the parties . . . had reached a 'meeting of the minds.' " *Fulk v. Piedmont Music CTR*, 138 N.C. App. 425, 430, 531 S.E.2d 476, 480 (2000) (citation omitted). Defendants argue the "sketchy" discussions between plaintiff and Simpson did not comprise a valid contract, and they assert plaintiff failed to show the parties agreed to the terms of the contract. Defendants also argue that if a contract existed between plaintiff and Simpson, it expired at the end of 1997 and was not perpetual. Defendants assert the true contract defining plaintiff's compensation was the annual Incentive Compensation Program ("ICP") which began and ended each calendar year. As an at-will employee, defendants contend plaintiff accepted the terms of this agreement by not "quitting."

The evidence presented by both parties creates an issue of fact concerning the existence of a contract. Whether a contract existed is a question for the jury. *See Goeckel v. Stokely*, 236 N.C. 604, 607, 73 S.E.2d 618, 620 (1952) (issues of fact concerning terms of a contract are for the jury to consider). Based upon plaintiff's testimony, as corroborated by the emails and the twenty percent bonuses defendants paid and plaintiff received in 1997, 1998, and 1999, a jury could find that the parties reached a clear and definite agreement regarding the details of the contract. *See Walker*, 90 N.C. App. at 486, 369 S.E.2d at 126 (the parties intentions may be shown through their agreement and subsequent actions).

Conflicts in the evidence are to be resolved in plaintiff's favor, and he "must be given the benefit of every inference reasonably to be drawn in his favor." *Williams v. Jones*, 322 N.C. 42, 48, 366 S.E.2d 433, 437 (1988) (citing *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E.2d 788 (1978) (conflicts, contradictions, and inconsistencies are to be resolved in the non-movant's favor)).

Plaintiff has offered sufficient evidence to present a question of fact for the jury in regards to the existence of an oral contract and to sustain a jury's verdict in his favor. *Davis*, 330 N.C. at 323, 411 S.E.2d at 138 (citing *In re Housing Authority*, 235 N.C. 463, 70 S.E.2d 500 (1952)). The trial court properly denied defendants' motions for

directed verdict and judgment notwithstanding the verdict. This portion of defendants' assignment of error is overruled.

2. Violation of the NCWHA

[2] The jury found defendants' actions violated the NCWHA, N.C. Gen. Stat. § 95-25.1 *et seq*. Specifically, plaintiff proffered evidence that: (1) he was promised wages by the oral agreement with Simpson under N.C. Gen. Stat. § 95-25.2(16); and (2) defendants changed his compensation plan without prior notice under N.C. Gen. Stat. § 95-25.13.

N.C. Gen. Stat. § 95-25.13(3) (2003) provides that every employer shall "[n]otify its employees, in writing or through a posted notice maintained in a place accessible to its employees, of any changes in promised wages prior to the time of such changes except that wages may be retroactively increased without the prior notice required by this subsection." *See Narron v. Hardee's Food Systems, Inc.*, 75 N.C. App. 579, 583, 331 S.E.2d 205, 208 ("[T]he Wage and Hour Act requires an employer to notify the employee in advance of the wages and benefits which he will earn and the conditions which must be met to earn them, and to pay those wages and benefits due when the employee has actually performed the work required to earn them."), *disc. rev. denied*, 314 N.C. 542, 335 S.E.2d 316 (1985).

> "Wages" include " 'compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation . . . For the purposes of G.S. 95-25.6 through 95-25.13 "wage" includes sick pay, vacation pay, severance pay, commissions, *bonuses, and other amounts promised when the employer has a policy or practice of making such payments*.' "

Murphy v. First Union National Bank, 152 N.C. App. 205, 208, 567 S.E.2d 189, 191-92 (2002) (quoting N.C. Gen. Stat. § 95-25.2(16)) (emphasis supplied).

Defendants assert: (1) they did not decrease plaintiff's "promised wages;" and (2) they gave plaintiff notice of the applicable 1999 and 2000 ICP plans. We have held that plaintiff offered sufficient evidence to support the jury's finding that a contract existed between plaintiff and defendants concerning plaintiff's bonus structure that was ongoing beyond 1997. In addition, the evidence showed plaintiff's bonus and compensation structure was unique to him and different from the generic ICP plans applicable to defendants' other employees. The

notices defendants assert were provided in accordance with the NCWHA did not apply to plaintiff. Defendants' arguments are without merit. This assignment of error is overruled.

IV. Jury Instructions

[3] Defendants assert the trial court erred in: (1) its instruction to the jury on the existence of a contract; (2) instructing the jury that First Union was required to prove plaintiff *acquiesced* to the bonus formula change; (3) failing to instruct the jury on estoppel; and (4) instructing the jury on spoliation of the evidence.

A. Standard of Review

On appeal, this Court must review and consider jury instructions "in their entirety." *Estate of Hendrickson v. Genesis Health Venture*, 151 N.C. App. 139, 150-51, 565 S.E.2d 254, 262 (citing *Robinson v. Seaboard System R.R., Inc.*, 87 N.C. App. 512, 361 S.E.2d 909 (1987), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988)), *disc. rev. denied*, 356 N.C. 299, 570 S.E.2d 503 (2002). The "appealing party must show not only that error occurred in the jury instructions but also that such error was likely, in light of the entire charge, to mislead the jury." *Id.* The trial court is "required to instruct a jury on the law arising from the evidence presented." *Lusk v. Case*, 94 N.C. App. 215, 216, 379 S.E.2d 651, 652 (1989); N.C. Gen. Stat. § 1A-1, Rule 51 (2003).

B. Existence of a Contract

The trial court instructed and presented to the jury the following query: "Did the plaintiff, Donald Arndt and the defendant, First Union National Bank enter into a contract by which First Union National Bank agreed to pay plaintiff an annual bonus, for 1997 and succeeding years, based on 20 percent of the annual net income, of the tax related securities group?" The court's instruction continued by detailing the elements of a contract that plaintiff must prove by a greater weight of the evidence. We have already held that plaintiff proffered sufficient evidence to show a contract existed between himself and defendants concerning an annual bonus to survive defendants' motions for directed verdict and judgment notwithstanding the verdict. This portion of defendants' assignment of error is overruled.

C. Acquiescence

The second instruction to the jury concerned plaintiff's alleged acquiescence to the changed bonus structure. Defendants assert the trial court "erroneously ignored [plaintiff]'s status as an at-will

employee and [defendants'] right to modify the incentive programs affecting its at-will employees at any time." Our review of the transcript indicates the trial court properly instructed the jury on plaintiff's at-will employment with defendants and its legal effect to changes in compensation:

> The parties to this action have agreed that the plaintiff is an employee at will. *[An] employee at will is an employee whose employment can be determined, at any time, by the employee [or] the employer*. There is no definite length of employment. The employment relationship continues until it is terminated by either party. The terms of the employment remain in effect until they are modified, by either—either agreement of the parties or by the employer, unilaterally. The employer, in an at will relationship, can modify, unilaterally the future compensation to be paid to an employee. If the employer modifies the terms of an employed, at will; and, the employee knows of the change, the employee is deemed to have *acquiesced* to the modified terms, if he continues in the employment relationship.

(Emphasis supplied). The trial court properly charged the jury on the issues of plaintiff's at will employment and his possible acquiescence to changes defendants alleged concerning his compensation package. This portion of defendants' assignment of error is overruled.

D. Estoppel

The trial court denied defendants' request for an instruction on estoppel. Specifically, defendants argued plaintiff was estopped from asserting that the generic ICP plan did not apply to him after acceptance of the benefits of the ICP plan, his annual bonuses. The trial court's instructions to the jury, when viewed "in their entirety," sufficiently present defendants' arguments to the jury whether: (1) the generic ICP plan applied to plaintiff; and (2) the bonuses he received after 1997 were provided in accordance with that generic ICP plan. Defendants do not argue and our review of the transcript does not show how the trial court's decision to not instruct the jury on estoppel was error, and in light of the entire charge, likely to mislead the jury. *See Estate of Hendrickson*, 151 N.C. App. at 150-51, 565 S.E.2d at 262. This portion of defendants' assignment of error is overruled.

E. Spoliation of the Evidence

Defendants argue plaintiff's evidence did not support an instruction to the jury on spoliation of evidence and that they were unfairly

prejudiced by the instruction. The basis for the instruction concerned plaintiff's discovery request of: (1) 1999 and 2000 profit and loss statements; and (2) the text of two emails.

The trial court provided the following instruction to the jury:

> Evidence has been received that tends to show that certain profit and loss statements and E-mails were in the exclusive possession of the defendant, First Union; and, [sic] have not been produced for inspection, by the plaintiff or his counsel, even though defendant, First Union, was aware of the plaintiff's claim. From this, you may infer, though you are not compelled to do so, that the profit and loss statements and the E-mails would be damaging to the defendant. You may give this inference such force and effect as you think it should have, under all the facts and circumstances. You are permitted this inference, even if there is no evidence that the defendant acted intentionally, negligently or in bad faith. However, you should not make this inference, if you find that there a [sic] fair frank and satisfactory explanation for the defendant's failure to produce the documents.

In *Yarbrough v. Hughes*, our Supreme Court considered spoliation of evidence and held, "where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control . . . there is a presumption or at least an inference that the evidence withheld, if forthcoming, would injure his case." 139 N.C. 199, 209, 51 S.E. 904, 907-08 (1905). This Court also addressed spoliation in *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 527 S.E.2d 712, *disc. rev. denied*, 352 N.C. 357, 544 S.E.2d 563 (2000). In *McLain*, we held that lost evidence creates a permissible "adverse inference," not a mandatory presumption. 137 N.C. App. at 185, 527 S.E.2d at 717 (quotation omitted). We further noted, "[w]hen the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case." *Id.* at 187-88, 527 S.E.2d at 718 (citing *Blinzler v. Marriott International, Inc.*, 81 F.3d 1148, 1158-59 (1st Cir. 1996)). The factfinder *is free* to determine "the documents were destroyed accidentally or for an innocent reason" and reject the inference. *McLain*, 137 N.C. App. at 185, 527 S.E.2d at 717 (citing *Blinzler*, 81 F.3d at 1159).

"[T]o qualify for the adverse inference, the party requesting it must ordinarily show that the 'spoliator was on notice of the claim or

potential claim at the time of the destruction.' " *McLain*, 137 N.C. App. at 187, 527 S.E.2d at 718 (quotation omitted). The obligation to preserve evidence may arise prior to the filing of a complaint where the opposing party is on notice that litigation is likely to be commenced. *Id.* (citation omitted). The evidence lost must be "pertinent" and "potentially supportive of plaintiff's allegations." *Id.* at 188, 527 S.E.2d at 718. Finally, "[t]he proponent of a 'missing document' inference need not offer direct evidence of a coverup to set the stage for the adverse inference. Circumstantial evidence will suffice." *Id.* at 186, 527 S.E.2d at 718 (citing *Blinzler*, 81 F.3d at 1159).

1. Notice

Plaintiff presented evidence that Bradshaw, First Union's human resources partner, was on notice and had detailed knowledge of plaintiff's claims. Bradshaw testified she was on "point" for defendants with this matter and was "representing the company" during these proceedings. She was "the person who has been relied upon to provide documents and to verify answers in the discovery requests" and "signed all the verifications that had to go with the discovery requests."

Having shown Bradshaw was very familiar with the case, plaintiff specifically addressed defendants' notice of his claims. Bradshaw testified that she handled plaintiff's questions concerning his compensation during his employment. When questions arose over plaintiff's compensation, he contacted her. Plaintiff introduced two emails addressed to Bradshaw concerning issues and nonpayment of his compensation. The first email inquired of defendants' proper procedure to contest and appeal nonpayment of his compensation. The second email was sent to Bradshaw after plaintiff determined a favorable resolution was not forthcoming. It asserted that if his compensation was not addressed "in an expedient and professional manner[, plaintiff would have] . . . no recourse but to seek appropriate remedies."

Bradshaw testified that she knew in February 2001 plaintiff was terminating his employment with defendants due to nonpayment of compensation he claimed. As the person on "point," Bradshaw acknowledged receiving a letter from plaintiff's counsel in March 2001 concerning an impending claim. Given Bradshaw's in-depth knowledge of the issues, this evidence shows defendants were on notice early on of plaintiff's intent to file a claim. *See McLain*, 137 N.C. App. at 187, 527 S.E.2d at 718 ("we believe the evidence that . . . [a party's] representative . . . was 'aware of the circumstances that

[were] likely to give rise to future litigation . . . .' ") (citing *Blinzler*, 81 F.3d at 1158-59).

2. Pertinent and Supportive Information

The information plaintiff sought discovery of included: (1) an email plaintiff sent to Simpson in 2000 concerning distribution and payment of plaintiff's 1999 bonus; (2) an email from David Yorker ("Yorker") to Simpson in which Yorker documented a conversation in which Simpson agreed that the general ICP plan did not apply to plaintiff; and (3) 1999 and 2000 annual profit and loss financial statements.

Plaintiff sought the emails as evidence of his 1999 compensation and the non-application of the general ICP plan to him. Both documents were central to the issues at bar. Their importance is shown by the trial court's permission for plaintiff to testify about the emails despite their physical absence. The two financial statements requested were intended to support plaintiff's argument that he had a contract separate from defendants' general ICP plan. Plaintiff asserts that the 1999 profit and loss statements would show defendants acted in compliance with the oral contract during that year of his employment, as well as in prior years; a fact contested by defendants. The 2000 statements were relevant to plaintiff's damages. The information plaintiff sought is pertinent to the issues in dispute and supportive of his claims.

3. Additional Evidence

In addition to showing defendants' notice of and the pertinence of the information requested to the claim, plaintiff offered the following evidence showing defendants failed to preserve necessary information for the matters in dispute despite early and prior notice of their existence and importance.

Bradshaw testified during her deposition, which was later read into evidence:

QUESTION: Did you make any effort, when Don Arndt left, to preserve his E-mails, to preserve his hard drive, in his computer, to make sure that everything that was in the computer would be preserved?

. . . .

BRADSHAW: Not that I recall.

QUESTION: Does anybody do that, as a matter of course?

. . . .

BRADSHAW: I don't do that, as a matter of course.

. . . .

QUESTION: Who would you call if you had to call somebody to say, "Preserve this evidence?"

BRADSHAW: I would probably call someone in our technology group and ask them to do that.

QUESTION: Did you do that?

BRADSHAW: No.

QUESTION: Well, you knew, at least, at the time you got the letter from Mr. Arndt's lawyer that there was a claim involved in this case; didn't you?

. . . .

BRADSHAW: I didn't.

. . . .

QUESTION: You knew, when you received a copy of that letter, that there was a claim being made on Wachovia; didn't you, by Mr. Arndt?

BRADSHAW: Yes.

QUESTION: Did you make any effort to save his hard drive?

BRADSHAW: No.

Second, plaintiff showed the 1999 and 2000 profit and loss statements existed through: (1) defendants' provision of other years' statements; and (2) plaintiff's former assistant providing a copy of the 2000 profit and loss statement.

Plaintiff proffered both direct and circumstantial evidence indicating defendants allowed the destruction of pertinent documents while on notice of his claim. This evidence supported the trial court's instruction on spoliation of evidence. Defendants were provided opportunities to rebut this allegation by offering evidence to explain "the documents were destroyed accidentally or for an innocent reason," and the trial court instructed the jury accordingly. *McLain*, 137 N.C. App. at 185, 527 S.E.2d at 717. The trial court did not err in

charging the jury on spoliation of the evidence. This portion of defendants' assignment of error is overruled.

V. Liquidated Damages

[4] Under N.C. Gen. Stat. § 95-25.22 (2003):

> (a) Any employer who violates the provisions of . . . G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to the employee or employees affected in the amount of . . . their unpaid amounts due under G.S. 95-25.6 through 95-25.12, as the case may be, plus interest at the legal rate set forth in G.S. 24-1, from the date each amount first came due.
>
> (a1) In addition to the amounts awarded pursuant to subsection (a) of this section, the court shall award liquidated damages in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court may, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

This Court determined in *Hamilton v. Memorex Telex Corp.* that the employer bears the burden to show liquidated damages should not be imposed. 118 N.C. App. 1, 14-15, 454 S.E.2d 278, 285, *disc. rev. denied*, 340 N.C. 260, 456 S.E.2d 830, *disc. rev. denied*, 340 N.C. 260, 456 S.E.2d 831 (1995). "[E]ven if an employer shows that it acted in good faith, and with the belief that its action did not constitute a violation of the [NCWHA,] the trial court may still, in its discretion, award liquidated damages in any amount up to the amount due for unpaid wages." *Id.* at 15, 454 S.E.2d at 285. If the employer is unable to make such a showing, the trial court is without discretion and must award liquidated damages. *Id.*

Defendants assert "the record is replete with evidence of First Union's good faith and reasonable belief" of its correct payment of plaintiff's bonus compensation for the year 2000. Defendants neither offer evidence showing nor argue how the trial court's decision to award liquidated damages was "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Further, our review of the record does

not indicate the trial court's decision to impose liquidated damages on defendants was "manifestly unsupported by reason." *Id.* This assignment of error is overruled.

VI. Conclusion

The trial court properly denied defendants' motions for directed verdict and judgment notwithstanding the verdict. Plaintiff proffered sufficient evidence to support and the trial court did not err in determining and providing the jury instructions on: (1) existence of a contract; (2) acquiescence; and (3) spoliation of evidence. The trial court did not err in denying defendants' request for jury instructions on estoppel. The trial court did not abuse its discretion in awarding plaintiff liquidated damages pursuant to N.C. Gen. Stat. § 95-25.22. We find no error in the jury's verdict in plaintiff's favor and the judgment entered thereon.

No error.

Judges McGEE and GEER concur.

REBECCA TAYLOR, EMPLOYEE, PLAINTIFF v. CAROLINA RESTAURANT GROUP, INC., EMPLOYER, THE HARTFORD, CARRIER, DEFENDANTS

No. COA04-981

(Filed 7 June 2005)

Workers' Compensation— disability—causation—findings and evidence

The Industrial Commission's findings in a workers' compensation case are binding on appeal when they are supported by competent evidence, even if the evidence might have supported contrary findings. Here, plaintiff slipped on degreaser and struck her knee on a wall while working at Wendy's. Defendants contended that the record was entirely devoid of evidence supporting findings that plaintiff would be able to work but for her knee injury and that her failed knee replacement caused her disability (rather than a subsequent injury); however, there was in fact evidence supporting the Commission's findings.

Judge Tyson dissenting.

Appeal by Defendants from Opinion and Award of the North Carolina Industrial Commission entered 2 April 2004. Heard in the Court of Appeals 22 March 2005.

Poisson, Poisson, Bower & Clodfelter, PLLC, by E. Stewart Poisson and Fred D. Poisson, Jr., for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Jaye E. Bingham and Erin F. Taylor, for defendant-appellants.

WYNN, Judge.

Where the Industrial Commission's findings of fact are supported by any competent evidence, those findings are binding on appeal. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Here, Defendants contend that there was no competent evidence to support the Industrial Commission's findings that Plaintiff's right knee injury caused her disability. We disagree and find that competent evidence supports the Industrial Commission's findings of fact, which in turn support its conclusions of law.

The record reflects that Plaintiff Rebecca Taylor was employed by Carolina Restaurant Group as an attendant to the hot bar of a Wendy's restaurant in July 1994. Additionally, at that time, Ms. Taylor drove a school bus (her primary employment), and cleaned houses. On 22 July 1994, in the course of her employment with the Carolina Restaurant Group, Ms. Taylor slipped on degreaser at Wendy's and struck her right knee on a wall. Ms. Taylor attempted to return to work with the Carolina Restaurant Group and her bus driving employment following the accidental injury but was unable to perform because she "couldn't take the pain." As a consequence of the July 1994 fall, Ms. Taylor underwent right knee replacement surgery in 1996. Since the July 1994 injury, Ms. Taylor has also undergone several arthroscopic surgeries, *inter alia*, to remove scar tissue from her right knee. Ms. Taylor's primary treating physician is Ward S. Oakley, Jr., M.D.

The record tends to show that while Ms. Taylor's condition eventually improved somewhat, she experienced continuing pain and swelling in the right knee. On 23 June 1998, Ms. Taylor was treated by Dr. Oakley for pain in her right knee. Dr. Oakley's assessment was "[r]ight knee pain" and "[r]ight knee failure of implant." Defendants then referred Ms. Taylor to David Mauerhan, M.D., of The Miller Clinic for further evaluation. Dr. Mauerhan recommended no further

surgery and that Ms. Taylor should continue to try to work. Dr. Mauerhan also noted as his impression:

> Continued pain following total knee replacement on the right knee. This unfortunate lady has had continued pain when reviewing her history from her very initial problem on through to the present. No surgical procedure including her arthroscopies nor the total knee have given her significant or continued relief.

Dr. Mauerhan also found that Ms. Taylor had a fifty-percent permanent disability and "a painful total knee replacement which is giving her difficulty."

In January 2000, Ms. Taylor fell on black ice in the parking lot of Richmond Community College, where she was employed as a janitor. (Ms. Taylor was at that time no longer working for the Carolina Restaurant Group.) Ms. Taylor stated that, when she realized she was going to fall, she guarded her right knee and took the blow to the left knee. The fall injured the left knee, which became increasingly painful. On 27 April 2000, Dr. Oakley performed an arthroscopic revision to the left knee. On 2 October 2001, Dr. Oakley assigned a twenty-percent impairment rating to the left knee and issued standard restrictions following the surgery to the left knee. On 13 December 2001, Ms. Taylor entered a settlement agreement with Richmond Community College for all liability under the Workers' Compensation Act.

By the Fall 2001, Ms. Taylor's left knee had healed well and required only light, if any, work restrictions. However, her right knee had become ever more painful. In September 2001, she reported to Dr. Oakley that she was experiencing increased pain, popping, and swelling in her right knee. Dr. Oakley noted that "she didn't relate it to any particular injury or trauma . . . ." In performing an arthroscopic surgery on her right knee in 2002, Dr. Oakley found shedding and plastic deformation of the stem, or weight-bearing part, of her knee replacement appliance. Dr. Oakley stated that such deterioration of the plastic appliance was "not uncommon," and would lead to more pain and a need for the deformed part to be replaced. Moreover, Dr. Oakley indicated that knee replacements typically do not last as long in younger, overweight persons, such as Ms. Taylor, and that there is a twenty- to thirty-percent chance of an appliance failing within ten years. Dr. Oakley also stated that he thought there was a better than fifty-percent chance that, within the next five years, the deformed part of Ms. Taylor's knee appliance would need to be replaced.

Ms. Taylor's 1994 and 2000 injury claims were consolidated before the Industrial Commission, and on 3 October 2002, Deputy Commissioner Phillip A. Holmes found, *inter alia*, that Ms. Taylor's 2000 accident resulted in her total disability, her prior right knee injury was aggravated as a consequence of her 2000 injury, and the aggravation of the right knee injury was compensable, as was her total disability, but that Ms. Taylor relinquished her right to recover from Richmond Community College under the settlement agreement she entered with them. Ms. Taylor appealed to the full Industrial Commission, which, with Chairman Lattimore dissenting, reached the opposite conclusions, determining that Ms. Taylor's 1994 right knee injury caused her disability and that Defendants were liable for her disability and medical compensation. Defendants appeal.

On appeal, our review of the Commission's Opinion and Award is "limited to reviewing 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*, 352 N.C. at 116, 530 S.E.2d at 553. The Industrial Commission is the "sole judge of the weight and credibility of the evidence," and this Court " 'does not have the right to weigh the evidence and decide the issue on the basis of its weight.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). Indeed, "so long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.' " *Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000) (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

" 'In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent.' " *Saums v. Raleigh Cmty. Hosp.*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)). "Under the Workers' Compensation Act, disability is defined by a diminished capacity to earn wages, not by physical infirmity." *Id.* at 764, 487 S.E.2d at 750 (citing N.C. Gen. Stat. § 97-2(9) (1991)). The employee may show disability in one of four ways:

> (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.

Knight v. Wal-Mart Stores, Inc., 149 N.C. App. 1, 7, 562 S.E.2d 434, 439 (2002), *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003) (quotation omitted). Further, "[i]n determining if plaintiff has met this burden, the Commission must consider not only the plaintiff's physical limitations, but also his testimony as to his pain in determining the extent of incapacity to work and earn wages such pain might cause." *Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 512, 540 S.E.2d 790, 793 (2000) (citing *Matthews v. Petroleum Tank Serv., Inc.*, 108 N.C. App. 259, 265, 423 S.E.2d 532, 535 (1992)), *cert. denied*, 353 N.C. 398, 548 S.E.2d 159 (2001); *see also Knight*, 149 N.C. App. at 7-8, 562 S.E.2d at 439-40 (same).

Here, Defendants contend, that "[t]he Record is *entirely* devoid of any evidence to support these findings" that "(1) '[w]ere it not for the right knee injury, plaintiff would be able to work,' and (2) plaintiff's failed knee replacement caused her disability . . . ." We disagree.

Defendants have not excepted to the Industrial Commission's finding that in July 1994, "plaintiff sustained an accidental injury to her right knee arising out of and in the course of employment with Wendy's . . . ." Defendants also have not excepted to the fact that Defendant's carrier, The Hartford, "eventually paid all of the medical procedures on the right knee." These findings are thus binding. *Pollock v. Reeves Bros., Inc.*, 313 N.C. 287, 292, 328 S.E.2d 282, 286 (1983) (holding that where defendants do not except to finding in a workers' compensation case, it is binding on appeal); *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480-81 (1997) ("[W]hen there are no exceptions to the [Industrial] Commission's findings, they are binding on appeal." (citation omitted)).

Moreover, the record shows some competent evidence to support the Industrial Commission's findings that, as a result of her right knee injury, Ms. Taylor experienced pain and swelling that ultimately

caused her total disability. For example, Dr. Oakley testified during his deposition that there were "recurrent episodes of discomfort, [and] swelling" after Ms. Taylor's knee replacement, that Ms. Taylor reported "persistent discomfort" in her right knee, that after her knee replacement Ms. Taylor was "struggling with it . . . ." Dr. Mauerhan, Defendants' doctor, also noted in 1998 that Ms. Taylor complained of "global knee pain. She says it hurts her all the time. There is no particular time when it doesn't hurt." Dr. Mauerhan had the impression that "[n]o surgical procedure . . . ha[d] given her significant continued relief," and found that Ms. Taylor "probably will have chronic pain in the knee." The Industrial Commission made a finding, to which Defendants did not except and which is thus binding, that Dr. Mauerhan found Ms. Taylor's "chronic right knee pain" would be "permanent and progressive." Ms. Taylor testified, *inter alia*, that her right knee "stayed in pain, it stayed swollen[,]" that her right knee pain "got steadily worse[,]" and that her knee "get[s] cramps[,]" needs to be moved all the time, and is painful. Ms. Taylor also testified that, *inter alia*, if her right leg were normal and not painful, and taking into consideration the injury to her left knee, she believes she could perform her former job at Richmond Community College, which she now cannot perform; she testified that, "if my right knee was normal, I could do it . . . ." Dr. Oakley confirmed that Ms. Taylor's belief that she could return to work but for her right knee troubles was possible.

Additionally, the record shows some competent evidence to support the Industrial Commission's findings that Ms. Taylor's right knee replacement failed and deteriorated. For example, as early as June 1998, *i.e.*, well before Ms. Taylor's January 2000 fall, Dr. Oakley's assessment of Ms. Taylor's condition was "[r]ight knee failure of implant." Moreover, the Industrial Commission made a finding not excepted to and thus binding on appeal that Dr. Mauerhan, as early as 1998, found Ms. Taylor's right knee condition to be "permanent and progressive." Dr. Mauerhan also noted that, while he believed Ms. Taylor could still work in 1998, she had at that time a permanent fifty-percent impairment in her right knee. Dr. Oakley testified extensively as to shedding and deformation of part of Ms. Taylor's right knee replacement appliance. Dr. Oakley found shedding and plastic deformation of the stem, or weight-bearing part, of Ms. Taylor's right knee replacement appliance and stated that such deterioration of the plastic appliance was "not uncommon[.]" Dr. Oakley stated that the shedding and deformation would lead to more pain and a need for the deformed stem to be replaced. Moreover, Dr. Oakley indicated

that knee replacements typically do not last as long in younger, overweight persons, such as Ms. Taylor, and that generally there is a twenty- to thirty-percent chance of an appliance failing within ten years. Dr. Oakley testified there was a better than fifty-percent chance that, within the next five years, the deformed part of Ms. Taylor's knee appliance would need to be replaced. And Dr. Oakley testified that, because of her right knee, Ms. Taylor could not: work on her knees, kneel down, squat, climb more than a few steps, sit for prolonged periods, stand for prolonged periods, or do continuous walking.

Moreover, the record shows some competent evidence to support the Industrial Commission's findings that Ms. Taylor is totally disabled. For example, Dr. Oakley, in his deposition, testified that, with respect to Ms. Taylor's right knee, Ms. Taylor would not be able to: work on her knees, kneel down, squat, climb more than a few steps, sit for prolonged periods, stand for prolonged periods, or do continuous walking. Dr. Oakley testified that Ms. Taylor would not be able to sit for longer than ten to fifteen minutes. Ms. Taylor testified that, *inter alia*, if her right leg were normal and not painful, and taking into consideration the injury to her left knee, she believes she could perform her former job at Richmond Community College, which she now cannot perform; she testified that, "if my right knee was normal, I could do it . . . ." Dr. Oakley confirmed that Ms. Taylor's belief that she could return to work but for her right knee troubles was possible. Further, Ms. Taylor, now fifty-seven years old, testified that she attended school only through the tenth grade, has never had an office job, is not qualified for such a job, and has worked her whole life in physical labor positions that she can no longer perform.

We further find in the record some competent evidence to support the Industrial Commission's findings that the cause of Ms. Taylor's disability was not the later left knee injury. For example, Dr. Oakley testified that Ms. Taylor "didn't relate [her right knee's popping and tenderness] to any particular injury or trauma that I'm aware of, at least none that my notes associate with it." Dr. Oakley testified that, while it would not have been unusual for Ms. Taylor to have had to rely more on her right leg as a consequence of the left knee injury, his records did not support that testimony. Dr. Oakley also indicated that Ms. Taylor's left knee had healed well and required only light, if any, work restrictions.

Defendants point in particular to (1) Ms. Taylor's statement that her right knee "got worse. It's got more painful from—I guess, from

having to switch back and forth on legs like I have to do—had to do []" after her left knee surgery, (2) Ms. Taylor's statement that her right knee symptoms worsened after her left knee surgery because she "was putting more weight on it, and . . . that's when my knee really started giving me a lot of problems[,]" and (3) Dr. Oakley's testimony that he viewed Ms. Taylor's injury to her left knee as "the straw that breaks the—you know, the camel[]" and "[j]ust one more little thing just kind of pushed her over the edge[]" to disability. While this and other evidence might have supported findings contrary to those made by the Industrial Commission, that is not of consequence. Because there is some evidence that directly or by reasonable inference tends to support the Industrial Commission's findings, this Court is bound, even though there is evidence that would have supported a finding to the contrary. *Shah*, 140 N.C. App. at 61-62, 535 S.E.2d at 580 ("Where there is evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.") (quotation omitted).

In support of their argument that Ms. Taylor's disability was caused by her January 2000 fall and not her 1994 injury, Defendants rely heavily on *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 352 S.E.2d 690 (1987). This case is, however, inapposite. In *Wilder*, unlike here, the plaintiff sustained a subsequent injury to the same knee that had previously undergone a knee replacement. This Court found that "the evidence clearly indicates that plaintiff's [subsequent] injury aggravated a latent condition" and that "uncontradicted evidence" showed the plaintiff's "disability was the result of a work-related injury which aggravated an existing infirmity." *Id.* at 196-97, 352 S.E.2d at 695. Here, in contrast, the January 2000 injury was not to the same knee that Ms. Taylor injured in the course of her employment with the Carolina Restaurant Group but rather to her other knee. Moreover, as discussed above, there is not "uncontradicted evidence" that "clearly indicates" that the January 2000 fall caused Ms. Taylor's disability.

In sum, we do not find, as Defendants contend, that "[t]he Record is *entirely* devoid of any evidence to support" its findings that "(1) '[w]ere it not for the right knee injury, plaintiff would be able to work,' and (2) plaintiff's failed knee replacement caused her disability . . . ." Moreover, we hold that the Industrial Commission's findings of fact support its conclusions of law and award.

Defendants also contend that the conclusions of law and award are "not supported by the applicable law." However, in their assignments of error, Defendants excepted to the conclusions and award only on the basis that the conclusions of law were "not supported by competent Findings of Fact" and that the award was "not supported by the Findings of Fact and the Conclusions of Law." This argument is therefore not properly before us. 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"); *Dep't of Transp. v. Elm Land Co.*, 163 N.C. App. 257, 264, 593 S.E.2d 131, 136 (quoting N.C. R. App. P. 10(a) and refraining from addressing an argument regarding a conclusion of law where the assignment of error in the record excepted to the conclusion under a different theory), *disc. review denied*, 358 N.C. 542, 599 S.E.2d 42 (2004).

For the foregoing reasons, we affirm the Industrial Commission's Opinion and Award.

Affirmed.

Judge ELMORE concurs.

Judge TYSON dissents.

Tyson, Judge dissenting.

The majority's opinion holds "some" competent evidence exists to support the Commission's findings of fact, which in turn support its conclusions of law, and affirms the Commission's opinion and award. There is no evidence to sustain the Commission's findings of fact. The majorities' opinions from the Commission and here are erroneous as a matter of law. I respectfully dissent.

I. Standard of Review

The Commission is the sole judge of issues of fact. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982). The Commission's findings of fact are binding on appeal when supported by competent evidence, *Deese*, 352 N.C. at 116, 530 S.E.2d at 553, and prevail "even though there is evidence that would support a finding [of fact] to the contrary." *Mica Co. v. Board of Education*, 246 N.C. 714, 717, 100 S.E.2d 72, 74 (1957) (citations omitted). The Commission's findings must support its conclusions of law. *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997) (citing *Moore v. Davis Auto Service*, 118 N.C. App. 624, 627, 456

S.E.2d 847, 850 (1995)). We review "the Commission's conclusions of law . . . *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citing *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. rev. denied*, 347 N.C. 671, 500 S.E.2d 86 (1998)). Our *de novo* review also applies to mixed questions of fact and law. *Campbell v. N.C. Dep't of Transport.*, 155 N.C. App. 652, 667, 575 S.E.2d 54, 64, *disc. rev. denied*, 357 N.C. 62, 579 S.E.2d 386 (2003).

II. *De Novo* Review

Both the opinion and award of the deputy commissioner and Chairman Lattimore's dissenting opinion from the Commission's opinion and award properly found plaintiff's right knee injury was a pre-existing condition "which was aggravated" by the 31 January 2000 accident and is "compensable as a part of that injury." No evidence before the Commission supports a contrary finding or conclusion.

A. Aggravation of Pre-existing Injury

"An injury by accident arising out of and in the course of employment which accelerates or aggravates a pre-existing disease or infirmity, thus proximately contributing to the . . . disability of the employee, is compensable." Leonard T. Jernigan, *North Carolina Workers' Compensation*, § 12:8, at 138 (4th ed. 2004) (citations omitted). "Because employers must accept employees as they find them, employers can potentially be liable for total disability benefits if an on-the-job injury aggravates or accelerates a pre-existing condition to such an extent that it causes complete disability." *Id.*, § 18:1, at 213 (citations omitted); *Brown v. Family Dollar Distrib. Ctr.*, 129 N.C. App. 361, 364, 499 S.E.2d 197, 199 (1998) ("Our courts have held that when an accident arising out of employment materially accelerates or aggravates a pre-existing condition and proximately contributes to disability, the injury is compensable.") (citing N.C. Gen. Stat. § 97-2 (1991); *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E.2d 265 (1951); *Buck v. Procter and Gamble Co.*, 52 N.C. App. 88, 278 S.E.2d 268 (1981); and *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 352 S.E.2d 690 (1987)). Undisputed here is that Richmond Community College was plaintiff's employer at the time her 1994 pre-existing injury was aggravated in January 2000.

Our Supreme Court stated in *Vause v. Equipment Co.*,

> [t]he hazards of employment do not have to set in motion the sole causative force of an injury in order to make it compensable. By

> the weight of authority it is held that where a workman by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury. But in such case the employment must have some definite, discernible relation to the accident.

233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951) (internal citation and quotation omitted).

In *Hoyle v. Carolina Associated Mills*, this Court stated:

> The work-related injury need not be the sole cause of the problems to render an injury compensable. *Kendrick v. City of Greensboro*, 80 N.C. App. 183, 186, 341 S.E.2d 122, 123, *disc. review denied*, 317 N.C. 335, 346 S.E.2d 500 (1986). If the work-related accident "contributed in 'some reasonable degree' " to plaintiff's disability, she is entitled to compensation. *Id.* at 187, 341 S.E.2d at 124. " 'When a pre-existing, non-disabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment . . . so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent.' " *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 196, 352 S.E.2d 690, 694 (1987) (quoting *Morrison v. Burlington Industries*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981)).

122 N.C. App. 462, 465-66, 470 S.E.2d 357, 359 (1996).

In *Mabe v. Granite Corp.*, the defendant argued certain factors are "beyond the control of an employer and cannot be considered in determining an employee's disability." 15 N.C. App. 253, 256, 189 S.E.2d 804, 807 (1972). This Court responded, "The answer to this is that an employer accepts an employee as he is. If a compensable injury precipitates a latent physical condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable and no attempt is made to weigh the relative contribution of the accident and the pre-existing condition." *Id.* (citing 2 Larson, Workmen's Compensation Law, § 59.20, p. 88.109).

" 'When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows

from the injury arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.' " *Roper v. J.P. Stevens & Co.*, 65 N.C. App. 69, 73, 308 S.E.2d 485, 488 (1983) (quotation omitted), *disc. rev. denied*, 310 N.C. 309, 312 S.E.2d 652 (1984).

B. Analysis

Undisputed evidence from the record shows plaintiff's pre-existing right knee injury was "aggravated" by the 31 January 2000 accident. Plaintiff was working full-time as a custodian for Richmond Community College while undergoing treatment for her right knee. Her position required "climbing stairs, bending, stopping, and prolonged standing and walking, all of which were in excess of her restrictions." Plaintiff continued working until her accident in January 2000.

The Commission found "plaintiff's condition stabilized until she slipped at work on an ink pen [in June 1997] and suffered a patella sprain to the right knee" and after treatment "the right knee pain resolved . . . ." However, after the 31 January 2000 accident, the Commission found: (1) "[p]laintiff used her left leg to compensate for her right knee, and would use her left leg to pull up her right leg when climbing stairs;" (2) "plaintiff could not favor her right knee by relying on her left knee;" and (3) "Dr. Oakley, the treating physician for both knee injuries, . . . opined that the [January] 2000 left knee injury was the straw that broke . . . that put her over the edge."

Plaintiff admitted the aggravation of injuries to her right knee after the 31 January 2000 accident: "Well, it's got worse. It's got more painful from—I guess, from having to switch back and forth on legs like I have to do." She testified her right knee worsened after the surgery on her left knee: "[I]t wasn't long after the surgery because I was having to use . . . my right knee more, you know. Like I said, to walk and all, I was putting more weight on it, and . . . *that's when my [right] knee really started giving me a lot more problems*." (emphasis supplied).

Undisputed evidence shows plaintiff's previously existing right knee injury was "materially accelerated and aggravated" by the 31 January 2000 accident while employed at Richmond Community College. *Brown*, 129 N.C. App. at 364, 499 S.E.2d at 199. Prior to the accident, plaintiff performed her employment duties and exceeded the work restrictions imposed by her physicians. Plaintiff was unable

to physically compensate for her injured right knee as a "natural consequence" of her accident at Richmond Community College, and its condition worsened. *See Roper*, 65 N.C. App. at 73, 308 S.E.2d at 488 ("When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct."). Richmond Community College "accepted" plaintiff with her pre-existing right knee injury. As her employer at that time, Richmond Community College is liable for the "aggravation" of plaintiff's pre-existing injury.

Plaintiff relinquished all her claims against Richmond Community College pursuant to the settlement agreement approved by the Commission. As Chairman Lattimore's dissenting opinion noted, "[p]laintiff should not be permitted to settle with Richmond Community College, then recover from defendants in this case that which would be paid by Richmond Community College but for the settlement agreement."

III. Conclusion

Plaintiff's accident on 31 January 2000 is "compensable," but not by defendants at bar. The injury to her left knee in 2000 "aggravated" her pre-existing right knee injury from 1994, "accelerated" its failure, and led to her eventual total disability. Jernigan, *supra* § 12:8, at 138. Additional injury to plaintiff's right knee was a "natural consequence" of the accident in the course of her employment with Richmond Community College. *Roper*, 65 N.C. App. at 73, 308 S.E.2d at 488. As her employer, Richmond Community College accepted plaintiff as it found her with the previously injured right knee. The majorities' opinions both at the Commission and at this Court erroneously places liability on defendants at bar. That liability rightfully and legally belongs to Richmond Community College. I respectfully dissent.

ALEX HARRISON, KAREN HICKS, AND PATRICIA POLK, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. WAL-MART STORES, INC., A DELAWARE CORPORATION, SAM'S CLUB, AN OPERATING SEGMENT OF WAL-MART STORES, INC., AND RICHARD ROES 1 THROUGH 75 AND JOHN DOES 1 THROUGH 10, STORE DISTRICT, CLUB/GENERAL AND REGIONAL MANAGERS, DEFENDANTS

No. COA04-989

(Filed 7 June 2005)

1. Appeal and Error— appealability—denial of class certification—substantial right

The appeal of an interlocutory order denying class certification has been held to affect a substantial right, and N.C.G.S. § 7A-27(d)(1) allows review.

2. Class Actions— certification—prerequisites—not shown

The prerequisites for a class action include a showing by the moving party that the unnamed members of the class have an interest in the same issues, that common issues dominate individual issues, and that there are no conflicts of interest between representatives and members of the class. Here, the trial court did not abuse its discretion by denying class certification for "all current and former hourly employees" employed at any Wal-Mart store in North Carolina subsequent to a certain date in an action by former Wal-Mart employees based upon alleged wage and hour contractual and statutory violations.

Appeal by Plaintiffs from order entered 11 March 2004 by Judge W. Douglas Albright in Superior Court, Forsyth County. Heard in the Court of Appeals 12 April 2005.

Bell, Davis & Pitt, P.A., by William K. Davis, Stephen M. Russell, and Kevin G. Williams, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., Kurt D. Weaver, Sean E. Andrussier, and Elaine Whitford, for defendant-appellees.

WYNN, Judge.

In order to succeed on a motion for class certification, the moving party must demonstrate, *inter alia*, that: (1) the named and unnamed members of the proposed class have an interest in the same issues of law or fact; (2) common issues predominates over issues

affecting only individual class members; and (3) no conflicts of interest exist between the named representatives and members of the class. *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280-82, 354 S.E.2d 459, 464-65 (1987). In this case, in which Plaintiffs Alex Harrison, Karen Hicks, and Patricia Polk, on behalf of themselves and all others similarly situated, contend that Defendants Wal-Mart Stores, Inc. and Sam's Club, Inc. (collectively "Wal-Mart") engaged in widespread wage and hour violations, Plaintiffs allege that the trial court erred in determining that the prerequisites for class certification were not met. Because the trial court's determinations were not "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision[,]" *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (quotations and citations omitted), we affirm the order of the trial court.

The record reflects that, on 29 November 2000, Plaintiffs, two former Wal-Mart employees and a former Sam's Club employee, filed a class action against Defendants. Plaintiffs alleged that, in contravention of Wal-Mart policies and unwritten contracts with Plaintiffs, Wal-Mart engaged in widespread wage and hour abuses, including failing to record and pay for all of the time employees were required to work and failing to permit employees to take or complete lunch and rest breaks. Plaintiffs pled six claims for relief: breach of contract for off-the-clock work, breach of contract for missed rest and meal breaks, quantum meruit, unjust enrichment, tortious interference with contractual relations, and violations of the North Carolina Wage and Hour Act.[1]

On 4 August 2003, Plaintiffs moved for class certification. Plaintiffs' proposed class was comprised of "all current and former hourly employees of Wal-Mart Stores, Inc. [] in North Carolina . . . who were employed by Wal-Mart on or subsequent to November 29, 1997." The record included affidavits and depositions of Wal-Mart employees who indicated they were not required to work off the clock, were not deprived their rest and meal breaks, or worked off-clock and missed breaks for reasons other than pressure exerted by Wal-Mart.

On 11 March 2004, the trial court filed an order denying Plaintiffs' motion for class certification. The trial court made numerous findings of fact and concluded, *inter alia*, that: (1) Plaintiffs' pro-

1. Plaintiffs filed an amended complaint on 18 January 2001 and a second amended complaint on 15 November 2002 and dismissed their claims as to the individual defendants on 31 July 2003.

posed class was overbroad and infeasible; (2) individual issues would predominate over common issues; and (3) conflicts of interest existed amongst the members of the proposed class. From this order, Plaintiffs appeal.

I. Interlocutory Appeal

[1] Preliminarily, we note that the order denying Plaintiff's motion for class certification is interlocutory, *i.e.*, was "made during the pendency of an action [and did] not dispose of the case, but instead [left] it for further action by the trial court to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999); *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (same). Generally, there is no right of immediate appeal from interlocutory orders. *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992); *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, we take this appeal pursuant to North Carolina General Statute section 7A-27(d)(1), allowing review of interlocutory orders affecting a substantial right, because the appeal of an interlocutory order denying class certification has been held to affect a substantial right. N.C. Gen. Stat. § 7A-27(d)(1) (2004); *Frost*, 353 N.C. at 192-93, 540 S.E.2d at 327 (stating that "*denial* of class certification has been held to affect a substantial right because it determines the action as to the unnamed plaintiffs[]" and citing *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 355-56 (1984)).

II. Standard of Review

[2] "The trial court has broad discretion in determining whether a case should proceed as a class action." *Faulkenberry v. Teachers' and State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 699, 483 S.E.2d 422, 432 (1997) (citation omitted). "Since the decision to grant or deny class certification rests within the sound discretion of the trial court, the appropriate standard for appellate review is whether the trial court's decision manifests an abuse of discretion." *Nobles v. First Carolina Comms., Inc.*, 108 N.C. App. 127, 132, 423 S.E.2d 312, 315 (1992). The trial court's decision constitutes an abuse of discretion where it is "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision[.]" *Frost*, 353 N.C. at 199, 540 S.E.2d at 331 (quotations and citations omitted). Moreover, "an appellate court is bound by the [trial] court's findings of fact if they are supported by competent evidence." *Nobles*, 108 N.C. App. at 132, 423 S.E.2d at 315 (citation omitted).

III. Rule 23 Requirements

"The party seeking to bring a class action . . . has the burden of showing that the prerequisites to utilizing the class action procedure are present." *Crow*, 319 N.C. at 282, 354 S.E.2d at 465 (footnote omitted). Requirements for class certification include the following:

> [A] 'class' exists under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. Other prerequisites for bringing a class action are that (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class.

Faulkenberry, 345 N.C. at 697, 483 S.E.2d at 431 (quotation and citations omitted); *see also*, *e.g.*, *Crow*, 319 N.C. at 282-84, 354 S.E.2d at 465-66 (same). Where all the prerequisites are met, it is within the trial court's discretion to determine whether "a class action is superior to other available methods for the adjudication of th[e] controversy."[2] *Crow*, 319 N.C. at 284, 354 S.E.2d at 466.

IV. Application

In the case *sub judice*, the trial court concluded that Plaintiffs failed to meet a number of the prerequisites for class certification.[3]

---

2. "[T]he trial court has broad discretion in [deciding whether a class action should be certified] and is not limited to consideration of matters expressly set forth in Rule 23 or in" case law. *Crow*, 319 N.C. at 284, 354 S.E.2d at 466 (citing *Maffei v. Alert Cable TV, Inc.*, 316 N.C. 615, 617, 342 S.E.2d 867, 870 (1986)).

3. While we address several of the trial court's conclusions, to all of which Plaintiffs excepted, Plaintiffs' failure to meet any one of the prerequisites for class certification necessitates the denial of their motion for class certification. *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 7-8, 254 S.E.2d 223, 230 ("The party who is invoking Rule 23 has the burden of showing that all of the prerequisites to utilizing the class action procedure have been satisfied.") (quotation omitted), *cert. denied*, 297 N.C. 609, 257 S.E.2d 217 (1979), *overruled on other grounds*, *Crow*, 319 N.C. at 280, 354 S.E.2d at 464.

A. Infeasible Class Definition

The trial court first determined that Plaintiffs failed to define a feasible class.

"[A] 'class' exists under Rule 23 when the named and unnamed members *each* have an interest in either the same issue of law or of fact[.]" *Crow*, 319 N.C. at 280, 354 S.E.2d at 464 (emphasis added); *Faulkenberry*, 345 N.C. at 697, 483 S.E.2d at 431 (same). In a strikingly similar case deemed persuasive authority by the trial court, *Petty v. Wal-Mart Stores, Inc.*, 148 Ohio App. 3d 348, 354, 773 N.E.2d 576, 580 (Ohio 2002), four named plaintiffs brought a class action against Wal-Mart, Sam's East, and store managers for forcing employees to work off the clock and forego rest and meal breaks. The *Petty* trial court found that the plaintiffs' proposed class of all past and present Ohio Wal-Mart employees necessarily failed because it was clear from the evidence that not all members of the putative class had an interest in the alleged wage and hour abuses of being forced to work off the clock and miss breaks. The Court of Appeals of Ohio noted that the persons exposed to the alleged wage and hour abuses would be a mere subset of the proposed class and that "[i]f this type of class were permitted, plaintiffs would be able to define a class as broadly as possible in the hope of netting a certain percentage of injured members[,]" which would "render the class action vehicle unduly cumbersome, and ultimately ineffective" *Id.*

In their motion for class certification, Plaintiffs here defined the proposed class as "all current and former hourly employees" employed at any Wal-Mart in North Carolina "on or subsequent to 29 November 1997."[4] The trial court determined that "[u]ncontroverted evidence presented to the Court establishes that the proposed class includes individuals who did not work off the clock or miss rest breaks or meal periods." This determination is supported by evidence in the record, including affidavits and deposition testimony of Wal-Mart employees who stated that they did not work off the clock or miss breaks. As the proposed class included individuals who were not subject to the wage and hour violations that are the basis of Plaintiffs' claims, the trial court concluded that the proposed class definition "must be rejected." Because not every member of the proposed class would have an interest in this action, *Crow*, 319 N.C. at 280, 354

4. In their complaint, Plaintiffs stated they brought suit on behalf of "a class consisting of all current and former hourly employees of Wal-Mart in the State of North Carolina who worked off-the-clock without compensation and/or worked through any part of a rest or meal break within the applicable period of limitations[.]"

S.E.2d at 464, and because in the strikingly similar *Petty*, the Ohio courts found the plaintiffs' proposed class definition, essentially identical to that here, untenable, the trial court's conclusion that Plaintiffs' class definition was overbroad and infeasible was neither manifestly unsupported by reason nor so arbitrary that it could not have been the product of a reasoned decision. *Cf. Carlson v. Carlson*, 127 N.C. App. 87, 94-95, 487 S.E.2d 784, 788 (1997) (where this Court noted the trial court's reasoning was consistent with courts in other jurisdictions, this Court found no abuse of discretion); *State ex rel. Long v. Am. Sec. Life Assurance Co.*, 109 N.C. App. 530, 538, 428 S.E.2d 200, 205 (1993) ("This Court finds the trial court's conclusion to be sound, made with full knowledge of the law as it exists in other jurisdictions, and based upon competent evidence. We, therefore, conclude that the trial court did not abuse its discretion . . . ."). We thus conclude that the trial court did not abuse its discretion in concluding that Plaintiffs failed to propose a certifiable class.

B. Individual Issues Predominate

The trial court further concluded that individual issues, not common issues, would predominate, and thus class certification must fail.

As previously stated, a class " 'exists . . . when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members.' " *Faulkenberry*, 345 N.C. at 697, 483 S.E.2d at 431 (quoting *Crow*, 319 N.C. at 280, 354 S.E.2d at 464). In *Falkenberry*, our Supreme Court held that the alleged underpayment of disability benefits due to an allegedly unconstitutional statutory amendment applied to every plaintiff and was a predominant common issue. *Id.* And in *Frost*, 353 N.C. at 190, 540 S.E.2d at 326, our Supreme Court held that the issue of whether a $158 fee charged to all class members was permitted under the uniform written contract signed by all class members constituted a predominant common issue.

Plaintiffs here allege breach of contract for off-the-clock work and breach of contract for missed rest and meal breaks. "In proving a breach of contract, the plaintiff must show: '(1) existence of a valid contract and (2) breach of that contract.' " *Hemric v. Groce*, —— N.C. ——, ——, 609 S.E.2d 276, 283 (2005) (quoting *Poor v. Hill*, 138 N.C. App. 19, 29, 530 S.E.2d 838, 845 (2000)). "It is essential to the formation of any contract that there be mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds.

Mutual assent is normally established by an offer by one party and an acceptance by the other . . . .” *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 911-12 (1998) (quotations omitted).

In another case strikingly similar to the one at bar and cited as persuasive authority by the trial court, *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548 (Tex. App. 2002), the plaintiffs brought a class action on behalf of Wal-Mart employees forced to work off the clock and denied rest and meal breaks. The Court of Appeals of Texas, Fourteenth District, held:

> [I]ndividual issues regarding the formation of 350,000 contracts in this case will predominate over any common issues. Appellees claim Wal-Mart made express [and implied] contractual offers of rest and meal breaks during the orientation process. Because each orientation session was conducted by different Wal-Mart personnel at different stores, proof of an oral contract with each class member will require a determination of the terms of the contract through offer and acceptance. Any determination concerning a “meeting of the minds” necessarily requires an individual inquiry into what each class member, as well as the Wal-Mart employee who allegedly made the offer, said and did. A determination must also be made as to the authority of each Wal-Mart manager who allegedly made such an offer and each employee’s belief regarding whether that manager had or lacked authority to make the offer.
>
> Even if appellees establish Wal-Mart had 350,000 oral contracts to provide rest and meal breaks, individual issues regarding the alleged breach of each contract will also predominate over common issues. Affidavits of current and former Wal-Mart employees submitted by appellees raise individual issues. For example, a number of employees state they missed rest and meal breaks, but offer no explanation for why they missed their breaks, *i.e.*, whether store management required the employee to work through the break or whether the employee voluntarily chose not to take a break for personal reasons, or why no time adjustment request form was submitted to reflect the hours worked so the employee could be appropriately compensated.

Id. at 557 (footnote omitted).

Here, with regard to contract formation, Plaintiffs concede that “[c]lass members did not have written contracts with Wal-Mart . . . .”

Moreover, "Plaintiffs do not contend that the [employee] Handbook [containing Wal-Mart's policies] is a contract." Plaintiffs instead allege that unwritten, unilateral contracts existed between themselves and Wal-Mart. The trial court held that individual issues predominate as to the formation and terms of Plaintiffs' contracts, stating, *inter alia*, "that the evidence on how the alleged contract[s were] formed will vary from associate-to-associate [sic][,]" that "a determination of the particular terms of each class member's oral, implied or unilateral agreement is going to turn on the individual accounts of conversations and representations made by countless numbers of present and former hourly Personnel Managers[,]" and that "deposition testimony establishes that putative class members have no uniform understanding with respect to the alleged contracts with Wal-Mart." These findings and conclusions are supported by competent evidence, including depositions and affidavits indicating, for example, that: (1) some putative class members learned of the opportunity to take rest and meal breaks prior to employment while others learned of the opportunity to take rest and meal breaks after accepting employment; (2) some putative class members understood their rest breaks to be paid while others understood the breaks to be unpaid; and (3) some putative class members believed they were entitled to meal breaks after eight hours of work while others believed they were entitled to such breaks after six or seven hours of work.

With regard to alleged breaches, the trial court stated "each member of the putative class will be required to show that there was a breach of his or her purported contract." The trial court found that Wal-Mart's Time Clock Archive Reports would not be a reliable source for showing breach, as "[a]ssociates, including named Plaintiff Harrison, admitted that they did not always swipe the time clock when they took their breaks or meal periods." The trial court concluded that, to determine whether a breach occurred, it would need to examine, *inter alia*, why an associate missed his/her breaks. The trial court found that putative class members testified that they missed breaks voluntarily, *inter alia*, in order to leave work early.

We hold that the trial court's findings, which are supported by competent evidence, and conclusions, supported by (strikingly similar) persuasive authority from another jurisdiction, are neither manifestly unsupported by reason nor so arbitrary that they could not have been the result of a reasoned decision. We thus conclude that the trial court did not abuse its discretion in finding that individual issues would predominate with regard to Plaintiffs' breach of con-

tract claims. *Am. Sec. Life Assurance Co.*, 109 N.C. App. at 538, 428 S.E.2d at 205.

Plaintiffs also pled unjust enrichment and quantum meruit. The trial court concluded that those claims:

> will require a person-by-person examination of the circumstances of every missed rest break or meal period to determine whether Wal-Mart was unjustly enriched. Indeed, a person-by-person and event-by-event inquiry will be necessary to determine whether a putative class member even claims unjust enrichment since many putative class members testified that they experienced none of the alleged problems.

While Plaintiffs excepted to this conclusion in their twenty-sixth assignment of error, contending that the trial court "erroneously determined that the plaintiffs' claims for unjust enrichment and quantum meruit would require a person-by-person or event-by-event inquiry[,]" they failed to cite and argue this assignment of error in their appellate briefing. This assignment of error is therefore deemed abandoned. N.C. R. App. P. 28(a).

Finally, Plaintiffs pled violations of North Carolina's Wage and Hour Act, which states that "[a]ny employer who violates the provisions of . . . G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to the employee or employees affected in the amount of their unpaid . . . wages." N.C. Gen. Stat. § 95-25.22(a) (2004). With regard to the wage and hour claim, the trial court found that the requisite proof "will involve an analysis of time records for each putative class member and investigation into any unique issues that may have been present in each particular store at the time of the alleged violations." Plaintiffs assign error to this conclusion, contending the trial court erred "in determining that individual issues predominate over the plaintiffs' common claim that Wal-Mart violated the N.C. Wage and Hour Act by depriving class members rest breaks, failing to compensate class members for rest breaks, and failing to compensate class members for off-the-clock work."

Similar to the breach of contract claims discussed above, the Wage and Hour Act claims would require individual determinations, including which putative class members were subject to the alleged violations and why those putative class members who worked off-the-clock did so, *i.e.*, whether they, for example, missed breaks in order to leave work early. Moreover, in the strikingly similar *Lopez*, the

court noted that the plaintiffs' statutory wage and hour argument, which was not preserved, would require individual inquiries. We find the trial court's conclusion here that individual rather than common issues predominate regarding Plaintiffs' statutory claim to be neither manifestly unsupported by reason nor so arbitrary that they could not have been the product of a reasoned decision.

In sum, the trial court did not abuse its discretion in concluding that individual rather than common issues predominate Plaintiffs' claims.

C. Existence of Conflicts of Interest

The trial court also determined that the named plaintiffs in the instant case would not adequately represent the class. Plaintiffs argue that this determination was in error.

As previously stated, to bring a class action "the named representatives must establish that they will fairly and adequately represent the interests of all members of the class" and "there must be no conflict of interest between the named representatives and members of the class . . . ." *Faulkenberry*, 345 N.C. at 697, 483 S.E.2d at 431. "This prerequisite is a requirement of due process. It is also specifically imposed by our Rule 23." *Crow*, 319 N.C. at 282, 354 S.E.2d at 465 (citations omitted).

Here, the trial court found that: "[t]here is uncontroverted evidence that some hourly associates [including named plaintiff Polk] . . . had or have supervisory authority over other hourly associates[;]" "[t]he motivation of certain class members to deny that associates under their supervision ever missed a rest break or meal period was borne out by the deposition testimony of a number of witnesses[;]" and there is yet other evidence that "hourly associates who acted as supervisors either directed or knowingly allowed off-the-clock work or caused subordinates to miss their rest breaks and meal periods." The trial court's findings are supported by competent evidence, including depositions of numerous Wal-Mart employees. The findings support the court's conclusion that it could not "certify a class in which some putative class members assert that other putative class members caused or contributed to the wrongs asserted and the latter deny the assertion. This puts class members who acted as supervisors in direct conflict with the class members they supervised." We find this conclusion to be neither manifestly unsupported by reason nor so arbitrary that it could not have been the product of

a reasoned decision. The trial court therefore did not abuse its discretion in denying class certification on this basis.

V. Conclusion

In sum, we hold that the trial court's order concluding that Plaintiffs failed to meet a number of the prerequisites for class certification was neither manifestly unsupported by reason nor so arbitrary that it could not have been the result of a reasoned decision. *Frost*, 353 N.C. at 199, 540 S.E.2d at 331. The trial court therefore did not abuse its discretion in denying Plaintiffs' motion for class certification. We find all of Plaintiffs' arguments and assignments of error to be without merit and affirm the order of the trial court.

Affirmed.

Judges TYSON and ELMORE concur.

GARY RAY SCHENK, SR., PLAINTIFF v. HNA HOLDINGS, INC., ALSO KNOWN AS TREVIRA, INC. FORMERLY HOECHST CELANESE, INC. AND FIBER INDUSTRIES, INC., DEFENDANT

DONALD LEE BELL, PLAINTIFF v. HNA HOLDINGS, INC., ALSO KNOWN AS TREVIRA, INC. FORMERLY HOECHST CELANESE, INC. AND FIBER INDUSTRIES, INC., DEFENDANT

No. COA03-1094-2
No. COA03-1095-2

(Filed 7 June 2005)

1. Damages and Remedies— punitive damages—willful and wanton conduct—destruction of memorandum—clear and convincing evidence

The trial court did not err by granting defendant's motion for directed verdict on the issue of punitive damages in an action seeking compensatory and punitive damages for alleged occupational exposure to asbestos dust and fibers at defendant's polyester manufacturing plant, because: (1) plaintiffs have not proved by clear and convincing evidence that destruction of a memorandum about improper handling of removed insulation asking to be advised of improper handling verbally rather than in writing constituted conscious and intentional disregard of and indifference

to the rights and safety of others; (2) there was no evidence that the destruction of the memorandum was related to the injuries suffered by plaintiffs when the underlying conduct alleged in the memorandum was not necessarily connected to asbestos; (3) although defendants expressly rejected the recommendation of an asbestos handling and removal specialist to use the global method of asbestos removal, no state or federal regulation requires use of this method and the specialist agreed that the asbestos removal was done properly and within the regulations; (4) assuming arguendo that defendant violated OSHA standards, this evidence goes only to the issue of defendant's negligence and does not, by itself, provide sufficient evidence of willful and wanton conduct to present the issue to the jury; (5) the evidence does not support a finding that defendant willfully concealed information about the risks of asbestos exposure; and (6) although plaintiffs contend it was error for the trial court to prevent counsel from questioning prospective jurors on the issue of punitive damages during voir dire, there were no assignments of error to support plaintiffs' arguments.

2. Appeal and Error— preservation of issues—failure to argue—setoff

Although plaintiffs contend the trial court erred by allowing defendant a full set-off for prior workers' compensation claim settlements and prior third-party settlement amounts paid to plaintiffs from other sources, this assignment of error is dismissed because: (1) plaintiffs did not assert N.C.G.S. § 97-10.2 nor their present argument to the trial court, nor did they assign the trial court's failure to apply N.C.G.S. § 97-10.2 before conducting the setoff hearing as error in the record on appeal; and (2) plaintiffs made no argument regarding the trial court's failure to apply N.C.G.S. § 97-10.2(e) in their brief on appeal.

Appeal by plaintiffs from judgments entered 3 January 2003 by Judge Charles C. Lamm in Rowan County Superior Court. Heard in the Court of Appeals 30 August 2004. Opinion filed 16 November 2004. On 4 December 2004, plaintiffs filed a Petition for Rehearing. The petition was granted by order of this Court 20 December 2004, reconsidering the case with the filing of additional briefs only. The following opinion supersedes and replaces the opinion filed 16 November 2004.

Wallace and Graham, P.A., by Mona Lisa Wallace, and Mauriello Law Offices, by Christopher D. Mauriello, for plaintiffs-appellants.

Kasowitz, Benson, Torres & Friedman, by Michael E. Hutchins, and Parker Poe Adams & Bernstein, LLP, by Josephine H. Hicks, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiffs' appeals in these cases present to this Court identical questions of law; therefore, we have consolidated the appeals pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 40 (2005). The appeals arise from lawsuits in which plaintiffs sought compensatory and punitive damages from defendant, HNA Holdings, Inc., for alleged occupational exposure to asbestos dust and fibers at defendant's polyester manufacturing plant.

Summarized only to the extent necessary for an understanding of the issues raised on appeal, the evidence at trial tended to show that defendant, HNA Holdings, Inc., or its predecessors in interest, owned the Celanese Fiber Plant ("Celanese"), located in Salisbury, North Carolina, since operations began in 1966. Like many industrial plants built in the 1960's and 1970's, the Celanese plant was constructed with insulation containing asbestos.

Daniel Construction Company built the Celanese plant and then provided maintenance for the company in specialty areas such as welding, pipe fitting, rigging and insulation. Daniel Construction Company and its successor in interest, Fluor Daniel ("Daniel"), employed plaintiff Schenk as a pipe fitter/welder beginning in 1975. Plaintiff Schenk worked for Daniel periodically until 1992, when Becon Construction Company ("Becon") assumed Daniel's maintenance contract. Plaintiff Schenk continued to work for Becon at Celanese until 1995. As a pipe fitter/welder, plaintiff Schenk was exposed to asbestos-containing insulation both through his work handling pipes and from being around people working with the insulation.

Daniel employed plaintiff Bell as an insulator for Celanese intermittently between 1973 and 1981, and then from 1988 until 1992. In 1992, when Daniel lost the overall maintenance contract to Becon, plaintiff Bell began working as an insulator for Becon and continued until 1995. At trial, plaintiff Bell testified he was exposed to asbestos dust in his work insulating pipes at Celanese while

cutting the insulation on a band saw, "rasping" or smoothing the rough edges of the insulation, and while removing asbestos "in every facet of the plant."

Plaintiffs offered the testimony of James Whitlock ("Whitlock"), an asbestos handling and removal specialist who worked for SOS, a subsidiary of Daniel. Whitlock, who was hired to oversee the removal of asbestos material at Celanese, testified at trial that prior to his arrival in 1990, insulators for Daniel were removing asbestos from the Celanese plant. During his first walk-through of the plant after he was hired, Whitlock observed areas where the asbestos insulation was in a "dilapidated condition and was hanging from the pipes," areas where insulation was on the floor, and areas where insulation was "in piles." He also saw non-authorized individuals "handling and removing asbestos."

Whitlock testified he informed by memorandum the plant industrial hygienist, Dave Smith, the resident engineer, John Winter ("Winter"), and others that "there was a lot of maintenance people that were doing removal of asbestos-containing insulation and that they were leaving the insulation lying around in the areas, and this was cause for concern because it was causing exposure." The next day, Winter asked Whitlock to "collect those letters and rip them up, take the letter out of [his] computer, off [his] hard drive, get it off floppy disk, and do away with it."

For asbestos removal, Whitlock recommended Celanese use a "global abatement procedure." In this procedure, a large area is contained and asbestos is totally removed from the entire area without other workers present. However, Whitlock's recommendation was rejected in favor of a "glove bagging" technique, in which only a small area is contained for removal of a small bit or piece of pipe insulation, rather than abatement of the whole area. Other workers were often present during the glove-bagging method.

Prior to trial, the court denied defendant's motion to strike the punitive damages claim but allowed an alternative motion to exclude any reference to punitive damages or defendant's financial worth until the court determined that plaintiffs had presented sufficient evidence to submit an issue of punitive damages to the jury. At the close of plaintiffs' evidence, after hearing arguments, the trial court granted defendant's motion for directed verdict on the issue of punitive damages.

The jury returned verdicts in favor of plaintiffs, finding the maintenance and construction work performed by plaintiffs was an inherently dangerous activity. The jury also found plaintiffs were injured as a direct result of defendant's negligence. Plaintiffs were awarded compensatory damages for personal injuries. The trial court then conducted a "set-off" hearing and reduced the awards by the amount each plaintiff had recovered as a result of prior settlements from other sources. Plaintiffs appeal.

I.

[1] Plaintiffs first assign error to the trial court's granting of defendant's motion for directed verdict on the issue of punitive damages. They argue there was sufficient evidence that defendant acted recklessly, willfully or intentionally to withstand defendant's motion. We do not agree.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). Our North Carolina statutes establish the requirements for punitive damages as follows:

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

N.C. Gen. Stat. § 1D-15(a) (2003). The existence of the aggravating factor must be proved by clear and convincing evidence. N.C. Gen. Stat. § 1D-15(b) (2003). Willful and wanton conduct is defined by statute as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7) (2003). To award punitive damages against a corporation, "the officers, directors, or managers of the cor-

poration [must have] participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C. Gen. Stat. § 1D-15(c) (2003). The jury awarded plaintiffs compensatory damages; therefore, the issue on appeal is whether there was sufficient evidence that the officers, directors, or managers of defendant, HNA Holdings, Inc., participated in or condoned willful or wanton conduct. *See id.*

Plaintiffs contend Winter's order to destroy Whitlock's memorandum constituted willful and wanton conduct by defendant. However, plaintiffs have not proved by clear and convincing evidence that destruction of the memorandum constituted "conscious and intentional disregard of and indifference to the rights and safety of others." N.C. Gen. Stat. § 1D-5(7). Whitlock testified Winter told him "he wanted to know about these things, to never put anything like that in writing again." Asking to be advised of improper handling of asbestos verbally rather than in writing does not demonstrate an intentional disregard to the safety of others. Furthermore, Winter was a resident engineer for Celanese; plaintiffs did not offer evidence that he was an officer, director or manager as required to award punitive damages against defendant.

In addition, there is no evidence that the destruction of the memorandum was related to the injuries suffered by plaintiffs, as the underlying conduct alleged in the memorandum was not necessarily connected to asbestos. *See Paris v. Kreitz*, 75 N.C. App. 365, 376-77, 331 S.E.2d 234, 243, *disc. review denied*, 315 N.C. 185, 337 S.E.2d 858 (1985). Whitlock admitted at trial that in each instance where he pointed out loose insulation on the floor, "it was taken care of." He also admitted the loose insulation was never tested, and thus he was unsure if any or all of this insulation contained asbestos. Although Whitlock observed non-authorized workers removing insulation, he had no knowledge that they were actually removing insulation that contained asbestos. When asked if he could remember specific occasions when plaintiffs were near loose insulation, Whitlock replied, "I'd say probably . . . ."

The clear and convincing evidence standard is greater than a preponderance of the evidence standard required in most civil cases, *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984), and requires "evidence which should 'fully convince.' " *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (quoting *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 364, 177 S.E.2d 176, 177 (1934)). Plaintiffs did not present clear and convincing evidence of

the connection between the destruction of the memorandum and plaintiffs' alleged harm.

Plaintiffs further argue defendant's express rejection of Whitlock's recommendation to use the global method of asbestos removal demonstrates willful and wanton behavior. Whitlock admitted at trial, however, that no state or federal regulation requires use of the global method. Furthermore, he agreed that the asbestos removal was "done properly and within the regulations."

Plaintiffs contend defendant's violation of Occupational Safety and Health Act ("OSHA") standards was sufficient evidence of willful and wanton conduct to allow the question of punitive damages to go to the jury. OSHA regulations are evidence of custom and can be used to establish the standard of care required in the industry. *Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 401, 549 S.E.2d 867, 869 (2001); *Cowan v. Laughridge Construction Co.*, 57 N.C. App. 321, 325, 291 S.E.2d 287, 290 (1982). However, a violation of OSHA regulations is not negligence *per se* under North Carolina law. *See Cowan*, 57 N.C. App. at 324-25, 291 S.E.2d at 289-90; *accord Geiger v. Guilford Coll. Comm. Volunteer Firemen's*, 668 F.Supp. 492, 497 (M.D.N.C. 1987). Assuming *arguendo* that defendant violated OSHA standards, this evidence goes only to the issue of defendant's negligence and does not, by itself, provide sufficient evidence of willful and wanton conduct to present the issue to the jury.

Relying on *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 103 N.C. App. 288, 407 S.E.2d 860 (1991), *aff'd in part and review improvidently granted in part*, 332 N.C. 1, 418 S.E.2d 648 (1992), plaintiffs argue that defendant willfully concealed the risks of asbestos exposure, rendering punitive damages appropriate. In *Rowan*, this Court affirmed the trial court's denial of the defendant's motion for directed verdict and judgment notwithstanding the verdict on the issue of punitive damages because the defendant defrauded the plaintiff by concealing the hazards of asbestos. *Id.* at 299, 407 S.E.2d at 866. Although this case is similar in that it involves third-party asbestos claims in the premises liability context, the evidence at trial does not support a finding that Celanese willfully concealed information about the risks of asbestos exposure. The evidence tended to show that OSHA regulations were posted on a bulletin board in the main hall at the entrance into Celanese. Clyde Miller, assistant to the safety superintendent from 1969 to 1980, testified that neither he, nor anyone in his department, ever deliberately withheld any information that impacted workers' safety.

According to the testimony of Dow Perry ("Perry"), Environmental Health and Safety Superintendent for Celanese from 1978 to 1990, the corporate office specified asbestos-free insulation for all their locations in 1973. He also testified that dust masks were available to maintenance workers in the 1970's. Celanese issued a standard practice document entitled "Control and Disposal of Asbestos Material" beginning in 1976 requiring, among other things, asbestos to be thoroughly wet before it was removed. Although Perry updated written procedures when he arrived in the department in 1978, the proper methods of removal were already in use.

The 1979 revision of "Control and Disposal of Asbestos Material" contained a section that required workers to "treat insulation as if it contained asbestos." Perry testified this meant workers were to prepare the work area, use personal protection and use work methods based on the OSHA regulations for asbestos removal, regardless of whether the insulation actually did contain asbestos. At least by 1979, air monitoring was implemented in Celanese, including air sampling and the monitoring of Celanese and Daniel workers. Celanese had annual asbestos-training sessions that were presented to all maintenance supervisors and mechanics. In addition, asbestos information was shared with Daniel, and Daniel developed its own asbestos-training program for its workers. To make certain the established procedures were followed, Celanese supervisors performed weekly safety inspections to ensure the mechanics complied with procedures. These policies and procedures do not demonstrate a "conscious and intentional disregard of and indifference to the rights and safety of others" by Celanese as required by statute to award punitive damages. N.C. Gen. Stat. § 1D-5(7) (2003).

Plaintiffs also argue it was error for the trial court to prevent counsel from questioning prospective jurors on the issue of punitive damages during *voir dire*. However, there were no assignments of error in the record to support plaintiffs' arguments and the issue is not properly before us. N.C. R. App. P. 10(c)(1) (2005). We overrule plaintiffs' first assignment of error.

II.

[2] In their second assignment of error, plaintiffs argue the trial court erred by allowing defendant a full set-off for prior workers' compensation claim settlements and prior third-party settlement amounts paid to plaintiffs from other sources. Plaintiffs argue the workers' compensation claim settlements, which compensated plaintiffs for

their inability to earn wages, were for a different injury, i.e., impairment to wage-earning capacity, than the jury award at trial, which compensated plaintiffs for their pain and suffering, future medical expenses and permanent injury. We do not agree.

"The purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers." *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997). The Act, however, was "never intended to provide the employee with a windfall of a recovery from both the employer and the third-party tort-feasor." *Id.* Workers' compensation benefits provide for the employee's inability to earn wages and do not provide for "physical pain or discomfort." *Branham v. Panel Co.*, 223 N.C. 233, 236, 25 S.E.2d 865, 867 (1943). Nevertheless,

> the weight of both authority and reason is to the effect that any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the *total recovery* in any action for the *same injury or damage.*

Holland v. Utilities Co., 208 N.C. 289, 292, 180 S.E. 592, 593-94 (1935) (emphasis added); *see Baity v. Brewer*, 122 N.C. App. 645, 647, 470 S.E.2d 836, 838 (1996). Each plaintiff sued defendants to recover for one injury, i.e., asbestos damage to his lungs. "Where '[t]here is one injury, [there is] still only one recovery.' " *Radzisz*, 346 N.C. at 89, 484 S.E.2d at 569 (citation omitted). We overrule this assignment of error.

In their response to this Court's order upon rehearing, plaintiffs argue the trial court erred in reducing the jury awards by the amount each plaintiff had recovered as a result of prior settlements from other sources. Plaintiffs contend section 97-10.2 of the North Carolina General Statutes requires the third party, defendant, to allege negligence against the employer, Daniel, before a set-off may be imposed by the court.

Although it is true that section 97-10.2 of the North Carolina General Statutes governs the "rights and remedies against third parties[,]" *see* N.C. Gen. Stat. § 97-10.2 (2003); *Jackson v. Howell's Motor Freight, Inc.*, 126 N.C. App. 476, 479, 485 S.E.2d 895, 898 (stating that, "[t]he provisions of N.C.G.S. § 97-10.2(e) govern in all actions by a plaintiff employee against a third party."), *disc. review*

denied, 347 N.C. 267, 493 S.E.2d 456 (1997), plaintiffs did not assert this statute, nor their present argument, to the trial court, nor did they assign the trial court's failure to apply section 97-10.2 before conducting the set-off hearing as error in the record on appeal. *See* N.C. R. App. P. 10(a) (2005) (noting that, "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal"); N.C. R. App. P. 10(b)(1) (2005) (stating that, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . ."). Plaintiffs made no argument regarding the trial court's failure to apply section 97-10.2(e) in their brief on appeal. *See* N.C. R. App. P. 28(a) (providing that, appellate "[r]eview is limited to questions so presented in the several briefs."); N.C. R. App. P. 28(b)(6) (2005) (stating that, "[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."). "It is not the role of the appellate courts . . . to create an appeal for an appellant. . . . [T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). We therefore do not review the merits of plaintiffs' argument.

In conclusion, the judgment of the trial court is hereby

Affirmed.

Judges WYNN and McGEE concur.

IN THE MATTER OF: Z.T.B., A MINOR CHILD

No. COA04-238

(Filed 7 June 2005)

1. Appeal and Error— preservation of issues—oral motion at trial—subject matter jurisdiction

Respondent sufficiently preserved for appeal issues of whether a petition to terminate parental rights was facially defective and whether the court had subject matter jurisdiction.

Moreover, subject matter jurisdiction can be raised for the first time on appeal.

2. Termination of Parental Rights— petition—required content—subject matter jurisdiction

A petition for termination of parental rights which did not include the existing custody order and did not provide the name and address of the child's guardian did not comply with statutory requirements and did not confer subject matter jurisdiction. There was no other information from which the defect could be cured, and the termination was reversed.

Judge MARTIN dissenting.

Appeal by respondent from an order entered 29 July 2003 by Judge Burford A. Cherry in Burke County District Court. Heard in the Court of Appeals 7 March 2005.

No brief filed by petitioner-appellee.

M. Victoria Jayne, for respondent-appellant.

JACKSON, Judge.

Respondent father appeals from an order terminating his parental rights to Z.T.B, born 24 June 1995. Petitioner, who is Z.T.B.'s mother, filed a petition for termination of respondent's parental rights on 3 January 2003, alleging respondent's willful abandonment, failure to legitimate Z.T.B., and lack of substantial financial support or consistent care. Respondent answered on 11 February 2003, admitting his failure to legitimate the minor child, but alleging that his inability to provide financial support was caused by petitioner's concealment of both her whereabouts and those of Z.T.B. for three years. He alleged that petitioner had moved numerous times and had changed her telephone number without notice to him. He further alleged that petitioner had not complied with the provisions of a custody order providing him with specific periods of visitation, by failing to appear at pre-arranged custody exchanges. He contended he consistently had resided in the same location since Z.T.B.'s birth, and that his extended family's residences were known to petitioner, who easily could have notified him about her whereabouts.

At the hearing on 12 June 2003, respondent was represented by counsel but did not appear. Based on verified pleadings, testimony, and evidence contained in the files in three other court proceedings

between the parties, the trial court found that respondent and petitioner had never married. In March 2001, petitioner moved with Z.T.B. to South Carolina. The first month following her move, she met respondent at a gas station to exchange Z.T.B. Petitioner returned to the gas station for the next two scheduled visits to exchange Z.T.B., but respondent did not appear.

The trial court also found there was no custody order attached to the termination petition, but that respondent had not raised petitioner's failure to attach the order as an affirmative defense or filed a motion to dismiss based on the defects in the petition, despite acknowledging the existence of a custody order in his answer. Regarding respondent's claim that he did not participate in Z.T.B.'s life due to his inability to find him, the trial court noted that petitioner had filed a motion and notice for child support on 19 February 2002, which was served upon respondent and which contained petitioner's address. Respondent never challenged service of the motion and notice for child support nor did he allege in response to the motion that petitioner had concealed the child from him.

Additionally, the trial court found that respondent had not provided substantial support or care for the child even though he had been under an order to pay child support, and that he had failed to appear in response to an order to show cause for failure to pay child support, resulting in the issuance of an order for his arrest, with bond set at $1,000.00. The trial court also observed that respondent's failure to appear at the termination hearing likely was due to this outstanding warrant for his failure to pay child support.

The trial court took judicial notice of three other court proceedings between the parties in Burke County, one of which purported to create a guardianship for the child, which the trial court found to be void. None of these court files were made a part of the record on appeal in this case. The trial court found that Z.T.B. had resided with petitioner for more than two years prior to the filing of the petition and that petitioner had informed respondent of her South Carolina address. The trial court also found that respondent had chosen to end his visitation with the minor and had not pursued enforcement of the visitation order.

Based upon its findings, the trial court concluded, *inter alia*:

> 5. That the Respondent is the father of the minor child, has never legitimated the minor child born out wedlock pursuant to NCGS § 49-10 or filed a petition for that purpose, has willfully

> abandoned the minor child for at least six consecutive months preceding the filing of the Petition, has not provided substantial financial support or consistent care with respect to the minor child and the Petitioner, and the grounds for termination of parental rights have been proven by clear, cogent and convincing evidence.
>
> . . .
>
> 11. That based upon the evidence, the verified pleadings, and the findings of fact contained above which are incorporated herein by reference, the Court concludes as a matter of law that not only do grounds exist for the termination of parental rights, but also that it would be in the best interests of the minor child that the parental rights of [respondent] in and to the minor child, [Z.T.B.] be terminated.

The trial court entered judgment terminating respondent's parental rights from which judgment respondent appeals.

[1] Respondent first argues that the petition to terminate his parental rights was defective on its face and should have been dismissed. The dissent in this case contends that respondent failed to raise the statutory defects either in his answer or by motion to dismiss and therefore cannot raise them on appeal. However, we note that respondent's attorney did make an oral motion before the trial court regarding these issues, which the trial court denied. In fact, after making his argument to the trial court respondent's attorney stated:

> "Your Honor, I'd just like to preserve my motion for the record. I understand the motion that the petition is outstanding and we've denied that. And the motion to dismiss the petition or the order granting the plaintiff or petitioner custody is not attached, and we've denied that. We'd like to preserve those for the record for appeal, Your Honor."

Respondent's attorney also raised the issue of the court's subject matter jurisdiction as shown by the following exchange between the trial judge and respondent's attorney:

> Court: Are you arguing this Court does not have subject matter jurisdiction in this TPR matter because of that guardianship?
>
> Mr. Hall: I'm arguing that. I'm arguing that my client doesn't have any rights to be terminated because he gave guardian-

> ship of him over to someone. And I'm arguing that [petitioner] has no standing to bring this matter.

Assuming *arguendo* that the arguments by respondent's counsel before the trial court are not sufficient to preserve the issue for appeal, because these defects raise a question of the trial court's subject matter jurisdiction over the action, these issues properly may be raised for the first time on appeal. N.C.R. App. P.10(a) (2005). *See State v. Beaver*, 291 N.C. 137, 140-41, 229 S.E.2d 179, 181 (1976).

[2] Pursuant to our statutory requirements "[t]he [district] court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile . . . ." N.C. Gen. Stat. § 7B-1101 (2004). Where there is no proper petition, however, the trial court has no jurisdiction to enter an order for termination of parental rights. *In re McKinney*, 158 N.C. App. 441, 445, 581 S.E.2d 793, 796 (2003); *see also*, *In re Ivey*, 156 N.C. App. 398, 576 S.E.2d 386 (2003).

The requirements for a proper petition to terminate parental rights are set forth in the North Carolina General Statutes, section 7B-1104, which provides in relevant part:

> The petition, or motion pursuant to G.S. 7B-1102, . . . *shall* set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner or movant *shall* so state:
>
> (4) The name and address of any person who has been judicially appointed as guardian of the person of the juvenile.
>
> (5) The name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; and a copy of the custody order *shall* be attached to the petition or motion.

N.C. Gen. Stat. § 1104 (2004) (emphasis added).

Respondent argues that the petition in the case *sub judice* fails to set forth facts known to petitioner, or fails to state that petitioner has no knowledge of facts, regarding the name and address of any judicially appointed guardian or the name and address of any person or agency awarded custody of the child by a court; and does not attach the existing custody order to the petition as explicitly required by North Carolina General Statutes section 7B-1104.

The use of the word "shall" by our Legislature has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error. *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001); *In re Johnson*, 76 N.C. App. 159, 331 S.E.2d 756 (1985); *In re Wade*, 67 N.C. App. 708, 313 S.E.2d 862 (1984). This Court also has held that when the statute governing petitions for termination of parental rights stated that " '[t]he petition shall be verified by the petitioner . . . ,' " the petitioner's failure to verify the petition precluded the trial court from exercising subject matter jurisdiction over the action. *In re Triscari Children*, 109 N.C. App. 285, 287, 426 S.E.2d 435, 436 (1993) (quoting N.C. Gen. Stat. § 7A-289.25 (1989)).

However, in another case, this Court declined to dismiss a petition for termination of parental rights that failed to conform to the requirements of North Carolina General Statutes section 7B-1104 absent a showing that the respondent was prejudiced by the omission. *In re Humphrey*, 156 N.C. App. 533, 539, 577 S.E.2d 421, 426 (2003). In *Humphrey*, the petitioner failed to include the required statement that the purpose of the petition was not to circumvent the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). *Id.*; *see* N.C. Gen. Stat. § 7B-1104(7). Although, the petitioner in *Humphrey* did not include the required statement, there was an allegation on the face of the petition filed in New Hanover County that there was a visitation proceeding in Wake County and the trial court made a finding of fact to that effect. This Court held that the trial court's finding of fact regarding this issue was sufficient to establish that the petition was not filed to circumvent the UCCJEA and to cure the defect.

The holding in *Humphrey* is distinguishable from the facts in the instant case because we are unable to review the trial court's determination that the guardianship was void. In *Humphrey* this Court had all the facts available to it for review. Here, we are faced with the trial court's bare statement:

> Well, first of all, in my opinion, the guardianship is void as I have ruled in several situations where supposedly the trial motion in the cause to modify the custody, which I think is absolutely void because the statute doesn't offer that. Chapter 50 does not authorize—plus there's a separate action in which she's granted custody.

The trial court states no basis for its conclusion on the record and provides no further illumination in its order. Was the order void *ab initio* for some reason? When was petitioner granted custody? We simply have no way of making these determinations from the trial court's transcript and order. Therefore, we must follow the statutory mandate and conclude that the trial court was without jurisdiction to hear this matter from its inception.

Humphrey is further distinguishable in that the defect in the petition in that case could be overcome by information contained on the face of the petition itself. The petition in Humphrey did not include a statement that it was not filed for the purpose of circumventing the UCCJEA. The petition in *Humphrey*, did however, have on its face, an acknowledgment that there existed a custody hearing in a county other than the one in which the petition was filed. This reference unequivocally shows the petition was not filed to circumvent the UCCJEA and therefore the petition was not defective on its face even absent a specific statement to that effect. In the instant case, there is no such remedy available on the face of the petition to correct the failure to attach the custody order or provide facts regarding the guardianship and prevent the petition from being facially defective.

As the petition at issue in the instant case fails to comply with the mandatory requirements of the statute, we hold that it is facially defective and failed to confer subject matter jurisdiction upon the trial court. Consequently, we reverse the order of the trial court terminating respondent's parental rights.

Reversed.

Chief Judge MARTIN dissenting.

Judge HUDSON concurs.

MARTIN, Chief Judge dissenting.

I respectfully dissent. While I agree with the majority that it was error to omit from the petition to terminate respondent's parental rights details concerning custody and a copy of the custody order as required by section 7B-1104(5), N.C. Gen. Stat. § 7B-1104(5) (2003), I find no authority supporting respondent's contention and the majority's holding that the failure to include the custody order divests the

trial court of subject matter jurisdiction requiring the reversal of the termination order. Since respondent did not demonstrate prejudice, nor are the statutory violations properly preserved for review, I would affirm the trial court's order.

The "most critical aspect" of a court's inherent authority is subject matter jurisdiction and a court cannot "act where it would otherwise lack jurisdiction." *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003). Subject matter jurisdiction has been defined as a court's power to hear a specific type of action, and "is conferred by either the North Carolina Constitution or by statute." *Id.* (citation omitted). The relevant jurisdiction statute, section 7B-1101, grants the court "exclusive original jurisdiction to hear and determine any petition . . . relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services . . . in the district at the time of filing." N.C. Gen. Stat. § 7B-1101 (2003). A parent has standing to bring a petition to terminate the other parent's rights. N.C. Gen. Stat. § 7B-1103(a)(1) (2003).

A lack of subject matter jurisdiction has been found where the petitioner lacked standing, *see In re Miller*, 162 N.C. App. 355, 358-59, 590 S.E.2d 864, 866 (2004) (no subject matter jurisdiction because DSS lacked standing to petition since child no longer in its custody), or where there was **no** petition filed. *McKinney*, 158 N.C. App. at 446-48, 581 S.E.2d at 797-98 (vacating termination order because no proper petition filed, only a "Motion in the Cause," reciting bare allegations, failing to request relief, reference any statutory provisions, or state it was a petition for termination); *see also In re Ivey*, 156 N.C. App. 398, 401, 576 S.E.2d 386, 389 (2003) (no petition at all was filed, so trial court lacked jurisdiction to order DSS to take the child into nonsecure custody).

In addition to the jurisdictional requirements of sections 7B-1101 and -1103, this Court has held that the verification requirement of section 7B-1104 is necessary to invoke the trial court's subject matter jurisdiction. *In re Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993). Verification requires a petitioner to attest "that the contents of the pleading verified are true to the knowledge of the person making the verification." N.C. Gen. Stat. § 1A-1, Rule 11 (2003). *Triscari* vacated the termination of parental rights due to improper verification, and the failure to verify the petition divested the trial court of jurisdiction, *Triscari*, 109 N.C. App. at 288, 426 S.E.2d at 437-38, just as in cases where no petition was filed. *See e.g.*,

McKinney, 158 N.C. App. at 448, 581 S.E.2d at 797-98; *Ivey*, 156 N.C. App. at 401, 576 S.E.2d at 389.

There is a distinction between the verification requirement of section 7B-1104, necessary to subject matter jurisdiction, and the required factual allegations of section 7B-1104(1)-(7). If the factual allegations listed in section 7B-1104(1)-(7) were required for jurisdiction, there would have been no need for respondents, who assert petitions to terminate their parental rights do not comport with statutory requirements, to demonstrate prejudice. Since lack of subject matter jurisdiction divests the trial court of any authority to adjudicate, if the majority correctly holds that facial defects in the petition require us to vacate the termination order, this Court could not have properly affirmed termination in cases where respondents failed to show prejudice. It is clear, however, that this Court has repeatedly affirmed termination orders despite statutory defects where no prejudice was shown. *See*, *e.g.*, *In re Humphrey*, 156 N.C. App. 533, 539, 577 S.E.2d 421, 426 (2003) (overruling respondent's assignment of error regarding non-compliance with mandatory language of section 7B-1104(7), because respondent failed to demonstrate prejudice); *In re B.S.D.S.*, 163 N.C. App. 540, 544, 594 S.E.2d 89, 92 (2004) (failure to show prejudice despite petition's reference to UCCJA not UCCJEA); *In re Clark*, 159 N.C. App. 75, 79, 582 S.E.2d 657, 660 (2003) (failure to attach statutorily required affidavit to initial petition did not divest jurisdiction); *In re Joseph Children*, 122 N.C. App. 468, 469-72, 470 S.E.2d 539, 540-41 (1996) (custody order not attached, as required by statute, nor were the notice requirements of the termination statute met, but error not prejudicial because notice required by civil procedure rules was met).

Here, Z.T.B. and petitioner resided in Burke County; therefore, the trial court had jurisdiction pursuant to section 7B-1101. As Z.T.B.'s parent, petitioner had standing pursuant to section 7B-1103(a)(1). There was a verified petition, with appropriate allegations, citation to statutory provisions, and a request for relief. Therefore, the trial court had jurisdiction to consider the termination petition.

Thus, while I agree that it was erroneous to omit the custody order and information regarding custody from the termination petition, as required by section 7B-1104(5), such error is harmless absent a showing of prejudice by respondent. The majority distinguishes *In re Humphrey*, which overruled an assignment of error regarding non-compliance with mandatory language in section 7B-1104(7), because respondent failed to demonstrate prejudice. 156

N.C. App. at 539, 577 S.E.2d at 426. *Humphrey* held the allegations in the petition sufficiently put the respondent on notice, despite a failure to allege that the petition was not filed to circumvent the UCCJEA. The Court stated:

> we find no authority that compelled dismissal of the action solely because petitioner failed to include this statement of fact in the petition. While it is a better practice to include the factual statement as stated in the statute, under the facts in this case we find that respondent has failed to demonstrate that she was prejudiced as a result of the omission.

Id. at 539, 577 S.E.2d at 426. *Humphrey* also concluded that the trial court did have jurisdiction pursuant to section 7B-1101. *Id.* at 537, 577 S.E.2d at 425.

The majority states that *Humphrey* is distinguishable because 1) we are unable to review the trial court's determinations due to a sparse transcript and order, and 2) the defect could be overcome by the allegations in the petition in *Humphrey*, which is not true about the allegations *sub judice*. These distinctions do not persuade me. The Rules of Appellate Procedure require the appellant to include "so much of the evidence . . . as is necessary for an understanding of all errors assigned." N.C. R. App. P. 9(a)(1)(e) (2004). "It is the duty of the appellant to ensure that the record is complete" and where the record is incomplete, we need not speculate as to error by the trial court. *Hicks v. Alford*, 156 N.C. App. 384, 389-90, 576 S.E.2d 410, 414 (2003). The burden was on respondent to compile a record that would illuminate us as to errors made by the trial court, and we defer to the trial court's conclusions if there are facts to support them. *Humphrey*, 156 N.C. App. at 539-40, 577 S.E.2d at 427.

The defect in *Humphrey* was cured with a finding of fact by the trial court, acknowledging non-compliance with section 7B-1104(7), but noting the petition "did allege the existence of a proceeding in Wake County, North Carolina regarding visitation." *Id.* at 539, 577 S.E.2d at 426. The trial court *sub judice* similarly cured the petition's defects, after hearing testimony and taking judicial notice (at respondent's request) of other files regarding Z.T.B., by noting the custody order was not attached but finding Z.T.B. had been in petitioner's custody and the guardianship order was void. Respondent fails, therefore, to demonstrate prejudice as a result of the error.

Assuming, *arguendo*, respondent had demonstrated prejudice from the error, the issue was not properly preserved and cannot now

be raised. The "Rules of Civil Procedure are not superimposed upon the procedures set forth by statute for termination of parental rights," but they "are not to be ignored." *In re Manus*, 82 N.C. App. 340, 344, 346 S.E.2d 289, 292 (1986) (internal citations omitted). N.C. Gen. Stat. § 1A-1, Rule 12(g) (2003) precludes a party from raising defenses or objections not raised in their initial pleadings. The transcript does not clearly indicate a motion by respondent's attorney to dismiss the petition. Moreover, there is no indication in the transcript that the trial court denied such a motion. The oral motion cited by the majority referred to the lack of a motion to dismiss prior custody or guardianship orders, rather than a motion to dismiss the termination petition. This reading is consistent with the trial court's finding that respondent never moved to dismiss for failure to attach the custody order. Respondent's failure to raise the statutory defects with the petition in either his answer or through a motion to dismiss cannot now be raised. The trial court adequately cured the defects in the petition by noting the custody order was not attached and finding respondent neither raised the failure to attach the custody order as an affirmative defense nor filed a motion to dismiss based on the defective petition. I vote to affirm the order of the trial court.

STATE OF NORTH CAROLINA v. COREY McNEILL

No. COA04-281

(Filed 7 June 2005)

Evidence— motion to suppress granted pretrial—evidence allowed at trial—motion in limine

The trial court did not err in a drug case by granting defendant's motion to suppress evidence of marijuana, cocaine, and digital scales recovered in the leaves of the shrubbery defendant frequented outside of his house without a written order prior to trial, thereafter allowing the evidence subject to the motion to suppress to be introduced at trial, and after trial entering a written order with findings of fact and conclusions of law supporting admission of the evidence on the basis that it was seized beyond the curtilage of the home, because: (1) motions to suppress are classified as a type of motion in limine, and ruling on a motion in limine is a preliminary or interlocutory decision that the trial court can change if circumstances develop which make it neces-

sary; (2) any ruling on a motion to suppress prior to trial is not final and the trial court may reverse its decision; (3) although defendant assigned error to the trial court's findings of fact that the evidence was located beyond the curtilage of the home, he did not brief these assignments of error on appeal and this issue is thus deemed abandoned; (4) N.C.G.S. § 15A-977(f) does not require findings to be made concurrent with the decision on the motion, and there was no prejudice to defendant by the court's delayed entry of findings of fact supporting its conclusion to admit the evidence at trial based on a different theory; and (5) the fact that the trial court's ruling in limine is inconsistent with the written order is not legally significant since a decision on a motion in limine is not final, and during trial neither party can rest on an earlier ruling in their favor.

Judge WYNN concurring.

Appeal by defendant from judgment entered 20 May 2003 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 16 November 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Martin T. McCracken, for the State.

Robert W. Ewing for defendant-appellant.

ELMORE, Judge.

Defendant was convicted of several drug related offenses. He appeals to this Court on the basis that his suppression motion was first granted, then denied, and that his habitual felon indictment was supported by two misdemeanors instead of three felonies. We hold that defendant's trial was free of error.

Defendant resides in a mobile home in Harnett County situated back off of a road, near another mobile home and a beauty parlor. After a confidential informant told the Harnett County Sheriff's Department that defendant had drugs within the last 48 hours, the sheriff's department acquired a search warrant for the property. Before executing the warrant, deputies and other officers conducted surveillance of the home via a car on the road and an open field in the back of the home. During the short interval of surveillance officers observed two cars come to the house and leave. When each car arrived, defendant would come out of the house, go to some shrub-

bery in the back, pick something up, and then give it to each driver. Each incident was videotaped by an officer in the field.

Upon executing the search warrant the sheriff's department discovered marijuana, cocaine, and digital scales covered in the leaves near the shrubbery defendant had frequented. Defendant was arrested and indicted for possession of more than one and one-half ounces of marijuana, possession with intent to sell or deliver marijuana, and being an habitual felon. Defendant was also indicted for possession with intent to sell and distribute cocaine; however, the jury found him not guilty of the charge.

Defense counsel made a motion to suppress the drugs and scales found outside near the shrubbery due to a defective warrant. After a hearing on the matter, the trial court agreed and granted defendant's motion to suppress. Defendant did not make a motion to dismiss. However, after the court granted defendant's motion to suppress, the State then continued to argue the admissibility of the evidence under the Fourth Amendment.

THE COURT: So then there's still pending a motion to suppress? Motion to suppress is allowed.

DEFENSE: Thank you, Your Honor.

STATE: We ask Your Honor to rule on the admissibility of the evidence in that case prior to trial.

THE COURT: What do you mean?

. . .

STATE: The admissibility of the evidence, Your Honor. Despite the search warrant being suppressed, I believe that the evidence is otherwise admissible.

. . . [The court then questioned the State on whether it was arguing constructive possession, an issue which would be for the jury to decide.]

STATE: I don't have any problems showing possession, Your Honor. It's the location of the cocaine and the marijuana some 25 yards from the house, next to a field and whether—

THE COURT: Was it in the curtilage?

STATE: That's going to be the question, Your Honor.

THE COURT: Okay. You may proceed.

The State's position was that since the drugs were found beyond the curtilage of the home, where no privacy rights exist, the evidence should be admissible despite its suppression on the basis of the warrant. However, following its presentation of evidence on the location of the drugs, the court orally denied the State's motion to admit the drugs on the basis that they were not seized in violation of the Fourth Amendment.

> THE COURT: I'm not going to rule on the admissibility of the evidence because I don't know—nobody's connected this man based on the hearing that I've heard.
>
> STATE: Well, I would ask Your Honor to find that the evidence seized was not seized in violation of the Fourth Amendment.
>
> THE COURT: Motion is denied.

Immediately after the denial, the case was called and a jury was impaneled.

As part of its case in chief, the State called several of the officers who had conducted the surveillance, executed the warrant, and subsequently arrested defendant. The officers testified as to what they saw, and a portion of the videotape was entered into evidence. One of the more veteran officers testified that upon seizing the bags in the leaves, he knew it was marijuana. The trial court allowed this testimony over defendant's objection. However, when that officer testified that the other recovered substance was cocaine, the trial court sustained defendant's objections. Still, the State elicited testimony as to where the drugs were located, that an officer thought it was marijuana, and the State also showed the bags and containers the drugs were found in. Although allowing the witnesses to testify as to the apparently suppressed evidence, the trial court sustained defendant's objection to having the drugs admitted into evidence.

Next, the State sought to introduce a lab report containing an analysis and weight of the substances recovered. Defendant objected. The court dismissed the jury, and for the first time, defense counsel reminded the court of its earlier ruling to suppress all the evidence seized at the home. The State, again, briefly argued that the drugs were admissible because they were seized beyond the curtilage of the home. The trial court then questioned defendant as to whether he had an objection to the lab report being introduced. Defendant responded that he did not, but that his objection was to the fact that already sup-

pressed evidence was being introduced to the jury. Defendant did not ask for a mistrial.

The trial court did not make any explicit reference to the fact that it had reconsidered its earlier suppression and was now, based on the evidence presented at trial, going to reverse that preliminary decision and allow the evidence to be submitted. The trial court then called the jury back in and defendant presented a continual objection to the identification of what was seized from the house.

Following the introduction of the lab report, the officer connected the results of the tests, that the recovered substances were actually marijuana and cocaine, to the State's exhibits. The State then moved that the drugs, containers, and report be admitted and, over defendant's objection, they were. Eighteen days after the trial concluded, the trial court entered a written order determining that: 1) the affidavit supporting the warrant was insufficient to establish probable cause, but 2) the drugs and scales were recovered from shrubbery that was beyond the curtilage of defendant's home. The trial court concluded that defendant had no right to privacy in the shrubbery where the evidence was recovered, and thus the evidence was admissible.

Defendant contends that it was prejudicial error for the court to grant his suppression motion without written order; allow the evidence subject to the motion to suppress to be introduced at trial; then following the trial enter a written order with findings of fact and conclusions of law supporting admission of the evidence on the basis that it was seized beyond the curtilage of the home. We disagree.

Defendant argues that under the plain language of section 15A-979(a), the trial court erred in allowing evidence into trial that was subject to a ruling granting suppression. N.C. Gen. Stat. § 15A-971 *et seq*. governs motions to suppress evidence and notes that these statutes are the "exclusive method" of challenging evidence seized in violation of either the United States Constitution or the North Carolina Constitution, or also evidence seized in a substantial violation of the Criminal Procedure Act. N.C. Gen. Stat. §§ 15A-979(d) and 15A-974 (2003); *c.f. State v. Tate*, 300 N.C. 180, 182-83, 265 S.E.2d 223, 225 (1980) (noting that motions to suppress based on grounds other than violations of the Criminal Procedure Act or the Constitution may not be governed exclusively by Article 53). Section 15A-979(a) states that, "[u]pon *granting* a motion to suppress evidence the judge must order that the evidence in question be excluded in the criminal action

pending against the defendant." N.C. Gen. Stat. § 15A-979(a) (2003) (emphasis added).

The State suggests that the pre-trial oral ruling suppressing the evidence was not "granting" the motion, such that section 15A-979(a) is triggered, but instead foreshadowing the court's inclination. The State's argument rests on the fact that a motion to suppress is a motion *in limine*, and any ruling on a motion *in limine* is not final, but instead may be revisited during trial. The State contends that the trial court changed its earlier ruling based on the testimony and other evidence presented at trial and properly admitted the drugs.

Even though the State's heavy reliance on *State v. Locklear*, 145 N.C. App. 447, 551 S.E.2d 196 (2001), may not control our decision here,[1] we conclude that our case law supporting the State's argument is well established. Our Supreme Court's opinion in *Tate*, 300 N.C. at 182, 265 S.E.2d at 225, classified motions to suppress as a type of motion *in limine*. "Article 53 of Chapter 15A deals with a specific type of a motion *in limine* and that is the motion *in limine* to suppress evidence. . . . The fact that it is a motion to suppress denotes the *type* of motion that has been made. The fact that it is also a motion *in limine* denotes the timing of the motion regardless of its type." *Id.* And, "[a] ruling on a motion *in limine* is a preliminary or interlocutory decision which the trial court can change if circumstances develop which make it necessary." *State v. Lamb*, 321 N.C. 633, 649, 365 S.E.2d 600, 608 (1988) (quoted with approval in *State v. Smith*, 352 N.C. 531, 553, 532 S.E.2d 773, 787 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001)); *see also State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam) (reversing this Court's opinion to the contrary: "Rulings on motions *in limine* are preliminary in nature and subject to change at trial, depending on the evidence offered, and thus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.") (internal quotations omitted). Thus, any ruling on a motion to suppress prior to trial is not final and the trial court may reverse its decision.

Despite defendant's reliance on section 15A-971 *et seq.*, our case law suggests that the State may have *two* options when a trial court

1. In *Locklear*, the Court rendered an opinion on a peremptory challenge issue; the Court's discussion of the suppression motion in that case was dicta. *Id.* at 451-52, 551 S.E.2d at 198 ("Because we have determined that defendant is entitled to a new trial, we believe it is in the interest of conserving judicial resources not to address the trial court's pretrial ruling at this juncture."). Accordingly, that panel's discussion of a motion to suppress is not binding on us.

grants a pre-trial motion to suppress on the basis of a procedural or constitutional issue. One, pursuant to N.C. Gen. Stat. §§ 15A-1445(b) and 15A-979(c) (2003), the State may immediately appeal if the evidence is "essential," *see, e.g.*, *State v. Buchanan*, 355 N.C. 264, 559 S.E.2d 785 (2002); *State v. Barnhill*, 166 N.C. App. 228, 601 S.E.2d 215 (2004); *State v. Fisher*, 141 N.C. App. 448, 539 S.E.2d 677 (2000); *State v. Judd*, 128 N.C. App. 328, 494 S.E.2d 605 (1998) (discussing procedure); or, two, the State may proceed to trial, attempt to introduce the evidence subject to suppression, and allow the trial court to either change its initial ruling at trial or make the defendant object to the admission of the evidence. *See State v. McCall*, 162 N.C. App. 64, 68-69, 589 S.E.2d 896, 899 (2004); *State v. Gaither*, 148 N.C. App. 534, 539, 559 S.E.2d 212, 215-16 (2002); *see also Hayes*, 350 N.C. at 80, 511 S.E.2d at 303.

Judging by the record in the case *sub judice*, the State chose the latter of its two options: proceed to trial and await a ruling on the admissibility of the evidence at that point. And the State did receive a favorable ruling at trial on the admissibility of the drugs and scale seized from the shrubbery. According to the trial court's order denying defendant's motion to suppress and admitting the evidence, it concluded that the evidence was located beyond the curtilage of the home, where defendant was not entitled to Fourth Amendment protection. This ruling was contrary to the trial court's pre-trial ruling, but as previously noted, this subsequent reversal is well within the court's authority.

In accordance with the State pursuing its second option, defendant did properly object at trial to the admissibility of the evidence, thus preserving his right to appeal the trial court's decision. *See T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602-03, 481 S.E.2d 347, 348-49, *disc. rev. denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). Yet, while defendant did assign error to the trial court's findings of fact that the evidence was located beyond the curtilage of the home, he did not brief these assignments of error on appeal. Accordingly, they are deemed abandoned. N.C.R. App. P. 28(b)(6) (2004) ("Assignments of error not set out in the appellant's brief, . . . will be taken as abandoned.").

Related to his earlier argument on the suppression motion, defendant contends that the trial court erred by delaying the entry of a written order with findings of fact and conclusions of law until after the trial. We do not agree. Our Supreme Court has determined that N.C. Gen. Stat. § 15A-977(f), which requires these findings, does not

require them to be made concurrent with the decision on the motion. *See State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984) ("The statute does not require that the findings be made in writing at the time of the ruling. Effective appellate review is not thwarted by the subsequent order."); *State v. Fisher*, 158 N.C. App. 133, 141, 580 S.E.2d 405, 412 (2003) (quoting with approval from *Horner*), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004).

Defendant argues that *Horner* and *Fisher* are inapplicable to these facts because in those cases the delayed written order was consistent with the trial court's oral ruling at trial. Notably though, we see no inconsistency between the trial court's decision *at trial* and his written order entered later. The fact that the Court's ruling *in limine* is inconsistent with the written order is not legally significant, because a decision on a motion *in limine* is not final, and during trial neither party can rest on an earlier ruling in their favor. *See Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 619, 504 S.E.2d 102, 105 (1998) ("[T]he court's ruling is not a final ruling on the admissibility of the evidence in question, but only interlocutory or preliminary in nature. Therefore, the court's ruling on a motion *in limine* is subject to modification during the course of the trial.") (citing *State v. Swann*, 322 N.C. 666, 686, 370 S.E.2d 533, 545 (1988)).

While entering findings of fact and drawing conclusions of law at the time evidence is admitted or suppressed may facilitate better understanding between the court and litigants during trial, this practice is not required.

> In *State v. Doss*, 279 N.C. 413 at 424, 183 S.E.2d 671 at 678, *death sentence vacated* 408 U.S. 939, 92 S.Ct. 2875, 33 L.Ed.2d 762 (1972), this Court noted that "it is better practice for the court to make [findings of fact] at some stage during the trial, preferably at the time the [defendant's inculpatory] statement is tendered and before it is admitted.' This admonition is equally applicable to findings of fact and conclusions of law respecting the admissibility of evidence which defendant contends has been illegally obtained.

State v. Richardson, 295 N.C. 309, 320, 245 S.E.2d 754, 761 (1978). Additionally, we can discern no prejudice to defendant by the court's delayed entry of findings of fact supporting its conclusion to admit the evidence at trial. *See Horner*, 310 N.C. at 279 311 S.E.2d at 285 (discussing the need for prejudice); *Richardson*, 295 N.C. at 319-20, 245 S.E.2d 754 at 761-62 (must show prejudice from after-the-fact

entry of findings). No prejudice arose here, contrary to defendant's suggestion, from the trial court ruling *in limine* to suppress the drugs but then at trial determining the evidence was admissible based on a different theory, because as we have stated, this was not error.

We have reviewed defendant's remaining assignments of error and have determined that they are without merit. Accordingly we find that defendant received a fair trial free from any prejudicial error.

No error.

Judge HUDSON concurs.

Judge WYNN concurs by separate opinion.

WYNN, Judge, concurring.

Although I agree with the majority's resolution of this matter, I write separately to elaborate on Defendant's argument that he was prejudiced by the delay in the court's written order, which was inconsistent with its in-court ruling granting Defendant's motion to suppress.

Before trial, Defendant made a motion to suppress the cocaine, marijuana, and scales found by shrubbery near his home. After the trial court heard defense counsel's and the State's arguments, it granted the motion, though without making any findings or conclusions. Initially, in accordance with this ruling, the trial court refused to allow the State to enter the suppressed material into evidence. However, without making any ruling reversing its prior decision to suppress the evidence, the trial court, over defense counsel's objection, allowed into evidence the previously suppressed material. Then, eighteen days after the conclusion of Defendant's trial, the trial court entered an order effectively reversing its earlier ruling and denying Defendant's motion to suppress.

North Carolina General Statute section 15A-977 regarding procedures for motions to suppress in superior court states that "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2003). Our Supreme Court has determined, however, that these findings and conclusions need not be made concurrent with the ruling on the motion to suppress. *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984) ("The statute does not require that the findings be made in writing at the

time of the ruling. Effective appellate review is not thwarted by [a] subsequent order."); *State v. Fisher*, 158 N.C. App. 133, 141, 580 S.E.2d 405, 412 (2003) (quoting with approval from *Horner*), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583-84 (2004). While entering findings of fact and conclusions of law at the time evidence is suppressed or admitted might facilitate better understanding between the court and litigants during trial, it is not required.

> In *State v. Doss*, 279 N.C. 413 at 424, 183 S.E.2d 671 at 678, *death sentence vacated* 408 U.S. 939 (1972), this Court noted that "it is better practice for the court to make (findings of fact) at some stage during the trial, preferably at the time the (defendant's inculpatory) statement is tendered and before it is admitted." This admonition is equally applicable to findings of fact and conclusions of law respecting the admissibility of evidence which defendant contends has been illegally obtained.

State v. Richardson, 295 N.C. 309, 320, 245 S.E.2d 754, 761 (1978).

Where a written order setting forth findings of fact and conclusions of law on a motion to suppress is entered subsequent to the ruling, the defendant must have been prejudiced by the delay for error to exist. *Horner*, 310 N.C. at 279, 311 S.E.2d at 285 (to show error, defendant must have been prejudiced by later written order elaborating on in-court ruling on motion to suppress); *Richardson*, 295 N.C. at 319-20, 245 S.E.2d at 761-62 (must show prejudice from subsequent entry of findings); *cf. State v. Williams*, 34 N.C. App. 386, 388, 238 S.E.2d 195, 196 (1977) (where a trial court admitted testimony into evidence, defendant must show "prejudice which resulted from the trial court's delay" in dictating its findings).

Our Supreme Court and this Court have found no error where a trial court entered its ruling on a suppression motion in open court and later entered a written order memorializing and elaborating on the earlier ruling. *See, e.g.*, *State v. Smith*, 320 N.C. 404, 415, 358 S.E.2d 329, 335 (1987) (no error where a written order entered over six months after trial "is simply a revised written version of the verbal order entered in open court which denied defendant's motion to suppress"); *Horner*, 310 N.C. at 279, 311 S.E.2d at 285 (no error where "the trial judge passed on each part of the motion to suppress in open court as it was argued" and "later reduced his ruling to writing[]"); *Fisher*, 158 N.C. App. at 141, 580 S.E.2d at 412-13 (no error where the trial court ruled on the motion to suppress in open court and later filed a written order setting forth findings and conclusions on the rul-

ing). I have not found in North Carolina an instance, such as the one before us, where the trial court's subsequent written order on a motion to suppress is inconsistent with its in-court ruling on the motion. Nevertheless, there is no prejudicial error.

Defendant contends that he was prejudiced because he relied on the pre-trial ruling suppressing evidence in making substantive decisions about his case, including the contents of defense counsel's opening statement and whether to accept a plea agreement. However a decision on a motion to suppress is a motion *in limine* (*State v. Tate*, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980) (classifying motions to suppress as a type of motion *in limine*), and rulings on motions *in limine* are not final. *See Heatherly v. Indus. Health Council*, 130 N.C. App. 616, 619, 504 S.E.2d 102, 105 (1998) ("[T]he court's ruling is not a final ruling on the admissibility of the evidence in question, but only interlocutory or preliminary in nature. Therefore, the court's ruling on a motion *in limine* is subject to modification during the course of the trial.") (citing *State v. Swann III*, 322 N.C. 666, 686, 370 S.E.2d 533, 545 (1988)). Because of the interlocutory or preliminary nature of the trial court's ruling on Defendant's motion *in limine*, Defendant cannot show prejudice by claiming that he changed his trial strategy based on that ruling.

STATE OF NORTH CAROLINA v. KENNETH WAYNE GOFORTH, DEFENDANT

No. COA04-608

(Filed 7 June 2005)

1. Sexual Offenses— first-degree—instructions—anal intercourse—sufficiency of evidence

There was sufficient evidence of anal intercourse with each of two children to support inclusion of anal intercourse in the enumerated acts in a first-degree sexual offense instruction and there was no plain error in the instruction.

2. Evidence— sexual abuse—expert medical opinion—foundation in physical evidence

Expert medical testimony that two children had been repeatedly abused sexually was properly admitted where there was a proper foundation of physical evidence consistent with sexual abuse.

3. Evidence— corroboration of child's statement—variation

A detective's testimony corroborating statements by a child who was the victim of sexual abuse was admissible, even though there was some variation from the child's statement.

Appeal by defendant from a judgment dated 26 August 2003 by Judge Susan C. Taylor in Cabarrus County Superior Court. Heard in the Court of Appeals 13 January 2005.

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

Office of the Public Defender, by Assistant Public Defender Julie Ramseur Lewis, for the defendant-appellant.

BRYANT, Judge.

Kenneth Wayne Goforth (defendant) appeals from judgments entered consistent with guilty verdicts dated 26 August 2003 of ten counts of first-degree statutory sexual offense, four counts of first-degree statutory rape, and one count of taking indecent liberties with a child. Defendant was sentenced to a minimum of 240 months and a maximum of 297 months for six counts of first-degree sexual offense and three counts of first-degree rape. The remaining four counts of first-degree sexual offense, one count of first-degree rape, and one count of taking indecent liberties with a child were consolidated and the court imposed a sentence of 240 to 297 months to run consecutive to the first sentence.

The State's evidence tended to show the following: Defendant is the stepgrandfather of the two child victims in this case. B.F.[1], born 22 May 1990, was thirteen years old at the time of trial. From November 1997 until April 1998, when B.F. was seven years old, she lived at defendant's house with defendant, her mother, father and brother. B.F. slept in a room with a pantry, her parents slept in the bedroom, and defendant slept in the living room on the "couch bed." At times, B.F.'s parents left her and her brother alone with defendant. During these times, defendant would tell B.F.'s brother to go outside and would push him out and lock the door. When B.F. and defendant were alone, defendant would touch B.F. sexually.

After moving out in April 1998, B.F. and her family visited defendant on weekends and they often spent the night. When B.F. and her

1. Initials have been used throughout to protect the identity of the juveniles.

family visited defendant in June, July and August of 2001, defendant touched B.F. sexually. Defendant told her not to tell or she would get in trouble. However, B.F. eventually told her mother and Detective Chris Nesbitt of the Kannapolis Police Department about defendant's conduct after defendant's sexual abuse of T.B. was reported.

T.B., who is B.F.'s cousin, was born 26 December 1994 and was eight years old at the time of trial. From May 1998 until June 2000, T.B. and her mother lived with defendant. For those two years, T.B. and her mother slept in the bedroom, while defendant slept in the living room on the couch.

Defendant cared for T.B. frequently while her mother worked. While alone, defendant would touch T.B.'s "privates—in her bottom private, in her mouth and in her back private." Defendant touched T.B. in her bottom private with his "hot dog" and it hurt. At first, T.B. did not tell her mother because defendant threatened her and told her they would be in a whole lot of trouble. After T.B. and her mother moved out of defendant's home, T.B. told her mother, a police officer and a nurse about defendant's conduct.

On 13 August 2001, T.B. was interviewed by Nurse Julie Brafford. T.B., who referred to defendant as "papa", stated defendant put his privates in her privates and in her mouth and told T.B. not to tell anyone about these acts or they would get in trouble.

Approximately five weeks later, on 24 September 2001, B.F. was seen at the Children's Advocacy Center (CAC) at Northeast Medical Center by Nurse Brafford, Dr. Rosalina Conroy and Detective Nesbitt. Before being seated, B.F. said she was scared to tell them what "that guy" did. When Nurse Brafford asked her who the guy was, B.F. said "Kenneth Wayne Goforth." B.F. told Nurse Brafford defendant touched her and put his private in her private many times.

Defendant appeals.

Defendant raises three issues on appeal: whether the trial court erred in (I) instructing the jury on first-degree sexual offense with regard to anal intercourse as to B.F.; (II) allowing Dr. Conroy to testify to her medical conclusions that T.B. and B.F. had been "repeatedly sexually abused"; and (III) permitting Detective Nesbitt to testify regarding B.F.'s statements.

I

[1] Defendant first argues the trial court erred in its jury charge by including anal intercourse among the enumerated acts that could

support the charge of first-degree sexual offense because the evidence did not show anal intercourse had occurred with B.F., only with T.B.

Because defendant failed to object to the jury instructions at trial, the standard of review therefore is plain error. N.C. R. App. P. 10(b)(2); 10(c)(4). Under the plain error standard, defendant must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict. N.C. Gen. Stat. § 15A-1443(a) (2003); *State v. Lucas*, 353 N.C. 568, 584, 548 S.E.2d 712, 723 (2001) (citation omitted). The error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *Id.* (quoting *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993)). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (citation and quotation omitted). In deciding whether a defect in the jury instruction constitutes "plain error," the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt. *Id.*

In the present case, defendant was charged with ten counts of first-degree sexual offense; six counts involving victim T.B. and four counts involving victim B.F. The crime of first-degree sexual offense is committed when a defendant engages in a sexual act with a child under the age of 13 years and the defendant is at least 12 years old and at least four years older than the victim. N.C. Gen. Stat. § 14-27.4(a) (2003). A "sexual act" is defined by statute as cunnilingus, fellatio, analingus, anal intercourse, or the penetration, however slight, by any object into the genital or anal opening of another person's body. N.C. Gen. Stat. § 14-27.1(4) (2003). The trial court instructed the jury in one charge as to all of the counts of sexual offense for which defendant was accused, as follows:

> The defendant has been charged with ten counts of first degree sexual offense. For you to find the defendant guilty in each of these offenses, the state must prove three things beyond a reasonable doubt, in each of these counts.
>
> First, that the defendant engaged in a sexual act with the victim. A sexual act means fellatio, which means any touching by lips or tongue of one person of the male sex organ of another, anal intercourse which is any penetration, however slight, of the anus of

> any person by the male sexual organ of another; any penetration, however slight, by an object into the anal opening of a person's body; second, that at the time of the acts alleged, the victim was a child under the age of thirteen; third, that at the time of the alleged offense, the defendant was at least twelve years old and was four years older than the victim.
>
> In considering each of those counts separately, if you find from the evidence, beyond a reasonable doubt, that on or about the alleged date the defendant engaged in a sexual act with a victim, and that, at the time, the victim was a child under the age of thirteen years old and was at least four years older than the victim, it would be your duty to return a verdict of guilty. If in considering each of these counts separately, if you do not so find, or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

After hearing the charge, the jury left the courtroom. The trial court asked the parties whether, before the jury began deliberations, they had any requests, corrections, or additions to the jury instructions given. Defendant did not object to the charge as given or propose additional instructions or suggest a different charge be given as to each victim involved. Defendant now complains, however, he was prejudiced by the trial court having included anal intercourse in the instruction. Defendant does not contend there was any lack of evidence defendant engaged in anal intercourse with T.B. At trial T.B. testified defendant had engaged in numerous acts of anal intercourse with her: defendant touched her in her bottom private with his hot dog and it hurt; defendant put his private in her back private in the living room; and defendant put his private in her back private a lot and in her mouth a lot.

As to B.F., there is evidence defendant committed acts of anal intercourse. Nurse Brafford testified that B.F. said defendant tried to put his "dick in her butt" and that "it didn't feel good whenever he tried to put it in her butt." Defendant refers to Brafford as a corroboration witness, and indeed she was. However, Brafford's testimony was admissible as corroborative and substantive evidence because defendant did not object to her testimony or request a limiting instruction. *See State v. Ford*, 136 N.C. App. 634, 640, 525 S.E.2d 218, 222 (2000) (citing *State v. Goodson*, 273 N.C. 128, 129, 159 S.E.2d 310, 311 (1968)) (if offering party does not designate purpose for which evidence is offered, evidence is admissible as either corroborative evidence or competent substantive evidence; trial court not required

to provide limiting instruction unless requested by party objecting to use of evidence as substantive). "The admission of evidence, competent for a restricted purpose, will not be held error in the absence of a request by defendant for a limiting instruction." *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988). Such an instruction is not required to be given unless specifically requested by counsel. *State v. Smith*, 315 N.C. 76, 82, 337 S.E.2d 833, 838 (1985).

In the instant case there was significant evidence of repeated acts of sexual touching, including anal intercourse, by defendant as to B.F. and T.B., therefore, the trial court properly included anal intercourse among the enumerated acts that would support a finding of first-degree sexual offense. This assignment of error is overruled.

II

[2] Defendant next argues the trial court erred in allowing Dr. Conroy to testify to her medical conclusions that T.B. and B.F. had been "repeatedly sexually abused."

Defendant neither objected to nor moved to strike this testimony. The standard of review therefore is plain error. N.C. R. App. P. 10(b)(2); 10(c)(4); *see State v. Walker*, 316 N.C. 33, 38-39, 340 S.E.2d 80, 83 (1986) (citation omitted); *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 806-07 (1983).

Dr. Conroy was admitted as an expert in the fields of pediatrics and child abuse and allowed to testify pursuant to Rule 702. N.C. Gen. Stat. § 8C-1, Rule 702 (2003) ("[A] witness qualified as an expert . . . may testify thereto in the form of an opinion.")

It is well settled that "[a]n expert medical witness may render an opinion pursuant to Rule 702 that sexual abuse has in fact occurred if the State establishes a proper foundation, i.e., physical evidence consistent with sexual abuse." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) (citation omitted). *See also State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90 (distinguishing the facts of that case, where there was physical evidence of the abuse, from those cases where there was no physical evidence, as in *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), and *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993), in finding the rendering of the doctor's opinion to be without error).

In the present case, there was physical evidence of abuse; the hymenal tissues of B.F. and T.B. reflected penetrating trauma.

Defendant, however, cites extensive caselaw in which there was no such physical evidence of sexual abuse, and which states where there is no physical evidence to support a diagnosis of sexual abuse, the trial court should not admit expert opinion that sexual abuse has in fact occurred because such testimony amounts to an impermissible opinion regarding the victim's credibility. *See State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789; *see also Trent* at 614-15, 359 S.E.2d at 465-66; *State v. Couser*, 163 N.C. App. 727, 730, 594 S.E.2d 420, 422 (2004); *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179 (2001). These cases are clearly distinguished from the present case, where there was strong physical evidence of abuse.

Generally, Dr. Conroy testified that when penetration is alleged, the findings could be anything from absolutely nothing to scar tissue. Probably less than 5% of the children that Dr. Conroy examines who allege abuse will have physical findings because children are groomed and learn very quickly that if something hurts to relax. Dr. Conroy testified that if there are physical findings, this is usually indicative of repeated abuse.

During T.B.'s examination on 13 August 2001, there were physical findings of sexual abuse. Pictures of T.B.'s vagina were taken with the culposcope, revealing the vascularity reflected in the color of the hymen. Dr. Conroy testified during a genital exam of a young girl, they look at the hymenal ring, which if normal is supposed to be a uniform thickness all the way around with no indentations; the edge should be smooth. If there has been trauma to the hymen, scar tissue may form at the location where the hymen has been split and comes back together. The normal hymen also has very pink color but when a scar is present, there is a loss of blood vessels in the area of the scar. Dr. Conroy concluded T.B. was sexually abused because her hymen had a relatively smooth edge except for two notches around an area of pallor, visibly pink, then pale, then pink. This color variance indicated there had been trauma to the hymen, it had healed and a loss of vascularity existed in that area in between the notches. Based on her experience and training, Dr. Conroy's observations of T.B.'s vagina indicated this loss of vascularity would be caused by an intentional, penetrating vaginal trauma. After discussing T.B.'s medical history and conducting the physical examination, Dr. Conroy reached a medical conclusion that T.B. had been repeatedly sexually abused.

In B.F.'s case, Dr. Conroy learned from Nurse Brafford of B.F.'s alleged penetration by a male private part into her private part. Dr.

Conroy physically examined B.F. on 24 September 2001, after having reviewed a February 1998[2] culposcope photograph of B.F.'s hymen, which showed an area of pallor on the hymen suspicious for sexual abuse. Based upon Dr. Conroy's training and experience, she testified the cause of such irregularity would be sexual abuse, penetrating trauma, not accidental. In comparison, the 2001 photographs of B.F.'s hymen show physical evidence of sexual abuse—loss of vascularity, linear pallor that is in the same position as the earlier photographs, only more advanced and more extensive than in the 1998 photograph. After physically examining B.F., discussing her medical history and looking at her culposcope photographs, Dr. Conroy reached a medical conclusion that B.F. also had been repeatedly sexually abused.

As we said in *Dixon*, where there is a proper foundation showing physical evidence consistent with sexual abuse, an expert medical witness may properly render an opinion pursuant to Rule 702 that sexual abuse has in fact occurred. *Dixon* at 52, 563 S.E.2d at 598. Here, there was a sufficient foundation of physical evidence of abuse for Dr. Conroy to properly render her expert opinion that both child victims had been repeatedly sexually abused. Dr. Conroy's testimony was properly admitted. This assignment of error is overruled.

III

[3] Defendant contends the trial court erred in permitting Detective Nesbitt to testify regarding statements made by B.F.

"Where testimony which is offered to corroborate the testimony of another witness does so substantially, it is not rendered incompetent by the fact that there is some variation." *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980). " 'Such variations affect only the weight of the evidence which is for the jury to determine.' " *State v. Benson*, 331 N.C. 537, 552, 417 S.E.2d 756, 765 (1992) (quotation omitted). "Prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony." *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992). "The admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions." *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988). "However, the witness's prior contradictory statements may not be admitted under the guise of corroborating his

2. B.F. was examined at the CAC in 1998, however there are no additional facts in the record regarding B.F.'s visit to the center prior to 2001.

testimony." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 574 (1986); *State v. Frogge*, 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997) (error to admit statement of witness where prior statement contained information "manifestly contradictory" to his testimony at trial and did not corroborate the testimony).

At trial B.F. responded "no" to the question of whether she had spent the night at defendant's house in June and August 2001. Defendant maintains B.F.'s statement, as rendered by Detective Nesbitt at trial, was "fatally contradictory":

> The weekend before my paw-paw got arrested, me, [my brother], mom and dad were at my paw-paw's. I don't remember if it was a Saturday or Sunday, but it was in the morning time.
>
> I came out of the bathroom and paw-paw stopped me in the hallway to keep me from going back to the bedroom that I fell asleep in—or that I sleep in. He grabbed my right hand and put it on his privates. He had on skimpy shorts and no shirt. He pulled his shorts down until his privates hung out. He put his privates in my mouth for about five minutes. Paw-paw said, oops, and white stuff came out of his privates. He heard a door open and he pulled his shorts back up.
>
> Later that same night, I was asleep in my bed—or in bed and I woke up. Paw-paw had his hands at my privates and he licked my privates. I had on my panties, but he moved them to the side. I told him to stop and he left the room. He came back into my room later while I was still asleep and put his privates in my privates. I told him to stop and he did.

Without having objected at trial, defendant argues admitting B.F.'s statement to Detective Nesbitt was plain error because the statement was inadmissible hearsay and failed to corroborate her response at trial. We reject defendant's portrayal of B.F.'s prior statement to Detective Nesbitt as fatally contradictory to her single response at trial. In addition to Detective Nesbitt's statement, B.F. and her mother also testified after the family moved out, they would visit defendant on weekends and spend the night. B.F. and her mother testified the family did spend nights with defendant when they went to his house for cookouts. B.F.'s statement to Detective Nesbitt was not "manifestly contradictory" but rather a slight variation from B.F.'s response at trial to whether she had spent the night at defendant's in 2001. B.F.'s statement to Detective Nesbitt was competent, corroborative

testimony and the trial court did not err in admitting the detective's testimony. This assignment of error is overruled.

No error.

Judges HUNTER and JACKSON concur.

STATE OF NORTH CAROLINA v. STEVEN DIXON PRENTICE

No. COA04-764

(Filed 7 June 2005)

1. Evidence— videotape—still photographs from videotape—authentication

The trial court did not err in a first-degree rape, double first-degree sexual offense, and taking indecent liberties with a minor case by admitting a videotape and still photographs taken from the videotape as substantive evidence of the alleged crimes, because: (1) an agent's testimony established an unbroken chain of custody from the time the tape was found in defendant's residence; (2) there was ample testimony to establish the identities of defendant, the minor child, and defendant's residence depicted on the videotape; (3) there was testimony that defendant's camcorder was in working condition; and (4) there was sufficient evidence from the testimony regarding chain of custody to establish the videotape had not been edited or altered, and that the videotape seized from defendant's residence was the same videotape reviewed by the jury.

2. Arrest— Interstate Agreement on Detainers—detainer

The trial court did not violate the Interstate Agreement on Detainers (IAD) or unconstitutionally evade the operation of that statute by arraigning defendant in Orange County District Court and returning defendant to federal custody without resolving his first-degree rape, double first-degree sexual offense, and taking indecent liberties with a minor case, because "detainer" does not include the arrest warrant served on defendant in this case when: (1) although defendant did have an untried indictment pending in Orange County when he was served with the order while in federal custody, there is nothing in the record to suggest that the

order for arrest was ever filed with the Federal Bureau of Prisons or any institution; and (2) there is nothing in the record to suggest that the State requested federal officials to hold defendant at the end of his federal sentence or notify it prior to defendant's release from federal custody.

Appeal by defendant from judgment entered 28 October 2003 by Judge Ronald L. Stephens in Orange County Superior Court. Heard in the Court of Appeals 14 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

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

MARTIN, Chief Judge.

Defendant appeals from his convictions of first-degree rape, two counts of first-degree sexual offense, and one count of taking indecent liberties with a minor. Defendant argues that video tape evidence of him committing the sexual acts complained of was not properly authenticated and that the trial court erred in failing to dismiss the charges under section 15A-761 of the North Carolina General Statutes, the Interstate Agreement on Detainers. We find no error by the trial court.

The pertinent factual and procedural history of the instant case is as follows: On 7 August 2001, defendant pled guilty to federal child pornography charges in the United States District Court for the Middle District of North Carolina and was sentenced to 210 months in prison. After sentencing, defendant was transferred as a federal prisoner to the Orange County jail, pursuant to a housing agreement between the United States government and Orange County. On 27 August 2001, the grand jury returned state indictments against defendant. The Orange County sheriff served defendant with an order for arrest on 28 August 2001. The following day, defendant appeared in state court, where he was informed of the charges against him and appointed an attorney. He was then returned to the Orange County jail and federal custody.

On 10 September 2001, federal authorities transported defendant from the Orange County jail to a federal prison in Kentucky. On 28 May 2003 the State prepared a writ of habeas corpus *ad prosequen-*

dum to secure defendant's presence in state court, and defendant was transferred to state custody pursuant to that writ on 15 July 2003. Defendant remained in state custody through his trial, which ended 28 October 2003.

The State's evidence at trial tended to show that defendant was the subject of a child pornography distribution investigation by the United States Postal Inspector. Defendant responded to an electronic mail ("e-mail") offering a video tape entitled "Number Fourteen, Teen Sex." Agents from the State Bureau of Investigation ("SBI") and postal inspectors subsequently searched defendant's residence, where the inspectors discovered several video tapes secured within a safe.

An SBI agent involved on the case, Mike Smith ("Agent Smith"), reviewed one of the video tapes and attempted to identify the persons depicted in it. The video tape showed a grown male, later identified as defendant, and a pre-pubescent female engaged in various sexual acts, including digital and penile penetration of the girl's vagina by defendant. Agent Smith testified he took still photographs made from the video tape to several of defendant's close acquaintances in an attempt to identify the young girl. Defendant's former girlfriend identified the girl as her daughter, K.H., and verified that the male in the video tape was defendant. K.H.'s grandmother also identified K.H. as the girl in the photograph.

K.H.'s mother testified at trial that she and her two daughters moved in with defendant in October 1999. K.H. was two to three years old during the time she resided with defendant. K.H.'s mother testified her daughter appeared to be three years old in the video tape. She identified a checked flannel shirt, worn by the girl in the video tape, as one belonging to K.H. She further stated the furnishings and decorations in the still photographs, taken from the video tape, appeared to be the same furnishings and decorations in defendant's bedroom at the time they were living there. According to K.H.'s mother, defendant also owned a camcorder and a tripod, which he had used to videotape the two of them having sexual intercourse in his bedroom. She stated she had no personal knowledge of whether defendant ever videotaped himself with K.H. and that she never observed defendant engage in any sexual activity with her daughter.

The State played the video tape at trial over defendant's objection. Defendant did not testify and presented no evidence. Upon review of the evidence, the jury found defendant guilty of all charges

and he was sentenced on 28 October 2003 to a term of 384 to 470 months in prison. Defendant appeals.

---

[1] Defendant argues the trial court erred by admitting the video tape and still photographs taken from the video tape into evidence. He further contends the State violated the Interstate Agreement on Detainers. For the reasons stated herein, we find no error.

A. Video Tape Evidence

Defendant first contends the trial court erred in admitting the video tape seized from his residence, as well as still photographs taken from that video tape, as substantive evidence of the alleged crimes. Defendant argues the State failed to properly authenticate the video tape prior to its introduction into evidence. We do not agree.

Video tapes are admissible as substantive evidence as long as applicable evidentiary requirements are met. *See* N.C. Gen. Stat. § 8-97 (2003). Rule 901 of the North Carolina Rules of Evidence requires "authentication or identification as a condition precedent to admissibility" of evidence. N.C. Gen. Stat. § 8C-1, Rule 901(a) (2003). The authentication or identification requirement is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id*. The General Assembly lists ten examples of authentication conforming with the rule, but is careful to note that the examples are "[b]y way of illustration only, and not by way of limitation . . . ." N.C. Gen. Stat. § 8C-1, Rule 901(b) (2003). Proper authentication of video tape evidence includes:

> (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 and internal quotations omitted), *reversed on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990); *see also State v. Mason*, 144 N.C. App. 20, 26, 550 S.E.2d 10, 15 (2001) (noting there are "three

significant areas of inquiry for a court reviewing the foundation for admissibility of a videotape: (1) whether the camera and taping system in question were properly maintained and were properly operating when the tape was made, (2) whether the videotape accurately presents the events depicted, and (3) whether there is an unbroken chain of custody"); *State v. Sibley*, 140 N.C. App. 584, 586, 537 S.E.2d 835, 837-38 (2000) (same).

We also note that our Supreme Court, in addressing the admissibility of *audio*tapes, has stated that " '[u]nder Rule 901, testimony as to accuracy based on personal knowledge is all that is required to authenticate a tape recording, and a recording so authenticated is admissible if it was legally obtained and contains otherwise competent evidence.' " *State v. Jones*, 358 N.C. 330, 344-45, 595 S.E.2d 124, 134 (quoting *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991)), *cert. denied*, —— U.S. ——, 160 L. Ed. 2d 500 (2004). Under this line of cases, any "conflict in the evidence goes to the weight and credibility of the evidence not its admissibility." *Stager*, 329 N.C. at 317, 406 S.E.2d at 898.

Defendant argues the State failed to introduce (1) sufficient evidence of an unbroken chain of custody; (2) testimony that the video tape accurately presents the events depicted; and (3) testimony that the video tape had not been altered. We disagree.

Agent Smith testified he was present when postal inspectors discovered the video tape in question, which was a "VHS-C" type, along with other video tapes, in a safe in defendant's bedroom. The video tapes were photographed in the safe, and then removed by postal inspectors. The video tape remained in postal inspector custody until brought to Agent Smith by the postal inspector. Agent Smith recognized the video tape as being the same one seized from defendant's residence. The two reviewed the video tape at Agent Smith's office. Agent Smith then took all of the video tapes to the SBI's digital evidence laboratory, and he provided detailed testimony about the chain of custody of the video tape at the SBI. Agent Smith then maintained custody of the video tape until trial.

Agent Smith further testified that the room depicted in the video tape shown to the jury was identical to the master bedroom in defendant's residence and that the man in the video tape was defendant. K.H.'s mother testified defendant owned a camcorder (the type of machine on which "VHS-C" tapes are recorded) and a tripod, which he had used to videotape them having sexual intercourse in the mas-

ter bedroom of defendant's residence. She also identified the room depicted in the video tape as defendant's master bedroom and the man on the video tape as defendant. K.H.'s mother identified the young girl on the video tape as K.H.

The testimony of Agent Smith establishes an unbroken chain of custody from the time the tape was found in defendant's residence. Further, there was ample testimony to establish the identities of defendant, the girl, and defendant's residence depicted on the video tape. There was also testimony to establish that defendant's camcorder was in working condition. Finally, there was sufficient evidence from the testimony regarding chain of custody to establish the video tape had not been edited or altered, and that the same video tape seized from defendant's residence was the same video tape reviewed by the jury. We conclude the trial court properly admitted the video tape and the photographs taken therefrom, and we overrule defendant's first assignment of error.

B. Interstate Agreement on Detainers

[2] Defendant next contends the State violated the Interstate Agreement on Detainers ("IAD") or unconstitutionally evaded the operation of that statute by arraigning defendant in Orange County District Court and returning defendant to federal custody without resolving his case. Specifically, defendant contends his charges should have been dismissed on the ground he was in federal custody when the State served him with the order for arrest. Defendant argues the order for arrest acted as a "detainer" and brought him into the jurisdiction of the State such that his subsequent return to federal custody without trial violated the provisions of Article IV of the IAD. We disagree.

The IAD is a compact entered into by North Carolina, forty-eight other states, the United States government, and the District of Columbia, and establishes a procedure for resolution of one state's outstanding charges against a prisoner of another state or the United States. *See* N.C. Gen. Stat. § 15A-761 (2003) (codifying IAD); *see also New York v. Hill*, 528 U.S. 110, 111, 145 L. Ed. 2d 560, 564 (2000). For our purposes, Article IV of the agreement provides Orange County, North Carolina, as the "jurisdiction in which an untried indictment . . . is pending," a procedural mechanism to have a defendant brought from another jurisdiction where he is already serving a sentence: here, the federal government. N.C. Gen. Stat. § 15A-761, art. IV(a).

Defendant is correct in asserting that once the prisoner arrives in the jurisdiction of the receiving state (the state in which the charges are pending), trial on those charges must commence within 120 days. *See* N.C. Gen. Stat. § 15A-761, art. IV(c) (2003). Also, "[i]f trial is not had on any indictment . . . prior to the prisoner's being returned to the original place of imprisonment . . . such indictment . . . shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." N.C. Gen. Stat. § 15A-761, art. IV(e) (2003). The provisions of the IAD are triggered only, however, when a "detainer" is filed with the sending state or institution by the receiving state. *United States v. Mauro*, 436 U.S. 340, 343, 56 L. Ed. 2d 329, 336 (1978).

Although no court has ever precisely determined what type of notice or request serves as a "detainer," thereby triggering the IAD, the United States Supreme Court has held that a federal writ of habeas corpus *ad prosequendum* is not a detainer for purposes of the IAD. *Mauro*, 436 U.S. at 361, 56 L. Ed. 2d at 347. The Court has also noted that "the Government need not proceed by way of the Agreement. . . . It is only when the Government does file a detainer that it becomes bound by the Agreement's provisions." *Id.* at 364 n. 30, 56 L. Ed. 2d at 349 n. 30.

Here, the State contends it never filed a detainer with any institution or sending state. It argues defendant was brought to appear for trial via a writ of habeas corpus *ad prosequendum*, thus never triggering the IAD. Defendant does not dispute the writ, but argues that the state arrest warrant, served on defendant twenty-one months before he was brought to trial and while he was in federal custody, either was a "detainer" or acted as one within the spirit of the IAD.

A detainer has been explained as a "legal order that requires a State in which an individual is currently imprisoned to hold that individual when he has finished serving his sentence so that he may be tried by a different State for a different crime." *Alabama v. Bozeman*, 533 U.S. 146, 148, 150 L. Ed. 2d 188, 192 (2001); *see also Mauro*, 436 U.S. at 359, 56 L. Ed. 2d at 346 (defining detainer as " 'a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction' " (internal citation omitted)).

Although this Court has never considered the issue of whether an arrest warrant or order for arrest acts as a detainer, cases from other jurisdictions are instructive. The District of Columbia Court of

Appeals construing Article III of the IAD has held that an arrest warrant serves as a detainer, and therefore triggers the provisions of the IAD, only if:

> 1) it is based on an untried information, indictment, or complaint; 2) it is filed by a criminal justice agency; 3) it is filed directly with the facility where a prisoner is incarcerated; 4) it notifies prison officials that a prisoner is wanted to face pending charges; and 5) it asks the institution where the prisoner is incarcerated either to hold the prisoner at the conclusion the prisoner's sentence, or to notify agency officials when the prisoner's release is imminent.

Tucker v. U.S., 569 A.2d 162, 165 (D.C. App. 1990). In *Tucker*, detectives with the District of Columbia Police Department went to South Carolina to interview a defendant being held for trial on charges in South Carolina. As a courtesy to the officers in South Carolina, the District detectives took copies of the arrest warrants filed in D.C. against the defendant. *Id.* at 164-65. The defendant argued that leaving the arrest warrants with the South Carolina police, who actually forwarded them to the state corrections facility, acted as a detainer. The *Tucker* Court rejected that argument, instead adopting the criteria above. *Id.*

Looking to the order for arrest used in this case, it appears only the first criteria from *Tucker* is met. Defendant did have an untried indictment pending in Orange County when he was served with the order while in federal custody. However, there is nothing in the record to suggest that the order for arrest was ever filed with the Federal Bureau of Prisons, or any institution. There is also nothing in the record to suggest that the State requested federal officials to hold defendant at the end of his federal sentence or notify it prior to defendant's release from federal custody. Accordingly, we do not construe "detainer" to include the arrest warrant served on defendant in this case. N.C. Gen. Stat. § 15A-761, art. IX (2003); *Tucker*, 569 A.2d at 165. The order for arrest served on defendant while in the Orange County jail was not a detainer, and the provisions of the IAD are not applicable to defendant. We overrule defendant's second assignment of error.

In conclusion, the order for arrest served on defendant while in the Orange County jail was not a detainer, and the provisions of the IAD are not applicable to defendant. Further, the trial court properly admitted a video tape depicting defendant engaged in the criminal act

for which he was convicted. In the judgment of the trial court we therefore find

No error.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. BILLY RAY BROWN, DEFENDANT

No. COA04-316

(Filed 7 June 2005)

1. Appeal and Error— denial of post-conviction DNA testing—no statutory right of appeal

There is no statutory right to appeal from a grant or denial of a motion for post-conviction DNA testing.

2. Appeal and Error— denial of post-conviction DNA testing—writ of certiorari

The Court of Appeals had no authority to allow defendant's petition for a writ of certiorari from the denial of post-conviction DNA testing. These motions cannot be treated as motions for appropriate relief, which would allow review by certiorari, because they do not involve the grounds specified by N.C.G.S. § 15A-1415(b). Review under Rule 21 of the Rules of Appellate Procedure is also not available.

3. Appeal and Error— denial of post-conviction DNA testing—appellate review to prevent manifest injustice—denied

Review of the denial of defendant's motion for post-conviction DNA testing under Appellate Rule 2 was declined because it was not necessary to prevent manifest injustice, and the Court of Appeals declined to exercise its discretion.

Appeal by defendant from order entered 17 December 2003 by Judge W. Russell Duke, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 10 January 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General William P. Hart, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, for defendant-appellant.

GEER, Judge.

Defendant Billy Ray Brown appeals from the trial court's denial of his motion for post-conviction DNA testing under N.C. Gen. Stat. § 15A-269 (2003). The State has argued that the appeal must be dismissed because the statute does not provide for appellate review and because review by writ of certiorari is unavailable. We agree and, accordingly, dismiss defendant's appeal.

Facts and Procedural History

On 25 September 2000, defendant, a former assistant principal at a middle school, was indicted for attempted second degree rape of a former student, R.T. Defendant was convicted on that charge on 15 November 2001, and Judge Thomas D. Haigwood sentenced him to a presumptive sentence of 58 months to 79 months imprisonment. Defendant did not timely notice appeal, but on 24 April 2002, defendant filed a petition for writ of certiorari in this Court, seeking a belated appeal based upon ineffective assistance of counsel. This Court allowed the belated appeal and subsequently upheld defendant's conviction and sentence. *State v. Brown*, 163 N.C. App. 784, 595 S.E.2d 238 (2004) (unpublished). A full account of the facts are set forth in that opinion.

The facts pertinent to this appeal are as follows. On 11 September 2000, R.T. was at home with her two-year old son. At approximately 2:30 p.m., defendant knocked at R.T.'s door. After defendant entered R.T.'s home, he asked to use her bathroom. When he returned from the bathroom, he made various sexually-related remarks and rubbed his penis through his shorts in front of R.T., causing R.T. to ask defendant to leave. Defendant then asked to use the bathroom a second time, and R.T. attempted to call her father while defendant was in the bathroom. Defendant, however, knocked the phone out of her hand and pushed her against a kitchen bar with his body. He attempted to kiss R.T., ripped her t-shirt open, fondled her breasts, and then threw her to the floor. He struck R.T. in the face, unfastened her jeans, and pulled out his penis. R.T. testified that she never actually saw his penis, but she felt it pressing against her stomach. When R.T. kicked defendant between his legs, defendant got up, banged his

head against a lamp, and ran out of the apartment while pulling his shorts up.

Defendant admitted at trial that he had been in R.T.'s house, but testified that they had simply had a conversation. He denied engaging in any of the sexual conduct to which R.T. testified. Specifically, defendant denied ever trying to kiss R.T., ripping her shirt, touching her breasts, throwing her to the ground, unfastening her pants, or rubbing and exposing his penis to her.

On 15 November 2001—the same day that the jury found defendant guilty of attempted second degree rape—Judge Haigwood signed an "Order for Disposition of Physical Evidence." In the order, the court directed that certain items of evidence—an orange t-shirt and a pair of black jeans—should be returned to R.T. or disposed of in accordance with the law. On 26 December 2001, after defendant had failed to appeal his conviction, the shirt and jeans were turned over to Velvet Blizzard of the Washington Police Department.

On 23 April 2002—a day prior to filing his petition for writ of certiorari—defendant filed a *pro se* motion seeking DNA testing pursuant to N.C. Gen. Stat. § 15A-269. Defendant requested that the court order DNA testing of (1) a torn blouse, (2) a pair of pants, (3) "[l]adies undergarment," (4) nail clippings and hair samples, and (5) any other similar evidence from the crime that might be unknown to defendant. Despite defendant's motion and unbeknownst to defendant, the t-shirt and jeans were destroyed by the police on 13 August 2002 after R.T. indicated that she did not want them returned.

Counsel was appointed on 13 September 2002 to represent defendant in connection with his motion for post-conviction DNA testing. That motion was heard before Judge W. Russell Duke, Jr. on 4 September 2003. At the hearing, defendant and his counsel learned for the first time that R.T.'s t-shirt and jeans had already been destroyed. During the hearing, Detective Steve Waters of the Washington Police Department testified that he had inspected the clothing at issue on the night of the incident and had found no evidence of any kind of bodily fluid transfer. He, therefore, did not order any DNA testing prior to the trial of defendant. Additionally, Waters testified that he never obtained any undergarments from R.T. or any nail clippings or hair samples.

On 17 December 2003, the trial court denied defendant's motion for post-conviction DNA testing. In its order, the court found that Detective Waters, who was experienced in handling biological evi-

dence, had examined the victim herself and the clothing she wore during the assault and did not observe any stains or other indication that bodily fluids had been transferred. The court also found that no nail or skin scrapings were collected from either the defendant or the victim because Detective Waters did not observe any scratches or skin irritations. Finally, the court found that the undergarments were never removed from the victim during the commission of the crime. Based upon these findings, the trial court determined that there was "no evidence that any biological evidence was transferred from the Defendant to the victim or the crime scene" and "no evidence that any biological evidence exists from which DNA testing could be conducted." The court concluded that the destruction of the t-shirt and jeans by the Washington Police Department was not done in bad faith and did not prejudice the defendant because there was no evidence that showed biological evidence existed on the clothing.

On 22 December 2003, defendant filed a notice of appeal from the trial court's order. In its appellee brief, the State argued that defendant does not have a right to appeal the trial court's denial of his motion for DNA testing. On 4 January 2005, defendant filed an "Alternative Application to Treat Appeal as a Petition for Writ of Certiorari."

Discussion

A. The Right to Post-Conviction DNA Testing

[1] In 2001, the General Assembly enacted "An Act to Assist an Innocent Person Charged With or Wrongly Convicted of a Criminal Offense in Establishing the Person's Innocence." 2001 N.C. Sess. Laws 282 (hereinafter "the Act"). Under this Act, a criminal defendant, as of 13 July 2001, has a right of access before trial to (1) any DNA analyses performed in connection with his case and (2) "[a]ny biological material, that has not been DNA tested, that was collected from the crime scene, the defendant's residence or the defendant's property." N.C. Gen. Stat. § 15A-267(a) (2003). Additionally, effective 1 October 2001, "a governmental entity that collects evidence containing DNA in the course of a criminal investigation shall preserve a sample of the evidence collected for the period of time a defendant convicted of a felony is incarcerated in connection with that case." N.C. Gen. Stat. § 15A-268(a) (2003).[1] The sample may be disposed of earlier only

1. This provision applies to evidence, records, and samples in the government's possession on or after the effective date of 1 October 2001. 2001 N.C. Sess. Laws 282, s. 6.

upon fulfillment of certain conditions, including notification of the defendant and defendant's counsel. N.C. Gen. Stat. § 15A-268(b).

Also effective 1 October 2001, following conviction, a defendant "may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing of any biological evidence . . . ." N.C. Gen. Stat. § 15A-269(a). In order to obtain "DNA testing of any biological evidence," the defendant must show that the evidence (1) is material, (2) is related to the investigation or prosecution, and (3) was not previously DNA tested or, if it was tested, current DNA testing would provide results that are significantly more accurate or would have a reasonable probability of contradicting prior test results. *Id.* The trial court shall grant a motion for post-conviction DNA testing (1) when the conditions set forth in N.C. Gen. Stat. § 15A-269(a) are met and (2) "there exists a reasonable probability that the verdict would have been more favorable to the defendant" if the DNA testing being requested had been conducted. N.C. Gen. Stat. § 15A-269(b).

If a motion for post-conviction DNA testing under N.C. Gen. Stat. § 15A-269 is allowed, the court shall, upon receiving the results of the testing, "conduct a hearing to evaluate the results and to determine if the results are unfavorable or favorable to the defendant." N.C. Gen. Stat. § 15A-270(a) (2003). If the results are not favorable, then the court shall dismiss the motion. N.C. Gen. Stat. § 15A-270(b). If, however, the results are favorable, then the court shall enter an order that "serves the interests of justice" and may (1) vacate and set aside the judgment, (2) discharge the defendant, (3) resentence the defendant, or (4) grant a new trial. N.C. Gen. Stat. § 15A-270(c).

B. The Right to Appeal

In its brief, the State argues that there is no right to appeal the denial of a motion for post-conviction DNA testing. "The right to appeal in a criminal proceeding is purely statutory." *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876 (1995), *aff'd per curiam on other grounds*, 342 N.C. 638, 466 S.E.2d 277 (1996). Further, Rule 4(a) of the Rules of Appellate Procedure provides that the appellate courts have jurisdiction over an appeal by "[a]ny party *entitled by law* to appeal from a judgment or order of a superior or district court rendered in a criminal action . . . ." N.C.R. App. P. 4(a) (emphasis added). The first question is, therefore, whether any statute authorizes an appeal of the denial of defendant's motion for post-conviction DNA testing.

There is no language in N.C. Gen. Stat. § 15A-269 or § 15A-270 that allows an appeal as of right from a grant or denial of a motion for post-conviction DNA testing. Indeed, there is no language addressing appellate review at all. In 2001, the General Assembly simply did not address the issue of appellate review in the Act and has not amended the legislation since to provide review.

Nor do any other statutes governing criminal proceedings provide a right to appeal in cases such as this one. Generally, the right to appeal in criminal cases is set out in N.C. Gen. Stat. § 15A-1444 (2003). Under that statute, a defendant who pleads not guilty at trial may appeal the judgment itself as a matter of right. N.C. Gen. Stat. § 15A-1444(a). In addition, a defendant who was found guilty or who pled guilty or no contest has the right to appeal the following issues:

> (1) whether the sentence is supported by the evidence (if the minimum term of imprisonment does not fall within the presumptive range); (2) whether the sentence results from an incorrect finding of the defendant's prior record level under N.C. Gen.Stat. § 15A-1340.14 or the defendant's prior conviction level under N.C. Gen.Stat. § 15A-1340.21; (3) whether the sentence constitutes a type of sentence not authorized by N.C. Gen. Stat. § 15A-1340.17 or § 15A-1340.23 for the defendant's class of offense and prior record or conviction level; (4) whether the trial court improperly denied the defendant's motion to suppress; and (5) whether the trial court improperly denied the defendant's motion to withdraw his guilty plea.

State v. Carter, 167 N.C. App. 582, 584, 605 S.E.2d 676, 678 (2004). In addition, N.C. Gen. Stat. § 15A-1432(d) (2003) allows a defendant, under certain circumstances, to appeal on an interlocutory basis a superior court's order reinstating criminal charges after a district court dismissal. Defendant's appeal does not fall within any of these categories of appeal.

Defendant does not point to any other statute specifically authorizing appeal from the order below, but argues that his appeal is permissible under N.C. Gen. Stat. § 7A-27(b) (2003). N.C. Gen. Stat. § 7A-27(b) allows an appeal "[f]rom any final judgment of a superior court." A denial of a motion for post-conviction DNA testing does not, however, constitute a "final judgment" as defined in criminal proceedings. Under N.C. Gen. Stat. § 15A-101(4a) (2003), judgment is defined as "when sentence is pronounced." *See also Berman v.*

United States, 302 U.S. 211, 212, 82 L. Ed. 204, 204, 58 S. Ct. 164, 165 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."). The order below does not involve the pronouncement of a sentence.

Accordingly, there is no statutory right of appeal to this Court from a grant or denial of a motion for post-conviction DNA testing. We, therefore, turn to consideration of defendant's alternative petition for writ of certiorari.

C. Petition for Writ of Certiorari

[2] In support of his petition for writ of certiorari, defendant first argues that motions for post-conviction DNA testing should be treated as motions for appropriate relief, which would allow us to review the trial court's order pursuant to N.C. Gen. Stat. § 15A-1422(c)(3) (2003). That statute provides that review of an order denying a motion for appropriate relief is by writ of certiorari "[i]f the time for appeal has expired and no appeal is pending . . . ." *Id.*

Defendant's motion for post-conviction DNA testing cannot, however, be deemed a motion for appropriate relief. N.C. Gen. Stat. § 15A-1415(b) (2003) sets forth "the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment." In addition, N.C. Gen. Stat. § 15A-1415(c) provides that "a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time . . . ." Defendant acknowledges that his motion does not involve any of the grounds specified in N.C. Gen. Stat. § 15A-1415(b) or (c). It cannot, therefore, be considered a motion for appropriate relief.

Review is also not available under Rule 21 of the North Carolina Rules of Appellate Procedure:

> [T]his Court is limited to issuing a writ of certiorari "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when [1] the right to prosecute an appeal has been lost by failure to take timely action, or [2] when no right of appeal from an interlocutory order exists, or [3] for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief."

State v. Pimental, 153 N.C. App. 69, 76-77, 568 S.E.2d 867, 872 (quoting N.C.R. App. P. 21(a)(1)), *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). In addition, under *State v. Bolinger*, 320 N.C. 596, 601-02, 359 S.E.2d 459, 462 (1987), a defendant may petition for writ of certiorari when challenging the procedures followed in accepting a guilty plea. *State v. Niccum*, 293 N.C. 276, 278, 238 S.E.2d 141, 143 (1977) also permits a petition for writ of certiorari upon denial of a petition for writ of habeas corpus.

In this case, seeking review of the DNA testing order, defendant did not lose the right to appeal by failing to take timely action; he does not challenge any guilty plea procedures; and his motion is not a petition for writ of habeas corpus. We have, however, held that the trial court's order did not constitute a "final judgment" in a criminal proceeding, thereby raising the question whether it can be considered an interlocutory order. An interlocutory order is defined as "one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). A motion for post-conviction DNA testing cannot be considered an interlocutory order because it is not made during the pendency of a criminal proceeding. The conviction has already been entered and there is no further action for the court to take. Accordingly, we have no authority to allow defendant's petition for writ of certiorari.

D. Rule 2 of Appellate Procedure

[3] The State suggests that this Court may use Rule 2 of the North Carolina Rules of Appellate Procedure to suspend the requirements of Rule 21. 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 application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2.

We decline to exercise our discretion under Rule 2 because defendant has failed to demonstrate that review is necessary in order to prevent manifest injustice. First, defendant is arguing that testing

the clothing would show a lack of DNA evidence, thereby corroborating his testimony. The statute, however, provides for testing of "biological evidence" and not evidence in general. N.C. Gen. Stat. § 15A-269(a). Since defendant desires to demonstrate a lack of biological evidence, the post-conviction DNA testing statute does not apply. Moreover, this case involves an *attempted* rape charge. Given the evidence offered at trial, the absence of DNA evidence would not necessarily exonerate defendant. This is not a case in which DNA testing would point to another perpetrator. Rather, DNA testing would only show that there was no bodily fluid transfer, a fact that would not exonerate defendant.

Second, defendant argues that sanctions should be imposed for the Washington Police Department's failure to preserve the evidence for testing. Without a showing that the clothing contained biological material or DNA, the requirement to preserve a sample of the evidence under N.C. Gen. Stat. § 15A-268 is not implicated. Moreover, as defendant admits, the legislation fails to provide a remedy for the improper destruction of relevant biological material. Defendant, however, asks this Court to devise a remedy for improperly destroyed biological evidence. We decline to do so—that is a task for the General Assembly and not the Court of Appeals.

Because we conclude that review is not necessary to prevent manifest injustice, we decline to exercise our power under Rule 2 to suspend the requirements of Rule 21 and allow defendant's petition for writ of certiorari. Accordingly, we have no choice but to dismiss defendant's appeal.

Conclusion

The General Assembly may wish to address the absence of any provision for appellate review of decisions under N.C. Gen. Stat. §§ 15A-269 and -270. Although the title of the Act—"An Act to Assist an Innocent Person Charged With or Wrongly Convicted of a Criminal Offense in Establishing the Person's Innocence"—indicates an intent to ensure that innocent defendants have the means to exonerate themselves, the lack of any appellate review, whether by appeal or certiorari, may undermine that goal. Until the General Assembly indicates otherwise, defendants are limited to reliance upon Rule 2.

Dismissed.

Chief Judge MARTIN and Judge CALABRIA concur.

SHAWN M. REEVES, PETITIONER v. YELLOW TRANSPORTATION, INC., AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. COA04-1140

(Filed 7 June 2005)

1. Unemployment Compensation— judicial review—interlocutory appeal

Appeal from superior court review of an Employment Security Commission decision is as provided in civil cases, and in general may not be from an interlocutory order. The trial court here did not rule on the merits of the claim and the appeal was dismissed as interlocutory.

2. Unemployment Compensation— discharge for substantial fault—findings

Employment Security Commission findings concerning problems in petitioner's performance of loading and driving duties for a shipping company were presumed correct on appeal because plaintiff did not except to them, and those findings supported the conclusion that petitioner was discharged for substantial fault.

3. Unemployment Compensation— disqualification—no reduction—supported by findings

The Employment Security Commission decision not to reduce the period of petitioner's disqualification from unemployment insurance benefits was supported by the findings and did not constitute error.

Appeal by petitioner from orders entered 9 June 2004 by Judge Wade Barber in Orange County Superior Court. Heard in the Court of Appeals 24 March 2005.

Thomas H. Hodges, Jr., for respondent-appellee Employment Security Commission of North Carolina.

Daniel F. Read, for petitioner-appellant.

LEVINSON, Judge.

Petitioner (Shawn Reeves) appeals from two orders of the trial court that reviewed orders by respondent North Carolina Employment Security Commission (ESC). We dismiss in part and affirm in part.

The factual and procedural history of this case is summarized as follows: In April 2002 petitioner began working for respondent Yellow Transportation Inc., a shipping and transportation company, at its Morrisville, North Carolina shipping terminal. Petitioner's employment as a dock worker and city driver required him to load and unload freight, transport materials to specified destinations, and perform various other duties under Yellow Transportation's supervision. He was also required to record pertinent data, such as freight location or movement, or odometer readings.

In August and September of 2002, petitioner received several written warnings about errors or omissions in his work, including: (1) a written warning for failure to record an odometer reading; (2) a one day suspension for error in recording freight data; (3) a three day suspension for failure to load material in the proper place; and (4) a fourth warning, accompanied by a discharge letter, for failure to load certain freight as directed. Petitioner grieved each of these written warnings, and a meeting was conducted as provided by the collective bargaining agreement between Yellow Transportation and petitioner's union. The meeting resulted in an agreement that petitioner would serve a three day suspension and that Yellow Transportation would rescind a fifth warning alleging that petitioner had been involved in a preventable accident. Petitioner served the three day suspension in October 2002. On 7 February 2003 Yellow Transportation issued petitioner another discharge letter, this time for his failure to properly transfer bags of salt from a pallet to a storage trailer. On 17 February 2003 the company issued petitioner a third discharge letter for not sweeping out an empty trailer as he had been instructed. Petitioner grieved both discharges, which were reviewed by a committee that included representatives of petitioner's union and Yellow Transportation. This committee reduced the 17 February discharge to a warning, but sustained petitioner's 7 February 2003 discharge. Petitioner was discharged from his employment, and last worked for Yellow Transportation on 17 March 2003.

After his discharge petitioner filed a claim with the North Carolina ESC, effective 9 February 2003, seeking unemployment insurance benefits (UID). Petitioner's claim for UI benefits was denied by an ESC adjudicator, pursuant to N.C.G.S. § 96-14(2) (2003), on the basis that he was discharged for misconduct. Petitioner appealed the adjudicator's decision, and his claim was heard by an ESC Appeals Referee. The Referee issued a decision finding petitioner was discharged for substantial fault not rising to the level of

misconduct, and disqualifying petitioner from UI benefits for a period of four weeks. Petitioner appealed to the ESC, and in Docket 03(UI)6077 the ESC modified the decision of the Appeals Referee by disqualifying petitioner from benefits for nine weeks.

Petitioner also filed another claim on 23 March 2003, and requested that it be made effective as of 16 March 2003. An Appeals Referee found petitioner was disqualified from receiving benefits for that week because he had not timely filed the claim. On appeal, the ESC in Docket 03(UI)7400 upheld this decision.

Petitioner appealed both of the ESC's decisions to superior court. On 9 June 2004 the trial court issued an order in Docket 03(UI)7400, remanding the case to the Commission for entry of a new order. Regarding Docket 03(UI)6077, the trial court ruled that "the Employment Security Commission's Findings Of Fact were based upon competent evidence contained in the record; the Employment Security Commission properly applied the law to those facts; and that Decision No. 03(UI)6077 should be affirmed in its entirety." Petitioner appealed both of the trial court's orders to this Court.

Appeal from Docket 03(UI)7400

[1] Appeal from the trial court's review of an ESC decision is governed by N.C.G.S. § 96-15(i) (2003), which provides in relevant part that "appeal may be taken from the judgment of the superior court, as provided in civil cases." In the instant case, we conclude that appeal from Docket 03(UI)7400 is not authorized by the North Carolina Rules of Civil Procedure.

An order "is either interlocutory or the final determination of the rights of the parties." N.C.G.S. § 1A-1, Rule 54(a) (2003). "The distinction between the two was addressed in *Veazey v. Durham*, 231 N.C. 354, [361-62], 57 S.E.2d 377, [381] (1950), wherein the Court stated: 'A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.' " *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001).

In Docket 03(UI)7400, the trial court did not rule on the merits of petitioner's claim. Instead, the court found that the ESC's order in

Docket 03(UI)7400 did not "address all of the relevant issues raised by the record" and that the findings were incomplete and failed to set out the sequence of events regarding the timing and notification of petitioner's discharge. The court concluded that "questions raised by the record need to be addressed by the ESC in more specific Findings of Fact and Conclusions of Law" and remanded Docket 03(UI)7400 to the ESC for "further Findings of Fact and Conclusions of Law." The order in Docket 03(UI)7400 is clearly interlocutory; it did not address the merits of petitioner's appeal, and it requires further action by the ESC.

In general, "there is no right to immediate appeal from an interlocutory order." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citing N.C.G.S. § 1A-1, Rule 54(b) [(2003)]). However, N.C.G.S. § 7A-27(d) (2003) permits immediate appeal from an interlocutory order that:

> (1) Affects a substantial right, or
>
> (2) In effect determines the action and prevents a judgment from which appeal might be taken, or
>
> (3) Discontinues the action, or
>
> (4) Grants or refuses a new trial[.]

N.C.G.S. § 1-277(a) (2003) also states, in pertinent part, that appeal "may be taken from every judicial order or determination of a judge of a superior or district court . . . which affects a substantial right[.]"

In the case *sub judice*, we conclude the order in Docket 03(UI)7400 neither affects a substantial right, nor meets any other criteria for immediate appeal, and thus should be dismissed as interlocutory. *See*, *e.g.*, *State ex rel. Employment Sec. Comm. v. IATSE Local* 574, 114 N.C. App. 662, 663-64, 442 S.E.2d 339, 340 (1994) (dismissing as interlocutory an appeal from superior court order which remanded ESC order to ESC Commission) (citing *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983)). We also note that *Facet Enterprises v. Deloatch*, 83 N.C. App. 495, 350 S.E.2d 906 (1986), cited by petitioner, is a straightforward appeal from a final judgment, and does not involve remand by the trial court. Petitioner's appeal from Docket 03(UI)7400 is dismissed as interlocutory.

Appeal from Docket 03(UI)6077—Standard of Review

N.C.G.S. § 96-15 (2003) sets out "the standard procedure for claims for UI benefits, appeals within ESC-agency, and appeals from the ESC-agency final decision to Superior Court." *Employment Security Commission v. Peace*, 341 N.C. 716, 718, 462 S.E.2d 222, 223 (1995). The statute "provides that[:]

> (1) a decision will be made by an adjudicator, N.C.G.S. § 96-15(b)(2) [(2003)]; (2) the adjudicator's decision may be appealed to an appeals referee, N.C.G.S. § 96-15(c); (3) on ESC-agency's own motion, the Commission or a Deputy Commissioner may affirm, modify, or set aside the decision of the appeals referee, N.C.G.S. § 96-15(e); and (4) an appeal to the Superior Court is available after exhaustion of the remedies set out above, N.C.G.S. § 96-15(h).

Peace, 341 N.C. at 718, 462 S.E.2d at 223.

Under N.C.G.S. § 96-15(h), a claimant's petition for superior court review of an ESC decision "shall explicitly state what exceptions are taken to the decision or procedure of the Commission and what relief the petitioner seeks." Superior Court jurisdiction is limited to exceptions and issues set out in the petition. *See Graves v. Culp, Inc.*, 166 N.C. App. 748, 751, 603 S.E.2d 829, 831 (2004) (because "claimant made no exceptions to the ESC's findings in his petition for review nor did he allege any fraud or procedural irregularity" he "did not preserve those issues for review by the superior court and the court lacked jurisdiction to address them").

In reviewing a decision by the ESC, "[t]he same standard of review applies in the superior court and in the appellate division: 'the findings [of fact] of the Commission, if there is any competent evidence to support them . . . shall be conclusive[.]' . . . Accordingly, this Court, like the superior court, will only review a decision by the [ESC] to determine 'whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law.' " *Davis v. Britax Child Safety, Inc.*, 163 N.C. App. 277, 281, 593 S.E.2d 97, 101 (2004) (quoting *In re Enoch*, 36 N.C. App. 255, 256, 243 S.E.2d 388, 389 (1978), and *RECO Transportation, Inc. v. Employment Security Comm.*, 81 N.C. App. 415, 418, 344 S.E.2d 294, 296 (1986)). Moreover:

> Even when the findings are not supported by the evidence, however, 'where there is no exception taken to such findings, they are

> presumed to be supported by the evidence and are binding on appeal.' In the present case, the findings of fact were not challenged and, hence, are conclusive; the sole question on appeal therefore is whether the findings of fact support the Commission's conclusion that the claimant was disqualified for unemployment compensation.

In re Hagan v. Peden Steel Co., 57 N.C. App. 363, 364, 291 S.E.2d 308, 309 (1982) (quoting *Beaver v. Paint Co.*, 240 N.C. 328, 330, 82 S.E.2d 113, 114 (1954)). *See also, e.g., Fair v. St. Joseph's Hosp.*, 113 N.C. App. 159, 161, 437 S.E.2d 875, 876 (1993) ("even if the findings of fact are not supported by the evidence, they are presumed to be correct if the petitioner fails to except") (citing *Hagan*, 57 N.C. App. at 364, 291 S.E.2d at 309).

Petitioner argues that the trial court erred by upholding the ESC's conclusions that (1) he was discharged for substantial fault, and that (2) reduction of the statutory period of disqualification was not justified by mitigating factors. We disagree.

[2] We first consider petitioner's argument that the Commission erred by concluding that he had been discharged for substantial fault not amounting to misconduct. In this regard, N.C.G.S. § 96-14(2a) (2003) provides that:

> Substantial fault is defined to include those acts or omissions of employees over which they exercised **reasonable control** and which violate **reasonable requirements** of the job, . . . but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment.

(emphasis added).

"The essence of G.S. § 96-14(2[a]) is that if an employer establishes a reasonable job policy to which an employee can conform, her failure to do so constitutes substantial fault. . . . An employee has 'reasonable control' when she has the physical and mental ability to conform her conduct to her employer's job requirements. . . . Reasonable control coupled with failure to live up to a reasonable employment policy equals substantial fault." *Lindsey v. Qualex, Inc.*, 103 N.C. App. 585, 590, 406 S.E.2d 609, 612 (1991) (citation omitted).

In the instant case, petitioner failed to except to any of the ESC's findings of fact in his petition for review in Superior Court. Accordingly, the Commission's findings are conclusively presumed to be correct on appeal. These findings include, in relevant part, the following:

. . . .

2. The claimant began working for the employer on or about April 23, 2002. He last worked for the employer on March 18, as a dock worker/local driver.

3. The claimant was discharged for repeated problems and carelessness in the performance of his loading dock and driving duties.

4. The claimant failed to complete his trip sheet paperwork that he was required to complete.

5. On August 8, 2002, the claimant failed to properly fill out freight paperwork, including marking a freight bill that was short on freight while the claimant was present on the loading dock.

6. On September 8, 2002, the claimant mistakenly loaded a trailer. More specifically, the claimant failed to correctly load the freight into the correct trailer. The claimant's mistake was due to a lack of attention. The claimant was warned and suspended three days as a result of his mistake.

7. On the same day, the claimant mistakenly recorded freight as having come in on a trailer.

8. On February 5, 2003, the claimant failed to place a pallet of salt bags in a storage trailer as directed; and on February 18, 2003, the claimant failed to sweep out a trailer as directed. The employer proposed the claimant's discharge under the governing collective bargaining agreement with the claimant's union. The claimant's proposed discharge was submitted to a joint employer-union grievance committee.

9. The joint committee ruled that the failure to sweep out the trailer did not warrant discharge, but did warrant a disciplinary warning letter. However, the committee also upheld the discharge based on the February 5, 2003 failure to place a pallet of salt bags in a proper storage trailer. The employer

> followed the required and approved disciplinary and discharge process. The claimant repeatedly failed to perform his job duties as required and was discharged on March 17, 2003.

On the basis of its findings of fact, the Commission concluded as a matter of law that petitioner had been dismissed for substantial fault, noting that "the claimant's own testimony and documents amounted to admissions of the claimant's failure to comply with the reasonable requirements of his job."

We conclude that the Commission's findings of fact support its conclusion of law that petitioner was discharged for substantial fault. We also conclude that Yellow Transportation's requirements that petitioner, *e.g.*, load and unload materials as directed, and keep proper records, were reasonable and were under petitioner's control. Accordingly, we conclude that the Commission did not err by concluding that petitioner was discharged for substantial fault, and that the trial court did not err by upholding the Commission's ruling. This assignment of error is overruled.

[3] We next consider petitioner's argument that the trial court erred by upholding the Commission's decision not to shorten the period of petitioner's disqualification from UI benefits.

N.C.G.S. § 96-14(2a) (2003), provides in pertinent part that a claimant "shall be disqualified for benefits:

> (2a) For a period of not less than four nor more than 13 weeks . . . if it is determined by the Commission that such individual . . . was discharged for substantial fault on his part connected with his work . . . Upon a finding of discharge under this subsection, the individual shall be disqualified for a period of nine weeks unless, based on findings by the Commission of aggravating or mitigating circumstances, the period of disqualification is lengthened or shortened within the limits set out above.

In the present case, the Commission concluded that claimant's "repeated failures do not justify mitigating the offense of substantial fault." This conclusion is supported by the Commission's findings of fact, and does not constitute error on the part of the Commission. Moreover, petitioner did not raise this issue by his petition, and thus did not preserve it for appellate review. We conclude that the Commission did not err by declining to reduce the period of petitioner's disqualification from UI benefits.

We have considered petitioner's remaining arguments, and find them to be without merit. Accordingly, the trial court's ruling in Docket 03(UI)6077 is affirmed.

Affirmed in part, dismissed in part.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. KRISTIE W. WHITFIELD

No. COA04-719

(Filed 7 June 2005)

Constitutional Law; Probation and Parole— right to counsel— revocation of probation—waiver

The trial court did not err by revoking defendant's probation and by activating her prison sentence for convictions of felony possession of cocaine and possession of cocaine with intent to sell and deliver even though defendant contends she should not have been permitted to proceed pro se without the trial court determining whether her waiver of the right to counsel was knowing, intelligent, and voluntary, because: (1) the trial court made the appropriate inquiry when it followed all three requirements set forth under N.C.G.S. § 15A-1242; (2) cognizant of these facts, defendant verbally gave a knowing, intelligent, and voluntary waiver of her right to counsel; (3) defendant later signed a document indicating that she waived her right to counsel and wanted to appear on her own behalf; (4) after defendant waived her right to counsel, she was competent enough to make a motion to continue the case; and (5) defendant made the comment about why she could not hire an attorney after the prosecutor asked her to admit or deny the charges, and defendant's explanation was not responsive to the inquiry but instead seemed to be a deliberate attempt to avoid answering the question.

Judge ELMORE dissenting.

Appeal by defendant from judgments entered 12 January 2004 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 14 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender, Matthew D. Wunsche, for defendant appellant.

McCULLOUGH, Judge.

Defendant Kristie W. Whitfield appeals from the trial court's order revoking her probation and activating her prison sentence. This case arose after defendant pled guilty to two separate drug convictions.

On 5 June 2002, defendant pled guilty to felony possession of cocaine. At that time, the trial judge sentenced defendant to between four and five months in prison. The judge suspended the sentence and placed defendant on probation for twenty-four months. On 22 May 2003, defendant pled guilty to possession of cocaine with intent to sell and deliver. The judge sentenced defendant to between eight and ten months in prison. The judge suspended the sentence and placed defendant on probation for eighteen months.

The terms of defendant's probation for the two convictions required her to perform community service, follow a nighttime curfew, pay community service costs, and regularly visit her probation officer.

On or about 28 October 2003, defendant's probation officer filed notices of probation violations against defendant in Wake County. The notices alleged that defendant failed to complete her community service hours, broke her curfew on several dates, missed office appointments with her probation officer, and did not pay community service fees, court fees, and probation fees.

A hearing occurred on 12 January 2004 in Wake County Superior Court. The trial court revoked defendant's probation and activated her sentences. Defendant appeals.

On appeal, defendant argues that the trial court erred by permitting her to proceed *pro se* without properly determining whether her waiver of the right to counsel was knowing, intelligent, and voluntary. We disagree and affirm the decision of the trial court.

Pursuant to N.C. Gen. Stat. § 15A-1344 (2003), a trial court may modify or revoke probation when a person violates one of the terms of probation. Subsection (d) of the statute provides in pertinent part:

> If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor.

N.C. Gen. Stat. § 15A-1344(d).

A defendant has a right to assistance of legal counsel during a probation revocation hearing. N.C. Gen. Stat. § 15A-1345(e) (2003). Defendant also has the right to refuse the assistance of counsel and proceed *pro se*. *State v. Gerald*, 304 N.C. 511, 516, 284 S.E.2d 312, 316 (1981). A defendant must clearly and unequivocally waive the right to counsel, and the trial court must make a thorough inquiry as to whether defendant's waiver was knowing, intelligent, and voluntary. *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994), *cert. denied*, 531 U.S. 843, 148 L. Ed. 2d 67, *reh'g denied*, 531 U.S. 1002, 148 L. Ed. 2d 475 (2000). A signed written waiver is presumptive evidence that a defendant wishes to act as his or her own attorney. *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). However, the trial court must still comply with N.C. Gen. Stat. § 15A-1242 (2003). This statute allows a defendant to proceed without counsel if the trial judge makes a thorough inquiry and is satisfied that defendant:

> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Id.

Defendant's contention is that the trial judge failed to comply with this statutory mandate. During the hearing, the following exchange took place between the trial judge and defendant:

THE COURT: All right. Ms. Whitfield, do you understand that you have possibly 11 to 15 months hanging over your head?

DEFENDANT: Yes, ma'am.

THE COURT: You understand that?

DEFENDANT: Yes, ma'am.

THE COURT: If your probation is revoked, you may very well have your sentence activated, have to serve that time. You're entitled to have an attorney to represent you. Are you going to hire an attorney to represent you, represent yourself, or ask for a court appointed attorney[?] [O]f those three choices, which choice do you make?

DEFENDANT: Represent myself.

THE COURT: Put your left hand on the Bible and raise your right hand.

(The Defendant was sworn by the Court)

THE COURT: That is what you want to do, so help you God?

DEFENDANT: Yes, ma'am.

This exchange reveals that the trial judge did make the appropriate inquiry as to whether defendant's waiver was knowing, intelligent, and voluntary. The trial judge followed all three requirements set forth in N.C. Gen. Stat. § 15A-1242. She informed defendant of the right of assistance of counsel, including the right to a court-appointed attorney if defendant was entitled to one. The trial judge also made sure that defendant understood that her probation could be revoked, that her sentences could be activated, and that she could serve eleven to fifteen months in prison. Cognizant of these facts, defendant verbally gave a knowing, intelligent, and voluntary waiver of her right to counsel. Later, defendant signed a document indicating that she waived her right to counsel and wanted to appear on her own behalf. Therefore, we have no doubt that defendant intended to and did in fact waive her right to counsel.

In her brief, defendant seizes upon a partial statement to suggest that she was confused about her right to counsel. When the prosecutor asked defendant to admit or deny the charges, defendant responded: "Excuse me. I cannot hire my own lawyer because I[.]" The timing and context of the statement suggest that defendant was not confused about waiving her right to counsel.

First, defendant's statement came *after* she waived her right to counsel verbally. As we have indicated, defendant was aware of the consequences of representing herself and made her decision without hesitation. Furthermore, the fact that defendant signed a written waiver is strong evidence tending to show that she made a knowing, intelligent, and voluntary waiver.

Second, after defendant waived her right to counsel, she was competent enough to make a motion to continue the case. The trial judge denied that motion and heard the matter immediately. This action is significant because it reveals defendant's effort to proceed on her own and zealously represent herself; it also contradicts the suggestion that defendant was confused about her right to counsel.

Finally, defendant made the comment about why she could not hire an attorney *after* the prosecutor asked her to admit or deny the charges. Since defendant's explanation as to why she could not hire her own lawyer was not responsive to that inquiry, it may have been a deliberate attempt to avoid answering the question.

After careful consideration, we conclude that the trial judge conducted the proper inquiry and determined that defendant's waiver of counsel was knowing, intelligent, and voluntary. We hold that the trial judge acted properly in revoking defendant's probation and activating her prison sentence. Therefore, the decision of the trial court is

Affirmed.

Chief Judge MARTIN concurs.

Judge ELMORE dissents.

ELMORE, Judge dissenting.

I do not agree with the majority's holding that defendant fully understood her waiver of counsel. As discussed above, N.C. Gen. Stat. § 15A-1242 (2003) mandates that the trial judge must conduct a "thorough inquiry and [be] satisfied that the defendant . . . [h]as been clearly advised[,] . . . [u]nderstands and appreciates[,] . . . and [c]omprehends" three distinct aspects of their waiver. A trial court's failure to thoroughly inquire into 1) the right to counsel; 2) the consequences of the decision to proceed *pro se*; *and* 3) the nature of the proceedings and possible punishments, fails to meet the statutory requirements for a clear an unequivocal wavier. *See* N.C. Gen.

Stat. § 15A-1242 (2003); *State v. Cox*, 164 N.C. App. 399, 401-02, 595 S.E.2d 726, 728 (2004); *State v. Evans*, 153 N.C. App. 313, 315-16, 569 S.E.2d 673, 675 (2002). There is no indication that Judge Hill's inquiry of defendant rose to this comprehensive level.

Most recently, in *State v. Hill*, 168 N.C. App. 391, 396-97, 607 S.E.2d 670, 673-74 (2005), this Court held that an open court discussion probing each of the three concerns stated in 15A-1242 was sufficient to support a waiver. There the court took several opportunities to make sure that defendant understood the detailed allegations against him, the possible penalties, and the full ramifications of waving not only appointed counsel but proceeding *pro se*. *Id.* Yet, in *Cox*, 164 N.C. App. at 399-402, 595 S.E.2d at 727-28, we reversed the probation revocation of defendant and remanded for a new hearing because the trial court failed to adequately comply with the dictates of section 15A-1242. There the trial court only inquired or informed defendant of his right to counsel or proceed *pro se*. The court did not inquire on whether defendant understood the ramifications of proceeding *pro se*. *Id.*

The inquiry conducted by Judge Hill aligns more closely with *Cox* and *Evans* than it does with the trial court's thorough inquiry in *Hill*. Here, the trial court failed to conduct any detailed inquiry into whether defendant understood and appreciated the consequences of the waiver or comprehended the nature of the charges and permissible punishments. *See* N.C. Gen. Stat. § 15A-1242 (2003). There was no explanation of the full charges by the probation officer and district attorney, nor was there any understanding evidenced that defendant appreciated the consequences of waiving counsel solely a question of "do you understand?"

Any question of whether defendant understood, comprehended, or appreciated the wavier of counsel should have been answered in the negative when she tried to explain why she did not have an attorney.

> DISTRICT ATT: Ma'am, do you admit or deny that you have, as of the date of this report, which was October 22, 2003, that you failed to complete 50 hours of community service?
>
> DEFENDANT: Excuse me. I cannot hire my own lawyer because I—
>
> COURT: Ma'am, listen to me very carefully.
>
> DEFENDANT: I'm sorry

> COURT: First of all, your going to have to talk so the court reporter can hear what you're saying. She asked you do you admit or deny certain violations. You answer I admit it or I deny it.
>
> DEFENDANT: I admit it.
>
> COURT: We're not here to hear a long sob story yet. I certainly will hear your reasons once we get through this portion of the procedure, okay? Okay. So as to the—just start all over.

The majority refers to defendant seizing upon "a partial statement" to bolster her claim that she did not understand the wavier. But her statement was only partial due to the fact that Judge Hill directed her to answer the question. It is unsubstantiated speculation on behalf of the majority to suggest that defendant was avoiding the question asked by the district attorney. Further, while marginally relevant, it is not "significant" to a determination of understanding a waiver that defendant asked for a continuance.

Further, while marginally relevant, it is not "significant" to a determination of understanding a waiver that defendant asked for a continuance. Defendant asked the district attorney for a continuance so that she could make payment on money owed under one of the judgments. The district attorney brought the request to the court's attention. After a brief discussion between the trial court, defendant, and probation officer, Judge Hill denied the continuance. The very next words were the district attorney's, listed above, and an attempted explanation by defendant as to why she could not afford an attorney. The district attorney then went through a series of "do you admit" questions regarding defendant's alleged probation violations, and defendant answered only "yes, ma'am" to each question. This exchange hardly shows zealous advocacy from someone who thoroughly understood the implications of waiving counsel and proceeding *pro se*.

Even though the mere utterance of "lawyer," "counsel," or "attorney" will not thwart an otherwise thorough inquiry, I am not convinced that section 15A-1242's "thorough" multiple approach inquiry has been achieved here. *See*, *e.g.*, *Hill*, 168 N.C. App. at 396, 607 S.E.2d at 673 ("Even after defendant discharged his appointed counsel and signed the written waiver of his right to assistance of counsel, the court offered defendant the opportunity to request a continuance for the purpose of hiring a private attorney.").

Accordingly, I would reverse the court's judgment revoking defendant's probation and remand for a new hearing.

HOME BUILDERS ASSOCIATION OF FAYETTEVILLE NORTH CAROLINA INC., JAMES EDWARD GRAVES, JIM GRAVES & ASSOCIATES, INC., JOHN McNATT GILLIS, GILLIS DEVELOPMENT CORPORATION, INC., ET AL., PETITIONER APPELLANTS v. CITY OF FAYETTEVILLE, RESPONDENT APPELLEE

No. COA04-1108

(Filed 7 June 2005)

1. Cities and Towns— annexation—untimely challenge—settlement with other petitioners—no effect

Petitioners' challenge to an annexation was time-barred because they did not file within the statutory 60-day period. A settlement between another group which did timely file and the City has no effect on petitioners, and respondent's motion to dismiss was correctly granted. The annexation statutes do not call for the treatment of a settlement as a new ordinance, as petitioner contends, which would allow a new 60-day period for review.

2. Cities and Towns— annexation—settlement—motion to intervene

There was no abuse of discretion in the denial of petitioner's motion to intervene in an annexation settlement by another group where petitioners did not timely file their challenge and the other group had timely filed. Intervention under Rule 24 of the Rules of Civil Procedure is not utilized when a differing procedure is prescribed by statute, as here; even so, there were none of the unusual circumstances required for post-judgment intervention.

Appeal by petitioners from orders entered 29 June 2004 by Judge Gary L. Locklear in Cumberland County Superior Court. Heard in the Court of Appeals 13 April 2005.

Garris Neil Yarborough, for petitioner appellants.

Parker, Poe, Adams, & Bernstein, by Anthony Fox and Brenton W. McConkey; and City Attorney Karen M. McDonald, for respondent appellee.

General Counsel Andrew L. Romanet, Jr., and Senior Assistant General Counsel Gregory F. Schwitzgebel, III, for Amicus Curiae North Carolina League of Municipalities.

McCULLOUGH, Judge.

Petitioners appeal from an order granting respondent's motion to dismiss and an order denying petitioners' motion to intervene. On 24 November 2003, the City of Fayetteville adopted an annexation ordinance that was to become effective on 30 June 2004. In North Carolina, an owner of annexed property may seek judicial review of an annexation if he or she petitions "[w]ithin 60 days following the passage of [the] annexation ordinance[.]" N.C. Gen. Stat. § 160A-50(a) (2003).

A group of Cumberland County residents, the Gates Four community, filed the only timely petition for review in Cumberland County Superior Court. Ultimately, the City and the Gates Four community reached a settlement which excluded Gates Four from the area to be annexed. On 12 May 2004, the superior court entered a consent judgment approving that settlement. The consent judgment was entered pursuant to N.C. Gen. Stat. § 160A-50(m) (2003) which gives courts discretion to resolve annexation challenges by approving "any settlement reached by all parties."

Petitioners were not part of the Gates Four petition and did not seek review of the annexation within the 60-day period. Instead, petitioners filed this challenge on 23 June 2004. This was five months after the 60-day period had ended.

Petitioners offered two different theories to the trial court. First, they claimed that the Gates Four Settlement revived their time to seek review. Second, they made a motion to intervene. The trial court rejected these arguments, granted respondent's motion to dismiss, and denied petitioners' motion to intervene. Petitioners appeal.

On appeal, petitioners argue that the trial court erred by granting respondent's motion to dismiss and denying petitioners' motion to intervene. We disagree and affirm the orders of the trial court.

I. Motion to Dismiss

[1] Petitioners argue that the trial court erred in granting respondent's motion to dismiss. We disagree.

In North Carolina, an owner of annexed property can seek judicial review if the owner files a petition "[w]ithin 60 days following the passage of an annexation ordinance[.]" N.C. Gen. Stat. § 160A-50(a). It is undisputed that petitioners failed to seek judicial review within 60 days after the passage of the annexation ordinance. In fact, they

made their challenge five months after the 60-day period ended. Therefore, their action is time-barred.

In an attempt to avoid this result, petitioners present two theories. First, they argue that the settlement required remand back to the City Council for adoption of an amended annexation ordinance. Second, they claim that the settlement created a "new" ordinance and a new 60-day period for challenges. Neither of these arguments is persuasive.

Although annexations are admittedly complex, the provisions dealing with time limitations and settlements are fairly straightforward. As we have indicated, the owner of annexed property has 60 days to seek judicial review of an annexation ordinance. N.C. Gen. Stat. § 160A-50(a). Similarly, the section dealing with settlements indicates that

> [a]ny settlement reached by all parties in an appeal under this section may be presented to the superior court in the county in which the municipality is located. If the superior court, in its discretion, approves the settlement, it shall be binding on all parties without the need for approval by the General Assembly.

N.C. Gen. Stat. § 160A-50(m).

It is noteworthy that neither subsection (a) nor subsection (m) calls for a remand to city council or the treatment of a settlement as a "new" ordinance which would allow a new 60-day period for judicial review. In another annexation case, this Court explained that courts must give a statute " 'its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein[.]' " *Sonopress, Inc. v. Town of Weaverville*, 139 N.C. App. 378, 383, 533 S.E.2d 537, 539 (2000) (citation omitted). Further, courts should not infer additional language when " 'it would have been a simple matter [for the General Assembly] to [have] include[d] th[at] explicit phrase[.]' " *Id.* at 383, 533 S.E.2d at 540 (citation omitted). Because the sections dealing with time limits and settlements have no language permitting a remand or a new 60-day period to seek judicial review, we are not at liberty to create such a remedy.

Our courts presume that the legislature acted rationally and " 'did not intend an unjust or absurd result.' " *Best v. Wayne Mem'l Hosp., Inc.*, 147 N.C. App. 628, 635, 556 S.E.2d 629, 634 (2001) (citation omitted), *appeal dismissed, disc. review denied*, 356 N.C. 433, 572 S.E.2d

426 (2002). In fact, there are sound public policy reasons for maintaining a clear, unqualified 60-day period for challenges. The strict time limitation promotes certainty and allows cities to extend services to newly annexed areas. Adopting petitioners' position would destroy the certainty of the 60-day period and allow those who did not file timely petitions (petitioners in this case) to unfairly benefit from those who did timely file and settle their dispute (the Gates Four community).

We are aware that a remand to the municipal governing board is a possible remedy *when the court conducts judicial review*. Subsection (f) describes the procedure for judicial review of annexation proceedings. N.C. Gen. Stat. § 160A-50(f). In that review, the court is to consider whether the annexation has complied with the overall statutory procedure. *Id.* This includes, for example, whether the character of the area to be annexed meets statutory requirements. *Id.* After conducting that review, the court has the option of affirming the ordinance, declaring the ordinance null and void, or remanding the action to the municipal governing board. N.C. Gen. Stat. § 160A-50(g)(1)-(4).

Although a remand is permitted under subsection (g), the key provisions in the present case (those dealing with time limitations and settlements) do not provide the option of a remand. This is revealing because it shows that when the General Assembly intends a remand to occur, it says so expressly. Once again, we will not read into or superimpose language which is not contained in the statute.

Finally, we are not persuaded by petitioners' suggestion that a remand is required under N.C. Gen. Stat. § 160A-75 (2003). This section, which is not a provision dealing with annexation, addresses voting by members of a city council and the mayor:

> An affirmative vote equal to a majority of all the members of the council not excused from voting on the question in issue, including the mayor's vote in case of an equal division, shall be required to adopt an ordinance[] [or] *take any action having the effect of an ordinance*[.]

Id. (emphasis added). Using this general language, petitioners contend that the settlement had "the effect of an ordinance" and therefore required a remand to city council. We disagree.

Settlements cannot be classified as "actions having the effect of an ordinance" because the city council and the mayor are not

involved in settlements in any way. Rather, settlements are carried out by cities and opposing parties who have a dispute involving the annexation. Since settlements are a method of dispute resolution in the annexation process, rather than governmental actions having the effect of an ordinance, there is no need to send the matter back to city council after a settlement is reached.

We recognize that every settlement changes the area to be annexed to some degree. In this case, the settlement between the City and Gates Four removed Gates Four from the area to be annexed. However, there are provisions in the *annexation statute* that show that the City is not required to start over simply because the area to be annexed has changed. Subsection (e) states:

> At any time before or during the review proceeding, any petitioner or petitioners may apply to the reviewing court for an order staying the operation of the annexation ordinance pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper, and *it may permit annexation of any part of the area described in the ordinance concerning which no question for review has been raised.*

N.C. Gen. Stat. § 160A-50(e) (emphasis added). Similarly, subsection (h) reveals that

> [t]he superior court may, with the agreement of the municipality, permit annexation to be effective with respect to any part of the area concerning which no appeal is being made and which can be incorporated into the city without regard to any part of the area concerning which an appeal is being made.

N.C. Gen. Stat. § 160A-50(h). These statutory provisions reveal that a remand is not required because it would amount to an unnecessary procedural delay. *See In re Durham Annexation Ordinance*, 66 N.C. App. 472, 489-90, 311 S.E.2d 898, 908 (1984) (explaining that in drafting N.C. Gen. Stat. § 160A-50, "the clear intent of the legislature was to provide an expedited judicial review, limited in scope, and avoiding unnecessary procedural delays").

Before moving to the next section, we wish to clarify our holding. Because petitioners failed to seek judicial review within the 60-day time period, their action was time-barred. Petitioners have sought to find a way around that deadline. However, a settlement between the city and another party that did timely file has no effect on the 60-day

rule. The statutes do not require a remand to city council or allow petitioners a new 60-day period. Therefore, we overrule this assignment of error.

II. Motion to Intervene

[2] Petitioners argue that the trial court erred by denying their motion to intervene. We considered this exact issue in *Gates Four Homeowners Assoc. v. City of Fayetteville*, 170 N.C. App. 688, 613 S.E.2d 55 (2005), and will apply the same analysis in the present case.

Petitioners argue that they should have been allowed to intervene under Rule 24(a) of the North Carolina Rules of Civil Procedure. Although the North Carolina Rules of Civil Procedure generally do apply to civil proceedings, they are not utilized "when a differing procedure is prescribed by statute." N.C. Gen. Stat. § 1A-1, Rule 1 (2003). N.C. Gen. Stat. § 160A-50 describes the procedure for annexations, including time limitations. Under subsection (a), a property owner must petition for judicial review within 60 days following the adoption of the annexation ordinance. N.C. Gen. Stat. § 160A-50(a).

In the present case, petitioners did not comply with the procedure set forth in the annexation provisions because they moved to intervene five months after the 60-day period had ended. Because Rule 24 intervention would have violated the statutory procedure of N.C. Gen. Stat. § 160A-50, intervention was not available.

Even if Rule 24 had applied, petitioners cannot show that the trial court abused its discretion in denying the motion to intervene. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a) (2003), anyone can intervene if the individual timely files a petition

> (1) When a statute confers an unconditional right to intervene; or
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The determination of the timeliness of the motion under this rule is left to the sound discretion of the trial court. *Taylor v. Abernethy*, 149 N.C. App. 263, 268, 560 S.E.2d 233, 236 (2002), *disc. review denied*, 356 N.C. 695, 579 S.E.2d 102 (2003). Such rulings are given great deference and will only be overturned upon a showing that the

ruling " 'was so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

When considering the issue of timeliness, North Carolina Courts consider five factors:

> "(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances."

State ex rel. Easley v. Philip Morris, Inc., 144 N.C. App. 329, 332, 548 S.E.2d 781, 783 (citation omitted), *disc. review denied*, 354 N.C. 228, 554 S.E.2d 831 (2001). While post-judgment intervention is not impossible, the law disfavors it. *Id.* It will only be allowed if there are extraordinary and unusual circumstances. *Id.*

After evaluating all five factors, we must conclude that the trial court did not abuse its discretion in denying the motion to intervene.

With regard to the first factor, status of the case, petitioners sought to intervene after the May 12 judgment had been entered. As we have mentioned, post-judgment intervention is disfavored. Likewise, under the second factor dealing with prejudice to the existing parties, intervention would prejudice the City and the Gates Four community by destroying their settlement.

The final three factors do not support petitioners' position. Petitioners have not offered a legitimate reason for the delay, and their "reliance" on the Gates Four community is meritless because there was no agreement, promise, or representation that Gates Four would protect their interests. Although denying the motion to intervene would harm petitioners, their action has caused this result. Finally, there are no unusual circumstances which lead us to conclude that the trial court abused its discretion in denying the motion to intervene.

After careful consideration of the record, briefs, and arguments of the parties, we conclude that the trial court acted properly in granting respondent's motion to dismiss and denying petitioners' motion to intervene. The orders are

Affirmed.

Judges HUNTER and Judge LEVINSON concur.

STATE OF NORTH CAROLINA v. JAMES DARYL WALKER

No. COA04-978

(Filed 7 June 2005)

1. Evidence— basis for expert's report—initial evidence gathering by another

Testimony from an expert SBI firearms examiner was properly admitted where it was based in part on initial evidence taken by another agent who did not testify. The evidence was corroborative and helped form the basis of the expert's opinion; the expert testified that he independently analyzed the entirety of the evidence, including the other agent's report; defendant was afforded a full opportunity to cross-examine the expert as to the basis of his expert opinion; and defendant did not request a limiting instruction.

2. Homicide— instructions—final mandate—self-defense

There was no plain error in the trial court's treatment of self-defense in its final mandate in a first-degree murder prosecution. The trial court correctly discussed self-defense in the body of its charge, and, in its final mandate instructed the jury that it could return a not guilty verdict if the State failed to satisfy the jurors beyond a reasonable doubt that the defendant did not act in self-defense.

3. Homicide— short-form indictment—constitutional

The short-form first-degree murder indictment was constitutional where defendant received the presumptive term of life without parole.

Appeal by defendant from judgment entered 15 October 2003 by Judge J. Richard Parker in Nash County Superior Court. Heard in the Court of Appeals 10 March 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General James P. Longest, Jr., for the State.

Paul Pooley for defendant-appellant.

CALABRIA, Judge.

James Daryl Walker ("defendant") appeals from a judgment entered on a jury verdict of guilty of first-degree murder. De-

fendant was sentenced to life imprisonment without possibility of parole in the North Carolina Department of Correction. We find no error.

The State presented evidence at trial that on the night of 10 November 2001 and during the early morning hours of 11 November 2001, Gerald Williams ("Williams"), Glenwood Loftin (the "victim"), and Jonathan Battle ("Battle") were driving in the Rocky Mount area to find a club to patron. After declining a couple of clubs due to inactivity, the three went to Moore's Ball Field at approximately 1:00 a.m. After a couple of conflicts with an individual identified as Rickshawn, Williams went outside and observed another conflict between Larry Williams and Jarvis Richardson. Williams, Battle, and Jeffrey Battle attempted to become involved, but Williams was prevented from doing so by an individual identified as Bohanon. At approximately the same time, defendant began firing at the victim as the victim was running from defendant in the area where cars were parked outside of the club. Defendant followed the victim and continued shooting him, even when the victim continued to try to flee after falling on the hood of a car. After the shooting, defendant left with Shawn Brake ("Brake"). Although multiple guns were involved, including 9mm pistols belonging to both defendant and Brake, ballistics comparisons revealed that the victim was shot and killed by bullets fired from defendant's weapon.

Defendant also presented evidence at trial. Defendant called Shanell Nicole Williams as a witness. She testified that the victim was holding a beer bottle during the time the fights occurred and was shot by Brake after Brake told him to drop the bottle. Next, defendant testified that, during the time the fights were ongoing, the victim approached him with an upraised beer bottle, and, when the victim failed to heed defendant's warnings to "[s]top or [he was] going to shoot," defendant closed his eyes and shot at the victim because he was afraid the victim was going to attack him and injure him using the bottle as a weapon. Defendant testified he did not want to hurt the victim but also did not want to get hurt. Defendant said when he opened his eyes, he saw the victim falling on the car and heard additional shots.

Defendant was arrested, charged, and indicted for first-degree murder. At the close of the State's evidence and again at the close of all the evidence, defendant moved to dismiss the charge. The trial court denied defendant's motions, and the jury found him guilty of first-degree murder. Defendant was sentenced to life imprisonment

without the possibility of parole. Defendant appeals from the judgment imposed.

I. Confrontation Clause

[1] In the instant case, State Bureau of Investigation ("SBI") Agent Peter Ware ("Agent Ware") testified as an expert in the field of forensic firearms identification. Agent Ware testified that, according to standard procedure, Special Agent Dave Santora initially took the evidence. He described the standard procedure as follows:

> What happens is when an individual examiner [here, Agent Santora] gets in evidence and they work the case, they compile their notes, and once their notes have been compiled and they issue a draft report, they then take that evidence, the fired casings and the projectile, whatever they may have from the scene, and then they are test fired, if there was a weapon involved. They take that to a senior examiner [here, Agent Ware]. The Senior examiner will then independently microsopically look at the casings or projectiles that have been test fired, reach their conclusions, and then they will review the notes and the report of the examiner who originally did the notes and report, and make sure that all the conclusions are in there and it's appropriately documented, and then they will sign off on that report, and it goes back to the examiner to have an administrative review done [before the final report from the SBI is issued].

Agent Ware further affirmed that he "actually work[ed] with every piece of evidence and every test firing of the weapons and everything" and "personally looked over all the evidence in the case and the conclusions." Detective Ware testified that he "c[a]me to the same conclusions as Mr. Santora did in his draft report" and had brought Agent Santora's original issued report and findings with him to court. Thereafter, Agent Ware testified, in relevant part, that the two 9mm bullets retrieved from the victim's body were fired from defendant's gun. One of those bullets lacerated the victim's aorta, causing his death.

At trial, defendant objected to Agent Ware's testimony on grounds of hearsay and to Agent Santora's report on the grounds that "the person who prepared [the report was] not [t]here to testify." The trial court overruled defendant's objections and admitted both the testimony and the report into evidence. In his first assignment of error, defendant asserts the trial court erred in allowing the ballistics report

and related testimony because Agent Santora did not appear at trial, was not unavailable, and who defendant did not have a prior opportunity to cross-examine. We disagree.

In 2004, the United States Supreme Court issued its opinion in *Crawford v. Washington*, 541 U.S. 36, 61, 158 L. Ed. 2d 177, 199 (2004), determining that the Confrontation Clause of the United States Constitution was a procedural, rather than substantive, guarantee designed to ensure a particular method of testing reliability—cross-examination—as opposed to ensuring a particular quantum of reliability with respect to certain statements. The Confrontation Clause bars testimonial statements of witnesses if they are not subject to cross-examination at trial unless (1) the witness is unavailable and (2) there has been a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 59, 158 L. Ed. 2d at 197. The Court defined testimony as follows: "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51, 158 L. Ed. 2d at 192. An exception to the new rule espoused in *Crawford* is a familiar one: where evidence is admitted for a purpose other than the truth of the matter asserted, the protection afforded by the Confrontation Clause against testimonial statements is not at issue. *Crawford*, 541 U.S. at 59-60, n.9, 158 L. Ed. 2d at 197-98, n. 9. Thus, where the evidence is admitted for, *inter alia*, corroboration or the basis of an expert's opinion, there is no constitutional infirmity. *See*, *e.g.*, *State v. Baymon*, 336 N.C. 748, 759-60, 446 S.E.2d 1, 6-7 (1994) (corroboration); *State v. Quick*, 329 N.C. 1, 29, 405 S.E.2d 179, 196 (1991) (basis of expert's opinion).

In the instant case, we conclude the evidence was properly admissible for non-testimonial purposes both because it was corroborative and because it helped form the basis of an expert's opinion. Agent Ware testified that he independently analyzed the entirety of the ballistics evidence, including Agent Santora's report, and concluded defendant's gun fired the bullets recovered from the victim's body. He further testified that his conclusions accorded with Agent Santora's report. As a result, the report was corroborative of Agent Ware's testimony and admissible for that purpose. In addition, Agent Ware was qualified as an expert in the area of forensic firearm identification and was entitled, therefore, to use Agent Santora's report for the purpose of forming his opinion on the issue of whether defendant's gun fired the bullets which were recovered from the victim's body. Defendant was, moreover, fully afforded the opportunity to cross-examine Agent Ware as to the basis of his

expert opinion. While the report might be used to prove the truth of the matter asserted and, therefore, be considered testimonial, the trial court properly admitted the evidence due to the permissible non-testimonial purposes. Defendant could have, but failed to, request a limiting instruction that would have clarified the appropriate evidentiary use of the evidence. *State v. Noble*, 326 N.C. 581, 585, 391 S.E.2d 168, 171 (1990). This assignment of error is overruled.

II. Jury Instruction

[2] Defendant's second assignment of error concerns the jury instruction. Defendant asserts the trial court committed plain error by failing to include in its final mandate to the jury a possible verdict of not guilty by reason of self-defense to the murder and manslaughter charges. Plain error review is the appropriate standard where, as here, defendant failed to object to the jury charge at trial.

"[T]he plain error rule . . . is always to be applied cautiously[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). "Under plain error review, 'reversal is justified when the claimed error is so basic, prejudicial, and lacking in its elements that justice was not done[,]' " *State v. Miller*, 357 N.C. 583, 592, 588 S.E.2d 857, 864 (2003), *cert. denied*, —— U.S. ——, 159 L. Ed. 2d 819 (2004) (quoting *State v. Prevatte*, 356 N.C. 178, 258, 570 S.E.2d 440, 484 (2002), and, "absent the [claimed] 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).

Defendant correctly contends that, where warranted, (1) a trial court's failure to include a possible verdict of not guilty by reason of self-defense in its final mandate to the jury results in prejudicial error entitling a defendant to a new trial and (2) that failure is not cured by a discussion of the law of self-defense in the body of the charge. *State v. Dooley*, 285 N.C. 158, 165-66, 203 S.E.2d 815, 820 (1974). The failure to charge the jury with self-defense entitled the defendant in *Dooley* to a new trial because "the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case." *Id.*, 285 N.C. at 165, 203 S.E.2d at 820. In *Dooley*, our Supreme Court set forth a model instruction for charging the jury as to the proper mandate for not guilty by reason of self-defense, but rigid adherence to this model instruction is not required where the trial court "adequately explain[s] to the jury that they can find the defendant not guilty by reason of self-defense." *State v. Bevin*, 55 N.C. App. 476, 477, 285 S.E.2d 873, 873 (1982).

In the instant case, the trial court correctly discussed the law of self-defense in the body of its charge to the jury. In its final mandate, the trial court instructed as follows:

> Finally, if the state has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense, then the defendant's action would be justified by self-defense and therefore, you would return a verdict of not guilty.

The trial court's instruction was not plainly erroneous for failing to adequately explain to the jury that they were permitted to find defendant acted in self-defense, and, that if they so found, the proper course of action would be to find defendant not guilty as a result. This assignment of error is overruled.

III. Short-Form Indictment

[3] In the instant case, the State utilized the short-form murder indictment for charging defendant with the offense of first-degree murder. Defendant asserts the use of the short-form indictment violated his state and federal constitutional rights. Our Supreme Court has rejected defendant's constitutional attacks on the short-form indictment with respect to all cases cited by defendant except for one. *See State v. Morgan*, 359 N.C. 131, 147, 604 S.E.2d 886, 896 (2004). The sole exception defendant cites is the United State Supreme Court holding in *Blakely v. Washington*, —— U.S. ——, 159 L. Ed. 2d 403 (2004) that a trial court alone may not sentence a defendant in excess of the "statutory maximum" absent either findings in aggravation by a jury or a waiver by defendant of his Sixth Amendment right to a trial by jury. In the instant case, defendant received the presumptive term for the charge with which he was convicted. Moreover, our Supreme Court has noted that the law of this State requires that, "whenever a defendant is charged with murder, questions of fact related to guilt or innocence . . . must be determined by the jury[.]" *State v. Braxton*, 352 N.C. 158, 175, 531 S.E.2d 428, 438 (2000). We are unpersuaded that this holding, especially in light of North Carolina's long adherence to the use of the short-form murder indictment, renders that use constitutionally unsound. This assignment of error is overruled.

No error.

Judges McGEE and TIMMONS-GOODSON concur.

RICHARD JARVIS, PLAINTIFF v. NATHANIEL M. STEWART & STEWART FINANCIAL GROUP, INC., DEFENDANTS

No. COA04-713

(Filed 7 June 2005)

Employer and Employee— disability provisions—state action—no preemption

Plaintiff's state action against his employer's financial advisor should not have been dismissed as preempted by federal ERISA legislation where none of plaintiff's claims raised any of the concerns Congress sought to address by ERISA. These claims arose from the difference between the disability benefits plaintiff received and representations made to him; among other things, these claims involved defendants who are not plan administrators or fiduciaries.

Appeal by plaintiff from order entered 19 March 2004 by Judge W. David Lee in Cabarrus County Superior Court. Heard in the Court of Appeals 16 February 2005.

Browne, Flebotte, Wilson, Horn & Webb, PLLC, by Martin J. Horn and Adam A. Smith, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by David N. Allen and Jennifer E. Marsh, for defendants-appellees.

JACKSON, Judge.

Richard Jarvis, ("plaintiff") appeals an order entered 19 March 2004 in Cabarrus County Superior Court dismissing, with prejudice as to further state proceedings, his complaint alleging breach of contract; detrimental reliance; negligence; negligent misrepresentation; and unfair or deceptive trade practices.

Plaintiff filed his initial complaint on 11 June 2003 and his first amended complaint and motion to amend complaint on 20 January 2004. The motion to amend complaint was heard and granted on 16 February 2004. Defendant-appellees, Nathaniel M. Stewart ("Stewart") and Stewart Financial Group, Inc. ("Stewart Financial") (collectively "defendants") responded to plaintiff's First Amended Complaint with a Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. In their Motion to Dismiss, defendants argued that plaintiff's claims were pre-

empted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144, (ERISA) and therefore the state courts did not have jurisdiction over the claims. In opposition to defendants' Motion to Dismiss, plaintiff argued that his claims were traditional state law claims and should not be preempted. Plaintiff contended that since the terms of the disability policy itself were not disputed and neither the plan nor any of the plan administrators were named as parties to the action the claims should not be preempted.

The trial court issued an order granting defendants' Motion to Dismiss with prejudice as to further state court proceedings on the claims on 19 March 2004. In its order the trial court held plaintiff's claims were "relate[d] to" an "employee welfare benefit plan" and were therefore preempted by ERISA. The trial court also held concurrent jurisdiction under 29 U.S.C. § 1132(e) was not proper as that section allows concurrent state court jurisdiction in the "limited circumstance of a participant or beneficiary seeking 'to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.' " (emphasis in original omitted) The trial court also noted in its order that plaintiff did not seek to recover under the terms of the plan and had not sued the plan, the plan's administrator, the plan's trustee, or the employer.

The basis of plaintiff's claim was a letter he received from Stewart on behalf of Stewart Financial informing him that his employer had made changes to his benefits package. These changes included adding a company paid long term disability policy. The letter also informed plaintiff that the new disability policy would pay him sixty-six and two thirds percent (66 2/3%) of his income in the event he became disabled. This information was confirmed to plaintiff verbally by defendants on several occasions.

Plaintiff subsequently was disabled. His actual benefits paid under the long term disability policy were only sixty percent (60%) of his income. The difference in benefits between the amount stated by defendants in the letter and the amount actually paid under the policy during plaintiff's disability was $48,572.48.

Plaintiff only filed suit against Stewart, who had acted as a financial advisor, and Stewart Financial and not against plaintiff's employer; the plan administrator; the plan trustee; nor the plan itself. His initial complaint was based on the grounds that: (1) the letter and subsequent conversations with defendants were sufficient to consti-

tute a contract between the parties and defendants breached that contract; (2) that defendants were negligent in sending the misleading letter to plaintiff and in failing to correct their misstatements; and (3) that plaintiff relied on the statements in the letter to his detriment. Plaintiff's amended complaint added claims for breach of contract based on defendants contract with plaintiff's employer, negligent misrepresentation and unfair or deceptive trade practices.

On defendants' motion, the trial court dismissed plaintiff's claims on the ground that they were preempted by ERISA. Plaintiff timely appealed. Plaintiff assigns as error: (1) the trial court's granting of defendants' motion to dismiss plaintiff's claims on the basis that they were related to a welfare benefits policy and therefore preempted by Federal Law and (2) the trial court's conclusion that state courts do not have concurrent jurisdiction over plaintiff's claims.

ERISA contains an express preemption clause which provides that ERISA supercedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). In its early attempts to interpret this preemption clause, the United States Supreme Court relied heavily on a textual analysis and dictionary definition of "relate to". *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 77 L. Ed. 2d 490, 501 (1983) (deciding, based on a definition from Black's Law Dictionary, that a state law "relates to" an employee benefit plan if it has a connection or reference to the plan). More recently, however, the Supreme Court has determined that ERISA's preemption clause analysis must begin with the "presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654, 131 L. Ed. 2d 695, 704 (1995). The Supreme Court has instructed that, in applying ERISA's preemption clause, courts should "look . . . to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656. Accordingly, the party asserting preemption must convince the court that the statute sought to be preempted is the type of law that Congress specifically intended ERISA to preempt. *De Buono v. NYSA-ILA Med. and Clinical Servs. Fund*, 520 U.S. 806, 814 138 L. Ed. 2d 21, 29 (1997).

The anti-preemption presumption can be overcome, according to the Supreme Court, in several ways. If the state law in question "acts immediately and exclusively upon ERISA plans" or if "the existence of ERISA plans is essential to the law's operation" then the law "refers to" ERISA plans and is preempted. *Cal. Div. Of Labor*

Stds. Enforcement v. Dillingham Constr., NA, 519 U.S. 316, 325, 136 L. Ed. 2d 791, 800 (1997). ERISA also preempts state laws that do not refer to ERISA or ERISA plans if there is a clear "connection with" a plan in that the law "mandated employee benefits structures or their administration" or "provides alternative enforcement mechanisms." *Travelers*, 514 U.S. at 658, 131 L. Ed. 2d at 707. Consistent with these opinions, the Ninth and Tenth Circuits have held that ERISA preempts

> (1) laws that regulate the type of benefits or terms of ERISA plans, (2) laws that create reporting, disclosure, funding, or vesting requirements, (3) laws that provide rules for calculation of the amount of benefits to be paid under ERISA plans, and (4) laws that provide remedies for misconduct growing out of the administration of ERISA plans.

Farr v. U.S. West Inc., 58 F.3d 1361, 1365 (9th Cir. 1995)[1], *Airparts v. Custom Benefit Servs*, 28 F.3d 1062, 1064-65 (10th Cir. 1994). Otherwise, the presumption against preemption is very strong and state laws of general application that simply impose some burdens on ERISA plans should not be preempted. *Plumbing Indus. Bd. v. E.W. Howell Co.*, 126 F.3d 61, 67 (2d Cir., 1997) (citing *De Buono*, 520 U.S. 806, 138 L. Ed. 2d 21).

"The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. 29 U.S.C. § 1144(c)(1). "[I]n appropriate circumstances, state common law claims fall within the category of state laws subject to ERISA preemption." *Griggs v. E.I. Dupont De Nemours & Co.*, 237 F.3d 371, 378 (4th Cir. 2001). Common law tort and breach of contract claims are preempted by ERISA if they involve "efforts by [plan] beneficiaries to undo some allegedly improper act of plan administration." *Airparts*, 28 F.3d at 1066.

Consistent with the above federal cases, is the opinion of this Court in *Vaughn v. CVS Revco D.S., Inc.*, 144 N.C. App. 534, 551 S.E.2d 122 (2001). In *Vaughn*, the plaintiff filed a common law claim of antic-

1. On appeal after remand, the 9th Circuit affirmed the trial court's holding that plaintiff's claims were preempted by ERISA, contrary to its holding in the original appeal. The Court's holding after remand was based on the ground that the Supreme Court decision in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996), handed down subsequent to the Court's first decision, expanded the scope of plan administration activities and brought the activities upon which plaintiff's claims were based within ERISA preemption. 151 F.3d 908 (1998) (amended opinion reported at 1998 U.S. App. LEXIS 38509).

ipatory breach of contract and a statutory claim of unfair and deceptive trade practices against the plaintiff's employer in its individual corporate capacity. The plaintiff did not seek relief from the plan administrator, did not attempt to regulate the plan itself, nor seek to recover benefits from the plan itself. *Id.* at 539. There, this Court held that the claims were traditional state-based claims of general application and not, therefore, preempted by ERISA. *Id.* at 540. *See also Welsh v. Northern Telecom, Inc.*, 85 N.C. App. 281, 354 S.E.2d 746 (1987) (holding that a claim, that was not against the ERISA plan, seeking amounts in addition to benefits under the plan based on an agreement to provide additional benefits did not concern the substance or regulation of the plan and was therefore not preempted).

As instructed by the Supreme Court in *Travelers* and *De Buono*, we begin by looking at the objectives of ERISA to determine if the state laws in question here are of the type that Congress intended ERISA to preempt. The ERISA preemption provision has two primary purposes: to protect employees and their beneficiaries in employee benefit plans and to ensure that there is a uniform body of benefit law among the states by minimizing "the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 112 L. Ed. 2d 474, 486 (1990). "Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11, 96 L. Ed. 2d 1 (1987).

In the instant case, plaintiff, in his amended complaint, alleges six causes of action: 1) breach of express agreement and contract (between himself and defendants); 2) negligence; 3) detrimental reliance; 4) breach of contract (between plaintiff's employer and defendants); 5) negligent misrepresentation; and 6) unfair or deceptive trade practices. The Fourth Circuit, which has jurisdiction over North Carolina federal claims, has found that state law claims for breach of contract, promissory estoppel and negligent misrepresentation were not preempted by ERISA where the claims would not submit the employer to conflicting employer obligations, create alternative standards of recovery, determine whether the plaintiff would receive benefits under the plan, or affect the administration of the plan. *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989). In *Pizlo*, as here, the damages sought were measured by the benefits the plaintiffs would have received under the plan, yet the claims were held to not be preempted. *Id.* at 120-21.

The common law and state statutory claims in the instant case do not act immediately and exclusively on ERISA plans nor is the existence of ERISA plans essential to the operation of these common law doctrines or state statutes which are instead claims of general application that do not fall within the situations that overcome the anti-preemption presumption set forth in *Dillingham*. 519 U.S. at 325. The basis of these claims is the actions of defendants who are not plan administrators or fiduciaries. The claims do not seek to recover benefits under the plan nor do they seek to mandate the structure of benefits or the administration of the plan and consequently do not fall within the situations outlined in *Travelers* that justify preemption. 514 U.S. at 658. Nor do these common law claims subject the plan to regulations that conflict with the uniform body of law regulating ERISA plans. Consequently, as none of plaintiff's claims raise any of the concerns Congress sought to address when the ERISA preemption provision was enacted, we hold that plaintiff's claims are not preempted by ERISA and reverse the trial court's order dismissing plaintiff's claims.

Because we have held that plaintiff's claims are not preempted by ERISA, it is unnecessary to reach plaintiff's second assignment of error regarding concurrent state jurisdiction.

Reversed.

Judges HUNTER and CALABRIA concur.

IN THE MATTER OF: K.R.S.

No. COA04-1381

(Filed 7 June 2005)

Termination of Parental Rights— guardian ad litem for mother—appointment required

A termination of parental rights was remanded for appointment of a guardian ad litem for the mother, and for a new trial, where the petition alleged grounds for termination under N.C.G.S. § 7B-1111(a)(6) in that respondent uses crack cocaine, has not followed through with drug treatment, and would probably remain incapable of providing care for the child. Although the

termination was on other grounds, the evidence supporting the grounds was intertwined and inseparable.

Appeal by respondent from order entered 17 May 2004 by Judge Charles Anderson in Chatham County District Court. Heard in the Court of Appeals 12 May 2005.

Lunday A. Riggsbee for petitioner-appellee Chatham County Department of Social Services.

Richard E. Jester for respondent-appellant.

TIMMONS-GOODSON, Judge.

Respondent appeals the trial court order terminating her parental rights to her minor daughter, Kate.[1] Because the trial court erred by failing to appoint a guardian *ad litem* for respondent, we reverse the trial court order and remand the case for a new trial.

The facts and procedural history pertinent to the instant appeal are as follows: On 29 September 2003, Chatham County Department of Social Services ("petitioner") filed a petition to terminate respondent's parental rights to Kate. The petition contained the following pertinent allegations:

> 1. That [Kate] was born May 17, 2002, and currently resides in foster care in Chatham County, North Carolina.
>
> . . . .
>
> 3. That [petitioner] has been given custody of [Kate] in an order dated May 20, 2002, and an order finding [Kate] dependent was entered at a hearing on October 24, 2002.
>
> . . . .
>
> 6. That grounds exist for the termination of the parental rights of [respondent], pursuant to N.C.G.S. 7B-1111[(a)](1) in that [petitioner] has neglected [Kate], and/or pursuant to N.C.G.S. 7B-1111[(a)](7) in that [respondent] has abandoned [Kate], and/or pursuant to N.C.G.S. 7B-1111[(a)](6) in that [respondent] is incapable of providing for the proper care and supervision of [Kate], such that [Kate] is a dependent juvenile and that there is a reasonable probability that such incapability will continue for the foreseeable future, in that:

1. For the purposes of this opinion we will refer to the minor child by the pseudonym "Kate."

a) [Petitioner] uses crack cocaine, and both [petitioner] and [Kate] tested positive for crack cocaine at the birth of [Kate].

b) [Petitioner] had not followed through with any drug treatment programs since the birth of [Kate]. She has entered and left several programs since the birth of [Kate].

. . . .

7. That it is in the best interests of [Kate] to terminate the parental rights of [petitioner].

The matter came to trial on 26 February 2004. Following presentation of evidence and argument from both parties, the trial court requested that petitioner and Kate's guardian *ad litem* prepare a proposed order of termination, and that respondent's attorney be given an opportunity to comment on the proposed order's findings. The trial court stated that it would enter its order after the proposed order had been presented, and it "reserve[d] the right in its discretion to request further hearings and to further consider the best interests of [Kate]."

On 7 May 2004, the trial court notified the parties of a hearing regarding its "taking [of] judicial notice of the record in civil and criminal proceedings . . . involving the respondent," and a hearing was held on the matter on 13 May 2004. Following the hearing, the trial court took judicial notice of the underlying files. In an order entered 17 May 2004, the trial court made the following pertinent findings of fact:

9. Grounds exist for the termination of the parental rights of [respondent] pursuant to NCGS 7B-1111(a)(1) and (7) in that:

(a) [Respondent] and [Kate] tested positive for cocaine at [Kate's] birth, May 17, 2002.

(b) [Respondent] has a long history of use of crack cocaine and alcohol.

(c) [Respondent] left voluntary residential drug treatment (Day by Day, Selma, NC[]) where she was placed with [Kate] after [Kate's] birth pursuant to [petitioner's] reunification effort and May 22, 2002, voluntary agreement, against advice of treatment providers and with express notice and warning that [Kate] would be removed from her care and placement and placed in foster care if she left the treatment program.

(d) Upon the direction and encouragement of [petitioner] as part of their reunification efforts [respondent] enrolled in outpatient treatment at the Horizon Outpatient Substance Abuse program (UNC Hospitals). However, after a brief period of attendance she failed to cooperate and attend sessions, in spite of her parents' encouragement and program assistance with transportation, and she dropped out of the outpatient treatment.

(e) Subsequent to dropping out of the Horizon Program, during a court ordered evaluation of [respondent] by David Rademacher, MA, LPA, NCP, [respondent] was diagnosed as suffering from cocaine dependency, alcohol abuse, with depression with psychotic features, post traumatic stress disorder and paranoid personality disorder. As a result of credible threats to the Department social worker made during the evaluation, [respondent] was involuntarily committed to John Umstead Hospital, and released shortly thereafter for outpatient care at Orange Person Chatham Mental Health; however [respondent] failed to attend outpatient treatment.

. . . .

15. The opinion of [Kate's] guardian ad litem, as set forth and substantiated in the GAL report filed as GAL Exhibit 1, is that it is in the best interests of [Kate] that parental rights be terminated.

Based in part upon these findings of fact, the trial court concluded that sufficient grounds exist to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (7). After further concluding that it was in Kate's best interests to do so, the trial court ordered that respondent's parental rights to Kate be terminated. Respondent appeals.

The dispositive issue on appeal is whether the trial court erred by failing to appoint a guardian *ad litem* for respondent. Because we conclude that respondent was entitled to an appointed guardian *ad litem* pursuant to N.C. Gen. Stat. § 7B-1101, we reverse the trial court order and remand the case for a new trial.

N.C. Gen. Stat. § 7B-1111(a)(6) (2003) provides that a respondent's parental rights may be terminated upon a finding that the respondent "is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile

within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future." The statute further provides that such incapability "may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the [respondent] unable or unavailable to parent the juvenile and the [respondent] lacks an appropriate alternative child care arrangement." *Id.*

N.C. Gen. Stat. § 7B-1101(1) (2003) requires appointment of a guardian *ad litem* for the respondent where "it is alleged that [the respondent's] rights should be terminated pursuant to G.S. 7B-1111[(a)](6), and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition." This Court has previously held that the requirement of N.C. Gen. Stat. § 7B-1101(1) is mandatory, and that a respondent does not lose the right to assert an error based upon a violation of N.C. Gen. Stat. § 7B-1101(1) by failing to request a guardian *ad litem* him or herself. *See In re Estes*, 157 N.C. App. 513, 517-18, 579 S.E.2d 496, 499 (citing *In re Richard v. Michna*, 110 N.C. App. 817, 821-22, 431 S.E.2d 485, 488 (1993)), *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003).

In the instant case, as detailed above, the petition to terminate respondent's parental rights specifically alleged that sufficient grounds exist to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). The petition alleged that Kate was a dependent juvenile and that there was a reasonable probability that respondent would remain incapable to provide for her care, in that respondent "uses crack cocaine" and "had not followed through with any drug treatment programs since" Kate's birth. However, despite these allegations, the trial court failed to appoint a guardian *ad litem* to represent respondent. We conclude that the trial court erred.

Petitioner contends that respondent is not entitled to a new trial because she has failed to demonstrate she was prejudiced by the trial court's error. In support of this contention, petitioner asserts that, prior to trial, it informed both the trial court and respondent that it would not proceed with termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). However, we note that petitioner concedes that "the record does not reflect that statement verbatim, nor was the intent reduced to writing." Petitioner nevertheless maintains that respondent has failed to demonstrate prejudicial error because the

trial court did not terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). In support of this contention, petitioner relies on *In re Dhermy*, 161 N.C. App. 424, 429, 588 S.E.2d 555, 559 (2003), in which this Court concluded that "although [the petitioner] should have formally dismissed Subsection 7B-1111(a)(6) as a ground for termination prior to the hearing, [the] respondent was not prejudiced by [the trial court's failure to appoint a guardian *ad litem*] since [the ground] was not pursued by [the petitioner] at the hearing or found as a ground for termination by the trial court." However, we note that in this Court's second opinion in *Dhermy*, we rejected this contention and reversed the trial court order terminating the respondent's parental rights, concluding that "the statutory mandate for appointment of a guardian ad litem was violated despite the trial court not terminating [the] respondent's parental rights based on juvenile dependency." *In re J.D.*, 164 N.C. App. 176, 182, 605 S.E.2d 643, 646, *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). We offered the following analysis for our conclusion:

> While neglect was the ground . . . pursued during the termination hearing and ultimately found by the trial court as the basis for terminating respondent's parental rights, there was nevertheless some evidence that tended to show that respondent's mental health issues and the child's neglect were so intertwined at times as to make separation of the two virtually, if not, impossible. In fact, in its order regarding adjudication, the trial court found that a doctor's psychological assessment of respondent was credible in that respondent's "psychological problems can negatively impact on her ability to be an adequate parent and caretaker. Further, that [respondent] was and is emotionally regressed and parenting would be a challenge to her." Moreover, the trial court considered respondent's mental health issues in its disposition order by stating that
>
> > the respondent mother cannot provide a safe and permanent home for the minor child as she lacks any insight into her own significant mental health issues, how her failure to protect her daughter damaged her daughter, that she helped to create the neglectful and abusive environment, and how this has been detrimental to her daughter.
>
> Respondent therefore should have had a guardian ad litem act on her behalf at the termination hearing.

Id. (alterations in original).

In the instant case, although the trial court terminated respondent's parental rights based upon those grounds listed in N.C. Gen. Stat. § 7B-1111(a)(1) and (7), the record tends to show that the trial court considered respondent's ongoing substance abuse and mental illness in determining whether to terminate her parental rights. As detailed above, in the order terminating respondent's parental rights, the trial court found as fact that respondent "has a long history of use of crack cocaine and alcohol" and "was diagnosed as suffering from cocaine dependency, alcohol abuse, with depression with psychotic features, post traumatic stress disorder and paranoid personality disorder." Furthermore, the trial court noted respondent's "continue[d] cocaine use" when determining whether she had "fail[ed] to show reasonable progress under the circumstances in correcting the conditions that led to [Kate's] removal[.]" Finally, the trial court based its conclusion that it was in Kate's best interests to terminate respondent's parental rights upon a report which stated:

> Although she can function well, [respondent] has what [a psychologist] has characterized as severe mental illness. She abuses both crack cocaine and alcohol. . . . [Respondent's] paranoid personality disorder appears to keep her from trusting the very people who could help her. [Respondent] has never been debriefed by the psychologist as to the results of her evaluation 18 months ago so she has never been told about her own mental illness directly and from a credible source.

In light of the foregoing, we conclude that evidence of respondent's mental health and substance abuse was "so intertwined" with evidence supporting the grounds of termination relied upon by the trial court that "at times . . . separation of the two [was] virtually, if not, impossible." *J.D.*, 164 N.C. App. at 182, 605 S.E.2d at 646. Therefore, we hold that respondent was entitled to an appointed guardian *ad litem*, and accordingly, we reverse the trial court order terminating respondent's parental rights, and we remand the case for appointment of a guardian *ad litem* and a new trial.

Reversed and Remanded.

Judges McCULLOUGH and STEELMAN concur.

KENNETH E. NICHOLSON, PLAINTIFF v. JACKSON COUNTY SCHOOL BOARD, JACKSON COUNTY BOARD OF EDUCATION, JAMES ROPER, CHAIRMAN, ALI LARGE, KEN HENKE, NATHAN MOSS, MARY JANE DILLARD, IN THEIR CAPACITIES AS MEMBERS OF THE JACKSON COUNTY SCHOOL BOARD, AND SUPERINTENDENT C.E. MCCARY, III, DEFENDANTS

No. COA04-1146

(Filed 7 June 2005)

1. Courts— transfer from district to superior—motions to dismiss in both

A motion to dismiss was appropriately heard immediately after the court transferred the case from district court where defendants had simultaneously filed a motion to dismiss in district court. Although plaintiff argues that the superior court lacked jurisdiction, the transfer occurred when the superior court allowed defendants' motion to transfer, and the superior court was therefore the proper place to hear the substantive motion to dismiss. Plaintiff had notice of the hearing on the motion to dismiss, attended and participated, and made no objection.

2. Collateral Estoppel and Res Judicata— prior ruling brought by petition—issue resolved—judgment on the merits

Res judicata and collateral estoppel barred a breach of contract action by a dismissed high school principal where a superior court had issued a prior ruling that plaintiff had not timely requested a hearing before the board of education. Although plaintiff contended that the earlier ruling did not constitute a judgment on the merits because the matter was before the court by way of petition, it is clear that the earlier court resolved the issue of whether plaintiff was denied a proper hearing, and he may not now relitigate the issue.

Appeal by plaintiff from judgment entered 1 June 2004 by Judge J. Marlene Hyatt in Jackson County Superior Court. Heard in the Court of Appeals 21 April 2005.

McLean Law Firm, P.A., by Russell L. McLean, III, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Kenneth A. Soo and Deborah R. Stagner, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff appeals from an order allowing defendants' motion to dismiss his complaint and denying plaintiff's motion to amend the complaint. We affirm.

On 4 March 2004, plaintiff filed a complaint in Jackson County District Court alleging claims against the Jackson County School Board ("School Board"), the Jackson County Board of Education ("Board of Education"), individual School Board members in their official capacities, and Superintendent C.E. McCary, III ("Superintendent McCary") (collectively hereinafter, "defendants") for breach of contract and wrongful termination. Plaintiff alleged he had been hired by defendants by contract dated 31 May 2000 to serve as the principal of Smoky Mountain High School in Jackson County. On or about 23 June 2003, Superintendent McCary suspended plaintiff from his position upon allegations he had violated School Board policies. Plaintiff was subsequently terminated from his position on 4 September 2003. In his complaint, plaintiff alleged he was terminated without proper procedure, specifically, that he was terminated without notice or a hearing upon the charges against him, and that defendants thereby breached their contract with him. Plaintiff claimed damages in excess of ten thousand dollars as a result of defendants' actions.

On 29 March 2004, the School Board and the Board of Education, along with the individual members of the School Board, moved to transfer plaintiff's case to superior court pursuant to section 7A-258 of the North Carolina General Statutes, on the ground that plaintiff sought damages in excess of ten thousand dollars. They also moved to dismiss plaintiff's case on the following grounds: (1) plaintiff had failed to plead facts to demonstrate he had exhausted administrative remedies available to him; (2) plaintiff's suit was barred by the doctrines of *res judicata* and collateral estoppel; (3) plaintiff's second cause of action did not state a claim for wrongful termination because he was a contract employee; and (4) plaintiff could not maintain his claims against the individual members of the School Board, as they were sued in their official capacities only.

In support of defendants' contention that plaintiff's complaint was barred by the doctrines of *res judicata* and collateral estoppel, an order of the superior court of Jackson County filed 22 December 2003 was attached to the motion to dismiss. The 22 December 2003 order contained the following pertinent findings:

3. On or about June 24, 2003, the superintendent of the Jackson County Schools, Dr. C.E. McCary III, suspended [plaintiff] from his duties with pay pursuant to G.S. 115C-325(f1). Dr. McCary notified [plaintiff] by letter that the purpose of the suspension was to investigate allegations that [plaintiff] had sexually harassed two subordinates.

4. [Plaintiff], in a letter from his attorney dated July 1, 2003, requested an appeal of the suspension with pay to the school board "unless, or until you can convince us that this does qualify for one of the criterion for which suspension may be appropriate under the statutes."

5. Nancy R. Sherill and B. David Steinbicker investigated complaints against [plaintiff], including complaints from a third employee, and notified [plaintiff] by letter dated July 8, 2003, that his alleged conduct violated Board policy. The letter stated that the matter would be referred to the superintendent for corrective steps.

6. [Plaintiff], through his attorney, wrote Superintendent McCary a letter dated July 10, 2003, stating "Please consider this letter a notice of appeal based upon the findings of Ms. Nancy R. Sherill." The letter further requested a copy of Ms. Sherill's report.

7. Superintendent McCary sent a letter to [plaintiff] on July 30, 2003, outlining in detail accusations of sexual harassment made by three school employees against [plaintiff]. The superintendent's letter notified [plaintiff] that the evidence showed that [plaintiff] had violated Jackson County Board of Education policy and the North Carolina General Statutes.

8. Superintendent McCary's July 30, 2003, letter stated that he would recommend to the Board of Education that the Board dismiss [plaintiff] from employment. The letter notified [plaintiff] that he could have the superintendent's intended recommendation reviewed by a case manager if he requested a hearing within fourteen days, and that he could request a hearing before the Board of Education within fourteen days. It is not disputed that [plaintiff] received the letter on July 31, 2003.

9. Superintendent McCary, [plaintiff] and their respective counsel met on August 4, 2003, to discuss the charges against [plaintiff].

10. Neither [plaintiff] nor his attorney filed a written request for a hearing within fourteen days of [plaintiff's] receipt of the July 30, 2003, letter from Superintendent McCary. By letter dated August 18, 2003, [plaintiff], through counsel, requested a hearing.

11. In view of [plaintiff's] failure to request a hearing within fourteen days of receipt of the July 30, 2003, letter, the Jackson County Board of Education on September 4, 2003, dismissed [plaintiff] upon Superintendent McCary's recommendation.

12. The procedures contained in N.C. Gen. Stat. § 115C-325 govern the dismissal of contract school principals and apply to this case.

13. The July 30, 2003, letter from Superintendent McCary adequately notified [plaintiff] that he must request a hearing within fourteen days, and [plaintiff] failed to do so as required by G.S. § 115C-325(h).

14. [Plaintiff] failed to request a hearing within fourteen days of his receipt of Superintendent McCary's notice to [plaintiff] of his intent to recommend [plaintiff's] dismissal to the Board of Education.

15. The Jackson County Board of Education did not violate [plaintiff's] rights under G.S. § 115C-325 or his due process rights when it dismissed him on September 4, 2003.

In the 22 December 2003 order, the trial court denied plaintiff's motions to (1) remand his case for a hearing before the Board of Education or case manager; (2) stay the Board of Education's decision to dismiss him; and (3) hold an evidentiary hearing before the trial court on the allegations contained in the sexual harassment complaint. Plaintiff did not appeal the 22 December 2003 order.

The motions to dismiss and to transfer plaintiff's case came before the superior court on 19 April 2004. The trial court also heard an oral motion by plaintiff to amend the complaint. After examining the pleadings, the court file, and upon argument by counsel, the trial court ordered the case transferred to superior court, allowed defendants' motion to dismiss, and denied plaintiff's motion to amend. Plaintiff appeals.

---

[1] Plaintiff first argues the trial court erred by hearing the motion to dismiss immediately after ruling on, and allowing, the motion to

transfer to superior court. On 29 March 2004, defendants served notice for a 19 April 2004 hearing of their motion to transfer to the superior court division. Also on 29 March 2004, defendants served plaintiff notice of hearing in the superior court division on their motion to dismiss. Defendants simultaneously filed their motion to dismiss in the district court division. Because defendants filed the substantive motion to dismiss in the district court division, plaintiff argues the superior court lacked jurisdiction over the motion to dismiss and that notice was thereby defective. We reject plaintiff's argument.

As plaintiff concedes, transfer of the substantive case occurred on 19 April 2004 when the superior court allowed defendants' motion to transfer to the superior court division. The case was transferred at that time, and the superior court was therefore the proper division to hear the substantive motion to dismiss. Moreover, plaintiff had notice of the hearing on the motion to dismiss more than two weeks before the actual hearing, attended and participated in the hearing, and made no objection to the hearing. "A party waives notice of a motion by attending the hearing of the motion and by participating in the hearing without objecting to the improper notice or requesting a continuance for additional time to produce evidence." *Anderson v. Anderson*, 145 N.C. App. 453, 456, 550 S.E.2d 266, 269 (2001). We overrule this assignment of error.

[2] By his second assignment of error, plaintiff contends the trial court erred in dismissing his case as a matter of law. Plaintiff argues the earlier 22 December 2003 order of the trial court did not constitute a "judgment on the merits" for the purposes of *res judicata*, and therefore poses no bar for his present claim for breach of contract. Again we disagree.

"Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier lawsuit; (2) an identity of the cause of action in the prior suit and the later suit; and (3) an identity of parties or their privies in both suits. *See Hogan v. Cone Mills Corp.*, 315 N.C. 127, 135, 337 S.E.2d 477, 482 (1985); *Culler v. Hamlett*, 148 N.C. App. 389, 392, 559 S.E.2d 192, 194 (2002). "When a court of competent jurisdiction has reached a decision on facts in

issue, neither of the parties are allowed to call that decision into question and have it tried again." *Green v. Dixon*, 137 N.C. App. 305, 308, 528 S.E.2d 51, 53, *aff'd per curiam*, 352 N.C. 666, 535 S.E.2d 356 (2000). Similarly, under the doctrine of collateral estoppel, "when an issue has been fully litigated and decided, it cannot be contested again between the same parties, even if the first adjudication is conducted in federal court and the second in state court." *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 52, 542 S.E.2d 225, 231, *disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). Collateral estoppel applies when the following requirements are met: (1) the issues to be concluded are the same as those involved in the prior action; (2) the issues in the prior action were raised and actually litigated; (3) the issues were material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action was necessary and essential to the resulting judgment. *Id.* at 54, 542 S.E.2d at 233.

In the case at bar, plaintiff's claims for breach of contract and wrongful termination are based entirely upon his contention he was denied a hearing by the School Board before his dismissal. The 22 December 2003 order of the trial court, however, addressed these very issues and concluded plaintiff was not entitled to a hearing because he failed to timely request such hearing. Plaintiff was entitled to appeal the 22 December 2003 order, but did not do so. Plaintiff nevertheless asserts the earlier order did not constitute a "judgment on the merits" for purposes of *res judicata* or collateral estoppel because the matter was then before the court by way of petition filed by plaintiff to review the actions of the School Board.

Plaintiff does not fully explain, nor does he cite any support for his assertion that an order issued by a trial court upon petition rather than upon complaint, does not constitute a "final judgment." Regardless of the procedural manner in which the issue reached the trial court, it is clear from the 22 December 2003 order that the focus of the court's review of the Board's termination of plaintiff was his claim that he was denied a proper hearing. The trial court resolved this issue against him, and plaintiff may not now seek to re-litigate whether or not he was denied a proper hearing. *See McCallum*, 142 N.C. App. at 55, 542 S.E.2d at 233 (holding that a federal court's resolution of issues central to the plaintiff's claims in state court prevented litigation of the plaintiff's suit in state court). Plaintiff's present suit is a breach of contract claim based upon his contention that he was denied a proper hearing. The doctrines of *res judicata*

and collateral estoppel bar an action, and the trial court did not err in dismissing it. We overrule this assignment of error.

Finally, plaintiff argues the trial court abused its discretion in denying his oral motion to amend his complaint. During the hearing to dismiss, defendants argued plaintiff's complaint failed to allege he had exhausted his administrative remedies before filing suit, and should therefore be dismissed. Plaintiff then moved to amend his complaint to allege he had in fact exhausted his administrative remedies, which motion the court denied. Plaintiff argues the court had no basis to deny his motion and thus abused its discretion. As we have already determined that plaintiff's complaint was properly dismissed on the basis of *res judicata* and collateral estoppel, we need not address this assignment of error.

The judgment of the trial court is hereby

Affirmed.

Judges TYSON and LEVINSON concur.

KEITH KEGLEY, AND KIMBER KEGLEY, CECIL HAMMONDS, AND MAGGIE HAMMONDS, AND CHADWICK J. MCKEOWN, PETITIONERS v. THE CITY OF FAYETTEVILLE, A NORTH CAROLINA MUNICIPALITY, RESPONDENT

No. COA04-1123

(Filed 7 June 2005)

Armed Services; Cities and Towns— annexation—federal Servicemembers Civil Relief Act—plain statement rule

The trial court did not err in an annexation case by granting respondent city's motion to dismiss based on the petition being time-barred even though petitioners contend the federal Servicemembers Civil Relief Act tolled their time to seek review, because: (1) petitioners sought judicial review after expiration of the 60-day period provided by N.C.G.S. § 160A-60(a); (2) although the plain statement rule applies when a federal statute intends to interfere with a state's regulation of its municipalities, the federal Act in this case does not contain a plain statement showing an unmistakably clear intent to intrude upon North Carolina's state sovereignty in the area of annexations when the word "annexa-

tion" does not appear anywhere in the statute, the Act's fundamental purpose is to address personal financial claims rather than large-scale government action, and petitioners failed to cite a single case which applies the Act to nonpersonal claims challenging large-scale government action; and (3) petitioners have not asserted any personal right and the remedy sought is too broad when it could halt the annexation almost indefinitely, thus going beyond the stated purpose of the Act.

Appeal by petitioners from order entered 28 June 2004 by Judge Gary L. Locklear in Cumberland County Superior Court. Heard in the Court of Appeals 13 April 2005.

Parker, Poe, Adams, & Bernstein, L.L.P., by R. Bruce Thompson II, and Anthony Fox; and City Attorney Karen M. McDonald, for respondent appellee.

The Brough Law Firm, by Robert E. Hornik, Jr., for petitioner appellants.

Andrew L. Romanet, Jr., and Gregory F. Schwitzgebel, III, for North Carolina League of Municipalities, Amicus Curiae.

McCULLOUGH, Judge.

Petitioner appellants appeal from an order granting respondent's motion to dismiss. On 24 November 2003, the City of Fayetteville adopted an ordinance annexing approximately 28 square miles of land and over 40,000 residents. The annexation was to become effective on 30 June 2004. In North Carolina, an owner of annexed property can seek judicial review if he or she files a petition "[w]ithin 60 days following the passage of an annexation ordinance." N.C. Gen. Stat. § 160A-50(a) (2003).

A group of Cumberland County residents, the Gates Four community, filed the only timely petition for review. The City of Fayetteville and Gates Four settled their dispute, and pursuant to N.C. Gen. Stat. § 160A-50(m) (2003), the superior court entered a consent judgment on 12 May 2004. Thus, the Gates Four community was excluded from the annexation.

Petitioners filed this challenge on 14 June 2004. This was five months after the 60-day period had ended, two-and-a-half years after the annexation was first publicized, and sixteen days before the annexation's effective date.

Although they petitioned for review after the 60-day period ended, petitioners argued that the federal Servicemembers Civil Relief Act ("Act") tolled their time to seek review. The trial court rejected this contention and dismissed the action as time-barred on 28 June 2004. Petitioners appeal.

On appeal, petitioners argue that the trial court erred by dismissing their petition as time-barred. We disagree and affirm the decision of the trial court.

Petitioners contend that the trial court erred in dismissing their appeal. Although they acknowledge that they sought judicial review after the 60-day period ended, petitioners argue that the Act tolled their time to seek review. They rely on Section 206 of the Act which states that:

> The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

50 App. U.S.C. § 526 (as amended by Pub. L. 108-189, § 206(a) Dec. 19, 2003)).

Petitioners suggest that since they were in the military during the 60-day period, the Act tolled the statutory period for them. We disagree.

As announced by the United States Supreme Court, the plain statement rule dictates that a federal statute cannot be interpreted to intrude upon state sovereignty unless the statute contains a plain statement showing an unmistakably clear intent to intrude. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 115 L. Ed. 2d 410, 424 (1991). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461, 115 L. Ed. 2d at 424. Therefore, the plain statement rule preserves the balance between state and federal power by ensuring that courts do not accidentally erode state power where Congress did not intend such a result.

Recently, the United States Supreme Court confirmed that the plain statement rule applies when a federal statute intends to inter-

fere with a state's regulation of its municipalities. *Nixon v. Missouri Municipal League*, 541 U.S. 125, 158 L. Ed. 2d 291 (2004). In *Nixon*, the federal Telecommunications Act of 1996 prohibited the states from barring "any entity" from the telecommunications business. *Id.* at 128, 158 L. Ed. 2d at 298. However, the State of Missouri adopted a statute prohibiting its own municipalities from providing telecommunications services. *Id.* at 129, 158 L. Ed. 2d at 298. Municipalities in Missouri challenged the state statute arguing that they fell within the federal Act's broad "any entity" language; the municipalities also claimed that the federal statute preempted the state law and invalidated Missouri's attempt to bar them from the telecommunications business. *Id.*

The United States Supreme Court rejected the municipalities' claim and declined to inject a federal statute into a state's sovereign right to govern its municipal subdivisions:

> Preemption [by the Federal Telecommunications Act] would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion."

Id. at 140, 158 L. Ed. 2d at 305 (citation omitted). The Supreme Court also explained that

> federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires.

Id. Therefore, in spite of the broad "any entity" language, the Supreme Court found no plain statement for the Telecommunications Act to apply to municipalities.

Although they are undertaken by municipalities, annexations derive from this State's sovereign power. The North Carolina Constitution vests the General Assembly with the exclusive, but delegable power, to regulate municipal borders. N.C. Const. art. VII, § 1. Municipal borders are fundamentally a State concern because municipalities are agents of the State. *See Smith v. Winston-Salem*, 247 N.C. 349, 354, 100 S.E.2d 835, 838 (1957) ("A municipal corporation, city or town, is an agency created by the State to assist in the civil

government of a designated territory and the people embraced within these limits."). Therefore, to interfere with how the General Assembly shapes municipal borders is to interfere with its sovereignty.

The issue is whether the federal Act contains a plain statement showing an unmistakably clear intent to intrude upon North Carolina's state sovereignty in the area of annexations. For several reasons, we conclude that it does not.

First, the word "annexation" appears nowhere in the statute, and petitioners have not cited a single case in which the tolling provision applied to annexations. It is difficult to imagine that Congress, intending to so dramatically alter state annexations, did so casually and quietly. If Congress truly aimed to overhaul state annexations, it surely would have used the word "annexation" at least once.

Second, the Act's fundamental purpose is to address personal financial claims, not large-scale government action. Numerous provisions seek to relieve servicemembers from worrying about standard financial claims and transactions. For instance, Section 201 limits creditors' ability to obtain default judgments against servicemembers. 50 App. U.S.C. § 525 (as amended by Pub. L. 108-189, § 201, Dec. 19, 2003). Section 207 lowers interest rates for indebtedness. *Id.* at § 207. Section 301 restricts evictions of servicemembers. *Id.* at § 301. And, other sections affect termination of motor vehicle leases, limit foreclosures against property, and protect servicemembers' rights under life insurance policies. Finally, and perhaps most importantly, petitioners have failed to cite a single case which applies the Act to non-personal claims challenging large-scale government action.

In fact, accepting respondents' position would cripple the way municipalities determine their borders. Indefinitely tolling the time to challenge annexations would give individual servicemembers substantial power over governments and entire communities. Petitioners concede that under their interpretation of the law, a single servicemember could challenge the validity of an annexation for years or even decades after the annexation's completion. Our courts presume that the legislature acted reasonably and " 'did not intend an unjust or absurd result. . . .' " *Best v. Wayne Mem'l Hosp., Inc.*, 147 N.C. App. 628, 635, 556 S.E.2d 629, 634 (2001) (citation omitted), *appeal dismissed, disc. review denied*, 356 N.C. 433, 572 S.E.2d 426 (2002). Allowing a single servicemember to hold up an annexation for years and perhaps decades would paralyze a municipality's ability to provide services to its citizens. This absurd and potentially damaging

result goes beyond the stated purpose of the Act which allows "the *temporary* suspension of judicial and administrative proceedings[.]" 50 App. U.S.C. § 525 (as amended by Pub. L. 108-189 § 2(2)). It further reveals that Congress did not intend to intrude upon North Carolina's state sovereignty in the area of annexations.

Finally, we cannot grant petitioners' relief because it is overly broad. Section 2 of the Act is designed "to provide for the *temporary* suspension of judicial and administrative proceedings . . . that may adversely affect the civil *rights of servicemembers during their military service.*" *Id.* (emphasis added). In the present case, petitioners have not asserted any personal right. They have not sought to limit the scope of the annexation or exclude their property from the annexation as the members of the Gates Four community did. Instead, the relief requested is a complete nullification, or at the very least, a potential long-term holdup, of the annexation. This remedy is broad and would go beyond the stated purpose of the Act. Nullifying an annexation is not simply an action to preserve the rights of servicemembers during their military service. Rather, it would allow the tolling provision to be improperly applied to *non-servicemembers*, people who would then receive the benefits and burdens of having the annexation nullified even if they failed to take timely action in seeking judicial review. Furthermore, as petitioners have acknowledged, the relief they request is not temporary because it could halt the annexation almost indefinitely.

While we recognize and appreciate the sacrifices of the members of our armed forces, we believe that Congress did not intend to defeat municipalities' ability to operate, including their ability to complete annexations with finality. Petitioners did not seek to exempt their own property and did not seek judicial review within the 60-day time period. The Act's tolling provision has never been applied to large-scale governmental action, such as annexations. Finally, since the Act does not reveal a clear intent to intrude upon North Carolina's state sovereignty in the area of annexations, we hold that the trial court acted properly in granting respondent's motion to dismiss. The order is

Affirmed.

Judges HUNTER and LEVINSON concur.

TIBER HOLDING CORPORATION, REGIS INSURANCE COMPANY, JANUS MANAGEMENT SERVICES AND CHARTER CAPITAL CORPORATION, PLAINTIFFS V. ANDREW P. DiLORETO, SUSAN S. DiLORETO, MICHAEL J. DiLORETO, AND CAMILLE A. DiLORETO, DEFENDANTS

No. COA04-1184

(Filed 7 June 2005)

1. Appeal and Error— appealability—motion to amend answer

The denial of a motion to file a supplemental answer was interlocutory and defendants' appeal of this issue was dismissed.

2. Collateral Estoppel and Res Judicata— res judicata—fraudulent conveyance—constructive trust

Actions for fraudulent conveyance and constructive trust have separate elements and, in this case, did not involve the same transfer of title. Summary judgment based on res judicata was correctly denied.

Appeal by Defendants from judgment entered 8 March 2004 by Judge William C. Griffin, Jr. in Superior Court, Currituck County. Heard in the Court of Appeals 10 May 2005.

Poyner & Spruill LLP, by J. Nicholas Ellis and Gregory S. Camp, for plaintiff-appellees.

Hornthal, Riley, Ellis & Maland, L.L.P., by L.P. Hornthal, Jr., for defendant-appellants.

WYNN, Judge.

"Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). In this case, Defendants contend this action for constuctive trust is barred by *res judicata* due to an earlier judgment on fraudulent conveyance involving the same parties. Because the claims involved different elements and were based on different title transfers of the property, we affirm the trial court's holding that *res judicata* does not bar the claim for constructive trust.

This action commenced with the filing of a complaint on 3 April 1989, in which Plaintiffs (Tiber Holding Corporation, Regis Insurance

Company, Janus Management Services, and Charter Capital Corporation) alleged a constructive trust on property in Currituck County, North Carolina titled in the name of Defendant Michael J. DiLoreto. The Complaint alleged that the down payment for the property purchased in 1987, an amount in excess of $80,000.00, was derived from funds improperly diverted from Plaintiffs. Defendant Michael J. DiLoreto is a former director, officer, and shareholder of Plaintiffs. Before the filing of an Answer, on 26 July 1989, the parties entered into a Stipulation and Consent Order that stayed further proceedings in the action subject to determination of several pending actions between the parties in Pennsylvania.

On 21 April 1998, judgment was entered against Defendant Michael J. DiLoreto in the Pennsylvania actions in the aggregate amount of $1,826,733.00. Thereafter, Plaintiffs domesticated the judgment in that action in Currituck County (file no. 99 CVS 194).

On 30 September 1999, Plaintiffs filed another action against Defendants, alleging they had been damaged by a fraudulent transfer of certain property by DiLoreto to himself and his wife, Camille DiLoreto, as tenants by the entirety. That Complaint alleged that in April 1996, Plaintiffs had obtained a large monetary judgment against DiLoreto for wrongful conversion, fraud, and breach of fiduciary duty. On 21 November 1996, a date prior to the execution of this judgment, Mr. DiLoreto conveyed real property previously titled solely in his name to himself and his wife as tenants by the entirety. When that case went to trial, Mrs. DiLoreto testified that when the real property in question was bought in 1987, she believed herself to be a joint owner. It was only at a meeting with their attorney to discuss the preparation of wills in April 1996 that Mrs. DiLoreto discovered the property was titled only to her husband. According to Mrs. DiLoreto, her husband's subsequent conveyance of the property as tenancy by the entirety was a correction of this error. That trial resulted in a jury verdict and judgment in favor of Defendants on the fraudulent conveyance action. Upon appeal by Plaintiffs, this Court affirmed the judgment of the trial court. *Tiber Holding Corp. v. DiLoreto*, 160 N.C. App. 583, 586 S.E.2d 538 (2003).

On 2 August 2002, Plaintiffs gave notice to return the 1989 constructive trust case to active status, requiring Defendants (Andrew P. DiLoreto, Susan S. DiLoreto, Michael J. DiLoreto, and Camille DiLoreto) to serve responsive pleadings per the previous Stipulation and Consent Order. Defendants, Michael J. DiLoreto and his wife,

Camille DiLoreto ("the DiLoretos")[1], filed an Answer, which included the defense of *res judicata*. In December 2002, the DiLoretos filed a Motion to File Supplemental Answer and a Motion for Summary Judgment. From the trial court's denial of both motions, the DiLoretos appealed to this Court.

---

[1] On appeal, the DiLoretos first argue that the trial court erred in denying their Motion to File Supplemental Answer. However, under North Carolina law, orders denying a motion to amend pleadings are interlocutory and do not affect a substantial right.[2] *See Buchanan v. Rose*, 59 N.C. App. 351, 352, 296 S.E.2d 508, 509 (1982); *Funderburk v. Justice*, 25 N.C. App. 655, 656, 214 S.E.2d 310, 311 (1975). Moreover, the DiLoretos made no argument that the trial court's denial of their motion to amend the complaint affected a substantial right. Accordingly, we dismiss this assignment of error as interlocutory.

[2] The DiLoretos next argue that the trial court erred in denying their motion for summary judgment because this suit is barred by *res judicata* due to the judgment of the 1999 action for fraudulent conveyance.[3]

---

1. Defendants Andrew P. DiLoreto and Susan S. DiLoreto are not parties to this appeal.

2. An order is interlocutory if it is 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 rights of all parties involved in the controversy. *See Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950); *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002). Generally, there is no right to appeal from an interlocutory order. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2004); *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. But there are two instances where a party may appeal interlocutory orders: (1) when there has been a final determination as to one or more of the claims and the trial court certifies that there is no just reason to delay the appeal, and (2) if delaying the appeal would prejudice a substantial right. *See Liggett Group Inc. v. Sunas*, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993).

Here, the trial court made no such certification. Thus, the DiLoretos are limited to the second route of appeal, namely where "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). In such cases, we may review the appeal under sections 1-277(a) and 7A-27(d)(1) of the North Carolina General Statutes. *See id.* "The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party." *Flitt*, 149 N.C. App. at 477, 561 S.E.2d at 513.

3. Although interlocutory,

> Denial of a summary judgment motion based on *res judicata* raises the possibility that a successful defendant will twice have to defend against the same claim

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 or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880; *Hales v. N.C. Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). "The doctrine prevents the relitigation of 'all matters . . . that were or should have been adjudicated in the prior action.' " *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880 (quoting *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)). Therefore, for *res judicata* to apply, the DiLoretos would need to show that the 1999 suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both they and Plaintiffs either were parties or stand in privity with parties.

In this case, the 1999 suit resulted in a final judgment on the merits, and all parties are the same in the 1999 and 1989 suits. Therefore, only one question remains for us to decide concerning the applicability of the doctrine of *res judicata*: Was the 1999 fraudulent conveyance action the same as the current action for a constructive trust? We hold that the actions are not the same.

In deciding the appeal of the 1999 action, this Court restated the three separate principles under which a conveyance would be classified as fraudulent:

> (1) 'if the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing'; (2) 'if the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, . . . although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay

---

by the same plaintiff, in frustration of the underlying principles of claim preclusion. Thus, the denial of summary judgment based on the defense of *res judicata* can affect a substantial right and may be immediately appealed.

Bockweg v. Anderson, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993); *see Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 589, 599 S.E.2d 422, 426 (2004). Therefore, the DiLoretos' appeal of their Motion for Summary Judgment is properly before this court.

> existing debts is retained'; and (3) 'if the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the *grantor*, participated in by the *grantee* or of which he has notice.'

Tiber Holding Corp., 160 N.C. App. at 585, 586 S.E.2d at 539 (quoting *Aman v. Waller*, 165 N.C. 224, 227, 81 S.E. 162, 164 (1914)). This court affirmed the denial of the motion for a directed verdict. In the 1999 case, the jury found, as to principles one and two, that "Mr. DiLoreto did not intend to hinder, delay, or defraud his creditors and that he retained sufficient property to pay his creditors[]" when he transferred title of the property from his name to himself and his wife as tenants by the entirety. *Tiber Holding Corp.*, 160 N.C. App. at 586, 586 S.E.2d at 540.

The present appeal arises from Plaintiffs' claim of a constructive trust. Under North Carolina law, a constructive trust is imposed "to prevent the unjust enrichment of the holder of the legal title to property acquired through a breach of duty, fraud, or other circumstances which make it inequitable for him to retain it against the claim of the beneficiary of the constructive trust." *Sara Lee Corp. v. Carter*, 351 N.C. 27, 35, 519 S.E.2d 308, 313 (1999) (internal quotes omitted); *see Speight v. Branch Banking & Trust Co.*, 209 N.C. 563, 565-66, 183 S.E. 734, 735-36 (1936). "[A] constructive trust ordinarily arises out of the existence of fraud, actual or presumptive—usually involving the violation of a confidential or fiduciary relation—in view of which equity transfers the beneficial title to some person other than the holder of the legal title." *Sara Lee Corp.*, 351 N.C. at 35, 519 S.E.2d at 313 (citation omitted). To succeed in having a constructive trust imposed on the property, Plaintiffs must prove that Mr. DiLoreto acquired the property in 1987 by breach of fiduciary duty, fraud, or other inequitable circumstances.

Not only does a claim of fraudulent conveyance involve completely separate elements from a claim of constructive trust, the two actions do not involve the same transfer of title of the property. The 1999 action for fraudulent conveyance involves transfer of title from Mr. DiLoreto to himself and his wife as tenants by the entirety in 1996, while this action involves the original purchase of the property by Mr. DiLoreto in 1987. As this action is not the same as the 1999 action, we hold that this action is not barred by *res judicata*. *Thomas M. McInnis & Assocs.*, 318 N.C. at 428, 349 S.E.2d at 556.

The DiLoretos voluntarily abandoned their remaining assignments of error and did not argue them in their brief. N.C. R. App. P. 28(b)(6).

Accordingly, we affirm the trial court's denial of the motion for summary judgment and dismiss the assignment of error appealing the denial of the motion to amend the complaint.

Affirmed in part and dismissed in part.

Judges BRYANT and JACKSON concur.

JON T. TERRELL, PLAINTIFF v. HARRIET A. KAPLAN, INDIVIDUALLY, AND HARRIET A. KAPLAN, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY KAPLAN, DECEASED, DEFENDANT

No. COA04-993

(Filed 7 June 2005)

Statute of Frauds— breach of contract—personal guarantee of promissory note—main purpose rule

The trial court erred by granting defendant's Rule 12(b)(6) motion to dismiss a breach of contract claim based on defendant's personal guarantee of a promissory note, because: (1) the allegations plead a direct, personal, and immediate pecuniary interest on the part of defendant so as to remove her promise to pay from the statute of frauds pursuant to the main purpose rule; and (2) it does not appear to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim. N.C.G.S. § 22-1.

Appeal by Plaintiff from order entered 14 June 2004 by Judge Beverly T. Beal in Superior Court, Mecklenburg County. Heard in the Court of Appeals 19 April 2005.

Katten Muchin Zavis Rosenman, by Richard L. Farley and Christopher A. Hicks, for plaintiff-appellant.

Tin Fulton Greene & Owen, by Shirley L. Fulton and Bartina L. Edwards, for defendant-appellee.

WYNN, Judge.

In deciding a motion to dismiss for failure to state a claim, a court must look to whether the pleadings, when taken as true, are legally sufficient to satisfy the elements of at least some legally recognized claim. *Arroyo v. Scottie's Prof'l Window Cleaning, Inc.*, 120 N.C. App. 154, 158, 461 S.E.2d 13, 16 (1995), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996). Here, Plaintiff Jon T. Terrell contends that the trial court erred in dismissing his complaint because, pursuant to the main purpose rule, Defendant Harriet A. Kaplan's promise to guarantee a promissory note is not within the statute of frauds. Mr. Terrell therefore argues that the trial court erred in granting Ms. Kaplan's motion to dismiss. We agree with Mr. Terrell, find that his complaint states a claim upon which relief may be granted, and therefore reverse the trial court's order and remand this case.

On 23 December 2003, Mr. Terrell filed a complaint against Ms. Kaplan. The complaint alleged that Stanley and Harriet Kaplan, whom Mr. Terrell has known for over thirty years, owned the Charlotte newspaper "The Leader" and that, in Spring 2000, Mr. Kaplan asked Mr. Terrell to loan $300,000 to The Leader. Mr. Kaplan promised that "repayment of the debt would be guaranteed by The Leader, Stan, and Harriet." Mr. Terrell agreed to loan the money to The Leader, and The Leader executed a promissory note in favor of Mr. Terrell in the amount of $300,000. Mr. Kaplan also executed a guarantee agreement, personally guaranteeing the payment of the promissory note. Ms. Kaplan did not execute a personal guarantee at that time.

The complaint stated that, in Fall 2001, Mr. Kaplan informed Mr. Terrell that he was dying and requested an extension of the payment period on the promissory note. Mr. Kaplan represented to Mr. Terrell that the note would be secured by personal guarantees executed by himself and Ms. Kaplan. Ms. Kaplan's attorney drew up a modification to the promissory note. The modification included statements that "Harriet A. Kaplan has agreed to become a guarantor of the Note[,]" and that the modification was made "in consideration of Harriet A. Kaplan's guaranty." The modification was executed by both Ms. Kaplan, as president of The Leader, and Mr. Terrell. Ms. Kaplan also had a personal guaranty agreement drawn up but never delivered the executed personal guaranty agreement to Mr. Terrell.

Mr. Kaplan died in December 2001, and Ms. Kaplan was duly appointed as personal representative of Mr. Kaplan's estate. The com-

plaint alleged that as the president and "sole remaining shareholder of The Leader" and "the personal representative and primary beneficiary" of Mr. Kaplan's estate, Ms. Kaplan "had a direct pecuniary interest in the estate and a direct pecuniary interest in the survival of The Leader."

The complaint further alleged that, in April 2002, as personal representative of Mr. Kaplan's estate, Ms. Kaplan published a notice of administration in a local newspaper but did not provide notice to Mr. Terrell, a resident of Santa Barbara, California and a known creditor of the estate. In August 2002, The Leader defaulted on the promissory note and modification by filing a bankruptcy petition. Mr. Terrell contacted Ms. Kaplan, as executrix of Mr. Kaplan's estate and as personal guarantor of the promissory note and modification, and demanded payment; Ms. Kaplan refused and failed to pay.

Ms. Kaplan, individually, filed a motion to dismiss the complaint pursuant to North Carolina Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief could be granted. She also filed an answer on behalf of Mr. Kaplan's estate. Mr. Terrell filed a motion for judgment on the pleadings against Ms. Kaplan, as representative of Mr. Kaplan's estate; the motion was granted on 4 May 2004. However, on 14 June 2004, the trial court granted Ms. Kaplan's motion to dismiss Mr. Terrell's breach of contract claim against her individually; Mr. Terrell appealed.

In reviewing the grant of a motion to dismiss for failure to state a claim upon which relief can be granted, we look to whether:

> the pleadings, when taken as true, are legally sufficient to satisfy the elements of at least some legally recognized claim. *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E.2d 838 (1987). In ruling upon a Rule 12(b)(6) motion, the trial court should liberally construe the complaint and should not dismiss the action unless it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim. *Davis v. Messer*, 119 N.C. App. 44, 457 S.E.2d 902 (1995).

Arroyo, 120 N.C. App. at 158, 461 S.E.2d at 16. "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd*, 357 N.C. 567, 597 S.E.2d 673 (2003).

Here, Mr. Terrell contends that the trial court erred in granting Ms. Kaplan's motion to dismiss, that the complaint states a claim upon which relief can be granted because, *inter alia*, Ms. Kaplan guaranteed repayment for entities in which she has a direct pecuniary interest. We agree.

As stated in North Carolina General Statutes section 22-1,

> No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

N.C. Gen. Stat. § 22-1 (2004). However, "if it is concluded that the promisor has the requisite personal, immediate, and pecuniary interest in the transaction in which a third party is the primary obligor, then the promise is said to be original rather than collateral and therefore need not be in writing to be binding." *Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 748, 202 S.E.2d 591, 597 (1981) (citation omitted); *see also*, *e.g.*, *Stuart Studio, Inc. v. Nat'l School of Heavy Equip., Inc.*, 25 N.C. App. 544, 546, 214 S.E.2d 192, 193 (1975) (Where "the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, . . . his promise is not within the statute [of frauds] . . . ." (quotation omitted)).

The main purpose rule has been applied to individuals guaranteeing the debt of corporations of which the guarantors were majority stockholders. For example, in *Stuart Studio*, 25 N.C. App. at 547-48, 214 S.E.2d at 194, the individual defendant orally guaranteed the corporate defendant's debt for catalogues to be produced by the plaintiff. The corporate defendant, however, was experiencing financial difficulties and filed for bankruptcy. Because the individual defendant was the sole shareholder of the corporate defendant's voting stock and owned forty-nine percent of another class of stock, this Court found that the individual defendant had a personal and direct interest in the corporate defendant sufficient to raise an issue for jury determination. And in *Bassett Furniture Indus. of N.C., Inc. v. Griggs*, 47 N.C. App. 104, 108-09, 266 S.E.2d 702, 705 (1980), the

defendant orally guaranteed the repayment of credit extended by the plaintiff to a corporation of which the defendant was an officer and the managing director and in which defendant owned half the company stock. This Court held that, given the evidence of the defendant's direct, personal, and immediate interest, summary judgment for the defendant was inappropriate. *Id.*

In the case *sub judice*, Mr. Terrell alleged that Ms. Kaplan was the president and sole shareholder of The Leader. The complaint alleged that Ms. Kaplan held these positions at a time when she represented that she would sign the personal guarantee agreement, and at the time she executed the note modification stating that "Harriet A. Kaplan has agreed to become a guarantor of the Note[]" and the modification was made "in consideration of Harriet A. Kaplan's guaranty." Moreover, Mr. Terrell alleged that The Leader was in financial distress and filed for bankruptcy shortly after Ms. Kaplan's promises, and that Ms. Kaplan is the primary beneficiary of the estate of Mr. Kaplan, who signed a personal guarantee of the original promissory note. These allegations, which on a motion to dismiss we must presume true, plead such direct, personal, and immediate pecuniary interest on the part of Ms. Kaplan so as to remove Ms. Kaplan's promise to pay from the statute of frauds. We therefore hold that it does not "appear[] to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim." *Arroyo*, 120 N.C. App. at 158, 461 S.E.2d at 16 (citation omitted). The trial court therefore erred in granting Ms. Kaplan's motion to dismiss Mr. Terrell's breach of contract claim based on Ms. Kaplan's personal guarantee of the promissory note. Accordingly, we reverse the trial court's order and remand this case for further proceedings.

Reversed and Remanded.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. DWIGHT McKENSEY PRICE, DEFENDANT

No. COA04-1024

(Filed 7 June 2005)

1. Larceny; Personal Property— larceny—injury to personal property—indictment—entity capable of owning property

Defendant's convictions for larceny of parking meters and injury to personal property are vacated because the indictments named "City of Asheville Transit and Parking Services" as the owner of the property which did not clearly indicate an entity capable of owning property.

2. Burglary and Unlawful Breaking or Entering— breaking into coin-operated machine—indictment—allegation of ownership unnecessary

Defendant's convictions for breaking into a coin-operated machine under N.C.G.S. § 14-56.1 is upheld even though ownership was not alleged in the indictment, because an allegation of ownership is not necessary to sustain this charge.

Appeal by Defendant from judgment entered 29 October 2003 by Judge Albert Diaz in Superior Court, Buncombe County. Heard in the Court of Appeals 10 May 2005.

Attorney General Roy Cooper, by Assistant Attorney General David J. Adinolfi II, for the State.

Bryan Gates, Jr., for defendant-appellant.

WYNN, Judge.

In *State v. Strange*, 58 N.C. App. 756, 757, 294 S.E.2d 403, 404 (1982) this Court found an indictment for larceny fatally defective because the words "Granville County Law Enforcement Association" did not import a legal entity capable of owning property. In this case, Defendant contends his convictions for larceny of parking meters cannot stand because the indictments named "City of Asheville Transit and Parking Services," which is not a legal entity capable of owning property, as the owner. Finding this Court's holding in *Strange* to be controlling, we agree; accordingly, we vacate Defendant's convictions for larceny and injury to personal property. However, we uphold Defendant's convictions for breaking into a coin-

operated machine since we hold that an allegation of ownership is not necessary to sustain that charge.

The evidence at trial tended to show that on 5 September 2002, Officer Dwight Arrowood, a member of the Asheville Police Department, observed Defendant Dwight McKensey Price cutting into a parking meter with a hacksaw. Officer Arrowood arrested Defendant and seized his blue tote bag, hacksaw with a blade, and coins totaling $4.60.

On 17 November 2002, Officer Arrowood observed Defendant sitting on a bench with a "tire tool" approximately an arm's length away. Upon returning twenty-five to thirty minutes later, Officer Arrowood observed a parking meter that had been broken into—to the right of where Defendant had been sitting. A short while later Defendant was arrested with a "tire tool" and coins totaling $16.70.

On 8 January 2003, June Melton saw a man prying open the back of a parking meter in front of her business in downtown Asheville. Ms. Melton had a co-worker, Carol Laurent, watch the man while she called the police. Ms. Laurent gave a description of the man she saw and later identified Defendant. Officer Luke Bigelow arrested Defendant, who had a screwdriver in his hand and $9.96 in coins.

The jury found Defendant guilty of misdemeanor larceny, three counts of breaking into a coin-operated machine, and injury to personal property causing more than $200.00 of damage. The jury also found Defendant guilty of being a habitual felon. Defendant was sentenced to ninety-three months to 121 months imprisonment. Defendant appeals.

---

[1] On appeal, Defendant first challenges the indictments supporting his convictions for injury to personal property and larceny.

To convict a defendant of injury to personal property, the State must prove that the personal property was that "of another," i.e., someone other than the person or persons accused. N.C. Gen. Stat. § 14-160 (2004) ("If any person shall wantonly and willfully injure the personal property of another he shall be guilty . . . ."); *In re Meaut*, 51 N.C. App. 153, 155, 275 S.E.2d 200, 201 (1981). Moreover, "an indictment for larceny must allege the owner or person in lawful possession of the stolen property." *State v. Downing*, 313 N.C. 164, 166, 326 S.E.2d 256, 258 (1985). Thus, to be sufficient, an indictment for injury to personal property or larceny must allege the owner or person in

lawful possession of the injured or stolen property. However, "[i]f the entity named in the indictment is not a person, it must be alleged 'that the victim was a legal entity capable of owning property[.]' " *State v. Phillips*, 162 N.C. App. 719, 721, 592 S.E.2d 272, 273 (2004) (quoting *State v. Woody*, 132 N.C. App. 788, 790, 513 S.E.2d 801, 803 (1999)).

Here, the indictments for injury to personal property and larceny named the property owner as "City of Asheville Transit and Parking Services," which is not a natural person. Significantly, the indictment did not allege that it was a legal entity capable of owning property. *See Phillips*, 162 N.C. App. at 721, 592 S.E.2d at 273.

In *State v. Thornton*, 251 N.C. 658, 661, 111 S.E.2d 901, 903 (1960), our Supreme Court held "that the fact of incorporation need not be alleged where the corporate name is correctly set out in the indictment." *Id.* (citation omitted). Nonetheless, the Court found an indictment for embezzlement fatally defective because the words "The Chuck Wagon" did not import a corporation capable of owning property. *Id.* at 662, 111 S.E.2d at 904. Thereafter, in *State v. Turner*, 8 N.C. App. 73, 75, 173 S.E.2d 642, 643 (1970), this Court upheld an indictment for larceny that named the "City of Hendersonville" as the property owner because it clearly denoted a municipal corporation authorized to own personal property. But more recently, in *Strange*, 58 N.C. App. at 757, 294 S.E.2d at 404, this Court held an indictment for larceny naming "Granville County Law Enforcement Association" as the property owner to be fatally defective because the words neither correctly set out a corporate name nor imported a legal entity capable of owning property.

Here, as in *Strange*, the words "City of Asheville Transit and Parking Services" do not indicate a legal entity capable of owning property. Moreover, this case is unlike *Turner*, in which "City of Hendersonville" was sufficient as it clearly denoted a municipal corporation, because the additional words after "City of Asheville" make it questionable what type of organization it is. Following *Strange*, we conclude that the name on the indictment in this case did not clearly indicate a corporate entity capable of owning property; and the indictments for larceny and injury to personal property failed to allege that "City of Asheville Transit and Parking Services" was an entity capable of owning property. Accordingly, these indictments were fatally defective and must be vacated.

[2] Defendant further contends that his convictions for breaking into a coin-operated machine in violation of section 14-56.1 of the North

Carolina General Statutes must likewise be vacated because ownership was not properly alleged. N.C. Gen. Stat. § 14-56.1 (2004) ("Any person who forcibly breaks into . . . any coin- or currency-operated machine with intent to steal any property or moneys therein shall be guilty . . . ."). We disagree with that contention.

As this Court has not examined whether the State must prove, as an element of section 14-56.1, the identification of the owner of the property, we will look to an analogous statute. Section 14-54(a) of the North Carolina General Statutes makes breaking and entering buildings a crime. N.C. Gen. Stat. § 14-54(a) (2004) ("Any person who breaks or enters any building with intent to commit any felony . . . ."). This Court has held that,

> it was not necessary that the indictment allege ownership of the building; it was only necessary that the State 'identify the building with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense.'

State v. Norman, 149 N.C. App. 588, 592, 562 S.E.2d 453, 456 (2002) (quoting *State v. Carroll*, 10 N.C. App. 143, 145, 178 S.E.2d 10, 12 (1970)). Because we find section 14-56.1 to be analogous to section 14-54(a) of the North Carolina General Statutes, we conclude that the identification of the owner of the property is not an element of the crime of breaking into a coin-operated machine under section 14-56.1. Accordingly, we uphold Defendant's convictions under the three indictments for breaking into a coin-operated machine.

Defendant failed to argue his remaining assignment of error in his brief; it is therefore deemed abandoned. N.C. R. App. P. 28(b)(6).

In sum, we vacate 02CRS61581 and 02CRS15483 and find no error as to 03CRS50310, 02CRS65019, and 02CRS61580.

Vacated in part, No Error in part.

Judges BRYANT and JACKSON concur.

IN THE MATTER OF: L.M.C.

No. COA04-912

(Filed 7 June 2005)

1. **Appeal and Error— preservation of issues—failure to object—plain error analysis inapplicable**

Although respondent mother contends the trial court erred by allowing the minor child's custodians to participate in the juvenile dependency proceedings without filing a motion to intervene, respondent failed to preserve this issue for review because: (1) the custodians participated in two prior proceedings on 9 July 2003 and 11 September 2003 as the minor child's caretakers, and respondent did not appeal from those orders which granted the custodians temporary and permanent custody respectively; (2) respondent did not object to their participation during the 11 December 2003 hearing; (3) although respondent argues plain error, plain error review is limited to criminal cases and is not applicable to civil cases; and (4) under N.C.G.S. § 7B-906(c), a custodian may present information to the trial court which the trial court is required to consider.

2. **Child Abuse and Neglect— dependency—permanency planning hearing—failure to appoint guardian ad litem for parent—mental health issues**

The trial court erred by conducting a permanency planning review hearing without appointing a guardian ad litem for respondent mother as required by N.C.G.S. § 7B-602(b)(1), because: (1) failure to appoint a guardian ad litem in any appropriate case is deemed prejudicial error per se, and court documents indicated that the mother had mental health issues, a depressive disorder and borderline personality disorder which resulted in the minor child's dependency; and (2) under N.C.G.S. § 7B-906, notice of the review hearing and its purpose was required to be given to the guardian ad litem and the court was required to consider any information the guardian ad litem presented.

Appeal by respondent from an order entered 18 December 2003 by Judge M. Patricia DeVine in Chatham County District Court. Heard in the Court of Appeals 2 March 2005.

Lunday A. Riggsbee for petitioner-appellee Chatham County Department of Social Services.

The Turrentine Group, PLLC, by Karlene Scott-Turrentine, for respondent-appellant.

HUNTER, Judge.

By this appeal, the respondent-mother challenges the trial court's order granting guardianship of her minor daughter to Joy MacVane ("JM") and Ed Calamai ("EC"). As we conclude the trial court failed to appoint a guardian ad litem as required under N.C. Gen. Stat. § 7B-602(b)(1) (2003), we remand for a new permanency planning hearing.

The pertinent facts tend to indicate that LMC is a minor child born on 2 September 1988. On 1 February 2000, LMC's father died and LMC began residing with her paternal grandmother. Her mother had a long history of emotional instability and after LMC's father's death, the mother's relationship with LMC deteriorated. A psychological evaluation determined the mother suffered from a depressive disorder and borderline personality disorder.

A juvenile petition was filed by the Chatham County Department of Social Services ("DSS") on 8 October 2000 alleging emotional abuse, neglect, and dependency. On 29 November 2000, the mother consented to the petition allegations, custody was placed with DSS, and physical custody was given to the paternal grandmother.

In a 19 March 2001 order, the paternal grandmother was given guardianship of LMC. A few months later, in a 12 July 2001 order, the trial court terminated jurisdiction, relieved DSS and LMC's guardian ad litem of any further responsibility, and continued guardianship with the grandmother. The trial court ordered that family therapy involving LMC and her mother continue, and that the guardian, the paternal grandmother, would determine whether contact outside of therapy would occur between LMC and her mother.

Almost two years later, the paternal grandmother died on 16 April 2003. Although the grandmother named an adult niece as LMC's guardian in her will, DSS was given temporary custody as the child wanted to remain in North Carolina and LMC's therapist felt it was in LMC's best interest to remain in North Carolina. DSS filed a new juvenile petition on 21 May 2003 alleging LMC was dependent. The mother consented to the petition allegations during a 12 June 2003

hearing. In the 9 July 2003 order, the trial court gave temporary custody of LMC to JM and EC. After a September 2003 review hearing, permanent custody was given to JM and EC and a review hearing was scheduled for 11 December 2003. During the 11 December 2003 hearing, JM and EC requested guardianship of LMC. In its 18 December 2003 order, the trial court gave guardianship of LMC to JM and EC and relieved DSS and LMC's guardian ad litem of any further responsibility. The mother appeals.

As an initial matter, we note the mother consented to a finding of dependency. Thus, all of the mother's issues on appeal relate to the trial court's disposition in this matter.

[1] The mother first argues the trial court erroneously allowed JM and EC to participate in the juvenile dependency proceedings without filing a motion to intervene. However, we note the mother did not appeal from the 9 July 2003 and 11 September 2003 orders which granted JM and EC temporary custody and permanent custody, respectively. These orders indicate that JM and EC participated in these prior proceedings as LMC's caretakers. Moreover, the record indicates the mother did not object to their participation during the 11 December 2003 hearing. Accordingly, the mother has failed to properly preserve this issue for our review as the mother failed to object to JM's and EC's participation in the proceedings at the trial level. *See* N.C.R. App. P. 10(b)(1). Although the mother argues this issue under a plain error analysis on appeal, we note that plain error review is limited to criminal cases and is not applicable to civil cases. *See Durham v. Quincy Mutual Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E.2d 372, 377 (1984). Furthermore, under N.C. Gen. Stat. § 7B-906(c) (2003), a custodian may present information to the trial court which the trial court is required to consider.

[2] Next, the mother argues the trial court erroneously conducted a review hearing without appointing a guardian ad litem for her pursuant to N.C. Gen. Stat. § 7B-602.[1] N.C. Gen. Stat. § 7B-602(b) states in pertinent part:

> [A] guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent in the following cases:

1. In her brief, the mother refers to N.C. Gen. Stat. § 7B-1111(6) (2004) as the statute governing when an appointment of a guardian ad litem for a parent is required. However, N.C. Gen. Stat. § 7B-1111 provides a list of grounds upon which parental rights may be terminated and this case is not a termination of parental rights proceeding. Rather, the governing statute is N.C. Gen. Stat. § 7B-602.

> (1) Where it is alleged that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101 in that the parent is incapable as the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition of providing for the proper care and supervision of the juvenile[.]

Id. As explained in *In re H.W.*, 163 N.C. App. 438, 447, 594 S.E.2d 211, 216 (2004), N.C. Gen. Stat. § 7B-602

> requires the appointment of a guardian ad litem only in cases where (1) it is alleged that a juvenile is dependent; and (2) the juvenile's dependency is alleged to be caused by a parent or guardian being "incapable as the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition of providing for the proper care and supervision of the juvenile."

Id. (emphasis omitted) (citation omitted). The "failure to appoint a guardian ad litem in any appropriate case is deemed prejudicial error *per se*[.]" *Id.* at 448, 594 S.E.2d at 216. In this case, the sole allegation in the juvenile petition was that LMC was a dependent juvenile. Although the juvenile petition indicated the facts supporting the dependency allegation were in an attached document, the attached document is not in the record before this Court. However, the court documents indicate the mother had mental health issues, a depressive disorder and borderline personality disorder, which resulted in LMC's dependency. Specifically, the 18 December 2003 order stated: "There has been a long history of mental instability and some inappropriate behaviors by the juvenile's mother . . . that has negatively impacted the stability and well-being of the juvenile." Therefore, the trial court erroneously failed to appoint a guardian ad litem for the respondent-mother.

Under N.C. Gen. Stat. § 7B-906, notice of the review hearing and its purpose was required to be given to the guardian ad litem and the court was required to consider any information the guardian ad litem presented. Accordingly, because the trial court failed to appoint the mother a guardian ad litem, the guardianship order is vacated and this cause is remanded for the appointment of a guardian ad litem and a new review hearing.

The mother also presents several issues regarding the trial court's findings of fact, conclusions of law, evidentiary and motion rulings. It

is unnecessary to address the remaining issues in light of our conclusion that the trial court's order must be vacated and this case remanded for further proceedings. We note that on remand, the trial court must comply with the provisions of N.C. Gen. Stat. §§ 7B-600, 7B-602, 7B-906 and 7B-907.

Vacated and remanded for further proceedings.

Judges CALABRIA and JACKSON concur.

BROOKE HUBBARD, AND HER HUSBAND, TODD HUBBARD, PLAINTIFFS v. PAMELA DAVIS FEWELL, JANE DOE, AND LABORATORY CORPORATION OF AMERICA, DEFENDANTS

No. COA04-1072

(Filed 7 June 2005)

Negligence— partial summary judgment—contradictory affidavit

The trial court erred by granting partial summary judgment for plaintiff on a negligence claim based solely on defendant's contradictory affidavit, because there was additional evidence beyond defendant's affidavit which established a genuine issue of material fact as to defendant's alleged negligence on the date in question including a second affidavit submitted by a human resources specialist who confirmed defendant's personal affidavit that she was present at work on the date in question.

Appeal by defendants Pamela Davis Fewell and Laboratory Corporation of America from an order entered 23 June 2004 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 9 March 2005.

John H. Anderson for plaintiff-appellees.

Ellis & Winters, L.L.P., by Richard W. Ellis and Alex J. Hagan, for defendant-appellants Pamela Davis Fewell and Laboratory Corporation of America.

HUNTER, Judge.

Pamela Davis Fewell ("defendant") and Laboratory Corporation of America ("LabCorp"), also a defendant in this action, appeals from an order, dated 23 June 2004, granting partial summary judgment. As an issue of material fact existed as to defendant's negligence, we find the trial court erred in granting partial summary judgment.

In 2001, Brooke and Todd Hubbard ("plaintiffs") sought preconception counseling from Dr. James Tomblin ("Dr. Tomblin"), a member of Physicians for Women of Greensboro ("PWG"). Plaintiffs were concerned as to whether Mrs. Hubbard was a carrier for hemophilia because of her family history. Dr. Tomblin ordered a hemophilia screen, and blood was drawn from Mrs. Hubbard on 17 September 2001 for this purpose. However, the blood work was not submitted until 18 September 2001 for testing by LabCorp, the company contracted to perform the analysis. The results of a Factor VIII test performed on the blood indicated that Mrs. Hubbard was not a carrier for hemophilia, and this information was relayed by PWG to plaintiffs. Relying on this knowledge, plaintiffs subsequently conceived and gave birth to a son who was diagnosed with hemophilia.

Plaintiffs brought suit against Dr. Tomblin and PWG for wrongful conception. During the course of that litigation, which was subsequently settled, plaintiffs obtained an affidavit and deposition from defendant. Defendant was employed by LabCorp as a phlebotomist in September 2001, and worked on-site at PWG. Defendant was not a party to the action brought against Dr. Tomblin.

In her affidavit, dated 17 April 2003, and later deposition testimony on 1 July 2003, defendant stated that she was absent from work on 17 September 2001. Defendant indicated that after returning to work on 18 September 2001, she was contacted by LabCorp regarding the missing blood work. Defendant stated she located the blood samples in the refrigerator, performed the required preparation of such samples as required by LabCorp's manual for a Factor VIII test, reprinted the request form, and placed the sample on dry ice for delivery to LabCorp.

On 2 January 2004, plaintiffs filed an action against defendant, LabCorp, and Jane Doe, an unknown phlebotomist, for medical negligence, negligent infliction of severe emotional distress, intentional infliction of severe emotional distress, fraudulent misrepresentation, punitive damages, breach of contract, and unfair and deceptive prac-

tices. Plaintiffs moved for partial summary judgment as to defendant's negligence, based on her prior affidavit and deposition in the lawsuit against Dr. Tomblin.

Defendant responded by submitting two affidavits in opposition to the motion for partial summary judgment. In a personal affidavit dated 18 May 2004, defendant stated that, upon reflection and investigation prior to the filing of the suit against her, she had determined that she was not absent from work on 17 September 2001, that she had performed the blood test on Mrs. Hubbard, and, as was her custom and practice, that she would have centrifuged the blood and quick frozen it immediately as required by LabCorp's manual. She further stated that she recalled discovering the next morning that the courier had not picked up the frozen blood in its dry ice container, and called LabCorp for it to be picked up after rewriting the order.

Defendant also presented to the trial court an affidavit, dated 21 May 2004, from Anjanette Greeson ("Greeson"), a human resources specialist for LabCorp. Greeson stated that employment records showed defendant was not absent from work on 17 September 2001.

After a hearing on 24 May 2004 on the motion, the trial court granted partial summary judgment as to defendant's negligence on the grounds that her contradictory affidavit could not be used to defeat a summary judgment motion. Issues of causation and damages were reserved for trial. Defendant and LabCorp appeal.

We initially note that plaintiff's motion to dismiss the appeal as interlocutory was denied by this Court on 9 September 2004, and that, as a matter of substantial right, this appeal is properly before us for review.

Defendant contends the trial court erred in granting partial summary judgment based solely on defendant's contradictory affidavit. We agree.

In *Mortgage Co. v. Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E.2d 727 (1978), *aff'd per curiam by an equally divided court*, 297 N.C. 696, 256 S.E.2d 688 (1979), this Court held that a nonmovant party may not defeat a motion for summary judgment solely by filing an affidavit contradicting personal prior sworn testimony, so that the only material fact is the credibility of the affiant. *Mortgage Co.*, 39 N.C. App. at 9, 249 S.E.2d at 732. Although this decision was affirmed by a split decision of our Supreme Court, and thus has no preceden-

tial value, *see Mortgage Co.*, 297 N.C. at 697, 256 S.E.2d at 689, this Court has subsequently applied and clarified the rule first set out in *Mortgage Co*.

In *Allstate Ins. Co. v. Lahoud*, 167 N.C. App. 205, 605 S.E.2d 180 (2004), this Court again addressed the issue of whether a contradictory affidavit would create an issue of material fact sufficient to defeat a motion for summary judgment. In *Allstate*, the defendant had previously pled guilty to a criminal act. *Id.* at 206, 605 S.E.2d at 182. A civil case predicated upon the same facts was brought against the defendant, and the defendant's insurer sought a declaratory judgment as to its obligations to the defendant, and moved for summary judgment. *Id.* The defendant contended summary judgment was not proper, as a material issue of fact existed as to whether his acts were intentionally harmful and therefore not covered by the policy. *Id.* In support, the defendant submitted an affidavit suggesting that the act might have been unintentional or negligent. *Id.* at 211, 605 S.E.2d at 184. The *Allstate* Court noted that it was well settled that "a nonmovant may not generate a conflict simply by filing an affidavit contradicting his own sworn testimony where the only issue raised is credibility." *Id.* at 211, 605 S.E.2d at 185. However, *Allstate* further clarified this rule, stating that:

> The issue is not whether the underlying facts as testified to by [the defendant] might have supported a jury verdict that he was merely negligent, but whether his affidavit and deposition contradicting earlier testimony in court is sufficient to create an issue of fact. We conclude that although [the defendant's] account of the underlying fact situation might, in other circumstances, be enough to defeat summary judgment, once [the plaintiff] supported its summary judgment motion with [the defendant's] sworn testimony, [the defendant] can only defeat summary judgment on the issue of his intentional acts by producing evidence *other than his own affidavit or deposition contradicting his own testimony.*

Id.

We note a substantial difference between the circumstances of *Allstate* and the case at bar. In *Allstate*, the defendant's contradictory affidavit provided the sole evidence of a material issue of fact. Summary judgment was therefore properly granted, as only an issue of credibility was created by the contradictory affidavit.

Here, defendant submitted two affidavits. First, defendant submitted a personal affidavit which contradicted her prior affidavit and deposition in stating that she, rather than an unknown third party, had worked on 17 September 2001 at PWG, and that she properly followed procedure in processing the sample. Standing alone, defendant's affidavit would fail to create a material issue of fact under *Allstate*, and might only raise an issue of credibility insufficient to defeat summary judgment. Defendant's personal affidavit, however, was corroborated by a second affidavit submitted by Greeson, the LabCorp human resources specialist, which confirmed defendant's personal affidavit that she was present at work on 17 September 2001.

Thus, as there was additional evidence beyond defendant's affidavit which established a genuine issue of material fact as to defendant's alleged negligence on the date in question, we find the trial court erred in granting partial summary judgment.

Reversed.

Judges McCULLOUGH and LEVINSON concur.

CONSOLIDATED ELECTRICAL DISTRIBUTORS, INC., Plaintiff v. HARRY DORSEY d/b/a Carolina Communications, Defendant

No. COA04-1182

(Filed 7 June 2005)

Appeal and Error— appellate rules violations—assignments of error—argument—statement of facts

An appeal was dismissed for multiple violations of the appellate rules where the appellant did not separate each question presented within the argument, cited insufficient authority, did not number each assignment of error separately, did not adequately refer to the record with each assignment of error, and intertwined the statement of facts with the statement of the case and the argument.

Judge Wynn concurring.

Appeal by defendant from judgment entered 17 March 2004 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 10 May 2005.

Vann & Sheridan, L.L.P., by *Nan E. Hannah for plaintiff-appellee.*

Harry Dorsey, pro se, for Harry Dorsey d/b/a Carolina Communications, defendant-appellant.

JACKSON, Judge.

Consolidated Electrical Distributors, Inc. ("plaintiff") is a supplier of electrical equipment, materials, and supplies. On 5 November 1997, plaintiff entered into a written contract with Harry Dorsey ("defendant"), owner of Carolina Communications and guarantor of an account with plaintiff. The contract allowed plaintiff to maintain an open account for defendant for materials, goods, and supplies. Defendant subsequently failed to pay plaintiff for these materials, goods, and supplies, which totaled thirteen thousand five hundred sixty-two dollars and seventy five cents ($13,562.75). On 24 September 2003, plaintiff sent a written letter to defendant notifying him that the attorney's fees provisions of the contract would be enforced if payment was not received. Defendant did not pay the amount owed to plaintiff and therefore, on 30 October 2003, plaintiff filed a complaint in Superior Court demanding the money in the amount of $13,562.75, plus interest at a rate of one and a half percent from 25 September 2003 until paid in full, and reasonable attorney's fees in the amount of $2,034.41. In the alternative, plaintiff sought judgment under a theory of quantum meruit.

On 16 January 2004, plaintiff filed a motion with the trial court for summary judgment along with an affidavit by David Shannonhouse, the Credit Manager of plaintiff. The hearing for the motion was set for 17 March 2004. On 13 February 2004, Judge Donald W. Stephens entered an order for a mediated settlement conference and set a tentative trial schedule. The mediation order stated that the mediated settlement conference should be completed by 13 June 2004. On 17 March 2004, the hearing on plaintiff's motion for summary judgment was heard before Judge Orlando F. Hudson, Jr. The court subsequently granted summary judgment in favor of plaintiff stating that there was no genuine issue of material fact and ordered defendant to pay plaintiff $13,562.75, plus interest at the contract rate of one and a half percent from 2 May 2003 until judgment and thereafter

at the legal rate of eight percent until paid in full, plus reasonable attorney's fees in the amount of $2,034.41. It is from this order defendant appeals.

Defendant contends the trial court erred by granting summary judgment in favor of plaintiff. Defendant further contends the trial court erred by granting summary judgment prior to the parties scheduling their claim for mediation.

In the instant case, defendant has failed to comply with the North Carolina Rules of Appellate Procedure, therefore, we decline to reach the merits of this case. The "failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (citing *Jim Walter v. Gilliam*, 260 N.C. 211, 132 S.E.2d 313 (1963)).

Rule 28(a) of the North Carolina Rules of Appellate Procedure provides that it is the "function of all briefs required or permitted by these rules . . . to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon." N.C. R. App. P. 28(a) (2005). It is further required by our rules of appellate procedure that:

> Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. 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. The body of the argument shall contain citations of the authorities upon which the appellant relies.

N.C. R. App. P. 28(b)(6) (2003). Here, defendant violated Rule 28 when he failed to separate each question presented within the argument section of his brief and failed to reference each assignment of error with numbers and pages where they appear in the record on appeal. N.C. R. App. P. 28(b)(6).

Defendant further failed to support his arguments with "stated or cited authority." N.C. R. App. P. 28(b)(6). While we recognize defendant made one reference to a statute and quoted once a statute pertaining to bonds, we do not find this sufficient citation to authority. A party's assignment of error is deemed abandoned in the absence of citation to supporting authority. *State v. Walters*, 357 N.C. 68, 85, 588

S.E.2d 344, 355 (2003), *cert. denied*, 540 U.S. 971, 124 S.Ct. 442, 157 L. Ed. 2d 320 (2003).

Defendant also failed to provide a "full and complete statement of the facts." N.C. R. App. P. 28(b)(5). This section of his brief "should [have combined] a non-argumentative summary of all material facts underlying the matter in controversy which [were] necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits." *Id.* Defendant's statement of the facts were intertwined with the statement of the case and the argument section. This was insufficient and in violation of Rule 28(b)(5). *Northwoods Homeowners Assn, Inc. v. Town of Chapel Hill*, 112 N.C. App. 630, 632, 436 S.E.2d 282, 283 (1993).

Finally, defendant violated Rule 10(c)(1) of the North Rules of Appellate Procedure by failing to number each assignment of error separately in the record on appeal. While Rule 10(c)(1) states that "[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made," the rule also requires that it be made "clear" with "specific record or transcript references." N.C. R. App. P. 10(c)(1) (2003).

Our rules of appellate procedure "must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (citing *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913)). Accordingly, we dismiss.

Dismissed.

Judge WYNN concurs in result in a separate opinion.

Judge BRYANT concurs.

WYNN, Judge concurring.

While I concur in the result, I write separately to express my displeasure with this strict application of the Rules of Appellate Procedure to this *pro se* appellant. However, in *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005),[1] our Supreme

1. "It is not the role of the appellate courts . . . to create an appeal for an appellant. . . . [T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless[.]" *Viar*, 359 N.C. at 402, 610 S.E.2d at 361.

Court admonished this Court to avoid applying Rule 2 of the Rules of Appellate Procedure to grant review where the appellant has violated our Rules of Appellate Procedure—even in instances where a party's Rules violations neither impede comprehension of the issues on appeal nor frustrate the appellate process. Because this Court must follow the dictates of *Viar*, I must concur that Defendant's failure to comply with several Rules of Appellate Procedure mandates the dismissal of this appeal.

GATES FOUR HOMEOWNERS ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, ET AL., PETITIONERS v. CITY OF FAYETTEVILLE, A NORTH CAROLINA MUNICIPALITY, RESPONDENT APPELLEE

No. COA04-1202

(Filed 7 June 2005)

1. Cities and Towns— annexation—motion to intervene—timeliness

A motion to intervene in an annexation was properly denied where the motion came almost six months after the annexation was adopted by the city. The proposed intervenors failed to comply with the time requirements of N.C.G.S. § 160A-50(a), which governs instead of N.C.G.S. § 1A-1, Rule 24.

2. Cities and Towns— annexation—motion to intervene—timeliness—Rule 24

The trial court did not abuse its discretion by denying a motion to intervene in an annexation. Even if N.C.G.S. § 1A-1, Rule 24 applies, the factors to be reviewed in determining timeliness on a motion to intervene under that rule did not support the petitioners' position.

Appeal by proposed intervenors Cumberland County Citizens United, Inc., et al., from order entered 28 June 2004 by Judge Gary L. Locklear in Cumberland County Superior Court. Heard in the Court of Appeals 13 April 2005.

C. Wes Hodges, II, P.L.L.C., by C. Wes Hodges, II, for petitioner appellees.

Parker, Poe, Adams, & Bernstein, L.L.P., by R. Bruce Thompson II and Anthony Fox; and City Attorney Karen M. McDonald, for respondent appellee.

The Brough Law Firm, by Robert E. Hornik, Jr., for proposed intervenor appellants.

McCULLOUGH, Judge.

Proposed intervenors appeal from the trial court's order denying its motion to intervene in the proceedings involving the review of an annexation ordinance. On 24 November 2003, the City of Fayetteville adopted an ordinance annexing approximately 28 square miles and over 40,000 residents of Cumberland County. The annexation was to become effective on 30 June 2004. In North Carolina, an owner of annexed property can seek judicial review if the owner files a petition "[w]ithin 60 days following the passage of an annexation ordinance[.]" N.C. Gen. Stat. § 160A-50(a) (2003).

Petitioners, who were members of the Gates Four community, filed the only petition for judicial review within the statutory period. No one else, including the proposed intervenors, filed a petition within that period. The local media first reported the Gates Four challenge on 30 January 2004.

On 25 March 2004, the Gates Four community and the City of Fayetteville mediated this dispute. During the mediation, the parties reached a tentative agreement in which the City agreed to remove Gates Four from the area to be annexed and not to institute any other involuntary annexation proceedings against Gates Four before 30 June 2008. This agreement was subject to approval by the Gates Four Homeowners Association and the Fayetteville City Council. A superior court judge also had to approve the settlement pursuant to N.C. Gen. Stat. § 160A-50(m) (2003).

On 4 April 2004, *The Fayetteville Observer* made public the proposed settlement in a newspaper article entitled "Gates Four may be excused." The article noted that "[u]nder the proposed settlement, Gates Four would not be annexed and the city would proceed with taking in the rest of the [annexation area] territory on June 30." The proposed intervenors failed to take action at that time.

On 12 May 2004, the Gates Four community and the City entered into a formal settlement agreement that memorialized the agreement the parties reached at mediation. The superior court entered a consent judgment on that same date. The judgment was entered under N.C. Gen. Stat. § 160A-50(m) which gives a superior court discretion to resolve an annexation challenge by approving "[a]ny settlement reached by all parties[.]" With the parties' consent, the superior court excluded Gates Four from the annexation.

For about six weeks prior to the 12 May judgment, the local media publicized the potential settlement of this action. There were at least seven articles discussing the proposed settlement. However, the proposed intervenors did not take any action.

On 14 June 2004, proposed intervenors made a motion to intervene. This was six months after the city adopted the ordinance, thirty-three days after the superior court entered final judgment, and sixteen days before the annexation's effective date. The superior court denied the motion to intervene. Proposed intervenors appeal.

[1] On appeal, proposed intervenors argue that the trial court erred by denying their motion to intervene. We disagree and affirm the decision of the trial court.

Citing Rule 24(a) of the North Carolina Rules of Civil Procedure, proposed intervenors contend that the trial court erred in denying their motion to intervene. However, while the North Carolina Rules of Civil Procedure govern civil proceedings generally, they do not apply "when a differing procedure is prescribed by statute[.]" N.C. Gen. Stat. § 1A-1, Rule 1 (2003).

N.C. Gen. Stat. § 160A-50 (2003), outlines the procedure for annexation, including the time limitations. Under subsection (a), a property owner *must* petition for judicial review within 60 days following the adoption of the annexation ordinance. N.C. Gen. Stat. § 160A-50(a). Proposed intervenors have failed to comply with the procedure set forth in the annexation provisions because they moved to intervene almost six months after the city adopted the annexation. Because Rule 24 intervention would have violated the statutory procedure of N.C. Gen. Stat. § 160A-50, intervention was not available. Therefore, the motion to intervene was properly denied.

[2] Proposed intervenors' appeal fails for another reason. Even if Rule 24 had applied, proposed intervenors cannot show that the trial

court abused its discretion in denying the motion to intervene. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 24 (2003),

> [u]pon timely application anyone shall be permitted to intervene in an action:
>
> (1) When a statute confers an unconditional right to intervene; or
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The determination of the timeliness of the motion under this rule is left to the sound discretion of the trial court. *Taylor v. Abernethy*, 149 N.C. App. 263, 268, 560 S.E.2d 233, 236 (2002), *disc. review denied*, 356 N.C. 695, 579 S.E.2d 102 (2003). Such rulings are given great deference and will only be overturned upon a showing that the ruling " ' "was so arbitrary that it could not have been the result of a reasoned decision." ' " *Id.* (citations omitted).

When considering the issue of timeliness, North Carolina Courts consider five factors:

> "(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances."

State ex rel. Easley v. Philip Morris, Inc., 144 N.C. App. 329, 332, 548 S.E.2d 781, 783 (citation omitted), *disc. review denied*, 354 N.C. 228, 554 S.E.2d 831 (2001). While post-judgment intervention is not impossible, the law disfavors it. *Id.* It will only be allowed if there are extraordinary and unusual circumstances. *Id.*

After evaluating all five factors, we must conclude that the trial court did not abuse its discretion in denying the motion to intervene.

With regard to the first factor, status of the case, proposed intervenors tried to intervene 33 days *after* the court entered final judgment. As we have indicated, post-judgment intervention is disfavored. Similarly, under the second factor dealing with prejudice to the existing parties, intervention would prejudice the City and the Gates Four community by destroying their settlement.

The final three factors do not support proposed intervenors' position. Proposed intervenors have not offered a legitimate reason for the delay, and their "reliance" on the Gates Four community is meritless because there was no agreement, promise, or representation that Gates Four would protect their interests. Although denying the motion to intervene would prejudice proposed intervenors, their own inaction has led to this result. Finally, there are no unusual circumstances which lead us to conclude that the trial court abused its discretion in denying the motion to intervene.

After careful consideration of the record, briefs, and arguments of the parties, we conclude that the trial court acted appropriately in denying the motion to intervene. The decision of the trial court is

Affirmed.

Judges HUNTER and LEVINSON concur.

STATE OF NORTH CAROLINA v. ROY BUCHANAN

No. COA04-1089

(Filed 7 June 2005)

Appeal and Error— preservation of issues—failure to renew motion to dismiss at close of all evidence—Rule 2

Defendant's appeal from convictions of maintaining a dwelling to keep a controlled substance, manufacturing marijuana, and possession of drug paraphernalia that asks the Court of Appeals to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to prevent a manifest injustice is dismissed, because: (1) defendant failed to comply with N.C. R. App. P. 10(b) by failing to renew his motion to dismiss at the close of all evidence; and (2) the Court of Appeals may not review an appeal that violates the Rules of Appellate Procedure even though such violations neither impede comprehension of the issues nor frustrate the appellate process.

Appeal by Defendant from conviction entered 21 August 2003 by Judge Ronald K. Payne in Superior Court, Henderson County. Heard in the Court of Appeals 19 April 2005.

Attorney General Roy Cooper, by Assistant Attorney General Jill A. Bryan, for the State.

Allen W. Boyer, for the defendant-appellant.

WYNN, Judge.

Recently, in *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005),[1] our Supreme Court admonished this Court to avoid applying Rule 2 of the Rules of Appellate Procedure even in instances where a party's "Rules violations did not impede comprehension of the issues on appeal or frustrate the appellate process." Defendant, recognizing that he has not preserved the grounds for his appeal from convictions of maintaining a dwelling to keep a controlled substance, manufacturing marijuana, and possession of drug paraphernalia, asks this Court to invoke Rule 2 to prevent a manifest injustice. Because we are constrained to follow the dictates of *Viar*, we must hold that Defendant's failure to comply with Rule 10(b) by failing to renew his Motion to Dismiss at the close of all evidence mandates a dismissal of this appeal.

Under Rule 10(b) of our Rules of Appellate Procedure as adopted by our Supreme Court:

> ***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.
>
> * * *
>
> A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. ***If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dis-***

1. "It is not the role of the appellate courts . . . to create an appeal for an appellant. . . . [T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless[.]" *Viar*, 359 N.C. at 402, 610 S.E.2d at 361.

> ***missal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.***
>
> A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, ***if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.***

N.C. R. App. P. 10(b) (emphasis added); *see also*, *e.g.*, *State v. Richardson*, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995) (The defendant's motion to dismiss after the close of the State's evidence was denied and he "did not renew his motion to dismiss at the close of all the evidence. Thus, under Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure, the issue of insufficiency was not preserved for appellate review.")

Here, at the close of the State's evidence, defense counsel moved for a dismissal and directed verdict of acquittal based on the State's failure to make a *prima facie* showing. When asked by the trial court "Do you wish to be heard" on the motion, defense counsel stated "Nothing further, Judge." The motion was then denied. At the close of all evidence, the trial court expressly asked "Anything else for the defendant?" The response: "Nothing from the defendant, Your Honor." Thus, Defendant waived his motion to dismiss by presenting evidence after making such motion, and failing to make a motion to dismiss at the close of all evidence. Accordingly, Defendant is precluded from urging the denial of a motion to dismiss as the ground for his appeal.

Nonetheless, Defendant asks this Court to invoke Rule 2 of our Rules of Appellate Procedure to review this unpreserved issue. 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 application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2. While we acknowledge that this Court and our Supreme Court have on many occasions invoked Rule 2 to allow a defendant access to our appellate process, two recent cases from our Supreme Court constrain our invocation of Rule 2.

In *Viar*, 359 N.C. at 402, 610 S.E.2d at 361, our Supreme Court stated that this Court may not review an appeal that violates the Rules of Appellate Procedure even though such violations neither impede our comprehension of the issues nor frustrate the appellate process. The Supreme Court stated: "It is not the role of the appellate courts . . . to create an appeal for an appellant. . . . [T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless[.]" *Id.*

In *State v. Dennison*, 359 N.C. 312, 608 S.E.2d 756 (2005), the State appealed from this Court's decision holding that Defendant was prejudiced by the improper admission of prior acts under Rule 404(b). Moreover, this Court found that Defendant had sufficiently preserved his Motion in Limine by moving to strike the evidence at trial. However, upon review, our Supreme Court, in a *per curiam* opinion, stated:

> [E]ven assuming arguendo that the admission of this evidence was error, defendant waived his right to appellate review of this issue because he failed to object when Tellado testified. *See* N.C. R. App. P. 10(b)(1) (a party must timely object to preserve a question for appellate review) . . . . Accordingly, the decision of the Court of Appeals is reversed . . . .

Id. at 312-13, 608 S.E.2d at 756.

In dismissing the appeal in *Dennison* without considering its merits, our Supreme Court implicitly found that neither this Court's finding of prejudicial error, which allowed the defendant a new trial, nor the sentence of life imprisonment imposed upon the defendant were sufficiently compelling reasons to invoke Rule 2 to prevent a manifest injustice to the defendant.

Because even under the far more compelling facts of *Dennison* Rule 2 was not invoked to prevent a manifest injustice, we are compelled to dismiss Defendant's appeal.

Dismissed.

Judge BRYANT concurs.

Judge JACKSON concurs in result only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 JUNE 2005

BROWN v. AMERICAN MULTIMEDIA, INC. No. 04-1075	Alamance (03CVS663)	Affirmed
BROWNE FLEBOTTE WILSON & HORN v. WHITE No. 04-1299	Durham (02CVD5175)	Dismissed
CITIFINANCIAL MORTGAGE CO. v. RUFFIN No. 04-879	Bertie (03CVS114)	Affirmed
COOK v. LOGGERHEAD, INC. No. 04-910	Ind. Comm. (I.C. #149303)	Affirmed
CORDELL EARTHWORKS, INC. v. TOWN OF CHAPEL HILL No. 04-189	Orange (02CVS1352)	Affirmed
CORDELL EARTHWORKS, INC. v. TOWN OF CHAPEL HILL No. 04-190	Orange (02CVS1353)	Affirmed
COREMIN v. SHERRILL FURN. CO. No. 04-844	Guilford (02CVS5841)	Affirmed
CRISPELL v. NEXT DIMENSION PRODS., LLC No. 04-1015	Wake (03CVS12064)	Reversed
ELECTRONIC WORLD, INC. v. BAREFOOT No. 04-1049	Columbus (00CVS258)	Affirmed
FOWLER v. FOOD LION, INC. No. 04-725	Ind. Comm. (I.C. #214669)	Affirmed
HINSON v. HARRIS STEEL ERECTORS, INC. No. 04-745	Ind. Comm. (I.C. #927717)	Affirmed
HINSON v. JARVIS No. 04-646	Wilkes (03CVS727)	Dismissed
IN RE S.R.S. & D.N.S. No. 04-1386	Halifax (03J37) (03J38)	Vacated and remanded for further proceedings
SMITH v. GOODYEAR TIRE & RUBBER CO. No. 04-839	Ind. Comm. (I.C. #456736)	Affirmed

STATE v. ANDERSON No. 04-891	Pitt (03CRS52511)	No prejudicial error
STATE v. BENJAMIN No. 04-1137	Johnston (03CRS50760) (03CRS1154)	No error
STATE v. GIBSON No. 04-1012	Guilford (03CRS77344) (03CRS77345) (03CRS77348) (03CRS77349) (03CRS77459) (03CRS77461) (03CRS77462) (03CRS77463) (03CRS77464) (03CRS77466) (03CRS77467) (03CRS77468) (03CRS77469) (03CRS77597) (03CRS77598) (03CRS77602) (03CRS77352)	No error
STATE v. HARRIS No. 04-1335	Cabarrus (03CRS18558) (03CRS18559) (03CRS18560) (03CRS18561) (03CRS18562) (03CRS18565) (03CRS18566)	No error
STATE v. KOZOMAN No. 04-753	Granville (02CRS053508)	No error
STATE v. LINNEY No. 04-497	Buncombe (96CRS8146) (96CRS8147) (96CRS8150)	No error
STATE v. LITTLE No. 04-447	Guilford (02CRS23574) (02CRS23575)	Affirmed
STATE v. MARTIN No. 04-1161	Chatham (97CRS5545)	No error
STATE v. MOOREFIELD No. 04-770	Guilford (02CRS101635)	No error

STATE v. SHELLHAMMER No. 04-297	Onslow (02CRS59178)	No error
STATE v. STAMEY No. 04-1031	Guilford (02CRS96306)	No error
STATE v. TAYLOR No. 04-1115	Carteret (04CRS914) (03CRS52678) (03CRS52679) (03CRS52680) (03CRS52681) (03CRS52685)	No error
STATE v. WARREN No. 04-1111	Beaufort (03CRS655) (03CRS656) (03CRS657) (03CRS658) (03CRS4389) (03CRS4390) (03CRS4391) (03CRS4392) (03CRS4393) (03CRS4396)	No error in part; vacated in part
WAGONER v. PIEDMONT/ HAWTHORNE HOLDINGS No. 04-1040	Ind. Comm. (I.C. #972261)	Affirmed
YOUNG v. PRANCING HORSE, INC. No. 04-727	Moore (01CVS1373)	Affirmed

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

Appealability—denial of motion to dismiss—defamation action—concluded political campaign—An appeal from the denial of a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) was itself dismissed as interlocutory where the action arose from a television advertisement during a political campaign. This case is governed by *Boyce v. Cooper*, 169 N.C. App. 572 (2005), from which it is indistinguishable. **Grant v. Miller, 184.**

Appealability—denial of motion to enforce settlement—An appeal from the denial of a motion to enforce a settlement agreement in a personal injury action was dismissed as interlocutory even though the parties had agreed that a substantial right was affected. The Court must determine whether the appeal is premature, and the right to settle a claim has been held not to affect a substantial right. Defendants may appeal the denial of their motion once there is a final judgment. **Milton v. Thompson, 176.**

Appealability—denial of summary judgment—qualified immunity—substantial right—Although an appeal from the denial of a motion for summary judgment is an appeal from an interlocutory order, an order denying police officers the benefit of qualified immunity, as in this case, affects a substantial right and is thus subject to immediate appeal. **Rogerson v. Fitzpatrick, 387.**

Appealability—initial permanency planning order—Respondent mother's appeal from an initial permanency planning order directing that the permanent plan for her son who had been adjudicated neglected and dependent be adoption is dismissed as an appeal from an interlocutory order, because the planning order was not an "order of disposition" subject to immediate appeal within the meaning of N.C.G.S. § 7B-1001(3). **In re B.N.H., 157.**

Appealability—interlocutory order—discretion of appellate court—The Court of Appeals declined to address the additional issue in an interlocutory appeal concerning plaintiff's conspiracy claim. **Rogerson v. Fitzpatrick, 387.**

Appealability—interlocutory order—sovereign immunity and public duty doctrine—substantial right—An interlocutory order involving sovereign immunity and the public duty doctrine affects a substantial right sufficient to warrant immediate appellate review. **Myers v. McGrady, 501.**

Appealability—motion to amend answer—The denial of a motion to file a supplemental answer was interlocutory and defendants' appeal of this issue was dismissed. **Tiber Holding Corp. v. DiLoreto, 662.**

Appealability—nolo contendere plea—no motion to withdraw plea—failure to petition for writ of certiorari—Defendant's appeal after a plea of nolo contendere in a possession of cocaine case of those assignments of error not related to the sentence imposed at trial are dismissed. **State v. Quick, 166.**

Appealability—partial summary judgment—one of several defendants—vicarious liability—substantial right—A substantial right was affected and a summary judgment for one of several defendants was immediately appealable where the claims against this defendant were based on vicarious liability for the

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

TERMINATION OF PARENTAL RIGHTS—Continued

followed through with drug treatment, and would probably remain incapable of providing care for the child. Although the termination was on other grounds, the evidence supporting the grounds was intertwined and inseparable. **In re K.R.S., 643.**

Lack of support—ability to pay—A showing that a termination of parental rights respondent had the ability to pay is not required; the statutory requirement is a showing that respondent did not provide substantial support or consistent care to the child or mother. Moreover, this issue was raised in the dissent rather than by respondent and it is not the role of the appellate courts to create an appeal. **In re J.D.S., 244.**

Means to legitimate child—findings sufficient—There was sufficient evidence to support the trial court's finding in a termination of parental rights proceeding that respondent had the means and ability to legitimate the child or establish paternity despite incarceration. **In re I.S., 78.**

Motion to dismiss—not considered—not prejudicial—The trial court's failure to hear respondent's motion to dismiss a termination of parental rights petition did not constitute prejudicial error. Given the nature of the proceedings, it is quite important that the grounds for plaintiff's motion be considered, but there is no evidence in the record that the court specifically considered respondent's motion to dismiss and declined to hear it. Moreover, contrary to DSS's contention, respondent was not responsible for calendaring the motion under Eighth Judicial District Family Court Rules. However, the court clearly considered the issues upon which respondent's petition was based and found them unpersuasive, and there is no reasonable possibility that a different result would have been reached without the error. **In re I.S., 78.**

Order—statement of standard of review—There would have been no reason to review the question of whether the clear, cogent and convicing standard of proof was adequately stated in a termination of parental rights order, even if respondent had sought appellate review of the issue, because the evidence supports the trial court's findings, the court stated on the record that its findings were based on clear and convincing evidence, and the findings supported the conclusion that respondent had willfully failed to pay for the care, support, and education of the child for one year as required by decree. **In re J.D.S., 244.**

Petition—required content—subject matter jurisdiction—A petition for termination of parental rights which did not include the existing custody order and did not provide the name and address of the child's guardian did not comply with statutory requirements and did not confer subject matter jurisdiction. There was no other information from which the defect could be cured, and the termination was reversed. **In re Z.T.B., 564.**

Required findings—misconstrued stipulation—The trial court in a termination of parental rights case must make specific findings as to all four subsections of N.C.G.S. § 7B-1111(a)(5); here, having erroneously found that respondent had stipulated to all four of the subsections when he had stipulated only to subsection (b), the court did not make the necessary findings and erred by concluding that grounds existed for termination. **In re I.S., 78.**

Stipulation—scope—The trial court erred in a termination of parental rights case by finding that respondent's stipulation encompassed elements not intend-

ZONING—Continued

WORD AND PHRASE INDEX