NORTH CAROLINA COURT OF APPEALS REPORTS

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OF
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1. Appointed as interim Chief Judge effective 6 August 2005 while Chief Judge John J. Carroll III is serving active military duty.

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9	Samuel B. Currin	Oxford
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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

UNITED STATES CONSTITUTION CITED

NORTH CAROLINA CONSTITUTION 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

DAVID NOBLE WATTS, EMPLOYEE, PLAINTIFF v. BORG WARNER AUTOMOTIVE, INC., EMPLOYER, AND LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER, DEFENDANTS

No. COA04-895

(Filed 21 June 2005)

Workers' Compensation— additional findings of fact required—reasonable excuse—causation

The Industrial Commission erred in a workers' compensation case by awarding plaintiff temporary total disability benefits and medical expenses without making adequate findings of fact on: (1) whether plaintiff had a reasonable excuse and the employer was not prejudiced by the delay in giving written notice as required by N.C.G.S. § 97-22; and (2) causation of the injury. Thus, the case is remanded for further findings.

Judge ELMORE concurring.

Judge TYSON dissenting.

Appeal by Defendants from Opinion and Award entered 4 March 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 March 2005.

The Law Office of David Gantt, by David Gantt, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, LLP, by Hope F. Smelcer and Angela M. Easley, for defendants-appellants.

WYNN, Judge.

The Industrial Commission is required to make findings on crucial facts upon which the right to compensation depends. *Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977). In this matter, the full Commission made no findings of fact whether, under the circumstances, Plaintiff had a reasonable excuse and the employer was not prejudiced for delay in giving written notice as required by section 97-22 of the North Carolina General Statutes. Additionally, the full Commission failed to make any findings of fact determining causation of the injury. Accordingly, we remand this case for further findings of fact.

Plaintiff David Noble Watts filed two workers' compensation claims alleging that he injured his lower back on 28 October 1999 and 26 May 2000 while lifting turbos. Mr. Watts filed an additional claim alleging that he injured his cervical spine and right hand and fingers while building turbos on 16 May 2000.

Following the 28 October 1999 injury, Mr. Watts went to a chiropractor, Dr. James Dutton, for back pain and did not report the injury as work-related. Dr. Dutton referred Mr. Watts to Dr. Stewart Harley, an orthopedic surgeon. On 24 November 1999, Dr. Harley saw Mr. Watts for lower back pain. Mr. Watts told Dr. Harley the injury was not a workers' compensation claim.

From 28 October 1999 until he was terminated on 30 April 2001, Mr. Watts was periodically absent from work and received short-term disability benefits while recovering from back surgery. During this period, Mr. Watts never told his supervisor or human resources that his injury was work-related. Mr. Watts filed four separate weekly indemnity forms for health benefits with Defendant Borg Warner Automotive, Inc., and stated in the four forms that the claims were not the result of a work-related illness or injury. Borg Warner terminated Mr. Watts on 30 April 2001 for failure to comply with its absence policy.

On 3 July 2001, Mr. Watts completed three separate Form 18s giving Borg Warner notice of the accident and claim. Borg Warner denied the claims. The case was heard before Deputy Commissioner Morgan S. Chapman on 11 July 2002. Deputy Commissioner Chapman filed an Opinion and Award denying all claims. Mr. Watts appealed to the full Commission. The full Commission reversed the award with regard to the 28 October 1999 claim number 152657, and awarded Mr. Watts temporary total disability benefits from 28 October 1999 through 27

December 1999 and ordered Borg Warner to pay for related medical expenses and attorney's fees. Borg Warner appealed the Opinion and Award as it related to claim number 152657.

On appeal, Borg Warner argues that the full Commission erred in awarding Mr. Watts temporary total disability benefits and medical expenses because (1) Mr. Watts's claim was barred by his failure to timely notify Borg Warner in writing of his injury; and (2) Mr. Watts did not sustain a compensable injury arising out of his employment. Because the full Commission failed to make adequate findings of fact on both issues, we remand this case for further findings of fact.

The standard of review for this Court in reviewing an appeal from the full Commission 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 v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). The full 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) (citation omitted). 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.

Borg Warner argues that the full Commission erred in awarding Mr. Watts temporary total disability benefits and medical expenses because Mr. Watts's claim was barred by his failure to timely notify Borg Warner, in writing, of his injury. Because the full Commission failed to make adequate findings of fact, we remand for further findings.

Section 97-22 of the North Carolina General Statutes provides in pertinent part:

> no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or

> death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

N.C. Gen. Stat. § 97-22 (2004). Section 97-22 clearly requires *written* notice be given by the injured employee to the employer within thirty days. *Pierce v. Autoclave Block Corp.*, 27 N.C. App. 276, 278, 218 S.E.2d 510, 511 (1975).

Here, both parties agree that Mr. Watts did not give written notice of injury to his employer until twenty months after the injury occurred. Since Mr. Watts failed to provide written notice within the thirty-day time period, (1) he must provide a reasonable excuse for not giving the written notice, and (2) the employer must show prejudice for the delay. *Id.*

Section 97-22 gives the Industrial Commission the discretion to determine what is or is not a "reasonable excuse." N.C. Gen. Stat. § 97-22 (". . . unless reasonable excuse is made *to the satisfaction of the Industrial Commission* . . .") (emphasis added). This Court has previously indicated that included on the list of reasonable excuses would be, for example, " 'a belief that one's employer is already cognizant of the accident . . .' or '[w]here the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows . . . .' " *Jones v. Lowe's Cos., Inc.*, 103 N.C. App. 73, 75, 404 S.E.2d 165, 166 (1991) (quoting *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987)); *see also Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 173, 573 S.E.2d 703, 706 (2002) (reasonable excuse because employer knew of injury where employee was injured on employer's aircraft, employer filed an incident report, and employee saw employer's doctor within the thirty days following the injury); *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 603-04, 532 S.E.2d 207, 214 (2000) (reasonable excuse found because employee did not know nature and character of injury where doctors originally told him he had a heart attack, not a herniated disk). The burden is on the employee to show a "reasonable excuse." *Jones*, 103 N.C. App. at 75, 404 S.E.2d at 166.

In this case, Mr. Watts argues in his brief[1] that his fear of retaliation was the "reasonable excuse" for failing timely to notify Borg

1. We note that Plaintiff-Appellee's brief exceeded the page limit. N.C. R. App. P. 28(j). Additionally, Plaintiff-Appellee's "Motion for Waiver of Page Limit to File Plaintiff-Appellee's Brief" was denied by this Court by Order dated 23 November 2004.

Warner in writing.[2] However, while the full Commission made a finding of fact that the "late reporting did not prejudice defendant and plaintiff's failure to timely report the injury is excused," it failed to make findings of fact to support the conclusion that the delay was due to a "reasonable excuse." Instead, the full Commission made the following conclusion of law which is not supported by adequate findings of fact:

> 5. Plaintiff stated that he did not report his 28 October 1999 injury because when he had filed a previous workers' compensation claim in 1991, he was moved to a job with more difficult duties. He believed the employer was trying to make him quit. He also stated that he feared losing his job. We find this to be a reasonable excuse.

While the Industrial Commission is not required to make specific findings of fact on every issue raised by the evidence, it is required to make findings on crucial facts upon which the right to compensation depends. *Gaines*, 33 N.C. App. at 579, 235 S.E.2d at 859. Specific findings on crucial issues are necessary if the reviewing court is to ascertain whether the findings of fact are supported by competent evidence and whether the findings support the conclusion of law. *Barnes v. O'Berry Ctr.*, 55 N.C. App. 244, 247, 284 S.E.2d 716, 718 (1981). "Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109-10 (1981)).

Whether an employee has shown reasonable excuse depends on the reasonableness of his conduct under the circumstances. *Lawton*, 85 N.C. App. at 592, 355 S.E.2d at 160. We hold that in this case, the full "Commission made no findings of fact showing that Mr. Watts

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Thus, this Court did not consider that part of Plaintiff's brief that exceeded the allowable page limit.

2. The dissent asserts that Plaintiff cannot provide a reasonable excuse because "Plaintiff did not give actual notice to defendants and intentionally misrepresented his accident." After throughly examining the record and transcripts, we find no evidence that Plaintiff concealed or intentionally misrepresented his injury. The record shows that when filling out health insurance forms for time off work due to his back injury, Plaintiff did not include that he was hurt at work. However, while he was filling out the health insurance forms, Plaintiff informed his supervisor, Myra Butler, of the nature and cause of his injury by stating "I did say that, you know, I'd hurt my back lifting the turbochargers last week[.]"

feared retaliation if he timely reported his injury." As such, the full Commission's conclusion that a "reasonable excuse" existed under section 97-22 of the North Carolina General Statutes, is not supported by adequate findings of fact. *Lawton*, 85 N.C. App. at 592-93, 355 S.E.2d at 160. Accordingly, this case must be remanded for additional findings. Additionally, if the full Commission finds these circumstances constitute a reasonable excuse, it must then make sufficient findings regarding whether Borg Warner was prejudiced by the delayed notice.[3] *See Lakey*, 155 N.C. App. at 173, 573 S.E.2d at 706; *Pierce*, 27 N.C. App. at 278, 218 S.E.2d at 511.

Borg Warner also argues that the full Commission erred in concluding that Mr. Watts sustained a compensable spine injury arising out of his employment. Because the full Commission failed to make adequate findings of fact on causation, we must remand this matter.

The plaintiff in a workers' compensation case bears the burden of initially proving each and every element of compensability, including causation.[4] *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003); *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 28, 514 S.E.2d 517, 521 (1999). Since the full Commission failed to make *any* findings of fact determining causation of the injury, we must remand this case for sufficient findings of fact on causation. *Lawton*, 85 N.C. App. at 592, 355 S.E.2d at 160.

Remanded.

Judge TYSON dissents in a separate opinion.

Judge ELMORE concurs in a separate opinion.

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3. The dissent asserts that since Plaintiff cannot meet either of the two previously established "reasonable excuses," *i.e.*, that the employer had actual notice or that the employee was unaware of the nature of his injuries, it is unnecessary to remand this case for further findings of fact. However, section 97-22 of the North Carolina General Statutes does not limit what constitutes a reasonable excuse, but instead gives the Industrial Commission discretion to determine if an excuse is reasonable on an individual basis. N.C. Gen. Stat. § 97-22 (". . . unless reasonable excuse is made *to the satisfaction of the Industrial Commission* for not giving such notice . . . ." (emphasis added)).

4. The dissent asserts that "[n]o competent evidence substantiates the required element of the accident causing plaintiff's injury[,]" therefore, the Opinion and Award should be reversed and not remanded. The dissent cites Dr. Bruce Kelly, Plaintiff's family physician, as testifying that "I do not think that his whatever happened at work caused all this . . . ." Dr. Kelly went on to testify that "I think it could have, could have aggravated, accelerated or contributed."

ELMORE, Judge concurring.

I concur in the result and reasoning of the majority opinion on both issues. I write separately in an attempt to guide the Industrial Commission on section 97-22 upon remand.

At the root of this case is the question of whether plaintiff's excuse for not reporting an alleged on-the-job injury within thirty days of its occurrence is reasonable, pursuant to N.C. Gen. Stat. § 97-22. The Full Commission did not make adequate findings on this issue, and thus we deem it necessary to remand for further consideration.

This Court has reviewed the "reasonable excuse" language in section 97-22 many times. *See, e.g.*, *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 573 S.E.2d 703 (2002); *Davis v. Taylor-Wilkes Helicopter Serv., Inc.*, 145 N.C. App. 1, 549 S.E.2d 580 (2001); *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 532 S.E.2d 207 (2000); *Westbrooks v. Bowes*, 130 N.C. App. 517, 503 S.E.2d 409 (1998); *Jones v. Lowe's Companies*, 103 N.C. App. 73, 404 S.E.2d 165 (1991); *Lawton v. County of Durham*, 85 N.C. App. 589, 355 S.E.2d 158 (1987); *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 334 S.E.2d 392, (1985); *Hill v. Bio-Gro Systems*, 73 N.C. App. 112, 326 S.E.2d 72 (1985). The majority and dissent in this case highlight a subtle difference in these cases that has not been precisely addressed: whether "reasonable excuse" should be read broadly under the circumstances or strictly construed and limited to two previously identified circumstances.

In *Lawton*, this Court remanded the case to the Full Commission for further findings, but not before interpreting the statutory language.

> While a belief that one's employer is already cognizant of the accident may serve as 'reasonable excuse' under G.S. 97-22, *see Key v. Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E.2d 254 (1977), it is not the only basis for establishing reasonable excuse. **The question of whether an employee has shown reasonable excuse depends on the reasonableness of his conduct under the circumstances.** Where the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows, he has established 'reasonable excuse' as that term is used in G.S. 97-22. *See generally* 3 Larson, *The Law of Workmen's Compensation*, Section 78.40 (1983). Though plaintiff testified

> that he did not immediately realize the nature and seriousness of his injury, the Commission made no findings whether, under the circumstances, that constituted a reasonable excuse. Accordingly, this case must be remanded for additional findings.

Lawton, 85 N.C. App. at 592-93, 355 S.E.2d at 160. Then, in *Jones*, the Court quoted the language in *Lawton*, not of "reasonableness under the circumstances," but the more definitive text as what constitutes a reasonable excuse.

> A 'reasonable excuse' has been defined by this Court to include 'a belief that one's employer is already cognizant of the accident . . .' or '[w]here the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows. . . .'

Jones, 103 N.C. App. at 75, 404 S.E.2d at 166 (internal quotations noted above). No Court has yet to hold that any circumstance other than the employer's knowledge of the injury or the employee's lack thereof is a reasonable excuse.

The dissent argues that these are the only two circumstances that warrant a reasonable excuse and plaintiff fails to fall into either. I write separately to stress the fact that the majority does not agree with this limited interpretation of "reasonable excuse." Indeed, the majority opinion cites *Lawton* for the proposition that "[w]hether an employee has shown a reasonable excuse depends on the reasonableness of his conduct under the circumstances." *Lawton*, 85 N.C. App. at 592, 355 S.E.2d at 160. The fact that no opinion has found a reasonable excuse to encompass anything other than the two identified in *Jones* should not limit the Commission's determination of what is reasonable.

TYSON, Judge dissenting.

The majority holds the Commission failed to make adequate findings of fact on: (1) a reasonable excuse for plaintiff's failure to timely notify his employer of an industrial accident; and (2) whether plaintiff's alleged injuries were caused by the accident and remands to the Commission for further findings of fact. Under the facts of and the law applicable to this case, remand is unnecessary. I vote to reverse and respectfully dissent.

I. Standard of Review

Our review of a 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 v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). No findings of fact support the Commission's conclusions of law. This Court reviews conclusions of law *de novo*. *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).

II. Notice Requirement

The Commission found as fact that "[p]laintiff did not report the injury to his employer within 30 days" but concluded as a matter of law that plaintiff's twenty month delay was justified by plaintiff's showing a "reasonable excuse." The majority agrees plaintiff failed to provide defendants notice within the required thirty day time period, but remands the matter for additional findings of fact whether a reasonable excuse was given. Undisputed evidence shows plaintiff failed to notify defendants within the statutorily required thirty days and failed to offer any "reasonable excuse" recognized by any precedent. Remand to the Commission for further findings of fact is unecessary. The Commission's opinion and award is affected with an error of law and should be reversed.

A. Immediate Notice

N.C. Gen. Stat. § 97-22 (2003) states "every injured employee . . . *shall immediately* on the occurrence of an accident . . . give or cause to be given to the employer a written notice of the accident" and "*no compensation shall be payable* unless such written notice is given *within 30 days* after the occurrence of the accident." (Emphasis supplied). "The purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment . . . to minimiz[e] the seriousness of the injury, and . . . [to] facilitate[] the earliest possible investigation of the circumstances surrounding the injury." *Booker v. Medical Center*, 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979) (N.C. Gen. Stat. § 97-22 inquiries are conducted to prevent prejudice to the employer by lack of notice by the employee).

"The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." *Hoffman v. Great*

American Alliance Ins. Co., 166 N.C. App. 422, 427, 601 S.E.2d 908, 912 (2004). We are required to interpret notice requirements in N.C. Gen. Stat. § 97-22 to protect the employer's right and to require timely notice of injury. *See Davis v. Taylor-Wilkes Helicopter Serv., Inc.*, 145 N.C. App. 1, 2, 549 S.E.2d 580, 581 (2001) (Both parties knew of the plaintiff's injury within thirty days but believed the plaintiff was an "independent contractor" when he was, in fact, an employee. The Court found reasonable excuse and no prejudice in the delay). Cases cited within Judge Elmore's concurring opinion show either the employer had actual knowledge of the injury or the plaintiff was unaware a compensable injury had occurred: *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 573 S.E.2d 703 (2002) (The defendant failed to allege prejudice and the delay of five months for written notice did not prejudice the defendant. The Court held the defendant had notice because the plaintiff's incident report was made after the flight was complete.), *disc. rev. denied*, 357 N.C. 251, 582 S.E.2d 271 (2003); *Westbrooks v. Bowes*, 130 N.C. App. 517, 503 S.E.2d 409 (1998) (The defendant conceded immediate notice but contended prejudice by the surviving spouse's filing of a claim a year late. The court remanded for a finding of prejudice because the Commission's award failed to address it.); *Hill v. Bio-Gro Systems*, 73 N.C. App. 112, 326 S.E.2d 72 (1985) (The employee told his supervisor about the accident within a week, but had not suffered any pain and was unaware of his injury. The Court found the defendant was not prejudiced in the delay.); *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 334 S.E.2d 392 (1985) (The employer was on constructive notice because it received a doctor's bill for plaintiff's injury within a month. The Court found no prejudice in the delay.); *see also Chilton v. School of Medicine*, 45 N.C. App. 13, 262 S.E.2d 347 (1980) (The plaintiff was not barred by failure to notify the employer within thirty days where school faculty had personal knowledge of the plaintiff's injury as it happened.).

Here, plaintiff failed to immediately and timely report his alleged 28 October 1999 injury to defendants until July 2001, more than twenty months after the accident. No precedent has allowed a reasonable excuse for a twenty month delay. Under N.C. Gen. Stat. § 97-22, plaintiff's failure to provide notice "immediately on the occurrence of an accident" which caused his alleged injuries bars his workers' compensation claim.

B. Reasonable Excuse

Plaintiff's failure to timely report the accident places the burden on him to provide a "reasonable excuse" for his delay. The Commission must find and be "satisfied that the employer has not been prejudiced." N.C. Gen. Stat. § 97-22.

The Commission concluded plaintiff's "fear[] [of] losing his job" was a reasonable excuse for his unduly delayed notification to defendants of his injuries. The majority remands to the Full Commission because "the full Commission made no findings of fact showing that [plaintiff] feared retaliation if he timely reported his injury" and whether this "fear" was a reasonable excuse. *Id.*; *Lawton v. County of Durham*, 85 N.C. App. 589, 592-93, 355 S.E.2d 158, 160 (1987) (The Commission did not address the employee's allegation that he did not "realize the nature and seriousness of his injury").

Defendants argue plaintiff failed to give and cannot provide a reasonable excuse for his prejudicial failure to provide written notice to his employer within thirty days. I agree. "The burden is on the employee to show a 'reasonable excuse.' " *Jones v. Lowe's Companies*, 103 N.C. App. 73, 75, 404 S.E.2d 165, 166 (1991) (quoting *Lawton*, 85 N.C. App. at 592, 355 S.E.2d at 160) (Two months after the injury, the employee gave oral notice and sought treatment. Three months after injury, the employee gave written notice. The Court found a reasonable excuse because the plaintiff did not know he was hurt). All prior cases recognized a "reasonable excuse" as either " 'a belief that one's employer is already cognizant of the accident . . .' or '[where] the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows . . . .' " *Id.* Undisputed facts show plaintiff cannot justify his failure of notice under either exception to excuse his noncompliance with the statute.

1. Employer Knew of Injury

The Commission erred in concluding as a matter of law that plaintiff gave a reasonable excuse for his failure to notify defendants of the accident. We all agree no findings of fact show the employer was "cognizant of the accident." *Id.* The Commission found: (1) "plaintiff *did not report* a work-related injury to defendant-employer[;]" (2) plaintiff "*did not mention* anything about an injury at work to [the human relations coordinator;]" and (3) "when [plaintiff] complet[ed] the forms regarding disability associated with the neck surgery," he

affirmatively "checked the box stating that the condition *was not the result* of a work-related illness or injury." (Emphasis added). The Commission's findings of fact directly conflict with his employer being "cognizant of the accident" to excuse plaintiff's failure to timely report. *Id.*

Plaintiff not only failed to report his accident to defendants but affirmatively represented his injury was not related to his employment. Plaintiff cannot meet his burden of proving a reasonable excuse existed for his failure to notify his employer of the accident.

2. Plaintiff was Unaware of Injury

We also all agree the Commission's findings of fact also cannot support a conclusion that plaintiff was unaware "of the nature, seriousness, or probable compensable character of his injury." *Id.* The Commission found plaintiff was injured on 28 October 1999, visited a chiropractor on 1 November 1999, "missed approximately two weeks of work," and was treated by an orthopedic surgeon. Plaintiff sought treatment from his chiropractor within four days of his injuries. Plaintiff was obviously aware of his injuries throughout these visits and knew or should have known of "the nature, seriousness, or probable compensable character of his injury." *Jones*, 103 N.C. App. at 75, 404 S.E.2d at 166. Plaintiff cannot meet his burden of showing a reasonable excuse by not realizing the "seriousness" of his injuries. *Id.* Undisputed facts also show plaintiff had previously filed a workers' compensation claim and was aware of his duty to promptly notify his employer.

N.C. Gen. Stat. 97-22 requires that a "reasonable excuse is made to the satisfaction of the Industrial Commission." The Commission's finding of fact stated, plaintiff's "late reporting did not prejudice defendant[s] and plaintiff's failure to timely report the injury is excused." The majority correctly holds the Commission failed to make a finding of fact to support its conclusion that plaintiff had a "reasonable excuse." N.C. Gen. Stat. § 97-22.

Undisputed evidence shows plaintiff cannot provide a reasonable excuse to the Commission for his failure to timely notify defendants of his injury. Plaintiff did not give actual notice to defendants and intentionally misrepresented his accident. Defendants were not "cognizant of the accident" and plaintiff was aware "of the nature, seriousness, or probable compensable character of his injury." *See Jones*, 103 N.C. App. at 75, 404 S.E.2d at 166.

Plaintiff's actions directly contravene the purpose of the notice requirement in N.C. Gen. Stat. § 97-22. This Court has recognized claims by a plaintiff where timely notice was not given, if the plaintiff was unaware of the serious nature of their injury. *See Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 532 S.E.2d 207 (2000) (The plaintiff filed a claim after thirty days but showed reasonable excuse that doctors mis-diagnosed his injury as a heart attack when the actual injury was a herniated disc and the plaintiff depended on his wife and doctor to notify the defendant of his work-related injuries.).

Here, plaintiff knew of his injuries, immediately sought treatment for them, and did not report the accident to his employer. Plaintiff's actions are easily distinguishable from all precedents upholding reasonable excuses. Plaintiff claims he failed to report his injuries for "fear[] [of] losing his job." The purpose of the notice requirement in N.C. Gen. Stat. § 97-22 is not for the benefit of the employee, but rather to provide actual notice to the employer. Plaintiff cannot meet his burden to show a reasonable excuse. *Jones*, 103 N.C. App. at 75, 404 S.E.2d at 166. The Commission's opinion and award should be reversed.

C. Prejudice to Employer

Defendants suffered prejudice as a matter of law by plaintiff's delay regardless of the Commission's conclusion that plaintiff had a reasonable excuse.

N.C. Gen. Stat. § 97-22 requires both a "reasonable excuse" and a showing "that the employer has not been prejudiced" if notice of an injury is untimely. "If prejudice is shown, [e]mployee's claim is barred even though he had a reasonable excuse for not giving notice of the accident within 30 days." *Id.* at 76, 404 S.E.2d at 167. The purpose of the requirement of notice is to prevent prejudice toward the employer. "The purpose is dual: First, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury." *Id.* at 76-77, 404 S.E.2d at 167; *Booker*, 297 N.C. at 481, 256 S.E.2d at 204; *see* 2B Larson's Workmen's Compensation Law § 78.10, 15-102.

Plaintiff delayed reporting his accident for nearly two years after it occurred. Without notice, defendant-employer was: (1) unable to provide plaintiff with immediate medical diagnosis; (2) unable to provide plaintiff with treatment and could not initiate the earliest possible investigation of the facts; (3) unable to interview employees who

may have witnessed plaintiff's injuries; (4) unable to investigate the site where the alleged injury occurred; and (5) unable to provide or direct plaintiff's medical treatment. *Jones*, 103 N.C. App. at 76-77, 404 S.E.2d at 167.

We all agree that although "the Commission is not required to make findings of fact concerning each question raised by the evidence, . . . it is required to make specific findings pertaining to these crucial facts upon which plaintiff's claim rests." *Barnes v. O'Berry Center*, 55 N.C. App. 244, 246, 284 S.E.2d 716, 717 (1981).

The Commission's conclusion of law, "[d]efendant-employer has not shown prejudice for plaintiff's late filing of this claim" is unsupported by its findings of fact. The only finding of fact made by the Commission is plaintiff's "late reporting did not prejudice defendant . . . . " This statement is actually a conclusion of law and does not explain or support the Commission's finding. The Commission failed to consider each of the factors above. *Jones*, 103 N.C. App. at 76-77, 404 S.E.2d at 167. If no finding of fact supports the Commission's conclusion of law, our review is *de novo*. *Grantham*, 127 N.C. App. at 534, 491 S.E.2d at 681. Defendants were prejudiced by plaintiff's delayed notification as a matter of law. *Jones*, 103 N.C. App. at 76, 404 S.E.2d at 167. Remand is unnecessary where plaintiff cannot offer any recognized "reasonable excuse" to overcome prejudice to defendants. The Commission's opinion and award should be reversed.

III. Causation

Defendants argue the Commission failed to make adequate findings of fact on causation.

We all agree the Commission "failed to make adequate findings of fact on causation," but the majority remands for further findings of fact. Our Supreme Court has repeatedly held "that the entirety of causation evidence" must "meet the reasonable degree of medical certainty standard necessary to establish a causal link between" the plaintiff's accident and their injury. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003); *Edmonds v. Fresenius Med. Care*, 165 N.C. App. 811, 600 S.E.2d 501 (2004) (J. Steelman, dissenting), *rev'd per curiam*, 359 N.C. 313, 608 S.E.2d 755 (2005); *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 603 S.E.2d 552 (2004) (J. Hudson dissenting), *rev'd per curiam*, 359 N.C. 403, 610 S.E.2d 374 (2005).

"Unless a causal connection between employment and injury is proved, the injury is not compensable. The burden of proving the

causal relationship or connection rests with the claimant." *Arp v. Parkdale Mills, Inc.*, 150 N.C. App. 266, 274, 563 S.E.2d 62, 68 (2002) (J. Tyson, dissenting), *rev'd per curiam*, 356 N.C. 657, 576 S.E.2d 326 (2003). "The rule of causal relation is 'the very sheet anchor of the Workmen's Compensation Act,' and has been adhered to in our decisions, and prevents our Act from being a general health and insurance benefit act." *Id.* (quoting *Bryan v. First Free Will Baptist Church*, 267 N.C. 111, 115, 147 S.E.2d 633, 635 (1966)).

"Although expert testimony as to the possible cause of a medical condition is admissible[,] . . . it is insufficient to prove causation, particularly 'when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation.' " *Edmonds*, 165 N.C. App. at 818, 600 S.E.2d at 506 (quoting *Holley*, 357 N.C. at 233, 581 S.E.2d at 753).

"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. In *Alexander*, our Supreme Court held "the role of the Court of Appeals 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.' " 166 N.C. App. at 573, 603 S.E.2d at 558 (quoting *Deese*, 352 N.C. at 116, 530 S.E.2d at 553).

Plaintiff's orthopedic surgeon, Dr. Moody, testified plaintiff's "work injury could have aggravated and caused the onset of symptoms in the neck and low back" or could have been caused by plaintiff's recreational weight lifting or working on his home. Plaintiff's family physician, Dr. Kelly, also testified concerning plaintiff's injuries, "I do not think that his whatever happened at work caused all this . . . ." Dr. Kelly later added, "I think it could have, could have aggravated, accelerated or contributed." This testimony is insufficient to prove causation.

> [M]edical experts were asked only whether " 'a particular event or condition could or might have produced the result in question, not whether it did produce such result.' " *Lockwood v. McCaskill*, 262 N.C. 663, 668, 138 S.E.2d 541, 545 (1964) (quoting Stansbury, North Carolina Evidence § 137, at 332 (2d ed. 1963)). With the adoption of Rule 704 in 1983, experts were allowed to testify more definitively as to causation. N.C.G.S. § 8C-1, Rule 704. While the "could" or "might" question format circumvented the admissibility problem, it led to confusion that such testimony was suffi-

> cient to prove causation. *See Alva v. Charlotte Mecklenburg Hosp. Auth.*, 118 N.C. App. 76, 80-81, 453 S.E.2d 871, 874 (1995) (a case that erroneously relied on *Lockwood* an opinion on the admissibility of expert opinion testimony, to find "could" or "might" testimony sufficient to prove causation). Although expert testimony as to the possible cause of a medical condition is admissible if helpful to the jury, *Cherry*, 84 N.C. App. at 604-05, 353 S.E.2d at 437, *it is insufficient to prove causation* . . . .

Holley, 357 N.C. at 232-33, 581 S.E.2d at 753 (emphasis supplied).

Plaintiff's physicians testified only to "possibility" and not to a "medical certainty" or that it is more likely plaintiff's injuries were caused by his accident. *Id.* at 234, 581 S.E.2d at 754. Possibility or might testimony "is insufficient to prove causation." *Id.* The entirety of plaintiff's expert medical testimony is "possibility" and "speculation" and does not meet plaintiff's burden to show the necessary degree of "medical certainty" to prove causation. *Id.*

Remand for further findings of fact could give plaintiff a second bite at the apple. Plaintiff fully litigated his claim and failed to prove causation. The majority perpetuates and encourages both fraudulent and stale claims against employers by employees who fail to report injuries for nearly two years and who fail to establish their injuries were caused by their alleged accident.

The Commission failed to make any findings of fact on the cause of plaintiff's injuries, but concluded "[p]laintiff sustained an injury by accident arising out of his employment with defendants as a direct result of the work assigned on or about 28 October 1999." No competent evidence substantiates the required element of the accident causing plaintiff's injury. The Commission's conclusion of law that "plaintiff suffered a compensable injury" is not supported by any competent evidence in the record. The Commission's opinion and award should be reversed.

III. Conclusion

Plaintiff failed to report his injury "immediately" to defendants within the statutorily required thirty day requirement and failed to provide a reasonable excuse for his twenty month delay. N.C. Gen. Stat. § 97-22 (2003). Defendants were prejudiced as a matter of law by plaintiff's unduly delayed notification.

The Commission's conclusion of law that "plaintiff suffered a compensable injury" is not supported by any competent evidence or

findings of fact. No competent evidence substantiates the required element of causation. Plaintiff's claim for temporary total disability compensation should be denied. I vote to reverse the Commission's opinion and award. I respectfully dissent.

STATE OF NORTH CAROLINA v. CELESTIO LEFRANZ HARRINGTON AND CHRIS RATTIS

No. COA04-500

(Filed 21 June 2005)

1. Criminal Law— joinder—common scheme to distribute marijuana

The trial court did not abuse its discretion in a drug case by joining defendants' cases for trial over their objections, because: (1) defendants failed to show that they were deprived of a fair trial when evidence presented by the State including marijuana, large amounts of money, and drug paraphernalia, found at both an apartment and a house was ample evidence to convict both defendants of the marijuana charges individually or jointly; (2) a coparticipant's testimony was relevant to the conspiracy charge and would have been admissible against defendants individually in separate trials; and (3) the State sought to hold defendants accountable for the same crimes that arose at the same time, and the State's evidence was sufficient to show that defendants were involved in a common scheme to distribute marijuana.

2. Drugs— trafficking in marijuana by possession, manufacture, and transportation—conspiracy to traffic marijuana—maintaining a place to keep a controlled substance—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendants' motions to dismiss the charges of trafficking in marijuana by possession and manufacture, the conspiracy charges, and the charge of maintaining a place to keep and sell marijuana, but erred by denying defendants' motion to dismiss the charges of trafficking in marijuana by transportation, because: (1) the evidence of drug paraphernalia found in various areas of the house where both defendants resided and the testimony of a coparticipant that both defendants were engaged in the sale of marijuana and

that both had access to the garage was sufficient for the issue of possession to survive a motion to dismiss; (2) evidence of scales and plastic bags found with marijuana is sufficient evidence for the issue of manufacturing to be submitted to the jury; (3) there was insufficient evidence that defendants had carried or moved the marijuana from one place to another for the transportation charges; (4) the State presented a number of different acts which when taken together amount to substantial evidence that defendants had agreed to distribute marijuana for the conspiracy charge; and (5) although one defendant contends that neither the jury nor the trial court specifically found that he intentionally violated N.C.G.S. § 90-108(a) and thus the violation should have only been a Class 1 misdemeanor instead of a Class 1 felony, defendant did not present an argument in support of this assignment of error, defendant did not object to the jury instructions at trial nor did he assign them as error, and by finding defendant guilty of maintaining a place for keeping controlled substances, the jury inherently found defendant did so intentionally.

3. Evidence— prior crimes or bad acts—relevant to conspiracy charge

The trial court did not abuse its discretion in a drug case by admitting evidence of defendant's other crimes or wrongs under N.C.G.S. § 8C-1, Rule 403, because: (1) the evidence was relevant to an issue other than defendant's propensity to commit the crime; (2) the State offered the prior acts as being relevant to the issue of conspiracy since testimony offered included facts that were sufficiently similar to facts involved in the present charges including that he lived at the pertinent house address and had scales similar to those found in the apartment; and (3) defendant does not show that a different result would have been reached by the jury if this evidence had been excluded or that he was prejudiced in any way.

4. Sentencing— decision to have jury trial—statutory minimum time

The trial court did not err or commit plain error in a drug case by allegedly considering defendant's decision to have a jury trial when imposing his sentence, because: (1) defendant was sentenced to the statutory minimum amount of time for each conviction; and (2) the trial court consolidated the charges of maintaining a place for keeping a controlled substance and conspiracy to traffic in marijuana for sentencing.

5. Constitutional Law— effective assistance of counsel—concession of guilt

Defendant did not receive ineffective assistance of counsel in a drug case even though he contends his counsel allegedly conceded his guilt in the closing argument without having defendant's consent, because: (1) the pertinent statement when viewed in context does not concede any crime; (2) counsel's statement to the jury suggested that defendant may have been guilty of lesser offenses involving marijuana in the past, such as smoking marijuana, but was not guilty of trafficking in marijuana; (3) counsel's statement taken in context was consistent with the overall theory of his closing argument that defendant was not guilty of trafficking in marijuana; and (4) defendant was not prejudiced since both the trial court and defense counsel took adequate measures to correct any prejudicial effect of counsel's statement.

6. Appeal and Error— preservation of issues—failure to argue

Defendant's remaining assignments of error are deemed abandoned under N.C. R. App. P. 28(b)(6) because defendant failed to argue them.

Appeal by defendants from judgments entered 29 September 2003 by Judge James Floyd Ammons, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 11 January 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood and Assistant Attorney General Steven Armstrong, for the State.

Jeffrey Evan Noecker for defendant Celestio Lefranz Harrington.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant Chris Rattis.

McGEE, Judge.

Celestio Lefranz Harrington (Harrington) and Chris Rattis (Rattis) (collectively defendants) were convicted of trafficking in marijuana by possession, trafficking in marijuana by manufacture, trafficking in marijuana by transportation, conspiracy to traffic marijuana, and maintaining a place to keep a controlled substance. Defendants were each sentenced to four consecutive terms of thirty-five to forty-two months.

The State's evidence at trial showed that on 10 April 2002, S.B.I. Special Agent Errol Jarman (Agent Jarman) intercepted a United Parcel Service package that he believed contained marijuana. Based on a canine inspection, Agent Jarman obtained a search warrant for the package and discovered marijuana therein. The package was addressed to a woman at 405-B Monza Court (the apartment). Agent Jarman and the Fayetteville Police Department conducted a controlled delivery of the package to the apartment. The apartment was leased to Charles Veal (Veal). Rattis was the only person at the apartment when Agent Jarman, working undercover, delivered the package.

After the package was delivered, the police entered the apartment to conduct a search pursuant to a warrant. They found scales, packages of sandwich bags, a .38 caliber revolver, bullets, and a block of marijuana. Rattis was detained by the police, after trying to exit the rear of the apartment.

The police also searched a vehicle located outside of the apartment that Rattis said belonged to a friend. Police found a rental agreement in the vehicle in the name of Joi Norfleet (Norfleet), for a house located at 6313 Rhemish Drive (the house). Police officers went to the house, which was five miles from the apartment. Norfleet answered the door and permitted the police to search the house, except for Harrington's bedroom. Defendants were both residents of the house, along with Norfleet.

In the garage of the house, police found a locked cardboard container, a large plastic outdoor trash bag filled with one to two thousand "dime bags" generally used for storing small amounts of marijuana, and a trash can with marijuana residue and seeds in it. Inside the house, police found a small bag of marijuana in one of Norfleet's dressers. In the kitchen, the police found a bag of marijuana, a digital scale, and a vacuum sealer, which is often used to package marijuana. In the bedroom shared by Rattis and Norfleet, the police found guns, a book on drug enforcement, large amounts of money, and multiple identification documents with Rattis's picture but with different names. The police also found a key to the locked cardboard container they had seen in the garage. When they opened the locked container, they found more than fifty-eight pounds of marijuana bricks, along with a note from Norfleet dated 7 April 2002, which indicated Norfleet had opened one of the bricks of marijuana, had sold a couple of ounces, and had kept some for herself.

Since Harrington was not present at the house, the police obtained a warrant to search his bedroom. In the bedroom, police found a set of scales, plastic bags containing marijuana residue, a bullet-proof vest, approximately $2,000 in cash, some credit cards bearing various names, and a large amount of marijuana.

Defendants, Norfleet, and Veal were arrested. Norfleet was offered a lesser sentence to testify against Veal and defendants. She testified that Veal and defendants had previously lived together in a house located at 6121 Conoway Drive, and that she thought Veal and defendants had engaged in distributing drugs. Norfleet further testified that she and defendants later lived together at the house located at 6313 Rhemish Drive, and that Veal lived at the apartment, but occasionally came to the house. Norfleet testified that defendants were selling marijuana, that the house was used for storing marijuana, and that the apartment was used for distribution.

During the trial, Veal changed his plea of not guilty to guilty. Defendants were given the same opportunity to change their pleas but chose to continue their jury trial. Harrington did not present any evidence, but Rattis testified on his own behalf.

Rattis testified that he was involved in many moneymaking enterprises, including buying and selling vehicles at auctions, working in the restaurant business, and working as a music promoter. He also testified that he had been unable to open a bank account in the United States because he was a Jamaican citizen, so he had to keep his money in his bedroom. Rattis further testified that he had been thinking about moving out of the house, and that he had gone to talk with a rental agent on 10 April 2002. When the agent was unavailable, Rattis went to the apartment to watch television while he waited for the rental agent to return. He also testified that he met women at the apartment because he did not want to tell people where he lived, and he did not want to bring other women to the house where he lived with Norfleet. Rattis testified that he was watching the news when a man arrived with a package. He stated that he refused to accept the package because it was not addressed to Veal or Veal's girlfriend, but that nevertheless, the delivery person left the package on the floor. Rattis testified that soon after the delivery, people banged on the door, entered the apartment, and pointed a firearm at his chest, which is why he went to the rear sliding door. He also testified that he did not know about the marijuana in the garage of the house because he had been out of town for several weeks.

I.

[1] Defendants first argue that the trial court erred in joining defendants' cases for trial, over their objections. Defendants filed a motion for severance, which was argued at a pre-trial hearing. Harrington renewed his motion to sever at the close of the State's evidence, and at the close of all of the evidence. The trial court allowed joinder and denied all motions to sever. Defendants argue that by joining their cases, the trial court denied defendants a fair trial.

Upon written motion of the State, a trial court *may* join the trials for two or more defendants "[w]hen each of the defendants is charged with accountability for each offense," or when the several offenses charged were "part of a common scheme or plan; . . . part of the same act or transaction; or . . . so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others." N.C. Gen. Stat. § 15A-926(b)(2) (2003). The State, in the present case, moved to join defendants' trials because each defendant was charged with the accountability of each offense, and because the evidence tended to show that defendants were engaged in a common scheme or plan to distribute marijuana.

Defendants each assert that the State's public policy interests "cannot stand in the way of a fair determination of guilt or innocence." *See State v. Hucks*, 323 N.C. 574, 582, 374 S.E.2d 240, 245 (1988). The trial court must, upon motion, "deny a joinder for trial or grant a severance of defendants" when necessary to fairly determine "the guilt or innocence of one or more of the defendants." N.C. Gen. Stat. § 15A-927(c)(2) (2003). However, "[t]he trial court's decision as to whether to grant a motion for severance under the statute is an exercise of discretion, and its ruling will not be disturbed on appeal unless the defendant demonstrates an abuse of discretion which effectively deprived him of a fair trial." *Hucks*, 323 N.C. at 582, 374 S.E.2d at 245. "An appellate court should affirm a discretionary decision by the trial court that is supported by the record, and reverse only where the decision is manifestly unsupported by reason and so arbitrary that it could not have been the result of a reasoned decision." *State v. Morgan*, 359 N.C. 131, 148-49, 604 S.E.2d 886, 897 (2004) (internal quotations and citations omitted).

Defendants argue that by joining their cases, the trial court forced defendants to defend themselves against each other, rather than against the charges. They argue that while examining witnesses, each of their defense counsel had to deflect the blame from his

respective client by casting blame on the other. Defendants further argue that their defenses were inherently antagonistic and that evidence was admitted at trial that would have been excluded had defendants been tried separately. *See State v. Foster*, 33 N.C. App. 145, 149, 234 S.E.2d 443, 446 (1977) (stating "the existence of antagonistic defenses, or the admission of evidence[,] which would be excluded on a separate trial," was evidence that "a joint trial would be prejudicial and unfair"). Specifically, Rattis argues that the evidence of other crimes or wrongful acts committed by Harrington had no probative value for Rattis, and therefore prejudiced Rattis. Harrington similarly argues that there was no evidence linking him to the apartment, and that in a separate trial this evidence would not have been admitted against him. We note, however, that Norfleet's testimony that defendants would sometimes go to the apartment and that defendants used the apartment to distribute marijuana, linked Harrington to the apartment.

The admission of evidence that would not be admitted in separate trials or the presence of antagonistic defenses does not necessarily require severance. *See State v. Nelson*, 298 N.C. 573, 587, 260 S.E.2d 629, 640 (1979), *cert. denied*, *Jolly v. North Carolina*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980). Rather, "[t]he test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *Id.* In the present case, defendants fail to show that they were deprived of a fair trial. Evidence presented by the State, including marijuana, large amounts of money, and drug paraphernalia, found at both the apartment and the house was ample evidence to convict both defendants of the marijuana charges, individually or jointly. Furthermore, Norfleet's testimony was relevant to the conspiracy charge, and would have been admissible against defendants individually in separate trials. Therefore, defendants' arguments of possible prejudice are insufficient to show that the trial court abused its discretion in joining the cases for trial. The State sought to hold defendants accountable for the same crimes that arose at the same time, and the State's evidence was sufficient to show that defendants were involved in a common scheme to distribute marijuana. The trial court did not err in joining defendants' cases for trial.

II.

[2] Defendants next argue that the trial court erred in denying their motions to dismiss the charges against them. Defendants moved to dismiss all charges against each of them at the close of the State's evi-

dence, and at the close of all of the evidence. These motions were denied. A defendant's motion to dismiss is properly 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. "Any contradictions or discrepancies in the evidence are for resolution by the jury." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

A.

Defendants were each charged with three counts of trafficking in marijuana: by possession, by manufacture, and by transportation. The State had to prove that defendants respectively possessed, manufactured, and transported more than fifty pounds but less than 2,000 pounds of marijuana. N.C. Gen. Stat. § 90-95(h)(1)(b) (2003). Neither Harrington nor Rattis disputes the amount or weight of the marijuana found in the garage of the house. Rather, they argue that there was insufficient evidence on the issues of possession, manufacturing and transportation.

Possession of a controlled substance may be actual or constructive. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "An accused has possession of contraband material within the meaning of the law when he has both the power and the intent to control its disposition or use." *State v. Davis*, 25 N.C. App. 181, 183, 212 S.E.2d 516, 517 (1975). When narcotics "are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714. "[W]here possession of the premises is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *Brown*, 310 N.C. at 569, 313 S.E.2d at 589.

In the present case, neither Harrington nor Rattis had exclusive possession of the marijuana found in the garage of the house. For this reason, each argues that there was insufficient evidence that he

had dominion or control over the marijuana. However, the State presented other incriminating evidence that was sufficient to allow the charge of possession for each defendant to go to the jury. In particular, the evidence of drug paraphernalia found in various areas of the house where both defendants resided, and the testimony of Norfleet that both defendants were engaged in the sale of marijuana and both had access to the garage, was sufficient for the issue of possession to survive a motion to dismiss.

Similarly, defendants each assert that the trial court erred when it denied their motions to dismiss on the charge of trafficking in marijuana by manufacture. Under the Controlled Substances Act, "manufacture . . . includes any packaging or repackaging of the substance or labeling or relabeling of its container[.]" N.C. Gen. Stat. § 90-87(15) (2003). Defendants concede that the police found a large plastic trash bag containing one to two thousand plastic "dime bags" near the marijuana in the garage, and found a scale and a vacuum sealer in the kitchen. Rattis argues, however, that the above definition of "manufacture" requires the active manufacturing of a controlled substance, i.e., that a defendant be actively engaged in packaging, repackaging, or labeling, rather than merely prepared to manufacture. Rattis contends that the trial court erred because no evidence was offered to show that defendants were engaged in manufacturing, only that defendants were equipped to manufacture marijuana, but had not begun to do so. However, our Court has held that evidence of scales and plastic bags found with marijuana is sufficient evidence for the issue of manufacturing to be submitted to a jury. *State v. Roseboro*, 55 N.C. App. 205, 210, 284 S.E.2d 725, 728 (1981), *disc. review denied*, 305 N.C. 155, 289 S.E.2d 566 (1982). Moreover, in the present case, Norfleet testified that Rattis used the scale and vacuum sealer found in the kitchen to weigh and package marijuana for distribution. We overrule Rattis's assignment of error on this issue.

Harrington argues that there was insufficient evidence that he ever manufactured the marijuana found in the garage. Harrington argues that while Norfleet testified that Rattis used a vacuum sealer to package the marijuana, no evidence suggested that Harrington was ever present while the marijuana was being packaged or that he ever engaged in the packaging. However, Norfleet testified that both defendants had access to the garage where one to two thousand "dime bags" were found, and certainly both defendants had access to the kitchen where the scale and vacuum sealer were found. Norfleet also identified the bags found in the garage as bags that were used by

defendants to distribute marijuana. Additionally, police found, among other things, a set of scales and plastic bags containing marijuana residue in Harrington's bedroom. There was substantial evidence of manufacture, and the trial court properly denied Harrington's motion to dismiss this charge.

Defendants also assign as error the trial court's denial of their motions to dismiss the charge of trafficking in marijuana by transportation. "Transportation" is the "real carrying about or movement from one place to another." *State v. Outlaw*, 96 N.C. App. 192, 197, 385 S.E.2d 165, 168 (1989) (citation omitted), *disc. review denied*, 326 N.C. 266, 389 S.E.2d 118 (1990). We agree with defendants that the trial court erred in submitting this issue to the jury when there was insufficient evidence that defendants had carried or moved the marijuana from one place to another.

The State argues that according to Norfleet's testimony, defendants stored the marijuana at the house and used the apartment for distribution, thus implying that defendants had to move the marijuana from the house to the apartment. However, absent other evidence of transportation, this implication is insufficient to overcome a motion to dismiss. *See State v. Lorenzo*, 147 N.C. App. 728, 732-33, 556 S.E.2d 625, 627 (2001) ("[W]e have found no case in North Carolina that recognizes the doctrine of constructive transportation."). Our Courts have previously found sufficient evidence of transportation of a controlled substance only when a defendant can be shown to have actively moved or carried the controlled substance.

For example, we have held that there was sufficient evidence of transportation when a defendant was observed moving a controlled substance from one place to another in a vehicle, even for a minimal distance. *See Outlaw*, 96 N.C. App. at 197, 385 S.E.2d at 168-69 (holding that there was sufficient evidence of transporting cocaine when the defendant carried cocaine from his home to his truck, got into the truck, and had begun backing down his driveway when the police stopped him); *see also State v. McRae*, 110 N.C. App. 643, 646, 430 S.E.2d 434, 437 (holding that evidence that the "defendant removed the drugs from a dwelling house and carried them to a car by which he left the premises" was "sufficient to sustain the charge of trafficking by transporting in violation of G.S. § 90-95(h)(3)"), *disc. review denied*, 334 N.C. 625, 435 S.E.2d 347 (1993). Additionally, our Court has held that a defendant personally tossing a bag or package containing a controlled substance may constitute real movement to sup-

port a charge of trafficking by transportation. *See State v. Wilder*, 124 N.C. App. 136, 140, 476 S.E.2d 394, 397 (1996); *State v. Greenidge*, 102 N.C. App. 447, 450-51, 402 S.E.2d 639, 641 (1991).

In the present case, however, no one testified to observing Harrington or Rattis personally or actively moving or carrying any controlled substance. There was therefore insufficient evidence to support the charge of trafficking by transportation, and the trial court erred in submitting this issue to the jury. Since defendants were convicted of this charge and were sentenced to an additional thirty-five to forty-two months for the charge, the error was not harmless. We therefore vacate defendants' convictions of trafficking in marijuana by transportation.

B.

Defendants next assign as error the trial court's denial of their motions to dismiss the conspiracy charges against them. " 'A criminal conspiracy is an agreement, express or implied, between two or more persons to do an unlawful act or to do a lawful act by unlawful means.' " *State v. Clark*, 137 N.C. App. 90, 95, 527 S.E.2d 319, 322 (2000) (citations omitted). In the present case, there is no direct evidence of an agreement to traffic in marijuana, but " '[d]irect proof of conspiracy is rarely available, so the crime must generally be proved by circumstantial evidence.' " *Id.* (citation omitted). "A conspiracy 'may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.' " *Id.* (quoting *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933)).

The State presented a number of different acts, which, when taken together, amount to substantial evidence that defendants had agreed to distribute marijuana. Norfleet testified that defendants and Veal were engaged in distributing marijuana as early as 2000, and that Harrington and Rattis each had access to the fifty-eight pounds of marijuana in the garage. Norfleet further testified that the house where both defendants lived, was used to store marijuana and that the apartment, where Veal lived, was used to distribute marijuana. Rattis was at the apartment when Agent Jarman made a controlled delivery of a package containing marijuana. Marijuana, scales, packaging materials, and weapons were found at both the apartment and the house. This incriminating evidence was found in each of defendants' bedrooms, as well as in public areas of the house. Based on this

evidence, the trial court did not err in denying defendants' motions to dismiss the conspiracy charge.

C.

Rattis also assigns as error the trial court's denial of his motion to dismiss the charge of maintaining a place to keep and sell marijuana. N.C. Gen. Stat. § 90-108(a)(7) (2003) states that it is unlawful for a person "[t]o knowingly keep or maintain any . . . dwelling house, . . . or any place . . . for the purpose of using [controlled] substances, or which is used for the keeping or selling of the same[.]" A person who violates N.C.G.S. § 90-108(a) "shall be guilty of a Class 1 misdemeanor[,]" unless "the criminal pleading alleges that the violation was committed intentionally, and upon trial it is specifically found that the violation was committed intentionally," then the violation "shall be a Class 1 felony." N.C. Gen. Stat. § 90-108(b) (2003).

Rattis does not argue that the State failed to present substantial evidence of all of the elements of this charge. Rather, he contends that neither the jury nor the trial court specifically found that Rattis *intentionally* violated N.C.G.S. § 90-108(a), and thus the violation of N.C.G.S. § 90-108(a) should have only been a Class 1 misdemeanor, not a Class 1 felony. Because Rattis does not present an argument in support of this assignment of error, the assignment of error is deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

Furthermore, though Rattis did not object to the jury instructions at trial and did not assign them as error, we note that the trial court's instruction to the jury on maintaining a place to keep controlled substances included intent as one of the elements of the crime. Specifically, the trial court stated:

> [Rattis] has also been charged with intentionally keeping or maintaining a building, which is used for the purpose of unlawfully keeping or selling controlled substances. For you to find [Rattis] guilty of this offense, the State must prove two things beyond a reasonable doubt. First, that [Rattis] kept or maintained a building, which was for the purpose of unlawfully keeping or selling marijuana. Marijuana is a controlled substance, the keeping or selling of which is unlawful. And, second, that [Rattis] did this intentionally.

Since intent was an element of the crime, the jury had to find this element beyond a reasonable doubt to convict Rattis of maintaining

a place for keeping a controlled substance. Thus, by finding Rattis guilty of maintaining a place for keeping controlled substances, the jury inherently found that Rattis did so intentionally. The trial court did not err in treating Rattis's violation of N.C.G.S. § 90-108(a) as a felony.

III.

[3] Rattis presents no additional assignments of error, but Harrington argues that the trial court erred in admitting evidence of Harrington's other crimes or wrongs pursuant to Rules 403 and 404 of the North Carolina Rules of Evidence. Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). "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, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). "Once the trial court determines evidence is properly admissible under Rule 404(b), it must still determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *State v. Bidgood*, 144 N.C. App. 267, 272, 550 S.E.2d 198, 202 (citing N.C. Gen. Stat. § 8C-1, Rule 403), *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001). "That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *Bidgood*, 144 N.C. App. at 272, 550 S.E.2d at 202.

The State presented evidence of two prior wrongs or acts committed by Harrington. The first occurred a year and a half prior to the present charges. Harrington was a passenger in a vehicle that had been stopped for a traffic violation and the officer testified at the present trial that he had smelled marijuana coming from the vehicle. Harrington was not charged with any marijuana offense and all other

charges against him were dismissed. The second prior act that was admitted into evidence occurred more than a year before the present charges. An officer had found Harrington asleep at the wheel of a vehicle, and a bag of marijuana and a set of scales had been plainly visible inside the vehicle.

Though neither of these prior incidents involved Rattis or Veal, the State offered these prior acts as evidence of conspiracy. In each incident, the officers had asked Harrington where he was living, and Harrington had responded that he lived at 6121 Conoway Drive. In the present case, the State argued that this evidence should be admissible as evidence of conspiracy because it corroborated Norfleet's testimony that defendants and Veal had previously lived together at 6121 Conoway Drive. Moreover, the State argued that the evidence was relevant to the conspiracy charge because the scales seized during the second prior act were the same type of scales found at the apartment. Since this evidence of prior acts by Harrington was relevant to an issue other than his propensity to commit the crime, the trial court did not err in determining that this evidence was admissible under Rule 404(b) of the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). The question before us is whether the trial court abused its discretion in determining that the probative value of this evidence of prior bad acts outweighed the possible prejudicial effect. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2003).

In engaging in a Rule 403 analysis, " 'the ultimate test of admissibility is whether [the prior acts] are sufficiently similar and not so remote' " to the charges or acts presently at issue. *State v. Ferguson*, 145 N.C. App. 302, 305, 549 S.E.2d 889, 892 (quoting *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991)), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). Harrington argues that the prejudicial effect of this evidence outweighed the probative value because neither of the prior acts was sufficiently similar to the current charges. He argues that both of these prior incidents occurred in vehicles in which he was either a passenger or driver. He further argues that the prior acts involved only the odor of marijuana, or a small bag of marijuana, while the current charges involve a trafficking amount of marijuana found in a residence. Harrington also argues that as these prior acts occurred at least a year before the current charges, they were too remote in time to be probative.

Our Court has held that "[t]he similarities between the other crime, wrong or act and the crime charged need not, however, 'rise to the level of the unique and bizarre in order for the evidence to be

admitted under Rule 404(b).' " *Ferguson*, 145 N.C. App. at 306, 549 S.E.2d at 892 (quoting *State v. Thomas*, 350 N.C. 315, 356, 514 S.E.2d 486, 511 (1999)). Furthermore, "remoteness in time generally goes to the weight of the evidence not its admissibility." *Ferguson*, 145 N.C. App. at 306, 549 S.E.2d at 892. The trial court admitted evidence of the prior acts as being relevant to the issue of conspiracy because the testimony offered included facts that were sufficiently similar to facts involved in the present charges. Those similar facts were that Harrington had lived at 6121 Conoway Drive and had scales similar to those found at the apartment. Thus, the trial court's Rule 403 determination was not "so arbitrary that it could not have resulted from a reasoned decision." *See Bidgood*, 144 N.C. App. at 272, 550 S.E.2d at 202.

Moreover, Harrington does not show that a different result would have been reached by the jury if this evidence had been excluded. "The party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission." *State v. Anthony*, 133 N.C. App. 573, 579, 516 S.E.2d 195, 199 (1999), *aff'd*, 351 N.C. 611, 528 S.E.2d 321 (2000). Furthermore, "evidentiary errors are harmless unless defendant proves that absent the error, a different result would have been reached." *State v. Campbell*, 133 N.C. App. 531, 540, 515 S.E.2d 732, 738, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999). Even assuming *arguendo* that the trial court erred, given the physical evidence found at the house showing that Harrington was trafficking in marijuana, and Norfleet's testimony linking Harrington to Rattis, Veal, and to the apartment, Harrington has failed to show that he was prejudiced by the admission of his prior acts. We overrule this assignment of error.

IV.

[4] Harrington next argues that the trial court erred in considering Harrington's decision to have a jury trial when imposing Harrington's sentence. A trial court, at sentencing, may not punish a defendant for exercising his constitutional right to a jury trial. *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). However, for us to properly review this assignment of error, Harrington must have presented this argument to the trial court. The record shows that Harrington did not object at trial to what he now deems to be improper statements by the trial court. He therefore failed to preserve this issue for appeal. *See* N.C. R. App. P. 10(b)(1). Though an issue not properly preserved at trial may be reviewed as plain error, N.C. R. App. P. 10(c)(4),

Harrington does not argue plain error, and therefore waives his right to plain error review.

We note that in our review of the record, we see no error or plain error in the trial court's statements to Harrington. To the contrary, the trial court ensured that defendants were informed of the implications of their pleas in light of the substantial evidence against them. During the trial, when Veal changed his plea, the trial court offered defendants the opportunity to receive less than the minimum sentences they would receive if convicted if they chose to change their pleas. The trial court further explained to defendants:

> If you are convicted, there are minimum sentences that you'll have to serve. And I'm not saying that you'll get more than this. You certainly won't get any less because of the minimum sentences. If you are found guilty, I'll make a judgment at that time.

When Harrington was convicted, the trial court sentenced him to the statutory minimum amount of time in prison for each conviction, being thirty-five to forty-two months. *See* N.C. Gen. Stat. § 90-95(h)(1)(b) (2003). The trial court also consolidated the charges against Harrington of maintaining a place for keeping a controlled substance and conspiracy to traffic in marijuana for sentencing. The trial court did not err.

V.

[5] Finally, Harrington argues that he received ineffective assistance of counsel and was thereby denied his Sixth Amendment right to a jury trial when his counsel conceded Harrington's guilt in the closing argument without having Harrington's consent. Generally, assistance of counsel is deemed ineffective when a defendant shows that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). However, in certain circumstances, the deficiency of the counsel's performance is so great that prejudice need not be argued. *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984). Following *Strickland* and *Cronic*, our Supreme Court determined that a defendant receives *per se* ineffective assistance of counsel when "the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). However, our Supreme Court also held in *State v. Gainey* that an

> argument that "the defendant is innocent of all charges, but if he is found guilty of any of the charges it should be of a lesser crime because the evidence came closer to proving that crime than any of the greater crimes charged, is not an admission that the defendant is guilty of anything, and the rule of *Harbison* does not apply."

Gainey, 355 N.C. 73, 92-93, 558 S.E.2d 463, 476 (quoting *State v. Harvell*, 334 N.C. 356, 361, 432 S.E.2d 125, 128 (1993)), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002).

Harrington argues that his counsel conceded Harrington's guilt in front of the jury during the closing argument without Harrington's permission, when his counsel said: "I'd submit to you that [Harrington] is a small time player in this operation. He hadn't fully moved [into] the league that [Rattis] was in." However, when viewed in context, we do not find that this statement conceded any crime. Harrington's counsel was recalling Norfleet's testimony to the jury when he made the above statement. Harrington's counsel was using Norfleet's testimony that she and Harrington had smoked marijuana together to demonstrate that Harrington was not in the business of selling or trafficking marijuana by contrasting it with Norfleet's testimony that Rattis did not smoke marijuana because he did not want to reduce his profits. Specifically, counsel said: "If you're a dealer, you're not going to be using your own product and wasting it. You're going to be trying to turn a profit, make as much money off of it. That's not what [Harrington] was doing." Counsel's next statement was the challenged statement:

> I'd submit to you that [Harrington] is a small player in this operation. He hadn't fully moved [into] the league that [Rattis] was in. Just like [Harrington] hadn't fully moved [into the house]. He was still on the outside looking in. And I don't think he knew—or I submit to you, based on the evidence, that he knew what was in those barrels and—all the weapons in this house.

The trial court interrupted counsel's closing argument at this point and asked the jury to leave the courtroom.

Rather than being a concession of Harrington's guilt, counsel's statement to the jury suggested that Harrington may have been guilty of lesser offenses involving marijuana in the past, such as smoking marijuana, but was not guilty of trafficking in marijuana. Taken in context, counsel's statement was consistent with the overall theory of

his closing argument that Harrington was not guilty of trafficking in marijuana. *See Gainey*, 355 N.C. at 93, 558 S.E.2d at 476 (finding no error when the defense counsel stated that the defendant was guilty of a lesser crime if guilty of anything, and when the consistent theory presented to the jury was that the defendant was not guilty).

Furthermore, Harrington was not prejudiced, because both the trial court and Harrington's counsel took adequate measures to correct any prejudicial effect of counsel's statement. *See State v. Mason*, 159 N.C. App. 691, 693-94, 583 S.E.2d 410, 411-12 (2003) (stating that any prejudice to the defendant when the defense counsel mistakenly said that his client should not be found innocent "was cured by additional argument made by defense counsel emphasizing defendant's innocence"). As mentioned above, the trial court stopped counsel's closing argument as soon as the challenged statement was made, and excused the jury. The trial court then gave Harrington an opportunity to object to his counsel's statement, gave a correcting instruction to the jury when it returned, and allowed Harrington's counsel the opportunity to explain his statement to the jury. Counsel explained:

> The lawyer is supposed to be very careful with the words he chooses and uses in the courtroom. And when I said that [Harrington] was a small player in this, I was referring to the testimony of Ms. Norfleet. That's basically what she said. I'm not saying he's guilty of what he's charged with in any way. I'm saying that he wasn't living at that place on a permanent basis. He didn't know that the marijuana was out in the garage. He didn't know all the paraphernalia, the guns and everything else that's been introduced into evidence was in that house.
>
> What I was trying to imply and a bit clumsily, I guess, was that [Harrington]—he may have smoked marijuana in the past. And he may have hung out with—with friends who you wouldn't want your son or daughter to hang out with. But he hadn't fully moved in with them to the point that he was guilty of what he's charged with, that he was in conspiracy with [Rattis].

Thus, Harrington has failed to show he received ineffective assistance of counsel, and we overrule this assignment of error.

[6] Harrington's remaining assignments of error are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) for lack of argument.

We vacate defendants' convictions of trafficking in marijuana by transportation. We find no error in defendants' additional convictions.

Vacated in part, no error in part.

Judges WYNN and TYSON concur.

IN RE: T.K., D.K., T.K., AND J.K., MINOR CHILDREN

No. COA04-196

(Filed 21 June 2005)

1. Child Abuse and Neglect— permanency planning hearing— consideration of parent's progress

A mother's progress toward correcting the conditions which had led to the removal of her neglected children was considered by the trial court at a permanency planning hearing, but was not sufficient for the return of the children.

2. Child Abuse and Neglect— primary focus—best interests of children—progress of parents

The trial court did not err when ceasing reunification efforts between a mother and neglected children by focusing on the best interests of the children rather the mother's progress. While the parent's right to maintain the family must be considered, at this stage the children's best interests are paramount.

Judge TYSON concurring in part and dissenting in part.

Appeal by respondent from an order dated 31 October 2003 by the Honorable Lisa C. Bell in Mecklenburg County Juvenile District Court. Heard in the Court of Appeals 21 October 2004.

Tyrone C. Wade for Mecklenburg County Department of Social Services, petitioner-appellee.

Michael E. Casterline for respondent-appellant mother.

BRYANT, Judge.

W.K.[1], (respondent-mother) appeals from a permanency planning order dated 31 October 2003 granting guardianship of T.K., D.K., and T.K. to the maternal aunt (C.C.) and a plan for reunification of J.K., the youngest child, with either or both parents.

1. Initials are used throughout to protect the identity of the juveniles.

On 7 May 2002 the Mecklenburg County Department of Social Services (DSS) initiated juvenile petitions alleging three minor children (T.K. age 12, D.K. age 10, and T.K. age 3) were neglected and dependent. At the time the juvenile petitions were filed, the children were living in a motel with their mother, stepfather, maternal aunt and cousin, as the family had been evicted from their home. On 6 September 2002, DSS initiated another juvenile petition alleging that newborn J.K. (born 5 September 2002) was a neglected and dependent child as J.K. tested positive for cocaine at birth. The court granted DSS non-secure custody of all the children.

On 17 July 2002 at the adjudicatory hearing, T.K., D.K., and T.K. were determined to be neglected and dependent juveniles, based on a number of findings by the trial court.[2] After a dispositional hearing on 22 August 2002, wherein the court approved a plan of reunification, on 29 October 2002, the court conducted an adjudication hearing as to J.K. and a review hearing as to T.K., D.K., and T.K. J.K. was adjudicated neglected and dependent. The plan for T.K., D.K., and T.K. was changed from reunification to termination of parental rights and adoption. At that time, the court found:

> The following progress has been made towards alleviating and mitigating the problems that necessitated placement: parents have a serious substance abuse problem which affects their ability to care for children . . . [p]arents have complied with some of plan goals but insufficient progress for children to be returned to them.

Thereafter, at the permanency planning hearing almost one year later on 16 October 2003, the court found that efforts to reunite T.K., D.K., and T.K. would have been futile and inconsistent with their health, safety, and need for a permanent home within a reasonable time. The court, however, continued the permanent plan of reunification for J.K.

Respondent-mother raises two issues on appeal from the permanency planning order: whether the trial court erred in ceasing reunification with the three older children when (I) the respondent-mother had made progress toward correcting conditions that led to the removal of the minor children and (II) the primary focus was on how well the children were doing in their placement rather than the progress of the parents. Respondent-mother's six remaining assign-

2. The trial court order was signed and entered 9 August 2002.

ments of error are not argued in her brief and are therefore deemed abandoned. N.C. R. App. P. 28(a); *McManus v. McManus*, 76 N.C. App. 588, 591, 334 S.E.2d 270, 272 (1985).

I

[1] In her first assignment of error, respondent-mother alleges the trial court erred in failing to consider her progress to reunite her and her three minor children. We disagree.

Pursuant to N.C.G.S. § 7B-907(c), the court is required to make findings regarding the "best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(c) (2003). In determining the best plan, the court must consider several factors, including but not limited to, how long DSS has provided efforts to the family before non-secure custody is obtained. *Id.* The court must also consider any substantial change after non-secure custody is obtained. *Id.* N.C.G.S. § 7B-507(a) requires the court to make a finding of reasonable efforts at each hearing. N.C. Gen. Stat. § 7B-507(a) (2003). "[T]he court may direct that reasonable efforts to eliminate the need for placement . . . shall cease if the court makes written findings of fact that . . . [s]uch efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-507(b)(1) (2003).

The court's relevant findings are:

2. That the parents have made some progress since the adjudication; however, progress began after a period of time. The respondent father has entered into substance abuse treatment and has maintained sobriety. Since entering, his urinalyses have been negative. He has secured employment; however, does not have housing. . . .

3. That respondent mother has submitted NA/AA forms to this [c]ourt. . . . The mother maintains she is substance abuse free; however, she tested positive for marijuana four months ago. The mother has employment, but does not yet have housing. . . .

4. That the mother has had seven (7) negative random urinalyses. The most recent sample was negative as well. However, based on the history of this case and the fact that the mother tested positive for controlled substances as

recently as four months ago and has attended visits with someone who smells of alcohol suggest to this [c]ourt there are still concerns regarding the mother's stability.

. . .

21. That [the stepfather, J.L.] has made greater progress than [the mother]; however, the [c]ourt does not find that six more months will make it more likely that his [youngest daughter, T.K.] could or should be removed from the household where she has resided for over a year. The [c]ourt specifically finds to the contrary that six more months will serve to strengthen that home environment and relationship for [the daughter]. The [c]ourt specifically finds there is a greater chance [the stepfather] can assume custody of [J.K.] within six months than [T.K.] if he continues to make progress.

22. That the mother is given credit for addressing her addiction and the efforts made to change her life which is difficult; however, the time line in the life of the children is not the same as that of an adult. One and a half years in the life of a child is vastly different than that of an adult. Children cannot wait for parents to get their lives together, get sober and do the things necessary to be an adequate parent.

Clearly the court considered that some progress had been made by respondent-mother and father toward correcting the conditions which lead to removal of the children; however that progress was not nearly enough. The issues that led to the children being removed from the home were substance abuse by the parents, inadequate housing, employment, the children failing to attend school regularly, the parent's failure to maintain D.K.'s prescription for medication associated with his ADHD and the parent's failure to provide counseling for T.K. Thereafter, the three older children were in and out of placement for 18 months. After careful consideration, the court had no assurances respondent-mother had made sufficient progress for the children to be returned to her care. This assignment of error is overruled.

II

[2] In her second assignment of error, the respondent-mother contends the trial court erred in ceasing reunification efforts with the three older children when the primary focus was how well the children were doing rather than the progress of the parents.

Pursuant to N.C.G.S. § 7B-907(a), in determining whether it is possible for the children to return home within six months of the permanency planning hearing, the court must look at the progress the parents have made in eliminating the conditions that lead to the removal of the children. N.C. Gen. Stat. § 7B-907(a) (2003). Further, if the court determines it is not possible for the juvenile to return home within that time, the court must then make findings as to why it is not in the juvenile's best interest to return home. *Id.*

"In determining the best interests of the child, the trial court should consider the parents' right to maintain their family unit, but if the interest of the parent conflicts with the welfare of the child, the latter should prevail." *In re Parker*, 90 N.C. App. 423, 431, 368 S.E.2d 879, 884 (1988). Thus, in this context, the child's best interests are paramount, not the rights of the parent. *In re Smith*, 56 N.C. App. 142, 150, 287 S.E.2d 440, 445, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982). In this case, the court determined that it was not in the three older children's best interest to return home before determining whether it was possible for them to return home. The court made the following findings of fact:

> 7. That in July 2002, the juveniles, [T.K., D.K., and T.K.] were placed with [C.C.], the maternal aunt, and all three have remained there since that time. The children have made great progress while in her home. [D.K.] has significant needs which are being addressed in therapy. Based on the history of the home at the time the children came into custody, the two older children are very vocal about not returning to the home of the mother and the stepfather.
>
> 8. That the children have thrived in the home of [C.C.] and the two older children have no interest in visiting with the mother though visitation has been offered. [D.K.] has expressed a desire to kill [her stepfather].
>
> 9. That the therapist reports [the youngest daughter, T.K.] recognizes [C.C.'s] home as her family home . . . .
>
> 10. That the children have resided with each other and look to each other for support and stability. It is, therefore, not in the best interest of the three older juveniles to separate one from the other.
>
> 11. That DSS has made reasonable efforts to implement a permanent plan for the juveniles. The permanent plan for [T.K.,

D.K. and T.K.] is guardianship with [C.C.]. The permanent plan for [J.K.] currently is reunification with either the mother or the father or both.

12. That the reports to the [c]ourt clearly indicate that it is not in [T.K., D.K., and T.K.'s] best interest to transition into the home of their mother.

13. That the [c]ourt specifically finds that efforts to reunite would be futile and inconsistent with the juveniles, [T.K., D.K., and T.K.'s] health, safety, and need for a permanent home within a reasonable period of time.

. . .

15. That it is not possible for [T.K., D.K., and T.K.] to be returned home immediately or within six months and the [c]ourt finds it is not in the best interest of these three juveniles to be returned home in light of the issues yet to be resolved.

16. That because the children's return home is not likely within six months, the [c]ourt has considered whether legal guardianship should be established. [T.K., D.K., and T.K.] have been placed with [C.C.] . . . for over a year. She has met the needs of the juveniles and provides a permanent safe environment.

. . .

24. That at this time, the juveniles' continuation in or return to their home is contrary to their best interest.

25. That guardianship in this [c]ourt's opinion is better because the children need to deal with the hurt and the anger they feel toward their parents, in particular [the oldest daughter, T.K. and D.K.].

The court then made the following conclusions of law:

2. [DSS] has made reasonable efforts since the last hearing to prevent or eliminate the need for foster care placement.

3. Continuation of the juveniles in or return to their home will be contrary to their best interest, health, safety and welfare.

4. Reasonable efforts to reunite [T.K., D.K., and T.K.] should be suspended as the permanent plan is guardianship with [C.C.].

Reasonable efforts to reunite [J.K.] should not be suspended at this time.

. . .

6. It is in the best interest of [T.K., D.K., and T.K.] to be placed under guardianship with [C.C.].

7. It is in the best interest of [J.K.] to remain in the legal custody of the [DSS] with placement in foster care.

8. The [c]ourt further concludes that termination of parental rights is not in the best interest of [T.K., D.K., and T.K.] as the permanent plan is guardianship with a relative.

Respondent-mother argues the court ceased reunification by disregarding the progress of the parents and focusing solely on the three older children's best interests. This argument is without merit. As noted above, the court made specific findings and conclusions of law based on the parents' progress. The court found that respondent-mother had addressed her drug addiction and changed her lifestyle, noting that while she had tested negative for drugs seven times, she had tested positive four months prior. The court also noted the father of the two oldest children had made greater progress than the respondent-mother in making lifestyle improvements, finding it was more likely the father would regain custody of the youngest child than the mother. Here the court properly made findings of fact as to the respondent-mother's progress (or lack thereof) and as to the best interest of the children. However, as we stated above, at this stage the best interests of the children, not the rights of the parents, are paramount. *In re Smith* at 150, 287 S.E.2d at 445; *See also*, *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991) (trial court did not abuse its discretion in maintaining custody arrangements before it, given the mother's relatively recent compliance with the trial court's orders and the children's stated desires to remain in their current placement). This assignment of error is overruled.

AFFIRMED

Judge LEVINSON 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 to affirm the trial court's order to continue reunification efforts for J.K. I disagree with the holding in the majority's opinion to affirm the trial court's permanency plan of guardianship for T.K., D.K., and T.K. I also disagree with the majority's holding to affirm the trial court's order because it failed to state the required clear, cogent, and convincing standard of proof and the trial court unlawfully delegated its judicial authority to determine respondent's visitation with her children to a therapist. I respectfully dissent.

I. Parental Rights

If the trial court determines the children are not to return home at the conclusion of the permanency planning hearing, the trial court must consider the following enumerated factors and make written findings of fact. Pursuant to N.C. Gen. Stat. § 7B-907(b) (2003), "(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."

The trial court determined continued reunification efforts were futile and that guardianship of T.K., D.K., and T.K. should be placed with C.C. with no visitation rights for respondent. The "rights and responsibilities" of the minor "should remain with the parent." *Id.* By ordering no visitation rights for respondent and guardianship to C.C., the trial court effectively terminated respondent's parental rights in violation of the statute. *Id.*

II. Permanency Planning Hearing

Pursuant to N.C. Gen. Stat. § 7B-907(a) (2003), "The purpose of [a] permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." The issue before us is whether the trial court erred in terminating respondent's reunification plan within two months, where she showed achievement of some goals and substantial progress toward others.

N.C. Gen. Stat. § 7B-907(a) (2003) states that "[i]n any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing designated as a permanency planing hearing within 12 months after the date of the initial order

removing custody . . . ." The purpose of this hearing is to find a safe, permanent home for the juvenile within a reasonable period of time. *Id.*

On 7 May 2002, DSS filed juvenile petitions for T.K., D.K., and T.K. On 17 July 2002, the juveniles were determined to be neglected and dependent. At a dispositional hearing on 22 August 2002, the court approved a plan for reunification. After considering DSS's summary report at a review hearing on 29 October 2002, the trial court reversed its decision for reunification and changed the plan to termination of parental rights and adoption. Only two months had elapsed between the court's adoption of a plan for reunification and its termination of that plan.

On 22 August 2002, a dispositional hearing addressed the problems which lead to the removal of the children. The order from that hearing identified these problems as: drug abuse, lack of employment, housing, and parenting. The majority's opinion details respondent's substantial progress toward each goal. Two months are simply not enough time for respondent to fully remedy these issues, or to entirely eliminate the causes that led to the removal of her children. In the review hearing order, the trial court found respondent had complied with some of the care plan goals and made substantial progress toward meeting others. Yet, the court ruled her compliance insufficient to merit continued reunification. The time period that the trial court allotted respondent to fully address and resolve the issues was unreasonable. The trial court erred in reversing the plan for reunification in light of the substantial progress respondent had shown during the short two month period.

III. Clear, Cogent, and Convincing Evidence

Our review of respondent's assignments of error is well-established. We must determine: (1) "whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence;" and (2) "whether the findings of fact support the conclusions of law" in the order. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000) (quotations and 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); *see also Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97-98 (2000). In *In re Church*, we remanded to "the trial court to determine whether the evidence satisfies the required standard of proof of clear and convincing evidence."

136 N.C. App. 654, 658, 525 S.E.2d 478, 481 (2000). That same result is required here.

Here, the trial court reversed its decision for reunification without making any required findings of fact based upon clear, cogent, and convincing evidence. When the trial court's findings of fact are not based on clear, cogent, and convincing evidence, the conclusions that are based on those facts are unsupported. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). The trial court erred in not articulating its standard of review. We may not infer it. *In re Church*, 136 N.C. App. at 658, 525 S.E.2d at 480.

IV. Unfitness as a Parent

The trial court's order granted guardianship to C.C. and did not permit respondent any visitation, supervised or unsupervised, with T.K., D.K., and T.K. In *Moore v. Moore*, this Court reiterated the importance of " 'the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail.' " 160 N.C. App. 569, 572-73, 587 S.E.2d 74, 76 (2004) (quoting *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994)). In reversing the trial court's order denying the plaintiff-father any and all visitation rights, we held that "without proof of inconsistent conduct, the 'best interest' test does not apply and the trial court is limited to finding that the natural parent is unfit to prohibit all visitation or contact with his or her child." *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76; *see* N.C. Gen. Stat. § 50-13.5(i) (2003).

The trial court's order fails to make a finding that either: (1) respondent's conduct was inconsistent with her protected status as a parent, thus triggering the "best interests of the child" standard; or (2) respondent has shown by clear and convincing evidence to be unfit as a parent. *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76; N.C. Gen. Stat. § 50-13.5(i). The trial court erred by denying respondent all visitation rights with T.K., D.K., and T.K. without finding her to be unfit or engaging in conduct inconsistent with her parental rights. *Id.* Absent proper findings supported by clear, cogent, and convincing evidence, the trial court's conclusions of law are erroneous, and should be reversed.

V. Delegation of Authority

The trial court wrongfully delegated its judicial authority to T.K.'s therapist to determine what is in her "best interest" and whether the respondent should have visitation. The trial court ordered if the ther-

apist concluded respondent's visitation with her children was "best," the court would summarily authorize the visits.

> "The rendering of a judgment is a judicial act, to be done by the court only," Hall, J., in *Mathews v. Moore*, 6 N.C. 181 [(1812)]. "Judgments are the solemn determinations of judges upon subjects submitted to them," Hall, J., in *Williams v. Woodhouse*, 14 N.C. 257 [(1831)]. "A judgment is not what may be entered, but it is what is considered and delivered by the court," Reade, J., in *Davis v. Shaver*, 61 N.C. 18 [(1866)]. "In its ordinary acceptation, a judgment is the conclusion of the law upon facts admitted or in some way established, and, without this essential fact, the court is not in a position to make final decision on the rights of the parties," *Sedbury v. Express Co.*, 164 N.C. 363, 79 S.E. 288 [(1913)].

Eborn v. Ellis, 225 N.C. 386, 389, 35 S.E.2d 238, 240 (1945).

This Court held

> wherein the court considered former N.C. Gen. Stat. § 7A-573, which explicitly permitted delegation of the court's power by administrative order, N.C. Gen. Stat. § 7B-2506 does not state, or even indicate, that the court may delegate its discretion. The 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 . . . juvenile. Accordingly, we hold the trial court improperly delegated its authority . . . .

In re Hartsock, 158 N.C. App. 287, 292, 580 S.E.2d 398, 399 (2003).

Upon close review, the General Assembly does not authorize a trial judge to delegate her authority and decision-making power for another to determine whether a parent may visit with her child. N.C. Gen. Stat. § 7B-2506 (2003). The trial court erred in delegating the decision whether respondent may visit with T.K. to the therapist.

VI. Conclusion

I concur in the majority's opinion to affirm the trial court's order to continue reunification efforts for J.K. I disagree with the holding in the majority's opinion to affirm the trial court's permanency plan of guardianship for T.K., D.K., and T.K. The majority's assertion "the child's best interests are paramount, not the rights of the parent" is an incorrect statement of the law. *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905 ("We hold that absent a finding that parents (i) are unfit

or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail.") A "best interest" analysis is not reached unless the trial court finds by clear, cogent, and convincing evidence that the parents are either "unfit or have engaged in conduct inconsistent with their parental rights." *Id.* at 403-04, 445 S.E.2d at 905; *see* N.C. Gen. Stat. § 50-13.5(i). That portion of the trial court's order ceasing reunification efforts should be reversed.

The trial court must make findings of fact based on clear, cogent, and convincing evidence, *In re Huff*, 140 N.C. App. at 291, 536 S.E.2d at 840, and judicially determine respondent's visitation with her children, *In re Hartsock*, 158 N.C. App. at 292, 580 S.E.2d at 394. The trial court's order is affected with an error of law and should be reversed. I respectfully dissent.

STATE OF NORTH CAROLINA v. MICHAEL LEE SANDERS

No. COA04-943

(Filed 21 June 2005)

1. Drugs— possession with intent to sell diazepam—30 pills—insufficient evidence of intent

There was insufficient evidence of intent to sell diazepam where the only evidence was thirty pills found in defendant's bedroom. Although the pills were found in a plastic bag rather than a prescription bottle, no officer testified that the packaging of the pills was indicative of intent to sell. The case was remanded for sentencing on the lesser included offense of misdemeanor possession of diazepam.

2. Appeal and Error— preservation of issues—record—denied instruction not included—assignment of error dismissed

The failure to include denied instructions in the record on appeal resulted in the dismissal of an assignment of error asserting plain error in the failure to give those instructions.

3. Drugs— keeping a dwelling for drug sales—instructions—definition of keeping

The failure to give defendant's requested instruction defining "keeping" a dwelling house for the sale of controlled substances

as possession "over a duration in time" was error but not prejudicial. The language defendant sought to include is found in a footnote to the pattern jury instruction; however, the evidence was clear that controlled substances were kept and sold in a dwelling maintained by defendant, and the court's instruction was substantially correct.

Judge TYSON concuring in part and dissenting in part.

Appeal by Defendant from judgment entered 9 January 2004 by Judge Mark Klass in Superior Court, Richmond County. Heard in the Court of Appeals 12 April 2005.

Attorney General Roy Cooper, by Assistant Attorney General Robert K. Smith, for the State.

Anne Bleyman, for defendant-appellant.

WYNN, Judge.

In *State v. King*, 42 N.C. App. 210, 213, 256 S.E.2d 247, 249 (1979), this Court held that possession of seventy phenobarbital tablets, absent other factors supplying intent to sell, was insufficient to support the charge of possession with intent to sell. Here, Defendant contends the evidence showing possession of thirty diazepam pills, without any other evidence to show intent, was insufficient to sustain his conviction for possession with intent to sell. As the State concedes that the trial court erred based on *King*, we set aside Defendant's conviction for possession of diazepam with intent to sell but remand this matter for resentencing on that part of the verdict that is supported by the evidence—misdemeanor possession of diazepam.

The underlying facts tend to show that on 21 March 2003, Defendant Michael Lee Sanders drove J.J. Locklear, and two others, to the Richmond County courthouse for Locklear's court date. Upon arriving at the courthouse, Locklear became involved in a dispute with men standing in front of the courthouse. The police were alerted to the situation and received a description of Defendant's vehicle. Detective Larry Bowden responded to the call, recognized Defendant's car, and pulled it over. Chief Deputy Philip Edward Sweatt, Jr. arrived at the scene and told Defendant that he "had received information" Defendant was involved in selling drugs. Chief Deputy Sweatt asked for and received permission from Defendant to search his office and residence.

Chief Deputy Sweatt, Detective Bowden, and several other officers first searched Defendant's office, then proceeded to Defendant's home. Defendant occupied the residence with seven other people, including Defendant's brother, son, and daughter. Upon the officers' arrival at Defendant's home, three of the occupants ran out the back door and were subsequently arrested. The officers searched the residence and found quantities of marijuana residue in plastic bags, police scanners, and two-way radios throughout the house.

The search of Defendant's bedroom revealed cigarette rolling papers, plastic baggies with corners ripped off, one plastic bag containing marijuana residue, thirty diazepam (a type of valium) pills in a cellophane cigarette package located inside a plastic bag, and a diazepam prescription bottle belonging to one of the occupant's mother with the label torn off containing .25 semi-automatic bullets. Defendant told the officers that he was aware of the drug selling and use at the house. Defendant explained he had asked the other occupants to stop their illegal behavior on several occasions because he was on probation for drug use.

Defendant was placed under arrest, warned of his rights, and provided the following written statement:

> I, Mike Sanders, give this statement to Detective B.J. Childers concerning drug activity at my residence at 171 Second Avenue, Aleo.
>
> I haven't sold any kind of drugs since I got caught July of last year. I know some of the kids that hang around my house and game room have been smoking dope there. All that has been sold at my house has been some marijuana that Andy has sold. There has not been any crack sold at my house.
>
> I give this statement to be true and complete to the best of my knowledge.
>
> Michael Sanders [signature] 3-21-03

On 5 May 2003, two separate indictments were issued charging defendant with: (1) possession with intent to manufacture, sell, and deliver diazepam; and (2) maintaining a place to keep controlled substances, marijuana and diazepam. At the jury trial, Defendant offered testimony along with his son, his brother, his physician's assistant, his probation officer, and two house mates. Following presentation of the evidence, the trial court dismissed the charge of misdemeanor

possession of marijuana with intent to sell and deliver. The jury returned guilty verdicts for: (1) "felonious possession with intent to sell and deliver diazapam/valium;" and (2) misdemeanor maintaining a dwelling for controlled substances.

Defendant was sentenced to six to eight months imprisonment, which was suspended for three years. Defendant was placed on supervised probation for three years on the condition that he serve a thirty-day active sentence. Defendant appeals.

On appeal, Defendant argues that (1) there was insufficient evidence to support his conviction of felonious possession with intent to sell and deliver diazepam; and (2) the trial court erred in denying his motions for jury instructions concerning the charge of misdemeanor maintaining a dwelling for controlled substances.

[1] Defendant argues the trial court erred in denying his motions to dismiss[1] the charge of felonious possession with intent to sell and deliver diazepam/valium as there was insufficient evidence of intent. We agree.

Indeed, the State agrees with Defendant that it "is unable to distinguish" *King*, 42 N.C. App. at 213, 256 S.E.2d at 249 (this Court held "that the defendant's possession of seventy tablets of phenobarbital, absent other factors supplying an intent to sell, is insufficient to withstand a motion for nonsuit on the charge of possession with intent to sell."). Here, the State presented evidence of only thirty diazepam pills found in Defendant's bedroom and no other evidence connected with the sale of diazepam. In its brief, the State concedes that *King* is indistinguishable and the evidence on the charge of possession of diazepam with intent to sell and deliver was insufficient as a matter of law. Pursuant to *King*, we find that there was insufficient evidence as a matter of law on the charge of possession of diazepam with intent to sell and deliver.

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1. When reviewing a motion to dismiss, we view "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004) (citing *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166, 107 S. Ct. 241 (1986)), *pet. for cert. pending* (filed 22 April 2005). If we find that "substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to [have denied] the motion." *Id.* (citing *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983)). "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, 587 (1984) (citing *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)).

Despite the parties' agreement that *King* controls, the dissent finds that *King* is distinguishable because the State presented evidence of packaging connected with the intent to sell. In particular, the dissent points out that the thirty diazepam pills were found inside a cellophane cigarette package inside a plastic bag. However, no officer testified that the packaging of the pills was indicative of an intent to sell rather than personal use. Although the State's evidence that Defendant kept the pills in a plastic bag rather than a labeled prescription bottle raised a suspicion that Defendant committed the offense, it was not substantial evidence. *See Malloy*, 309 N.C. at 179, 305 S.E.2d at 720 (When the evidence presented "is sufficient only to raise a suspicion or conjecture as to [] the commission of the offense . . . the motion to dismiss must be allowed. . . . This is true even though the suspicion aroused by the evidence is strong." (citation omitted)).

The trial court submitted two possible verdicts to the jury with respect to the possession of diazepam charge: Guilty of felonious possession with intent to sell and deliver diazepam/valium, and not guilty. The jury found facts supporting a conviction on the charge of possession of diazepam, as this is an element of the felony charge. *See* N.C. Gen. Stat. § 90-95(a)(1) (2003); *State v. Hyatt*, 98 N.C. App. 214, 217, 390 S.E.2d 355, 357 (1990). Accordingly, we remand for the entry of judgment and sentencing on the lesser included offense of misdemeanor possession of diazepam.

[2] Next, Defendant argues the trial court erred in denying his two motions requesting jury instructions for the charge of keeping or maintaining a dwelling for keeping or selling controlled substances. We disagree.

Section 15A-1231(a) of the North Carolina General Statutes provides, "[a]t the close of the evidence or at an earlier time directed by the judge, any party may tender *written* instructions. A party tendering instructions must furnish *copies* to the other parties at the time he tenders them to the judge." N.C. Gen. Stat. § 15A-1231(a) (2004) (emphasis added). Our Supreme Court held that it was not error for a trial court to deny a defendant's oral request for jury instructions. *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997) (citing *State v. Martin*, 322 N.C. 229, 237, 367 S.E.2d 618, 623 (1988)), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998).

Defendant *orally* requested the trial court to include an instruction that it is lawful to possess a controlled substance pursuant to a

prescription. Defendant asserts that despite the absence of a written motion for a jury instruction, this Court may consider the trial court's denial under plain error review.

Our Supreme Court adopted the plain error rule as an exception to the appellate court requirement of preserving basis for assignments of error at the trial court level. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983) (applied to assignments of error regarding jury instructions); *see also* N.C. R. App. P. 10 (2005). The proponent must show that:

> [A]fter reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

We examine the entire record to decide whether the error "had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 379 (citation omitted). We determine whether the jury would have returned a different verdict absent the error. *State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986).

The substance of Defendant's request for additional jury instructions falls within the scope of plain error review. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. However, Defendant failed to include the content or substance of the instruction in the record on appeal. Therefore, we are unable to consider the basis of Defendant's request under plain error review. This portion of Defendant's assignment of error is dismissed.

[3] Defendant was indicted for, "knowingly and intentionally keep[ing] and maintain[ing] a dwelling house, the defendant's home . . . that was used for keeping and selling controlled substances . . . in violation of the North Carolina Controlled Substances Act."

Defendant moved the trial court, in writing, to provide this additional instruction to the jury: "The keeping of controlled substances within a house must be more than mere temporary possession of controlled substances but rather must be possession of controlled substances that occurs over a duration of time." Defendant cited *State v. Mitchell*, 336 N.C. 22, 32-33, 442 S.E.2d 24, 30 (1994), as the source of his requested instruction.

The trial court denied Defendant's request and provided the following instruction to the jury:

> The defendant has also been charged with intentionally keeping or maintaining a building which is used for the purpose of unlawfully keeping or selling controlled substance. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant kept or maintained a building which was used for the purpose of unlawfully keeping or selling diazepam as a controlled substance, the keeping or selling of which is unlawful.
>
> And, second, that the defendant did this intentionally. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.
>
> You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonable and prudent person would ordinarily draw therefrom.
>
> A person acts intentionally if he desires to cause consequences of his acts.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally kept or maintained a building which was used for the unlawful keeping or selling of controlled substance, then it would be your duty to return a verdict of guilty of this offense.
>
> If you do not so find, or have a reasonable doubt as to one or both of these things, you would not find the defendant guilty of this offense.
>
> But you must consider whether the defendant is guilty of the offense of knowingly keeping or maintaining a building which is

used for the purpose of unlawfully keeping or selling controlled substances.

The offense of knowingly keeping or maintaining a building which is used for the purpose of keeping or selling controlled substances differs from the offense of intentionally keeping or maintaining such a building in that the State is not required to prove beyond a reasonable doubt that the defendant acted intentionally, but that he did so knowingly.

A person knows of an activity if he is aware of a high probability of its existence.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant knowingly kept or maintained a building which was used for the purpose of unlawfully keeping or selling controlled substance, then it would be your duty to return a verdict of guilty of knowingly keeping or maintaining a house or building which was used for the purpose of unlawfully keeping or selling controlled substances.

If you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The trial court explained the reason for its decision as, "I'm going to use the 2000 pattern instruction. That's [*State v. Mitchell*] a '94 case. I'll stick to the pattern instruction."

Our review of the pattern jury instruction shows a footnote to the words "kept" and "maintained," which refer to *Mitchell* and its discussion on the verb "maintain" and the term "keeping." N.C.P.I.-Crim. 260.90 (2000) ("The verb 'maintain' is defined as: 'to continue, to carry on; to keep up; to preserve or retain; to keep in a condition of good repair or efficiency; to provide for; to bear the expenses of.' The term 'keeping' denotes not just possession but possession which occurs over a period of time." *State v. Mitchell*, 336 N.C. 22 (1994)).

North Carolina statutes and case law do not require a trial court to use the exact words a defendant requests to charge the jury. *State v. Vause*, 328 N.C. 231, 239, 400 S.E.2d 57, 63 (1991). "[W]hen the request is correct in law and supported by the evidence, the court must give the instruction in substance." *State v. Ball*, 324 N.C. 233,

238, 377 S.E.2d 70, 73 (1989) (citations omitted); *see State v. Singletary*, 344 N.C. 95, 106, 472 S.E.2d 895, 902 (1996).

The trial court erred by not including Defendant's requested additional language in the jury instruction. The language Defendant sought to include is found in the *Mitchell* footnote to the pattern jury instruction. Defendant proffered evidence in support of his defense that he did not possess the controlled substance for the required "duration of time." The requested instruction was "correct in law and supported by the evidence[.]" *Ball*, 324 N.C. at 238, 377 S.E.2d at 73.

Having determined it was error to deny Defendant's request for additional language to the jury instructions, we now consider whether such error was prejudicial.

> 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.

N.C. Gen. Stat. § 15A-1443(a) (2003). A reasonable possibility must exist that the evidence complained of contributed to the conviction. *State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981). The burden is on the defendant to show both the error and its prejudicial effect. *Id.*; N.C. Gen. Stat. § 15A-1443(a).

Defendant admitted that the house was under his control. He further admitted that marijuana was kept, used, and sold from his house. The jury found that he possessed diazepam. Substantial evidence supports the jury's finding that Defendant knowingly kept and maintained a dwelling house for the keeping or selling of controlled substances.

Defendant's requested jury instruction is "correct in law and supported by the evidence." *Ball*, 324 N.C. at 238, 377 S.E.2d at 73. However, the evidence before the jury, including Defendant's own signed statement and testimony under oath, made clear that controlled substances were "kept" and "sold" in a dwelling that he "maintained." The trial court's instruction was substantially correct in light of the evidence. In light of Defendant's admissions, the trial court's error in failing to define "keeping" as possession "over a duration of time" was not prejudicial. This portion of Defendant's assignment of error is overruled.

Reversed and remanded in part; no prejudicial error in part.

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 trial court did not err in denying defendant's two motions for jury instructions; and (2) the trial court erred by denying defendant's motion to dismiss the charge of felonious possession with intent to sell diazepam/valium due to insufficiency of evidence to support intent. I concur with the analysis and holding in the majority's opinion with regards to the jury instructions. However, I respectfully dissent from its holding concerning defendant's motion to dismiss.

I. State's Concession

The majority's opinion holds the trial court erred by not granting defendant's motion to dismiss and cites the State's concession in its brief that it "is unable to distinguish" our holding in *State v. King*, 42 N.C. App. 210, 256 S.E.2d 247 (1979) from the facts at bar. We are not bound by parties' concessions or stipulations concerning an issue of law. *See State v. Phifer*, 297 N.C. 216, 226, 254 S.E.2d 586, 591 (1979) ("This Court, however, is not bound by the State's concession. The general rule is that stipulations as to the law are of no validity. Whether the facts in this case give rise to probable cause is a legal determination reserved for the courts. Where a particular legal conclusion follows from a given state of facts, no stipulation of counsel can prevent the court from so declaring.") (internal citations and quotations omitted).

Conclusions of law are reviewable *de novo*. *State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993), *cert. denied*, 512 U.S. 1239, 129 L. Ed. 2d 865 (1994). Under *de novo* review, we consider the issue "anew" and determine the applicability of the law. *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002). The State's concession is not binding on appeal to this Court. *Phifer*, 297 N.C. at 226, 254 S.E.2d at 591.

II. Sufficiency of the Evidence

The majority's opinion holds insufficient evidence supports a finding that defendant "intended" to sell the controlled substance. I disagree.

The elements of the crime of possession with intent to sell or deliver a controlled substance are: (1) the defendant possessed the substance; (2) the substance is a controlled substance; and (3) the defendant intended to sell or deliver the controlled substance. N.C. Gen. Stat. § 90-95(a)(1) (2003); *State v. Mackey*, 352 N.C. 650, 658, 535 S.E.2d 555, 559 (2000). Defendant admits he possessed diazepam, a schedule IV controlled substance. Defendant challenges the sufficiency of the State's evidence regarding the third element of the offense: whether defendant intended to sell or deliver the controlled substance. *See* N.C. Gen. Stat. § 90-95(a)(1).

A defendant's intent to sell or deliver may be shown by: (1) the quantity of the substance found; (2) the manner in which its packaged; and (3) the presence of other packaging materials. *State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974). The large quantity of controlled substance along with the existence of paraphernalia for measuring, weighing, packaging, and/or distribution are all circumstances from which it could properly be inferred that the controlled substance was possessed for sale or delivery rather than for personal use. *State v. Mitchell*, 27 N.C. App. 313, 314-16, 219 S.E.2d 295, 297-98 (1975) (citations omitted), *cert. denied*, 289 N.C. 301, 222 S.E.2d 701 (1976).

In *King*, the defendant was charged and convicted of possession with intent to sell a controlled substance. 42 N.C. App. at 210, 256 S.E.2d at 247. The only evidence of the defendant's intent to sell that the State tendered was his possession of seventy pills of a controlled substance. *Id.* We acknowledged in *King* that "the requisite intent can be at least partially inferred from the quantity of controlled substance found in defendant's possession." 42 N.C. App. at 212-13, 256 S.E.2d at 248-49 (citing *Mitchell*, 27 N.C. App. 313, 219 S.E.2d 295). The trial court's denial of the defendant's motion for nonsuit was reversed. *Id.* We held that the "defendant's possession of seventy tablets of [a controlled substance], absent other factors supplying an intent to sell, is insufficient to withstand a motion for nonsuit on the charge of possession with intent to sell." *Id.* at 213, 256 S.E.2d at 249.

King is readily distinguishable from the facts at bar. In *King*, the Court found "no evidence of intent was presented other than the seventy tablets of phenobarbital found in defendant's cabinet . . . [and] [n]o items usually associated with drug trafficking were found which would supply an inference of an intent to sell." 42 N.C. App. at 213, 256 S.E.2d at 249.

Here, the State's evidence was not limited solely to the large quantity of thirty pills of diazepam and its packaging. The thirty diazepam pills were placed and found inside a cellophane cigarette package, which itself was placed inside a plastic bag. The State also proffered testimony and exhibits showing a considerable amount of drug paraphernalia was present inside both defendant's house and his bedroom. This evidence included measuring scales, cigarette/marijuana rolling papers, plastic baggies with corners ripped off, and one plastic bag containing marijuana residue.

The only prescription bottle for diazepam found inside the house belonged to someone other than defendant, and had a portion of the label torn off. In addition, defendant's probation officer testified that defendant did not show a positive presence of diazepam in his body after drug tests, although defendant testified he took diazepam every day for his nerves.

III. Conclusion

After considering the evidence in the light most favorable to the State and giving the State every reasonable inference, the trial court did not err in denying defendant's motions to dismiss. *See Morgan*, 359 N.C. at 161, 604 S.E.2d at 904 (standard of review of a trial court's ruling on a motion to dismiss as described in footnote 1 of majority opinion). Substantial direct and circumstantial evidence was proffered and tended to show defendant possessed a controlled substance which he intended to sell or deliver. *See id.*; *see also Brown*, 310 N.C. at 566, 313 S.E.2d at 587.

Other than solely relying on the State's concession that *King* is controlling, the majority's opinion does not address the uncontested evidence described above that defendant's actions far exceeded mere possession of a schedule IV narcotic. The diazepam was not contained in its original container: (1) it was not legally connected to defendant through a prescription; (2) defendant's drug tests showed no presence of diazepam in his body despite his testimony that he took the drug every day; and (3) defendant's home contained diverse and substantial quantities of other drug paraphernalia. These facts clearly distinguish this case from *King*.

The evidence was sufficient to survive defendant's motion to dismiss and to allow the jury to determine the issue. I vote to affirm the trial court's denial of defendant's motion to dismiss and find no error in defendant's conviction and judgment entered thereon. I respectfully dissent.

TRACY POWELL TOOMER, ANDREA POWELL KEEFE, AND ERICA RENEE CLARK, PLAINTIFFS v. BRANCH BANKING AND TRUST COMPANY, AS TRUSTEE UNDER THE WILL OF JOAN BROWN WILLIAMSON AND AS SUCCESSOR-BY-MERGER TO UNITED CAROLINA BANK, AS EXECUTOR OF THE ESTATE OF JOAN BROWN WILLIAMSON AND TRUSTEE UNDER THE WILL OF JOAN BROWN WILLIAMSON, DEFENDANT

No. COA04-599

(Filed 21 June 2005)

1. Pleadings— dismissal—standards for appellate review

Appellate review of Rule 12(b)(6) and 12(c) rulings is de novo; a statute of limitations can provide the basis for dismissal on a Rule 12(b)(6) motion; and Rule 12(c) permits a party to move for judgment on the pleadings if the complaint reveals that claims are baseless.

2. Fraud— constructive—required allegation—benefit to defendant

Plaintiffs did not adequately assert claims for constructive fraud arising from the management of a trust, and the trial court correctly applied the three-year statute of limitations for breach of fiduciary duty rather than the ten-year statute of limitations for constructive fraud, where plaintiffs did not assert that defendant sought benefit for itself.

3. Fiduciary Relationship— breach of duty—statute of limitations—knowledge of facts by guardian

The statute of limitations for breach of fiduciary duty begins to run when an infant's guardian knew or should have known of the facts giving rise to the claim, and the trial court here did not err by dismissing plaintiffs' breach of fiduciary claims arising from management of a trust. Allegations that defendant failed to investigate and correct breaches of fiduciary duty did not revive the expired claims.

4. Fiduciary Relationship— breach of duty—delayed distribution of trust

An allegation of breach of fiduciary duty in delaying distribution of a trust for twenty-five days while a change of trustee was imminent should have been dismissed for failure to state a claim.

5. Damages and Remedies— underlying claims barred—remedy not available

An accounting was not available as a remedy for alleged breaches of fiduciary duty and constructive fraud in managing a trust where the underlying allegations did not sufficiently state a claim for relief or were barred by the statute of limitations.

Appeal by plaintiffs from judgment entered 2 February 2004 by Judge Gregory A. Weeks in Columbus County Superior Court. Heard in the Court of Appeals 14 February 2005.

Erwin and Eleazer, P.A., by L. Holmes Eleazer, Jr., and Peter F. Morgan, for plaintiff appellants.

Murchison, Taylor & Gibson, PLLC, by Andrew K. McVey and W. Berry Trice, for defendant appellee.

McCULLOUGH, Judge.

Plaintiffs appeal from an order granting defendant's motion to dismiss and motion for judgment on the pleadings. We affirm.

I.

Plaintiffs Tracy Powell Toomer, Andrea Powell Keefe, and Erica Renee Clark are the children of the late Joan Brown Williamson, who died testate on 30 April 1982. Williamson's Will created three equal and separate trusts, one each for Tracy, Andrea, and Erica. In the Will, United Carolina Bank (UCB) was nominated executor of Williamson's estate and trustee of the trusts. The Will was admitted for probate in May 1982, at which time the superior court appointed UCB to be the executor of Williamson's estate. The superior court subsequently appointed UCB to be the trustee of each of the plaintiffs' trusts. Defendant Branch Banking and Trust Company (BB&T) is the successor-by-merger to UCB and has assumed UCB's liabilities.

On 31 July 2003, plaintiffs filed a complaint in which they purported to assert (1) claims by all plaintiffs against BB&T as successor-in-interest to UCB for constructive fraud; (2) claims by all plaintiffs against BB&T as successor-in-interest to UCB and as trustee under the Will for breach of fiduciary duty; (3) separate claims by Erica, Andrea, and Tracy against BB&T as successor-in-interest to UCB and as trustee under the Will for breach of fiduciary duty; and (4) claims by all plaintiffs against BB&T as successor-in-interest to UCB and as trustee under the Will for an accounting.

The complaint made the following pertinent factual allegations:

1. Plaintiff Tracy Powell Toomer . . . attained the age of majority on June 20, 1990. . . .

2. Plaintiff Andrea Powell Keefe . . . attained the age of majority on March 2, 1994. . . .

3. Plaintiff Erica Renee Clark . . . attained the age of majority on February 3, 1999.

. . . .

16. In approximately February or March of 1994, Arthur L. Clark ("Clark") in his capacity as Erica's guardian, began a preliminary audit of UCB's accounting with respect to the common trust account that had been established by the Estate prior to the establishment of separate trusts for each of the Plaintiffs.

17. On or about March 21, 1994, Clark completed his preliminary audit and advised the UCB Trust Officer, Richard H. Newton ("Newton"), of several apparent errors and/or anomalies in the valuation of certain assets belonging to one or more of the trusts as well as issues arising from trustee's fees and estate tax payments. In light of these errors and/or anomalies, Clark scheduled a meeting with Newton in April of 1994.

18. Following a[n] April 11, 1994, meeting with Clark, UCB specifically agreed to do the following:

    a) Review all fee calculations in relation to its admitted error in its accounting regarding the value of a tract of real property owned by the Estate known as the "Foreman Tract," as well as its other fee calculations based upon discrepancies between market value of trust holdings as identified for purposes of calculation of fees and market value as shown on trust account statements;

    b) Analyze and report upon the financial impact of the trustee's admitted error in the 1987 Fiduciary Income Tax Return, as well as make adjustments to Tracy's Trust for incorrect tax payments made by the trustee from 1990 through 1994;

    c) Review the method of allocation of timber sale expenses and proceeds among the Beneficiaries' accounts, as well as the valuation and distribution of the timber holdings fol-

lowing the division of the common trust account into separate accounts.

19. By early May of 1994, UCB reported that it had corrected the initial inequality in distributions arising from the division of the common trust as well as the estate tax payment errors. However, Clark continued to correspond with UCB in May of 1994 regarding adjustments to its trustee fees and certain additional issues which were disclosed by his initial audit of the "farm account" established by UCB.

20. Following its own review of trustee fee calculations and tax accounting, UCB admitted in late May of 1994 that it had overcharged Tracy's Trust and Erica's Trust for trustee fees and had overpaid taxes on the sale of timber holdings in 1987 by nearly $23,000.00. According to correspondence from UCB Regional Trust Manager David V. Wyatt dated June 2, 1994, these errors were corrected by reimbursement to the Plaintiffs with interest on May 31, 1994. At that time, Mr. Wyatt also acknowledged certain additional errors had been made with respect to tax payments, income distributions, and other matters related to the farm account and reported that these errors had been corrected. All of these errors had been disclosed by Clark's May 1994 audit of the farm account.

21. On June 8, 1994, UCB wrote in a letter to Clark, Andrea, and Tracy that UCB had conducted an "extensive review" of the three trusts and the farm account, which review disclosed additional errors including insurance payments that had been made out of the wrong account and misallocation of timber sales proceeds. According to David Wyatt, these errors were corrected in early June of 1994. However, Clark was not able to conduct any further audit of the Plaintiffs' trust accounts in 1994 due to health and family problems. Plaintiffs allege[] upon information and belief that Clark was only able to review approximately forty percent (40%) of the transactions related to the trusts created by the Will in the course of his 1994 audit.

22. On February 7, 1999, four days after Erica's eighteenth birthday, Clark contacted Anthony C. Sessoms, Senior Vice-President for BB&T, regarding Erica's Trust. At that time, Clark requested that BB&T in its capacity as trustee provide information regarding the value of the assets in Erica's Trust

as well as take steps to completely segregate the property accounting for Tracy's Trust, Andrea's Trust, and Erica's Trust. Upon information and belief, no action was taken by BB&T in response.

23. On August 29, 2001, Erica sent a letter to Ann Smith, a trust officer with BB&T in Whiteville, North Carolina, advising that funds had been removed from Erica's Trust without the permission of either Erica or her guardians and demanding that such funds be replaced immediately with accrued interest.

24. Upon information and belief, Erica further alleges as follows with respect to the removal of the funds described in the preceding paragraph:

    a) The removal of the funds took place on April 16, 1986; April 15, 1987; April 22, 1988; and April 27, 1994.

    b) The total funds so removed were $14,388.73.

    c) All of the funds were deposited into Andrea's Trust.

    d) On each of the four occasions identified above on which funds were removed, a promissory note bearing interest at eight percent (8%), compounded annually, was issued in which Andrea's Trust was the promisor and Erica's Trust was the promisee.

25. Upon information and belief, BB&T took no immediate action in response to Erica's August 29, 2001, letter.

26. On February 12, 2002, Erica wrote a letter to BB&T President John Allison indicating that she had received no response to her August 29, 2001, letter. At that time, Erica also raised concerns regarding the combination of the farm holdings from each of the Plaintiffs' trust accounts into a single farm trust account.

27. On March 18, 2002, Senior Vice President Betsy B. Davis ("Davis") on behalf of BB&T provided a written response to Erica's August 29, 2001, and February 12, 2002, letters. In that response, BB&T admitted that the funds had been withdrawn from Erica's Trust in order to satisfy the tax obligations of Andrea's Trust. BB&T further advised that it would proceed with collection of the accrued interest and principal amounts due Erica's Trust upon the promissory notes in question, but

"[a]s there are no liquid assets to immediately satisfy the debt, we will need time to market the appropriate assets and raise the cash."

28. Clark wrote to BB&T on March 20, 2002, indicating that Erica had granted Clark a power of attorney for purposes of handling her dispute with BB&T over administration of the Plaintiffs' trusts. Clark also requested a meeting to discuss a variety of issues, including without limitation the following:

    a) All issues that had been raised by Clark's 1994 audit . . . but never addressed by UCB;

    b) The auditing procedures employed by BB&T's trust department to confirm the validity and accuracy of its trust accounting; and

    c) The basis for BB&T's failure to ensure payment was made to Erica upon the promissory notes described in Paragraph 24 of the Complaint upon her demand on August 29, 2001.

29. On April 22, 2002, Clark provided Davis with a memorandum outlining some additional issues associated with three tobacco barns located upon the real property belonging to one or more of the Plaintiff[s] that were constructed, purchased, and/or moved utilizing funds from all three of the Plaintiffs' trust accounts. Clark requested that these issues also be discussed at any meeting between BB&T and Plaintiffs.

30. On April 30, 2002, Clark, Erica, Andrea, and Andrea's guardians (Joe and Cheryl Powell) met with Davis and certain other representatives of BB&T to discuss the Plaintiffs' concerns regarding the administration of the trusts created under the Will. The issues raised by Plaintiffs at that meeting included not only the [foregoing] issues . . . , but also the following (among others):

    a) Failing to obtain an accurate appraisal of the farm lands owned by the Estate at the time of Williamson's death in 1982. UCB commissioned an appraisal by Clyde Elliott, one of its own employees, which appraisal upon information and belief overstated the fair market value of the properties in question by as much as thirty percent (30%). As a consequence, Plaintiffs' inheritance tax liability was significantly increased

and UCB collected inflated fees on Erica's Trust and Andrea's Trust from 1982 through 1989.

b) Overvaluation of certain real property known as the "Foreman Tract," which continued until the error was detected by UCB in 1990. Due to this error, UCB collected inflated fees on Andrea's Trust and Erica's Trust from 1985 through 1990.

c) Failing to accurately account for the harvest and sale of timber from the Plaintiffs' farm properties in 1987 by adjusting the value of those properties downward. This adjustment in value was not made until late 1989, and in the interim UCB collected trustee fees based upon inflated farm property values.

d) In conjunction with revaluation of the farm properties pursuant to a new appraisal obtained in 1989, UCB erroneously assigned a value of $29,500.00 to certain real property generally known as the "Pinkney Street Lot," which was over twice the previous value of the property. This valuation error was corrected by UCB in 1990, but not before UCB had collected trustee fees for 1989 from Erica's Trust and Andrea's Trust.

e) As part of the same reappraisal process in 1989 just described, UCB failed to adjust the value of a certain parcel of real property generally known as the "Zylphia Brown Farm" from $51,438 to its reappraised value of $29,500.00. This error continued until 1994. As a consequence, UCB collected fees on an inflated property value from 1989 through 1994.

f) The removal of funds from Andrea's Trust and Erica's Trust in 1986, 1987, 1988, and 1989, to pay taxes incurred by Tracy's Trust due to its ownership of certain real property generally known as the "Railroad Farm."

g) UCB erroneously removed several demand notes from Tracy's Trust on December 31, 1987, which error was corrected on December 31, 1988. However, prior to the correction, UCB collected trustees' fees based upon an inflated value for Tracy's Trust.

h) On May 3, 1993, UCB removed $3,640.94 from Erica's Trust and transferred it to Andrea's Trust without creating an

> instrument to evidence the "loan" in either account. After this error was detected and reported to UCB by Clark in 1994, its trust officer represented to Clark that the money had been repaid to Erica's Trust in 1994. However, Clark discovered in 2002 that UCB had not in fact corrected this error.
>
> . . . .
>
> 37. On October 22, 2002, Clark wrote a letter to BB&T's counsel in which he nominated Cheryl Powell to serve as the replacement trustee for BB&T. At that time, Clark also reminded BB&T that, contrary to the clear language of the Will, BB&T had failed to terminate Tracy's Trust when she reached the age of twenty-seven on June 20, 1999.

BB&T filed an answer, motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c). BB&T asserted, *inter alia*, that the applicable statutes of limitations barred plaintiffs' claims.

In an order entered 2 February 2004, the trial court concluded that plaintiffs' individual and collective claims for breach of fiduciary duty were barred by the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52(1) and that plaintiffs had not stated a claim for constructive fraud. Accordingly, the court granted BB&T's motions to dismiss and for judgment on the pleadings. From this order, plaintiffs now appeal.

II.

[1] We begin our analysis with the standard of review. "On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). Dismissal under Rule 12(b)(6) is proper if

> (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Id. (citation omitted). "A statute of limitations can provide the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint establishes that plaintiff's claim is so barred." *Soderlund v. N.C. School of the Arts*, 125 N.C. App. 386, 389, 481 S.E.2d 336, 338 (1997).

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2003) permits a party to move for judgment on the pleadings, after the filing of a responsive pleading, where the formal pleadings reveal that certain claims or defenses are baseless. *Garrett v. Winfree*, 120 N.C. App. 689, 691, 463 S.E.2d 411, 413 (1995).

> A motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c), should not be granted unless "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. In considering a motion for judgment on the pleadings, the trial court is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party."

American Bank & Trust Co. v. Elzey, 26 N.C. App. 29, 32, 214 S.E.2d 800, 802 (quoting 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368 (1969)), *cert. denied*, 288 N.C. 252, 217 S.E.2d 662 (1975).

This court reviews *de novo* rulings on motions made pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and (c). *See, e.g.*, *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414 (2003) (Rule 12(b)(6)); *Garrett*, 120 N.C. App. at 691, 463 S.E.2d at 413 (Rule 12(c)).

III.

[2] The first issue on appeal is whether plaintiffs' complaint asserts only claims for breach of fiduciary duty or whether the complaint also states claims for constructive fraud. Plaintiffs contend that their complaint includes claims for constructive fraud, which are governed by a ten-year statute of limitations. We do not agree.

"When determining the applicable statute of limitations, we are guided by the principle that the statute of limitations is not determined by the remedy sought, but by the substantive right asserted by plaintiffs." *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 414, 558 S.E.2d 871, 875, *disc. review denied*, 355 N.C. 490, 563 S.E.2d 563 (2002). Allegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1) (2003).[1] *See Tyson v. N.C.N.B.*, 305 N.C. 136, 142, 286 S.E.2d

1. Specifically, N.C. Gen. Stat. § 1-52(1) (2003) requires "an action . . . [u]pon a contract, obligation or liability arising out of a contract, express or implied," to be brought within three years of the time that the cause of action accrues.

561, 565 (1982) (holding that where defendant accepted positions as executor and trustee, which created the fiduciary duties allegedly breached, and defendant received commissions or fees as executor and trustee, "[t]he overall transaction . . . [was] clearly contractual in nature . . . and any failure to perform in compliance with the duties as a fiduciary [was] tantamount to a breach of contract."). However, "[a] claim of constructive fraud based upon a breach of fiduciary duty falls under the ten-year statute of limitations contained in N.C. Gen. Stat. § 1-56 [2003]."[2] *Nationsbank of N.C. v. Parker*, 140 N.C. App. 106, 113, 535 S.E.2d 597, 602 (2000).

"In order to maintain a claim for constructive fraud, plaintiffs must show that they and defendants were in a 'relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.' " *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). "Implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of plaintiff' is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself." *Id.*

In the instant case, plaintiffs' complaint makes the following averments under the heading "Claims for Constructive Fraud by all Plaintiffs":

> 40. Plaintiffs, as the beneficiaries of trusts established under the Will, placed a special confidence in UCB during the time period that UCB served as trustee.
>
> 41. UCB, by accepting the appointment as trustee by this Court, obligated itself to act in good faith and with due regard to the interests of Plaintiffs.
>
> 42. By virtue of the foregoing, a fiduciary relationship was created between Plaintiffs and UCB which began on the date of UCB's appointment as trustee in 1984 and continued until the date of its merger with BB&T in 1997.
>
> 43. UCB utilized its fiduciary relationship with Plaintiffs, and more particularly its responsibility for management of the

2. N.C. Gen. Stat. § 1-56 (2003) provides that "[a]n action for relief not otherwise limited . . . may not be commenced more than 10 years after the cause of action has accrued."

assets and liabilities of Plaintiffs' respective trusts, for improper financial gain at the expense of Plaintiffs. UCB's abuse of its fiduciary relationship with Plaintiffs includes, but is not limited to, the collection of inflated trustees' fees arising from the following errors that were discovered by Clark during his partial audit of the trust accounts in 1994:

a) The overvaluation of the Foreman tract . . . ;

b) The failure to adjust property values following the harvest and sale of timber . . . ;

c) Valuation errors arising from the Pinkney Street Lot and Zylphia Brown Farm . . . ; and

d) The erroneous removal of several demand notes from Tracy's Trust on December 31, 1987 . . . .

44. UCB also abused its fiduciary relationship with Plaintiffs by collecting trustees' fees based upon an inaccurate appraisal of Plaintiffs' farm lands by UCB's own employee in 1982, which appraisal overstated the value of the appraised properties and thus significantly increased the trustees' fees which UCB was able to charge. This misconduct was discovered by Clark in March or April of 2002.

Noticeably absent is the required assertion that UCB sought to benefit itself. Indeed, plaintiffs' complaint characterizes UCB's behavior as "erroneous." Accordingly, plaintiffs have not asserted claims for constructive fraud. As plaintiffs' complaint alleges only breach of fiduciary duty claims, the trial court properly ruled that all of plaintiffs' claims are governed by the three-year statute of limitations contained in N.C. Gen. Stat. § 1-52(1).

This assignment of error is overruled.

IV.

[3] The next issue on appeal is whether the trial court erred by dismissing all of plaintiffs' breach of fiduciary duty claims. We conclude that the trial court's dismissal must be affirmed because all but one of plaintiffs' breach of fiduciary duty claims are barred by the statute of limitations, and the remaining allegation of breach fails to state a claim upon which relief may be granted.

For cases involving allegations that a trustee is in breach of its fiduciary duty, "[t]he statute of limitations begins to run when the

claimant 'knew or, [by] due diligence, should have known' of the facts constituting the basis for the claim." *Pittman v. Barker*, 117 N.C. App. 580, 591, 452 S.E.2d 326, 332 (quoting *Hiatt v. Burlington Industries, Inc.*, 55 N.C. App. 523, 530, 286 S.E.2d 566, 570, *disc. review denied*, 305 N.C. 395, 290 S.E.2d 365 (1982)), *disc. review denied*, 340 N.C. 261, 456 S.E.2d 833 (1995). If the materials before the court present a factual question as to when a plaintiff knew or should have known of the facts giving rise to the claim, then this issue must be submitted to the jury. *Dawn v. Dawn*, 122 N.C. App. 493, 495, 470 S.E.2d 341, 343 (1996). Under North Carolina law, " 'the statute of limitations begins to run against an infant . . . who is represented by a guardian at the time the cause of action accrues.' " *Bryant v. Adams*, 116 N.C. App. 448, 459, 448 S.E.2d 832, 837 (1994) (quoting *Trust Co. v. Willis*, 257 N.C. 59, 62, 125 S.E.2d 359, 361 (1962)), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995). Therefore, if an infant is represented by a guardian, the statute of limitations for a breach of fiduciary duty claim begins to run when her guardian knew or should have known of the facts giving rise to the claim. *See id.*

In the instant case, the vast majority of the breaches asserted by plaintiffs occurred prior to Arthur Clark's "preliminary audit" of the trust accounts in the spring of 1994. Clark's audit allegedly revealed a number of problems with the accounts, and at this point, plaintiffs were put on notice that there were possible problems with the administration of the trusts. As of that point, Tracy and Andrea had reached the age of majority, and Erica was being represented by a guardian. Accordingly, plaintiffs knew or should have known about any pre-1994 breaches within a reasonable amount of time following the 1994 audit. Thus, the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52(1) expired well prior to filing of plaintiffs' complaint on 31 July 2003.

Further, nearly all of the indiscretions which plaintiffs allege BB&T committed within three years prior to the filing of the complaint involve BB&T's failure to "investigate and correct" the breaches of fiduciary duty for which recovery is barred by the statute of limitations. Such allegations are insufficient to revive plaintiffs' expired claims.

[4] We note also that plaintiffs have averred that "BB&T breached its fiduciary duty to Andrea by failing to distribute all of the assets in [her] Trust . . . to her on March 2, 2003." Although this averment includes conduct which occurred within three years of the filing of

plaintiffs' complaint, it should have been dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

To state a claim for breach of fiduciary duty, a plaintiff must allege that a fiduciary relationship existed and that the fiduciary failed to " 'act in good faith and with due regard to [plaintiff's] interests[.]' " *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004) (quoting *Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951)), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). In the instant case, plaintiffs' complaint states that Arthur Clark nominated a replacement trustee for BB&T on 22 October 2002 and that BB&T ceased being the trustee of plaintiffs' trust accounts on 27 March 2003. The complaint fails to offer any explanation as to how delaying distribution of Andrea's trust assets for twenty-five days while a change of trustee was imminent constituted a failure to act in good faith and with due regard for Andrea's interests.

These assignments of error are overruled.

V.

[5] The final issue on appeal is whether the trial court improperly disposed of plaintiffs' claim for an accounting. Plaintiffs contend that the trial court erred by dismissing this claim and by failing to set forth the grounds for the dismissal. We disagree.

Plaintiffs sought an accounting as an equitable remedy for the alleged breaches of fiduciary duty and constructive fraud. As the underlying allegations either fail to state a claim for relief or assert claims that are barred by the statute of limitations, the remedy sought is also unavailable. Moreover, given that the grounds for dismissal are readily discernible, we decline to remand for further conclusions of law from the trial court. *See O'Neill v. Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979) ("The purpose for requiring findings of fact and conclusions of law is to allow meaningful review by the appellate courts.").

This assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. ANTIONE DENARD ALLEN

No. COA02-1624-2

(Filed 21 June 2005)

Constitutional Law; Evidence— right of confrontation—hearsay—unavailable witness—testimonial statements—photographic lineup identification—harmless error

A review of defendant's case in light of *Crawford v. Washington*, 541 U.S. 36 (2004), revealed that although defendant's right to confrontation was violated in a first-degree murder case by the admission of evidence through an officer's testimony of statements made by two unavailable witnesses to the officer in the victim's apartment and during one witness's photographic lineup identification of a coparticipant on 28 January 1998 since the statements were testimonial, the error was harmless beyond a reasonable doubt because: (1) the evidence of defendant's guilt even without considering the statements made by the two unavailable witnesses is overwhelming; (2) two of the State's witnesses testified that they, along with defendant and two others, were involved in a plan to rob the victim; (2) the doctor who performed the autopsy testified that the older victim's wounds were consistent with a high-velocity bullet from a rifle and that the cause of death was a gunshot wound to the abdomen, and defendant admitted that he was carrying an assault rifle into the apartment and that the victim fell after defendant pulled the rifle's trigger; and (3) even though the officer testified that one of the witnesses identified a photo of a coparticipant as being the person who shot her daughter, this evidence did not directly implicate defendant for the murder of the other victim, defendant himself testified that the coparticipant was present with him and that shots were fired in the apartment, neither witness identified defendant, and defendant was not convicted for the murder of the six-year-old girl.

Appeal by defendant from judgment dated 1 March 2002 by Judge Melzer A. Morgan, Jr. in Superior Court, Forsyth County. Heard by this Court on 9 October 2003 and opinion filed finding no prejudicial error on 17 February 2004. Remanded to this Court by order of the North Carolina Supreme Court for reconsideration in light of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

Attorney General Roy Cooper, by Assistant Attorney General Robert C. Montgomery, for the State.

Reita P. Pendry for defendant-appellant.

McGEE, Judge.

Antione Denard Allen (defendant) was convicted of first-degree murder of Feliciano Noyola (Noyola).[1] At trial, the State's evidence tended to show that on 27 January 1998, Marshall Gillespie (Gillespie) visited Stephon Hairston (Hairston) at Hairston's home. Gillespie asked Hairston to help him rob "some Mexicans" living at 1231-B Gholson Street, Winston-Salem, North Carolina. Hairston agreed, retrieved his gun, and got into a vehicle with Gillespie. Steven Gaines (Gaines) and defendant were already in the vehicle. Defendant was armed with an assault rifle. The four men planned the robbery as they drove to the home of defendant's aunt, where they switched vehicles, getting into defendant's aunt's vehicle to drive to pick up Kenyon Grooms (Grooms).

Grooms got into the driver's seat, and defendant directed him to an apartment complex on Gholson Street. At the apartment complex, Hairston, Gaines, Gillespie and defendant got out of the vehicle and approached apartment 1231-B (the apartment). Gaines went toward the rear of the apartment. Hairston walked away, abandoning the robbery. Grooms stayed in the car. Defendant, carrying the assault rifle, and Gillespie, armed with a nine millimeter gun, entered the apartment. Defendant shot Noyola and Gillespie shot a six-year-old girl. Hearing gunshots, Grooms started the car and drove away.

Officer T.G. Brown (Officer Brown) of the Winston-Salem Police Department responded to a telephone call reporting gunfire. Officer Brown found two Hispanic women, Maria Santos (Santos) and Justina Dominguez (Dominguez), in the apartment. The two women were crying and were unable to speak English. Officer Brown found Noyola still breathing, but Noyola died before emergency medical personnel arrived. Officer Brown found the body of the six-year-old girl on the floor near the entrance to a bedroom.

Officer Rafael Barros (Officer Barros) of the Winston-Salem Police Department arrived approximately ten minutes after Officer

1. Defendant was originally convicted of two counts of first-degree murder, but on appeal, our Supreme Court granted him a new trial. *State v. Allen*, 353 N.C. 504, 546 S.E.2d 372 (2001). The subsequent trial is the subject of this appeal.

Brown. Officer Barros spoke fluent Spanish. He found Santos and Dominguez in one of the bedrooms. Santos, who was the mother of the six-year old girl, reported that three black men had entered the apartment through the front door, demanded money, shot Noyola, shot the six-year old girl, and left the scene. Dominguez, who was Noyola's wife, said that she had been in a bedroom with her baby when one of the intruders kicked the door open and ripped a gold chain from her neck. She heard gunshots but she never left the bedroom.

Officer Barros showed a photographic lineup to Santos and Dominguez on 28 January 1998. Officer Barros testified that Santos identified Gillespie as the man who shot Santos's daughter; but Officer Barros admitted that Santos was not positive in her identification. Dominguez did not identify Gillespie, and neither woman identified defendant. Santos and Dominguez later returned to Mexico and refused to return for defendant's trial.

Prior to trial, the trial court ruled that the statements made by Santos and Dominguez at the scene and during the photographic lineup would be admissible under the excited utterance exception and the residual exception to the hearsay rule respectively.

At trial, in addition to Officer Barros testifying as to the statements made by Santos and Domiguez, Hairston and Grooms testified as witnesses for the State. Both men admitted their participation in the robbery. Each testified that defendant, armed with an assault rifle, entered the apartment with Gillespie.

Dr. Patrick Lantz (Dr. Lantz) also testified for the State. Dr. Lantz conducted autopsies on both Noyola and the six-year-old girl. He testified that the entrance and exit wounds, and the multiple fragments found in Noyola's abdomen were characteristic of being from a high-powered rifle. The six-year-old girl's wounds were consistent with a bullet from a nine millimeter gun or other medium caliber gun, not an assault rifle.

Defendant testified that he had gone with the others to the apartment to sell an assault rifle to Noyola as payment for drugs. Defendant further testified that when he entered the apartment, Noyola pulled out a gun, and fired a shot toward defendant's head. Defendant "tensed up" and accidentally pulled the trigger of the rifle. Noyola dropped his gun and fell. Defendant testified that shots were fired in the apartment and that he and Gillespie fled.

The jury found defendant guilty of first-degree murder, and defendant was sentenced to life in prison without parole. Defendant appealed to this Court and argued in part that the trial court erred in admitting hearsay statements made by Dominguez and Santos as conveyed through the testimony of Officer Barros. Our Court concluded that because the statements by Santos and Dominguez "were made only twenty minutes after the shootings and the statements related to the startling events at issue, the testimony was properly admitted pursuant to N.C.G.S. § 8C-1, Rule 803(2)" as an excited utterance. *State v. Allen*, 162 N.C. App. 587, 593, 592 S.E.2d 31, 37 (2004). We further concluded that the trial court had properly "determined that the admission of Santos'[s] identification would serve the interest of justice" and that the trial court had properly admitted the photographic identification under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). *Id.* at 593-96, 592 S.E.2d at 37-39.

The United States Supreme Court subsequently filed its decision in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). Defendant filed notice of appeal and a petition for discretionary review in our Supreme Court on 23 March 2004. The Supreme Court dismissed defendant's notice of appeal and allowed his petition for discretionary review for the limited purpose of remanding the matter to this Court for reconsideration in light of *Crawford*. *State v. Allen*, 358 N.C. 546, 599 S.E.2d 557 (2004).

The United States Supreme Court in *Crawford* revised its previous standard for admissibility of hearsay evidence under the Confrontation Clause of the Sixth Amendment of the United States Constitution. *Crawford*, 541 U.S. at 60-69, 158 L. Ed. 2d at 198-203. "Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68, 158 L. Ed. 2d at 203. In the present case, defendant argues that, in light of *Crawford*, his Sixth Amendment right of confrontation was violated. He argues that his right of confrontation was violated by admitting into evidence through Officer Barros's testimony: (1) the statements made by Santos and Dominguez to Officer Barros in the apartment, and (2) Santos's identification of Gillespie on 28 January 1998.

Our Court has held that evaluating whether a defendant's right to confrontation has been violated is a three-step process. *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217, *disc. review denied*, 358 N.C. 734, 601 S.E.2d 866 (2004). We must determine: "(1) whether the evidence admitted was testimonial in nature; (2) whether

the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *Clark*, 165 N.C. App. at 283, 598 S.E.2d at 217. It is undisputed, however, that both Santos and Dominguez were unavailable and that defendant did not have an opportunity to cross-examine either declarant. Therefore, the issue before us is whether the statements made by Santos and Dominguez, as conveyed through Officer Barros, were testimonial.

Although the United States Supreme Court chose to "leave for another day any effort to spell out a comprehensive definition of 'testimonial[,]' " it provided examples of statements that would be testimonial. *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203. Testimonial statements referred to included *ex parte* statements made in court, affidavits, depositions, confessions, and "pretrial statements that declarants would reasonably expect to be used prosecutorially." The Court specifically identified "[s]tatements taken by police officers in the course of interrogations" as being testimonial. *Id*. at 52, 158 L. Ed. 2d at 193. While the Supreme Court held that a tape-recorded statement made to police by Crawford's wife, "knowingly given in response to structured police questioning, [qualified] under any conceivable definition [of interrogation,]" the Court refrained from defining "interrogation" with any greater particularity. *Id*. at 53 n.4, 158 L. Ed. 2d at 194 n.4. The Court did specify, however, that it was using "interrogation" in its colloquial, not its technical legal sense. *Id*.

In the case before us, the State argues that " 'interrogation' does not encompass preliminary investigatory questions asked by the police at the scene of the crime shortly after its occurrence." Indeed, the Supreme Court narrowed the application of *Crawford* by using the word "interrogation" rather than "questioning," suggesting that police questioning is not the same as police interrogation. *See Hammon v. State*, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004) (concluding that the Supreme Court's "choice of words clearly indicates that police 'interrogation' is not the same as, and is much narrower than, police 'questioning' "). However, our Courts have previously determined that a witness's statements to a police officer "made during [the officer's] initial investigation" may be testimonial. *Clark*, 165 N.C. App. at 284, 598 S.E.2d at 217; *State v. Lewis*, 166 N.C. App. 596, 601, 603 S.E.2d 559, 562, *disc. review granted*, 359 N.C. 195, 608 S.E.2d 60 (2004); *see also State v. Morgan*, 359 N.C. 131, 155-56, 604 S.E.2d 886, 901 (2004). By contrast, in *State v. Forrest*, our Court held

that statements to a police officer made during the initial investigation were not testimonial when the witness "was not providing a formal statement, deposition, or affidavit, was not aware that she was bearing witness, and was not aware that her utterances might impact further legal proceedings." *State v. Forrest*, 164 N.C. App. 272, 280, 596 S.E.2d 22, 27 (2004), *aff'd*, 359 N.C. 424, 611 S.E.2d 833 (2005). Thus, whether "interrogation" encompasses a statement made in response to police questioning at the scene of a crime is a factual question that must be determined on a case-by-case basis. *See State v. Sutton*, 169 N.C. App. 90, 97, 609 S.E.2d 270, 275 (2005) (determining whether the police questioning of a victim at the crime scene constituted an "interrogation").

The State argues that the present case can be analogized to *Forrest* because Santos and Dominguez made their statements while under the stress of the shootings and without being aware that their "utterances might impact further legal proceedings." In *Forrest*, the declarant made statements to the police immediately upon being rescued by them, after she was kidnapped and assaulted. *Forrest*, 164 N.C. App. at 280, 596 S.E.2d at 27. While the declarant was making her statement, she was "nervous, shaking, and crying" and "[h]er demeanor never changed during the conversation with [the police officer]." *Id.* We compared the declarant's statement in *Forrest* to a 911 call, stating that "a spontaneous statement made to police immediately after a rescue can be considered 'part of the criminal incident itself, rather than as part of the prosecution that follows.' " *Id.* (quoting *People v. Moscat*, 777 N.Y.S.2d 875 (NY 2004)). We further stated that "*Crawford* protects defendants from an absent witness's statements introduced after formal police interrogations in which the police are gathering additional information to further the prosecution of a defendant. *Crawford* does not prohibit spontaneous statements from an unavailable witness like those at bar." *Forrest*, 164 N.C. App. at 280, 596 S.E.2d at 27.

However, as defendant points out, the statements in *Forrest* were spontaneously made to the police when the police responded to a 911 call and were initiated by the victim/declarant, unlike the statements in this case. *See Forrest*, 164 N.C. App. at 280, 596 S.E.2d at 27. In light of our Court's recent *Sutton* opinion, we agree with defendant's argument. *See Sutton*, 169 N.C. App. at 98, 609 S.E.2d at 275. In *Sutton*, we found a statement made at the crime scene by the victim of the crime to be testimonial when the victim's statement was "neither spontaneous nor unsolicited." *Id.* As in the present case, the challenged

statement in *Sutton* was originally admitted into evidence at trial under the excited utterance exception to hearsay[2] because it was found that the victim "was still operating under the shock of the horrible events of the night." *Id.* The police questioning in *Sutton* was found to constitute an "interrogation" not only because the police approached and questioned the victim, but also because the challenged statement was the second statement the victim gave to the police that night, and thus "an objective witness would reasonably believe . . . that the statement would be available for use at trial." *Id.*

Though the facts of the present case indicate that Santos and Dominguez were still operating under the stress of the shootings, neither Santos nor Dominguez spontaneously initiated their statements to Officer Barros. Rather, the statements were elicited by the police twenty minutes after the shootings occurred. Unlike in *Sutton* where the challenged statement was the witness's second statement to the police, Officer Barros's "arrival at the scene offered [Santos and Dominguez] their first opportunity to convey the events of the shootings." *Allen*, 162 N.C. App. at 593, 592 S.E.2d at 37. However, the twenty minutes between the shootings and Officer Barros's arrival provided enough time for Santos and Dominguez to reflect on the shootings before they conversed with Officer Barros. Having more time to reflect makes it more probable that an objective witness, when subsequently questioned by the police, "would reasonably believe . . . that the statement would be available for use at trial." *See Sutton*, 169 N.C. App. at 98, 609 S.E.2d at 275.

Furthermore, unlike the situation in *Forrest*, the witnesses in the present case were not "rescued" by Officer Barros. In *Forrest*, the police arrived while the defendant was in a house with the victim; they observed the defendant hold a knife to the victim's throat and were initially concerned with securing the peace and protecting the victim, rather than collecting evidence to solve a crime. *Forrest*, 164 N.C. App. at 273-74, 596 S.E.2d at 23-24. As mentioned above, the

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2. We recognize that, after *Crawford*, whether a statement qualifies as an excited utterance is not a factor in our Confrontation Clause analysis. *See Forrest*, 164 N.C. App. at 280, 596 S.E.2d 22, 25-28 (demonstrating that, when a defendant's right to confrontation is implicated, whether a statement qualifies as an exception to hearsay is relevant only upon a finding that the statement was not testimonial); *see also Morgan*, 359 N.C. at 154, 604 S.E.2d at 900 (analyzing statements as exceptions to hearsay when the defendant did not argue that *Crawford* applied to a particular statement). Based on the particular circumstances of a case, statements that could be characterized as being excited utterances may or may not be testimonial.

victim's statements in *Forrest* were made to the police immediately upon being rescued, and the statements were thereby considered "part of the criminal incident itself[.]" *Id.* at 280, 596 S.E.2d at 27. In the present case, the challenged statements were not given during the "criminal incident itself," but rather after the apartment had been secured and the threat of danger to Santos and Dominguez was no longer immediate. Officer Barros arrived twenty minutes after the shootings, and ten minutes after the first police officer arrived on the scene. Officer Barros's primary focus would have been to investigate the crime and he would have had "an eye toward trial" when he questioned Santos and Dominguez. *See Sutton*, 169 N.C. App. at 98, 609 S.E.2d at 275.

Under these facts, Officer Barros's questioning of Santos and Dominguez amounted to interrogation, and Santos and Dominguez reasonably believed that their statements would be used prosecutorially. Thus, the challenged statements were testimonial. Since it is undisputed that both Santos and Dominguez were unavailable and that defendant did not have an opportunity to cross-examine either declarant, defendant's Sixth Amendment right to confrontation was violated by the admission of their statements through Officer Barros's testimony at trial.

However, a violation of defendant's confrontation rights does not necessarily result in a new trial. "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). "[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988). In the present case, the evidence of defendant's guilt, even without considering the statements made by Santos and Dominguez, is overwhelming.

Defendant argues that the statements made by Santos and Dominguez were prejudicial in that they provided the only evidence of an attempted robbery. However, two of the State's witnesses, Hairston and Grooms, testified that they, along with defendant, Gillespie and Gaines, were involved in a plan to rob Noyola. Specifically, Hairston testified that on 27 January 1998, Gillespie had told Hairston that Gillespie had a "lick," or a robbery, that he wanted Hairston to help him commit. Hairston further testified that he agreed

to participate, grabbed his gun, and went with Gillespie to the vehicle where defendant and Gaines were waiting. Hairston stated that the men discussed the robbery on their way to defendant's aunt's house, but that the robbery had been defendant's and Gillespie's idea. Hairston further testified that defendant not only participated in the planning of the robbery, but also provided the vehicle and the directions to the apartment. Hairston testified that when they arrived at the apartment, Gaines walked toward the back of the building and Hairston, defendant and Gillespie approached the apartment from the front.

Grooms testified that he agreed to drive the car for a "lick" that Gillespie wanted to commit. Grooms did not want to drive his vehicle, so Gillespie talked to defendant and then asked Grooms if Grooms would mind driving defendant's aunt's vehicle. Like Hairston, Grooms testified that Gaines went behind the apartment building, and that defendant, Hairston, and Gillespie approached from the front. Both Hairston and Grooms testified that defendant was armed with an assault rifle and that Gillespie had a nine millimeter gun when they entered the apartment. Contrary to defendant's argument, the testimony of Hairston and Grooms amply demonstrates that defendant intended to commit a robbery.

Furthermore, other evidence presented at trial supports the jury's guilty verdict. Dr. Lantz testified that Noyola's wounds were consistent with a high-velocity bullet from a rifle, and that the cause of death was a gunshot wound to the abdomen. The six-year-old girl's wounds were consistent with a bullet from a nine millimeter gun. Defendant's testimony corroborated the testimony of the other witnesses in that defendant admitted that he was carrying an assault rifle into the apartment, and that Noyola fell after defendant pulled the rifle's trigger. The sum of this evidence supports defendant's guilt to the extent that the trial court's error in admitting the testimonial hearsay of Santos and Dominguez was harmless beyond a reasonable doubt.

Defendant also argues that Santos's identification of Gillespie from the photographic lineup was testimonial because it was made in response to police questioning the day after the killings. We agree. In *State v. Lewis*, we held out-of-court identifications from photographic lineups to be testimonial, stating:

> In substance, the information obtained from a photo line-up is not very different from other evidence that is classified as testimonial under *Crawford*. Indeed, the photo line-up is very similar to the

> ex parte and extra-judicial examinations by government officials which *Crawford* makes clear the Sixth Amendment was meant to address.

Lewis, 166 N.C. App. at 602, 603 S.E.2d at 563 (citing *Crawford*, 541 U.S. at 51-52, 158 L. Ed. 2d at 192-93). Moreover, as a photographic lineup has the clear purpose of collecting evidence for prosecution and a person being faced with a photographic lineup must know that his or her identification will be used for prosecution, there is not the same factual question as to whether such an identification is testimonial as discussed above. Thus, the admission of the photographic lineup identification when Santos was not available to testify and defendant did not have the opportunity to confront Santos about this identification did violate defendant's right to confront his accuser under the Sixth Amendment.

However, again the State demonstrates that this error was harmless beyond a reasonable doubt. The State asserts that even though Officer Barros testified that Santos identified a photograph of Gillespie as being the person who shot her daughter, this evidence "did not directly implicate defendant for the murder of Feliciano Noyola." This evidence may have prejudiced defendant in that it corroborated the testimony of Hairston and Grooms, showing that Gillespie was present in the apartment when the shooting occurred. However, defendant himself testified that Gillespie was present with him and that shots were fired in the apartment. Also, the facts that neither Santos nor Dominguez identified defendant, and that defendant was convicted for Noyola's murder and not for the murder of the six-year-old girl, indicate that the admission of this identification was harmless beyond a reasonable doubt. *Cf State v. Herrmann*, 679 N.W.2d 503, 510 (S.D. 2004) (finding the admission of an out-of-court statement harmless, even if testimonial, because the statement did not implicate the defendant as the perpetrator and because there was substantial DNA evidence against the defendant).

For the foregoing reasons, upon review in light of *Crawford*, we find no prejudicial error.

No prejudicial error.

Judges HUNTER and CALABRIA concur.

STATE OF NORTH CAROLINA v. CHRISTIAN LEE STRECKFUSS

No. COA04-609

(Filed 21 June 2005)

1. Motor Vehicles— driving while impaired—motion to dismiss—sufficiency of evidence—double jeopardy

The trial court did not violate defendant's right against double jeopardy by denying his motion to dismiss the charge of driving while impaired even though the State confiscated and retained his South Dakota driver's license when defendant refused to take an Intoxilyzer test and imposed a $50 fee, because: (1) contrary to defendant's argument, nothing in N.C.G.S. § 20-16.5 indicates that the purpose underlying the statute is different for out-of-state drivers than it is for North Carolina drivers when the threat posed to the citizens of North Carolina by an impaired driver driving on North Carolina highways is the same regardless of what state's license the driver has; (2) it is clear from the plain language of N.C.G.S. § 20-16.5 that it applies equally to a driver who has a North Carolina driver's license and to a driver who has a license from another state; (3) defendant does not argue, and nothing in the record indicates, that defendant was actually deprived of the ability to drive in the State of South Dakota for thirty days, and nothing in the record suggests that defendant could not have applied for or obtained a duplicate license or otherwise sought relief in South Dakota; (4) the State provides statutory remedies for a driver to secure his revoked license, which mitigate any possible punitive effects of the State's confiscation of a nonresident's license; and (5) the $50 fee is not a fine, but rather a minimal administrative fee that covers the costs for the action.

2. Criminal Law— motion to dismiss—double jeopardy—time of motion—denial as harmless error

The trial court's error of dismissing as untimely defendant's motion to dismiss a driving while impaired charge on the ground of double jeopardy did not prejudice defendant when the trial court correctly ruled on the substantive issue of double jeopardy.

3. Criminal Law— prejudice analysis—no double jeopardy violation

The trial court did not err by applying a prejudice analysis in denying defendant's motion to dismiss a driving while impaired charge on the ground of double jeopardy, because dismissal was not mandatory when the trial court properly concluded that defendant was not placed in prior jeopardy for the offense.

4. Evidence— lay testimony—field sobriety tests

The trial court did not err in a driving while impaired case by allowing a deputy to testify regarding the field sobriety tests over defendant's objection even though the State failed to establish both that the deputy was qualified to properly administer or interpret the tests and that the tests had been properly administered, because the testimony was relevant to the deputy's lay testimony that defendant was impaired.

Appeal by defendant from judgment entered 30 September 2003 and order entered 30 October 2003 by Judge Wade Barber in Superior Court, Wake County. Heard in the Court of Appeals 2 February 2005.

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

George B. Currin for defendant-appellant.

McGEE, Judge.

Deputy Joel B. Goodwin (Deputy Goodwin) of the Wake County Sheriff's Office was on patrol on 15 March 2002 traveling southbound on Capital Boulevard, at approximately 1:00 a.m., when he saw Christian Lee Streckfuss (defendant) turn onto northbound Capital Boulevard. Deputy Goodwin made a u-turn and followed defendant's vehicle, which was traveling approximately seventy-five m.p.h. in a fifty-five m.p.h. zone. He also observed that defendant was unable to maintain a steady, straight line in his lane of traffic. Deputy Goodwin pulled defendant over to the side of the road.

When Deputy Goodwin approached defendant's vehicle, defendant rolled down his window and Deputy Goodwin smelled a "strong odor of alcoholic beverage emanating from the vehicle." Defendant produced a South Dakota driver's license and a North Carolina registration for the rental vehicle defendant was driving. Defendant admitted to having had "a couple of drinks." Deputy Goodwin

observed that defendant's "eyes were kind of red and glassy and his speech was slightly slurred." Deputy Goodwin administered field sobriety tests to defendant. After defendant failed three attempts to stand on one foot, Deputy Goodwin formed the opinion that defendant's mental and physical capacities were impaired. Deputy Goodwin arrested defendant.

Chemical Analyst Jackie Oliver (Oliver) read defendant his rights prior to administering the Intoxilyzer test and gave defendant an opportunity to call an attorney, which defendant declined. Defendant refused to take the Intoxilyzer test. Oliver noted that defendant's eyes were "red kind of glassy" and that defendant smelled like alcohol.

Deputy Goodwin seized defendant's South Dakota driver's license pursuant to N.C. Gen. Stat. § 20-16.5(b). Defendant's license was held by the State of North Carolina for thirty days and was not released until defendant paid the required $50.00 fee.

At a pre-trial hearing, defendant pled guilty to speeding, but moved to dismiss the driving while impaired (DWI) charge on double jeopardy grounds. In an order entered 30 October 2003, the trial court dismissed defendant's motion as being untimely filed. However, the trial court also ruled on the merits of the motion, concluding that the confiscation of defendant's South Dakota license did not "place Defendant in prior jeopardy for the offense."

At trial, defendant was convicted of driving while impaired. He received a sixty-day suspended sentence and was ordered to pay a fine of $713.00. Defendant appeals.

I.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the DWI charge against him. Defendant argues that criminal prosecution and punishment of defendant for driving while impaired were barred because the State's confiscation and retention of his South Dakota driver's license and imposition of a $50.00 fee constituted punishment for double jeopardy purposes.

Defendant's license was seized pursuant to N.C. Gen. Stat. § 20-16.5 (b) when he refused to submit to the chemical analysis of an intoxilyzer test. Defendant concedes that our Courts have previously held that N.C.G.S. § 20-16.5 is remedial in nature, and that it does not constitute punishment for double jeopardy purposes. *See State v. Evans*, 145 N.C. App. 324, 334, 550 S.E.2d 853, 860 (2001); *see also State v. Oliver*, 343 N.C. 202, 209-10, 470 S.E.2d 16, 21 (1996).

However, defendant argues that these prior decisions are inapplicable to him because his license was an out-of-state license. Defendant asserts that our Courts' decisions that the statute's provisions do not constitute punishment for double jeopardy purposes are premised on the recognition that the civil revocation serves a lawful remedial purpose that outweighs its punitive effects. *See Evans*, 145 N.C. App. at 334-35, 550 S.E.2d at 860. Defendant contends that because he was a nonresident driver, the confiscation of his out-of-state license punished him by depriving him of the ability to drive in the State of South Dakota for thirty days, and thus the punitive effects of the revocation outweigh the remedial purpose. We disagree.

In *Evans*, our Court thoroughly analyzed N.C.G.S. § 20-16.5 to determine whether the statute, as amended in 1997, violated the Double Jeopardy clause of the United States Constitution or the Law of the Land clause of the North Carolina Constitution. *Id.* at 331-34, 550 S.E.2d at 858-60. We noted that "because N.C.G.S. § 20-16.5, as enacted, reflects an intent by the legislature for the revocation provision to be a remedial measure, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Evans*, 145 N.C. App. at 332, 550 S.E.2d at 859 (internal quotes and citations omitted). We reiterated that the statute has a legitimate remedial purpose, which "is to remove from our highways drivers who either cannot or will not operate a motor vehicle safely and soberly" and "to prevent unsafe and unfit drivers from operating vehicles and endangering the citizens of North Carolina." *Id.* at 331-32, 550 S.E.2d at 859. Finally, we concluded that the statute does not subject a person to double jeopardy because the statute "is neither punitive in purpose nor effect[.]" *Id.* at 334, 550 S.E.2d at 860.

Contrary to defendant's argument, nothing in our analysis of N.C.G.S. § 20-16.5 indicates that the purpose underlying the statute is different for out-of-state drivers than it is for North Carolina drivers. Certainly, the threat posed to the citizens of North Carolina by an impaired driver driving on North Carolina highways is the same regardless of what state's license the driver has. Furthermore, it is clear from the plain language of N.C.G.S. § 20-16.5, and related statutes, that N.C.G.S. § 20-16.5 applies equally to a driver who has a North Carolina driver's license and to a driver who has a license from another state.

First, related statute N.C. Gen. Stat. § 20-22 provides that driver's licenses of out-of-state drivers "shall be subject to suspension or

revocation by the Division [of Motor Vehicles] in like manner and for like cause as a driver's license issued [in North Carolina] may be suspended or revoked." N.C. Gen. Stat. § 20-22(a) (2003). Therefore, the revocation of a license pursuant to N.C.G.S. § 20-16.5 for failure to submit to chemical analysis applies to nonresident drivers.

Second, the plain language of N.C.G.S. § 20-16.5 demonstrates that the General Assembly intended for the statute to apply equally to drivers from other states, as well as to those from North Carolina. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) ("Legislative purpose is first ascertained from the plain words of the statute."). The statute applies to a*ny* person "who operates a motor vehicle upon the highways of the State[,]" *State v. Allen*, 14 N.C. App. 485, 489, 188 S.E.2d 568, 571 (1972), and is charged with an implied consent offense, such as impaired driving. N.C. Gen. Stat. § 20-16.5(b)(1)-(3) (2003) (referring to N.C. Gen. Stat. § 20-16.2). Such a person "is deemed to have given consent to a breathalyzer test." *Allen*, 14 N.C. App. at 489, 188 S.E.2d at 571. If the person "[w]illfully refuses to submit to the chemical analysis[,]" the person's driver's license is subject to revocation for thirty days, assuming the other provisions of N.C.G.S. § 20-16.5(b) are met. N.C.G.S. § 20-16.5(b).

Third, N.C.G.S. § 20-16.5 expressly applies to licenses issued in states other than North Carolina. The statute defines "Surrender of a Driver's License" as "[t]he act of turning over to a court or a law-enforcement officer the person's most recent, valid driver's license . . . issued by the Division [of Motor Vehicles] *or by a similar agency in another jurisdiction*[.]" N.C. Gen. Stat. § 20-16.5(a)(5) (2003) (emphasis added). Additionally, when N.C. Gen. Stat. § 20-16.2 is read together with N.C.G.S. § 20-16.5, it is clear that the immediate civil license revocation for persons charged with implied-consent offenses in N.C.G.S. § 20-16.5 applies to persons with out-of-state licenses. N.C.G.S. § 20-16.2 includes a provision requiring the North Carolina Division of Motor Vehicles to notify "the motor vehicle administrator of the state of the person's residence and of any state in which the person has a license" of the revocation when a nonresident's privilege to drive in the State has been revoked. N.C. Gen. Stat. § 20-16.2(f) (2003). Defendant's argument that the statute does not have a remedial purpose as applied to drivers with out-of-state licenses is without merit.

Similarly, we are not persuaded by defendant's contention that the punitive effects of N.C.G.S. § 20-16.5, as applied to a nonresident,

outweigh the lawful remedial purpose discussed above. Defendant asserts that N.C.G.S. § 20-16.5 serves only to punish him by depriving him of the ability to drive in the State of South Dakota for thirty days. Defendant's argument is centered on the premise that the State of North Carolina does not have authority to restrict or interfere with defendant's ability to drive in his home state. *See Hendrick v. Maryland*, 235 U.S. 610, 622, 59 L. Ed. 385, 391 (1915) (stating that it is within the police power of a state to "prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles[,]" including licensing their drivers). However, that the State of North Carolina might have improperly seized defendant's driver's license does not mean that the revocation amounts to punishment.

Defendant does not argue, and nothing in the record indicates, that defendant was actually deprived of the ability to drive in the State of South Dakota for thirty days. Neither is there evidence in the record showing when or whether defendant returned to South Dakota. Nor does defendant demonstrate that he was denied the privilege of driving in South Dakota. "The license is merely physical evidence of the existence of the privilege to drive in the state wherein [the license] was issued." Opinion of Attorney General Robert Morgan, 40 N.C. Op. Att. Gen. 420, 422 (1969). Nothing in the record suggests that defendant could not have applied for or obtained a duplicate license or otherwise sought relief in South Dakota. Defendant was merely denied the physical evidence of the privilege to drive in his home state, his driver's license, which does not constitute punishment.

Additionally, the State provides statutory remedies for a driver to secure his revoked license, which mitigate any possible punitive effects of the State's confiscation of a nonresident's driver's license. N.C.G.S. § 20-16.5(g) provides that a person may contest the validity of a revocation in a hearing before a magistrate or district court judge, either of whom may rescind the revocation. N.C.G.S. § 20-16.5(g). The request for such a hearing "may be made at the time of the person's initial appearance, or within 10 days of the effective date of revocation" and "the hearing must be held within three working days following the request if the hearing is before a magistrate or within five working days if the hearing is before a district court judge." *Id.* In addition to contesting the validity of the revocation, defendant could have sought a limited driving privilege under N.C.G.S. § 20-16.5(p).

Whether or not the State should have required defendant to surrender his South Dakota driver's license, *see* Opinion of Attorney General Robert Morgan, 40 N.C. Op. Att. Gen. at 422 ("To require the surrender of a valid driver's license issued by another state would be an empty gesture since the North Carolina court cannot determine the status of a nonresident's privilege to drive in his home state."), the State's seizure of defendant's South Dakota license was not punishment. The only harm evident in the record is that defendant had to pay $50.00 to restore his privilege to drive in North Carolina after the thirty-day revocation period expired. Defendant does not argue, and we do not see, how this fee constituted punishment. The $50.00 charge is not a fine, but rather a minimal administrative fee that covers the "costs for the action[.]" N.C.G.S. § 20-16.5(j). Thus, defendant fails to offer proof sufficient to "override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *See Evans*, 145 N.C. App. at 332, 550 S.E.2d at 859. The trial court correctly concluded that defendant was not placed in prior jeopardy for driving while impaired, and we thereby affirm the trial court's denial of defendant's motion to dismiss on double jeopardy grounds.

II.

[2] Defendant next argues that the trial court erred in dismissing defendant's motion to dismiss as being untimely filed. We agree. A motion to dismiss on the grounds of double jeopardy may be made at any time. N.C. Gen. Stat. § 15A-954(c) (2003). However, the trial court correctly ruled on the substantive issue of double jeopardy and its error in dismissing defendant's motion to dismiss as being untimely did not prejudice defendant.

III.

[3] Defendant's third assignment of error is that the trial court erred in applying a prejudice analysis in denying defendant's motion to dismiss for double jeopardy. Specifically, defendant argues that the trial court erred when it concluded that "[t]he unlawful actions of the State in seizing the license was not such a flagrant violation of Defendant's constitutional rights resulting in such irreparable prejudice that there is no remedy but to dismiss the prosecution." Defendant asserts that dismissal is mandatory under N.C.G.S. § 15A-954 when the trial court concludes that a defendant has already been placed in jeopardy for the same offense, and thus engaging in a prejudice analysis was misplaced. *See* N.C. Gen. Stat. § 15A-954(a)(5) (2003). However, as discussed above, the trial

court properly concluded that defendant was not placed in prior jeopardy for the offense. Thus, dismissal was not mandatory, and defendant's argument to the contrary is overruled.

IV.

[4] Finally, defendant assigns as error the trial court's allowing Deputy Goodwin to testify regarding the field sobriety tests over defendant's objection. Defendant argues that the trial court erred in allowing Deputy Goodwin to testify about the field sobriety tests when the State had failed to establish both that Deputy Goodwin was qualified to properly administer or interpret the field sobriety tests, and that the tests had been properly administered. However, we conclude that there was no error in admitting this evidence because it was relevant to Deputy Goodwin's lay testimony that defendant was impaired.

Relevant evidence is admissible, except as specifically provided by law. N.C. Gen. Stat. § 8C-1, Rule 402 (2003). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue. In criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Smith*, 357 N.C. 604, 613-14, 588 S.E.2d 453, 460 (2003) (internal quotes and citations omitted), *cert. denied*, —— U.S. ——, 159 L. Ed. 2d 819 (2004). A trial court must determine if the proposed evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003). "[A] trial court's rulings on relevancy . . . are not discretionary and therefore are not reviewed under the abuse of discretion standard[.]" *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398 (1992). Nevertheless, "such rulings are given great deference on appeal." *Id.*

At trial, the trial court allowed defendant to conduct a voir dire hearing outside the jury's presence to assess Deputy Goodwin's training and qualifications in administering field sobriety tests. Following the voir dire, the trial court concluded:

> [Deputy Goodwin] cannot testify that he administered standardized field sobriety tests. The officer may testify what he asked the defendant to do and what the defendant did in response thereto. The defense is free to cross-examine [Deputy Goodwin] at will with regard to that testimony, and if the defense chooses, may

cross-examine him with regard to the standardized test, so forth as you choose.

The trial court stated that Deputy Goodwin could not testify that he believed defendant to be impaired because defendant failed the tests; however, he could testify that he formed an opinion that defendant was impaired when Deputy Goodwin asked defendant to stand on one leg and defendant started to hop and then fell over. In other words, Deputy Goodwin was permitted to testify as a lay witness, rather than as an expert.

"[A] lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness's personal observation." *State v. Rich*, 351 N.C. 386, 398, 527 S.E.2d 299, 306 (2000) (citing *State v. Lindley*, 286 N.C. 255, 258, 210 S.E.2d 207, 209 (1974)). In the present case, Deputy Goodwin only testified that, based on his personal observations, he formed an opinion that defendant was impaired. Evidence that defendant was impaired is relevant to the issue of whether defendant was driving while impaired. Therefore, the trial court did not err in admitting Deputy Goodwin's testimony about defendant's field sobriety tests.

No error.

Judges TYSON and GEER concur.

THE PENINSULA PROPERTY OWNERS ASSOCIATION, INC., PLAINTIFF v. CRESCENT RESOURCES, LLC, DEFENDANT

No. COA04-796

(Filed 21 June 2005)

1. Appeal and Error— standard of review—Rule 12(b)(6) motion

Appellate review of a Rule 12(b)(6) motion to dismiss is de novo.

2. Deeds— property owners association—bylaws and covenants—approval of lawsuit—standing

Contractual provisions agreed to by members of a property owners association may provide procedural prerequisites or contractually limit the time, place, or manner of asserting claims.

Here, an association (PPOA) lacked the authority to begin a lawsuit against a developer (Crescent) and did not have standing where it had not received approval from two thirds of its members, as required by a valid provision of the by-laws and declaration of covenants.

Appeal by plaintiff from judgment entered 24 February 2004 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 March 2005.

Weaver, Bennett & Bland, P.A., by Michael David Bland and Benjamin L. Worley, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Irvin W. Hankins, III, and John W. Francisco, for defendant-appellee.

TYSON, Judge.

The Peninsula Property Owners Association, Inc. (the "PPOA") appeals from judgment entered granting Crescent Resources, LLC's ("Crescent") motion to dismiss and motion for summary judgment based on the PPOA's lack of standing. We affirm.

I. Background

Beginning in 1989, Crescent, a subsidiary of Duke Power Company, developed "the Peninsula," a planned residential community on Lake Norman near Charlotte, North Carolina. Crescent sold over nine hundred lots in the Peninsula between 1990 and 1 January 1999. As part of the development, Crescent established the PPOA as a North Carolina non-profit corporation. Crescent appointed the original members of the Board of the PPOA ("the Board") and maintained majority control of the Board until 1 January 1999. The Declaration of Covenants, Conditions, and Restrictions ("the Declaration") and the Bylaws of the PPOA ("Bylaws") were created by Crescent. Both the Declaration and the Bylaws contain the following provision:

> the affirmative vote of no less than two-thirds (2/3) of all votes entitled to be cast by the Master Association Members shall be required in order for the Master Association to (1) file a complaint, on account of an act or omission of Declarant, with any governmental agency which has regulatory or judicial authority over the Project or any part thereof; or (2) assert a claim against or sue Declarant.

In addition, the Declaration and the Bylaws granted authority to the Board to contract with third parties to install infrastructure for the Peninsula including streets, sewers, sidewalks, the golf course, the clubhouse, parking lots, and street lights. The Board entered into a lease agreement with Duke Power to install and maintain decorative brass street light poles and fixtures. The PPOA made lease payments to Duke Power from annual dues collected from the homeowners.

When Crescent relinquished control of the Board in January 1999, the PPOA's members "discovered" the lease agreement between the PPOA and Duke Power. The Board decided to buy the street light equipment from Duke Power for $1,200,000.00, instead of completing the remaining lease payments totaling $1,500,000.00.

On 1 September 2000, the PPOA and one of its members filed a complaint in Mecklenburg County Superior Court against Crescent and sought certification of the matter as a class action. The PPOA made no attempt to secure a vote of two-thirds of its members prior to instituting this action. The complaint alleged constructive fraud, unfair and deceptive trade practices, and violation of the Interstate Land Sales Full Disclosure Act. The trial court entered an order denying the request for class certification on 26 October 2001. The PPOA subsequently filed a voluntary dismissal without prejudice.

On 30 October 2002, the PPOA filed this action in Mecklenburg County Superior Court. As with the earlier suit, the PPOA did not attempt to garner the required two-thirds vote under the Bylaws and the Declaration. The PPOA asserted claims of constructive fraud and unfair and deceptive trade practices. These causes of action were alleged on behalf of the PPOA itself, rather than individual homeowners. The PPOA filed an amended complaint on 6 January 2003 to correct Crescent's business organization status.

Crescent answered on 24 March 2003 and argued in part that the PPOA lacked standing to assert its claims. Following discovery by both parties, Crescent filed a motion for summary judgment on 9 December 2003 claiming: (1) the PPOA did not have the authority or standing to assert its claims; (2) the PPOA's claims are time barred by the statute of limitations; and (3) the PPOA has not asserted valid claims. Crescent filed an amended motion to dismiss combined with a motion for summary judgment on 3 December 2003 arguing: (1) the trial court lacked jurisdiction; (2) allegations in PPOA's complaint fail

to state a claim upon which relief can be granted; (3) the PPOA does not have authority or capacity to assert its claims; and (4) there are no genuine issues of material fact.

After submission of affidavits, pleadings, and other documents and arguments by both parties, the trial court ruled that the PPOA did "not have standing to file and prosecute this action" and granted Crescent's motion to dismiss and motion for summary judgment. The PPOA appeals.

II. Issue

The issue on appeal is whether the trial court erred in ruling the PPOA lacked standing and authority to assert its claims against Crescent.

III. Standard of Review

[1] Our review of a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure is *de novo*. *Country Club of Johnson Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002) (citation omitted); N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2003). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

IV. Subject Matter Jurisdiction

The PPOA argues the trial court erred by: (1) dismissing its complaint for lack of subject matter jurisdiction; and (2) granting Crescent's motion for summary judgment. We disagree.

A. Standing

[2] "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *American Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002) (citations omitted), *cert. denied*, 357 N.C. 61, 579 S.E.2d 283 (2003). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) (internal quotation marks omitted). As the

party seeking to invoke jurisdiction, the PPOA has the burden of proving the elements of standing. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citations omitted), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

"Standing . . . is . . . properly challenged by a Rule 12(b)(1) motion to dismiss," *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001), and a showing must be made " 'that the plaintiff have been injured or threatened by injury or have a statutory right to institute an action,' " *Bruggeman v. Meditrust Co., LLC*, 165 N.C. App. 790, 795, 600 S.E.2d 507, 511 (2004) (quoting *In re Baby Boy Scearce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410, *disc. rev. denied*, 318 N.C. 415, 349 S.E.2d 589 (1986)). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commer. Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (citations omitted), *disc. rev. denied*, 359 N.C. 632, 613 S.E.2d 688 (2005).

Statutes or contract provisions may also prescribe whether a court possesses subject matter jurisdiction. *See* N.C. Gen. Stat. § 55-7-42 (2003) (a shareholder may not commence a derivative action without: (1) "written demand . . . upon the corporation to take suitable action;" and (2) "90 days have expired from the date the demand was made unless, prior to the expiration of the 90 days, the shareholder was notified that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90 day period."); *see also Allen v. Ferrera*, 141 N.C. App. 284, 287-89, 540 S.E.2d 761, 764-65 (2000) (applying N.C. Gen. Stat. § 55-7-42); *Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 92, 414 S.E.2d 30, 33 (1992) ("[P]arties have endeavored to avoid potential litigation concerning judicial jurisdiction and the governing law by including in their contracts provisions concerning these matters. Although the language used may differ from one contract to another, one or more of three types of provisions (choice of law, consent to jurisdiction, and forum selection), which have very distinct purposes, may often be found in the boilerplate language of a contract.").

B. Two-Thirds Voting Provision

The North Carolina Nonprofit Corporation Act ("the Act") is found in N.C. Gen. Stat. § 55A-1-01 *et seq*. Included within the Act are guidelines for corporations' bylaws, which "may contain any provi-

sion for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation." N.C. Gen. Stat. § 55A-2-06(b) (2003).

Neither party asserts a discrepancy between the Bylaws and the articles of incorporation. For corporations with members, the bylaws "may include any provisions not inconsistent with law . . . with respect to: . . . (2) Voting rights and the manner of exercising voting rights; (3) The relative rights and obligations of members among themselves, to the corporation, and with respect to the property of the corporation; . . . (7) Any other matters." N.C. Gen. Stat. § 55A-6-20 (2003).

Here, Article III, Section 10 of the Bylaws and Article III, Section 3.3 of the Declaration state, "[t]he affirmative vote of no less than two-thirds (2/3) of all votes entitled to be cast by the [PPOA] members shall be required in order for the [PPOA] to . . . assert a claim against or sue [Crescent]." The two-thirds provision is limited to situations where the PPOA desires to commence legal action against Crescent directly or complain to a governmental agency about Crescent's acts or omissions. The PPOA never attempted to obtain nor actually received the required two-thirds vote by its members approving its decision to file any complaint against Crescent. The trial court dismissed the PPOA's complaint based on the PPOA's lack of authority and standing to assert claims against Crescent without prior approval by two-thirds of its members.

The PPOA argues the extra majority approval by its members is "in violation to the stated public policy to allow entities free access to the courts," and asserts the two-thirds vote requirement "directly inhibits [the PPOA's] ability to recover from [Crescent] for its fraudulent actions by restricting [the PPOA's] access to the court system." In support of its argument, the PPOA first cites N.C. Gen. Stat. § 22B-10 (2003) which provides,

> [a]ny provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable. This section does not prohibit parties from entering into agreements to arbitrate or engage in other forms of alternative dispute resolution.

The PPOA contends N.C. Gen. Stat. § 22B-10 embodies North Carolina's public policy "to allow persons and entities to have their

day in court." The PPOA further asserts the two-thirds provision is an illegal restraint of the right to sue. *See Duffy v. Insurance Company*, 142 N.C. 100, 103, 55 S.E. 79, 81 (1906) ("By-laws restricting the right to sue in the courts are generally void."). Finally, the PPOA argues the two-thirds provision equates to an exculpatory clause. *See Fortson v. McClellan*, 131 N.C. App. 635, 636, 508 S.E.2d 549, 551 (1998) ("an exculpatory contract will be enforced unless it violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest").

Our *de novo* review of the two-thirds voting provision and the applicable statutory and case law shows the voting requirement is valid and enforceable. *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. at 647, 576 S.E.2d at 319. In response to the PPOA's first two arguments, the PPOA is not prevented from either obtaining access to the judicial system or asserting its right to file suit. The Bylaws do not require and the PPOA did not "waive [its] right to a jury trial." N.C. Gen. Stat. § 22B-10.

The two-thirds vote provision in the Bylaws and the Declaration does not eliminate the PPOA's right to file a legal action. Both the PPOA and its members enjoy the unlimited ability to file causes of action against Crescent, subject to the required approval by its members. The two-thirds voting provision merely requires the PPOA to garner extra-majority approval from its members before instituting legal action. Crescent does not control the required two-thirds majority vote to sue. Crescent owned only two of the nine hundred lots within the Peninsula at the time the PPOA filed its complaint, less than one-percent of the voting rights.

Exculpatory clauses contractually limit a party's liability. *Hall v. Refining Co.*, 242 N.C. 707, 709-10, 89 S.E.2d 396, 398 (1955). The two-thirds provision does not limit Crescent's liability to the PPOA for *any* alleged wrongdoing. Rather, the PPOA must obtain the required approval from its membership prior to commencing an action against Crescent for alleged wrongdoings. In addition, the PPOA's individual members are not covered by the two-thirds provision and are not without legal recourse against Crescent.

Crescent correctly notes that a two-thirds vote, or other pre-lawsuit requirements, are common. *See* N.C. Gen. Stat. § 55-7-42 (a shareholder may not commence a derivative action without: (1) "written demand . . . upon the corporation to take suitable action;" and (2) "90

days have expired from the date the demand was made unless prior to the expiration of the 90 days, the shareholder was notified that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period."); N.C. Gen. Stat. § 47F-1-102(d) (2003) (a homeowner association formed prior to 1 January 1999 may adopt the provisions of the North Carolina Planned Community Act with at least two-thirds member support).

As noted, contractual provisions agreed to by members of the PPOA may provide procedural prerequisites or contractually limit the time, place, or manner for asserting claims. *Johnston County*, 331 N.C. at 92-93, 414 S.E.2d at 33 (choice of law, consent to jurisdiction, and forum selection limitations); *Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980) ("where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect"); *Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 678 (2001) (there is a strong public policy favoring arbitration in North Carolina).

Crescent argues prior notice to the PPOA's members shows knowledge and ratification to uphold the validity of the two-thirds provision. Crescent began developing the Peninsula in 1989 and established the PPOA in 1990. The Bylaws were adopted in July 1990. The Declaration was made and entered into in September 1990. Crescent began selling residential lots later that year. In connection with each sale of real property by Crescent to homeowners, the contracts included an express acknowledgment by the homeowners that they "read, understood, and agreed to" terms of the Declaration. Crescent also required prospective lot owners to sign a separate acknowledgment that they had read and understood a copy of the PPOA's previous year's budget, which included lease payments for the street lights.

The PPOA's members also received ample opportunity to review the two-thirds voting requirement in the Declaration and the Bylaws prior to purchasing real property within the Peninsula. Both the Declaration and the Bylaws include provisions permitting review and inspection of the PPOA's books, records, and papers during "reasonable business hours." *See* N.C. Gen. Stat. § 55A-16-02 (2003) ("A member is entitled to inspect and copy . . . any of the records of the corporation . . . ."). All members were further provided access to all financial records pertaining to the PPOA's operating budget, including

the lease payments to Duke Power, which were provided every year during annual meetings. In addition, all prospective purchasers and lot owners were provided record notice, as both the Bylaws and the Declaration were filed with and are available in the county register of deeds office.

The trial court did not err in dismissing the PPOA's complaint for lack of subject matter jurisdiction. The PPOA fails to prove it has standing. *Neuse River Found., Inc.*, 155 N.C. App. at 113, 574 S.E.2d at 51. Our review of the record and applicable law indicates the two-thirds vote provision requiring member approval prior to litigation against Crescent is valid. The PPOA and its members were on notice of this requirement. The PPOA never attempted to obtain nor received the required member approval vote prior to filing this or the previous action. Without the required vote, the PPOA lacked the authority to commence legal proceedings against Crescent and does not possess standing. *Estate of Apple*, 168 N.C. App. at 177, 607 S.E.2d at 16. Without standing, the trial court could not exercise subject matter jurisdiction over its claims. *Street*, 157 N.C. App. at 305, 578 S.E.2d at 698. In light of our holding, we decline to address the trial court's grant of summary judgment in Crescent's favor or the PPOA's remaining assignments of error.

V. Conclusion

The required two-thirds vote provision is valid and enforceable as a matter of law. The PPOA never attempted to obtain nor received the required approval by its members to institute this action. The trial court properly dismissed the PPOA's complaint for lack of subject matter jurisdiction. The trial court's order is affirmed.

Affirmed.

Judges McGEE and GEER concur.

GARY A. CARPENTER, PLAINTIFF-APPELLANT v. STEPHEN REED AGEE AND DAVIS TRANSPORT, INC., DEFENDANTS-APPELLEES

No. COA04-768

(Filed 21 June 2005)

Process and Service— statutory presumption of valid service—failure to rebut

The trial court erred in an action for damages arising out of a motor vehicle accident by granting defendant's motion to dismiss based on insufficient service of the civil summons and complaint, because: (1) by filing a copy of the signed return receipt along with an affidavit that comports with N.C.G.S. § 1-75.10, plaintiff is entitled to a rebuttable presumption of valid service; and (2) defendant's single affidavit does not rebut the presumption when he merely states that he had not resided at the address to which service was addressed since 2002 and he does not state or otherwise present any evidence that his mother, who signed for the civil summons and complaint, was not authorized to accept service for him.

Judge GEER concurring.

Appeal by plaintiff from order entered 9 February 2004 and amended 18 February 2004 by Judge Richard D. Boner in Superior Court, Cleveland County. Heard in the Court of Appeals 2 February 2005.

Cerwin Law Firm, by Todd R. Cerwin, for plaintiff-appellant.

Dean and Gibson, LLP, by Rodney Dean, for defendant-appellee Stephen Reed Agee.

McGEE, Judge.

Gary Carpenter (plaintiff) appeals from an order entered 9 February 2004 and amended 18 February 2004 granting defendant Stephen Reed Agee's motion to dismiss. Defendant Davis Transport, Inc. (Davis) is no longer a party to this action, pursuant to plaintiff's voluntary dismissal of his claims against Davis filed on 16 December 2003.

Plaintiff filed a complaint on 4 March 2003 seeking damages for injuries he sustained in a motor vehicle collision on 21 August 2000,

that he alleged were caused by the negligence of Stephen Reed Agee (defendant). The civil summons and complaint were addressed to defendant by certified mail, return receipt requested, at an address in San Bernadino, California. The return receipt was signed by defendant's mother, Dixie Agee, at the same address, on 12 March 2003. Plaintiff filed an affidavit of service by certified mail and a copy of the signed return receipt on 25 March 2003. The affidavit averred that a copy of the civil summons and complaint was mailed by certified mail, return receipt requested, and that it was so received on 12 March 2003.

Defendant filed an answer to the complaint on 9 May 2003. Along with his answer, defendant served plaintiff with defendant's first set of interrogatories and request for the production of documents. Plaintiff served defendant with plaintiff's first set of interrogatories on 22 September 2003, to which defendant responded on 9 December 2003.

Defendant filed a motion to dismiss and an affidavit on 16 January 2004, claiming that he was never properly served with the civil summons and complaint. In his affidavit, defendant stated that although defendant's mother resided at the address where the civil summons and complaint were mailed, defendant had not resided at that address since 2002. The trial court granted defendant's motion to dismiss in an order entered 9 February 2004 and amended 18 February 2004.

Plaintiff contends that the trial court erred in granting defendant's motion to dismiss because plaintiff properly served defendant with the civil summons and complaint. Plaintiff argues that plaintiff's affidavit of service by certified mail, coupled with a copy of the signed return receipt, created a presumption of valid service that defendant has failed to rebut.

Rule 4(j)(1)(c) of our Rules of Civil Procedure permit service by certified mail "[b]y mailing a copy of the summons and of the complaint, . . . return receipt requested, addressed to the party to be served, and delivering to the addressee." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c) (2003). Once service by certified mail is complete, the serving party may make proof of service by filing an affidavit in accordance with N.C. Gen. Stat. § 1-75.10. N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2003). Under N.C. Gen. Stat. § 1-75.10 (2003), the affidavit must aver:

a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;

b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and

c. That the genuine receipt or other evidence of delivery is attached.

Such an affidavit, filed along with a return receipt signed by the individual who received the mail, "raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process[.]" N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2); *see also Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 490-91, 586 S.E.2d 791, 796 (2003); *Fender v. Deaton*, 130 N.C. App. 657, 663, 503 S.E.2d 707, 710 (1998), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999); *Steffey v. Mazza Construction Group*, 113 N.C. App. 538, 540-41, 439 S.E.2d 241, 243 (1994), *disc. review improvidently allowed*, 339 N.C. 734, 455 S.E.2d 155 (1995).

By filing a copy of the signed return receipt, along with an affidavit that comports with N.C. Gen. Stat. § 1-75.10, plaintiff is entitled to a rebuttable presumption of valid service. We find that defendant's single affidavit does not rebut the presumption in this case. In his affidavit, defendant merely asserts that he had not resided at the address to which service was addressed since 2002. However, defendant does not state or otherwise present any evidence that Dixie Agee, who signed for the civil summons and complaint, was not authorized to accept service for him. In the absence of such evidence, defendant has failed to rebut the statutory presumption of valid service. We therefore conclude that the Rule 4 requirements of service of process were met, and we reverse the trial court's order granting defendant's motion to dismiss.

Since this issue is dispositive of this case on appeal, we need not address plaintiff's remaining assignments of error.

Reversed.

Judge TYSON concurs.

Judge GEER concurs in the result with a separate opinion.

GEER, Judge, concurring in the result.

I agree with the majority that the trial court improperly granted defendant's motion to dismiss based on insufficient service. Because, however, I believe that defendant waived this defense, I concur in the result only.

Rule 12(h)(1) of the Rules of Civil Procedure provides: "A defense of . . . insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." Defendant filed no initial motion to dismiss, but rather relied upon his answer to assert his defenses. I believe the dispositive question for this appeal is whether defendant's answer waived the defense of insufficiency of process.

Plaintiff and defendant were involved in an accident on 21 August 2000. Accordingly, the statute of limitations ran on 21 August 2003. Plaintiff filed his complaint on 4 March 2003 and on 25 March 2003 filed an affidavit of service indicating that the complaint had been received on 12 March 2003. On 2 April 2003, defendant moved for an extension of his time to respond to the complaint until 12 May 2003. On 8 May 2003, defendant served his answer, interrogatories, and a request for amount of monetary relief sought.

Defendant's answer specifically raised the defenses of contributory negligence and the failure to state a claim for relief. In addition, defendant's answer included a catch-all fourth defense: "The Defendants plead all of the defenses set forth in Rule 12(b) of the North Carolina Rules of Civil Procedure. This Answer is subject to all said defenses and is specifically made without waiving any defense set forth in Rule 12(b) which is incorporated by reference." The answer never specifically mentioned the defense of insufficiency of service of process. Nor did defendant ever amend his answer to add that defense. Defendant did not explicitly raise any inadequacy of service until he filed his motion to dismiss on 16 January 2004.

Defendant cites no authority supporting his contention that his broadside defense incorporating by reference all of the defenses under Rule 12(b) is sufficient to avoid waiver under Rule 12(h)(1). I have been unable to find any such authority from this State, from the federal courts, or from any other state's courts. This absence of authority is hardly surprising given the plain language of North

Carolina's Rules of Civil Procedure, which are substantially similar to the Federal Rules of Civil Procedure on this issue.

Rule 8(b) provides that "[a] party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." Defendant contends that "it would be difficult to have a much more plain and concise statement than was raised by the Defendant in this Answer, which specifically incorporated Rule 12(b) defenses by reference." I do not agree that the fourth defense is either plain or concise. While Rule 8(b) does "carr[y] the theme of notice pleading over into responsive pleadings and defenses as well," 1 Gray Wilson, *North Carolina Civil Procedure* § 8-4, at 137 (2d ed. 1995), defendant has overlooked the "notice" part of "notice pleading." Defendant's catch-all paragraph incorporating seven possible defenses—including one, Rule 12(b)(6), already listed as defendant's third defense—hardly provided notice that defendant intended to challenge the sufficiency of service.

This Court has recently held that "[p]ursuant to Rule 12(h)(1) of the North Carolina Rules of Civil Procedure, defenses arising under Rule 12(b)(4) and 12(b)(5) must be *affirmatively plead* in a party's responsive pleadings, or are deemed thereafter waived." *Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App. 180, 185, 609 S.E.2d 456, 459 (2005) (emphasis added). Under Rule 8(c), defenses "constituting an avoidance or affirmative defense" must similarly be "affirmatively" set forth or are waived. *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989) (affirmative defense must be pled "with certainty and particularity"; a failure to do so "ordinarily results in its waiver"). Rule 8(c) explains what is required to affirmatively plead a defense: "Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved."

No one would suggest, in light of this requirement, that a bald assertion in an answer that the defendant was incorporating by reference all of the affirmative defenses listed in Rule 8(c) was sufficient to avoid waiver of one of the defenses included in that rule. *See* 5 Charles Alan Wright et al., *Federal Practice and Procedure* § 1274, at 617 (3d ed. 2004) (although an affirmative defense may be pled in general terms it must give the plaintiff "fair notice of the nature of the defense"). Yet, defendant's wholesale incorporation of Rule 12(b) is logically no different. There is no reasonable rationale

for requiring less specificity in pleading for Rule 12(b) defenses than for Rule 8(c) affirmative defenses, especially in light of Rule 12(b) and (h)'s purpose of ensuring that defenses specified in Rule 12 are resolved at an early stage in the litigation. Less specificity leads to delay in resolution.

This Court has also held that a defendant "fulfills his obligation to inform the court and his opponent of possible jurisdictional defects" when he "has alerted the opponent and given him the opportunity to cure any jurisdictional defect from the outset." *Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 248, 468 S.E.2d 600, 604, *disc. review denied*, 343 N.C. 514, 472 S.E.2d 19 (1996). I would hold that because defendant's answer never mentions Rule 12(b)(5) or the sufficiency of the service of process and because defendant's motion to dismiss specifically raising this defense was filed eight months after the answer and five months after the statute of limitations ran—thereby denying plaintiff any opportunity to cure any deficiency—defendant waived the defense under Rule 12(h)(1). *See also Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1096 (2d Cir. 1990) (defense of insufficiency of service waived despite answer's assertion of a lack of personal jurisdiction because: "[The defendant] did nothing to alert [the plaintiff] promptly that its lack-of-jurisdiction claim was in fact a contention that service of process was insufficient. . . . A defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitations has run, thereby depriving the plaintiff of the opportunity to cure the service defect.").

My conclusion is further supported by Rule 10(b) of the Rules of Civil Procedure, which provides that "[a]ll averments of claim or defense shall be made in numbered paragraphs, the contents of each of which be [sic] limited as far as practicable to a statement of a single set of circumstances . . . . [E]ach defense other than denials shall be stated in a separate . . . defense whenever a separation facilitates the clear presentation of the matters set forth." Because of the nature of the Rule 12(b) defenses—which rarely overlap—I believe that "the clear presentation" of the defenses requires that each defense be set forth separately.[1]

1. I recognize that in some special circumstances multiple defenses—such as subject matter jurisdiction and personal jurisdiction—may arise out of the same facts and justify consolidation in a single paragraph, but that is not the situation in the usual case.

Finally, I note that a catch-all defense such as the one relied upon here raises Rule 11 concerns. *See Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988) (holding that "the practice of 'throwing in the kitchen sink' at times may be so abusive as to merit Rule 11 condemnation," but finding no Rule 11 violation in that case). Under Rule 11(a), the attorney's signature on the answer "constitutes a certificate by him . . . that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . ." A defense that broadly incorporates by reference all of the defenses contained in Rule 12(b) without explanation or distinction among the defenses raises a red flag that the attorney has not conducted the required factual or legal inquiry necessary to determine whether those defenses are in fact applicable. For example, it is difficult to see how Rule 12(b)(1) (lack of subject matter jurisdiction) could possibly be relevant in this particular automobile accident litigation. A defendant's counsel cannot, under Rule 11, simply reference all possible defenses in order to avoid waiving a defense unless he or she has conducted the inquiry required to determine that the defense is viable.

For the foregoing reasons, I agree that the trial court erred in granting defendant's motion to dismiss.

KIMBERLY FAKHOURY, PETITIONER-APPELLEE v. KAREM FAKHOURY, RESPONDENT-APPELLANT, FOR THE ADOPTION OF K.K.F.

No. COA04-714

(Filed 21 June 2005)

Adoption— stepparent—consent—fraud—constructive fraud—public policy

The trial court did not err by concluding as a matter of law that respondent maternal grandfather/adoptive father's consent to petitioner stepparent's adoption of the minor child was not procured by fraud, because: (1) respondent cannot rely on the possibility that petitioner had accessed Internet divorce sites in establishing that petitioner made a false representation; (2) respondent was fully aware of the precarious status of the marriage; (3) assuming arguendo without deciding that a showing of

constructive fraud is sufficient to void a consent to adoption, respondent has failed to show that constructive fraud occurred; and (4) public policy of North Carolina as expressed in Chapter 48 mandates that respondent's motion to dismiss petitioner's petition be denied since it encourages the finality of adoptions and the prompt, conclusive disposition of adoption proceedings, it requires that the interests of the child take precedence over the interests of anyone else including those who are parties to the marriage, and the minor child has been raised by petitioner since January 2000 and considers petitioner his mother.

Appeal by respondent from order dated 22 October 2003, *nunc pro tunc* 14 August 2003, by Judge Paul G. Gessner in District Court, Wake County. Heard in the Court of Appeals 2 March 2005.

The Sandlin Law Firm, PA, by Deborah Sandlin, V.A. Davidian, III, and Debra A. Griffiths, for petitioner-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for respondent-appellant.

McGEE, Judge.

Karem Fakhoury (respondent) is the maternal grandfather and adoptive father of K.K.F. K.K.F. was born 2 June 1998 to respondent's daughter, Raisha. In mid-December 1999, Raisha asked respondent to raise K.K.F. Respondent agreed on the condition that respondent be permitted to adopt K.K.F. Raisha and K.K.F.'s biological father consented to the adoption, and respondent petitioned for the adoption of K.K.F. on 7 January 2000.

At the time respondent petitioned for the adoption of K.K.F., respondent and Kimberly Fakhoury (petitioner) were living together and discussing marriage. However, they did not yet have specific wedding plans. Respondent and petitioner agreed that petitioner would adopt K.K.F. pursuant to a stepparent adoption. Respondent and petitioner agreed to wait for two years after they were married for petitioner to adopt K.K.F. so that a home study would not need to be completed. *See* N.C. Gen. Stat. § 48-2-501(d) (1999). Respondent and petitioner were married on 27 April 2000.

Respondent signed a consent to the adoption on 19 September 2002, and petitioner filed a petition to adopt K.K.F. on 20 September 2002. Respondent's statutory ability to revoke the consent expired on 26 September 2002. *See* N.C. Gen. Stat. § 48-3-608(a) (2001).

Respondent and petitioner separated on 20 November 2002 when petitioner left the marital home. Respondent testified that it was a "total surprise" and that petitioner had not previously indicated that she was contemplating leaving respondent. However, respondent testified about several incidents of marital discord that occurred prior to 20 November 2002. Respondent testified that petitioner had previously separated from him for three or four nights. Respondent also testified that he and petitioner had discussed going to marriage counseling. Respondent testified that in June 2002, he and petitioner disagreed about their vacation plans in Myrtle Beach, and that while they were in Myrtle Beach, they had a disagreement about respondent's drug use.

Respondent filed a motion to dismiss petitioner's petition to adopt K.K.F. on 25 February 2003, alleging that respondent's consent to the adoption was procured by fraud and was therefore void. The trial court impaneled an advisory jury and the matter was heard before the trial court and the advisory jury on 13 and 14 August 2003. *See* N.C. Gen. Stat. § 1A-1, Rule 39(c) (2003). Respondent requested that the trial court instruct the jury on both actual fraud and constructive fraud. Petitioner objected to an instruction based on constructive fraud. The trial court instructed the jury on actual fraud only.

The advisory jury rendered its verdict on 14 August 2003 and found that petitioner did not fraudulently induce respondent to execute the consent to petitioner's adoption of K.K.F. The trial court took the case under advisement and in an order dated 22 October 2003, *nunc pro tunc* 14 August 2003, made the following findings of fact:

> 18. The parties had separated in May, 2001 for about five days. Petitioner stayed with her sister, Rhonda Green[,] during that separation. Despite the fact that the parties separated, [r]espondent indicated that it was still his intention at that time that [p]etitioner adopt [K.K.F.].
>
> . . . .
>
> 22. On June 15, 2002, the parties had a disagreement that led to [p]etitioner leaving the residence with the parties' daughter and spending the night at her mother's home. . . . Petitioner was very upset about [r]espondent's use of marijuana in the home. Petitioner had refused to go on vacation to Myrtle Beach because of [respondent's] marijuana use and the

events that had transpired in June 2001. [Petitioner] and [r]espondent had gone to Myrtle Beach in June 2001 and [r]espondent smoked a significant amount of marijuana in the presence of [p]etitioner and [K.K.F.] on that trip. Petitioner was pregnant at that time and became very upset and angry at [r]espondent's refusal to stop smoking the marijuana. She left the condominium and took a walk with [K.K.F.] to get away from the marijuana. [Petitioner] became so upset that she called her mother.

23. By the spring and summer of 2002, [r]espondent's drug use had become a very significant issue to [p]etitioner. The parties again planned to go to the beach. Petitioner refused to go to the beach because of the marijuana use. After [p]etitioner refused to go to the beach in 2002, [r]espondent told her that if she would go to the beach then they could talk about their problems. Petitioner agreed to go to the beach and [r]espondent smoked marijuana on that vacation. This left [p]etitioner very stressed and it is not surprising that she sought medication for anxiety. Likewise, it is not surprising that [p]etitioner sought a counselor as it is evident that the parties were arguing much of the time about money and drugs.

. . . .

28. Given the arguments and status of the marriage at the time [r]espondent gave his consent for the adoption, he knew or should have known that there was some possibility that the parties would separate. Further, given the fact that [r]espondent had been represented by Bobby Mills, one of the two members of the American Academy of Adoption Attorneys in North Carolina, in the initial adoption, he should have had a greater awareness of the consequences of giving his consent for the adoption. Evidence showed that [p]etitioner had indicated many times to [r]espondent that she had . . . serious concerns and problems with his drug usage.

. . . .

32. Respondent hired Capital City Consulting to run an analysis of the hard drive on the family computer. . . .

33. . . . . Mr. Marcus [Capital City Consulting employee] found that there had been two web sites accessed with the words

divorce in them. One web site was www.divorcecare.com and the other was www.fbcla.org.

. . . .

36. No evidence was presented from either the expert nor any other source regarding the content of the web sites entitled www.divorcecare.com and www.fbcla.org. The actual websites were not produced and [were] not entered. The [trial] court can draw no conclusions regarding the contents of the sites or what may have been accessed. The web sites may very well have contained information on self care, comfort, solace, reflections, etc. To draw any inference regarding the content of the sites would be purely speculative.

The trial court then made the following conclusions of law:

3. Respondent has failed to prove by clear and convincing evidence that [p]etitioner procured [r]espondent's consent for the adoption through fraud.

4. Respondent's consent to the adoption of his adopted son, [K.K.F.][,] was voluntary and procured without fraud and duress.

5. Petitioner did not fraudulently conceal any material fact from [r]espondent in procuring his consent for the adoption.

6. No good cause exists to delay the entry of the adoption order.

The trial court thereafter denied respondent's motion to dismiss petitioner's adoption petition. Respondent appeals.

We first note that respondent has failed to assign error to any of the trial court's findings of fact. Therefore, all of the trial court's findings of fact are deemed conclusive on appeal. *Draughon v. Harnett Cty Bd. of Educ.*, 166 N.C. App. 449, 451, 602 S.E.2d 717, 718 (2004) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

Respondent assigns error to the trial court's conclusion of law that respondent's consent to petitioner's adoption of K.K.F. was not procured by fraud. Conclusions of law are generally upheld when they are supported by the findings of fact. *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984).

Consent to an adoption is void when "[b]efore the entry of the adoption decree, the individual who executed the consent establishes

by clear and convincing evidence that [the consent] was obtained by fraud or duress[.]" N.C. Gen. Stat. § 48-3-609(a)(1) (2003). The elements of fraud are:

> "(1) That [petitioner] made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when [s]he made it, [petitioner] knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that [petitioner] made the representation with intention that it should be acted upon by [respondent]; (5) that [respondent] reasonably relied upon the representation and acted upon it; and (6) that [respondent] thereby suffered injury."

In re Baby Boy Shamp, 82 N.C. App. 606, 612, 347 S.E.2d 848, 852 (1986), *disc. review denied*, 318 N.C. 695, 351 S.E.2d 750 (1987) (quoting *Keith v. Wilder*, 241 N.C. 672, 675, 86 S.E.2d 444, 446 (1955)).

Respondent argues that petitioner made a false representation when petitioner failed to reveal that, prior to obtaining respondent's consent to the adoption, she had accessed "Internet divorce sites," and she had told a counselor and a physician that she was planning on separating from respondent. We disagree. We first find that respondent cannot rely on the possibility that petitioner had accessed "Internet divorce sites" in establishing that petitioner made a false representation. The trial court's finding of fact which, as mentioned earlier, is conclusive and binding on this Court, states that no evidence was presented regarding the content of the "Internet divorce sites." Therefore, assuming *arguendo* that petitioner did in fact access "Internet divorce sites," the lack of evidence regarding the content of the web sites precludes a finding that, by visiting the web sites, petitioner made any false representations about her intentions or the status of the marriage.

In addition, the trial court found, and the evidence was clear, that respondent was fully aware of the precarious status of the marriage. Petitioner repeatedly indicated to respondent that she was unhappy in the marriage. Respondent and petitioner had several arguments about respondent's drug use. Petitioner had left the marital home and separated from respondent for several days in May 2001, and again for one night on 15 June 2002. Furthermore, the trial court specifically found that respondent "knew or should have known that there was some possibility that the parties would separate." We find that

the trial court's findings of fact support its conclusions of law that petitioner did not fraudulently conceal any material facts from respondent and that she did not procure respondent's consent to the adoption through fraud.

Respondent next assigns as error the trial court's failure to apply a constructive fraud standard in determining whether the consent to the adoption was procured by fraud. Petitioner contends that a consent to an adoption is void for fraud only upon a showing of actual fraud, and that a showing of constructive fraud is insufficient. Assuming *arguendo*, without deciding, that a showing of constructive fraud is sufficient to void a consent to adoption, we find that respondent has failed to show that constructive fraud occurred.

A claim for constructive fraud is shown by establishing "(1) a relationship of trust and confidence, (2) that [petitioner] took advantage of that position of trust in order to benefit [herself], and (3) that [respondent] was, as a result, injured." *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). "Put simply, a [respondent] must show (1) the existence of a fiduciary duty, and (2) a breach of that duty." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823, *disc. review denied*, 356 N.C. 164, 568 S.E.2d 196 (2002).

Respondent claims that petitioner breached the fiduciary duty between spouses when petitioner failed to disclose that she had told a counselor and a physician that she was separating from respondent. We disagree. Petitioner had left respondent twice before and petitioner had confronted respondent numerous times about her unhappiness with his drug use. Petitioner repeatedly told respondent that she was unsatisfied in the marriage and demonstrated, through leaving him twice before, that she was willing and able to separate from him. Therefore, petitioner did not breach her fiduciary duty to respondent and did not commit constructive fraud.

The final assignment of error addressed in respondent's brief contends that public policy opposes a stepparent adoption when the stepparent, at the time of filing the petition for adoption, does not intend to stay in the marriage with the legal parent. Respondent argues that the public policy of North Carolina is to " 'endeavor[] to maintain the marital state[,]' " *Vann v. Vann*, 128 N.C. App. 516, 519, 495 S.E.2d 370, 372 (1998) (quoting *Bruce v. Bruce*, 79 N.C. App. 579, 583, 339 S.E.2d 855, 858, *disc. review denied*, 317 N.C. 701, 347 S.E.2d

36 (1986)), and that this policy is not served by allowing a stepparent adoption under these facts.

While we acknowledge the State's interest in preserving marital relations, the State also has a stated public policy interest in providing children with stable and permanent homes. In Chapter 48 of the North Carolina General Statutes, our General Assembly has asserted that:

> (a) The General Assembly finds that it is in the public interest to establish a clear judicial process for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.
>
> (b) With special regard for the adoption of minors, the General Assembly declares as a matter of legislative policy that:
>
> (1) The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption[.]
>
> . . . .
>
> (c) In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor.
>
> (d) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.

N.C. Gen. Stat. § 48-1-100 (2003).

We find that the public policy of North Carolina as expressed in Chapter 48 mandates that respondent's motion to dismiss petitioner's petition be denied. Chapter 48 encourages the finality of adoptions

and the "prompt, conclusive disposition of adoption proceedings[.]" N.C. Gen. Stat. § 48-1-100(a). Chapter 48 also requires that the interests of the child take precedence over the interests of anyone else, including those who are parties to the marriage. N.C. Gen. Stat. § 48-1-100(c). In this case, K.K.F. has been raised by petitioner since January 2000 and considers petitioner his mother. Furthermore, a decree of adoption was entered on 30 October 2003 establishing petitioner as K.K.F.'s adoptive mother. In order to promote the public policy as stated in Chapter 48, we affirm the trial court's order denying respondent's motion to dismiss petitioner's petition.

We deem those assignments of error not addressed in respondent's brief to be abandoned. N.C. R. App. P. 28(b)(6).

Affirmed.

Judges TYSON and GEER concur.

RONALD C. COX, EMPLOYEE, PLAINTIFF v. CITY OF WINSTON-SALEM, EMPLOYER, SELF INSURED, DEFENDANT

No. COA04-1037

(Filed 21 June 2005)

1. Workers' Compensation— credit—disability payments—made while claim pending

While an employer who pays benefits while contesting the claim may be entitled to a credit against the subsequently determined claim, it has not been held that an employer is necessarily entitled to a credit for payments received by an injured employee pursuant to a program partially funded by the employee. Here, there was no abuse of discretion in the Industrial Commission's decision to deny a city a credit for disability payments made to a city worker from the Local Government Employees' Retirement System (LGERS).

2. Workers' Compensation— disability calculation—longevity payment

There was evidence to support the Industrial Commission's calculation of the average weekly wage for a disability plaintiff

where the calculation included a longevity payment that plaintiff received in the last year before his injury but which was not guaranteed.

3. Workers' Compensation— appeal—attorney fees—discretion of Commission

The Industrial Commission did not err by denying attorney fees to a workers' compensation plaintiff where the case had been appealed and remanded. Although N.C.G.S. § 97-88 allows the Commission to order payment of attorney fees to the plaintiff for an insurer's unsuccessful appeal, the plain language of the statute and the cases decided under it establish that the decision to award attorney fees is in the discretion of the Commission.

Appeal by plaintiff and defendant from opinion and award filed 5 April 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 March 2005.

Robert A. Lauver for plaintiff appellant-appellee.

Wilson & Iseman, L.L.P., by S. Ranchor Harris, III, for defendant appellant-appellee.

McCULLOUGH, Judge.

On 31 August 1998, plaintiff Ronald C. Cox fell into an open manhole and injured his shoulder while working as a wastewater pump mechanic for defendant City of Winston Salem. This injury exacerbated problems related to a preexisting tumor in Cox's right sternoclavicular joint. After his treating physicians advised plaintiff to remain out of work indefinitely, plaintiff began drawing long-term disability retirement from the Local Governmental Employees' Retirement System (LGERS).

In an opinion and award entered 10 September 2001, the North Carolina Industrial Commission awarded Cox temporary total disability benefits, granted the City a partial credit for Cox's LGERS' disability retirement payments, and denied Cox's request for attorney's fees. Cox filed a motion for reconsideration with respect to whether the City should receive a credit for the LGERS' disability payments; the Commission denied this motion. On an appeal by both parties, this Court affirmed the award of temporary total disability benefits, but remanded with instructions that the Commission, *inter alia*: (1) make findings to clarify how it determined Cox's average weekly

wage for the purpose of determining his compensation rate; (2) hear additional evidence and determine whether the City is entitled to a credit for LGERS' disability payments to Cox in light of new information presented with Cox's motion for reconsideration, and (3) reconsider whether Cox is entitled to attorney's fees in light of its conclusion on the credit issue. *Cox v. City of Winston-Salem*, 157 N.C. App. 228, 238-39, 578 S.E.2d 669, 677 (2003).

On remand, the Commission received additional testimony concerning the LGERS' disability fund and entered an opinion and award on 5 April 2004 in which it adjusted Cox's average weekly wage and provided an explanation of its calculations, denied the City credit for LGERS' disability retirement payments to Cox, and again denied Cox's request for attorney's fees. From the 5 April 2004 opinion and award, both parties now appeal.

THE CITY'S APPEAL

I.

[1] We first address the City's appeal. In its first argument, the City contends that the competent evidence of record does not support the denial of a credit for the LGERS' disability payments made to Cox. We do not agree.

The standard of review for an opinion and award of the North Carolina Industrial Commission is "(1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). "This Court reviews the Commission's conclusions of law *de novo*." *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

With respect to the granting of a credit, the Workers' Compensation Act provides the following guidance:

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the

> amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. Unless otherwise provided by the plan, when payments are made to an injured employee pursuant to an employer-funded salary continuation, disability or other income replacement plan, the deduction shall be calculated from payments made by the employer in each week during which compensation was due and payable, without any carry-forward or carry-back of credit for amounts paid in excess of the compensation rate in any given week.

N.C. Gen. Stat. § 97-42 (2003). Pursuant to the statute, "[t]he decision of whether to grant a credit is within the sound discretion of the Commission." *Shockley v. Cairn Studios Ltd.*, 149 N.C. App. 961, 966, 563 S.E.2d 207, 211 (2002), *disc. review denied*, 356 N.C. 678, 577 S.E.2d 888 (2003). Therefore, this Court will not disturb the Commission's grant or denial of a credit to the employer on appeal in the absence of an abuse of discretion. *Id.*

Our Supreme Court has held that, if an employer contests a worker's compensation claim, but nevertheless pays the employee wage-replacement benefits which are fully funded by the employer and are not due and payable to the employee, then the employer "should not be penalized by being denied full credit for the amount paid as against the amount which [is] subsequently determined to be due the employee under workers' compensation." *Foster v. Western-Electric Co.*, 320 N.C. 113, 117, 357 S.E.2d 670, 673 (1987); *see also Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 576, 468 S.E.2d 396, 399 (1996) (holding that the Commission erred by denying employer a credit where employer contested the claim but provided the employee with three months of full salary, followed by partial salary for the remaining time out of work). The failure to award such a credit constitutes an abuse of discretion by the Commission. *Thomas v. B.F. Goodrich*, 144 N.C. App. 312, 319 n.2, 550 S.E.2d 193, 197 n.2, *disc. review denied*, 354 N.C. 228, 555 S.E.2d 276 (2001). However, neither the Supreme Court nor this Court has held that an employer is necessarily entitled to a credit against a worker's compensation award for payments received by an injured employee pursuant to a benefits program that has been partially funded by the employee. *See Foster*, 320 N.C. at 117 n.1, 357 S.E.2d at 673 n.1 ("We express no opinion as to whether payments made to a claimant under a plan to which the claimant contributed are within the purview of

N.C.G.S. § 97-42."); *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 605, 532 S.E.2d 207, 214 (2000) ("The competent evidence in the record does not indicate that the employee contributed to this disability plan. Accordingly, we conclude that the [employer] is entitled to a credit for the disability benefits.").

In the instant case, it is undisputed that Cox was required to contribute six percent of his pay to receive benefits under LGERS. LGERS is administered in accordance with the North Carolina General Statutes, which permit a disabled employee with five or more years of creditable service to "be retired . . . on a disability retirement allowance." N.C. Gen. Stat. § 128-27(c) (2003).

> Upon retirement for disability . . . , a member [employee] shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

N.C. Gen. Stat. § 128-27(d4) (2003). The term "retirement allowance" is statutorily defined to include both employer and employee contributions into the retirement system. N.C. Gen. Stat. § 128-21(20), (3), (15) (2003).

The City presented the Commission with deposition testimony from Clark Case, its financial system and employee accounting manager. Case testified that he had developed an "acid test" to determine whether the City or its employees were paying for LGERS' disability retirement benefits. For the purpose of this test, Case considered the impact of no one taking disability retirement. According to Case, if this happened, employees would still be required to contribute six percent of their pay to fund their service retirement, but the City's contribution amount would be greatly reduced because it would no longer have to pay for disability. Case further posited that, if all employees took disability retirement, the employee contribution into the retirement system would remain six percent of their pay, but the City's required contribution would be greatly increased. Case also opined that, because Cox was eligible to request a refund of his contributions plus four percent interest, he "didn't contribute anything" to pay for his disability benefits.

Cox presented the deposition of the Deputy Director of the State Retirement System, J. Marshall Barnes, III, who testified that

> the benefits provided by the system, both service retirement and disability, are funded in part by the employer and funded in part by the employee. . . . The employer contributions for . . . all of the employers participating in the system, and again remember it's a multi-employer plan or actually lumped into one fund which is the Pension Accumulation Fund. So all the employer monies go into the Pension Accumulation Fund. The employee contributions go into the Annuity Savings Fund. And we actually keep individual records of the employee contributions. We do not keep individual records of the employer contributions. Pensions are paid out of the Pension Accumulation Fund, whether it be a disability or service, it's paid from the Pension Accumulation Fund. When a person retires, the amount of money their contributions and interest are credited to their account and the Annuity Savings Fund [comprised of employee contributions] is actually transferred from that fund to the Pension Accumulation Fund. Again from which all pensions are paid.

Thus, Barnes opined that Cox's disability benefits were not entirely funded by the City.

In its 5 April 2004 opinion and award, the Commission made the following finding of fact:

> [A]fter considering the additional depositions of Mr. Barnes and Mr. Case, the Full Commission finds that the disability retirement allowance benefits that were paid to plaintiff beginning in October 1999 through the Local Governmental Employees' Retirement System (a defined benefit plan), were not fully funded by defendant-employer, as the program is a joint contributory program whereby the employee is required to contribute six percent of pay for the benefits as his cost.

The Commission concluded that the City "is not entitled to a credit for benefits paid . . . pursuant to a disability retirement plan to which the defendant-employer and employee jointly contributed."

Barnes' testimony provides competent record evidence to support the Commission's finding of fact, and this finding supports the Commission's conclusion of law. Moreover, on the facts of the instant case, we discern no abuse of discretion in the Commission's decision

to deny the City a credit for disability retirement payments made to Cox. This assignment of error is overruled.

II.

[2] In its second argument on appeal, the City contends that on remand the Commission erroneously determined Cox's average weekly wage and, therefore, his weekly compensation. We do not agree.

"[W]here the incapacity for work resulting from [a compensable] injury is total, the employer shall pay or cause to be paid . . . to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of his average weekly wages . . . ." N.C. Gen. Stat. § 97-29 (2003). The term "average weekly wages" is defined as

> the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . ; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.

N.C. Gen. Stat. § 97-2(5) (2003).

In the instant case, it is not disputed that, in the year immediately preceding his injury, Cox earned $28,295.09 and was also paid a longevity bonus of $600.29 and an overtime adjustment for longevity of $57.64. At the hearing before the Commission, the City contended that the longevity payments were not guaranteed and could not be considered as part of Cox's wages. The Commission made the following finding of fact:

> [Cox]'s correct average weekly wage is $570.95 and the compensation rate is $380.65. These figures are determined by taking plaintiff's total earnings of $28,295.09, together with the longevity bonus of $600.29 and the overtime adjustment for longevity of $57.64 for a total of $28,953.02. This total gross earnings amount is then divided by 50.71 (52 weeks less 1.29 weeks, a period of lost time exceeding seven consecutive days).

This finding is supported by competent evidence in the record and must be affirmed. This assignment of error is overruled.

COX'S APPEAL

[3] In his only argument on appeal, Cox contends that the Commission erred by denying his motion for attorney's fees. We do not agree.

Cox's motion for attorney's fees was made pursuant to N.C. Gen. Stat. § 97-88 (2003), which provides that

> [i]f the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

This provision "permits the Full Commission or an appellate court to award fees and costs based on an insurer's unsuccessful appeal." *Rackley v. Coastal Painting*, 153 N.C. App. 469, 475, 570 S.E.2d 121, 125 (2002). It does not require that the appeal be brought without reasonable ground for plaintiff to be entitled to attorney's fees. *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 53, 464 S.E.2d 481 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). This Court reviews the Commission's ruling on a motion for attorney's fees for an abuse of discretion. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 394, 298 S.E.2d 681, 683 (1983).

In the instant case, the Commission's 10 September 2001 opinion and award denied Cox's motion for attorney's fees pursuant to N.C. Gen. Stat. § 97-88 because the City, which is self-insured, "was successful on appeal with regard to entitlement to a credit [for disability retirement payments to Cox]." In its 5 April 2004 opinion and award, which was entered on remand from this Court, the Commission determined that the City is not entitled to a credit and again concluded that Cox "is not entitled to attorney['s] fees pursuant to N.C. Gen. Stat. § 97-88." Cox argues that the Commission could not deny his motion for attorney's fees because the Commission "revers[ed] its previous error on the credit issue, and thereby eliminat[ed] its previously expressed ground for the denial of the motion for attor-

ney's fees." This position is contrary to the plain language of N.C. Gen. Stat. § 97-88 and the cases decided under it, all of which establish that the decision to award attorney's fees is consigned to the **discretion** of the Commission.

After careful review, we are unpersuaded that the Commission abused its discretion by denying Cox's motion for attorney's fees. This assignment of error is overruled.

Affirmed.

Judges HUNTER and LEVINSON concur.

JASON RANDALL CLARK, PLAINTIFF v. SUSAN DAWN PEARSON GRAGG, DEFENDANT

No. COA04-200

(Filed 21 June 2005)

1. Contempt— civil—child support—findings

An order holding plaintiff in civil contempt for not complying with child support consent orders was remanded for further findings on willfulness and ability to pay.

2. Appeal and Error— appeal bond—money judgment—civil contempt—child support

Orders for the payment of child support are money judgments under N.C.G.S. § 1-289. The trial court had the authority to require an appeal bond where the court had held plaintiff in civil contempt for failure to pay child support and ordered a payment plan for the past due amount.

Appeal by plaintiff from orders entered 18 November 2003 and 4 December 2003 by Judge Robert M. Brady in Caldwell County District Court. Heard in the Court of Appeals 10 January 2005.

W. C. Palmer, Attorney at Law, PLLC, by W. C. Palmer, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

GEER, Judge.

Plaintiff Jason Randall Clark appeals the order of the trial court holding him in civil contempt for failure to comply with prior orders requiring him to maintain health insurance coverage for his minor child and pay half of her uninsured medical, orthodontic, and dental bills. Plaintiff argues on appeal that the trial court erred by (1) holding him in civil contempt without finding that he had the ability to comply with the previous court orders and (2) requiring that he file a bond to stay the court's order pending appeal. We hold that the trial court did not err in requiring an appeal bond, but that the trial court's order fails to make sufficient findings regarding plaintiff's willfulness in failing to comply with the previous court orders. Accordingly, we reverse and remand for further proceedings.

Facts

Plaintiff originally commenced this action on 16 December 1994 by filing a complaint against defendant Susan Dawn Pearson Gragg seeking visitation with his child. The parties entered into a consent judgment regarding the custody of the minor child on 19 December 1994. That judgment provided for joint custody, but specified that defendant would have sole care, custody, and control of the child subject to visitation by plaintiff. Additionally, the judgment ordered plaintiff (1) to pay all medical premiums for the child; (2) to be equally responsible for payment of the insurance deductible, dental expenses, and orthodontic expenses; and (3) to pay defendant $200.00 per month in child support. On 19 February 1996, the trial court entered a second consent order that set out requirements regarding the transfer of the child for visitation, ordered plaintiff to make all child support payments to the Caldwell County Clerk of Superior Court, and required plaintiff to supply a copy of his insurance card to the child's doctors.

On 25 September 2003, defendant filed a motion seeking an order holding plaintiff in contempt of the December 1994 and February 1996 orders. The motion stated that plaintiff had, in violation of those orders, failed to pay medical premiums for his child; failed to pay his share of medical, dental, and orthodontic expenses; and failed to provide his insurance card to the child's doctors. Plaintiff was served with an order to show cause and the trial court conducted an evidentiary hearing on 6 November 2003.

The court filed its order holding plaintiff in civil contempt on 14 November 2003. The court ordered: "The Plaintiff is in Civil Contempt

of Court and shall be incarcerated in the Caldwell County Jail indefinitely, but by and with his consent, he may purge himself from this Contempt by paying $2,000.00 into the Office of the Clerk of Superior Court of Caldwell County prior to his release." The order further provided that upon plaintiff's release, he was required to pay $100.00 per month until the remaining past-due amount of $1,612.44 was paid in full.

Plaintiff subsequently filed a timely notice of appeal. He also filed a motion to stay the court's order, asserting that "the Plaintiff has no means with which to comply with the Order." On 4 December 2003, the trial court entered an order staying commitment of plaintiff to jail pending appeal. The court, however, also ordered plaintiff to "post an Appeal Bond secured by sureties satisfactory to the Court that binds the Plaintiff and the sureties to pay the amount of Three Thousand Six Hundred Twelve and 44/100 Dollars ($3,612.44) in this case into the Office of the Clerk of Court of Superior Court of Caldwell County to be disbursed to the Defendant if and when the Court's judgment is affirmed on appeal." On 4 December 2003, plaintiff filed the required bond. He has also noticed appeal from the order requiring the bond.

I

[1] Plaintiff's first assignment of error challenges the trial court's entry of an order holding him in civil contempt on the grounds that "[t]he Court must find facts and the evidence must support such finding that the Plaintiff had the present ability *to* comply with the original support order. There is no such adequate finding and there is no evidence to support any such finding." In a civil contempt proceeding, the trial court must address a party's "ability to comply" in two separate respects.

First, in order to find a party in civil contempt, the court must find that the party acted willfully in failing to comply with the order at issue. *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002). "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Id.* Therefore, in order to address the requirement of willfulness, "the trial court must make findings as to the ability of the plaintiff to comply with the court order during the period when in default." *Id.* at 119, 562 S.E.2d at 596. *See also Goodson v. Goodson*, 32 N.C. App. 76, 80, 231 S.E.2d 178, 181 (1977) ("In order to hold a parent in contempt for failure to pay child support in accordance with a decree, the failure must be wilful. In order to find the failure wilful, there must be *par-*

ticular findings of the ability to pay during the period of delinquency." (emphasis added)).

Second, once the trial court has found that the party had the means to comply with the prior order and deliberately refused to do so, "the court may commit such [party] to jail for an indefinite term, that is, until he complies with the order." *Bennett v. Bennett*, 21 N.C. App. 390, 393-94, 204 S.E.2d 554, 556 (1974). At that point, however, the court must also find that the party possesses the means to avoid jail by complying with the terms specified by the contempt order. *Id.* at 394, 204 S.E.2d at 556. In other words, in a civil contempt case, if the trial court orders the party imprisoned unless he pays the full amount of any arrearages, then the court must find that the party has the present ability to pay the total outstanding amount. *See also McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985) ("[T]hese statutes require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt.").

Although plaintiff's assignment of error and his brief are not as clear as we would prefer, it appears that plaintiff is arguing on appeal that the trial court failed to make adequate findings regarding plaintiff's willfulness in violating the consent orders.[1] Plaintiff does not include any specific argument that he could not pay the $2,000.00 that, according to the order, was required "by and with his consent" to purge him of contempt. Nor does he contend that he cannot comply with the requirement that he pay $100.00 per month until the remaining amount due is paid in full. We, therefore, have limited our consideration to the question whether the trial court made adequate findings of willfulness.

We agree that in holding plaintiff to be in civil contempt for failure to comply with the two consent orders, the trial court never made the findings necessary to establish that plaintiff's non-compliance was willful. Indeed, the court never actually found that plaintiff's non-compliance was "willful." Further, the trial court never specifically found that plaintiff had the means to comply with the orders during the period when he was in default. *See Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 393 (1966) ("[T]his Court has required the trial courts to find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default.").

1. Plaintiff repeatedly refers to his ability to comply with "the original support order," "the prior Consent Order," and "the prior order."

The only findings of fact relating to plaintiff's ability to pay include:

> 14. The Plaintiff is an able-bodied, 32 year old, who attended high school up to the tenth grade. He has no military background. His work experience includes running a Tenon machine in the furniture industry. The plaintiff has skills in the furniture industry, but prefers to work in landscaping or construction. The Plaintiff has worked odd-jobs for himself and for others. The Plaintiff has been paid in cash. The Plaintiff worked for 8 months last year as a brick mason for Jones Rock Mason, and earned $8.00 per hour and worked forty-hour weeks, with no overtime.
>
> . . . .
>
> 16. The Court finds that the Plaintiff is like an ostrich, burying his head in the sand, in [that] he believes that if he does not see the minor child's medical bills, that he will not have to pay them. The Plaintiff believes ignorance is bliss.
>
> . . . .
>
> 18. While [the] Court does not disbelieve that the Plaintiff would prefer to work at an outside job, when a child is in the equation, the Plaintiff has to do what is necessary for the child.

Our appellate courts have previously held that almost identical findings are insufficient, standing alone, to support the finding of willfulness necessary to hold a party in civil contempt.

In *Mauney*, 268 N.C. at 257-58, 150 S.E.2d at 394, our Supreme Court held that the following finding of fact was not a sufficient basis for the conclusion that the non-paying party's conduct was willful in the absence of a finding that defendant had in fact been able to make the required payments during the period in which he was in arrearage:

> Judge Martin found that the defendant "is a healthy, able bodied man, 55 years old, presently employed in the leasing of golf carts and has been so employed for many months; that he owns and is the operator of a Thunderbird automobile; that he has not been in ill health or incapacitated since the date of [the] order [requiring payment of alimony] entered on the 5th day of October, 1964; that the defendant has the ability to earn good wages in that he is a trained and able salesman, and is experi-

> enced in the restaurant business; and has been continuously employed since the 5th day of October, 1964; that since October 5, 1964, the defendant has not made any motion to modify or reduce the support payments."

Id. at 255, 150 S.E.2d at 392. Likewise, in *Hodges v. Hodges*, 64 N.C. App. 550, 553, 307 S.E.2d 575, 577 (1983), this Court reversed an order for civil contempt because

> [o]ur Supreme Court has held that a trial court's findings that a defendant was healthy and able-bodied, had been and was presently employed, had not been in ill-health or incapacitated, and had the ability to earn good wages, without finding that defendant presently had the means to comply, do not support confinement in jail for contempt.

Id. See also Yow v. Yow, 243 N.C. 79, 84, 89 S.E.2d 867, 871-72 (1955) (setting aside civil contempt decree when the trial court found only that the defendant was employed as a manager of a grocery and did not specifically find that the defendant possessed the means to comply with the prior orders during the period that he was in default).

The trial court, however, did include in its conclusions of law a finding that "the Plaintiff has the present ability to comply *with at least a portion* of the Orders of this Court." (Emphasis added.) Even if we construe this finding to refer to plaintiff's ability to comply with the prior consent judgments and not as support for the court's requiring payment of $2,000.00, it is not sufficient.[2] This Court has held that a finding of fact that a party has had the ability to pay as ordered "justif[ies] a conclusion of law that defendant's violation of the support order was willful . . . ." *McMiller*, 77 N.C. App. at 809, 336 S.E.2d at 135. In this case, however, the trial court found only that plaintiff had the ability to pay "a portion" of the prior orders. In *Green v. Green*, 130 N.C. 578, 578-79, 41 S.E. 784, 785 (1902), our Supreme Court held that such a finding is insufficient to support an order of civil contempt. *Id.* (holding that "[c]learly" a finding of fact that " 'defendant could have paid at least a portion of said money, as provided in said order' " could not support an order of contempt based on a failure to pay alimony).

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2. As explained above, the trial court was also required to make findings of fact regarding plaintiff's ability to make the payment necessary to purge himself of contempt. The most reasonable reading of this finding is that the trial court was determining that plaintiff had the ability to pay a portion of the arrearage in the amount of $2,000.00.

Accordingly, we must reverse the trial court's order and remand for further findings of fact. The trial court must make specific findings addressing the willfulness of plaintiff's non-compliance with the prior consent orders, including findings regarding plaintiff's ability to pay the amounts provided under those prior orders during the period that he was in default.

II

[2] Plaintiff also assigns error to the trial court's order requiring that he file an appeal bond. Plaintiff does not argue that he lacked the ability to comply with the requirement to post a bond; indeed, he did comply. Instead, he contends that the General Statutes do not provide for a bond under the circumstances of this case. Plaintiff has overlooked N.C. Gen. Stat. § 1-289 (2003).

Under N.C. Gen. Stat. § 1-289, no judgment directing the payment of money is stayed pending an appeal unless a bond is posted. That statute provides in pertinent part:

> (a) If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal, except as provided in subsection (b) of this section.

Although plaintiff complains that the trial court ordered the bond *ex mero motu* in response to his motion for a stay, the statute, by its plain language, conditions a stay upon the posting of a bond.

As this Court has previously observed, "[o]ur courts have construed orders for the payment of alimony, alimony *pendente lite*, child support, and counsel fees to be money judgments under G.S. 1-289." *Berger v. Berger*, 67 N.C. App. 591, 600, 313 S.E.2d 825, 831, *disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984). *See also Faught v. Faught*, 50 N.C. App. 635, 639, 274 S.E.2d 883, 886 (1981) (holding that an "order requiring the payment of alimony is a 'judgment directing the payment of money' " under N.C. Gen. Stat. § 1-289(a) and, therefore, the trial court could require the posting of a bond). As part of its decision below, the trial court determined that

plaintiff owed defendant $3,612.44 under the consent judgments. The order in this case then sets out a payment plan with plaintiff to immediately pay $2,000.00 towards his arrearages and $100.00 per month thereafter until the remaining past-due amount of $1,612.44 is paid in full. Under N.C. Gen. Stat. § 1-289(a), the trial court had authority to order the posting of a bond as security for payment of those amounts. We, therefore, overrule this assignment of error.

Reversed and remanded.

Chief Judge MARTIN and Judge CALABRIA concur.

STATE OF NORTH CAROLINA v. LENNARD AMIER HARRIS

No. COA04-984

(Filed 21 June 2005)

1. Sexual Offenses— failing to register as offender—notice of requirement

Defendant's motion to dismiss a charge of failing to register as a sex offender was correctly denied where he was notified of the requirement 5 days before his release rather than the statutory 10. N.C.G.S. § 14-208.8 is an administrative provision; the Legislature did not intend to eliminate registration requirements for sex offenders who receive untimely notice, especially when there was no prejudice.

2. Criminal Law— defenses—voluntary intoxication—specific intent crimes only

Voluntary intoxication was not a defense to failing to register as a sex offender, which is not a specific intent crime.

Appeal by defendant from judgment entered 13 November 2003 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 9 March 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General John J. Aldridge, III, for the State.

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

McCULLOUGH, Judge.

Defendant (Lennard Amier Harris) appeals from conviction and judgment for failing to register as a sex offender. We find no error.

The evidence at trial tended to show the following: On 7 February 1994 defendant was convicted of taking indecent liberties with a child, for which he received an active term of imprisonment. Defendant was required to register as a sex offender pursuant to N.C. Gen. Stat. § 14-208.7(a)(1) within ten days of his release from prison.

Defendant served a term of imprisonment for the indecent liberties conviction beginning in February 1994 and apparently was subsequently imprisoned again in February 1996 for violating a condition of probation imposed pursuant to another conviction. Defendant was originally scheduled to be released from prison on 15 September 2000.

On 6 September 2000, Corrections Officer Deborah Walser met with defendant to apprise him of his obligation to register as a sex offender. During this meeting, defendant told Walser that he would be living with his grandmother in Wake County after being released. Walser testified that she then informed defendant that he was to register with the Wake County Sheriff within ten days of his release from prison and advised him to complete this obligation immediately upon release. Walser further testified that she read the Department of Corrections' written Notice of Duty to Register to defendant "word-for-word" and witnessed defendant sign the Notice. Walser did not remember defendant appearing to be intoxicated at this meeting.

As a result of being credited with time, defendant was released five days early, on 10 September 2000. Accordingly, defendant's meeting with Walser occurred on the fifth day prior to his release date, and he had until 20 September 2000 to register as a sex offender with the Wake County Sheriff. In March 2003, Captain William McLean with the Wake County Sheriff's Office discovered defendant's name on a list of unregistered sex offenders maintained by the State Bureau of Investigation. Captain McLean verified that defendant had been convicted of an offense requiring registration, had been notified of his duty to register, and had failed to do so.

Defendant testified that he felt as if he had been wrongly imprisoned and that he "basically dealt with it by being intoxicated by the use of marijuana." Defendant introduced evidence that a drug

test administered during his confinement indicated that he had been using illegal drugs. According to defendant, he was "under the influence of drugs" during the meeting with Corrections Officer Walser on 6 September 2000. Defendant further testified that he vaguely remembered the meeting, but that he only recalled signing his release paper, and he denied knowing that he had to register as a sex offender.

The jury convicted defendant of failing to register as a sex offender, and the trial court imposed an active sentence of twenty-four to twenty-nine months' imprisonment. Defendant now appeals.

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[1] In his first argument on appeal, defendant contends that the trial court erred by denying his motion to dismiss. Specifically, defendant insists that a formerly incarcerated sex offender cannot be convicted of failing to register if the penal institution in which he was confined did not strictly comply with N.C. Gen. Stat. § 14-208.8(a) by notifying him of his obligation to register "[a]t least 10 days, but not earlier than 30 days" before he was released. We disagree.

Pursuant to the Sex Offender and Public Protection Registration Program, a North Carolina resident with a conviction for taking indecent liberties with a minor must "maintain registration with the sheriff of the county where the person resides." N.C. Gen. Stat. § 14-208.7(a) (2003); N.C. Gen. Stat. § 14-208.6(4)(a), (5) (2003) (establishing taking indecent liberties with a minor as a "sexually violent offense" and classifying a conviction for taking indecent liberties with a minor as a "reportable conviction"). If the person is incarcerated and is a current North Carolina resident, then the person must register "[w]ithin 10 days of release from a penal institution or arrival in a county to live outside a penal institution." N.C. Gen. Stat. § 14-208.7(a)(1). Failing to register is a Class F felony. N.C. Gen. Stat. § 14-208.11(a)(1) (2003).

Due process mandates that a sex offender have notice of his obligation to register before being convicted of failing to do so. *See State v. Young*, 140 N.C. App. 1, 12, 535 S.E.2d 380, 386 (2000) ("[A]lthough ignorance of the law is no excuse, and the statute at issue does *not* require the State to prove intent, due process requires that defendant have knowledge, actual or constructive, of the statutory requirements before he can be charged with its violation."), *appeal dismissed, disc. review denied in part and allowed in part*, 353 N.C. 397, 547 S.E.2d 429-30, *disc. review improvidently allowed*, 354 N.C. 213, 552

S.E.2d 142 (2001). Accordingly, the General Assembly has provided the following instructions to penal institutions that are about to release convicted sex offenders:

> At least 10 days, but not earlier than 30 days, before a person who will be subject to registration [as a sex offender] is due to be released from a penal institution, an official of the penal institution shall:
>
> (1) Inform the person of the person's duty to register . . . and require the person to sign a written statement that the person was so informed or, if the person refuses to sign the statement, certify that the person was so informed;
>
> (2) Obtain the registration information required under G.S. 14-208.7(b)(1), (2), (5), and (6), as well as the address where the person expects to reside upon the person's release; and
>
> (3) Send the Division and the sheriff of the county in which the person expects to reside the information collected in accordance with subdivision (2) of this subsection.

N.C. Gen. Stat. § 14-208.8(a) (2003).

Read closely and in context, N.C. Gen. Stat. § 14-208.8 must be construed as an administrative provision. It is designed to ensure that sex offenders are notified that they must register, to facilitate cooperation among the several agencies tasked with administration of sex offender registration, and to promote prompt detection of sex offenders who fail to register. As a general matter, if a penal institution has complied with N.C. Gen. Stat. § 14-208.8, a defendant has been made aware of his obligation to register and may be convicted for failing to do so under N.C. Gen. Stat. § 14-208.11(a)(1). Significantly, however, although some form of notification of the duty to register is a prerequisite to a conviction for failing to do so, N.C. Gen. Stat. § 14-208.11(a)(1) does not explicitly make the time-line set forth in N.C. Gen. Stat. § 14-208.8 a precondition for such a conviction.

Notwithstanding this omission, defendant posits that a sex offender must be notified of registration requirements within the twenty-day period set forth in N.C. Gen. Stat. § 14-208.8(a) and that, if he is not, the duty to register is extinguished. However, even a cursory reading of the statutory provisions at issue reveals that the Legislature did not intend to eliminate registration requirements for formerly incarcerated sex offenders who have received untimely

notice of their duty to register. Rather, the General Assembly has determined that "sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration and that protection of the public from sex offenders is of paramount governmental interest." N.C. Gen. Stat. § 14-208.5 (2003). The Legislature has expressed no lesser concern for danger to the public where an incarcerated sex offender has been notified of his duty to register outside of the twenty-day window contained in N.C. Gen. Stat. § 208.8(a).

In addition, we note that, if a defendant has not been prejudiced by the untimely notice, the case for excluding him from registration requirements has even less force. This is especially so where, as here, a defendant has never complied with his obligation to register in the nearly two-year period between his release from prison and the detection of his failure to observe this obligation.

In the instant case, the Department of Corrections inadvertently apprised defendant of his duty to register as a sex offender later than ten days prior to his release from prison. Though such an oversight failed to comply strictly with the statutory notification procedure for incarcerated sex offenders, the late notice to defendant is not fatal to his conviction for failing to register given that he actually received notice and was not prejudiced by the slight delay. Accordingly, we hold that defendant was not entitled to a dismissal merely because he was given notice that he must register as a sex offender five days prior to his release from prison. This assignment of error is overruled.

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[2] In his second argument on appeal, defendant contends that the trial court erred by instructing the jury that voluntary intoxication is not a defense for failing to register as a sex offender. We do not agree.

" 'Except where a crime requires a showing of specific intent, voluntary intoxication is not a defense to a criminal charge.' " *State v. Jones*, 300 N.C. 363, 365, 266 S.E.2d 586, 587 (1980) (citations omitted). Therefore, voluntary intoxication is no defense to a general intent crime or a strict liability offense. *See id.* The statute which criminalizes failing to register as a sex offender no longer contains a specific intent element:

> Prior to 1997, N.C. Gen. Stat. § 14-208.11 included a *mens rea* element, providing that only offenders "who knowingly and with intent to violate" the provision were subject to conviction. N.C. Gen. Stat. § 14-208.11(a) (1995). The legislature amended

the statute in 1997 to remove this language. 1997 N.C. Sess. Laws ch. 516.

State v. White, 162 N.C. App. 183, 189, 590 S.E.2d 448, 452 (2004). Accordingly, this Court has repeatedly held that the State need not prove specific intent to procure a conviction for a sex offender's failure to comply with registration requirements. *See id.* ("We hold as a matter of statutory construction that N.C. Gen. Stat. § 14-208.11 does not require a showing of knowledge or intent."); *State v. Holmes*, 149 N.C. App. 572, 577, 562 S.E.2d 26, 30 (2002) (excluding intent from the recitation of the essential elements for conviction under N.C. Gen. Stat. § 14-208.11(a)(2), which makes it unlawful for a sex offender to fail to notify the last registering sheriff of a change of address."); *Young*, 140 N.C. App. at 8, 535 S.E.2d at 384 ("[W]e note that the statute [N.C. Gen. Stat. § 14-208.11] has no requirement of knowledge or intent, so as to require that the State prove either defendant knew he was in violation of or intended to violate the statute when he failed to register his change of address.").

In the instant case, defendant was not charged with a specific intent crime, and voluntary intoxication was not available to him as a defense. The trial court did not err by instructing the jury accordingly. This assignment of error is overruled.

No error.

Judges HUNTER and LEVINSON concur.

IN THE MATTER OF: C.J.B. AND M.G.B., MINOR CHILDREN

No. COA04-992

(Filed 21 June 2005)

Termination of Parental Rights— entry of written order—five month delay—prejudicial

A termination of parental rights order was reversed where there was a five-month delay between the trial court's announcement of its decision and entry of the written order. While entry of the order outside the statutory thirty-day requirement has never been held reversible error without a showing of prejudice, a longer delay means that prejudice is more likely to be readily

apparent. Here, closure was delayed for everyone involved, and records and transcripts have been misplaced or are irretrievable.

Judge TYSON concurring.

Appeal by respondent-mother from order entered 3 July 2003 by Judge William M. Neely in Moore County District Court. Heard in the Court of Appeals 22 March 2005.

Katharine Chester, for respondent-appellant.

Krishnee Coley, for petitioner-appellee Moore County Department of Social Services.

No brief filed on behalf of guardian ad litem.

ELMORE, Judge.

Esther Kay Coughenhour (respondent) is mother to two children: C.J.B and M.G.B. After the two children were adjudicated neglected and dependent, the Moore County Department of Social Services filed a petition to terminate respondent's parental rights on 26 September 2001. From that point, respondent showed improvement in caring for the children, and termination proceedings were "suspended." But respondent could not maintain her improvement, relapsed into her previous behavior, and the trial court proceeded with termination. On 9 December 2002, 18 December 2002, and again on 28 January 2003 the trial court conducted a hearing on the petition for the termination of parental rights. On 5 March 2003 the trial court announced its decision that respondent's parental rights would be terminated. Respondent filed notice of appeal. On 3 July 2003, approximately five months later, the trial court entered a written order consistent with its earlier oral announcement. Respondent filed a notice of appeal from this order as well.

Section 7B-1109 and section 7B-1110 of our General Statutes provide that a trial court must enter a written order regarding its decision on termination within thirty days of the completion of the hearing. *See* N.C. Gen. Stat. §§ 7B-1109(e) and 7B-1110(a) (2003). This Court has previously interpreted the nature and effect of failing to comply with this mandate. *See In re T.L.T.*, 170 N.C. App. 430, 612 S.E.2d 436 (2005); *In re A.D.L.*, 169 N.C. App. 701, 612 S.E.2d 639 (2005); *In re L.E.B.*, 169 N.C. App. 375, 610 S.E.2d 424 (2005); *In re B.M.*, 168 N.C. App. 350, 607 S.E.2d 698 (2005); *In re J.L.K.*, 165 N.C. App. 311, 598 S.E.2d 387, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004); *In re E.N.S.*, 164 N.C. App. 146, 595 S.E.2d 167 (2004).

While earlier holdings determined that non-compliance with statutory time lines did not warrant a new termination hearing, absent a showing of prejudice, *see In re J.L.K.*, 165 N.C. App. at 315-16, 598 S.E.2d at 390-91, our Court's more recent decisions have been apt to find prejudice in delays of six months or more. *See In re T.L.T.*, 170 N.C. App. at 431-32, 612 S.E.2d at 437-38; *In re L.E.B.*, 169 N.C. App. at 379, 610 S.E.2d at 426.

Here, the trial court did not enter the order terminating respondent's parental rights until approximately five months after the hearing. Respondent argues that non-compliance with the thirty-day statute is prejudice *per se*, thus requiring a new hearing. Our Court has never held that entry of the written order outside the thirty-day time limitations expressed in sections 7B-1109 and 7B-1110 was reversible error absent a showing of prejudice. To the contrary, we have held that prejudice must be shown before the late entry will be deemed reversible error. *See In re J.L.K.*, 165 N.C. App. at 315-16, 598 S.E.2d at 390-91 (respondent failed to show prejudice from a three-month delay in violation of N.C. Gen. Stat. § 7B-1109(e)); *see also In re B.M.*, 168 N.C. App. at 353-55, 607 S.E.2d at 700-02 (discussing the need for prejudice in missing timing requirements of section 7B-907(e)).

Our holdings requiring the respondent to show prejudice should by no means be taken as an endorsement of the delay in meeting statutory time lines in adjudication proceedings. Again, to the contrary, "[w]e strongly caution against this practice, as it defeats the purpose of the time requirements specified in the statute, which is to provide parties with a speedy resolution of cases where juvenile custody is at issue." *In re B.M.*, 168 N.C. App. at 355, 607 S.E.2d at 702. In fact, citing numerous appeals from violations of the relevant time lines, Judge Timmons-Goodson's concurring opinion in *In re L.E.B.*, stressed that reversal was necessary to restore the effectiveness of the General Assembly's mandates. 169 N.C. App. at 381-82, 610 S.E.2d at 428 (Timmons-Goodson, J., concurring). However, we recognize that reversing an order for non-adherence to these time lines further unbalances the need for swift finality in termination proceedings, the undisputed intent and presumed effect of the General Assembly's addition of the thirty-day entry deadline to N.C. Gen. Stat. § 7B-1109(e). *See In re A.D.L.*, 169 N.C. App. at 705, 612 S.E.2d at 642.

In an effort to balance giving effect to the clear mandate of a timely entered order according to N.C. Gen. Stat. § 7B-1109(e) against the need for finality of juvenile custody, we have evaluated the preju-

dice—not only to respondent, but to the children, petitioners, adoptive and foster parents—arising from the delay. *See In re T.L.T.*, 170 N.C. App. at 432, 612 S.E.2d at 438; *In re L.E.B.*, 169 N.C. App. at 381-82, 610 S.E.2d at 426-27. A review of our recent cases on point exemplifies that the need to show prejudice in order to warrant reversal is highest the fewer number of days the delay exists. *See*, *e.g.*, *In re A.D.L.*, 169 N.C. App. at 713-14, 612 S.E.2d at 647 (Tyson, J., concurring) (discussing absence of prejudice with sixteen-day delay). And the longer the delay in entry of the order beyond the thirty-day deadline, the more likely prejudice will be readily apparent. *See*, *e.g.*, *In re T.L.T.*, 170 N.C. App. at 432, 612 S.E.2d at 438; *In re L.E.B.*, 169 N.C. App. at 379, 610 S.E.2d at 426-27.

Applying this analysis to the case *sub judice* results in a determination that prejudice has been adequately shown by a five-month delay in entry of the written order terminating respondent's parental rights. For four unnecessary months the appellate process was put on hold, any sense of closure for the children, respondent, or the children's current care givers was out of reach, and particular to this case, records and transcripts have become misplaced or are irretrievable. Admittedly, the prejudice argued by respondent in this case is generic and susceptible to challenge, but in light of a five-month delay, little more than common sense is necessary in order to perceive aspects of prejudice to all parties involved in this termination proceeding.

In light of the foregoing, we do not reach respondent's other assignments of error but reverse the trial court's order and remand this case for a new trial on the termination of respondent's parental rights.

Reversed and remanded.

Judge TYSON concurs.

Judge WYNN concurs by separate opinion.

WYNN, Judge concurring.

I concur in the majority's resolution of this matter and write separately to underscore that non-compliance with the thirty-day requirement for the trial court's entering a termination order is not *per se* prejudicial and that prejudice must be shown for delayed entry to constitute reversible error.

In the recent *In re B.P., S.P., and R.T.*, —— N.C. App. ——, —— S.E.2d —— (No. COA04-498) (19 April 2005), the majority indicated that a violation of a thirty-day requirement for filing adjudication and dispositional orders required that the orders be vacated. I dissented from the majority to make clear that this Court had previously held that a thirty-day rule violation does not *per se* warrant the delayed order to be vacated. Indeed, in *In re J.L.K.*, 165 N.C. App. 311, 598 S.E.2d 387 (2004), this Court stated that "[w]hile the trial court's [89-day] delay clearly violated the 30-day provision of N.C. Gen. Stat. § 7B-1109(e), we find no authority compelling that the TPR order be vacated as a result." *Id.* at 315, 598 S.E.2d at 390.

As I underscored in my dissent, a party "must show that she was prejudiced by the delay in order to grant a new hearing." *In re B.P., S.P., and R.T.*, —— N.C. App. at ——, —— S.E.2d at —— (Wynn, J., concurring in part, dissenting in part) (citation omitted). In *In re B.P., S.P., and R.T.*, the Clerk of Court lost the original order, and a new order was thus re-filed outside the thirty-day period. The respondent did not dispute the circumstances or object to the timeliness of the new order, the new order did not require anything different of respondent, and the filing of the new order did not impede respondent's ability to appeal. I therefore saw no prejudice. *Id.* at ——, —— S.E.2d at ——.

Here, in contrast, as the majority notes, prejudice by the five-month delay in entering the order has been shown: Records and transcripts are missing and unretrievable, and Respondent's appellate counsel is unable to reconstruct the trial court proceedings. The delayed order therefore must be vacated.

STATE OF NORTH CAROLINA v. DEMOND ANTONIO WELLS, DEFENDANT

No. COA04-952

(Filed 21 June 2005)

Criminal Law— final closing argument—evidence not introduced on cross-examination

Defendant did not introduce new evidence within the meaning of Rule 10 of the General Rules of Practice, and should have had the final argument, where he cross-examined a witness by reading from a prior statement which was never formally intro-

duced. The questioning was about statements directly related to the witness's testimony on direct examination.

Appeal by defendant from judgment entered by Judge Paul L. Jones in the Superior Court in New Hanover County. Heard in the Court of Appeals 15 February 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General H. Dean Bowman, for the State.

Hosford & Hosford, P.L.L.C., by Sofie W. Hosford, for defendant.

HUDSON, Judge.

Defendant Demond Antonio Wells was indicted for first-degree murder, carrying a concealed weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a firearm into occupied property. At the 16 February 2004 Criminal Session of Superior Court in New Hanover County, the court dismissed the charge of assault with a deadly weapon, and the jury found defendant guilty of second-degree murder and carrying a concealed weapon, but not guilty of discharging a firearm into an occupied property. Finding defendant to be record level II, the court sentenced defendant to 180 to 225 months imprisonment on the murder charge, and forty-five days in custody of the sheriff with credit for time served on the concealed weapons charge. Defendant appeals. We conclude that he is entitled to a new trial.

Defendant worked as a recording engineer, paying an hourly fee to subcontract Heavy Rotation, a recording studio owned in part by Charles Echols. On 17 December 2002, defendant argued with the victim, Roncin Sanders, at the studio in a disagreement about defendant's commitment to record tracks for the victim's music group. Ladiamond Jones, a friend of the victim, accompanied Sanders. The argument continued outside the recording studio, and defendant and the victim began fighting. Jones eventually joined in the fight as well, though it was unclear whether he was participating or only trying to break it up. Shortly thereafter, witnesses heard a series of gunshots. Witness William Bell testified that defendant was not being attacked when he fired at the victim. Defendant shot the victim in the hand and chest, killing him, and later turned himself into police.

Defendant first argues that the court erred in denying him the final closing argument. Defendant contends he did not introduce evi-

dence within the meaning of Rule 10 of the General Rules of Practice for the Superior and District Courts and retained the right to open and close the arguments. We agree.

Rule 10 provides that in cases where the defendant introduces no evidence, "the right to open and close the argument to the jury shall belong to him." N.C. Super. and Dist. Ct. R. 10. In support of his argument, defendant cites *State v. Shuler*, which summarizes the law on this point as follows:

> As a general proposition, any testimony elicited during cross-examination is 'considered as coming from the party calling the witness, even though its only relevance is its tendency to support the cross-examiner's case. Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 170, at 559 (5th ed. 1998) [hereinafter North Carolina Evidence]. Indeed, the general rule also provides there is no right to offer evidence during cross-examination. *Id.*; *State v. Yoes* and *Hale v. State*, 271 N.C. 616, 646, 157 S.E.2d 386, 409 (1967). Nonetheless, evidence may be 'introduced,' within the meaning of Rule 10, during cross-examination when it is 'offered' into evidence by the cross-examiner, *State v. Hall*, 57 N.C. App. 561, 564, 291 S.E.2d 812, 814 (1982); *see* North Carolina Evidence § 18, at 70, and accepted as such by the trial court. North Carolina Evidence § 170, at 560 n.592; *State v. Baker*, 34 N.C. App. 434, 441, 238 S.E.2d 648, 652 (1977). Although not formally offered and accepted into evidence, evidence is also 'introduced' when new matter is presented to the jury during cross-examination and that matter is not relevant to any issue in the case. *See State v. Macon*, 346 N.C. 109, 114, 484 S.E.2d 538, 541 (1997); N.C.G.S. § 8C-1, Rule 611(b) (1992). New matters raised during the cross-examination, which are relevant, do not constitute the 'introduction' of evidence within the meaning of Rule 10. *See* N.C.G.S. § 8C-1, Rule 401. To hold otherwise, 'would place upon a defendant the intolerable burden of electing to either refrain from the exercise of his constitutional right to cross-examine and thereby suffer adverse testimony to stand in the record unchallenged and un-impeached or forfeit the valuable procedural right to closing argument.' *Beard v. State*, 104 So. 2d 680, 682 (Fla. Dist. Ct. App. 1958).

State v. Shuler, 135 N.C. App. 449, 452-53, 520 S.E.2d 585, 588-89 (1999) (some internal quotation marks and citations omitted). In *Shuler*, we granted a new trial to the defendant, after the trial court

erroneously denied her the right to make the final closing argument. Defendant Shuler, on trial for embezzlement, had attended several interviews with a co-worker, Jackson, who testified against Shuler at trial. On direct examination, Jackson testified to various statements made by Shuler during the interviews. On cross-examination, defense counsel asked Jackson to read portions of transcripts from the interviews to put Shuler's statements into context and also questioned Jackson about her accounting procedures and other topics discussed in the interviews. This Court held that, although some of the topics raised on cross-examination were "new matters," all were "relevant to Jackson's testimony during direct examination." *Id.* at 454, 520 S.E.2d at 589.

Here, defendant contends that he did not offer evidence as meant by Rule 10 when he cross-examined witness Bell about inconsistencies between two statements he gave about the shooting. During its case-in-chief, the State introduced a statement Bell gave to detectives on 18 December 2002 describing the shooting. In this statement, offered as substantive evidence without objection from defendant, Bell stated that defendant stood in the middle of the street and fired at the victim and Jones as they fled, then casually drove away. On cross-examination, defendant moved to introduce a statement Bell gave on 17 December 2002, in which he stated that defendant was running away from the recording studio as he fired at the victims. As defense counsel moved to introduce the earlier statement, the following colloquy occurred:

> Prosecutor: Your honor, if counsel is going to refer to that statement, he needs to introduce it and I don't object to that at all.
>
> Defense counsel: Okay, move to introduce Defendant's Exhibit No. 1.
>
> The court: Well, it's the State's case.
>
> Defense counsel: It's been marked for identification and when it's our turn, I'll introduce it.

Defense counsel then read the entire statement, line by line, asking Bell if he agreed with each sentence. However, defendant presented no evidence, and defense counsel never formally introduced the statement.

While the colloquy reveals that this evidence was never formally received into evidence, the State contends that defendant's cross-

examination of Bell constituted an introduction of evidence because it was received as substantive evidence. The State cites *State v. Macon*, 346 N.C. 109, 484 S.E.2d 538 (1997), in support of its argument. Factual distinctions from the case here, however, render it inapposite. In *Macon*, "[d]uring defendant's cross-examination of [police] Officer Denny, and before the State had presented any evidence regarding defendant's postarrest statement to police, defense counsel asked Officer Denny to read notes of defendant's statement to the police given shortly after the shooting." *Id.* at 114, 484 S.E.2d at 541. Our Supreme Court held that because this testimony was introduced as "substantive evidence without any limiting instruction, not for corroborative or impeachment purposes, as defendant did not testify at trial and the statement did not relate in any way to Officer Denny," it constituted an introduction of evidence by the defendant.

We conclude that the circumstances here are more analogous to *Shuler* than to *Macon*. In *Macon*, the evidence at issue involved a new matter, not relevant to Officer Denny's testimony on direct, as the State's witnesses had not previously mentioned anything about the defendant's post-arrest statement. Defense counsel asked Officer Denny to read notes referring to the defendant's own statement to police, in an apparent attempt to bring self-serving statements before the jury without putting the defendant on the stand. In contrast, here, as in *Shuler*, a witness on the stand was questioned about statements directly related to the witness' own testimony on direct examination.

Because defendant did not introduce any evidence within the meaning of Rule 10, the court erred in depriving him of the right to the closing argument to the jury. As we did in *Shuler*, we conclude that this error entitles defendant to a new trial. *Shuler*, 135 N.C. App. at 455, 520 S.E.2d at 590.

Because we hold that defendant should receive a new trial on the basis of the issue discussed above, we decline to address defendant's other arguments.

New trial.

Judges WYNN and STEELMAN concur.

STATE OF NORTH CAROLINA v. GERALD MICHAEL DELANEY

No. COA04-1101

(Filed 21 June 2005)

Evidence— expert testimony—analyses conducted by others—right to confrontation—analyses not hearsay

The trial court did not violate defendant's right to confrontation in a drug case by admitting expert testimony based on chemical analyses conducted by someone other than the testifying expert, because: (1) defendant had an opportunity to cross-examine the expert as provided under *Crawford v. Washington*, 541 U.S. 36 (2004); (2) an expert may base an opinion on tests performed by others in the field; and (3) the analyses on which the expert testimony was based were not hearsay.

Appeal by Defendant from judgment entered 14 August 2003 by Judge Susan C. Taylor in Superior Court, Cabarrus County. Heard in the Court of Appeals 17 May 2005.

Attorney General Roy Cooper, *by Special Deputy Attorney General Amar Majmundar*, *for the State.*

J. Clark Fischer, *for the defendant-appellant.*

WYNN, Judge.

"The admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination." *State v. Huffstetler*, 312 N.C. 92, 108, 322 S.E.2d 110, 120-21 (1984). In this case, Defendant contends that expert testimony based on analyses conducted by someone other than the testifying expert violated his right to confrontation under the rationale of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). Because Defendant had an opportunity to cross-examine the expert, and because the analyses on which the expert testimony was based were not hearsay, we affirm the trial court's admission of the expert testimony.

The facts pertinent to the resolution of the issues on appeal show that under a search warrant issued in November 2002, the Cabarrus County Sheriff's Department searched Defendant's residence and

found marijuana and a lock box containing drugs under Defendant's bed. Further, in an outbuilding, the police discovered additional drugs that appeared ready for distribution. Defendant's appeal does not challenge the constitutionality of the search of his residence or the propriety of seizing the evidence of drugs on the property.

In the course of the police investigation into Defendant's case, the various drugs found at Defendant's residence were sent to the North Carolina State Bureau of Investigation for analyses. At trial, Special Agent Aaron Joncich testified as an expert witness regarding the results of those analyses, which had been conducted by another analyst at the State Bureau of Investigation. A jury convicted Defendant of trafficking in opium, possession of Lortab, possession of Klonopin, and intentionally maintaining a dwelling for the purpose of keeping or selling controlled substances. The trial court arrested judgment with regard to maintaining a dwelling for the purpose of keeping or selling controlled substances. Defendant appealed.

On appeal, Defendant contends that the trial court committed prejudicial error by allowing the prosecution to introduce hearsay evidence of the chemical analyses performed by a nontestifying chemist because the admission of that evidence violated his confrontation rights under the rationale of *Crawford*, 541 U.S. 36, 158 L. Ed. 2d 177. We disagree.

In *Crawford*, the United States Supreme Court held that a recorded out-of-court statement made by the defendant's wife to the police regarding the defendant's alleged stabbing of another, which was introduced as hearsay at trial, was testimonial in nature and thus inadmissible due to Confrontation Clause requirements. *Id.* Regarding nontestimonial evidence, the Supreme Court stated: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* at 68, 158 L. Ed. 2d at 203. *Crawford* made explicit that its holding was not applicable to evidence admitted for reasons other than proving the truth of the matter asserted. *Id.* at 60, 158 L. Ed. 2d at 198 (stating that the Confrontation "Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted") (citing *Tennessee v. Street*, 471 U.S. 409, 414, 85 L. Ed. 2d 425 (1985)).

Under North Carolina case law, "testimony as to information relied upon by an expert when offered to show the basis for the expert's opinion is not hearsay, since it is not offered as substantive evidence." *Huffstetler*, 312 N.C. at 107, 322 S.E.2d at 120 (citing *State v. Wood*, 306 N.C. 510, 294 S.E.2d 310 (1982)). Indeed, our Supreme Court has stated that "[i]t is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence[,]" and that "[a]n expert may properly base his or her opinion on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field." *State v. Fair*, 354 N.C. 131, 162, 557 S.E.2d 500, 522 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

Regarding expert testimony and the Confrontation Clause, our Supreme Court has held that "[t]he admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination." *Huffstetler*, 312 N.C. at 108, 322 S.E.2d at 120-21 (citing *United States v. Williams*, 447 F.2d 1285 (5th Cir. 1971) (en banc), *cert. denied*, 405 U.S. 954, 31 L. Ed. 2d 231 (1972); *United States v. Lawson*, 653 F.2d 299 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150, 71 L. Ed. 2d 305 (1982)).[1]

In the case *sub judice*, after a recitation of his credentials, Special Agent Joncich was tendered and accepted, without objection by Defendant, as an expert in analyzing controlled substances. Special Agent Joncich, after a thorough review of the methodology undertaken by his colleague, relied on the colleague's analyses in forming his opinion that the substances recovered from Defendant's

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1. In a recent unpublished case, *State v. Jones*, No. COA03-976, 2004 N.C. App. LEXIS 1655 (N.C. Ct. App. Sept. 7, 2004), this Court stated:

> In the case before us, after a recitation of Agent Hamlin's professional credentials, Agent Hamlin was tendered and accepted as an expert in controlled substance analysis without objection by defendant. Agent Hamlin, after a thorough review of the methodology undertaken by Agent Koontz, relied on Agent Koontz's lab analysis in forming her opinion that the white substance was cocaine. Her opinion was based on data reasonably relied upon by others in the field. *Carmon*, 156 N.C. App. at 244, 576 S.E.2d at 737.
>
> *Jones*, 2004 N.C. App. LEXIS 1655, at *10. In *Jones* as here, the defendant directed this Court to *Crawford*. However, this Court concluded that *Crawford* was not applicable because "it is well established that an expert may base his or her opinion on tests performed by others in the field and defendant was given an opportunity to cross-examine Agent Hamlin as to the basis of her opinion." *Id.* at *11. This Court therefore found that there has been no violation of the defendant's right of confrontation. *Id.*

residence and outbuilding were marijuana and opium, and his opinion was based on data reasonably relied upon by others in the field. Defendant was given an opportunity to cross-examine Special Agent Joncich as to his opinion and the bases thereof.

Since it is well established that an expert may base an opinion on tests performed by others in the field and Defendant was given an opportunity to cross-examine Special Agent Joncich on the basis of his opinion, we conclude that there has been no violation of Defendant's right of confrontation under the rationale of *Crawford*.

We also note that Defendant has failed to argue his remaining assignments of error. They are therefore deemed abandoned. N.C. R. App. P. 28(b).

No error.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. VINCENT LEBRON LEDFORD

No. COA04-812

(Filed 21 June 2005)

Homicide— second-degree murder—final mandate—exclusion of verdict of not guilty by reason of self-defense

The trial court erred in a second-degree murder case by omitting the verdict of not guilty by reason of self-defense in its final mandate to the jury and defendant is entitled to a new trial.

Appeal by defendant from judgment entered 1 August 2003 by Judge Ronald K. Payne in McDowell County Superior Court. Heard in the Court of Appeals 8 March 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General John F. Maddrey, for the State.

Paul Pooley for defendant-appellant.

ELMORE, Judge.

Vincent Lebron Ledford (defendant) appeals his conviction on the charge of second-degree murder. After reviewing the record, we determine that the trial court committed prejudicial error in omitting the verdict of not guilty by reason of self-defense in its final mandate to the jury.

Defendant was indicted for the first-degree murder of George William Birchfield (Birchfield). At trial, Deputy Jason Crisp of the McDowell County Sheriff's Office (Sheriff's Office) testified that at 8:36 p.m. on 4 January 2002 he responded to a 911 call at the Birchfield residence. Deputy Crisp stated that when he entered the residence, he saw a body lying face down on the floor and that defendant was crouched down over the body and holding a knife in his hand. A forensic pathologist for the State testified that Birchfield died from internal bleeding as a result of bullet wounds. Defendant's estranged wife, Janet Susan Ledford (Susan), had separated from defendant on 29 August 2001. Susan testified that she had gone out to eat with Birchfield on two occasions prior to the 4 January 2002 shooting. She and Birchfield were sitting at the kitchen table in Birchfield's home during the evening of 4 January when she heard a knock on the door and saw defendant looking into the house through the window over the door. As Susan was waiting in a bedroom while defendant and Birchfield were talking, she heard defendant announce that he was going to use the bathroom. Defendant pushed open the bedroom door that Susan was standing behind and then confronted her about what she was doing there. Susan observed defendant grab Birchfield in a headlock and start to hit him with his fist. She went into a second bedroom to call 911 and, while speaking to the 911 operator, heard a gunshot. Following the shot, she heard Birchfield ask defendant if he was going to stop. She then heard a series of three or four gunshots, after which defendant said, "Susan, look what you caused."

Defendant testified on his own behalf. He stated that he arrived at Birchfield's home on 4 January after calling Birchfield's phone and getting the answering machine at 7:50 p.m. Defendant testified that he saw Birchfield sitting at the kitchen table with another person sitting across from him, and that the two appeared to kiss. Birchfield answered defendant's knock on the door, and the two talked inside the home. When defendant went to use the bathroom, he saw Susan hiding behind a bedroom door. Defendant testified that Birchfield grabbed him by the shirt, and defendant reacted by grabbing him

around the neck. Defendant and Birchfield continued their scuffle in the living room. Birchfield picked up a gun and shot defendant in the leg. Defendant did not remember shooting Birchfield but did recall picking up a knife after seeing Birchfield with a gun. A detective from the Sheriff's Office testified that defendant had a gunshot wound to his right leg.

The jury returned a verdict of guilty on the charge of second-degree murder, and the trial court entered judgment on 1 August 2003. Defendant filed notice of appeal on 5 August 2003. Defendant contends that he is entitled to a new trial, arguing that the trial court erred in failing to include in its final mandate on all charges and defenses a possible verdict of not guilty by reason of self-defense. We agree.

The State concedes that it is unable to distinguish the trial court's jury instructions in *State v. Williams*, 154 N.C. App. 496, 571 S.E.2d 886 (2002), from the case at bar. In *Williams*, this Court held that the "trial court's failure to include the possible verdict of not guilty by reason of self-defense in its final mandate to the jury [was] prejudicial error, entitling the defendant to a new trial." *Id.* at 499, 571 S.E.2d at 888; *see also State v. Dooley*, 285 N.C. 158, 165-66, 203 S.E.2d 815, 820 (1974) (failure of trial court to include not guilty by reason of self-defense as possible verdict in final mandate to jury was prejudicial error; this error "was not cured by the discussion of the law of self-defense in the body of the charge.").

Here, after reviewing defendant's motion for jury instructions, the trial court indicated at the charge conference that it would give the pattern instruction on first-degree murder where a deadly weapon is used, "including the defense of self-defense." Indeed, N.C.P.I.—Crim. 206.10 (2003) states, in pertinent part, that "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; therefore, you would return a verdict of not guilty." However, the trial court failed to include this specific instruction on self-defense in the final mandate to the jury. The trial court's discussion of the law of self-defense in the body of the jury instructions did not cure the error. *See Dooley*, 285 N.C. at 165-66, 203 S.E.2d at 820; *Williams*, 154 N.C. App. at 498, 571 S.E.2d at 888. Even if the omission in the final mandate was inadvertent, we must hold that defendant was prejudiced thereby and is entitled to a new trial.

As defendant's remaining assignments of error may not recur in a new trial, we do not address them in this appeal.

New trial.

Judges WYNN and TYSON concur.

AUTEC, INC., PLAINTIFF v. SOUTHLAKE HOLDINGS, LLC, DEFENDANT

No. COA04-761-2

(Filed 21 June 2005)

Appeal and Error— appealability—challenge to service of process

N.C.G.S. § 1-277(b) does not apply to challenges to the sufficiency of service of process, and an appeal from such challenge was dismissed ex mero motu as interlocutory.

Appeal by Defendant from judgment entered 20 February 2004 by Judge Kimberly Taylor in Superior Court, Iredell County. Heard in the Court of Appeals 15 February 2005. Opinion filed 15 March 2005. Petition for rehearing granted 26 April 2005, reconsidering the case without the filing of additional briefs and without oral argument. The following opinion supersedes and replaces the opinion filed 15 March 2005.

Caudle & Spears, P.A., by C. Grainger Pierce, Jr. and Christopher J. Loebsack for defendant-appellant.

Eisele, Ashburn, Greene & Chapman, P.A., by John D. Greene for plaintiff-appellee.

WYNN, Judge.

Section 1-277(b) of the North Carolina General Statutes states "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]" N.C. Gen. Stat. § 1-277(b) (2004). In *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982), our Supreme Court held that section 1-277(b) does not apply to challenges to sufficiency of service of process. In this case, Defendant appeals from an interlocutory order denying a motion to dismiss for insufficient service of process after an entry of default. As Defendant appeals from an interlocutory order, and there is no statutory right of immediate appeal, we dismiss this appeal as premature.

Plaintiff, Autec, Inc., filed the Complaint in this action on 12 August 2003 against Defendant, Southlake Holdings, Inc., for the collection of a balance due for the sale and installation of car wash equipment. Summons was issued on the same date to Southlake's registered agent at its registered address.

The car wash at issue is located in Mecklenburg County, North Carolina. Southlake's registered agent was Kimberly E. Fox, and the registered address was in Huntersville, North Carolina in Mecklenburg County.

On 13 August 2002, service was attempted by certified mail at the registered address but was returned with the notations "Not Deliverable as Addressed" and "Forwarding Order Expired." On 9 September 2002, Alias and Pluries summons were issued for two additional addresses obtained by Autec and mailed via certified mail. But those two service attempts were returned with the notation "Unclaimed." Service was also attempted by the Sheriff of Mecklenburg County but that attempt was unsuccessful.

Autec published a notice of service by publication on 17, 24, and 31 January 2003 in the Mooresville Tribune, which has a circulation throughout southern Iredell County and around the Lake Norman shoreline.

On 19 March 2003, Autec filed an affidavit of publication along with a motion for entry of default and motion for default judgment. That same day, an entry for default and a default judgment were entered against Southlake.

On 10 December 2003, Southlake filed a motion to dismiss and motion to set aside the default judgment and entry of default. Following a hearing, the trial court denied Southlake's motions to dismiss and to set aside the entry of default and granted its motion to set aside the default judgment due to Autec's failure to post bond pursuant to Rule 55(c) of the North Carolina Rules of Civil Procedure. Southlake appealed.

On appeal, Southlake argues that the trial court erred in denying its motion to dismiss pursuant to Rule 12(b)(5) of the North Carolina Rules of Civil Procedure as Autec did not comply with all requirements for service by publication. We do not reach the merits of this argument.

Although the trial court set aside the default judgment, it left in place the entry of default against Southlake. Rule 55(a) of the North Carolina Rules of Civil Procedure provides that:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

N.C. Gen. Stat. § 1A-1, Rule 55(a) (2004). The entry of default is interlocutory in nature and is not a final judicial action. *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 265, 330 S.E.2d 645, 648 (1985); *Whaley v. Rhodes*, 10 N.C. App. 109, 111, 177 S.E.2d 735, 736 (1970). Generally, there is no right to appeal from an interlocutory order. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2004); *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

Southlake contends that this case is immediately appealable pursuant to section 1-277(b) of the North Carolina General Statutes. Section 1-277(b) states that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]" N.C. Gen. Stat. § 1-277(b). Here, Southlake challenged the sufficiency of the service of process pursuant to Rule 12(b)(5) of the North Carolina Rules of Civil Procedure. Our Supreme Court has previously held that section 1-277(b) does not apply to challenges to sufficiency of service of process. *Love*, 305 N.C. at 581, 291 S.E.2d at 146; *Cook v. Cinocca*, 122 N.C. App. 642, 644, 471 S.E.2d 108, 109 (1996); *Sigman v. R.R. Tydings, Inc.*, 59 N.C. App. 346, 347-48, 296 S.E.2d 659, 660 (1982).

The order from which Southlake seeks appeal is interlocutory and there exists no statutory right to immediate appeal. Accordingly, we dismiss the appeal as premature *ex mero motu*. *Love*, 305 N.C. at 577, 291 S.E.2d at 144 ("The threshold question which should have been considered by the Court of Appeals, although not presented to that court, was whether an immediate appeal lies from the trial court's orders.")

Dismissed.

Judges HUDSON and STEELMAN concur.

HUGH KEVIN HINES, Plaintiff v. GARLAND N. YATES, in his Individual and Personal Capacity and in His Official Capacity as the District Attorney for the 19-B Prosecutorial District, State of North Carolina; LITCHARD D. HURLEY, in His Individual and Personal Capacity and in His Official Capacity as the Sheriff of Randolph County, North Carolina; WESTERN SURETY COMPANY, a South Dakota Corporation, Defendants

No. COA04-775

(Filed 5 July 2005)

1. Appeal and Error— appealability—preservation of issues—failure to argue—interlocutory order

The cross-assignments of error that plaintiff failed to argue in his brief are deemed abandoned under N.C. R. App. P. 28(a) and plaintiff's cross-appeals, except for wrongful discharge, are interlocutory and dismissed under N.C. R. App. P. 10.

2. Appeal and Error— appealability—denial of summary judgment—immunity—substantial right

Although an appeal from the denial of a motion for summary judgment is generally an appeal from an interlocutory order, defendants' appeal is properly before the Court of Appeals because defendants' answer and arguments assert the affirmative defenses of immunity and qualified immunity which affect a substantial right sufficient to warrant immediate appellate review.

3. Wrongful Interference— malicious interference with contractual relations—summary judgment

The trial court erred by denying defendant sheriff's motion for summary judgment on plaintiff's claim for malicious interference with contractual relations in defendant's official and individual capacity, because: (1) plaintiff's allegations fail to establish the element of "no justification" to support his claims for malicious interference with contract as an investigatorial assistant in the district attorney's office; (2) plaintiff's allegations do not show that defendant sheriff did not have an official or personal justification in requesting plaintiff to be reassigned or terminated and that defendant, as a constitutionally elected officer, enjoyed a qualified immunity from tort in communicating with defendant district attorney who was also a constitutionally elected officer; (3) plaintiff offered no evidence to show that the district attorney terminated him because of the sheriff's request or that he suf-

fered recoverable damages as a result of the sheriff requesting plaintiff's termination; and (4) the district attorney's affidavit and answers to plaintiff's interrogatories set forth objective and substantial reasons for terminating plaintiff, none of which were based upon the sheriff's request to do so.

4. Constitutional Law— North Carolina—suit against district attorney in individual and personal capacity—summary judgment

The trial court erred by concluding that defendant district attorney was not entitled to summary judgment on plaintiff's claim for relief under violations of the North Carolina Constitution in defendant's individual and personal capacity, because: (1) it is well settled in North Carolina that no direct cause of action for monetary damages exists against officials sued in their individual capacities who have allegedly violated a plaintiff's constitutional rights; and (2) plaintiff concedes that his complaint does not set forth a cause of action against defendant in his individual and personal capacity for this claim.

5. Public Officers and Employees— wrongful termination— investigatorial assistant in district attorney's office

The trial court did not err by granting summary judgment for defendant district attorney on plaintiff's wrongful termination claim based on defendant firing plaintiff as an investigatorial assistant after plaintiff's unsuccessful candidacy for sheriff, because: (1) plaintiff did not show that he was discharged for any reason that contravenes public policy; (2) plaintiff was not restrained by defendant from running for public office, making any speech, or engaging in a protected activity which furthers a public policy; (3) as an at-will and exempt employee under N.C.G.S. § 126-5(c1)(2) based on his employment in the Judicial Department, plaintiff's public opposition to his superior's discretionary decisions and his inability to work cooperatively with law enforcement agencies with which the district attorney must communicate and coordinate on a daily basis is a legally sufficient reason for defendant to terminate plaintiff's employment; (4) plaintiff did not allege that his candidacy for sheriff, speeches, and activities, for which he was allegedly terminated, resulted from his employer's demand that he conduct some unlawful activity or was in retaliation for cooperating with a law enforcement agency conducting an investigation; (5) plaintiff's allegations and evidence did not show how his candidacy for sheriff immunized

his speech as political expression that is protected by a public policy exception to bar his termination when that speech publicly exuded insubordination and directly criticized his supervisor's prosecutorial discretion whether to bring criminal charges; (6) plaintiff's public statements criticizing defendant's discretionary decisions and the disruption of his office's working relationship with law enforcement agencies were sufficient reasons, standing alone, to terminate plaintiff's at-will employment; and (7) defendant's decision to terminate plaintiff rested within his lawful and discretionary scope of authority under N.C.G.S. § 7A-69.

6. Civil Rights— § 1983 claim—failure to show deprivation of constitutionally protected rights

The trial court erred by denying summary judgment for defendants on plaintiff's 42 U.S.C. § 1983 claim, because: (1) plaintiff failed to show any public policy exception which cloaks him from termination of his at-will employment as an investigatorial assistant who serves at the pleasure of the district attorney as provided by N.C.G.S. § 7A-69; (2) there is no genuine issue of material fact as to whether plaintiff was deprived of any rights, privileges, or immunities secured by the Constitution and laws as a terminated at-will employee of defendant district attorney (DA); (3) plaintiff's right to say whatever he wanted was not restrained by defendant DA or anyone else; and (4) defendant DA had the right to terminate plaintiff's employment for any reason, for no reason, or for an arbitrary or irrational reason so long as his actions did not violate a recognized public policy.

7. Damages and Remedies— punitive damages—summary judgment

The trial court's denial of defendants' motions for summary judgment on the remainder of plaintiff's claims, including those for punitive damages, that have not been previously dismissed are reversed.

Judge WYNN concurring in part and dissenting in part.

Appeals by defendants and cross appeals by plaintiff from order entered 26 February 2004 by Judge John O. Craig, III, in Randolph County Superior Court. Heard in the Court of Appeals 2 February 2005.

Puryear and Lingle, P.L.L.C., by David B. Puryear, Jr., for plaintiff-appellee/cross-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Grady L. Balentine, Jr., for defendant-appellant/cross-appellee Garland N. Yates.

Womble Carlyle Sandridge & Rice, A Professional Limited Liability Company, by Allan R. Gitter and Douglas R. Vreeland, for defendants-appellants/cross-appellees Litchard D. Hurley and Western Surety Company.

TYSON, Judge.

Garland N. Yates ("Yates"), Litchard D. Hurley ("Hurley"), and Western Surety Company (collectively, "defendants") appeal from an order denying their motions for summary judgment. We affirm in part, reverse in part, and dismiss plaintiff's complaint.

I. Background

From 7 January 1999 to 31 December 2002, Hugh Kevin Hines ("plaintiff") worked as an investigatorial assistant in the district attorney's office for 19-B Prosecutorial District. Plaintiff's job duties included locating and interviewing witnesses, serving subpoenas for attendance at trials, and acting as a liaison between the district attorney's office and law enforcement agencies. Prior to working for Yates, plaintiff worked as a lieutenant for the sheriff of Randolph County.

During the 2002 election, plaintiff became a candidate in the republican primary election for sheriff of Randolph County and challenged Hurley, the incumbent sheriff. Over the course of the campaign, plaintiff publicly criticized Yates for his prosecutorial decisions in prior cases and publicly announced his disagreement with Yates' decision to not criminally charge a sheriff's deputy who had collided with a motorcyclist during a pursuit. The motorcyclist died from injuries sustained from the collision. Plaintiff also publically expressed his disagreement with the sheriff's department's investigation and handling of an unrelated and unsolved murder case.

Plaintiff's affidavit states that:

> Yates, on numerous occasions personally stated to me that he intended to discharge me from my employment . . . due to my seeking the office of Sheriff of Randolph County . . . after

> each occasion on which I made a public appearance or there was some news media attention in connection with my election campaign.

After plaintiff appeared at a public event to express interest in running for the sheriff's position, plaintiff was instructed by Yates not to work on pending cases involving the Randolph County sheriff's department.

In the primary election held 10 September 2002, Hurley defeated plaintiff, secured the republican party's nomination, and won reelection as sheriff of Randolph County in the November general election. On 16 September 2002, less than one week after the primary election, plaintiff's annual employee performance report was completed. On 26 September 2002, Kay Lovin, Yates' administrative assistant and plaintiff's supervisor, informed plaintiff of his impending termination. Yates extended the termination date to 31 October 2002, and again to 31 December 2002, and offered plaintiff the opportunity to resign. Yates also offered to provide a reference to other law enforcement agencies. Plaintiff refused to resign and continued to criticize the sheriff's department after the election.

In his sworn affidavit, Yates stated, "[Plaintiff] continued to criticize the Sheriff and even accused him of voter fraud" and "stated publically that he intended to run against the Sheriff again in 2006." On 31 December 2002, plaintiff received a separation notice from Yates stating as grounds that "[e]mployee is no longer able to function effectively in his position. To wit: cooperate and maintain an effective and confidential relationship with all law enforcement agencies in the judicial district." Yates listed as a second reason for plaintiff's separation as "[e]mployee further directly criticized supervisor's decision in the media concerning a law enforcement matter."

Plaintiff instituted this action seeking damages from defendants for various torts: (1) wrongful discharge against Yates in both his official and individual capacity; (2) malicious interference with contractual relations against Hurley; (3) violation of plaintiff's State constitutional rights by Yates and Hurley in their official capacities; (4) violation of plaintiff's federal constitutional rights under 42 U.S.C. § 1983 against Yates and Hurley in their official and personal individual capacities; and (5) claims for punitive damages for Hurley's and Yates' conduct in their official and personal individual capacities. Plaintiff asserted claims against Western Surety Company on Hurley's official bond. Defendants answered and asserted

defenses of sovereign immunity, qualified immunity, and that plaintiff was an "at will employee."

Defendants moved for summary judgment. Hurley's sworn affidavit, filed with his motion for summary judgment, admits he asked Yates to reassign plaintiff from the sheriff's department's cases due to "[his] concern that a conflict of interest was arising by plaintiff's reportedly questioning crime victims as to whether they were satisfied with response times, friendliness, etc. of deputy investigators . . . for the time during the election campaign." Hurley denies requesting Yates to terminate plaintiff. Yates' sworn affidavit states, "[a]t no time did Sheriff Hurley or anyone on his behalf ask me to fire [plaintiff]. I made the decision."

The trial court granted defendants' motions regarding: (1) "plaintiff's first claim for relief as against defendant Yates in his official capacity and in his individual and personal capacity" (wrongful discharge); (2) "plaintiff's third claim for relief as against defendant Hurley in his official capacity and in his individual and personal capacity" (denial of State constitutional rights); (3) "plaintiff's third claim for relief as against defendant Yates in his official capacity, but not as against defendant Yates in his individual and personal capacity" (denial of State constitutional rights); (4) "plaintiff's fourth claim for relief as against defendant Yates in his official capacity for all forms of relief except injunctive relief, but not as against defendant Yates in his individual and personal capacity" (denial of federal constitutional rights under color of State law); (5) "plaintiff's sixth claim for relief as against defendant Yates in his official capacity, but not as against defendant Yates in his individual and personal capacity" (punitive damages); and (6) plaintiff's sixth claim for relief as against defendant Hurley in his official capacity but not as against defendant Hurley in his individual and personal capacity (punitive damages).

The trial court denied defendants' motions for summary judgment on plaintiff's: (1) second claim of relief for malicious interference with contractual relations against Hurley; (2) injunctive relief for violation of plaintiff's State constitutional rights by Yates in his individual and personal capacities; (3) violation of plaintiff's federal constitutional rights under 42 U.S.C. § 1983 against Yates in his individual and personal capacities limited to injunctive relief; (4) plaintiff's fifth claim for relief on the sheriff's bond against Western Surety Company (for wrongful conduct by Hurley in his official capacity as sheriff); and (5) punitive damages against both Hurley and Yates in

their individual and personal capacities. Defendants appeal and plaintiff cross appeals.

II. Issues

The common issues presented by defendants are whether the trial court erred in denying defendants' summary judgment motions on plaintiff's claims for violation under 42 U.S.C. § 1983 and punitive damages. Defendants Hurley and Western Surety separately assert the trial court erred in denying summary judgment on plaintiff's malicious interference with contractual relations as plaintiff failed to allege a waiver of immunity.

[1] Plaintiff assigned cross assignments of error on the granting of defendants' motions for summary judgment dismissing plaintiff's claims for: (1) wrongful discharge by Yates; (2) punitive damage charge against Hurley in his official capacity; (3) all forms of relief except injunction in regards to his 42 U.S.C. § 1983 action; and (4) punitive damages against Yates and Hurley in their official capacities. Except for the trial court's granting Yates summary judgment and dismissing plaintiff's claims for wrongful discharge, plaintiff's arguments in his brief assert solely alternative grounds to support the trial court's partial summary judgment in his favor. Plaintiff abandoned his remaining cross assignments of error by not arguing them in his brief. N.C. R. App. P. 28(a) (2004); *Summers v. City of Charlotte*, 149 N.C. App. 509 n.8, 562 S.E.2d 18 n.8 (2002). Also, plaintiff's cross appeals, except the wrongful discharge, are interlocutory and are dismissed. N.C. R. App. P. 10 (2004).

III. Interlocutory Appeal

[2] Defendants' appeal of an order denying their motions for summary judgment is interlocutory. However, "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (citations omitted). We recognize the non-prevailing party's right to immediate review because " 'the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.' " *Id.* (quoting *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849, *disc. rev. denied*, 344 N.C. 436, 476 S.E.2d 115 (1996) (citing *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991))). Defendants' answer and arguments assert the affirmative defense of

immunity and qualified immunity. This appeal is properly before this Court. *Id.*

IV. Standard of Review

In a motion for summary judgment, the movant has the burden of establishing that there are no genuine issues of material fact. The movant can meet the burden by either: "1) Proving that an essential element of the opposing party's claim is nonexistent; or 2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim." *Price v. Davis*, 132 N.C. App. 556, 559, 512 S.E.2d 783, 786 (1999) (citing *Messick v. Catawba County*, 110 N.C. App. 707, 712, 431 S.E.2d 489, 492-93, *disc. rev. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993)).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2003).

V. Interference with Contract

[3] Hurley asserts the trial court erred in its order denying his motion for summary judgment on plaintiff's claim against him for malicious interference with contractual relations in his official and individual capacity. We agree.

The five essential elements a plaintiff must show for a viable claim for malicious interference with contract are:

> (1) a valid contract existed between plaintiff and a third person, (2) defendant knew of such contract, (3) defendant intentionally induced the third person not to perform his or her contract with plaintiff, (4) defendant had no justification for his or her actions, and (5) plaintiff suffered damage as a result.

Wagoner v. Elkin City Schools' Bd. of Education, 113 N.C. App. 579, 587, 440 S.E.2d 119, 124 (1994) (*citing McLaughlin v. Barclays American Corp.*, 95 N.C. App. 301, 308, 382 S.E.2d 836, 841, *cert. denied*, 325 N.C. 546, 385 S.E.2d 498 (1989); *Uzzell v. Integon Life*

Ins. Corp., 78 N.C. App. 458, 463, 337 S.E.2d 639, 643 (1985), *cert. denied*, 317 N.C. 341, 346 S.E.2d 149 (1986)).

Plaintiff's complaint alleges "[a]t all times herein alleged, Hurley was the duly elected Sheriff of Randolph County." Plaintiff's claim for malicious interference with contractual relations asserts Hurley "acted without any proper purpose related to his duties as Sheriff . . . solely for reasons of ill will and malice . . . to intentionally and maliciously cause defendant Yates to terminate plaintiff's employment." Hurley argues public official immunity and qualified immunity bar this claim.

"Governmental immunity protects the governmental entity and its officers or employees sued in their 'official capacity.' " *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 279 (1993) (quoting *Whitaker v. Clark*, 109 N.C. App. 379, 382, 427 S.E.2d 142, 144, *disc. rev. and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993)), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). We have held "absent an allegation to the effect that immunity has been waived, the complaint fails to state a cause of action." *Clark v. Burke County*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994) (citing *Gunter v. Anders*, 115 N.C. App. 331, 444 S.E.2d 685 (1994)). We have also held "[g]overnmental immunity . . . does not preclude an action against the sheriff and the officers sued in their official capacities . . . . The statutory mandate that the sheriff furnish a bond works to remove the sheriff from the protective embrace of governmental immunity . . . ." *Messick*, 110 N.C. App. at 715, 431 S.E.2d at 494 (internal citations omitted).

Although plaintiff failed to plead Hurley or Yates waived immunity, plaintiff joined the issuer of the sheriff's bond as a party defendant. His failure to allege waiver of immunity procedurally does not bar review of his claim. Hurley's governmental immunity in his official capacity has been sufficiently waived as to allow review of this claim. *Id.*

Plaintiff's complaint alleges conduct that occurred at all times while Hurley was sheriff, about matters and conversations concerning the sheriff's department and its working relationship with the district attorney's office. The allegations indicate a cause of action against Hurley in his official capacity. *See Taylor*, 112 N.C. App. at 608, 436 S.E.2d at 279; *see also Whitaker*, 109 N.C. App. at 383, 427 S.E.2d at 144-45.

Hurley stated in his response to plaintiff's interrogatories that he had concerns about: (1) plaintiff's derogatory comments about a

deputy; and (2) the perception of a conflict of interest with plaintiff working at Yates' office in Randolph County and had requested that plaintiff work in other counties in the judicial district. Hurley stated Yates did not act on this request and reassign plaintiff. Hurley also stated in his affidavit that plaintiff's public criticism of himself, a deputy, and Yates concerning a discretionary decision on a particular case, created an unsatisfactory and potentially damaging working relationship between the sheriff's department and the district attorney's office.

Plaintiff's allegations fail to establish the fourth element of "no justification" to support his claims for malicious interference with contract. *Wagoner*, 113 N.C. App. at 587, 440 S.E.2d at 124. Plaintiff's allegations do not show Hurley did not have an official or personal justification in requesting plaintiff to be reassigned or terminated and that Hurley, as a constitutionally elected officer, enjoyed a qualified immunity from tort in communicating with Yates, also a constitutionally elected officer. *Id.*

Plaintiff states in his affidavit:

> Mr. Yates stated to me that Sheriff Hurley had contacted him to complain about my continuing campaign activities . . . during the period between October 15, 2001, and August 22, 2002, stated to me on many different occasions that Sheriff Hurley had told him that Sheriff Hurley wanted him to terminate me from my employment with the District Attorney's office.

Plaintiff concedes he was not fired at that time and was given two extensions by Yates of his pending termination in order to secure other employment along with the option to resign and receive a reference to other law enforcement agencies after the 2002 primary and general elections were held. Plaintiff was terminated on 31 December 2002, more than three months after the conclusion of the primary election. Plaintiff offered no evidence to show Yates terminated him because of Hurley's request. Yates stated in his sworn answers to plaintiff's interrogatories that plaintiff was terminated because of his

> inability to cooperate with and to maintain good working relations with the law enforcement agencies in the prosecutorial district; inability to function as an effective liaison with sheriff's department; . . . inability to show loyalty to the District Attorney's office by criticizing me over the motorcycle incident; [and] inability to refrain from campaigning on office time . . . .

Plaintiff was terminated several months after Hurley's purported request. Yates' affidavit and answers to plaintiff's interrogatories sets forth objective and substantial reasons for terminating plaintiff, none of which were based upon Hurley's request to do so. Examination of the verified pleadings shows: (1) Yates had justification for his actions; and (2) plaintiff suffered no recoverable damage as a result. *Id.* Plaintiff made no showing that he was terminated because of Hurley's request or that he suffered recoverable damages as a result of Hurley requesting plaintiff's termination. *Id.*

As the material facts are not in dispute, the trial court should have granted summary judgment for Hurley and Western Surety on plaintiff's claim for malicious interference with contractual relations. That portion of the trial court's order is reversed.

VI. State Constitutional Rights

[4] The trial court concluded that Yates was not entitled to summary judgment on plaintiff's claim for relief under violations of the North Carolina Constitution "in [his] individual and personal capacity." It is well settled in North Carolina that no direct cause of action for monetary damages exists against officials sued in their individual capacities who have allegedly violated a plaintiff's constitutional rights. *Corum v. University of North Carolina*, 330 N.C. 761, 788, 413 S.E.2d 276, 293, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). In *Corum*, our Supreme Court held, a "plaintiff may assert his freedom of speech right only against state officials, sued in their official capacity." 330 N.C. at 788, 413 S.E.2d at 293.

Plaintiff concedes his complaint does not set forth a cause of action against Yates in his "individual and personal capacity" in his State constitutional claim for relief. "The trial court should have granted [defendants'] motion for summary judgment as to plaintiff's claims against him . . . . The trial court's failure to do so was error." *Caudill v. Dellinger*, 129 N.C. App. 649, 658, 501 S.E.2d 99, 104 (1998). That portion of the trial court's judgment denying Yates' motion for summary judgment on plaintiff's State constitutional claim is reversed.

VII. Wrongful Termination

[5] Plaintiff assigns error to the trial court granting summary judgment for Yates and argues he was wrongfully terminated, immunity does not bar his claim, and he properly asserted a 42 U.S.C. § 1983 action against defendants. Plaintiff was employed by Yates as an

investigatorial assistant "to serve at his pleasure." N.C. Gen. Stat. § 7A-69 (2003). Yates argues he: (1) retained complete discretion in the evaluation of plaintiff's job performance and retention; (2) was acting in his official capacity in terminating plaintiff; and (3) is entitled to public official and qualified immunity.

In *Coman v. Thomas Manufacturing Co.*, the plaintiff alleged that he was discharged from his employment as a long-distance truck driver after refusing to violate federal transportation regulations. 325 N.C. 172, 381 S.E.2d 445 (1989). The plaintiff brought suit for wrongful discharge. In *Coman*, our Supreme Court explicitly recognized a public policy exception to the well-entrenched employment-at-will doctrine, quoting with approval the following language from the Court of Appeals' opinion:

> [W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

325 N.C. at 175, 381 S.E.2d at 447 (quoting *Sides v. Duke University*, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985), *overruled on other grounds by Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 331, 493 S.E.2d 429, 422 (1997) (holding that absent a contract, employment is presumed to be at will; reassurances of employment alone do not constitute a contract)). The Court stated, "public policy has been defined as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at 175 n.2, 381 S.E.2d at 447 n.2 (citing *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959)).

Pursuant to N.C. Gen. Stat. § 126-5(c1)(2) (2003), a plaintiff, as an "[o]fficer[] and [or] employee[] of the Judicial Department," is exempt from protections of the State Personnel Act. Plaintiff served at the "pleasure" of the district attorney, was exempt from coverage under the State Personnel Act, and was an "at will" employee to Yates. N.C. Gen. Stat. § 7A-69.

This Court held in *Caudill* a district attorney's termination of his "administrative assistant's employment," as permitted through N.C.

Gen. Stat. § 7A-68, because she cooperated with the State Bureau of Investigation is in direct conflict with public policy. 129 N.C. App. at 656-57, 501 S.E.2d at 103-04. We held, "it is the public policy of this state that citizens cooperate with law enforcement officials in the investigation of crimes." *Id.* at 657, 501 S.E.2d at 104.

Unlike the plaintiff in *Caudill*, plaintiff's allegations do not show he was discharged for any reason that "contravenes public policy." *Coman*, 325 N.C. at 175, 381 S.E.2d at 447 (quoting *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826); *see also Caudill*, 129 N.C. App. at 656, 501 S.E.2d at 103. Plaintiff argues he is entitled to publically criticize the sheriff and the district attorney while a candidate for sheriff. Yates states in his sworn affidavit that plaintiff's speeches were directly injurious to him and the district attorney's office and detrimental to its cooperation and coordination with the sheriff's department and other law enforcement agencies. Yates stated in plaintiff's notice of termination that he was "no longer able to function effectively in his position" and Yates cited his "lack of confidence" in plaintiff's ability to maintain a relationship with law enforcement agencies and plaintiff's insubordinate criticism of his employer's discretionary decisions. Plaintiff was not restrained by Yates from running for public office, making any speech, or engaging in a protected activity which furthers a public policy. *Id.* at 175, 381 S.E.2d at 446. As an at will and exempt employee, plaintiff's public opposition to his superior's discretionary decisions and his inability to work cooperatively with law enforcement agencies with which the district attorney must communicate and coordinate on a daily basis is a legally sufficient reason for Yates to terminate plaintiff's employment. Unlike the plaintiff in *Coman* and in *Caudill*, plaintiff here did not allege his candidacy, speeches, and activities, for which he was allegedly terminated, resulted from his employer's demand that he conduct some unlawful activity or was in retaliation for cooperating with a law enforcement agency conducting an investigation. *See Coman*, 325 N.C. at 175-76, 381 S.E.2d at 447; *Caudill*, 129 N.C. App. at 656-57, 501 S.E.2d at 104 (the plaintiff gave truthful information on the district attorney's expense accounts and falsification of bank documents to a law enforcement agency).

Plaintiff's allegations and evidence does not show how his candidacy for sheriff immunizes his speech as political expression that is protected by a public policy exception to bar his termination, when that speech publically exudes insubordination and directly criticizes his supervisor's prosecutorial discretion whether to bring criminal

charges. Plaintiff was a candidate for sheriff, not for district attorney, and was told by Yates to "keep his office out of it" when Yates learned plaintiff would be a candidate for sheriff.

Plaintiff's public statements criticizing Yates' discretionary decisions and the disruption of his office's working relationship with law enforcement agencies were sufficient reasons, standing alone, to terminate plaintiff's at will employment. Yates' decision to terminate plaintiff rested within his lawful and discretionary scope of authority. N.C. Gen. Stat. § 7A-69. Plaintiff's termination was not injurious to the public or "against the public good." *Coman*, 325 N.C. at 175 n.2, 381 S.E.2d at 447 n.2. Plaintiff has not presented any evidence to establish a genuine issue of material fact to support a claim for wrongful discharge against Yates. Plaintiff's cross assignment of error is overruled. That portion of the trial court's order is affirmed.

VIII. 42 U.S.C. § 1983

[6] Defendants argue the trial court erred in denying summary judgment for them for immunity against plaintiff's 42 U.S.C. § 1983 claim. We agree.

42 U.S.C. § 1983 (2003) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding to redress . . . .

As an at will and exempt employee, plaintiff has no protected "rights, privilege, or immunities" or property interest to assert in his employment by Yates without proof of violation of a public policy or constitutional deprivation. *Id.* N.C. Gen. Stat. § 7A-69 provides an investigatorial assistant "serve[s] at his [district attorney's] pleasure." Further, pursuant to N.C. Gen. Stat. § 126-5(c1)(2), plaintiff, as an "[o]fficer[] and [or] employee[] of the Judicial Department," is exempt from the State Personnel Act. Plaintiff is an at will employee. *Caudill*, 129 N.C. App. at 649, 501 S.E.2d at 99 (an administrative assistant pursuant to N.C. Gen. Stat. § 7A-68 was an employee to serve at the pleasure of the district attorney and was not covered

under the State Personnel Act, thus an at will employee, but her termination was protected under the Whistle Blower Act).

Plaintiff has failed to show any public policy exception which cloaks him from termination of his at will employment. Moreover, there is no genuine issue of material fact as to whether plaintiff was deprived of "any rights, privileges, or immunities secured by the Constitution and laws . . ." as a terminated at will employee of Yates. 42 U.S.C. § 1983.

Plaintiff's right to say whatever he wanted was not restrained by Yates or anyone else. Yates had the right to terminate plaintiff's employment for any reason or for "no reason, or for an arbitrary or irrational reason," so long as Yates' actions did not violate a recognized public policy. *Coman*, 325 N.C. at 175, 381 S.E.2d at 447 (quotation omitted); *Caudill*, 129 N.C. App. at 656, 501 S.E.2d at 103 (quotation omitted). Without any showing of a deprivation of any constitutionally protected rights, plaintiff's 42 U.S.C. § 1983 claim must be dismissed. The trial court erred in not granting summary judgment for defendants on this claim.

IX. Conclusion

No genuine issue of material fact supports the elements for plaintiff's malicious interference with contract claim against Hurley. Plaintiff concedes his State constitutional claim against Yates in his individual capacity. Yates can not be held liable for monetary relief for violation of plaintiff's State constitutional rights without State action. *Corum*, 330 N.C. at 788, 413 S.E.2d at 293. Plaintiff fails to assert a contravention of "public policy" claim or a wrongful termination claim against Yates. *Id.* Plaintiff's 42 U.S.C. § 1983 action should have been dismissed because no genuine issue of material fact tends to show he was deprived of any protected "rights, privileges or immunities" under color of law, or public policy as a terminated at will employee. 42 U.S.C. § 1983.

As a constitutionally elected officer, Yates has the statutory right to choose his staff to "serve at his pleasure." *Caudill*, 129 N.C. App. at 656, 501 S.E.2d at 103; N.C. Gen. Stat. § 7A-69. Plaintiff's inconsistency and fallacy throughout his claims and arguments are his assertions that freedom of speech and expression shields his termination from at will employment, (that is exempt from the State Personnel Act), and compels his reinstatement by injunctive relief and allows him to hold Yates and Hurley liable for compensatory and punitive damages.

Plaintiff asserts Hurley is liable in tort for speaking his views of plaintiff to Yates on matters that concern both constitutional officers, and Yates must suffer plaintiff's continued employment while his subordinate publically criticizes and disrespects the district attorney's office, and erodes its working relationship with a law enforcement agency. Plaintiff told Yates he planned to continue this behavior for the next four years when he would again be a candidate for sheriff.

Plaintiff was never: (1) restrained from becoming a candidate, filing, and running for elective office; (2) restrained from making any speeches or representations, other than his employer's request to "leave [the district attorney's] office out of it;' " or (3) terminated for any conduct protected by the United States or North Carolina Constitutions or established public policy. Plaintiff's insubordination and criticism of Yates' discretionary decisions were blatant, impugned the character of his employer, and disrupted an essential working relationship between the sheriff's department and the district attorney's office. When faced with plaintiff's continued criticism of the sheriff's department after the election, his allegations of voter fraud and plaintiff's stated intent to seek the sheriff's office again in 2006, Yates was not powerless to avoid years of continued turmoil and future criticisms.

Any constitutionally elected officer of the judicial department possesses the inherent and statutory right to choose their staff. Such officers cannot be compelled under threats of injunctive relief or payment of damages to retain or reinstate an insubordinate at will employee where no constitutional or public policy violation demands retention or reinstatement. N.C. Gen. Stat. 7A-69; *Caudill*, 129 N.C. App. 649, 501 S.E.2d 99 (district attorney's administrative assistant fired in violation of public policy is not entitled to reinstatement under successor district attorney).

[7] We have carefully reviewed plaintiff's remaining claims defendants appealed from and fail to find any claims plaintiff asserted, which shields him from termination of his at will and exempt employment as Yates' investigatorial assistant. *Caudill*, 129 N.C. at 658, 501 S.E.2d at 104. The trial court's grant of summary judgment for Yates on plaintiff's wrongful discharge claim is affirmed. The trial court's denial of defendants' motions for summary judgment on the remainder of plaintiff's claims, including those for punitive damages, not previously dismissed is reversed. Plaintiff's complaint is dismissed.

Affirmed in part, Reversed in part, and Dismissed.

Judge McGEE concurs.

Judge WYNN concurs in part, dissents in part.

WYNN, Judge concurring in part, dissenting in part.

The majority states that "Examination of the verified pleadings shows: (1) Yates had justification for his actions; and (2) plaintiff suffered no damage as a result. *Id*. Plaintiff made no showing that he was terminated because of Hurley's request or that he suffered recoverable damages as a result of Hurley requesting plaintiff's termination." Because, beyond the pleadings, *which are not verified*, the "depositions, answers to interrogatories, and admissions on file, together with the affidavits," N.C. Gen. Stat. § 1A-1, Rule 56(c) (2004), reveal that there exists a material dispute of fact as to Plaintiff's interference with contract claim, I respectfully dissent as to that claim.

Section 1A-1, Rule 56 of our General Statutes states that 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 any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). Summary judgment

> is "a drastic measure, and it should be used with caution." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979). "When ruling on a motion for summary judgment, 'the court must look at the record in the light most favorable to the party opposing the motion.' " *Wilkes County Vocational Workshop, Inc. v. United Sleep Prods.*, 321 N.C. 735, 737, 365 S.E.2d 292, 293 (1988) (quoting *W.S. Clark & Sons, Inc. v. Union Nat'l Bank*, 84 N.C. App. 686, 688, 353 S.E.2d 439, 440, *disc. rev. denied*, 320 N.C. 177, 358 S.E.2d 70 (1987)).

Moore v. City of Creedmoor, 345 N.C. 356, 364, 481 S.E.2d 14, 20 (1997).

On summary judgment, the movant has the burden of clearly establishing the lack of any material factual dispute. *Jennings Communs. Corp. v. PCG of the Golden Strand, Inc.*, 126 N.C. App. 637, 639, 486 S.E.2d 229, 231 (1997) ("The party moving for summary

judgment has the burden of clearly establishing a lack of any triable issue of fact by the record proper before the court.") (citing *Singleton v. Stewart*, 280 N.C. 460, 465, 186 S.E.2d 400, 403 (1972)).

As the majority notes,

> There are five essential elements for an action for malicious interference with contract: (1) a valid contract existed between plaintiff and a third person, (2) defendant knew of such contract, (3) defendant intentionally induced the third person not to perform his or her contract with plaintiff, (4) defendant had no justification for his or her actions, and (5) plaintiff suffered damage as a result.

Wagoner v. Elkin City Sch. Bd. of Educ., 113 N.C. App. 579, 587, 440 S.E.2d 119, 124 (1994) (citations omitted).

The majority here finds that "Examination of the verified pleadings shows: (1) Yates had justification for his actions; and (2) plaintiff suffered no damage as a result. *Id*. Plaintiff made no showing that he was terminated because of Hurley's request or that he suffered recoverable damages as a result of Hurley requesting plaintiff's termination." Viewing the evidence in the light most favorable to the non-moving party, as required by law, I disagree.

First, as to the "no justification" element, the evidence in the record demonstrates a material dispute of fact. In Plaintiff's affidavit of 13 November 2003, he stated that "Mr. Garland Yates, on numerous occasions personally stated to me that he intended to discharge me from my employment as his investigatorial assistant due to my seeking the office of Sheriff of Randolph County." Plaintiff stated that "[o]n each such occasion, Mr. Yates stated to me that Sheriff Hurley had contacted him to complain about my continuing campaign activities."

Mr. Tony Yates, Defendant Yates' brother, stated in his deposition that when he went to his brother Defendant Yates' office, "I told him, I said, I've come over here because I heard you were going to fire Kevin because he's going to run for sheriff. And I said I realize that, you know, you have the right to do whatever you want . . . . But I said, I don't think this is fair because a person has a right to run for a political office in this country." Upon being asked whether "your brother ever t[old] you that Sheriff Hurley expressed any interest in having Mr. Hines discharged[,]" Mr. Yates answered "[y]es" and stated that "[a]t the end of that little statement, he made the—made the state-

ment that the sheriff had called him and told him that he had to get rid of Kevin now."

In his deposition, Plaintiff stated that Defendant Yates' brother, Tony Yates, as well as Defendant Yates himself, informed him that Defendant Hurley demanded that Defendant Yates terminate Plaintiff's employment because of Plaintiff's candidacy for sheriff. Plaintiff stated that Defendant Yates told him "that the sheriff come to him and told him he wanted me—that he wanted me moved out of the county. He wanted me fired." Plaintiff said that Defendant Yates "told me he was going to fire me at different—at different times. He was going to fire me if I filed. And then when I filed, he decided to wait, and then he told me he was going to fire me before the election, and then he told me he was going to fire me after the election. I was told countless times that he was going to fire me if I ran against him."

In her deposition and through an accompanying exhibit, Ms. Cynthia Kay Lovin, administrative assistant to Defendant Yates, indicated that Plaintiff's performance evaluations for 2001 and 2002 rated Plaintiff's job performance as being satisfactory to outstanding. A portion of his 2001 performance evaluation stated:

> Kevin had previous law enforcement experience when he joined our office. He possesses excellent investigative skills, which our office uses to develop and prepare cases for trial. He also serves as a liaison with the law enforcement agencies and has a proactive working relationship with these agencies.
>
> Kevin has a very easy-going personality, which is a true asset in his job performance. He has proven to be invaluable in his ability to locate and interview witnesses. This is often a time-consuming process and requires someone with excellent investigative techniques and the ability to communicate with all segments of society.
>
> Kevin is also very informed as to the elements of criminal law and the policies and procedures of the judicial system. He works independently and has the ability to analyze each case or situation and make any necessary decisions.
>
> Kevin is always available and willing to help . . . whether it is directly in our office or in the judicial community.

In Defendant Hurley's deposition, the following colloquy took place:

Q: Is it within the scope of your authority as sheriff of Randolph County to cause or seek to cause the termination of any employee at the district attorney's office?

A: No. I didn't try to do that.

Q: Well, my question is simply is that within the scope of your authority.

A: No, sir.

Q: So whether you did it or not, you agree you don't have any legal right to try to cause a termination of an employee at the district attorney's office?

A: Absolutely not.

* * *

Q: Did you have any legal right or lawful authority in the fall of 2001 to ask Garland Yates to get rid of Kevin Hines?

A: No.

With regard to the damages element of Plaintiff's interference with contract claim, Plaintiff made clear that he was terminated from his employment with Defendant Yates, and at his deposition on 13 June 2003 that he was seeking but had not yet found full-time employment and was "drawing from the state of North Carolina unemployment . . . ." Indeed, Plaintiff stated that Defendant Hurley had contacted an administrator at a community college, at which Plaintiff obtained part-time employment after his termination by the District Attorney's Office, and "tried to get me fired . . . ."

In sum, the pleadings in this matter, contrary to the majority's assertion, are unverified. Under the "drastic measure" of summary judgment, this Court must look at the record in the light most favorable to the party opposing the motion. Beyond the unverified pleadings, the "depositions, answers to interrogatories, and admissions on file, together with the affidavits" in this case show that there are genuine issues of material fact as to Plaintiff's interference with contract claim. Thus, Superior Court Judge John O. Craig, III, correctly applied the law to this claim in denying summary judgment.

MW CLEARING & GRADING, INC., PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF AIR QUALITY, RESPONDENT

No. COA04-852

(Filed 5 July 2005)

1. Environmental Law— property boundaries on land— proper calibration of measuring wheel—open burning piles—whole record test

The trial court did not err by affirming the Environmental Management Commission's decision affirming the civil penalty and investigation costs against petitioner company for violation of the burning regulation while clearing a large parcel of land in Gaston County even though petitioner contends the agency did not provide sufficient evidence that the occupied structure and the open burning piles were on different pieces of property or that the measuring device was properly calibrated as required by 15A N.C.A.C. 2D .1903(2)(b)(B), because: (1) there is a presumption of regularity of official acts by public officials and petitioner failed to present evidence showing the burning piles were located on the same property as the nearby residence; (2) petitioner did present evidence regarding the accuracy of the measuring wheel through the testimony of the company president, respondent also presented evidence regarding the wheel's accuracy, and the trial court weighed the conflicting evidence using the whole record test; (3) if there is more than one reasonable interpretation of the evidence in the record and the agency has chosen one, the trial court may not replace the agency's interpretation with its own; (4) it is the agency's province to weigh the credibility of witnesses, and the trial court may not overrule the agency's determination as to the value of testimony and credibility of witnesses; and (5) although petitioner argued the agency's action was arbitrary and capricious based on the lack of substantial evidence regarding property boundaries or the accuracy of the measuring device, this argument is without merit since the Court of Appeals upheld the agency's interpretation of the evidence with respect to both of these claims.

2. Environmental Law— application of controlling law— mandatory assessment factors—equal protection claim— de novo review

Applying a de novo review, the trial court did not err by affirming the Environmental Management Commission's decision affirming the civil penalty and investigation costs against petitioner company for violation of the burning regulation while clearing a large parcel of land in Gaston County even though petitioner contends the agency misapplied the controlling law under N.C.G.S. § 143-215.114A(a)(1) by failing to require evidence of all elements of the violation, failing to correctly apply mandatory assessment factors, and finding multiple violations from a single incident, because: (1) even though the agency had previously counted multiple piles as a single violation where a single penalty was considered sufficient to effect future compliance, it is not irrational or illogical to count each pile as one violation; (2) each individual pile located within the 1,000 foot requirement does in fact violate the statute; (3) in light of petitioner's continued disregard for the regulations as evidenced by three prior violations, the agency properly exercised its discretion in counting each open burning pile as a separate violation; (4) in regard to petitioner's equal protection claim, no fundamental right is implicated by imposing a fine on petitioner for violation of a regulatory scheme, nor does petitioner fall within any suspect class, and the imposition of multiple fines for multiple open burning piles is rationally related to a legitimate government purpose; and (5) although petitioner contends the Court of Appeals should use a de novo review to overrule the agency's determination of the significance of the impact of petitioner's violations, the legislature has granted such discretion to the agency, the Court of Appeals may only review the agency's evaluation under the whole record test, and there was substantial evidence to support the agency's application of the mandatory assessment factors.

Judge JACKSON dissenting.

Appeal by petitioner from judgment entered 1 March 2004 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 21 March 2005.

Knox, Brotherton, Knox & Godfrey, by Allen C. Brotherton and Kara F. McIvor, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for respondent-appellee.

MARTIN, Chief Judge.

Petitioner, MW Clearing and Grading, Inc., is a grading contractor with its office in Blacksburg, South Carolina. Petitioner is engaged in the business of clearing parcels of land by removing trees, vegetation, and other unwanted materials from above and below the ground's surface. These materials are then disposed of by either grinding or open burning. In November of 1999, petitioner cleared a large area of land in Cramerton, North Carolina in Gaston County. Tony McManus, an inspector for the North Carolina Department of Environment and Natural Resources (DENR), Division of Air Quality, respondent, was driving home from work on 4 November 1999 when he noticed several large columns of white smoke off of Highway 74. McManus stopped to investigate. When he arrived at the cleared site, he discovered several burning piles of land-clearing debris. Kenneth Wilson had been left in charge of the site that day by Richard Moorhead, petitioner's president. McManus discussed the open burning regulations with Wilson, including the requirement that "[t]he location of the burning [be] at least 1,000 feet from any dwelling, group of dwellings, or commercial or institutional establishment, or other occupied structure not located on the property on which the burning is conducted." 15A N.C.A.C. 2D .1903(2)(b)(B) (1999). Wilson said he was not familiar with the regulations, but he agreed to meet McManus the next day to measure the distance of the existing piles from the closest residence. McManus did not have a measuring device, and Wilson offered to bring the company's measuring wheel to the site with him the following day.

On 5 November 1999, using petitioner's measuring device, McManus counted nine open burning piles that were within one thousand feet of the nearest residence. The distances of these piles from the residence were 453 feet, 536 feet, 610 feet, 659 feet, 704 feet, 758 feet, 873 feet, 923 feet, and 990 feet. Prior to making these measurements, McManus had not calibrated or tested the accuracy of the measuring device. As a result of these violations, petitioner was assessed a civil penalty of $36,000: $4,000 for each of the nine piles, plus $365 for the investigation costs. Petitioner had previously violated the same open burning regulation on three sepa-

rate occasions, for which it was assessed civil penalties of $1,247.44, $1,341.56, and $2,842.00.

On 15 March 2000, petitioner filed a petition for a contested case hearing in the Administrative Office of Hearings. Petitioner contested the civil penalty assessment, claiming DENR (1) exceeded its authority or jurisdiction, (2) acted erroneously, (3) failed to use proper procedure, (4) acted arbitrarily or capriciously, and (5) failed to act as required by law or rule. *See* N.C. Gen. Stat. § 150B-51(b) (2003). The administrative law judge issued a recommended decision affirming the civil penalty and investigation costs, to which petitioner excepted. The Environmental Management Commission then issued a final agency decision adopting the recommended decision to affirm the penalty and costs. Petitioner sought judicial review of the agency decision in Wake County Superior Court, where the agency decision was affirmed. Petitioner appeals.

Upon appeal from an order of the superior court affirming an agency decision, "the appellate court must examine the trial court's order to determine first, whether the trial court exercised the appropriate standard of review, and secondly, whether the trial court properly applied that standard to the record before it." *Skinner v. N.C. Dep't of Corr.*, 154 N.C. App. 270, 273, 572 S.E.2d 184, 187 (2002). The proper standard of review in the superior court depends upon the nature of the alleged error. *Id.*; *Dixie Lumber Co. of Cherryville v. N.C. Dept. of Env't, Health, and Nat. Res.*, 150 N.C. App. 144, 146, 563 S.E.2d 212, 214, *disc. review denied*, 356 N.C. 161, 568 S.E.2d 192 (2002). When the petitioner alleges the agency decision was not supported by substantial evidence or was arbitrary and capricious, the proper standard is the "whole record" test. When the petitioner contends the agency made an error of law, the superior court is required to review the error *de novo*. *Skinner*, 154 N.C. App. at 273-74, 572 S.E.2d at 187; *Dixie Lumber*, 150 N.C. App. at 146, 563 S.E.2d at 214.

"The reviewing court may be required to utilize both standards of review if warranted by the nature of the issues raised." *R.J. Reynolds Tobacco Co. v. N.C. Dep't of Env't & Natural Res.*, 148 N.C. App. 610, 614, 560 S.E.2d 163, 166, *disc. review denied*, 355 N.C. 493, 564 S.E.2d 44 (2002). Here, petitioner presents two principal arguments on appeal. First, petitioner argues the trial court erred by affirming the agency's decision as it was not supported by substantial evidence and was arbitrary and capricious. Specifically, petitioner claims the

agency did not provide sufficient evidence that the occupied structure and the open burning piles were on different pieces of property, as required by statute, or that the measuring device was properly calibrated. These arguments required the court to apply the whole record test. Second, petitioner argues the agency misapplied the controlling law by: (1) failing to require evidence of all elements of the violation, (2) failing to correctly apply mandatory assessment factors, and (3) finding multiple violations from a single incident. Therefore, petitioner contends the trial court incorrectly applied *de novo* review by affirming the agency's conclusions of law. In neither argument does petitioner allege the trial court applied an incorrect standard of review; therefore, our review is limited to whether the trial court properly applied each standard to petitioner's arguments.

In applying the whole record test, the reviewing court must examine the entire record to determine whether the agency decision was supported by substantial evidence. " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' 'If substantial evidence supports an agency's decision after the entire record has been reviewed, the decision must be upheld.' " *Dixie Lumber*, 150 N.C. App. at 147, 563 S.E.2d at 214 (citations omitted). The court must consider evidence that supports the agency's decision as well as evidence that contradicts it. *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 923 (1979). However, if there is more than one reasonable interpretation of the evidence in the record, and the agency has chosen one, the reviewing court may not replace the agency's interpretation with its own. *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). Nor may the reviewing court weigh the probative value of testimony. The agency may accept or reject in whole or part the testimony of any witness, and the agency's determination as to the value of testimony and the credibility of witnesses is final. *Little v. Board of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983).

[1] Petitioner argues the trial court incorrectly applied the whole record test because the agency decision was not supported by substantial evidence. According to petitioner, DENR failed to present evidence regarding the property boundaries on the land in question and failed to prove the measuring wheel was properly calibrated. Therefore, petitioner claims the evidence in the record did not show the burning piles were located on different property than the residence from which they were measured, nor did it show the distance of the piles from the residence had been accurately measured, two

essential elements of the statute. 15A N.C.A.C. 2D .1903(2)(b)(B) (1999). The burden is on petitioner, however, to prove DENR's non-compliance with the statute.

There is a presumption of regularity of official acts by public officials. This presumption

> is rebuttable by affirmative evidence of irregularity or failure to perform duty, but the burden of producing such evidence rests on him who asserts unlawful or irregular conduct. The presumption, however, prevails until it is overcome by . . . evidence to the contrary. . . [and] [e]very reasonable intendment will be made in support of the presumption.

Huntley v. Potter, 255 N.C. 619, 628, 122 S.E.2d 681, 687, (1961) (citations omitted). Petitioner claims this burden was not an affirmative duty but was met by simply showing the agency's evidence was insufficient. We disagree. The clear import of the presumption is to require petitioner to present substantial evidence that DENR failed to comply with the statute. *See In re Annexation Ordinance*, 304 N.C. 549, 551, 284 S.E.2d 470, 472 (1981); *Painter v. Board of Education*, 288 N.C. 165, 178, 217 S.E.2d 650, 658 (1975); *Civil Service Bd. v. Page*, 2 N.C. App. 34, 40, 162 S.E.2d 644, 647 (1968). Petitioner, however, presented no evidence showing the open burning piles were located on the same property as the nearby residence and therefore failed to rebut this element of the statute.

Petitioner did present evidence regarding the accuracy of the measuring wheel through the testimony of Richard Moorhead, the company president. Respondent also presented evidence regarding the wheel's accuracy, largely through the testimony of its inspector, Mr. McManus. The trial court weighed the conflicting evidence and made the following findings:

> 5. The record contains testimony of both Tony McManus, the field inspector for the Division of Air Quality and testimony of Richard D. Moorhead, owner of MW Clearing and Grading, Inc. Testimony at the hearing shows that the measuring wheel used by McManus to determine the distance the nine piles of burning debris were located from the nearest residence was provided by petitioner to respondent for the purpose of measuring the distances involved. Mr. McManus testified that there was no malfunctioning of the wheel apparent to him at the time the wheel was being used. Further testimony indicates that nei-

ther Mr. Wilson nor Mr. Richard M. Moorhead, agents of petitioner who were present at the time of the measurement, ever cautioned Mr. McManus about any malfunction involving their measuring wheel.

6. Mr. Richard D. Moorhead testified that he was aware of an error in the measurements when he first received the civil penalty assessment document in February, 2000. The administrative law judge's order for pre-hearing statements required petitioner to identify issues to be resolved at the hearing. Petitioner's pre-hearing statement dated 19 April 2000 did not identify any possible malfunctioning of the wheel or accuracy of measurements as an issue to be resolved. Nor did the order on final pretrial conference signed by counsel identify such an issue. Moreover, petitioner's initial response to the notice of violation indicated that the house had not even been seen.

7. Where there are two reasonably conflicting views as to whether the wheel actually malfunctioned, the whole record test does not allow the court to replace the administrative agency's judgment, even though it could justifiably have reached a different result had the matter been before the court *de novo*. While taking into account contradictory evidence from petitioner that the wheel had two bent pegs, there is substantial other evidence in the whole record to discredit that testimony and to support the agency's acceptance of the testimony of Mr. McManus (and inferences therefrom) that the wheel was not malfunctioning at the time he was using it. The credibility of witnesses and the probative value of particular testimony are for the administrative body to determine and it may accept or reject, in whole or in part, the testimony of any witness.

The trial court correctly stated the whole record test and properly applied the test to the evidence before it. The trial court noted, as we have above, that if there is more than one reasonable interpretation of the evidence in the record, and the agency has chosen one, the trial court may not replace the agency's interpretation with its own. *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 540 (1977). The final agency decision was a reasonable interpretation of the substantial evidence before it, and the trial court properly affirmed the agency's action.

We also stated that it is the agency's province to weigh the credibility of witnesses, and the trial court may not overrule the agency's

determination as to the value of testimony and credibility of witnesses. *Little v. Board of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983). Petitioner argues that the Environmental Management Commission made an improper inference of false testimony from petitioner's failure to disclose the inaccuracy of the measuring wheel prior to trial. The trial court, however, could not reconsider Mr. Moorhead's credibility or the value of his testimony, nor could it substitute its own interpretation of his testimony for the agency's. The trial court, therefore, properly upheld the agency's finding that such testimony failed to overcome the presumption of regularity of official acts.

Agency decisions have been found to be arbitrary and capricious when they "indicate a lack of fair and careful consideration; [or] when they fail to indicate 'any course of reasoning and the exercise of judgment.' " *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980) (citation omitted). Petitioner argued the agency's action was arbitrary and capricious because of the lack of substantial evidence regarding property boundaries or the accuracy of the measuring device. Because we have upheld the agency's interpretation of the evidence with respect to both of these claims, we find this argument to be without merit.

[2] Petitioner's second argument is that the Environmental Management Commission's interpretation of the controlling statute was erroneous. Unlike the whole record test, the trial court is free to substitute its own judgment for that of the agency when reviewing questions of law *de novo*. However, "although courts are the final interpreters of statutory terms, 'the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference.' " *Best v. N.C. State Board of Dental Examiners*, 108 N.C. App. 158, 162, 423 S.E.2d 330, 332 (1992), *disc. review denied*, 333 N.C. 461, 428 S.E.2d 184 (1993) (quoting *Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981)). The weight accorded to an agency's interpretation of a statute by the trial court " 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " *Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981) (quoting *Skidmore v. Swift & Company*, 323 U.S. 134, 140, 89 L. Ed. 124, 129 (1944)).

The Legislature has conferred on the Environmental Management Commission the authority to set air quality standards and regulate pollution abatement efforts. N.C. Gen. Stat. § 143-211(c) (2003); N.C. Gen. Stat. § 143-215.107(a)(1),(3) (2003). Such authority includes the ability to enforce these standards and regulations through the imposition of civil penalties. N.C. Gen. Stat. § 143-215.114A (2003). The statute provides, in pertinent part,

> (a) A civil penalty of not more than ten thousand dollars ($10,000) may be assessed by the Secretary against any person who:
>
> (1) Violates any classification, standard or limitation established pursuant to G.S. 143-215.107 [Air quality standards].

N.C. Gen. Stat. § 143-215.114A(a)(1) (2003). Petitioner's primary objection to the Commission's interpretation of this statute is the imposition of separate penalties for each open burning pile.

Petitioner contends DENR "exceeded its discretion and authority" in interpreting each pile to be one violation because such an interpretation was an "overt avoidance of the $10,000 statutory limit." The statute, however, does not define what constitutes a violation. Even though the agency had previously counted multiple piles as a single violation where a single penalty was considered sufficient to effect future compliance, it is not irrational or illogical to count each pile as one violation. Each individual pile located within the 1,000 foot requirement does, in fact, violate the statute. Noting the deference given to an agency's interpretation of a statute, the trial court concluded:

> 12. Notwithstanding petitioner's allegation that respondent's treatment of this multiple pile violation is inconsistent with respondent's treatment of petitioner's previous multiple pile violations, the testimony reflects a consistent application of graduated penalties in which the amount of each penalty increases each time petitioner repeats the violation. Respondent may exercise its enforcement discretion, as it did in the preceding penalty assessments, by declining to enforce as to a particular burning pile where it is anticipated that a single penalty would be sufficient to obtain compliance. However, where repeated violations of the same nature continue to occur, it is not inconsistent for respondent to begin to enforce as to each separate pile in an effort to deter continued non-compliance.

In light of petitioner's continued disregard for the regulations as evidenced by three previous violations, we agree with the trial court that the agency properly exercised its discretion in counting each open burning pile as a separate violation. Although an agency's interpretation of a statute is not binding on the courts, it is afforded some deference, and we see no reason to fail to yield such deference here.

Petitioner also argues such an interpretation violated its rights to equal protection because (1) the evidence tended to show that no previous violators of this statute had incurred multiple penalties for multiple piles, and (2) the assessment of multiple penalties bore no rational relationship to the purpose of the statute because the same debris arranged in one large pile could only have incurred a maximum penalty of $10,000. We disagree.

A claim of equal protection requires a two-tiered scheme of analysis. The first tier requires the court to apply strict scrutiny where the petitioner is either placed in a suspect class or claims an infringement of a fundamental right. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 10-11, 269 S.E.2d 142, 149 (1980). No fundamental right is implicated by imposing a fine on petitioner for violation of a regulatory scheme, nor does petitioner fall within any "suspect class." Although petitioner correctly states that a "class of one" may arise where an individual has been "intentionally treated differently from others similarly situated," *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 1063 (2000), petitioner does not constitute such a class.

Mr. McManus testified he was not aware of anyone else, in his ten years of experience, who had been cited for violating the same regulation four times. He could remember only one individual who had been issued as many as two notices of violations. Keith Overcash, deputy director for DENR's Division of Air Quality, also testified that most penalties assessed were rather light because many first-time violators were not aware of the regulations. Here, however, upon the admission of its president and as evidenced by three prior violations, petitioner was clearly aware of the regulations. The evidence before the trial court, therefore, indicated that petitioner was not, as argued, "similarly situated" to others subject to the same penalties, and we decline to find that petitioner was placed in a suspect class. Because the State's action neither affected a fundamental right nor implicated a suspect classification, we need not apply strict scrutiny to petitioner's claim.

We now consider whether the imposition of multiple fines under N.C. Gen. Stat. § 143-215.114A(a)(1) bears a rational relationship to a conceivable legitimate government purpose. *Texfi Industries*, 301 N.C. at 11, 269 S.E.2d at 149. According to N.C. Gen. Stat. § 143-211,

> Standards of water and air purity shall be designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.

N.C. Gen. Stat. § 143-211(c) (2003). Petitioner argues that imposing multiple fines for multiple burning piles bears no rational relationship to this stated purpose. We disagree.

In determining the amount of a civil penalty for violating open burning regulations, the Division of Air Quality considers numerous assessment factors. One such factor is "the degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation." N.C. Gen. Stat. § 143B-282.1(b)(1) (2003). The harm resulting from petitioner's violation was assessed as "significant." Another factor is "the effect . . . on air quality," which was also found to be "significant." N.C. Gen. Stat. § 143B-282.1(b)(3) (2003). The State's protection of the natural environment and the health of its citizens is a vital government function. Three prior penalties failed to deter petitioner from adhering to air quality regulations, and the Legislature granted DENR and the Environmental Management Commission the authority and discretion to prevent continuing violations by petitioner. We find the imposition of multiple fines for multiple open burning piles to be rationally related to a legitimate government purpose, and we find no merit in petitioner's claim that its right to equal protection of the laws has been violated.

Finally, petitioner argues that DENR incorrectly applied the statutory assessment factors in reaching the amount of the civil penalty. The Legislature granted the Environmental Management Commission quasi-judicial power to assess civil penalties for violations of environmental regulations. N.C. Gen. Stat. § 143B-282.1(a) (2003). In determining the amount of those penalties, the Commis-

sion considered the following factors under N.C. Gen. Stat. § 143B-282.1(b) and rated petitioner's violations accordingly:

(1) The degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation;

significant

(2) The duration and gravity of the violation;

significant

(3) The effect on ground or surface water quantity or quality or on air quality;

significant

(4) The cost of rectifying the damage;

not significant

(5) The amount of money saved by noncompliance;

very significant

(6) Whether the violation was committed willfully or intentionally;

significant

(7) The prior record of the violator in complying or failing to comply with programs over which the Environmental Management Commission has regulatory authority; and

extremely significant

(8) The cost to the State of the enforcement procedures.

not significant

N.C. Gen. Stat. § 143B-282.1(b) (2003). Our Supreme Court has previously held that "some discretion may be granted to agencies to ensure that they accomplish the purposes for which they were created, provided that such discretion is accompanied by adequate guiding standards." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 382, 379 S.E.2d 30, 35-36 (1989). In *Civil Penalty*, the following assessment factors were found to be adequate guiding standards for the agency to impose civil penalties in varying amounts within a statutory limit: "the degree and extent of harm caused by the violation, the cost

of rectifying the damage, the amount of money the violator saved by his noncompliance, whether the violation was committed willfully and the prior record of the violator in complying or failing to comply with this Article." *Id.* at 383, 379 S.E.2d at 36. These five factors are virtually identical to five of the factors in N.C. Gen. Stat. § 143B-282.1(b) above; therefore, we also hold these mandatory assessment factors to be sufficient to "check the exercise of [the agency's] discretion in its assessment of civil penalties in varying amounts, commensurate with the seriousness of the violations of the Act." *Id.* at 383, 379 S.E.2d at 36.

Petitioner argues that we, using *de novo* review, should overrule the agency's determination of the significance of the impact of petitioner's violations. However, the Legislature has granted such discretion to the agency. We cannot, as a matter of law, reevaluate the impact on the environment of petitioner's violations; we may only review the agency's evaluation under the whole record test. Upon careful consideration of the entire record before us, we conclude there was substantial evidence to support the agency's application of the mandatory assessment factors. This assignment of error is overruled.

We have reviewed each of petitioner's assignments of error and find each of them to be without merit. The Commission's final decision was supported by substantial evidence on the whole record as submitted, and therefore the decision was not arbitrary or capricious. Upon *de novo* review, the trial court correctly interpreted and applied the relevant law. The order from which petitioner appeals is affirmed.

Affirmed.

Judge HUDSON concurs.

Judge JACKSON dissents.

JACKSON, Judge dissenting.

For the reasons stated below, I must respectfully dissent from the majority's conclusion that Petitioner's violations constituted nine, rather than one, violations of North Carolina General Statutes section 143-215.114A.

I concur, however, with the majority's conclusion that Petitioner violated 15A North Carolina Administrative Code 2D.1900 and reluc-

tantly agree that the agency's use of the measuring wheel was acceptable, although I would caution regulatory agencies against the dangers of using another's equipment as the basis for their enforcement actions as became apparent in the instant case.

The majority cites—and dismisses—Petitioner's argument that the agency's decision exceeded its statutory authority. The majority correctly notes that an argument that an agency action was in excess of statutory authority is subject to *de novo* review. *North Carolina Department of Natural Resources v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004).

" '[W]e must expect the Legislature to legislate only so far as is reasonable and practical to do and we must leave to [the agency] the authority to accomplish the legislative purpose, guided of course by proper standards.' " *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 381-82, 379 S.E.2d 30, 35 (1989) (emphasis omitted) (quoting, *Com'r of Insurance v. Rate Bureau*, 300 N.C. 381, 402, 267 S.E.2d 547, 563 (1980)). It is well-settled that state agencies must employ "adequate guiding standards" which ensure that the agency's decision-making process is not arbitrary and that the agency is not called upon to make significant policy determinations appropriately left to other branches of government. *Adams v. Dept of N.E.R*, 295 N.C. 683, 697-98, 249 S.E. 2d 402, 411 (1978); *see In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 382, 379 S.E.2d 30, 35.

Petitioner was cited for nine violations of 15A North Carolina Administrative Code 2D.1900, "Open Burning," within 1,000 feet of occupied structures. North Carolina General Statutes section 215.114A specifically states that "[t]he Secretary may assess a civil penalty of not more than ten thousand dollars ($10,000) per day for a violation of the emissions limitations set out in G.S. 143-215.107D as provided in this subsection."

The company's previous history of compliance was as follows: on 16 September 1992 Notice of Violation was issued for open burning within 1,000 feet and a civil penalty of $1,247.44 was assessed and paid, on 21 March 1996 Notice of Violation was issued for open burning within 1,000 feet and a civil penalty of $1,341.56 was assessed and paid, and on 6 October 1997 Notice of Violation was issued for open burning within 1000 feet and a civil penalty of $2,842.00 was assessed and paid.

The initial notice of violation prepared by Tony L. McManus (McManus), an environmental specialist with the Mooresville

Division of Air Quality in the North Carolina Department of Environment and Natural Resources, on 5 November 1999 indicated that there was one, not nine, violations of 15A NCAC 2D.1900 in accordance with the agency's past practice of citing for multiple for violations.

In the "Enforcement Case Assessment Factors Report," a recommendation prepared by McManus, the "alleged violation" is described as "[t]he open burning of land clearing debris within 1,000 feet of an occupied residence by MW Clearing & Grading, Inc. located off of Highway 74/Wilkinson Boulevard . . . ." No mention is made that there were nine debris piles burning in this description of the alleged violation. Moreover, McManus sent a memorandum on 29 December 1999 to Mike Aldridge, supervisor of the enforcement group, regarding petitioner's violation. In the 29 December memorandum, with the subject of "Fast Track Enforcement," McManus identified the type and number of violations as "One violation of 15A NCAC 2D.1900, 'Open Burning.' " This citation of one violation of the administrative code was consistent with the agency's past practices as both McManus and Keith Overcash (Overcash), Deputy Director for the Division, testified at the administrative hearing.

Deputy Director Overcash, however, elected unilaterally to throw out the agency's past practices in assessing the penalty in this matter. Included in the evidence presented at the administrative hearing was a "Division of Air Quality—Civil Penalty Assessment" worksheet. The assessment factors were based upon provisions included in North Carolina General Statutes section 143B-282.1 and North Carolina Administrative Code 15A 2J.0006. These provisions are required considerations in each assessment according to Overcash. Accordingly, he completed a worksheet for every penalty the agency assessed for which he was responsible. For each factor, the alleged violation could be rated as not significant, moderately significant, significant, very significant, or extremely significant. Petitioner was rated as follows:

1) The degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation;

   significant

2) The duration and gravity of the violation;

   significant

3) The effect on ground or surface water quantity or quality or on air quality;

significant

4) The cost of rectifying the damage;

not significant

5) The amount of money saved by noncompliance;

very significant

6) Whether the violation was committed willfully or intentionally [Cause];

significant

7) The prior record of the violator in complying of failing to comply with the programs over which the Environmental Management Commission has regulatory authority; and

extremely significant

8) Cost to the State of enforcement procedures.

not significant

9) The effectiveness of the action taken by the violator to cease the violation.

not significant

In addition to the assessment factors preprinted on the page, Overcash hand wrote in the following three items: "[p]reviously assessed (3 times) for same violation;" "[n]ine piles [within] 1000 f[ee]t of residence;" and "[r]esponse from violator indicated savings of [$]31,000 by open-burn vs. hauling." No credit was given to petitioner for the following "Remission Factors:"

Whether one or more of the civil penalty assessment factors were wrongly applied to the detriment of the petitioner;

Whether the violator promptly abated continuing environmental damage resulting from the violation;

Whether the violation was inadvertent or the result of an accident;

Whether the violator had been assessed civil penalties for any previous violations; and Whether payment of the civil penalty will prevent payment for the remaining necessary remedial actions.

Overcash also testified that there was no Division policy on treating multiple piles as a single violation. He further stated that because of the financial savings petitioner would realize by burning rather than hauling away its debris, he "felt that we could count them as separate violations." Overcash also testified that the Division uses a "penalty tree" to ensure consistency between assessments from one to the next, but that basically it was for first and second time violators and after that, the decision to assess at a higher amount was solely in his discretion. There simply were no principled "adequate guiding standards" underlying Overcash's decision to deviate from the agency's historical practice of assessing one penalty for multiple piles, nor for failing to utilize the Division's penalty tree that he specifically stated was intended to ensure consistency.

"It is a well-established principal that the long standing interpretation of a statute by the administering agency should be given deference." 2002 N.C.A.G. 525, 2002 W.L. 431451 (N.C.A.G.) (citing *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). "Administrative interpretation of a statute, acquiesced in over a long period of time, is properly considered in the construction of the statute by the courts." *Petty v. Owen*, 140 N.C. App. 494, 500, 537 S.E.2d 216, 220 (2000) (citing *Duggins v. Board of Examiners*, 25 N.C. App. 131, 137, 212 S.E.2d 657, 662, *cert allowed*, 287 N.C. 258, 214 S.E.2d 430 (1975) and *affirmed*, 294 N.C. 120, 240 S.E.2d 406 (1978)). Although not binding upon this Court, the advisory opinions of the Attorney General do merit "respectful consideration." *Williams v. Alexander County Board of Education*, 128 N.C. App. 599, 602, 495 S.E.2d 406, 408 (1998).

The majority states, *supra*, that "[e]ven though the agency had previously counted multiple piles as a single violation where a single penalty was considered sufficient to effect future compliance, it is not irrational or illogical to count each pile as one violation." The majority also correctly notes the deference properly given to an agency's interpretation of its own statutes. However, given the agency's longstanding prior history of interpreting violations of North Carolina General Statutes section 143-215.114A and 15A North Carolina Administrative Code 2D.1900 with multiple burn piles as constituting one violation of the statute and the code, *that* is the proper interpretation which should receive deference, not an interpretation in which the Deputy Director essentially throws out the rule book in order to assess a civil penalty inconsistent with the agency's previous actions.

Because I have determined that the agency acted in excess of its statutory authority by its actions in this instance in that it employed wholly new guidelines never utilized before that were not a part of its worksheet and it deviated from its penalty tree, it is unnecessary to determine at this time whether, after implementation of "adequate guiding standards," imposition of such a penalty would be appropriate.

SYLVIA YOUSE, PLAINTIFF-APPELLANT v. DUKE ENERGY CORPORATION, DEFENDANT-APPELLEE

No. COA04-797

(Filed 5 July 2005)

1. Appeal and Error— violations of appellate rules—issues clear—no dismissal

Violations of the Rules of Appellate Procedure did not result in dismissal of the appeal where the Court of Appeals was able to determine the issues on appeal and defendant was put on sufficient notice of the issues.

2. Collateral Estoppel and Res Judicata— federal and state claims—identical underlying factual issues

Collateral estoppel barred plaintiff's state claims for discrimination in the termination of her employment based on age and disability where her companion federal case had determined identical underlying factual issues.

3. Collateral Estoppel and Res Judicata— negligent infliction of emotional distress—prior federal determination

Collateral estoppel barred plaintiff's state claim for negligent infliction of emotional distress based on breach of public policy on age and disability discrimination. A federal court had already determined that no age or disability discrimination occurred in her termination.

4. Collateral Estoppel and Res Judicata— claim splitting—collateral estoppel not waived

A defendant does not waive collateral estoppel by consenting to claim splitting.

5. Collateral Estoppel and Res Judicata— federal action—not simultaneous

A federal action filed on the same day as a state action was not a subsequent or simultaneous action for collateral estoppel where the federal action was complete by the time the state action was heard.

Judge TYSON dissenting.

Appeal by plaintiff from order and judgment entered 11 February 2004 by Judge Anderson Cromer in Superior Court, Guilford County. Heard in the Court of Appeals 2 February 2005.

Hicks McDonald Noecker LLP, by David W. McDonald, for plaintiff-appellant.

Constangy, Brooks & Smith, LLC, by John J. Doyle, Jr. and Jill Stricklin Cox, for defendant-appellee.

McGEE, Judge.

Sylvia Youse (plaintiff) was employed by Duke Energy Corporation (defendant) from 8 October 1984 to 21 March 2002. Plaintiff became a Quality Assurance Analyst (QAT Analyst) for defendant on 1 June 1999. The QAT Analyst job description contained the following provision:

I. POSITION PURPOSE

Monitors and evaluates the quality of inbound telephone calls. Document[s] quality issues and performance measures for management review . . . . Provide[s] information to assist in the feedback and formal education process of individuals on the phone. Provides subject matter expertise regarding call segment processes and call criteria. Informal feedback and auditing of non-call work is also summarized and audited to assure quality issues are addressed.

II. MAJOR ACCOUNTABILITIES/ESSENTIAL DUTIES

. . . .

2. . . .

. . . .

B. Maintains appropriate relationships and credibility needed to assure that quality scores are used effectively to improve performance of Customer Service Specialists.

Plaintiff and her husband owned a house in Mebane, North Carolina (the Mebane house), which they leased to their son and daughter-in-law. Defendant provided electrical service to the Mebane house. Plaintiff's son and daughter-in-law arranged to move out of the Mebane house in February 2002. Electrical service was scheduled to be changed from plaintiff's daughter-in-law's name to plaintiff's name on 18 February 2002. However, the electrical service was disconnected on 11 February 2002.

Plaintiff telephoned defendant on 11 February 2002 and inquired as to why the electrical service was not working. Plaintiff spoke with customer service representative Demishie Grier (Grier), who informed plaintiff that the electrical service had been disconnected for non-payment. Plaintiff and Grier began to disagree as to whether the electrical service should be turned back on. When plaintiff asked to speak with a supervisor, Grier stated that Grier could not transfer the call but would have a supervisor call plaintiff. Plaintiff stated that she could not be called back since she was on a cell phone and had an unreliable connection. Plaintiff and Grier thereafter ended their telephone conversation.

Plaintiff then telephoned call service response and spoke with Billy Kingry (Kingry), a service response specialist. Plaintiff had originally hired Kingry to work for defendant and was Kingry's former supervisor. Plaintiff asked Kingry to look at the Mebane house account and told him that she needed electrical service at the Mebane house. Kingry then arranged to have the electrical service turned back on at the Mebane house. This reconnection of the electrical service was in violation of defendant's "non-pay reconnect" guidelines, which provide that a reconnect of an account is only available once payment has been made on the account. Kingry told Yolanda Peterson (Peterson), a HR Consultant for defendant, that he did "ma[k]e an exception for [plaintiff] because of [Kingry and plaintiff's] previous relationship and [plaintiff's] knowledge of how things work."

The following day, on 12 February 2002, defendant determined that the electrical service at the Mebane house had been erroneously reconnected. The account was scheduled for another non-pay disconnect, and a disconnect notice was delivered to the Mebane house.

Peterson received an email on 18 February 2002 from Dawn Morrison (Morrison), plaintiff's supervisor. The email stated that plaintiff may have engaged in "very inappropriate conduct." The email also recommended that an investigation take place. Peterson began an investigation into plaintiff's conduct, during which Peterson interviewed numerous individuals and reviewed the history of the Mebane house account. Plaintiff was removed from defendant's employment on 8 March 2002 pending the completion of Peterson's investigation.

During the course of the investigation, Peterson learned that in January 2002, plaintiff had accessed her daughter-in-law's account at the Mebane house. This activity was in violation of defendant's procedures which prohibit employees from working on their own, their co-workers,' or their family members' electrical service accounts. Peterson also determined that plaintiff's conduct, when plaintiff spoke with Grier, included "hostile and intimidating statements" and an "attempt to persuade . . . Grier to circumvent established call procedures." Finally, Peterson found that plaintiff "circumvent[ed] . . . customer service processes" when she called Kingry directly in an effort to restore the electrical service, and that she made false statements to Kingry about the Mebane house account. Due to this conduct, Peterson determined that plaintiff was unable to satisfy the requirements of her position as a QAT Analyst. Peterson found that plaintiff

> compromised her credibility and her relationship with [defendant's] employees when she completely disregarded the very same customer service procedures that she was charged with administering, made intimidating statements to a customer service specialist and service response employee, and abused her position [with defendant] to achieve her own personal objectives.

Peterson recommended to Lynetta Chisolm (Chisolm), General Manager of Customer Contact Services, that plaintiff be discharged. Chisolm agreed, and plaintiff's employment with defendant was terminated on 21 March 2002.

Plaintiff filed a complaint against defendant on 20 September 2002, alleging wrongful termination in violation of public policy based on age and handicap discrimination, negligent infliction of emotional distress, a violation under the Wage and Hour Act, N.C. Gen. Stat. § 95-25.1-95-25.25, and punitive and special damages. That same day, plaintiff filed a complaint in the United States District

Court for the Middle District of North Carolina (Middle District) alleging identical facts to those in the state court complaint. The complaint filed in the Middle District alleged violations of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621-634, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101-12213, and the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001-1461. Defendant filed a motion for summary judgment in the Middle District case on 24 October 2003. In an order and recommendation dated 15 December 2003, a magistrate judge recommended that defendant's motion for summary judgment be granted. *Youse v. Duke Energy Corporation*, 1:02CV00808 (M.D.N.C. 2003). Plaintiff objected to the recommendation, and a district court judge made a *de novo* determination of the magistrate judge's recommendation. *See* 28 U.S.C. § 636 (b)(1) (2004). The district court judge adopted the magistrate judge's recommendation and ordered that defendant's motion for summary judgment be granted as to all claims on 23 January 2004.

Defendant filed a motion for summary judgment in state court on 21 January 2004. The trial court granted defendant's motion in an order entered 11 February 2004. Plaintiff appeals.

I.

[1] We first address defendant's argument that plaintiff's appeal should be dismissed due to plaintiff's violations of the North Carolina Rules of Appellate Procedure. Defendant specifies that plaintiff has violated the Rules by: (1) failing to reference the record page numbers on which her assignments of error appear, *see* N.C. R. App. P. 28(b)(6); (2) referencing the incorrect assignment of error in support of Argument D in her brief, *see id.*; (3) using argumentative language when summarizing the facts of the case, *see* N.C. R. App. P. 28(b)(5); (4) failing to reference pages of the transcript or record on appeal in connection with her factual assertions, *see id.*; (5) failing to include relevant portions of statutes in the Appendix to her brief, *see* N.C. R. App. P. 28(d)(1)(c); (6) using the incorrect font size for the footnotes in her brief, *see* N.C. R. App. P. 26(g); (7) providing the improper citations for several of the authorities on which plaintiff's brief relies, *see* N.C. R. App. P. 28(b)(6); and (8) filing her Appeal Information Statement two weeks after the date her brief was due to be filed, *see* N.C. R. App. P. 41(b)(2).

Although we recognize that plaintiff failed to comply with several of our Rules of Appellate Procedure, we do not find that dismissal of

the appeal is proper in this case. Despite the Rules violations, we are able to determine the issues in this case on appeal. Furthermore, we note that defendant, in filing a brief that thoroughly responds to plaintiff's arguments on appeal, was put on sufficient notice of the issues on appeal. *See Viar v. N.C. Dep't of Transportation*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Since plaintiff's Rules violations are not "so egregious as to invoke dismissal[,]" *Symons Corp. v. Insurance Co. of North America*, 94 N.C. App. 541, 543, 380 S.E.2d 550, 552 (1989), we elect to review the significant issues of this appeal pursuant to N.C. R. App. P. 2. *See Symons*, 94 N.C. App. at 543, 380 S.E.2d at 552.

II.

[2] Plaintiff's first assignment of error contends that the trial court erred in granting summary judgment in favor of defendant on plaintiff's claim of wrongful discharge against public policy. The trial court's order stated the following:

> 1. Defendant is entitled to summary judgment on plaintiff's claim of wrongful discharge against public policy. . . . The same issues that are dispositive of plaintiff's claim of wrongful discharge against public policy already have been litigated to final judgment by the [Middle District] in plaintiff's companion lawsuit against defendant . . . . Therefore, plaintiff's claims in this state court proceeding are barred by the doctrine of collateral estoppel.

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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The moving party to a summary judgment motion can prevail by showing that "the other party cannot overcome an affirmative defense which would bar the claim." *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998). Collateral estoppel is an affirmative defense. *See* N.C. Gen. Stat. § 1A-1, Rule 8 (2003); *Johnson v. Smith*, 97 N.C. App. 450, 453, 388 S.E.2d 582, 584, *disc. review denied*, 326 N.C. 596, 393 S.E.2d 878 (1990).

Collateral estoppel prevents "the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." *Whitacre P'ship v. Biosignia, Inc.*,

358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). An action is barred under the doctrine of collateral estoppel "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 227, 231, *disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). Collateral estoppel will apply when: "(1) a prior suit result[ed] in a final judgment on the merits; (2) identical issues [were] involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *McDonald v. Skeen*, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211, *disc. review denied*, 356 N.C. 437, 571 S.E.2d 222 (2002) (citing *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 429-30, 349 S.E.2d 552, 557-58 (1986)). In determining what issues were actually litigated or decided by the earlier judgment, the court in the second proceeding is " 'free to go beyond the judgment roll, and may examine the pleadings and the evidence [if any] in the prior action.' " *Miller Building Corp. v. NBBJ North Carolina, Inc.*, 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998) (alteration in original) (quoting 18 James W. Moore et al., *Moore's Federal Practice* § 132.03 [4][i] (3rd ed. 1997)).

Although plaintiff's companion Middle District case was based on different legal claims than the case before us, the state court and Middle District cases involved identical underlying factual issues. "To the extent the U.S. District Court ruled on these issues, plaintiff is barred from relitigating the issues in state court." *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 594, 599 S.E.2d 422, 429 (2004). We conclude that plaintiff's state law claim that she was discriminated against on the basis of her age and disability in violation of North Carolina's public policy is barred by collateral estoppel.

N.C. Gen. Stat. § 143-422.2 (2003) states: "It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination . . . on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees." Our Supreme Court has directed that "we look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *Dept. of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983); *see also Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 685-86, 504 S.E.2d 580, 584 (1998), *disc. review denied*, 350 N.C. 91, 527 S.E.2d 662 (1999).

In this case, the Middle District considered plaintiff's claims for both age discrimination under the ADEA, and disability discrimination under the ADA. While plaintiff argues that the Middle District never addressed the issue of whether North Carolina public policy was violated, plaintiff also "contends that her discharge was motivated by defendant's discrimination based upon her age and disability," the same factual issues decided by the Middle District.

The Middle District granted summary judgment to defendant on plaintiff's ADEA claim since, although plaintiff was able to establish a prima facie case of discrimination, defendant "ha[d] proffered substantial evidence of a legitimate, nondiscriminatory reason for [p]laintiff's discharge, and [p]laintiff ha[d] failed to produce sufficient evidence that [d]efendant's proffered reason [wa]s a pretext for discrimination." Specifically, the Middle District found that "[d]efendant's evidence demonstrates that [p]laintiff violated [defendant's] policy against working orders to a relative's account, engaged in inappropriate behavior with a customer service specialist over the telephone, and abused her status as a QAT analyst and former supervisor to circumvent established company procedures." Since the Middle District determined that plaintiff had failed to prove that defendant's proferred reason for plaintiff's termination was a pretext for discrimination, plaintiff's state law claim based on the same factual allegation of age discrimination is collaterally estopped.

Similarly, the Middle District granted summary judgment to defendant on plaintiff's ADA claim. The Middle District found that plaintiff had failed to even establish a prima facie case of disability discrimination:

> Plaintiff has not offered any further evidence of actions by [defendant] which would tend to show resentment of or animus towards [p]laintiff because of her "disability." Rather, the record evidence demonstrates a long history of accommodations by [defendant] for [p]laintiff's personal and health needs. Furthermore, [p]laintiff admits that no one at [defendant] ever made any derogatory remarks about her health.

Again, since the Middle District determined that plaintiff had failed to prove, under the ADA, that she was discriminated against based on her disability, we find that plaintiff's state law claim based on the same factual allegation of disability discrimination is collaterally estopped.

[3] We also find that collateral estoppel bars plaintiff's claim for negligent infliction of emotional distress. To establish a claim for negligent infliction of emotional distress, a plaintiff must prove that: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). To prove that a defendant "negligently engaged in conduct," a plaintiff must show: (1) a legal duty; (2) a breach of that duty; and (3) that damages were proximately caused by such breach. *Tise v. Yates Construction Co.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997).

In this case, plaintiff claims that defendant breached its duty to plaintiff to not violate the public policy of North Carolina by discriminating against her on the basis of her age and disability. However, as stated above, the Middle District determined that defendant did not discriminate against plaintiff on either the basis of her age or disability. Assuming *arguendo* that defendant had a duty to plaintiff to not violate the public policy of North Carolina, the Middle District has already determined that a breach of such duty did not occur. Therefore, plaintiff's claim for negligent infliction of emotional distress is collaterally estopped.

[4] Plaintiff argues that defendant has waived its right to a collateral estoppel defense because defendant failed to oppose plaintiff's strategy of filing two different lawsuits. Plaintiff contends that defendant, by not objecting to the Middle District action on the grounds of prior pending action, waived a collateral estoppel defense. In support of her argument, plaintiff cites *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993) and *Howerton v. Grace Hospital*, 130 N.C. App. 327, 502 S.E.2d 659 (1998). We find *Bockweg* and *Howerton* inapplicable to this case. First, neither *Bockweg* nor *Howerton* involved the doctrine of collateral estoppel, or issue preclusion, but rather involved the doctrine of res judicata, or claim preclusion. *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161; *Howerton*, 130 N.C. App. at 330, 502 S.E.2d at 661. Second, *Bockweg* and *Howerton* did not address whether a defendant waives the right to a collateral estoppel defense, but rather dealt with the issue of whether a party has consented to claim splitting. *Bockweg* held that "[f]ailure to timely object to the other action pending may be viewed as consent to the claim-splitting." 333 N.C. at 496, 428 S.E.2d at 164. Similarly, *Howerton* held that "when a party consents to the dismissal without prejudice of one or more (but not

all) of several claims, they tacitly consent to claim splitting." 130 N.C. App. at 331, 502 S.E.2d at 662. In this case, defendant does not challenge plaintiff's claim-splitting. Rather, defendant only argues that plaintiff's claims are barred by collateral estoppel and in fact raised this defense as soon as the defense became available to defendant. Nothing in *Bockweg* or *Howerton* suggests that by consenting to claim-splitting, a defendant waives the defense of collateral estoppel. We find that plaintiff's claims for discrimination are barred by collateral estoppel, and thereby serve the purpose of the doctrine: to "protect[] litigants from the burden of relitigating previously decided matters and promot[e] judicial economy by preventing needless litigation." *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161.

[5] Plaintiff also argues that her federal action was not a "prior action" but rather a "subsequent" or "simultaneous" action. We disagree. The magistrate judge's recommendation disposing of the federal action was filed on 15 December 2003, and the recommendation was adopted by the district court judge on 23 January 2004. The hearing on the state court motion for summary judgment did not occur until 9 February 2004. Therefore, at the time the state trial court heard defendant's motion for summary judgment and considered the issue of collateral estoppel, the Middle District case was complete and the issues common to both cases had already been decided. *See Houghton v. Harris*, 243 N.C. 92, 95, 89 S.E.2d 860, 863 (1955); *and Leary v. Land Bank*, 215 N.C. 501, 510, 2 S.E.2d 570, 575 (1939) (" 'A prior judgment upon the same cause of action sustains the plea of former recovery, although the judgment is in action commenced subsequently to the one in which it is pleaded. The date is of no consequence; it is the fact of an adjudication between the same parties upon the same subject matter, which gives effect to the former recovery.' " (citation omitted)).

Since our determination of the foregoing issues are dispositive of this case on appeal, we need not address plaintiff's remaining assignments of error. For those assignments of error not addressed in plaintiff's brief, we deem them abandoned. N.C. R. App. P. 28(b)(6).

Affirmed.

Judge GEER concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge dissenting.

The majority's opinion recites many of plaintiff's violations of our appellate rules, yet decides to reach the merits of plaintiff's appeal and affirms the trial court's grant of summary judgment in defendant's favor. Plaintiff egregiously failed to comply with multiple provisions of the North Carolina Rules of Appellate Procedure. This appeal should be dismissed. I respectfully dissent.

I. Rules of Appellate Procedure

Plaintiff's appellate rules violations have impeded comprehension of the issues on appeal and frustrated the appellate process. This appeal is not properly before us and should be dismissed. *See Steingress v. Steingress*, 350 N.C. 64, 65-67, 511 S.E.2d 298, 299-300 (1999) ("when the appellant's brief does not comply with the rules by properly setting forth exceptions and assignments of error with reference to the transcript and authorities relied on under each assignment, it is difficult if not impossible to properly determine the appeal") (citing *State v. Newton*, 207 N.C. 323, 329, 177 S.E. 184, 187 (1934).

Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure states an appellant's brief shall contain:

> An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. 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.

N.C. R. App. P. 28(b)(6) (2004). Plaintiff failed to comply with these rules.

N.C. R. App. P. 28(b)(5) (2004) also requires an appellant's brief contain "a non-argumentative summary of all material facts underlying the matter in controversy . . . supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be." The Rules further provide "relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief" must be reproduced as appendices to the brief. N.C. R. App. P. 28(d)(1)(c) (2004). N.C. R. App. P.

26(g)(1) (2004) mandates "[a]ll printed matter [in a brief] must appear in at least 12-point type . . . [t]he body of text shall be presented with double spacing between each line of text." Plaintiff violated or failed to comply with these provisions.

Rule 12 states the record on appeal must be filed within fifteen days after it has been settled. N.C. R. App. P. 12(a) (2004). Rule 28 requires an appellant's brief contain "[i]dentification of counsel by signature, typed name, office address and telephone number" and "[t]he proof of service required by Rule 26(d)." N.C. R. App. P. 28(b)(8)-(9) (2004). "Papers presented for filing shall contain . . . proof of service . . . certified by the person who made service." N.C. R. App. P. 26(d) (2004). "The body of the document shall at its close bear the . . . manuscript signature of counsel of record." N.C. R. App. P. 26(g)(3) (2004). Finally, each appellant must file an Appeal Information Statement at or before the time appellant's brief is due and must serve a copy of the statement upon all other parties to the appeal. N.C. R. App. P. 41(b)(2) (2004). Plaintiff also failed to comply with any of these provisions.

In order to reach the merits of plaintiff's argument and reverse the trial court's decision, this Court is limited to the issues properly presented for appeal. N.C. R. App. P. 10(a) (2004). Plaintiff's appeal and brief contains at least fourteen violations of the North Carolina Rules of Appellate Procedure.

As noted by the majority's opinion, plaintiff violated the Rules by: (1) failing to reference the record page numbers on which her assignments of error appear, *see* N.C. R. App. P. 28(b)(6); (2) referencing the incorrect assignment of error in support of argument D in her brief, *see id.*; (3) using argumentative language when summarizing the facts of the case, *see* N.C. R. App. P. 28(b)(5); (4) failing to reference pages of the transcript or record on appeal in connection with her factual assertions, *see id.*; (5) failing to include relevant portions of statutes in the appendix to her brief, *see* N.C. R. App. P. 28(d)(1)(c); (6) using the incorrect font size for footnotes in her brief, *see* N.C. R. App. P. 26(g); (7) providing improper citations for several of the authorities on which plaintiff's brief relies, *see* N.C. R. App. P. 28(b)(6); and (8) filing her Appeal Information Statement two weeks after the date her brief was due to be filed, *see* N.C. R. App. P. 41(b)(2).

Further review of the record and briefs reveals plaintiff also: (9) presented argument in footnotes, *see* N.C. R. App. P. 26(g)(1), *see also Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 147-48,

468 S.E.2d 269, 273 (1996); (10) served the record on appeal late (order entered 21 April 2004 extending time to serve record on appeal to 12 May 2004; record on appeal served 15 June 2004), *see* N.C. R. App. P. 12(a); (11) failed to sign her reply brief, *see* N.C. R. App. P. 28(b)(8) and N.C. R. App. P. 26(g)(3); (12) failed to sign the certificate of service in her reply brief, *see* N.C. R. App. P. 28(b)(9) and N.C. R. App. P. 26(d); (13) failed to sign the certificate of filing by first class mail in her reply brief, *see* N.C. R. App. P. 26(a)(1); and (14) failed to reference any assignment of error in support of Argument E in her brief, *see* N.C. R. App. P. 28(b)(6). Plaintiff's reply brief should be stricken. *See* N.C. R. App. P. 25(b) and N.C. R. App. P. 34(b)(3).

In *Shook v. County of Buncombe*, this Court dismissed the appellant's brief due to numerous violations of the Rules. 125 N.C. App. 284, 284, 480 S.E.2d 706, 706 (1997). The record on appeal in *Shook* consisted of three volumes containing 767 pages and numerous and complicated issues to be considered on appeal. *Id.* at 286, 480 S.E.2d at 707. We stated the violations in *Shook* "highlight[ed] why our appellate rules are a necessity." *Id.*

We further stated, "[w]hen we are presented with an appeal such as the instant one, the rules are not merely ritualistic formalisms, but are essential to our ability to ascertain the merits of an appeal." *Id.* We concluded by repeating that "[o]ur rules are mandatory, and in fairness to all who come before this Court, they must be enforced uniformly." *Id.* at 287, 480 S.E.2d at 708 (citation omitted).

Here, the record on appeal contains three volumes consisting of 609 pages and appellant's brief purports to present five questions for review. Appellant's numerous rules violations have made it "difficult if not impossible to properly determine the appeal." *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299 (citation omitted). Because "[o]ur rules are mandatory, and in fairness to all who come before this Court, they must be enforced uniformly[,] . . . [plaintiff's] appeal [should be] dismissed." *Shook*, 125 N.C. App. at 287, 480 S.E.2d at 708 (internal citation omitted).

II. Rule 2

The majority's opinion recognizes plaintiff egregiously failed to comply with the appellate rules, yet decides to review the merits of plaintiff's claims by invoking Rule 2 of the North Carolina Rules of Appellate Procedure.

Rule 2 states:

> [t]o 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 (2004) (emphasis supplied).

"Our Supreme Court stated in *Steingress v. Steingress* that 'Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and *only in such instances*.' " *Wolfe v. Villines*, 171 N.C. App. 483, 492, 610 S.E.2d 754, 761 (2005) (J. Tyson dissenting) (citing *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300 (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)). "This Court has repeatedly held that 'there is no basis under Appellate Rule 2 upon which we should waive plaintiff's violations of Appellate Rules . . . .' " *Wolfe*, 171 N.C. App. at 492, 610 S.E.2d at 761 (quoting *Holland v. Heavner*, 164 N.C. App. 218, 222, 595 S.E.2d 224, 227 (2004) (quoting *Sessoms v. Sessoms*, 76 N.C. App. 338, 340, 332 S.E.2d 511, 513 (1985))).

Further, our Supreme Court recently held in *Viar v. N.C. Dep't of Transp.*, "[i]t 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." 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (*per curiam*) ("[t]he majority opinion in the Court of Appeals, recognizing the flawed content of plaintiff's appeal, applied Rule 2 of the Rules of Appellate Procedure to suspend the Rules").

III. Conclusion

Our Rules are mandatory and in fairness to all parties must be uniformly enforced. Plaintiff's appeal should be dismissed. *See Shook*, 125 N.C. App. at 287, 480 S.E.2d at 708. "My review of the entire record fails to disclose any 'exceptional circumstances,' 'significant issues,' or 'manifest injustice' to warrant suspension of the Appellate Rules." *Wolfe*, 171 N.C. App. at 493, 610 S.E.2d at 761. Without a show-

ing of "exceptional circumstances," "significant issues," or "manifest injustice," our precedents do not allow invoking Rule 2 to excuse appellant's rule violations and reach the merits of this appeal. *Id.* I vote to dismiss plaintiff's appeal and respectfully dissent.

STATE OF NORTH CAROLINA v. RODNEY MICHAEL FISHER

No. COA04-1155

(Filed 5 July 2005)

1. Confessions and Incriminating Statements— custodial statements—voluntariness—intoxication

The trial court did not commit plain error in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and multiple assaults with a deadly weapon with intent to kill by denying defendant's motion to suppress his custodial statement to an officer even though defendant contends he was intoxicated and does not remember waiving his Miranda rights, because: (1) a confession is admissible unless defendant is so intoxicated that he is unconscious of the meaning of his words; (2) in the instant case the officer testified that he read defendant the Miranda warnings, defendant acknowledged that he understood the warnings, and thereafter defendant waived his rights and agreed to answer any of the officer's questions; (3) the officer testified that he did not smell alcohol on defendant, that defendant did not seem impaired in the slightest, and that defendant made no indication that he had any difficulty at all in understanding the officer's questions; (4) if there is a conflict between the State's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal; and (5) an unsigned statement taken in longhand is not precluded from admission if it contains a record of defendant's actual responses to the recorded questions.

2. Assault— deadly weapon with intent to kill inflicting serious injury—motion to dismiss—sufficiency of evidence—perpetrator of crime

The trial court did not err by denying defendant's motion to dismiss the charges of assault with a deadly weapon with intent to kill inflicting serious injury and multiple assaults with a deadly

weapon with intent to kill, because viewing the evidence in the light most favorable to the State demonstrates that there was sufficient evidence to demonstrate that defendant was the perpetrator of the crimes for which he was charged including that: (1) defendant admitted that he took the gun from the man who fired the initial shot and thereafter followed three men down the street with it while firing eight or nine times at them while they were running; (2) the victim was standing on the corner of the street where defendant was firing the shots and was hit by a bullet from one of these gunshots; and (3) a witness testified that she heard eight total gunshots and the victim testified that she heard eight or nine total gunshots.

3. Appeal and Error— preservation of issues—continuation of trial after dismissal of juror—failure to object

Although defendant contends the trial court erred in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and multiple assaults with a deadly weapon with intent to kill by continuing the trial following the dismissal of a juror due to his sleeping problem, this assignment of error is dismissed because: (1) there is no indication in the record that defendant moved for a mistrial or offered any objection to the trial court's continuation of the trial with an alternate juror; and (2) although defendant assigned plain error to this issue on appeal, plain error review is reserved for instructional errors or the admissibility of evidence.

4. Assault— failure to give curative instruction—misstatement of charges

The trial court did not commit plain error by failing to give a curative instruction sua sponte following a prior misstatement of the charges against defendant when the trial court informed the jury at the opening of trial that defendant was being tried in part for the crime of assault with a deadly weapon inflicting serious injury on one of the victims and later at trial the State advised the court that the calendar incorrectly reflected that defendant was indicted for assault with a deadly weapon inflicting serious injury rather than assault with a deadly weapon with intent to kill inflicting serious injury for the pertinent victim, because: (1) the trial court correctly instructed the jury that defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury; (2) the trial court correctly instructed the jury regarding the elements of the offense; and (3)

defendant failed to demonstrate how the alleged error impacted the jury's verdict.

5. Evidence— lay opinion—difference in shell casings fired from an automatic weapon versus a revolver

The trial court did not commit plain error in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and multiple assaults with a deadly weapon with intent to kill by failing to instruct the jury to disregard a detective's testimony following a sustained objection about the difference in shell casings fired from an automatic weapon versus a revolver, because: (1) the detective's testimony regarding the location of shell casings when a bullet is fired from two different weapons was not based upon any specialized expertise or training, but merely upon his own personal experience and observations in firing different kinds of weapons; and (2) having failed to qualify the detective as an expert in shell casing ballistics, the State was not prevented from eliciting lay opinion testimony from him.

6. Discovery— destruction of shell casing prior to trial—failure to request evidence—failure to show bad faith

A defendant's due process rights were not violated in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and multiple assaults with a deadly weapon with intent to kill by the destruction of shell casings prior to his trial, because: (1) there is no indication in the record that defendant filed a discovery request for the shell casings; and (2) defendant has neither alleged nor demonstrated any bad faith on the part of the prosecutor or police department in the destruction of the shell casings.

Appeal by defendant from judgment entered 2 June 2003 by Judge Andy Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 12 May 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, for the State.

Hall & Hall Attorneys at Law, P.C., by Susan P. Hall, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Rodney Michael Fisher ("defendant") appeals his convictions for one count of assault with a deadly weapon with intent to kill inflicting serious injury and three counts of assault with a deadly weapon with intent to kill. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error.

The State's evidence presented at trial tends to show the following: On the night of 2 June 1998, defendant was at the residence of Jay Irvin ("Irvin") on 24th Street in Winston-Salem, North Carolina. At approximately 10:00 p.m., Irvin and defendant were approached by Ray Von Rousseau ("Ray Von") and Marlo Rousseau ("Marlo"). Shortly thereafter, a confrontation between the four men ensued. At some point during the confrontation, defendant pointed a weapon at Ray Von and Marlo. As Ray Von and Marlo were telling defendant and Irvin that they did not have weapons, Donald Lewis Rousseau ("Donald") approached the men. Donald pointed a weapon at defendant, and the two began to argue over whether Ray Von and Irvin should fight. Ray Von and Irvin thereafter began fighting, and, at some point during the fight, Ray Von stabbed Irvin.

After the fight between Ray Von and Irvin ended, Ray Von, Donald, and Marlo heard a gunshot. Donald and Marlo believed Ray Von had been shot, and they helped Ray Von up from the ground. The three men then began walking down 24th Street, toward Cleveland Avenue and away from Irvin's residence. As they turned onto Cleveland Avenue, Donald, Ray Von, and Marlo heard gunshots fired from behind them. The three men separated, and Ray Von ran toward the corner of Cleveland Avenue and 23rd Street. As he reached the corner of Cleveland Avenue and 23rd Street, Ray Von heard a woman scream and fall to the ground.

April Penn Bailey ("Bailey") and Debra Boyd ("Boyd") were standing on the corner of Cleveland Avenue and 23rd Street when they heard gunshots coming from the direction of 24th Street. Immediately after hearing the first shot, Bailey was struck by a bullet that entered her stomach area. Bailey fell to the ground and began crawling into a nearby manhole. Bailey thereafter heard more gunshots fired from 24th Street.

After learning that Bailey had been shot, Boyd ran to a nearby store for help. As she was running to the store, Boyd heard more gunshots fired from the direction of 24th Street. In total, Boyd heard eight gunshots and Bailey heard eight or nine gunshots.

Winston-Salem Police Department Officer Priscilla Thomas ("Officer Thomas") was dispatched to the area of Cleveland Avenue and 24th Street to investigate an alleged assault with a deadly weapon. Upon arrival at the scene, Officer Thomas learned that Irvin, the alleged victim of the assault, had been transported to the hospital. Officer Thomas went to the hospital and spoke to Irvin, who informed Officer Thomas that he did not want to prosecute the individual who stabbed him. Officer Thomas thereafter ordered the destruction of the evidence gathered by her fellow law enforcement officers, including seven shell casings collected from the corner of Cleveland Avenue and 24th Street.

At or around the same time Officer Thomas was dispatched to the area of Cleveland Avenue and 24th Street, Winston-Salem Police Department Officer Douglas McGraw ("Officer McGraw") was dispatched to the area to investigate a shooting. As he arrived at the corner of Cleveland Avenue and 23rd Street, Officer McGraw noticed a large crowd standing at the intersection. Officer McGraw and other law enforcement officers began interviewing witnesses in the area. Based upon the information that the officers collected, a warrant was subsequently issued for defendant's arrest.

On 17 June 1998, Officer McGraw observed defendant in the passenger seat of a vehicle traveling in Winston-Salem. Officer McGraw initiated a vehicle stop and placed defendant under arrest. During the arrest, Officer McGraw retrieved a loaded handgun from the portion of the dashboard directly in front of the passenger seat. Defendant was served with an arrest warrant and transferred to the Forsyth County Detention Center for an interview. During the interview, Officer McGraw asked defendant questions and recorded defendant's answers in a report.

On 13 August 2001, Defendant was indicted for one count of assault with a deadly weapon with intent to kill inflicting serious injury upon Bailey, one count of assault with a deadly weapon with intent to kill Ray Von, one count of assault with a deadly weapon with intent to kill Donald, and one count of assault with a deadly weapon with intent to kill Marlo. At trial, Officer McGraw read the following pertinent narration from his report:

> I transported [defendant] to the jail and interviewed him in the BT room. . . . I asked [defendant] if he would start from the beginning and tell me the entire story. He began saying "the whole thing began at J's lounge . . . . J's lounge is located in the 2500

> block of north Liberty Street. Ray Von Rousseau thought Jay Irvin hit him from behind but Jay didn't hit anyone. On June 2nd of 1998, Ray Von, Marlo and Donald Rousseau confronted Jay in front of his residen[ce] . . . . Ray Von and Jay were fist fighting and the next thing I knew was that Jay had been stabbed. I ran to help Jay. After I got to him I helped him to his feet and I noticed a lot of blood coming from his chest. When Jay got on his feet he fired one shot at Ray Von who was running toward Cleveland Avenue. Ray Von fell as if he had been shot but he hadn't. Donald and Marlo kept running and I took the gun from Jay and followed. Jay got in the car and left for the hospital. While I followed—while I was following the [Rousseaus] I fired eight or nine times at them while they were running from 24th street towards 23rd on Cleveland Avenue. . . . I went to [the] hospital to check on my cousin Jay. While I was at the hospital I saw the ambulance bring [Bailey] in the emergency [room]. I didn't know that she ha[d] been shot. I was in the room with Jay when I heard that she had been shot.["] I asked [defendant] if he had shot April. [Defendant] said "I didn't shoot her I will admit that I was shooting but I don't think I shot her."

On cross-examination, Officer McGraw read further from his report, which stated that after making the above-detailed statement, defendant informed Officer McGraw that he had an attorney and had "telephoned [Bailey] and her father and told them that [he] wasn't the person who shot her."

Defendant presented evidence from Irvin, Irvin's wife, Tanesha Irvin ("Tanesha"), and Larry Puryear ("Puryear"). Tanesha testified that she saw Irvin and Ray Von fighting, and that she saw defendant "pull[] his gun out" while Donald was approaching the fight. Although she testified that she heard gunshots fired on the street after the fight, Tanesha testified that she did not see defendant shoot the weapon that he was holding.

Irvin testified that on 2 June 1998, defendant was present at a fight between Irvin and Ray Von. Irvin testified that after he and Ray Von fought, he realized he had been stabbed. Irvin further testified that, after being stabbed, he drew his gun and fired one shot at Ray Von in order to prevent Ray Von from approaching him again.

Puryear testified that he saw the fight between Irvin and Ray Von, and that he also saw defendant point a gun at Donald during the fight.

Puryear testified that after Irvin "pulled out a gun and shot one time[,]" he transported Irvin to the hospital.

On 24 July 2002, the jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury upon Bailey, assault with a deadly weapon with intent to kill Ray Von, assault with a deadly weapon with intent to kill Donald, and assault with a deadly weapon with intent to kill Marlo. The trial court subsequently determined that defendant had a prior felony record level III, and on 2 June 2003, the trial court sentenced defendant to a total of 218 to 269 months imprisonment. Defendant appeals.

The issues on appeal are: (I) whether the trial court erred by denying defendant's motion to suppress his custodial statement to Officer McGraw; (II) whether the trial court erred by denying defendant's motion to dismiss the charges against him; (III) whether the trial court erred by continuing the trial following the dismissal of a juror; (IV) whether the trial court erred by failing to give a curative instruction following a prior misstatement of the charges against defendant; (V) whether the trial court erred by failing to instruct the jury to disregard testimony following a sustained objection; and (VI) whether defendant's due process rights were denied by the destruction of the shell casings.

[1] Defendant first argues that the trial court committed plain error by denying his motion to suppress Officer McGraw's report of defendant's custodial interview. Defendant asserts that the trial court erred by finding that defendant voluntarily waived his *Miranda* rights and made the statement in the report. We disagree.

We note initially that although he filed a pretrial motion *in limine*, defendant did not object at trial to the State's questions regarding Officer McGraw's report. In order to preserve a question for appellate review, N.C. R. App. P. 10(b)(1) (2005) requires "the complaining party to obtain a ruling upon the party's request, objection or motion." When the party's objection involves the admissibility of evidence, the complaining party must present an objection when the evidence is introduced at trial, even where, as here, the objection was previously considered in a motion *in limine*. *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam); *but see* N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2003) (effective October 1, 2003) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objec-

tion or offer of proof to preserve a claim of error for appeal."). Nevertheless, a criminal defendant may preserve an evidentiary issue where he or she assigns plain error to the issue on appeal. *See* N.C. R. App. P. 10(c)(4).

In the instant case, defendant asserts that the trial court committed plain error by denying his motion *in limine*. In support of this assertion, defendant contends that there was evidence introduced at the suppression hearing tending to show that he was intoxicated while being interviewed by Officer McGraw, and therefore he was unable to voluntarily waive his right to an attorney.

"Plain error exists where, after reviewing the entire record, the claimed error is so fundamental, so basic, so prejudicial, or so lacking in its elements that justice could not have been done." *State v. Fleming*, 350 N.C. 109, 132, 512 S.E.2d 720, 736, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). "A prerequisite to our engaging in a 'plain error' analysis is the determination that the [trial court's action] constitutes 'error' at all." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). In the instant case, we conclude that the trial court did not err.

A trial court's findings of fact regarding a motion to suppress are conclusive on appeal if supported by competent evidence. *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). The trial court's findings of fact must support its conclusions of law, and the trial court's conclusions must be "legally correct, reflecting a correct application of applicable legal principles to the facts found." *Id.* (citing *State v. Payne*, 327 N.C. 194, 208-09, 394 S.E.2d 158, 166 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991)).

In the instant case, the trial court found that defendant "was responsive to questions asked about the shooting . . . and the events surrounding it[,]" that defendant "did understand what was being told to him and asked by" Officer McGraw, and that defendant "did understand the Miranda rights given and did not ask for a lawyer or indicate that he was represented by a lawyer until the conclusion of the interview." The trial court chose not to make "any findings as to whether [] defendant had consumed any alcohol or not," but it did find that "defendant was responsive and understood the rights that were indicated regardless of whether he had consumed any alcohol or not in the hours previous to the interview."

Defendant contends that the trial court's findings that he voluntarily waived his constitutional rights are unsupported by com-

petent evidence. In support of this contention, defendant cites his own testimony during the suppression hearing, in which defendant stated that he was arrested at approximately 2:30 a.m., after having consumed "around 15 shots of Seagram's Gin" at a local bar. Defendant testified that he did not recall Officer McGraw reading him his *Miranda* rights, and he did not recall making a statement to Officer McGraw. However, defendant did recall "repeatedly" telling Officer McGraw that he had hired an attorney and needed to use the restroom.

"In determining the voluntariness of the confession and the waiver of *Miranda* rights, we look to the totality of the circumstances." *State v. McKoy*, 323 N.C. 1, 21, 372 S.E.2d 12, 23 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). "While intoxication is a circumstance critical to the issue of voluntariness, intoxication at the time of a confession does not necessarily render it involuntary. It is simply a factor to be considered in determining voluntariness." *Id.* at 22, 372 S.E.2d at 23 (citations omitted). "The confession 'is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words.' " *Id.* (quoting *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981)).

> Unless a defendant's intoxication amounts to mania—that is, unless he is so drunk as to be unconscious of the meaning of his words—his intoxication does not render inadmissible his confession of facts tending to incriminate him. The extent of his intoxication when the confession was made, however, is a relevant circumstance bearing upon its credibility, a question exclusively for the jury's determination.

State v. Logner, 266 N.C. 238, 243, 145 S.E.2d 867, 871, *cert. denied*, 384 U.S. 1013, 16 L. Ed. 2d 1032 (1966).

In the instant case, Officer McGraw testified at the suppression hearing that he read defendant "the Miranda warnings as printed on the Miranda warnings card[,]" and that defendant "acknowledged that he understood the warnings" and "waived his right and agreed to answer any of [Officer McGraw's] questions." Officer McGraw further testified that he did not smell alcohol on defendant, that defendant was not stumbling or slurring his speech, that defendant did not seem impaired "in the slightest[,]" and that defendant "made no indication that he had any difficulty at all" in understanding Officer McGraw's questions. Although we note that defendant presented testimony to the contrary, we further note that " '[i]f there is a con-

flict between the [S]tate's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal.' " *Fernandez*, 346 N.C. at 11, 484 S.E.2d at 357 (quoting *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982)). Therefore, in light of the foregoing, we conclude that ample evidence supports the trial court's determination regarding defendant's intoxication and voluntary waiver of his *Miranda* rights.

Defendant maintains that the trial court erred by concluding that his statement to Officer McGraw was admissible, in that he did not sign it or otherwise acquiesce to its contents. We disagree.

Generally, a "statement of an accused reduced to writing by another person, where it was freely and voluntarily made, and where it was read to or by the accused and signed or otherwise admitted by him as correct shall be admissible against him." *State v. Boykin*, 298 N.C. 687, 693, 259 S.E.2d 883, 887 (1979), *cert. denied*, 446 U.S. 911, 64 L. Ed. 2d 264 (1980); *see State v. Cole*, 293 N.C. 328, 334, 237 S.E.2d 814, 818 (1977). In *State v. Walker*, 269 N.C. 135, 139-41, 152 S.E.2d 133, 137-39 (1967), our Supreme Court held that a defendant must indicate his acquiescence in the correctness of a written statement in order for it to be tendered by the State as his confession. However, our courts have since recognized that "the written instrument is admissible, without regard to the defendant's acquiescence, if it is a 'verbatim record of the questions [asked] . . . and the answers' given by him." *State v. Bartlett*, 121 N.C. App. 521, 522, 466 S.E.2d 302, 303 (1996) (quoting *State v. Byers*, 105 N.C. App. 377, 383, 413 S.E.2d 586, 589 (1992)); *see Cole*, 293 N.C. at 334-35, 237 S.E.2d at 818 (officer wrote down statements in longhand in "defendant's own words" and swore they were defendant's actual words); *State v. Fox*, 277 N.C. 1, 25, 175 S.E.2d 561, 576 (1970) (sheriff testified that the transcription was an "exact copy" of the conversation between himself and defendant). Therefore, the Court's decision in *Walker* "does not preclude admission of an unsigned statement taken in longhand" if it contains a record "of a defendant's actual responses to the recorded questions." *State v. Wagner*, 343 N.C. 250, 256-57, 470 S.E.2d 33, 36 (1996).

In the instant case, Officer McGraw's report of his interview with defendant contains a record of his questions as well as the answers provided by defendant. Officer McGraw testified at the suppression hearing that defendant made the statement contained in the report, and at trial Officer McGraw testified that he "asked the questions to

[defendant], [defendant] answered and I wrote [defendant's] answer down in my report." There is no indication in the record that Officer McGraw's report contains "merely [his own] impressions of the import of defendant's statements." *Cole*, 293 N.C. at 334-35, 237 S.E.2d at 818. Instead, the sworn testimony indicates that the report contains the actual answers provided by defendant in response to Officer's McGraw's actual questions. Therefore, in light of the foregoing, we conclude that the trial court did not err by admitting into evidence defendant's statement to Officer McGraw following his arrest. Accordingly, defendant's first argument is overruled.

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charges against him. Defendant asserts that the State produced insufficient evidence to demonstrate that he was the perpetrator of the crimes. We disagree.

When considering a motion to dismiss, the trial court must determine whether "substantial evidence exists to support each element of the crime charged and that [the] defendant was the perpetrator[.]" *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004). "[T]he trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Id.* "[C]ontradictions 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, 653 (1982).

In the instant case, the evidence tends to show that after the fight between Ray Von and Irvin, someone fired a shot at Ray Von. Donald, Marlo, and Ray Von thereafter ran down 24th Street and turned onto Cleveland Avenue toward 23rd Street. While they were running, Donald, Marlo, and Ray Von heard several more shots fired from behind them. A bullet from one of these gunshots injured Bailey, who was standing on the corner of 23rd Street and Cleveland Avenue. Although both Irvin and Puryear testified that Irvin fired the initial shot at Ray Von, both Irvin and Puryear further testified that Puryear transported Irvin to the hospital after the initial shot was fired. In his statement to Officer McGraw, defendant admitted that he took the gun from Irvin after Irvin fired the initial shot, and that he thereafter followed Donald, Marlo, and Ray Von down the street. Defendant stated that "while [he] was following [Donald, Marlo, and Ray Von], [he] fired eight or nine times at them while they were running from 24th street towards 23rd on Cleveland Avenue." Boyd testified that she heard eight total gunshots and Bailey testified that she heard eight or nine total gunshots. Considering the foregoing evidence in

the light most favorable to the State, we conclude that the State offered sufficient evidence to demonstrate that defendant was the perpetrator of the crimes for which he was charged. Accordingly, we overrule defendant's second argument.

[3] Defendant next argues that the trial court erred by continuing the trial following the dismissal of a juror. Our review of the record indicates that during the trial, the trial court dismissed one juror due to his "sleeping problem." However, there is no indication in the record that defendant thereafter moved for a mistrial or offered any objection to the trial court's continuation of the trial with an alternate juror. Although we note that defendant has assigned plain error to this issue on appeal, we also note that our Supreme Court "has only elected to review unpreserved issues for plain error that involve instructional errors or the admissibility of evidence." *State v. Carpenter*, 147 N.C. App. 386, 397, 556 S.E.2d 316, 323 (2001) (citing *State v. Steen*, 352 N.C. 227, 536 S.E.2d 1 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001) and *State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28 (1996)), *disc. review denied*, 355 N.C. 217, 560 S.E.2d 143, *cert. denied*, 536 U.S. 967, 153 L. Ed. 2d 851 (2002). Thus, in light of the foregoing, we conclude that defendant has failed to properly preserve this issue for appeal. Accordingly, we overrule defendant's third argument.

[4] Defendant next argues that the trial court erred by failing to give a curative instruction following a prior misstatement of the charges against him. The record reflects that, at the opening of the trial, the trial court informed the jury that defendant was being tried in part for the crime of assault with a deadly weapon inflicting serious injury upon Bailey. Later in the trial, the State advised the trial court that "the calendar did not correctly reflect what was indicted" in 98 CRS 27852, in that it appeared on the calendar that defendant was indicted for assault with a deadly weapon inflicting serious injury upon Bailey rather than assault with a deadly weapon *with intent to kill* inflicting serious injury upon Bailey. The trial court inquired as to whether either party wanted to "tell the jury about that[,]" noting that it "was not sure they paid that much attention to detail in the beginning[,]" and that "[t]hey know it is a serious assault charge." Although defendant did not request a curative instruction at that time, he now contends that the trial court committed plain error by not issuing a curative instruction *sua sponte*. We disagree.

As discussed above, "[a] prerequisite to our engaging in a 'plain error' analysis is the determination that the [trial court's ac-

tion] constitutes 'error' at all." *Torain*, 316 N.C. at 116, 340 S.E.2d at 468. Once we have determined that the trial court erred, " '[b]efore 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.' " *Id.* (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)). In the instant case, we conclude that defendant has failed to meet this burden. Although the trial court did not give any additional instructions to the jury at the time the issue was first raised, in its charge to the jury following presentation of all the evidence, the trial court correctly instructed the jury that defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury upon Bailey. The trial court also correctly instructed the jury regarding the elements of the offense. Defendant has failed to demonstrate how the alleged error impacted the jury's verdict. Accordingly, we overrule defendant's fourth argument.

[5] Defendant next argues that the trial court erred by failing to instruct the jury to disregard testimony following a sustained objection. The record reflects that at trial, the State introduced testimony from Winston-Salem Police Department Detective Brian Frady ("Detective Frady"). Detective Frady testified that he was employed by the Winston-Salem Police Department as a crime scene technician, and that on 2 June 1998, he responded to the area of 24th Street and Cleveland Avenue in response to an assault with a deadly weapon call. Detective Frady stated that his investigation of the area produced seven fired shell casings, each .45 automatic caliber. During direct examination, the State asked Detective Frady to "[t]ell the jury the difference between an automatic weapon and a revolver, what happens to a shell casing[.]" Defendant objected to this question "unless he is an expert[,]" and the trial court sustained the objection. Following both parties' examination of Detective Frady regarding his experience and training, the trial court again sustained defendant's objection. The State thereafter examined Detective Frady as follows:

Q: Have you ever shot an automatic weapon?

A: Yes.

Q: Can you tell the jury what happens when you shoot an automatic weapon with the shell casing[?]

A: Well the shell casing ejects out of the weapon and lands on the ground somewhere and—

Q: And have you ever shot a revolver?

A: Yes.

Q: Can you tell the members of the jury what happens when you shoot a revolver?

A: Well it depends on how many shots it is after you get through firing the last shot, you have to actually open the gun up and dump the shells out, they don't eject after each round is fired.

Q: So the difference then as you have seen it is that when a revolver is shot the shell casings stay[] within the revolver?

A: That is correct they stay in the revolver.

Q: And [with an] automatic weapon they are ejected from the gun, [is] that right?

A: That is correct.

Defendant did not object to this testimony at trial. On appeal, defendant contends that the trial court committed plain error by failing to instruct the jury to disregard the testimony. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 701 (2003) provides that where a witness is not testifying as an expert witness, "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." In *State v. Shaw*, 322 N.C. 797, 370 S.E.2d 546 (1988), our Supreme Court affirmed the trial court's decision to allow a police officer to testify that two pairs of shoes showed similar wearing on their respective heels. The Court noted that "[n]o specialized expertise or training is required for one to determine that two shoes share wear patterns[,]" and that "[s]uch a determination may be made by merely observing each pair." *Id.* at 809, 370 S.E.2d at 552-53. Similarly, in the instant case, Detective Frady's testimony regarding the location of shell casings when a bullet is fired from two different weapons was based not upon any "specialized expertise or training," but merely upon his own personal experience and observations in firing different kinds of weapons. Having failed to qualify Detective Frady as an expert in shell casing ballistics, the State was not prevented from eliciting lay opinion testimony from him. Accordingly, we overrule defendant's fifth argument.

[6] Defendant's final argument is that his due process rights were violated by the destruction of the shell casings prior to his trial. Defendant asserts that the destruction of the shell casings violated his discovery rights under N.C. Gen. Stat. § 15A-903 and prevented him from proving that the weapon in his possession when he was arrested was not involved in the shooting. We disagree.

N.C. Gen. Stat. § 15A-903(e) (2003)[1] provides as follows:

> Reports of Examinations and Tests.—Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

"The State has no statutory duty to provide discovery absent a request from [the] defendant." *State v. Cummings*, 346 N.C. 291, 322, 488 S.E.2d 550, 568 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). This Court has previously stated that "[w]hether the destruction [of evidence] infringes upon the rights of an accused depends upon the circumstances in each case." *State v. Anderson*, 57 N.C. App. 602, 610, 292 S.E.2d 163, 168, *disc. review denied*, 306 N.C. 559, 294 S.E.2d 372 (1982). " '[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' " *State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58, 102 L. Ed. 2d 281, 289 (1988)), *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994).

In the instant case, there is no indication in the record that defendant filed a discovery request for the shell casings, and defend-

1. While it does not affect our analysis in the instant case, N.C. Gen. Stat. § 15A-903 was recently amended by Session Laws 2004-154, s.4. The amended statute is applicable to cases where the trial date was set pursuant to N.C. Gen. Stat. § 7A-49.4 on or after 1 October 2004.

ant has neither alleged nor demonstrated any bad faith on the part of the prosecutor or police department in the destruction of the shell casings. Officer Thomas testified that she had "no idea [the shell casings] were related to the stabbing" of Irvin, and that after learning that Irvin did not wish to prosecute Ray Von, she ordered the destruction of the evidence gathered during the investigation of the stabbing, including the shell casings. On cross-examination, Officer Thomas testified that she "could never ascertain" if the shell casings were involved in the shootings, and therefore she "had the casings destroyed because [they] were not related to [her] stabbing case." Officer Thomas further testified that "had [she] know[n] that these two cases were related [she] would have kept the shell casings." In light of the foregoing, we conclude that defendant's due process rights were not violated by the destruction of the shell casings. Accordingly, we overrule defendant's final argument.

In light of the foregoing conclusions, we hold that defendant received a trial free of prejudicial error.

No error.

Judges McCULLOUGH and STEELMAN concur.

CAROLINE D'AQUISTO, Plaintiff v. MISSION ST. JOSEPH'S HEALTH SYSTEM, Employer, CAMBRIDGE INTEGRATED SERVICES, Servicing Agent, Defendants

No. COA04-1259

(Filed 5 July 2005)

1. Workers' Compensation— assault at work—arising from employment

The Industrial Commission properly concluded in a workers' compensation case that an assault arose out of plaintiff's employment as a cancer analyst at a hospital.

2. Workers' Compensation— credibility—responsibility of Commission

Determining credibility in a workers' compensation case is the responsibility of the Industrial Commission, not the appellate court, which does not reweigh the evidence. Furthermore, the

Commission does not have to explain its findings by attempting to distinguish the evidence or witnesses it finds credible.

3. Workers' Compensation— characterization and weight of testimony—Commission's responsibility

The Industrial Commission in a workers' compensation case did not mischaracterize certain testimony, although it did give less weight to the testimony. Determining credibility is the Commission's responsibility.

4. Workers' Compensation— sanctions—investigation and defense of claim

There was competent evidence to support the Industrial Commission's findings of fact regarding defendant's investigation and defense of a workers' compensation case and the Commission's imposition of sanctions under N.C.G.S. § 97-88.1.

5. Workers' Compensation— shifting burden of proof—no citation to opinion of Full Commission

The Industrial Commission did not place the burden of proof on defendants in a workers' compensation case. Although defendants cited pages from the transcript of the hearing before the Deputy Commissioner, they did not cite anything in the full Commission's opinion and award to demonstrate that it shifted the burden of proof.

6. Workers' Compensation— acceptance of evidence—credibility determination—responsibility of Commission

The acceptance of evidence by the Industrial Commission in a workers' compensation case, and the discounting of other evidence, was a credibility determination rather than the application of a standard of proof, and lies solely with the Commission. Furthermore, the Commission does not have to explain its findings by distinguishing the evidence it does or does not find credible.

7. Workers' Compensation— burden of proof—Commission rule-making authority

Rule 601 of the Workers' Compensation Rules does not impermissibly shift the burden of proof and deny defendants' due process. The General Assembly has specifically vested the Industrial Commission with the ability to make rules governing Workers' Compensation cases. Defendants neither made arguments nor cited authority for denial of due process.

Appeal by Defendants from Opinion and Award entered 20 May 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 June 2005.

Ganly & Ramer, P.L.L.C., by Thomas F. Ramer, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Allan R. Tarleton, for defendants-appellants.

WYNN, Judge.

Under the Workers' Compensation Act, an injury is only compensable if it is the result of an "accident arising out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-2(6) (2004). In this case, the employer acknowledges that an assault upon Plaintiff-employee occurred "in the course of" her employment but argues that it did not "arise out of" her employment. For the reasons given in *Wake County Hosp. Sys., Inc. v. Safety Nat'l Cas. Corp.*, 127 N.C. App. 33, 487 S.E.2d 789, *disc. review denied*, 347 N.C. 410, 494 S.E.2d 600 (1997), we hold that the full Commission properly concluded that the assault "arose out of" Plaintiff's employment. We further uphold the full Commission's Opinion and Award on the remaining issues presented on appeal.

The record on appeal shows that on 30 April 2001, Plaintiff Caroline D'Aquisto, a cancer analyst at Defendant Mission St. Joseph's Health System ("Mission Health System"), arrived at her office at approximately 6:00 a.m. At approximately 7:15 a.m. Ms. D'Aquisto left her office on the first floor to go to the morgue on the second floor. She carried paperwork needed to confirm the causes of death of individuals who had died the previous week.

While Ms. D'Aquisto waited in front of the first floor main staff elevators, a man wearing green scrubs approached her. After exchanging a few words, the man walked up to her and said, "Selene . . . We're going to finish it." Ms. D'Aquisto testified that he grabbed her breasts and nipples, turned them, and brought her to her knees. Ms. D'Aquisto broke away and ran into the stairwell. But the man pursued her, grabbed her from behind, grabbed her hair and her groin area, and pulled her down the steps. Ultimately, Ms. D'Aquisto broke free, ran up the steps to the second floor, opened the door, and fell into the arms of a co-worker, A.J. Ward.

Mr. Ward, a twenty-one year employee at Mission Health System, corroborated Ms. D'Aquisto's testimony, stating that she came out

of the stairwell with a man behind her "[a]nd it seemed like he was over the top of her trying to—trying to grab her again[.]" Ms. D'Aquisto fell into his arms and said "A.J., I don't know the man." The man ran away.

After the incident, Ms. D'Aquisto returned to her office and provided an account of the assault to security personnel. Ms. D'Aquisto then filled out a security incident report. Later that morning, Ms. D'Aquisto reported the incident to the Asheville Police Department.

The next day, Ms. D'Aquisto met with Linda Anderson, director of post-op surgical services, and Jerri Mitchell, director of endoscopy. Ms. Anderson testified that Ms. D'Aquisto was very upset, had several torn fingernails, scrapes on her shins, and a "hand print" bruise on a breast. Ms. Mitchell testified that she observed "some bruises on her chest and on her breasts and they were pretty impressive."

After the incident, Mission Health System sent out an e-mail alerting employees that an employee had been "inappropriately touched." The employee newspaper later described it as a more violent attack.

On 21 May 2001, Mission Health System security notified Ms. D'Aquisto that the alleged attacker had been spotted on the hospital premises and she and Mr. Ward were asked to identify him. Mr. Ward positively identified the man, who was later determined to be Charles Greene, a sitter[1] for Diversified Personnel. Mr. Greene was later charged with assault and found not guilty.

On 25 May 2001, Karen Blicher, Director of Mental Health Education at Mountain Area Health Education Center specializing in women's psychological issues including sexual assault, evaluated Ms. D'Aquisto. Ms. Blicher testified that "by the end of that first interview it was very clear to me that she was experiencing posttraumatic stress disorder of the acute kind." On 29 May 2001, Ms. Blicher recommended that Ms. D'Aquisto take a week off of work.

On 31 May 2001, Dr. Steven Mendelsohn, a board-certified internist and rheumatologist, evaluated Ms. D'Aquisto. He found:

> That her neck was very stiff compared to before [the assault]. She had a lot of muscle spasms around the neck, extending across the shoulders and into the back. She had a slight loss of movement in

1. A sitter is privately hired by the patient and/or patient's family to sit in the hospital room with the patient. The family hired Mr. Greene through Diversified Personnel. Mr. Greene was not an employee of Mission Health System.

> both shoulders. And her upper and lower back were quite sore. She had diffuse old bruises in her chest wall, and her lower back was quite tender.

Dr. Mendelsohn prescribed an anti-depressant, anti-inflammatories, pain medication, and sleeping pills. On 13 June 2001, Dr. Mendelsohn gave Ms. D'Aquisto a written note taking her out of work for a month.

On 4 June 2001, Dr. Karen Dedman, a family-practice physician, examined Ms. D'Aquisto who reported that she "was having vomiting, was terrified, not sleeping, roaring in her ears, coughing to the point of vomiting." Dr. Dedman observed fading bruises on her breast, upper abdomen, and in her left groin. Dr. Dedman diagnosed Ms. D'Aquisto with "severe acute stress reaction" and felt she was unable to work. Dr. Dedman testified that as a result of the assault Ms. D'Aquisto "had a severe stress reaction psychologically[,] . . . an exacerbation of her underlying left neck pain with underlying degenerative disk disease[,]" psoriasis, psoriatic arthritis, sleep disorder, and panic attacks.

In September 2001, Ms. D'Aquisto began seeing Dr. William Anixter, a psychiatrist. After the initial visits, Dr. Anixter diagnosed Ms. D'Aquisto with posttraumatic stress disorder, chronic type. Upon continued treatment, Dr. Anixter also diagnosed Ms. D'Aquisto with depression which was caused by many events, which included the assault, criminal trial, her sister's death, and her husband's disappearance. Dr. Anixter testified that Ms. D'Aquisto was unable to work and prescribed for her various anti-depressants and anti-anxiety medication.

Dr. Claudia Coleman, a psychologist, examined Ms. D'Aquisto at the request of Mission Health System's counsel. Dr. Coleman performed two tests on Ms. D'Aquisto and examined her history, but did not have any notes from Dr. Anixter at the time she made her report nor did she have an accurate history of Ms. D'Aquisto's past treatment for depression. At the time of the examination, Ms. D'Aquisto was taking a variety of medications. Dr. Coleman was unable to give an opinion to any degree of medical certainty about the origin of Ms. D'Aquisto's panic attacks. Dr. Coleman opined that Ms. D'Aquisto did not have posttraumatic stress disorder, but "anxiety disorder, not otherwise specified, in partial remission with dependent personality traits."

This case came for hearing before Deputy Commissioner Edward Garner, Jr. who awarded Ms. D'Aquisto ongoing total dis-

ability compensation, medical and psychological expenses, and ordered Mission Health System to pay costs and attorney's fees. On 20 May 2004, the full Commission filed an Opinion and Award affirming the prior award. Defendants—Mission Health System and its insurance carrier servicing agent, Cambridge Integrated Services, Inc.—appealed.

On appeal[2], Defendants argue that the full Commission erred by (1) concluding that Ms. D'Aquisto's assault arose out of her employment; (2) disregarding competent evidence; (3) making findings of fact unsupported by competent evidence; and (4) imposing sanctions against Defendants. Defendants also argue that the Industrial Commission's rules and standards of assessing evidence deprived Defendants of due process. We disagree.

[1] First, Defendants argue that the full Commission erred in concluding that Ms. D'Aquisto's assault arose out of her employment.

Under the Workers' Compensation Act, an injury is compensable only if it is the result of an "accident arising out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-2(6) (2004). "Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and the Industrial Commission's findings in this regard are conclusive on appeal if supported by competent evidence." *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 247, 377 S.E.2d 777, 780, *aff'd*, 325 N.C. 702, 386 S.E.2d 174 (1989) (citing *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). The employee must establish both the "arising out of" and "in the course of" requirements to be entitled to compensation. *Roberts*

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2. The standard of review for this Court in reviewing an appeal from the full Commission 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 v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). The full 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). It is not the job of this Court to re-weigh the evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. 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.

v. Burlington Indus., Inc., 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988). Defendants conceded at the hearing that the assault occurred "in the course of" Ms. D'Aquisto's employment, but contend that it did not "arise out of" her employment.

The words "arising out of the employment" refer to the origin or cause of the accidental injury. *Roberts*, 321 N.C. at 354, 364 S.E.2d at 420. Thus, our first inquiry "is whether the employment was a contributing cause of the injury." *Id.* at 355, 364 S.E.2d at 421.

The record on appeal shows that as a part of her regular job duties Ms. D'Aquisto had to leave her office and walk to the morgue, which was located on another floor. Therefore, her reason for walking to the morgue that day was for the purpose of performing her job. *See Culpepper*, 93 N.C. App. at 248-49, 377 S.E.2d at 781 (the plaintiff was sexually assaulted after she stopped to help a guest with car trouble because she had been directed to always be helpful to guests; since her decision to stop had its origin in her employment the injuries arose out of her employment). This evidence supports the full Commission's determination that Ms. D'Aquisto's employment was a contributing cause of the injury.

"Second, a contributing proximate cause of the injury must be a *risk* inherent or incidental to the employment, and must be one to which the employee would not have been equally exposed apart from the employment." *Id.* at 248, 377 S.E.2d at 781 (citing *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 533). Under this "increased risk" analysis, the "causative danger must be peculiar to the work and not common to the neighborhood." *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 533 (citation omitted).

The full Commission relied on *Wake County Hosp. Sys., Inc.*, 127 N.C. App. 33, 487 S.E.2d 789, in concluding that Ms. D'Aquisto's injuries arose out of her employment. In *Wake County*, the employee was "abducted from the employee parking lot, she was assaulted and killed on an adjacent street, she was carrying work materials, and the assailant was a co-employee." *Id.* at 39, 487 S.E.2d at 792. This Court held that, following the reasoning in *Culpepper*, the facts were sufficient to show a causal relationship between the employee's employment and her death. *Id.* at 39-40, 487 S.E.2d at 792; *see also Culpepper*, 93 N.C. App. at 249-50, 377 S.E.2d at 782 (the plaintiff's injuries arose out of her employment because the nature of the plaintiff's employment as a cocktail waitress placed her at an increased risk of sexual assault not shared by the general public); *Pittman v.*

Twin City Laundry & Cleaners, 61 N.C. App. 468, 473, 300 S.E.2d 899, 902 (1983) (employee's death arose out of his employment where he was working at the time of the shooting, the shooting occurred on the employer's premises, and the shooting was caused by an argument between two co-employees); *but see Gallimore*, 292 N.C. at 404-05, 233 S.E.2d at 533 (employee's assault and death did not arise out of her employment where employee had completed work at a store in a mall, was not carrying any work materials, and was assaulted in the mall parking lot).

The full Commission found that Ms. D'Aquisto was at an "increased risk" for an assault not because of the nature of her job, but because her job duties required her to walk to areas of the hospital where there were "few, if any, people in her vicinity." Nonetheless, Defendants argue that no competent evidence supported the full Commission's finding of fact number twenty-six that Ms. D'Aquisto's work takes her to areas of the hospital where there are few people. Finding of fact twenty-six states:

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> 26. Regardless of whether or not Mr. Greene was plaintiff's assailant, the Full Commission finds that a man wearing scrubs at Mission had the appearance of a legitimate business purpose in being there. Although the majority of plaintiff's work did occur at her desk, her job duties required her to carry business records to the morgue on a regular basis, causing her to be present in areas of the hospital with few, if any, people in her vicinity. Thus, the Full Commission finds that plaintiff was as an increased risk of being exposed to an assailant not by virtue of her job as a cancer analyst, but rather because of where her job duties took her—the morgue and other such places with few, if any, people in her vicinity.
>
> ***

We, however, find that the record on appeal shows competent evidence to support the finding that Ms. D'Aquisto's job duties took her out of her office to other areas of the hospital. Indeed, Ms. D'Aquisto testified that a part of her normal job duties required her to go to the morgue every Monday to verify causes of death. Her office was on the first floor and the morgue is on the second floor, causing her to have to either use a stairwell or wait for an elevator. The record shows that Ms. D'Aquisto was assaulted in front of the staff elevators on the first

floor, with no person visible to Ms. D'Aquisto but the man who assaulted her. The staff elevators are at least "[a] football field" away from the main hospital lobby and behind the patient elevators. At approximately 7:15 a.m. when Ms. D'Aquisto was waiting for the elevators the lights were still dim at the lobby entrance. On the morning Ms. D'Aquisto was assaulted, Mr. Ward testified that, "At that time, it wasn't too busy that morning[.]"

As 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, this evidence supports the full Commission's finding that on the morning of 30 April 2001, Ms. D'Aquisto's job duties took her to an area of the hospital where there were few other people around. Moreover, the record shows competent evidence to support finding that Ms. D'Aquisto was at an "increased risk," assaulted inside the hospital, carrying business records at the time, and by a man wearing scrubs who appeared to have legitimate business at the hospital. Accordingly, we hold that the full Commission properly concluded that the assault "arose out of" her employment. *See Wake County Hosp. Sys., Inc.*, 127 N.C. App. at 39, 487 S.E.2d at 792.

[2] Second, Defendants argue that the full Commission erred in impermissibly disregarding competent evidence as to whether the assault on Ms. D'Aquisto actually occurred and as to Ms. D'Aquisto's credibility and demeanor. Determining credibility of witnesses is the responsibility of the full Commission, not this Court. *Adams*, 349 N.C. at 681, 509 S.E.2d at 413. This Court does not re-weigh the evidence. *Id.*, 509 S.E.2d at 414. Furthermore, "the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Thus, we hold that this argument is without merit.

[3] Third, Defendants argue that a portion of finding of fact number forty-five mischaracterizes Dr. Coleman's testimony and is not supported by competent evidence. Finding of fact forty-five, in pertinent part, states:

> ***
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> 45. . . . However, when presented with the actual findings of fact, including the eyewitness testimony of A.J. Ward, Dr. Coleman admitted that the attack could not have been a dissociative episode.
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> ***

Dr. Coleman testified as follows:

Q: My question is, if that's true—if, for example, A. J. Ward, who's an employee, says they fell out into my arms and the guy ran away and he was reaching toward her breasts, that's not a dissociative episode, that's a physical act, isn't it?

A: Your description of it is a physical act. That's absolutely true.

Q: And if that were true, if a judge has said that is what happened, that would not be a dissociative episode.

A: That part of it, no.

***

Q: . . . But if those are the facts as testified by Ms. D'Aquisto and Mr. A. J. Ward, who now you've got a third person who was either engaged in a dissociative episode with her—

A: No. You have someone that saw part of her story.

Mr. Ward testified that Ms. D'Aquisto came out of the stairwell with a man behind her "[a]nd it seemed like he was over the top of her trying to—trying to grab her again[.]" Ms. D'Aquisto fell into his arms and the man ran away. Dr. Coleman testified that since there was an eyewitness, at least the portion of the assault—Ms. D'Aquisto coming out of a stairwell with a man trying to grab her from behind—could not have been a dissociative episode.

We hold that the full Commission did not mischaracterize Dr. Coleman's testimony. Although the full Commission afforded less weight to Dr. Coleman's testimony, determining credibility of witnesses is the responsibility of the full Commission, not this Court. *Adams*, 349 N.C. at 681, 509 S.E.2d at 413.

[4] Next, Defendants argue that the findings of facts concerning its investigation and defense are not supported by competent evidence and that the full Commission erred by imposing sanctions against Defendants under section 97-88.1 of the North Carolina General Statutes.[3] We disagree.

The Industrial Commission may assess costs and attorney's fees if it determines that "any hearing has been brought, prosecuted, or

3. We note that Plaintiff-Appellee's brief exceeded the page limitations for briefs filed in the North Carolina Court of Appeals. N.C. R. App. P. 28(j) (thirty-five page limit). Therefore, we do not consider that portion of the brief which exceeds the page limitation.

defended without reasonable ground[.]" N.C. Gen. Stat. § 97-88.1 (2004). "The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54-55, 464 S.E.2d 481, 486 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). An abuse of discretion results only where a decision is " 'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Long v. Harris*, 137 N.C. App. 461, 465, 528 S.E.2d 633, 635 (2000) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). "In determining whether a hearing has been defended without reasonable ground, the Commission (and a reviewing court) must look to the evidence introduced at the hearing. 'The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.' " *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225, 502 S.E.2d 419, 422-23 (1998) (quoting *Sparks v. Mountain Breeze Rest.*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982)). Defendants argue that they had reasonable ground to defend themselves as there were "doubts about the relationship between Plaintiff's injuries and her story of an assault on April 30 (sic) . . . ." (Def. Br. 33).

Defendants contest the following findings of fact related to the award of costs and attorney's fees:

> 46. Defendants presented no witnesses at hearing before the Deputy Commissioner, and offered only one exhibit (plaintiff's job evaluation) in the three days of hearings. All of the witnesses offered by plaintiff, and their statements, were readily available to defendants to consider in their investigation and subsequent denial of this matter. Most of the 21 documentary exhibits entered into evidence by plaintiff were readily available to defendants for investigation, if one had been properly undertaken. When asked by the Deputy Commissioner why he was defending this case, counsel replied, "We don't know what happened."
>
> 47. Defendants possessed documents that confirmed plaintiff accounts of the attack, which they refused to make available to the plaintiff. She was required to file a Motion to Compel to obtain such documents.
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> ***

> 49. As a result of defendants' failure to perform a reasonable investigation of this matter, and based upon defendants' refusal to admit plaintiff was even assaulted, despite eyewitness testimony, plaintiff was required to prosecute a three day hearing, presenting at least ten witnesses and twenty-one exhibits. Thus, the Full Commission finds defendants' defense of this matter was based on stubborn, unfounded litigiousness.
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> 50. As a result of defendants unreasonable and unjustified defense of his (sic) matter, and their pattern and practice of unreasonable defense and bad faith, the Full Commission finds that an award of twenty-five percent (25%) of the total indemnity benefits recovered is reasonable.

The record indicates that Defendants presented no witnesses at the hearing before the Deputy Commissioner. But the record does show that Defendants issued a subpoena for Mr. Greene and had it delivered to the sheriff. The transcripts from Mr. Greene's criminal trials were entered into the record. The record shows that the Deputy Commissioner admitted seven exhibits offered by Defendants, not one as finding of fact number forty-six indicates. Also Defendants' counsel did state that Defendants did not know what happened as they questioned Ms. D'Aquisto's credibility. Despite the mistake regarding the number of exhibits submitted by Defendants, there is competent evidence to support the remainder of finding of fact forty-six.

The record shows that there is competent evidence to support finding of fact forty-seven. On 14 October 2002, the Deputy Commissioner filed an Order for Production of Documents. The order stated that it "now appear[ed] defendants [had] failed to comply with the standing bench order to produce the Risk Management records and file[.]" There is also evidence in the record to support the finding that Defendants failed to perform a reasonable investigation causing the hearing to last three-days and depose six other witnesses. At the hearing, the Deputy Commissioner stated that:

> MR. TARLETON: I've been practicing before [the Industrial Commission] for twenty years and I've never had [a motion for discovery] allowed.
>
> THE COURT: Have you ever asked me?
>
> MR. TARLETON: No, sir, I have not.
>
> ***

> THE COURT: . . . Mr. Ramer [Plaintiff's counsel] had to file Motions with me just for me to order you to turn over some documents. Then I had come up (sic) and do an in-camera inspection of things that didn't make any difference anyway. Then you attacked the Constitution of the United States on the due-process clause.
>
> MR. TARLETON: Well, I certainly am not attacking the Constitution of the United States. I am invoking the Constitution of the United States.
>
> THE COURT: I'll use the word "invoking" the Constitution of the United States. Then you say here today almost, "We don't think we should turn over things because is (sic) no discovery." And we've been discovering in—in workers' comp cases the history of the Industrial Commission. People do that all the time.
>
> MR. TARLETON: You've—you've experienced a different history than I have. I can tell you that.
>
> THE COURT: You don't do any discovery in your workers' comp case?
>
> MR. TARLETON: I do my best and—and I've given up trying to ask for leave to depose a plaintiff. I'll never get that. I can assure you of that. . . .

This exchange indicates that Defendants' counsel inhibited discovery and failed properly to investigate by not even making a motion for discovery, due to his anticipation of its being denied. Therefore, there is competent evidence to support findings of fact forty-nine and fifty. As there was competent evidence to support the findings of fact, the full Commission did not abuse its discretion in awarding costs and attorney's fees, as the findings were not manifestly unsupported by reason. *Troutman*, 121 N.C. App. at 54-55, 464 S.E.2d at 486.

[5] Next, Defendants argue that the full Commission impermissibly placed on them the burden to prove that Ms. D'Aquisto had not been assaulted. The plaintiff has the burden of proving that the claim is compensable, which includes proving that the accident occurred. *Henry v. A. C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950). Defendants reference multiple pages in the hearing transcript before the Deputy Commissioner for support of their contention, however, they fail to cite any part of the full Commission's Opinion and Award that demonstrates the full Commission impermissibly shifted the burden of proof. We have carefully reviewed the

entire record and find nothing to indicate that either the Deputy Commissioner or the full Commission improperly placed a burden of proof on Defendants. In fact when discussing Defendants' theory that no assault actually occurred, Defendant's counsel stated, "I don't believe I have the burden to prove that scenario." The Deputy Commissioner responded, "I agree." The Deputy Commissioner understood that Ms. D'Aquisto had the burden to prove all elements of compensability. We find no error.

[6] Next, Defendants contend that the full Commission applied the incorrect standard of proof by using the appellate review standard of "any competent evidence." Defendants argue that this is evident in the full Commission accepting evidence favorable to Ms. D'Aquisto and discounting evidence in favor of them. This is not a standard of proof, but a credibility determination which is solely the responsibility of the full Commission. *Adams*, 349 N.C. at 681, 509 S.E.2d at 413. Furthermore, "the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. We find this argument to be without merit.

Next, Defendants argue that the full Commission's adoption of portions of Ms. D'Aquisto's proposed opinion and award is a failure to properly weigh the evidence. Since Defendants failed to cite any authority to support this argument, it is deemed abandoned. N.C. R. App. P. 28(b)(6).

[7] Finally, Defendants contend that Rule 601 of the Workers' Compensation Rules impermissibly shifts the burden of proof and denied them due process. We disagree.

Rule 601 of the Workers' Compensation Rules provides in pertinent part:

> The detailed statement of the basis of denial shall set forth a statement of the facts, as alleged by the employer, concerning the injury or any other matter in dispute; a statement identifying the source, by name or date and type of document, of the facts alleged by the employer; and a statement explaining why the facts, as alleged by the employer, do not entitle the employee to workers' compensation benefits.

Defendants argue that "Rule 601's requirement of an employer to come forward with any evidence to rebut a plaintiff's claim effectively shifts the burden of proof to the employer at the outset

of a claim and deprives the employer of procedural due process." (Def. Br. 30).

The General Assembly has specifically vested the North Carolina Industrial Commission with the ability to make rules governing Workers' Compensation cases. N.C. Gen. Stat. § 97-80 (2004) ("The Commission may make rules, not inconsistent with this Article, for carrying out the provisions of this Article."). Furthermore,

> [t]he North Carolina Industrial Commission has the power not only to make rules governing its administration of the act, but also to construe and apply such rules. Its construction and application of its rules, duly made and promulgated, in proceedings pending before the said Commission, ordinarily are final and conclusive and not subject to review by the courts of this State, on an appeal from an award made by said Industrial Commission.

Winslow v. Carolina Conference Ass'n of Seventh Day Adventists, 211 N.C. 571, 579-80, 191 S.E. 403, 408 (1937). Rule 601 was duly made and promulgated and therefore is presumed valid. Defendants make no specific arguments as to how Rule 601 denies them procedural due process nor do they cite any authority. We find this argument to be without merit, as Rule 601 was properly enacted.

Accordingly, we find no error by the full Commission and affirm the Opinion and Award.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

IN RE: D.J.D., D.M.D., S.J.D., J.M.D., MINOR JUVENILES

No. COA04-955

(Filed 5 July 2005)

1. Termination of Parental Rights— petition—required verification

The required verification was included in a petition for the termination of parental rights, although it was initially omitted from the record on appeal, and there was no defect in jurisdiction in the appeal.

2. Termination of Parental Rights— incarcerated father—reasonable efforts toward reunification

Although an incarcerated termination of parental rights respondent argued that DSS failed to make reasonable efforts to reunify him with his children, there was competent evidence otherwise and the court made the requisite findings.

3. Termination of Parental Rights— not able to care for children—insufficient alternative care proposed

There were sufficient findings for a termination of parental rights where neither parent was able to care for the children (respondent being incarcerated), nor did the parents suggest appropriate alternative placement. Respondent proposed his aunt, but he had not spoken with her in five years and there was no evidence that she was willing or able to care for the children.

4. Termination of Parental Rights— incarcerated father—lack of relationship—best interests of children

It was not an abuse of discretion for the trial court to determine that it was in the best interests of neglected children to terminate their incarcerated father's parental rights. While incarceration limited respondent's ability to show his children affection, it does not excuse failure to show an interest by whatever means available.

5. Termination of Parental Rights— incarcerated father—no effort to maintain relationship—sufficiency of evidence

There was sufficient evidence to support termination of the parental rights of an incarcerated father who had taken no steps to develop or maintain a relationship with his children.

6. Termination of Parental Rights— inability to establish safe home—sufficiency of evidence

Termination of parental rights was justified for the inability to establish a safe home where respondent's rights to two other children had been terminated, he was incarcerated, and he was unable to suggest alternate arrangements for his children.

7. Termination of Parental Rights— delayed scheduling of hearing—not prejudicial

Respondent was not prejudiced by a delay in scheduling his termination of parental rights hearing, and the termination of his rights was affirmed. The court continued to review the case on

the permanency planning schedule, a guardian ad litem was appointed for respondent, respondent moved for a continuance, and respondent had not had a relationship with his children for five years.

Appeal by respondent father from order entered 17 November 2003 by Judge Lawrence J. Fine in Forsyth County District Court. Heard in the Court of Appeals 9 May 2005.

Katharine Chester for respondent-appellant.

Theresa A. Boucher, Assistant County Attorney for Forsyth County Department of Social Services, and Womble Carlyle Sandridge and Rice, by G. Wriston Marshburn, for the Guardian ad Litem.

MARTIN, Chief Judge.

Respondent appeals the termination of his parental rights to D.J.D., D.M.D., S.J.D., and J.M.D. For the reasons stated below, we affirm the order of the trial court.

On or about 24 August 1999 the Forsyth County Department of Social Services (DSS) assumed non-secure custody when the children's mother started a fire after falling asleep with a pot of food cooking on the stove. DSS alleged neglect because of the family's involvement with DSS due to J.M.D.'s testing positive for cocaine at birth, the history of domestic violence between the parents, the mother's admission of drug addiction, the refusal to enroll one child in school, excessive absenteeism by another child, and the failure to maintain immunizations. At a hearing on 22 September 1999, the mother acknowledged the allegations, respondent "stood mute" and the children were adjudicated neglected pursuant to N.C. Gen. Stat. § 7B-101(15). Permanency planning review hearings were conducted on 17 December 1999, 17 March 2000, 12 July 2000, 13 September 2000, 14 March 2001, 14 September 2001, 15 March 2002, 14 June 2002, 13 September 2002, 13 December 2002 and 13 June 2003. On 1 May 2003 DSS filed a petition to terminate parental rights.

It appears from the record before us that respondent was incarcerated at some time between the non-secure custody order and the 22 September 1999 adjudication. On 30 May 2000, he "was convicted of possession of cocaine and habitual felony" and sentenced to a minimum of 80 months in the custody of the Department of Corrections.

The trial court acknowledged that due to his incarceration, respondent would be unable to comply with the DSS case plan pursuant to the 22 September 1999 order. At all of the review hearings, however, respondent was ordered to comply with substantially the same reunification requirements:

a) Address legal issues.

b) Obtain a drug assessment to determine his drug usage.

c) Attend Family Services—Men's Time Out Program for domestic violence issues and comply with recommendations[.]

d) Pay child support for each child beginning in January, 2000.

e) Attend supervised visitation with children according to DSS recommendations.

At the 17 December 1999 hearing DSS was relieved of reunification efforts.

During December of 1999 and January and February of 2000, respondent, apparently on bond awaiting trial, successfully attended supervised visitation, but did not pay child support, obtain a drug assessment, or attend the domestic violence program. At the 17 March 2000 hearing, placement with the maternal grandmother was the permanent plan. In addition to reiterating requirements similar to those recited above, the trial court ordered respondent to 1) pay $50.00 in child support by 1 April 2000; 2) not disrupt the children's placement, 3) receive birth control education, and 4) submit to drug testing at DSS's cost.

In its order following the 12 July 2000 hearing, the trial court found respondent had tested positive for cocaine on 17 March and suspended his child support obligations until he was eligible for work release. The permanent plan for the children continued to be placement with their maternal grandmother, but adoption was considered a concurrent plan. Similar findings were reiterated at the 13 September 2000 hearing, since respondent refused to attend the detention center's domestic violence program, failed to demonstrate appropriate parenting skills at subsequent visits with the children and had not completed any reunification requirements. The court determined that the children had been in foster care for over one year, and it approved the permanent plan to be adoption since "their mother, father, and maternal grandmother" were not suitable placements.

At the 14 March 2001 hearing, the court made additional findings concerning respondent's pending charges for driving without a license and speeding. It also noted that he was enrolled in a GED program and still had not attempted reunification requirements. The child support order was modified to be effective "at the point of his release or as he is eligible for work release." At the 14 September 2001 review, the only substantial change from the previous orders was that respondent should be allowed to 1) send his children mail through DSS and 2) conditioned upon the approval of the children's therapist, visit with them at the detention center.

At the 15 March 2002 hearing, the court found respondent "previously requested not to be writted [sic] in for future review hearings" and noted that respondent had institutional charges for active rioting, fighting and "creating offensive" at Caswell Correctional Center, and he still was not addressing the required issues. The permanent plan remained adoption, but since the mother was making progress regarding her requirements, the concurrent plan was reunification with her and DSS was ordered not to file a termination petition for six months. Respondent's child support obligations were "suspended retro-active July 14, 2000 until [respondent was] eligible for the Work Release Program" after the 14 June 2002 hearing.

Prior to the 13 December 2002 hearing the mother had a stroke, requiring care by the children's maternal grandmother, so, while adoption remained the permanent plan, the concurrent plan was changed to reunification with their mother and/or guardianship with relatives. At the 13 June 2003 hearing, the court noted that a termination petition had been filed on 1 May 2003 and the termination hearing was scheduled for 21 July 2003; counsel and a Guardian ad Litem were appointed for respondent. This same order also scheduled another permanency planning review hearing for 12 December 2003 and the termination hearing for 15 September 2003.

Citing court conflicts, the case was continued until 10 September 2003. The 10 September 2003 order noted that the children's mother had suffered a stroke and had indicated through her attorney that she would "sign a Relinquishment of Minor for Adoption" form. Respondent, not present at the hearing but represented by counsel, indicated that he "intended to contest the Petition and wanted to be present for the hearing;" so the court granted his counsel's motion to continue. The court scheduled a hearing for 17 November 2003, and arranged for respondent's presence.

At the 17 November 2003 hearing, testimony by DSS tended to show that there was an existing pre-adoptive home for three of the four children, and a potential home for the fourth child; and that respondent visited with his children fifteen times between August 1999 and his 30 May 2000 conviction but had not communicated with them since. Respondent testified that he could not comply with all reunification requirements because he was not accepted into the DART program since he "was a drug dealer" not a "user." Other relevant findings by the trial court are:

> (14) While respondent father has been in custody, he has had absolutely no contact with his children. He has not made any telephone calls, sent any cards, written any letters, nor arranged for any gifts. Furthermore, no one acting on his behalf (family member or friend) has contacted the Department of Social Services requesting a visit with or attempting to communicate with the minor children. The Court finds that no child support was paid but also finds that respondent father was not employed at the time.
>
> (15) Although there was a prison program available to provide Christmas cards and gifts at no expense to a prisoner, the respondent father testified that he was advised that he could not participate without knowing the children's address. However, respondent father did have contact with his mother, sister, and the children's mother and never requested any one of those individuals (or any other family member or friend) to contact the Department of Social Services to check on the welfare of his children or even to ascertain an address where mail could be sent to the children. The Court finds that respondent mother had been in regular contact with the Department of Social Services and his sister, who lives in Forsyth County, as well as other relatives who live in Forsyth County, could also have made inquiries with the Forsyth County Department of Social Services on his behalf but none did so. When asked why he did not write to his children, his sworn testimony was that he "did not want the children to know that he was in prison."
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> . . . .
>
> (17) Upon cross-examination, respondent father was unable to provide the date, month, year, or age of any of his four children.
>
> . . . .

> (19) . . . The Court finds that respondent father has not provided the name of any suitable person who could provide for the children until the time of his release from prison, whether in calendar year 2005 or calendar year 2007.
>
> (20) Although respondent is limited as to what he can do at this time to provide for his children while he is incarcerated, he has failed to provide any contact, love, or affection for his children . . . . Although he has some difficulties with reading and writing, that cannot excuse his lack of effort to communicate with his children, either directly or with the assistance of other family members or friends.
>
> . . . .
>
> (22) . . . . The Court specifically finds that none of the children have any significantly strong relationship with their father and the Court finds that that can be reasonably . . . related to the lack of contact between father and children for which respondent father must assume responsibility. Clearly, there will be at least two more years which will delay any form of permanency plan and, based upon the respondent father's present situation, he is incapable of caring for the children and the children are dependent juveniles within the meaning of N.C.G.S. § 7B-101. It is clear that there is a reasonable probability that such incapability will continue at least until such time as respondent father is released and for some period of time thereafter.

The trial court concluded grounds existed for termination pursuant to four subsections of N.C. Gen. Stat. § 7B-1111(a): *i.e.*, respondent (1) "neglected the minor children . . . and continues to neglect the minor children in that, he has failed to provide any contact, love or affection as the result of his total lack of communication with them;" (2) "is incapable of caring for them at this time", due to his incarceration, and an extended period of time in foster care would be required; (3) willfully abandoned the children for at least six consecutive months before the filing of the petition because, despite increased literacy skills, he took no "steps to even contact [DSS] to inquire as to the health, education or welfare of the children" and (4) "lacks the ability to establish a safe home for these children at this time." Respondent appeals from the order terminating his parental rights.

On appeal, respondent presents twelve of his sixteen assignments of error in four arguments. He has not presented arguments in sup-

port of the remaining assignments of error contained in the record on appeal, and they are deemed abandoned. N.C. R. App. P. 28(b)(6). Respondent argues that 1) the petition was not properly verified; 2) DSS failed to make reasonable efforts to reunify the children with their father; 3) the trial court erred in concluding that the children were dependent, neglected, willfully abandoned, and that respondent lacked the ability to establish a safe home; and 4) the trial court failed to hold a timely termination hearing.

[1] Respondent's first argument is that the petition did not include verification, which divests the trial court of jurisdiction. *In re Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993). The initial petition included a verification page, which was erroneously left out of the record on appeal. This Court permitted petitioner to amend the record on 25 January 2005 to include the complete petition. Since the record before us contains the verification page, and an affidavit by the Deputy Clerk of Superior Court, Juvenile Division, for Forsyth County, attesting to the fact that the petitions in each juvenile file contained the required verification page, the defect of which respondent complains has been cured. *See In re Baker*, 158 N.C. App. 491, 492, 581 S.E.2d 144, 145 (2003) (amending record on appeal to include notice of appeal, thus granting this Court jurisdiction); *In re Pierce*, 146 N.C. App. 641, 643, 554 S.E.2d 25, 27 (2001), *aff'd*, 356 N.C. 68, 78 565 S.E.2d 81, 88 (2002) (same). This assignment of error is overruled.

[2] In his second argument respondent asserts that DSS failed to make reasonable efforts to reunify him with his children. Relying on *In re Harris*, 87 N.C. App. 179, 360 S.E.2d 485 (1987), respondent contends that there is not a significant difference between "diligent efforts" and "reasonable efforts". The termination statute which applied in *Harris* required DSS to undertake "diligent efforts;" however, that statute was replaced by section 7B-1111(a)(2) which

> deleted the "diligent efforts" requirement, indicating an intent by the legislature to eliminate the requirement that DSS provide services to a parent before a termination of parental rights can occur. . . . [A] determination that DSS made diligent efforts to provide services to a parent is no longer a condition precedent to terminating parental rights.

In re Frasher, 147 N.C. App. 513, 517, 555 S.E.2d 379, 382 (2001); *see also In re J.W.J.*, *T.L.J.*, *D.M.J.*, 165 N.C. App. 696, 700, 599 S.E.2d 101, 103 (2004) (holding diligent efforts is no longer required). DSS

may be ordered to end reunification efforts during a review hearing if the trial court makes written findings of fact that:

> (1) Such [reunification] efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;

In re H.W., 163 N.C. App. 438, 445, 594 S.E.2d 211, 215, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 46 (2004) (quoting N.C. Gen. Stat. § 7B-507(b) (2003)).

The trial court relieved DSS of efforts to reunify as of 17 December 1999. After recounting DSS attempts to assist the mother, the trial court found that return of the children would be contrary to their best interests. Respondent had not worked with DSS regarding his children. Moreover, there was evidence over the course of eleven review hearings showing DSS efforts with the family. Additionally, respondent testified that he did not want his children to know he was in jail, even though the court gave permission for DSS to facilitate visits. Because the trial court made the requisite findings, supported by competent evidence, this assignment of error is overruled.

[3] In his third argument, respondent maintains that there were insufficient findings to support the grounds cited by the trial court when terminating his parental rights. We disagree. There are two stages to a termination of parental rights proceeding: adjudication, governed by N.C. Gen. Stat. § 7B-1109, and disposition, governed by N.C. Gen. Stat. § 7B-1110. *In re Brim*, 139 N.C. App. 733, 741, 535 S.E.2d 367, 371 (2000). During the adjudication stage, petitioner has the burden of proof by clear, cogent, and convincing evidence that one or more of the statutory grounds set forth in section 7B-1111 exists. N.C. Gen. Stat. § 7B-1109(e)-(f) (2003). "A finding of any one of the grounds enumerated [in section 7B-1111], if supported by competent evidence, is sufficient to support a termination." *In re J.L.K.*, 165 N.C. App. 311, 317, 598 S.E.2d 387, 391, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004). The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9, 10 (2001).

After a trial court determines that grounds to terminate parental rights exist, "the court shall issue an order terminating the parental rights" unless termination is contrary to the children's best interests.

N.C. Gen. Stat. § 7B-1110(a) (2003). Whether termination is in the best interests of the child is discretionary, and a court may decline to terminate parental rights only "where there is reasonable hope that the family unit within a reasonable period of time can reunite and provide for the emotional and physical welfare of the child." *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001).

Respondent contends there were insufficient findings, based on clear, cogent, and convincing evidence, of dependency, neglect, willful abandonment, or his inability to establish a safe home to support the trial court's conclusion that grounds for termination existed. A finding, supported by competent evidence, of any one of the grounds in section 7B-1111 is sufficient to support a termination. *J.L.K.*, 165 N.C. App. at 317, 598 S.E.2d at 391.

Respondent asserts his children are not dependent because he attempted to suggest an alternate child care arrangement while he is incarcerated. We disagree. A dependant child is "in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2003). The evidence supports the conclusion that these children are dependent since their parents were neither able to care for them nor did they suggest appropriate alternate placements. Respondent contends that he did propose an alternate placement; *i.e.*, his aunt, whom he brought to DSS's attention at the termination hearing, but with whom he acknowledged that he had not spoken in five years. There was no evidence she was willing or able to care for these children. *Cf. In re M.R.D.C.*, —— N.C. App. ——, ——, 603 S.E.2d 890, 896 (2004), *disc. review denied*, —— N.C. ——, —— S.E.2d —— No. 607P04 (March 3, 2005) (reversal of a permanency planning order where trial court failed to consider placement with paternal grandmother, despite her testimony at the hearing that she wanted and was able to care for the child). This assignment of error is overruled.

[4] Respondent next contends there were insufficient findings to support the trial court's conclusion of neglect. A prior adjudication of neglect "is admissible in subsequent proceedings to terminate parental rights," and evidence of changed conditions "and the probability of a repetition of neglect" must be considered. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984); *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001). As always, the best interests

of the children and parental fitness at the time of the termination hearing are the determinative factors. *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. Neglect is more than a parent's "failure to provide physical necessities" and can include the total failure to provide love, support, affection, and personal contact. *In re Ore*, 160 N.C. App. 586, 589, 586 S.E.2d 486, 488 (2003) (internal citation omitted).

Respondent maintains that since he was unable to visit with his children due to his incarceration, but had a prior good relationship, the trial court's findings that he failed to provide any contact, love or affection and that future neglect was probable, are not supported by sufficient evidence. He further argues that there were no findings regarding why he was not at home at the time the children were initially removed. These arguments are not persuasive.

First, respondent was present at the neglect adjudication and presented no evidence regarding the allegations, he simply "stood mute" when given an opportunity to explain his absence. Second, while we acknowledge that incarceration limited his ability to show affection, it is not an excuse for respondent's failure to show "interest in the children's welfare by whatever means available." *Whittington v. Hendren (In re Hendren)*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003). A father's neglect of his child cannot be negated by incarceration alone. *Id.*; *see also Blackburn*, 142 N.C. App. at 612, 543 S.E.2d at 909 (affirming termination of parental rights where mother rehabilitated in prison, and wrote letters to her child and DSS, but also had disciplinary problems while incarcerated, and would be unable to care for the child); *cf. In re Shermer*, 156 N.C. App. 281, 287, 576 S.E.2d 403, 407 (2003) (father incarcerated while his children in care, failed to work parts of his case plan, but no clear, cogent and convincing evidence of neglect because he demonstrated a relationship with his children, by contacting DSS from prison, writing letters and telephoning).

There is no evidence here that respondent attempted to show interest in his children, despite having more than five years to take some action. The trial court found continued neglect, evidenced by his lack of contact over the five years the children were in foster care. Respondent cannot remember their birthdays, made no attempt to communicate with them or to comply with the plan he signed with DSS, despite other efforts at rehabilitation. He also did not attempt to communicate with DSS regarding their welfare nor did he attempt to contact them through family members, despite the fact that he testified that he wrote to his mother and girlfriend. The evidence supports

the findings of a lack of a relationship between the children and their father, and the likelihood of future neglect. Therefore, it was not an abuse of discretion by the trial court to determine it was in the best interests of the children to terminate respondent's parental rights, and this argument is overruled.

[5] Parental rights can also be terminated when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." N.C. Gen. Stat. § 7B-1111(a)(7) (2003). Willful abandonment has been found where "a parent withholds his presence, his love, his care, the opportunity to display filial affection, and [willfully] neglects to lend support and maintenance." *In re McLemore*, 139 N.C. App. 426, 429, 533 S.E.2d 508, 509 (2000) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)). Despite incarceration, a parent failing to have any contact can be found to have willfully abandoned the child, *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986), and this Court has upheld termination based on willful abandonment despite some contact between the parent and the children. *See*, *e.g. In re T.D.P.*, 164 N.C. App. 287, 291, 595 S.E.2d 735, 738 (2004), *aff'd*, 359 N.C. 405, 610 S.E.2d 199 (2005) (termination upheld despite parent's communication with social worker via phone and letter, requests for photographs, arranged to have Christmas gifts sent, and evidence that prior to incarceration was an active participant in child's life); *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (four cards over seven years, less than one visit a year, one birthday card and no financial support). As recited above, respondent has taken none of the steps to develop or maintain a relationship with his children. Accordingly, this assignment of error is overruled.

[6] Respondent also contends the petitioner failed to prove that he was unable to establish a safe home. We disagree. A parent's rights can be terminated when the parental rights with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home. N.C. Gen. Stat. § 7B-1111(a)(9) (2003); *In re V.L.B.*, ___ N.C. App. ___, ___, 608 S.E.2d 787, 791, *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2005) No. 188P05 (May 4, 2005) (parents unable to establish a safe home due to unstable mental health history and domestic violence, in light of Michigan termination of rights to other children).

Respondent does not dispute that his rights to two other children have been terminated. This fact, combined with the clear, cogent and

convincing evidence regarding his incarceration and his inability to suggest alternate arrangements for his children, supports the trial court's conclusion that respondent was unable to establish a safe home, and justifies the termination of his parental rights on this ground as well. This assignment of error is overruled.

[7] In his final argument, respondent argues the termination hearing was not timely, and thus, we must vacate the order and dismiss the petition to terminate his parental rights. While we agree there was error in the scheduling of the termination hearing, we do not believe respondent was prejudiced thereby. This Court has previously held that despite an eighty-nine day delay in reducing the order to writing, "vacating the TPR order" was "not an appropriate remedy for the trial court's failure to enter the order within 30 days of the hearing" where "neglect and abandonment had been proven by clear, cogent and convincing evidence as the grounds upon which respondent's parental rights were being terminated." *J.L.K.*, 165 N.C. App. at 316, 598 S.E.2d at 391; *see also In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 172, *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903-04 (2004) (holding reversal simply because of order's untimely filing would only further delay a determination of custody and respondent could not demonstrate prejudice); *In re Joseph Children*, 122 N.C. App. 468, 471, 470 S.E.2d 539, 541 (1996) (statute was violated but respondent failed to show prejudice).

Recent cases finding that a violation of the statutory time requirements prejudices all parties involved are distinguishable from the case *sub judice*. In *In re B.P.*, —— N.C. App. ——, ——, —— S.E.2d ——, —— (2005), this Court held the respondent was prejudiced by a "six month delay between the hearing and entry of the order, [when] respondent was not provided the necessary information from which she could prepare for future proceedings." Likewise, a "delay in excess of six months to enter the adjudication and disposition order terminating" a respondent's parental rights" was "highly prejudicial to all parties involved," because respondent "could not appeal until "entry of the order." *In re L.E.B.*, —— N.C. App. ——, ——, 610 S.E.2d 424, 426 (2005).

This case is distinguishable both statutorily and factually. First, the procedure here is governed by a different statutory provision stating "[t]he hearing on the termination of parental rights . . . shall be held . . . no later than 90 days from the filing of the petition . . . unless the judge pursuant to subsection (d) of this section orders that it be held at a later time." N.C. Gen. Stat. § 7B-1109(a) (2003).

Continuances are permitted "for good cause shown . . . for up to 90 days from the date of the initial petition" and those that "extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice and the court shall issue a written order stating the grounds for granting the continuance." N.C. Gen. Stat. § 7B-1109(d) (2003). *B.P.* and *L.E.B.* concerned requirements that orders "be reduced to writing, signed, and entered no later than 30 days following the completion" of the hearing. *B.P.*, ––– N.C. App. at –––, ––– S.E.2d at ––– (quoting N.C. Gen. Stat. § 7B-905(a)); *L.E.B.*, ––– N.C. App. at –––, 610 S.E.2d at 426 (quoting N.C. Gen. Stat. § 7B-1109(e)).

There is a distinction between the failure of the trial court to reduce an order to writing, which effects the respondent's time to appeal, and a delay in scheduling a matter for hearing. In *B.P.* and *L.E.B.*, the time that elapsed between the filing of the petition and the hearing delayed the respondents' ability to appeal. *B.P.*, ––– N.C. App. at –––, ––– S.E.2d at –––; *L.E.B.*, ––– N.C. App. at –––, 610 S.E.2d at 426. Here, the petition was filed on 1 May 2003; the permanency planning review hearing order, entered 25 June 2003, *nunc pro tunc* 13 June 2003, notes that the original termination hearing was scheduled for 21 July 2003, within the statutory requirements. The order also scheduled the termination hearing for 13 September 2003, ninety days from the date of the permanency planning review hearing, and forty-four days after the termination hearing should have been held.

While this was a technical error, we do not believe it rises to the egregious, prejudicial delay found to have existed in *B.P.* and *L.E.B.*, where the trial court was required to reduce the order to writing within thirty days and took over six months. While the case was erroneously delayed, the court continued to review the case on the permanency planning schedule, during which time a guardian ad litem was appointed for respondent. At the 10 September 2003 scheduled hearing, respondent's motion for a further continuance was granted and the hearing was set for 17 November 2003. Since respondent moved for the continuance, adding sixty-eight days to the trial court's original error, he has failed to demonstrate prejudice.

Moreover, respondent had no relationship with his children for five years, unlike the mother in *L.E.B.*, who had weekly visitation. Delays prejudice the children, who are denied permanency. As *L.E.B.* points out, the time requirements in the statutes are designed "to provide prompt resolution in such matters" and children in this "age group traditionally have faced difficulty finding adoptive homes, as

many prospective parents seeking to adopt limit their search to infants or younger children." *L.E.B.*, at ——, 610 S.E.2d at 427. A forty-four day delay is not so prejudicial to respondent to warrant reversal where there is ample evidence on multiple grounds to terminate respondent's rights.

We reiterate that the best interests of the children are the paramount concern, *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984), and they "are at issue here, not respondent's hopes for the future." *Blackburn*, 142 N.C. App. at 614, 543 S.E.2d at 911. The children involved in the present case have been in care for almost six years, are thirteen, twelve, nine and six years old, and there was sworn testimony that their foster parents want to adopt them. Moreover, they do not have a relationship with their father, in part because of his unwillingness to communicate with them. The trial court did not err in determining, based on this evidence and the other evidence supporting the grounds to terminate respondent's rights, that it was in the children's best interests to do so.

Affirmed.

Judges TYSON and LEVINSON concur.

IN THE MATTER OF: D.M.

No. COA04-484

(Filed 5 July 2005)

Termination of Parental Rights— failure to make reasonable progress toward correcting conditions that led to removal—clear, cogent, and convincing evidence

The trial court did not err by terminating respondent father's parental rights even though respondent contends that the trial court ignored positive evidence regarding his attempts to correct those conditions which led to his child's removal, because there was clear, cogent, and convincing evidence to support the trial court's findings and conclusions that: (1) domestic violence counseling was the focal point of respondent's case plan, respondent's participation in the New Options for Violent Actions Program

(NOVA) was the key to successfully completing the case plan, and respondent did not complete the NOVA program; and (2) although respondent claims to have sought private counseling, there was no evidence in the record from the counselor regarding the substance of the counseling or treatment and it is unclear from the record that domestic violence was even the central focus of the limited counseling respondent attended.

Judge TYSON dissenting.

Appeal by respondent from order entered 8 October 2003, *nunc pro tunc* 25 September 2003, by Judge Avril U. Sisk in Mecklenburg County District Court. Heard in the Court of Appeals 21 April 2005.

Mecklenburg County Attorney's Office, by J. Edward Yeager, Jr., for petitioner-appellee Mecklenburg County Department of Social Services.

David Childers for respondent-appellant.

MARTIN, Chief Judge.

Respondent father appeals from an order terminating his parental rights as to his minor son, D.M., born 19 August 1999. For the reasons which follow, we affirm the order of the trial court.

On 11 June 2001, the Mecklenburg County Youth and Family Services, a division of the Mecklenburg County Department of Social Services ("DSS") filed a petition alleging that D.M. was a neglected and dependent juvenile in that he lived in an environment injurious to his health, did not receive proper care or supervision, and did not receive proper medical care. In the petition, DSS alleged that a history of domestic violence existed between respondent and D.M.'s mother, and that both respondent and the child's mother had violated protective orders put in place to protect the mother and her children, including D.M. DSS took custody of D.M. by non-secure custody order and placed him with his maternal grandmother.

On 28 August 2001, *nunc pro tunc* 23 July 2001, D.M. was adjudicated a neglected and dependent juvenile as to his mother. The case was continued as to respondent to allow for paternity testing. On 31 July 2001, respondent entered into a case plan with DSS, in which he agreed to participate in a domestic violence program entitled "New Options for Violent Actions" ("NOVA"), and follow all recommendations in order to "learn about the effects of domestic

violence" on his child and the child's mother. On 7 March 2002, *nunc pro tunc* 28 February 2002, D.M. was adjudicated neglected and dependent as to respondent.

On 25 July 2002, DSS filed a petition to terminate respondent's parental rights. As grounds for termination, the petition alleged: (1) D.M. had been in the custody of DSS for more than six months and respondent had willfully failed to pay a reasonable portion of the cost of child care; and (2) respondent had willfully left D.M. in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress had been made towards correcting those conditions which led to D.M.'s removal. Accordingly, DSS argued that it was in the best interests of the child that respondent's parental rights be terminated.

On 31 July 2003 and 25 September 2003, hearings were held on the petition to terminate respondent's parental rights, during which DSS offered evidence tending to show the following: Kathy Broome, case management supervisor for the Mecklenburg County NOVA program, testified that respondent had been enrolled in the NOVA program on three separate occasions, but had been terminated from the program each time. According to Ms. Broome, the NOVA program required respondent to "attend [a] group [session] once a week for two hours, take responsibility for his domestic violence behaviors, and not violate any of the program rules." Ms. Broome testified respondent began his most recent enrollment in the program on 9 March 2002, but was sent home during the following session because "he was so angry and defensive and unwilling to listen." During the 23 March 2002 session, respondent was again asked to leave after he brought a tape recorder to the group and attempted to secretly record the session in violation of NOVA rules. Respondent was subsequently terminated from the program. During his enrollment at NOVA, Ms. Broome stated respondent "severely minimized his part in [incidents of domestic violence]." Ms. Broome testified respondent

> refuses to accept any kind of feedback. He is not taking full responsibility for his behaviors. That was the first problem. And then he's not willing to accept any feedback or any ways that he can make changes in his life. He's not interested in making changes from what I can see. He's more interested in finding other people to blame for his situation.

Ms. Broome classified respondent as being "at high risk to re-offend."

Respondent testified that following his latest termination from the NOVA program, he sought private counseling with Mr. Larry Shullman. Respondent stated he attended six counseling sessions with Mr. Shullman, during which he discussed "the trouble I was having in our home . . . . the trouble with temper. Try to walk away from people who keep on starting trouble. There was a lot of stuff I talked to him about. You know, about my job situation, you know, other things." Mr. Shullman did not testify.

Belinda McLaughlin, a social worker with DSS, testified she spoke with Mr. Shullman and was only able to verify that respondent attended four counseling sessions with him. Ms. McLaughlin stated this time was insufficient to properly address respondent's issues of domestic violence. Respondent offered no other evidence of his compliance with the DSS case plan.

Following presentation of the evidence, the trial court concluded that respondent had willfully left D.M. in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress had been made towards correcting those conditions which led to his removal. Accordingly, the trial court concluded that it was in the best interests of the juvenile that respondent's parental rights be terminated. Respondent appeals.

Respondent argues the trial court erred by granting the petition to terminate his parental rights because the allegations were not proven by clear, cogent and convincing evidence. Respondent contends the trial court ignored positive evidence regarding his attempts to correct those conditions which led to his child's removal. Respondent cites evidence that he completed parenting classes, sought private counseling, obtained employment, and enjoyed visitation with his son. Respondent concedes that he did not complete classes with NOVA, but contends he was treated unfairly. After careful review of the record, briefs and contentions of the parties, we affirm the order of termination.

Section 7B-1111 of the North Carolina General Statutes sets out the statutory grounds for terminating parental rights. *See* N.C. Gen. Stat. § 7B-1111 (2003). A finding of any one of the separately enumerated grounds is sufficient to support a termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "[T]he party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997).

In the case *sub judice*, the trial court concluded that respondent had willfully left D.M. in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress had been made towards correcting those conditions which led to the child's removal. *See* N.C. Gen. Stat. § 7B-1111(a)(2) (2003). The evidence in the record supports the trial court's findings and conclusion. Respondent had a history of engaging in domestic violence with the child's mother which led to the child's removal. Due to the issue of domestic violence, respondent agreed to complete an assessment with NOVA, to learn about the effects of domestic violence on his child, and follow all recommendations. Domestic violence counseling was the focal point of his case plan, and respondent's participation in NOVA was the key to successfully completing the case plan. Respondent, however, did not complete the NOVA program. Although respondent claims to have sought private counseling with Larry Shullman, there was no evidence in the record from Mr. Shullman regarding the substance of the counseling or treatment. Indeed, it is unclear from the record that domestic violence was even the central focus of the limited counseling respondent attended with Mr. Shullman. Respondent testified he spoke with Mr. Shullman about various topics, including employment issues. Thus, we conclude there was clear, cogent and convincing evidence in the record to support the trial court's findings and conclusion that respondent had failed to make reasonable progress towards correcting the conditions that led to D.M.'s removal. Accordingly, the order terminating respondent's parental rights is affirmed.

Affirmed.

Judge LEVINSON concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

The majority's opinion affirms the trial court's order to terminate respondent's parental rights for failure to make reasonable progress towards correcting the conditions that resulted in D.M.'s removal. I respectfully dissent.

I. 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) (citing *In re Oghenekevebe*, 123 N.C. App 434, 439, 473 S.E.2d 393, 398 (1996)). The clear, cogent, and convincing evidence "standard is greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984) (citing *Santosky v. Kramer*, 455 U.S. 745, 745, 71 L. Ed. 2d 599, 599 (1982)). The burden of proof rests on DSS to provide clear, cogent, and convincing evidence to justify termination of respondent's parental rights. *In re Nolen*, 117 N.C. App. 693, 698, 453 S.E.2d 220, 223 (1995) (citations omitted).

II. Reasonable Progress

The trial court concluded respondent left D.M. in foster care for more than twelve months without showing to the satisfaction of the court reasonable progress had been made to correct the conditions which led to D.M.'s removal.

N.C. Gen. Stat. § 7B-1111(a)(2) (2003) provides grounds for the termination of parental rights, in pertinent part:

> The court may terminate the parental rights upon . . . finding . . . [t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile . . . .

Reasonable efforts can include a "positive response toward improving [a] situation[,]" "the []ability of respondent to care for [his] child," or the "[ability] to show progress in . . . therapy." *In re Oghenekevebe*, 123 N.C. App. at 437, 473 S.E.2d at 396-97.

"To uphold the trial court's order, we must find that the respondent's failure was willful, which is established when the respondent had the ability to show reasonable progress but was unwilling to make the effort." *In re Shermer*, 156 N.C. App. 281, 289, 576 S.E.2d 403, 409 (2003) (citing *In re Fletcher*, 148 N.C. App. 228, 235, 558 S.E.2d 498, 502 (2002)); *see In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (willful failure to make progress where the respondent's alcoholism and abusive living arrangement continued for three and one-half years while the children were in foster care); *In re Bluebird*, 105

N.C. App. 42, 411 S.E.2d 820 (1992) (willful failure to make reasonable progress where the mother left her child in foster care for eighteen months, was unemployed, lived with her abusive boyfriend, and did not attempt to improve her parenting skills).

Respondent's case plan objectives included: (1) complete the NOVA program; (2) attend visits with D.M.; (3) pay child support; and (4) stay away from D.M.'s mother, half-brothers, and half-sister.

A. NOVA Program

The trial court found as fact respondent did not complete objective one, the NOVA program. The NOVA classes were to assist respondent in dealing with issues of domestic violence. Respondent began the NOVA program on three occasions. On the third attempt, respondent attended two or three sessions before he was terminated from the program because he brought a tape recorder with him. Respondent claims he was treated unfairly during the NOVA classes and brought in the tape recorder to prove his unfair treatment. Respondent claims the case manager insisted he admit to allegations he had perpetrated domestic violence in order to continue his participation in the program. After being excluded from NOVA, respondent sought and received alternative counseling with Larry Shulman ("Shulman") of Charlotte Professional Counseling Center to deal with issues of domestic violence. Shulman stated respondent was open in his discussions about domestic violence, seeing himself as a victim of domestic violence by D.M.'s mother and calling Schulman when he was stressed or when "his back was against the wall." Respondent also attended and completed parenting classes and attended some of the counseling sessions with D.M., D.M.'s mother, and her other children.

The trial court found as fact respondent presented no evidence from Shulman to show the extent of his counseling. However, the record shows respondent signed a release to allow Shulman to discuss his treatment with his case worker. Additionally, the case worker received a report from Shulman regarding respondent and noted this in a reasonable efforts report. The trial court failed to consider or make findings on this evidence in its order.

N.C. Gen. Stat. § 7B-1111(a)(2) requires "reasonable progress" by the parent to correct the conditions which led to removal of the child. Here, respondent substantially complied with the case management order. The trial court ordered respondent to complete NOVA classes to address issues of domestic violence. Respondent did attend these

sessions, but was excluded from participation. When NOVA proved to be an inadequate setting for respondent, he sought alternative treatment for domestic violence with Shulman. Respondent should not be bound by a single source provider to seek to overcome the issues that led to the child's removal. Respondent also sought alternative treatment by attending parenting classes and some counseling sessions. Respondent did not ignore the case management order after leaving the NOVA program, but rather made a conscious and concerted effort to comply by seeking alternative counseling. No clear, cogent, and convincing evidence supports a finding that respondent did not make reasonable progress with his domestic violence counseling. His failure to complete NOVA, standing alone, is not clear, cogent, and convincing evidence to support a contrary finding, where he was required to admit he had perpetrated domestic violence as a condition of continued participation in NOVA.

B. Visitation

The second objective of the case management order for respondent to attend visitations with D.M. was fully completed. Respondent visited D.M. on a weekly basis during the months of 5 July 2002 through 22 November 2002. Visits temporarily ceased from 6 December 2002 through 25 April 2003 because of problems with D.M.'s mother and her family filing complaints including communicating threats, restraining orders, and assault charges. However, visits were resumed on a biweekly basis once the problems with D.M.'s mother and her family ceased. On 6 June 2003, respondent received approval to visit D.M. once per week. The social worker assigned to D.M.'s case noted in her report, "the visits have been pleasant for everyone."

Another social worker, Ms. Clark-Moser, supervised visits and testified respondent provided food for D.M. on every visit and always hugged, kissed, and buckled D.M. into his seat at the end of every visit. Respondent expressed concern over D.M.'s well being during his visits. Ms. Clark-Moser testified respondent: (1) complained D.M.'s shorts were too large for him on one occasion, requiring a pin to hold them up; (2) expressed concern about D.M.'s clothes being dirty; (3) expressed concern about a hole in D.M.'s shoe; (4) expressed concern about a scar on D.M.'s knee; (5) complained about a hole in D.M.'s sock; (6) went to his car and retrieved an antiseptic to treat a mosquito bite on D.M.'s face; (7) complained D.M.'s clothes were too small; (8) inquired as to why D.M. never wore shoes respondent bought for him; (9) again complained about D.M. wearing

old shoes with a hole in them; (10) purchased a new pair of shoes for D.M.; (12) provided a picnic for D.M.; and (13) provided a bed and mattress for D.M.

The trial court noted respondent used his cell phone during a visit and labeled this conduct "inappropriate behavior." However, respondent complied with the case management order, attended visitations regularly, and the social worker observed a warm, affectionate relationship between father and son. Under N.C. Gen. Stat. § 7B-1111(a)(2), DSS failed to prove by clear, cogent, and convincing evidence that respondent failed to make "reasonable progress" during his visits with D.M.

C. Child Support

Respondent paid child support in order to comply with objective three of the case management order. Respondent was ordered by the court to pay monthly child support payments beginning 1 January 2002. Respondent paid the monthly child support. At the time of the hearing in the Summer 2003, respondent's arrearage was only $88.47. D.M.'s mother's arrearage totaled $1,085.75. The trial court's finding of fact stated, "neither parent has paid child support as ordered by the court." This finding is not supported by any evidence and certainly not by the required standard of clear, cogent, and convincing evidence regarding respondent's failure to pay child support. Respondent made reasonable and substantial progress in providing support for D.M. and complied with objective three of his case management order.

D. Contact with D.M.'s Mother

The final objective for respondent in the trial court's case management order was to avoid contact with D.M.'s mother and her other children. The court did not find or conclude respondent's non-compliance with this condition as a basis to terminate his parental rights.

III. Analysis

In order for this Court "[t]o uphold the trial court's order, we must find that the respondent's failure [to make reasonable progress] was willful[.]" *In re Shermer*, 156 N.C. App. at 289, 576 S.E.2d at 409. "The word willful as applied in termination proceedings . . . has been defined as 'disobedience which imports knowledge and a stubborn resistance.' " *In re Pope*, 144 N.C. App. 32, 44, 547 S.E.2d 153, 160 (quotation omitted), *aff'd per curiam* 354 N.C. 359, 554 S.E.2d 644

(2001). " 'Willful' has also been defined as 'doing an act purposely and deliberately.' " *Id.* (citations omitted).

Respondent's conduct does not show he willfully failed to comply with the case management order. Respondent's reasonable efforts are shown by his substantial compliance with all conditions of the order to retain his parental rights.

Respondent's reasonable progress included a positive response towards improving the situation which led to removal of his child, showing his ability to care for D.M., obtaining employment, attending parenting classes, receiving counseling, and paying child support. Respondent did not display "disobedience which imports knowledge and a stubborn resistance." *In re Pope*, 144 N.C. App. at 44, 547 S.E.2d at 160 (quotation omitted). Rather, respondent displayed a willingness to accomplish the tasks necessary to reunite himself and D.M., despite D.M.'s mother and her family's attempts to obstruct and frustrate respondent's efforts.

Respondent made reasonable and substantial efforts to correct the conditions which led to D.M.'s removal. *See In re Nesbitt*, 147 N.C. App. 349, 555 S.E.2d 659 (2001) (The respondent's progress in safety and parenting skills, housing, and employment were evaluated over a twenty-seven month period. Reasonable efforts were found where the respondent attended therapy and coping skills group; selected appropriate television shows and provided toys and physical safety for child; attempted to recognize and improve reactions to child; secured and lived in a new home for almost one year after being evicted, living in a hotel, and living in other temporary arrangements; maintained child support payments; and continued efforts to secure employment although the respondent held approximately seven jobs since the child had been removed.)

Here, respondent sought alternative counseling for his domestic violence issues, attended and completed parenting classes, attended some counseling sessions with D.M., D.M.'s mother, and her other children, attended regular visitations with D.M. at which he displayed affection and concern for D.M.'s well being, and paid child support. NOVA's requirement that respondent admit he was the perpetrator of domestic violence as a condition of his continued participation in the program was unreasonable. Respondent's attempt to tape record his sessions, standing alone, also is not a reasonable basis to terminate his participation in the program. "While we recognize that the trial court is perhaps in the best position to evaluate the evidence in these

very sensitive cases and are mindful of the need for permanency for young children; we believe that the law requires compelling evidence to terminate parental rights." *In re Nesbitt*, 147 N.C. App. at 361, 555 S.E.2d at 667. Here, no clear, cogent, and convincing evidence supports termination of respondent's parental rights for failure to make reasonable progress.

IV. Conclusion

Respondent submitted to paternity testing to establish his rights as D.M.'s father. Respondent voluntarily entered into a case plan with DSS and participated in multiple hearings to be reunited with his son. The record clearly shows respondent's substantial progress in or completion of all objectives of the case plan. No clear, cogent, and convincing evidence in the record shows respondent did not make reasonable progress in his efforts to correct the conditions that led to D.M.'s removal. I respectfully dissent.

THOMAS NEIL CANNON, EMPLOYEE, PLAINTIFF-APPELLEE v. GOODYEAR TIRE & RUBBER COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS-APPELLANTS

No. COA04-168

(Filed 5 July 2005)

1. Appeal and Error— motion to dismiss—timeliness of proposed record on appeal

Although plaintiff employee contends that defendants' appeal in a workers' compensation case should be dismissed on the ground that defendants did not timely file the proposed record on appeal, the Court of Appeals denied the motion to dismiss on 23 June 2004.

2. Workers' Compensation— work-related injury—specific traumatic incident

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff employee sustained a work-related injury by specific traumatic incident while lifting a drum hoist, because: (1) plaintiff testified in detail at the hearing about the 6 April 2001 incident; and (2) plaintiff's supervisor and the infirmary nurse confirmed plaintiff's testimony at the hearing.

3. Workers' Compensation— automobile accident aggravated and/or exacerbated work-related injury—failure to show independent intervening cause

The Industrial Commission did not err in a workers' compensation case by its finding of fact and conclusion of law that plaintiff's 18 April 2001 automobile accident aggravated and/or exacerbated his 6 April 2001 work-related injury, because: (1) regardless of whether plaintiff was en route to receive treatment for his work-related injury, the automobile accident was not an independent intervening cause since it did not result from plaintiff's own intentional conduct; and (2) competent evidence in the record supported the conclusion of law that the automobile accident aggravated plaintiff's work-related injury including the testimony of plaintiff's chiropractor.

4. Workers' Compensation— expert testimony—guess or mere speculation

The Industrial Commission erred in a workers' compensation case by its finding of fact and conclusion of law that plaintiff's preexisting spinal kyphotic deformity was materially aggravated or exacerbated by the 6 April 2001 work-related injury and the case is remanded for new findings of fact and conclusions of law in accordance with the correct legal standard, because: (1) expert testimony that a work-related injury could or might have caused further injury is insufficient to prove causation when other evidence shows the testimony to be a guess or mere speculation, whereas expert testimony that establishes a work-related injury likely caused further injury provides competent evidence to support a finding of causation; (2) the expert testimony in this case does not rise above a guess or mere speculation when the expert testified that the work-related injury could have been an exacerbating or aggravating factor, but he further testified that he was uncertain that this was the case; and (3) the expert testified that he was unsure as to whether any single event caused the onset of plaintiff's symptoms at all and further testified that plaintiff's 6 April 2001 work-related injury could have nothing to do with the kyphotic deformity.

5. Workers' Compensation— amount of compensation— aggravation and/or exacerbation caused by automobile accident

A workers' compensation case is remanded for a determination as to the proper amount of compensation to which plaintiff

is entitled for his 6 April 2001 work-related injury and its aggravation and/or exacerbation caused by an 18 April 2001 automobile accident.

6. Appeal and Error— preservation of issues—failure to argue

The assignments of error that were not addressed in defendants' brief are abandoned pursuant to N.C. R. App. P. 28(b)(6).

Appeal by defendants from opinion and award entered 24 October 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2005.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Nicole Dolph Viele, for defendants-appellants.

McGEE, Judge.

Thomas Neil Cannon (plaintiff) began working for defendant Goodyear Tire and Rubber Company (Goodyear) in 1976. Plaintiff was employed as a tire builder throughout his employment at Goodyear. Plaintiff went to Doctors' Urgent Care on 22 March 2001 seeking treatment for blurred vision and "tingling" in his feet. An initial neurological examination by Dr. Michael Christopher Moore (Dr. Moore) was inconclusive. Dr. Moore referred plaintiff to a neurologist and an optometrist. Plaintiff scheduled an appointment with a neurologist, Dr. Rangasamy Ramachandran (Dr. Ramachandran), for 10 April 2001.

Plaintiff was changing a drum on 6 April 2001, while acting within the scope of his employment. When plaintiff lifted the hoist off the drum, he felt a sharp pain in the lower part of his back. Plaintiff also experienced a "tingling numbness" in his feet but testified that it was a different sensation than what he had complained of on 22 March 2001. Plaintiff reported the accident to his supervisor and went to the infirmary. Plaintiff was given light duty for the remainder of the day. When plaintiff arrived at work the following day, he returned to the infirmary, complaining of lower back pain and numbness from his knees down to his feet. The infirmary nurse, Wanda Monroe, sent plaintiff to Primary Care Plus. The doctors at Primary Care Plus diagnosed plaintiff with lumbar strain and gave plaintiff light duty.

Plaintiff was told to follow up on 9 April 2001 with the company doctor for further assessment. Plaintiff testified that he did not follow up on 9 April 2001 because the doctor at Primary Care Plus "didn't do nothing to [him]."

Plaintiff missed his appointment with Dr. Ramachandran on 10 April 2001 due to illness, and rescheduled the appointment for 18 April 2001. While en route to this appointment, plaintiff was injured in an automobile accident. Plaintiff was taken to the emergency room of Cape Fear Valley Medical Center, where he was diagnosed with thoracic, lumbar, and cervical spine strain, as well as left knee sprain. Plaintiff was prescribed pain medication, was given two days off work, and was given light duty for five days.

Plaintiff was finally able to see Dr. Ramachandran on 23 April 2001. Dr. Ramachandran ordered an MRI of plaintiff's cervical spine. The MRI revealed "a large posterior osteophyte at C-4-5 with indented spinal cord on the left paracentral region." Dr. Ramachandran referred plaintiff to a neurosurgeon.

Plaintiff saw Dr. Robert Allen (Dr. Allen), a neurosurgeon, on 18 May 2001. Plaintiff did not inform Dr. Allen that plaintiff had been involved in a work-related accident on 6 April 2001 or that plaintiff had been in a car accident on 18 April 2001. Plaintiff did not list either of these events on the "Medical History Questionnaire" (the Questionnaire) that he filled out before the appointment with Dr. Allen. Plaintiff also listed the onset of the symptoms as occurring on 1 April 2001. The Questionnaire also asked whether plaintiff's visit was "related to an accident[.]" Plaintiff checked the "NO" box next to this question. Finally, Dr. Allen's notes from plaintiff's visit states: "There is no inciting event for [plaintiff's] symptoms other than he does have a previous history of a pretty major accident as a teenager back when he was around 16 or 17 years old."

Dr. Allen reviewed plaintiff's MRI and determined that plaintiff had a kyphotic deformity in the cervical spine. Dr. Allen described plaintiff's kyphotic deformity as "[i]nstead of [having] a straight spine, [plaintiff] had a very bad angulation to the spine." Dr. Allen's physical examination of plaintiff confirmed this preliminary diagnosis. Although Dr. Allen did not know the cause of the kyphotic deformity, he testified that the deformity was "quite fused," and therefore "suggestive of very chronic phenomena" or a "long-standing" condition. He believed that the deformity was either a congenital condition or "due to trauma in the remote past." Dr. Allen testified that it was

"potentially" caused by an automobile accident in which plaintiff had been involved when plaintiff was sixteen years old.

Dr. Allen performed surgery on the kyphotic deformity on 27 July 2001. Plaintiff steadily improved after the surgery, returning to work on 26 November 2001. Dr. Allen testified in his deposition that by that time plaintiff had reached maximum medical improvement. Dr. Allen estimated that plaintiff had sustained twenty percent permanent partial disability to his back.

In an opinion and award entered 24 October 2003, the Industrial Commission (the Commission) made the following pertinent findings of fact:

> 11. Dr. Allen opined that the accident at work could have been an exacerbating or aggravating factor in the onset of plaintiff's cervical myelopathy. He further opined that plaintiff's kyphotic deformity caused plaintiff to be more susceptible to injury after a specific traumatic incident. Dr. Allen opined that given the long-standing kyphotic deformity, any trauma such as the work-related injury or the car accident of 18 April 2001 could have been sufficient to create plaintiff's current symptoms. Dr. Allen was unable to apportion plaintiff's current condition between the automobile accident when plaintiff was 16, the work-related accident of 6 April 2001, and the auto accident on 18 April 2001.
>
> 12. Plaintiff's pre-existing condition of kyphotic deformity was materially aggravated and/or exacerbated by the work-related specific traumatic incident of 6 April 2001. Plaintiff's back condition was further materially aggravated and/or exacerbated by the automobile accident of 18 April 2001.

The Commission then made the following pertinent conclusions of law:

> 1. On 6 April 2001, plaintiff sustained an injury to his back as a direct result of a specific traumatic incident arising out of and in the course of employment with defendant-employer. N.C. Gen. Stat. § 97-2.
>
> 2. On 18 April 2001, plaintiff was in an automobile accident which materially aggravated and/or exacerbated his work-related injury and his pre-existing condition of kyphotic deformity. . . . In the instant case, the subsequent aggravation of

> plaintiff's condition was not due to an intervening cause attributable to plaintiff's own intentional conduct. Rather, it occurred while plaintiff was on his way to receive treatment for his compensable work-related injury of 6 April 2001; therefore, the aggravation of plaintiff's condition was a direct and natural result of plaintiff's compensable injury. N.C. Gen. Stat. § 97-25.

Chairman Buck Lattimore dissented from the Commission's opinion and award, stating:

> [P]laintiff's complaints all regarded a lower back injury on April 6, 2001. Not one of four doctors deposed in this case indicated that plaintiff's lower lumbar pain allegedly experienced on April 6, 2001 definitely caused or aggravated a pre-existing condition in plaintiff's cervical spine.

The Commission awarded plaintiff: (1) temporary total disability at the rate of $620.00 per week from 23 April 2001 through 25 November 2001 and (2) permanent partial disability at the rate of $620.00 for sixty weeks for the twenty percent permanent partial disability rating to his back. Defendants appeal.

I.

[1] We first note that plaintiff has argued in his brief that defendants' appeal should be dismissed on the ground that defendants did not timely file the proposed record on appeal. Plaintiff filed a motion to dismiss this appeal on 10 June 2004, in which he presented the same argument, verbatim. Our Court determined this matter in an order denying the motion to dismiss on 23 June 2004.

II.

We have a "quite narrow" standard of review in workers' compensation cases. *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000). Our review is limited to the consideration of two issues: (1) whether the Commission's findings of fact are supported by competent evidence; and (2) whether the conclusions of law are supported by the findings of fact. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). When there is any evidence in the record that tends to support a finding of fact, the finding of fact is supported by competent evidence and is conclusive on appeal. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Likewise, "[w]e are not bound by the findings of the

Commission when they are not supported by competent evidence in the record." *English v. J.P. Stevens & Co.*, 98 N.C. App. 466, 471, 391 S.E.2d 499, 502 (1990).

[2] Defendants argue that no competent evidence supports the Commission's finding of fact that plaintiff sustained an injury by specific traumatic incident while lifting a drum hoist. We disagree. Plaintiff testified in detail at the hearing about the 6 April 2001 incident. Plaintiff stated that, while changing a drum, he "pulled on the hoist to lift it off the iron bar." Plaintiff testified that this action caused him to pull the lower part of his back and experience a sharp pain. Plaintiff then filled out an accident report and went to the infirmary, where he was put on light duty. Plaintiff returned to the infirmary the following day, complaining of lower back pain, and the infirmary nurse sent plaintiff to Primary Care Plus, where he was diagnosed with lumbar strain. Both Harold Brock, plaintiff's supervisor, and the infirmary nurse confirmed plaintiff's testimony at the hearing. We hold that this is competent evidence that supports the Commission's finding of fact and conclusion of law that plaintiff sustained a work-related injury by specific traumatic incident on 6 April 2001.

III.

[3] Defendants next assign error to the Commission's finding of fact and conclusion of law that plaintiff's automobile accident aggravated and/or exacerbated his work-related injury. All natural consequences that result from a work-related injury are compensable under the Workers' Compensation Act. *Roper v. J.P. Stevens & Co.*, 65 N.C. App. 69, 73-74, 308 S.E.2d 485, 488 (1983), *disc. review denied*, 310 N.C. 309, 312 S.E.2d 652 (1984). Therefore, when a work-related injury leaves an employee in a weakened state that results in further injury, the subsequent injury is compensable. *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 381-82, 323 S.E.2d 29, 31 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985). However, compensation is precluded when "the subsequent aggravation is the result of an independent intervening cause attributable to claimant's own intentional conduct[.]" *Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 685, 459 S.E.2d 797, 799, *disc. review denied*, 342 N.C. 192, 463 S.E.2d 237 (1995). " 'An intervening cause is one occurring entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is a cause of that result.' " *Petty v. Transport, Inc.*, 276 N.C. 417, 426, 173 S.E.2d 321, 328 (1970) (citation omitted).

Defendants argue that the Commission erred when it found that plaintiff was in the 18 April 2001 automobile accident while en route to receive treatment for his 6 April 2001 work-related injury. We find that, regardless of whether plaintiff was en route to receive treatment for his work-related injury, the automobile accident was not an independent intervening cause because it did not result from plaintiff's own intentional conduct. Rather, the evidence shows, and defendants do not contend otherwise, that the automobile accident was the result of another driver's negligence. Therefore, the accident was not an intervening cause precluding compensation for aggravation of plaintiff's work-related injury. *See, e.g., Baker v. City of Sanford*, 120 N.C. App. 783, 789, 463 S.E.2d 559, 564 (1995), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996) (since the plaintiff's brother's death "was not attributable to [the] plaintiff's own intentional conduct," the plaintiff was entitled to compensation for the exacerbation of his work-related depression); *Horne*, 119 N.C. App. at 687, 459 S.E.2d at 800-01 (finding that an automobile accident was not an independent, intervening cause of the plaintiff's injury because there was no evidence that the plaintiff's own intentional conduct caused the accident).

Furthermore, we find that competent evidence in the record supports the Commission's conclusion of law that the automobile accident aggravated plaintiff's work-related injury. Dr. Jeffrey Baldwin (Dr. Baldwin), plaintiff's chiropractor, testified that the automobile accident exacerbated the work-related injury:

> The [automobile] accident . . . is a trauma to the spine. Even though the majority of the trauma was up top, any trauma to the spine, especially if an area is already damaged, . . . the spine is going to absorb that trauma to some extent throughout the course of the spine, and it's going to affect the lower back if there was a previous existing problem down there . . . .

Therefore, the Commission did not err in finding as fact and concluding as a matter of law that the automobile accident aggravated or exacerbated plaintiff's work-related injury.

IV.

[4] Defendants' next assignment of error contends that competent evidence does not support the Commission's finding of fact and conclusion of law that plaintiff's pre-existing spinal kyphotic deformity was materially aggravated or exacerbated by the 6 April 2001 work-related injury.

North Carolina law is clear that "[w]hen a pre-existing, *nondisabling*, *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[.]" *Morrison v. Burlington Industries*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981). As long as "the work-related accident 'contributed in "some reasonable degree" ' to [the] plaintiff's disability, [the plaintiff] is entitled to compensation." *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 466, 470 S.E.2d 357, 359 (1996) (citations omitted). However, a plaintiff must prove by a "preponderance of the evidence" that the accident was a causal factor resulting in the disability. *Ballenger v. ITT Grinnell Industrial Piping*, 320 N.C. 155, 158-59, 357 S.E.2d 683, 685 (1987).

In workers' compensation cases that involve "complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Furthermore, "expert opinion testimony [that] is based merely upon speculation and conjecture . . . is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000); *see also Dean v. Coach Co.*, 287 N.C. 515, 522, 215 S.E.2d 89, 94 (1975) ("[A]n expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.").

In *Young*, the plaintiff suffered a lumbo-sacral strain while in the course and scope of her employment. *Young*, 353 N.C. at 228, 538 S.E.2d at 913. The plaintiff was later diagnosed with fibromyalgia and argued that the work-related injury was the cause of the fibromyalgia. *Id.* at 229-30, 538 S.E.2d at 914. Our Supreme Court held that there was no competent evidence to support a finding of causation, since the doctor's testimony on which the plaintiff relied "was based entirely upon conjecture and speculation." *Id.* at 231, 538 S.E.2d at 915. Although the doctor testified that the work-related " ' "injury could have or would have aggravated or caused the fibromyalgia[,]" ' " *id.* at 233, 538 S.E.2d at 916 (quoting *Young v. Hickory Bus. Furn.*, 137 N.C. App. 51, 56, 527 S.E.2d 344, 348 (2000)), the Court stated that " 'could' or 'might' expert testimony [is] insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Young*, 353 N.C. at 233, 538 S.E.2d at 916.

Our Supreme Court recently reaffirmed its holding in *Young* when it adopted the dissents from this Court's opinions in *Edmonds v. Fresenius Med. Care*, 165 N.C. App. 811, 600 S.E.2d 501 (2004) (Steelman, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, 359 N.C. 313, 608 S.E.2d 755 (2005), and *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 603 S.E.2d 552 (2004) (Hudson, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, 359 N.C. 403, 610 S.E.2d 374 (2005). In *Edmonds*, the plaintiff suffered from pre-existing kidney problems. 165 N.C. App. at 812-13, 600 S.E.2d at 503. As the result of a compensable work-related injury, the plaintiff was placed on non-steroidal anti-inflammatory drugs (non-steroidals). *Id.* at 812, 600 S.E.2d at 502-03. The plaintiff claimed that the non-steroidals exacerbated her pre-existing kidney problems, resulting in renal failure, and sought compensation from her employer. *Id.* at 813, 600 S.E.2d at 503. The dissent adopted by the Supreme Court found that the plaintiff failed to prove that the administration of non-steroidals for her work-related injury caused her renal failure. *Id.* at 819, 600 S.E.2d at 506. The dissent relied on the Commission's finding of fact that the expert testimony only indicated that the non-steroidals "possibly" or "could or might" have worsened the plaintiff's kidney problems:

> 19. . . . [The expert] could not say that it was probable; he could only say that it was possible. He stated he could not give an opinion, to a reasonable degree of medical certainty, without knowing all the information surrounding the drugs. [The expert] testified that [the] plaintiff's kidney disease could be attributed to a number of factors, including diabetes, hypertension, a drug source injury, or a blunt trauma injury.

Id. at 817-18, 600 S.E.2d at 506. The dissent concluded that "[t]his testimony does not rise above a guess or mere speculation" and therefore was not competent evidence to show causation. *Id.* at 818, 600 S.E.2d at 506.

In contrast, the dissent adopted from *Alexander* found that competent evidence supported the plaintiff's claim that a work-related injury to his foot caused a ruptured disk in the plaintiff's back. 166 N.C. App. at 571, 603 S.E.2d at 558. The dissent stated that although "it [wa]s possible to find a few excerpts [of the plaintiff's doctor's testimony] that might be speculative[,] . . . much of the evidence reveals that the doctor expressed her opinions repeatedly and without equivocation." *Id.* at 573, 603 S.E.2d at 558. Therefore, since the doctor did

testify that it was "likely" that the plaintiff's back injury occurred during the work-related accident, competent evidence supported the Commission's conclusion that the work-related accident caused the back injury. *Id.*

Based on these holdings, it appears that our Supreme Court has created a spectrum by which to determine whether expert testimony is sufficient to establish causation in worker's compensation cases. Expert testimony that a work-related injury "could" or "might" have caused further injury is insufficient to prove causation when other evidence shows the testimony to be "a guess or mere speculation." *Young*, 353 N.C. at 233, 538 S.E.2d at 916; *see also Edmonds*, 165 N.C. App. at 818, 608 S.E.2d at 506. However, when expert testimony establishes that a work-related injury "likely" caused further injury, competent evidence exists to support a finding of causation. *Alexander*, 166 N.C. App. at 573, 603 S.E.2d at 558.

We find that, like in *Edmonds*, the expert testimony in this case "does not rise above a guess or mere speculation." *Edmonds*, 165 N.C. App. at 818, 600 S.E.2d at 506. Dr. Allen testified that the work-related injury "*could have* been an exacerbating or aggravating factor" in plaintiff's kyphotic deformity, but further testified that he was uncertain that this was the case:

> A What pushed [the kyphotic deformity] over the edge, *I'm not sure if there was anything*. . . . I think what he is describing as his presentation, how it's due to any one particular event, I think is not clear.
>
> . . . .
>
> Q So it is possible with this condition that, even if the Industrial Commission finds that [plaintiff] did suffer an on-the-job injury on April the 6th, 2001, that it could have *nothing to do* with the condition that you treated him for here?
>
> A Correct.
>
> Q And there's no way for you to determine whether it was totally degenerative or something else specifically caused it?
>
> A Now I think that the evidence would suggest that he had a major kyphotic deformity present as the major problem. *Whether some incident pushed it over the edge, I think, is less clear.*

(emphases added).

Dr. Allen's testimony indicates that he was unable to go beyond a guess or speculation in determining whether plaintiff's work-related injury aggravated and/or exacerbated plaintiff's kyphotic deformity. Rather, Dr. Allen's testimony shows that he was unsure as to whether any single event caused the onset of plaintiff's symptoms at all. Further, Dr. Allen testified that plaintiff's 6 April 2001 work-related injury "could have nothing to do with" the kyphotic deformity. The Commission's findings of fact reflect Dr. Allen's uncertainty:

> 11. Dr. Allen opined that the accident at work *could have been* an exacerbating or aggravating factor in the onset of plaintiff's cervical myelopathy. . . . Dr. Allen opined that given the long-standing kyphotic deformity, *any trauma such as the work-related injury or the car accident of 18 April 2001 could have been sufficient to create plaintiff's current symptoms*.

(emphases added).

Under *Young* and *Edmonds*, plaintiff has failed to carry his burden of proving that his work-related injury was a causal factor in his kyphotic deformity. Furthermore, Dr. Allen's testimony never indicated that, in his opinion, it was "likely" that the work-related injury caused an aggravation and/or exacerbation of plaintiff's kyphotic deformity. *See Alexander*, 166 N.C. App. at 573, 603 S.E.2d at 558. Therefore, we hold that the Commission's finding of fact that the work-related injury aggravated and/or exacerbated plaintiff's kyphotic deformity was not supported by competent evidence. We remand to the Commission for new findings of fact and conclusions of law in accordance with the correct legal standard. *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685 (stating that "[w]hen the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard."); *see also Edmonds*, 165 N.C. App. at 817, 600 S.E.2d at 506 (Steelman, J., dissenting) ("It is not the role of the appellate courts to sift through the evidence and find facts that are different from those actually found by the Commission.").

[5] We vacate the Commission's 24 October 2003 opinion and award. We remand for findings of fact and conclusions of law applying the correct legal standard. We also remand for a determination as to the proper amount of compensation to which plaintiff is entitled for his 6 April 2001 work-related injury and its aggravation and/or exacerbation by the 18 April 2001 automobile accident.

[6] We deem abandoned those assignments of error not addressed in defendants' brief. N.C. R. App. P. 28(b)(6).

Vacated and remanded.

Judges WYNN and TYSON concur.

DONNA L. BROWN, WESLEY R. BROWN AND WIFE, MARTEE U. BROWN, JACK M. FISHER AND WIFE, CATHEY G. FISHER, ANTHONY N. HUBBARD AND WIFE, FRANCES M. HUBBARD, JAMES M. MECUM, JR., GARNETT L. MIDKIFF, JR., E. RAYMOND NICHOLSON, DONALD W. PETERS, G. FLOYD SIDES AND WIFE, JO ANN SIDES, PLAINTIFFS v. CITY OF WINSTON-SALEM, ALLEN JOINES, MAYOR, VIVIAN H. BURKE, DAN BESSE, ROBERT C. CLARK, JOYCELYN V. JOHNSON, NELSON L. MALLOY, JR., VERNON ROBINSON, WANDA MERSCHEL AND FREDERICK N. TERRY, CITY COUNCIL MEMBERS, DEFENDANTS

No. COA04-1245

(Filed 5 July 2005)

1. Appeal and Error— appealability—annexation—partial summary judgment—judicial economy—convenience and preferences of parties

An interlocutory appeal from an involuntary annexation was considered under Rule 2 in the interest of judicial economy; however, the convenience and preferences of the parties are not proper considerations in deciding whether to hear an interlocutory appeal.

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

The standard of review for summary judgment is whether there is a genuine issue of material fact, with the evidence viewed in the light most favorable to the moving party and with the appellate court conducting a de novo review.

3. Cities and Towns— involuntary annexation—equal protection

The Court of Appeals did not consider an alleged equal protection violation arising from an involuntary annexation because the North Carolina Supreme Court and other panels of the Court of Appeals have decided the issue.

4. Cities and Towns— involuntary annexation—city charter—general statutes

Under N.C.G.S. § 160A-3(c), the statutory provision allowing involuntary annexations supercedes the Winston-Salem Charter provision permitting only voluntary annexations.

5. Cities and Towns— involuntary annexation—notice of meetings

Summary judgment should have been granted for defendants in an involuntary annexation dispute where plaintiffs alleged inadequate notice but did not respond to defendants' affidavits.

6. Open Meetings— involuntary annexation—Open Meetings Law—notice

Summary judgment should have been granted for defendants in an involuntary annexation dispute where plaintiffs alleged inadequate notice under the Open Meetings Law, but did not file affidavits contrary to those of defendant showing proper notice. Evidence that meetings were improperly reported was not evidence that the City failed to give proper notice.

Judge STEELMAN dissenting.

Appeal by plaintiffs and defendants from an order entered 4 February 2004 by Judge John O. Craig, III, in Forsyth County Superior Court. Heard in the Court of Appeals 22 April 2005.

Richard J. Browne for plaintiff appellants-appellees.

Womble Carlyle Sandridge & Rice, PLLC, by Roddey M. Ligon, Jr., and the Office of the Winston-Salem City Attorney, by Ronald G. Seeber and Charles C. Green, Jr., for defendant appellant-appellees.

McCULLOUGH, Judge.

Plaintiffs, citizens of an area which the City of Winston-Salem is seeking to annex, appeal from a superior court order granting partial summary judgment in defendants' favor. Defendants, the City of Winston-Salem, its Mayor and City Council members, appeal from the partial denial of their motion for summary judgment. For the reasons set forth below, we address the parties' arguments pursuant to Rule 2 and Rule 21 of the North Carolina Rules of Appellate Procedure, and conclude that the trial court's order must be affirmed in part and reversed in part.

I.

At a special meeting held on 23 June 2003, the City Council of Winston-Salem, North Carolina, adopted annexation ordinances designed to extend the City's corporate limits to include, *inter alia*, real property owned by plaintiffs. For the purposes of this annexation, the City Council elected not to rely upon the voluntary annexation procedure provided for in its charter and instead relied upon the procedures set forth in N.C. Gen. Stat. § 160A-49 to conduct an involuntary annexation.

On 22 August 2003, plaintiffs filed a complaint in superior court in which they set forth three claims. In their first claim (Claim I), plaintiffs asserted that they were being denied equal protection under the law, as guaranteed by the North Carolina Constitution, in that the Legislature has elected to require voter approval for certain municipal annexations while not including such a limitation in the general annexation laws codified in Article 4A of Chapter 160A of the General Statutes. In their second claim (Claim II), plaintiffs sought a declaration that the Winston-Salem City Charter, rather than N.C. Gen. Stat. § 160A-45, *et seq.*, governed the challenged annexation such that voter approval for the border extension was required. In their third claim (Claim III), plaintiffs averred that the City Council failed to provide proper notice for certain special meetings at which the annexation issue was discussed and voted upon.

Defendants filed a motion for summary judgment, along with affidavits in support of the motion. By an order entered 4 February 2004, the trial court granted the defendants' motion for summary judgment with respect to Claims I and II, and denied defendants' motion for summary judgment with respect to Claim III. Plaintiffs and defendants have appealed from this order.

II.

[1] At the outset, we note that the challenged order granted partial summary judgment and thus left issues to be resolved at trial. Therefore, the order is interlocutory. *See Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993) (noting that partial summary judgment is interlocutory). Furthermore, the trial court did not certify that there is no just reason for delaying the parties' appeals and the present case does not involve a substantial right. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2003) ("[T]he court may enter a final judgment as to one or more but fewer than all of the claims or parties

only if there is no just reason for delay and it is so determined in the judgment."); *Liggett Group*, 113 N.C. App. at 23-24, 437 S.E.2d at 677 (noting that judicial review is appropriate where an interlocutory appeal involves a substantial right). Therefore, dismissal of the parties' appeals would be appropriate.

In their briefs, plaintiffs and defendants have requested that we decide the present case because "[the] parties wish to have [this] Court take and decide the case without requiring further hearings" and "resolution of the three issues . . . can . . . be easily resolved." The convenience of deciding appellate arguments and the preferences of the parties are not proper considerations for this Court in determining whether to hear an interlocutory appeal. As such, we admonish the attorneys as to the impropriety of using these proffered bases for review and note that we are not entertaining the instant interlocutory appeal to accommodate the parties.

However, our examination to determine the existence or nonexistence of a substantial right has revealed that the unique posture of the present case counsels in favor of appellate disposition. Specifically, the trial court correctly granted summary judgment with respect to Claims I and II, and erred by denying summary judgment in defendants' favor with respect to Claim III. Accordingly, if this Court were to dismiss the present appeals as interlocutory, then Claim III would proceed to trial, after which the parties would likely appeal to this Court again. This additional litigation would be a waste of judicial resources. Furthermore, the resulting delay would be especially inappropriate given that the instant litigation concerns a matter of public interest.

Rule 2 of the North Carolina Rules of Appellate Procedure permits this Court to suspend or vary the requirements of the Rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." We exercise our authority under Rule 2 to consider the parties' appeals as petitions for *certiorari*, and we grant *certiorari* to review the trial court's interlocutory order. *See* N.C. R. App. P. 21(a) ("The writ of certiorari may be issued in appropriate circumstances by [an] appellate court to permit review . . . when no right of appeal from an interlocutory order exists . . . ."); *Kimzay Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 79, 404 S.E.2d 176, 177 (using Rule 2 to treat an appeal from an interlocutory order as a petition for a writ of *certiorari*), *disc. review denied*, 329 N.C. 497, 407 S.E.2d 534-35 (1991).

III.

[2] We begin our analysis of the parties' arguments with the standard of review. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). On a motion for summary judgment, "[t]he evidence is to be viewed in the light most favorable to the nonmoving party." *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998) (citation omitted). When determining whether the trial court properly ruled on a motion for summary judgment, this court conducts a *de novo* review. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

IV.

A.

[3] We first consider plaintiffs' arguments. In their first argument, plaintiffs contend that the trial court erred by granting summary judgment to defendants with respect to Claim I, which asserted a state constitutional equal protection violation. In their brief, plaintiffs cite authority from our Supreme Court and this Court which is contrary to the position they have taken throughout the instant litigation and concede that "[the] North Carolina [appellate] courts have consistently held that the annexation statutes do not deny any qualified voter in this state the [e]qual [p]rotection of the law under [either] the federal [or] state constitutions." Notwithstanding this contrary authority, plaintiffs request that this Court "exercise its prerogative to revisit the [e]qual [p]rotection issue."

This Court has no authority to overrule decisions of our Supreme Court and has the responsibility to follow those decisions until otherwise ordered by the Supreme Court. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Likewise, "[w]here a panel of [this] Court . . . has decided the same issue, albeit in a different case, a subsequent panel . . . 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).

Accordingly, we are unable to revisit the equal protection issue argued by plaintiffs. This assignment of error is overruled.

B.

[4] Plaintiffs next contend that the trial court erred by granting summary judgment in favor of defendants with respect to Claim II, in which plaintiffs asserted that the Winston-Salem City Charter, as opposed to the general annexation laws, applied and required voter approval of the challenged annexation. We disagree.

In 1947, the General Assembly amended the Winston-Salem City Charter to permit the City to extend its borders, subject to a "vote of the qualified voters of [the] [C]ity . . . and of the territory to be annexed." Winston-Salem, N.C., City Charter art. I, § 2 (enacted by 1947 N.C. Sess. Laws ch. 710). Pursuant to the Charter, the Forsyth County Board of Elections must conduct the election. *Id.* Subsequently, the General Assembly enacted Chapter 160A, Article 4A, Part 3 of the North Carolina General Statutes, which allows large North Carolina municipalities to extend their borders without first conducting an election. *See, e.g.*, 1959 N.C. Sess. Laws ch. 1009, § 5; 1973 N.C. Sess. Laws ch. 426, § 74; 1983 N.C. Sess. Laws ch. 636. Thus, the Winston-Salem City Charter, by requiring an election, limits the power of annexation in a way that the subsequently enacted general annexation laws do not.

The interplay between city charters and the general law of this State is governed by the following rules:

> (a) When a procedure that purports to prescribe all acts necessary for the performance or execution of any power, duty, function, privilege, or immunity is provided by both a general law and a city charter, the two procedures may be used as alternatives, and a city may elect to follow either one.
>
> (b) When a procedure for the performance or execution of any power, duty, function, privilege, or immunity is provided by both a general law and a city charter, but the charter procedure does not purport to contain all acts necessary to carry the power, duty, function, privilege, or immunity into execution, the charter procedure shall be supplemented by the general law procedure; but in case of conflict or inconsistency between the two procedures, the charter procedure shall control.
>
> (c) When a power, duty, function, privilege, or immunity is conferred on cities by a general law, and a charter enacted earlier than the general law omits or expressly denies or limits the same

> power, duty, function, privilege or immunity, the general laws shall supersede the charter.

N.C. Gen. Stat. § 160A-3 (2003).

In the instant case, the Winston-Salem City Charter requires action by the Forsyth County Board of Elections, which also derives authority from, and is subject to limitations by, authorities other than the Charter. It follows, plaintiffs contend, that the Charter does not contain "all acts necessary" to conduct the annexation such that, pursuant to N.C. Gen. Stat. § 160A-3(b), the General Statutes' involuntary annexation procedure is supplemental to the Charter and the Charter supercedes the General Statutes to the extent there is conflict between the two.

We need not address whether the Charter contains "all acts necessary" to conduct an annexation because subsection (c) of N.C. Gen. Stat. § 160A-3 applies in the instant case. The power to annex is conferred upon the City in its Charter and by the General Statutes. The Charter was enacted prior to the applicable provisions of the General Statutes and contains a limitation on the power to annex that the general law does not: the requirement that a proposed annexation be approved in an election. Pursuant to N.C. Gen. Stat. § 160A-3(c), the statutory provision establishing involuntary annexations supercedes the Charter provision permitting only voluntary annexations.

Accordingly, the trial court properly granted summary judgment to defendants with respect to Claim II. This assignment of error is overruled.

V.

[5] We next address defendants' only argument, in which they contend that the trial court erroneously denied their motion for summary judgment with respect to Claim III, which alleged insufficient notice was given for certain special meetings of the City Council at which the annexation plan was discussed and voted upon. We hold that this ruling was erroneous.

Claim III concerned the notice with respect to two City Council meetings. The City Council held a special meeting on 11 June 2003 to consider the annexation, and held a special meeting on 23 June 2003 to vote on the annexation plan. The Council also planned to hold meetings on 25, 26 and 30 June 2003 in the event that the vote on the annexation was delayed by procedural measures. However, the an-

nexation plan was adopted at the 23 June meeting, and meetings were not held on 25, 26, or 30 June. In their complaint, plaintiffs alleged that, "[c]ontrary to [language in the motion to call the 11 June 2003 special meeting], no written notice of the . . . meeting was posted, mailed or delivered," and that the City had violated the Open Meetings Law by providing notice for the 25, 26 and 30 June meetings in a way that confused the public about whether the 23 June meeting was still going to be held.

Along with their motion for summary judgment, defendants filed the affidavit of City Secretary Renee P. Rice, in which she stated the following:

2. During the June 2, 2003 special meeting of the Winston-Salem City Council a motion was approved to call a special meeting of the City Council on June 11, 2003 at 5:30 p.m. to consider a revised annexation plan.

3. On June 10, 2003 a notice for the June 11, 2003 and June 23, 2003 special meetings of the Winston-Salem City Council was delivered by facsimile to all media and others on the notice request list. A true copy of said notice is attached hereto and made a part hereof.

4. During the June 11, 2003 special meeting of the Winston-Salem City Council a motion was approved to call a special meeting of the City Council on June 23, 2003 at 7:30 p.m. for the purpose of taking action on the proposed annexation.

5. On June 23, 2003 the Winston-Salem City Council held a special meeting to consider (1) amending the annexation report related to the proposed annexations, and (2) adopting annexation ordinances . . . . The special meeting of June 23, 2003 was scheduled at the Council meeting of June 11, 2003 in open session. No public hearing was scheduled for the special meeting of June 23, 2003 because the required public hearing related to the proposed annexations had already been held on May 27, 2003.

6. On June 23, 2003 the Mayor of the City of Winston-Salem issued a call for special meetings of the Winston-Salem City Council to be held on June 25, 26, and 30, 2003 to consider proposed annexation issues. On the morning of June 23, 2003, my office duly notified the media of the scheduling of these spe-

cial meetings. At no time did my office distribute any notice to anyone stating that the special meeting scheduled for June 23, 2003 had been cancelled or that the City Council's consideration of any annexation issue had been postponed.

7. The purpose for calling the special meetings for June 25, 26, and 30, 2003 was to provide an opportunity for the Winston-Salem City Council to further consider amendment of the annexation report and adoption of the proposed annexation ordinances in the event consideration of these matters was delayed by procedural rules or if a second reading of the proposed annexation ordinances became necessary.

8. At the June 23, 2003 special meeting, the Winston-Salem City Council duly amended the annexation report and adopted the proposed annexation ordinances on first reading. Thus the special meeting schedule of June 25, 26, and 30, 2003 was never held.

Defendants also filed the affidavit of Pat Gentry, an employee in the City's Marketing and Communications Department tasked with examining local periodicals for items related to the City. Gentry attached a number of newspaper articles, published 16, 17 and 23 June 2003, which reported that the 23 June 2003 meeting was going to be held.

Prior to the hearing of the present appeal, plaintiffs moved to amend the record to include the affidavit of Benjamin T. Hoover. According to Hoover, he had planned to attend the 23 June 2003 special meeting of the City Council but did not do so because a newscast on a local television station reported that the station had just received notice from the City that the meeting had been postponed. Plaintiffs also sought to include a videotape of the alleged newscast and a transcript of the summary judgment hearing. This Court denied the motion to add these items to the record on appeal. Thus, the record contains no affidavit filed by plaintiffs in response to the affidavits filed by defendants.

"When a motion for summary judgment is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or . . . otherwise . . . , must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." N.C. Gen. Stat. § 1A-1,

Rule 56(e) (2003). The present plaintiffs' complaint asserts two separate failures by the City to provide notice for meetings. Plaintiffs have failed to meet their burden under N.C. Gen. Stat. § 1A-1, Rule 56(e) with respect to each allegation.

The complaint first alleges that the City Council failed to comply with its self-imposed requirement to provide written notice for the 11 June 2003 meeting. However, defendants filed an affidavit in which the City Secretary asserted that she did provide written notice for this meeting. Plaintiffs failed to file any affidavit disputing the City Secretary's affidavit. Therefore, summary judgment should have been granted to defendants with respect to this allegation.

[6] The complaint also alleges that the notification for the 23 June 2003 meeting violated the North Carolina Open Meetings Law. Under the Open Meetings Law, the City was required to provide written notice of the 23 June special meeting no less than forty-eight hours in advance. N.C. Gen. Stat. § 143-318.12(b)(2) (2003). Defendants presented affidavits which showed that the City had provided the required notice to the local media. The record contains no contrary affidavits from plaintiffs. Moreover, even assuming *arguendo* that the Hoover affidavit and the related videotape were presented to the trial court, these items do not contradict the affidavits offered by the defendants. Rather, the Hoover affidavit and the videotaped newscast demonstrate, at best, that erroneous information was reported about whether the City Council was going to meet on 23 June 2003; these items do not show that the City failed to give proper notice of the meeting.

Therefore, the trial court erred by failing to grant summary judgment in defendants' favor with respect to Claim III. The trial court's denial of defendant's motion for summary judgment with respect to this claim is reversed.

For the foregoing reasons, the trial court's order is

Affirmed in part and reversed in part.

Judge TIMMONS-GOODSON concurs.

Judge STEELMAN dissents.

STEELMAN, Judge dissenting.

I agree with the majority's discussion of the interlocutory nature of both appeals contained in part II of the opinion, but disagree with the manner in which the majority resolves this issue.

There has been a disturbing trend in recent years of parties appealing interlocutory orders of the trial court where no right of appeal exists under either N.C. Gen. Stat. § 1-277 or N.C. Gen. Stat. § 7A-27(d). As noted by the majority, the parties in this case have candidly acknowledged the questionable legal basis for their appeals. The majority chastises the parties for their conduct and then in the interests of judicial economy utilize Rules 2 and 21 of the North Carolina Rules of Appellate Procedure to hear both appeals. I respectfully suggest that creating a way to hear an improper interlocutory appeal does nothing but encourage such conduct by parties in the future.

Both Rule 2 and Rule 21 are discretionary rules. This Court does have the discretion to hear and rule on both of the appeals in this matter. However, I question the wisdom of doing so in this case. There are numerous appeals which this Court has dismissed as being interlocutory during the year 2005, to date. *See e.g. Hinson v. Jarvis*, 170 N.C. App. 697, 614 S.E.2d 608 (2005) (unpublished); *State Auto. Mut. Ins. Co. v. Iadanza*, 170 N.C. App. 437, 613 S.E.2d 753 (2005) (unpublished); *Grant v. Miller*, 170 N.C. App. 184, 611 S.E.2d 477 (2005); *Milton v. Thompson*, 170 N.C. App. 176, 611 S.E.2d 474 (2005); *In re B.P.*, 169 N.C. App. 728, 612 S.E.2d 328 (2005); *Atwood v. Eagle*, 169 N.C. App. 255, 611 S.E.2d 899 (2005) (unpublished); *N.C. Dep't of Transp. v. Williams*, 168 N.C. App. 728, 609 S.E.2d 498 (2005) (unpublished); *Johnson v. Lucas*, 168 N.C. App. 515, 608 S.E.2d 336 (2005); *Mech. Sys. & Servs. v. Carolina Air Solutions*, 168 N.C. App. 240, 607 S.E.2d 55 (2005) (unpublished); *Neill Grading & Constr. Co. v. Lingafelt*, 168 N.C. App. 36, 606 S.E.2d 734 (2005); *Stewart v. N.C. Dep't of Juvenile Justice*, 167 N.C. App. 808, 606 S.E.2d 458 (2005) (unpublished); *Robinson v. Gardner*, 167 N.C. App. 763, 606 S.E.2d 449 (2005).

Unless the Rules of Appellate Procedure are consistently applied they become meaningless. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

STATE OF NORTH CAROLINA v. TONY EDWARD ENGLISH

No. COA04-890

(Filed 5 July 2005)

1. Sentencing— habitual felon—prior record level

Defendant's sentencing for sale, delivery, and possession with intent to sell or deliver a controlled substance which was enhanced by his status as an habitual felon is remanded for resentencing, because: (1) a prior record level worksheet standing alone does not meet the State's burden for establishing prior convictions under N.C.G.S. § 15A-1340.14(f); and (2) the State did not establish that defendant stipulated to the prior convictions at issue nor has it presented records pursuant to N.C.G.S. § 15A-1340.14(f) to prove the existence of the prior convictions.

2. Constitutional Law— right of confrontation—laboratory report—stipulation

The trial court did not violate defendant's Sixth Amendment right of confrontation in a sale, delivery, and possession with intent to sell or deliver a controlled substance case by permitting the State to read into evidence a laboratory report identifying the substance purchased by an officer as cocaine without the preparer of the report being available for cross-examination, because defendant explicitly waived his right to cross-examine the report's preparer when: (1) defense counsel stipulated to the laboratory report at the beginning of defendant's trial and affirmed that no further authentication or testimony was required; and (2) the trial court confirmed defendant's stipulation through extensive questioning of defendant and further showed that defendant understood the nature of the question being put to him.

3. Evidence— hearsay—neighborhood had reputation for drug use and drug sales

The trial court did not err in a sale, delivery, and possession with intent to sell or deliver a controlled substance case by allowing an officer to testify that the neighborhood in which defendant was arrested had a reputation as a heavy, heavy area for drug use and drug sales, because: (1) the testimony was prompted by a question by the State as to why the officer was in the neighborhood; (2) the statement was offered to explain why the officer

subsequently solicited drugs from a pedestrian in that neighborhood, and not as an assertion that the neighborhood was, in fact, known for its heavy drug traffic; and (3) even if the evidence was considered to be inadmissible hearsay, its admission did not require a new trial due to the overwhelming evidence of defendant's guilt including an officer's testimony about defendant's role in the drug sale, the laboratory analysis proving the substance was crack cocaine, and defendant's possession of a twenty dollar bill.

Judge STEELMAN concurring.

Appeal by defendant from judgment entered 5 November 2003 by Judge Timothy S. Kincaid in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 March 2005.

Attorney General Roy A. Cooper, *by Assistant Attorney General Christopher W. Brooks*, *for the State.*

Appellate Defender Staples Hughes, *by Assistant Appellate Defender Katherine Jane Allen*, *for defendant-appellant.*

McGEE, Judge.

Tony Edward English (defendant) was convicted on 5 November 2003 of sale, delivery, and possession with intent to sell or deliver a controlled substance. Defendant admitted he had attained habitual felon status. The evidence at trial tended to show that Officer Harrland McKinney (Officer McKinney) was an undercover officer with the Street Drug Interdiction Unit of the Charlotte Mecklenburg Police Department on the night of 10 April 2003. Officer McKinney saw Sean Williams (Williams), a person Officer McKinney knew had previously been involved with drugs, standing on a street corner. Officer McKinney approached Williams and asked to buy "a twenty," which Officer McKinney testified was slang for a twenty dollar rock of crack cocaine. Williams initially offered to get into Officer McKinney's vehicle to "take [Officer McKinney] to get it[,]" but Officer McKinney refused. Williams then told him to return ten minutes later.

When Officer McKinney returned, defendant was standing on the corner with Williams. Defendant was holding a clear plastic bag. Williams reached into the bag, pulled out a rock of crack cocaine, and walked over to Officer McKinney's vehicle. Officer McKinney

inspected the rock briefly. Satisfied that the rock was crack cocaine, Officer McKinney gave Williams a twenty dollar bill. Williams ran over to defendant and handed defendant the twenty dollar bill. Officer McKinney drove away and immediately called in other officers to arrest Williams and defendant.

Based on Officer McKinney's description, Officer Shawn Blee (Officer Blee) discovered defendant on a nearby street. Defendant fled and Officer Blee gave chase. A few minutes later, Office Blee located defendant in the backyard of a residence. Defendant appeared to be chewing something, which Officer Blee ordered him to spit out. The item defendant had been chewing was a twenty-dollar bill. No drugs were found on defendant. The rock sold to Officer McKinney was later determined by laboratory analysis to be .10 grams of cocaine.

Defendant was convicted of all charges and he admitted he was an habitual felon. He was sentenced to a minimum term of 120 months and a maximum term of 153 months. Defendant appeals.

I.

[1] Defendant first argues that his case should be remanded for resentencing. Defendant specifically contends that the prior record level determined by the trial court is improper under N.C. Gen. Stat. § 15A-1340.14. We agree.

A trial court must "determine the prior record level for the offender pursuant to [N.C.]G.S. [§] 15A-1340.14" before imposing sentence. N.C. Gen. Stat. § 15A-1340.13(b) (2003). The minimum sentence imposed must be "within the range specified for the class of offense and prior record level[.]" *Id.* As an habitual offender, it was determined that defendant had eight prior record points and a prior record level III, for sentencing under N.C.G.S. § 15A-1340.14.

N.C. Gen. Stat. § 15A-1340.14(f) (2003) states that prior convictions may be proved by:

(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.G.S. § 15A-1340.14(f). During sentencing, the trial court was informed that the files concerning some of defendant's previous offenses had been destroyed, and thus no proof of these offenses could be offered. To meet its burden, the State would have had to either obtain a stipulation from defendant or prove the convictions by "[a]ny other method found by the court to be reliable." *Id.*

The State presented a prior record level worksheet that listed defendant's prior convictions by class of felony, classifying defendant as a record level III offender. Neither defendant nor his defense counsel stipulated to the contents of the prior record worksheet. Rather, the record shows that defense counsel expressly declined to stipulate to the worksheet and renewed defendant's motion to suppress two of the listed convictions.

Our Court has repeatedly held that a prior record level worksheet, standing alone, does not meet the State's burden for establishing prior convictions under N.C.G.S. § 15A-1340.14(f). *See State v. Johnson*, 164 N.C. App. 1, 23, 595 S.E.2d 176, 189, *disc. review denied*, 359 N.C. 194, 607 S.E.2d 659 (2004) ("It has been repeatedly held that the submission of a worksheet by the State is insufficient to satisfy the State's burden under this statute[.]"); *State v. Riley*, 159 N.C. App. 546, 557, 583 S.E.2d 379, 387 (2003) ("A statement by the State that an offender has seven points, and thus is a record level III, if only supported by a prior record level worksheet, is not sufficient to meet the catchall provision found in N.C.G.S. § 15A-1340.14(f)(4), even if uncontested by defendant."); *State v. Bartley*, 156 N.C. App. 490, 502, 577 S.E.2d 319, 326 (2003) ("An unsupported statement by the State that an offender has eleven points, and thus is a record level IV, even if uncontested, does not rise to the level sufficient to meet the catchall provision found in N.C.G.S. § 15A-1340.14(f)(4)."); *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002) ("There is no question that a worksheet, prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions.").

The State has not established that defendant stipulated to the prior convictions at issue, nor has it presented records pursuant to N.C.G.S. § 15A-1340.14(f) to prove the existence of the prior convictions. Therefore, the State did not meet its evidentiary burden under

the statute. *See State v. Spellman*, 167 N.C. App. 374, 392-93, 605 S.E.2d 696, 709 (2004) (remanding for resentencing because record was bare of any evidence or stipulation other than a worksheet), *disc. review denied*, 359 N.C. 325, 611 S.E.2d 845. Therefore, we remand for resentencing.

Defendant makes two additional arguments for resentencing. Specifically, defendant argues that the trial court erred in imposing an aggravated sentence when the aggravating factor on which the sentence was based required that defendant join "with *more than one* other person in committing the offense[,]" and defendant joined with only one other person. N.C. Gen. Stat. § 15A-1340.16(d)(2) (2003) (emphasis added). Defendant further argues that, for the trial court to use this aggravating factor for sentencing purposes, it must have first submitted the issue to the jury for the jury to find the aggravating factor beyond a reasonable doubt. *See Blakely v. Washington*, 542 U.S. ——, 159 L. Ed. 2d 403 (2004). However, because we remand for resentencing on other grounds, we do not reach the merits of these arguments.

II.

Defendant next argues that he is entitled to a new trial because the trial court erred in admitting evidence.

A.

[2] First, defendant argues that the trial court erred by permitting the State to read into evidence a laboratory report identifying the substance purchased by Officer McKinney as cocaine without the preparer of the report being available for cross-examination. The laboratory report confirmed that the substance purchased by Officer McKinney was .10 grams of cocaine. Officer McKinney, rather than the preparer of the report, read this report into evidence. Defendant argues that under the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), such reading violated defendant's Sixth Amendment right to confront the witnesses against him. Specifically, defendant argues that the laboratory report was testimonial and improperly admitted into evidence because the report was not presented by its preparer, who was not deemed unavailable by the trial court, and because defendant did not have the opportunity to cross-examine the report's preparer. *See Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203 ("Where testimonial evidence is at issue, . . . the Sixth Amendment demands

what the common law required: unavailability and a prior opportunity for cross-examination.").

Our Court has held that, in evaluating whether a defendant's right to confrontation has been violated, we must determine: "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217, *disc. review denied*, 358 N.C. 734, 601 S.E.2d 866 (2004). However, we need not employ this analysis in the case before us because defendant explicitly waived his right to cross-examine the report's preparer.

Our Supreme Court has held that "the constitutional right of an accused to be confronted by the witness against him is a personal privilege, which [the accused] may waive even in a capital case." *State v. Moore*, 275 N.C. 198, 210, 166 S.E.2d 652, 660 (1969); *see also State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985) ("The constitutional right of an accused *to be confronted by* the witnesses against him is a personal privilege which he may waive expressly or by a failure to assert it in apt time even in a capital case."); *State v. Hutchins*, 303 N.C. 321, 341-42, 279 S.E.2d 788, 801 (1981) ("[A] defendant may waive the benefit of constitutional guarantees by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.").

In the present case, defense counsel offered to stipulate to the laboratory report at the beginning of defendant's trial. The trial court asked whether defense counsel was "stipulating that the report may be received into evidence, without further authentication or further testimony," and defense counsel answered in the affirmative. The trial court then confirmed defendant's stipulation through extensive questioning of defendant.

> THE COURT: . . . You have the right to a trial, by a jury. And in that trial, by jury, you have the right to require that the state prove each and every element of the offenses beyond a reasonable doubt.
>
> One of the . . . charges . . . is that the substance [sold to Officer McKinney] was an illegal drug. And, you can require that the state prove that it was . . . an illegal drug.
>
> They may do that in one of several ways, such as calling laboratory witnesses and that kind of thing.

Your attorney has indicated that, on your behalf, she is willing to stipulate that the lab report that she's received, in the discovery, is accurate; and, that the substance was cocaine.

Did you understand her to say that?

[DEFENDANT]: Yes, sir.

THE COURT: And, are you agreeing that that stipulation is accurate and may be received by the Court?

[DEFENDANT]: Yes, sir.

THE COURT: And, do you understand, again, that you can require the state to prove this; that you don't have to stipulate to it?

[DEFENDANT]: Yes, sir.

THE COURT: Now, you, making this stipulation, voluntarily, without any threat or coercion against you?

[DEFENDANT]: Yes, sir.

THE COURT: All right. Do you have any questions about it, at all?

[DEFENDANT]: No, sir.

THE COURT: And, do you understand that this means that the state wouldn't have to call their chemist or laboratory person to come in and testify as to what the substance was; or, whether anything is in the report. That the jury will get to see the report, without that having to happen?

[DEFENDANT]: Yes, sir.

THE COURT: And, you are agreeing that that's all right?

[DEFENDANT]: Yes, sir.

THE COURT: Very well. Thank you, sir.

Then, let the record show that the defendant has, upon informed choice, exercise of free will, voluntarily agreed and stipulated that the laboratory report identifying the reported substance as cocaine, shall be received, without further authentification or, without requirement of expert testimony or otherwise.

The trial court's thorough inquiry ensured that defendant not only stipulated to the contents of the laboratory report but also under-

stood the nature of the question being put to him. Defendant clearly waived his Sixth Amendment right to confront the preparer of the laboratory report. We overrule this assignment of error.

B.

[3] Defendant next argues that the trial court erred by allowing Officer McKinney to testify that the neighborhood in which defendant was arrested had a reputation as a "heavy, heavy area for drug use and drug sales." Our Court has held that "[i]n North Carolina, the 'general rule is that in a criminal prosecution evidence of the reputation of a place or neighborhood is ordinarily inadmissible hearsay.' " *State v. Williams*, 164 N.C. App. 638, 639, 596 S.E.2d 313, 314 (2004) (quoting *State v. Weldon*, 314 N.C. 401, 408, 333 S.E.2d 701, 705 (1985)). For the reasons below, we agree with the State's arguments that this general rule does not mandate that defendant receive a new trial.

First, "[i]f a statement is offered for any purpose other than that of proving the truth of the matter asserted, it is not objectionable as hearsay." *State v. White*, 298 N.C. 430, 437, 259 S.E.2d 281, 286 (1979) (internal citations omitted); *see also State v. Walker*, 170 N.C. App. 632, 613 S.E.2d 330 (2005) (holding that statements made for purposes of corroboration rather than truth of the matter asserted are admissible under *Crawford v. Washington*). In the instant case, Officer McKinney's testimony regarding the neighborhood's reputation was prompted by a question by the State as to why Officer McKinney was in the neighborhood. This statement was offered to explain why Officer McKinney subsequently solicited drugs from a pedestrian in that neighborhood, and not as an assertion that the neighborhood was, in fact, known for its heavy drug traffic. Thus, the statement was not hearsay and was admissible.

Second, even were we to consider the statement to be inadmissible hearsay, "[e]rroneous admission of evidence may be harmless where there is an abundance of other competent evidence to support the state's primary contentions . . . or where there is overwhelming evidence of [the] defendant's guilt." *Weldon*, 314 N.C. at 411, 333 S.E.2d at 707; *see also State v. Stevenson*, 136 N.C. App. 235, 241, 523 S.E.2d 734, 737 (1999), *disc. review denied*, 351 N.C. 368, 543 S.E.2d 144 (2000) (citations omitted). In *Williams*, the defendant was in possession of what appeared to be cocaine but was in fact Goody's Headache Powder. A police officer testified that the incident took place in a "neighborhood known as an 'open air market for drugs.' "

Williams, 164 N.C. App. at 639, 596 S.E.2d at 314. Our Court considered the other evidence introduced during the trial and concluded that "there is a reasonable possibility that, had the erroneous reputation evidence not been admitted, the jury would have reached a different result at trial." *Id.* at 647, 596 S.E.2d at 319. We therefore remanded for a new trial. *Id.* However, in *Weldon*, a police officer found six grams of heroin in the defendant's house and testified at trial that the house "had a reputation as a place where illegal drugs could be bought or sold." *Weldon*, 314 N.C. at 402, 333 S.E.2d at 702. Our Supreme Court found that the trial court erred in admitting this testimony but concluded that its admission did not require a new trial due to the overwhelming evidence of the defendant's guilt (specifically, heroin was found in the defendant's house). *Id.* at 411, 333 S.E.2d at 707-08.

In the present case, the other evidence of defendant's guilt, including Officer McKinney's testimony about defendant's role in the drug sale, the laboratory analysis proving the substance was crack cocaine, and defendant's possession of a twenty dollar bill, is sufficiently overwhelming that there is not a reasonable possibility that exclusion of the reputation testimony could have resulted in a different verdict. Defendant's arguments for a new trial are without merit.

No error; remand for resentencing.

Judge BRYANT concurs.

Judge STEELMAN concurs with a separate opinion.

STEELMAN, Judge concurring.

I fully concur with the majority opinion in this case, but write separately because I believe defendant's appellate counsel should be sanctioned for presenting the argument discussed in section IIA of the opinion.

Appellate counsel has a duty to zealously and diligently represent his or her client. This is especially true when that client is a criminal defendant facing incarceration because of a conviction in the trial court. However, there are limits to zealous representation. Rule 34(a)(1) of the Rules of Appellate Procedure states that counsel may be sanctioned when "the appeal [is] not well grounded in fact and warranted by existing law or a good faith argument for the extension,

modification, or reversal of existing law." N.C. R. App. P. 34(a)(1) (2005). These strictures apply to each of the arguments made within an appellate brief.

In defendant's sixth assignment of error he asserts as error: "The Trial Court's failure to intervene *ex mero motu* when State's witness Officer McKinney read into evidence, and the State later introduced as Exhibit No. 4, the chemist's report regarding the analysis of the substance . . . ." This assignment of error concludes by stating, "To the extent this error is not otherwise preserved, defendant asserts plain error."

Appellant's counsel proceeds to argue for eight pages in the brief that the trial court's error violated defendant's constitutional right to confront a witness under the rationale of *Crawford v. Washington*, 541 U.S. 36, 61, 158 L. Ed. 2d 177, 199, (2004). Although defendant asserts plain error, appellant counsel fails to argue it in the brief. The argument ignores facts as set forth in the majority's opinion, which reveal that not only did defendant's trial counsel stipulate that the laboratory report could be received into evidence, but the trial judge had an extensive conversation with defendant to make certain he understood the ramifications of the stipulation. The trial judge went above and beyond what he was required to do to insure defendant's constitutional rights were fully protected. However, appellant's counsel completely ignores defendant's stipulation that "the report may be received into evidence without further authentication or further testimony." Appellate counsel never attempts to argue that the stipulation was somehow invalid, nor that trial counsel was ineffective in any manner.

The role of the appellate courts is to review and correct errors which actually occurred in the trial division. The function of an appellant's brief is to clearly and concisely bring those errors to the appellate court's attention, together with controlling authorities. It is not the function of an appellate brief to discuss intellectual and academic points of law that do not arise from the facts of the case being discussed.

I do not undertake the writing of the concurrence lightly. It was not my intent to discourage criminal appellate counsel from zealously representing their clients, but rather to emphasize that there are limits to what is acceptable conduct by counsel, even in criminal cases.

There was no basis in fact or law for the arguments asserted by appellate counsel for defendant pertaining to his sixth assignment of error. For these reasons, I believe this Court should impose sanctions upon counsel for the appellant.

EMILY M. ARMSTRONG, BY AND THROUGH HER GUARDIAN AD LITEM, G. BRYAN COLLINS, JR., AND SANDRA ARMSTRONG AND WILLIAM EARL ARMSTRONG, PLAINTIFFS V. JAMES A. BARNES, JR., M.D., NEWTON WOMEN'S CARE, P.A., CATAWBA MEMORIAL HOSPITAL, INC., AND CATAWBA VALLEY MEDICAL CENTER, INC., DEFENDANTS

No. COA04-300

(Filed 5 July 2005)

1. Appeal and Error— appealability—discovery order—interlocutory—substantial right

The appeal of a discovery order was interlocutory but involved a substantial right where a doctor who was a defendant in a medical malpractice case asserted a statutory privilege concerning his drug abuse.

2. Medical Malpractice— discovery—physician's drug abuse—impaired physician's program

An order should have been issued in a medical malpractice case protecting from discovery a physician's participation in an impaired physicians program. However, N.C.G.S. § 90-21.22, which protects participation in these programs, does not insulate defendant from discovery of records or information unrelated to participation in the program, including his own knowledge of his drug abuse.

3. Medical Malpractice— discovery—physician's drug abuse—credentialing committee

A physician who was the defendant in a medical malpractice action could not invoke N.C.G.S. § 131E-95(b) to shield himself from answering deposition questions about his own drug abuse merely because he disclosed those details during credentialing committee proceedings. However, on remand, the trial court is to determine whether other credentialing committee information sought by plaintiffs is privileged.

4. Medical Malpractice— discovery—physician's drug abuse—credentialing committee—presence of plaintiff's counsel

A physician who was the defendant in a medical malpractice action was not prejudiced through the improper presence of plaintiffs' attorney at a credentialing committee hearing. The record discloses that plaintiffs obtained evidence of defendant's drug abuse from separate, public records.

Appeal by defendant, James A. Barnes, Jr., M.D., from an order entered 9 October 2003 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 6 December 2004.

Kirby & Holt, L.L.P., by C. Mark Holt and William B. Bystrynski, and Sigmon, Clark, Mackie, Hutton, Harvey & Ferrell, P.A., by Jeffrey T. Mackie, for plaintiffs-appellees.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten and Jaye E. Bingham, for defendant-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael E. Weddington, for the North Carolina Physicians Health Program, Inc., amicus curiae.

CALABRIA, Judge.

James A. Barnes, Jr., M.D., ("Dr. Barnes") appeals a discovery order that compels him to provide deposition testimony regarding the details of his history of drug abuse and grants in part his motion for a protective order pursuant to N.C. Gen. Stat. § 131E-95(b) (2003). The appeal additionally involves the trial court's failure to address the privilege afforded under N.C. Gen. Stat. § 90-21.22 (2003). We affirm in part and remand.

On 25 February 2000, Emily M. Armstrong (the "child") was born to Sandra Armstrong ("Mrs. Armstrong") and William Earl Armstrong ("Mr. Armstrong") at Catawba Memorial Hospital, Inc., now known as Catawba Valley Medical Center, Inc. ("Catawba Memorial"). Dr. Barnes, Mrs. Armstrong's obstetrician, managed her labor and delivered the child by cesarean section. Soon after birth, medical staff discovered the child had a brain injury. The child, through her guardian ad litem, Mrs. Armstrong, and Mr. Armstrong (collectively "plaintiffs") filed this action alleging that the child's brain injury resulted from the medical malpractice and negligence of Dr. Barnes, Catawba

Memorial, and Dr. Barnes' employer, Newton Women's Care, P.A., (collectively "defendants") and from the negligent oversight and retention of Dr. Barnes by Catawba Memorial and Newton Women's Care, P.A.

Dr. Barnes has a history of drug abuse, which started in 1988 during his second year of residency. At that time, he sought help and treatment through the North Carolina Physicians Health Program (the "PHP"), an organization allied with the North Carolina Medical Board (the "Board") and created to aid impaired physicians. In 1991, Dr. Barnes completed treatment through the PHP, finished his residency, and practiced obstetrics and gynecology with a group practice in Catawba County.

In December 1993, Dr. Barnes relapsed and started abusing drugs again. As a result, his employment with the group practice was terminated two months later. In March 1994, Dr. Barnes sought professional help through the PHP and voluntarily surrendered his medical license to the Board. The Board issued Dr. Barnes a temporary medical license, which required periodic re-issuance, dependant on his compliance with mandatory drug abuse monitoring through the PHP (the "PHP drug monitoring").

In December 1994, Dr. Barnes started his own practice, Newton Women's Care, P.A., then initiated the credentialing process required by Catawba Memorial to regain medical staff privileges at its facilities. As part of this process, in May 1995, the Catawba Memorial credentialing committee (the "credentialing committee") required Dr. Barnes to appear and testify before them. Two months later, the credentialing committee granted Dr. Barnes medical staff privileges at Catawba Memorial conditioned upon his participation in drug abuse monitoring.

Dr. Barnes was monitored and complied for a number of years. However, during his deposition for the malpractice action, Dr. Barnes admitted he had relapsed and started abusing drugs again in April 2000. He obtained drugs by writing prescriptions for fictitious patients and filling the prescriptions in local pharmacies. In May 2000, his drug abuse was discovered through the PHP drug monitoring. The same month, he closed his practice and voluntarily surrendered his medical license to the Board. Dr. Barnes stated he was not abusing drugs during Mrs. Armstrong's prenatal care nor during the month or on the day the child was delivered.

During the deposition, plaintiffs asked Dr. Barnes several questions concerning the details of his drug abuse and his treatment as well as the proceedings leading to his credentialing at Catawba Memorial and the PHP drug monitoring. Dr. Barnes' counsel objected to and instructed Dr. Barnes not to answer the questions. On 9 September 2003, plaintiffs filed a motion to compel Dr. Barnes to answer discovery, including deposition questions regarding his history of drug abuse and the process of his re-acquiring privileges at Catawba Memorial. Two weeks later, Dr. Barnes filed a motion for a protective order contending these matters were privileged. On 9 October 2003, the trial court entered a discovery order requiring Dr. Barnes to answer all deposition questions except the following:

> Dr. Barnes does not have to give deposition testimony about the testimony he gave to the [Catawba Memorial] medical review committee or about the evidence he presented at the medical review committee hearing. Dr. Barnes does have to answer deposition questions even if the same questions were asked at the medical review committee [hearing].

Dr. Barnes appeals asserting the discovery order fails to address his statutory privilege under N.C. Gen. Stat. § 90-21.22(e) and improperly requires the disclosure of statutorily privileged matters.

[1] Initially, we address the interlocutory nature of this appeal. The discovery order from which Dr. Barnes appeals is interlocutory because it "does not determine the issues but directs some further proceeding preliminary to a final decree." *McDonald v. Skeen*, 152 N.C. App. 228, 229-30, 567 S.E.2d 209, 211 (2002). Although an interlocutory order is generally not immediately appealable, such an order may be appealable "if it affects a substantial right." *Mabrey v. Smith*, 144 N.C. App. 119, 121, 548 S.E.2d 183, 185 (2001). "[W]hen . . . a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under [N.C. Gen. Stat. §§] 1-277(a) and 7A-27(d)(1) [(2003)]." *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999) (holding an interlocutory discovery order affects a substantial right when a privilege under N.C. Gen. Stat. § 90-21.22 is asserted and remanding the appeal to this Court for a decision on the merits) ("*Sharpe I*"). In the instant case, Dr. Barnes' assertions of statutory privilege relate directly to the matters to be disclosed under the trial court's interlocutory discovery

order. Accordingly, we hold the challenged discovery order affects a substantial right, and the instant appeal is properly before us.

[2] Dr. Barnes first asserts the trial court erred by failing to enter a protective order addressing his privilege under N.C. Gen. Stat. § 90-21.22(e), which protects information regarding participation in an impaired physicians program. We agree.

North Carolina General Statutes § 90-21.22 provides for the establishment of peer review agreements between the Board and the North Carolina Medical Society, as well as its local components. These agreements facilitate peer review activities, which include programs to aid impaired physicians, like the PHP. *Id.* Pursuant to N.C. Gen. Stat. § 90-21.22(e):

> Any confidential patient information and other nonpublic information acquired, created, or used in good faith by [the North Carolina Medical Society or its local components] pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case. No person participating in good faith in the peer review or impaired physician . . . programs of this section shall be required in a civil case to disclose any information acquired or opinions, recommendations, or evaluations acquired or developed solely in the course of participating in any agreements pursuant to this section.

In the instant case, Dr. Barnes participated in the PHP. During discovery, plaintiffs posed questions concerning details of his treatment and participation. In response, Dr. Barnes moved for a protective order covering the details of his PHP treatment and participation. However, the trial court failed to enter an order pursuant to N.C. Gen. Stat. § 90-21.22(e) protecting from discovery the matters privileged under the statute. Accordingly, we hold the trial court erred by failing to enter an order in favor of Dr. Barnes protecting from discovery those matters privileged under N.C. Gen. Stat. § 90-21.22(e), and we remand.

In arguing this issue, Dr. Barnes also more specifically contends that the N.C. Gen. Stat. § 90-21.22(e) privilege extends to all details of his drug abuse. Since it is likely to recur upon remand, we address this contention. In determining whether the details of his drug abuse are privileged, we recognize the General Assembly enacted N.C. Gen. Stat. § 90-21.22 to create a broad privilege that would "encourage health care providers to seek treatment for their impairments." *Sharpe v. Worland*, 137 N.C. App. 82, 87, 527 S.E.2d 75, 78 (2000)

(interpreting N.C. Gen. Stat. § 90-21.22(e) upon remand from *Sharpe I*) ("*Sharpe II*"). In *Sharpe II*, this Court held that documents concerning the defendant doctor's participation in the PHP were privileged under N.C. Gen. Stat. § 90-21.22(e) even though they were released to the defendant hospital. *Id.*, 137 N.C. App. at 89, 527 S.E. 2d at 79-80.

Unlike the documents protected in *Sharpe II* and contrary to Dr. Barnes' contention, nothing in N.C. Gen. Stat. § 90-21.22 evinces a legislative intent to insulate a participant from disclosing the details of his drug abuse merely because he related the details of his drug abuse to a society administering an impaired physicians program during the course of his participation in that program. Such a holding would allow a participant in an impaired physician program to use the program as a shield to escape liability for his negligence by foreclosing any meaningful discovery by an injured party. This was not the intended function of this statutory privilege. Although the statute protects a physician's participation in an impaired physicians program, it does not insulate him from discovery of records or information unrelated to his participation in such a program. Accordingly, we hold Dr. Barnes may not invoke the privilege under N.C. Gen. Stat. § 90-21.22(e) to shield the details of his drug abuse from discovery to the extent his knowledge of those details exists irrespective of his participation in the PHP.

[3] Dr. Barnes next asserts, based on N.C. Gen. Stat. §§ 131E-95(b), 90-21.22A(c), and 131E-97.2 (2003), that the trial court erred by requiring him to answer deposition questions even if the same questions were asked at the credentialing committee hearing (the "hearing"). Specifically, Dr. Barnes argues the details of his drug abuse—as disclosed to the credentialing committee during the hearing—and the details of his credentialing are privileged under these three statutory provisions.

We first consider N.C. Gen. Stat. § 131E-95(b), which provides:

> The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records . . . and shall not be subject to discovery or introduction into evidence in any civil action against . . . a provider of professional health services which results from matters which are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any

> civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. *However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee.* A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings.

(Emphasis added). Under N.C. Gen. Stat. § 131E-76(5) (2003), a "medical review committee" is defined to include a committee responsible for "medical staff credentialing." Therefore, a medical staff credentialing committee, such as the one here, falls within the terms of N.C. Gen. Stat. § 131E-95(b). *Accord Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 87, 347 S.E.2d 824, 831 (1986).

In *Shelton*, our Supreme Court determined the purpose of N.C. Gen. Stat. § 131E-95(b) is to promote medical staff candor and medical review committee objectivity. *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829. *See also Whisenhunt v. Zammit*, 86 N.C. App. 425, 427, 358 S.E.2d 114, 116 (1987). The statute accomplishes this purpose by providing a broad privilege that protects "a medical review committee's (1) proceedings; (2) records and materials it produces; and (3) materials it considers." *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829. The statute also accomplishes a balance between this broad privilege and the interest of allowing reasonable discovery by permitting "access to information not generated by the committee itself but merely presented to it . . . ." *Id.* Therefore, the privilege referenced in the statute does not extend to "information . . . available[] from original sources other than the medical review committee . . . merely because it was presented during medical review committee proceedings[,]" and the statute's purpose is not violated by allowing materials otherwise available to "be discovered and used in evidence even though they were considered by [a] medical review committee." *Id.*, 318 N.C. at 83-84, 347 S.E.2d at 829.

In *Shelton*, the plaintiffs sought discovery from the defendant hospital's medical review committee records and information regarding the review proceedings with respect to the defendant doctor. *Id.*, 318 N.C. at 81, 347 S.E.2d at 828. Similarly, the plaintiffs in *Whisenhunt* sought discovery from a hospital of its "credentialing

records" concerning the defendant doctor. *Whisenhunt*, 86 N.C. App. at 426, 358 S.E.2d at 115. Each decision held that the information sought was not discoverable because the plain language of N.C. Gen. Stat. § 131E-95(b) extends a statutory privilege to the records produced by a medical review committee and the information concerning its proceedings. *Shelton*, 318 N.C. at 82-83, 347 S.E.2d at 829; *Whisenhunt*, 86 N.C. App. at 428, 358 S.E.2d at 116.

Dr. Barnes contends that, as the information regarding the review proceedings in *Shelton* and *Whisenhunt* was not discoverable, the information sought by plaintiffs in the instant case is not information from any original source other than the credentialing committee. However here, plaintiffs seek disclosure of the details of Dr. Barnes' drug abuse from Dr. Barnes. Unlike the hospitals in *Shelton* and *Whisenhunt*, Dr. Barnes is an original source with respect to the information sought because he created and knows the details of his drug abuse outside the privileged proceedings of the credentialing committee and the records it produced. Therefore, Dr. Barnes, as an original source, may not invoke N.C. Gen. Stat. § 131E-95(b) to shield himself from answering deposition questions regarding the details of his drug abuse merely because he disclosed those details during the credentialing committee proceedings and those details were presumably included in the committee's records.

North Carolina General Statutes § 90-21.22A(c) is functionally identical to N.C. Gen. Stat. § 131E-95(b) in its application to the instant case. Under N.C. Gen. Stat. § 90-21.22A(c):

> The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records . . . and shall not be subject to discovery or introduction into evidence in any civil action against a provider of health care services who directly provides services and is licensed under this Chapter . . . . No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. *However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee.* A member of the committee may testify in a civil action but cannot be asked about his or her testimony before

> the committee or any opinions formed as a result of the committee hearings.

(Emphasis added). We also note a medical staff or credentialing committee falls within the terms of N.C. Gen. Stat. § 90-21.22A(c). *See* N.C. Gen. Stat. § 90-21.22A(a) (2003) (defining a "medical review committee" to include a committee for "provider credentialing"). Therefore, our above analysis regarding the privilege provided under N.C. Gen. Stat. § 131E-95(b) applies equally to N.C. Gen. Stat. § 90-21.22A(c), and Dr. Barnes, as an original source, may not invoke the privilege provided under N.C. Gen. Stat. § 90-21.22A(c) to shield himself from answering deposition questions concerning the details of his drug abuse.

Pursuant to N.C. Gen. Stat. § 131E-97.2:

> Information acquired by a . . . hospital, or by persons acting for or on behalf of a hospital, in connection with the credentialing and peer review of persons having or applying for privileges to practice in the hospital is confidential and is not a public record . . .; *provided that information otherwise available to the public shall not become confidential merely because it was acquired by the hospital or by persons acting for or on behalf of the hospital.*

(Emphasis added). The plain language of this statute extends a privilege only to "[i]nformation acquired" by hospitals, or persons acting on their behalf, "in connection with the credentialing and peer review of persons having or applying for privileges to practice in the hospital . . . ." *Id.* As discussed above, Dr. Barnes did not acquire knowledge of the details of his drug abuse through the credentialing committee's proceedings. Nor was he acting on behalf of Catawba Memorial in connection with the credentialing committee's review. Therefore, contrary to Dr. Barnes' assertion, the privilege provided under N.C. Gen. Stat. § 131E-97.2 is inapplicable here.

Accordingly, we hold the trial court did not violate the statutory privileges provided under N.C. Gen. Stat. §§ 131E-95(b), 90-21.22A(c), or 131E-97.2 to the extent it required Dr. Barnes, an original source with respect to the details of his drug abuse, to answer all questions concerning the details of his drug abuse even if the same questions were asked at the credentialing committee hearing. However, the trial court's order does not address how the privilege applies to other aspects of the credentialing committee's proceedings, the records and materials it produced, and the materials it considered. Therefore,

upon remand, the trial court is instructed to determine whether other information sought by plaintiffs is of a type privileged under N.C. Gen. Stat. §§ 131E-95(b) and 90-21.22A(c) and to amend its order to protect any such information.

[4] Dr. Barnes finally asserts the trial court erred by requiring him to answer questions even if they were asked at the credentialing committee hearing because plaintiffs' counsel was improperly allowed to attend the hearing and was improperly provided hearing documents and a partial transcript. Specifically, Dr. Barnes argues the opposing counsel's knowledge of the hearing prejudices him because (1) plaintiffs have access to documents and testimonial records that ordinarily would be unavailable through discovery and (2) the counsel's presence at the hearing makes it impossible to distinguish between information from original sources and information generated by the credentialing committee. Dr. Barnes contends this prejudice can only be prevented by forbidding any further discovery regarding his drug abuse and credentialing.

Assuming *arguendo* plaintiffs' counsel was improperly allowed to attend the hearing and was improperly provided with hearing documents, Dr. Barnes will be afforded his full statutory privilege and will be required to answer only those questions concerning the details of his drug abuse, which are not privileged. The record discloses that plaintiffs obtained evidence of Dr. Barnes' drug abuse from public records separate from their counsel's knowledge of the hearing, in particular: (1) the 31 August 1994 Board of Medical Examiners Order regarding Dr. Barnes, which stated Dr. Barnes had a history of drug abuse, had relapsed, and agreed to surrender his medical license for the issuance of a temporary license and (2) newspaper articles regarding Dr. Barnes' disciplinary history and surrender of his license. Therefore, public records would inform any plaintiff that Dr. Barnes had a drug abuse problem. Accordingly, we hold no prejudice will inure to Dr. Barnes through discovery due to opposing counsel having learned of his drug abuse not only from the public records but also presumably from the hearing.

We have carefully reviewed Dr. Barnes' remaining arguments and consider them to be without merit. For the foregoing reasons, we (1) remand to the trial court for entry of an order in favor of Dr. Barnes protecting those matters privileged under N.C. Gen. Stat. § 90-21.22(e); (2) affirm the trial court's order requiring Dr. Barnes to answer deposition questions regarding the details of his drug abuse even if the same questions were asked at the credentialing hearing;

and (3) instruct the trial court upon remand to determine whether other information sought by plaintiffs is of a type privileged under N.C. Gen. Stat. §§ 131E-95(b) and 90-21.22A(c) and to amend its order to protect any such information.

Affirmed in part and remanded.

Chief Judge MARTIN and Judge GEER concur.

FIRST COMMERCE BANK, PLAINTIFF v. MICHAEL W. DOCKERY, ANNETTA B. DOCKERY, DEFENDANTS

No. COA04-1102

(Filed 5 July 2005)

Negotiable Instruments— promissory note—signed writing required for release—summary judgment

The trial court did not err by granting summary judgment in favor of plaintiff bank based on defendant's default of a $38,000 promissory note even though defendant contends there was a genuine issue of material fact regarding whether plaintiff agreed to release defendant from any liability on the $38,000 debt as part of the reaffirmation agreement between her husband and plaintiff, because: (1) although defendant contends plaintiff verbally agreed to release her from the debt obligation, the release was not in a signed writing as required by N.C.G.S. § 25-3-604; and (2) defendant admitted in her answer that she was in default of her obligations under the promissory note she signed by failing to make payments when due.

Judge LEVINSON concurring.

Appeal by defendant Annetta B. Dockery from judgment entered 12 May 2004 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 March 2005.

Cranford, Schultze and Tomchin, P.A., by Michael F. Schultze, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Richard B. Fennell, for defendant-appellant Annetta B. Dockery.

HUNTER, Judge.

Defendant, Annetta B. Dockery, appeals the trial court's order granting summary judgment in favor of plaintiff, First Commerce Bank. After careful review, we affirm the summary judgment order.

The undisputed facts tend to indicate that on or about 21 November 2002, First Commerce Bank agreed to loan, and defendants, Michael and Annetta Dockery, agreed to borrow, the original principal sum of $38,000.00 pursuant to a Promissory Note. The loan was secured by a 1997 Ford Expedition automobile and a 2000 Sea Doo Boat, which were titled only in Michael Dockery's name. Michael and Annetta Dockery failed to make payments when due and were default on their obligations under the promissory note. First Commerce Bank accelerated the principal balance by filing a complaint against Michael and Annetta Dockery on 22 May 2003. Annetta Dockery filed her answer on 23 July 2003.

After the complaint was filed, Michael Dockery sought bankruptcy protection on 11 July 2003, which resulted in an automatic stay of the action brought by First Commerce Bank against Michael Dockery. In response, First Commerce Bank sought relief from the automatic stay in order to repossess the collateral. Then, on 4 August 2003, Michael Dockery's attorney sent a letter to First Commerce Bank regarding the possibility of reaffirming the debt owed to First Commerce Bank, which would allow Michael Dockery to retain the ownership of the collateral—the Ford Expedition and the Sea Doo Boat. In an exchange of letters, Michael Dockery and First Commerce Bank agreed to reaffirm the debt for $20,000.00 payable over a sixty month time period with an interest rate of eight percent (8%). Michael Dockery and First Commerce Bank then executed a reaffirmation agreement, which contained their agreement that Michael Dockery would reaffirm $20,000.00 of his indebtedness owed to First Commerce Bank, payable in sixty monthly installments with eight percent (8%) interest per year. The agreement also referenced 11 U.S.C. § 524, which governs reaffirmation agreements.

On 30 March 2004, First Commerce Bank moved for summary judgment against Annetta Dockery. In response, Annetta Dockery filed an affidavit from Michael Dockery, which stated that First Commerce Bank agreed to release Annetta Dockery if Michael Dockery reaffirmed the debt. Boyd Coggins, Vice President of Bank of Granite, the successor to First Commerce Bank, filed an affidavit in response to the Micheal Dockery affidavit. Mr. Coggins stated that

Michael Dockery and the Bank agreed that in exchange for Michael Dockery reaffirming his obligations under the Note for $20,000.00, the bank would not seek relief from the automatic stay to repossess the collateral. According to Mr. Coggins, there was no agreement reached concerning the balance of the debt as it relates to any other obligor or guarantor. The trial court determined there were no genuine issues of material fact and entered summary judgment in favor of First Commerce Bank. Annetta Dockery appeals.

Annetta Dockery contends the trial court erroneously granted summary judgment to First Commerce Bank because a genuine issue of material fact exists regarding whether First Commerce Bank agreed to release Annetta Dockery from any liability on the $38,000.00 debt as part of the reaffirmation agreement between Michael Dockery and First Commerce Bank. 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).

> When the party bringing the cause of action moves for summary judgment, he must establish that all of the facts on all of the essential elements of his claim are in his favor and that there is no genuine issue of material fact with respect to any one of the essential elements of his claim. In other words, the party must establish his claim beyond any genuine dispute with respect to any of the material facts. An issue is genuine if it may be maintained by substantial evidence. An issue is material if the facts as alleged would constitute a legal defense, would affect the result of the action or would prevent the party against whom it is resolved from prevailing in the action. If the movant carries his burden of establishing *prima facie* that he is entitled to summary judgment then his motion should be granted unless the opposing party responds and shows either that a genuine issue of material fact exists or that he has an excuse for not so showing. If the movant fails to carry his burden, the opposing party does not have to respond and summary judgment is not proper regardless of whether he responds or not.

Development Corp. v. James, 300 N.C. 631, 637, 268 S.E.2d 205, 209-10 (1980) (citations omitted). "In ruling on the motion, the court must consider the evidence in the light most favorable to the non-movant, who is entitled to the benefit of all favorable inferences

which may reasonably be drawn from the facts proffered." *Averitt v. Rozier*, 119 N.C. App. 216, 218, 458 S.E.2d 26, 28 (1995).

"A reaffirmation agreement is a contract between a debtor and a creditor. In substance a reaffirmation agreement is a new contract that renegotiates or reaffirms the original debt. Conventional contract principles apply to reaffirmation agreements." *Schott v. Wyhy Fed. Credit Union*, 282 B.R. 1, 7 (B.A.P. 10th Cir. 2002) (citations omitted). Thus, state law governs the construction and interpretation of a reaffirmation agreement. *Id.*

The promissory note entered into by Annetta Dockery is a negotiable instrument governed by Article 3 of the Uniform Commercial Code ("UCC"), N.C. Gen. Stat. § 25-3-101 *et seq*. According to N.C. Gen. Stat. § 25-3-104 (2003), the following elements are required for an instrument to be classified as a negotiable instrument:

> (a) Except as provided in subsections (c) and (d) of this section, "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
>
> (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
>
> (2) Is payable on demand or at a definite time; and
>
> (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.
>
> . . .
>
> (d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this Article.

Id. The promissory note in this case complies with all of the provisions in N.C. Gen. Stat. § 25-3-104(a)(1)-(3) and it does not contain a

conspicuous statement indicating it is not negotiable. Therefore, the promissory note is a negotiable instrument governed by the UCC.

Under the UCC: "A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument . . . (ii) by agreeing not to sue or otherwise renouncing rights against the party by a *signed writing*." N.C. Gen. Stat. § 25-3-604(a) (2003) (emphasis added). Although Annetta Dockery contends First Commerce Bank verbally agreed to release her from the debt obligation, the release was not in a signed writing as required by N.C. Gen. Stat. § 25-3-604. *See id*. As Annetta Dockery admitted in her answer that she was in default of her obligations under the promissory note she signed because she failed to make payments when due, summary judgment was properly granted by the trial court.

Affirmed.

Judge McCULLOUGH concurs.

Judge LEVINSON concurs in a separate opinion.

LEVINSON, Judge concurring.

I write separately to clarify why, in my view, the superior court order should be affirmed.

In her three-page argument, appellant contends that there are genuine issues of material fact as to "whether the [reaffirmation agreement] evidenced the full agreement between the parties" and "whether the parties agreed to release [appellant] in return for Michael Dockery's agreement to reaffirm his liability on the debt." Appellant essentially contends that as part of the consideration supporting the reaffirmation agreement, First Commerce Bank (*hereinafter* "bank") agreed to release her from the $38,000 promissory note. I conclude that admission of evidence concerning appellant's release from debt would impermissibly add to the clear and unambiguous terms of the written reaffirmation agreement, which represents a fully integrated contract.

Preliminarily, I observe that because it appears the reaffirmation agreement itself does not meet the requirements set forth in N.C.G.S. § 25-3-104 (2003) for negotiable instruments, and because neither party contends on appeal that the provisions of Article 3 of the UCC

apply to this agreement, I resolve this matter by application of common law principles. With respect to the original $38,000 promissory note that is the subject of the current action against appellant, I agree with the majority that Article 3 of the UCC generally governs.

Appellant's argument that the bank agreed not to seek recourse against her if Michael Dockery agreed to the reaffirmation depends entirely on the introduction of parol evidence. This is because there is nothing within the agreement whatsoever that purports to release her from the $38,000 obligation to the bank. Michael Dockery's affidavit, which states that the bank "agreed to release [appellant] if I reaffirmed the debt[,]" was offered by appellant in opposition to the bank's motion for summary judgment on the debt. In response, the bank tendered an affidavit from its executive which stated that the bank agreed not to "seek relief from [the bankruptcy] stay to repossess [the collateral, a Ford vehicle and recreational boat,]" and that "[a]t no time was any agreement reached concerning the balance of the debt as it relates to any other obligor or guarantor." Indeed, as the record reveals, the reaffirmation agreement was entered as a consequence of a bankruptcy case involving only Michael Dockery (No. 03-32605 W.D.N.C.).

The affidavit appellant seeks to admit would violate the parol evidence rule, which "prohibits the consideration of evidence as to anything which happened prior to or simultaneously with the making of a contract which would vary the terms of the agreement." *Harrell v. First Union Nat. Bank*, 76 N.C. App. 666, 667, 334 S.E.2d 109, 110 (1985), *affirmed*, 316 N.C. 191, 340 S.E.2d 111 (1986). The parol evidence rule prohibits the admission of evidence " 'to vary, add to, or contradict [the terms of] a written instrument intended to be the final integration of the transaction.' " *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 76, 598 S.E.2d 396, 402 (quoting *Hall v. Hotel L'Europe, Inc.*, 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984)), *disc. review denied*, 359 N.C. 67, 604 S.E.2d 310 (2004). Our Supreme Court has also described the parol evidence rule as follows:

> It appears to be well settled in this jurisdiction that parol testimony of prior or contemporaneous negotiations or conversations inconsistent with a written contract entered into between the parties, or which tends to substitute a new or different contract for the one evidenced by the writing, is incompetent. 2 Stansbury's N.C. Evidence 253 (Brandis Rev. 1973). This rule applies where the writing totally integrates all the terms of a contract or supersedes all other agreements relating to the transac-

> tion. The rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract. The terms not included in the writing may then be shown by parol. *Id.*, § 252.

Craig v. Kessing, 297 N.C. 32, 34-35, 253 S.E.2d 264, 265-66 (1979).

Appellant contends that, because the reaffirmation agreement does not contain a merger clause, it cannot constitute a complete integration. Appellant misstates the law in this regard.

The inclusion of a merger clause does not conclusively determine whether a contract is fully integrated. *See* Restatement (Second) of Contracts, § 216 (1981) ("a [merger and integration] does not control the question whether the writing was assented to as an integrated agreement. . . ."); *see also Zinn v. Walker*, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1987). The words of a merger clause do not categorically determine whether a contract is fully integrated, but only "create a rebuttable presumption that the writing represents the final agreement between the parties." *Zinn*, 87 N.C. App. at 333, 361 S.E.2d at 318. A merger clause "is evidence of the intention of the parties to the [contract] that it constitute their entire agreement[.]" *Drug Stores v. Mayfair*, 50 N.C. App. 442, 449, 274 S.E.2d 365, 369 (1981).

Further, a contract may be fully integrated even though the drafters omit the merger clause:

> [W]here the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is **presumed** the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed **merged** in the written agreement.

Neal v. Marrone, 239 N.C. 73, 77, 79 S.E.2d 239, 242 (1953) (emphasis added); *see also Weiss v. Woody*, 80 N.C. App. 86, 91, 341 S.E.2d 103, 106 (1986).

Appellant does not cite any authority to support its contention that, in the absence of a merger clause, an agreement **cannot** constitute a complete integration, and we find none. Nor does appellant cite any North Carolina or other authority illustrating or suggesting that the Dockery affidavit is admissible. Our common law, in fact, suggests the contrary result. *See id.*; *see also Craig*, 297 N.C. at 34-35, 253 S.E.2d at 265-66. In sum, appellant's conclusory argument that the

reaffirmation agreement was not intended as a complete integration is unconvincing. In my view, the record unequivocally demonstrates that the reaffirmation agreement was intended as a fully integrated memorialization of a negotiated settlement between Michael Dockery and the bank, and that allowing parol evidence of a purported agreement by the bank to forego its remedies on the $38,000 note against appellant would impermissibly add to the agreement, or "tend[] to substitute a new or different contract for the one evidenced by the writing" in violation of *Craig*.

Since the record suggests only that the agreement was intended to be fully integrated, the admission of parol evidence for reasons other than certain exceptions would be error:

> [P]arol evidence of a failure of consideration may be admissible to elucidate the terms of a contract. However, in . . . cases wherein parol evidence was admitted to show lack of consideration, the evidence pertained to a condition precedent that was not stated on the face of the contract, but which was a condition on which the validity of the contract depended. Therefore, the parol evidence did not contradict the contract, but merely set out the full understanding between the parties. In [these cases], the parol evidence was necessary to explain the terms of the contract. However, parol evidence is not admissible to contradict the language of the contract.

Thompson v. First Citizens Bank & Tr. Co., 151 N.C. App. 704, 709, 567 S.E.2d 184, 189 (2002) (citations omitted).

Appellant contends neither that parol evidence is necessary to establish, *e.g.*, fraud, mistake or undue influence, nor that parol evidence is necessary to help clarify or understand the express terms of the reaffirmation agreement. And appellant does not suggest that there was a condition precedent to the obligations contained in the reaffirmation agreement, or that Michael Dockery's affidavit is admissible to demonstrate a failure of consideration and an elucidation of the contractual terms. Instead, appellant acknowledges that the bank's agreement to forego its remedies against appellant would constitute an "additional term" which will "supplement" the agreement. Again, as discussed above, the parol evidence rule bars such evidence on the facts of this case.

Even assuming, *arguendo*, the bank agreed not to collect on appellant's obligation as part of its reaffirmation with Michael

Dockery, appellant does not articulate—and this Court therefore need not address—whether or how she could utilize the same as an intended third party beneficiary and/or as a legal defense in the bank's direct action against her on the $38,000 note.

I conclude that any evidence that the bank agreed not to pursue its remedies against appellant on the $38,000 note would impermissibly allow an addition to the clear and unambiguous terms of the written reaffirmation agreement, which represents a fully integrated contract. Consequently, Michael Dockery's affidavit does not help appellant defeat the bank's motion for summary judgment, and appellant's generalized contention that the affidavit raises a genuine issue of material fact fails. Finally, appellant has not articulated how this would, in any event, provide a bar to the present action.

Like the majority, I conclude summary judgment was properly granted in favor of plaintiff.

STATE OF NORTH CAROLINA v. KIMBERLY KNOWLES BRIGMAN

No. COA04-563

(Filed 5 July 2005)

Constitutional Law— right of confrontation—nontestimonial hearsay—sexual abuse—statements of children conveyed through foster and adoptive parents—catchall exception—unavailable witness

The trial court did not err in a multiple first-degree sex offense and multiple counts of indecent liberties case involving defendant mother's three sons by admitting the statements by the sons as conveyed through their foster and adoptive parents, because: (1) defendant waived her right to confront two of the boys whose statements were admitted under the catchall exception based on circumstantial guarantees of trustworthiness when defendant failed to call these two boys to testify; (2) none of the challenged statements constituted formal statements to police or other government officers; (3) although defendant implies the foster parents played a quasi-governmental role since they recorded the boys' statements and conveyed the statements to both DSS and the police, the statements are not the type of formal tes-

timonial statements envisioned by the U.S. Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004); and (4) the boy whose statements were admitted based on the fact that he was an unavailable witness made statements spontaneously to his foster mother, who was one of the people closest to him, without the reasonable belief that the statements would be used at a subsequent trial, and statements made to family, friends, and acquaintances without an intention for use at trial have consistently been held not to be testimonial.

Appeal by defendant from judgments entered 7 November 2003 by Judge W. Erwin Spainhour in Superior Court, Rowan County. Heard in the Court of Appeals 25 January 2005.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.

J. Clark Fischer for defendant-appellant.

McGEE, Judge.

Kimberly Knowles Brigman (defendant) was convicted of eighteen counts of first-degree sex offense and twenty-seven counts of indecent liberties with her three sons, for which she was sentenced to 576 to 715 months in prison. Defendant appeals.

The State's evidence tended to show that Rockwell Chief of Police Hugh W. Bost, Jr. (Chief Bost) responded to a call reporting unattended children in Rockwell, North Carolina on 15 April 2002. He found three boys, J.B., A.B., and N.B. (collectively the boys), ranging in age from a toddler to a pre-schooler, playing in the street. All of the boys were dirty, and the youngest was naked except for a baby t-shirt. After learning the boys' names, Chief Bost knew that defendant was their mother, and returned them to defendant's home.

Later that day, Marcus Landy (Landy) of Rowan County Child Protective Services investigated the incident. He found defendant's home to be "filthy," and described seeing spoiled food on the kitchen table and on the stove. Landy testified that the house had a "very strong urine odor," and that the three boys were dirty and their feet were black. He further testified that the youngest boy, N.B., had feces "smeared down his legs." Landy removed the boys from the home and placed them in foster care. J.B. and A.B. were placed with Ms. M.; N.B. was placed with Mr. and Mrs. A.

Ms. M. testified that on 12 June 2002, she overheard J.B. saying, "[l]ick me, lick me." She then observed J.B. pulling A.B. down on top of him. J.B. told Ms. M. that he and A.B. were playing the "puppy game." J.B. further explained that the boys had played this game with defendant and defendant's husband; the game involved all of them licking each other's genitalia. Ms. M. told J.B. and A.B. to separate, called to her husband to continue making dinner, and returned to talk with J.B. and A.B. She saw J.B. on top of A.B., "humping" him. She again asked the boys what they were doing, and J.B. said they were "getting ready to play the picture game." J.B. explained that the boys would pose while defendant and defendant's husband took pictures of them. J.B. and A.B. demonstrated the poses, which were all sexually explicit. When asked how they were dressed for the "picture game," J.B. responded that they were naked.

Ms. M. reported to the Rowan County Department of Social Services (DSS) that she thought "there was more going on with the boys other than just neglect." After talking with DSS, Ms. M. continued to talk with the boys and attempted to tape-record the conversation. The tape was inaudible, but Ms. M. wrote down notes of the conversation immediately after it occurred. The boys told Ms. M. that they, defendant, and defendant's husband would start with the "picture game," and "the winner of the game got to do all the licking, and that they all ended up being winners."

Ms. M. testified that following this 12 June 2002 incident, J.B. became increasingly sexually active with A.B., which upset A.B. Both J.B. and A.B. began mental health counseling. Ultimately, the decision was made to separate J.B. and A.B. J.B. went to live with Ms. P., who later adopted him. A.B. continued to live with Ms. M. temporarily, but was eventually adopted by Mr. and Mrs. A., who also had custody of N.B.

It was determined that N.B. also needed counseling after Mr. and Mrs. A. observed N.B. trying to put toy keys in his rectum on 18 June 2002. N.B. "used the keys to the point that he excited himself and urinated on the couch." When asked what he was doing, N.B. cried and said he was sorry. Mr. and Mrs. A. began to record their observations. They noted on several occasions that N.B. stated that defendant had "hurt his butt" or hurt his penis. Mr. A. testified that N.B. said defendant had inserted keys or fingers into N.B.'s rectum, that defendant and defendant's husband had "bitten" his, J.B.'s, and A.B.'s penises. Mrs. A. testified that after she and Mr. A. had custody of A.B., A.B. stated that defendant's husband had "pulled, pinched, rubbed and

licked" A.B.'s penis and that defendant's husband had put his penis in A.B.'s mouth.

Other evidence presented by the State at trial corroborated sexual abuse of the boys. Dr. Rosalina Conroy, a pediatrician, testified as an expert in pediatric medicine. She examined all three boys in July 2002, and concluded that all of them had been sexually abused or had symptoms consistent with sexual abuse.

Defendant's written statement was also read into evidence by a police detective. The statement detailed defendant's participation in sexual abuse of all three boys. The statement described defendant's husband having defendant undress the boys and having the boys pose naked in sexual poses for photographs. The statement also described defendant holding "the boys' butt cheeks apart" while defendant's husband inserted fingers or toys into the boys' rectums, and described defendant being forced to touch the boys' penises and to hold the boys while defendant's husband engaged, and attempted to engage, in anal sexual intercourse with the boys. Defendant wrote in her statement that her husband forced her to participate in these acts by threatening to kill her. Defendant wrote that her husband first threatened her with a knife, but eventually got a gun, which defendant's husband would have "in the boys' room to intimidate [defendant]." Defendant did not present any evidence at trial.

Defendant's sole assignment of error on appeal is that the trial court erred in admitting the statements by the boys as conveyed through their foster and adoptive parents. Prior to trial, the State moved to admit hearsay statements the boys made to their foster and adoptive parents, pursuant to Rules 803(24) and 804(b)(5) of the North Carolina Rules of Evidence. The trial court conducted a voir dire hearing and determined that hearsay statements by J.B. to his foster mother were admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) because J.B. was unavailable as a witness since he had testified that he did not remember "the subject matter of his statement[.]" N.C. Gen. Stat. § 8C-1, Rule 804(a)(3) (2003). The trial court did not find A.B. and N.B. unavailable as witnesses, but nevertheless admitted hearsay statements by A.B. and N.B. made to their foster and adoptive parents under the catchall hearsay exception, N.C. Gen. Stat. § 8C-1, Rule 803(24). Defendant had the opportunity to cross-examine the boys during voir dire.

Defendant does not challenge the trial court's findings of fact or the trial court's ruling at the voir dire hearing. Rather, defendant

argues that the statements by the boys were testimonial, and thus were inadmissible as a matter of law under *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). "Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68, 158 L. Ed. 2d at 203. In analyzing a *Crawford* claim, we must determine: "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217, *disc. review denied*, 358 N.C. 734, 601 S.E.2d 866 (2004).

On the first question, the United States Supreme Court in *Crawford* chose to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.' " *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203. However, the Court said at a minimum, the term "testimonial" covered "prior testimony at a preliminary hearing, before a grand jury, or at a former trial," including *ex parte* statements made in court, affidavits, depositions, confessions, and other "pretrial statements that declarants would reasonably expect to be used prosecutorially[.]" *Id.* at 51 & 68, 158 L. Ed. 2d at 193 & 203. Additionally, the Court identified "[s]tatements taken by police officers in the course of interrogations" as being testimonial. *Id.* The Supreme Court did not define "interrogation" with any particularity in *Crawford*, other than to say that a recorded statement made to police by Crawford's wife, "knowingly given in response to structured police questioning, [qualified] under any conceivable definition [of interrogation.]" *Id.* at 53 n.4, 158 L. Ed. 2d at 194 n.4. The Court did specify, however, that it was using "interrogation" in its colloquial, not technical legal sense. *Id.*

In the present case, defendant does not argue that the boys' statements were prior testimony. Rather, defendant argues that these challenged statements were testimonial because they were elicited in a manner similar to formalized police questioning. Specifically, regarding the statements by J.B. and A.B., defendant contends that because Ms. M. tape-recorded an interview with the boys and provided this evidence to DSS and police investigators, "this hearsay evidence was far more akin to the type of police action at issue in *Crawford* than [to] 'an off-hand, overheard remark.' " *See Crawford*, 541 U.S. at 51, 158 L. Ed. 2d at 192 ("[N]ot all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be

unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted."). Similarly, defendant contends that the statements made by N.B., as testified to by Mr. & Mrs. A, were also akin to "official investigations" in that they were "reduced to notes which were provided to the prosecution." We are not persuaded by defendant's arguments.

First, we note that defendant's arguments only pertain to statements made by J.B. because he was the only witness determined to be unavailable by the trial court. The trial court specifically found that "regarding [A.B.'s and N.B.'s] testimony, that they do not fit within the definition of unavailability under the statute." The trial court ruled that the statements of A.B. and N.B. were admissible hearsay under Rule 803(24), which provides that hearsay evidence may be admitted, "even though the declarant is available as a witness[,]" if it has "circumstantial guarantees of trustworthiness," and

> if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C-1, Rule 803(24) (2003). *Crawford* revised the standard for admissibility of hearsay evidence under the Confrontation Clause of the Sixth Amendment of the United States Constitution only when the witness is *unavailable*. *Crawford*, 541 U.S. at 60-69, 158 L. Ed. 2d at 198-203. A defendant's right to confront defendant's accuser is not compromised when the declarant is available to testify. However, a defendant may waive this right "by simply failing to exercise it at the trial." *State v. Splawn*, 23 N.C. App. 14, 18, 208 S.E.2d 242, 245 (stating that a defendant's confrontational rights may be waived "by an accused's counsel acting in his behalf"), *cert. denied*, 286 N.C. 214, 209 S.E.2d 318 (1974). In the present case, A.B. and N.B. were "available" to testify, although neither the State nor defendant called them to testify. Defendant therefore waived her right to confront A.B. and N.B., and defendant's arguments as they relate to the statements made by A.B. and N.B. are overruled.

Second, and more importantly, none of the challenged statements constituted formal statements to police or other government offi-

cers.[1] Courts in some other states have held statements made by children to social workers or police investigators to be testimonial where the evidence suggested that "the government was purposefully creating formalized statements for potential use at trial." Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 538 (2005); *see also People v. Vigil*, 104 P.3d 258, 262 (Colo. App. 2004) (holding a videotaped statement given by a child to a police officer who had told the child she was a police officer, had ascertained that the child knew the difference between the truth and a lie, and had told the child to tell the truth, to be testimonial), *cert. granted on this issue* (Colo. 20 December 2004) (unpublished opinion) (appeal pending); *Snowden v. State*, 846 A.2d 36, 47 (Md. App. 2004) (statements made by children conveyed through a social worker held to be testimonial when the statements were taken by the social worker with the expressed purpose of developing the social worker's testimony in a child abuse case), *aff'd*, 867 A.2d 314 (Md. 2005). However, the statements in the present case were not procured by a government officer. *See People v. Geno*, 683 N.W.2d 687, 692 (Mich. App. 2004) (concluding that a child's statement to the executive director of a children's assessment center, who was not a government employee, was not testimonial), *appeal denied*, 688 N.W.2d 829 (Mich. 2004). Rather, in the present case, the statements were made to the boys' foster parents. Although defendant implies that the foster parents played a quasi-governmental role because they recorded the boys' statements and conveyed the statements to both DSS and the police, we do not find the statements in the present case to be the formal testimonial statements envisioned by the U.S. Supreme Court in *Crawford*.

The statements made by J.B. were made spontaneously to one of the people closest to him, his foster mother. "[S]tatements made to family, friends, and acquaintances without an intention for use at trial have consistently been held not to be testimonial." Mosteller, 39 U. Rich. L. Rev. at 540. For example, our Court has held that statements made by a victim of an armed burglary to his wife and daughter before he died were not testimonial, but were personal conversations, unlikely to have been made with the belief that the statements would be used prosecutorially. *State v. Blackstock*, 165 N.C. App. 50, 62, 598 S.E.2d 412, 420 (2004), *disc. review denied*, 359 N.C. 283, 610 S.E.2d 208 (2005). *See also State v. Rivera*, 844 A.2d 191, 202

1. Though we only address defendant's arguments as they pertain to J.B., we note that the analysis and resulting conclusions regarding the statements made by A.B. and N.B. would be the same.

(Conn. 2004) (holding that a declarant's statement to his nephew about the declarant's involvement with the defendant was not testimonial because "the circumstances under which the statement was made would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial").

Some of J.B.'s statements to Ms. M. were arguably solicited by Ms. M. after she ended her telephone conversation with DSS and while she was trying to tape-record the conversation. However, the information conveyed during this part of the conversation was first revealed prior to Ms. M.'s telephone call to DSS. The only new information obtained was that J.B. told Ms. M. that "the winner of the [picture] game got to do all the licking, and that they all ended up being winners." The majority of the evidence from this 12 June 2002 conversation was revealed because Ms. M. asked J.B. and A.B. what they were doing after she observed J.B. pulling A.B. onto him, asking A.B. to lick him, and observed J.B. "humping" A.B. J.B.'s statements were spontaneous answers to Ms. M.'s open-ended inquiries. No evidence suggests that J.B. made these statements with the idea that they would be used prosecutorially.

Additionally, J.B.'s age raises the question as to whether he was even capable of reasonably believing that these statements would be used at trial. We recognize that this argument was rejected by the Colorado Court of Appeals in *Vigil*, 104 P.3d at 262, but note that the facts in *Vigil* were significantly different than those in the case before us. In *Vigil*, the challenged statement came from a seven-year-old child during a videotaped interview with a police officer who had "extensive training in the particular interrogation techniques required for interviewing children." *Id.* at 262. The interviewer had told the child that she was a police officer and had asked the child what the child thought should happen to the defendant, to which the child responded that the defendant should go to jail. *Id*. The police officer then told the child that the child would need to talk to a district attorney who was going to try to put the defendant in jail. *Id*. at 263. The trial court determined that "[t]his discussion, together with the interviewer's emphasis at the outset regarding the need to be truthful, would indicate to an objective person in the child's position that the statements were intended for use at a later proceeding that would lead to punishment of [the defendant]." *Id*.

In the present case, not only were none of the challenged statements made directly to a police officer, but also J.B. was younger than the child in *Vigil*. J.B. was not quite six years old at the time he

made these statements and was less likely to understand the potential for his statements to be used prosecutorially than the child in *Vigil*. Also, unlike the child in *Vigil*, J.B. did not make any statements indicating that he understood the consequences of his statements or how they might be used to put defendant in jail. For instance, nothing in the record suggests that J.B. was asked what he thought should happen to defendant. Nor was J.B. given the opportunity to talk to a district attorney who would be trying to put defendant in jail. Finally, J.B. did not seem to know that what defendant and defendant's husband were making the boys do constituted criminal activity. Ms. M. testified that J.B. seemed surprised that Ms. M. did not know that the boys were naked when they had played "the picture game" with defendant and defendant's husband. This surprise suggests that J.B. was making these statements to his foster mother innocently, without the purpose of the statements being used at defendant's subsequent trial. When this evidence is taken together, it is highly implausible that J.B. reasonably believed that his statements to his foster mother would be used prosecutorially. Since J.B.'s statements were made to a person close to him, and without the reasonable belief that the statements would be used at a subsequent trial, we conclude that the statements were not testimonial.

As such, we need not address "whether the trial court properly ruled [that] the declarant [J.B.] was unavailable" or "whether defendant had an opportunity to cross-examine the declarant." *See Clark*, 165 N.C. App. at 283, 598 S.E.2d at 217. Moreover, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law[.]" *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203. The trial court did not err in admitting these challenged statements as hearsay exceptions. As defendant does not challenge the trial court's admission of this evidence on any additional grounds, we find no error.

No error.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. BILLY GENE LEDWELL

No. COA04-872

(Filed 5 July 2005)

1. Appeal and Error— preservation of issues—failure to argue

Defendant abandoned three of his nine assignments of error by failing to argue them in his brief as required by N.C. R. App. P. 10(b).

2. False Pretense— attempting to obtain property by false pretenses—failure to include specific amount of currency—notice

The original and superseding indictments for attempting to obtain property by false pretenses were proper even though they did not include a specific amount of currency which defendant was alleged to have obtained, because: (1) N.C.G.S. § 14-100 states that any money obtained by false pretenses constitutes a violation of the statute and does not specify that the indictment must include the specific amount of money; and (2) the term "United States currency" is sufficient to describe the money and the inclusion of the watch band in the indictment provides defendant with notice of the crime of which he is accused.

3. False Pretense— attempting to obtain property by false pretenses—motion to dismiss—sufficiency of evidence

The trial court did not err in an attempting to obtain property by false pretenses case by denying defendant's motions to dismiss based on an alleged variance between the indictment and the proof presented by the State at trial concerning evidence of a statement that defendant was entitled to a refund for a watchband that defendant knew he had unlawfully taken, because: (1) representation of a false pretense need not come through spoken words, but instead may be by act or conduct; (2) the State presented testimony by witnesses that defendant represented in act and through words that he wanted a refund for the watch; and (3) a reasonable juror could conclude from the State's evidence that defendant represented that he was entitled to a refund.

4. False Pretense— attempting to obtain property by false pretenses—instructions—plain error analysis

The trial court did not commit plain error by instructing the jury regarding elements of attempting to obtain property by false

pretenses even though defendant contends they were not specific to the misrepresentation alleged in the indictment, because: (1) the State presented evidence of a single misrepresentation from which a reasonable juror could infer defendant represented to the employee that he wanted a refund for the watch that defendant knew he had unlawfully taken; and (2) there is no other misrepresentation that the jury could have found and thus there was no need to instruct the jury on the specific misrepresentation.

5. Sentencing— habitual felon—attempting to obtain property by false pretenses

The trial court did not improperly enter judgment and sentence under the habitual felon indictment alone, because: (1) although both the file number for the habitual felon indictment and the file number for the underlying offense of attempting to obtain property by false pretenses (AOPFP) should have been listed in the upper right corner of the judgment, this error is merely clerical; (2) defendant received notice by a proper indictment and was charged with AOPFP, and the file number for AOPFP is noted on the face of the judgment; and (3) defendant was not convicted of being an habitual felon, but rather his status as an habitual felon enhanced his conviction of AOPFP.

6. Sentencing— habitual felon—miscalculation of prior record level

Defendant was not prejudiced by the trial court's miscalculation of his prior record level for purposes of his habitual felon status, because: (1) his sentence was within the range for a Class C level V felon; and (2) the trial court reviewing the miscalculation found as fact that the District Attorney's office discovered convictions that it failed to include in the initial sentencing worksheet, and including these convictions would place him at nineteen points which is within the presumptive range for level VI.

7. Constitutional Law; Sentencing— habitual felon—proportionate—not cruel and unusual punishment

The trial court's sentencing of defendant to 142 months to 180 months was not disproportionate to the crime committed and did not violate defendant's Eighth and Fourteenth Amendment rights, because: (1) contrary to defendant's contention that he was sentenced to a maximum of 180 months for attempting to steal a nine dollar watchband, defendant's sentence was imposed based on his status as an habitual felon; (2) sentencing an habitual felon is

based not only on defendant's most recent offense, but on his past criminal offenses as well; and (3) defendant had a twenty-five year history of criminal convictions.

Appeal by defendant from judgment entered 1 May 2002 by Judge Clarence E. Horton, Jr. in Richmond County Superior Court. Heard in the Court of Appeals 13 June 2005.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for the State.

James P. Hill, Jr. for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from his conviction of attempting to obtain property by false pretenses and of being an habitual felon. We find no error.

The State presented evidence at trial tending to show the following: On 5 January 2001 defendant entered a Wal-Mart store in Rockingham, North Carolina. Defendant approached the jewelry counter, placed two necklace chains on the counter, and asked if he could return them. Defendant had no receipt for the chains and was told that he could not return them because there was no inventory of those items at the store. The jewelry department manager testified that, as defendant walked away from the counter, he removed a watch from the store shelf, placed it in his pocket, and discarded the packaging. The manager then observed defendant request a refund for the watchband from the customer service department. Defendant was informed that he could only return those items in the jewelry department. Defendant then returned to the jewelry department and requested a refund for the necklaces and the watchband. Wal-Mart policy prohibited employees from confronting defendant about shoplifting the watch. Defendant received $13.64 for the watchband.

Defendant presented no evidence. The jury found defendant guilty of attempt to obtain property by false pretenses. Defendant pled guilty to habitual felon status. The trial court imposed a sentence of 142 months to 180 months. Defendant appeals.

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[1] The record on appeal contains nine separate assignments of error. Defendant brings forward six of the assignments of error in his brief. The remaining assignments of error are abandoned. N.C. R.

App. P. 10(b). Defendant asserts (1) the indictment and superceding indictment returned against him were invalid; (2) the trial court erred when it denied defendant's motions to dismiss based on insufficiency of the evidence; (3) the trial court committed plain error by improperly instructing the jury regarding elements of the crime on which defendant is charged; (4) the trial court erred by entering judgment and imposing sentence under the habitual felon indictment; (5) the trial court erred in imposition of sentence against defendant by miscalculating defendant's prior record level; and (6) the sentence of 142 months to 180 months was disproportionate to the crime committed and thus a violation of the Eighth and Fourteenth Amendments. We address these arguments in turn.

I. Indictments

[2] Defendant first contends that the original indictment and superceding indictment for obtaining property by false pretenses were invalid, because the indictments for obtaining property by false pretenses did not include a specific amount of currency which defendant was alleged to have obtained. Defendant argues that the failure of the indictments to state the amount of currency did not provide adequate notice. We do not agree.

The "indictment must charge the essential elements of the alleged offense." *State v. Thomas*, 153 N.C. App. 326, 335, 570 S.E.2d 142, 147 (2002). To provide notice, an indictment must contain, "[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2003). The elements of obtaining property by false pretenses are "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Childers*, 80 N.C. App. 236, 242, 341 S.E.2d 760, 764 (1986).

Regarding the crime of obtaining property by false pretenses, "[i]t is the general rule that the thing obtained . . . must be described with reasonable certainty, and by the name or term usually employed to describe it." *State v. Walston*, 140 N.C. App. 327, 334, 536 S.E.2d 630, 635 (2000) (quoting *State v. Gibson*, 169 N.C. 381, 383, 85 S.E. 7, 8 (1915)). Here, the original and superceding indictments allege that

defendant attempted to obtain "United States currency" by false pretenses. Specifically the indictment alleges defendant communicated false pretenses when he "represented to an employee of Wal-Mart that he was entitled to a refund for a watch band, when in truth and in fact, the defendant knew that he had unlawfully taken the watch band and was not entitled to a refund." North Carolina General Statute § 14-100 states that "any money" obtained by false pretenses constitutes a violation of the statute and does not specify that the indictment include the specific amount of money. N.C. Gen. Stat. § 14-100 (2003).

Although defendant is correct in asserting that the North Carolina Supreme Court has held that the indictment should describe the money by giving the amount in dollars and cents when alleging money has been obtained by false pretenses, the present case can be distinguished from these earlier holdings. *See State v. Smith*, 219 N.C. 400 (1941) (holding that an indictment charging a defendant with obtaining money by false pretenses should describe the money by the amount); *see also State v. Resse*, 83 N.C. 637 (1880) (holding that indictments for obtaining property by false pretenses should describe goods by the usual name and money in dollars and cents). This case is distinguished because the indictment mentions the specific item which defendant used to obtain the money. The term "United States currency" is sufficient to describe the money and the inclusion of the watch band in the indictment provides defendant with notice of the crime of which he is accused. The indictment in question set forth the elements necessary to provide defendant with proper notice regarding the conduct of attempting to obtain property by false pretenses. We overrule this assignment of error.

II. Motion to Dismiss

[3] Second, defendant argues there was a variance between the indictment and the proof presented by the State at trial. The superceding indictment described the false pretense as "[t]he defendant represented to an employee of Wal-Mart that he was entitled to a refund for a watch band, when in truth and in fact, the defendant knew that he had unlawfully taken the watch band and was not entitled to a refund." Defendant argues the State presented insufficient evidence regarding his representation to the Wal-Mart employee that he was entitled to a refund. Defendant contends the trial court therefore should have granted his motion to dismiss. We find no merit to this argument.

"In ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997). Defendant argues the State presented no evidence of a statement that he was entitled to a refund. However, representation of a false pretense "need not come through spoken words, but instead may be by act or conduct." *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001). The State presented testimony by witnesses that defendant represented in act and through words that he wanted a refund for the watchband.

State's witness, Theresa Hatcher, testified that defendant "asked could he get a refund for any of this—which was the watchband and the necklace." Ms. Hatcher also testified, "He went back there [to the jewelry counter] and he pulled out the watchband and this necklace and throwed [sic] them on the counter again, and told them that he wanted a refund." Another witness for the State, Amy Updike, testified at trial, "he came back to the service desk, and he was still trying to get a refund. He had a watchband and a necklace that he put up on there. . . . And he wanted to know if he could get a refund on anything." Mary Durocher, a witness for the State, testified, "[h]e came up to the service desk. And he opened up his hand and had jewelry—a chain in his hand, and a watchband in his hand. And he showed them to me like this, and he was like, . . . 'What do I need to do with this?' "

When viewed in the light most favorable to the State, a reasonable juror could conclude from the State's evidence that defendant represented that he was entitled to a refund.

III. Jury Instructions

[4] Third, defendant argues the jury instructions were prejudicial because they were not specific to the misrepresentation alleged in the indictment. Defendant alleges the trial court erred in giving the following instruction to the jury:

> First, that the defendant made a representation to another. Second, that that representation was false. Third, that the representation was calculated and intended to deceive. You need not find that the person to whom the representation was made was in fact deceived. And, fourth, that the defendant thereby attempted to obtain property from the victim.

Defendant asserts that the jury was never instructed as to the specific misrepresentation it needed to find in order to convict defendant based on the indictment. We do not agree.

Because there was no objection to the instructions during the charge conference, defendant's contention is reviewed under the plain error standard. To determine whether plain error has been committed, "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." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). The error must be so prejudicial that justice has not been served or a fundamental right is denied. *Id.* at 660, 300 S.E.2d at 378.

A jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds "no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury." *State v. Clemmons*, 111 N.C. App. 569, 578, 433 S.E.2d 748, 753 (1993).

The indictment stated that "defendant represented to an employee of Wal-Mart that he was entitled to a refund for a watch band, when in truth and in fact, the defendant knew that he had unlawfully taken the watch band and was not entitled to refund." The State presented evidence of a single misrepresentation. There is no other misrepresentation that the jury could have found; therefore, there is no need to instruct the jury on the specific misrepresentation. The State presented evidence from which a reasonable juror could infer defendant represented to the Wal-Mart employee that he wanted a refund for the watch.

IV. Habitual Felon Status

[5] Fourth, defendant argues that the judgment and commitment impose an active sentence on him solely for being an habitual felon. This argument is based on the omission of the file number for the charge of attempting to obtain property by false pretenses in the upper right corner of the judgment. The judgment lists both file numbers, but only the file number corresponding with the habitual felon indictment is in the upper right corner position. Defendant asserts that this is a judicial error, requiring reversal. We disagree.

Habitual felon is a status meant to enhance a sentence after a person is convicted of a crime. The habitual criminal act does not create a separate offense that is sufficient to support a criminal sen-

tence by itself. *State v. Thomas*, 82 N.C. App. 682, 683, 347 S.E.2d 494, 495 (1986). Though both the file number for the habitual felon indictment and the file number for the underlying offense of attempting to obtain property by false pretenses should have been listed in the upper right corner, this is no more than a clerical error. Defendant received notice by a proper indictment and was clearly charged with attempting to obtain property by false pretenses. The file number for attempting to obtain property by false pretenses is noted on the face of the judgment. Defendant was sentenced only once as required by the habitual felon statute. N.C. Gen. Stat. § 14-7.6 (2003). Defendant was not convicted of being an habitual felon, rather his status as an habitual felon enhanced his conviction of attempting to obtain property by false pretenses.

V. Prior Record Level

[6] Defendant argues that two of his prior convictions were incorrect for the purposes of his habitual felon status. Defendant correctly notes that his conviction for sell/delivery of cocaine should have been calculated as a Class H felony instead of a Class G felony and the convictions for 97 CRS 9949 should have been counted once, for a resulting record level of V.

However, defendant has suffered no prejudice, as his sentence was within the range for a Class C level V felon. In addition, the trial court reviewing the miscalculation found as fact that the District Attorney's office discovered convictions that it failed to include in the initial sentencing worksheet. Including these convictions in defendant's prior record would place him at nineteen points; the presumptive range for level VI. Thus, defendant has suffered no prejudice as a result of the error.

VI. Proportionality of the Sentence

[7] Finally, defendant argues that his sentence of 142 months to 180 months is disproportionate to the crime he committed, and that it therefore violates the Eighth Amendment prohibition on cruel and unusual punishment. We do not agree.

It is highly unusual for the sentence in a non-capital case to be so disproportionate that it violates the Eighth Amendment. *State v. Hensley*, 156 N.C. App. 634, 639, 577 S.E.2d 417, 421 (2003). Contrary to defendant's contention that he was sentenced to a maximum of 180 months for attempting to steal a nine dollar watchband, defendant's sentence was imposed based on his status as an habitual felon.

Sentencing an habitual felon is based not only on his most recent offense, but on the past criminal offenses as well. *State v. Aldridge*, 76 N.C. App. 638, 640, 334 S.E.2d 107, 108, (1985). Defendant had a lengthy criminal record and was sentenced accordingly. The sentence of 142 months to 180 months is not disproportionate to defendant's twenty-five year history of criminal convictions.

No error.

Judges WYNN and TIMMONS-GOODSON concur.

JOY A. STACK, AS ADMINISTRATRIX OF THE ESTATE OF STACY B. STACK, PLAINTIFF-APPELLANT V. UNION REGIONAL MEMORIAL MEDICAL CENTER, INC., AND CAROLINAS HEALTHCARE FOUNDATION, INC. D/B/A UNION REGIONAL MEDICAL CENTER, DEFENDANTS-APPELLEES

No. COA04-914

(Filed 5 July 2005)

Process and Service— validity of alias or pluries summons— relation back—summons listed different corporation

The trial court did not err by granting summary judgment in favor of defendant hospital based on the fact that the summons issued against defendant was not a valid alias or pluries summons under N.C.G.S. § 1A-1, Rule 4(d), because: (1) the original civil summons was not directed to defendant and was actually served on a foundation, and thus the subsequent issuance of a summons against defendant did not relate back to the original summons; (2) plaintiff did not attempt service on defendant through the wrong registered agent when the summons listed an entirely different corporation, and plaintiff never attempted service on defendant until almost five months after service was due; (3) it would be inconsistent to hold that an action against multiple defendants can be commenced by issuing a summons to a single defendant with process and service to the other defendants to come at plaintiff's leisure; and (4) plaintiff presented no evidence that defendant had actual notice of the suit, and further our courts have repeatedly held that actual notice is not a valid substitute for service when that service does not comply with the statute.

Appeal by plaintiff from order entered 20 February 2004 by Judge W. David Lee in Superior Court, Union County. Heard in the Court of Appeals 9 March 2005.

Karen Zaman & Associates, by Karen Zaman, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein L.L.P., by Harvey L. Cosper, Jr. and John E. Grupp, for defendant-appellee Union Regional Memorial Medical Center, Inc.

McGEE, Judge.

Joy A. Stack (plaintiff) appeals from an order entered 20 February 2004 granting summary judgment in favor of defendant Union Regional Memorial Medical Center, Inc. (Union Regional).

Plaintiff originally filed a complaint against Union Regional on 13 November 2000. Plaintiff served the complaint on Union Regional's registered agent, Libby Drury, on 13 November 2000. Plaintiff filed a voluntary dismissal without prejudice of all claims pending against Union Regional on 23 May 2002.

Plaintiff filed a second complaint on 20 May 2003 against Union Regional and "Carolinas Healthcare Foundation, Inc. d/b/a Union Regional Medical Center." A summons was issued on 20 May 2003 for service on Scott Kerr, registered agent for Carolinas Healthcare Foundation, Inc. (the Foundation). The summons was returned not served, and subsequently endorsed on 16 July 2003. The summons and complaint were served on Scott Kerr by certified mail on 24 July 2003. No summons was issued to or served on Union Regional.

The Foundation filed a motion for summary judgment on 26 September 2003. The motion stated, in pertinent part:

> 12. The Foundation has never done business as Union Regional[.] Furthermore, the Foundation has never owned, merged with, operated or controlled Union Regional. . . .
>
> 13. The Foundation is a charitable organization. It does not currently and did not in July 1997 engage in the provision or supervision of healthcare services. . . .
>
> . . . .

> 16. Scott Kerr is not the registered agent for Union Regional . . ., and the Foundation is not authorized to accept service of legal documents on Union Regional. . . .

Plaintiff thereafter obtained a civil summons for Union Regional and served the summons and complaint by certified mail on 14 October 2003 on Keith A. Smith, the registered agent for Union Regional at that time. Union Regional filed a motion to dismiss, or in the alternative a motion for summary judgment, on 10 December 2003. Union Regional contended that plaintiff was required to recommence its action against Union Regional by 23 May 2003 under the requirements of Rule 41, which states that "a new action based on the same claim may be commenced within one year after such dismissal[.]" N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2003). Although plaintiff filed her second complaint on 20 May 2003, a summons was not issued against Union Regional until 14 October 2003. Union Regional claimed that the 14 October 2003 summons was a new summons, and not a valid alias or pluries summons. Union Regional argued that, therefore, plaintiff failed to recommence its action against Union Regional until 14 October 2003, almost five months after the 20 May 2003 deadline.

In orders entered 20 February 2004, the trial court granted both Union Regional's and the Foundation's motions for summary judgment. Plaintiff appeals only from the order granting summary judgment for Union Regional.

Plaintiff's sole assignment of error contends that the trial court erred in granting Union Regional's motion for summary judgment because the summons issued against Union Regional was a valid alias or pluries summons. Rule 4 of the North Carolina Rules of Civil Procedure governs the procedures for service of process. N.C. Gen. Stat. § 1A-1, Rule 4 (2003). A summons must be issued within five days of the filing of a complaint. N.C.G.S. § 1A-1, Rule 4(a). That summons must then be served on a defendant "within 60 days after the date of the issuance of summons." N.C.G.S. § 1A-1, Rule 4(c). If service cannot be made to a defendant within that time,

> the action may be continued in existence as to such defendant by either of the following methods of extension:
>
> (1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. . . . Such endorsement may

be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or

(2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain or summonses or within 90 days of the last prior endorsement.

N.C.G.S. § 1A-1, Rule 4(d). If neither of these deadlines are met,

> the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, *but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.*

N.C.G.S. § 1A-1, Rule 4(e) (emphasis added).

Plaintiff first contends that the 14 October 2003 summons was a valid alias or pluries summons properly issued within ninety days of the 16 July 2003 endorsement of the original 20 May 2003 summons. Plaintiff argues that case law supports the substitution of Union Regional for the Foundation as the named defendant in the 20 May 2003 summons. We disagree.

As the text of Rule 4(d) makes clear, an alias or pluries summons is simply an extension of the deadline for service of the original summons: "When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension . . . ." N.C.G.S. § 1A-1, Rule 4(d); *see also Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 5, 351 S.E.2d 834, 837 (1987) ("The function of an alias [or] pluries summons is to keep a lawsuit alive and maintain the original date of the commencement of the action when the original summons has not been properly served upon the original defendant named therein."). Therefore, the validity of an alias or pluries summons is dependent on the validity of the original summons.

Since the original civil summons was not directed to Union Regional, the subsequent issuance of a summons against Union Regional did not relate back to the original summons. *See Roshelli v.*

Sperry, 63 N.C. App. 509, 511, 305 S.E.2d 218, 219, *disc. review denied*, 309 N.C. 633, 308 S.E.2d 716 (1983). In *Roshelli*, the plaintiff filed a complaint on 27 March 1981 against the defendant seeking recovery for personal injuries when the defendant's daughter negligently drove the defendant's car. *Id.* at 510, 305 S.E.2d at 218. A summons was issued that same day in the name of the defendant's daughter. *Id.* However, a summons was not issued in the name of the defendant until 7 April 1981, eleven days after the complaint was filed. *Id.* We held that the 7 April 1981 summons did not relate back to the 27 March 1981 summons: "The purpose of Rule 4(d) is only to keep the action alive by means of an endorsement on the original summons or by issuance of an alias or pluries summons in situations where the original, properly directed summons was not yet served." *Id.* at 511-12, 305 S.E.2d at 219. Since the original summons was not properly directed to the defendant, and was actually served on another individual, Rule 4(d) did not apply and the summons was not a valid alias or pluries summons. *Id.*

The present case is similar to *Roshelli* in that the original summons was not directed to or served on Union Regional, but rather an entirely different entity. Since there was not a properly directed summons that was merely not served, Rule 4(d) does not apply and the subsequent summons is not a valid alias or pluries summons that relates back to the original summons. Therefore, plaintiff's service of process on Union Regional fell outside of the statutorily authorized time.

Plaintiff argues that her summons merely names the incorrect agent, not the incorrect defendant, and that summary judgment was therefore improper. In support of her argument, plaintiff relies on *Tyson*. In *Tyson*, the plaintiff directed the summons to "L'eggs Products, Inc. c/o Registered Agent Proctor-Wayne Leggett." *Tyson*, 84 N.C. App. at 3, 351 S.E.2d at 836. However, Proctor-Wayne Leggett was the registered agent for "Leggs, Inc.," a corporation that had no relation to L'eggs Products, Inc. *Id.* at 4, 351 S.E.2d at 836. The plaintiff thereafter served an alias or pluries summons on the Vice President of Manufacturing for L'Eggs Products, Inc. *Id.* We held that the original summons complied with the Rule 4 requirement that a summons "be directed to the defendant," N.C.G.S. § 1A-1, Rule 4(b), since "th[e] summons was directed to the corporate defendant *in care of* the agent." *Id.* at 5, 351 S.E.2d at 836.

We find *Tyson* inapposite to this case. Plaintiff did not attempt service on Union Regional through the wrong registered agent.

Rather, plaintiff never attempted service on Union Regional until almost five months after service was due. The original summons in this case named an entirely different corporation, not just a different agent. Therefore, the summons did not comply with the Rule 4(b) requirement that a summons "be directed to the defendant." N.C.G.S. § 1A-1, Rule 4(b).

Plaintiff next argues that the Rule 4 requirement that a summons be issued within five days does not signify a requirement that a summons be issued to *each* defendant in the case, but simply that *a* summons be issued within that time frame. Thus, plaintiff argues that Rule 4 is satisfied if a summons is issued to *any* one of the defendants within five days of filing a complaint.

Rule 4(b) explicitly states: "[The summons] shall be directed to the defendant or defendants and shall notify *each defendant* to appear and answer within 30 days after its service upon [the defendant or the defendants] . . . ." N.C.G.S. § 1A-1, Rule 4(b) (emphasis added).

While this Court has never directly addressed this question, we have previously held that a plaintiff has only a five-day window within which to commence suit by issuing a summons. *See*, *e.g.*, *Selph v. Post*, 144 N.C. App. 606, 607, 552 S.E.2d 171, 172 (2001); *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984). It would be inconsistent with such holdings to now hold that an action against multiple defendants can be commenced by issuing a summons to a single defendant, with process and service to the other defendants to come at plaintiff's leisure. "The purpose and aim of the service of the summons are to give notice to the party against whom the proceeding or action is commenced[.]" *Jester v. Steam Packet Co.*, 131 N.C. 54, 55, 42 S.E. 447, 448 (1902); *see also Harris v. Maready*, 311 N.C. 535, 541-42, 319 S.E.2d 912, 916 (1984); *Wiles v. Construction Co.*, 295 N.C. 81, 84, 243 S.E.2d 756, 758 (1978); *Morton v. Insurance Co.*, 250 N.C. 722, 725, 110 S.E.2d 330, 332 (1959); *Farr v. City of Rocky Mount*, 10 N.C. App. 128, 130, 177 S.E.2d 763, 764 (1970), *cert. denied*, 277 N.C. 725, 178 S.E.2d 831 (1971). Such notice cannot be accomplished when service of summons is not made to each individual defendant.

Plaintiff suggests that, because the Foundation and Union Regional share the same attorney and have registered agents for service at the same address, Union Regional must have known about the

suit. This argument is without merit. Plaintiff has presented no evidence that Union Regional had actual notice of the suit. Furthermore, our Courts have repeatedly held that actual notice is not a valid substitute for service when that service does not comply with the statute. *See Guthrie v. Ray*, 293 N.C. 67, 69, 235 S.E.2d 146, 148 (1977) (" '[W]here a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service.' " (quoting *Lowman v. Ballard*, 168 N.C. 16, 18, 84 S.E. 21, 22 (1915))); *Philpott v. Kerns*, 285 N.C. 225, 228, 203 S.E.2d 778, 780 (1974) (finding that actual notice is not a substitute for valid service in accordance with the statute); *Roshelli v. Sperry*, 57 N.C. App. 305, 307, 291 S.E.2d 355, 356 (1982) ("It is generally held that process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid even though a defendant had actual notice of the lawsuit.").

We find plaintiff's arguments to be without merit. We affirm the order of the trial court granting summary judgment to Union Regional.

Affirmed.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. ERIC MACKINLEY LEDWELL

No. COA04-958

(Filed 5 July 2005)

1. Drugs— felonious possession of a controlled substance— improper indictment

The trial court lacked jurisdiction to convict defendant of felonious possession of a controlled substance because the indictment which alleged possession of methylenedioxyamphetamine failed to allege a substance listed in Schedule 1 of N.C.G.S. § 90-89.

2. Drugs— felonious conspiracy to traffic in cocaine—failure to instruct on lesser-included charges

The trial court did not err in a felonious conspiracy to traffic in cocaine case by failing to instruct on the lesser-included offenses of conspiracy to traffic in cocaine by possession of 200 to 400 grams of cocaine and conspiracy to feloniously possess cocaine, because: (1) despite defendant's contention, there is no conflicting evidence in the record as to the amount of cocaine defendant was to traffic; and (2) the fact that not all of the money that defendant was told to pay for the cocaine was on him at the time of his arrest and that the cocaine was packaged in smaller bags was not enough evidence to convince the trier of fact that defendant should be convicted of less grievous offenses.

3. Appeal and Error— preservation of issues—failure to argue

Defendant's failure to argue an assignment of error means that it is deemed abandoned pursuant to N.C. R. App. P. 28(b).

Appeal by Defendant from judgment entered 12 December 2003 by Judge Ronald E. Spivey in Superior Court, Guilford County. Heard in the Court of Appeals 6 June 2005.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State.

M. Gordon Widenhouse, Jr., for the defendant-appellant.

WYNN, Judge.

An indictment is fatally flawed where it "fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (quotation omitted). Here, Defendant Eric MacKinley Ledwell contends that the trial court lacked jurisdiction on the charge of felonious possession of a controlled substance because the indictment failed to allege a substance listed in Schedule I, North Carolina General Statutes section 90-89. N.C. Gen. Stat. § 90-89(3) (2003). We agree and hold that the indictment fails to allege felonious possession of a Schedule I controlled substance. But as to Defendant's issues on appeal regarding the remaining charge of felonious conspiracy to traffic in cocaine, we find no error.

The record reflects that on 15 October 2002, members of the Greensboro Police Department monitored the motel area near

Interstate 40 and High Point Road for narcotics trafficking. That day, Defendant was observed checking into a motel, exiting the motel while on a cellular telephone and looking up and down the street. Approximately ten minutes thereafter, a blue Ford Expedition entered the motel parking lot. The driver was driving very slowly and circling and was also on a cellular telephone. The driver of the Expedition then parked the vehicle, Defendant got into the passenger side, and the vehicle left the parking lot. The police stopped the Expedition, and Defendant was asked to step out of the vehicle and placed under arrest. A police detective searched the Expedition and found, in the front center console, a semi-automatic weapon, and in the back center console, $3000.00 in cash. When the police searched Defendant's person, they found $8690.00 in cash, postal scales, marijuana, and a tablet of "[m]ethylenedioxyamphetamine (MDA)[.]" When the driver of the Expedition, Timothy Walden, was searched, he was found to have $2472.00 and marijuana on his person.

Shortly after stopping the Expedition, the police stopped a black pick-up truck that had been following the Expedition. The driver of the pick-up truck, Eliazar Perez Garcia, appeared shocked, looked toward the Expedition, and stated "I don't know them." Garcia was asked to step out of the vehicle, and the police observed that Garcia's pocket contained a large, partially open grocery bag filled with cocaine. Garcia also had $4236.00 in cash on his person.

Defendant presented no evidence at trial. Moreover, Defendant entered into a stipulation at trial as to "a laboratory report reflecting the contents of the plastic bag described as off-white powder sent, and reflected in State's Exhibit No. 2, containing cocaine, Schedule II. The weight of that material, 592.2 grams." The trial court then explained to the jury "Members of the jury, the parties have stipulated or agreed that these facts should be accepted by you as true without further authentication or proof in the form of this laboratory report . . . ." Further, at trial, Garcia testified that Defendant "called me and he told me to bring him that amount [of cocaine]. And that's what I did." Garcia testified that Defendant had "three of four times[]" bought 500 grams of cocaine from him. In response to being asked "Did you get drugs for any other people other than Eric Ledwell[,]" Garcia responded "No." When asked "[w]ere all the drugs for Eric Ledwell[,]" Garcia responded affirmatively. Moreover, evidence admitted at trial demonstrated that Defendant and Garcia had telephoned one another's cellular telephones before their arrests.

Defendant was convicted of felonious possession of MDA and felonious conspiracy to traffic in cocaine by possession of more than 400 grams. Defendant appeals.

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[1] On appeal, Defendant contends that the trial court lacked jurisdiction on the charge of felonious possession of a controlled substance because the indictment was facially insufficient in failing to allege a substance listed in Schedule I.[1] We agree.

"It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted). An "indictment must allege all of the essential elements of the crime sought to be charged." *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (citation omitted). Identity of a controlled substance allegedly possessed is such an essential element. *State v. Board*, 296 N.C. 652, 658, 252 S.E.2d 803, 807 (1979) (testimony that substance a special agent purchased was "MDA" insufficient evidence that defendant possessed and sold "3, 4-methylenedioxyamphetamine" as charged in bills of indictment). An indictment is invalid where it "fails to state some essential and necessary element of the offense of which the defendant is found guilty." *Wilson*, 128 N.C. App. at 691, 497 S.E.2d at 419 (quotation omitted).

Here, the indictment at issue states that "on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did possess Methylenedioxyamphetamine (MDA), a controlled substance included in Schedule I of the North Carolina Controlled Substances Act."

Schedule I of the Controlled Substances Act, North Carolina General Statutes section 90-89, includes, *inter alia*, the following controlled substances:

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1. The State argues that because Defendant did not previously raise the indictment issue, it is not preserved for appellate review. We disagree. "[W]hen an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001). Moreover, the State offers no support for its unconvincing argument that Defendant's stipulating to the laboratory analysis of the substance seized constituted a waiver of the indictment issue. *See Wilson*, 128 N.C. App. at 691, 497 S.E.2d at 419 (a defendant's waiver of indictment must be in writing and signed by the defendant and his attorney; tendering a guilty plea, tendering an unsigned waiver, and requesting a jury instruction do not constitute waiver).

(3) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

a. 3, 4-methylenedioxyamphetamine.

b. 5-methoxy-3,4-methylenedi-oxyamphetamine.

c. 3,4-Methylenedioxymethamphet-amine (MDMA).

d. 3,4-methylenedioxy-N-ethyl-amphetamine (also known as N-ethyl-alpha-methyl-3,4-(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA).

e. N-hydroxy-3,4-methylenedioxy-amphetamine (also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA).

N.C. Gen. Stat. § 90-89(3). In the case *sub judice*, the indictment alleged possession of "[m]ethylenedioxyamphetamine (MDA), a controlled substance included in Schedule I of the North Carolina Controlled Substances Act." No such substance, however, appears in Schedule I.[2]

In a similar case, *United States v. Huff*, 512 F.2d 66 (5th Cir. 1975), the defendant was charged with two crimes: distribution of "3,4 methylenedioxy amphetamine," a controlled substance pursuant to a statutory schedule of controlled substances, and possession of "methylenedioxy amphetamine," which was not listed on the statutory schedule of controlled substances. The Fifth Circuit stated that while "[t]he addition of the numbers '3,4' would have indeed saved this count, . . . we cannot regard this defect as a mere technicality, for the chemical and legal definition of these substances is itself technical and requires precision." *Id.* at 69. The Fifth Circuit held that the second count failed to charge an offense and reversed the defendant's conviction. In contrast, in *Rogers v. State*, 599 So. 2d 930 (Miss. 1992), the Supreme Court of Mississippi upheld an indictment that charged a defendant with distribution of "crystal methamphetamine." Notably,

2. *State v. Hosick*, 12 N.C. App. 74, 182 S.E.2d 596 (1971), indicated that "3, 4—Methylenedioxyamphetamine (MDA)" and "Methylenedioxyamphetamine" do not constitute the same substance. Moreover, in the case *sub judice*, an investigating detective testified at trial that the substance he believed Defendant possessed was "MDMA[.]"

however, the Mississippi controlled substance statute explicitly included as controlled substances " '[a]ny substance which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers[.]" *Id.* at 933 (emphasis omitted) (quotation omitted). North Carolina's Schedule I, in contrast, does not include any substance which contains any quantity of "methylenedioxyamphetamine (MDA)." N.C. Gen. Stat. § 90-89.

Here, as in *Huff*, the substance listed in Defendant's indictment does not appear in Schedule I of the North Carolina Controlled Substances Act. N.C. Gen. Stat. § 90-89. As a consequence, the indictment must fail, and Defendant's conviction of felonious possession of "[m]ethylenedioxyamphetamine (MDA)[]" is vacated.

[2] Defendant further argues that the trial court erred by failing to instruct the jury on the lesser-included offenses of conspiracy to traffic in cocaine by possession of 200 to 400 grams of cocaine and conspiracy to feloniously possess cocaine "where there was conflicting evidence as to the specific amount of cocaine[]" Defendant intended to possess. We disagree.

A defendant "is 'entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). However, " 'due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence.' " *Id.* (quoting *Hopper v. Evans*, 456 U.S. 605, 611, 72 L. Ed. 2d 367, 373 (1982)) (citation omitted). "The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985) (quotation and citation omitted).

The crime of conspiracy is an agreement to commit a substantive criminal act, here trafficking by possession of cocaine. *State v. Griffin*, 112 N.C. App. 838, 840, 437 S.E.2d 390, 392 (1993) ("The essence of the crime of conspiracy is the agreement to commit a substantive crime." (citation omitted)). The crime is complete when

the agreement is made; no overt act in furtherance of the agreement is required. *State v. Rozier*, 69 N.C. App. 38, 49-50, 316 S.E.2d 893, 900-01 (1984).

Despite Defendant's contention, there is no conflicting evidence in the record as to the amount of cocaine Defendant entered into an agreement, *i.e.*, a conspiracy, to traffic. Garcia testified that Defendant "called me and he told me to bring him that amount [of cocaine]. And that's what I did." Garcia testified that Defendant had "three of four times[]" bought 500 grams of cocaine from him. When asked if all the drugs he had when arrested were for Defendant, Garcia responded affirmatively, and the State's laboratory report, to which Defendant stipulated, proved that the white powder found on Garcia was cocaine and that the weight of the cocaine was 592.2 grams. Defendant himself presented no evidence at trial. The fact that not all of the $11,500 Garcia was to be paid for the cocaine was on Defendant's person at the time of Defendant's arrest ($8690.00 was found on Defendant's person, $3000.00 was found in the back center console of the Expedition, and $2417.00 was found on Walden's person) and that the cocaine was packaged in three bags contained in one larger grocery bag could not "convince a rational trier of fact to convict the defendant of a less grievous offense." *Peacock*, 313 N.C. at 558, 330 S.E.2d at 193. The trial court therefore did not err in not giving jury instructions for conspiracy to traffic in cocaine by possession of 200 to 400 grams of cocaine and conspiracy to feloniously possess cocaine.

[3] Defendant failed to argue his second assignment of error. It is therefore deemed abandoned. N.C. R. App. 28(b).

No Error in part, Vacated in part.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

IN RE S.W.

[171 N.C. App. 335 (2005)]

IN THE MATTER OF: S.W.

No. COA04-1138

(Filed 5 July 2005)

1. Search and Seizure— warrantless search of student at school—school resource officer—motion to suppress drugs

The trial court did not err in a delinquency hearing arising out of possession with intent to sell or deliver a schedule VI substance by denying defendant juvenile's motion to suppress evidence of drugs obtained during a search by a deputy, because: (1) the deputy was exclusively a school resource officer who was present in the school hallways during school hours and was furthering the school's educational related goals when he stopped the juvenile; (2) the deputy was not conducting the investigation at the behest of an outside officer who was investigating a non-school related crime; (3) the deputy's employment mandated that he help maintain a drug-free environment at the school, and the deputy smelled a strong odor of marijuana when defendant walked past him in the hall which gave the deputy reasonable grounds to suspect that a search would turn up evidence the juvenile violated or was violating the law and/or school rules; (4) the search was reasonably related to the objective and was not excessively intrusive in light of the age and gender of the juvenile and the nature of the suspicion; and (5) the juvenile consented to the search even though the search could have been performed without his consent.

2. Trials— incomplete transcript—presumption of regularity

Defendant juvenile is not entitled to a new delinquency hearing based on an incomplete transcript of his adjudication where portions of the transcript contain the word "inaudible" omitting sections of missing testimony, because the juvenile failed to demonstrate, and a review of the record failed to disclose, any specific affirmative showing that error was committed in the inaudible portions of the transcript to overcome the presumption of regularity at trial.

Appeal by juvenile from orders entered 25 March 2004 by Judge Marcia H. Morey in Durham County District Court. Heard in the Court of Appeals 9 May 2005.

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for juvenile-appellant.

TYSON, Judge.

S.W. ("juvenile") appeals from adjudication and dispositional orders finding him delinquent for possession with intent to sell or deliver a schedule VI substance. We affirm.

I. Background

On 2 December 2003, the juvenile walked by Durham County Deputy Sheriff and School Resource Officer Eric Wade Carpenter ("Deputy Carpenter") at Riverside High School. Deputy Carpenter noticed a strong odor of marijuana emanating from the juvenile, and requested the juvenile to accompany him in the hallway. Deputy Carpenter located two school administrators, Assistant Principal Travis Taylor ("Assistant Principal Taylor") and Assistant Principal Dan Davis ("Assistant Principal Davis"). Deputy Carpenter asked Assistant Principals Taylor and Davis and two unidentified students to accompany him and the juvenile into the school's weight room. There, Deputy Carpenter asked the juvenile if he "had anything on him." The juvenile responded, "no." Deputy Carpenter asked the juvenile, "do you mind if I search?" Again, the juvenile responded, "no." Deputy Carpenter conducted a search and requested the juvenile to empty his pockets. While emptying his pockets, the juvenile produced a plastic bag that containing ten small plastic bags of marijuana.

On 17 December 2003, a juvenile petition was filed alleging the juvenile possessed with intent to sell or deliver a schedule VI substance in violation of N.C. Gen. Stat. § 90-95(a)(1). During the hearing, Deputy Carpenter testified for the State and the juvenile testified on his own behalf. The trial court found the juvenile to be delinquent and placed him on level I supervised probation for six months. The juvenile appeals.

II. Issues

The juvenile argues the trial court erred by: (1) denying his motion to suppress evidence obtained during an alleged unlawful search; and (2) failing to provide him with a reliable and accurate transcript of his hearing in violation of his United States and North Carolina Constitutional rights.

III. Motion to Suppress

[1] The juvenile argues the trial court should have granted his motion to suppress evidence obtained during an alleged unlawful search. We disagree.

We note initially the juvenile properly preserved his assignment of error by objecting when the trial court denied his motion to suppress in conformity with the amended North Carolina Rules of Evidence 103. N.C. Gen. Stat. § 8C-1, Rule 103 (2003); 2003 N.C. Sess. Laws ch. 101, §§ 1-2 (effective 1 October 2003); *see also State v. Rose*, 170 N.C. App. 284, 288, 612 S.E.2d 336, 339 (2005) (holding once the trial court denied the defendant's motion to suppress, he was not required to object again to preserve argument for appeal).

Our review is limited to whether the trial court's findings of fact are supported by competent evidence. *State v. Tappe*, 139 N.C. App. 33, 38, 533 S.E.2d 262, 264-65 (2000). If competent evidence exists in the record, the trial court's findings of fact are binding upon appeal. *Id.* Our review is focused upon whether those findings of fact support the trial court's conclusions of law. *Id.* "Nevertheless, the conclusions of law drawn from the facts found are not binding on the appellate court." *State v. Pruitt*, 286 N.C. 442, 454, 212 S.E.2d 92, 100 (1975) (citations omitted).

IV. Warrantless Searches

The United States Supreme Court discussed warrantless searches of students at school in *New Jersey v. T.L.O.*, 469 U.S. 325, 83 L. Ed. 2d 720 (1985) (holding the juvenile's consent is not needed to conduct a search of his person while at school).

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

Id. at 341-42, 83 L. Ed. 2d at 734-35.

Applying the *T.L.O.* standard, this Court found it permissible to conduct a search of a student based upon a school's investigation or

at the direction of a school official, in the furtherance of well established educational and safety goals. *In re D.D.*, 146 N.C. App. 309, 318, 554 S.E.2d 346, 352 (citations omitted), *appeal dismissed and disc. rev. denied*, 354 N.C. 572, 558 S.E.2d 867 (2001). More recently, we held

> [w]hile the holding in *T.L.O.* was limited to searches by school administrators and officials, our Court has recently adopted an extension of this reasonableness standard to searches conducted by law enforcement officials. We have since held that the *T.L.O.* standard governs searches conducted by resource officers working " 'in conjunction with' school officials," where these officers are primarily responsible to the school district rather than the local police department.

In re J.F.M., 168 N.C. App. 143, 147, 607 S.E.2d 304, 307 (citing *In re D.D.*, 146 N.C. App. at 320, 554 S.E.2d at 353-54 (citations omitted)), *disc. rev. denied*, 359 N.C. 411, 612 S.E.2d 321 (2005).

> Courts draw a clear distinction between the aforementioned categories of cases and those cases in which outside law enforcement officers search students as part of an independent investigation or in which school official[s] search students at the request or behest of the outside law enforcement officers and law enforcement agencies. Courts do not apply *T.L.O.* to these cases but instead require the traditional probable cause requirement to justify the search.

In re D.D., 146 N.C. App. at 318, 554 S.E.2d at 352 (internal citation omitted).

Deputy Carpenter was an employee of the Durham County Sheriff's Department. He was assigned to permanent full-time duty as the Riverside High School resource officer. *See In re J.F.M.*, 168 N.C. App. at 147, 607 S.E.2d at 307 (holding the *T.L.O.* standard applies to law enforcement officers which are resource officers acting in conjunction with school officials). Deputy Carpenter assisted school officials with school discipline matters and taught law enforcement related subjects. *Id.* Deputy Carpenter was exclusively a school resource officer, who was present in the school hallways during school hours and was furthering the school's educational related goals when he stopped the juvenile. *Id.*

Deputy Carpenter was not an outside officer conducting an investigation. *See id.*; *see also T.L.O.*, 469 U.S. at 341-42, 83 L. Ed. 2d at

734-35. Deputy Carpenter did not conduct the investigation at the behest of an outside officer who was investigating a non-school related crime. In maintaining a proper educational environment, Deputy Carpenter's employment as a resource officer mandates that he help maintain a drug free environment at the school. When the juvenile walked by Deputy Carpenter in the hall, Deputy Carpenter smelled a "strong odor" of marijuana. Deputy Carpenter had a reasonable suspicion the juvenile possessed marijuana in violation of State law and the school's rules. *T.L.O.*, 469 U.S. at 341-42, 83 L. Ed. 2d at 734. Deputy Carpenter was working in conjunction with school officials and did not need to obtain the juvenile's consent to search him. *In re J.F.M.*, 168 N.C. App. at 148-49, 607 S.E.2d at 307. The search of the juvenile was limited to a "pat down" and the juvenile emptying his pockets, which produced a plastic bag containing ten small plastic bags of marijuana.

After having smelled marijuana on the juvenile, Deputy Carpenter had reasonable grounds to suspect a search would turn up evidence the juvenile violated or was violating the law and or school rules. The search was reasonably related to the objective and was not excessively intrusive in light of the age and gender of the juvenile and the nature of the suspicion. *T.L.O.*, 469 U.S. at 341-42, 83 L. Ed. 2d at 734-35. Evidence tended to show the juvenile consented to the search and neither his United States nor North Carolina Constitutional rights were violated. The search could have been performed without his consent. The trial court's denial of the juvenile's motion to suppress was supported by competent evidence. *In re J.F.M.*, 168 N.C. App. at 148-49, 607 S.E.2d at 307; *see also Tappe*, 139 N.C. App. at 38, 533 S.E.2d at 264-65. This assignment of error is overruled.

V. Accurate Transcript

[2] The juvenile contends he should be granted a new hearing due to the incomplete transcript of his adjudication. We disagree.

There is a presumption of regularity in a trial. *State v. Sanders*, 280 N.C. 67, 72, 185 S.E.2d 137, 140 (1971). In order to overcome this presumption, it is necessary for the defendant to include or call our attention to matters which constitute material and reversible error in the record on appeal. *Id.*

> Before a new trial should be ordered, certainly enough ought to be alleged to show that error was probably committed. If defense counsel even suspect error in the charge, they should set out in

> the record what the error is. If the solicitor does not object, theirs becomes the case on appeal. If he does object, the court could then settle the dispute. The appellate court would then have something tangible upon which to predicate a judgment. The material parts of a record proper do not include either the testimony of the witnesses or the charge of the court.

In re Howell, 161 N.C. App. 650, 654, 589 S.E.2d 157, 159 (2003).

This Court has considered cases in which a complete stenographic trial transcript was lacking. *State v. Neely*, 26 N.C. App. 707, 708, 217 S.E.2d 94, 96, *cert. denied*, 288 N.C. 512, 219 S.E.2d 347 (1975). In *Neely*, a partial transcript was prepared. *Id.* The direct examination of at least two witnesses, in addition to defendant's testimony, were not transcribed. *Id.* The defendant appealed and alleged errors which may have been committed in portions of the lost testimony. *Id.*

This Court emphasized the presumption of regularity in a trial and indicated specific error should be set forth by the defendant in the record. *Id.* We concluded that mere allegations that an error occurred is not sufficient to warrant a reversal. *Id.* at 709, 217 S.E.2d at 97. We stated, "absent some specific, affirmative showing by the defendant that error was committed, we will uphold the conviction because of the presumption of regularity in a trial." *Id.*

Here, portions of the transcript read "inaudible." These facts are unlike *Neely* where the transcript of entire testimonies were missing. *Id.* The juvenile argues these portions of the transcript that read "inaudible" are prejudicial and a new hearing should be granted. The juvenile fails to demonstrate and our review does not disclose any "specific, affirmative showing" that error was committed in the inaudible portions of the transcript to overcome the presumption of regularity at trial. *Id.* This assignment of error is overruled.

VI. Conclusion

The juvenile's argument that his consent for the search was not freely given is moot. The search could have been lawfully performed without his consent. Deputy Carpenter had a valid reason to search the juvenile and the search was in furtherance of the school's objective to maintain a proper and drug free educational environment.

The transcript contains the word "inaudible" omitting sections of missing testimony. This case highlights the serious need for reliable

and accurate transcription equipment in our district courtrooms. A rising number of direct appeals from the district court contain transcripts where portions of the trial transcript are missing, inaudible, or of such poor quality that an accurate transcript cannot be prepared. We note our concern as the number of appeals and the need will only increase. However, the missing or inaudible sections of the transcript do not: (1) rise to the level of prejudicial error; (2) preclude the juvenile from preparing an adequate defense; or (3) prevent this Court's review for errors in the juvenile's hearing. The trial court's adjudication and dispositional orders finding the juvenile delinquent for possession with intent to sell or deliver a schedule VI substance are affirmed.

Affirmed.

Chief Judge MARTIN and Judge LEVINSON concur.

IN THE MATTER OF: C.B.

No. COA04-1166

(Filed 5 July 2005)

1. Child Abuse and Neglect— failure to appoint guardian ad litem for parent—mental illness

The trial court erred by adjudicating respondent mother's minor daughter as dependent and neglected without appointing respondent a guardian ad litem as required by N.C.G.S. § 7B-602 and the case is remanded for a new trial, because: (1) the neglect and dependency petition specifically alleged dependency as a ground for adjudication, and the petition twice referred to respondent's mental health issues and referenced respondent's alleged sexual abuse of her own four-year-old son; and (2) petitioner cites no authority for the proposition that the allegation of the petition must be specific to trigger the requirements of N.C.G.S. § 7B-602, and various witnesses testified regarding respondent's mental illness.

2. Evidence— court reports—child neglect adjudication

The trial court did not err by incorporating into the child neglect adjudication order two court reports filed by a social

worker and a guardian ad litem program supervisor, because: (1) the trial court's order specifically states the court reports were accepted into evidence for disposition purposes and not adjudication purposes; and (2) the court reports were introduced into evidence after the trial court moved to the disposition stage of the proceedings, and N.C.G.S. § 7B-901 provides that the court may consider written reports or other evidence concerning the needs of the juvenile during the disposition hearing and allows the parties an opportunity to present evidence and to advise the court concerning the disposition they believe to be in the best interests of the juvenile.

Appeal by respondent-mother from order entered 29 April 2004 by Judge J.H. Corpening in New Hanover County District Court. Heard in the Court of Appeals 6 June 2005.

Dean W. Hollandsworth for petitioner-appellee New Hanover County Department of Social Services.

Regina Floyd-Davis for guardian ad litem-appellee.

Lisa Skinner Lefler for respondent-appellant.

TIMMONS-GOODSON, Judge.

Respondent-mother ("respondent") appeals the trial court order adjudicating her minor daughter, Christine,[1] dependent and neglected. 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 15 November 2002, New Hanover County Department of Social Services ("petitioner") filed a Juvenile Petition alleging that Christine was a neglected juvenile, in that she lived in an environment injurious to her welfare. In support of this allegation, petitioner asserted that respondent had been charged in Onslow County "with multiple charges of 1st degree rape, sexual offense, indecent liberties with a minor, incest, and contributing to the delinquency of a minor," with the alleged victim being respondent's four-year-old son and Christine's older brother,

1. For the purposes of this opinion, we will refer to the minor child by the pseudonym "Christine."

Ronald.[2] Petitioner further asserted that Orange County Department of Social Services had "substantiated sexual abuse" arising out of these incidents, and that respondent was "alleged to have mental health issues."

The petition also alleged that Christine was a dependent juvenile. In support of this allegation, petitioner asserted that respondent "is alleged to suffer from mental health issues [and] is charged criminally for sexually assaulting her son . . . ."

On 14 January 2004 and 4 February 2004, the trial court heard argument and received evidence from the parties. On 29 April 2004, the trial court entered an order containing the following pertinent findings of fact:

> 6. [Respondent] has been charged in Onslow County with multiple counts of rape, incest, sexual offense, and indecent liberties with a minor arising from the sexual abuse incidents with her son, [Ronald]. Such charges were recently referred to the grand jury but have not been tried as of yet.
>
> 7. The sexual abuse of [Ronald] by [respondent] was substantiated by the Orange County Department of Social Services, as was his physical abuse at age two, also by [respondent]. Such substantiation of sexual abuse took into account the report of Donna Potter and Dr. Dana Leinenweber of the Center for Child and Family Health and the disclosures of the child to various persons.
>
> . . . .
>
> 15. [Respondent] suffers from mental health issues, not by the testimony of a psychologist or therapist but by her own testimony and that of other witnesses, including [Ronald], Debra Reuben and [Christine's father]. [Ronald] testified as to her aberrant sexual behavior towards him, which the Court finds as fact, [Christine's father] testified as to her depression and mood swings, as did Ms. Reuben, citing strange interactions between [respondent] and [Christine] in visitation and incidents of voice changes during phone conversations with [respondent]. Also, [respondent's] accounts of a twin fetus being born dead with

2. For the purposes of this opinion, we will refer to the minor child by the pseudonym "Ronald."

> [Christine] along with other testimony by her observed by the Court, raises issues of her mental stability.
>
> . . . .
>
> 17. [Christine] was dependent at the time of the Juvenile petition due to [respondent's] inability to provide a safe home for her due to her pending criminal charges and mental health issues . . . .
>
> . . . .
>
> 19. The Court Report dated January 14, 2004, and prepared by Debra Reuben, social worker with New Hanover County Department of Social Services, was accepted into evidence by the Court for disposition purposes and is incorporated by reference hereto.
>
> 20. The Court Report dated January 14, 2004, and prepared by Leslie B. Wilder, Guardian ad Litem program supervisor, was accepted into evidence by the Court for disposition purposes and is incorporated by reference hereto.

Based in part upon these findings of fact, the trial court concluded as a matter of law that Christine was a dependent and neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(9) and (15). After concluding that it was in Christine's best interests to do so, the trial court placed Christine in her father's custody, denied respondent visitation, and allowed petitioner to cease efforts to reunite Christine with respondent. Respondent appeals.

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[1] The dispositive issue on appeal is whether the trial court erred by failing to appoint a guardian *ad litem* to represent respondent. Because we conclude that respondent was entitled to an appointed guardian *ad litem*, we reverse the trial court order and remand the case for a new trial.

N.C. Gen. Stat. § 7B-602 (2003) provides in pertinent part as follows:

> (b) In addition to the right to appointed counsel . . ., 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) 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[.]

This Court has previously noted that N.C. Gen. Stat. § 7B-602(b) "is narrow in scope and does not require the appointment of a guardian ad litem in every case where dependency is alleged, nor does it require the appointment of a guardian ad litem in every case where substance abuse or some other cognitive limitation is alleged." *In re H.W.*, 163 N.C. App. 438, 447, 594 S.E.2d 211, 216, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 46 (2004). Instead, we have concluded that N.C. Gen. Stat. § 7B-602(b)(1) requires appointment of a guardian *ad litem* only where "(1) the petition specifically alleges dependency; and (2) the majority of the dependency allegations tend to show that a parent or guardian is incapable as the result of some debilitating condition listed in the statute of providing for the proper care and supervision of his or her child." *Id.*

In *H.W.*, we affirmed the trial court's adjudication order and held that the trial court was not required to appoint a guardian *ad litem* for the respondent because the relevant petition did not allege that the juvenile was dependent based upon the respondent's substance abuse and incapacity. *Id.* However, in the instant case, the neglect and dependency petition specifically alleged dependency as a ground for adjudication, and the petition twice referred to respondent's "mental health issues" and referenced respondent's alleged sexual abuse of her own four-year-old son. Petitioner nevertheless asserts that a guardian *ad litem* was not required because there was no specific mental illness alleged or found by the trial court. However, petitioner cites no authority for the proposition that the allegations of the petition must be specific to trigger the requirements of N.C. Gen. Stat. § 7B-602, and we note that at trial, various witnesses testified regarding respondent's mental illness.

We recognize that the commencement of the action is the primary focus in determining whether the trial court erred by failing to appoint a guardian *ad litem* pursuant to N.C. Gen. Stat. § 7B-602(b). However, we also recognize that in termination proceedings, when determining whether an appointed guardian *ad litem* was required by N.C. Gen. Stat. § 7B-1101, this Court has considered the evidence introduced by the parties during the hearing and relied upon by the trial court in its termination order. *See 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) (holding that guardian *ad litem* required by N.C. Gen. Stat. § 7B-1101 in termination hearing where, although dependency was not pursued as a ground for termination, "some evidence . . . 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[,]" and the trial court referred to and considered mental health issues in its termination order). We see no reason why our analysis of the issues arising under N.C. Gen. Stat. § 7B-1101 would not be applicable to the same issues arising under N.C. Gen. Stat. § 7B-602(b). Thus, in the instant case, after reviewing the petition, evidence, and adjudication order entered by the trial court, we conclude that the trial court erred by failing to appoint a guardian *ad litem* for respondent.

As detailed above, the petition alleging neglect and dependency twice referred to respondent's "mental health issues" and the criminal charges pending against her. At trial, New Hanover County Department of Social Services Social Worker Debra Reuben ("Reuben") testified that respondent's "unusual actions" were "getting more consistent in every visit" with Christine, and that she had noticed "a swing in [respondent's] mood" during several visits. Reuben testified that "several times" she called respondent and believed she "was talking to a different person" with a "totally different" voice. Reuben testified that she would continue to talk to respondent and then hear her voice, "but it appeared to be a different tone, a different elevation, a different voice," and it "confused" Reuben "several times[.]" Reuben later testified that respondent's psychological evaluation "cited [that] she had narcissistic tendencies." On cross-examination, Christine's father testified regarding his concerns for respondent's "mental stability." After hearing this testimony, the trial court found as fact that respondent "suffers from mental health issues," and that the testimony of the witnesses "raises issues of her mental stability." In light of the foregoing, we hold that, under the facts and circumstances of this case, the trial court erred by failing to appoint a guardian *ad litem* for respondent. Accordingly, we reverse the trial court's order and remand the case for a new trial.

We note that respondent also argues that the trial court erred by incorporating two court reports into its order. Although our resolution of the guardian *ad litem* issue is dispositive of this appeal, because the same issue may again arise upon rehearing, in the interest of judicial economy we have elected to examine the merits of respondent's argument.

[2] Respondent contends that the trial court committed reversible error by incorporating "into the order on adjudication" court reports filed by Reuben and Guardian Ad Litem Program Supervisor Leslie B. Wilder ("Wilder"). However, we note that the trial court's order specifically states that the court reports were "accepted into evidence . . . for disposition purposes" and not adjudication purposes. Furthermore, our review of the transcript indicates that the court reports were introduced into evidence after the trial court moved to the disposition stage of the proceedings. N.C. Gen. Stat. § 7B-901 (2003) provides that "the court may consider written reports or other evidence concerning the needs of the juvenile" during the disposition hearing, and it allows the parties "an opportunity to present evidence, and [to] advise the court concerning the disposition they believe to be in the best interests of the juvenile." In light of the foregoing, we conclude that the trial court did not err in considering the court reports during disposition. Nevertheless, because we have concluded that the trial court erred by failing to appoint a guardian *ad litem* to represent respondent, the trial court's order finding Christine neglected and dependent is reversed, and the case is remanded for a new trial. On remand, the trial court is instructed to appoint a guardian *ad litem* for respondent pursuant to the provisions of N.C. Gen. Stat. § 7B-602(b).

Reversed and remanded.

Chief Judge MARTIN and Judge WYNN concur.

IN THE MATTER OF: D.D.Y.

No. COA04-990

(Filed 5 July 2005)

Child Abuse and Neglect— failure to appoint guardian ad litem for parent—mental illness

The trial court erred by failing to sua sponte appoint a guardian ad litem (GAL) for respondent mother under N.C.G.S. § 7B-602 in light of her alleged mental illness before finding her minor child to be abused, neglected, and dependent, because: (1) N.C.G.S. § 7B-602 provides that a GAL shall be appointed if the

juvenile is alleged to be dependent and the parent is incapable as a result of mental illness of providing the proper care and supervision of the juvenile; (2) the amended petition in this case alleges that the minor child is a dependent juvenile and that respondent's behavior is in part the result of mental illness; (3) the court's findings indicated that respondent was incapable as a result of her mental illness of providing for the proper care and supervision of the minor child; and (4) although this case is not a termination of respondent's parental rights, the ruling reaches the same effect when the minor child was placed with his maternal grandmother and respondent was not allowed any visitation or communication with the minor child.

Appeal by respondent mother from orders entered 17 July 2003 and 22 August 2003 by Judge Alma L. Hinton and orders entered 15 October 2003 by Judge H. Paul McCoy, Jr., in Halifax County District Court. Heard in the Court of Appeals 12 April 2005.

Jeffery L. Jenkins, for petitioner-appellee Halifax County Department of Social Services.

The Turrentine Group, PLLC, by Karlene Scott-Turrentine, for respondent-appellant.

Deborah Greenblatt, for Amicus Curiae ACLU of North Carolina and Carolina Legal Assistance.

Seth H. Jaffe, for Amicus Curiae ACLU-NCLF Legal Foundation, Inc.

TYSON, Judge.

Respondent appeals from orders entered 17 July 2003, 22 August 2003, and 15 October 2003. The trial court found respondent's minor child ("D.D.Y.") to be abused, neglected, and dependent. D.D.Y. was placed in the custody of the Halifax County Department of Social Services ("DSS"), who placed him with his maternal grandmother. Respondent was not allowed any contact or visitation with her son. We reverse and remand.

I. Background

D.D.Y. was born on 20 October 1989. D.D.Y.'s biological father is unknown. Respondent and D.D.Y. have lived with friends and respondent's biological family for several years. In late 1996, respond-

ent moved to North Carolina. DSS received a report on 7 July 2003 alleging sexual abuse of D.D.Y. by respondent and filed an amended petition alleging D.D.Y. was an abused, neglected, and dependent child on 6 August 2003. DSS's petition was based on allegations that respondent: (1) sexually fondled D.D.Y.; (2) was sleeping in the same bed with D.D.Y.; (3) had washed D.D.Y.'s fruit with Clorox and put Clorox in his drinking water; (4) fought with D.D.Y., leaving bruises on him; and (5) made D.D.Y. wear gloves at times so he could not touch anything with his bare hands.

On 8 July 2003, Esterine Pitt, a social worker with DSS, met with respondent and prepared a safety assessment. DSS sent a letter to respondent on 9 July 2003 requesting her cooperation with an examination and interview of D.D.Y. at the Tedi Bear Child Advocacy Center in Greenville, North Carolina. On 11 July 2003, DSS filed a petition alleging respondent obstructed or interfered with its investigation by refusing to allow D.D.Y. to go to the Tedi Bear Center without respondent being present. Respondent was ordered to cease obstruction and interference of DSS's investigation on 17 July 2003. An *ex parte* order dated 25 July 2003 placed D.D.Y. into the nonsecure custody of DSS. Throughout the process, respondent repeatedly refused or waived appointed counsel. During the hearings, respondent participated in the proceedings by cross-examining witnesses, testifying on her own behalf, introducing documents as exhibits, and objecting to numerous questions.

The trial court entered an order continuing nonsecure custody and placed D.D.Y. in the home of his maternal grandmother in Maryland. Respondent was initially allowed supervised visitation with D.D.Y.

A psychological evaluation of D.D.Y. was conducted on 4 August 2003. The evaluation did not produce any evidence of sexual abuse, but produced other evidence that respondent: (1) punched D.D.Y. in the eyes; (2) would chase D.D.Y. with a knife thinking D.D.Y was a man named "Darryl" who was controlled by the "devil;" (3) told D.D.Y. "Darryl's" family "was going to die and she was going to buy a gun and kill his family" and "that she would kill [D.D.Y.] to get to 'Darryl;' " and (4) undressed in front of D.D.Y. and walked around the house naked while she cooked and cleaned.

The trial court reviewed the placement order on 15 August 2003 and found the nonsecure order should continue. However, the court ordered no visitation or communication to occur between respondent

and D.D.Y. The trial court held an adjudication hearing on 3 October 2003 and entered an order on 15 October 2003 finding that D.D.Y. was abused, neglected, and dependent. Custody and guardianship of D.D.Y. was given to his maternal grandmother and any visitation and communication rights to respondent were denied. Respondent appeals. Within the notices of appeal, respondent again specifically waived her right to counsel.

II. Issues

Respondent argues the trial court committed "plain" and reversible error by: (1) failing to appoint a guardian *ad litem* for respondent *sua sponte*; (2) finding as fact respondent "obstructed or interfered" with DSS's investigation; (3) abusing its discretion in ordering respondent to transport D.D.Y. to the Tedi Bear Center and erred by holding her in contempt when she was unable to provide transportation; (4) finding D.D.Y. in substantial risk of physical injury; and (5) ordering supervised visitation and later prohibiting visitation and eliminating reunification efforts.

III. Guardian *ad Litem* Appointment

Respondent argues the trial court was under a duty to appoint a guardian *ad litem* ("GAL") *sua sponte* in light of her alleged mental illness. DSS argues the case at bar does not terminate parental rights under N.C. Gen. Stat. § 7B-1111 and respondent should not be appointed a GAL. We agree with respondent.

N.C. Gen. Stat. § 7B-602(b)(1) (2003) provides when a petition is filed by DSS alleging abuse, neglect and/or dependancy:

> (b) . . . 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) 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 . . . .

Citing *In re Estes*, respondent argues this Court has held she is entitled to a guardian *ad litem* and the trial court's failure to appoint one is reversible error. 157 N.C. App. 513, 518, 579 S.E.2d 496, 499,

disc. rev. denied, 357 N.C. 459, 585 S.E.2d 390 (2003). In *In re Estes*, we stated:

> [t]he dispositive issue on appeal is whether the trial court could properly terminate respondent's parental rights without appointing a guardian ad litem to represent respondent at the termination hearing where the petition or motion to terminate parental rights alleged, and the evidence supporting such allegations tended to show, that respondent was incapable of providing proper care and supervision to the child due to mental illness. Because we conclude that section 7B-1101 requires the trial court to appoint a guardian ad litem in such instances, we reverse the order of the trial court.

157 N.C. App. at 515, 579 S.E.2d at 498. Under the facts before us, DSS has not filed a petition to terminate respondent's parental rights.

In *In re L.M.C.*, DSS alleged the respondent mother's child to be dependent and removed L.M.C. from the custody of the respondent mother. 170 N.C. App. 676, 613 S.E.2d 256 (2005). We stated:

> 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. at 679, 613 S.E.2d at 258 (citation omitted). We held because DSS alleged the respondent mother's child to be dependent and the trial court's documents and findings indicated the respondent mother had mental health issues, the trial court erred in failing to appoint a GAL for her. *Id.* We vacated and remanded the case, stating "[t]he 'failure to appoint a guardian *ad litem* in any appropriate case is deemed prejudicial error *per se* . . . .' " *Id.* (quotation omitted).

Under N.C. Gen. Stat. § 7B-602, a GAL *shall* be appointed if the juvenile is alleged to be "dependent" and "the parent is incapable as a result of . . . mental illness . . . of providing the proper care and supervision of the juvenile." Here, DSS's original petition did not allege dependency. However, the amended petition alleges D.D.Y is a "dependent juvenile," in that his "parent . . . is unable to provide for

[his] care or supervision and lacks an appropriate alternative child care arrangement." The amended petition alleges respondent's behavior is in part the result of mental illness and states, "[a]s a result of her untreated mental illness, the [respondent] is not able to provide proper care, supervision, discipline, housing and physical necessities for the juvenile . . . ."

At the time of the hearings, the trial court was on notice of respondent's alleged mental conditions. The trial court made references to and questioned respondent's mental condition in several of its orders. The amended petition on 6 August 2003 stated, "behavior of the mother of the juvenile . . . is, in part, the result of mental illness." On 15 October 2003, "[t]he court specifically [found] that [respondent] suffers from some emotional or mental disorder which significantly impairs her ability to parent her child appropriately." The court's findings indicate respondent was incapable as a result of her mental illness of "providing for the proper care and supervision [of D.D.Y]." N.C. Gen. Stat. § 7B-602.

Here, as in *In re L.M.C.*, DSS's petition alleges: (1) D.D.Y. is a dependent juvenile; and (2) respondent cannot provide the necessary care and supervision D.D.Y. needs as a result of respondent's mental condition. Under the facts before us, a GAL should have been appointed. The trial court's failure to do so is " 'prejudicial error *per se*.' " *In re L.M.C.*, 170 N.C. App. at 679, 613 S.E.2d at 258 (quotation omitted).

Although this case is not a termination of respondent's parental rights, the trial court's ruling reaches the same effect. Exclusive custody of D.D.Y. was placed with his maternal grandmother and not with respondent. Respondent is not allowed *any* visitation or communication with D.D.Y. The trial court found in the custody order "that [respondent] suffers from some emotional or mental disorder" and used this finding to adjudicate D.D.Y. as an abused, neglected, and dependent juvenile. Based on the trial court's findings of fact and conclusions of law, D.D.Y. was placed into the legal custody of his maternal grandmother. We note that during the proceedings where respondent waived her right to counsel, the trial court took notice of respondent's mental illness yet failed to appoint a GAL.

Under N.C. Gen. Stat. § 7B-602, the trial court "shall" appoint a GAL where it is "alleged" the juvenile is dependent in that the parent has a mental illness and is incapable "of providing for the

proper care and supervision of the juvenile." The statute is not limited to an appointment of a GAL only in termination of parental rights cases. The trial court erred in not appointing a GAL *sua sponte* for respondent.

V. Conclusion

The trial court is under a statutory duty to appoint a GAL when a petition "alleges" a child is dependent and the parent can not offer proper care for their child based on mental illness or other conditions listed in N.C. Gen. Stat. § 7B-602(b)(1). In light of our decision on this issue, we do not address respondent's remaining assignments of error. The trial court's orders are reversed and we remand for appointment of a GAL for respondent and a new hearing.

Reversed and remanded.

Judges WYNN and ELMORE concur.

FRANK P. FLYNN, EMPLOYEE, PLAINTIFF v. EPSG MANAGEMENT SERVICES, EMPLOYER, RSKCO, CARRIER, DEFENDANTS

No. COA04-1447

(Filed 5 July 2005)

Workers' Compensation— compensable occupational injury— cameraman's shoulder

An injury to a cameraman's shoulder resulted from causes and conditions characteristic of his employment as a cameraman, and competent evidence in the record supported the Industrial Commission's award of workers' compensation benefits. The injury is not an ordinary disease of life to which the general public is exposed.

Appeal by defendants from opinion and award entered 3 June 2004 and amendment to opinion and award entered 14 June 2004 by Commissioner Thomas J. Bolch for the North Carolina Industrial Commission. Heard in the Court of Appeals 15 June 2005.

Leah L. King, for plaintiff-appellee.

Hedrick & Morton, L.L.P., by G. Grady Richardson, Jr. and Stephen E. Coble, for defendants-appellants.

TYSON, Judge.

EPSG Management Services and its insurance carrier, RSKCO, (collectively, "defendants") appeal the opinion and award of the Full Commission of the North Carolina Industrial Commission ("the Commission") which concluded Frank P. Flynn ("plaintiff") suffered a compensable occupational disease. We affirm.

I. Background

From April through July 2001, plaintiff worked as a camera operator on a Showtime Entertainment project entitled, "Going to California." On average, he worked twelve hours a day, five to six days per week. Plaintiff utilized a hand-held camera about twenty-five to thirty percent of the time. He would pick the camera up and rest it on his shoulder while moving and contorting his body to obtain the correct filming angle. The camera weighed thirty to forty-five pounds.

On 20 July 2001, plaintiff reached across his body with his left arm to pick up his camera. As he lifted the camera, plaintiff experienced a sudden, piercing pain in his left arm. Plaintiff described the pain as stabbing initially, followed by numbness. Prior to 20 July 2001, plaintiff had noted some tightness and stiffness in his shoulder. However, plaintiff presumed it was caused by fatigue from the long hours he worked.

Plaintiff sought medical attention from his primary physician, Dr. Alan Jackson ("Dr. Jackson"), on 30 July 2001 and complained of left shoulder pain. Plaintiff provided Dr. Jackson a history that he had used his left shoulder a "bit too much these past few weeks shooting a movie." Plaintiff was sent for a shoulder x-ray and an MRI was later performed on 29 August 2001. After receiving the MRI results, Dr. Jackson scheduled an appointment for plaintiff with Dr. David A. Esposito ("Dr. Esposito") on 13 September 2001. At that time, Dr. Jackson's diagnosis of plaintiff's complaint was distal supraspinatus tendonosis.

Plaintiff remained out of work during this time. His first appointment with Dr. Esposito was on 12 October 2001. At that time, Dr. Esposito noted plaintiff to be "tender over the front part of his

shoulder." Dr. Esposito felt plaintiff would benefit from arthroscopic surgery. Dr. Esposito further indicated that he restricted plaintiff to light duty jobs with no use of the left arm, if such work was available.

On 6 December 2001, Dr. Esposito performed arthroscopic surgery on plaintiff. Dr. Esposito located a tear in plaintiff's rotator cuff and also noted plaintiff had synovitis, *i.e.* inflammation of the joint lining. Dr. Esposito testified that the synovitis was "most likely reactive in nature" from the 20 July 2001 injury. Plaintiff remained out of work and his condition did not improve. Plaintiff underwent a separate treatment for his ailing shoulder by Dr. Esposito.

Plaintiff made efforts to find other employment which would not require the use of his left shoulder. He enjoyed little success. At the time of the injury, plaintiff was fifty-six years old with a high school education. The majority of his career was spent in the motion picture industry.

Plaintiff filed a Form 18 on 27 December 2001 describing his injury as "left shoulder." An amended Form 18 was filed on 2 July 2002, alleging "trauma in the employment pursuant to N.C.G.S. 97-53(20)" and adding "synovitus" as a listed injury or occupational disease. "Synovitus, caused by trauma in employment" is enumerated as an occupational disease in N.C. Gen. Stat. § 97-53(20).

RSKCO denied plaintiff's claim asserting, "Mr. Flynn did not sustain a compensable injury by accident . . . ." and the case was assigned for hearing. A pretrial order was filed declaring the issues to be determined, in part whether plaintiff sustained: (1) a compensable injury by accident under N.C. Gen. Stat. § 97-2(2); and (2) an occupational disease as defined by N.C. Gen. Stat. § 97-53(20).

The case was heard before the deputy commissioner on 24 September 2002. The deputy commissioner filed an opinion and award on 28 January 2003 finding plaintiff's rotator cuff tear was an occupational disease. The order was later amended on 10 February 2003 to change plaintiff's average weekly wage. Defendants appealed to the Commission and the case was heard on 8 July 2003. The Commission ordered the record to be reopened on 9 July 2003 for plaintiff to undergo a functional capacity evaluation.

On 3 June 2004, the Commission filed its opinion and award affirming the deputy commissioner's opinion and award that plaintiff suffers from a compensable occupational disease. The

Commission's opinion and award included the following stipulations by the parties:

> The issues before the Full Commission are: (i) whether plaintiff sustained a compensable injury by accident arising out of and in the course of his employment with defendant-employer on 20 July 2001; (ii) whether plaintiff contracted an occupational disease arising out of and in the course of his employment with defendant-employer; and (iii) if so, what compensation, if any, is due plaintiff.

An amendment to the opinion and award was filed on 14 June 2004 to change plaintiff's average weekly wage. Defendants appeal.

II. Issue

The issue on appeal is whether competent evidence supports the Commission's findings of fact and conclusions of law that plaintiff suffered a compensable occupational injury.

III. Standard of Review

The appropriate appellate standard of review in appeals arising from decisions by the Commission is well established. "In reviewing an order and award of the Industrial Commission in a case involving workmen's compensation, [an appellate court] is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Moore v. Federal Express*, 162 N.C. App. 292, 297, 590 S.E.2d 461, 465 (2004) (quotation omitted). "As long as the Commission's findings are supported by competent evidence of record, they will not be overturned on appeal." *Rackley v. Coastal Painting*, 153 N.C. App. 469, 472, 570 S.E.2d 121, 124 (2002) (citation omitted).

Although on appeal the Commission's findings of fact are conclusive where supported by competent evidence, "findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (internal citations and quotations omitted). Further, "the Industrial Commission's conclusions of law are reviewable *de novo*." *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003) (citing *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996)).

IV. Compensable Occupational Injury

Defendants argue the Commission erred in determining plaintiff's injury qualified as compensable occupational injury. We disagree.

An occupational disease is compensable if the disease "is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13) (2003); *Thomason v. Fiber Indus.*, 78 N.C. App. 159, 161, 336 S.E.2d 632, 633 (1985), *disc. rev. denied*, 316 N.C. 202, 341 S.E.2d 573 (1986).

> There are three elements which are necessary for the plaintiff to prove in order to show the existence of a compensable occupational disease under N.C. Gen. Stat. § 97-53(13): (1) the disease must be characteristic of persons engaged in a particular trade or occupation in which the plaintiff is engaged; (2) the disease must not be an ordinary disease of life to which the public is equally exposed; and (3) there must be a causal connection between the disease and the plaintiff's employment.

Jarvis v. Food Lion, Inc., 134 N.C. App. 363, 367, 517 S.E.2d 388, 391 (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981)), *disc. rev. denied*, 351 N.C. 356, 541 S.E.2d 139 (1999).

Plaintiff proffered substantial evidence that his injury resulted from his employment as a cameraman. Dr. Esposito testified that plaintiff's job, which involved significant overhead activity, predisposed plaintiff to, and placed him at a greater risk for, rotator cuff and shoulder problems, than the general public. Dr. Esposito stated that plaintiff's job as a cameraman required him to contort his body into different positions to get the correct camera angle, operate and lift over his head cameras of varying weight, and work long hours. These factors differentiated plaintiff's employment from that of the general population. Dr. Esposito further opined that because of the constant overhead activity, the incident on 20 July 2001 was "the final straw that broke the camel's back."

Based on our review of the record, depositions, and transcripts, competent evidence exists to support the Commission's conclusion of law that: (1) "[p]laintiff developed a rotator cuff tear and further medical complications due to causes and conditions characteristic of

and peculiar to his employment . . . ."; and (2) "[t]his rotator cuff tear and further medical complications is not an ordinary disease of life to which the general public not so employed is equally exposed, and is, therefore, an occupational disease." *See Jarvis*, 134 N.C. App. at 367, 517 S.E.2d at 391 (three elements necessary to show a compensable occupational disease under N.C. Gen. Stat. § 97-53(13)); *Rackley*, 153 N.C. App. at 472, 570 S.E.2d at 124 ("As long as the Commission's findings are supported by competent evidence of record, they will not be overturned on appeal."). Defendants' assignment of error is overruled.

V. Conclusion

Plaintiff's injury resulted from causes and conditions characteristic of his employment as a cameraman. The injury is not an ordinary disease of life to which the general public is exposed. Competent evidence in the record supports the Commission's findings of fact and conclusions of law. The Commission's opinion and award is affirmed.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

JULINE BROWN, PLAINTIFF v. MONTEZ BROWN, DEFENDANT

No. COA04-1189

(Filed 5 July 2005)

Child Support, Custody, and Visitation— support arrears— enforceability by civil contempt

The trial court erred by adjudicating defendant in civil contempt of a 21 August 1986 judgment for child support arrears and the judgment of 14 July 2004 is vacated, because: (1) N.C.G.S. § 50-13.4(f)(8) and (9) when read together provide that if a child support arrearage is reduced to a money judgment and the judgment provides for periodic payments, the judgment is enforceable by contempt proceedings; and (2) the civil judgment in this case was not enforceable by contempt proceedings when neither the 1996 judgment nor any subsequent orders

of the North Carolina court required a specific unequivocal directive for defendant to pay child support on a certain schedule and/or by certain dates.

Appeal by defendant from order entered 14 July 2004 by Judge John Smith in New Hanover County District Court. Heard in the Court of Appeals 24 March 2005.

Frank Cherry, for plaintiff appellee.

Montez D. Brown, pro se defendant-appellant.

LEVINSON, Judge.

Montez Brown (defendant) appeals from the trial court's order adjudicating him in civil contempt of a 21 August 1986 judgment for child support arrears. In a 21 August 1996 judgment, a North Carolina court made the following findings of fact:

1. That the plaintiff had obtained a judgment for child support arrearages in the State of Maryland against the defendant in the Circuit Court of Prince George County in the amount of $13,178.48 as of January 26th, 1996;

2. That the aforementioned judgment is given full faith and credit of the laws of the State of North Carolina and is hereby declared legally enforceable in the State of North Carolina as a judgment lien against Montez Brown and any property owned by Montez Brown in the State of North Carolina, County of New Hanover including the one-half (1/2) undivided interest in a house and lot situated at 4005 Princess Place Drive, Wilmington, North Carolina and more fully described in a Deed recorded in [a deed book];

3. That on the 21st of November 1995, the plaintiff filed a Notice of Claim against the defendant's interest in the estate of Beatrice Brown[]; that as of November 21, 1995, the defendant had a—undivided interest in said real property under the Last Will and Testament of Beatrice Brown[;]

. . . .

7. That the plaintiff has employed the services of [an attorney, and] . . . the reasonable value of said services [is] $2,500.

Upon these findings, the trial court concluded:

> 1. That the plaintiff is entitled to a judgment in the amount of the Judgment rendered in the State of Maryland against . . . Montez Brown in the amount of $13,178.48;
>
> 2. That the plaintiff is entitled to enforce said judgment by execution against the interest of any property owned by the defendant in the State of North Carolina as of November 21, 1995; and the plaintiff is entitled to immediate execution on said property to satisfy this Judgment for back child support and for the . . . attorneys fees . . . .;
>
> . . . .
>
> 4. That [the attorney] is entitled to a reasonable attorneys fee . . . in the amount of $2,500.

In the decretal portion, the trial court directed that:

> [T]he judgment rendered against the Defendant . . . in the State of Maryland for back child support in the amount of $13,178.48 is hereby given the full faith and credit of the laws of the State of North Carolina and fully enforceable in this State; that the plaintiff is entitled to execute on any property which the defendant . . . had an interest [in] as of November 21st, 1995; that the plaintiff is hereby allowed the sum of $2,500 as reasonable attorneys fees . . . ; [and] that the plaintiff is entitled to recover interest on the above sums at the legal rate in the State of North Carolina plus the costs of this action from the defendant[.]

On 29 July 2004, plaintiff filed a motion for contempt. In said motion, plaintiff alleged that, since the 21 August 1996 judgment, defendant had only paid $600 in back child support; that defendant had assets and income from which to pay the judgment; that he had taken steps to "place his assets beyond the reach of the judgment"; that defendant's failure to pay had been "wilful and intentional"; and that plaintiff should be awarded attorney fees associated with her motion for contempt.

While the Maryland judgment provided for scheduled payments on the arrearages, neither the 21 August 1996 judgment, nor any subsequent order of the North Carolina trial court, did so. The record reveals that, between the entry of the 1996 North Carolina judgment and plaintiff's 29 July 2004 motion for contempt, there was no North Carolina court activity in this matter. Defendant contends that, during this period, he made some payments directly to the State of Maryland pursuant to that state's ongoing arrearages requirements.

In its 14 July 2004 order on contempt which is the subject of this appeal, the trial court found that, since the August 1996 judgment, defendant had paid $810.00 in child support arrearages; was gainfully employed and had the financial capacity to satisfy the judgment; that he had previously conveyed an interest in property to another individual without consideration; that defendant had willfully failed to pay the judgment; and that plaintiff was entitled to an award of attorney fees. The trial court concluded that defendant was in civil contempt of court and that plaintiff was entitled an award of attorney fees, and decreed that defendant be incarcerated until he purged himself of contempt by paying the remaining balances due for child support arrearages, interest and attorney fees.

On appeal, defendant contends the trial court was without authority to hold him in contempt because neither the 1996 judgment nor any subsequent orders of the North Carolina court required a specific, unequivocal directive for him to pay child support on a certain schedule and/or by certain dates. We agree.

Under N.C.G.S. § 1-302 (2003), if "a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution[.]" Thus, it has long been the general rule that "judgment fixes the amount due, and execution—not contempt proceedings—issues if not paid." *Hildebrand v. Vanderbilt*, 147 N.C. 640, 642, 61 S.E. 620, 629 (1908). However, N.C.G.S. § 50-13.4(f) (2003) provides the additional option of enforcing judgments for child support arrearage by contempt proceedings, under specified conditions:

> (8) . . . [P]ast due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments and may include provisions for periodic payments.
>
> (9) An order for the periodic payments of child support or a child support judgment that provides for periodic payments is enforceable by proceedings for civil contempt, and disobedience may be punished by proceedings for criminal contempt, as provided in [N.C.G.S. §] Chapter 5A[.]

N.C.G.S. § 50-13.4(f)(8) and (9). Read together, these subsections provide that, **if** child support arrearages are reduced to a money judgment, **and** the judgment "provides for periodic payments," the judgment is enforceable by contempt proceedings.

The judgment entered in the instant case neither requires defendant to make periodic payments in a specific amount, nor sets any deadlines or ongoing monthly dates for certain payments on the arrearages. Under the plain language of G.S. § 50-13.4(f)(8), the order was, therefore, a "judgment which shall be a lien as other judgments," and not a judgment enforceable by contempt under G.S. § 50-13.4(f)(9). Because subsections (f)(8) and (f)(9) of this statute are more specific than the generalized contempt allowances set forth in Chapter 5A of the North Carolina General Statutes, the former must control.

Where an order reducing child support arrears to a money judgment does not include a provision for periodic payments or other deadline for payment, it is not enforceable by contempt. Thus, in the instant case, the trial court did not have jurisdiction to enter an order finding defendant in contempt:

> Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner . . . an act of the Court beyond these limits is in excess of its jurisdiction. . . . Where the court acts in excess of its authority, [its judgment] . . . is void . . . [and] may be attacked whenever and wherever it is asserted[.]

Allred v. Tucci, 85 N.C. App. 138, 143, 354 S.E.2d 291, 294-95 (1987) (internal quotation marks and citations omitted).

Because the civil judgment was not enforceable by contempt proceedings, the 14 July 2004 contempt order on appeal must be vacated.

Vacated.

Judges HUNTER and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 JUNE 2005

IN RE A.L.B. No. 04-371	Robeson (02J330)	No error in part, remanded in part
IN RE A.N.P. & S.R.P. No. 04-1151	Buncombe (03J207) (03J208)	Affirmed
IN RE K.D., B.G. & D.C. No. 04-1254	Catawba (03J167) (03J168) (03J169)	Affirmed
IN RE L.T.L. No. 04-1366	Onslow (03J236)	Affirmed
REESE v. DAVIS No. 04-793	Mecklenburg (03CVS17958)	Affirmed; remanded for sanctions
SIZEMORE v. TATUM No. 04-1416	Yadkin (03CVS674)	Reversed and remanded
STATE v. BORDERS No. 04-1463	Cleveland (01CRS52965)	No error
STATE v. BRODIE No. 04-308	Wayne (02CRS57143) (02CRS57144) (02CRS57145)	No error in part and new trial in part
STATE v. CAMERON No. 04-1199	Harnett (02CRS7376) (02CRS7377) (02CRS7378) (02CRS7388) (02CRS7389) (02CRS7390) (02CRS55386) (03CRS5481) (03CRS5482) (02CRS7392) (02CRS7393) (02CRS7394) (02CRS7395) (02CRS7396)	No error
STATE v. DOE No. 04-1250	Forsyth (03CRS31229) (03CRS60578)	No error

STATE v. ESTEP No. 04-1580	McDowell (04CRS746) (04CRS747) (04CRS748) (04CRS749)	Affirmed
STATE v. FORRESTER No. 04-1109	Mecklenburg (03CRS236418)	No error
STATE v. FOYE No. 04-299	Lenoir (03CRS52173)	No error in part, dismissed without prejudice in part
STATE v. GEORGE No. 04-1294	Craven (03CRS52717)	No error in part, reversed and remanded in part
STATE v. GRIFFIN No. 04-228	Randolph (01CRS52098)	No error
STATE v. HOLDEN No. 04-1464	Wake (03CRS57763) (03CRS101963)	No error
STATE v. MICKENS No. 04-960	Johnston (02CRS52867)	No error
STATE v. MORGAN No. 04-1376	Forsyth (00CRS30015)	No prejudicial error
STATE v. NGUYEN No. 04-538	Cumberland (02CRS58218)	No prejudicial error
STATE v. SMITH No. 04-1165	Mecklenburg (04CRS3314) (04CRS3315) (04CRS3316) (04CRS3317) (04CRS3318)	Affirmed
STATE v. STEVENS No. 04-1157	McDowell (02CRS53869)	No error
STATE v. ZIGLAR No. 04-1051	Wake (02CRS89392)	Vacated
WORLEY v. WORLEY No. 04-840	Wake (02CVD4089)	Affirmed

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AUMAN v. SMITH No. 04-875	Alamance (00CVS1972)	Affirmed
BABB v. GRAHAM No. 04-805	Forsyth (02CVS1091)	Affirmed

BLUE RIDGE HEALTH INVESTORS, LLC. v. MARS SYS., INC. No. 04-1248	Forsyth (04CVD964)	Affirmed
BROWN v. BROWN No. 04-1600	New Hanover (96CVD280)	Vacated
BROWN v. BROWN No. 04-1154	Wake (01CVD6280)	Reversed and remanded
BUCHANAN v. CITY OF HIGH POINT No. 04-1398	Guilford (03CVS8693)	Dismissed
HUDSON v. OVERMAN No. 04-1163	Alamance (03CVS1925)	Dismissed
IN RE A.D.W. No. 04-1243	Lee (04J15)	Reversed and remanded
IN RE K.N.N. No. 04-1143	Iredell (01J205)	Affirmed
IN RE Y.U., S.U., I.U. No. 04-1390	Guilford (03J26) (03J27) (03J28)	Affirmed
KIRKPATRICK v. TOWN OF ABERDEEN No. 04-1004	Moore (03CVS495)	Affirmed
MABE v. MONTAGUE No. 04-218	Stokes (02CVS164)	We affirm the trial court's judgment as to defendant's appeal and plaintiff's cross-appeal
MATHEWSON v. CARTER No. 04-1399	Moore (01CVS1255)	Affirmed
ROBESON CTY. DSS v. McGEACHY No. 04-1305	Robeson (98CVD1569)	No error
SEES v. CLEVELAND CONTAINER SERV. No. 04-1256	Ind. Comm. (I.C. 191347)	Affirmed
STATE v. BUCHANAN No. 04-1270	Swain (01CR153)	Reversed
STATE v. CANNON No. 04-937	Mecklenburg (94CRS60232)	Appeal dismissed

STATE v. COTTEN No. 04-1112	Halifax (02CRS57253)	No error
STATE v. CREW No. 04-1410	Harnett (03CRS54055) (03CRS54101) (03CRS54102) (04CRS413)	Affirmed
STATE v. FIELDS No. 04-1099	Granville (03CRS50597)	No error
STATE v. GAINES No. 04-1461	Montgomery (01CRS51921)	Affirmed
STATE v. GILBERT No. 04-1227	Davidson (03CRS59079) (03CRS10727)	No error
STATE v. GREEN No. 04-1403	Durham (03CRS55355) (04CRS45501)	No error
STATE v. HORTON No. 04-1488	Moore (03CRS55149) (04CRS05090)	No error
STATE v. JEFFERS No. 04-1237	Mecklenburg (04CVD7239)	Vacated and remanded
STATE v. JOHNSON No. 04-945	Mecklenburg (00CRS40922) (00CRS40923) (01CRS162278) (01CRS162279) (01CRS162280)	No error
STATE v. JORDAN No. 04-1080	Guilford (03CRS79074)	No error
STATE v. JOYNER No. 04-1319	Wilson (01CRS6108)	No error
STATE v. KALLIE No. 04-888	Cumberland (02CRS53048) (02CRS54119)	Reversed and remanded
STATE v. LEATHERWOOD No. 04-1437	Haywood (00CRS3299) (00CRS3644) (00CRS3896) (00CRS5250)	Affirmed
STATE v. OAKS No. 04-1087	McDowell (03CRS50567) (03CRS50568)	No error

STATE v. OGLESBY No. 04-1576	Forsyth (01CRS60765) (01CRS60766) (01CRS61029) (01CRS36365)	Vacated and remanded
STATE v. ROGERS No. 04-1168	Mecklenburg (02CRS208248) (02CRS208249) (02CRS208250) (02CRS208251)	No error
STATE v. SAVARIA No. 04-1353	Buncombe (03CRS16441)	Reversed
STATE v. SILVA No. 04-192	Cumberland (01CRS65526)	No error
STATE v. ZIMMERMAN No. 04-1236	Mecklenburg (04CVD7584)	Vacated and remanded
STATE FARM FIRE & CAS. CO. v. PALMER CORP. OF N.C. No. 04-1435	Forsyth (04CVS1475)	Dismissed
STROUD v. WILLIAMS, ROBERTS, YOUNG, INC. No. 04-1302	Forsyth (02CVS7327)	Affirmed

JACKIE L. ELEY, PLAINTIFF v. MID/EAST ACCEPTANCE CORPORATION OF N.C., INC., DEFENDANT

No. COA04-790

(Filed 5 July 2005)

1. Conversion— watermelons on repossessed truck—time to unload—evidence and findings

A finding that plaintiff was not allowed a reasonable time to unload 130 watermelons from a truck that was being repossessed was supported by competent evidence in the bench trial for conversion of those watermelons.

2. Conversion— watermelons on repossessed truck—assumption of ownership

The findings in a bench trial for conversion of watermelons left in the sun on a repossessed truck supported the inference that defendant assumed and exercised the right of ownership over plaintiff's watermelons without her permission when repossessing her truck, to the exclusion of plaintiff's rightful ownership interest.

3. Unfair Trade Practices— watermelons on repossessed truck—opportunity to unload

The denial of any meaningful opportunity for plaintiff to remove watermelons from her repossessed truck supported the conclusion that defendant had committed an unfair and deceptive trade practice.

4. Damages— oral testimony—value of converted watermelons

Plaintiff's testimony about what she paid for her watermelons was sufficient to support the court's calculation of her damages in an action for conversion of watermelons.

5. Costs— attorney fees—appeal

Plaintiff was entitled to attorney fees on appeal because she was entitled to attorney fees under Chapter 75 in winning a judgment at the trial level; however, the award was remanded for a determination of the hours spent on appeal and entry of a reasonable hourly rate.

Appeal by defendant from order entered 12 November 2003 by Judge W. Rob Lewis, II, in Hertford County District Court. Heard in the Court of Appeals 2 February 2005.

Janet B. Dudley for plaintiff-appellee.

William F. Hill, P.A., by William F. Hill and Mary C. Higgins, for defendant-appellant.

GEER, Judge.

Defendant Mid/East Acceptance Corporation of N.C., Inc. appeals from an order entered in favor of plaintiff Jackie L. Eley following a bench trial in Hertford County District Court. Plaintiff's claims for conversion and unfair and deceptive trade practices were based on defendant's otherwise lawful repossession of plaintiff's truck, which contained a load of watermelons belonging to plaintiff. After defendant caused plaintiff's truck to be repossessed, the melons, which were still in the truck bed, quickly spoiled in the summer heat, rendering them valueless. On appeal, defendant argues that it is not liable for conversion because it did not engage in the unauthorized assumption and exercise of the right of ownership over plaintiff's watermelons to the exclusion of plaintiff's rights. It also argues that it did not commit an unfair and deceptive trade practice under N.C. Gen. Stat. § 75-1.1 (2003). Because we find that competent evidence exists to support the trial court's findings of fact and those findings are sufficient to establish conversion and unfair and deceptive trade practices, we affirm.

" 'It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *Keel v. Private Bus., Inc.*, 163 N.C. App. 703, 707, 594 S.E.2d 796, 799 (2004) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). Upon a finding of such competent evidence, this Court is bound by the trial court's findings of fact even if there is also other evidence in the record that would sustain findings to the contrary. *Hensgen v. Hensgen*, 53 N.C. App. 331, 335, 280 S.E.2d 766, 769 (1981). Competent evidence is evidence "that a reasonable mind might accept as adequate to support the finding." *Andrews v. Fulcher Tire Sales & Serv.*, 120 N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995). The trial court's conclusions of law, by con-

trast, are reviewable *de novo*. *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000).

Facts

Plaintiff's evidence tended to show the following. Plaintiff was the owner of a 1995 Ford F150 pick-up truck that she had purchased through a loan from defendant, using the truck as collateral. In the summer of 2002, plaintiff missed two consecutive payments on the loan, and defendant made repossession arrangements with Carolina Repossessions. At approximately 4:00 a.m. on 29 July 2002, employees of Carolina Repossessions, Roger Pinkham and his brother, arrived at plaintiff's residence and began to hitch plaintiff's pick-up truck to their tow truck. Plaintiff heard them and went outside to investigate. When she requested to see the paperwork related to the repossession, one of the men briefly showed it to her.

Plaintiff explained to Pinkham that she was not contesting the repossession of the truck, but that she was concerned about the 130 watermelons in the truck bed. She had purchased and loaded them into the truck on the previous day and had planned to drive them to Maryland for re-sale. In addition to the watermelons, the truck also contained some other personal items belonging to plaintiff, including a coat, an ice chest, and some children's toys. Plaintiff asked Pinkham if she could unload her melons and other personal property before he towed the truck. Pinkham refused, telling her he was in a hurry because he had to get to his regular job. Pinkham also refused to allow plaintiff to deliver the truck herself later that morning after she had had time to unload the melons.

Plaintiff called defendant's office at about 8:00 a.m. the same morning and spoke to defendant's employee, Joyce White. When plaintiff asked White if she could retrieve her watermelons out of the repossessed truck, White replied, "What truck?" Fearing that the melons would quickly spoil in the summer heat, plaintiff, on the same day, filed a complaint alleging conversion in the Hertford County Small Claims Court.

Defendant's evidence tended to show that on Wednesday, 31 July 2002, two days after the repossession, one of defendant's employees called plaintiff and asked her to bring her truck key to defendant's office, but plaintiff refused. White testified that it was not defendant's practice to allow public access to the lot where repossessed items were kept; rather, defendant usually sent an employee to the lot to

gather up personal property left in repossessed vehicles and bring it to defendant's office for the owners to collect. White noted that plaintiff's load of watermelons created an unusual situation, and defendant had asked plaintiff to furnish her truck keys so that defendant could drive the truck to its office and allow plaintiff to unload it there.

Defendant then mailed plaintiff a letter, stating, "The watermelons are rotting and the smell is polluting the storage lot. If something is not done with them by 12:00 p.m., Friday, August 2, 2002, we will have to hire someone to dispose of them for us and the fee will be charged to your account." Although the post office attempted to deliver this letter to plaintiff, she never received it, and it was later returned to defendant's office.

On Thursday, 1 August 2002, the day after defendant mailed the letter, defendant called plaintiff again and asked her to come retrieve her watermelons from the repossessed truck because they were spoiling and creating a mess. Plaintiff informed defendant that since the melons were rotten, she no longer wanted them.

The small claims court dismissed plaintiff's conversion claim in a judgment dated 19 August 2002. Plaintiff filed a timely appeal to the Hertford County District Court. Following a bench trial, the district court entered an order on 12 November 2003, concluding that defendant had converted plaintiff's property and committed an unfair and deceptive trade practice under N.C. Gen. Stat. § 75-1.1. The order awarded damages in the amount of $455.00, the value of the watermelons. These damages were then trebled in accordance with North Carolina's unfair and deceptive trade practice statute, N.C. Gen. Stat. § 75-16 (2003), for a total liability of $1,365.00. The court also awarded plaintiff $1,562.50 in attorneys' fees, under N.C. Gen. Stat. § 75-16.1 (2003). Defendant has appealed to this Court.

I

[1] " 'Conversion is defined as: (1) the unauthorized assumption and exercise of the right of ownership; (2) over the goods or personal property; (3) of another; (4) to the exclusion of the rights of the true owner.' " *Estate of Graham v. Morrison*, 168 N.C. App. 63, 72, 607 S.E.2d 295, 302 (2005) (quoting *Di Frega v. Pugliese*, 164 N.C. App. 499, 509, 596 S.E.2d 456, 463 (2004)). "[C]onversion may occur when a valid repossession of collateral results in an incidental taking of other property, *unless* the loan agreement includes the debtor's consent to the incidental taking." *Clark v. Auto Recovery Bureau*

Conn., Inc., 889 F. Supp. 543, 548 (D. Conn. 1994); *see also Rea v. Universal C. I. T. Credit Corp.*, 257 N.C. 639, 642, 127 S.E.2d 225, 228 (1962) (holding that plaintiff was entitled to a new trial on his conversion claim when the trial court failed to submit to the jury the question whether, at the time of repossession, plaintiff's car contained tools belonging to plaintiff); *Kitchen v. Wachovia Bank & Trust Co., N.A.*, 44 N.C. App. 332, 334, 260 S.E.2d 772, 773 (1979) (denying a lender's motion for summary judgment on the issue of conversion when the lender repossessed plaintiff's mobile home containing some of her personal property in which the lender did not have a security interest).

Defendant in this case contends that there was no unauthorized assumption and exercise of the right of ownership over the watermelons to the exclusion of the rights of the true owner. In support of this contention, defendant asserts (1) that plaintiff had an opportunity to remove the watermelons before the repossession and (2) that the loss of the watermelons was due to plaintiff's subsequent failure to supply defendant with her truck key.

With regard to the first assertion, defendant argues that there is no competent evidence to support the trial court's finding that defendant's agent, Carolina Repossessions, failed to give plaintiff "a reasonable amount of time to unload her watermelons during the repossession." We disagree. Plaintiff testified specifically that she requested an opportunity to remove her melons from the truck at the time of repossession and that her request was refused. Also, plaintiff's brother testified as follows:

> A. . . . . I got up and went to the door, and [plaintiff] was talking to two men, and one of them was starting hooking up the truck, and I asked her what they were doing. She said, "They came to get the truck." I said, "Well, are they gonna let you get the watermelons off?" and while she was standing talking to them, I went back to get dressed to come back, and when I got back out there they had the truck loaded up going down the lane throwing the watermelons all in the lane. That's when I told her to call the police department and see if they knew anything about it.
>
> Q. How long would you say it took you to go back and get dressed and come back out?
>
> A. Two to three minutes. . . .
>
> . . . .

Q. What did—what did Ms. Eley say when you came back and—and asked her about the watermelons?

A. She said they'd got—they'd gone on down the lane, and that's when I told her to call the police. They were supposed to give you time to get your property out of there.

Even Mr. Pinkham, one of the repossessors, testified that "when I got the truck turned around to leave, [plaintiff] did say that she wanted to get her belongings out of the truck, and I told her that if she wanted to get her belongings she needed to go ahead and get them because I did have to get back to Washington, and after about 15 minutes of being there, I figured that had been enough time for her to get the belongings, so I left. I did have other things to do, and so I pulled out."

The record thus contains competent evidence allowing the trial court to find that plaintiff was not allowed a reasonable time to unload her 130 watermelons. Although it is arguable that the record might also support a finding that plaintiff did have time to unload her melons, but failed to do so, the trial court's finding of fact otherwise is supported by ample evidence and is, therefore, binding on appeal. *Hensgen*, 53 N.C. App. at 335, 280 S.E.2d at 769.

[2] With regard to defendant's second assertion regarding plaintiff's failure to give defendant her truck keys, the trial court made the following pertinent findings of fact:

9. Ms. Eley contacted Ms. White, of Mid-East Acceptance, on the morning of July 29, 2003 to inquire as to the location of her truck so she could retrieve her watermelons. Ms. White's reply was "What truck?"

10. Mid-East Acceptance was the bailee of Ms. Eley's personal property and had an obligation to protect this collateral from harm.

11. When Mid-East Acceptance contacted Ms. Eley on Juy [sic] 31st to tell her where her truck was located the watermelons were already decomposing.

12. Mid-East Acceptance placed a condition on the return of Ms. Eley's property by requiring her to bring them the vehicle ignition key prior to that return.

Since defendant has not assigned error to these findings of fact, they are binding on this Court. *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001). These findings of fact establish that the loss was not due to plaintiff's failure to deliver the truck key because the request for the key came too late to preserve the watermelons.

Taken together, all of these facts combine to support the inference that defendant assumed and exercised the right of ownership over plaintiff's watermelons without her permission, to the exclusion of her own rightful ownership interest. More colloquially, as plaintiff put it, "It was too hot. The melons was already there a week. The melons were spoiled. They wouldn't do me any good. They were their melons. They took the truck, they took the melons. They were their melons then." The trial court, therefore, did not err in entering judgment in favor of plaintiff on her claim for conversion.

II

[3] Defendant next contends that the trial court erred by concluding that defendant's actions amounted to an unfair and deceptive trade practice under N.C. Gen. Stat. § 75-1.1. A practice violates N.C. Gen. Stat. § 75-1.1 if it is " '(1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs.' " *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 533, 551 S.E.2d 546, 552 (quoting *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000)), *disc. review denied*, 354 N.C. 363, 557 S.E.2d 538 (2001). Defendant argues only that plaintiff failed to prove the first element: the existence of an unfair or deceptive act or practice.

"A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Also, " '[a] party is guilty of an unfair act or practice when it engages in conduct [that] amounts to an inequitable assertion of its power or position.' " *Lake Mary Ltd. P'ship*, 145 N.C. App. at 533, 551 S.E.2d at 553 (quoting *Johnson v. Ins. Co.*, 300 N.C. 247, 264, 266 S.E.2d 610, 622 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988)). Although "whether a practice is unfair or deceptive is . . . dependent upon the facts of each case," *Moretz v. Miller*, 126 N.C. App. 514, 518, 486 S.E.2d 85, 88, *disc. review denied*, 347 N.C. 137, 492 S.E.2d 24 (1997), "[t]he determination of whether an act or practice is an unfair or

deceptive practice that violates N.C.G.S. § 75-1.1 is a question of law for the court." *Gray*, 352 N.C. at 68, 529 S.E.2d at 681.

Here, the trial court entered an explicit finding of fact stating that "[e]mployees of Mid-East Acceptance used their relative position of power to deprive the Plaintiff of her personal property." Defendant argues that this finding is unsupported by competent evidence. We disagree because we find ample support in the trial court's other, unchallenged findings of fact as well as in the evidence admitted at trial. *See Lake Mary Ltd. P'ship*, 145 N.C. App. at 532, 551 S.E.2d at 553.

The trial court found and evidence supports that (1) two men appeared at the female plaintiff's house at 4:05 a.m. with a tow truck and hauled away her truck without giving plaintiff a reasonable time to unload her 130 watermelons; (2) following the repossession, when plaintiff contacted defendant to inquire as to the location of her truck so she could retrieve her watermelons, defendant denied knowledge of the truck; (3) defendant was unresponsive to plaintiff's inquiries about her watermelons; (4) defendant only offered to give plaintiff access to the truck—by requesting her truck key—*after* the watermelons were already rotting and of no value; and (5) defendant has never compensated, nor offered to compensate, plaintiff for the converted property. These unchallenged findings of fact, taken together, are such as "a reasonable mind might accept as adequate" to support the finding that the defendant deprived plaintiff of her property by means of inequitably asserting its relative position of power. *Andrews*, 120 N.C. App. at 605, 463 S.E.2d at 427. Therefore, we are unpersuaded by defendant's contention that no competent evidence supports this finding.

Further, this Court has already held that comparable findings are sufficient to establish an unfair and deceptive trade practice. *See Love v. Pressley*, 34 N.C. App. 503, 516-17, 239 S.E.2d 574, 583 (1977) (holding that the evidence supported the existence of an unfair and deceptive trade practice when (1) a landlord converted plaintiffs' personal property while cleaning the apartment for re-leasing, even though the lease had not yet expired; and (2) the landlord refused to respond to the plaintiffs' inquiries about the property), *disc. review denied*, 294 N.C. 441, 241 S.E.2d 843 (1978). Under the circumstances of this case—involving perishable goods, defendant's denial of any realistic opportunity to remove the goods, and defendant's failure to respond to plaintiff's prompt inquiries—the trial court properly held defendant liable under N.C. Gen. Stat. § 75-1.1.

III

[4] The trial court awarded damages to plaintiff in the amount of $455.00 on her conversion claim, an amount that reflects the trial court's finding that plaintiff's truck bed contained approximately 130 watermelons valued at $3.50 each. Defendant challenges this award on the ground that there was insufficient evidence of the value of the watermelons. Specifically, defendant contends that plaintiff's oral testimony as to the value of the watermelons is "not even adequate in the most basic business setting, and is woefully inadequate in a court of law." To the contrary, it is well-settled in this state that "the opinion of a property owner is *competent evidence* as to the value of such property." *Compton v. Kirby*, 157 N.C. App. 1, 18, 577 S.E.2d 905, 916 (2003) (emphasis added) (finding that competent evidence supported a finding that plaintiff's allegedly converted partnership interest was worth over $50,000.00 when plaintiff sent defendant a letter to that effect).

Here, when asked how much she had paid for the watermelons, plaintiff opined, "About $3.50 apiece." In accordance with *Compton*, this testimony is sufficient to support the trial court's calculation of plaintiff's damages. Moreover, since we have upheld the trial court's conclusion that defendant committed an unfair and deceptive trade practice under Chapter 75, we also affirm the trebling of the $455.00 to $1,365.00 in accordance with N.C. Gen. Stat. § 75-16.[1]

Defendant also challenges the trial court's award of attorneys' fees under N.C. Gen. Stat. § 75-16.1. Defendant offers no argument as to why the award in this case is improper apart from its contention that plaintiff was not entitled to recover under N.C. Gen. Stat. § 75-1.1. We, therefore, affirm the trial court's attorneys' fee award.

[5] Plaintiff has filed a motion for attorneys' fees incurred during this appeal. This Court has previously held that: "Upon a finding that

1. Plaintiff cross-assigned error to the trial court's award of damages, arguing that the price of $3.50 per melon was too low and did not reflect the market value of the watermelons. Plaintiff did not, however, file an appellant's brief on this issue, but rather included her discussion in her appellee's brief. Because this argument is not an alternative basis for upholding the trial court's order, N.C.R. App. P. 10(d), but rather asks this Court to reverse the order in part, plaintiff was required to file a separate appellant's brief. Plaintiff's assignment of error is not, therefore, properly before this Court. *See Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 117, 314 S.E.2d 775, 781 (1984) ("Because plaintiff's cross-assignment of error does not present an alternative basis upon which to support the judgment, the question argued therein is not properly before this court. The proper method to have preserved this issue for review would have been a cross-appeal. Plaintiff's cross-assignment of error is overruled.").

[appellees] were entitled to attorney's fees in obtaining their judgment [under N.C. Gen. Stat. § 75-16.1], any effort by [appellees] to protect that judgment should likewise entitle them to attorney's fees." *City Fin. Co. of Goldsboro, Inc. v. Boykin*, 86 N.C. App. 446, 449, 358 S.E.2d 83, 85 (1987). Accordingly, because plaintiff was entitled to attorneys' fees for hours expended at the trial level, we hold plaintiff is entitled to attorneys' fees on appeal, especially in light of the limited amount of money at issue in the litigation. *Id.* at 450, 358 S.E.2d at 85 (noting that because the damages amounted to only $500.00, defense of the judgment would not be "economically feasible" in the absence of an award of attorneys' fees). We remand to the trial court for a determination of the hours spent on appeal and a reasonable hourly rate and for the entry of an appropriate attorneys' fee award.

Affirmed and remanded.

Judges McGEE and TYSON concur.

JOHN D. MOOSE AND SANDRA MOOSE, & LYNN McLELLAN, PLAINTIFFS v. VERSAILLES CONDOMINIUM ASSOCIATION; MARILYN WILHELM, ANGIE STATHAKIS, RICHARD VALLEJO, CASSIE DRACOS, AND ANN PATTON, AS DIRECTORS AND OFFICERS OF VERSAILLES CONDOMINIUM ASSOCIATION, AND INDIVIDUALLY; ASSOCIATION MANAGEMENT GROUP OF CHARLOTTE, INC., AND CNE SERVICES, INC., DEFENDANTS

No. COA04-1034

(Filed 5 July 2005)

1. Appeal and Error— cross-assignment of error—not properly preserved for appeal

Although an appellee may cross-assign error to any action of the trial court which was properly preserved for appellate review, a cross-assignment was not properly preserved where it was not included in the record.

2. Arbitration and Mediation— right to compel lost—delay

Defendant's delayed effort to compel arbitration waived that right where plaintiff was placed at a disadvantage in discovery and incurred additional attorney fees.

Appeal by defendant Association Management Group of Charlotte, Inc. from order filed 26 March 2004 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 April 2005.

Richard H. Robertson for plaintiff-appellee.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by Rex C. Morgan and Jason B. James, for defendant-appellant Association Management Group of Charlotte, Inc.

BRYANT, Judge.

Association Management Group of Charlotte, Inc. ("AMG"/ defendant) appeals from an order filed 26 March 2004, denying defendant's motion to compel arbitration.

John D. Moose, Sandra Moose, and Lynn McLellan (plaintiffs) are members of Versailles Condominium Association and unit owners in "The Condominium at Versailles," Building No. 1, located at 2600 Park Road, Charlotte, North Carolina (hereinafter "the property"). On or about 1 December 2001, the property and the common area immediately surrounding the property were damaged by a fire that originated in one of the downstairs units in the 2600 building. The resulting damage to plaintiffs' property was determined to be "partial destruction" as defined in paragraph 21 of the declarations and by-laws of the Versailles Condominium Association (hereinafter the "declarations and by-laws"). Subsequent to the loss, Versailles contracted with CNE, a general contractor, to perform necessary structural and cosmetic repairs to plaintiffs' property as well as all necessary repairs to the common areas and other portions of the condominium units for which Versailles was responsible pursuant to the declarations and by-laws.

On 7 March 2003, plaintiffs filed suit naming as defendants: Versailles Condominium Association; Marilyn Wilhelm, Angie Stathakis, Richard Vallejo, Cassie Dracos, and Ann Patton, as Directors and Officers of Versailles Condominium Association, and Individually (hereinafter "the Board"); Association Management Group of Charlotte, Inc.; and CNE Services, Inc. (collectively defendants). In their complaint, plaintiffs asserted causes of action against Versailles and the Board for breach of fiduciary relationship, as well as breach of trust. Plaintiffs alleged two causes of action against AMG and CNE: breach of contract and unfair or deceptive acts or practices pursuant to N.C. Gen. Stat. § 75-1.1(a).

Plaintiffs' complaint centered around allegations that the repairs to their property and the surrounding common areas were not performed in a timely and/or workmanlike manner. With respect to the claims against AMG, plaintiffs alleged, *inter alia*, they were third-party beneficiaries of Versailles' contract with AMG for the management of the condominiums and AMG had failed to "fully and substantially perform the duties required of it pursuant to its management contract with [Versailles]."

Counsel for defendants Versailles, the Board, and AMG filed an answer to plaintiffs' complaint on behalf of all defendants on 12 May 2003, with the exception of CNE who was represented by other counsel. The answer filed by counsel for defendants Versailles, the Board, and AMG did not contain a motion to compel arbitration and stay proceedings.

Following service of plaintiffs' complaint and summons, discovery was undertaken on behalf of both plaintiffs and all defendants. Plaintiffs served defendants, including AMG, with requests for production of documents on 5 May 2003. AMG timely submitted responses to plaintiffs' request. At the same time, on 16 June 2003, counsel for defendants Versailles, the Board, and AMG served plaintiffs with defendants' first set of interrogatories and request for production of documents. Plaintiffs timely responded to defendants' discovery requests. Additionally, CNE served plaintiffs with interrogatories and request for production of documents on 28 May 2003, to which plaintiffs timely responded.

Plaintiffs filed a motion for leave to amend the complaint on 19 September 2003. Plaintiffs' motion was heard at the 30 October 2003 session of Mecklenburg County Superior Court with the Honorable David S. Cayer presiding. The trial court granted plaintiffs' motion for leave to amend the complaint, and plaintiffs filed their amended complaint on 10 November 2003.

Plaintiffs' amended complaint set forth new factual allegations against AMG, as well as new causes of action against AMG for breach of the implied covenant of good faith and fair dealing. The new factual allegations against AMG included, but were not limited to, paragraph 47 of the amended complaint, which stated:

> At all times herein alleged, the Defendant AMG knew that the Association and the Directors and Officers of the Association stood in a confidential and fiduciary relationship to the Plaintiffs,

> and that this relationship imposed a fiduciary duty upon the Association and the Directors and Officers for whom and in whose place and stead AMG was acting.

In response to plaintiffs' amended complaint, counsel for defendants Versailles and the Board filed an amended answer and motion to dismiss. AMG filed a motion to compel arbitration pursuant to the arbitration clause of the contract between Versailles and AMG—the contract under which plaintiffs claim third-party beneficiary status—and a motion to dismiss.

AMG's motions were heard at the 11 February 2004 session of Mecklenburg County Superior Court with the Honorable J. Gentry Caudill presiding. The trial court denied AMG's motion to dismiss, and allowed plaintiffs' oral motion to amend their complaint a second time to properly allege third-party beneficiary status pursuant to the contract between AMG and Versailles.

With respect to AMG's motion to compel arbitration, the trial court, after reviewing the affidavits filed by the parties, entered the following findings of fact:

> 10. AMG, as a matter of right, engaged in extensive discovery procedures as provided for by the Rules of Civil Procedure, N.C.G.S. § 1A-1, Rule 26, et seq. However, in arbitration parties may only engage in discovery with permission of the arbitrator as provided for by the Uniform Arbitration Act pursuant to N.C.G.S. §1-567.8 or the Revised Uniform Arbitration Act pursuant to N.C.G.S. §1-569.17. As such, AMG has utilized and benefited [sic] from discovery procedures under the Rules of Civil Procedure; discovery procedures that would be within the discretion of the arbitrator if this matter were referred to arbitration.
>
> 11. Plaintiffs, according to the affidavit submitted by Plaintiffs' counsel, have paid a total of $32,854.00 in legal fees and costs to date in pursuing this civil action. A significant portion of this is attributable to providing information to AMG, and would not have been incurred had AMG sought arbitration without delay.

Based upon these findings of fact, the trial court made the following conclusions of law:

> 7. If arbitration were now ordered, Plaintiffs would be prejudiced by Defendant AMG's delay in seeking arbitration.
>
> 8. By its acts and conduct, AMG has impliedly waived any

right, which it may have to arbitrate pursuant to the agreement to arbitrate.

Despite finding the management agreement contained a valid and enforceable arbitration provision that was in force and binding upon the parties, the trial court denied AMG's motion to compel arbitration.

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[2] The dispositive issue on appeal is whether the trial court erred in denying defendant's motion to compel arbitration[1].

As a preliminary matter, we note the denial of a motion to compel arbitration is interlocutory in nature. *Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 677 (2001). This Court, however, has held " 'the right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable.' " *Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 106, 566 S.E.2d 730, 732 (2002) (citation omitted).

When a party claims a dispute is covered by an agreement to arbitrate and the other party denies the existence of an arbitration agreement, the trial court must determine whether an arbitration agreement actually exists. N.C.G.S. § 1-567.3 (2001). "The question of whether a dispute is subject to arbitration is an issue for judicial determination." *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678. This judicial determination involves the two-step process of ascertaining: "(1) whether the parties had a valid agreement to arbitrate, and also (2) whether 'the specific dispute falls within the substantive scope of that agreement.' " *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678 (citation omitted).

Only when a valid arbitration agreement exists can a matter be settled by arbitration. N.C.G.S. § 1-567.2 (2001). "[T]he party seek-

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[1] 1. In their appellate brief, plaintiffs cross-assign as error, the trial court's determination that a valid arbitration agreement existed between the Versailles Condominium Association and AMG and was binding upon plaintiffs. Although plaintiffs correctly cite, in their brief, N.C. R. App. P. 10(d) for the proposition that an "appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review," plaintiff failed to include this cross-assignment of error in the record, in violation of 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.") Accordingly, this cross-assignment of error has not been properly preserved for appellate review. *See also*, *Viar v. North Carolina Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005) ("The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' ").

ing arbitration must show that the parties mutually agreed to arbitrate their disputes." *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992). "The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002). The trial court's determination of whether a dispute is subject to arbitration, however, is a conclusion of law reviewable *de novo*. *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678.

Here, the trial court found a valid arbitration agreement existed, but defendant waived its right to arbitration by undertaking actions which would prejudice plaintiffs if arbitration were compelled. *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984).

> A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial; evidence helpful to a party is lost because of delay in the seeking of arbitration; a party's opponent takes advantage of judicial discovery procedures not available in arbitration; or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon.

Cyclone Roofing Co., 312 N.C. at 229-30, 321 S.E.2d at 876-77, (internal citations omitted). "Waiver of a contractual right to arbitration is a question of fact." *Id.* In this regard, "[f]indings of fact, when supported by any evidence, are conclusive on appeal. Conclusions of law, even if stated as factual conclusions, are reviewable." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (quoting *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 465, 98 S.E.2d 871, 876 (1957)). Nevertheless, when there is evidence in the record which supports the trial court's findings of fact, and those findings support its conclusions of law that a party has waived its right to compel arbitration, the decision must be affirmed. *Prime South Homes*, 102 N.C. App. at 261, 401 S.E.2d at 827.

Defendant contends the trial court erred in concluding defendant had waived its right to compel arbitration, and specifically alleges certain findings of fact are not supported by the evidence. The trial court based its denial of defendant's motion on the following conclusions of law:

7. If arbitration were now ordered, Plaintiffs would be prejudiced by Defendant AMG's delay in seeking arbitration.

8. By its acts and conduct, AMG has impliedly waived any right which it may have to arbitration pursuant to the agreement to arbitrate.

The trial court supported its conclusions of law by the following findings of fact which AMG alleges are not supported by the evidence:

10. AMG, as a matter of right, engaged in extensive discovery procedures as provided for by the Rules of Civil Procedure, N.C.G.S. § 1A-1, Rule 26, et seq. However, in arbitration parties may only engage in discovery with permission of the arbitrator as provided for by the Uniform Arbitration Act pursuant to N.C.G.S. §1-567.8 or the Revised Uniform Arbitration Act pursuant to N.C.G.S. §1-569.17. As such, AMG has utilized and benefited [sic] from discovery procedures under the Rules of Civil Procedure; discovery procedures that would be within the discretion of the arbitrator if this matter were referred to arbitration.

11. Plaintiffs, according to the affidavit submitted by Plaintiffs' counsel, have paid a total of $32,854.00 in legal fees and costs to date in pursuing this civil action. A significant portion of this is attributable to providing information to AMG, and would not have been incurred had AMG sought arbitration without delay.

Defendant contends the evidence does not support the findings in paragraph 10. Defendant further contends that since the court made no findings the witnesses deposed would have been available to attend an arbitration hearing, the record does not support a finding defendant took advantage of discovery procedures that would be unavailable in arbitration. Defendant argues, therefore, the court's conclusion defendant waived its right to compel arbitration is not supported by the evidence.

Defendant relies upon the authority of *Sullivan v. Bright*, 129 N.C. App. 84, 497 S.E.2d 118 (1998); however, its reliance is misplaced. *Sullivan* construed N.C. Gen. Stat. § 1-567.8(b), which makes depositions in arbitration dependent upon witness availability. The issue in *Sullivan* was whether a witness who had been deposed under the Rules of Civil Procedure would have been unavailable to attend an arbitration hearing, and under N.C. Gen. Stat. § 1-567.8(b) subject to deposition in arbitration anyway. Because there was no evidence in

the record one way or the other, it is to be expected that the court would find no waiver of arbitration rights. The court's duty was to decide the case before it on the record, and not speculate about availability of a witness outside the record. *Sullivan* is distinguishable from the case under consideration.

The applicable North Carolina General Statutes provide "[o]n application of a party and for use as evidence, the arbitrators may permit a deposition to be taken . . . of a witness who cannot be subpoenaed or is unable to attend the hearing." N.C. Gen. Stat. § 1-567.8(b) (2001). Plaintiffs in this lawsuit are not witnesses who cannot be subpoenaed or are unable to attend the arbitration hearing. They filed the lawsuit and are vitally interested in it. They appeared for their depositions voluntarily, and without being subpoenaed. They are local residents residing at the same addresses where they resided when they filed this lawsuit, and they could have been subpoenaed to attend an arbitration hearing. Defendant did not present any evidence to the contrary. Accordingly, plaintiffs would not be subject to being deposed in arbitration.[2] By taking their depositions before requesting arbitration, defendant took advantage of a discovery procedure not available in arbitration in order to gain access to evidence.

Having benefitted therefrom, defendant demanded arbitration, cutting off plaintiffs' ability to obtain discovery. When defendant's motion to compel discovery was heard, plaintiffs were in need of obtaining discovery from defendant, and were actively pursuing necessary discovery. Plaintiffs' motion to compel discovery against defendant was heard at the same hearing that resulted in the order appealed from, and defendant was ordered to respond to plaintiffs' discovery requests within 30 days of the entry of the order. In addition, plaintiffs were actively seeking to take the depositions of a former employee of defendant who was in charge of the Association account and the Nationwide Insurance Company adjuster who handled the fire loss claims for the Association's carrier.

Defendant further contends no evidence exists as to the amount of legal fees and costs which plaintiffs have been required to pay by reason of defendant's delay in requesting arbitration. Again, defendant relies upon *Sullivan* and again its reliance is misplaced. In *Sullivan*, the trial court found the unnamed insurance carrier

2. Note, however, under current North Carolina law, an "arbitrator may permit any discovery the arbitrator decides is appropriate under the circumstances . . . ." N.C. Gen. Stat. § 1-569.17(c) (2003). This new law is applicable to "an agreement to arbitrate made on or after January 1, 2004." N.C. Gen. Stat. § 1-569.3(a) (2003).

incurred significant expense as a result of the plaintiff's delay in seeking arbitration. Our Court determined the record evidence did not support this finding "since there is no statement indicating how much money [the carrier] spent by reason of plaintiff's forbearance." *Sullivan*, 129 N.C. App. at 87, 497 S.E.2d at 121. Such is not the case here.

There is evidence in the record which supports the trial court's findings of fact that plaintiffs "have paid a total of $32,854.00 in legal fees and costs to date in pursuing this civil action [and a] significant portion of this is attributable to providing information to AMG, and would not have been incurred had AMG sought arbitration without delay." Plaintiffs submitted a detailed billing record which itemized the attorney's fees incurred by plaintiffs from the date they employed their attorney to file suit through December 2002, prior to defendant requesting arbitration. The charges included time spent preparing for and participating in depositions, drafting written discovery responses and requests, and preparing for and appearing in court. These costs resulted from defendant's delay in demanding arbitration, and would not have been incurred had defendant made a timely demand for arbitration.

As stated previously, when there is evidence in the record which supports the trial court's findings of fact, and those findings support its conclusions of law that a party has waived its right to compel arbitration, the decision must be affirmed. *Prime South Homes*, 102 N.C. App. at 261, 401 S.E.2d at 827. In this case, the trial court's findings of fact are supported by the evidence and the conclusions of law are supported by the findings of fact. Therefore, defendant has impliedly waived its right to compel arbitration. This assignment of error is overruled.

Affirmed.

Judges McGEE and STEELMAN concur.

JOANNE MUNOZ, EMPLOYEE, PLAINTIFF v. CALDWELL MEMORIAL HOSPITAL, EMPLOYER, AND ALLIED CLAIMS ADMINISTRATION, CARRIER, DEFENDANTS

No. COA04-1292

(Filed 5 July 2005)

1. Workers' Compensation— going and coming rule—traveling salesman exception—home health nurse

The traveling salesman exception to the going and coming rule applied in a workers' compensation case to a home health nurse injured in an automobile collision while going to a patient's residence. The record supports the Commission's conclusion that plaintiff's employment involved multiple patients with no fixed hours or places of work.

2. Workers' Compensation— going and coming rule—contractual duty exception—home health nurse

The contractual duty exception applied in a workers' compensation case to a home health nurse injured in an automobile accident on her way to a patient's house. The parties stipulated that the distance was sufficient for plaintiff to be reimbursed for mileage under her contract.

3. Workers' Compensation— going and coming rule—exceptions—deviation from direct route—not distinct departure

A home health nurse's decision to drive to her employer's office to drop off time slips on her way to a patient's residence did not prevent application of the traveling salesman and contractual duty exceptions to the going and coming rule. Even if plaintiff deviated from the most direct route, this deviation does not rise to the level of a distinct departure from her business trip.

4. Workers' Compensation— average weekly wage—straight average rather than weighted

The Industrial Commission did not err by using a straight rather than a weighted average to determine the average weekly wage of an injured nurse employed less than a year where the decision was based on the parties' stipulation. Defendants neither cite authority nor demonstrate why a weighted average is to be preferred.

Appeal by defendants from opinion and award entered 28 June 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 May 2005.

Charles G. Monnett, III & Associates, by Craig O. Asbill, for plaintiff-appellee.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Caldwell Memorial Hospital ("Caldwell") and Allied Claims Administration ("Allied") (collectively, "defendants") appeal an opinion and award of the North Carolina Industrial Commission awarding Joanne Munoz ("plaintiff") compensation for injuries resulting from an automobile collision. For the reasons discussed herein, we affirm the opinion and award.

The facts and procedural history pertinent to the instant appeal are as follows: On 5 January 2001, plaintiff began work for Caldwell as a home health care nurse. Plaintiff's position with Caldwell required her to travel each day to an assigned patient's residence to provide care for the patient. Plaintiff provided care for only one patient per day, and her hourly wages began when she reached the patient's home. As part of plaintiff's compensation, Caldwell paid plaintiff excess travel mileage if her patient's residence was more than sixty miles round trip from her own residence.

On 8 January 2001, plaintiff was assigned to care for a patient in Lenoir, North Carolina. While on her way to the patient's residence, plaintiff decided to drop off her time slips at Caldwell's office, which was also located in Lenoir. As plaintiff drove to Caldwell's office, she was involved in an automobile collision and suffered injuries to her head and back. Caldwell denied plaintiff's subsequent worker's compensation claim, contending that the collision did not arise out of and in the course of plaintiff's employment at Caldwell.

On 6 November 2002, the case was heard by North Carolina Industrial Commission Deputy Commissioner Edward Garner, Jr. ("the Deputy Commissioner"). On 10 March 2003, the Deputy Commissioner entered an opinion and award concluding that plaintiff's injuries arose out of and in the course of her employment at Caldwell. Based upon this conclusion, the Deputy Commissioner awarded plaintiff $271.46 per week in compensation.

Defendants appealed the Deputy Commissioner's award to a full panel of the North Carolina Industrial Commission ("the Full Commission"). On 28 June 2004, the Full Commission entered an opinion and award affirming the Deputy Commissioner's prior award. The Full Commission made the following pertinent conclusions of law:

> 5. In this case, the "traveling salesman" exception applies because plaintiff was injured while en route to visit a patient pursuant to a job with no fixed hours or place of work. Plaintiff's job required that she report directly from her home to the patient's home for which she would be caring each day rather than beginning her day at her employer's fixed place of business. Plaintiff's job required that she visit with only one patient per day, but during the four days that plaintiff had been employed, she had visited three different patients at three different residences, and worked varying hours each day. . . . [U]nder these circumstances, the "traveling salesman" exception would apply to each day upon leaving her house to travel to her patient's home because plaintiff did not have a fixed work place or fixed work hours.
>
> 6. Plaintiff's employment was of a nature that failed to establish a fixed work place or fixed work hours, and plaintiff's mere intention to drop her pay slips off while traveling the route to her patient's home that would take her by her employer's place of business on January 8, 2001, did not constitute a "distinct" and "total" departure on a personal errand. Accordingly, the traumatic brain injury and other injuries resulting from plaintiff's automobile accident on January 8, 2001, are compensable as they arose out of and in the course of her employment pursuant to the "traveling salesman" exception to the "going and coming" rule.
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> . . . .
>
> 8. Plaintiff's injuries sustained while traveling to work on January 8, 2001, are compensable pursuant to the "contractual duty" exception because [Caldwell] was under an active contractual duty to reimburse plaintiff for her mileage at the time of her automobile collision. Pursuant to this mileage plan, plaintiff was paid mileage for the amount of miles she was required to travel in excess of 60 miles roundtrip to a single patient's home. Thus, the "contractual duty" exception would apply to a home health care nurse visiting a single patient over the course of a day at the time that nurse traveled beyond a 30-mile radius of her listed home address.

9. Plaintiff's mere intent to drop her pay slip off, as required, while traveling the route to her patient's home that would take her by her employer's place of business does not constitute a "distinct" or "total" departure on a personal errand.

Based upon these conclusions of law, the Full Commission awarded plaintiff $271.46 per week in compensation. Defendants appeal.

The issues on appeal are whether the Full Commission erred by: (I) concluding that plaintiff's injury arose out of and in the course of her employment; and (II) determining plaintiff's average weekly wage.

[1] Defendants first argue that the Full Commission erred by concluding that plaintiff's injuries arose out of and in the course of her employment. Defendants assert that because the collision giving rise to plaintiff's injuries occurred while plaintiff was driving her personal vehicle to work, plaintiff's injuries are not compensable. We disagree.

This Court's review of a decision of the Full Commission is limited to determining whether competent evidence supports the Full Commission's findings of fact, and whether the Full Commission's findings of fact support its conclusions of law. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). "Whether an injury arises out of and in the course of a claimant's employment is a mixed question of fact and law[.]" *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 481 (1997).

The "going and coming rule" states that "injuries sustained by an employee while going to or from work are not ordinarily compensable" because the injuries do not arise out of or in the course of employment. *Bass v. Mecklenburg County*, 258 N.C. 226, 231-32, 128 S.E.2d 570, 574 (1962) (citations omitted); *Hunt v. Tender Loving Care Home Care Agency, Inc.*, 153 N.C. App. 266, 269, 569 S.E.2d 675, 678, *disc. review denied*, 356 N.C. 436, 572 S.E.2d 784 (2002). The rationale for this rule is that "the risk of injury while traveling to and from work is one common to the public at large," *Creel*, 126 N.C. App. at 555, 486 S.E.2d at 482, and "[a]n employee is not engaged in the business of the employer while driving his or her personal vehicle to the place of work or while leaving the place of employment to go home." *Hunt*, 153 N.C. App. at 269, 569 S.E.2d at 678. Nevertheless, the going and coming rule is subject to exceptions. Such exceptions have been recognized where:

> (1) an employee is going to or coming from work but is on the employer's premises when the accident occurs (premises exception); (2) the employee is acting in the course of his employment and in the performance of some duty, errand, or mission thereto (special errands exception); (3) an employee has no definite time and place of employment, requiring her to make a journey to perform a service on behalf of the employer (traveling salesman exception); or (4) an employer contractually provides transportation or allowances to cover the cost of transportation (contractual duty exception).

Stanley v. Burns Int'l Sec. Servs., 161 N.C. App. 722, 725, 589 S.E.2d 176, 178 (2003) (citations omitted).

In the instant case, the Full Commission determined that both the traveling salesman exception and the contractual duty exception apply. Defendants contend that the traveling salesman exception does not apply because on the date of the collision, plaintiff had a fixed job location at the residence of her patient. In support of this contention, defendants cite this Court's refusal to apply the traveling salesman exception to the facts in *Hunt*. However, we conclude that *Hunt* is distinguishable from the instant case.

In *Hunt*, we noted that "[i]f travel is contemplated as part of the employment, an injury from an accident during travel is compensable." 153 N.C. App. at 269, 569 S.E.2d at 678. Thus, under the traveling salesman exception, "employees with no definite time and place of employment . . . are within the course of their employment when making a journey to perform a service on behalf of their employer." *Creel*, 126 N.C. App. at 556-57, 486 S.E.2d at 483 (citations omitted). "The applicability of the 'traveling salesman' rule to the facts [of a case] depends upon the determination of whether [the] plaintiff had fixed job hours and a fixed job location." *Hunt*, 153 N.C. App. at 270, 569 S.E.2d at 678.

Like the plaintiff in the instant case, the plaintiff in *Hunt* was a nursing aide whose work required her to travel to a patient's residence rather than report to her employer's premises. However, unlike the plaintiff in the instant case, the plaintiff in *Hunt* had worked for her employer for "over two years" and had worked "solely" with the same patient at the same address. *Id.* at 270, 569 S.E.2d at 678-79. Based upon these facts, this Court determined in *Hunt* that the plaintiff's "employment did not require attending to several patients, at different locations with no fixed work location." *Id.* at 270, 569 S.E.2d at 679.

In the instant case, plaintiff had only been employed at Caldwell for four days at the time of the collision, and she had been assigned to three different patients at different locations on each date of her employment. Although the parties stipulated that "plaintiff . . . would visit only one patient per day[,]" the parties also stipulated that "[s]ome of [Caldwell's] home health care nurses were limited to a single patient and some would see multiple patients[.]" The parties further stipulated that plaintiff's wages would "begin upon reaching a patient's residence." Thus, unlike in *Hunt*, plaintiff was not assigned "solely" to the patient she was en route to assist on the date of her injury. Instead, the record supports the Full Commission's determination that plaintiff's employment with Caldwell involved multiple patients, and that plaintiff had "no fixed hours or place of work." Therefore, we conclude that the Full Commission did not err by determining that the traveling salesman exception applies to the instant case.

[2] Defendants also contend that the Full Commission erred by determining that the contractual duty exception applies to the instant case. In *Hunt*, this Court stated that "where an employer provides transportation or allowances to cover the cost of transportation, injuries occurring while going to or returning from work are compensable" under the contractual duty exception. *Id.*

> For a claim to fall within this exception, the transportation must be provided as a matter of right as a result of the employment contract. If the transportation is provided permissively, gratuitously, or as an accommodation, the employee is not within the course of employment while in transit. Where the cost of transporting employees to and from work is made an incident to the contract of employment, compensation benefits have been allowed.

Id. (citations omitted).

In the instant case, plaintiff's employment with Caldwell included a mileage compensation plan "for approved patient care, education, and business miles." The plan provided that "[f]or those having only one patient [per day], mileage will be paid if greater than 60 miles roundtrip from their listed home address." In *Hunt*, we rejected the plaintiff's claim that her accident was covered under a similar compensation policy, noting that "[t]he parties stipulated that [the] plaintiff was not compensated for her travel because she did not travel over" the relevant amount of mileage necessary for compensation

under the policy. *Id.* at 271, 569 S.E.2d at 679. However, in the instant case, the parties stipulated that "[t]he distance between the residence of [] plaintiff . . . and the residence of the patient she was visiting on January 8, 2001, was in excess of 60 miles round trip[,]" and the parties also stipulated that plaintiff "would be reimbursed as per [the mileage compensation plan] for mileage to a patient's residence in Lenoir." The Full Commission noted these stipulations prior to determining that the contractual duty exception applies to the instant case. We conclude that the Full Commission did not err in its determination.

[3] Defendants maintain that neither the traveling salesman nor the contractual duty exceptions should apply to plaintiff's claim because at the time of the collision, plaintiff was driving to Caldwell's office rather than her patient's residence. We disagree.

This Court has noted that the traveling salesman exception does not apply where the evidence demonstrates a distinct departure by the employee on a personal errand. *Dunn v. Marconi Communications, Inc.*, 161 N.C. App. 606, 612, 589 S.E.2d 150, 155 (2003). Similarly, we have also noted that "the 'contractual duty' exception can be negated if the Commission finds that the employee, while using an employer-provided vehicle, abandoned his employment-related purpose for using the vehicle." *Id.* However, our courts have further recognized that workers' compensation rules are subject to "liberal construction," and therefore, " '[w]here any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as "arising out of employment." ' " *Kiger v. Service Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963) (quoting *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960)).

In the instant case, defendants contend that plaintiff's route the date of the collision was not the most direct to her patient's residence, and that at the time of the collision, plaintiff had "doubled back" to drop off her time slips. However, we note that in *Creel*, this Court agreed that " '[a]n identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviation is so small as to be regarded as insubstantial.' " 126 N.C. App. at 557, 486 S.E.2d at 483 (quoting 1 Arthur Larson & Lex K. Larson, *Larson's Workmen's Compensation Law* § 19.00, at 4-352 (1996)). Moreover, in *Smith v. Central Transport*, 51 N.C. App. 316, 321, 276 S.E.2d 751, 754 (1981), we held that an employee's injury

from an automobile collision arose out of and in the course of his employment, and was not incurred during a distinct departure, even though the collision occurred "approximately four and a half hours after [the employee] had delivered his load of chemicals, and while he was . . . heading in a direction which would have been opposite to the most direct route back" to his employer's business. In the instant case, we conclude that even if plaintiff deviated from the most direct route of her travel in order to drop off her time slips, this deviation does not rise to the level of a distinct departure. Plaintiff stipulated that "[s]he was on her way to see a patient" when the collision occurred, but because "[s]he had extra time . . . she decided to drop off [her] time slips at" Caldwell's office. Plaintiff also stipulated that she was required to drop her time slips off at Caldwell's office by 5:00 p.m. on Mondays, including Monday, 8 January 2001, the date of the collision. Although we note that plaintiff would not be reimbursed for the mileage she incurred in driving to drop off her time slips, we also note that Caldwell's office was located in the same town as plaintiff's patient's residence. In light of the foregoing, we conclude that the Full Commission correctly determined that plaintiff's "mere intention to drop her pay slips off while traveling the route to her patient's home" did not prevent application of the traveling salesman and contractual duty exceptions. Accordingly, we overrule defendants' first argument.

[4] Defendants' final argument is that the trial court erred by determining plaintiff's average weekly wage. N.C. Gen. Stat. 97-2(5) (2003) governs the determination of an injured worker's average weekly wage, and it provides in pertinent part as follows:

> Average Weekly Wages.—"Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . . Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same

> grade and character employed in the same class of employment in the same locality or community.
>
> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

In the instant case, prior to the hearing, the parties stipulated in pertinent part as follows:

> 3. With respect to average weekly wage, during the year 2000, [Caldwell's] PRN (as needed) LPNs worked:
>
> a. If each week is averaged, the total average hours per week is 23.94.
>
> b. With a weighted average (weeks with 10 LPNs working would receive twice the weight as weeks with 5 LPNs working), the average hours per week is 22.76.

Based in part upon this stipulation, the Full Commission concluded in pertinent part as follows:

> 11. In this case, plaintiff's average weekly wage is best determined by employing another method as set forth in N.C. Gen. Stat. § 97-2(5) because plaintiff's employment prior to her injury extended over a period of less than 52 weeks. Accordingly, plaintiff's average weekly wage shall be that of a similar situated employee who has been employed by [Caldwell] for more than one year. Since the parties stipulated that other LPNs worked an average of 23.94 hours per week, at $17.00 per hour for 23.94 hours per week, plaintiff's average weekly wages are $406.98, which yields a compensation rate of $271.46 per week.

Defendants contend that the Full Commission should have used the weighted average hours detailed in the stipulation rather than the straight average. However, notwithstanding their assertion that the weighted average "more accurately reflects expected hours of a PRN LPN," defendants cite no authority in support of their argument and fail to demonstrate why the weighted average is preferred. As discussed above, our review on appeal of an opinion and award of the Full Commission is limited to determining whether competent evidence supports the Full Commission's findings of fact, and whether those findings of fact support the Full Commission's conclusions of

law. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. In the instant case, the Full Commission's conclusion of law indicates that it based its decision to use the straight average upon the stipulation agreed to by both parties. Thus, in light of the foregoing, we conclude that the Full Commission did not err in its determination regarding plaintiff's average weekly wage. Therefore, we overrule defendants' final argument, and accordingly, we affirm the Full Commission's opinion and award.

Affirmed.

Judges McCULLOUGH and STEELMAN concur.

IN THE MATTER OF THE WILL OF MARION L. PRIDDY, DECEASED

No. COA04-1330

(Filed 5 July 2005)

1. Wills— testamentary capacity—issue of fact

There were genuine issues of material fact as to whether the caveator to a will had shown that the essential element of testamentary capacity did not exist, and summary judgment should not have been granted for the propounder.

2. Wills— undue influence—summary judgment

The trial court erroneously granted summary judgment for propounder on the issue of whether a testator was under undue influence of propounder at the execution of the will.

3. Wills— witnesses—summary judgment

The trial court erroneously granted summary judgment for propounder on the issue of compliance with the requirements for witnessing a will where issues of material fact existed as to whether the notary qualified as a witness and whether a witness signed in the presence of the testator and at his request.

Appeal by Caveator from orders entered 4 August 2004 and 24 August 2004 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 20 April 2005.

Hahn & Chastain, P.A., by Charles B. Hahn, for caveator-appellant.

Forman Rossabi Black, P.A., by T. Keith Black, Theodora Vaporis, and Jason M. Goins, for propounder-appellees.

HUNTER, Judge.

Vickie L. Dixon ("Caveator") appeals from summary judgment orders entered on 4 August 2004 and 24 August 2004 in favor of Susan L. Priddy ("Propounder"). The issues before the Court are whether the trial court's entry of summary judgments for the Propounder were proper on the issues of (I) whether decedent had the capacity to execute a will, (II) whether decedent was under the undue influence of Propounder when the will was executed, and (III) whether there was compliance with the formalities required by law for executing a will. For the reasons discussed herein, we reverse on all issues.

On 8 June 2003, Marion L. Priddy ("Testator") died at the age of 71 years in Guilford County, North Carolina. At the time of his death, Testator was survived by his four children, including his daughter, Caveator, and his wife, Propounder. On 11 June 2003, Propounder presented to the clerk of superior court a paper-writing, purporting to be Testator's Last Will and Testament ("Will"). Rosemary Cummo ("Cummo") and Dorthea Tinnen ("Tinnen") each submitted an "Affidavit of Subscribing Witnesses for Probate of Will," stating that they had signed the paper-writing at the request and in the presence of Testator as an attesting witness. The clerk of court admitted the paper-writing to probate in common form.

On 21 August 2003, Caveator filed a Caveat, asserting that Testator did not possess the capacity to execute a will, and that the 2002 paper-writing was obtained through undue influence by his estranged wife, Propounder. Propounder filed a Motion for Summary Judgment in the caveat proceedings on 15 July 2004. The trial court, finding there were no genuine issues of material fact, granted Propounder's motions and the caveat proceedings were dismissed.

I.

The standard of review on appeal for summary judgment is whether there is any "genuine issue as to any material fact" and whether the moving party is entitled to a "judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003); *In re Will of Campbell*, 155 N.C. App. 441, 450, 573 S.E.2d 550, 557 (2002). In ruling on a

motion for summary judgment, the court may consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits[.]" N.C. Gen. Stat. § 1A-1, Rule 56(c); *In re Will of McCauley*, 356 N.C. 91, 100, 565 S.E.2d 88, 95 (2002). All such evidence must be considered in the light most favorable to the nonmoving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

" 'The purpose of a caveat [proceeding] is to determine whether the paper-writing purporting to be a will is in fact the last will and testament of the person for whom it is propounded.' " *Campbell*, 155 N.C. App. at 451, 573 S.E.2d at 558 (citation omitted). "While it is true that the issue of *devisavit vel non* (a determination of whether the will is valid) must be tried by a jury," summary judgment as to other issues, such as undue influence and capacity, may be granted. *Id.* at 450, 573 S.E.2d at 558.

[1] In her first assignment of error, Caveator contends the trial court erroneously granted a summary judgment motion in favor of Propounder on the issue of whether Testator had the capacity to execute a will. We agree.

" 'A testator has testamentary capacity if he comprehends the natural objects of his bounty; understands the kind, nature and extent of his property; knows the manner in which he desires his act to take effect; and realizes the effect his act will have upon his estate.' " *In re Estate of Whitaker*, 144 N.C. App. 295, 298, 547 S.E.2d 853, 856 (2001) (citations omitted). " 'The law presumes that a testator possessed testamentary capacity, and those who allege otherwise have the burden of proving by the preponderance or greater weight of the evidence that he lacked such capacity.' " *In re Will of Jarvis*, 334 N.C. 140, 146, 430 S.E.2d 922, 925 (1993) (citation omitted). However, to establish testamentary incapacity, a caveator need only show that one of the essential elements of testamentary capacity is lacking. *In re Will of Kemp*, 234 N.C. 495, 499, 67 S.E.2d 672, 675 (1951). "It is not sufficient for a caveator to present 'only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which [a caveator] based [her] opinion[] as to [the testator's] mental capacity.' " *In re Will of Smith*, 158 N.C. App. 722, 725, 582 S.E.2d 356, 359 (2003) (citation omitted). A caveator needs to present specific evidence " ' "relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made." ' " *Id.* (citations omitted).

Here, the evidence tends to show that Testator devised his entire estate to his estranged wife, Propounder, and did not provide for any of his four surviving children. Additionally, Caveator's evidence shows that Testator and Propounder had separated in 1999, when Testator moved to North Carolina. Propounder remained in their home in Charleston, South Carolina. Testator and Propounder continued to live separate and apart until the time of Testator's death. Testator eventually came to live with his daughter, Caveator, where she cared for him until his death.

The evidence tends to show that Testator suffered from ischemic cardiomyopathy, kidney disease, and depression. There is evidence that Testator, who was 71, attempted to find work and shared concerns about his financial situation, although he had considerable assets. Caveator has presented an affidavit from one of the attesting witnesses, Benjamin Butler ("Butler"), stating:

> Even though I signed the "will" as my friend requested, I did not then and I do not believe now that he was competent and aware enough to sign such a document. At the time, he was under considerable distress, stress, anxiety, and fear. I don't believe he was fully in touch with reality, nor was he acting under his own free, aware and conscious will.

Butler also noted that Testator was "showing increasingly erratic and irrational behavior" and "taking a considerable amount of medication." Additionally, an affidavit from Testator's friend, Fran Cuthbertson ("Cuthbertson"), stated that Testator had told Cuthbertson that Testator wished to leave everything to his daughter, Caveator.

Considering the evidence in the light most favorable to the nonmoving party, Caveator, there are genuine issues of material fact as to whether Testator understood the effect of his actions. Because there are genuine issues of material fact as to whether Caveator has shown that an essential element of testamentary capacity did not exist, we hold that it was error for the trial court to grant Propounder's motion for summary judgment as to testator's capacity to execute a will.

II.

[2] In her second assignment of error, Caveator contends the trial court erroneously granted summary judgment in favor of Propounder on the issue of whether Testator was under undue influence at the execution of the Will. We agree.

"The four general elements of undue influence are: (1) decedent is subject to influence, (2) beneficiary has an opportunity to exert influence, (3) beneficiary has a disposition to exert influence, and (4) the resulting will indicates undue influence." *Smith*, 158 N.C. App. at 726, 582 S.E.2d at 359. " 'The influence necessary to nullify a testamentary instrument is the " 'fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.' " ' " *Id.* (citations omitted).

The North Carolina Supreme Court has identified several relevant factors as to the issue of undue influence:

" '1. Old age and physical and mental weakness.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the will is different from and revokes a prior will.

5. That [the will] is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution.' "

In re Andrews, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (citation omitted); *Smith*, 158 N.C. App. at 726-27, 582 S.E.2d at 359-60. "Whether these or other factors exist and whether executor unduly influenced decedent in the execution of the Will are material questions of fact." *Smith*, 158 N.C. App. at 727, 582 S.E.2d at 360.

Caveator's evidence tends to show that Testator was 71 years old, suffered from kidney disease, heart disease, and depression. Caveator contends that although Propounder did not live with Testator for several years, she was in contact by phone, purportedly had the Will prepared and drafted for him, and dominated his financial affairs. Caveator argues that due to Testator's disposition of property to his estranged wife, Propounder, he disinherited his children, including Caveator, despite stating that he wanted to leave his estate to Caveator, who cared for him until his death. Affidavits from Cuthbertson and Caveator both stated that Testator was frightened of Propounder, dominated and controlled by her, and submissive to her demands.

Because there are genuine issues of material fact as to whether the *Andrews* factors exist, we hold that it was error for the trial court to grant Propounder's motion for summary judgment as to whether Testator was under the undue influence of Propounder.

III.

[3] In her final assignment of error, Caveator contends the trial court erroneously granted summary judgment in favor of Propounder on the issue of whether there was compliance with the formalities required by law for executing a will. We agree.

For a will to be valid, it must comply with the statutory requirements. N.C. Gen. Stat. § 31-3.1 (2003). Propounder has the initial burden of proof and must show that the paper-writing in question was executed with the proper formalities required by N.C. Gen. Stat. § 31-3.1. *In re Will of Roberts*, 251 N.C. 708, 715, 112 S.E.2d 505, 509 (1960); *In re Will of Parker*, 76 N.C. App. 594, 597, 334 S.E.2d 97, 99 (1985). N.C. Gen. Stat. § 31-3.3 states:

> (a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section.
>
> (b) The testator must, with intent to sign the will, do so by signing the will himself or by having someone else in the testator's presence and at his direction sign the testator's name thereon.
>
> (c) The testator must signify to the attesting witnesses that the instrument is his instrument by signing it in their presence or by acknowledging to them his signature previously affixed thereto, either of which may be done before the attesting witnesses separately.
>
> (d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other.

N.C. Gen. Stat. § 31-3.3 (2003).

In this case, Caveator's evidence tends to show that on 30 August 2002, Testator executed his Will at Wachovia Bank in Greensboro. Upon arriving at the bank, Testator and his friend, Butler, met with bank employee, Cummo, to have Testator's Will signed and notarized. According to Butler's affidavit, Testator asked Cummo to notarize his Will and she agreed. While in Cummo's office, Testator signed the Will in the presence of Butler and Cummo. Butler next signed the Will as

an attesting witness at Testator's request. Cummo then took the Will and left, leaving both Testator and Butler alone in her office for about five to eight minutes, before returning with the Will, which then bore the signature of Tinnen, one of the bank's tellers. Cummo proceeded to notarize the Will, and Testator and Bulter left the bank.

Here, a material issue of fact exists as to whether Testator complied with the will formalities required by N.C. Gen. Stat. § 31-3.3. Although Propounder presented self-proving affidavits along with a notarized and signed Will, Caveator presents evidence that Testator did not sign the Will in Tinnen's presence or acknowledge his signature to Tinnen. Further, Caveator's evidence suggests Tinnen did not sign in the presence of Testator. Therefore, a material issue of fact exists as to whether Tinnen is a competent witness as defined by N.C. Gen. Stat. § 31-3.3(c)-(d).

Propounder contends, however, that even if Tinnen is not a competent witness, Cummo, the notary, is a second competent witness to the Will, and therefore the statute was properly complied with.

A testator " 'need not formally request the witness to attest his will as the request may be implied from his acts and from the circumstances attending the execution of the will.' " *In re Will of Kelly*, 206 N.C. 551, 553, 174 S.E. 453, 454 (1934) (citations omitted). " '[A] request will be implied from the testator's asking that the witness be summoned to attest the will, or by his acquiescence in a request by another that the will be signed by the witness.' " *Id.* (citations omitted). "Whether the testator impliedly requested the witnesses attest the will is ordinarily a factual question for the jury." *Brickhouse v. Brickhouse*, 104 N.C. App. 69, 73, 407 S.E.2d 607, 610 (1991) (hereinafter "*Brickhouse I*").

In *Brickhouse I*, this Court held that it was error for the trial court to grant a summary judgment motion, because there remained a factual issue as to whether the notary qualified as an attesting witness. *Id.* at 74, 407 S.E.2d at 610. This Court remanded the case for determination of whether the notary qualified as an attesting witness. *Id.* at 74, 407 S.E.2d at 611.

In *Brickhouse v. Brickhouse*, 110 N.C. App. 560, 430 S.E.2d 446 (1993) (hereinafter "*Brickhouse II*"), this Court found that there was sufficient evidence to affirm the trial court's factual determination that the notary was an attesting witness. *Brickhouse II*, 110 N.C. App. at 568, 430 S.E.2d at 450. Additionally, this Court affirmed that a

notary's signature, although signed in a separate place from the other witnesses, does not preclude the notary from being considered an attesting witness, if the testator requested that the notary attest his signature. *Id.* at 567, 430 S.E.2d at 450.

Here, Cummo signed an "Affidavit of Subscribing Witnesses for Probate of Will," asserting that she had signed, in the presence of Testator and at his request, the paper-writing as an attesting witness. Propounder asserts that Cummo was asked to witness the Will's execution, in addition to notarizing the document.

Caveator, however, presented evidence that Testator never expressly requested that Cummo attest the Will. As in *Brickhouse I*, there is a factual discrepancy as to whether Testator implicitly requested Cummo witness the document or merely notarize it and therefore, summary judgment was improperly granted.

Because there are genuine issues of material fact and *devisavit vel non* must be tried by a jury, we hold that it was error for the trial court to grant Propounder's motion for summary judgment, as there remained the factual issue of whether Cummo qualified as an attesting witness and whether Tinnen signed in the presence of Testator and at his request.

As issues of material fact existed, the trial court's entry of summary judgments for Propounder were improper on (I) whether testator had the capacity to execute a will, (II) whether testator was under the undue influence of Propounder when the Will was executed, and (III) whether there was compliance with the formalities required by law for executing a will. Therefore, we reverse the trial court's grant of summary judgment.

Reversed.

Judges HUDSON and GEER concur.

BETTY L. DUNCAN, INDIVIDUALLY AND IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF MICHAEL RAY DUNCAN, PLAINTIFF v. CUNA MUTUAL INSURANCE SOCIETY AND CUNA MUTUAL LIFE INSURANCE COMPANY, DEFENDANTS

No. COA04-1176

(Filed 5 July 2005)

1. Insurance— life—exclusion for drug use—exception for prescription drugs—summary judgment

Summary judgment was correctly granted for a life insurance company on the issue of whether an exclusion for the voluntary use of drugs applied to bar coverage. Although plaintiff-beneficiary claimed the benefit of an exception to the exclusion for prescription drugs, she was not able to offer evidence raising an issue of fact.

2. Costs— insurance defense—summary judgment

The trial court did not err by awarding costs to defendants, insurance companies defending a life insurance claim. The assignment of error concerned the possibility that summary judgment was incorrectly awarded and the judgment not final, but summary judgment was correct. Arguments not set out in the assignments of error will not be considered.

Appeal by plaintiff from orders entered 9 March 2004 by Judge Michael E. Helms, and 28 April 2004 by Judge Catherine C. Eagles, in Forsyth County Superior Court. Heard in the Court of Appeals 13 April 2005.

Law Offices of Jonathan S. Dills, by Jonathan S. Dills, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Reid C. Adams, Jr., and Bradley O. Wood, for defendant-appellees.

LEVINSON, Judge.

Plaintiff (Betty Duncan) appeals from an order of summary judgment entered in favor of defendants (Cuna Mutual Ins. Society and Cuna Mutual Life Ins. Co.) We affirm.

Uncontradicted record evidence tends to show, in pertinent part, the following: Plaintiff and Michael Duncan (Duncan) were married in 1987 and separated in 1998. Duncan had several DWI con-

victions and a history of substance abuse. In October 1998, Duncan purchased a $150,000 life insurance policy (the policy) from defendants, and named plaintiff as the beneficiary. The policy contained the following exclusion:

> Exclusions. We will not pay a benefit for any Loss to an Insured Person caused by or resulting from . . . 8. Voluntary use of any drug, medicine, or sedative, except as prescribed by a physician.

On 8 April 2000 Duncan's body was found on a couch in his living room. Although plaintiff and Duncan separated in July, 1998, they were still married at the time of Duncan's death. An autopsy was performed, determining the cause of death to be "methadone toxicity." The autopsy report, death certificate, and medical examiner's report all list the cause of death as "methadone toxicity."

After Duncan's death, plaintiff filed a claim for benefits under the policy. In response, defendants asked plaintiff for a list of Duncan's prescriptions, which plaintiff failed to provide.

On 8 April 2003 plaintiff filed suit against defendants, alleging that defendants had breached the insurance contract, and seeking benefits under the policy. In their answer, defendants denied the material allegations of the complaint and asserted various defenses, including the policy's exclusion for non-prescribed drugs. After deposing plaintiff, defendants filed a motion for summary judgment on 5 January 2004, asserting that:

> [P]laintiff, by her own admission, can produce no evidence whatsoever to meet her burden to prove an exception to the exclusion contained in the life insurance policy in question . . . in other words, plaintiff cannot prove that the plaintiff's decedent was prescribed the methadone which caused his death, nor can plaintiff otherwise demonstrate the existence of a genuine issue of material fact for a jury to decide.

On 9 March 2004 the trial court entered an order granting summary judgment for defendants, and on 28 April 2004 the court awarded defendants $562.24 in costs. Plaintiff timely appealed from both orders.

Standard of Review

Plaintiff appeals from a summary judgment order. N.C.G.S. § 1A-1, Rule 56(c) (2003) provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admis-

sions 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."

"[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact[,]" *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985), and "evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted). If a summary judgment motion is "supported as provided in this rule, an adverse party . . . must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e).

"Our Court's standard of review on appeal from summary judgment requires a two-part analysis. 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." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000).

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[1] Plaintiff argues first that the trial court erred by granting summary judgment, on the grounds that the evidence raised genuine issues of material fact about her entitlement to benefits under Duncan's life insurance policy. We disagree.

Where interpretation of an insurance policy is at issue, the initial burden to show coverage is on the insured. *Production Systems v. Amerisure Ins. Co.*, —— N.C. App. ——, ——, 605 S.E.2d 663, 665 (2004) ("In North Carolina the insured 'has the burden of bringing itself within the insuring language of the policy.' ") (quoting *Hobson Construction Co., Inc. v. Great American Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984)), *disc. review denied*, 359 N.C. 322, 611 S.E.2d 415 (2005). Defendants herein concede that, except for the exclusion, plaintiff would be entitled to benefits under the policy.

"Once it has been determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurer to prove that a policy exclusion excepts the particular injury from coverage." *Hobson*, 71 N.C. App. At 590, 322 S.E.2d at 635 (citation omitted). If there is an exception to the exclusion, "the burden is upon the insured to prove the existence of an exception to the exclu-

sion which is applicable to restore coverage." *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94, 518 S.E.2d 814, 816 (1999) (citing *Home Indemnity Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 189, 494 S.E.2d 774 (1998)).

Further, in the absence of contrary evidence, it is presumed that substances are ingested voluntarily. *See Mehaffey v. Insurance Co.*, 205 N.C. 701, 705, 172 S.E. 331, 333 (1934):

> Assuming that there was evidence of poison in his stomach after death, there is no evidence that it got there through accidental means. Indeed, the facts and circumstances disclose without equivocation that any poison in the stomach of deceased was the natural and probable consequence of an ordinary act in which he voluntarily engaged. Hence no recovery [on the life insurance policy] can be sustained[.]

In the instant case, the dispositive issue is whether the evidence raised a genuine issue of material fact regarding the policy's **exclusion** for loss resulting from the "voluntary use of any drug, medicine, or sedative," or the exclusion's **exception** for the use of such drugs "as prescribed by a physician."

The uncontradicted evidence was that the immediate cause of Duncan's death was "methadone toxicity." Neither party disputes that methadone is a "drug, medicine, or sedative," or that Duncan had a history of alcohol and substance abuse. Duncan's body was found in his own living room, with no evidence of forced entry or foul play. We conclude that defendants met their burden to show that the exclusion bars plaintiff from recovering under the policy.

Plaintiff, however, urges that defendants must "disprove her claims" with affirmative proof that Duncan took methadone 'voluntarily,' basically requiring defendants to prove Duncan was **not** 'involuntarily' forced to take methadone. This reasoning was expressly rejected in *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62, 63, 414 S.E.2d 339, 341, 342 (1992) (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 103 N.C. App. 440, 442, 406 S.E.2d 10, 12 (1991)), *overruled in part on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998):

> While conceding that there is no evidence in the record that defendant knew or should have known of the existence of the substance, the . . . [court] below held that defendant is entitled to summary judgment 'only if it meets its burden of showing that it

> did not know, and should not have known,' of the presence of the substance[.] . . . [Defendant] demonstrated that plaintiff could not produce evidence to prove an essential element of her case—that defendant knew or should have known of the existence of the substance[.] . . . [D]efendant was not required to produce evidence showing that it did not know or should not have known of the substance[.]

We conclude that defendants presented evidence that coverage was barred by the policy's exclusion, thus shifting the burden of proof to plaintiff to demonstrate the existence of a genuine issue of material fact regarding the exclusion's **exception** for drugs, medicines, or sedatives used "as prescribed by a physician."

At her deposition, plaintiff admitted she did not know anything about Duncan's prescriptions, or whether he ever had a prescription for methadone. Plaintiff testified that in a phone conversation Duncan once said he had fallen out of a tree and might consult a physician, but that she did not know if Duncan actually saw a doctor. She offered no testimony or evidence from anyone with first-hand information about Duncan's use of methadone, and no evidence that Duncan had a prescription for methadone. We conclude that plaintiff's deposition testimony did not raise any genuine issues of material fact.

We also conclude that the affidavit of Stephen W. Ringer, a substance abuse counselor, which was offered by plaintiff, contains no admissible evidence raising an issue of material fact. We first note that Rule 56(e) provides in relevant part that:

> [A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers . . . referred to in an affidavit shall be attached[.]

In his affidavit, Ringer stated that he was a licensed social worker and counselor, and that he had counseled Duncan for alcohol and substance abuse. He offered no other first-hand information about Duncan or whether Duncan used methadone. The remainder of the affidavit consists of generalized observations and opinions about methadone use and abuse.

N.C.G.S. § 8C-1, Rule 701 (2003), states in relevant part that testimony of a lay witness "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[.]" In the instant case, Ringer's conclusions were based on: general information about methadone; plaintiff's hearsay testimony that Duncan told her he fell out of a tree and might see a doctor; and on two articles, one a "recent study" by the American Medical Association, the other a press release from the N.C. Department of Health and Human Services. Because Ringer's opinions were neither based on his personal knowledge, nor proffered as expert opinions, his affidavit does not meet the requirement of N.C.G.S. § 1A-1, Rule 56(e) that affidavits be "made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence." We conclude that Ringer's affidavit does not raise a genuine issue of material fact.

We conclude the record evidence shows that coverage was barred by the policy's exclusion, and also that plaintiff was unable to offer evidence raising an issue of fact regarding the exclusion or its exception. This assignment of error is overruled.

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[2] Plaintiff also argues that the court erred by awarding costs to defendants. The lone assignment of error addressing the court's award of costs asserts only that "a higher Court may find that the summary judgment was improperly entered and that no final judgment had been entered." However, this Court has not found that summary judgment was improperly entered. Nor will we consider arguments not set out in plaintiff's assignments of error. 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."). This assignment of error is overruled.

For the reasons discussed above, we conclude the court did not err by entering summary judgment for defendants, and that its order should be

Affirmed.

Judges HUNTER and McCULLOUGH concur.

ALAN CAPPS, PLAINTIFF-APPELLEE v. NW SIGN INDUSTRIES OF NORTH CAROLINA, INC., A NORTH CAROLINA CORPORATION, RONALD BRODIE, AND CHRIS REEDEL, DEFENDANT-APPELLANTS

No. COA04-1229

(Filed 5 July 2005)

Appeal and Error— appealability—denial of motion to dismiss—forum selection and arbitration clause

The denial of a motion to dismiss an employment dispute was interlocutory, did not affect a substantial right, and was not immediately appealable even though the employment agreement in issue contained a forum selection and arbitration clause. Whether or not the terms of this clause were valid and enforceable was a question of fact still pending in the trial court.

Judge WYNN dissenting.

Appeal by defendants from an order filed 18 February 2004 by Judge J. Gentry Caudill, in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 May 2005.

James, McElroy & Diehl, P.A., by Jared E. Gardner for plaintiff-appellee.

Vandeventer Black LLP, by David P. Ferrell and Norman W. Shearin, Jr. for defendant-appellants.

BRYANT, Judge.

NW Sign Industries of North Carolina, Inc., (NW Sign of N.C.) a North Carolina Corporation, Ronald Brodie (Brodie) and Chris Reedel (Reedel), collectively defendants, appeal from an order filed 18 February 2004 denying a Rule 12(c) motion for judgment on the pleadings and motion to dismiss pursuant to Rules 12(b)(1) (subject matter jurisdiction) and 12(b)(6) (failure to state a claim). Brodie is President and CEO of NW Sign Industries, Inc., (non-party NW Sign of N.J.) a New Jersey Corporation. Reedel is Vice President of non-party NW Sign of N.J. and General Manager of NW Sign of N.C.

This dispute arose out of the employment contract between Alan Capps (plaintiff) and non-party NW Sign of N.J. Capps was employed as a salesperson by non-party NW Sign of N.J. from December 2000 until November 2002. He began working in New Jersey and in January

2001, worked for NW Sign of N.C., at which time he was added to the NW Sign of N.C. payroll. Plaintiff alleges NW Sign of N.C. terminated his employment in November 2002 in order to avoid paying him a draw against his 9.09% commission ($70,000.00) of his sales.

Plaintiff commenced an action against defendants[1] on 20 June 2003 by the issuance of a summons and leave of the trial court to file a complaint within twenty days pursuant to N.C. Gen. Stat. § 1A-1, Rule 3(a)[2]. In plaintiff's complaint he alleged all three defendants violated the North Carolina Wage and Hour Act, and brought claims of wrongful discharge and breach of contract against NW Sign of N.C. On 15 October 2003, plaintiff filed and served an Amended Complaint, which added a claim for punitive damages against NW Sign of N.C.

On 19 November 2003, defendants filed an Answer, Motion for Judgment on the Pleadings, Motion to Dismiss, and Counterclaims against plaintiff. On 18 February 2004, the Honorable J. Gentry Caudill of Mecklenburg County Superior Court filed an order denying defendants' motions for judgment on the pleadings and motion to dismiss.

Defendants appeal. Plaintiff has filed a motion to dismiss this appeal as interlocutory. For the following reasons, we grant plaintiff's motion to dismiss.

A judgment is either interlocutory or a final determination of the rights of parties. N.C. Gen. Stat. § 1A-1, Rule 54(a) (2003); *see Veazey v. Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950). An order is interlocutory if it is entered during the pendency of an action and does not dispose of the case, but requires further action by the trial court to finally determine the rights of all the parties involved in the controversy. *Veazey* at 362, 57 S.E.2d at 381; *see, e.g., Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co.*, 135 N.C. App. 159, 161, 519 S.E.2d 540, 542 (1999). Generally, there is no right to appeal from an interlocutory order. *See* N.C.G.S. § 1A-1, Rule 54(b) (2003). Our courts, however, have recognized an appeal may be allowed under the provisions of N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d), if a substantial right is affected, the order determines the

1. In his original complaint, plaintiff also named Daniel Clower, Senior Vice President of Sales for non-party NW Sign of N.J. Clower was dismissed from plaintiff's Amended Complaint, filed 15 October 2003.

2. A second action against NW Sign Industries of N.J. was commenced; however plaintiff did not file a complaint and that action abated.

action and prevents a judgment from which an appeal may be taken, or discontinues the action. *See* N.C.G.S. §§ 1-277(a), 7A-27(d) (2003); *Hoots v. Pryor*, 106 N.C. App. 397, 401, 417 S.E.2d 269, 272 (1992).

The right to immediate appeal under the substantial right exception is determined pursuant to a two step process. *Id.* The appellant must first show that: (1) the order affects a right that is indeed 'substantial,' and (2) "enforcement of that right, absent immediate appeal, [will] be 'lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order.' " *Country Club* at 162, 519 S.E.2d at 543; *see, e.g.*, *Dalton Moran Shook, Inc. v. Pitt Dev. Co.*, 113 N.C. App. 707, 710, 440 S.E.2d 585, 588 (1994). Neither denial of a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction nor motion for failure to state a claim for which relief can be granted under Rule 12(b)(6) affects a substantial right and neither is immediately appealable. *See Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 108 N.C. App. 357, 365, 424 S.E.2d 420, 423 (1993) (denial of motion to dismiss is generally not appealable); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982) (lack of subject matter jurisdiction under Rule 12(b)(1)); *Shaver v. N.C. Monroe Constr. Co.*, 54 N.C. App. 486, 487, 283 S.E.2d 526, 527 (1981) (lack of subject matter jurisdiction not immediately appealable); *O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 231-32, 252 S.E.2d 231, 234-35 (1979) (failure to state claim upon which relief may be granted under Rule 12(b)(6)).

Here, the trial court's denial of defendants' motion to dismiss is interlocutory, does not affect any substantial right of the parties and is therefore not immediately appealable. Defendants argue because their motion was based on the existence of a valid forum selection and arbitration clause in the "written enforceable employment contract between the parties," the denial of the motion to dismiss affects a substantial right. We disagree.

Defendants' motion to dismiss does not affect a substantial right of the named defendants: NW Sign Industries of N.C.; Brodie; or Reedel. In 2000, plaintiff and non-party NW Sign of N.J. entered into an employment contract. Shortly thereafter, plaintiff went to work for NW Sign of N.C. Whether or not the terms of such employment contract are valid and enforceable is a question of fact still pending in the trial court. By denying defendants' motion to dismiss based on failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction, the trial court has not made a final determination as to the rights of the parties involved in the liti-

gation. Further, defendants have failed to show that a substantial right has been implicated in order for this matter to be properly considered by this Court.

Dismissed.

Judge JACKSON concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge dissenting.

Because our case law holds that the denial of a motion to dismiss based on an alleged forum-selection clause is immediately appealable, I respectfully dissent.

Preliminarily, I note that a motion to dismiss due to a forum-selection clause is more properly brought pursuant to North Carolina Rule of Civil Procedure 12(b)(3), allowing dismissal for improper venue. N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2004). Here, Defendants brought their motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(1), allowing dismissal for lack of subject-matter jurisdiction. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2004). Nevertheless, it is clear from Defendants' motion to dismiss that Defendants moved to dismiss, *inter alia*, due to the applicability of the forum-selection clause—the issue thus before us now. *Hickox v. R&G Group Int'l, Inc.*, 161 N.C. App. 510, 588 S.E.2d 566 (2003) (reviewing a motion to dismiss based on the application of a forum-selection clause brought under Rule 12(b)(1) and Rule 12(b)(2) rather than Rule 12(b)(3)).[3]

The majority correctly notes that a denial of a motion to dismiss is an interlocutory order and thus not ordinarily appealable. However, if the issue pertains to the application of a forum-selection clause, our courts have held that a defendant may nevertheless immediately appeal the order because the order affects a substantial right. *Hickox*, 161 N.C. App. at 511-12, 588 S.E.2d at 567-68; *Mark Group Int'l, Inc.*

3. In another recent, albeit unpublished, case, this Court reviewed a motion to dismiss challenging jurisdiction on the basis of a forum-selection clause. *Seaboard Container Cleaning, LLC v. Four Seasons Envtl., Inc.*, No. COA03-1367, 2004 N.C. App. LEXIS 2245, at *4 (N.C. Ct. App. Aug. 25, 2004) ("In its motion to dismiss here, defendant alleges lack of jurisdiction, contending that the agreement between the parties contained a binding forum-selection clause, and thus, this interlocutory appeal is properly before us.").

v. Still, 151 N.C. App. 565, 566 n.1, 566 S.E.2d 160, 161 n.1 (2002) (the denial of a motion to dismiss based on a forum-selection clause is immediately appealable); *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 776, 501 S.E.2d 353, 355 (1998) (same).

The majority notes that whether the terms of the employment contract containing the alleged forum-selection clause are valid and enforceable "is a question of fact still pending in the trial court." But pending before this Court is the issue of the applicability of the contract's alleged forum-selection clause. Because a motion to dismiss due to a forum-selection clause is immediately appealable, I believe dismissal is improper.

STATE OF NORTH CAROLINA v. PATRICK D. FLEMMING, DEFENDANT

No. COA04-1043

(Filed 5 July 2005)

1. Criminal Law— instructions—consensus—unanimity

An instruction that a jury could reach a verdict by consensus was not plain error where the court twice stated that the jury must unanimously agree.

2. Sentencing— habitual felon—jurisdiction of underlying felony—collateral attack

A motion to dismiss an habitual felon charge for insufficient evidence was correctly denied where the motion concerned the jurisdiction of the district court on one of the prior convictions. Questioning the validity of the original conviction is an impermissible collateral attack.

3. Sentencing— habitual felon—Class I underlying felony—not disproportionate

Defendant's sentence for being an habitual felon was not grossly disproportionate. Sentencing as an habitual felon where the underlying felony is Class I (as here) or Class H has been affirmed on several occasions.

Appeal by Defendant from judgment entered 25 February 2004 by Judge Catherine C. Eagles in Superior Court, Forsyth County. Heard in the Court of Appeals 13 June 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Thorsen Law Office, by Haakon Thorsen, for defendant-appellant.

WYNN, Judge.

In *State v. Parker*, 29 N.C. App. 413, 414, 224 S.E.2d 280, 281 (1976), this Court held that a trial court's jury instruction to return a majority verdict violated our Constitution's unanimous verdict requirement for criminal trials. N.C. Const. art. I, § 24. In this case, Defendant argues that the trial court's use of the term "consensus" likewise violated the verdict unanimity requirement. Because the trial judge twice repeated that the jury must unanimously agree on a verdict, we find no error. We also find no error in Defendant's remaining arguments.

A jury found Defendant Patrick D. Fleming[1] guilty on the charge of possession of cocaine and found him to be an habitual felon. From his convictions and sentence of eighty-four months to 110 months imprisonment, Defendant appeals, arguing:

(1) The trial court erred in allowing him to be convicted with fewer than twelve jurors finding him guilty;

(2) The trial court erred by denying his motion to dismiss the habitual felon charge; and

(3) His sentence was in violation of constitutional protections against disproportionate punishment.

[1] First, Defendant contends that the trial court erroneously instructed the jury that it could reach a decision with a less than unanimous vote, thereby denying him of a jury of twelve. As Defendant did not object to the instruction at trial, we review the jury instruction for plain error. N.C. R. App. P. 10(b)(1), (c)(4); *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000) (explaining that plain error review will be applied only to matters of evidence and jury instructions), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001); *see also State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578 (2000). Plain error is error " 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Parker*, 350 N.C.

1. The judgment lists his name as Patrick D. Flemming.

411, 427, 516 S.E.2d 106, 118 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

The Constitution of North Carolina provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24; N.C. Gen. Stat. § 15A-1201 (2004) ("In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous."); N.C. Gen. Stat. § 15A-1235(a) (2004) ("Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.").

After the jury found Defendant guilty on the charge of possession of cocaine, the trial court instructed the jury on the habitual felon charge and sent them out to deliberate. After about an hour, the jury sent out the following note: "What do we do when one juror don't (sic) want to vote in this case?" In response, the trial court gave the following charge:

> Let me just tell you that it is your duty as jurors and when you took your oath as jurors in this case you did promise and agree to deliberate with each other, to participate in jury deliberations in good faith and to follow my instructions on the law. And, of course, it is your duty and obligation to talk to each other, to reason the matter over together and to do what you can to reach a verdict.
>
> Now, it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and to reconcile your differences, if you can, without the surrender of conscientious convictions. Now, no juror should surrender his or her honest conviction about the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict. That is, if you think the verdict should be one way, you shouldn't give that up just because everybody else says otherwise. But you should talk to each other about it, reason the matter over together. It is your duty to do everything you can to try to reach a verdict, if you can do that without giving up your honest convictions. And, of course, by definition that does mean that you have to take a position on the case and say what you think about the case. *Most*

> *juries do that by voting but the verdict sheet does say that you must unanimously agree, whether that's by voting or consensus, as long as you unanimously agree you can return a verdict* and it is your duty to take a position on the case and to participate fully in deliberations.

(emphasis added). Defendant argues that the use of the word "consensus" in the jury instruction created the error as the "court instructed that the juror did not have to vote."

In *Parker*, 29 N.C. App. at 414, 224 S.E.2d at 281, this Court held that where the jury instruction "is susceptible of the interpretation that when a vote is taken and there is a majority—either for conviction or acquittal—the minority must then cast their vote with the majority and make the verdict unanimous, before returning the verdict in open court[,]" prejudicial error exists. In *Parker*, the trial court gave the following instruction:

> . . . before you return your verdict it must be unanimous. You cannot return a verdict without a *majority vote*. That does not mean that your verdict must be unanimous when you retire. It means that it must be unanimous when you return to open court to announce it, because the jury is a deliberative body. You are to sit together, discuss the evidence, recall and review it all and remember it all; then after you have deliberated together return an unanimous verdict to open court.

Id. (emphasis added). This Court found that the use of the phrase "majority vote" by the trial court made the instruction misleading and confusing. *Id.*; *see also State v. Cumber*, 32 N.C. App. 329, 338, 232 S.E.2d 291, 297 (1977).

In this case, in response to a question about what to do when a juror does not want to vote, the trial judge instructed the jurors that it was their duty to try to reach a verdict and that "[m]ost juries do that by voting but the verdict sheet does say that you must unanimously agree, whether that's by voting or consensus, as long as you unanimously agree you can return a verdict and it is your duty to take a position on the case and to participate fully in deliberations." The trial judge twice repeated that the jury must *unanimously agree* on a verdict.

In *Parker*, the trial judge told the jury that they could not "return a verdict without a *majority vote*." *Parker*, 29 N.C. App. at 414, 224

S.E.2d at 281 (emphasis added). In contrast, in this case, the trial judge twice repeated that the jury must *unanimously agree*.

[2] Next, Defendant argues that the trial court erred by denying his motion to dismiss the habitual felon charge for insufficiency of the evidence. We disagree.

One of the felonies listed on the habitual felon indictment, possession with intent to sell or deliver cocaine, was entered in District Court, Forsyth County. The State submitted as evidence of the prior felony: the prior record level worksheet, the transcript of the plea in District Court, and the magistrate's order on which District Court Judge William Graham recorded sentence on a guilty plea. *See* N.C. Gen. Stat. § 14-7.4 (2004) ("A prior conviction may be proved by . . . the original or a certified copy of the court record of the prior conviction.").

Defendant contends that there was insufficient evidence to prove that the District Court in Forsyth County had jurisdiction to enter a felony conviction. "When appealing the use of a prior conviction as a partial basis for a habitual felon indictment, inquiries are permissible only to determine whether the State gave defendant proper notice that he was being prosecuted for some substantive felony as a recidivist, pursuant to the procedure provided in N.C. Gen. Stat. § 14-7.3 (1993)." *State v. Creason*, 123 N.C. App. 495, 500, 473 S.E.2d 771, 773 (1996), *aff'd per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997). Questioning the validity of the original conviction is an impermissible collateral attack. *Id.* A defendant may not collaterally attack a prior conviction which is the basis of an habitual felon charge. *Id.* at 501, 473 S.E.2d at 774; *see also State v. Dammons*, 128 N.C. App. 16, 26, 493 S.E.2d 480, 486 (1997). Accordingly, the collateral attack is impermissible, and we overrule the assignment of error.

[3] Finally, Defendant argues that his sentence was in violation of constitutional protections against disproportionate punishment. We disagree.

Defendant argues that his sentence, within the mitigated range for an habitual felon, violates the federal and state constitutions, citing *Ewing v. California*, 538 U.S. 11, 155 L. Ed. 2d 108 (2003). This argument has been previously made and rejected by this Court. *State v. Clifton*, 158 N.C. App. 88, 96, 580 S.E.2d 40, 46, *cert. denied*, 357 N.C. 463, 586 S.E.2d 266 (2003). In *Clifton*, this Court, in applying *Ewing*, held that "our Court must continue to apply the 'grossly dis-

proportionate' principle, remembering that 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." 158 N.C. App. at 94, 580 S.E.2d at 45 (internal citations omitted).

Under the North Carolina Habitual Felon Act, Defendant's sentence would be as a Class C felony. N.C. Gen. Stat. § 14-7.6 (2004). Defendant had a prior record level of III and was sentenced to eighty-four to 110 months imprisonment, which is in the mitigated sentencing range. *See* N.C. Gen. Stat. § 15A-1340.17 (2004). Defendant argues that he should not be subject to North Carolina's habitual felon statute when the underlying felony is a Class I felony. But this Court has on several occasions affirmed the sentence of a defendant as an habitual felon where the defendant was convicted of an underlying Class H or Class I felony. *See, e.g.*, *State v. Parks*, 146 N.C. App. 568, 553 S.E.2d 695 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 220, 560 S.E.2d 355, *cert. denied*, 537 U.S. 832, 154 L. Ed. 2d 49 (2002) (where the underlying felonies were felonious larceny and felonious possession of stolen goods, Class H felonies under N.C. Gen. Stat. § 14-72); *State v. Hairston*, 137 N.C. App. 352, 528 S.E.2d 29 (2000) (where the underlying felony was felonious breaking and entering a motor vehicle, a Class I felony under N.C. Gen. Stat. § 14-56).

Following *Clifton*, *Parks*, and *Hairston*, we find that the sentence imposed on Defendant was not grossly disproportionate. Accordingly, we overrule this assignment of error.

Defendant failed to argue his remaining assignments of error, they are therefore deemed abandoned. N.C. R. App. P. 28(b)(6).

No Error.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. DAVID MICHAEL TORRES

No. COA04-1130

(Filed 5 July 2005)

1. Homicide— felony murder—killing of accomplice

An instruction on felony murder was proper where defendant shot and killed a person who approached him from out of the headlights during a roadside robbery, and that person turned out to be an accomplice. Felony murder does not distinguish between victims who are innocent and those who are co-felons.

2. Criminal Law— voluntary intoxication—intent to commit crime throughout

There was no plain error in the failure to instruct on voluntary intoxication sua sponte in an armed robbery prosecution. Although there was general evidence that defendant was drinking and taking drugs on the evening of the crime, there was also evidence that defendant and his accomplice had the specific intent to commit the crime throughout the evening, including defendant's statement that he and his accomplice drove around looking for targets and rejected several, and that they pulled off the road at a fishmonger's truck solely to rob him.

3. Appeal and Error— preservation of issues—argument not supported by authority

An argument concerning transferred intent in a robbery and murder prosecution was deemed abandoned for lack of supporting authority.

Appeal by defendant from judgment entered 19 March 2004 by Judge W. Osmond Smith, III, in Wake County Superior Court. Heard in the Court of Appeals 20 April 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields, III, for the State.

Megerian & Wells, by Franklin E. Wells, Jr., for defendant-appellant.

ELMORE, Judge.

David Torres (defendant) was convicted of first-degree murder, assault with a deadly weapon inflicting serious injury, and robbery with a dangerous weapon. He appeals those convictions arguing that

it was error for the trial court to 1) instruct the jury on both "premeditation and deliberation" and felony murder; 2) fail to instruct on voluntary intoxication; and 3) instruct the jury on transferred intent.

During the late hours of 30 May and into the early morning hours of 31 May 2003 defendant and two friends, Josh Paz (Paz) and Tomeka Campbell (Campbell), were evaluating potential places to rob. These plans were occurring as the group was using drugs and alcohol. The three drove into several area gas stations intent on robbing the stores, but abandoned their plans for various reasons. Then, at around 5:00 a.m. on 31 May, the group found Anthony Luft (Luft), a merchant selling seafood out of the back of his truck. They pulled their car directly in front of the parked truck, so the two vehicles were facing each other.

Defendant and Paz got out of the car and approached Luft, who was packing up. Both defendant and Paz were wearing bandanas over their faces and carrying guns. Defendant got to Luft first, who was behind his trailer, and asked him for his money. Then Paz demanded the money. Luft told the two men his wallet did not have any money in it. Defendant ordered Luft to lie face down on the ground, and as he did, Luft's dog began barking from the truck. After yelling at the dog, defendant shot it twice and killed it. He then shot Luft twice, once in the back and once in the left shoulder, severely wounding him.

Defendant ran back toward the car yelling for Paz to join him. When he reached the car, he turned around and was looking into the headlights of the truck. From that angle defendant saw a person approaching him from beside the truck, but the lights obscured any ability to tell who was approaching. Defendant raised his gun and fired at the figure. The person fell immediately. When he ran over to examine his victim, defendant realized he had shot and fatally wounded Paz who was returning with a cash drawer from inside Luft's truck. According to Campbell's trial testimony, defendant later told her that he shot Paz again at close range, once he realized it was him, so he would not suffer. The medical examiner's report, introduced at trial, supports Paz being shot twice at close range, the second shot being fatal. Defendant's statement, introduced at trial, however, does not indicate he shot Paz a second time and denies he ever shot with the intent to kill.

The trial court instructed the jury on first-degree murder, including instructions on both felony murder and premeditation. The verdict sheets reflect that the jury found defendant guilty of the charge

under both theories. They found defendant not guilty of the attempted murder of Luft, but did find him guilty of 1) assault with a deadly weapon inflicting serious injury and 2) robbery with a firearm. From the judgments entered consistent with these verdicts, defendant appeals.

[1] Defendant first argues that it was error for the trial court to instruct the jury on felony murder because it was his co-felon who was killed in the robbery. Defendant cites to *State v. Bonner*, 330 N.C. 536, 411 S.E.2d 598 (1992), for the proposition that the felony murder rule was not designed to protect the life of the aggressors. Yet, this is an inaccurate read of our Supreme Court's opinion. In *Bonner*, the Court was faced with determining whether to extend the felony murder rule to cover the death of an accomplice *at the hands of the victim*. The Court held that it was bringing North Carolina in line with the general rule that "for a defendant to be held guilty of murder [by felony murder], it is necessary that the act of killing be that of the defendant, and for the act to be his, it is necessary that it be committed by him or by someone acting in concert with him." *Bonner*, 330 N.C. at 542-43, 411 S.E.2d at 601 (internal quotation omitted) (citing cases). Since the defendant's accomplice in *Bonner* was killed by the victim, the Court determined it was prejudicial error to instruct the jury on felony murder. The Court in *Bonner* assessed criminal responsibility through felony murder by analyzing who or what action killed the victim, not the status of the victim as innocent, the intended victim, or even an accomplice. Here, the death of Paz during the perpetration of a felony was the direct result of *defendant's hand*, not that of an adversary to the felonious actions of the group. *Bonner* is simply inapplicable here, and in fact, supports the felony murder instruction.

Despite having no case on point in North Carolina, we believe the circumstances of Paz's death fall well within the established boundaries of felony murder. *See State v. Richardson*, 341 N.C. 658, 666-67, 462 S.E.2d 492, 498 (1995) ("The felony murder rule was promulgated to deter even accidental killings from occurring during the commission of or attempted commission of a dangerous felony."); *People v. Graham*, 477 N.E.2d 1342, 1347 (Ill. App. Ct. 1985) ("[Felony murder] addresses the killing of 'an individual' during a forcible felony; the language does not distinguish between victims who are innocent and victims who are co-felons. In keeping with its purpose, we find the guilt or innocence of the deceased irrelevant to the felony-murder doctrine."); *People v. Warren*, 205 N.W.2d 599, 600 (Mich. Ct. App.

1973) (where killing was done by defendant, felony-murder rule was applicable although victim was a co-felon). Defendant shot at an unknown figure approaching him from out of the headlights during a robbery. The fact that this person was defendant's accomplice does not change the fact that his death occurred by defendant's hands during the perpetration of a felony.

[2] Next, defendant argues that the trial court erred in failing to instruct the jury on the defense of voluntary intoxication regarding the robbery charge. Defendant did not object to the absence of this instruction at trial, and now asks this Court to review it for plain error. We cannot agree with defendant that including the instruction would have resulted in a different verdict for the specific intent crime of robbery with a dangerous weapon. "Voluntary intoxication is not a legal excuse for a criminal act; however, it may be sufficient in degree to prevent and therefore disprove the existence of a specific intent such as an intent to kill." *State v. Spencer*, 154 N.C. App. 666, 669, 572 S.E.2d 815, 818 (2002) (internal quotations omitted). But before the trial court will be required to instruct on voluntary intoxication, defendant must produce substantial evidence that, at the time of the crime for which he is being tried, defendant was intoxicated to the point that his mind and reason were overthrown, and that he was thus utterly incapable of forming the requisite intent to commit the crime. *See State v. Long*, 354 N.C. 534, 538, 557 S.E.2d 89, 92 (2001). "Evidence of mere intoxication is not enough to meet defendant's burden of production." *State v. Kornegay*, 149 N.C. App. 390, 395, 562 S.E.2d 541, 545, *disc. review denied*, 355 N.C. 497, 564 S.E.2d 51 (2002). Where the defendant fails to meet this high burden, the court is not required to charge the jury on voluntary intoxication. *See id.*

Here, defendant failed to meet that burden. Evidence did exist that, prior to 5:00 a.m. when he robbed Luft, defendant had been drinking and taking drugs intermittently between 8:00 p.m. and 1:00 a.m. However, this evidence was general at best. On the other hand, there was evidence that throughout the evening and early morning, including the time he was drinking and smoking, defendant had the specific intent to commit robbery. Defendant's statement to police stated that he and Paz began driving around early in the evening looking for "targets" to rob and pulled in several places before deciding to leave. The statement also noted that the sole reason for pulling off the road and up in front of Luft's truck was to rob him. Since he was packing up, defendant "thought he had some

money on him. . . . I had lost my job and needed money." Applying plain error review, we find defendant's evidence to fall short of requiring the judge, *sua sponte*, to instruct the jury on voluntary intoxication regarding the robbery charge. *See Spencer*, 154 N.C. App. at 670-71, 572 S.E.2d at 818-19.

[3] Finally, defendant argues that the trial court erred in instructing the jury on transferred intent. Although he states that "there was no reason for the court to give a transferred intent instruction, and giving it may have confused the jury about the nature of specific intent required for first degree murder[,]" defendant is unable to cite any authority to support the proposition. Accordingly, under N.C.R. App. P. 28(b)(6), we deem this issue abandoned.

No error.

Judges McGEE and CALABRIA concur.

CABARRUS COUNTY, Plaintiff v. SYSTEL BUSINESS EQUIPMENT COMPANY, INC., Defendant

No. COA04-1221

(Filed 5 July 2005)

Counties— preaudit certificate—settlement agreement

Any county obligation evidenced by an agreement to pay money shall include a preaudit certificate signed by a finance officer. An agreement settling a dispute concerning rented copier equipment was not valid because it did not include the required certificate. N.C.G.S. § 159-28(a).

Appeal by Plaintiff from order entered 27 April 2004 by Judge W. David Lee in Superior Court, Cabarrus County. Heard in the Court of Appeals 10 May 2005.

Hartsell & Williams, P.A., by Fletcher L. Hartsell, Jr. and Christy E. Wilhelm, for plaintiff-appellant.

Poyner & Spruill, LLP, by E. Fitzgerald Parnell, III and Cynthia L. Van Horne, for defendant-appellee.

WYNN, Judge.

Under North Carolina law, any county obligation evidenced by an agreement to pay money shall include a preaudit certificate signed by a finance officer. N.C. Gen. Stat. § 159-28(a) (2004). In this appeal, Plaintiff Cabarrus County contends that a settlement agreement between itself and Defendant Systel Business Equipment Company, Inc., which did not include a signed preaudit certificate, was invalid. Because the settlement agreement failed to meet the statutory requirements, we hold that the agreement was unenforceable. Accordingly, we reverse the trial court's ruling.

The record reflects that in December 1999, Cabarrus County issued a request for proposed bids from companies for photocopier services. The Board of County Commissioners voted on 18 January 2000 to award the contract to Systel. On 18 July 2000, a Cabarrus County manager executed an Equipment Rental Agreement.

On 17 April 2001, Cabarrus County notified Systel that it was not renewing the copier contract as outlined in the Equipment Rental Agreement and requested that Systel remove its equipment from Cabarrus County's offices. Systel failed to remove its equipment, claiming that Cabarrus County remained obligated to use Systel's services under the Equipment Rental Agreement. Cabarrus County argued that the Equipment Rental Agreement could not be enforced because, *inter alia*, it did not include a preaudit certificate as required by statute.

On 26 July 2001, Cabarrus County filed an action in Superior Court, Cabarrus County to, *inter alia*, determine the validity of, and the rights of the parties under, the Equipment Rental Agreement. Systel filed a counterclaim for breach of contract on 8 October 2001. Systel and Cabarrus County participated in formal and informal mediation of their dispute. In February 2003, Systel presented a proposed settlement agreement, the terms of which required Cabarrus County to, *inter alia*, pay Systel the sum of $43,390.00, which was reduced to $21,695.00, and sign a new Equipment Lease Agreement allowing Systel to provide photocopier equipment and services to Cabarrus County for a sixty-four month period. Cabarrus County Attorney Fletcher L. Hartsell, Jr. presented the proposed settlement agreement to the Board of County Commissioners during its 20 October 2003 meeting. The Board of County Commissioners voted to approve the proposed settlement agreement and authorized the County Manager to execute the settlement agreement documents on behalf of Cabarrus County and to prepare a budget amendment. On 21

October 2003, Mr. Hartsell reported to Systel that the Board of County Commissioners voted to approve the proposed settlement agreement. At its meeting on 27 October 2003, the Board of County Commissioners discussed the settlement agreement again, voted to rescind its approval of the settlement agreement, and directed the County Manager to continue settlement negotiations with Systel.

Systel filed a motion to enforce the settlement agreement, which the trial court granted in an order entered 27 April 2004. The trial court concluded that the settlement agreement was valid and binding upon Cabarrus County, and Cabarrus County appealed.

On appeal, Cabarrus County argues that the trial court erred in concluding that a settlement agreement between itself and Systel was valid and binding despite the absence of a completed preaudit certificate. We agree.

A settlement agreement is interpreted according to general principles of contract law, and since contract interpretation is a question of law, the standard of review on appeal is *de novo*. *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001); *Harris v. Ray Johnson Constr. Co., Inc.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000).

North Carolina General Statutes section 159-28(a), a part of the Local Government Budget and Fiscal Control Act, states:

> If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection. The certificate, which shall be signed by the finance officer or any deputy finance officer approved for this purpose by the governing board, shall take substantially the following form:
>
> "This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.
>
> _____
> (Signature of finance officer)."

"Where a plaintiff fails to show that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, there is no valid contract, and any claim by plaintiff based upon such contract must fail." *Data Gen. Corp. v. County of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243,

247 (2001) (citing *Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 408, 399 S.E.2d 758, 759 (1991)); *see also L&S Leasing, Inc. v. City of Winston-Salem*, 122 N.C. App. 619, 622-23, 471 S.E.2d 118, 121 (1996) ("[T]he alleged contract is invalid and unenforceable by virtue of N.C. Gen. Stat. § 159-28(a)" because "Plaintiff has failed to show that such a certificate" existed.).

In the case *sub judice*, the settlement agreement contained a preaudit certificate that was never executed by Cabarrus County: No finance officer signed the certificate. The requirements of North Carolina General Statutes section 159-28(a) were therefore not met and thus "there is no valid contract, and any claim . . . based upon such contract must fail." *Data Gen. Corp.*, 143 N.C. App. at 103, 545 S.E.2d at 247.

Nonetheless, Systel cites *Lee v. Wake County*, 165 N.C. App. 154, 598 S.E.2d 427, *disc. review denied*, 359 N.C. 190, 607 S.E.2d 275 (2004), to support its argument that the lack of a signed preaudit certificate does not render the settlement agreement invalid and unenforceable. In *Lee*, this Court held that "an otherwise valid memorandum of agreement is not rendered void by the fact it does not bear the requisite pre-audit certificate." *Id.* at 162, 598 S.E.2d at 433. The crucial difference, however, between *Lee* and this case is that in *Lee*, "the subject memorandum of agreement [was] an agreement to prepare a formalized settlement compromise agreement for the [Industrial] Commission's consideration[,]" and therefore the action on appeal was "for specific performance, not for the payment of money." *Id.* Here, in contrast, the settlement agreement, which the trial court ordered enforced, required Cabarrus County to pay Systel the sum of $21,695.00. The payment of the $21,695.00 was neither conditional nor contingent but mandatory under the settlement agreement. The settlement agreement here therefore was "for the payment of money" and *Lee* is therefore inapplicable.

Systel further argues that North Carolina General Statutes section 159-28(a) does not apply because the monetary obligations under the settlement agreement were to be incurred in fiscal years subsequent to the parties' contracting to the settlement agreement. Systel did not, however, (cross-)assign error to the trial court's conclusions indicating that the settlement agreement became binding only as of the Board of County Commissioners' 20 October 2003 vote to approve the settlement agreement and the communication of such approval to Systel, and that payment of at least some of the obligations under the agreement would come due in fiscal year 2003. Moreover, as Systel

concedes, the settlement agreement set no timeline for payment of the $21,695.00 (while the settlement agreement indicated that obligations under the lease agreement would come due first in July 2004). Payment of the $21,695.00 would therefore appear to be due immediately under the settlement agreement, and Systel's contention that "it is at least arguable that the payment obligation [regarding the $21,695.00] was not due until the Lease obligations began on July 1, 2004" is thus unconvincing.

Systel cites *Media Gen. Broad. of S.C. Holdings, Inc. v. Pappas Telecasting of the Carolinas*, 152 F. Supp. 2d 865 (W.D.N.C. 2001), and states that "[w]here a contract contains an express and unambiguous severability provision, the Court may strike an unenforceable provision from the otherwise enforceable agreement and give effect to all remaining terms." Systel fails, however, to argue that the settlement agreement at issue here includes an express severability provision—and for good reason, as the settlement agreement before this Court does not contain such a provision.

In sum, we find that the settlement agreement required Cabarrus County to pay Systel money and was thus subject to North Carolina General Statutes section 159-28(a). The agreement, however, lacked a preaudit certificate signed by a Cabarrus County finance officer. The settlement agreement therefore failed to meet North Carolina General Statutes section 159-28(a)'s requirements, and, as a consequence, the settlement agreement is unenforceable. We therefore reverse the trial court's order enforcing the settlement agreement.

Reversed.

Judges BRYANT and JACKSON concur.

IN RE: R.A.H.

No. COA04-965

(Filed 5 July 2005)

Termination of Parental Rights— guardian ad litem for child— timeliness of appointment

The termination of respondent's parental rights was reversed and remanded because a guardian ad litem was not appointed for the child in a timely fashion. There should have been a guardian

ad litem investigating and determining the best interests of the child from the first petition alleging neglect through the final determination; it was not sufficient that an attorney advocate was appointed for her or that the attorney advocate was appointed as the guardian ad litem during the hearing. The functions of the attorney advocate and guardian ad litem are not sufficiently similar to allow one to substitute for the other when the best interests of the juvenile are at stake.

Appeal by respondent from an order entered 23 August 2002 by Judge Jayrene R. Maness in Randolph County District Court. Heard in the Court of Appeals 1 March 2005.

David A. Perez, for petitioner-appellee.

Rebekah W. Davis, for respondent-appellant.

STEELMAN, Judge.

Respondent appeals from the termination of her parental rights to R.A.H., the youngest of her three children. On 11 June 1998 respondent's three children were taken from her custody by Randolph County Department of Social Services. Petitioner stipulated that she had "engaged in action or inaction which resulted in or contributed to [R.A.H.] experiencing severe developmental deficiencies." Based on this stipulation, the trial court determined that R.A.H. was a neglected juvenile under N.C. Gen. Stat. § 7A-517(21) (1999) by order entered 10 June 1999.

On 9 March 2000 the permanent plan was changed to adoption. On 23 August 2002 respondent's parental rights were terminated based on a finding of neglect and that respondent had left R.A.H. in foster care for more than 12 months without demonstrating reasonable progress pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2) (2003). From the order terminating her parental rights to R.A.H., respondent appeals. Other relevant facts will be discussed below.

In her second argument, respondent contends that the trial court erred in failing to appoint a guardian *ad litem* for R.A.H. prior to the termination hearing and in accordance with N.C. Gen. Stat. § 7B-1108. We agree.

N.C. Gen. Stat. 7B-1108(b) (2004) states: "The appointment, duties, and payment of the guardian ad litem shall be the same as in G.S. 7B-601 . . . ." N.C. Gen. Stat. 7B-601(a) (2004) states: "When in a peti-

tion a juvenile is alleged to be abused or neglected, the court shall appoint a guardian ad litem to represent the juvenile." Additionally: "The appointment shall terminate when the permanent plan has been achieved for the juvenile and approved by the court." *Id.* Further:

> In every case where a nonattorney is appointed as a guardian ad litem, an attorney shall be appointed in the case in order to assure protection of the juvenile's legal rights throughout the proceeding. The duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

Id. N.C. Gen. Stat. § 7B-1108(d) states:

> If a guardian ad litem has previously been appointed for the juvenile under G.S. 7B-601, and the appointment of a guardian ad litem could also be made under this section, the guardian ad litem appointed under G.S. 7B-601, and any attorney appointed to assist that guardian, shall also represent the juvenile in all proceedings under this Article and shall have the duties and payment of a guardian ad litem appointed under this section, unless the court determines that the best interests of the juvenile require otherwise.

In the instant case, no guardian *ad litem* was appointed pursuant to N.C. Gen. Stat. § 7B-601, even though the 1 September 2000 petition alleged neglect, and respondent's parental rights were terminated based in part on a finding of neglect. We note that though the record does not contain these petitions, it is clear from the order entered 10 June 1999 that petitions filed 11 and 14 June 1998 also alleged neglect. It does not appear that any permanent guardian *ad litem* was appointed pursuant to these earlier petitions, though there is reference in the 10 June 1999 order to "Gale Miller, Volunteer Guardian Ad Litem."

Inexplicably, an attorney advocate was appointed 8 January 2001 pursuant to N.C. Gen. Stat. § 7B-601(a). No guardian *ad litem* was

appointed, even though appointment of an attorney advocate, whose job is to give legal advice to the guardian *ad litem*, is only necessary if the appointed guardian *ad litem* is not an attorney licensed in North Carolina. *Id.* The termination hearing began 13 February 2001 (the pre-trial conference was held 9 February 2001) and was scattered over 13 days ending 31 July 2001. The attorney advocate, who had been present at all these dates, was appointed as guardian *ad litem* 27 February 2001, after three and a half days of testimony. Thus, until that date, there was no guardian *ad litem* making an "investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues," or attending to any of the other duties mandated by N.C. Gen. Stat. § 7B-601.

Pursuant to N.C. Gen. Stat. § 7B-1108(d) and § 7B-601, there should have been a guardian *ad litem* investigating and determining the best interests of the child from the first petition alleging neglect in June 1998 through the final determination. There should have been a guardian *ad litem* representing R.A.H. at the termination hearing who had been involved in the case from the beginning. If the guardian *ad litem* was not an attorney licensed in North Carolina, there should have also been an attorney advocate providing the guardian *ad litem* legal assistance on behalf of R.A.H.

When a child is permanently taken from its parents' custody through a termination proceeding without a guardian *ad litem* ever having been appointed to represent the child, the matter must be remanded for appointment of a guardian *ad litem* and a new termination proceeding conducted. *In re J.L.S.*, —— N.C. App. ——, ——, 608 S.E.2d 823, 824-25 (2005); *In re Fuller*, 144 N.C. App. 620, 622-23, 548 S.E.2d 569, 571 (2001). Undecided by our case law is the appropriate remedy when a guardian *ad litem* for a minor child is not appointed at the time mandated by statute, but is appointed at a later date.

In the instant case there was no representative of R.A.H. performing the duties required by N.C. Gen. Stat. § 7B-601 until four days into the termination hearing. Petitioner argues that R.A.H. was adequately represented because she had an attorney advocate in court representing her on those days before a guardian *ad litem* was appointed, and that because the attorney advocate was appointed as the guardian *ad litem*, no prejudice resulted.

The guardian *ad litem* and the attorney advocate perform distinct and separate roles under the juvenile code. " 'The appointment of the guardian *ad litem* is to protect the interest of the infant defendant at every stage of the proceeding.' 7 Strong's N.C. Index 3d, Infants § 9, p. 202." *In re Clark*, 303 N.C. 592, 598, 281 S.E.2d 47, 52 (1981). In the instant case, a guardian *ad litem* should have been appointed after the initial petition alleging neglect pursuant to N.C. Gen. Stat. § 7B-601. This guardian *ad litem* would then have been involved at all stages of the proceeding, interviewing the child, the parents, and any other persons relevant to the proceedings. The guardian *ad litem* would have been working with all parties to both determine what course of action was in the best interests of the child, and how best to pursue that course of action. The guardian *ad litem's* position is very "hands on," and thus the guardian *ad litem* has the opportunity to acquire intimate knowledge pertinent to the best interests of the child.

The attorney advocate, on the other hand, is not required to conduct field investigation, or interview witnesses. In the instant case, the attorney advocate had not interviewed the child or respondent before the termination hearing. The job of the attorney advocate is to provide legal advice and assistance to the guardian *ad litem* in representing the minor child. The attorney advocate is not charged with making the determination of what is in the best interest of the child. N.C. Gen. Stat. § 7B-601(a) (attorney advocate shall "assure protection of the juvenile's *legal* rights") (emphasis added).

In the instant case, the trial court made a valiant effort to correct the error and proceed with the termination hearing by appointing a guardian *ad litem* immediately once the error was brought to its attention, and offering the newly appointed guardian *ad litem* the option of recalling witnesses and postponing further hearings in the matter. However, because our polar star in these proceedings is the best interests of the child, *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984), we must presume prejudice where, as here, a child was not represented by a guardian *ad litem* at a critical stage of the termination proceedings. This is particularly so in light of the fact that the minor child is not capable of understanding and protecting its own rights and interests. The functions of the guardian *ad litem* and the attorney advocate are not sufficiently similar to allow one to "pinch hit" for the other when the best interest of a juvenile is at stake. The trial court should have terminated the hearing, appointed a guardian *ad litem* for R.A.H., and set a new hearing date

giving the guardian *ad litem* sufficient time to become familiar with the case and make the relevant inquiries and investigations. We hold that the violation of the mandates of N.C. Gen. Stat. §§ 7B-1108 and 7B-601 in this case require reversal of the order, and remand for a new termination hearing.

We do not address respondent's remaining arguments.

REVERSED AND REMANDED.

Judges WYNN and HUDSON concur.

LAURA CURNUTT SANTANA, PLAINTIFF v. JOAQUIN RAMIREZ SANTANA, DEFENDANT

No. COA04-1158

(Filed 5 July 2005)

Divorce— equitable distribution—timeliness of claim

An equitable distribution claim filed between the pronouncement of divorce in open court and the filing of the signed order was timely and should not have been dismissed. The right to equitable distribution is lost if not asserted before the judgment of absolute divorce, but the divorce judgment in this case did not become final until entry.

Appeal by Plaintiff from judgment entered 29 April 2004 by Judge Thomas G. Foster, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 6 June 2005.

Bell, Davis & Pitt, P.A., by Robin J. Stinson, for plaintiff-appellant.

Jaquin Ramirez Santana, pro se, no brief filed.

WYNN, Judge.

"An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce[.]" N.C. Gen. Stat. § 50-11(e) (2003). In this case, Plaintiff contends that the trial court erred in holding that her claim for equitable distribution was

not timely submitted. Because Plaintiff asserted her right to equitable distribution one day before entry of the divorce judgment, we reverse the trial court's order granting Defendant's motion to dismiss.

Plaintiff, Laura Curnutt Santana, and Defendant, Joaquin Ramirez Santana, married in 1987 and separated in June 2001. In December 2002, Plaintiff filed a complaint for absolute divorce alleging, *inter alia*, that "[t]he issues of child support, alimony, and equitable distribution are to be reserved." Defendant answered in June 2003, joining in Plaintiff's request for an absolute divorce. Thereafter, Plaintiff moved for summary judgment on her request for absolute divorce, and further requested the "issues of child support, alimony, and equitable distribution are to be reserved."

The trial court conducted the divorce hearing on 11 August 2003 and filed an order dated 19 August 2003, granting Plaintiff's request for divorce and reserving the issues of child support, alimony, and equitable distribution "to extent (sic) that any aforementioned claims have been preserved, served, and filed as of entry of this judgment so as to otherwise survive and be reserved."

On 18 August 2003, Plaintiff filed a motion alleging that "[t]he parties own marital property located in Mexico, specifically but not limited to a house owned by the Plaintiff solely and retirement funds in the Defendant's name the plaintiff has a marital interest in said property." Plaintiff requested "the court preserve her rights to equitable distribution of marital property and debts." Attached to the motion was a certificate of service, signed by Plaintiff's attorney on 18 August 2003, indicating that she served the motion by United States mail "upon all other parties."

Following entry of the divorce judgment, Defendant moved to dismiss Plaintiff's claim to equitable distribution. From the trial court's grant of that motion, Plaintiff appeals.

On appeal, Plaintiff argues that the trial court erred in dismissing her claim for equitable distribution. We agree.

"Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." N.C. Gen. Stat. § 50-20(a) (2003). "An absolute divorce obtained within this State shall destroy the right of a spouse to equitable dis-

tribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce[.]" N.C. Gen. Stat. § 50-11(e); *see Howell v. Howell*, 321 N.C. 87, 361 S.E.2d 585 (1987).

The trial court's order dismissing Plaintiff's claim of equitable distribution states in pertinent part:

> FINDINGS OF FACT
>
> ***
>
> 4. On August 11, 2003, the matter came on for hearing before the Honorable A. Robinson Hassell. The court granted the Plaintiff's request for divorce and reserved the other claims "to the extent they are presented, served and filed as of the entry of this judgment so as to otherwise survive and be reserved."
>
> 5. On August 18, 2003, Plaintiff filed a motion alleging *inter alia*, that "the parties own marital property located in Mexico, specifically but not limited to a house owned by the Plaintiff solely and retirement funds in the Defendant's name [sic] the plaintiff has a marital interest in said property," and requesting that the court "reserve [Plaintiff's] rights to equitable distribution of marital property and debts." No certificate of service was attached to the filed copy of the motion.
>
> ***
>
> CONCLUSIONS OF LAW
>
> 1. The Plaintiff's motions for alimony and equitable distribution were not timely filed, and are therefore barred as a matter of law.

The trial court's finding of fact number four states that the matter came before hearing on 11 August 2003. But Judge Hassell did not sign the order until 18 August 2003, and did not file the order until 19 August 2003. Thus, the absolute divorce judgment was not entered until 19 August 2003, one day after Plaintiff asserted her equitable distribution claim in her written motion for an order for equitable distribution. N.C. Gen. Stat. § 1A-1, Rule 7(b) (2004) ("An application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.").

"[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2003). "An announcement of judgment in open court consti-

tutes the rendition of judgment, not its entry." *Searles v. Searles*, 100 N.C. App. 723, 726, 398 S.E.2d 55, 56 (1990). In fact, without entry of a written judgment on the same date of pronouncement, the issue of divorce is still pending. Thus, pronouncement of an absolute divorce judgment is "of no effect absent an *entry* of judgment." *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 321, 438 S.E.2d 471, 475 (1994). "[F]inality and fair notice require entry of judgment after the requisite findings of fact have been adopted . . . ." *Id.*

While the trial judge in the instant case orally pronounced and rendered an absolute divorce in open court on 11 August 2003, an order was neither signed nor filed on that date. The trial court signed the order on 18 August 2003, and the order was filed on 19 August 2003. Consequently, the absolute divorce did not become final until entry of judgment on 19 August 2003. Because the equitable distribution motion was asserted one day prior to the entry of absolute divorce judgment, Plaintiff's equitable distribution claim was viable and survived Defendant's motion to dismiss.

Since Plaintiff asserted her right to equitable distribution prior to the divorce judgment, her claim for equitable distribution was not barred as a matter of law, and the trial court erred in granting Defendant's motion to dismiss. N.C. Gen. Stat. § 50-11(e).

Reversed.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

ANDREW JOHN SALIBY, PLAINTIFF-APPELLANT v. CHRISTOPHER ROBERT CONNERS, DEFENDANT-APPELLEE

No. COA04-1016

(Filed 5 July 2005)

Process and Service— presumption of proper service—rebuttal—more than one affidavit

A defendant bears the burden of rebutting the presumption of valid service by more than a single contradictory affidavit. In this case, defendant submitted only testimony from his father that he had moved to Texas for a job; defendant's unverified answer did not serve as additional evidence rebutting the presumption of

proper service, and the trial court erred by granting defendant's motion to dismiss.

Appeal by plaintiff from order entered 13 May 2004 by Judge Stafford G. Bullock in Superior Court, Wake County. Heard in the Court of Appeals 23 March 2005.

Patterson, Dilthey, Clay, Bryson, & Anderson, L.L.P., by Reid Russell, for plaintiff-appellant.

Larcade & Heiskell, PLLC, by Christopher N. Heiskell, for defendant-appellee.

McGEE, Judge.

Andrew John Saliby (plaintiff) filed suit against Christopher Robert Conners (defendant) on 23 September 2003 to recover damages for injuries sustained in a motor vehicle collision. Wake County Deputy Sheriff S.R. Williamson (Deputy Williamson) served the summons on defendant's father, Wayne G. Conners (Mr. Conners), at defendant's residence at 1028 Wintu Court, in Raleigh, North Carolina (the residence) on 30 September 2003. Mr. Conners accepted the summons and subsequently faxed it to defendant in Houston, Texas. Mr. Conners also faxed the summons to defendant's automobile insurance company.

Defendant filed an answer, which included a motion to dismiss plaintiff's action for insufficient process and insufficient service of process pursuant to Rules 12(b)(4) and (5) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(b)(4) and (5) (2003). A hearing on defendant's motion to dismiss was held on 21 April 2004. Deputy Williamson testified at the hearing that prior to serving the summons, he asked Mr. Conners if defendant lived at the residence. Mr. Conners replied in the affirmative. Mr. Conners testified that defendant had moved from the residence to Houston, Texas in early June 2002 to accept a new job, but Mr. Conners stated he was unsure whether he had relayed this information to Deputy Williamson. Defendant presented only the testimony of Mr. Conners in support of his motion to dismiss. The trial court granted defendant's motion, dismissing plaintiff's complaint without prejudice for insufficient process and insufficient service of process. Plaintiff appeals.

Plaintiff argues that the trial court erred in granting defendant's motion to dismiss because the presumption of valid service can-

not be overcome by the testimony of just one witness. We agree. Service may be made on a natural person "[b]y delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(a) (2003). Our Supreme Court has consistently held that "[w]hen the return shows legal service by an authorized officer, nothing else appearing, the law presumes service." *Harrington v. Rice*, 245 N.C. 640, 642, 97 S.E.2d 239, 241 (1957) (stating "[s]ervice of process, and the return thereof, are serious matters; and the return of a sworn authorized officer should not 'be lightly set aside.' ") (quoting *Burlingham v. Canady*, 156 N.C. 177, 179, 72 S.E. 324, 325 (1911)); *see also Smathers v. Sprouse*, 144 N.C. 637, 638, 57 S.E. 392, 393 (1907).

"[A]n officer's return of service may not be set aside unless the evidence consists of more than a single contradictory affidavit (the contradictory testimony of one witness) *and* is clear and unequivocal." *Id.* A defendant thus bears the burden of rebutting the presumption by evidence that consists of more than a single contradictory affidavit. *See id.*; *see also Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996); *Guthrie v. Ray*, 293 N.C. 67, 71, 235 S.E.2d 146, 149 (1977); *Burlingham*, 156 N.C. at 179, 72 S.E. at 325.

Defendant has not met his burden in the present case. Deputy Williamson's return of the summons indicates legal service under Rule 4(j)(1)(a), which results in a presumption of valid service of process. *See Gibby v. Lindsey*, 149 N.C. App. 470, 473, 560 S.E.2d 589, 592 (2002) (citing *Guthrie*, 293 N.C. at 71, 235 S.E.2d at 149). Defendant submitted only Mr. Conners's affidavit to rebut this presumption.

Defendant argues that his motion and answer, when combined with Mr. Conners's affidavit, can serve as additional evidence that rebuts the presumption of proper service. However, our Court in affirming a trial court's denial of a defendant's motion to dismiss for insufficient service of process where only an unverified answer was filed, emphasized the *Harrington* requirement that more than a single contradictory affidavit is required to show improper service. *Brown v. King*, 166 N.C. App. 267, 270, 601 S.E.2d 296, 298 (2004). In *Brown*, we held the defendant failed to meet the evidentiary burden necessary to show improper service. *Id.* In the case before us, defendant's argument that his unverified answer supplemented

Mr. Conners's affidavit as evidence of insufficient process is without merit.

We need not examine the second requirement in *Harrington* that the evidence must be "clear and unequivocal," *see Harrington*, 245 N.C. at 642, 97 S.E.2d at 241, since defendant's evidence was not "more than a single contradictory affidavit" in support of his motion to dismiss. Because defendant failed to rebut the presumption of valid service, the trial court erred in granting his motion to dismiss.

Reversed.

Judges BRYANT and STEELMAN concur.

IN THE MATTERS OF: C.L.C., K.T.R., A.M.R., E.A.R., MINOR CHILDREN

No. COA04-471

(Filed 19 July 2005)

1. Termination of Parental Rights— jurisdiction—failure to comply with statutory time deadlines—failure to show prejudicial error

The trial court was not deprived of jurisdiction to terminate respondent mother's parental rights even though the trial court and the Department of Social Services (DSS) failed to comply with the statutory time limitations with respect to the filing of the 28 February 2002 adjudication and disposition order, the scheduling of the first review hearing following the disposition, the filing of the permanency planing review orders for 6 June 2002, 12 September 2002, and 15 January 2003, and the filing of the petition to terminate parental rights because: (1) any challenge to the 28 February 2002 adjudication is not properly before the Court when the mother failed to appeal within 10 days from the order as required by N.C.G.S. § 7B-1001; (2) with respect to the other timing issues, time limitations in the Juvenile Code are not jurisdictional in cases such as this one and do not require reversal of orders in the absence of a showing by the appellant of prejudice resulting from the relatively limited time delays; and (3) with respect to the three-month delay of the petition for termination of parental rights, respondent does not explain in what manner the

delay prejudiced her in light of the fact she chose not to take advantage of the opportunity to have visitation with her children and failed to have any contact with DSS between the time that DSS ceased reunification efforts and months later initiated termination proceedings.

2. Termination of Parental Rights— findings of fact—summarizing testimony

The trial court did not err in a termination of parental rights case by its findings of fact 31, 47, 48, 49, 50, and 51 even though respondent mother contends the trial court failed to make findings of fact but simply recited the testimony of witnesses at the hearing and made contradictory findings, because: (1) while the trial court did include findings of fact that summarized the testimony, the court also made the necessary ultimate findings of fact; (2) there is nothing impermissible about describing testimony so long as the court ultimately makes its own findings resolving any material disputes; and (3) although respondent contends there were inconsistencies in the testimony summaries regarding the date when the mother stopped consistently visiting her children, the trial court made a finding resolving this dispute.

3. Termination of Parental Rights— grounds for termination-willfully left child in foster care without showing reasonable progress—neglect—willful abandonment

Although respondent mother contends the trial court relied upon an incorrect standard when it found that grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(2) since the statute has been amended so that the focus is no longer solely on the progress made in the twelve months prior to the petition, the error is immaterial because: (1) in this case the mother has not assigned error to the trial court's other grounds for termination including neglect under N.C.G.S. § 7B-1111(a)(1) and willful abandonment under N.C.G.S. § 7B-1111(a)(7); and (2) either of the two unchallenged grounds for termination is sufficient to support the trial court's order.

4. Termination of Parental Rights— best interests of child—abuse of discretion standard

The trial court did not abuse its discretion by determining that it was in the best interests of the children to terminate respondent mother's parental rights because although the mother emphasizes that she has a strong bond with her children and that

she had made progress in doing what the trial court ordered including completing most of her parenting classes and regularly visiting her children, the trial court was entitled to give greater weight to other factors including: (1) the mother's repeated statements when she had custody that she could not handle the responsibility of parenting her children and her choice on two occasions to request that her children be placed in foster care; (2) the mother's failure to obtain stable housing and employment at any time; (3) her failure to successfully complete her parenting classes; (4) her failure to comply with any recommendations arising out of her psychological assessment; (5) her failure to complete a substance abuse assessment; and (6) her failure after early October 2002 to visit her children, to send letters or gifts to her children, to pay support, or to have contact with DSS other than two phone calls.

Judge TYSON dissenting.

Appeal by respondent from judgment entered 15 October 2003 by Judge Marvin P. Pope in Buncombe County District Court. Heard in the Court of Appeals 2 December 2004.

John C. Adams for petitioner-appellee.

Charlotte Gail Blake for respondent-appellant.

Judy N. Rudolph for appellee Guardian ad Litem.

GEER, Judge.

Respondent mother L.M. appeals from the judgment terminating her parental rights to her four children, C.L.C., K.T.R., A.M.R., and E.A.R. On appeal, the mother argues primarily that the judgment must be reversed because the trial court's and DSS' failure to comply with certain statutory time deadlines deprived the trial court of jurisdiction. Since, however, L.M. has failed to demonstrate prejudice from the missed deadlines and because we do not find her other arguments on appeal meritorious, we affirm.

Facts

This case began in March 2001 when the Buncombe County Department of Social Services ("DSS") received a report that L.M. ("the mother") was not properly supervising her four children, that the father of one child whipped him with a belt, that there was severe

domestic violence between the mother and father, and that the mother failed to take her children to medical and dental appointments. After substantiating the report, DSS began working with the family. The mother frequently told a social worker that she could not handle the responsibility of parenting her children and asked that the children be placed elsewhere. On 26 July 2001, the mother voluntarily placed the children in the Angel Watch program.

The mother located appropriate housing and the children were returned to her on 1 November 2001. The mother agreed not to allow her boyfriend to be around the children until he completed substance abuse treatment. In addition, any visitation between the children and their father was required to be supervised because of the history of severe domestic violence between the mother and father. DSS learned, however, that the mother had, during the following two weeks, allowed her boyfriend to be around the children on at least three occasions and had allowed the father to have unsupervised contact with the children.

On 18 November 2001, the mother called the after-hours on-call social worker for DSS and told her that she could not handle caring for the children any more and that she wished to have the children placed in foster care. After subsequently stating the same thing to two other social workers, the mother again voluntarily placed her children with Angel Watch.

On 6 December 2001, DSS filed a petition alleging that the minor children were neglected and obtained non-secure custody of the children. The mother consented to the trial court's adjudication of her minor children as neglected based upon stipulated findings of fact. In its order filed 28 February 2002, following a hearing on 28 January 2002, the trial court determined that the children were neglected based on the fact that the children did not receive proper care and supervision and lived in an environment injurious to their welfare due to the domestic violence between the mother and father. The court ordered the mother to (1) complete parenting classes, (2) complete a substance abuse program and follow all recommendations, (3) obtain a psychological assessment and follow all recommendations, and (4) obtain stable employment and housing.

The mother has acknowledged that on 24 January 2002, she tested positive for opiates. Subsequently, the mother failed to complete the ordered substance abuse assessment. Although she began parenting classes in January 2002 and attended all but three classes,

she failed to complete the remaining three classes over the next 15 months. A psychological assessment concluded: "[The mother's] ability to parent her children effectively is often clouded by the emotional issues resulting from a history of abuse, inadequate coping skills, and chaotic interpersonal relationships. [The mother] . . . has the potential to provide a safe, stable home for her children, but there are many issues that she needs help with before she is able to parent them effectively." Although the court had ordered that the mother comply with any recommendations arising out of the assessment—which included recommendations of therapy, assertiveness training, anger management, participation in a support group for battered women, and completion of parenting classes—the mother failed to do so.

Throughout the period prior to the filing of the petition, the mother failed to obtain stable employment and housing. Following July 2002, the mother refused two drug screen requests. She was convicted of writing worthless checks in October 2002 and had another charge of worthless checks pending that was in violation of her probation for possession of drug paraphernalia.

The mother visited with the children on a somewhat regular basis until early October 2002. Following July 2002, the mother did not send letters, cards, or gifts to the children. She did not pay any child support even after a child support order of $104.00 was entered; she acknowledged at the time of the hearing that she was in arrears in the amount of approximately $500.00.

At a permanency planning hearing held on 6 November 2002, the plan for the children was changed from reunification to adoption, although DSS was required to allow visitation if the mother requested it. The mother did not contact her social worker again until December 2002. At that time, she did not, however, request visitation with the children. The mother did not attend a permanency planning hearing on 2 December 2002 and the court's order indicates that the mother had had no contact with either her attorney or DSS. The court, therefore, discontinued all visitation.

The mother made no further contact with DSS with the exception of leaving a voice mail on 3 January 2003, saying that she had moved to Tennessee and that she would be supplying DSS with her new address and phone number. Between that message and the filing of the petition for termination of parental rights, DSS heard nothing further from the mother.

On 17 April 2003, DSS filed separate petitions to terminate the mother's parental rights to each of her four children.[1] The petitions were served on 3 July 2003, the hearing was held on 2-3 September 2003, and the trial court filed a judgment terminating the mother's parental rights on 15 October 2003. In its order, the court concluded that the mother (1) neglected the children, (2) willfully left the children in foster care for more than 12 months without showing that reasonable progress had been made to correct the conditions that caused the removal of her children, and (3) willfully abandoned the children for at least six consecutive months immediately prior to the filing of the petition. After concluding that grounds for termination existed, the court further found that it was in the best interests of the children that their mother's parental rights be terminated.

I

[1] The mother first contends on appeal that the trial court and DSS failed to comply with the statutory time limitations with respect to the filing of the 28 February 2002 adjudication and disposition order; the scheduling of the first review hearing following the disposition; the filing of the 6 June 2002, 12 September 2002, and 15 January 2003 permanency planning review orders; and the filing of the petition to terminate parental rights. The mother contends that "[t]he Court's failure to comply with these time lines in [the mother's] case deprived the Court of jurisdiction to terminate her parental rights [and] [t]herefore, the trial court should be reversed, and the petition to terminate her parental rights should be dismissed."

We first observe that any challenge to the 28 February 2002 adjudication is not properly before us. Under N.C. Gen. Stat. § 7B-1001 (2003), the mother had 10 days in which to appeal that order. *In re Padgett*, 156 N.C. App. 644, 647, 577 S.E.2d 337, 340 (2003) (adjudication and disposition order finding children to be neglected must be appealed within 10 days). With respect to the other timing issues, this Court has held that time limitations in the Juvenile Code are not jurisdictional in cases such as this one and do not require reversal of orders in the absence of a showing by the appellant of prejudice resulting from the time delay. *See In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391 ("[W]e conclude that, on these facts, vacating the TPR order is not an appropriate remedy for the trial court's failure to enter the order within 30 days of the hearing. . . . Respondent has

1. These petitions also sought to terminate the father's parental rights for K.T.R., A.M.R., and E.A.R. C.L.C.'s father was deceased.

failed to demonstrate that he suffered any prejudice by the trial court's delay."), *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004); *In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 172 ("[A]lthough the order was not filed within the specified time requirement, respondent cannot show how she was prejudiced by the late filing."), *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903 (2004).

In this case, it appears that the review hearing was only three days late, N.C. Gen. Stat. § 7B-906(a) (2003) (requiring review hearing within 90 days of the dispositional hearing), although we also note that between the date of the adjudication and dispositional order and the review hearing, the court conducted a hearing on the placement of the children with a paternal grandmother. With respect to the permanency planning orders, they were late by approximately four days, 20 days, and 14 days respectively.[2] *See* N.C. Gen. Stat. § 7B-907(c) (2003) (requiring that permanency planning hearing orders be entered no later than 30 days following the hearing). Since the mother has made no attempt to demonstrate any prejudice from these relatively limited delays, we find no error. *See, e.g.*, *In re A.D.L.*, 169 N.C. App. 701, 706, —— S.E.2d ——, ——, 2005 N.C. App. LEXIS 797, at *6-*8 (April 19, 2005) (holding no prejudicial error when an order was 16 days late); *In re J.L.K.*, 165 N.C. App. at 315, 598 S.E.2d at 390 (holding no prejudicial error when an order was 89 days late). We continue, however, to caution courts and parties that by failing to comply with the legislature's mandates, they are disregarding the best interests of the children involved.

With respect to the timeliness of the petition for termination of parental rights, N.C. Gen. Stat. § 7B-907(e) (2003) provides that DSS:

> shall file a petition to terminate parental rights within 60 calendar days from the date of the permanency planning hearing unless the court makes written findings why the petition cannot be filed within 60 days. If the court makes findings to the contrary, the court shall specify the time frame in which any needed petition to terminate parental rights shall be filed.

In this case, the hearing at which the permanent plan changed took place on 6 November 2002. Neither the order resulting from that hearing nor the order resulting from the December 2002 permanency plan-

2. We are only able to approximate the filing dates since the mother, contrary to the Rules of Appellate Procedure, has not either ensured that the record on appeal contains legible date stamps indicating the filing date or typed the date of filing on the orders for which review is sought. N.C.R. App. P. 9(b)(3).

ning hearing contained any extension of DSS' deadline or any findings as to why the petition could not be filed within 60 days. The petitions should have been filed by 6 January 2003. They were not, however, filed until 17 April 2003, more than three months late.

In *In re B.M.*, 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005), this Court held that "the time limitation specified in N.C. Gen. Stat. § 7B-907(e) is directory rather than mandatory and thus, not jurisdictional." The Court then concluded that the respondents had failed to show that they were prejudiced by a petition that was 11 months late. The Court observed:

> Respondents' right to appeal was not affected by the untimely filing. An order following a review hearing or permanency planning hearing that changes the permanency plan from reunification to termination of parental rights is a dispositional order that fits within the statutory language of N.C. Gen. Stat. § 7B-1001. Respondents could have appealed from either the review hearing ceasing DSS's efforts to reunify the family or from the permanency planning order which changed the permanency plan for the juveniles to termination of parental rights, as they both constituted dispositional orders which were immediately appealable under the provisions of N.C. Gen. Stat. § 7B-1001.

Id. at 354-55, 607 S.E.2d at 701 (internal citations omitted). The mother in this case could likewise have appealed from the permanency planning order entered 3 December 2002. The only prejudice that the mother identifies is that "DSS ceased reunification but waited many months to initiate termination proceedings." She does not explain in what manner the delay prejudiced her in light of the fact she chose not to take advantage of the opportunity to have visitation with her children during this period and failed to have any contact with DSS.

Since the mother has not pointed to any circumstances in this case that could distinguish her situation from *In re B.M.*, that case, involving an 11-month delay, controls with respect to this case, involving a three-month delay. We, therefore, hold that the mother is not entitled to reversal of the trial court's termination of parental rights order based on the trial court's and DSS' failure to comply with the statutory deadlines.

II

[2] The mother next assigns error to the trial court's findings of fact 31, 47, 48, 49, 50, and 51 on the grounds that the court "erred by

failing to make findings of fact but simply recit[ed] the testimony of witnesses at the hearing and making findings that are contradictory." We disagree.

N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) provides in pertinent part: "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law . . . ." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2003). The Supreme Court, in interpreting Rule 52(a)(1), noted that trial courts must make specific findings of the ultimate facts, but need not make findings regarding evidentiary and subsidiary facts:

> [A] proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.
>
> . . . .
>
> [W]hile Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Quick v. Quick, 305 N.C. 446, 451-52, 290 S.E.2d 653, 657-58 (1982) (internal citations omitted).

While the trial court did include findings of fact that summarized the testimony, the court also made the necessary ultimate findings of fact. There is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes. The testimony summaries were not the ultimate findings of fact; those findings were found elsewhere in the order.

The mother argues that there were inconsistencies in the testimony summaries, pointing only to a dispute regarding the date when the mother stopped consistently visiting her children. The witnesses variously stated that the date was July, September, or October 2002. The trial court, however, made a finding resolving this dispute. In finding of fact 31, the court found "[t]hat Respondent Mother visited with the minor children on a somewhat regular basis until early October 2002, when she began to fail to appear for visits . . . ." We, therefore, overrule this assignment of error.

III

[3] The mother next argues that the trial court relied upon the incorrect standard when it found that grounds existed to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(2) (2003). In finding of fact 25, the court stated:

> That pursuant to N.C.G.S. §7B-1111(2) [sic] the Respondent Mother has willfully left the minor children in foster care or placement outside the home for more than twelve (12) months without showing to the satisfaction of the Court that *reasonable progress under the circumstances has been made within twelve (12) months* in correcting those conditions which led to the removal of the minor children . . . .

(Emphasis added.) The statute has, however, been amended to provide: "The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that *reasonable progress under the circumstances has been made* in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (emphasis added). The focus is no longer solely on the progress made in the 12 months prior to the petition.

Because this problem appears to occur with frequency, we urge the courts and counsel to take care to ensure that they are referring to the proper version of the statute. Nevertheless, because, in this case, the mother has not assigned error to the trial court's other grounds for termination—neglect under N.C. Gen. Stat. § 7B-1111(a)(1) and willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7)—the trial court's error is immaterial. "The finding of any one of the grounds is sufficient to order termination." *Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 267 (2003). Either of the two unchallenged grounds for termination is sufficient to support the trial court's order.

IV

[4] In her last assignment of error, the mother argues that even if grounds exist to terminate her parental rights, the trial court abused its discretion in deciding that it was in the best interests of the children to terminate those rights. After reviewing the record, we cannot perceive any basis for concluding that the trial court abused its discretion.

If at least one ground for termination is proven by clear, cogent and convincing evidence, then the trial court proceeds to the dispositional phase and considers whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a) (2003); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). "It is within the trial court's discretion to terminate parental rights upon a finding that it would be in the best interests of the child." *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406-07 (2003). On appeal, we review the trial court's decision to terminate parental rights for an abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

In support of her argument, the mother emphasizes that she has a strong "bond" with her children and that she had made progress in doing what the trial court ordered, such as completing most of her parenting classes and regularly visiting her children. The trial court was, however, entitled to give greater weight to other facts that it found, including: (1) the mother's repeated statements—when she had custody—that she could not handle the responsibility of parenting her children and her choice on two occasions to request that her children be placed in foster care; (2) the mother's failure to obtain stable housing and employment at any time; (3) her failure to successfully complete her parenting classes; (4) her failure to comply with any recommendations arising out of her psychological assessment; (5) her failure to complete a substance abuse assessment; and (6) her failure after early October 2002 to visit her children, to send letters or gifts to her children, to pay support, or to have contact with DSS other than two phone calls. It was up to the trial court to decide the degree of progress made by the mother and whether these facts outweighed the mother's bond with her children. Significantly, the court found that at the hearing—2 1/2 years after DSS first became involved—the mother "stated that it is best for the children to stay where they are until she shows 'what she can do.' "

Based on the trial court's findings of fact and the record, we hold that the trial court did not abuse its discretion in terminating the mother's parental rights. *See In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003) (upholding termination order where evidence showed the mother failed to contact her child for a significant period and had withheld her love, care, and affection from the child); *In re Leftwich*, 135 N.C. App. 67, 518 S.E.2d 799 (1999) (affirming order terminating parental rights where the parent failed to enroll in a drug treatment facility and to make other improvements in her lifestyle that might help her to better care for her children).

The mother's remaining assignments of error were not argued in her brief. They are, therefore, deemed abandoned. N.C.R. App. P. 28(b)(6).

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge TYSON dissents in separate opinion.

Tyson, Judge dissenting.

I respectfully dissent.

What began as an impassioned plea for help to DSS by an impoverished single mother with four small children has ended, despite her substantial efforts, with termination of her parental rights to all children. The trial court found DSS had shown the mother: (1) neglected her four minor children; (2) willfully left her children in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made within 12 months in correcting those conditions which led to the removal of the children; and (3) willfully abandoned her children for at least six consecutive months immediately preceding the filing of the petition and continued to abandon the minor children up to the time of the hearing for termination of parental rights. Based on these findings and conclusions, the court terminated L.M.'s parental rights to all four of her children.

I. Background

L.M. is the mother of four minor children; a son, C.L.C. (Born 22 March 1996), a son, K.T.R. (Born 5 December 1997), a daughter, A.M.R. (Born 24 May 1999), and a daughter, E.A.R. (Born 27 May 2000). The father of C.L.C. committed suicide five months after C.L.C. was born. The father of K.T.R., A.M.R., and E.A.R. displayed a continuous pattern of domestic violence against L.M. L.M. had moved away from and was not living with the father of her three younger children at the time DSS took custody of the children. At the time of the hearing for termination of L.M.'s parental rights, L.M. was twenty-four years old and her children ranged from three to seven years old.

II. Statutory Time Limits

L.M. argues DSS and the trial court's failure to obey the statutorily mandated time lines regarding permanency planning, initiation of

the petitions to terminate her parental rights, and the entry of orders deprived the court of jurisdiction to rule on the petition to terminate her parental rights. L.M. also argues she and her children were prejudiced as a result of DSS' and the trial court's failure to obey the statutory time lines. I agree.

A. Time Limits Regarding Custody

"In any case where custody is removed from a parent . . . the court *shall* conduct a review hearing within 90 days from the date of the dispositional hearing and shall conduct a review hearing within six months thereafter." N.C. Gen. Stat. § 7B-906(a) (2003) (emphasis supplied). Orders from review hearings "*must* be reduced to writing, signed, and entered within 30 days of the completion of the hearing." N.C. Gen. Stat. § 7B-906(d) (2003) (emphasis supplied). "In any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge *shall* conduct a review hearing designated as a permanency planning hearing within 12 months after the date of the initial order removing custody . . . ." N.C. Gen. Stat. § 7B-907(a) (2003) (emphasis supplied). Orders from permanency planning review hearings "*shall* be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing." N.C. Gen. Stat. § 7B-907(c) (2003) (emphasis supplied).

B. Time Limits Regarding Termination of Parental Rights

The statutes also prescribe time limits when the child's permanent plan requires terminating a parent's parental rights.

> If a proceeding to terminate the parental rights of the juvenile's parents is necessary in order to perfect the permanent plan for the juvenile, the director of the department of social services *shall* file a petition to terminate parental rights within 60 calendar days from the date of the permanency planning hearing unless the court makes written findings why the petition cannot be filed within 60 days.

N.C. Gen. Stat. § 7B-907(e) (2003) (emphasis supplied). After a petition to terminate parental rights is filed, the Court *must* hold the adjudicatory hearing "no later than 90 days from the filing of the petition or motion unless the judge pursuant to subsection (d) of [§ 7B-1109] orders that it be held at a later time." N.C. Gen. Stat. § 7B-1109(a) (2003). "The adjudicatory order *shall* be reduced to writing, signed, and entered no later than 30 days following the completion of the ter-

mination of parental rights hearing." N.C. Gen. Stat. § 7B-1109(e) (2003) (emphasis supplied). Further,

> Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court *shall* issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated. Any order *shall* be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

N.C. Gen. Stat. § 7B-1110(a) (2003) (emphasis supplied).

C. Prejudice Resulting from Failure to Follow Statutory Time Limits

L.M. asserts she and her children were prejudiced by DSS' and the trial court's failure to comply with the statutory time limits required in custody and termination of parental rights proceedings.

> This Court has previously stated that absent a showing of prejudice, the trial court's failure to reduce to writing, sign, and enter a termination order beyond the thirty day time window may be harmless error. *See In re J.L.K.*, 165 N.C. App. 311, 315, 598 S.E.2d 387, 390 (2004) (order entered eighty-nine days after the hearing), *disc. rev. denied*, 359 N.C. 68, 607 S.E.2d 314 (2004). This holding has also been applied to adjudication and disposition orders involving custody proceedings under N.C. Gen. Stat. § 7B-807(b) and § 7B-905(a). *See In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 172 (2004) (no prejudice shown on adjudication and disposition orders entered over forty days after the hearing), *disc. rev. denied*, 359 N.C. 189, 606 S.E.2d 903 (2004). The reasoning in *In re E.N.S.* was applied to petitions seeking termination of parental rights under N.C. Gen. Stat. § 7B-907(e). *See In the Matter of B.M., M.M., An.M., and Al.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005) (although no prejudice was shown, we stated, "[w]e strongly caution against this practice as it defeats the purpose of the time requirements specified in the statute, which is to provide parties with a speedy resolution of cases where juvenile custody is at issue.").

In re L.E.B., 169 N.C. App. 375, 378-79, 610 S.E.2d 424, 426 (2005).

Here, the statutorily mandated time limits were violated virtually every time. L.M. consented to an adjudication of neglect on 28 January 2002 and the adjudication and disposition order was filed on 28 February 2002. Although the adjudication hearing was held within the required 90 days, the order was not entered until the expiration of the thirty days on 28 February 2002. Further, the trial court was required to hold a review hearing within 90 days of 28 January 2002. However, no review hearing was held until 2 May 2002, 94 days later. The trial court also failed to reduce to writing, sign, and enter orders from permanency planning review hearings within the statutorily mandated 30 days. Orders from the 2 May 2002, 24 July 2002, and 2 December 2002 permanency planning review hearings were entered on 5 June 2002 (34 days), 12 September 2002 (50 days), and 15 January 2003 (44 days) after the permanency planning review hearings.

On 6 November 2002, the permanent plan for the minor children was changed from reunification to adoption. The trial court upheld this plan at the 2 December 2002 permanency planning review hearing. Once the permanent plan was changed to adoption, N.C. Gen. Stat. § 7B-907(e) requires the director of the DSS to file a petition to terminate parental rights "within 60 calendar days from the date of the permanency planning hearing." However, DSS did not file a petition to terminate L.M.'s parental rights until 17 April 2003, 162 days after the 6 November 2002 permanency planning review hearing and 136 days after the 2 December 2002 permanency planning review hearing. The hearing on these petitions to terminate L.M.'s parental rights was held on 2 and 3 September 2003 (138 days later) and the order was entered on 15 October 2003 (42 days later) (180 total days after the petition was filed). *See* N.C. Gen. Stat. § 7B-907(e) (after a petition to terminate parental rights is filed, the Court *must* hold the adjudicatory hearing "no later than 90 days from the filing of the petition or motion . . .") and N.C. Gen. Stat. § 7B-1109(e) ("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.") (emphasis supplied).

L.M. has sufficiently shown prejudice by the continual failure by petitioner to comply with the statutorily mandated time lines. *See In re C.J.B.*, 171 N.C. App. 132, 133, 614 S.E.2d 368, 369 (2005) (holding that prejudice shown where there was a five month delay in entry of the written order terminating respondent's parental rights).

L.M., a young, impoverished, single mother of four children, contacted DSS and, based upon her concern for their welfare, twice voluntarily placed her children in the custody of DSS, while she sought employment, parenting skills, and a safe and secure home. Throughout the entire process, L.M. was required to make progress toward the recommendations of DSS and the trial court in order to address and improve her situation and regain custody of her children. However, DSS and the trial court repeatedly failed to follow the statutorily mandated time limits regarding permanency planning hearings, entry of orders, and filing of the petition to terminate respondent's parental rights. As a result, L.M. was unable to receive the consistent statutorily mandated evaluations and be given notice of the recommendations and requirements to regain custody of her children.

Repeated failures to comply with the time limits "defeat[ed] the purpose of the time requirements specified in the statute, which is to provide [all] parties with a speedy resolution of cases where juvenile custody is at issue" and prejudiced all parties: respondent, her children, and those caring for her children. *In re B.M.*, *M.M.*, *An.M.*, *and Al.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005).

In *In re R.T.W.*, our Supreme Court recently noted the "potential tension between parental rights and child welfare[,]" stating that children should be removed from their homes only " 'when necessary' and consistent with fairness, equity, and 'the constitutional rights of juveniles and parents.' " 359 N.C. 539, 544, 614 S.E.2d 489, 493 (2005) (quoting N.C. Gen. Stat. § 7B-100 (2003)). The Court stated "[o]ur legislature values 'family autonomy' and prefers the familial unit as usually being the best means of satisfying a child's need for 'safety, continuity, and permanence.' " *Id.*

The Court further stated the " 'best interests of the juvenile' [is] the courts' 'paramount consideration' . . . [and] when reunification is against the child's best interest [the statute] favors placing the child 'in a safe, permanent home within a reasonable amount of time.' " *Id.* The children were initially placed with the maternal grandmother of the three youngest children with orders that respondent have no contact with her children and that no derogatory comments about respondent be made to the children. Here, repeated failures to comply with the statutory mandates violated fairness and increased tensions within the family, caused prejudice to both the juveniles and L.M., and did not meet the need for placing the juveniles "in a safe,

permanent home within a reasonable amount of time" as required by our legislature and case law. *Id.*

Prejudice is also shown because the "appellate process was put on hold[] [and] any sense of closure for the children, respondent, or the children's current care givers was out of reach . . . ." *In re C.J.B.*, 171 N.C. App. at 134, 614 S.E.2d at 370. Because L.M., her children, and her children's care-givers suffered prejudice resulting from repeated and cumulative failures to comply with the statutorily mandated time limits throughout the child custody and termination of parental rights proceedings, I vote to reverse the order of the trial court.

III. Clear, Cogent, and Convincing Evidence

Respondent argues the trial court order is not supported by clear, cogent, and convincing evidence. Termination of parental rights requires clear, cogent, and convincing evidence. "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) (*citing In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996)).

This "standard is greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984) (*citing Santosky v. Kramer*, 455 U.S. 745, 745, 71 L. Ed. 2d 599, 599 (1982)). The burden of proof rests on DSS to provide clear, cogent, and convincing evidence to justify termination of respondent's parental rights. *In re Nolen*, 117 N.C. App. 693, 698, 453 S.E.2d 220, 223 (1995) (citations omitted).

A. Reasonable Efforts

Respondent argues the trial court erred by applying the incorrect standard in finding that she did not make reasonable progress under the circumstances "within 12 months in correcting [the] conditions which led to the removal of the children." The trial court articulated the former standard, that reasonable progress be made within 12 months, not the current standard, that "reasonable progress under the circumstance has been made." N.C. Gen. Stat. § 7B-1111(a)(2) (2003). As the majority opinion notes, "the focus is no longer solely on the progress made in the 12 months prior to the petition."

Applying the correct standard of reasonable efforts, not limited to the twelve months preceding the petition, no clear, cogent, and convincing evidence supports the finding that L.M. failed to make reasonable progress. L.M. was ordered to: (1) attend and comply with the Helpmate program; (2) utilize counseling through the Blue Ridge Center; (3) obtain a substance abuse assessment and follow any recommendations; (4) obtain a psychological evaluation and follow recommendations; (5) attend and complete parenting classes; and (6) maintain stable employment and housing.

According to her testimony, L.M.: (1) attended two to three DBT (Dialectical Behavior Therapy) training classes (which were recommended following her completed psychological assessment) before asking for on one-on-one counseling; respondent stated the class did not relate to her issues because it mainly dealt with alcoholics; (2) completed all but two of her parenting classes; (3) completed a psychological evaluation; (4) obtained a home in Tennessee; (5) obtained a steady job; (6) obtained a vehicle; and (7) completed a substance abuse assessment on 27 June 2003.

Further, L.M. called and visited her children, frequently inquired about her children, and provided them with birthday and Christmas presents, toys, clothes and necessities. A review of the record and transcripts shows very little evidence was presented regarding any problems with L.M.'s two daughters.

Reviewed in the light most favorable to respondent, clear, cogent, and convincing evidence does not support a finding or conclusion L.M. did not make reasonable progress to correct the conditions which led to the removal of her children. *See In re Nesbitt*, 147 N.C. App. 349, 555 S.E.2d 659 (2001) (The respondent's progress in safety and parenting skills, housing, and employment were evaluated over a twenty-seven month period. Reasonable efforts were found where the respondent attended therapy and coping skills group; selected appropriate television shows and provided toys and physical safety for her child; attempted to recognize and improve reactions to her child; secured and lived in a new home for almost one year after being evicted, living in a hotel, and living in other temporary arrangements; maintained child support payments; and continued efforts to secure employment although the respondent held approximately seven jobs since the child had been removed.)

L.M.'s reasonable progress was demonstrated. No substantial evidence was shown to terminate L.M.'s parental rights on this ground, particularly as it applies to her two daughters, A.M.R. and E.A.R.

B. Willful Abandonment

No evidence supports a finding that L.M.'s children were willfully abandoned for at least six consecutive months immediately preceding the filing of the petition. The petitions for termination of parental rights were filed 17 April 2003. In the permanency planning review hearing held 6 November 2002, the court found L.M. was incarcerated for the past month due to writing worthless checks. Incarceration, standing alone, is insufficient to support a termination of parental rights. *See In re Clark*, 151 N.C. App. 286, 289-90, 565 S.E.2d 245, 247-48, *disc. rev. denied*, 356 N.C. 302, 570 S.E.2d 501 (2002) (termination of the respondent's parental rights reversed where the respondent was incarcerated and evidence was insufficient to find he was unable to care for his child). The trial court issued an order on 2 December 2002 (filed 15 January 2003) stating "[t]hat all visits for [L.M.] with the minor children will cease."

Naomi Kent, a DSS foster care social worker, testified L.M. contacted DSS in December 2002 and again on 3 January 2003 and 4 March 2003 to request visits with the children. L.M. also requested a home study by DSS of her new home in Tennessee on 3 June 2003. The record shows that during this time period when L.M. maintained contact with DSS and attempted to visit her children and requested DSS perform a home study of her new home, the 2 December 2003 order (which was filed 15 January 2003) barring her from any contact with her children was in effect. The petition to terminate respondent's parental rights was not filed within sixty days of this order as statutorily required, but four and one half months later. N.C. Gen. Stat. § 7B-907(e). The hearing on the petitions to terminate was not held until 2 and 3 September 2003 (138 days later) and the order terminating parental rights was not entered until 15 October 2003 (42 days later) (180 total days after the petition was filed). L.M. was incarcerated for worthless checks during some of this time period, but maintained regular contact with DSS, appeared at all but one of her hearings, repeatedly requested visits with and information about her children, and requested a DSS home study of her new home in Tennessee. DSS admitted it did not allow or follow up on these requests. L.M. did not willfully abandon her children for six consecutive months immediately preceding the filing of the petition. *See Bost v. Van Nortwick*, 117 N.C. App. 1, 14, 449 S.E.2d 911, 919 (1994) (quoting *In re Roberson*, 97 N.C. App. 277, 280, 387 S.E.2d 668, 670 (1990)) ("The word 'willful' as applied in termination proceedings . . . has been defined as 'disobedience which imports knowledge

and a stubborn resistance . . . .' "), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995).

III. Conclusion

L.M. was clearly prejudiced by petitioner's repeated and cumulative failures to comply with the statutorily mandated time lines.

No clear, cogent, and convincing evidence supports a finding that L.M. failed to make reasonable progress in correcting the conditions which resulted in the removal of her children or that L.M. willfully abandoned her children for six consecutive months immediately preceding the filing of the petition although she was under an order not to see her children.

I vote to reverse the trial court's order for either or all of these reasons. I respectfully dissent.

IN THE MATTER OF: O.C. AND O.B., MINOR CHILDREN

No. COA04-923

(Filed 19 July 2005)

1. Termination of Parental Rights— failure to appoint guardian ad litem for parent—substance abuse—dependency adjudication proceeding

The trial court did not err by failing to appoint respondent mother a guardian ad litem (GAL) due to her history of substance abuse for either the hearing on termination of parental rights or the dependency adjudication proceedings that occurred nineteen months earlier, because: (1) the motion to terminate parental rights neither alleged respondent was incapable of caring for the minor children due to a debilitating condition nor did it cite N.C.G.S. § 7B-1111(a)(6), and none of the allegations in the motion tended to show respondent was incapable of providing care for the children; and (2) even assuming arguendo that the trial court failed to appoint a GAL for respondent during the adjudication proceedings and that she was even entitled to such a GAL, it does not bear a legal relationship with the validity of the later order on termination.

2. Termination of Parental Rights— findings of fact—clear, cogent, and convincing evidence

The trial court did not err in a termination of parental rights case by its findings of fact 19, 96, 100, 101, 114, 133, and 141 that in turn supported its conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondent mother's parental rights based mostly on domestic violence and respondent's substance abuse, because the findings were supported by clear, cogent, and convincing evidence.

Appeal by respondent mother from judgment entered 21 October 2003 by Judge Louis A. Trosch, Jr. in Mecklenburg County District Court. Heard in the Court of Appeals 21 April 2005.

Alan B. Edmonds, for petitioner-appellee Mecklenburg County Youth and Family Services.

Katharine Chester, for respondent mother-appellant.

LEVINSON, Judge.

Respondent-mother (respondent) appeals from an order terminating her parental rights in the minor children, O.C. and O.B. We affirm.

A motion to terminate respondent's parental rights was filed 6 December 2002. The termination of parental rights proceeding was heard in two parts, the first being held 2 June 2003, and the second 2 September 2003. The evidence presented may be summarized as follows: Mecklenburg County Youth and Family Services ("YFS") began providing services to respondent in March 1999. On 13 November 2001 YFS filed a petition alleging the children were neglected and dependent. Respondent had been stabbed by the maternal grandmother and assaulted by her live-in boyfriend. Respondent had not addressed her substance abuse issues. On 9 January 2002 a case plan was developed through a mediated agreement, which was incorporated by reference in a 10 January 2002 order that adjudicated the minor children dependent. Respondent was required to "successfully resolve any substance or alcohol abuse issues and maintain sobriety on an ongoing basis", complete parenting classes, pursue a GED, maintain safe housing, complete a parenting capacity evaluation and domestic violence assessment, and obtain employment.

Jamesia Boyd was the YFS social worker assigned to the case between January 2002 and February 2003. While Boyd was the

caseworker, respondent was not able to complete an inpatient drug treatment program or maintain sobriety. In the spring of 2002, respondent began drug treatment twice. While she was incarcerated in the Mecklenburg County jail in July 2002, respondent completed a drug treatment, or drug education, program offered by the county jail. Following respondent's release from jail, on 2 October 2002, she tested positive for cocaine and marijuana. Respondent began inpatient treatment 26 November 2002 but did not complete the program. Respondent began treatment 23 April 2003 with the Cascade program, an intensive outpatient drug treatment program. The Cascade program recommended that respondent obtain inpatient treatment.

Respondent remained unemployed. She did not complete her GED. Respondent paid no child support. Other than completing parenting classes in October 2002, respondent did not provide proof to Boyd that she had completed any of the other items in her case plan. Respondent did visit regularly with her children and brought them gifts of toys and food. Respondent had requested that the minor children be placed with relatives. According to Boyd, YFS had investigated the placements suggested by respondent and none proved suitable.

Respondent testified. In February 2002, she left the maternal great-grandmother's home and moved into a two bedroom apartment with a male friend. Although the lease was in respondent's name, the male friend paid her rent. She borrowed money from her mother and grandmother to pay the utilities. She applied for housing through the Housing Authority, but was unable to secure public housing. Respondent began, but did not complete, an inpatient drug treatment program recommended for her by the Cascade program 30 May 2003. She did complete an inpatient program in August 2003, but did not return to the Cascade program. At the time of the termination hearing, respondent had not been employed since October of 2002. She had been looking for work unsuccessfully "from the end of last year [2002] up until April of this year [2003]." Respondent took a placement test at Central Piedmont Community College in August 2002 but had not completed any academic courses there. Respondent had visited with her children. Respondent described her visits with her children and the gifts she had provided them. Respondent stated she loves her children and asked the court for additional time to work on her substance abuse issues. Respondent requested that the court reconsider the relative placements previously investigated by YFS.

Natasha Perry testified. At the termination hearing on 2 June 2003, she was respondent's case manager with the Cascade program. When respondent tested positive for drugs, the Cascade program referred her to a 28 day inpatient treatment program. Respondent was to complete the inpatient program before continuing her treatment with the Cascade program. At the second hearing date, on 2 September 2003, Perry did not return to testify.

The children's foster mother, Geraldine Walton, testified. She had not seen respondent since the late fall of 2002. She described the children's needs. O.C. had severe eczema. Both children had allergies and O.B. was suspected of having developmental delays. Although Walton had seen respondent regularly during respondent's visits with the children, respondent had never asked about the children's medical needs.

The guardian *ad litem*, Maxine Twery, testified. She had observed many of respondent's visits with the children. According to the guardian *ad litem*, respondent did not express appropriate concern for her children's significant medical conditions. O.C. was diagnosed with ADHD and O.B. had severe speech and language delays. Both children received therapy. According to Twery, respondent's anger was a problem during visits. Respondent never inquired about the children's medical conditions or attended their therapy appointments. When asked whether Twery and the caseworker could make a home visit, respondent refused, telling them she did not want home visits.

The maternal grandmother and maternal great-grandmother testified. Both requested that their homes be considered as placement alternatives for the children.

The trial court found grounds to terminate respondent's parental rights on the basis of neglect, pursuant to N.C.G.S. § 7B-1111(a)(1), failure to make reasonable progress to correct the conditions leading to the children's removal, pursuant to N.C.G.S. § 7B-1111(a)(2), and failure to pay child support, pursuant to N.C.G.S. § 7B-1111(a)(3). The trial court determined it was in the best interests of the minor children to terminate respondent's parental rights. From this order, respondent appeals.

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[1] Respondent first argues that the trial court erred by not appointing her a guardian *ad litem* due to her history of substance abuse. Respondent makes two arguments in this regard: first, that the trial

court's failure to appoint a GAL for her for the hearing on termination of parental rights requires reversal; and second, that because the trial court failed to appoint a GAL for her during the dependency proceedings in January 2002, the 21 October 2003 order on termination of parental rights must be reversed.[1] We disagree, and discuss each of these two contentions in turn.

Respondent was not entitled to the appointment of a GAL for the hearing on the petition to terminate parental rights. N.C.G.S. § 7B-1101 (2001), the statute in effect at the commencement of the termination matter, provided in pertinent part:

> In addition to the right to appointed counsel . . ., 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) Where it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(6); or
>
> (2) Where the parent is under the age of 18 years.

(Emphasis added).

N.C.G.S. § 7B-1111(a)(6) (2001) provided, in pertinent part:

> That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition.

This Court, in *In re Estes*, 157 N.C. App. 513, 518, 579 S.E.2d 496, 499, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003), held "where . . . the allegations contained in the petition or motion to terminate parental rights tend to show that the respondent is incapable of properly caring for his or her child because of mental illness, the trial court is required to appoint a guardian ad litem to represent the respondent at the termination hearing."

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1. For clarity, we will refer to the adjudication and disposition order entered as a result of the petition alleging O.C. and O.B. were neglected and dependent juveniles as the "adjudication order", and the order resulting from the motion for termination of parental rights as the "order on termination of parental rights" or "order on termination".

In the instant case, the motion to terminate parental rights neither alleged respondent was incapable of caring for the minor children due to a debilitating condition, nor cited G.S. § 7B-1111(a)(6). Rather, the motion alleged grounds for termination based on: (1) neglect, pursuant to G.S. § 7B-1111(a)(1); (2) failure to make reasonable progress to correct the conditions leading to the children's removal, pursuant to G.S. § 7B-1111(a)(2); and (3) failure to pay child support, pursuant to G.S. § 7B-1111(a)(3). Moreover, none of the allegations in the motion tended to show respondent was incapable of providing care for the children. The trial court did not err by failing to appoint a guardian *ad litem* for respondent for the hearing associated with the motion to terminate parental rights.

We also reject respondent's contention that the termination order on appeal must be reversed because of the trial court's failure to appoint her a GAL for the dependency adjudication proceedings occurring nineteen (19) months earlier.

N.C.G.S. § 7B-602(b)(1) (2003) governs the circumstances when a parent must be appointed a GAL for dependency proceedings:

> In addition to the right to appointed counsel . . ., a guardian ad litem shall be appointed . . . to represent a parent in the following cases:
>
> > (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 . . . .

Only the order on termination of parental rights is before this Court; the order on adjudication is not. Even assuming, *arguendo*, that the trial court failed to appoint a GAL for respondent during the adjudication proceedings and that she was even entitled to such a GAL, we reject her argument that this bears a legal relationship with the validity of the later order on termination.[2] First, there is no statutory authority for the proposition that the instant order is reversible because of a GAL appointment deficiency that may have occurred years earlier. Our legislature has adopted two separate juvenile GAL

2. Our review of the 13 November 2001 petition alleging neglect and dependency suggests respondent would not have been entitled to the appointment of a GAL under G.S. § 7B-602(b).

appointment provisions concerning the appointment of a GAL for a parent, one found in Article 6 of the Juvenile Code concerning petitions alleging the status of the child, G.S. § 7B-602(b), and a second, equally specific provision in Article 11 concerning the appointment of a GAL for a parent within the context of a motion or petition for termination of parental rights, G.S. § 7B-1101. Neither of these two provisions, nor anything in our Juvenile Code, evinces an intent on the part of the legislature that a failure to appoint a GAL during the earlier adjudication proceedings impacts a later order on termination of parental rights. Secondly, there is no common law authority to support such a proposition. Respondent contends *In re T.B.K.*, 166 N.C. App. 234, 603 S.E.2d 805 (2004), supports her position. However, *T.B.K.* is consistent with all of this Court's opinions concerning this subject: If the trial court fails to appoint a required GAL for a parent for the proceedings associated with the order on appeal, such order must be reversed. *See, e.g.*, *In re K.R.S.*, 170 N.C. App. 643, 613 S.E.2d 318 (2005) (termination order on appeal reversed for want of GAL for termination proceedings); *In re S.B.*, 166 N.C. App. 494, 602 S.E.2d 694 (2004) (same); *In re Estes*, 157 N.C. App. 513, 579 S.E.2d 496 (2003) (same); *In re Richard v. Michna*, 110 N.C. App. 817, 431 S.E.2d 485 (1993) (same). While this Court has taken a *per se* reversible error approach to failures of the trial court to appoint a GAL when such procedural deficiency concerned the orders on direct appeal, adoption of the respondent's argument would represent an expansion of this area of the law that we are unwilling to craft absent a legislative mandate to do so.

We make several additional observations which help illustrate the fallacy of respondent's argument that, where the trial court fails to appoint a GAL for the parent during the adjudication proceedings, a later order on termination of parental rights must be reversed. First, this would create uncertainty and render judicial finality meaningless. Termination orders entered three, five, even ten years after the initial adjudication could be cast aside. Secondly, by necessarily tying the adjudication proceedings and termination of parental rights proceedings together, respondent misapprehends the procedural reality of matters within the jurisdiction of the district court: Motions in the cause and original petitions for termination of parental rights may be sustained irrespective of earlier juvenile court activity. *See In re R.T.W.*, 359 N.C. 539, 553, 614 S.E.2d 489, 497 (2005) ("Each termination order relies upon an independent finding that clear, cogent, and convincing evidence supports at least one of the grounds for termination under N.C.G.S. § 7B-1111. . . . Simply put, a termi-

nation order rests upon its own merits."). Thirdly, even if respondent was entitled to a GAL for the proceedings associated with the earlier dependency proceedings, there cannot be prejudice to her in the termination proceedings because she was not even entitled to the appointment of a GAL for the termination proceedings. Finally, respondent's argument does not account for the fact that circumstances surrounding an individual change over time: The parent may no longer have the concerns which caused his or her incapacity months or years earlier.

Finally, the consequences of reversing termination orders for deficiencies during some prior adjudication would yield nonsensical results. While the order on termination would be set aside, the order on adjudication would not; consequently, the order on adjudication would remain a final, undisturbed order in all respects. This would generate a legal quagmire for the trial court: It has continuing jurisdiction over these children by operation of the undisturbed order on adjudication, but must "undo" everything following the time the children were initially removed from the home if it ever wishes to enter a valid termination of parental rights order. This assignment of error is overruled.

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[2] We next address respondent's argument that numerous findings of fact were not supported by clear, cogent and convincing evidence and, further, that the court's findings do not support its conclusion that grounds existed pursuant to G.S. § 7B-1111(a)(2) to terminate her parental rights.

Grounds for termination of parental rights must be supported by clear, cogent and convincing evidence. *See* N.C.G.S. § 7B-1111(b) (2003). G.S. § 7B-1111(a)(2) (2003) provides a parent's rights may be terminated where:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. . . .

Thus, to find grounds to terminate a parent's rights under G.S. § 7B-1111(a)(2), the trial court must perform a two part analysis. *See In re Baker*, 158 N.C. App. 491, 494, 581 S.E.2d 144, 146 (2003). The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or place-

ment outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. Evidence and findings which support a determination of "reasonable progress" may parallel or differ from that which supports the determination of "willfulness" in leaving the child in placement outside the home.

"A finding of willfulness does not require a showing of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996) (citing *In re Bishop*, 92 N.C. App. 662, 669, 375 S.E.2d 676, 681 (1989)). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001) (citing *In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (1995)). "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children." *Nolen*, 117 N.C. App. at 699, 453 S.E.2d at 224 (citing *In re Becker*, 111 N.C. App. 85, 95, 431 S.E.2d 820, 826-27 (1993)).

With respect to the requirement that the petitioner demonstrate that the parent has not shown reasonable progress, we conclude that, under the applicable, amended statute, evidence supporting this determination is not limited to that which falls during the twelve month period next preceding the filing of the motion or petition to terminate parental rights. Our Supreme Court, in *In re Pierce*, 356 N.C. 68, 565 S.E.2d 81 (2002), recognized this when it observed:

> [D]uring the 2001 session of the General Assembly, the legislature struck the "within 12 months" limitation from the existing statute detailing the requirements for establishing grounds for the termination of parental rights. *See* Act of June 15, 2001, ch. 208, sec. 6, 2001 Sess. Laws, 111, 113. Thus, under current law, there is no specified time frame that limits the admission of relevant evidence pertaining to a parent's "reasonable progress" or lack thereof.

Id. at 75 n.1, 565 S.E.2d at 86 n.1 (emphasis added).

We next apply the foregoing principles to the instant case. Respondent challenges findings of fact numbers 19, 96, 100, 101, 114, 133, and 141:

19. The mother was to secure housing for herself and the children. She had no[t] made any progress toward securing housing as of June 2, 2003.

. . . .

96. She has started a GED Program three times since the beginning of the case plan. The mother has never completed her GED. She has never made it [past] the first session.

. . . .

100. In a period of ten to eleven months, the mother has looked for work only thirteen places. The mother is no closer to securing employment on September 2, than she was at the beginning of the case plan nor has she had employment while this case has been pending.

101. She has made no progress on the case plan goals of education or employment.

. . . .

114. [Respondent] has failed repeatedly to address her substance abuse issues. It is documented many times in Court testimony, Court Orders, and Summaries the mother has started substance abuse treatment but then failed to complete the treatment. She has begun substance abuse treatment in the same program four different times. While in jail, she did complete the program referenced in paragraph 34.

. . . .

133. [Respondent] never addressed the issue of domestic violence. She was to attend counseling at the Women's Center. YFS did not push the mother to attend this because she had not completed substance abuse treatment.

. . . .

141. Even as the termination of parental rights trial was ongoing, the mother could not complete her inpatient substance abuse treatment in twenty-eight days. She took three months to complete it and then did not enroll in after care.

The children were removed from the home pursuant to the petition for non-secure custody filed 13 November 2001 and had been in foster care for more than twelve months at the time of the termina-

tion hearing on 2 June 2003 and 2 September 2003. The conditions leading to the removal of the children were, in large measure, due to domestic violence and respondent's substance abuse.

Treatment for respondent's substance abuse was the first item on the mediated case plan. Up to and including the time of trial, respondent made six attempts to address her substance abuse. In the spring of 2002 respondent began substance abuse treatment twice but did not complete either program. While incarcerated, in July 2002, respondent did complete a drug treatment program provided by the Mecklenburg County jail. This program was not an inpatient substance abuse program. There was some evidence it was only a drug education program, though the certificate of completion labeled it a "Substance Abuse Treatment Program." On 2 October 2002, following her release from jail, respondent tested positive for marijuana and cocaine. In November 2002, respondent began drug treatment for the fourth time, but did not successfully complete the program. Respondent did not enter treatment again until the spring of 2003, when she began the Cascade program. Respondent did not complete this program. Respondent later completed a 28 day inpatient treatment program over a three month period, finishing it in August 2003.

In February 2002, respondent moved out of her grandmother's home and began sharing an apartment with a male friend who paid her rent. Respondent remained unemployed through the termination proceedings and depended on gifts of money for her support. She did not begin looking for work until the end of 2002, and was unsuccessful in doing so. Respondent did not follow through with a GED program, and did not address her issues with domestic violence.

We conclude that findings of fact numbers 19, 96, 100, 101, 114, 133, and 141 were supported by clear, cogent and convincing evidence. These findings support the trial court's conclusion of law that grounds existed to terminate respondent's parental rights pursuant to G.S. § 7B-1111(a)(2).

Because we find grounds for termination were properly established pursuant to G.S. § 7B-1111(a)(2), we need not address respondent's further arguments regarding termination pursuant to G.S. § § 7B-1111(a)(1) and (a)(3). *See In re Stewart Children*, 82 N.C. App. 651, 655, 347 S.E.2d 495, 498 (1986) (once one statutory ground for termination is established, this Court need not address assignments of error challenging other grounds). This assignment of error is overruled.

We have carefully reviewed respondent's remaining assignments of error and conclude they are without merit.

Affirmed.

Chief Judge MARTIN concurs.

Judge TYSON concurs in the result.

IN THE MATTER OF: C.E.L., A MINOR CHILD

No. COA04-1349

(Filed 19 July 2005)

1. Child Abuse and Neglect— permanency planning proceeding—custody and guardianship—failure to make reasonable and timely progress to correct conditions that led to removal

The trial court did not err in a permanency planning proceeding by placing custody and guardianship of the minor child with the maternal great-grandmother instead of respondent paternal aunt after finding that respondent had failed to comply with prior court orders or to make reasonable and timely progress to correct the conditions that led to the minor child's removal from respondent's home even though respondent contends there are no prior court orders that directly order her to take any action with regard to this minor child but rather only with regard to her biological child, because: (1) in the 14 October 2002 review order that addresses both minor children, the trial court ordered that respondent submit to random drug screens; (2) the trial court in a subsequent permanency planning order also ordered respondent to aggressively comply with the conditions of the Family Services Case Plan; and (3) competent evidence supports the trial court's finding of fact that respondent failed to comply with the trial court's orders including testimony from a social worker that respondent submitted to only two of the fourteen random drug screens that respondent was asked to take by the social worker, and the minor child's guardian ad litem testified that during her visits to respondent's home the minor child's bedroom was piled

high with boxes, the home was in general disarray with little food in the cabinets and no light in respondent's home, and seventy-five to eighty-five percent of the time respondent was ill or sick in bed when she visited respondent's home.

2. Child Abuse and Neglect— permanency planning proceeding—custody and guardianship—finding of fact—not possible for minor child to be returned to home within six months following proceeding—physically incapable of caring for minor child—failure to make reasonable and timely progress to correct conditions that led to removal

The trial court did not err in a permanency planning proceeding by placing custody and guardianship of the minor child with the maternal great-grandmother instead of respondent paternal aunt after finding that it was not possible for the minor child to be returned to respondent's home within six months following the proceeding even though respondent contends there was insufficient evidence to show that she was physically incapable of caring for the minor child, because: (1) respondent's testimony about her health problems is competent evidence that supports the trial court's finding of fact including that she had degenerative disk disease and was unable to work, she had high blood pressure, she was under the care of a physician and was taking methadone and hydrocodone; she applied for disability and had been appealing the decision for almost a year, and she needed surgery on a ruptured disc but was unable to obtain the surgery since she did not have insurance; and (2) the trial court did not rely solely on respondent's inability to care for the minor child when it found that it was not possible for the minor child to return to respondent's home within six months, but also found that respondent had failed to make reasonable progress in correcting those conditions that led to removal of the minor child from respondent's custody.

3. Child Abuse and Neglect— permanency planning proceeding—legal guardianship—best interest of child—res judicata

The trial court did not err in a permanency planning proceeding by finding that it was not in the minor child's best interest to be returned to respondent paternal aunt's home and that it was in the best interest that legal guardianship be awarded to the maternal great-grandmother even though respondent contends the trial court was bound by res judicata from changing its position on the

issue and awarding guardianship to the maternal grandmother when it had previously found that the pending Chapter 50 action was the more appropriate venue to determine the minor child's best interests, because: (1) respondent failed to support this argument with any citations to legal authority in violation of N.C. R. App. P. 28(b)(6); (2) the 6 January 2005, nunc pro tunc 15 April 2003, permanency planning order in which the trial court referred to the Chapter 50 action did not purport to be a final adjudication on the merits and is not res judicata as to the issues in the 22 March 2004 permanency planning order, but instead stated that DSS should continue to make reasonable efforts to prevent or eliminate the need for placement of the minor child, respondent and DSS shall aggressively comply with the conditions of the Family Services Case Plan, and failure to do so may result in termination of parental rights; (3) giving the previous order res judicata effect would contravene the trial court's duty to consider all relevant evidence; (4) the trial court cannot be bound by a previous permanency planning order when changing needs and circumstances impact future permanency plans; and (5) N.C.G.S. § 7B-907 provides for initial as well as subsequent permanency planning hearings, thus showing the system anticipates the evolving nature of the best interests of and permanent plans for juveniles.

4. Child Abuse and Neglect— permanency planning proceeding—conclusion of law—unable to provide adequately for minor child's care and supervision

The trial court did not err in a permanency planning proceeding by concluding as a matter of law that respondent paternal aunt was unable to provide adequately for the minor child's care and supervision, because the trial court's findings of fact are supported by competent evidence and support this conclusion of law including: (1) respondent failed to comply with court orders; (2) respondent failed to make reasonable and timely progress; (3) it was not possible for the minor child to return to respondent's home within six months; and (4) it was in the minor child's best interest to not return to respondent's home but to live with her maternal great-grandmother.

Appeal by respondent from order entered 22 March 2004 by Judge C. Randy Pool in District Court, Rutherford County. Heard in the Court of Appeals 14 June 2005.

No brief for petitioner-appellee, Rutherford County Department of Social Services.

Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett, for Guardian ad Litem.

Leslie C. Rawls for respondent-appellant.

McGEE, Judge.

Respondent, the paternal aunt of C.E.L., appeals from a permanency planning order placing custody and guardianship of C.E.L. with C.E.L.'s maternal great-grandmother, M.R.O. C.E.L.'s natural mother is deceased. C.E.L.'s natural father has not participated in the proceedings regarding C.E.L.'s placement. Respondent and her husband (R.E.H.) had obtained a temporary, nonprejudicial custody order for C.E.L. pursuant to an action brought under Chapter 50 of the North Carolina General Statutes (Chapter 50). R.E.H. is not a party to this appeal.

The evidence at the permanency planning hearing tended to show the following. C.E.L. was removed from respondent's home on 18 January 2002. E.L.H., respondent's son, was also removed at that time. The placement of E.L.H. is not at issue in this appeal. Rutherford County Department of Social Services (DSS) visited respondent's home and found that it was unsafe for C.E.L.:

> There were chemicals and cleaning supplies sitting out in the kitchen. There were two propane tanks and loaded guns in the closet of the living area. Various boxes of car parts, pill bottles and junk were lying around. Also found in the home were 5 grams of methamphetamines. There were also plastic Baggies and ties found with the methamphetamines. Drugs and paraphernalia were found on . . . a friend who was sleeping in the bedroom. [The friend] claimed a portion of the methamphetamines. There were five pieces of aluminum foil beside the bed on the nightstand in [respondent's and R.E.H.'s] bedroom. All of these pieces were charred and burned on the bottom. According to law enforcement, this is one means of smoking methamphetamines.

DSS completed a home study of respondent's home. DSS learned that respondent was unemployed and had filed for Social Security disability due to scoliosis and degenerative disc disease but had not yet been approved. R.E.H. also suffered from back injuries and

received Social Security disability. DSS learned that respondent was taking the following medications: Hydrocodone, MS Contin, Methylphenidate, Alprazolam and Aygestin. In addition, R.E.H. was taking Oxycontin, APAP/Oxycodone (Percocet), Prozac, Protonix and Diazepam. Respondent and R.E.H. had also been the subjects of a federal drug investigation.

In a review order filed 14 October 2002, the trial court ordered that:

> [Respondent and R.E.H.] may exercise unsupervised visitation with [C.E.L. and E.L.H.] on alternate weekends providing they sign necessary releases so that DSS[,] the [Guardian ad Litem] and this [c]ourt can monitor their compliance with [m]ental [h]ealth and substance abuse treatment, and further providing that they submit upon request to random drug screens.

In a permanency planning order entered 6 January 2004, *nunc pro tunc* 15 April 2003, the trial court noted that respondent and R.E.H. were involved in a Chapter 50 custody action with M.R.O. The trial court rejected DSS's recommendation that guardianship be immediately awarded to M.R.O.:

> There is an ongoing Chapter 50 action with regard to [C.E.L.'s] best interest in this matter. Chapter 7B is not designed to determine best interests as is Chapter 50. [C.E.L.] appears to be happy and healthy where she is. The [trial court] will defer to the child custody action between [M.R.O.] and [respondent and R.E.H.] to determine [C.E.L.'s] best interests.

The trial court also ordered that: "[Respondent and R.E.H.] shall aggressively comply with the conditions of the Family Services Case Plan. Failure on the part of [respondent and R.E.H.] to do so may result in termination of their parental rights."

In a permanency planning order entered 22 March 2004, which is the subject of this appeal, the trial court made the following findings of fact:

> Following adjudication a case plan was placed into effect which required [respondent and R.E.H.] to attend parenting classes, submit to drug and/or alcohol assessments and follow up with any recommended treatment and to submit to random tests for the detection of controlled substances upon request of the

social worker. [Respondent and R.E.H.] did attend parenting classes. They also obtained assessments and have submitted to some random drug screens.

In an order entered in the Chapter 50 child custody action . . . a motion and order to show cause seeking to have [respondent and R.E.H.] held in contempt was dismissed. The order provided however, that [respondent and R.E.H.] were to obtain a blood test to determine their use, if any, of controlled substances that same day. [Respondent and R.E.H.] did not submit to such blood tests by their own admission until 11 to 18 days later. [Respondent and R.E.H.] have submitted to two random drug tests requested by DSS. [Respondent and R.E.H.] have been requested on at least 14 occasions to submit to drug tests by their social worker. Sickness of one or both [respondent and R.E.H.], unavailability or schedule conflicts have been offered as excuses for [respondent's and R.E.H.'s] failure to timely submit to random drug tests. Both [respondent and R.E.H.] take by prescription methadone and hydrocodone. [Respondent and R.E.H.] are not in substantial compliance with prior orders of this court requiring they submit to random drug tests.

. . . .

The guardian ad litem repeatedly requested [respondent and R.E.H.] to provide appropriate releases so that she could have access to their medical, mental health and treatment records. Those requests were not complied with. Instead [respondent] requested that the guardian ad litem see the care provider to obtain a release.

. . . .

. . . . During the time social worker McKinney has had responsibility for [C.E.L.] neither respondent [nor R.E.H.] signed any release so that she could obtain access to their medical records despite her repeated requests and despite prior orders of this court. (After the conclusion of all evidence it was stipulated and agreed by the parties that [r]espondent's Exhibit F could be admitted into evidence. That exhibit is purported [to be] a "Release for Medical Records" signed by [respondent] on September 26, 2002. However no box is checked to indicate which, if any[,] records are to be released. The doctor in question has never released any records to the social worker. A copy of

> Exhibit F was not provided to DSS, the guardian ad litem, or [the trial] court until after the conclusion of [the] hearing.)

The trial court thereafter awarded legal guardianship of C.E.L. to M.R.O.

I.

Respondent assigns error to several of the trial court's findings of fact. A trial court's findings of fact in a permanency planning order are conclusive on appeal when they are supported by competent evidence. *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). If supported by some competent evidence, the findings of fact are conclusive even if some evidence supports findings to the contrary. *In re B.P.*, 169 N.C. App. 728, 732-33, 612 S.E.2d 328, 331 (2005).

A.

[1] Respondent first assigns error to the trial court's finding of fact that respondent had failed to comply with prior court orders or make reasonable and timely progress to correct the conditions that led to C.E.L.'s removal from respondent's home. Respondent argues that there are no prior court orders that directly order respondent to take any action with regard to C.E.L., but rather only with regard to E.L.H. We disagree. In the 14 October 2002 review order that addresses both C.E.L. and E.L.H., the trial court ordered that respondent submit to random drug screens. The trial court, in a subsequent permanency planning order, also ordered respondent to "aggressively comply with the conditions of the Family Services Case Plan." Therefore, the trial court ordered respondent to take action with regard to C.E.L., and not E.L.H. only.

We also find that competent evidence supports the trial court's finding of fact. Social worker Anitra McKinney (McKinney) testified that respondent submitted to only two of the fourteen random drug screens that McKinney asked respondent to take. This testimony is competent evidence that respondent failed to comply with the trial court's orders. Furthermore, Louisa Davenport (Davenport), C.E.L.'s guardian ad litem, testified that during Davenport's visits to respondent's home, C.E.L.'s bedroom was "piled high with boxes" and the home was in general disarray. Davenport stated that there was little food in the cabinets and there was no light in respondent's home. Davenport also testified that "seventy-five to eighty-five percent" of the time that she visited respondent's home, respondent was ill or sick in bed. Thus, competent evidence supports the trial court's find-

ing that respondent had failed to make reasonable and timely progress to correct the conditions that led to C.E.L.'s removal from respondent's home.

B.

[2] Respondent next assigns error to the trial court's finding of fact that it was not possible for C.E.L. to be returned to respondent's home within six months following the proceeding. The trial court made the following finding:

> The [trial] [c]ourt finds that it is not possible for [C.E.L.] to be returned home immediately or within the next six months to the full legal custody of her former custodians and that it is not in the best interest of [C.E.L.] to return home because of [respondent's and R.E.H.'s] inability to provide for the care and supervision of [C.E.L.] and [respondent's and R.E.H.'s] failure to make reasonable progress in correcting those conditions that led to the removal of [C.E.L.] from [their] custody.

Respondent argues that there was not sufficient evidence to show that respondent was physically incapable of caring for C.E.L. Again, we disagree.

Respondent testified that she was thirty-eight years old, had a degenerative disk disease and high blood pressure. She stated that she was under the care of a physician and that she was on methadone and hydrocodone. Respondent testified that she applied for disability and had been appealing the decision for "almost a year[.]" She testified that she had a ruptured disk at L1-S5 that needed surgery, but she was unable to obtain the surgery because she did not have insurance. Respondent gave the following testimony on cross-examination:

> Q Okay. Now, you're seeking disability because of a disk problem or (inaudible) problem or both?
>
> A The disk problems because my doctor says that I wouldn't be able to work the job like I used to work because I was an injection mold operator. And she said that I would no longer be able to do that type o[f] a job.
>
> Q So did she say you're not (inaudible)?
>
> A She said that it would be hard for me to do any type of job that had a lot of standing, walking, or anything like that due to my back.

Q The difficulties because of your back is standing and walking (inaudible)?

A I lay down sometimes. But if [C.E.L.] is there, I'm with her the whole time she's there.

Q So you can stand and walk when you're with [C.E.L.], but you can't stand and walk (inaudible)?

A I've not tried—not tried to work since then. I mean, I—nobody will hire anybody with back problems. They will tell you if you have back problems they won't hire you.

. . . .

A My medical problems do not keep me from taking care of [C.E.L.].

Q Now, you're completely able to take care of a four-year-old child?

A Yes, I am. I bathe her. I take her outside. I play with her. I ride a bicycle while she's riding her little four-wheeler. I ride horses with her. She has her own horse, everything.

Q You can ride horses with her?

A Yes.

Q With a degenerative disk disease?

A Yes, I do.

Q But you're incapable—

A It hurts, but I do it.

Q But you're incapable of work?

A That's what my doctor said.

Q Did your doctor say [or] determine whether you're not capable to work or did you determine it?

A No. She told me that I'm not to work, not to try to get a job. And I'm taking a chance riding horses on paralyzing myself. But if I can make [C.E.L.] happy, I'll do it.

We find that respondent's testimony about her health problems is competent evidence that supports the trial court's finding of fact that respondent was incapable of properly caring for C.E.L.

Furthermore, we note that the trial court did not rely solely on respondent's inability to care for C.E.L. when it found that it was not possible for C.E.L. to return to respondent's home within six months. Rather, the trial court also found that it would not be possible to return C.E.L. to respondent's home within the next six months because respondent had "failed to make reasonable progress in correcting those conditions that led to removal of [C.E.L.] from [respondent's] custody." As we have determined above, the trial court correctly found that respondent had failed to correct the conditions that led to C.E.L.'s removal. Therefore, respondent's failure to correct the conditions leading to C.E.L.'s removal provides independent support for the trial court's finding that it was not possible for C.E.L. to return to respondent's home within six months.

C.

[3] Respondent next assigns error to the trial court's finding of fact that it was not in C.E.L.'s best interest to be returned to respondent's home and that it was in C.E.L.'s best interest that legal guardianship be awarded to M.R.O. In support of this argument, respondent relies on the 6 January 2004, *nunc pro tunc* 15 April 2003, permanency planning order that deferred to the Chapter 50 child custody action. Respondent argues that since the trial court had previously found that the pending Chapter 50 action was the more appropriate venue to determine C.E.L.'s best interests, the trial court was bound by *res judicata* from changing its position on the issue and awarding guardianship to M.R.O.

We first note that respondent has failed to support this argument with any citations to legal authority, in violation of Rule 28(b)(6) of our Rules of Appellate Procedure. N.C.R. App. P. 28(b)(6) ("The body of the argument [of an appellant's brief] *shall* contain citations of the authorities upon which the appellant relies." (emphasis added)). Violations of the Rules of Appellate Procedure subject an appeal to dismissal. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005). Furthermore, we find respondent's argument unpersuasive.

In order for the doctrine of *res judicata* to apply, there must be: "(1) a final judgment on the merits in an earlier lawsuit; (2) identity of the cause of action in the prior suit and the later suit; and (3) an identity of the parties or their privies in both suits." *Culler v. Hamlett*, 148 N.C. App. 389, 392, 559 S.E.2d 192, 194 (2002); *see also State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 463, 468, 385 S.E.2d

451, 453-54 (1989). When an order "[leaves] the merits of the matter open for future adjudication[,]" there has not been a final judgment on the merits. *Whitmire v. Savings & Loan Assoc.*, 23 N.C. App. 39, 42, 208 S.E.2d 248, 250-51 (1974).

In *Whitmire*, the defendants argued that the order from receivership proceedings was *res judicata* as to all the claims at controversy in an action for the recovery of loan proceeds. *Id.* at 41, 208 S.E.2d at 250. However, the order from the receivership proceeds stated that loan proceeds could not be disbursed " 'until the controversy involved [was] adjudicated or terminated according to law.' " *Id.* at 42, 208 S.E.2d at 250. We held that, since the order "did not purport to be an adjudication on the merits but expressly left the merits of the matter open for future adjudication[,]" the receivership order was not *res judicata* as to the claims for loan proceeds. *Id.* at 42, 208 S.E.2d at 250-51.

In this case, the 6 January 2004, *nunc pro tunc* 15 April 2003, permanency planning order in which the trial court deferred to the Chapter 50 action did not purport to be a final adjudication on the merits. Rather, the order stated: "[DSS] should continue to make reasonable efforts to prevent or eliminate the need for placement of [C.E.L.]." It further ordered that: "[Respondent and R.E.H.] and [DSS] shall aggressively comply with the conditions of the Family Services Case Plan. Failure on the part of [respondent and R.E.H.] to do so may result in termination of their parental rights." This language indicates that the trial court intended to leave the matter of C.E.L.'s placement for further review and reconsideration. As a result, the order was not a final adjudication on the merits and is not *res judicata* as to the issues in the 22 March 2004 permanency planning order.

Furthermore, we find that giving the previous order *res judicata* effect would contravene the trial court's duty to consider all relevant evidence, N.C. Gen. Stat. § 7B-907(b) (2003), and "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." N.C. Gen. Stat. § 7B-907(c) (2003); *see also In re J.N.S.*, 165 N.C. App. 536, 538-39, 598 S.E.2d 649, 650-51 (2004). The trial court cannot be bound by a previous permanency planning order when changing needs and circumstances impact future permanency plans. N.C. Gen. Stat. § 7B-907 provides for initial, as well as subsequent, permanency planning hearings. This system thus anticipates the evolving nature of the best interests of and permanent plans for juveniles.

II.

[4] Respondent's last assignment of error contends that the trial court erred in concluding as a matter of law that respondent was unable to provide adequately for C.E.L.'s care and supervision. Conclusions of law are upheld when they are supported by findings of fact. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). We have already determined that the trial court's findings of fact that (1) respondent failed to comply with court orders, (2) respondent failed to make reasonable and timely progress, (3) it was not possible for C.E.L. to return to respondent's home within six months, and (4) it was in C.E.L.'s best interest for her not to return to respondent's home but to live with M.R.O. are supported by competent evidence. These findings of fact support the conclusion of law that respondent was unable to provide adequately for C.E.L.'s care and supervision. This assignment of error is overruled.

Since the trial court's findings of fact are supported by competent evidence, and the findings of fact support the conclusions of law, we find that the trial court did not err in awarding custody and guardianship of C.E.L. to M.R.O.

Affirmed.

Judges HUNTER and LEVINSON concur.

MICHAEL DEAN, PLAINTIFF v. STEVEN HILL, DEFENDANT

No. COA04-735

(Filed 19 July 2005)

1. Landlord and Tenant— implied warranty of habitability— North Carolina Residential Rental Agreements Act—failure to pay rent after failure to make necessary repairs

The trial court erred by granting plaintiff's motion for directed verdict (more properly a motion for involuntary dismissal under N.C.G.S. § 1A-1, Rule 41(b) since the case was tried without a jury) on defendant's counterclaim for breach of implied warranty of habitability arising out of defendant's failure to pay rent based on plaintiff's failure to provide alleged necessary

repairs to a leased mobile home, because: (1) the North Carolina Residential Rental Agreements Act provisions governing claims of implied warranty of habitability require that a landlord must make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition and shall keep all common areas of the premises in safe condition, N.C.G.S. § 42-42(a)(2) and (3); and (2) the trial court's findings of fact alone are sufficient to support defendant's claim for breach of implied warranty of habitability.

2. Unfair Trade Practices— improper dismissal of counterclaim—residential rental agreement—collecting rent after having knowledge of uninhabitable nature

The trial court erred by granting plaintiff's motion for directed verdict (more properly a motion for involuntary dismissal under N.C.G.S. § 1A-1, Rule 41(b) since the case was tried without a jury) on defendant's counterclaim for unfair and deceptive trade practices arising out defendant's failure to pay rent based on plaintiff's failure to provide alleged necessary repairs to a leased mobile home, and on remand the trial court must enter judgment for defendant on this issue, because: (1) residential rental agreements fall within Chapter 75 since the rental of residential housing is considered commerce pursuant to N.C.G.S. § 75-1.1; (2) defendant's evidence established that his residential rental premises were uninhabitable and that plaintiff knew that the premises needed repair, but failed to correct the defects and continued to demand payment; and (3) plaintiff's conduct of collecting rent after having knowledge of the uninhabitable nature of part of the house constituted an unfair trade practice.

3. Landlord and Tenant— implied warranty of habitability—rent abatement

Defendant is entitled to rent abatement for breach of the implied warranty of habitability and the case is remanded for further calculation of damages in favor of defendant.

Appeal by defendant from judgment entered 13 February 2003 by Judge Dennis J. Redwing in Gaston County District Court. Heard in the Court of Appeals 7 March 2005.

No brief filed by plaintiff-appellee.

Legal Aid of North Carolina, Inc., by L. Ashley Huffstetler and Theodore O. Fillette, III, for defendant-appellant.

JACKSON, Judge.

On 12 January 2004, the trial court granted plaintiff's motion for directed verdict and dismissed plaintiff's complaint for summary ejectment. Specifically, the trial court concluded as a matter of law that defendant surrendered the leasehold to plaintiff, that the action for summary ejectment is now moot, and that "despite the findings of fact, . . . defendant did not allege specific enough damages in his counterclaim for the court to grant relief." Defendant now appeals.

In March 2003, plaintiff and defendant entered into an oral lease agreement to rent a mobile home ("the leased premises") in Gaston County, North Carolina, with payments to be made to plaintiff on the third or fifth day of each month at the rate of three hundred and fifty dollars ($350.00) per month. Defendant paid plaintiff two hundred dollars ($200.00) as a security deposit and three hundred and fifty dollars ($350.00) for rent during the months of April, May, June, July, and August 2003. Plaintiff failed to provide necessary repairs to the leased premises notwithstanding defendant's repeated requests.

On 3 September 2003, defendant refused to pay plaintiff rent, and once again, urged plaintiff to make the necessary repairs to the leased premises. Defendant informed plaintiff that he would not make any further rent payment until all repairs were made. On 6 September 2003, defendant contacted Gaston County Code Enforcement to request an inspection of the leased premises. On 9 September 2003, plaintiff served defendant with a complaint in summary ejectment alleging that the lease period had ended and defendant was holding over. On 18 September 2003, the trial court entered judgment in favor of plaintiff and ordered defendant be removed from possession of the leased premises. On 25 September 2003, defendant filed a notice of appeal with the district court. Defendant signed a bond stating that he would pay rent to the clerk of court as it became due as he was appealing from a summary ejectment judgment and was continuing to stay on the leased premises until the appeal was heard. Accordingly, defendant paid a September rent appeal bond in the amount of one hundred and sixty-one dollars and nine cents ($161.09) to the clerk of court.

At trial, the court determined that the fair rental value of the premises in its defective condition was one hundred and fifty dollars ($150.00) per month from 1 April 2003 through 30 September 2003 and the fair market value of the premises as warranted was three hundred

and fifty dollars ($350.00) per month from 1 April 2003 through 30 September 2003.

The trial court further found that when defendant moved into the mobile home, the flooring in the kitchen and bathroom was unstable and there was a large hole located behind the refrigerator covered with wire. After defendant moved into the premises, he discovered: (1) deteriorating flooring throughout the home; (2) a large sewage leak from the neighboring property which caused a noxious smell and affected defendant's enjoyment of the premises; (3) electrical problems in the kitchen area; and (4) sparks emitting from a breaker box. All of these defects violated the Gaston County Housing Code.

Defendant asserts that the trial court erred when determining his counterclaims did not allege specific enough damages to entitle him to any relief and in granting plaintiff's motion for a directed verdict. Defendant contends that the pleadings were sufficiently detailed to entitle him to relief pursuant to a breach of the implied warranty of habitability and the North Carolina Unfair and Deceptive Trade Practices Act. N.C. Gen. Stat. § 42-42 (2003); N.C. Gen. Stat. § 75-1.1 (2003).

The North Carolina Rules of Civil Procedure, section 1A-1, Rule 41 provides, in pertinent part:

> (b) Involuntary dismissal[:] . . . . [A] defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.
>
> (c) . . . . The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third-party claim.

N.C. Gen. Stat. § 1A-1, Rule 41(b) and (c). In the instant case, the trial court stated in its order that "Plaintiff's motion to dismiss the Defendant's counterclaims by directed verdict is hereby granted." However, it is well settled that a motion for a directed verdict only is proper in a jury trial. "[H]aving been tried without a jury, the proper motion by which to test the sufficiency of plaintiff's evidence to

establish a right to relief was a motion for involuntary dismissal under Rule 41(b)." *Town of Rolesville v. Perry*, 21 N.C. App. 354, 356-57, 204 S.E.2d 719, 721 (1974) (citing *Bryant v. Kelly*, 10 N.C. App. 208, 178 S.E.2d 113 (1970), *rev'd on other grounds*, 279 N.C. 123, 181 S.E.2d 438 (1971)); N.C. Gen. Stat. § 1A-1, Rule 41(b). Therefore, in the instant case, we will treat the trial court's order for directed verdict in favor of plaintiff as an order involuntarily dismissing defendant's counterclaims. *Town of Rolesville*, 21 N.C. App. at 356-57, 204 S.E.2d at 721.

The proper standard of review for a motion for an involuntary dismissal under Rule 41 is (1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment. *McNeely v. Railway Co.*, 19 N.C. App. 502, 505, 199 S.E.2d 164, 167, *cert. denied*, 284 N.C. 425, 200 S.E.2d 660 (1973). We hold that there was competent evidence to support the trial court's findings of fact and that they are deemed to be conclusive on appeal. *Id.* at 505, 199 S.E.2d at 167. Having determined that the findings of fact are supported by competent evidence, we now must determine "whether the findings of fact support the conclusions of law and the judgment." *Id.* We hold that they do not.

In the instant case, the trial court determined that defendant did not state with specificity those facts that would entitle him to relief. However, the trial court's findings did not address nor list any of those facts set forth in defendant's counterclaim. After carefully examining the evidence before this Court, we believe it is important for clarification purposes to list those facts defendant set forth in his counterclaim:

> The rental property was subject to the Residential Rental Agreements Act;
>
> During all relevant times, plaintiff has had actual or apparent authority to perform the landlord's obligations under the Residential Rental Agreements Act;
>
> The Residential Rental Agreements Act created an implied warranty of habitability for all rental dwellings in North Carolina;
>
> Plaintiff's failure to keep the leased premises in a fit and habitable condition breached the implied warranty of habitability statute.

> Defendant is entitled to actual and consequential damages, defendant's obligation to pay rent abated per N.C.G.S. § 42-41, and defendant was entitled to recover damages in the form of rent abatement calculated as the difference between the fair rental value of the premises in the unfit condition for the period which the premises was in a defective condition.

On 6 February 2004, the trial court found defendant's premises were defective and thus violated the Gaston County Housing Code. The court referenced problems with the sewage leak from neighboring property owned by plaintiff, deteriorating flooring throughout the kitchen, electrical problems with the kitchen stove, and sparks emitting from the breaker box. The trial court also found that defendant paid six months rent under the rental rate agreed to in the lease—three hundred and fifty dollars per month. The trial court's conclusions of law stated (1) defendant surrendered the leasehold to plaintiff and summary ejectment is therefore moot, and (2) despite the findings of fact, the court believed defendant did not allege specific enough damages in his counterclaim sufficient for the court to grant relief.

[1] The North Carolina Residential Rental Agreements Act provisions governing claims for implied warranty of habitability require that a landlord must "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition" and shall "[k]eep all common areas of the premises in safe condition." N.C. Gen. Stat. § 42-42(a)(2) and (3); *see Creekside Apartments v. Poteat*, 116 N.C. App. 26, 33, 446 S.E.2d 826, 831, *disc. rev. denied*, 338 N.C. 308, 451 S.E.2d 632 (1994); *Allen v. Simmons*, 99 N.C. App. 636, 394 S.E.2d 478 (1990). The trial court's findings of fact alone are sufficient to support defendant's claim for breach of implied warranty of habitability. Accordingly, this assignment of error is reversed and remanded for the trial court to enter judgment in favor of defendant as to defendant's counterclaim for breach of implied warranty of habitability.

[2] Defendant also contends that the trial court erred in dismissing his counterclaim for unfair and deceptive trade practices. We apply the same standard of review as we did *supra*. Having held the findings of fact are supported by competent evidence, we also hold that the trial court's findings of fact do not support its conclusion of law that there was insufficient evidence to show plaintiff knew the leased premises were uninhabitable and continued to demand rent payments.

North Carolina General Statutes, section 75-1.1 (2003), provides that it is unlawful to participate in "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Our courts previously have considered a trade practice to be unfair " 'when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' " *Pierce v. Reichard*, 163 N.C. App. 294, 301, 593 S.E.2d 787, 791 (2004) (quoting *Creekside Apartments*, 116 N.C. App. at 36, 446 S.E.2d at 833). Residential rental agreements fall within Chapter 75 because "the rental of residential housing is" considered commerce pursuant to N.C. Gen. Stat. § 75-1.1." *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E.2d 574, 583 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978). In determining what type of conduct falls within the purview of Chapter 75, our Courts have stated that "[c]onduct is unfair or deceptive if it has the capacity or tendency to deceive the average consumer." *Creekside Apartments*, 116 N.C. App. at 36, 446 S.E.2d at 833 (citing *Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992)). This rule, however, does not require proof of actual deception. *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 461, 400 S.E.2d 476, 482 (1991). Whether a party has committed an unfair and deceptive trade practice will " 'depend upon the facts of each case and the impact the practice has in the marketplace.' " *Mitchell v. Linville*, 148 N.C. App. 71, 74, 557 S.E.2d 620, 623 (2001) (citing *Johnson v. Insurance Co.*, 300 N.C. 247, 262-63, 266 S.E.2d 610, 621 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 685 (1988)).

In the instant case, defendant's evidence established that his residential rental premises were uninhabitable and that plaintiff knew that the premises needed repair, but failed to correct the defects and continued to demand rent payments. This evidence supports a factual finding that plaintiff committed an unfair and deceptive trade practice. The record clearly indicates that defendant's premises were uninhabitable and violated the Gaston Housing Building Code. The trial court listed numerous defects that existed on the premises prior to and during defendant's living in those premises and incorporated those defects into its findings of facts in making its determination that the premises were uninhabitable. Defendant specifically alleged in his counterclaim that plaintiff repeatedly refused to repair any of those defects the trial court found to have existed in and about the leased premises.

"[P]laintiff's actions in collecting rent after having knowledge of the uninhabitable nature of part of the house constituted unfair trade practices and was thus a violation of [North Carolina General Statutes, section] 75-1.1." *Pierce*, 163 N.C. App. at 302, 593 S.E.2d at 792. *See Allen v. Simmons*, 99 N.C. App. 636, 645, 394 S.E.2d 478, 484 (1990) (where defendant's evidence tended to show that plaintiff leased him a residential home containing defects which rendered the home uninhabitable, a jury could find plaintiff committed an unfair trade practice); *Foy v. Spinks*, 105 N.C. App. 534, 540, 414 S.E.2d 87, 89-90 (1992) ("where a tenant's evidence establishes the residential rental premises were unfit for human habitation and the landlord was aware of the needed repairs but failed to honor his promises to correct the deficiencies and continued to demand rent, then such evidence would support a factual finding . . . that the landlord committed an unfair or deceptive trade practice"). Accordingly, we hold that plaintiff's conduct was "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Creekside Apartments*, 116 N.C. App. at 38, 446 S.E.2d at 834. Therefore, the trial court erred in dismissing defendant's counterclaim for unfair and deceptive trade practice, and on remand, it must enter judgment for defendant consistent with this holding.

[3] Defendant next asserts that absent evidence to the contrary, and after making specific findings of fact regarding the fair rental value of the leased premises as warranted and the fair rental value of the leased premises in their defective condition, the trial court should have found plaintiff liable for the difference between the fair rental value prior to defendant's moving into the leased premises and the value of the leased premises in their current state. Defendant further contends that the trial court's findings regarding the fair market value of the premises in its warranted and defective condition required the trial court to award defendant rent abatement damages. We agree.

According to North Carolina law, defendant is entitled to file suit against plaintiff requesting rent abatement for breach of implied warranty of habitability. In determining the appropriate amount due to defendant in such an action, this Court previously has stated that:

> "the proper measure of damages in a rent abatement action based on a breach of the implied warranty of habitability is the difference between the fair rental value of the property in a warranted condition and the fair rental value of the property in its unwar-

> ranted condition; provided, however, the damages do not exceed the total amount of rent paid by the tenant. Additionally, the tenant is entitled to any 'special and consequential damages alleged and proved.' "

Cardwell v. Henry, 145 N.C. App. 194, 196, 549 S.E.2d 587, 588 (2001) (citations omitted).

In the instant case, the trial court found that defendant took possession of the premises in late March 2003 and vacated the leased premises in early October 2003. The trial court also found that defendant paid rent to plaintiff in the amount of three hundred and fifty dollars ($350.00) per month for the months of April, May, June, July, and August 2003. Defendant then paid to the clerk of court the September rent appeal bond in the amount of one hundred and sixty one dollars and nine cents ($161.09). According to the trial court, the fair rental value of the premises in its defective condition for the months of 1 April 2003 through 30 September 2003 was one hundred and fifty dollars ($150.00) per month. The fair market value of the premises, as warranted, for the months of 1 April 2003 through 30 September 2003 was three hundred and fifty dollars ($350.00).

Having found the trial court erred in involuntarily dismissing defendant's counterclaim for breach of implied warranty, we also conclude that defendant was entitled to damages. This assignment of error is reversed and remanded for further calculation of damages in favor of defendant not inconsistent with this opinion.

After thorough review of the record, we hold that there was competent evidence to support the trial court's findings; however, those findings did not support the trial court's conclusions of law. Therefore, we reverse the trial court's judgment finding in favor of plaintiff on the issues of breach of implied warranty of habitability and unfair and deceptive trade practices. We further remand the case to the trial court for judgment to be entered in favor of defendant. The trial court shall make a determination of defendant's damages consistent with this opinion.

Reversed and remanded.

Chief Judge MARTIN and Judge HUDSON concur.

IN RE K.C.G. & J.G.

[171 N.C. App. 488 (2005)]

IN THE MATTER OF: K.C.G. AND J.G., MINOR CHILDREN

No. COA04-902

(Filed 19 July 2005)

1. Child Abuse and Neglect— jurisdiction—ex parte order—cease interference with DSS investigation

The trial court had jurisdiction to issue an ex parte order to cease respondent mother's interference with DSS's investigation, because: (1) N.C.G.S. § 7B-200(a) provides that the court has exclusive original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent and also has exclusive original jurisdiction over proceedings in which a person is alleged to have obstructed or interfered with an investigation required by N.C.G.S. § 7B-302; and (2) in the instant case DSS received a report that the younger child was neglected and initiated an investigation, DSS filed a petition of obstruction of or interference with a juvenile investigation seeking an ex parte order commanding respondent mother to cease interference with the investigation and allow the child to be examined, and the trial court concluded as a matter of law that respondent obstructed or interfered with the investigation in that she refused to allow the child to be examined in a Child Medical Evaluation and interfered with the social worker's ability to interview the two children thus giving the court exclusive original jurisdiction over the case under N.C.G.S. § 7B-200(a)(6).

2. Child Abuse and Neglect— sole and exclusive temporary custody without a court order—failure to request nonsecure custody

The trial court did not have authority to place sole and exclusive temporary custody of the two minor children with the father without proper notice to the parties and without a juvenile abuse/neglect/dependency petition being filed, because: (1) although N.C.G.S. § 7B-500(a) provides a narrow exception for a child to be taken into temporary custody without a court order only by a law enforcement officer or a DSS worker, in this case the judge granted sole and exclusive temporary custody of the minor children to their father; and (2) N.C.G.S. § 7B-503(a) provides that an order issuing nonsecure custody will only be granted when a request is made for nonsecure custody and when there is a reasonable factual basis to believe the matters

alleged in the petition are true, and in the instant case no request for nonsecure custody was presented alleging that the children were neglected.

Appeal by respondent mother from orders entered 13 February 2004, 26 February 2004, and 19 March 2004 by Judge Richard W. Stone in Rockingham County District Court. Heard in the Court of Appeals 8 March 2005.

No brief filed for petitioner-appellee.

Susan J. Hall, for respondent-appellant.

TYSON, Judge.

Respondent appeals the trial court's orders allowing R.G. ("father") to have custody over their minor children K.C.G. and J.G. and the trial court's *ex parte* order requiring respondent to cease obstruction of or interference with the juvenile investigation. We affirm in part, reverse in part, and remand.

I. Background

K.C.G. and J.G. are the minor daughters of father and respondent. Respondent maintained physical custody of K.C.G. and J.G. after her separation from their father. On 16 October 2003, the Rockingham County Department of Social Services ("DSS") received a report alleging neglect of K.C.G. The report alleged: (1) respondent was trying to obtain a prescription of Valium for the child despite doctors' opinions that such a prescription was not appropriate; (2) respondent, who had no medical training, was diagnosing K.C.G. herself; (3) K.C.G. was not attending school; and (4) respondent was "doctor-shopping" for K.C.G.

Beretta Clayton ("Ms. Clayton"), a DSS Child Protective Services Investigator, began an investigation into the allegations regarding respondent and K.C.G. on 16 October 2003. Ms. Clayton visited K.C.G. at school, where she first encountered K.C.G.'s older sibling, J.G., and then respondent, who was also present at school with K.C.G. K.C.G.'s medical records, information from confidential sources, and information obtained through discussions with respondent raised additional concerns about K.C.G. and respondent. Three confidential sources alleged the relationship between respondent and K.C.G. may evidence Munchausen's Syndrome by Proxy, a disorder in which a caretaker fabricates or exaggerates physical manifestations or emotional

symptoms of a person in their care for whatever reasons. Examples of reasons for the disorder include, sympathy, or a perverse relationship with the other person. Records confirmed respondent had seen many doctors in an attempt to obtain Valium for K.C.G. and had prevented K.C.G. from attending school out of concern the child had an anxiety disorder and other medical problems.

Respondent took K.C.G. to see a psychologist, Dr. Julia Brannon, Ph.D. ("Dr. Brannon"), twice. Respondent informed Dr. Brannon of visits to several doctors for various problems she believed K.C.G. suffered, including teeth-grinding, constipation, and nocturnal seizures. She also said she thought K.C.G. had school phobia, social phobia, panic disorder, and seizures relating to her anxiety about school. Respondent informed Dr. Brannon that K.C.G.'s psychiatrist, Dr. King, had refused to prescribe Valium for K.C.G. Respondent requested Dr. Brannon refer her to a doctor who could prescribe the drug.

Dr. Brannon diagnosed K.C.G. as suffering from a "parent-child relational problem" and concluded K.C.G. did not suffer from the phobias or anxieties respondent claimed. Dr. Brannon stated Munchausen's Syndrome by Proxy is a sort of parent-child relational problem and based on: (1) respondent's vehement belief that she knew more than the professionals about K.C.G.'s condition; (2) respondent herself diagnosing K.C.G.; and (3) the extensive medical treatment K.C.G. had undergone at respondent's request, Dr. Brannon concluded respondent's relationship with K.C.G. may be a case of Munchausen's Syndrome by Proxy and K.C.G. needed further evaluation. In Dr. Brannon's opinion, a doctor should examine the child, the caretaker, and the medical history, including which treatments have been sought for the child, in order to make a determination of whether Munchausen's Syndrome by Proxy was present.

Sometime after the investigation began, respondent withdrew K.C.G. from public school and subsequently received her certification to home school K.C.G. Since that time, all contact between Ms. Clayton and K.C.G. has been at respondent's home while respondent is present. Respondent also requested all interviews of J.G. be performed at home, not at school. J.G. refused to speak with Ms. Clayton at school on 5 February 2004, saying she was not allowed to.

Ms. Clayton advised both respondent and K.C.G.'s father of the nature of the concerns and requested K.C.G. be examined during a Child Medical Evaluation ("CME") which would consist of a physical examination and another appointment for a mental health examina-

tion. The father signed a consent for the examinations and offered to take K.C.G. to the first appointment on 12 February 2004. Respondent repeatedly refused to allow examinations to occur. Respondent cancelled the 12 February 2004 appointment for the CME physical examination.

On 13 February 2004, DSS filed a petition alleging obstruction of or interference with a juvenile investigation with the Clerk of Superior Court in Rockingham County. On 13 February 2004, an *ex parte* order to cease obstruction of or interference with a juvenile investigation was filed. On 25 February 2004, the court continued the 13 February 2004 order and further ordered that: (1) neither parent would obstruct or interfere with DSS's pending investigation; and (2) respondent would have K.C.G. ready for her father to pick up and transport her to the first CME appointment. The order was not filed until 19 March 2004.

Respondent demanded a hearing on the *ex parte* order. Following an informal emergency hearing on 26 February 2004, a temporary custody order was signed and filed awarding the father temporary sole and exclusive custody of K.C.G. and J.G. On 26 February 2004, a second order was issued declaring that the 25 February 2004 order remained in effect and was stayed only insofar as respondent's own cooperation with and participation in the CME was concerned. The order also denied respondent's motion to seal the results of the CME. The order stated the temporary custody order entered earlier on 26 February 2004 was fully incorporated by reference and awarded temporary custody to the father due to the evidence heard the prior day and the court's concerns about the safety of the children. This order was filed on 19 March 2004. Respondent appeals.

II. Issues

The issues on appeal are whether: (1) the trial court had jurisdiction to place sole and exclusive temporary custody of the juveniles with the father without proper notice to the parties and without a juvenile abuse/neglect/dependency petition being filed; (2) the court abused its discretion in finding Dr. Brannon to be an expert in psychology and mental disorders due to a lack of evidentiary foundation; and (3) the trial court abused its discretion in concluding as a matter of law that the reports received by DSS, if true, would constitute neglect of the juvenile K.C.G. due to insufficiency of the evidence.

III. Jurisdiction

A. Cease Interference Order

[1] We initially consider whether the trial court had jurisdiction to issue the *ex parte* order to cease respondent's interference with DSS's investigation. N.C. Gen. Stat. § 7B-200(a) (2003) states: "[t]he court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." In addition, the court also has exclusive original jurisdiction over "[p]roceedings in which a person is alleged to have obstructed or interfered with an investigation required by G.S. 7B-302." N.C. Gen. Stat. § 7B-200(a)(6) (2003). N.C. Gen. Stat. § 7B-302(a) (2003) states:

> [w]hen a report of abuse, neglect, or dependency is received, the director of the department of social services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition.

N.C. Gen. Stat. § 7B-303(a) (2003) provides, "[i]f any person obstructs or interferes with an investigation required by G.S. 7B-302, the director may file a petition naming said person as respondent and requesting an order directing the respondent to cease such obstruction or interference." N.C. Gen. Stat. § 7B-303(b) (2003) states obstruction of or interference with an investigation includes

> refusing to disclose the whereabouts of the juvenile, refusing to allow the director to have personal access to the juvenile, refusing to allow the director to observe or interview the juvenile in private, refusing to allow the director access to confidential information and records upon request pursuant to G.S. 7B-302, refusing to allow the director to arrange for an evaluation of the juvenile by a physician or other expert, or other conduct that makes it impossible for the director to carry out the duty to investigate.

Further, N.C. Gen. Stat. § 7B-303(d) (2003) provides:

> If the director has reason to believe that the juvenile is in need of immediate protection or assistance, the director shall so allege in the petition and may seek an ex parte order from the court. If the court, from the verified petition and any inquiry the court makes of the director, finds probable cause to believe both that the juve-

> nile is at risk of immediate harm and that the respondent is obstructing or interfering with the director's ability to investigate to determine the juvenile's condition, the court may enter an ex parte order directing the respondent to cease such obstruction or interference. The order shall be limited to provisions necessary to enable the director to conduct an investigation sufficient to determine whether the juvenile is in need of immediate protection or assistance.

Here, DSS received a report K.C.G. was neglected and initiated an investigation. On 13 February 2004, pursuant to N.C. Gen. Stat. § 7B-303(d), DSS filed a petition of obstruction of or interference with a juvenile investigation seeking an *ex parte* order commanding respondent to cease interference with the investigation and allow K.C.G. to be examined.

According to N.C. Gen. Stat. § 7B-303(d), the court may "enter an ex parte order directing the respondent to cease such obstruction or interference" and the "order shall be limited to provisions necessary to enable the director to conduct an investigation sufficient to determine whether the juvenile is in need of immediate protection or assistance."

The trial court concluded as a matter of law that respondent obstructed or interfered with the investigation in that she refused to allow K.C.G. to be examined in a CME and interfered with the social worker's ability to interview the two children. *See* N.C. Gen. Stat. § 7B-303(b). The trial court had exclusive, original jurisdiction over the case pursuant to N.C. Gen. Stat. § 7B-200(a)(6).

This statute conferred upon the trial court the authority to issue the *ex parte* order to cease interference with DSS's investigation. This assignment of error is overruled.

B. Custody

[2] We next consider whether the trial court had authority to place K.C.G. and J.G. in the temporary sole and exclusive custody of their father. N.C. Gen. Stat. § 7B-500(a) (2003) governs the procedure for removing and taking a child into temporary custody:

> A juvenile may be taken into temporary custody without a court order by a law enforcement officer or a department of social services worker if there are reasonable grounds to believe that the

> juvenile is abused, neglected, or dependent and that the juvenile would be injured or could not be taken into custody if it were first necessary to obtain a court order.

"This statute is a narrow exception to the requirement that a petition must be filed prior to the issuance of a court order for non-secure custody." *In re Ivey*, 156 N.C. App. 398, 402, 576 S.E.2d 386, 389 (2003). "In the case of any juvenile alleged to be within the jurisdiction of the court, the court may order that the juvenile be placed in nonsecure custody pursuant to criteria set out in G.S. 7B-503 when custody of the juvenile is necessary." N.C. Gen. Stat. § 7B-502 (2003). N.C. Gen. Stat. § 7B-503(a) (2003) provides in part:

> [w]hen a request is made for nonsecure custody . . . [a]n order for nonsecure custody shall be made only when there is a reasonable factual basis to believe the matters alleged in the petition are true, and . . . [a] juvenile alleged to be abused, neglected, or dependent shall be placed in nonsecure custody only when there is a reasonable factual basis to believe that there are no other reasonable means available to protect the juvenile.

In *Ivey*, DSS filed petitions to have the respondents' (mother and father) children adjudicated neglected. 156 N.C. App. at 399, 576 S.E.2d at 388. The trial court adjudicated the three children as neglected and DSS received nonsecure custody of the children. *Id.* While a permanency planning review was pending, the respondent mother gave birth to an infant who remained in the respondents' custody. *Id.* at 400, 576 S.E.2d at 388. At the permanency planning hearing, the court found that "no child, including the infant who presently resides with [the respondent mother], should be forced to endure such circumstances" and the court further found that "non-secure custody should be taken of the infant presently living in the [respondents'] home, to be followed as reasonably soon as possible with a Juvenile Petition." *Id.* at 400, 576 S.E.2d at 388-89.

This Court held the trial court lacked jurisdiction to order DSS to assume nonsecure custody of the infant because "[a]t the time of the hearing, DSS had not filed any petition alleging that [the infant] was an abused or neglected child." *Id.* at 401, 576 S.E.2d at 389. We stated, N.C. Gen. Stat. § 7B-503(a) "sets forth the criteria for nonsecure custody and states: 'an order for nonsecure custody shall be made only when there is a reasonable factual basis to believe the matters alleged in the petition are true . . . .' " *Id.* (quoting N.C. Gen. Stat. § 7B-503(a)). The trial court did not possess jurisdiction to grant DSS nonsecure

custody of the infant because no petition alleging the infant to be an abused or neglected child had been filed. *Id.*

N.C. Gen. Stat. § 7B-500 allows a narrow exception for a child to be taken into temporary custody without a court order only by a law enforcement officer or a department of social services worker. Here, however, the trial judge issued a court order granting sole and exclusive temporary custody of K.C.G. and J.G. to their father. K.C.G. was within the jurisdiction of the court. As established above, N.C. Gen. Stat. § 7B-502 provides the trial judge with authority to place K.C.G. in nonsecure custody "pursuant to [the] criteria set out in G.S. 7B-503." However, an order issuing nonsecure custody will only be granted when "a request is made for nonsecure custody" and "when there is a reasonable factual basis to believe the matters alleged in the petition are true . . . ." N.C. Gen. Stat. § 7B-503(a). The plain language of the statute shows that a request for nonsecure custody must be made and a petition must be filed before the court may issue an order for nonsecure custody. N.C. Gen. Stat. § 7B-503.

As in *Ivey*, no request for nonsecure custody was presented in this case. In the preamble to the temporary custody order entered on 26 February 2004, the trial court stated, "[n]o juvenile petition has been filed and the only pending matter was the petition concerning non-interference." As the trial court noted, the only request or petition pending was the petition alleging obstruction of or interference with a juvenile investigation filed by DSS on 13 February 2004 seeking an order commanding respondent to cease interfering with DSS's investigation. At no time did DSS request nonsecure custody or file a petition alleging that K.C.G. was a neglected child.

As we stated in *Ivey*, "[w]ithout such petition, the trial court did not have the jurisdiction to order [K.C.G.'s father] to assume nonsecure custody" of K.C.G. and J.G. *Ivey*, 156 N.C. App. at 401, 576 S.E.2d at 389. The trial court's order of sole exclusive custody of K.C.G. and J.G. to their father is reversed.

IV. Conclusion

The trial court possessed jurisdiction to issue the *ex parte* order to cease interference with DSS's investigation. That portion of the trial court's order is affirmed.

Without a filed petition alleging K.C.G. and J.G. to be neglected children, the trial court was without jurisdiction to place K.C.G. and J.G. solely and exclusively in the custody of their father. The trial

court erred in assigning sole and exclusive nonsecure custody of K.C.G. and J.G. to their father. That portion of the trial court's order is reversed.

Because we find the trial court lacked jurisdiction to place K.C.G. in the custody of her father, we do not prematurely reach or decide the issues of whether the trial court abused its discretion in: (1) finding Dr. Brannon to be an expert in psychology and mental disorders due to lack of evidentiary foundation; and (2) concluding as a matter of law that the reports received by DSS, if true, would constitute neglect of the juvenile K.C.G. due to insufficiency of the evidence in the record.

Affirmed in Part, Reversed in Part, and Remanded.

Judges WYNN and ELMORE concur.

IN THE MATTER OF: D.W.

No. COA04-1211

(Filed 19 July 2005)

1. Appeal and Error— preservation of issues—failure to argue

Three of defendant juvenile's six assignments of error that he did not bring forward on appeal are deemed abandoned pursuant to N.C. R. App. P. 28(a).

2. Rape— attempted first-degree—motion to dismiss—sufficiency of evidence—age—intent—act beyond mere preparation

The trial court did not err by denying defendant juvenile's motion to dismiss the charge of attempted first-degree rape at the end of all the evidence, because: (1) the age element was satisfied when the evidence showed that defendant was fourteen years old and the victim was eight years old at the time of the offense; (2) the age of defendant, the act of defendant touching his penis to the victim's vagina, and defendant running to the closet and hiding from the victim's mother permit a reasonable inference that defendant had the requisite intent to gratify his passion through

vaginal intercourse with the victim; and (3) defendant committed an act that goes beyond mere preparation when he pulled down his pants and touched his penis to the victim's vagina.

3. Indecent Liberties— between children—motion to dismiss—sufficiency of evidence—purpose or intent of gratifying sexual desire

The trial court did not err by denying defendant juvenile's motion to dismiss the charge of indecent liberties between children under N.C.G.S. § 14-202.2, because: (1) defendant was fourteen years old and the victim was eight years old at the time of the offense, creating more than the required three-year age difference between them; and (2) the evidence presented by the State was sufficient to show that defendant had the requisite intent and purpose in acting to gratify a sexual desire when defendant was seen in his room running to the closet while pulling up his pants and the victim was found in defendant's bed unclothed from the waist down.

4. Criminal Law— recordation—failure to record defendant's direct examination—reconstruction of testimony available

Defendant juvenile is not entitled to a new trial in a first-degree attempted rape and indecent liberties between children case based on the trial court's inadvertent failure to record his testimony on direct examination at trial, because the Court of Appeals was able to conduct a meaningful review of defendant's appeal when: (1) his only other argument on appeal is the trial court's denial of his motion to dismiss, and the State presented substantial evidence of every element of each offense; (2) the cross-examination of defendant by the State is included in the transcript, and it provided a partial reconstruction of defendant's account of what took place; and (3) defendant's attorney summarized his testimony during her argument in support of the motion to dismiss and further reconstructed defendant's account of the sequence of events.

Appeal by defendant from judgment entered 9 March 2004 by Judge Elizabeth D. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 6 June 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Gail E. Dawson, for the State.

Anthony M. Brannon for defendant-appellant.

MARTIN, Chief Judge.

Defendant juvenile, D.W., was adjudicated responsible for first-degree attempted rape and indecent liberties between children. A sentence of nine months probation was imposed. For the reasons that follow, we find no error in the trial court's ruling.

The State presented evidence at trial tending to show the following: In June 2004, eight-year-old A.M. lived with her mother, step-father, fourteen-year-old step-brother (D.W.), three-year-old brother, and six-week-old brother. A.M. testified that on 23 June 2004 she was in the living room sitting on the couch with her baby brother. At the time, her mother was in her bedroom with the three-year-old. D.W. was in his room, then came out, went into the kitchen, and went to the mailbox. When D.W. came back into the house he took the baby from A.M. and put the baby in his crib. D.W. then told A.M. to "come here" and pulled her into his room. A.M. testified that D.W. pulled down her pants and touched her "private" with his "private." A.M.'s mother entered D.W.'s room and saw D.W. run into the closet. At that time his pants were down around his legs. A.M. was shown a drawing of a boy without clothing and a girl without clothing and was able to identify their body parts. A.M. indicated on the drawings that D.W. touched her vagina with his penis.

The testimony of A.M.'s mother and Officer Adrian Hucks of the Charlotte-Mecklenburg Police Department indicated that A.M. told each of them the same sequence of facts. A.M.'s mother testified that when she entered the room, she saw A.M. in D.W.'s bed with the covers up to her neck. She removed the covers from A.M. and found that the child was not wearing any bottoms. She waited for D.W.'s father to return home from work, then she and D.W.'s father talked to D.W. about the incident. D.W. maintained that he did not do anything. A.M.'s mother called the police, and Officer Hucks arrived and took a statement from A.M. Later, A.M. complained that she felt a burning sensation when she urinated, so her mother took her to the hospital.

At the close of the State's evidence, defendant juvenile moved to dismiss the charges based on the insufficiency of the evidence and a failure to show the ages of A.M. and D.W. A review of the evidence showed that evidence of A.M.'s age had been presented, but there had been no evidence of D.W.'s age. The State was permitted, over defendant juvenile's objection, to reopen the evidence and present evidence that D.W. was fourteen years of age at the time of the incident.

Defendant juvenile presented testimony on his own behalf. His testimony during direct examination was not recorded and is therefore not included in the transcript. However, his testimony on cross-examination is in the transcript before us. D.W. testified on cross-examination that on the morning of 23 June 2004 he watched a movie. After the movie he went to the bathroom. A.M. was in his room when he returned. D.W. testified that he was on the floor when his step-mother came into the room. When he heard her coming, D.W. ran into the closet. He testified that he was not pulling his pants up while he ran to the closet. D.W. did not leave the closet until A.M. and his step-mother left the room.

The trial court adjudicated defendant juvenile responsible for attempted first-degree rape and indecent liberties between minors. The trial court imposed a sentence of nine months probation. Defendant juvenile appeals.

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[1] The record on appeal contains six separate assignments of error. Defendant brings forward three of the assignments of error in two separate arguments. The remaining assignments of error are deemed abandoned. N.C. R. App. P. 28(a) (2004). Defendant asserts that (1) he is entitled to a new trial because although he testified at trial, the trial court inadvertently failed to record his testimony, and (2) the trial court erred in denying his motion to dismiss at the end of all of the evidence when the evidence was insufficient to support an adjudication that defendant committed attempted first-degree statutory rape and indecent liberties between children. We will first address the trial court's denial of defendant's motion to dismiss.

I. Motion to Dismiss

In reviewing a motion to dismiss on the grounds of sufficiency of the evidence, the issue is "whether substantial evidence exists as to each essential element of the offense charged and of the defendant being the perpetrator of that offense." *State v. Glover*, 156 N.C. App. 139, 142, 575 S.E.2d 835, 837 (2003). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). A motion to dismiss should be denied if there is substantial evidence, whether direct, circumstantial, or both, that the defendant committed the offense charged. *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005). "The trial court must consider the evidence 'in the light most favorable to the State,' and the State is en-

titled to every reasonable inference to be drawn from it." *State v. Quinn*, 166 N.C. App. 733, 739, 603 S.E.2d 886, 889 (2004) (quoting *State v. Bright*, 301 N.C. 243, 257, 271 S.E.2d 368, 377 (1980)).

A. Attempted First-Degree Rape

[2] Defendant contends that the trial court erred when it failed to dismiss the allegation of attempted first-degree rape at the end of all of the evidence. In order for defendant to be adjudicated responsible for attempted first-degree rape of a child,

> the State must show that the victim was twelve years old or less, that the defendant was at least twelve years old and at least four years older than the victim, that the defendant had the intent to engage in vaginal intercourse with the victim, and that the defendant committed an act that goes beyond mere preparation but falls short of actual commission of intercourse.

State v. Gregory, 78 N.C. App. 565, 571, 338 S.E.2d 110, 114 (1985), *cert. denied*, 498 U.S. 879, 112 L. Ed. 2d 171 (1990); *see* N.C. Gen. Stat. § 14-27.2 (2003). Since *Gregory*, the statute was amended to read that the victim must be thirteen years old or less. N.C. Gen. Stat. § 14-27.2 (2003) (stating that a person is guilty of first-degree rape for vaginal intercourse "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"). The evidence tended to show that defendant was fourteen years old and AM was eight years old at the time of the offense. Therefore, defendant was six years older than the victim, and the age elements of attempted first-degree rape of a child are satisfied.

The intent element of attempted first-degree rape is established if the defendant, at any time during the attempt, intended to gratify his passion upon the victim, notwithstanding any resistance on the victim's part. *State v. Moser*, 74 N.C. App. 216, 220, 328 S.E.2d 315, 317 (1985). Because intent is "an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances which may be inferred." *Id.*

Defendant argues that the State did not present the evidence necessary to find an intent to engage in vaginal intercourse. We disagree. The evidence as viewed in the light most favorable to the State is as follows: defendant told A.M. to come into his room. A.M. entered the room, and defendant pulled down A.M.'s pants. Defendant then pulled

down his own pants and touched A.M.'s vagina with his penis. When he heard A.M.'s mother, defendant ran to his closet while pulling up his pants. While A.M.'s mother was in the room defendant hid in the closet. At that time, A.M. was under the covers in defendant's bed wearing no pants or underwear. The age of the defendant, the act of defendant touching his penis to A.M.'s vagina, and defendant running to the closet and hiding from A.M.'s mother permit a reasonable inference that defendant had the requisite intent to gratify his passion through vaginal intercourse with A.M.

Defendant also "committed an act that goes beyond mere preparation" when he pulled down his pants and touched his penis to A.M.'s vagina, thereby satisfying the final element of the offense. *Gregory*, 78 N.C. App. at 571, 338 S.E.2d at 114 (1985). The trial court properly denied defendant's motion to dismiss for insufficiency of the evidence on the charge of attempted first-degree rape of a child.

B. Indecent Liberties Between Minors

[3] Defendant also asserts that the trial court erred by failing to dismiss the allegation in the petition that D.W. committed indecent liberties between children. Defendant contends that the State did not present any evidence that defendant acted with the purpose or intent of gratifying sexual desire. Under N.C. Gen. Stat. § 14-202.2 (indecent liberties between children),

> (a) A person who is under the age of 16 years is guilty of taking indecent liberties with children if the person either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex who is at least three years younger than the defendant 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 of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire.

N.C. Gen. Stat. § 14-202.2 (2003). As we have noted, defendant was fourteen years old and A.M. was eight years old at the time of the offense, creating more than the required three-year age difference between them.

To prove that defendant had "the purpose of arousing or gratifying a sexual desire," *id.*, there must be some showing of intent, matu-

rity, experience, or purpose in acting. *In re T.C.S*, 148 N.C. App. 297, 302-03, 558 S.E.2d 251, 254 (2002). The act alone does not infer the gratification of sexual desires when the offense is between children. *Id.* The facts in this case are similar to the facts of *In re T.C.S.*, where the evidence presented by the State was sufficient to deny a motion to dismiss because the defendant was seen leaving a secretive wooded area hand-in-hand with the victim, who appeared disheveled. *Id.* Defendant in this case was seen in his room running to the closet while pulling up his pants, and the victim was found in defendant's bed unclothed from the waist down. The evidence presented by the State was sufficient to show defendant had the requisite "intent" and "purpose in acting" to gratify a sexual desire. *Id.* The trial court properly denied defendant's motion to dismiss for insufficiency of the evidence on the charge of indecent liberties between children. Defendant's argument with respect to both of the offenses is overruled.

II. Sufficiency of the Transcript

[4] Defendant also alleges that he is entitled to a new trial because the trial court inadvertently failed to record his testimony on direct examination at trial. "If a transcript is altogether inaccurate and no adequate record of what transpired at trial can be reconstructed, the court must remand for a new trial." *In re Rholetter*, 162 N.C. App. 653, 664, 592 S.E.2d 237, 244 (2004). A new trial is appropriate if the incomplete nature of the transcript prevents the appellate court from conducting a "meaningful appellate review." *In re Hartsock*, 158 N.C. App. 287, 293, 580 S.E.2d 395, 399 (2003).

In the present case, we are able to conduct a meaningful review of defendant's appeal for two reasons. First, defendant's only other argument on appeal is the trial court's denial of his motion to dismiss. As we have held above, the State presented substantial evidence of every element of each offense. Regardless of what defendant might have testified to on direct examination, we are still required, upon a motion to dismiss, to consider the evidence "in the light most favorable to the State; [and] the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Any contradictions or discrepancies the defendant might have raised in his direct examination "are for the [fact-finder] to resolve and do not warrant dismissal." *Id.* Therefore, because the record before us clearly shows that the evidence presented by the State was sufficient

to deny defendant's motion to dismiss, we are able to conduct meaningful review of defendant's sole argument on appeal. *See In re Rholetter*, 162 N.C. App. 653, 664-65, 592 S.E.2d 237, 244 (2004) (stating that where "none of the . . . findings of fact and conclusions of law in which respondent assigns error are supported solely on [the missing] testimony," respondent failed to prove that the transcript was "altogether inaccurate and inadequate").

Second, though the direct examination of defendant was not on record in the transcript, the cross-examination of defendant by the State is included in the transcript. So long as the missing parts of the transcript can be reconstructed from the record, and the transcript is adequate to allow the defendant to raise appellate issues, a new trial should not be granted. *State v. Hammonds*, 141 N.C. App. 152, 167-68, 541 S.E.2d 166, 177-78 (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). Defendant's testimony during cross-examination provides a partial reconstruction of his account of what took place. He testified that after watching a movie he went to the bathroom. A.M. was in his room when he returned. He was sitting on the floor when his step-mother came into the room, and when he heard her coming, he ran into the closet. He testified that he was not pulling his pants up while he ran to the closet.

Defendant's attorney also summarized his testimony during her argument in support of her motion to dismiss. Her argument further reconstructs defendant's account of the sequence of events:

> [W]hat his evidence has indicated is the question is why did he run in the closet? . . . He knew he was in trouble because he had left the house without his stepmother's permission. His [father has] indicated that that would indeed get him into trouble. And so when he (inaudible) the house, there's also (inaudible) not just even between the two of them which is contradictory to what [AM's mother] testified to when she was on the stand. . . . The child ran into the closet to avoid her, that the young lady was on his bed, that he did not know her state of apparel because she had the covers over her . . . . That I don't know why and my client does not know why she would have her clothes off or down or however because [he] was not in the room when she came in the room. He went to the bathroom, and then when he came to the room, she was under the covers in the bedroom. So he doesn't know exactly what was going on in regards to that.

The import of defendant's testimony is in the record before us through his cross-examination and his attorney's argument. Because we are able to reconstruct the missing testimony, and because we can rule upon defendant's only other argument based on the sufficiency of the State's evidence, the record before us is adequate. This argument is overruled.

In the judgment of the trial court, we find

No error.

Judges WYNN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. DARREN WILLIAM DENNISON

No. COA02-1512-2

(Filed 19 July 2005)

1. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence—premeditation and deliberation

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder even though defendant contends there was insufficient evidence of his premeditation and deliberation, because: (1) the doctor who performed the autopsy of the victim testified to the brutality of the wounds and in his opinion the multiple slashes were caused by repeated blows from defendant's knife; (2) evidence was presented that the victim harassed defendant and defendant left the scene after stabbing the victim; (3) with close or borderline cases on the issue of insufficient evidence, there is a clear preference for submitting the issue to the jury; and (4) defendant stabbed a man who was smaller than he was eight times in a public place and the victim was the only person potentially threatening him at the time.

2. Homicide— self-defense—instructions—plain error review

The Court of Appeals is bound by a Supreme Court opinion that defendant failed to properly assert plain error in this murder case; furthermore, a review of the entire record and instructions as a whole reveals that the trial court did not commit plain error by instructing the jury that defendant would lose the bene-

fit of self-defense if he was the initial aggressor or the jury determined that defendant used more force than necessary under the circumstances.

Appeal by defendant from judgment entered 20 May 2002 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 10 September 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Daniel Shatz for defendant-appellant.

ELMORE, Judge.

Darren William Dennison (defendant) appeals from a judgment entered 20 May 2002 consistent with a jury verdict finding him guilty of the first-degree murder of Chad Everette Spaul (Mr. Spaul). The trial court sentenced defendant to life imprisonment without parole and, after extensive appellate review, we find that defendant received a fair trial, free from prejudicial error.

I.

This Court has previously examined defendant's trial and conviction for first-degree murder. On 6 April 2004, we filed *State v. Dennison*, 163 N.C. App. 375, 594 S.E.2d 82 (2004), *rev'd per curiam*, 359 N.C. 312, 608 S.E.2d 756 (2005), in which we determined that defendant was entitled to a new trial based upon the prejudicial error of admitting evidence regarding defendant's prior violent acts against a former girlfriend. The State appealed to our Supreme Court, which held that defendant failed to properly preserve that error for appellate review. *State v. Dennison*, 359 N.C. 312, 312, 608 S.E.2d 756, 757 (2005). Accordingly, our Supreme Court remanded the case back to this Court so that we may review defendant's other preserved errors. *Id.* at 313, 608 S.E.2d at 757. As such, we will address the trial court's denial of defendant's motion to dismiss and its instructions to the jury on self-defense. And although the facts of this case were adequately laid out in our previous opinion, since this opinion will supercede the former, we will recite them again.

II.

The evidence presented at trial tended to show that on the evening of 21 September 2001, defendant, defendant's girlfriend

Melanie Gammons, and Charlene Waller traveled together to the Challenger Sports Bar in High Point, North Carolina. Among those also present at the crowded bar that evening were Delores Vail and her sister Diane Lovern; Lovern's daughter Tracy Boone and Boone's boyfriend, Jeff Peele; and Mr. Spaul and Mr. Spaul's co-worker, David Moore.

Waller testified that after she, defendant, and Gammons played two games of a NASCAR-themed board game popular with the bar's patrons, they stepped outside along with Vail, and that Moore, whom she did not know, then approached the group and "got in [her] face." Waller briefly went back inside the bar with Vail, only to re-emerge after Moore followed them inside. Waller testified that when she and Vail exited the bar the second time, they went around to the side of the building, where they encountered Michael Crane, and that they were soon joined there by defendant, Gammons, and Moore. Several witnesses testified that Moore had been trying unsuccessfully throughout the evening to speak with Vail, with whom he had been romantically involved several years earlier, and Waller testified that Moore was continuing to do so at this point.

According to the testimony of various witnesses, Mr. Spaul then came outside the bar and approached the group, just as a visibly upset Moore was walking away, and Mr. Spaul and Moore spoke briefly outside the hearing of the others before Moore re-entered the bar. Lovern, who had by this time stepped outside the bar, testified that Mr. Spaul then began "arguing and carrying on with . . . mostly [Gammons] and [Waller] . . . but he was trying to start with [defendant]." Waller and Lovern each testified that Mr. Spaul then began calling defendant "faggot," "fag," and "queer." At that point, defendant, Gammons, Waller, and Crane walked back around to the front of the building in an attempt to get away from Mr. Spaul, who followed the group and continued to call defendant names. The group moved three or four times to various locations around the building in an effort to defuse the situation, but Mr. Spaul continued to follow the group and continued to behave belligerently towards defendant. Lovern, Moore, and the bar's owner each tried, to no avail, to get Mr. Spaul to desist.

According to Waller, Mr. Spaul then briefly re-entered the bar, but shortly thereafter he emerged with a bottle of beer and resumed calling defendant a "faggot." Mr. Spaul exchanged words with Waller and Gammons and then stated that he was going to hit Crane, who was standing next to defendant. According to the testimony of Waller,

Lovern, and Peele, each of whom witnessed this portion of the fatal confrontation between defendant and Mr. Spaul, Mr. Spaul first struck Crane, and then defendant, in rapid succession with his fist, causing Crane to fall to the ground and defendant to be knocked down and against a post. Waller testified that after Mr. Spaul hit Crane and defendant, she ran into the bar to get help. Lovern testified that when "[defendant] got up, he went to swinging" at Mr. Spaul, at which point she "was pushed out of the way, and that's all [she] saw" until she turned back around and saw Mr. Spaul on the ground "and a lot of blood." Lovern's testimony was generally corroborated by that of Peele. Defendant was six feet two inches tall and weighed approximately 215 pounds at the time, while Mr. Spaul was five feet, eleven inches tall and weighed approximately 165 pounds. Both defendant and Mr. Spaul had been drinking before the altercation.

Dr. Thomas Clark, the forensic pathologist who performed Mr. Spaul's autopsy, testified that Mr. Spaul suffered eight sharp-force injuries inflicted with a knife. The most significant wound went "across the middle of the body and the right side of the neck . . . [and] cut both of the carotid arteries," which, in Dr. Clark's opinion, caused Mr. Spaul to bleed to death. None of the other seven wounds were as significant, and several were described as "superficial" by Dr. Clark. In Dr. Clark's opinion, all of Mr. Spaul's injuries could not have been inflicted by a single swing of a knife, although some of the wounds were on a linear track.

Defendant testified at trial and admitted cutting Mr. Spaul with a knife he regularly carried, but only after Mr. Spaul repeatedly called defendant names, followed defendant around outside the bar when defendant tried to avoid confrontation, and eventually struck defendant in the head. Defendant testified he "believe[d he] was hit with a beer bottle," but neither defendant nor any other witness testified that they actually saw Mr. Spaul wield a beer bottle when he struck defendant. Defendant testified that as Mr. Spaul was attempting to strike him a second time, defendant pulled his knife out of his pocket and pushed upward with the knife, cutting Mr. Spaul. Defendant testified that he "did not mean to kill [Mr. Spaul]," but rather that he "meant . . . to cut [Mr. Spaul] to get him off of me."

Defendant, Gammons, and Waller then got in Waller's car and left the scene. Defendant testified that he left because he was scared of Moore, who upon seeing Mr. Spaul prone and bleeding profusely threatened to kill defendant, and beat on Waller's car as the car pulled out of the parking lot. Defendant, Gammons, and Waller proceeded to

Waller's home, where defendant showered and changed his clothes, which were stained with Mr. Spaul's blood. Defendant testified that because he feared the police would find him at Waller's house, the group was then driven to a motel by a third person, at which point defendant telephoned the bar and was informed that Mr. Spaul was dead. After contacting the High Point police department, defendant turned himself in at 5:00 p.m. the following afternoon.

Defendant moved to dismiss the charges against him at the close of the State's evidence and again at the close of all evidence; each motion was denied. Prior to the jury charge, defendant moved for a mistrial based on the improper admission of evidence concerning defendant's character, which motion was also denied. The jury subsequently returned a verdict finding defendant guilty of first-degree murder, and the trial court sentenced defendant to life imprisonment.

III.

[1] Defendant contends that the State has presented insufficient evidence of his premeditation and deliberation, a necessary element of first-degree murder. When a defendant moves for dismissal, "the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Substantial evidence is that evidence which " 'a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In determining whether the State's evidence is substantial, the trial court must examine the evidence in the light most favorable to the State, and "the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* at 237, 400 S.E.2d at 61 (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

Our appellate courts have held that "[p]remeditation is present where the defendant formed a specific intent to kill the victim some period of time, no matter how short, prior to perpetrating the actual act. . . . Deliberation is acting in a cool state of blood and not under the influence of a violent passion." *State v. Andrews*, 154 N.C. App. 553, 561, 572 S.E.2d 798, 804 (2002) (citations omitted), *cert. denied*, 358 N.C. 156, 592 S.E.2d 696 (2004). But still, "[o]ne may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by

passion at the time." *Vause*, 328 N.C. at 238, 400 S.E.2d at 62. Premeditation and deliberation "are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence." *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994). Among the circumstances from which premeditation and deliberation may properly be inferred in a prosecution for first-degree murder are:

> (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

Vause, 328 N.C. at 238, 400 S.E.2d at 62.

Taken in the light most favorable to the State, there is substantial evidence of premeditation and deliberation. Relative to the sixth and seventh factors, Dr. Clark testified to the brutality of the wounds and in his opinion the multiple slashes were caused by repeated blows from defendant's knife. Evidence was also presented, relative to the second factor, that suggested Mr. Spaul was harassing defendant and after the stabbing defendant left the scene. These points may not be significant by themselves, but taken together are evidence of premeditation and deliberation that a juror could find adequate. Moreover, with close or borderline cases on he issue of insufficient evidence, there is a clear preference for submitting the issue to the jury. *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

Defendant claims that *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981), is controlling on the lack of evidence regarding premeditation and deliberation. However, we find the facts in *Corn* different from defendant's situation. The defendant in *Corn* shot at one of two men—both bigger than him and one with a history of violence—who were charging at him while he was on the couch in his home. Here, defendant stabbed a man—who was smaller than defendant—eight times in a public place, and the victim was the only person potentially threatening him at the time.

IV.

[2] Defendant also assigns error to the trial court's instruction that defendant would lose the benefit of self-defense if he was the initial aggressor or the jury determined defendant used more force than necessary under the circumstances. Defendant asserts we should conduct plain error review of the instructions on these points.

Yet, our Supreme Court has already held that defendant failed to properly assert plain error concerning the admission of defendant's violent acts. *Dennison*, 359 N.C. at 312-13, 608 S.E.2d at 757. We are admittedly at a loss to distinguish defendant's assertions of plain error regarding the trial court's instructions, in which he states "[d]efendant asserts plain error," from those that the North Carolina Supreme Court determined did not "specifically and distinctly" assert plain error. *Id*. One of those assignments stated, "[t]o the extent that this issue is not preserved for appellate review, the defendant asserts plain error," and we are not able to discern what more defendant could have said to preserve this issue for plain error review.

However, although we are bound by our Supreme Court's opinion dismissing plain error review in this case, after reviewing the entire record and the instructions as a whole, we see no merit in defendant's contentions that the instructions in this case misled or confused the jury.

No error.

Judges TIMMONS-GOODSON and HUDSON concur.

IGNACIA HERNANDEZ, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA04-1474

(Filed 19 July 2005)

Insurance— motor vehicles—non-owned vehicle—would-be purchaser—unfinished sale

An automobile policy issued to an individual provided coverage for the individual while driving an automobile as a non-owned vehicle in connection with a collision where the individual was in

the midst of an unfinished purchase of the car, because: (1) the individual did not hold legal title to the automobile at the time of the collision, and all cars which are not owned within the meaning of N.C.G.S. § 20-72(b) are insured "non-owned" automobiles except those which are furnished for the regular use of the insured or his relative; and (2) at the time of the accident the automobile was not furnished for the individual's regular use.

Appeal by defendant from judgment entered by Judge Milton F. Fitch, Jr., in the Superior Court in Edgecombe County. Heard in the Court of Appeals 11 May 2005.

Rountree & Boyette, L.L.P., by Charles S. Rountree, for plaintiff-appellee.

Baker, Jones, Daly, Murray, Askew, Carter & Daughtry, P.A., by Ernie K. Murray and Kevin N. Lewis, for defendant-appellant.

HUDSON, Judge.

On 20 February 2004, plaintiff Ignacia Hernandez filed a complaint against defendant Nationwide Mutual Insurance Company ("Nationwide") asking the court to declare Nationwide's liability to plaintiff in connection with a car collision. Both parties stipulated that there was no issue of material fact and each moved for summary judgment. The court granted summary judgment in favor of plaintiff, and defendant now appeals. As discussed below, we affirm the decision of the trial court.

Cynthia Norris ("Norris") owned an auto insurance policy with Nationwide which covered her family's vehicles. Norris worked at S&J Auto Sales ("S&J"). On Friday, 13 April 2001, Norris took a 1997 Chevrolet Blazer home for a weekend test drive. S&J issued her a temporary permit for the test drive. On Monday, 16 April 2001, Norris returned to S&J and announced her intention to buy the Blazer. During that day, Norris and David Shirley ("Shirley"), her boss at S&J, executed all paperwork needed for the sale and purchase of the Blazer except the transfer of title. Norris and Shirley ran out of time to transfer title, and since Shirley would be out of town on Tuesday, they planned to complete the process on Wednesday, 18 April 2001. During her lunch break on Tuesday, Norris, driving the Blazer, collided with a car in which plaintiff was riding. Plaintiff sued both Norris and S&J for her personal injuries. Nationwide denied coverage. Plaintiff obtained judgment against Norris and S&J; after ex-

haustion of S&J's liability policy, Norris remained indebted for an amount less than $10,000.

Nationwide argues that the court erred in finding coverage under its policy with Norris. We disagree.

This case involves application of the "non-owned vehicle" coverage required by the North Carolina Motor Vehicle Safety and Financial Responsibility Act. N.C. Gen. Stat.§ 20-279.1, *et seq.* (2001). These statutes require that a "policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon [her] by law for damages arising out of the use by [her] of any motor vehicle not owned by [her]. . ." subject to certain limits. N.C. Gen. Stat. § 20-279.21(c) (2001). North Carolina is a strict "title" state with regard to ownership of motor vehicles. N.C. Gen. Stat. § 20-4.01(26) defines an owner as the "person holding the legal title to the vehicle." Because Norris did not hold legal title to the Blazer at the time of the collision, she was not the owner.

"[A]ll cars which are not owned within the meaning of G.S. 20-72(b) are insured 'non-owned' automobiles except those which are furnished for the regular use of the insured or his relative." *Gaddy v. State Farm Mut. Auto. Ins. Co.*, 32 N.C. App. 714, 716, 233 S.E.2d 613, 614 (1977). This Court has stated that:

> [t]he clear import of the provision excluding coverage of another's automobile which is furnished the insured for his 'regular use' is to provide coverage to the insured while engaged in only an infrequent or merely casual use of another's automobile for some quickly achieved purpose but to withhold it where the insured uses the vehicle on a more permanent and reoccurring basis.

Devine v. Aetna Casualty & Surety Co., 19 N.C. App. 198, 206, 198 S.E.2d 471, 477, *cert. denied*, 284 N.C. 253, 200 S.E.2d 653 (1973). Nationwide contends that this regular use exclusion prevents its liability here and that this Court's holding in *Gaddy* compels us to reverse the trial court. However, because we believe *Gaddy* is distinguishable, we decline to follow it here.

In *Gaddy*, the Franklins had paid the entire purchase price and had completed their purchase of a Chevrolet. The title had not been transferred because the seller did not have it. This was not an incomplete transaction, awaiting the seller's delivery of title; the seller in *Gaddy* would never be able to deliver title. This Court thus concluded

that the Chevrolet was "furnished for the regular use of" the Franklins because they had done all they could to acquire and exercise dominion and control over the car. The parties in *Gaddy* were not in the midst of a sale that was not quite completed; they had done everything possible to finalize the transfer of ownership. Thus, although the Franklins were not owners of the Chevrolet under this State's strict title scheme, the car was furnished for their regular use. In contrast, at the time of the collision here, Norris was a would-be purchaser in the midst of an unfinished sale and purchase. She had been given only temporary and limited control and possession of the Blazer; in fact, Norris was operating the Blazer under a temporary permit issued on 13 April by S&J for her test drive. Because at the time of the accident the Blazer was not furnished for Norris' regular use, neither the exclusion nor *Gaddy* applies here. Thus, we conclude that the Nationwide policy does provide coverage for Norris driving the Blazer as a non-owned vehicle.

Affirmed.

Judges HUNTER and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 JULY 2005

ADAMS v. ADAMS No. 04-851	Forsyth (00CVD7602)	Affirmed
BRODE v. SWEETWATER, INC. No. 04-883	Onslow (01CVS788)	Affirmed
DAUGHERTY v. MOUNTAIN CONSTR. ENTERS., INC. No. 04-1177	Ind. Comm. (I.C. #120931)	Appeal dismissed
FAISON v. AMERICAN NAT'L CAN CO. No. 04-1297	Ind. Comm. (I.C. #628691)	Affirmed in part, remanded in part
GOUGH v. N.C. STATE BD. OF EXAM'RS OF PLUMBING, HEATING & FIRE SPRINKLER CONTR'RS No. 04-926	Yadkin (03CVS75)	Affirmed
IN RE J.D. No. 04-1253	Sampson (03J87)	Vacated and remanded for additional findings of fact
IN RE J.S.H. No. 04-1152	Buncombe (99J79(F))	Affirmed
IN RE K.L.S. & D.L.C. & C.M.C. No. 04-1328	McDowell (01J88) (01J89) (01J90)	Remanded
IN RE L.G. No. 04-1531	Catawba (02J281)	Affirmed
IN RE M.S. No. 04-1153	Catawba (01J243)	Affirmed
IN RE M.T.G. No. 04-1212	Lee (03J43)	Affirmed
IN RE R.H. No. 04-1321	Durham (04J56)	Affirmed
IN RE T.C., T.C., T.C., T.C. No. 04-1021	Wilkes (98J130) (98J131) (98J132) (02J193)	Affirmed
JONES v. GEORGIA PACIFIC CO. No. 04-1473	Ind. Comm. (I.C. #132183)	Dismissed

LIFETIME WINDOWS & SIDING, INC. v. McLAWHON No. 04-1444	Pitt (02CVD1903)	Dismissed
MORTON v. N.C. DEP'T OF CORR. No. 04-1262	Ind. Comm. (I.C. #TA-17130)	Affirmed
NOBLOT v. TIMMONS No. 04-1523	Lincoln (03CVS222)	Dismissed
NORMAN v. BRANNER No. 04-1032	Mecklenburg (02CVS755)	Affirmed
PAGE v. UNC CHAPEL HILL No. 04-1218	Ind. Comm. (I.C. #696704) (I.C. #055882)	Dismissed
POWERS v. APAC-CAROLINA/BARRUS No. 04-861	Ind. Comm. (I.C. #084629)	Affirmed
SKEEN v. SPORTS AUTH., INC. No. 04-976	Gaston (02CVS2186)	Dismissed
STATE v. BALL No. 04-1582	Henderson (03CRS55975) (04CRS2631)	No error
STATE v. BEATTY No. 04-1375	Durham (02CRS44625)	No prejudicial error
STATE v. COFFIN No. 04-425	Durham (01CRS50252)	Motion for appropriate relief is granted. Remanded for resentencing
STATE v. DOELMAN No. 04-1492	Pitt (03CRS65794) (03CRS65556) (03CRS65557) (03CRS65558) (03CRS65559)	No error
STATE v. DUNN No. 04-1512	Lenoir (03CRS53866)	No error
STATE v. HARRIS No. 04-1132	Alamance (03CRS52704) (03CRS55420)	No error
STATE v. HAYES No. 04-1550	Yadkin (03CRS51098) (03CRS51101) (03CRS51104) (04CRS145)	Motion denied; judgment affirmed

	(03CRS51274) (03CRS51275) (03CRS51278) (03CRS51280)	
STATE v. HERNDANDEZ No. 04-358	Cumberland (01CRS54636)	No error
STATE v. HOLMAN No. 04-962	Durham (02CRS045019) (03CRS013559)	No error
STATE v. IVEY No. 04-1420	Mecklenburg (02CRS240940) (02CRS240941)	Affirmed
STATE v. JONES No. 04-1233	Scotland (02CRS51328)	No error
STATE v. KEY No. 04-1525	Nash (02CRS50991)	Dismissed
STATE v. LEMASTER No. 04-1363	Wayne (03CRS57329A)	No error
STATE v. LONGS No. 04-1438	Columbus (02CRS1261) (02CRS50910) (02CRS50911)	Affirmed; remanded for correction of clerical error in the judgment
STATE v. LUTTERLOAH No. 04-1471	New Hanover (01CRS13586)	No error
STATE v. MARSH No. 04-732	Randolph (01CRS53837)	No error, remanded with instructions
STATE v. McTAGGART No. 04-1190	Cherokee (03CRS2432)	Vacated and remanded for a new trial
STATE v. MOLIERRE No. 04-1569	Wake (03CRS44288) (03CRS44289) (03CRS44290)	No error
STATE v. PEREZ No. 04-1507	Carteret (03CRS50247)	No error
STATE v. POLLARD No. 04-1309	Edgecombe (02CRS53138)	No error
STATE v. PRINCE No. 04-1255	Forsyth (02CRS60410) (03CRS105)	No error

STATE v. RATHBONE No. 04-1303	Haywood (03CRS1767)	No error
STATE v. ROBBINS No. 04-1039	Guilford (03CRS75173) (03CRS75174) (03CRS75175) (03CRS75176)	Vacated and remanded
STATE v. SCOTT No. 04-1479	Robeson (02CRS55918)	No error
STATE v. SHABAZZ No. 04-1232	Rowan (03CRS57917) (03CRS11943) (03CRS11944)	No error
STATE v. TRUESDALE No. 04-1465	Forsyth (03CRS37610)	No error
STATE v. WILLIAMS No. 04-266	Wayne (03CRS50173) (02CRS54559) (03CRS2859)	Remanded
STATE v. WILLIAMS No. 04-1276	Guilford (02CRS105954)	No error
WALKER v. TIPPETT No. 04-1359	Anson (04CVS243)	Affirmed
WEISBERG v. GRIFFITH No. 04-380	New Hanover (02CVD3939)	Affirmed in part, vacated in part and remanded
WESTWOOD INDUS., INC. v. AESTHETIC, INC. No. 04-1422	Catawba (01CVS2552)	Appeal dismissed

STATE OF NORTH CAROLINA v. MICAH LEE TUTT

No. COA04-821

(Filed 19 July 2005)

1. Appeal and Error— preservation of issues—necessity of objection at trial—rulemaking authority of Supreme Court

The Constitution of North Carolina vests the Supreme Court with the exclusive authority to make rules of practice and procedure for the appellate courts. Although N.C.G.S. § 8C-1, Rule 103(a)(2)(2004) permits appellate review of an evidentiary ruling without an objection at trial when the trial court has made a definitive ruling on the record admitting or excluding the evidence either at or before trial, that statute is inconsistent with Appellate Rule 10(b)(1). Although this defendant did not object at trial and preserve for appeal his objection to a photographic lineup, the merits of defendant's claim were addressed in the Court's discretion to prevent manifest injustice.

2. Identification of Defendants— photographic lineup—not unduly suggestive

A photographic lineup was not impermissibly suggestive where the photographs were not unduly suggestive and the evidence, although conflicting, supported the court's findings concerning the manner of the lineup.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered 21 November 2003 by Judge Catherine C. Eagles in Superior Court, Guilford County. Heard in the Court of Appeals 8 March 2005.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly W. Duffley, for the State.

Terry F. Rose for defendant-appellant.

WYNN, Judge.

The Constitution of North Carolina vests our Supreme Court with exclusive authority to make rules of practice and procedure for the appellate division of the courts. N.C. Const. Art. IV, § 13 (2). In this case, N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2004) permits appellate review of an evidentiary ruling even though the party fails to object

at trial as required by N.C. R. App. P. 10(b)(1). Because N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) is inconsistent with N.C. R. App. P. 10(b)(1), we hold that the statute must fail. Nonetheless, in our discretion, we have reviewed the assignment of error and affirm the trial court's admission of the evidence.

The underlying facts of this matter tend to show that on 5 November 2002, Defendant Micah Lee Tutt and his brother entered a Quick Mart convenience store owned by Anh Vu's family in Greensboro, North Carolina. The door to the store was kept locked, and the owner's daughter let the two men in. Anh Vu ran to the front of the store after hearing her daughter start screaming. Defendant ran toward Anh Vu, pointed a large knife at her stomach, and pushed her to the cash register. When Anh Vu did not open the cash register, Defendant poked a hole into her stomach, which later became infected. Anh Vu opened the cash register, Defendant and his brother took cash and cigarettes, then fled the store.

After the robbery, J. R. Labarre, an officer with the Greensboro Police Department, arrived at the store. He took the store's security tape, which recorded the robbery, as evidence. He also interviewed Anh Vu, through an interpreter, and obtained a description of the robbers. She described one of the robbers as being an African-American male, about eighteen to nineteen-years-old, short hair, and wearing a gray jacket with writing on the front.

Detective G. R. Marks, also assigned to the case, made a photograph from the security tape to send to other districts in an attempt to locate the suspects. On 13 November 2002, Defendant was arrested on unrelated charges. The arresting officer noticed that Defendant matched the description of the Quick Mart robber and his jacket was similar. The officer notified Detective Marks of the arrest.

Thereafter, Detective Marks created a photographic lineup, consisting of Defendant and five other African-American males of a similar description. Anh Vu identified Defendant from the lineup as one of the robbers. Detective Marks testified that this was the first photograph of Defendant he showed Anh Vu. However, Anh Vu gave inconsistent testimony as to whether the first photograph she saw was the lineup or an individual photograph of Defendant wearing a gray jacket with writing.

Defendant was indicted for robbery with a dangerous weapon and conspiracy. On 3 November 2003, Defendant filed a written motion to suppress the pretrial photographic lineup identification.

Following a pretrial hearing, the trial court orally denied the motion to suppress, finding that the photographic lineup was not "unduly suggestive." The photographic lineup was admitted into evidence at trial, without objection by Defendant, and Anh Vu identified Defendant in court.

Defendant was found guilty by a jury of robbery with a dangerous weapon and conspiracy. The trial court sentenced Defendant to twenty-seven to forty-two months imprisonment for the conspiracy charge and a consecutive sentence of 103 to 133 months imprisonment for the robbery with a dangerous weapon charge. Defendant appeals.

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[1] Although Defendant failed to object at trial to the admission of the photographic lineup evidence, he argues on appeal that the trial court erred in denying his motion to suppress the pretrial photographic lineup identification.

A pretrial motion to suppress is a type of motion *in limine*. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 84 (2004). Our Supreme Court has consistently held that "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam) (citations omitted); *see also State v. Dennison*, 359 N.C. 312, 608 S.E.2d 756 (2005) (per curiam) (in light of discussion below the trial judgment was on 20 May 2002, before the amendment); *Martin v. Benson*, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (1998); N.C. R. App. P. 10(b)(1). 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." *T & T Dev. Co. v. S. Nat'l Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997) (citation omitted). Therefore, Tutt's pretrial motion to suppress is not sufficient to preserve for appeal the question of the admissibility of the photographic lineup because he did not object at the time the lineup was offered into evidence.

The General Assembly, however, recently amended Rule 103(a) of the North Carolina 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. Gen. Stat. § 8C-1, Rule 103(a)(2) (2004). This amendment applies to rulings made on or after 1 October 2003. 2003 N.C. Sess. Laws ch. 101. As the trial in the instant case began on 18 November 2003, the amended Rule 103(a) is applicable.

However, Rule 103(a)(2) of the North Carolina Rules of Evidence is in direct conflict with Rule 10(b)(1) of the Rules of Appellate Procedure as interpreted by our case law on point.[1] Under the Constitution of North Carolina, "[t]he Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const. Art. IV, § 13 (2). Thus, we address whether N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) seeks to make a rule of "procedure and practice for the Appellate Division" that lies within the exclusive authority of our Supreme Court.

In *State v. Stocks*, 319 N.C. 437, 355 S.E.2d 492 (1987), our Supreme Court addressed a similar issue wherein it struck down N.C. Gen. Stat. § 15A-1446(d)(5) (1986) to the extent that it conflicted with N.C. R. App. P. 10(b)(3).

> N.C.G.S. 15A-1446(d)(5) provides that errors based upon insufficiency of the evidence may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. N.C.R. App. P. 10(b)(3), however, provides that a defendant '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.' To the extent that N.C.G.S. 15A-1446(d)(5) is inconsistent with N.C.R. App. P. 10(b)(3), the statute must fail. *Citations omitted.*

Stocks, 319 N.C. at 439, 355 S.E.2d at 493.

Moreover, in *State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983), our Supreme Court addressed this issue wherein it struck down N.C. Gen. Stat. § 15A-1446(d)(13) (1982) and part of N.C. Gen. Stat. § 15A-1231(d) (1982) to the extent that it conflicted with N.C. R. App. P. 10(b)(2).

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1. The amendment to Rule 103 is in direct conflict with our Supreme Court's interpretation of Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure. *See Dennison*, 359 N.C. 312, 608 S.E.2d 756; *Hayes*, 350 N.C. at 80, 511 S.E.2d at 303. As the Supreme Court has the Constitutional authority to make "rules of procedure and practice" for the State's appellate courts, we defer to its interpretation of Rule 10(b)(1).

> G.S. 15A-1446(d)(13) allows for appellate review of errors in the charge to the jury 'even though no objection, exception or motion has been made in the trial division.' Rule 10(b)(2) states: 'No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . .' Rule 10(b)(2) is a rule of appellate practice and procedure, promulgated by the Supreme Court pursuant to its exclusive authority under the Constitution of North Carolina, Article IV, Section 13(2). To the extent that G.S. 15A-1446(d)(13) is inconsistent with Rule 10(b)(2), the statute must fail. *See State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981). We also note that G.S. 15A-1231(d) states in part that '[f]ailure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13).' Inasmuch as this section also conflicts with Rule 10(b)(2), it too must fail.

Bennett, 308 N.C. at 535; 302 S.E.2d at 790.

Similarly, our Supreme Court addressed this issue in *State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981), when it struck down N.C. Gen. Stat. § 15A-1446(d)(6) (1980) to the extent that it conflicted with N.C. R. App. P. 10 and 14(b)(2).

> G.S. 15A-1446 (d) (6) [] provides:
>
> Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.
>
> (6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.
>
> Subsection (6) of G.S. 15A-1446 (d) is in direct conflict with Rules 10 and 14 (b) (2) of the Rules of Appellate Procedure and our case law on the point. The Constitution of North Carolina provides that '[t]he Supreme Court shall have exclusive authority to make rules of practice and procedure for the Appellate Division.' N.C. Const. Art. IV § 13 (2). The General Assembly was without authority to enact G.S. 15A-1446 (d) (6). It violates our Constitution.

Elam, 302 N.C. at 160, 273 S.E.2d at 664.

As in *Stocks*, *Bennett*, and *Elam*, the statute in this case, N.C. Gen. Stat. § 8C-1, Rule 103(a)(2), seeks to make a rule of practice or procedure for the Appellate Division. Moreover, analogous to the statutes in those cases, Rule 103(a)(2) would allow appellate review of an evidentiary ruling even though the party failed to follow the Supreme Court's procedural requirements under N.C. R. App. P. 10(b)(1) mandating that the party further object at trial.

The "dissenting" opinion[2] states that Rule 103 is a rule of evidence and not one of practice and procedure for the appellate courts because it is placed in the Evidence Code of the North Carolina General Statutes. However, "[t]he law is clear that captions of a statute cannot control when the text is clear." *In re Appeal of Forsyth County*, 285 N.C. 64, 71, 203 S.E.2d 51, 55 (1974) (citing *In re Chisholm's Will*, 176 N.C. 211, 213, 96 S.E. 1031 (1918)). In Rule 103 the text makes it clear that this is a rule of practice and procedure of when evidence is preserved for appellate review. Therefore, regardless of the title and placement of Rule 103 by the General Assembly, the text of the rule makes it one of practice and procedure.

While the separate opinion is lengthy, we point out that we agree with its general statements of law. But we disagree with the conclusion of the separate opinion that Rule 103 is an evidentary rule, not an appellate procedural rule because: (1) the North Carolina Constitution vests with our Supreme Court the authority to make appellate rules of practice and procedure and (2) under N.C. R. App. P. 10(b)(1), our Supreme Court has long held that this rule is one of practice and procedure. *See Dennison*, 359 N.C. 312, 608 S.E.2d 756; *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003); *State v. Grooms*, 353 N.C. 50, 65, 540 S.E.2d 713, 723 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001); *Hayes*, 350 N.C. at 80, 511 S.E.2d at 303; *Martin*, 348 N.C. at 685, 500 S.E.2d at 665.

We further disagree that a valid distinction of our Supreme Court's holdings in *Stocks*, *Bennett*, and *Elam* is that "the statute considered and held to be in conflict in each case was N.C. Gen. Stat. § 15A-1446 . . . ." Following that logic would lead to the absurd conclusion that if the General Assembly had moved its enactments

2. Since the separate opinion does not address whether the trial court erred in denying Defendant's motion to suppress, there is no dissent from the ultimate issue presented on appeal. Accordingly, any appeal should be directed towards obtaining discretionary review, which we urge our Supreme Court to grant in this case because of the importance of deciding the Rule 103 issue.

in *Stocks*, *Bennett*, and *Elam* to the evidence section, chapter 8C-1 of the North Carolina General Statutes, rather than under section 15A-1446, then our Supreme Court would have found those acts to have been constitutional. Instead, the common element of *Stocks*, *Bennett*, and *Elam* is that in each instance, our Supreme Court had enacted a rule of appellate practice and procedure under the authority granted to it under our Constitution, which the General Assembly sought to contravene by enacting contrary legislation. Likewise, in this case, our Supreme Court has enacted N.C. R. App. P. 10(b)(1), which the General Assembly seeks to contravene by enacting contrary legislation.

Finally, a protracted discussion of the identical Federal Rules of Evidence Rule 103 has no applicability to the issue in this case because North Carolina has, under section thirteen of its Constitution, granted our Supreme Court the exclusive authority to make rules of practice and procedure for the appellate division of the courts. N.C. Const. Art. IV, §13. In contrast, the United States Constitution has no provision similar to that of section thirteen of the North Carolina Constitution. Accordingly, while in many instances interpretations of identical rules are generally persuasive for this Court, federal case law offers no guidance for deciding this issue.

In sum, we must hold that to the extent that N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) is inconsistent with N.C. R. App. P. 10(b)(1), it must fail.[3] *Stocks*, 319 N.C. at 438-39, 355 S.E.2d at 493; *Bennett*, 308 N.C. at 535, 302 S.E.2d at 790; *Elam*, 302 N.C. at 160, 273 S.E.2d at 664. Accordingly, we hold that Defendant did not properly preserve his objection to the lineup for appellate review. *Golphin*, 352 N.C. at 405, 533 S.E.2d at 198.

Nonetheless, as the Supreme Court did in *Stocks* and *Elam*, because it would be a manifest injustice to Defendant to not review his appeal on the merits after he relied on a procedural statute that was presumed constitutional at the time of trial, we have reviewed the evidence at our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 2; *see also Stocks*, 319 N.C. at 439, 355 S.E.2d at 493 ("While we thus are not compelled to do so, we have nevertheless reviewed the evidence in our discretion . . . ."); *Elam*, 302 N.C. at 161, 273 S.E.2d at 664 ("Within

3. In *State v. Rose*, 170 N.C. App. 284, 612 S.E.2d 336, *pet. for cert. filed* (296P05, 9 June 2005) and *In re S.W.*, 171 N.C. App. 335, —— S.E.2d —— (COA04-1138) (5 July 2005), while this Court cited Rule 103, it neither considered nor addressed the constitutionality of Rule 103.

our discretion, and in the exercise of our supervisory powers, we have decided to address the merits of defendant's constitutional claims."). After review, we conclude that the trial court did not err in denying the motion to suppress as the lineup was not impermissibly suggestive.

[2] When a motion to suppress identification testimony is made, the trial judge must conduct a *voir dire* hearing and make findings of fact to support his conclusion of law and rule as to the admissibility of the evidence. "When the facts found are supported by competent evidence, they are binding on the appellate courts." *State v. Freeman*, 313 N.C. 539, 544, 330 S.E.2d 465, 470 (1985). Although the trial judge in the instant case did not make written findings of fact and conclusions of law, she did issue oral findings and conclusions, albeit not separated.

Identification procedures so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification violate a defendant's right to due process. *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983); *State v. Leggett*, 305 N.C. 213, 220, 287 S.E.2d 832, 837 (1982). This Court has said that to determine the suggestiveness of pretrial identification, the test is whether the totality of circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice. *Id.* If an identification procedure is not impermissibly suggestive, the inquiry is ended. *Freeman*, 313 N.C. at 544, 330 S.E.2d at 471. If the procedure is impermissibly suggestive, then it is necessary to determine whether "all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification." *State v. Grimes*, 309 N.C. 606, 609, 308 S.E.2d 293, 294 (1983).

Due process does not require that all subjects in a photographic lineup be identical in appearance. *State v. Montgomery*, 291 N.C. 91, 100, 229 S.E.2d 572, 579 (1976). Nor is such a lineup impermissibly suggestive merely because the defendant has a distinctive appearance. *Freeman*, 313 N.C. at 545, 330 S.E.2d at 471. All that is required is that the lineup be fair and the investigating officers do nothing to induce the witness to select one subject rather than another. *Id.*

We find no substantial evidence of State action in the pretrial identification procedure that was impermissibly suggestive. As to the selection of the photographs used in the pretrial lineup, the trial court found that "[t]here's nothing that highlights the defendant as com-

pared to the other six (sic), and nothing about skin tone that makes one person different from any of the other five in any clear and obvious ways[.]" After reviewing the photographic lineup, we agree with the trial court that none of the five other photographs chosen indicates unfairness, nor are they unduly suggestive.

Defendant also argues that the manner in which Detective Marks showed the pretrial photographic lineup to Anh Vu was unduly suggestive. Defendant contends that from the testimony one could conclude that Detective Marks first showed Anh Vu an individual photograph of Defendant wearing a gray jacket with writing, and then showed Anh Vu the photographic lineup. However, the trial court found that "there was (sic) some differences about [Anh Vu's] testimony there. But the police officer's testimony was clear that he presented the lineup, M—1, to her first. And she picked the defendant's picture out. And only after that would he have shown the individual picture."

Detective Marks testified at the hearing that, although he was unsure of if he showed an individual picture of Defendant to Anh Vu, he would never have shown an individual picture to a witness before a lineup. However, there was some confusion as to Anh Vu's testimony. While the trial court recognized the witness's confusion, it gave weight to Detective Marks's testimony. As there is competent evidence in the record to support this finding of fact, it is binding on appeal. *Freeman*, 313 N.C. at 544, 330 S.E.2d at 470. Therefore, we agree with the trial court's conclusion of law that the manner in which the police showed the witness the photographic lineup was not unduly suggestive.

As the pretrial photographic lineup procedures were not impermissibly suggestive, the inquiry ends here. *Grimes*, 309 N.C. at 609, 308 S.E.2d at 294.

Affirmed.

Judge ELMORE concurs.

Judge TYSON dissents.

Tyson, Judge dissenting.

The majority holds N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) is inconsistent with Rule 10(b)(1) of the North Carolina Rules of Appellate

Procedure and strikes down as unconstitutional the General Assembly's enactment amending North Carolina's Rules of Evidence. Rule 103(a)(2) is a statutory rule of evidence, not of appellate procedure or practice. I respectfully dissent.

I. Standard of Review

A presumption exists that "any act passed by the legislature is constitutional, and the court will not strike it down if [it] can be upheld on any reasonable ground." *Ramsey v. Veterans Commission*, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964) (citations omitted). The unconstitutionality of the statute must appear beyond a reasonable doubt. *Turner v. Reidsville*, 224 N.C. 42, 46, 29 S.E.2d 211, 214 (1944); *Assurance Co. v. Gold, Comr. of Insurance*, 249 N.C. 461, 463, 106 S.E.2d 875, 876 (1959) ("Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond a reasonable doubt.").

II. Rules of Procedure and Practice

Our Supreme Court, under both constitutional and statutory authority, promulgates the North Carolina Rules of Appellate Procedure which includes requirements for the preservation of issues for review by the appellate courts. *See* N.C. Const. Art. IV § 13(2) ("The Supreme Court shall have exclusive authority to make rules of *procedure and practice* for the Appellate Division.") (emphasis supplied); *see also* N.C. Gen. Stat. § 7A-33 (2003) ("The Supreme Court shall prescribe rules of *practice and procedure* designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division.") (emphasis supplied). However, it is the power of the General Assembly, not the courts, to adopt Rules of Evidence and Civil Procedure. *State v. Lassiter*, 13 N.C. App. 292, 297, 185 S.E.2d 478, 482 (1971) ("It is well settled in this State that it is within the power of the General Assembly to change the rules of evidence . . . .") (citation omitted), *cert. denied*, 280 N.C. 495, 186 S.E.2d 514 (1972); *Bockweg v. Anderson*, 328 N.C. 436, 452, 402 S.E.2d 627, 637 (1991) ("the General Assembly is the sole source of the North Carolina Rules of Civil Procedure, unless this authority is expressly delegated to the Supreme Court") (citations omitted).

A. N.C. Gen. Stat. § 15A-1446(d)

Our Supreme Court has interpreted N.C. Const. Art. IV § 13(2) as authority for the Court to strike down conflicting criminal procedure statutes enacted by the General Assembly purportedly governing

appellate procedure and practice. *Elam*, 302 N.C. at 160-61, 273 S.E.2d at 664 (N.C. Gen. Stat. § 15A-1446(d)(6) "is in direct conflict with Rules 10 and 14(b)(2) of the Rules of Appellate Procedure . . . ."); *Bennett*, 308 N.C. at 532-33, 302 S.E.2d at 788 (Appellate Rule 10(b)(2) is in conflict with N.C. Gen. Stat. § 15A-1446(d)(13)); *Stocks*, 319 N.C. at 439, 355 S.E.2d at 493 (N.C. Gen. Stat. § 15A-1446(d)(5) is in conflict with Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure); *State v. Spaugh*, 321 N.C. 550, 552-53, 364 S.E.2d 368, 370 (1988) (N.C. Gen. Stat. § 15A-1446(d)(5) is in conflict with Rule 10(b)(3)); *State v. Richardson*, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995) (N.C. Gen. Stat. § 15A-1446(d)(5) is in conflict with Rule 10(b)(3)); *State v. O'Neal*, 77 N.C. App. 600, 603-04, 335 S.E.2d 920, 923 (1985) (N.C. Gen. Stat. § 15A-1446(d)(5) is in conflict with Rule 10 of the North Carolina Rules of Appellate Procedure); *State v. Bradley*, 91 N.C. App. 559, 563-64, 373 S.E.2d 130, 132-33 (1988) (N.C. Gen. Stat. § 15A-1446(d)(5) is in conflict with Rule 10(b)(3)), *disc. rev. denied*, 324 N.C. 114, 377 S.E.2d 238 (1989); *State v. Hinnant*, 131 N.C. App. 591, 596-97, 508 S.E.2d 537, 540 (1998) (N.C. Gen. Stat. § 15A-1446(d)(5) is in conflict with Rule 10(b)(3)), *rev'd on other grounds*, 351 N.C. 277, 523 S.E.2d 663 (2000); *State v. Moore*, 132 N.C. App. 197, 201-02, 511 S.E.2d 22, 25 (N.C. Gen. Stat. § 15A-1446(d)(5) is in conflict with Rule 10(b)(3)), *cert. denied and appeal dismissed*, 350 N.C. 103, 525 S.E.2d 469 (1999).

Three cases above, *Stocks*, *Bennett*, and *Elam*, are cited in the majority's opinion as authority to support its holding that N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) constitutionally fails. These cases are inapposite and do not support the conclusion reached by the majority.

In *Stocks*, the defendant argued the trial court erred in denying his motion to dismiss at the conclusion of the State's evidence. 319 N.C. at 438-39, 355 S.E.2d at 492-93. The defendant did not renew his motion to dismiss after offering evidence. *Id.* N.C. Gen. Stat. § 15A-1446(d)(5) provided at the time that such renewals were unnecessary to preserve error based upon insufficiency of the evidence for appellate review. *Id.* This statute was held to be in conflict with Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure which requires renewal of the motion to dismiss at the close of all evidence. *Id.* Our Supreme Court held the "statute must fail" to the extent it was inconsistent with Rule 10(b)(3). *Id.*

In *Bennett*, the defendant argued the jury instructions were improper. 308 N.C. at 532, 302 S.E.2d at 788. However, defendant

failed to request instructions or to object to the instructions given before the jury retired. *Id.* at 535, 302 S.E.2d at 790. At the time, N.C. Gen. Stat. § 15A-1446(d)(13) permitted appellate review of jury instructions "even though no objection, exception or motion has been made in the trial division." *Id.* (citing N.C. Gen. Stat. § 15A-1446(d)(13)). Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure states, "No party may assign error to any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider the verdict . . . ." *Id.*; N.C.R. App. R. 10(b)(2). Our Supreme Court followed this Court's discussion of the conflict between N.C. Gen. Stat. § 15A-1446(d)(13) and Rule 10(b)(2) and held, "[t]o the extent [it] is inconsistent with Rule 10(b)(2), the statute must fail." *Id.*

In *Elam*, the defendant argued for the first time on appeal his conviction violated his constitutional rights. 302 N.C. at 159, 273 S.E.2d at 663. This Court overruled his argument for failing to raise the issue before the trial court in violation of Rule 14(b)(2) of the North Carolina Rules of Appellate Procedure. *Id.* at 160, 273 S.E.2d at 664. The defendant appealed to our Supreme Court arguing this Court erred in overruling "his constitutional attack" of the statute, in contravention of N.C. Gen. Stat. § 15A-1446(d)(6). *Id.* N.C. Gen. Stat. § 15A-1446(d)(6) provided that an objection, exception, or motion was not necessary to preserve errors based upon "[t]he defendant [being] convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina." *Id.* The Court held N.C. Gen. Stat. § 15A-1446(d)(6) was "in direct conflict with Rules 10 and 14(b)(2) of the Rules of Appellate Procedure . . . ." *Id.*

The common element in all of the cases listed above, including those cited within the majority's opinion, is the statute considered and held to be in conflict in each case was N.C. Gen. Stat. § 15A-1446 entitled, Requisites for preserving the right to appeal. This statute is found within Chapter 15A, The Criminal Procedure Act and Article 91 entitled, Appeal to Appellate Division. The conflicting provisions stricken were all located within subsection (d) which begins, "[e]rrors based [upon any of] the following grounds, which are asserted to have occurred, *may be the subject of appellate review* even though no objection, exception or motion has been made in the trial division." N.C. Gen. Stat. § 15A-1446(d) (emphasis supplied).

Here, Rule 103 sets out instances where an objection, exception, or motion is not necessary in order to preserve *an issue for appellate*

review, and uniformly applies to all civil, criminal, and administrative proceedings where the Rules of Evidence apply.

B. N.C. Gen. Stat. § 1A-1, Rule 46(a)(1)

North Carolina's appellate courts have previously upheld legislative exceptions to the appellate rules requiring an objection to preserve error for appellate review. Under N.C. Gen. Stat. § 1A-1, Rule 46(a)(1) (2003), "when there is an objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning." This rule operates "to preserve the continued effect of a specific objection, once made, to a particular line of questioning." *Power Co. v. Winebarger*, 300 N.C. 57, 68, 265 S.E.2d 227, 233 (1980); *see also Dep't of Transportation v. Fleming*, 112 N.C. App. 580, 586, 436 S.E.2d 407, 411 (1993) ("Rule 46(a)(1) . . . preserves the effect of a seasonably made objection to a specified line of questioning.") (citing N.C. Gen. Stat. § 1A-1, Rule 46(a)(1)).

III. Rule 103

A. Federal Rule of Evidence

In 2000, Federal Rule of Evidence 103 was amended to include additional language. Fed. R. Evid. 103. Under the Federal Rule, a new paragraph was added at the end of the rule separate from, cumulative of, and equally applicable to subsections (1) and (2):

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> 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.

Id. (emphasis supplied).

All federal courts that have considered the 2000 amendment in either a civil, criminal, or administrative context have upheld its validity and not voiced *any* concerns regarding encroachment upon their appellate rule making or procedural authority. *Dell Computer Corp. v. Rodriguez*, 390 F.3d 377, 387 (5th Cir. 2004) ("A renewed objection at trial is no longer required to preserve error."); *United States v. Malik*, 345 F.3d 999, 1001 (8th Cir. 2003) (holding a pretrial objection preserved the issue for review under Rule 103(a) of the Federal Rules of Evidence); *Micro Chemical, Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1391 (Fed. Cir. 2003) (Pursuant to Rule 103, the plaintiff's contention that the defendants waived their right to challenge on appeal the admission of an expert's testimony is rejected.); *Crowe v. Bolduc*, 334 F.3d 124, 133-34 (1st Cir. 2003) ("Our circuit rule has now been codified in a 2000 amendment to Rule 103, Federal Rules of Evidence."); *United States v. Brown*, 303 F.3d 582, 600 (5th Cir. 2002) ("As the Advisory Committee Notes to Rule 103 make clear, '[w]hen the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity.' "), *cert. denied*, 537 U.S. 1173, 154 L. Ed. 2d 915 (2003); *United States v. Harrison*, 296 F.3d 994, 1002 (10th Cir. 2002) (The 2000 amendment to Rule 103 provides parties need not renew an objection "once the Court makes a definitive ruling.") (citing Fed. R. Evid. 103), *cert. denied*, 537 U.S. 1134, 154 L. Ed. 2d 825 (2003); *Mathis v. Exxon Corp.*, 302 F.3d 448, 459 (5th Cir. 2002) (a pretrial objection was sufficient to preserve error of proposed expert testimony for appellate review); *Elsayed Mukhtar v. Cal. State University, Hayward*, 299 F.3d 1053, 1062-63 (9th Cir. 2002) (Citing Rule 103(a)(2), the court held a "[c]ontemporaneous objection is not required where, as here, the trial court definitively ruled on a motion *in limine* after exploring [the defendant's] objection."), *amended by*, 519 F.3d 1073 (9th cir. 2003); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 791-92 (6th Cir. 2002) (the defendant did not waive introduction of expert testimony by not renewing proper objection in pretrial hearing), *cert. denied*, 537 U.S. 1148, 154 L. Ed. 2d 850 (2003).

Federal cases, although not binding on this Court, are instructive and persuasive authority. *House v. Hillhaven, Inc.*, 105 N.C. App. 191, 195, 412 S.E.2d 893, 896, *disc. rev. denied*, 331 N.C. 284, 417 S.E.2d 252 (1992). When the North Carolina rule of evidence is "identical" to

the Federal rule, "[t]he intent is to make applicable, as an aid in construction, the federal decisional law construing identical or similar provisions of the Federal Rules of Evidence." N.C. Gen. Stat. § 8C-1, Rule 102 commentary. "[T]hese rules are not adopted in a vacuum. A substantial body of law construing these rules exists and should be looked to by the courts for enlightenment and guidance in ascertaining the intent of the General Assembly in adopting these rules." *Id.*

B. North Carolina Rule of Evidence

Rule 103 of the North Carolina Rules of Evidence contained verbatim language to that of the Federal Rule of Evidence prior to its amendment in 2000. Effective 1 October 2003, the General Assembly amended Rule 103 by adding the following language to subsection (a)(2): "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." 2003 N.C. Sess. Laws ch. 101, §§ 1-2. The language of the amendment is verbatim with Rule 103 of the Federal Rules of Evidence and Rule 103 of the Uniform Rules of Evidence. *Id.*; Fed. R. Evid. 103.

The basis for and intent of the amendment to the North Carolina rule is to follow the format and language of Federal Rule 103. 2003 N.C. Sess. Laws ch. 101, §§ 1-2 ("An Act conforming Rule 103 of the North Carolina Rules of Evidence to the corresponding Federal Rule."). Despite the published version showing this added language under subsection (a)(2), the General Assembly clearly intended to apply the amendment to *both* objections under subsection (a)(1) and offers of proof under subsection (a)(2). The language in the amendment addresses and applies to both subsections.

This Court recently considered amended Rule 103 in *State v. Rose*, 170 N.C. App. 284, 288, 612 S.E.2d 336, 339 (2005) and in *In re S.W.*, 171 N.C. App. 335, 337, 614 S.E.2d 424, 426 (2005). In *Rose*, the defendant's sole argument on appeal was the trial court erred in denying his pretrial motion to suppress evidence. 170 N.C. App. at 287, 612 S.E.2d at 338. The defendant failed to object when the evidence he had sought to suppress was offered at trial. *Id.* at 288, 612 S.E.2d at 339. We held that under the amendment to Rule 103, effective 1 October 2003, "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." *Id.*

In *In re S.W.*, the juvenile filed a motion to suppress evidence obtained during an alleged illegal search, which the trial court denied. 171 N.C. App. at 337, 614 S.E.2d at 426. The juvenile did not object when the evidence was admitted during trial. However, we held:

> the juvenile properly preserved his assignment of error by objecting when the trial court denied his motion to suppress in conformity with the amended North Carolina Rules of Evidence 103. N.C. Gen. Stat. § 8C-1, Rule 103 (2003); 2003 N.C. Sess. Laws ch. 101, §§ 1-2 (effective 1 October 2003); *see also State v. Rose*, 170 N.C. App. 284, 288, 612 S.E.2d 336, 339 (2005) (holding once the trial court denied the defendant's motion to suppress, he was not required to object again to preserve argument for appeal).

Id. at 337, 614 S.E.2d at 426; *see also In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.") (citations omitted).

IV. The Majority's Opinion

The majority's holding will adversely affect forum selection by creating a conflict between the North Carolina and Federal Rules of Evidence. *See State v. Bogle*, 324 N.C. 190, 202-03, 376 S.E.2d 745, 752 (1989) ("[T]here is merit in uniformity of interpretation of similar rules by state and federal courts. The commentary to Rule 102 (purpose and construction of our Rules of Evidence) notes that federal precedents are not binding on our courts in construing the rules. However, '[u]niformity of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and should be a goal of our courts in construing those rules that are identical.' N.C.G.S. § 8C-1, Rule 102 commentary (1988).").

Application of Article IV, § 13(2) of the North Carolina Constitution to strike the General Assembly's enactments which prescribe rules of procedure or practice for the appellate courts has been solely limited to N.C. Gen. Stat. § 15A-1446(d), a criminal procedure statute. The North Carolina case law cited above and by the majority's opinion focuses exclusively on N.C. Gen. Stat. § 15A-1446, which does not directly concern alleged error resulting from a trial court's decision to admit or suppress evidence during a pretrial hearing. No North Carolina case law or any authority cited within the majority

opinion indicates not preserved errors and omitted objections considered by our appellate courts under N.C. Gen. Stat. § 15A-1446 resulted from the admission or suppression of evidence. The cases cited by the majority's opinion solely concern: (1) sufficiency of evidence; (2) jury instructions; and (3) a statute's constitutionality. Neither the State's brief nor the majority's opinion cite any basis to overcome the presumption of constitutionality of enactments of the General Assembly or to conclude the statute is unconstitutional beyond a reasonable doubt. *Turner*, 224 N.C. at 46, 29 S.E.2d at 214 (citations omitted).

V. Conclusion

Under their express constitutional authority, our General Assembly enacted the additional language of Rule 103 that is identical to the Federal Rule of Evidence and the Uniform Code of Evidence. It is an evidentiary rule, not an appellate procedure rule. The application of Article IV, § 13(2) of the North Carolina Constitution to declare void the General Assembly's enactment of statutes in conflict with the rules of appellate procedure and practice has been limited solely to N.C. Gen. Stat. § 15A-1446, a criminal procedure statute.

Until today, no prior North Carolina court has struck down a rule of evidence as procedurally unconstitutional due to Article IV, § 13(2) of the North Carolina Constitution. This ruling extends beyond the criminal context as the rules of evidence also apply in civil and administrative proceedings.

Rule 103(a)(2) of the North Carolina Rules of Evidence: (1) is presumed constitutional; (2) has not been shown to be unconstitutional beyond a reasonable doubt; and (3) does not conflict with our Rules of Appellate Procedure, despite the majority's bald assertion otherwise.

The majority's opinion holds defendant's objection was not preserved by Rule 103. Defendant does not argue and the majority does not discuss plain error. The majority's opinion fails to follow established precedent of this Court to reach and review the merits of defendant's claims. *See State v. Jordan*, 49 N.C. App. 561, 568, 272 S.E.2d 405, 410 (1980) ("Failure to object at trial is normally held to constitute a waiver of the error."); *State v. Nobles*, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999) (the defendant failed to argue in his brief that the assigned error amounted to plain error, thus, he

waived appellate review) (citing N.C.R. App. P. 10(c)(4), 28(a), and 28(b)(5)). Under the majority's holding that defendant failed to object when the evidence sought to be suppressed was admitted at trial, defendant's appeal should be dismissed for failure to preserve error, waiver, or defendant's failure to assign and argue plain error. I respectfully dissent.

KEITH DANIELS, ADMINISTRATOR OF THE ESTATE OF LORREN ALAINE DANIELS, TONYA KOONCE-DANIELS, AND KEITH DANIELS, INDIVIDUALLY, PLAINTIFFS v. DURHAM COUNTY HOSPITAL CORPORATION D/B/A DURHAM REGIONAL HOSPITAL; DOE CORPORATIONS ONE THROUGH FIVE; AND DOE INDIVIDUALS ONE THROUGH FIVE, DEFENDANTS

No. COA04-338

(Filed 19 July 2005)

1. Hospitals and Other Medical Facilities— nurses' failure to oppose doctor's decision—summary judgment

A nurse may not be liable for obeying a doctor's order unless the order was so obviously negligent that any reasonable person would anticipate substantial injury to the patient. Summary judgment was correctly granted for the hospital here on a claim based on nurses' failure to oppose the doctor's decision to conduct a mid-forceps delivery.

2. Hospitals and Other Medical Facilities— duty to inform patient—nurses

Any duty to obtain informed consent was born by a private physician performing a mid-forceps delivery rather than the nurses and summary judgment was correctly granted for the hospital. Moreover, plaintiffs did not offer evidence that the hospital required its nurses to obtain the signed consent of the hospital's patients.

3. Hospitals and Other Facilities— failure to have policy—no evidence of contents of policy—summary judgment

Summary judgment was correctly granted for a hospital on the issue of whether it should have been liable for not having a policy on mid-forceps deliveries where there was no evidence of the contents of any such policy.

Judge TYSON concurring.

Appeal by plaintiffs from judgment entered 17 October 2002 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 16 February 2005.

Burford & Lewis, PLLC, by Robert J. Burford and James W. Vaughan, for plaintiffs-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Timothy P. Lehan, Christopher G. Smith, and Kelly L. Podger, for defendant-appellee.

GEER, Judge.

Plaintiffs Keith Daniels and his wife Tonya Koonce-Daniels brought suit against defendant Durham County Hospital Corporation ("the Hospital") for the death of their baby, Lorren Alaine Daniels, due to injuries they contend were sustained during her delivery. Plaintiffs have appealed from the trial court's order granting the Hospital summary judgment, arguing that the Hospital is liable based on (1) its nurses' failure to oppose the delivering doctor's decision to perform a mid-forceps delivery, (2) the nurses' failure to obtain plaintiffs' informed consent, and (3) the Hospital's failure to adopt a policy governing mid-forceps deliveries. We affirm the trial court's grant of summary judgment in favor of defendant.

Facts

On 1 September 1995, Ms. Koonce-Daniels was admitted to the Hospital by her private physician, Dr. James Dingfelder, for induction of labor due to her elevated blood pressure. At approximately 7:30 a.m. on 2 September 1995, Nurse Clara Butler Sharpe, an employee of the Hospital, came on duty as Ms. Koonce-Daniels' primary labor and delivery nurse. Nurse Sharpe had worked with Dr. Dingfelder for 18 to 19 years.

At 10:30 a.m., Ms. Koonce-Daniels received an epidural to address her labor pains. Her labor continued through the afternoon without any signs of fetal distress or maternal compromise. At 3:55 p.m., Ms. Koonce-Daniels was in the second stage of labor, the point at which she would normally push the baby down further into the birth canal to complete a normal vaginal delivery. Nurse Sharpe assessed Ms. Koonce-Daniels at this time and noted that her vital signs were "stable" and that the baby's heart rate was "normal." Dr. Dingfelder, however, performed a vaginal examination of Ms. Koonce-Daniels

and determined that the baby was in an "occiput posterior" position, looking up at her mother's stomach, rather than in the normal position, looking down towards her mother's back.

Dr. Dingfelder made the decision to perform a forceps delivery rather than to allow Ms. Koonce-Daniels to begin pushing and attempt a normal vaginal delivery. At this point, the baby was at a "plus-two" station in the birth canal. In other words, she had not yet proceeded far enough along in the birth canal for her head to be visible during contractions. A forceps delivery performed upon such a baby is known as a "mid-forceps" delivery. At 4:04 p.m., Dr. Dingfelder used forceps to rotate the baby 180 degrees to the proper anterior position and then to deliver the baby. He was assisted in the delivery by Nurse Sharpe and Nurse Kay Parker (also an employee of the Hospital).

When Lorren was delivered at 4:18 p.m., she was unresponsive, blue in color, and not breathing. Subsequent examination revealed that she had been born with a cervical spine injury. She was paralyzed from the neck down and unable to breathe on her own. Lorren died from this spinal injury on 11 April 1996.

In 1997, plaintiffs filed suit against Dr. Dingfelder and the Hospital and its agents, alleging joint and several liability for negligence and medical malpractice arising out of Lorren's spinal injury and death. Plaintiffs voluntarily dismissed their claims against the Hospital in 1998 and later entered into a settlement agreement with Dr. Dingfelder. On 19 February 1999, plaintiffs re-filed their claims against the Hospital, asserting causes of action for negligence and negligent infliction of severe emotional distress.

After filing an answer and after completion of discovery, the Hospital moved for summary judgment. In response, plaintiffs contended that the Hospital was liable based on *respondeat superior* (1) for its nurses' failure to oppose the doctor's decision to perform a mid-forceps delivery by either refusing to assist in the procedure or by invoking the hospital chain of command policy and (2) for its nurses' failure to obtain informed consent from plaintiffs. Plaintiffs further contended that the Hospital was directly negligent in failing to adopt a policy governing the performance of mid-forceps deliveries. Following a hearing, Judge Orlando Hudson entered summary judgment in favor of the Hospital. Plaintiffs filed a timely appeal of that order.

Standard of Review

"It is well established that the standard of review of the grant of a motion for summary judgment requires a two-part analysis of whether, (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (internal quotation marks omitted), *aff'd per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001). The moving party has the burden of establishing the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the non-moving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party. *Id.* We review the trial court's grant of summary judgment *de novo*. *Shroyer v. County of Mecklenburg*, 154 N.C. App. 163, 167, 571 S.E.2d 849, 851 (2002).

The Nurses' Failure to Oppose the Doctor's Decision

[1] With respect to plaintiffs' claim regarding the nurses' failure to oppose the doctor's decision to deliver plaintiffs' baby by way of a mid-forceps delivery, defendants initially contend that the record contains insufficient evidence of proximate cause. We need not, however, address that issue because we agree with defendant's alternative contention that plaintiffs' evidence is not sufficient to meet the standard set forth in *Byrd v. Marion Gen. Hosp.*, 202 N.C. 337, 162 S.E. 738 (1932).

Under *Byrd*, a nurse may not be held liable for obeying a doctor's order unless "such order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient from the execution of such order or performance of such direction." *Id.* at 341, 162 S.E. at 740. The Court stressed that "[t]he law contemplates that the physician *is solely responsible* for the diagnosis and treatment of his patient. Nurses are not supposed to be experts in the technique of diagnosis or the mechanics of treatment." *Id.* at 341-42, 162 S.E. at 740 (emphasis added).

Although these principles were set out more than 70 years ago, they remain the controlling law in North Carolina. *Blanton v. Moses*

H. Cone Mem'l Hosp., Inc., 319 N.C. 372, 376, 354 S.E.2d 455, 458 (1987). Plaintiffs refer repeatedly to the responsibilities of the "delivery team" and argue for a collaborative process with joint responsibility. While medical practices, standards, and expectations have certainly changed since 1932 and even since 1987, this Court is not free to alter the standard set forth in *Byrd* and *Blanton*.

In applying *Byrd*, this Court has stated: "While a nurse may disobey the instructions of a physician where those instructions are obviously wrong and will result in harm to the patient, the duty to disobey does not extend to situations where there is a difference of medical opinion." *Paris v. Michael Kreitz, Jr., P.A.*, 75 N.C. App. 365, 380, 331 S.E.2d 234, 245 (internal citations omitted), *disc. review denied*, 315 N.C. 185, 337 S.E.2d 858 (1985). In *Paris*, this Court noted that while the negligence of the doctor was a question of fact, "it is clear that the negligence was not so obvious as to require [the nurse] to disobey an instruction or refuse to administer a treatment [because] . . . [a]ny disagreement or contrary recommendation she may have had as to the treatment prescribed would have necessarily been premised on a separate diagnosis, which she was not qualified to render." *Id.* at 381, 331 S.E.2d at 245.

Here, although plaintiffs' expert witness affidavits list ten functions that nurses perform in the course of a mid-forceps delivery, plaintiffs do not contend that the defendant nurses were negligent in performing those functions. Instead, plaintiffs contend that the nurses should have challenged the doctor's decision and, if unsuccessful in changing that decision, should have "refused to participate as a part of Tonya Daniels's labor and delivery team in the non-indicated and unconsented-to mid-forceps rotation and delivery." (Emphasis omitted.)

Based on our review of plaintiffs' evidence, even if there is an issue of fact regarding the negligence of Dr. Dingfelder, that evidence does not establish that the negligence was so obvious as to require the nurses to refuse to obey the doctor. In arguing that the nurses should have challenged the doctor's order, plaintiffs discuss factual issues regarding "clinical indications," the level of the baby in the birth canal, the degree of maternal and fetal distress, and the viability and appropriateness of proceeding to stage two labor—all factors underlying a medical diagnosis and a decision regarding treatment. They argue that the nurses, in considering all of these factors, should have concluded that a mid-forceps delivery was not appropriate.

Thus, just as in *Paris*, plaintiffs present a medical dispute regarding diagnosis and treatment that nurses are not qualified to resolve. *See* N.C. Gen. Stat. § 90-171.20(7) (2003) (providing that the "practice of nursing by a registered nurse" includes "[c]ollaborating with other health care providers in determining the appropriate health care for a patient but, subject to the provisions of G.S. 90-18.2 [governing nurse practitioners], not prescribing a medical treatment regimen or making a medical diagnosis, except under supervision of a licensed physician"). As a result, under *Byrd*, *Blanton*, and *Paris*, plaintiffs' evidence fails to establish a breach of duty by the nurses and accordingly—because the claim against the Hospital was based on *respondeat superior*—the trial court properly granted summary judgment to the Hospital on this claim.

Informed Consent

[2] In addition, plaintiffs contend that the nurses and the Hospital breached a duty to obtain proper informed consent from plaintiffs even though Ms. Koonce-Daniels' delivery was performed by her private physician. This Court is, however, bound by *Cox v. Haworth*, 54 N.C. App. 328, 283 S.E.2d 392 (1981). In *Cox*, this Court wrote:

> This Court has held that if circumstances warrant, a physician has a duty to warn a patient of consequences of a medical procedure. The physician in this case was [plaintiff's] own privately retained physician. Any duty to inform [plaintiff] of the risks of the procedures would have been on the privately retained physician, not on the Hospital or its personnel. Consequently, we find that the Hospital had no duty to inform [plaintiff] of the risks and procedures to be used . . . or to secure his informed consent when [plaintiff] hired his private physician to perform the [procedures]. . . . Since we find no duty on the part of the Hospital to advise [plaintiff] of the risk involved in the [procedure] and no duty to obtain his consent, [plaintiff] could not recover under the facts of this case, and summary judgment was properly granted.

Id. at 332-33, 283 S.E.2d at 395-96 (internal citations omitted).

The only contrary authority cited by plaintiffs is *Campbell v. Pitt County Mem'l Hosp., Inc.*, 84 N.C. App. 314, 352 S.E.2d 902 (1987). In *Campbell*, two judges agreed, based on the evidence presented, that the hospital could be held liable for failing to obtain informed consent. Following an appeal based on the dissent on that issue, the North Carolina Supreme Court was evenly divided and accordingly

affirmed the *Campbell* opinion, but stripped it of precedential value. *Campbell v. Pitt County Mem'l Hosp., Inc.*, 321 N.C. 260, 265-66, 362 S.E.2d 273, 276 (1987).

In any event, plaintiffs' showing in this case does not rise to the level found sufficient in *Campbell*. The concurring opinion in *Campbell* clarified that the question before the panel was "whether a court should instruct a jury regarding a duty which, the evidence shows, the hospital had imposed on itself." *Campbell*, 84 N.C. App. at 330, 352 S.E.2d at 911 (Becton, J., concurring). The concurrence stressed: "Judicial enforcement of a duty that a hospital imposes upon itself is significantly different than judicial imposition of a new duty on a hospital." *Id.* The Court determined the following evidence to be sufficient to establish that the hospital had assumed a duty of obtaining informed consent: (1) expert testimony regarding a nurse's duty to ensure that a patient is fully informed, and (2) evidence that the "hospital had a policy requiring labor and delivery room nurses to obtain the signature of patients on a hospital consent form before delivery." *Id.*

While plaintiffs in this case presented expert testimony regarding the nurses' duty, the record contains only two pertinent policies of the hospital, including (1) a statement of patient's rights providing that a patient has the right to obtain "[a]s much information about any proposed treatment or procedure as [the patient] may need in order to make a decision" and has a right to "[a]ctive participation in decisions regarding medical care;" and (2) a "Standard Care Statement: Labor Management" that with respect to "Patient Education" provides that "[a]ll procedures are explained and documentation noted." In contrast to *Campbell*, plaintiffs in this case did not offer any evidence that the hospital required its nurses to obtain the signed consent of the hospital's patients.[1]

Subsequently to *Campbell*, this Court reiterated the holding in *Cox* after noting *Campbell's* lack of precedential value: "[W]e have expressly declined to . . . impose upon a hospital the duty to obtain a patient's informed consent before treatment when, as here, the patient is admitted by a private physician for surgery." *Clark v. Perry*,

1. Plaintiffs also refer to excerpts from the Joint Commission on the Accreditation of Hospitals ("JCAH") standards applicable to the Hospital. Our Supreme Court has held that evidence a hospital failed to follow JCAH safety standards is "some evidence of negligence." *Blanton*, 319 N.C. at 376, 354 S.E.2d at 458. Nothing, however, in the provided excerpts purports to place a duty on nurses, in addition to the private physician, to obtain informed consent.

114 N.C. App. 297, 315, 442 S.E.2d 57, 67 (1994). We are not free to disregard *Cox* and *Clark*. Any change must be accomplished by the Supreme Court or the General Assembly. The trial court, therefore, properly granted summary judgment on the informed consent claim.

Hospital Policy on Forceps Deliveries

[3] Finally, plaintiffs contend that the Hospital may be held directly liable because of its failure to have a policy in place regarding mid-forceps deliveries. *See Bost v. Riley*, 44 N.C. App. 638, 647, 262 S.E.2d 391, 396 (a hospital may be found negligent for its failure to promulgate adequate rules or policies), *disc. review denied*, 300 N.C. 194, 269 S.E.2d 621 (1980). Plaintiffs offered expert testimony that the hospital should have had such a policy, but that witness declined to express any opinion as to what a proper policy would say. Plaintiffs offered no other evidence as to the appropriate contents of a policy governing mid-forceps deliveries.

In the present case, assuming *arguendo* that the defendant Hospital did breach a duty by failing to have proper policies in place, plaintiffs would have had to present evidence that such a breach was a "contributing factor" to the baby's injuries and ultimate death. *Id.* at 648, 262 S.E.2d at 397 ("Where a hospital's breach of duty is not a contributing factor to the patient's injuries, the hospital may not be held liable."). Without, however, evidence of what a proper policy would have stated, it is impossible to determine whether such a policy would have precluded the delivery in this case and thus whether the lack of a policy was a contributing factor to the baby's injuries.

Because of the lack of evidence as to the contents of any required policy, the trial court properly granted summary judgment as to this claim as well. *Compare Reed v. Granbury Hosp. Corp.*, 117 S.W.3d 404, 411-13 (Tex. App.—Fort Worth 2003) (holding that the trial court properly granted summary judgment on a claim that a hospital negligently failed to have a protocol on the administration of a particular drug to stroke patients when the expert witnesses demonstrated a complete lack of knowledge regarding the specifics of any other hospitals' protocols concerning administration of that drug) *with Edwards v. Brandywine Hosp.*, 438 Pa. Super. 673, 684-85, 652 A.2d 1382, 1387-88 (1995) (holding that the trial court erred in directing a verdict on the plaintiff's claim that the hospital's policies regarding moving catheters were inadequate when the plaintiff "introduced evi-

dence that a 48-hour rule was appropriate, but the hospital had adopted a different rule allowing catheters to be left in place for as long as 72 hours").[2]

Conclusion

In sum, we hold that the trial court properly entered summary judgment for the Hospital based on (1) the lack of evidence to meet the *Byrd* and *Blanton* standards; (2) the lack of a duty under *Cox* and *Clark* for a hospital or its nurses to obtain the informed consent of a patient receiving care from a private physician; and (3) the lack of evidence as to the contents of the policy that plaintiffs contend the hospital negligently failed to adopt.

Affirmed.

Judge HUNTER concurs.

Judge TYSON concurs in separate opinion.

TYSON, Judge concurring.

I concur in the decision to affirm the trial court's judgment. I write separately to further address the issues presented.

I. Background

In addition to those facts set out in majority's opinion, it is important to note: (1) Daniels accompanied his wife to the Hospital and remained present with her at all times; (2) at the time of delivery in September 1995, Nurse Sharpe, was licensed as a registered nurse for more than twenty years and had worked with Dr. Dingfelder for eighteen to nineteen years; (3) around 7:30 a.m. on 2 September 1995, Nurse Sharpe was also assigned as nurse to Mrs. Daniels; and (4) Nurse Parker had been a practicing nurse for nineteen years.

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2. Plaintiffs have also contended that the trial court erred in considering the affidavits and depositions of Drs. Dingfelder and Fried that were submitted by the Hospital in support of its motion for summary judgment because both doctors were interested in the outcome of this case. *See State Farm Life Ins. Co. v. Allison*, 128 N.C. App. 74, 77, 493 S.E.2d 329, 330 (1997), *disc. review denied*, 347 N.C. 584, 502 S.E.2d 616 (1998). We need not, however, address these arguments since our opinion affirming summary judgment in favor of defendants does not rely on the content of those affidavits and depositions.

II. Issue

Plaintiffs assert the trial court erred by awarding summary judgment to the Hospital based on finding and concluding as a matter of law that no act or failure to act by the Hospital or its agents proximately caused or contributed to the injury and death of Lorren.

III. Summary Judgment

A. Standard of Review

A portion of our standard of review is set out in the majority's opinion: summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003).

In addition to that portion of our standard of review previously stated, we have also held:

> 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 . . . . *Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.*

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003), *aff'd per curiam*, 358 N.C. 137, 591 S.E.2d 520 (2004) (internal quotations and citations omitted) (emphasis supplied).

In order to survive a motion for summary judgment in a negligence action, the plaintiff must show: "(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *Strickland v. Doe*, 156 N.C. App. 292, 294, 577 S.E.2d 124, 128 (2003), *disc. rev. denied*, 357 N.C. 169, 581 S.E.2d 447 (quoting *Lavelle v.*

Schultz, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. rev. denied*, 342 N.C. 656, 467 S.E.2d 715 (1996)).

IV. Nurses' Duties to a Patient

Plaintiffs argue that Nurse Sharpe and Nurse Parker were negligent by following Dr. Dingfelder's instructions. In *Byrd v. Hospital*, and as more recently followed in *Blanton v. Moses H. Cone Hosp.*, our Supreme Court stated:

> nurses, in the discharge of their duties, must obey and diligently execute the orders of the physician or surgeon in charge of the patient, unless, of course, such order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient from the execution of such order or performance of such direction. Certainly, if a physician or surgeon should order a nurse to stick fire to a patient, no nurse would be protected from liability for damages for undertaking to carry out the orders of the physician. *The law contemplates that the physician is solely responsible for the diagnosis and treatment of his patient. Nurses are not supposed to be experts in the technique of diagnosis or the mechanics of treatment.*

Byrd v. Hospital, 202 N.C. 337, 341-42, 162 S.E. 738, 740 (1932) (emphasis supplied), *followed by Blanton v. Moses H. Cone Hosp.*, 319 N.C. 372, 354 S.E.2d 455 (1987); *see also Paris v. Kreitz*, 75 N.C. App. 365, 381, 331 S.E.2d 234, 245 (1985) ("it is clear that the negligence was not so obvious as to require [the nurse] to disobey an instruction or refuse to administer a treatment [because] . . . [a]ny disagreement or contrary recommendation she may have had as to the treatment prescribed would have necessarily been premised on a separate diagnosis, which she was not qualified to render." (citing *Byrd*, 202 N.C. at 337, 162 S.E. at 738).

In *Byrd*, our Supreme Court also recognized:

> If the injury resulted from a peculiar condition of plaintiff's body, producing unusual or abnormal susceptibility to [the treatment], then this was a matter of diagnosis and lay exclusively within the duty of the physician, unless, of course, as hereinbefore indicated, the type of disease was so pronounced and so well known as to lead the nurse in the exercise of ordinary care to anticipate injury.

202 N.C. at 342-43, 162 S.E. at 741.

In *Byrd*, as here, "there was nothing to indicate to the nurse[s] that the [procedure to] plaintiff with the acquiescence and implied approval of the physician was obviously dangerous or likely to produce harm." 202 N.C. at 343, 162 S.E. at 741. Testimony in the depositions before the trial court on summary judgment show forceps deliveries are "common." Nurse Parker testified that she expected the procedure to be a "regular routine forcep[s] delivery for a first-time mom." Plaintiffs present no forecast of evidence to show the forceps procedure chosen by Dr. Dingfelder was "obviously dangerous" or "likely to produce harm." *Id.* at 342-43, 162 S.E. at 741.

The trial court did not err by concluding that plaintiffs failed to show as a matter of law the nurses or the Hospital could have reasonably "anticipate[d] injury" or death to Lorren. *Id.*

V. Act or Failure to Act

Plaintiffs contend the trial court erred by concluding they failed to show the actions or inactions of the Hospital or its agents contributed to or proximately caused Lorren's injuries based on the affidavits of Drs. Dingfelder and Fried.

A. *Respondeat Superior*

Plaintiffs argue "[t]he affidavits of Dr. Dingfelder and of Dr. Fried do not address all of the negligent acts of the hospital and its agents." In support of this argument, plaintiffs assert the Hospital is jointly liable for the negligence of the labor and delivery team under the theory of *respondeat superior*.

"If an employee is negligent while acting in the course of employment and such negligence is the proximate cause of injury to another, the employer is liable in damages under the doctrine of *respondeat superior* . . . ." *Johnson v. Lamb*, 273 N.C. 701, 707, 161 S.E.2d 131, 137 (1968) (citing *Gillis v. Tea Co.*, 223 N.C. 470, 27 S.E.2d 283 (1943); *West v. Woolworth Co.*, 215 N.C. 211, 15 S.E.2d 546 (1939)). Beyond their broad assertion, plaintiffs neither presented nor forecasted any evidence to show: (1) that any of the Hospital's employees were negligent; or (2) that even if one of the Hospital's employees was negligent, that such negligence contributed to or was the proximate cause of Lorren's death. *Johnson*, 273 N.C. at 707, 161 S.E.2d at 137.

"Plaintiff [as the nonmoving party] is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so,

[summary judgment] is proper." *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162, 468 S.E.2d 260, 263, *disc. rev. denied*, 344 N.C. 444, 476 S.E.2d 134 (1996) (alterations in original) (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992)). Without evidence to show the Hospital's employees were negligent or that such negligence was the proximate cause of Lorren's death, the trial court did not err in awarding summary judgment to the Hospital on plaintiffs' claims for negligence or liability under the theory of *respondeat superior*.

B. Informed Consent

Next, plaintiffs contend the Hospital negligently failed to ensure that Mrs. Daniels gave informed consent to the forceps procedure. Plaintiffs argue the lack of testimony in Drs. Dingfelder's and Fried's depositions raise genuine issues of material fact regarding Mrs. Daniels' informed consent.

Our Supreme Court "has long recognized that hospitals owe a duty of care to their patients. They must exercise ordinary care in the selection of their agents. They must make a reasonable effort to monitor and oversee the treatment their staffs provide to patients." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 138, 472 S.E.2d 778, 781 (1996) (citations omitted). *Horton*, which extended the continuing course of treatment doctrine to hospitals, is instructive, but not controlling to the case at bar. 344 N.C. at 139, 472 S.E.2d at 782.

Here, plaintiffs do not contend the Hospital's actions were unreasonable but argue the Hospital and its employees were negligent in failing to obtain Mrs. Daniels' informed consent to the forceps procedure. Addressing an issue similar to that at bar, this Court stated:

> We are urged to . . . impose a duty upon a hospital to properly inform and advise a patient of the nature of a medical procedure to be performed on him when the patient is admitted to the hospital for an operation under the care of his privately retained physician. We decline to do so.

Cox v. Haworth, 54 N.C. App. 328, 331, 283 S.E.2d 392, 394-95 (1981).

Plaintiffs contend *Sharpe v. Pugh*, 270 N.C. 598, 155 S.E.2d 108 (1967), establishes a duty on the Hospital to obtain informed consent. *Sharpe* involved an action only against the treating physician and did not identify or join a hospital as party to that action nor did the Supreme Court set forth any discussion regarding a hospital's liabil-

ity. The reasoning in *Sharpe* is distinguishable and not controlling to the facts here.

In *Campbell v. Pitt County Memorial Hosp.*, this Court stated in a split decision:

> defendant, under the doctrine of corporate negligence set forth in *Bost v. Riley*, 44 N.C. App. 638, 262 S.E.2d 391, *disc. rev. denied*, 300 N.C. 194, 269 S.E.2d 621 (1980) as applied to the specific facts and circumstances of this case, did have a legal duty to insure that plaintiffs' informed consent to a vaginal delivery of a footling breech baby had been obtained prior to delivery.

84 N.C. App. 314, 322, 352 S.E.2d 902, 907 (1987), *aff'd*, 321 N.C. 260, 362 S.E.2d 273, *overruled on other grounds*, *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990). Judge Becton, the authoring judge in *Cox*, distinguished the facts in *Campbell* from those in *Cox* in his concurring in part, dissenting in part opinion and explained, "In *Cox* we were asked to determine if a court could impose such a duty on a hospital. In the case *sub judice*, we are asked to determine whether a court should instruct a jury regarding a duty which, the evidence shows, the hospital *had imposed on itself*." *Campbell*, 84 N.C. App. at 330, 352 S.E.2d at 911 (J. Becton concurring in part, dissenting in part) (emphasis supplied).

Upon appeal of right based on the dissenting opinion, the Supreme Court was equally divided in *Campbell* and ruled, "[t]he decision of the Court of Appeals on this issue is thus left undisturbed and stands without precedential value." 321 N.C. 260, 266, 362 S.E.2d 273, 276 (1987) (citing *Forbes Homes, Inc. v. Trimpi*, 313 N.C. 168, 326 S.E.2d 30 (1985)). This Court in *Clark v. Perry* followed *Cox* and later held, "we have expressly declined to . . . impose upon a hospital the duty to obtain a patient's informed consent before treatment when, as here, the patient is admitted by a private physician for surgery." 114 N.C. App. 297, 315, 442 S.E.2d 57, 67 (1994) (citing *Cox*, 54 N.C. App. at 332-33, 283 S.E.2d at 395-96).

This appeal concerns a motion for summary judgment similar to *Cox* and not an appeal addressing jury instructions based on presentation of the evidence as the issues in *Campbell*. The dicta in *Campbell* is "without precedential value" and does not address the issue presented here. 84 N.C. App. at 330, 352 S.E.2d at 911.

Following this Court's holdings in *Cox* and *Clark*, plaintiffs forecast no basis to impose a separate duty on the Hospital to obtain

informed consent without any evidence to support or a finding to show the treating physician failed to do so. *Cox*, 54 N.C. App. at 331, 283 S.E.2d at 394-95; *Clark*, 114 N.C. App. at 315, 442 S.E.2d at 67.

C. Chain of Command

Plaintiffs also argue the Hospital should be held liable because it failed to have "an effective chain of command procedure" in place at the time of Lorren's delivery. Plaintiffs neither present nor cite to any authority to support this argument. N.C.R. App. P. 28(b)(6) (2004) ("Assignments of error . . . in support of which no . . . authority [is] cited, will be taken as abandoned.).

Additionally, plaintiffs argue the Hospital "made no showing before the trial court as to why these negligent failures on its part were not proximate causes of" Lorren's death. This argument is misplaced. Plaintiffs, not the Hospital, carry the burden of "establish[ing] beyond mere speculation or conjecture every essential element of negligence," including the element of proximate cause. *Young*, 122 N.C. App. at 162, 468 S.E.2d at 263 (quoting *Roumillat*, 331 N.C. at 68, 414 S.E.2d at 345). Without a forecast of evidence to support this element, plaintiffs cannot shift their burden to defendants. Summary judgment for the Hospital on this issue is proper. *Id.*

D. Interested Parties

Finally, plaintiffs contend the trial court erred in considering the affidavits and depositions of Drs. Dingfelder and Fried presented by the Hospital in support of its motion for summary judgment. Plaintiffs argue that Drs. Dingfelder's and Fried's testimony were biased because they both were "employed" by the Hospital at the time of the alleged negligent acts and have a personal stake in the outcome. Their argument asserts both doctors were "interested in the outcome of the case" which requires a jury, not the trial court, to act as the fact finder to resolve questions regarding credibility. *State Farm Life Ins. Co. v. Allison*, 128 N.C. App. 74, 77, 493 S.E.2d 329, 330 (1997), *disc. rev. denied*, 347 N.C. 584, 502 S.E.2d 616 (1998).

Plaintiffs fail to identify any specific testimony by the doctors or any other evidence considered by the trial court to support their argument. Plaintiffs also fail to forecast any evidence to contradict the doctors' testimony. Without a forecast of disputed testimony or evidence to create a genuine issue of material fact, consideration and resolution of any credibility issues of an alleged interested witness

does not deprive the trial court of its ability to rule on a motion for summary judgment. *Id.*

VI. Conclusion

Although the facts at bar are tragic, plaintiffs settled and dismissed their claims with prejudice against the treating physician, Dr. Dingfelder, without any admission or finding of liability by him. In asserting claims against the Hospital and its nurses, plaintiffs have failed to forecast evidence to show a separate duty imposed on the nurses' or the Hospital's alleged negligence proximately caused Lorren's injuries.

Plaintiffs also failed to show the trial court erred by considering the affidavits of Drs. Dingfelder and Fried. Although the majority's opinion rests on plaintiffs' failure to establish any genuine issue of material fact of defendants owing a duty or breach of that duty, the trial court alternatively did not err by concluding that plaintiffs failed as a matter of law to "produce a forecast" to show that the Hospital's or its agents' acts, or failure to act, contributed to and proximately caused Lorren's injury or death. *Draughon*, 158 N.C. App. at 708, 582 S.E.2d at 345 (quoting *Gaunt v. Pittaway*, 13 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000)).

Having carefully reviewed the record and evidence before the trial court on the Hospital's motion for summary judgment, as well as plaintiffs' briefs and oral arguments on appeal, I concur to affirm the trial court's judgment.

BRENDA WILKINS CUNNINGHAM, PLAINTIFF v.
JON CRAIG CUNNINGHAM, DEFENDANT

No. COA04-280

(Filed 19 July 2005)

1. Divorce— equitable distribution—military pension—defined benefit plan not valued—remanded

An equitable distribution order was remanded where the court failed to determine that defendant's military pension was a defined benefit retirement plan and failed to value it.

2. Divorce— equitable distribution—military pension—reduction for disability payments

An equitable distribution action was remanded for revision to avoid foreclosing defendant's right to forego military pension payments in favor of disability payments, which are not classified as marital property.

3. Child Support, Custody, and Visitation— custody—findings—misconduct

The trial court did not err in a child custody action by not making findings concerning plaintiff's alleged deception in not joining defendant with the children during a military deployment to Okinawa. The court's order reflects consideration of the parties' ability to cooperate for the benefit of the children, their badly flawed behavior toward each other, and the possible effect on the children. The court chose to find that neither party was fully victim or villain.

4. Child Support, Custody, and Visitation— restrictions on children's contact with parent's friend—sufficient

In a child custody action, the restrictions placed on the children's contact with a friend of the mother were sufficient. Those prohibitions were not exclusive; defendant may bring to the court any circumstances which constitute the mother permitting interference by the friend with the father's relationship with the children.

5. Child Support, Custody, and Visitation— custody—best interests of children—living in North Carolina

There was competent evidence in a child custody case that the best interests of the children did not require that plaintiff and the children live in North Carolina after 1 July 2005, when defendant intended to retire from the Marine Corps. Defendant testified he intended to live near the children wherever plaintiff and the children resided.

6. Appeal and Error— Court of Appeals—judicial notice

The Court of Appeals did not take judicial notice of school calendars (and thus the nights the children would be with defendant) in an appeal from a child support order where the calendar for one year could have been submitted to the trial court, and the calendar for another should have been the subject of a motion in the cause in the trial court to modify the support order.

7. Divorce— alimony—misconduct—findings

The trial court fully addressed the issue of plaintiff's misconduct relating to alimony where the court recited misconduct by plaintiff and defendant, and court found that the marriage was dysfunctional, that both parties were at fault, and that plaintiff should be given credit for career sacrifices that helped defendant succeed.

8. Divorce— alimony—reasons for duration—findings

An alimony order was remanded where the court made insufficient findings about the reasons for the duration of the alimony payments.

9. Divorce— alimony—living expenses

The trial court did not abuse its discretion in an alimony award by reducing the amount allowed for defendant's living expenses.

10. Divorce— alimony—income—bonuses

There was no prejudice from any error in a finding in an alimony award that defendant's income would be supplemented by bonuses. Defendant would have sufficient funds for his monthly expenses and obligations under the order even without the bonuses.

11. Divorce; Child Support, Custody, and Visitation— attorney fees—apportionment between issues

The court had sufficient evidence upon which to base its apportionment of attorney fees between equitable distribution, child custody and support, and alimony.

12. Costs— attorney fees—divorce—ability to pay

A finding that defendant had the ability to pay the last portion of plaintiff's attorney fees in a lump sum was remanded where the equitable distribution award was also remanded. A change in the assets awarded to plaintiff through equitable distribution might impact his ability to make such a lump sum payment.

Appeal by defendant from judgments entered 11 July 2003 by Judge Karen Alexander in Craven County District Court. Heard in the Court of Appeals 10 January 2005.

Charles William Kafer, for plaintiff-appellee.

Wyrick, Robbins, Yates & Ponton, LLP, by K. Edward Greene and Donald L. Beci, for defendant-appellant.

CALABRIA, Judge.

Jon Craig Cunningham ("defendant") appeals orders entered on 11 July 2003 concerning (1) equitable distribution (the "ED order"); (2) defendant's military retirement benefits (the "military pension order"); and (3) custody, child support, alimony, and attorney fees. We affirm in part, reverse in part, and remand.

Defendant and Brenda Wilkins Cunningham ("plaintiff") were married 19 May 1990, separated 20 June 2000, and divorced 13 November 2001. Two children were born of the marriage, the first child on 9 July 1992 and the second child on 21 March 1995 (the "children"). In August 1997, the parties moved to Havelock, North Carolina after defendant, a Lieutenant Colonel and aviator in the United States Marine Corps, was transferred to Cherry Point Marine Corps Air Station ("Cherry Point"). In early 2000, the parties jointly decided that defendant would accept a three-year overseas tour of duty in Okinawa beginning 20 June 2000 and that plaintiff and the children would accompany him. Prior to defendant's departure, plaintiff changed the plan and told him that she and the children would not accompany him initially but would join him later. After defendant arrived in Okinawa, plaintiff informed defendant that neither she nor the children would be joining him and that she wanted a separation and divorce.

The parties never resumed marital relations after 20 June 2000. On 19 September 2000, plaintiff filed a complaint for divorce from bed and board, postseparation support, alimony, child custody, child support, and attorney fees. Defendant filed an answer and counterclaimed, seeking, *inter alia*, equitable distribution, child support and custody of the minor children. Defendant subsequently shortened his tour of duty in Okinawa to one year and returned to North Carolina to be near the children.

The Honorable Karen Alexander presided over the fifteen-day trial in Craven County District Court, which started on 5 March 2002 and concluded on 27 November 2002. The court found defendant's taxable monthly wages for 2002, as a Lieutenant Colonel continuously on active duty since 13 March 1981, were $6,919.80. His non-taxable monthly allowances were $1,130.47. Therefore, his gross monthly

income totaled $8,040.27, and his monthly income after taxes and withholding was $6,250.49. In 2002, defendant's income was supplemented with yearly bonuses of up to $9,000.00. Defendant accrued military retirement benefits ("military pension") from 11 August 1983 and became eligible to receive his military pension on 11 August 2003. Plaintiff offered evidence at trial that, based on his pay scale as of 1 July 2000, defendant would receive a monthly military pension of $3,126.00 and, based on his life expectancy, would receive a total pension in the amount of $561,494.62. Plaintiff is a registered nurse and did not work outside the home after the birth of the parties' second child until after the parties' separation when she commenced employment as a school nurse. During the 2002-2003 academic year, plaintiff earned $1,169.64 per month.

In the ED order, the trial court concluded, "[t]he large disparity in [the] income between the parties and the substantial difference between the military retirement distribution warrants an unequal distribution of the marital property and debts." The trial court did not value defendant's retirement plan, but found the following:

> Were the defendant to retire on 11 August 2003, his earliest possible retirement date, ... [p]laintiff's share under the terms of this order would be 25.22 percent. Therefore, the defendant will receive 74.88 percent or a substantially greater portion of this retirement. The longer he stays in the Marine Corps after 11 August 2003, the greater will be his share of this retirement.

The trial court further ordered that plaintiff "receive one-half of the marital portion of the defendant's military retirement" as set out in the military pension order.

The military pension order required defendant to pay plaintiff one-half of the marital portion of each monthly military pension payment beginning the first date defendant receives his first pension check. The marital portion of the military pension would be determined by a coverture fraction, the numerator being 121.03, the number of months the parties were married, and the denominator being defendant's total number of months of service for pension purposes. The trial court further ordered that "the defendant shall not take any steps designed to diminish or in any way reduce the amount of disposable retired or retainer pay that he is entitled to receive by virtue of his military service to the end that the plaintiff's portion of his retirement is reduced."

In the order for custody, child support, alimony, and attorney fees, the trial court granted the parties joint custody of the children. The trial court granted primary custody to plaintiff and secondary custody and visitation to defendant. Plaintiff's primary custody was conditioned on her and the children's continued residence in North Carolina unless defendant was transferred to another duty station outside North Carolina or ceased to reside in North Carolina; however, plaintiff was not required to reside in North Carolina after 1 July 2005. The trial court further ordered that plaintiff's friend, Kim Tippett, with whom defendant had a poor relationship, "shall not be utilized as a babysitter for the children under any circumstances and the children shall not spend the night with Kim Tippett for any reason." Defendant was ordered to pay plaintiff: (1) $1,160.57 per month in child support beginning 1 January 2003; (2) $1,000.00 per month in alimony beginning 1 January 2003 and ending 1 December 2005; and (3) $35,000.00 in attorney fees paid at the rate of $500.00 per month from 1 January 2003 through 1 December 2005 with the $17,000.00 balance payable on or before 31 December 2005. From these orders, defendant appeals.

I. Equitable Distribution

[1] Defendant asserts the trial court failed to value his military pension in the ED order. "Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties . . . ." N.C. Gen. Stat. § 50-20(a) (2003). The division of property in an equitable distribution "is a matter within the sound discretion of the trial court." *Gagnon v. Gagnon*, 149 N.C. App. 194, 197, 560 S.E.2d 229, 231 (2002). The trial court's division will only be reversed upon a showing that it "could not have been the result of a reasoned decision." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986).

Under N.C. Gen. Stat. § 50-20(c) (2003), equitable distribution is a three-step process; the trial court must (1) "determine what is marital [and divisible] property"; (2) "find the net value of the property"; and (3) "make an equitable distribution of that property." *Soares v. Soares*, 86 N.C. App. 369, 371, 357 S.E.2d 418, 419 (1987) (reversing and remanding where the trial court "made some findings and conclusions regarding marital property, but it did not place a value on the marital home"). "Marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal

Uniformed Services Former Spouses' Protection Act." N.C. Gen. Stat. § 50-20(b)(1) (2003). A trial court must value all marital and divisible property—collectively termed distributable property—in order to reasonably determine whether the distribution ordered is equitable. *Turner v. Turner*, 64 N.C. App. 342, 346, 307 S.E.2d 407, 409 (1983). Therefore, when no finding is made regarding the value of an item of distributable property, a trial court's findings are insufficient even if a determination is made with respect to the percentage of a distributable property's value to which each party is entitled. *Byrd v. Owens*, 86 N.C. App. 418, 421-22, 358 S.E.2d 102, 105 (1987) (holding the trial court erred by failing to assign a promissory note value using traditional methods of tracing funds and "simply distribut[ing] it by giving an 80% interest to defendant and 20% to plaintiff").

Pursuant to N.C. Gen. Stat. § 50-20.1(b) (2003),

> The award of nonvested pension, retirement, or other deferred compensation benefits may be made payable:
>
> (1) As a lump sum by agreement;
>
> (2) Over a period of time in fixed amounts by agreement; or
>
> (3) By appropriate domestic relations order as a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits.

Regardless of the method of payment under N.C. Gen. Stat. § 50-20.1(b), the amount of the award shall be determined by applying a coverture fraction—"the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment"—to the value of "the vested and nonvested accrued benefit . . . ." N.C. Gen. Stat. § 50-20.1(d) (2003).

A defined benefit retirement plan, as opposed to a defined contribution retirement plan, "is determined without reference to contributions and is based on factors such as years of service and compensation received." *Seifert v. Seifert*, 82 N.C. App. 329, 333, 346 S.E.2d 504, 506 (1986). For the purpose of equitable distribution, a defined benefit plan is valued as follows:

> First, the trial court must calculate the amount of monthly pension payment the employee, assuming he retired on the date of

> separation, will be entitled to receive at the later of the earliest retirement age or the date of separation. This calculation must be made as of the date of separation and "shall not include contributions, years of service or compensation which may accrue after the date of separation." [N.C. Gen. Stat. § 50-20.1(d)]. . . . Second, the trial court[,] [using an acceptable mortality table] must determine the employee-spouse's life expectancy as of the date of separation and use this figure to ascertain the probable number of months the employee-spouse will receive benefits under the plan. Third, the trial court, using an acceptable discount rate, must determine the then-present value of the pension as of the later of the date of separation or the earliest retirement date. Fourth, the trial court must discount the then-present value to the value as of the date of separation. In other words, determine the value as of the date of separation of the sum to be paid at the later of the date of separation or the earliest retirement date. . . . Finally, the trial court must reduce the present value to account for contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan. This calculation cannot be made with reference to any table or chart and rests within the sound discretion of the trial court.

Bishop v. Bishop, 113 N.C. App. 725, 731, 440 S.E.2d 591, 595-96 (1994).

In the instant case, defendant's military pension is categorized as a defined benefit retirement plan. 10 U.S.C. § 6323 (2005) (providing retirement benefit eligibility to Marine officers who have served twenty years); *Seifert*, 82 N.C. App. at 333, 346 S.E.2d at 506 (stating "[t]he military retirement system is noncontributory . . ."). The trial court properly determined that the coverture fraction would entitle plaintiff to 25.22 percent of defendant's military pension if defendant retired at his earliest retirement date, 11 July 2003. In addition, the trial court properly attempted, pursuant to N.C. Gen. Stat. § 50-20.1(b)(3), to award plaintiff a prorated portion of defendant's military pension, one-half of the marital portion of each of defendant's pension payments, to be paid by defendant at the time he began receiving benefits. However, the trial court failed to determine that defendant's military pension was a defined benefit retirement plan and failed to value it. We further note the record contained evidence regarding the value of defendant's military pension as of the date of separation. *Cf. Albritton v. Albritton*, 109 N.C. App. 36, 426 S.E.2d 80 (1993) (holding the trial court's error in not valuing a

retirement account was not prejudicial because plaintiff failed to provide evidence regarding the date of separation value). Accordingly, we reverse and remand the trial court's ED order and military pension order for a new equitable distribution order including valuation of defendant's military pension using the method established in *Bishop*.

[2] Defendant also asserts the trial court erred in the ED order by ordering that defendant "shall not take any steps designed to diminish or in any way reduce the amount of disposable retired or retainer pay that he is entitled to receive by virtue of his military service to the end that the plaintiff's portion of his retirement is reduced." Specifically, defendant argues the order forecloses his right to forego military pension payments in favor of disability payments if he becomes so eligible. It is well established that "disability payments cannot be classified as marital property subject to distribution under state equitable distribution laws." *Bishop*, 113 N.C. App. at 733, 440 S.E.2d at 597. In *Halstead v. Halstead*, 164 N.C. App. 543, 550, 596 S.E.2d 353, 358 (2004), this Court held that the trial court's "order requiring [the defendant] to pay his former wife any amount withheld from her share of [the defendant's] military retirement due to future reductions caused by an act or omission, including future waivers of retirement pay, contravenes [federal law]" by distributing disability payments. In the instant case, the trial court's order could encompass reductions in defendant's military pension payments due to his electing to receive disability payments if he becomes eligible. Accordingly, upon remand, the trial court must revise the ED order so as to avoid foreclosing defendant's right to forego pension payments in favor of disability payments if he becomes so eligible.

II. Child Custody

[3] In child custody determinations, the welfare of the child is paramount, and "the court must consider all of the facts of the case and decide the issue [of custody] in accordance with the best interests of the child." *Dean v. Dean*, 32 N.C. App. 482, 484-85, 232 S.E.2d 470, 472 (1977). Moreover, the trial court must resolve all issues raised by relevant evidence that directly concern the fitness of a party to have care, custody, and control of a child, *In re Kowalzek*, 37 N.C. App. 364, 370, 246 S.E.2d 45, 48 (1978), or that directly concern the child's best interests. *Lamond v. Mahoney*, 159 N.C. App. 400, 407, 583 S.E.2d 656, 661 (2003). While a trial court's decisions in child custody matters will not be overturned absent a clear abuse of discretion, *see*

Surles v. Surles, 113 N.C. App. 32, 36-37, 437 S.E.2d 661, 663 (1993), a custody order is, nonetheless, "deemed fatally defective when it fails to treat an important question raised by the evidence." *Dixon v. Dixon*, 67 N.C. App. 73, 77, 312 S.E.2d 669, 672 (1984).

Defendant asserts the trial court erred by failing to make findings regarding whether plaintiff, in order to deprive defendant of contact with the children, willfully misled defendant during their discussions concerning her intention to later join defendant with the children in Okinawa. Evidence of a parent's ability or inability to cooperate with the other parent to promote their child's welfare is relevant in a custody determination and material to determining the best interests of the child. *Cf. Phelps v. Phelps*, 337 N.C. 344, 446 S.E.2d 17 (1994) (quoting as relevant to a custody determination a finding of fact regarding one parent's inability to cooperate in a reasonable fashion with the other parent to promote their child's best interests); *Woncik v. Woncik*, 82 N.C. App. 244, 249, 346 S.E.2d 277, 280 (1986) (holding "interference with visitation of the noncustodial parent . . . [that negatively] impact[s] . . . the welfare of the child can constitute a substantial change of circumstances sufficient to warrant a change of custody").

The trial court's order reflects that it fully considered and made findings to address each parent's ability to cooperate for the benefit of the children and both parents' marital misconduct. As defendant acknowledges, the trial court did not ignore his evidence regarding Okinawa, but rather found:

> 59. The defendant was to have permanent change of duty station orders in June, 2000. Discussion was had between the parties as to the location for these orders and a joint decision was made that the defendant would take an accompanied three-year overseas tour in Okinawa beginning in June, 2000. However, the parties had arguments and the turmoil between the parties continued to exist. After the defendant received orders and the transfer was to happen, the plaintiff advised him that she was not going to go with him initially. This was not expected by the defendant. He testified that he felt "set up". Evidence was presented that the plaintiff went to divorce and separation classes on base with her friend, Kim Tippett, as a disguise prior to the defendant's overseas tour. She stated that she would consider going with him at a later time. Subsequently, she advised him that she was not coming to Okinawa.

This finding of fact fully describes the circumstances surrounding defendant's tour in Okinawa and, indeed, directly parallels the facts identified in defendant's brief on appeal. Defendant's objection appears to be solely that the trial court did not brand this conduct as deceitful and conclude that it so adversely affected plaintiff's ability to be a good parent that defendant should be given primary custody.

It is apparent from the trial court's order that the trial court did not disregard or fail to resolve the issue of plaintiff's ability to cooperate with defendant regarding the children, but rather concluded that *both parents* were badly flawed in this area. The court specifically found:

> 84. The parties have been excellent parents for the two minor children, but the parties have been poor spouses to each other. The way the parties treat each other is a concern. . . .
>
> 85. . . . The problems these parties have with each other maybe [sic] affecting the children on a psychological standpoint since evidence exists of episodes of anxiety and repeated incidences where the younger child soils his pants by having bowel movements.
>
> 86. . . . Both parties are well grounded and are the best . . . parent anyone could have but for the behavior exhibited by each party around the other. . . . Each party has acted poorly with the other and each has faults with respect to how each has treated the other.

In short, the trial court specifically addressed the ability of the parents to cooperate with each other and found that both parents were severely lacking. *See In re Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971) (noting that the "trial judge is not required to find all the facts shown by the evidence. . . . It is sufficient if enough material facts are found to support the judgment"). The trial court chose to find that neither party was fully the villain or the victim.

[4] Defendant further asserts the trial court erred by placing insufficient restrictions on the children's contact with Kim Tippett. The trial court's findings of fact are conclusive on appeal if supported by competent evidence. *Raynor v. Odom*, 124 N.C. App. 724, 729, 478 S.E.2d 655, 658 (1996). The trial court's conclusions of law and orders will not be reversed if supported by the findings of fact. *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990). Based on competent evidence, the trial court found the following facts:

> Ms. Tippet does not like the defendant. She has insulted him. The defendant does not like Ms. Tippet. There was evidence that Ms. Tippet interfered with the defendant spending quality time with the children at such times he had an opportunity to do so. This type of interference shall not be allowed by the plaintiff in the future.

These findings of fact support the trial court's order that "Kim Tippet shall not be utilized as a babysitter for the children under any circumstances and the children shall not spend the night with Kim Tippet for any reason." However, as the trial court's findings and order indicate, whatever relationship Kim Tippett has with the children, it is and must continue to be subordinate to defendant's relationship with the children. The order of the trial court has given the father recourse against the mother should she fail to prevent interference by Kim Tippett in that relationship, and we do not read the trial court's prohibition against babysitting or spending the night as an exclusive list of those situations through which Kim Tippett has interfered in the father and children's relationship. The father, accordingly, may bring to the attention of the trial court, for purposes of holding the mother responsible, *any* circumstances which constitute the mother's permitting interference by Kim Tippett with the father's relationship with the children. We find this recourse, in conjunction with the listed restrictions, to be sufficient.

[5] Defendant additionally contends the trial court did not have competent evidence to support its finding of fact that the best interests of the children would not require plaintiff and the children to remain in North Carolina after 1 July 2005. The trial court found as fact that both parties are suitable persons to have custody of the children and that the best interests of the children would be served by the parties having joint custody, with plaintiff having primary custody. Furthermore, the trial court found the following:

> The best interest and general welfare of the children will be promoted by the plaintiff staying in the State of North Carolina with the children as long as the defendant is stationed and continues to reside in the State of North Carolina. However, if he is not stationed in North Carolina or ceases to reside in North Carolina, the best interests of the children will not require that the plaintiff continue to reside here. Further, the best interests and general welfare of the children will not require that the plaintiff and the children reside in North Carolina after 1 July 2005.

At the hearing, defendant testified that he would be stationed at Cherry Point until his intended retirement in June 2005. Defendant also testified he intended to live near the children no matter where the plaintiff and the children reside. Accordingly, the trial court had competent evidence that a move by plaintiff and the children after 1 July 2005 would not compromise the children's ability to have contact with defendant and did not abuse its discretion by allowing plaintiff and the children to move from North Carolina after that date.

III. Child Support

[6] Defendant asserts the trial court erred under the child support guidelines by computing child support using worksheet A. Specifically, based on the calendars for the children's elementary school, defendant argues the children will live with him for at least 123 nights annually; therefore, the trial court was required under the guidelines to use worksheet B.

In support of his argument, defendant requests that this Court take judicial notice of the children's elementary school calendars for the academic years 2003-2004 and 2004-2005, which defendant obtained from a county website. We note, however, the defendant could have entered the 2003-2004 calendar into evidence because it was adopted 21 November 2002, six days before the final date of the hearing. Under N.C. R. App. P. 9 (2005), this Court's review is limited to the record on appeal and the verbatim transcript of the proceedings, and judicial notice is not a substitute for the proper compilation of evidence that could have been submitted to the trial court during the hearing and included in the record on appeal.

The 2004-2005 school calendar reflects that it was not adopted until 20 November 2003 and was therefore not in existence at the time of the hearing. Rather than requesting this Court to take judicial notice of evidence that the trial court could not have considered, defendant's proper course of action with respect to the 2004-2005 calendar—or any subsequent school calendar—would be to file a motion in the cause with the trial court to modify or vacate the child support order pursuant to N.C. Gen. Stat. § 50-13.7(a) (2003). Accordingly, we decline to take judicial notice of the 2003-2004 and 2004-2005 school calendars.

IV. Alimony

[7] In making an award of alimony, the trial court must consider "all relevant factors" necessary to determine that the award is equitable.

N.C. Gen. Stat. § 50-16.3A(a) (2003). "[T]he court shall make a specific finding of fact on each of the factors in [N.C. Gen. Stat. § 50-16.3A(b) (2003)] if evidence is offered on that factor." N.C. Gen. Stat. § 50-16.3A(c) (2003). Pursuant to N.C. Gen. Stat. § 50-16.3A(b)(1), the trial court must consider "the marital misconduct of either of the spouses." Marital misconduct includes the act of abandoning the other spouse. N.C. Gen. Stat. § 50-16.1A(3) (2003). "An abandonment occurs when one spouse brings the cohabitation with the other spouse to an end without justification, without the consent of the other spouse and without intent of renewing it. The spouse alleging abandonment must prove the absence of justification for the abandonment." *Corbett v. Corbett*, 67 N.C. App. 754, 755, 313 S.E.2d 888, 889 (1984) (emphasis omitted).

Defendant asserts the trial court erred by failing to make findings regarding whether plaintiff abandoned defendant by representing she would join him in Okinawa, then informing him, after he had moved, she would not join him and intended to divorce him. Defendant alleged and offered evidence that plaintiff intentionally misled him into accepting a post in Okinawa with promises to accompany him while actually intending to end their marital relationship. In its order, the trial court not only recited the events surrounding Okinawa, but also made findings regarding marital misconduct of defendant and other marital misconduct of plaintiff. Not surprisingly, the trial court then found that "[t]he marriage between the parties was dysfunctional" and that "[b]oth parties were at fault in the breakup of the marriage." The trial court then specifically found—while addressing the alimony issue—that "[d]espite the marital misconduct of the plaintiff, she should be given credit for her career sacrifices that no doubt helped the defendant succeed in his military goals." The trial court thus fully addressed the question of plaintiff's misconduct as it relates to alimony. *See Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395, 545 S.E.2d 788, 794 (2001) (holding "the findings of fact required to support . . . an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case and the findings of fact show the trial court properly applied the law in the case").

[8] Defendant also asserts the trial court made insufficient findings regarding the duration of the alimony. "[A] trial court's failure to make any findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates N.C. Gen. Stat. § 50-16.3(A)(c)." *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588

S.E.2d 517, 522-23 (2003). While the trial court made sufficient findings regarding the reasons for the amount and manner of payment, the trial court failed to make findings concerning the reasons for the duration of the alimony payments. Accordingly, we remand the alimony order for further findings of fact concerning the duration of the alimony award.

[9] Defendant next asserts the trial court's reduction in his expenses was arbitrary, and the amount of alimony when combined with his expenses, including child support and other payments, exceeds that which he is able to pay. Since it is likely to recur upon remand, we deem it necessary to address this issue. "The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32 (1982). "Implicit in this is the idea that the trial judge may resort to his own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties." *Bookholt v. Bookholt*, 136 N.C. App. 247, 250, 523 S.E.2d 729, 732 (1999).

The trial court found defendant's net income after taxes and withholding was $6,250.49 per month. The trial court's custody, child support, alimony, and attorney fees order required defendant to pay per month $1,160.57 in child support, $1,000.00 in alimony, $500.00 in attorney fees, and $88.78 in medical insurance for the children. After these deductions, defendant would have $3,501.14 per month for living expenses. Defendant submitted an affidavit stating that his monthly living expenses were $4,648.00.

The trial court found defendant could reasonably lower his monthly living expenses by almost $1,500.00, to $3,156.00, by taking the following steps: (1) reducing his $134.00 telephone bill to $100; (2) cancelling his $55.00 cable television subscription; (3) reducing his $650.00 food expense to $400.00; (4) reducing his $100.00 clothing expense to $50.00; (5) stopping his $60.00 allowance to the children since he would be paying child support; (6) reducing his $207.00 gift and special occasion expense to $104.00; (7) reducing his vacation and recreation expense from $450.00 to $100.00; and (8) reducing his $60.00 grooming and hygiene expense to $20.00. Additionally, the trial court found that defendant's $150.00 furniture payment would soon end and his $400.00 credit card payments were a duplication of other expenses.

After reviewing the record on appeal, we hold the trial court did not abuse its discretion by making the above reductions to defendant's monthly expenses. Accordingly, defendant will have sufficient funds to meet his monthly living expenses and obligations under the trial court's current order and will also have approximately $345.14 per month in unutilized funds.

[10] Defendant also argues the trial court's finding that his income would be supplemented by bonuses was not supported by the evidence. He states the only evidence concerning his bonuses was from him and that he would receive no more bonuses. However, as established above, even in the absence of bonuses, defendant would have sufficient funds for his monthly expenses and obligations under the current order. Therefore, to the extent the finding was in error, we can discern no prejudice to defendant.

V. Attorney Fees

[11] Defendant asserts the trial court erred by failing to make valid findings that the attorney fees awarded were not attributable to work performed on the equitable distribution portion of the case. Specifically, defendant argues one cannot discern the portion of the case to which each charge applies nor the nature of the service provided from the fee affidavits submitted by plaintiff's attorney; therefore, the trial court had insufficient evidence upon which to base its award of attorney fees.

Pursuant to N.C. Gen. Stat. § 50-13.6 (2003), the trial court may award attorney fees in an action for child custody and support if the party seeking the award was an interested party acting in good faith when she instituted the action and has "insufficient means to defray the expense of the suit." *Cox v. Cox*, 133 N.C. App. 221, 228, 515 S.E.2d 61, 66 (1999). Under N.C. Gen. Stat. 50-16.4 (2003), the trial court may award attorney fees in an action for alimony or postseparation support "to a party who has shown that she is entitled to the relief demanded, is a dependent spouse, and lacks sufficient means upon which to live during the prosecution of the suit and to defray her necessary legal expenses." *Perkins v. Perkins*, 85 N.C. App. 660, 668, 355 S.E.2d 848, 853 (1987). If each of the statute's requirements are met, this Court reviews the amount of attorney fees awarded under an abuse of discretion standard. *Id.*; *Atwell v. Atwell*, 74 N.C. App. 231, 238, 328 S.E.2d 47, 51 (1985).

To support the reasonableness of an award of attorney fees, the trial court must make "findings regarding the nature and scope of the

legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers." *Cobb v. Cobb*, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986); *Perkins*, 85 N.C. App. at 668, 355 S.E.2d at 853. "Moreover, attorney fees are not recoverable in an action for equitable distribution." *Holder v. Holder*, 87 N.C. App. 578, 584, 361 S.E.2d 891, 894 (1987). Therefore, in a combined action, the trial court's findings of fact must reflect that the attorney fees awarded are attributable only to the alimony or child custody and support claims. *Id.*

Pertinent to the issue of attorney fees and based on competent evidence, the trial court found plaintiff was the dependent spouse, defendant was the supporting spouse, and plaintiff was entitled to alimony. The trial court also made the following pertinent findings:

> 99. The plaintiff is an interested party acting in good faith who has insufficient means to defray the expenses of this action. . . . She is not entitled to receive attorneys's fees for the portions of this case relating to equitable distribution and divorce. However, the time expended by plaintiff's attorney regarding those issues has not been substantial
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> 104. The trial of this case took fifteen days. Although a portion of the trial related to the issue of equitable distribution, the vast majority of the trial related to the issue of custody. . . .
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> 105. The plaintiff['s] . . . attorney has been licensed to practice since 1969[,] . . . limits his practice to family law[,] . . . is board certified in family law[,] . . . [and] charges $300.00 per hour[,] . . . which [b]ased upon . . . his experience . . . is reasonable.
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> 107. The trial of this case has resulted in a substantial increase in attorney's fees and time expended. The trial of this case, the preparation for trial, the staff time, [and] the attorney's time have resulted in 244.8 hours of service. That time and services have a reasonable value of $64,830.00. . . . Of this $64,830.00, at least 75% of that time and that fee have related to issues pertaining to custody, child support, and alimony. Of these fees, the defendant should pay the sum of $35,000.00.

Therefore, the trial court's findings properly (1) met the statutory requirements necessary for an award of attorney fees; (2) addressed

the services, skill, time, and rate of plaintiff's counsel; and (3) apportioned the fees to exclude attorney fees for equitable distribution.

We note defendant does not argue on appeal that the trial court had insufficient evidence for its findings that plaintiff was acting in good faith and had insufficient means to defray the costs of the action. Moreover, the trial court had sufficient evidence upon which to base its apportionment of the attorney fees between equitable distribution and the other relevant issues. Although the fee affidavits did not label every charge as being attributable to a particular issue, our review of the affidavits reveals plaintiff's counsel adequately described each line item service. Therefore, the trial court could reasonably compare the time spent on each issue at trial and the evidence presented with the line item services on the fee affidavits. In this way, the trial court could rationally determine that approximately seventy-five percent of plaintiff's attorney fees, roughly $48,622.50, were attributable to issues pertaining to alimony or child custody and support. Accordingly, we can discern no abuse of discretion by the trial court in ordering defendant to pay $35,000.00 in attorney fees.

[12] Defendant also assigns error to the trial court's finding that, after paying "$500.00 per month for each month beginning 1 January 2003 through 1 December 2005[,]" defendant has the ability to pay the remaining portion of the $35,000.00 in attorney fees by making a "lump sum payment of $17,000.00 on or before 31 December 2005." Because a change in the amount of assets awarded defendant through equitable distribution might impact his ability to make such a lump sum payment, we remand the issue of defendant's ability to make a lump sum payment of $17,000.00 in attorney fees for further findings of fact in light of the new equitable distribution order required by our above holding.

VI. Conclusion

We have carefully considered defendant's remaining arguments and find them to be without merit. For the foregoing reasons, we (1) reverse and remand the trial court's ED and military pension orders for valuation of defendant's military pension and a new equitable distribution order as well as a revision of the ED order to avoid language foreclosing defendant's right to forego pension payments in favor of disability payments if he becomes eligible; (2) affirm the trial court's child custody order; (3) affirm the child support order; (4) reverse and remand the trial court's alimony order for findings explaining the reasons for the duration of the alimony award; and (5) affirm the trial

court's award of attorney fees but remand the issue of defendant's ability to pay a lump sum of $17,000.00 in light of the new equitable distribution order. "On remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999).

Affirmed in part, reversed in part, and remanded.

Chief Judge MARTIN and Judge GEER concur.

STATE OF NORTH CAROLINA v. JOHNNY SHANE CURRY

No. COA04-776

(Filed 19 July 2005)

1. Appeal and Error— preservation of issues—no objection at trial

Defendant did not preserve for appeal issues concerning letters written by a codefendant where he did not move to redact or exclude the letters or object to their admission.

2. Appeal and Error— plain error—properly argued

Defendant properly argued plain error in the admission of letters from a codefendant, warranting appellate review of an otherwise unpreserved assignment of error.

3. Evidence— letters from codefendant—admission not prejudicial

Defendant did not demonstrate plain error in the admission of portions of letters from a codefendant. The State offered separate and overwhelming testimonial and physical evidence of defendant's guilt.

4. Criminal Law— question by judge—no indication of opinion

The court's question to a witness did not constitute prejudicial error where the court clarified a line of questions about a pertinent fact and did not comment on the credibility of the witness or his testimony. Moreover, the court instructed the jury that the

judge is required to be impartial, that it should not infer that he was implying that evidence or facts were or were not proven, and that the jury alone finds the facts.

5. Conspiracy— felony murder—specific intent

The trial court did not err by submitting to the jury conspiracy to murder under the felony murder rule. The court's instruction required the jury to find an agreement and specific intent to kill and eliminated the possibility that an unintentional felony murder formed the basis for the specific intent underlying the conspiracy.

6. Constitutional Law— ineffective assistance of counsel— overwhelming evidence of guilt

There was no prejudice from any ineffective assistance of counsel in the admission of letters from a codefendant in a prosecution for assault, breaking and entering, and other crimes. The State presented overwhelming testimonial and physical evidence of defendant's guilt.

Judge WYNN concurring in the result.

Appeal by defendant from judgments entered 16 January 2004 by Judge Michael E. Helms in Wilkes County Superior Court. Heard in the Court of Appeals 8 March 2005.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey R. Edwards, for the State.

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

TYSON, Judge.

Johnny Shane Curry ("defendant") appeals from judgments entered after a jury returned guilty verdicts for: (1) assault with a deadly weapon with intent to kill inflicting serious injury; (2) felonious breaking or entering; (3) felonious larceny; (4) robbery with a dangerous weapon against Lloyd Triplett ("Triplett"); (5) felonious conspiracy to commit first-degree murder under the felony murder rule; (6) felonious conspiracy to commit robbery against Ruth's Ice Cream and Sandwich Shop ("Ruth's"); (7) felonious conspiracy to commit robbery with a dangerous weapon against Triplett; and (8) attempted murder. We find no error.

I. Background

Defendant, twenty-nine years old, and Danielle Edsel ("Edsel"), seventeen years old, were dating in February 2003. Triplett operated Wood's Grocery Store ("Wood's") and lived in a house next door. Triplett had known Edsel since she was a child and allowed her to live in a small apartment in the back of Wood's Grocery. He also gave her money and food and permitted her to use his bathroom when those at Wood's were not working. Edsel also occasionally worked for Triplett at Wood's.

The State's evidence tended to show that defendant and Edsel were seeking money. They discussed robbing Ruth's, where Edsel formerly worked. However, on the day they planned to rob Ruth's, bad weather had forced Ruth's to close early and they could not get inside the store.

Defendant and Edsel next planned to rob Triplett. They discussed several options to steal Triplett's money. The first option involved Edsel seducing Triplett, tying him to the bed, then forcing him to tell them where he kept his money. However, they determined that plan would allow Triplett to identify both of them.

The next plan involved Edsel knocking Triplett out at his house with defendant coming in and killing him. However, Edsel later determined that she would kill Triplett, so defendant would not "be the one to live with it."

On the evening of 16 February 2003, Edsel approached Triplett as he was working at Wood's and asked if she could use his bathroom. He agreed and the two walked from Wood's to Triplett's house. Triplett cooked dinner while Edsel showered. The two ate together, drank liquor, and watched television. Triplett asked Edsel if she wanted to spend the night. She agreed and Triplett left the house to move Edsel's car behind Wood's. After Triplett left, Edsel called defendant and asked him to come over to complete the robbery. When defendant hesitated, Edsel told him to "never mind," that she would call him later.

Triplett returned home after moving Edsel's car and the two talked for a while. At about 11:00 p.m., Triplett heard someone knocking on the door and went to answer it. Edsel, believing defendant was at the door, panicked and grabbed a gun she had hidden underneath the sofa. She aimed and shot Triplett in the back of the head. Triplett was knocked unconscious by the bullet and collapsed.

Defendant came inside Triplett's house and began searching for money. He went to Triplett's room and discovered another gun, which he stole. Edsel and defendant also grabbed some jewelry and another gun. Edsel checked Triplett and determined he was still alive. She was about to shoot him again when defendant stopped her. As Triplett regained consciousness, defendant and Edsel told him that someone had hit him on the head. Defendant advised Triplett to go to the hospital, but he refused. Edsel and defendant asked Triplett where he kept his money. Triplett claimed his niece held it all.

Defendant stayed with Triplett while Edsel went to Wood's to look for money. She broke open video poker machines and stole all of the quarters, but could not find additional cash. Edsel returned to Triplett's house and she and defendant attempted to cut the phone lines to Triplett's house. Defendant then left to search Wood's for money. Triplett still refused to go to the hospital. Edsel walked out of Triplett's house for a moment to get away from him. Triplett locked Edsel out of the house and called the police and his sister. Defendant returned to the house and he and Edsel asked Triplett to let them back inside. Triplett refused and informed them that he had called the police and his sister.

Defendant and Edsel returned to Wood's. Defendant broke open another video poker machine, stole cigarettes, and other items. They gathered the stolen goods into several bags and placed them inside Edsel's car. Both entered the vehicle, which they started to defrost the windows.

Wilkes County Sheriff's deputies were dispatched to Triplett's house in response to the 911 call. They arrived and saw Edsel's car parked behind Wood's. Triplett told the deputies that someone had knocked him unconscious. When he regained consciousness, he observed defendant and Edsel going through his things. The deputies approached Edsel's car and asked Edsel if they could search the vehicle. Edsel consented to the search. The deputies recovered two guns, a large quantity of cigarette cartons, bags of jewelry, and cash. When asked about these items, defendant and Edsel responded that they did not know how the items got into the car.

Triplett was taken to Wilkes Regional Medical Center and was treated for a gunshot wound to the head. The bullet fractured Triplett's skull and he was transferred to Baptist Hospital in Winston-Salem. He underwent neurosurgery to treat the gunshot wound and skull fracture.

On 14 April 2003 and 8 December 2003, the grand jury of Wilkes County returned true bills of indictment against defendant for: (1) assault with a deadly weapon with intent to kill inflicting serious injury; (2) felonious breaking and entering; (3) felonious larceny; (4) robbery with a dangerous weapon against Triplett; (5) felonious conspiracy to commit first-degree murder under the felony murder rule; (6) felonious conspiracy to commit robbery against Ruth's; (7) felonious conspiracy to commit robbery with a dangerous weapon against Triplett; and (8) attempted murder.

A. Defendant's Evidence

Defendant was tried by a jury during the 12 January 2004 Criminal Session of Wilkes County. Defendant offered evidence from a fellow inmate of Edsel that she had planned the entire event and intended on having sex with Triplett in exchange for money. This testimony tended to show that after Edsel engaged in sexual intercourse, Triplett did not pay her and she shot him. The fellow inmate also testified Edsel stated she did not contact or involve defendant until after she had shot Triplett. Defendant did not testify.

B. Verdict and Sentence

On 16 January 2004, the jury found defendant to be guilty of all charges. The trial court arrested judgment on the charge of conspiracy to commit robbery with a dangerous weapon (03 CRS 50657) and consolidated the verdicts for the charges of felonious larceny (03 CRS 50656) and felonious breaking and entering (03 CRS 50656). During sentencing, defendant was found to have a prior record level of III. Defendant was sentenced in the presumptive range for all charges, the following to run consecutively: (1) 220 months minimum to 273 months maximum for attempted murder; (2) 116 months minimum to 149 months maximum for assault; (3) 220 months minimum to 273 months maximum for conspiracy to commit murder; (4) 103 months minimum to 133 months maximum for armed robbery; and (5) ten months minimum to twelve months maximum for breaking and entering. Defendant was also sentenced for a concurrent term of ten months minimum to twelve maximum for conspiracy to commit robbery. Defendant appeals.

II. Issues

Defendant argues: (1) the trial court erred in admitting into evidence letters written between defendant and Edsel; (2) the trial court erred in posing a question to a defense witness; (3) he was improperly

charged for conspiracy to commit felony murder; and (4) defendant received ineffective assistance of counsel.

III. Admissibility of Letters

Defendant argues the trial court committed plain error by failing to edit or redact highly prejudicial portions from letters written by defendant and Edsel and later admitted into evidence at trial. We disagree.

A. Preservation of Potential Error for Appellate Review

[1] Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

N.C.R. App. P. 10(b)(1) (2004). Assignments of error are generally not considered on appellate review unless an appropriate and timely objection was entered. *State v. Short*, 322 N.C. 783, 790, 370 S.E.2d 351, 355 (1988) (citing *State v. Reid*, 322 N.C. 309, 367 S.E.2d 672 (1988)); N.C. Gen. Stat. § 15A-1446(a) (2003).

Our review of the transcripts and record fails to show that defendant moved to redact portions of or exclude the letters or made a timely and specific objection when the State proffered the letters and Edsel's corroborating testimony into evidence. Defendant had access to the letters prior to trial, knew the State intended to introduce them, but failed to request the trial court to edit the allegedly prejudicial portions. Under Rule 10(b)(1), defendant failed to preserve this assignment of error for review.

B. Plain Error Rule

[2] Our Supreme Court adopted the plain error rule as an exception to Rule 10 in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)

(applied to assignments of error regarding jury instructions). A defendant seeking plain error review must "specifically and distinctly contend[]" that any error committed by the trial court amounted to plain error. *State v. Nobles*, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999). The proponent must show that:

> [A]fter reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). We may only apply the plain error rule in exceptional cases. *State v. Sams*, 317 N.C. 230, 241, 345 S.E.2d 179, 186 (1986) (citation omitted). Our Supreme Court has extended plain error review to issues concerning admissibility of evidence. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983).

We examine the entire record to decide whether the error "had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 379 (citation omitted). We determine whether, absent the error, the jury would have returned a different verdict. *State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986). Defendant properly argued in his brief with citations to relevant authority that the admission of portions of the letters constitutes plain error, warranting this Court's review of an otherwise unpreserved assignment of error.

C. Relevant Evidence

[3] " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact at issue." *State v. Sloan*, 316 N.C. 714, 724, 343 S.E.2d

527, 533 (1986) (citations omitted). Our Supreme Court has "interpreted Rule 401 broadly and [has] explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994) (citations omitted).

Generally, all relevant evidence is admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (2003). However, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by the considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2003). Exclusion or admission of evidence under Rule 403 rests within the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986).

Here, defendant asserts the following portions of the letters read into evidence and Edsel's testimony were highly prejudicial: (1) Edsel's opinion that defendant was guilty of felony larceny and felony breaking and entering; (2) defendant had prior criminal convictions; (3) defendant had previously been incarcerated; (4) defendant threatened to assault Edsel; (5) defendant advised Edsel how to pass a gunshot residue test; (6) defendant had no intention of testifying or taking a plea offer; (7) defendant thought a "fixer" was the only means to prevent his conviction; (8) defendant thought he had a "piss-poor" lawyer; and (9) defendant knew of "things that can be done" to get shorter sentences.

Our review of these instances set out in the transcript and the entire record indicate absent this evidence, the jury would not have returned a different verdict. *Riddle*, 316 N.C. at 161, 340 S.E.2d at 80. The State proffered separate and overwhelming testimonial and physical evidence against defendant to prove his guilt. Defendant has failed to show any alleged error in permitting introduction of the above evidence was "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quotation omitted). Under the other evidence presented, defendant has failed to show this is the exceptional case where the claimed error is so fundamental that justice was not done. *Sams*, 317 N.C. at 241, 345 S.E.2d at 186. This assignment of error is overruled.

IV. Trial Court's Question

[4] Defendant asserts the trial court committed prejudicial error by asking a defense witness a question. We disagree.

Here, defendant was arrested with $19.75 in quarters in his pockets. The State presented evidence that the quarters came from the video poker machines located inside Wood's. To rebut the State's evidence, defense witness Joshua Curry testified that he and defendant tended bar the night before the incident. He continued that it had been "fifty-cent beer night" and customers had left quarters as tips. The following exchange took place:

Defense Counsel:	What happens when they tell you to keep the change?
Joshua Curry:	You put the quarters in the tip jar.
Defense Counsel:	That night did you get a bunch of quarters in the tip jar?
Joshua Curry:	Yeah. We do every night when we have 50-cent beer. They don't tip dollars; they tip 50 cents.
Defense Counsel:	Okay. If you remember, do you remember whether [defendant] got a bunch of tips that night? How do you split the tips?
Joshua Curry:	We split it right down the middle. Divide them at the end of the night.
Defense Counsel:	Take the jug or whatever and pour it out?
Joshua Curry:	Count it out and split it right down the middle.
Defense Counsel:	Okay.
Trial Court:	What do you do with your quarters when you get them?
Joshua Curry:	Cash them in.
Trial Court:	For dollars?
Joshua Curry:	Sometimes I do, sometimes I don't.
Trial Court:	You carry them for 48 hours in your pocket if there are 80 quarters?
Joshua Curry:	He left early that night.
Trial Court:	Go ahead.

Our Supreme Court considered this issue in *State v. Fleming*, 350 N.C. 109, 125-26, 512 S.E.2d 720, 732, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999).

> The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury. . . . The law imposes on the trial judge the duty of absolute impartiality. The trial judge also has the duty to supervise and control a defendant's trial, including the direct and cross-examination of witnesses, to ensure fair and impartial justice for both parties. Furthermore, it is well recognized that a trial judge has a duty to question a witness in order to clarify his testimony or to elicit overlooked pertinent facts.
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> In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized. The trial court has a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting the witness from prolonged, needless, or abusive examination. In performing this duty, however, the trial court's position as the standard-bearer of impartiality requires that the trial judge must not express any opinion as to the weight to be given to or credibility of any competent evidence presented before the jury.

Id. (internal citations and quotations omitted).

The trial court did not comment on the credibility of the witness or his testimony. Rather, it just clarified the line of questioning concerning defendant's possession of the quarters, a pertinent fact. *Fleming*, 350 N.C. at 126, 512 S.E.2d at 732 ("[I]t is well recognized that a trial judge has a duty to question a witness in order to clarify his testimony or to elicit overlooked pertinent facts.") (citations omitted).

In addition, the trial court provided the following instruction to the jury immediately prior to their deliberations:

> As presiding judge, I am required by law to be impartial. Therefore, you shouldn't mistakenly infer that I have implied that any of the evidence should or should not be believed, that a fact has or has not been proven or what your findings ought to be.

> Instead, you alone are to find the facts and to render a verdict reflecting the truth as you find it.

We hold the trial court's questions to the defense witness on the pertinent facts surrounding defendant's possession of quarters was not a comment on the witness's credibility or his testimony. The jury was instructed that the trial judge is required to be impartial. This assignment of error is overruled.

V. Conspiracy to Commit Felony Murder

[5] Defendant argues that North Carolina does not recognize conspiracy to commit felony murder and the trial court erred in submitting the offense to the jury. We disagree.

Our Supreme Court addressed this issue in *State v. Gibbs*, 335 N.C. 1, 51, 436 S.E.2d 321, 350 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). The defendant in *Gibbs* contended "the trial court erred by instructing the jurors that they could convict him of conspiracy to commit murder if they found an agreement to commit felony murder." *Id.* The Court disagreed, holding "[f]irst-degree murder by reason of felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony [is] committed or attempted with the use of a deadly weapon . . . . In felony murder, the killing may, but need not, be intentional." *Id.* The key component, however, is the jurors must be instructed that "to find a conspiracy to commit murder, they must first find an agreement to commit first-degree murder." *Id.*

Here, the trial court instructed the jury as follows:

> the State must prove three things beyond a reasonable doubt: First, that the defendant and Danielle Edsel entered into an agreement; second, that the agreement was to commit first-degree murder . . . [;] [a]nd third, that the defendant and Danielle Edsel intended the agreement to be carried out at the time it was made.

This instruction requiring the jury to find an agreement and specific intent to kill "eliminated the possibility that an unintentional felony murder formed the basis for the specific intent underlying the conspiracy of which they convicted defendant." *Id.* at 52, 436 S.E.2d at 350. This assignment of error is overruled.

VI. Ineffective Assistance of Counsel

[6] Defendant contends he was deprived of his constitutional right to effective assistance of counsel when defense counsel allowed the letters to be admitted. We disagree.

Our Supreme Court adopted the United States Supreme Court's language in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), concerning claims of ineffective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). The *Braswell* Court developed a two-part test in considering these arguments:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

> The fact that counsel made an error, *even an unreasonable error*, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. This determination must be based on the totality of the evidence before the finder of fact.

Id. at 563, 324 S.E.2d at 248 (citations omitted) (emphasis supplied). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249.

The State presented overwhelming testimonial and physical evidence of defendant's guilt. Triplett, Triplett's sister and brother-in-law, Wilkes County Sheriff's deputies, and Edsel testified defendant and Edsel planned to rob and kill Triplett to prevent their identification. Triplett survived the murder attempt and identified both defendant and Edsel as those who shot him. He also identified both as those who stole items from his home and Wood's. Triplett's sister and brother-in-law corroborated Triplett's testimony and testified when

they arrived at Triplett's home, defendant and Edsel were found with items stolen from Triplett's home and from Wood's. Wilkes County Sheriff's deputies testified defendant and Edsel were found in a car in possession of items stolen from Triplett's home and from Wood's. A State Bureau of Investigation agent testified bullet fragments removed from Triplett's skull were fired from a gun like the one defendant and Edsel used.

Defendant asserts his trial counsel committed prejudicial error by allowing the admission of letters written back and forth between defendant and Edsel. All of the evidence set out above was presented and properly admitted in addition to the letters allegedly admitted by defense counsel's error in judgment. Defendant fails to show and our review of the record and transcripts does not indicate a "reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different . . . ." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. This assignment of error is overruled.

VII. Conclusion

The trial court did not commit plain error by admitting letters written by defendant and Edsel into evidence. The trial court clarified and did not improperly comment on testimony by asking a witness additional questions. Defendant was properly charged and convicted of conspiracy to commit first-degree murder under the felony murder rule. Defendant was not prejudiced by his counsel's alleged error in judgment leading to the admission of evidence. Defendant received a fair trial, free from prejudicial errors he assigned and argued.

No error.

Judge ELMORE concurs.

Judge WYNN concurs in the result by separate opinion.

WYNN, Judge concurring in result.

While I concur in the result, I write separately to comment further on the trial court's questioning of a witness and the conspiracy to commit felony murder.

Regarding the trial court's questioning of a witness, "the trial court is permitted to 'interrogate witnesses, whether called by itself or by a party,' N.C.G.S. § 8C-1, Rule 614(b) (1992), 'in order to clarify

confusing or contradictory testimony,' *State v. Ramey*, 318 N.C. 457, 464, 349 S.E.2d 566, 571 (1986)." *State v. Corbett*, 339 N.C. 313, 328, 451 S.E.2d 252, 260 (1994).

In the case at bar, Defendant had $19.75 in quarters in his pockets, and the State presented evidence that the quarters came from game machines located inside Wood's Grocery Store. The defense rebutted with witness Joshua Curry, who testified that he and Defendant tended bar together the night before the alleged crimes, when it had been fifty-cent beer night. Joshua Curry testified that customers left quarters as tips. After testifying that he and Defendant split the quarters in the tip jar in half, the trial court then asked:

Trial Court: What do you do with your quarters when you get them?

Joshua Curry: Cash them in.

Trial Court: For dollars?

Joshua Curry: Sometimes I do, sometimes I don't.

Trial Court: You carry them for 48 hours in your pocket if there are 80 quarters?

Joshua Curry: He left early that night.

The trial court's questions here do not clarify confusing or contradictory testimony. While we have only the benefit of the cold record to review this exchange, it is logical to conclude that the questioning, particularly "You carry them for 48 hours in your pocket if there are 80 quarters?" with voice inflections, may have come uncomfortably close to an opinion as to the credibility of the witness's testimony. As this Court has made clear,

> Trial judges are prohibited from expressing an opinion by N.C. Gen. Stat. § 15A-1222 (1978). They must be careful in what they say and do because a jury looks to the court for guidance and picks up the slightest intimation of an opinion. It does not matter whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is entitled to a trial before an impartial judge and an unbiased jury. *State v. Whitted*, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

State v. Sidbury, 64 N.C. App. 177, 178-79, 306 S.E.2d 844, 845 (1983). Nevertheless, "not every improper remark made by the trial judge requires a new trial[,]" and "the underlying result may manifest mere

harmless error." *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361 (citations omitted), *disc. review denied*, 327 N.C. 143, 394 S.E.2d 183 (1990). Here, given the overwhelming weight of the evidence against Defendant, any error in the trial court's questioning would have been harmless.

Regarding conspiracy to commit felony murder, Defendant posits that North Carolina does not recognize conspiracy to commit felony murder. The two cases on which Defendant heavily relies in making his argument are *State v. Lea*, 126 N.C. App. 440, 485 S.E.2d 874 (1997), and *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000). While those cases addressed attempted felony murder and attempted second-degree murder, respectively, their reasoning, particularly that in *Lea*, also applies to conspiracy to commit felony murder.

In *Lea*, this Court stated:

> [A] conviction of felony murder requires no proof of intent other than the proof of intent necessary to secure conviction of the underlying felony. *Id.*
>
> To convict a defendant of criminal attempt, on the other hand, requires proof that the defendant *specifically intended* to commit the crime that he is charged with attempting. *E.g.*, *State v. McAlister*, 59 N.C. App. 58, 60, 295 S.E.2d 501, 502 (1982), *disc. review denied*, 307 N.C. 471, 299 S.E.2d 226 (1983). An attempt, by definition, "is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission." *Id.* "Although a murder may be committed without an intent to kill, attempt to commit murder requires a specific intent to kill." *Braxton v. United States*, 500 U.S. 344, 351, 114 L. Ed. 2d 385, 393, 111 S. Ct. 1854 (1991) (citation omitted).
>
> We conclude that a charge of "attempted felony murder" is a logical impossibility in that it would require the defendant to intend what is by definition an unintentional result. Accordingly, the offense of "attempted felony murder" does not exist in North Carolina.

Lea, 126 N.C. App. at 449-50, 485 S.E.2d at 880. And in *Coble*, our Supreme Court affirmed *Lea* and held:

> Because specific intent to kill is not an element of second-degree murder, the crime of attempted second-degree murder is a logical

> impossibility under North Carolina law. The crime of attempt requires that the actor specifically intend to commit the underlying offense. *See Hageman*, 307 N.C. at 13, 296 S.E.2d at 441. It is logically impossible, therefore, for a person to specifically intend to commit a form of murder which does not have, as an element, specific intent to kill.

Coble, 351 N.C. at 451, 527 S.E.2d at 48.

While neither *Lea* nor *Coble* addresses conspiracy to commit felony murder, extending the logic particularly of *Lea* could lead one to conclude that conspiracy to commit felony murder is also a logical impossibility, given the requirement for specific intent for conspiracy and the lack of such requisite intent for felony murder. Nevertheless, a prior North Carolina Supreme Court case, *State v. Gibbs*, 335 N.C. 1, 51-52, 436 S.E.2d 321, 350 (1993), explicitly upheld a conspiracy to commit felony murder conviction. And because *Lea*, a Court of Appeals case, could not overrule *Gibbs*, and neither *Lea* nor *Coble* directly addressed conspiracy to commit felony murder, *Gibbs* controls, and this Court is constrained to hold that Defendant's conviction of conspiracy to commit felony murder must stand. I do, however, respectfully urge our Supreme Court to grant review on this issue, if requested by Defendant, to give greater clarity on the law controlling this issue.

TERI HARVEY LITTLE AND FRANK DONALD LITTLE, JR., PLAINTIFFS V. OMEGA MEATS I, INC., THOMAS A. CASSANO, AND RONALD LEE SMITH, DEFENDANTS

No. COA04-154

(Filed 19 July 2005)

Employer and Employee— negligent hiring and retention— directed verdict—independent contractor—duty of care— proximate cause

The trial court did not err by directing a verdict for defendant company and its president in an action for negligent hiring and retention of an independent contractor salesman who was employed by defendant company to sell meat door to door and who broke into plaintiffs' home and assaulted, kidnapped, and robbed them after he drove into the neighborhood in a company truck because defendants did not owe plaintiffs a duty of care,

even though they knew the salesman had previously been convicted of common law robbery and kidnapping, where: (1) the salesman was not in a place where he had a legal right to be since he broke into plaintiffs' home; (2) the salesman and plaintiffs did not meet as a direct result of the salesman's relationship with defendants since he did not enter plaintiff's home as a salesman; and (3) defendants received no direct, indirect or potential benefit from the "meeting" between the salesman and plaintiffs. Assuming arguendo that defendants breached a duty to plaintiffs and were negligent in hiring the salesman, this negligence was not a proximate cause of plaintiffs' injuries because the salesman's association with defendants did not advance his criminal endeavor in any manner.

Judge GEER dissenting.

Appeal by plaintiffs from judgment entered 20 August 2003 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 22 September 2004.

Schoch and Schoch by Arch K. Schoch IV and Arch K. Schoch V for plaintiff-appellants.

Horton and Gsteiger, P.L.L.C. by Urs R. Gsteiger for defendant-appellees.

STEELMAN, Judge.

Plaintiffs Frank and Teri Little resided in a single-family residence in the City of Greensboro. About midday on 23 March 2001, Frank was at work and Teri had left the residence to take a walk in a nearby neighborhood. While the Littles were gone from their residence, defendant Smith (Smith) drove into the Littles' neighborhood, operating a refrigerated Omega Meats truck. Smith parked the truck in the driveway of the Littles' next door neighbor, and proceeded to break into the side entrance of the Littles' residence. While Smith was still inside, Teri returned to the home and went inside. She was attacked by Smith, handcuffed and robbed. Approximately twenty to thirty minutes later, Frank also returned home. Smith then further assaulted Teri, bound Frank, and attempted to asphyxiate him with a plastic bag. As Smith began to sexually assault Teri, Frank freed himself and grabbed a knife. A struggle ensued over the knife, during which Teri was able to flee from the home. Realizing that one of his victims had escaped, Smith fled from the Littles' residence and drove

off in the Omega Meats truck. Smith was subsequently convicted of several counts of kidnapping, felony assault, robbery, and felonious breaking and entering. *See State v. Smith*, 160 N.C. App. 107, 584 S.E.2d 830 (2003).

Defendant Omega Meats I, Inc. (Omega) sells meat products using independent contractor salesmen. Defendant Thomas A. Cassano (Cassano) is the president of Omega. Salesmen rent refrigerated trucks from Omega on a daily basis, and attempt to sell consigned meats to customers, door to door. At the end of the day, the salesman pays Omega for the truck rental, and for any meat sold. Once a salesman leaves Omega's warehouse, he is not supervised or controlled by Omega. Each salesman develops his own customers and decides where to drive the truck to service his existing customers or attempt to acquire new customers.

Smith first worked for Omega in 1997. Prior to beginning work as an independent contractor salesman, Omega performed a driver's licence check on Smith, but did not perform a criminal background check. Had a criminal background check been performed, it would have revealed that Smith had numerous convictions, including drug offenses and assault. During his first period as a salesman for Omega, Smith was convicted of common law robbery and kidnapping, and served an active prison sentence of 26 months. Following Smith's release from prison, he went back to work for Omega as an independent contractor salesman. It was during Smith's second term with Omega that the incident with the Littles occurred.

This action was initiated on 21 February 2002, seeking damages for personal injury and punitive damages from defendants Omega, Cassano and Smith arising out of the events of 23 March 2001. The claims against Omega and Cassano were for negligent hiring and retention of Smith as a salesman. This matter came on for trial before the Honorable Michael E. Helms and a jury at the 11 August 2003 session of Civil Superior Court for Guilford County. The plaintiffs' claims against Omega and Cassano were severed from the claims against Smith, and only the claims against Omega and Cassano were tried before Judge Helms. At the conclusion of the plaintiffs' evidence, defendants Omega and Cassano moved for a directed verdict pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure. This motion was granted, and the trial court dismissed plaintiffs' claims against Omega and Cassano. The trial court certified its judgment pursuant to Rule 54(b) for immediate appeal. Plaintiffs appeal.

In plaintiffs' sole assignment of error they argue that the trial court erred in directing verdict in favor of defendants Omega and Cassano because the evidence presented was sufficient for the case to be submitted to the jury on the issue of defendants' negligence in hiring and retaining Smith. We disagree.

> A motion for directed verdict under G.S. 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to take the case to the jury. In ruling on a defendant's motion for directed verdict, the trial court must take plaintiff's evidence as true, considering plaintiff's evidence in the light most favorable to him and giving him the benefit of every reasonable inference. Defendant's motion for a directed verdict should be denied "unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." Given these principles it is clear that a defendant in a negligence action is not entitled to a directed verdict unless the plaintiff has failed, as a matter of law, to establish the elements of actionable negligence.

McMurray v. Surety Federal Sav. & Loan Asso., 82 N.C. App. 729, 730, 348 S.E.2d 162, 164 (1986) (citations omitted). "Negligence has been defined as the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them. The traditional elements of actionable negligence are the existence of a legal duty or obligation, breach of that duty, proximate cause and actual loss or damage." *Id.* at 731, 348 S.E.2d 162, 164.

We agree with plaintiffs that Smith's relationship with Omega was that of an independent contractor and not an employee. "Generally, one who employs an independent contractor is not liable for the independent contractor's [acts]." *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000). However, in certain limited situations an employer may be held liable for the negligence of its independent contractor. Such a claim is not based upon vicarious liability, but rather is a direct claim against the employer based upon the actionable negligence of the employer in negligently hiring a third party. *Id.* at 375, 533 S.E.2d at 491-92, *citing Woodson v. Rowland*, 329 N.C. 330, 352, 407 S.E.2d 222, 235 (1991) ("The party that employs an independent contractor has a continuing responsibility to ensure that adequate safety precautions are taken. . . . The employer's liability for breach of this duty 'is direct and not derivative . . . .' "). Because plaintiff's claim against Omega is a direct claim, there must be a legal duty

owed by the employer to the injured party in order to establish the claim for negligent hiring. Once that duty is established then the plaintiff must prove four additional elements to prevail in a negligent hiring and retention case: "(1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff's injury was the proximate result of this incompetence." *Kinsey v. Spann*, 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000), *citing Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990). Most of our cases dealing with negligent hiring of an independent contractor have turned upon the third element, whether the employer had actual or constructive notice of the incompetence of the independent contractor. *Kinsey*, 139 N.C. App. 370, 533 S.E.2d 487 (holding defendant had no notice of her nephew's incompetence in tree removal); *Woodson*, 329 N.C. 330, 407 S.E.2d 222 (holding that a general contractor did not have notice of subcontractor's practices which led to a trench cave-in); *Medlin*, 327 N.C. 587, 398 S.E.2d 460 (holding that defendant school system did not have notice of a principal's pedophilic tendencies). Since these cases turned on the notice question, they do not contain any significant discussion of the duty owed by the employer to the plaintiff.

However, other cases make it clear that there must be a duty owed by the employer to the plaintiff in order to support an action for negligent hiring. In the leading case of *Page v. Sloan*, 281 N.C. 697, 702, 190 S.E.2d 189, 192 (1972) (*citing* 40 Am. Jur. 2d, Hotels, Motels and Restaurants § 81), our Supreme Court stated that the "duties thus imposed upon an innkeeper for the protection of his guests 'are nondelegable, and liability cannot be avoided on the ground that their performance was entrusted to an independent contractor.' " In *Kinsey*, this Court stated that in cases where the independent contractor engages in ultra-hazardous or inherently dangerous work, that "the employer has a non-delegable duty for the safety of others." *Kinsey*, 139 N.C. App. at 374, 533 S.E.2d at 491, *citing Canady v. McLeod*, 116 N.C. App. 82, 88, 446 S.E.2d 879, 883 (1994).

The nature and extent of the duty owed by the employer to injured parties in negligent hiring cases has not been described with great precision in the case law of North Carolina to date. However:

> Most jurisdictions accepting the theory of negligent hiring have stated that an employer's duty to select competent employees extends to any member of the general public who comes into con-

> tact with the employment situation. Thus, courts have found liability in cases where employers invite the general public onto the business premises, or require employees to visit residences or employment establishments. One commentator, in analyzing the requisite connection between plaintiffs and employment situations in negligent hiring cases, noted three common factors underlying most case law upholding a duty to third parties: (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff.

Cindy M. Haerle, 68 Minn. L. Rev. 1303, 1308-09, *MINNESOTA DEVELOPMENTS: Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments* (1984) (citation omitted) (emphasis added). Courts in other jurisdictions have generally, though not exclusively, declined to hold employers liable for the acts of their independent contractors or employees under the doctrine of negligent hiring or retention when *any one* of these three factors was not proven. *Id. See also McLean v. Kirby Co.*, 490 N.W.2d 229 (N.D., 1992); *Baugher v. A. Hattersley & Sons, Inc.*, 436 N.E.2d 126, 129 (Ind. Ct. App., 1982); *Parry v. Davidson-Paxon Company*, 73 S.E.2d 59 (Ga. Ct. App., 1952); *Goforth v. Office Max*, 48 Va. Cir. 463, 467 (Va. Cir. Ct., 1999). It is only after a plaintiff has established that the defendant owed a duty of care that the trial court considers the other elements necessary to establish a claim for negligent hiring or retention of an independent contractor. *See* 68 Minn. L. Rev. 1303, 1308, *supra* ("Thus, to be liable the employer must first owe the plaintiff a duty of care.").

In the instant case Smith was not in a place where he had a legal right to be since he broke in to plaintiffs' home; Smith and plaintiffs did not meet as a direct result of Smiths' relationship with defendants, since he did not enter plaintiffs' home as a salesman; finally, defendants received no benefit, direct, indirect or potential, from the tragic "meeting" between Smith and plaintiffs. We have found no authority in North Carolina suggesting that defendants owed plaintiffs a duty of care on these facts, and we hold that in fact none existed.

We refuse to make employers insurers to the public at large by imposing a legal duty on employers for victims of their independent

contractors' intentional torts that bear no relationship to the employment. We note that because this is a direct action against the employer, for the purposes of this appeal the result would be the same if Smith had been an employee of defendants instead of an independent contractor. Smith could have perpetrated the exact same crimes against these plaintiffs, in the exact same manner, and with identical chances of success, on a day that he was not selling Omega's meats and driving Omega's vehicle.

Because Omega did not owe plaintiffs a duty of care, plaintiffs had no legal cause of action against Omega grounded in negligent hiring or retention. Having so held, we must further hold that the same reasoning applies to defendant Cassano. Therefore, the trial court properly granted defendants' motion for directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. Our holding should not be interpreted as limiting employers' duties to third parties in negligent hiring or retention claims to duties that are non-delegable. What is required, however, is a nexus between the employment relationship and the injury.

Assuming *arguendo* that defendants did owe plaintiffs a duty of care, we further hold there was insufficient evidence, taken in the light most favorable to plaintiffs, to prove that any negligence on the part of defendants was the proximate cause of plaintiffs' injuries.

> "Proximate cause is a cause which in natural and continuous sequence, unbroken by any new or independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed." Thus, it is axiomatic that proximate cause requires foreseeability.

Johnson v. Skinner, 99 N.C. App. 1, 7-8, 392 S.E.2d 634, 637 (1990) (internal citations omitted). Plaintiffs argue that "it was foreseeable to defendants that sending a person such as Smith, with his recent, as well as long, record and propensity for violence, into residences could and likely would create an unreasonable risk of harm." In support of this contention they cite the North Dakota Supreme Court case of *McLean v. Kirby Co.*, 490 N.W.2d 229 (N.D., 1992). While plaintiffs may be correct in their assertion that sending Smith into residences could foreseeably create an unreasonable risk of harm, the foreseeability of a risk of harm is insufficient unless defendants'

negligent hiring or retention of Smith in some manner *actually caused* the injury in question.

In *McLean*, the victim "let Molachek into her apartment to demonstrate [defendant's] vacuum cleaner. Molachek also brought with him a set of knives, provided by the distributor, as a 'door opener' or 'gift offering' for allowing the in-home demonstration. After beginning the demonstration, Molachek used the knives in assaulting and raping [the victim]." *McLean*, 490 N.W.2d at 232. In *McLean*, defendant's independent contractor was invited into the victim's home as a direct result of his position as a representative of defendant. Further, he accomplished the assault and rape by utilizing knives provided to him by the defendant. The facts in *McLean* support a finding of proximate cause arising out of the employment or independent contractor relationship. This is not true in the instant case. As discussed above, though Smith was driving an Omega truck, his association with defendants did not advance his criminal endeavor in any manner. The same result would have occurred had he not been driving an Omega truck.

Therefore, even assuming *arguendo* that defendants were negligent in hiring Smith, this negligence was not the proximate cause of plaintiffs' injuries. The trial court correctly granted defendants' motion for directed verdict. This assignment of error is without merit.

AFFIRMED.

Judge CALABRIA concurs.

Judge GEER dissents.

GEER, Judge, dissenting.

The fundamental question presented by this case is whether defendants may be held liable for the torts of their independent contractor, Ron Smith. While the general rule in North Carolina "is that an employer or contractee is not liable for the torts of an independent contractor committed in the performance of the contracted work," *Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817 (1971), *aff'd*, 281 N.C. 697, 190 S.E.2d 189 (1972), our Supreme Court has held that "[a] third party not contractually related to and injured by an incompetent or unqualified independent contractor may proceed against one who employed the independent contractor on the

theory that the selection was negligently made." *Woodson v. Rowland*, 329 N.C. 330, 358, 407 S.E.2d 222, 239 (1991).

I believe that plaintiffs' evidence was sufficient to permit the jury to find that defendants negligently selected Ron Smith because he was unqualified to serve as a salesman going door to door in residential neighborhoods given his convictions for common law robbery, second degree kidnapping, and unlawful possession of a firearm by a felon. I would, therefore, reverse the trial court's order directing a verdict in defendants' favor. For that reason, I dissent.

The Supreme Court in *Woodson* cited *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972) as support for allowing a negligent hiring claim with respect to independent contractors. In *Page*, the Court held that "[i]f defendants knew, or in the exercise of due care should have known, that [the independent contractor] was not competent to do such work and if the [independent contractor's] negligence was a proximate cause of the explosion and ensuing death of plaintiff's testate, defendants would be liable." *Id.* at 703, 190 S.E.2d at 193.

Ten years later, this Court relied upon language in the underlying Court of Appeals decision in *Page* as "controlling" on the question "whether there is any cause of action for the negligent hiring of an independent contractor." *Deitz v. Jackson*, 57 N.C. App. 275, 277, 291 S.E.2d 282, 284 (1982). The Court quoted:

> "[A] condition prescribed to relieve an employer from liability for the negligent acts of an independent contractor employed by him is that he shall have exercised due care to secure a competent contractor for the work. Therefore, if it appears that the employer either knew, or by the exercise of reasonable care might have ascertained that the contractor was not properly qualified to undertake the work, he may be held liable for the negligent acts of the contractor. . . ."

Id. at 277-78, 291 S.E.2d at 284-85 (quoting *Page*, 12 N.C. App. at 439, 183 S.E.2d at 817). In *Deitz*, the Court then held that an employer of a general contractor "may be subject to liability for an injury done to a plaintiff as a proximate result of the [employer's] negligence in hiring an independent contractor to perform [the contracted-for] work." *Id.* at 278, 291 S.E.2d at 285.

Based on this authority, I believe that our courts have already established a duty on the part of employers of independent contractors and that the majority opinion's conclusion that there is no duty

in this case—as a matter of law—cannot be reconciled with this authority. Under *Woodson*, *Page*, and *Deitz*, a plaintiff may establish a claim of negligent hiring of an independent contractor by proving (1) the independent contractor was not qualified or competent to perform the contracted work, (2) the defendant knew or should have known that the independent contractor was not qualified or competent, and (3) the plaintiff was harmed as a proximate cause of the lack of qualification or incompetence.

In order to flesh out these elements, it is appropriate to look to the Restatement (Second) of Torts § 411 (1965), which was adopted by both the Supreme Court and the Court of Appeals in *Page*. That section of the Restatement provides:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

Id. The comments to the Restatement explain that "[t]he words 'competent and careful contractor' denote a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others, *and who also possesses the personal characteristics which are equally necessary*." *Id.* cmt. a (emphasis added). The Restatement stresses, however, that for liability to exist, it is "necessary that harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him." *Id.* cmt. b.

In holding that a showing of these elements is not sufficient in the absence of a separate showing of a "duty," the majority overlooks our Supreme Court's analysis of when a duty is owed. In *Mullis v. Monroe Oil Co.*, 349 N.C. 196, 505 S.E.2d 131 (1998), the Court held:

> A legal duty is owed whenever one person is by circumstances placed in such a position [towards] another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard

> to those circumstances he would cause danger of injury to the person or property of the other. Every man is in general bound to use care and skill in his conduct wherever the reasonably prudent person in his shoes would recognize unreasonable risk to others from failure to use such care. Risk-creation behavior thus triggers duty where the risk is both unreasonable and foreseeable. . . . [T]he orbit of the danger as disclosed to the eye of reasonable vigilance [is] the orbit of the duty.

Id. at 204-05, 505 S.E.2d at 137 (internal citations and quotation marks omitted). A duty arises based on evidence showing that a defendant "should have recognized that [plaintiff], or anyone similarly situated might be injured by their conduct." *Id.* at 205, 505 S.E.2d at 137. This analysis directly parallels the elements for negligent hiring set out in *Woodson*, *Page*, *Deitz*, and the Restatement without any further showing. The majority's holding that there must be "a nexus between the employment relationship and the injury" goes to the question of the foreseeability of the risk or, in other words, whether the employer of the independent contractor knew or should have known that the independent contractor created a risk of injury to plaintiff or others similarly situated because of his incompetence or lack of qualifications—precisely the test set out in *Woodson*, *Page*, *Dietz*, and the Restatement.

The Restatement provides as an illustration:

> 1. The A Company sells pianos on the installment plan. It employs the B Company, a collecting agent, to collect the unpaid installments on these pianos. The A Company knows that the B Company's employees are rough and violent and addicted to quarreling with the customers of its clients. The A Company instructs the B Company to collect C's unpaid installments. The B Company sends D, one of its employees, to do so. D gets into an argument with C and in the course of it unjustifiably knocks C down and seriously harms him. *A is subject to liability to C.*

Id. cmt. a, illus. 1 (emphasis added). This illustration confirms that these principles of liability apply to an independent contractor's intentional torts as well as to his negligence. I believe that this factual scenario is closely analogous to that presented in this appeal and it demonstrates that the trial court erred in granting a directed verdict.

In this case, plaintiffs offered evidence that Ron Smith had been convicted of common law robbery and second degree kidnapping and

that defendants, prior to hiring Smith, knew not only of these convictions, but also that Smith had only recently been released from prison.[1] Further, following Smith's hiring, defendants learned from Smith's girlfriend, who also worked for Omega Meats, that defendant was convicted of possession of a firearm by a felon. He was arrested on that charge while driving an Omega Meats truck.

Defendant Cassano testified that despite these convictions, he hired Smith as an independent contractor to sell Omega Meats products door-to-door while driving an Omega Meats truck. Salesmen like Smith would pick up an Omega Meats truck from 8:00 a.m. to 11:00 a.m. and then return the truck at some time between 6:00 p.m. to 11:00 p.m. Cassano explained that the salesmen "cold-call," going "from door to door at residences." He acknowledged that Smith "was going to be calling door-to-door at residences" and that he sold and marketed Omega Meat products using an Omega truck.

I believe that a reasonable juror could find that a convicted robber and kidnapper—who also unlawfully carried a firearm while working—did not possess the personal qualities necessary for making cold calls door-to-door in residential neighborhoods. If the jury found that Smith was not competent or qualified to be a door-to-door salesman, then plaintiffs' evidence is also sufficient to establish defendants' actual knowledge of that incompetence. Accordingly, I believe this evidence is sufficient to allow a jury to find defendants negligent in selecting Smith as an independent contractor.

The remaining issue is whether plaintiffs were harmed as a proximate cause of that negligence. Plaintiffs' evidence established that Smith checked out an Omega Meats truck in the morning and that the break-in occurred at mid-day while Smith was still using the Omega Meats truck. Defendants have contended that plaintiffs did not prove causation because they did not offer any evidence that Smith was in fact using the truck at the time of the break-in. Plaintiff Frank Little testified, however, that when he pulled into his driveway, shortly before he was attacked in his home, he noticed a white pickup truck with a freezer that had the logo for Omega Meats on it in his neighbor's driveway. The truck's engine was running. Little was familiar with Omega Meats because salesmen had previously come to his door

1. Smith was convicted of those crimes while working for Omega Meats the first time. Defendant Cassano testified that he learned of the convictions when Smith did not return to work. Had Cassano performed a criminal record check, he would also have learned that Smith had been convicted of five assault on a female charges, five indecent exposure charges, and one simple assault charge.

offering to sell meat products. In addition, plaintiffs offered evidence that an Omega Meats truck was impounded by the police from the scene. While it would have been helpful to have evidence that this truck was in fact the truck provided to Smith, a jury could infer from the evidence offered that Smith was using the Omega Meats truck when he committed the break-in.

The question remains whether the injuries to plaintiffs resulting from the break-in and attack were reasonably foreseeable to defendants. As our Supreme Court has noted, "it is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979). I do not believe that this case falls into the exceptional category.

Although the critical issue with respect to proximate cause is the foreseeability of the plaintiffs' injuries, the law does not require that the precise injury be foreseeable to defendants. *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233-34, 311 S.E.2d 559, 565 (1984). Instead, "[t]he test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant." *Williams*, 296 N.C. at 403, 250 S.E.2d at 258.

In this case, I believe that a jury could conclude—in light of Smith's convictions for robbery, kidnapping, and possession of a firearm (the latter while using an Omega Meats truck)—that it was reasonably foreseeable to defendants that there was a risk that Smith would use the Omega Meats truck as a cover while breaking into homes during the day, at a time when most homeowners would be away from their homes. *See Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 737 (Tex. 1998) ("A person of ordinary intelligence should anticipate that an unsuitable dealer [who had previously engaged in sexual misconduct] would pose a risk of harm" in connection with door-to-door sales.). While the jury could also decide that the risk was not foreseeable based either on the convictions or defendants' actual experience with Smith, I do not believe that a court can decide the foreseeability issue as a matter of law given the evidence in this record.

I recognize that this case presents a troubling policy issue. Imposing liability on defendants for hiring Smith despite his criminal record risks chilling defendants and other employers from hiring individuals with criminal records. Without the ability to obtain employ-

ment, rehabilitation becomes nearly impossible. Nevertheless, under the law of North Carolina, hiring is only a problem if the conviction renders the individual unsuitable for the position. For example, few would question that a person convicted of drug offenses would be unsuitable for a position providing access to narcotics. I believe that the evidence in this case is sufficient to permit, but not require, a jury to conclude that Smith was unsuitable for an unsupervised position as a door-to-door salesman.

JAMES GOODSON, EMPLOYEE-PLAINTIFF AND N.C. DEPARTMENT OF INSURANCE, EX REL. JAMES LONG, COMMISSIONER, INTERVENOR V. P. H. GLATFELTER CO., EMPLOYER-DEFENDANT; LANGDON M. COOPER, TRUSTEE IN BANKRUPTCY FOR RFS ECUSTA, INC., DEFENDANT AND NORTH CAROLINA SELF-INSURANCE GUARANTY ASSOCIATION, DEFENDANT

No. COA04-886

(Filed 19 July 2005)

1. Workers' Compensation— sale of business—continuing jurisdiction of Industrial Commission

An employer who had sold its paper mill and workers' compensation liabilities after an employee's work-related accident continued to be subject to the jurisdiction of the Industrial Commission with regard to that accident.

2. Workers' Compensation— jurisdiction of Industrial Commission—not divested by course of conduct

None of the cited authority supported an argument that a course of conduct by the Department of Insurance or the Industrial Commission could divest the Commission of the jurisdiction conferred on it by statute in a workers' compensation case involving an employer that had sold its business. Moreover, the parties had stipulated that the employer, Glatfelter, was bound by the provisions of the Workers' Compensation Act.

3. Workers' Compensation— authority of Industrial Commission—agreement transferring obligations

Adjudication of the validity of an agreement transferring workers' compensation liabilities along with a paper mill fell within the delegated authority of the Industrial Commission. N.C.G.S. § 97-6.

4. Workers' Compensation— authority of Industrial Commission—discharge of obligation

Determining whether a self-insurer has fully discharged its workers' compensation obligations is the province of the Industrial Commission; the Department of Insurance does not have that authority, by implication or expression. The Department of Insurance in this case improperly released the bond of a self-insured employer which did not secure its obligations in a manner compliant with N.C.G.S. § 97-185(g).

5. Appeal and Error— assignment of error—not supported by authority—abandoned

An assignment of error was deemed abandoned for failure to cite legal authority.

6. Workers' Compensation— transfer of obligation—estoppel

Assuming that estoppel could be asserted against the Industrial Commission in a case involving the attempted transfer of workers' compensation liabilities, the actions necessary for the transfer occurred before the Commission was informed or involved.

7. Workers' Compensation— transferred liability—enforcement of award—authority of Commission versus Department of Insurance

Although defendant argued that the Department of Insurance had exclusive regulatory jurisdiction, the Industrial Commission properly exercised its authority in determining that a self-insured employer who attempted to transfer its workers' compensation liabilities along with its paper mill remained subject to the Workers' Compensation Act.

8. Workers' Compensation— necessary parties—sale of business and obligations

All of the necessary parties were before the Industrial Commission in a workers' compensation case arising from the sale of a paper mill and its liabilities.

9. Workers' Compensation— sale of business—transfer of obligations—no statutory provisions

Although N.C.G.S. § 97-6 allows employers to use devices to relieve themselves of workers' compensation obligations where "otherwise expressly provided" in the Workers' Compensation

Act, there are no such mechanisms allowing the transfer under the facts of this case.

10. Workers' Compensation— levy on deposits—allowed but not required

Although N.C.G.S. § 97-185(f) endorses a levy upon applicable deposits by claimants entitled to workers' compensation benefits, nothing in the statute indicates that a claimant must levy on the deposit or that the Commission has the authority to force a claimant to do so.

11. Workers' Compensation— unsuccessful transfer of obligation—order to retain certificate of deposit—erroneous

The Industrial Commission erred by ordering the Department of Insurance to retain a certificate of deposit belonging to defendant RFS where it had determined that RFS was not responsible for Glatfelter's workers' compensation obligations.

Appeal by P. H. Glatfelter Co. and Langdon M. Cooper, trustee in bankruptcy for RFS Ecusta, Inc. from order entered 12 February 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 March 2005.

Neill S. Fuleihan and Timothy L. Finger, for employee-plaintiff.

Young, Moore, and Henderson, P.A., by Robert C. Paschal, John N. Fountain, and Michael W. Ballance, for employer-defendant.

Stuart Law Firm, P.L.L.C., by Catherine R. Stuart and Charles C. Kyles, for the North Carolina Self-Insurance Guaranty Association.

Mullen, Holland, & Cooper, P.A., by Langdon M. Cooper, Jesse V. Bone, Jr., Jason R. Shoemaker, and Nancy B. Paschall, for Langdon M. Cooper, Trustee in Bankruptcy for RFS Ecusta, Inc.

Attorney General Roy Cooper, by Assistant Attorney General E. Clementine Peterson, for intervenor North Carolina Department of Insurance.

CALABRIA, Judge.

P. H. Glatfelter Co. ("Glatfelter") appeals an opinion and award entered by the North Carolina Industrial Commission ("Commission"), in which the Commission found James Goodson ("plaintiff")

was entitled to have Glatfelter pay his workers' compensation claim and ordered Glatfelter to (1) pay compensation to plaintiff pending appeal and (2) secure its obligations under the Workers' Compensation Act by either re-qualifying as a self-insurer or posting an appropriate special release bond. We affirm in part and reverse in part.

From 24 June 1987 until 9 August 2001, Glatfelter operated a paper mill, known as the Ecusta Division, where plaintiff was employed. On 17 January 1992, the North Carolina Department of Insurance ("DOI") licensed Glatfelter to self-insure its workers' compensation liabilities, and Glatfelter posted a commercial surety bond issued by Travelers Casualty and Surety Company of America to satisfy certain statutory bond requirements. The bond was originally for $500,000.00 but was increased to $1.6 million as liabilities grew. Glatfelter remained self-insured until 24 August 2001 and was a member of the North Carolina Self-Insurance Guaranty Association ("SIGA"), a statutorily created legal entity created to pay "covered claims" against insolvent member self-insurers. During this period of time, plaintiff sustained a compensable injury by accident and began receiving temporary total disability compensation.

In 2001, Donald Bowman ("Bowman"), Corporate Insurance and Credit Manager for Glatfelter, became aware of efforts by Glatfelter to sell the Ecusta Division, including its liabilities. On 18 June 2001, Bowman wrote Ronald Ennis ("Ennis"), senior financial analyst responsible for supervising the self-insured workers' compensation unit with DOI. In the letter, Bowman explained that Glatfelter was "in the process of selling its Ecusta Division along with the Workers Compensation liabilities[,] . . . no longer want[ed] or need[ed] to be Self-Insured[,] . . . and [desired] to cancel the [existing] Surety Bond[.]" Bowman requested information on "exactly what . . . is needed from [Glatfelter in order] to withdraw from being Self-Insured."

Three days later, Ennis responded to Bowman's letter "notifying [DOI] of [Glatfelter's] voluntary termination of self-insured status . . . effective 24 August 2001." Ennis' letter noted that the Ecusta Division was "being acquired by a third party that is assuming all past workers' compensation liabilities accrued during the Company's operation of the division." Ennis informed Bowman that the surety bond could be cancelled "by giving the Commissioner 60 days written notice" but warned that the surety would "remain liable for all obligations and liabilities . . . that arose under Chapter 97 of the North Carolina General Statutes." Nonetheless, Ennis went on to

state that if "the acquiring company provides a replacement bond, then the Department will release the Surety Company of any past, present or future liabilities."

In August 2001, Glatfelter entered into a written acquisition agreement with, *inter alia*, RFS Ecusta, Inc. ("RFS") for the sale of the Ecusta Division. The acquisition agreement purportedly transferred certain liabilities, including workers' compensation claims, of the Ecusta Division. RFS deposited a $1.6 million certificate of deposit with DOI, and, on 24 August 2001, Ennis wrote Bowman and informed him that DOI had received confirmation that RFS deposited $1.6 million "to secure the assumption of liabilities of [Glatfelter's] worker's compensation reserve loss claims" thus purportedly "discharg[ing] . . . all past, present, existing and potential liability for [Glatfelter's surety company]." Ennis also noted that Glatfelter had voluntarily terminated their status as a self-insured employer in North Carolina. DOI released Glatfelter's bond. In a subsequent memorandum regarding self-insured corporations, Ennis noted Glatfelter sold the Ecusta Division to RFS, who assumed all liabilities and posted a $1.6 million certificate of deposit as a "dollar for dollar exchange with [Glatfelter's] surety bond [and Glatfelter's] surety bond company was granted a full release from liability." A second memorandum by Ennis the following month added that DOI "notified the Industrial Commission of the transfer of the loss claims to [RFS] to ensure the appropriate legal responsibility for their discharge."

As noted previously, RFS assumed control of the operations of the Ecusta Division. Besides the certificate of deposit with DOI, RFS was insured at all times from 8 August 2002 to 23 September 2003 for claims arising during that period but not for prior pending claims. DOI did not require RFS to become self-insured when it posted the bond. In October 2002, RFS filed petitions in bankruptcy. RFS made no payments for plaintiff's admittedly compensable claim after 30 September 2002 yet failed to follow statutory procedures to terminate compensation.

Glatfelter and SIGA denied liability for payments on plaintiff's claim. North Carolina Chief Deputy Commissioner Stephen Gheen initiated a proceeding *ex mero motu* concerning continued payments of workers' compensation benefits from RFS and/or Glatfelter, and in an order entered 3 December 2002, the deputy commissioner added Glatfelter, SIGA, and DOI as parties. After a hearing on the matter and completion of the record, Deputy Commissioner George R. Hall, III,

entered an opinion and award providing, in relevant part, as follows: (1) there were no additional necessary parties; (2) the acquisition agreement did not effectuate a valid transfer of Glatfelter's workers' compensation liabilities to RFS by virtue of N.C. Gen. Stat. § 97-6 (2003) and the lack of a statutory scheme permitting a self-insured employer to transfer liabilities for workers' compensation claims by private contractual agreement; (3) Glatfelter, as plaintiff's self-insured employer at the time of the injury, was responsible for paying the compensable claim; (4) DOI erroneously released Glatfelter's bond because no "special release bond" as required by N.C. Gen. Stat. § 97-185(g) (2003) had been posted and Glatfelter had not fully discharged its obligations under the Workers' Compensation Act; (5) the certificate of deposit posted by RFS did not qualify as a "special release bond" because RFS was not a corporate surety as defined by N.C. Gen. Stat. § 97-165(5) (2003); and (6) SIGA's liability was not at issue since RFS' certificate of deposit was not implicated.

The Commission affirmed the opinion and award on appeal but modified certain provisions, in relevant part, as follows: (1) the agreements between Glatfelter and RFS, to the extent they purported to transfer workers' compensation liabilities, were void *ab initio* as a matter of law and public policy; (2) Glatfelter negotiated its workers' compensation liabilities into the sales price of the Ecusta Division, and the purpose of the certificate of deposit posted by RFS was "to secure . . . the self-insurer's claims liability to insure that injured workers' injuries on the job will be properly compensated, irrespective of the employer's financial condition"; and (3) Glatfelter erroneously relied on the posting of the certificate of deposit by RFS to bring Glatfelter into compliance with the "special release bond" provisions. In its award, the Commission ordered the use of the certificate of deposit posted by RFS based on the purpose stated in the award and opinion. The Commission further ordered Glatfelter to secure its obligations under the Act by either re-qualifying as a self-insurer or posting an appropriate special release bond as well as to make appropriate workers' compensation payments to plaintiff. Finally, the Commission ordered Glatfelter to pay compensation to plaintiff pending appeal pursuant to N.C. Gen. Stat. § 97-86.1 (2003) and dismissed SIGA as a party in the action. Both Glatfelter and RFS gave notice of appeal to this Court.

I. Standard of Review

Our Supreme Court has recently re-iterated that the Workers' Compensation Act is designed " 'to provide compensation for injured

employees' "; therefore, its provisions should be " 'liberally construed' " and " 'its benefits should not be denied by a technical, narrow, and strict construction.' " *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (quoting *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968)). In reviewing an opinion and award by the Commission, we must determine "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . 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). We view the evidence in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Findings of fact are conclusive on appeal when supported by competent evidence, despite evidence that would support contrary findings, and conclusions of law are reviewed *de novo*. *McRae*, 358 N.C. at 496, 597 S.E.2d at 700-01 (citations omitted). As to the Commission's findings of jurisdictional fact, such findings "are *not* conclusive on appeal, even if supported by competent evidence[,]" and the reviewing court has a duty to make independent findings of jurisdiction considering all the evidence of record. *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000).

II. Jurisdiction

[1] In the first assignment of error, Glatfelter asserts the Commission "lack[ed] the jurisdiction to address the issue [presented] because Glatfelter is not an 'employer' subject to the Workers' Compensation Act." Specifically, Glatfelter argues that, following RFS' purchase of Ecusta, Glatfelter was not an employer as defined by N.C. Gen. Stat. § 97-2(3) (2003) and was not subject to the jurisdiction of the Commission. However, the subsequent sale of the Ecusta Division to RFS does not, standing alone, divest the Commission of jurisdiction over Glatfelter as plaintiff's employer at the time of the accident. *See Lucas v. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976) (noting that the Commission's jurisdiction over issues of compensation under the Act depends on whether there existed, "at the time of the accident[,]" an employer-employee relationship between the claimant and the party from whom compensation is sought). The parties stipulated that this relationship existed between plaintiff and Glatfelter on 23 May 1999, the date of the accident. This assignment of error is overruled.

III. Validity of Transfer of Liabilities

A. Jurisdiction over Glatfelter

[2] In the first argument contained in Glatfelter's second assignment of error, Glatfelter, citing (1) its inquiries and dealings with DOI in selling the Ecusta Division, (2) the subsequent notification to the Commission, and (3) RFS' payment of plaintiff's compensation benefits after the sale, asserts that "[u]nder such circumstances, the combined actions of [DOI] and the [Commission] served to strip the [Commission] of jurisdiction over Glatfelter in this matter, and Glatfelter should be dismissed." In support of this argument, Glatfelter cites *Bryant v. Dougherty*, 267 N.C. 545, 148 S.E.2d 548 (1966); N.C. Gen. Stat. § 97-185(g) and (h); and N.C. Gen. Stat. § 58-2-1.

North Carolina General Statutes § 58-2-1 statutorily creates DOI and charges it "with the execution of laws relating to insurance and other subjects placed under [it]." Our Supreme Court's holding in *Bryant* merely concerned whether an employee could bring a malpractice claim against physicians who treat an employee's compensable injury and whether the Commission had "jurisdiction to hear and determine such action." *Bryant*, 267 N.C. at 552, 148 S.E.2d at 554. North Carolina General Statutes § 97-185 contains, in relevant part, certain provisions concerning how DOI is to handle securities of self-insured employers. The instant case does not concern a plaintiff attempting to bring suit against his physician for alleged malpractice, and none of the above cited authority supports an argument that a course of conduct by DOI or the Commission somehow divests the Commission of jurisdiction. Moreover, we have found no support for the proposition that a course of action by DOI or the Commission could divest it of the jurisdiction which has been conferred upon it by statute. In any event, Glatfelter's objections to the Commission's jurisdiction over it conflict with the pre-trial agreement entered into, *inter alios*, by Glatfelter. The pre-trial agreement provided that Glatfelter agreed to certain stipulations from which the Commission could make findings of fact and conclusions of law. Included in such stipulations was that Glatfelter was subject to and bound by the applicable provisions of the Act. This assignment of error is overruled.

B. Jurisdiction over Adjudication of the Validity of the Agreement

[3] Glatfelter alternatively argues that, even if the Commission had jurisdiction over Glatfelter, it did not have jurisdiction to adjudicate

the validity of the terms of the acquisition agreement purporting to transfer the workers' compensation liability for the the Ecusta Division from Glatfelter to RFS. Citing *TIG Ins. Co. v. Deaton, Inc.*, 932 F. Supp. 132 (W.D.N.C. 1996), Glatfelter contends the agreement was a discreet contract over which the Commission had no jurisdiction. We disagree.

The Commission is expressly vested with jurisdiction to determine "[a]ll questions arising under" the Workers' Compensation Act, *see* N.C. Gen. Stat. § 97-91 (2003), and "is charged with the duty of administering provisions of the Act such as to provide speedy, substantial and complete relief to all parties bound by the Act." *N.C. Ins. Guar. Ass'n v. International Paper Co.*, 152 N.C. App. 224, 226, 569 S.E.2d 285, 286 (2002). The jurisdiction conferred by statute to the Commission also includes "such judicial power as is necessary to administer the Workers' Compensation Act." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 138, 337 S.E.2d 477, 483 (1985), *appeal after remand*, 94 N.C. App. 640, 381 S.E.2d 151 (1989), *reversed on other grounds*, 326 N.C. 476, 390 S.E.2d 136 (1990).

In the instant case, the Commission considered the acquisition agreement to determine whether Glatfelter could validly transfer its workers' compensation liabilities under the Act to RFS. North Carolina General Statutes § 97-6 (2003) provides as follows: "No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer in whole or in part, of any obligation created by this Article, except as herein otherwise expressly provided." We conclude that the portion of the contract that attempted to transfer the workers' compensation liabilities of Glatfelter to RFS was the type of device contemplated by N.C. Gen. Stat. § 97-6 such that adjudication of the validity of that device fell within the scope of the Commission's delegated authority under N.C. Gen. Stat. § 97-91.

Nor is our conclusion affected by the reasoning in *TIG*, which involved a dispute between an insurance company that provided workers' compensation coverage and an insurance company that provided excess workers' compensation coverage. *TIG*, 932 F.Supp. at 135. Neither *TIG* nor *Clark v. Ice Cream Co.*, 261 N.C. 234, 134 S.E.2d 354 (1964), upon which the *TIG* opinion relied, implicated the operation of N.C. Gen. Stat. § 97-6 but, rather, concerned whether coverage ever arose under the terms of the contract for excess workers' compensation insurance. This assignment of error is overruled.

IV. Purported Transfer of Liabilities

[4] Having determined the Commission had jurisdiction to make a determination with respect to the validity of the purported transfer of liabilities by Glatfelter to RFS, we now turn to whether the Commission properly decided the question. The Commission concluded that "to the extent the agreements purported to transfer Glatfelter's workers' compensation liabilities" under the Act, the agreement violated N.C. Gen. Stat. § 97-6 and was void *ab initio*. As this issue concerns statutory interpretation of the Act, it is a question of law we review *de novo*.

We have previously stated that an employer is "primarily liable to an employee for a workers' compensation award" and " 'must pay benefits to its employees, whether the employer has the necessary insurance, is self-insured, or has no insurance at all.' " *Tucker v. Workable Company*, 129 N.C. App. 695, 700, 501 S.E.2d 360, 364 (1998) (quoting *Ryles v. Durham County Hospital Corp.*, 107 N.C. App. 455, 461, 420 S.E.2d 487, 491 (1992)). Every employer is required to secure its obligations under the Act by either insuring its workers' compensation liability or self-insuring where it has the financial ability to pay for benefits. N.C. Gen. Stat. § 97-93 (2003). Noticeably absent in the Act, however, is a provision allowing one employer to effectively escape any obligation under the Act by transferring *en toto* all of its obligations to another employer by contract or otherwise. Moreover, we agree with the Commission that any attempt to do so would conflict with the plain language of N.C. Gen. Stat. § 97-6 as an attempt to "relieve an employer [by contract] . . . of an[] obligation created" by the Workers' Compensation Act.

This does not mean, of course, that an employer is precluded from selling a division of a company to another. In such circumstances, the selling employer remains primarily liable for any workers' compensation liability arising during the time of ownership, and the selling employer is free to recover the costs associated with securing that liability in the purchase price of the division. Moreover, a selling employer may freely cease to self-insure if it complies with the following mandatory provision of N.C. Gen. Stat. § 97-185(g) (2003):

> If a self-insurer ceases to self-insure . . . the self-insurer shall notify the Commissioner [of Insurance], and may recover all or a portion of the securities deposited with the Commissioner [of Insurance] upon posting instead an acceptable special release

> bond issued by a corporate surety in an amount equal to the total value of the securities. The special release bond shall cover all existing liabilities under the Act plus an amount to cover future loss development and shall remain in force until all obligations under the Act have been discharged fully.

Subsection (h) prohibits release of a self-insurer's deposits by the Commissioner upon cessation of self-insurance "until the self-insurer has discharged fully all the self-insurer's obligations under the Act."

As noted *supra*, the Commission determines an employer's liability under the Act by virtue of N.C. Gen. Stat. § 97-91. While we agree that DOI has the authority to administer and govern self-insurers' methods of *securing their liabilities* under the Workers' Compensation Act, nothing in the statutory scheme grants DOI the Commission's authority to determine *what those liabilities are*. In short, subsections (g) and (h) of N.C. Gen. Stat. § 97-185 do not, either by implication or expression, allow DOI to make determinations regarding whether a self-insurer has fully discharged its workers' compensation obligations. That determination has been, and remains, the province of the Commission.

It is undisputed that no special release bond was posted by Glatfelter. Additionally, RFS' certificate of deposit cannot be considered a special release bond because RFS is not a "corporate surety." *See* N.C. Gen. Stat. § 97-165(5) (2003) (defining a corporate surety as "an insurance company authorized by the Commissioner to write surety business" in North Carolina); N.C. Gen. Stat. § 97-185(g). Accordingly, DOI improperly released Glatfelter's bond under N.C. Gen. Stat. § 97-185(h) since Glatfelter had not secured its obligations under the Act in a manner compliant with N.C. Gen. Stat. § 97-185(g).

V. Ratification

[5] Glatfelter asserts the actions of DOI and the Commission after the purported assignment of liability to RFS ratified the acquisition agreement. Glatfelter fails to cite any legal authority or even a legal definition of the term ratification in its brief to this Court. It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein. This assignment of error is deemed abandoned by virtue of N.C. R. App. P. 28(b)(6) (2005).

VI. Estoppel

[6] In its next argument, Glatfelter "emphatically contends that both [DOI] and the [Commission] are estopped from entering any order that requires Glatfelter to fund the workers' compensation claim[] at issue . . . ." No order of DOI enforcing Glatfelter's liability to plaintiff under the Act is contained in the record or pending before this Court; therefore, we need not address any argument concerning whether DOI is estopped in the instant case. Moreover, Glatfelter cannot assert estoppel against the Commission.

The common law doctrine of equitable estoppel serves "to aid the law in the administration of justice when without its intervention injustice would result[,]" *see Thompson v. Soles*, 299 N.C. 484, 486, 263 S.E.2d 599, 602 (1980), and prevents one from asserting a right otherwise available to him against another if his own conduct would render such an assertion of that right against the other unfair. *LSB Fin. Servs., Inc. v. Harrison*, 144 N.C. App. 542, 548, 548 S.E.2d 574, 579 (2001). "Equitable estoppel is established by evidence that an individual . . . induces another to believe that certain facts exist and that other person rightfully relies on those facts to his detriment." *Bunn Lake Prop. Owner's Ass'n v. Setzer*, 149 N.C. App. 289, 297, 560 S.E.2d 576, 582 (2002) (citations and internal quotation marks omitted).

Assuming *arguendo* that Glatfelter could otherwise use the doctrine of estoppel to preclude the Commission from carrying out its duties under the Act, the actions necessary to effectuate the intended transfer of liabilities occurred before the Commission was involved in this action in any way or was even informed that the transfer was being attempted. Notably, no action by the Commission occurred until after the attempted transfer was complete. Accordingly, Glatfelter cannot, under these facts, show any action on the part of the Commission inducing Glatfelter to undertake the attempted transfer. Our research reveals no analogous application of the doctrine, nor are we persuaded the doctrine operates under these facts. This assignment of error is overruled.

VII. N.C. Gen. Stat. § 97-93

[7] Glatfelter next asserts the Commission erred in ordering it to "secure its obligations under the Workers' Compensation Act as required by N.C. Gen. Stat. § 97-93" because "self-insured employers are regulated exclusively by the Commissioner of Insurance" and the

Commission has no "jurisdiction to require Glatfelter to secure any obligations that the [Commission] finds to exist." Under N.C. Gen. Stat. § 97-94, employers bound by the compensation provisions of the Act are required to file with the Commission, as opposed to DOI, evidence of compliance with N.C. Gen. Stat. § 97-93 as often as deemed necessary by the Commission. The statute goes on to expressly grant the Commission, as opposed to DOI, the authority to penalize any employer "who refuses or neglects to secure such compensation . . . ." N.C. Gen. Stat. § 97-94. Moreover, once the Commission determined Glatfelter remained liable to plaintiff after the failed attempt to transfer its liability to RFS, it had the authority to order Glatfelter to take steps to secure that liability in a manner consistent with the Act and to impose penalties on Glatfelter for failure to do so. We hold the Commission properly exercised its authority in determining Glatfelter was an employer subject to the Act, and Glatfelter must secure its obligation to plaintiff by one of the permitted statutory methods in order to accomplish the opinion and award. This assignment of error is overruled.

VIII. Necessary Parties

[8] In its next assignment of error, Glatfelter asserts the Commission erred in determining no other parties were necessary to the action on the grounds that the acquisition agreement listed additional purchasing parties who were to be assuming Glatfelter's workers' compensation obligations. In the pre-trial agreement, one of the stipulated facts reads as follows: "On August 9, 2001, Glatfelter and [RFS] executed an Assumption Agreement, whereby RFS purported to assume the self-insured workers' compensation liabilities of certain Glatfelter employees, including [plaintiff]." There is no error in relying on the parties' stipulation that the assumption of Glatfelter's workers' compensation obligations to plaintiff was by RFS. Therefore, all necessary parties were before the Commission, and this assignment of error is overruled.

IX. Statutory Mechanism for Transfer of Liabilities

[9] Glatfelter asserts, in its next assignment of error, that the Act does permit the attempted transfer of liabilities. Specifically, Glatfelter contends N.C. Gen. Stat. §§ 97-6, 97-185 and 97-51 (2003), "when read together, provide a logical and effective mechanism for the release and discharge of Glatfelter's liability" for plaintiff's claim. Glatfelter directs the attention of this Court to the last portion of N.C. Gen. Stat. § 97-6, which allows employers to use devices to relieve

themselves of workers' compensation obligations where "otherwise expressly provided" in the Act.

Glatfelter's citation to the other two aforementioned provisions as expressly providing for the transfer contemplated in the instant case cannot be sustained. North Carolina General Statutes § 97-51 concerns liabilities between joint employers of an injured employee. It has no application in the instant case as Glatfelter and RFS were never joint employers of plaintiff. Glatfelter's reliance on subsections (g) and (h) of N.C. Gen. Stat. § 97-185 harken back to arguments already rejected herein and are likewise unavailing. There are no "expressly provided" mechanisms satisfying the requirements of N.C. Gen. Stat. § 97-91 that sanction Glatfelter's attempt to transfer its obligations to RFS under the facts of the instant case, and this assignment of error is overruled.

X. N.C. Gen. Stat. § 97-185(f)

[10] In its last assignment of error, Glatfelter asserts the Commission erred in failing to order plaintiff to levy upon RFS' certificate of deposit under N.C. Gen. Stat. § 97-185(f) (2003), which provides as follows: "No judgment creditor, other than a claimant entitled to benefits under the Act, may levy upon any deposits made under this section." While subsection (f) endorses levying on applicable deposits by claimants entitled to benefits under the Act, nothing in the provision indicates that a claimant must levy on such a deposit or that the Commission has the authority to force a claimant to do so. Moreover, Glatfelter's assertion is premised on the incorrect supposition that, upon "[l]evying on RFS' certificate of deposit[,] . . . [l]iability would fall upon the appropriate entity, and other claimants could avail themselves of this remedy." However, as our holding makes clear, Glatfelter and not RFS is the employer that is liable to plaintiff. For these reasons, we overrule this assignment of error.

XI. Appeal by RFS

[11] RFS appeals that portion of the Commission's opinion and award that reads as follows: "Since the purpose of the surety bond was to insure Glatfelter's workers' compensation obligations, the bond monies should be available for that purpose and therefore the parties shall immediately take the necessary steps to effectuate the underlying purpose for which the bond was issued."[1] RFS asserts the certificate of deposit cannot be retained by DOI "to 'in-

1. RFS actually posted a certificate of deposit as opposed to a bond.

sure' obligations that the Full Commission held could not be transferred by Glatfelter and remained the sole responsibility of Glatfelter." We agree.

The Commission determined that RFS was not liable for Glatfelter's workers' compensation obligations as a result of the attempted transfer. Having determined the issue of liability, the method of handling the certificate of deposit belonging to RFS, when it had no obligations under the Act, falls within the ambit of DOI's jurisdiction. Accordingly, we reverse that portion of the opinion and award of the Commission ordering DOI to retain RFS' certificate of deposit.

Affirmed in part and reversed in part.

Judges HUNTER and JACKSON concur.

McGLADREY & PULLEN, LLP, PETITIONER v. NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS, RESPONDENT

No. COA04-911

(Filed 19 July 2005)

1. Accountants and Accounting— name of CPA firm—right of free speech

Petitioner's right to free speech was not violated by the Board of Certified Public Accountant Examiners' denial of its request to change its name to "RSM McGladrey & Pullen, LLP, Certified Public Accountants." The Board considered and found relevant and substantial evidence tending to show that petitioner's proposed name could be confusing and deceptive and that petitioner's proffered firm name is deceptive to the general public.

2. Accountants and Accounting— CPA firm name change—equal protection

The trial court correctly held that the Board of Certified Public Accountant Examiners did not violate petitioner's constitutional right of equal protection by refusing its name change. Petitioner failed to offer evidence of a similarly situated firm that received unlawful preferential treatment or treatment inconsistent with the Board's decision in petitioner's case.

3. Accountants and Accounting— name of CPA firm—change denied—statutory authority

The trial court correctly held that the Board of Certified Public Accountant Examiners acted within its statutory authority in denying petitioner's name change. The Board possesses the statutory authority to regulate CPA firm names, and there was substantial evidence supporting the Board's findings that petitioner's proposed name could be deceptive to the public.

4. Accountants and Accounting— name of CPA firm—change denied—not arbitrary and capricious

The trial court was not arbitrary and capricious in affirming the Board of Certified Public Accountant Examiners' ruling denying petitioner's proposed name change.

Judge WYNN dissenting.

Appeal by petitioner from order entered 18 March 2004 by Judge Orlando F. Hudson, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 April 2005.

Parker Poe Adams & Bernstein, LLP, by William L. Rikard, Jr., R. Bruce Thompson, III, and Deborah L. Edney, for petitioner-appellant.

Allen and Pinnix, P.A., by Noel L. Allen and M. Jackson Nichols, for respondent-appellee.

TYSON, Judge.

McGladrey & Pullen, LLP ("petitioner") appeals from order adopting and affirming the declaratory ruling issued by The North Carolina State Board of Certified Public Accountant Examiners (the "Board"). We affirm.

I. Background

Petitioner is a North Carolina limited liability partnership and licensed by the Board to practice in North Carolina as a certified public accounting ("CPA") firm. Petitioner specializes in providing audit and attest services for mid-sized businesses. Petitioner is affiliated with RSM McGladrey, Inc., a national consulting, wealth management, and corporate finance firm, through an "Alternative Business Structure."

RSM McGladrey, Inc. is a member of RSM International, Inc., a subsidiary of H&R Block. "RSM" is an acronym for Robson Rhodes, a United Kingdom firm, Salustro Reydel, a firm in France, and petitioner.

In Fall 2002, petitioner sought to change its name from "McGladrey & Pullen, LLP" to "RSM McGladrey & Pullen, LLP, Certified Public Accountants." Petitioner gave notice of intent to change its name to each jurisdiction in which it was registered.

On 1 October 2002, Robert N. Brooks, the Board's executive director, recommended petitioner's name change request be rejected on the grounds the initials "RSM" could deceive the public by conveying the impression that any firm using a name that begins with "RSM" is a lawful CPA firm.

On 11 March 2003, petitioner submitted its request to the full Board for a declaratory ruling. By letter dated 2 May 2003, the Board informed petitioner that the Board adopted the declaratory ruling on 28 April 2003 denying petitioner's request and ruling petitioner's proposed name change to "RSM McGladrey & Pullen, LLP, Certified Public Accountants" violated N.C. Admin. Code. Tit. 21, 8N.0307.

On 30 May 2003, petitioner filed a petition in the Wake County Superior Court for judicial review. The petition was heard on 26 February 2004 and on 18 March 2004, the trial court entered an order affirming the Board's declaratory ruling. Petitioner appeals.

II. Issues

Petitioner contends the trial court erred by: (1) violating petitioner's right to free speech and equal protection under the North Carolina and United States Constitutions; (2) affirming the declaratory ruling of the Board after it acted outside of its statutory authority and jurisdiction in violation of N.C. Gen. Stat. § 150B-51(b)(2); and (3) being arbitrary and capricious in affirming the Board's ruling.

III. Standard of Review

Upon our "judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citations omitted). N.C. Gen. Stat. § 150B-51(b) (2003) states:

> in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the adminis-

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

"This standard of review applies to judicial review of an agency's decision, whether at the superior or the appellate court level." *Vanderburg v. N.C. Dep't of Revenue*, 168 N.C. App. 598, 608, 608 S.E.2d 831, 839 (2005) (citing *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616-17 (1991) (superior court review)); *see also Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998) (appellate court review) (citing *Shoney's v. Bd. of Adjustment for City of Asheville*, 119 N.C. App. 420, 421, 458 S.E.2d 510, 511 (1995)).

> This Court has held that fact-intensive issues
>
> " 'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.' " This standard of review requires the reviewing court to analyze all the evidence provided in the record "to determine whether there is substantial evidence to justify the agency's decision." Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." A reviewing court "may not substitute its judgment for the agency's," even if a different conclusion may result under a whole record review.

Vanderburg, 168 N.C. App. at 609, 608 S.E.2d at 839 (internal quotations and citations omitted).

In *In re Appeal of the Maharishi Spiritual Ctr. of Am.*, our Supreme Court revered the Court of Appeals for reasons stated in the

dissenting opinion and explained the Court's proper role under the whole record test when reviewing an administrative agency's ruling or judgment.

> The whole record test is not "a tool of judicial intrusion." This test does not allow a reviewing court to substitute its own judgment in place of the Commission's judgment even when there are two reasonably conflicting views. The whole record test merely allows a reviewing court to determine whether the decision of the Commission is supported by substantial evidence.
>
> " 'Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " "The credibility of the witnesses and resolution of conflicting testimony is a matter for the administrative agency to determine." This Court cannot overturn the Commission's decision if supported by substantial evidence.

152 N.C. App. 269, 284, 569 S.E.2d 3, 12 (2002) (J. Tyson dissenting) (internal quotations and citations omitted), *per curiam rev'd*, 357 N.C. 152, 579 S.E.2d 249 (2003).

IV. Free Speech

[1] Petitioner argues the trial court erred in affirming the Board's declaratory ruling because it violated petitioner's constitutional freedom of speech.

" 'Untruthful speech, commercial or otherwise, has never been protected for its own sake.' " *Friedman v. Rogers*, 440 U.S. 1, 9, 59 L. Ed. 2d 100, 110 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789 (1974); *Konigsberg v. State Bar*, 366 U.S. 36, 49, 6 L. Ed. 2d 105 (1961)). In *Central Hudson Gas v. Public Service Comm'n*, the United States Supreme Court defined commercial speech as an "expression related solely to the economic interests of the speaker and its audience." 447 U.S. 557, 563-64, 65 L. Ed. 2d 341, 348 (1980) (citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 48 L. Ed. 2d 346 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-64, 53 L. Ed. 2d 810 (1977); *Friedman v. Rogers*, 440 U.S. 1, 11, 59 L. Ed. 2d 100 (1979)).

The United States Supreme Court also held "the First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson Gas*, 447 U.S. at 563-64, 65

L. Ed. 2d at 348 (citing *Virginia Pharmacy Bd*, 425 U.S. at 761-63, 48 L. Ed. 2d at 346). The Supreme Court explained:

> The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. *The government may ban forms of communication more likely to deceive the public than to inform it*, or commercial speech related to illegal activity. If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech.

Id. at 564-65, 65 L. Ed. 2d 348-49 (internal citations omitted) (emphasis supplied).

The respondent Board is a State agency created by N.C. Gen. Stat. § 93-12 to regulate CPA firms. One of the Board's duties is to regulate the manner in which CPA firms hold themselves out to the public. N.C. Admin. Code tit. 21, 8N.0307(a) (2004) entitled, "Deceptive Names Prohibited," allows the Board to prohibit a CPA firm from using any name that would have "the capacity or tendency to deceive."

The parties agree the regulation at issue restricts petitioner's commercial speech. The parties disagree on whether adding "RSM" and "Certified Public Accountants" to petitioner's trade name is misleading, tends to be deceptive, and whether the regulation as applied, violates petitioner's First Amendment rights.

Evidence before the Board included: (1) a U.S. federal claims court case wherein a managing director of RSM McGladrey, Inc. testified and was referred to as an expert in auditing; and (2) several filings with the Securities and Exchange Commission showing the public misperception and referring to "RSM McGladrey" as a public accounting firm and confusing ownership and services rendered by the firm.

The Board may "ban forms of communication more likely to deceive the public than to inform it." *Central Hudson Gas*, 447 U.S. at 563, 65 L. Ed. 2d at 349 (citing *Friedman*, 440 U.S. at 13, 59 L. Ed. 2d at 113; *Olralik v. Ohio State, Bar Assn.*, 436 U.S. 447, 464-65, 56 L. Ed. 2d 444, 461 (1978)). The Board exercised its discretion under its statutory authority to determine what firm names are

acceptable. N.C. Admin. Code. tit. 21, 8N.0307(a). We may not substitute our judgment for the agency's and must only look to see if there is substantial evidence to support their conclusion. *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). The Board considered and found relevant and substantial evidence tending to show petitioner's proposed name could be confusing and deceptive and determined petitioner's proffered firm name is deceptive to the general public. *Central Hudson Gas*, 447 U.S. at 563-64, 65 L. Ed. 2d at 349.

Petitioner fails to show the Board's findings of fact are not supported by substantial evidence and those findings do not support the court's conclusions of law. The trial court's holding that the Board did not violate petitioner's freedom of speech under the United States or North Carolina Constitutions is affirmed.

V. Equal Protection

[2] Petitioner alleges the names "RSM McGladrey Inc." and "RSM McGladrey & Pullen L.L.P. Certified Public Accountants" are not deceptive or misleading. Petitioner asserts the Board failed to apply its standard of review equally.

"Inequalities and classifications, however, do not, *per se*, render a legislative enactment unconstitutional." *Cheek v. City of Charlotte*, 273 N.C. 293, 298, 160 S.E.2d 18, 23 (1968) (citing *Ramsey v. Veterans Commission*, 261 N.C. 645, 135 S.E.2d 659; *State v. Trantham*, 230 N.C. 641, 55 S.E.2d 198 (1949); 2 Strong, N.C. Index 2d, *Constitutional Law* § 20 (1967)). Our Supreme Court has held "[c]lassifications are not offensive to the Constitution 'when the classification is based on a reasonable distinction and the law is made to apply uniformly to all the members of the class affected.' " *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 67, 366 S.E.2d 697, 700-01 (1988) (quoting *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968)). The Court also held "[c]lassification[s] [are] permitted when (1) it is based on differences between the business to be regulated and other businesses and (2) when these differences are rationally related to the purpose of the legislation." *Id.* at 67, 366 S.E.2d at 701 (citing *State v. Harris*, 216 N.C. 746, 65 S.E.2d 854 (1940)).

Petitioner argues it received unequal review and treatment from the Board and cites the Board's approval of Grant Thornton as a trade name in 2002. The Board's rulings in Grant Thornton's case and petitioner's case are easily distinguishable.

Grant Thornton is a long established CPA firm in North Carolina and was using its approved trade name prior to 1999. Grant Thornton continued its operation as a CPA firm with the "Grant Thornton" name. "RSM McGladrey & Pullen, LLP Certified Public Accountants" is not a long established CPA firm in North Carolina. RSM is not an individual CPA nor is it a licensed CPA firm in any state or United States territory. Petitioner's proposed name change occurred after the grand-fathering provision established in 1999 to allow continued use of existing trade names expired.

The Board's regulation allowing grand-fathering of trade names is based on criteria that petitioner does not meet. N.C. Admin. Code tit. 21, 8N.0307(c) (2004) states any CPA firm that has continuously used an assumed name approved by the Board prior to 1 April 1999 may continue to use the assumed name subject to certain restrictions. Furthermore, petitioner concedes that RSM International, Inc.'s status is different from the "Big Four" accounting firms. RSM International, Inc. is a non-CPA association and not a national or international CPA firm.

Petitioner fails to show the evidence before the Board and the record before the trial court lacked substantial evidence to support the Board's findings of fact, or that those findings support the Board's conclusions of law. *Vanderburg*, 168 N.C. App. at 609, 608 S.E.2d at 839. Petitioner fails to proffer evidence of a similarly situated firm that received unlawful preferential treatment or treatment inconsistent with the Board's decision in petitioner's case. *Poor Richard's, Inc.*, 322 N.C. at 67, 366 S.E.2d at 700-01. We affirm the trial court's holding that the Board did not violate petitioner's constitutional right of equal protection.

VI. Statutory Authority of the Board

[3] Petitioner alleges the trial court erred by finding the Board acted within its statutory authority. The Board is established and promulgated by N.C. Gen. Stat. § 93-12. This State agency is charged, in part, with certifying and licensing CPAs and adopting or issuing guidelines for their conduct. The Board adopted guidelines for the names CPA firms could use in holding themselves out to the public:

> (a) Deceptive Names Prohibited. A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive . . . .

> (b) Style of Practice. It is considered misleading if a CPA firm practices under a name or style which would tend to imply the existence of a partnership or registered limited liability partnership or a professional corporation or professional limited liability company of more than one CPA shareholder or CPA member or an association when in fact there is no partnership nor is there more than one CPA shareholder or CPA member of a CPA firm. For example, no CPA firm having just one CPA owner may have as a part of its name the words "associates" or "company" or their abbreviations. It is also considered misleading if a CPA renders non-attest professional services through a non-CPA firm using a name that implies any non-licensees are CPAs.
>
> (c) Any CPA firm that has continuously used an assumed name approved by the Board prior to April 1, 1999, may continue to use the assumed name, so long as the CPA firm is only owned by the individual practitioner, partners, or shareholders who obtained Board approval for the assumed name. A CPA firm (or a successor firm by sale, merger, or operation of law) may continue to use the surname of a retired or deceased partner or shareholder in the CPA firm's name so long as that use is not deceptive.

N.C. Admin. Code tit. 21, 8N.0307(a)-(c) (2004).

Petitioner appeals the trial court's decision affirming the Board's finding the proposed firm name "RSM" was misleading to the public. The Board possesses the authority to regulate CPA firms and CPA firm names. N.C. Gen. Stat. § 93-12 (2003); N.C. Admin. Code tit. 21, 8N.0307. The Board promulgates rules and guidelines to regulate whether an offered firm name is deceptive to the general public. *Id.*; *see also* N.C. Admin. Code tit. 21, 8N.0307. The Board determines if firm names are acceptable or deceptive. *Id.*; N.C. Admin. Code tit. 21, 8N.0307. Substantial evidence in the record supports the Board's findings that petitioner's proposed name could be deceptive to the public. *Vanderburg*, 168 N.C. App. at 609, 608 S.E.2d at 839; *see also Central Hudson Gas.*, 447 U.S. at 563-64, 65 L. Ed. 2d at 349 (The government may ban commercial speech that is "likely to deceive.").

Petitioner fails to show the trial court's conclusion that its proposed trade name could be deceptive is not supported by substantial evidence. The trial court's holding that the Board acted within its statutory jurisdiction and authority is affirmed.

VII. Arbitrary and Capricious

[4] Defendant asserts the trial court acted in an arbitrary and capricious manner in affirming the Board's ruling.

> Where an allegation is made that a final agency decision is not supported by competent evidence or is arbitrary and capricious, the trial court must review the decision under the whole record test. The whole record test requires the trial court to examine all of the evidence before the agency in order to determine whether the decision has a rational basis in the evidence. If the trial court concludes there is substantial competent evidence in the record to support the findings, the agency decision must stand. The trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency.

Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C. App. 24, 31-32, 594 S.E.2d 832, 837 (2004) (internal citations omitted).

We previously held substantial evidence supports the findings of fact and conclusions of law of the Board's ruling and the trial court's order. After reviewing the whole record and finding substantial evidence, we hold the trial court did not act in an arbitrary and capricious manner in affirming the Board's ruling. This assignment of error is overruled.

VIII. Conclusion

Petitioner fails to show the findings of fact and conclusions of law of the trial court are not supported by substantial evidence. Neither this Court nor the trial court may substitute our own judgment for that of the Board where the record shows substantial evidence supports their decision.

The State, through the Board, may regulate deceptive commercial speech. Regulation of deceptive commercial speech does not violate petitioner's freedom of speech. *Central Hudson Gas*, 447 U.S. at 563, 65 L. Ed. 2d at 349. Substantial evidence in the whole record supports the Board's unchallenged findings of fact, which in turn supports the Board's conclusions of law that petitioner's proposed name had "the capacity or tendency to deceive." N.C. Admin. Code tit. 21, 8N.0307.

Petitioner fails to present any evidence that the Board treated another company similarly situated to petitioner differently or provided preferential treatment in violation of its equal protection rights.

The burden of proof is not on the administrative agency or the Board to justify its decision, but rather it rests upon the petitioner to show the Boards's "findings and conclusions are unsupported by competent, material, and substantial evidence." *In re Appeal of Maharishi Spiritual Ctr. of Am.*, 152 N.C. App. at 284, 569 S.E.2d at 12. Petitioner cannot shift its burden on appeal to the Board utilizing extraneous comments made during the hearing by a Board member as a basis to reverse the Board's unchallenged findings of fact under our standard of review.

The trial court's findings of fact and conclusions of law are supported by substantial evidence in the whole record and are not arbitrary or capricious. Petitioner failed to show any abuse of discretion. The trial court's order is affirmed.

Affirmed.

Judge ELMORE concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

In this case, the North Carolina State Board of Certified Public Accountant Examiners ("CPA Board") prohibits McGladrey & Pullen, LLP ("McGladrey & Pullen") from changing its name to "RSM McGladrey & Pullen, LLP, Certified Public Accountants." In denying this name change, the CPA Board cited N.C. ADMIN. CODE tit. 21, r. 8N.0307(a) (Mar. 2003) which provides,

> A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive.

McGladrey & Pullen argues that the CPA Board has failed to meet its burden to show that the proposed name will mislead or deceive the public and, therefore, violates its right to free speech. I agree that the CPA Board has failed to show how the name will be misleading or deceiving. Accordingly, I respectfully dissent.

The United States Supreme Court has long held that "commercial speech" is protected by the First Amendment of the United States Constitution. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770, 48 L. Ed. 2d 346, 363 (1976). The government may ban forms of communication more likely to deceive the

public than to inform it, or commercial speech related to illegal activity. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563-64, 65 L. Ed. 2d 341, 349 (1980) (internal citations omitted).

In *Cent. Hudson Gas & Elec. Corp.*, the United States Supreme Court set out three prongs the State must meet to validly restrict commercial speech: (1) "The State must assert a substantial interest to be achieved by restrictions on commercial speech[;]" (2) "the restriction must directly advance the state interest involved[;]" and (3) "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.*, 65 L. Ed. 2d at 349-50.

McGladrey & Pullen acknowledges that the CPA Board has a "substantial interest in protecting the public from misleading and deceptive names and advertising by CPAs[,]" meeting the first prong of the *Cent. Hudson Gas & Elec. Corp.* test. But McGladrey & Pullen argues that the CPA Board failed to meet the second prong, because the proposed name is not deceptive or misleading and the CPA Board's asserted harms are merely speculative. I agree.

The second prong of the *Cent. Hudson Gas & Elec. Corp.* test "is not satisfied by mere speculation or conjecture[.]" *Edenfield v. Fane*, 507 U.S. 761, 770, 123 L. Ed. 2d 543, 555 (1993). In the CPA Board's declaratory ruling denying the name change, it stated "the use of 'RSM' in the name of the firm would have the capacity or tendency to deceive the public by giving the impression that any firm using a name that begins with 'RSM,' regardless of the nature of the firm, is a lawful CPA firm." But this is not a concrete reason for the restriction; instead, it is merely conjecture. Indeed, the record shows that a CPA board member stated, "I think it's important to note that whether it's deceitful or not, we didn't—we don't believe that. It's just that it gets caught in the language of our rules more than anything else." This cannot satisfy the second prong of the *Cent. Hudson Gas & Elec. Corp.* test, as there was merely a speculative reason that the CPA Board denied the proposed name change. *See, e.g.*, *Michel v. Bare*, 230 F. Supp. 2d 1147, 1154 (D. Nev. 2002) (State failed to show that a rule prohibiting an attorney from using the trade names "Your Legal Power" and "Su Poder Legal," directly advanced the State's interest).

Moreover, the CPA Board's emphasis on the addition of three letters, "RSM", ignored the addition of the words "Certified Public Accountants" to the end of the proposed name change. Indeed, the

proposed name of "RSM McGladrey & Pullen, LLP, Certified Public Accountants" when compared to "RSM McGladrey, Inc." would be less misleading than the current name of "McGladrey & Pullen, LLP." As McGladrey & Pullen points out, the word "McGladrey" has been used in both names for five years without prohibition, and there is no evidence that the public has been deceived by those names.

In sum, I would hold that the CPA Board's denial of McGladrey & Pullen's proposed name change impermissibly restricted McGladrey & Pullen's right to free speech under the First Amendment of the United States Constitution. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563-64, 65 L. Ed. 2d at 349-50. Accordingly, I respectfully dissent from the majority opinion and would reverse the trial court's order.

STATE OF NORTH CAROLINA v. TIMOTHY SETH PHILLIPS

No. COA04-933

(Filed 19 July 2005)

1. Evidence— cross-examination—credibility—impeachment

The trial court did not abuse its discretion in a first-degree murder by torture, first-degree felony murder, and felonious child abuse inflicting serious bodily injury case by permitting the State to ask defendant during cross-examination if he had a conversation with the owner of a water company that serviced defendant's residence and whether he told the owner "that water done killed my baby," because: (1) testing defendant's credibility and impeaching his explanations of the minor child's cause of death is relevant evidence well within the scope of cross-examination; and (2) while this line of questioning may be damaging to defendant and cast doubt on his theory and explanation of the cause of the child's death, such evidence is highly probative of the issues at trial.

2. Criminal Law— failure to grant mistrial ex mero motu— curative instruction

The trial court did not err in a first-degree murder by torture, first-degree felony murder, and felonious child abuse inflicting serious bodily injury case by failing to grant a mistrial ex mero

motu after the State withdrew the testimony of the owner of a water company that serviced defendant's residence that stated defendant said "that water had killed his child" because assuming the testimony before the jury was improper, the court cured any error by its action in sustaining the objection and giving a curative instruction.

3. Criminal Law— failure to reopen evidence—newly discovered evidence—cumulative

The trial court did not abuse its discretion in a first-degree murder by torture, first-degree felony murder, and felonious child abuse inflicting serious bodily injury case by failing to reopen the evidence to allow admission of newly discovered evidence from a newly found witness who stated he saw the victim crash on his bicycle, which evidence defendant contends shows how the victim got bruises on his body, because: (1) defendant had the opportunity to learn of the witness's presence at his younger son's bicycle accident through his older son prior to and during trial; (2) even though the witness's testimony may have corroborated defendant's testimony regarding the severity of his younger son's bicycle wreck, defendant testified on direct and cross-examined his older son extensively regarding the younger son's bicycle wreck; (3) the witness's testimony was cumulative regarding the possible causes of the younger son's bruises and would have only possibly served to corroborate defendant's testimony or facts brought to the jury's attention during the older son's cross-examination; and (4) two doctors attributed the younger son's cause of death to hypothermia and not to bruises. N.C.G.S. § 15A-1226(b).

4. Constitutional Law— effective assistance of counsel—failure to move for mistrial—insufficient record

Although defendant contends he received ineffective assistance of counsel (IAC) in a first-degree murder by torture, first-degree felony murder, and felonious child abuse inflicting serious bodily injury case by his counsel's failure to move for a mistrial after the State offered and later withdrew the direct testimony of the owner of a water company that serviced defendant's residence that defendant said "that water had killed his child," this assignment of error is dismissed without prejudice to defendant to move for appropriate relief and to request a hearing to determine whether he received effective assistance of counsel because: (1) the transcripts and records are insufficient to deter-

mine whether defense counsel's actions or inaction resulted from trial tactics and strategy, from a lack of preparation, or an unfamiliarity with the legal issues; and (2) defendant acknowledges in his brief that he is unable, on the present record, to litigate any of those claims for IAC.

5. Appeal and Error— preservation of issues—failure to assign error—failure to argue

Defendant failed to assign error to or provide any argument in his brief regarding the trial court's ex parte communication with the Institute of Government as required by N.C. R. App. P. 28(b)(6), and thus, this issue is waived.

Judge WYNN concurring in the result.

Appeal by defendant from judgment entered 3 October 2003 by Judge Christopher M. Collier in Iredell County Superior Court. Heard in the Court of Appeals 22 March 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Jill Ledford Cheek, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

TYSON, Judge.

Timothy Seth Phillips ("defendant") appeals from judgment entered after a jury found him to be guilty of first-degree murder by torture, first-degree felony murder, and felonious child abuse inflicting serious bodily injury. We find no error.

I. Background

Defendant is the biological father of three-year-old Bailey Mallan ("Bailey"). Bailey lived in foster care beginning in January 2001 until he was placed in defendant's care on 20 December 2001. Defendant was accorded weekend visitation with his other children from a previous marriage, a twelve-year-old son, Seth Phillips ("Seth"), and a daughter.

A. State's Evidence

1. Emergency Medical Personnel

On 14 January 2002, emergency medical personnel ("EMT") were dispatched to defendant's residence in response to a 911 call from

defendant. Upon arrival, the EMTs found Bailey lying on the bedroom floor without a pulse. Defendant told the EMTs that: (1) Bailey had not felt well and had laid down; (2) defendant went to the mailbox and was gone for about fifteen minutes; (3) upon returning, he found Bailey in the bed not breathing; and (4) he called 911. EMT Phyllis Baity spoke with defendant and was told Bailey had suffered an asthma attack and stopped breathing. When Bailey arrived at the hospital, he had no pulse, no audible heart activity, and a core bodily temperature of sixty-nine degrees Fahrenheit. After three hours of resuscitative attempts and treatment for hypothermia, Bailey was pronounced dead.

On 25 March 2002, defendant was indicted for first-degree murder. The trial commenced on 22 September 2003.

2. Seth Phillips

At trial, Seth testified that after Bailey wet his bed defendant would become very angry and give Bailey a cold bath. Defendant would direct Seth to run a cold bath and to "turn it all the way cold." Defendant placed Bailey in the tub containing cold water up to his upper stomach. When Bailey tried to crawl out of the tub, defendant pushed him back into the water and told Bailey this was his punishment for wetting his bed.

Seth also testified: (1) defendant would occasionally quit watching television to make sure Bailey remained in the water for thirty to forty minutes; (2) Bailey would be crying and shivering when defendant removed him from the water; (3) defendant would lay Bailey across the washing machine with his legs hanging off the edge and spank him with a belt; (4) defendant would usually hit Bailey hard about three times; (5) defendant would place Bailey in a corner for about forty-five minutes to an hour; and (6) that this routine happened several times.

Seth further testified defendant had given Bailey a bicycle for Christmas. Seth stated Bailey experienced some accidents while riding the bicycle but none were severe. On the morning of 13 January 2003, the day before his death, Bailey again wet his bed. Seth stated that defendant administered the punishments described above.

3. Dr. Todd Hansen

The State tendered Dr. Todd Hansen ("Dr. Hansen") as an expert witness without objection from defendant. Dr. Hansen was an emer-

gency room physician who examined Bailey upon arrival at the hospital. He determined Bailey's core bodily temperature was sixty-nine degrees Fahrenheit.

Dr. Hansen opined that hypothermia was the major cause of Bailey's death. He could not offer any medical explanation how a child's temperature could drop to sixty-nine degrees within a fifteen minute time span after defendant asserted he had last checked on Bailey. Dr. Hansen also testified the center bar on Bailey's bicycle, as shown in a photograph, could not have caused the injuries on his buttocks Dr. Hanson observed and opined those injuries were not accidentally caused.

4. Dr. Patrick Eugene Lantz

The State offered Pathologist Patrick Eugene Lantz ("Dr. Lantz") as an expert witness without objection from defendant. Dr. Lantz performed the autopsy on Bailey and testified he observed bruises consistent with childhood type injuries and eight bruises on the back of Bailey's head. Dr. Lantz stated the eight bruises were consistent with adult finger "thumping" on the back of Bailey's head.

Dr. Lantz also observed bruising on Bailey's buttocks and testified in his opinion the injuries Bailey's body presented were not caused by falling from a bicycle and were not accidental. Dr. Lantz opined the linear nature of the bruises on the buttocks were consistent with Bailey having been struck with a belt. He found no evidence of any natural disease that would have caused or contributed to Bailey's death.

Based upon Bailey's weight and size, Dr. Lantz opined Bailey could have become severely hypothermic after remaining forty-five minutes to an hour and one-half in water with a temperature of forty-five to fifty-five degrees. Dr. Lantz opined that Bailey's cause of death was severe hypothermia and that hypoglycemia would not cause the bodily temperature to drop to sixty-nine degrees.

Dr. Lantz also observed two burn marks on Bailey's left arm and opined the marks were consistent with being caused by a cigarette or cigarette-like object. Finally, Dr. Lantz opined that the burns to Bailey's arm, the bruising on his buttocks, and severe hypothermia were painful injuries.

B. Defendant's Evidence

Defendant testified in his defense. During cross-examination, defendant was asked about a telephone conversation that allegedly occurred with Danny Corriher ("Corriher") regarding the water service to defendant's residence. Defendant stated he spoke with a female to cancel his water services and insisted he did not talk to Corriher and did not say, "that water done killed my baby." Defense counsel made a general objection to this line of cross-examination.

C. State's Rebuttal

Corriher is the proprietor of the water system which serviced defendant's residence. He was called as a witness for the State on rebuttal to impeach defendant's testimony and his answers on cross-examination. Corriher was asked if he was familiar with 124 Cove View Road located in Mooresville, North Carolina. Corriher testified he had spoken with a male calling from that address to cancel the water service but the person calling never identified himself. Corriher testified the person calling had stated, "that water had killed his child." Upon further questioning by Corriher the caller replied, "he died in the bathtub." Corriher stated he assumed that the caller's baby had drowned.

Defendant objected to this line of questioning and the judge excused the jury. After *voir dire*, the State withdrew Corriher's testimony. The judge instructed the jury that the State had withdrawn Corriher's testimony and defendant's answers to the State's cross-examination had been stricken and to not consider any of Corriher's testimony during deliberations.

After defendant rested his case on surrebuttal, a charge conference was held and court recessed for the evening. Upon arriving at his office the next day at 7:45 a.m., defense counsel received a tape recorded telephone message left by a caller who identified himself as Allen Lorek ("Lorek"). Lorek informed defense counsel that he had witnessed Bailey having a "bad" bicycle wreck and falling in a ditch. Defendant moved to reopen the evidence to allow this witness to rebut Seth's testimony and the State's evidence on the cause of Bailey's bruising. The court denied defendant's motion.

The jury found defendant guilty of first-degree murder by torture, first-degree felony murder, and felonious child abuse inflicting serious bodily injury. Defendant was sentenced to life imprisonment without parole. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) permitting the State to question him in an improper and highly prejudicial manner; (2) not granting a mistrial *ex mero motu* after the State withdrew Corriher's testimony; and (3) not reopening the evidence to allow admission of newly discovered evidence. Defendant also asserts he was denied effective assistance of counsel.

III. Defendant's Cross-Examination

[1] Defendant argues the trial court erred by permitting the State to question him in an improper and highly prejudicial manner. We disagree.

Pursuant to Rule 611(b) of the North Carolina Rules of Evidence, "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2003). The trial court, however, "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C. Gen. Stat. § 8C-1, Rule 611(a) (2003). " 'Because the manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge, his control of the case will not be disturbed absent a manifest abuse of discretion.' " *State v. Demos*, 148 N.C. App. 343, 351, 559 S.E.2d 17, 22 (quoting *State v. Harris*, 315 N.C. 556, 562, 340 S.E.2d 383, 387 (1986)), *cert. denied*, 355 N.C. 495, 564 S.E.2d 47 (2002).

During cross-examination, defendant was asked if he had a conversation with Corriher and whether he told Corriher, "that water done killed my baby." The State introduced the evidence for the purpose of challenging the credibility of defendant and his explanation of the cause of Bailey's death. Testing defendant's credibility and impeaching his explanations of Bailey's cause of death is relevant evidence well within the scope of cross-examination. N.C. Gen. Stat. § 8C-1, Rule 611(b). While this line of questioning may be damaging to defendant and cast doubt on his theory and explanation of the cause of Bailey's death, such evidence is highly probative of the issues at trial. The trial court did not abuse its discretion in allowing the questions. This assignment of error is overruled.

IV. *Ex Mero Motu*

[2] Defendant argues the trial court committed plain error by not declaring a mistrial e*x mero motu* after the State withdrew Corriher's testimony.

During rebuttal, the State asked Corriher if anything unusual was said during his telephone conversation. Corriher replied the caller stated, "that water had killed his child." Defense counsel objected and the trial court sustained the objection. The court recessed for lunch and after returning into session, the State moved to withdraw Corriher's testimony. Defendant moved to strike this testimony and asked that a curative instruction be given to the jury.

After the State moved to withdraw Corriher's testimony, defendant's motion to strike was granted. Curative instructions were given to the jury. "Jurors are presumed to follow a trial judge's instructions." *State v. Taylor*, 340 N.C. 52, 64, 455 S.E.2d 859, 866 (1995) (citing *State v. Rouse*, 339 N.C. 59, 92, 451 S.E.2d 543, 561 (1994)).

After the judge gave instructions to disregard Corriher's testimony, defense counsel thanked the court and proceeded to present his case without moving for a mistrial. Presuming Corriher's testimony before the jury was improper, " 'the court cured any error by its action in sustaining the objection and giving the curative instruction.' " *State v. Fletcher*, 125 N.C. App. 505, 512, 481 S.E.2d 418, 423 (1997) (quoting *State v. Bowie*, 340 N.C. 199, 209, 456 S.E.2d 771, 776, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 435 (1995)). The trial court did not err by not granting a mistrial *ex mero motu*. This assignment of error is dismissed.

V. Newly Discovered Evidence

[3] Defendant asserts the trial judge erred by not reopening the evidence to allow admission of newly discovered evidence.

N.C. Gen. Stat. § 15A-1226(b) (2003) provides, "[t]he judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict." Our Supreme Court has stated, "[t]he trial court has discretionary power to permit the introduction of additional evidence after a party has rested." *State v. Jackson*, 306 N.C. 642, 653, 295 S.E.2d 383, 389 (1982) (citing *State v. Revelle*, 301 N.C. 153, 270 S.E.2d 476 (1980); *State v. Carson*, 296 N.C. 31, 249 S.E.2d 417 (1978); *State v. Coffey*, 255 N.C. 293, 121 S.E.2d 736 (1961)). "It is within the discretion of the trial judge to permit, in the

interest of justice, the examination of witnesses at any stage of trial." *State v. Johnson*, 23 N.C. App. 52, 57, 208 S.E.2d 206, 210 (citing *State v. King*, 84 N.C. 737 (1881)), *cert. denied*, 286 N.C. 339, 210 S.E.2d 59 (1974).

We review this ruling for an abuse of discretion and will uphold a trial court's ruling under N.C. Gen. Stat. § 15A-1226(b) unless it is shown to be "manifestly unsupported by reason." *State v. Farmer*, 138 N.C. App. 127, 130, 530 S.E.2d 584, 587 (2000) (citing *State v. Wooten*, 344 N.C. 316, 474 S.E.2d 360 (1996)); *see also State v. Carson*, 296 N.C. 31, 45, 249 S.E.2d 417, 425 (1978) (even after arguments to the jury have begun, it is not an abuse of discretion for the court to allow additional evidence).

After defendant rested his case on surrebuttal, a charge conference was held. The court was recessed for the evening. A caller, who identified himself as Lorek left a message on defense counsel's telephone recorder stating he had previously seen Bailey have a bad bicycle wreck and fall into a ditch. Defense counsel called the trial judge at 8:10 a.m. to inform him of the message and moved the court to reopen the evidence. The tape recording of Lorek's message was presented to and heard by the court.

On the tape, the caller identified himself as "Allen Lorek," and stated: (1) "I saw the little boy crash, he fell into my ditch;" (2) "I ran out into my yard [sic] ask him if he was ok and his brother was there also;" and (3) "I don't think that he hit his little boy, I think the little guy actually did crash on his bicycle [sic] cause I saw it."

Defendant argues the State would not have been prejudiced by reopening the evidence because neither side had concluded their case through closing arguments. The State objected to reopening the evidence. The trial court denied defendant's motion to reopen the evidence but allowed the tape to be admitted as a proffer of evidence.

Although defendant may not have previously been aware of Lorek's testimony and presented the evidence and moved the court to reopen the evidence as soon as it was available to him, those facts alone do not warrant a new trial. During preparation for trial, defendant with due diligence could have asked his son, Seth, whether anyone else was present when Bailey fell from his bicycle. Also, during Seth's cross-examination, defendant could have inquired whether any other person witnessed or made any comments regarding Bailey's fall from the bicycle.

Even though Lorek's testimony may have corroborated defendant's testimony regarding the severity of the bicycle wreck, defendant testified on direct and cross-examined Seth extensively regarding Bailey's bicycle wrecks. Relevant "evidence may be excluded . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. Lorek's testimony was cumulative and would have only possibly served to corroborate defendant's testimony or facts brought to the jury's attention during Seth's cross-examination. *Id.*

Both Dr. Hansen and Dr. Lantz attributed Bailey's cause of death to hypothermia and not to bruises. The trial court did not abuse its discretion finding Lorek's testimony to be cumulative regarding the possible causes of Bailey's bruises and not allowing defendant's motion to reopen the trial for additional evidence. This evidence is merely cumulative to other evidence and testimony defendant placed before the jury for its consideration. *Id.* Defendant has failed to show any abuse in the trial court's discretion. This assignment of error is overruled.

VI. Ineffective Assistance of Counsel

[4] Defendant asserts his trial counsel failed to provide meaningful assistance which prejudiced his defense by not moving for a mistrial after the State offered Corriher's direct testimony and later withdrew it.

A defendant's ineffective assistance of counsel ("IAC") claim may be brought on direct review "when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (citations omitted), *motion to withdraw opinion denied*, 354 N.C. 576, 558 S.E.2d 861 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

Here, the record is insufficient for us to review and rule on defendant's claim. The transcripts and record are insufficient for us to determine whether defense counsel's actions or inaction resulted from trial tactics and strategy or from a lack of preparation or an unfamiliarity with the legal issues. Further, defendant acknowledges in his brief that he "is unable, on the present record, to litigate any of those claims for [IAC]." We decline to reach defendant's IAC assignment of error because it is not properly raised at this stage of review. This assignment of error is dismissed.

Our dismissal of this assignment of error is without prejudice to defendant to move for appropriate relief and to request a hearing to determine whether he received effective assistance of counsel. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal." (citing *e.g.*, *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982)).

VII. Trial Court's *Ex Parte* Communication

[5] Defendant failed to assign error to or provide any argument in his brief regarding the trial court's *ex parte* communication with the Institute of Government. N.C.R. App. P. 28(b)(6) (2004). Any discussion regarding the trial court's action and authority is extraneous to and not germane to any issue before us on appeal.

> 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.

Smith v. R.R., 114 N.C. 728, 749-50, 19 S.E. 863, 869 (1894); *see also State v. Clark*, 165 N.C. App. 279, 293, 598 S.E.2d 213, 223 (J. Wynn concurring in the result only by separate opinion), *disc. rev. denied*, 358 N.C. 734, 601 S.E.2d 866, *appeal dismissed*, 359 N.C. 192, 607 S.E.2d 651 (2004).

VIII. Conclusion

Defendant failed to show the trial court committed prejudicial error in allowing the State to question defendant on cross-examination regarding a purported telephone conversation with Corriher. The trial court struck this testimony and provided curative instructions to the jury. The trial court did not err in not granting a mistrial *ex mero motu*.

Defendant failed to show the trial court abused its discretion by not allowing defendant to introduce testimony of a newly found witness. That witness's proffered testimony was cumulative of other evidence defendant already presented. Defendant had the opportunity to learn of Lorek's presence at Bailey's bicycle accident through his son, Seth, prior to and during trial.

Defendant's claim of ineffective assistance of counsel is not properly before us and is dismissed without prejudice. Defendant received a fair trial free from prejudicial errors he preserved and argued.

No error.

JUDGE ELMORE concurs.

JUDGE WYNN concurs in the result by separate opinion.

WYNN, Judge concurring in the result.

I write separately to note in passing[1] an apparently on-going occurrence in our judiciary in which judges are permitted, without restriction, under our Code of Judicial Conduct to engage in *ex parte* discussions on issues of law with individuals ("disinterested experts") who are not parties to the proceeding. N.C. Code of Judicial Conduct Canon 3(A)(4) (2003).[2]

In this case, the trial court initially indicated that it would admit evidence of a telephone conversation that Corriher allegedly had with Defendant. Shortly thereafter, however, the State withdrew Corriher's testimony. The trial court responded that it thought the testimony was admissible and had conferred with the Institute of Government during the lunch recess. After probing by defense counsel, the trial judge revealed the name of the individual that he spoke to at the Institute of Government, "Ms. Smith."

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1. The practice of our courts commenting on relevant matters in the record that are not raised by the parties is well established by "noting in passing." *See, e.g.*, *First Nat'l Bank of Lumberton v. McCaskill*, 174 N.C. 390, 391, 93 S.E. 905, 905 (1917) ("not[ing], in passing," the personal history of a party to a prior case); *Onuska v. Barnwell*, 140 N.C. App. 590, 591, 537 S.E.2d 840, 841 (2000) ("not[ing] in passing" an incorrect citation); *State v. Jenkins*, 21 N.C. App. 541, 543, 204 S.E.2d 919, 921 (1974) ("not[ing] in passing" that a breathalyzer test does not give rise to the inference that a party was "under the influence."). While not binding, this practice allows our courts to move beyond the technical rules of appeal to provide guidance for improving the legal profession.

2. Canon 3(A)(4) of the North Carolina Code of Judicial Conduct provides:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.

While this assertion by the trial judge appears at first glance to be benign, I believe it raises a strong concern regarding the apparently common practice of judges consulting "disinterested experts" or obtaining opinions from non-judicial entities such as the Institute of Government[3] on the law applicable to a proceeding before them.

The primary reason that *ex parte* communications are prohibited, is to ensure that parties appearing "before a judge have access to the relevant materials on which a judge may rely." Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 856 (1989). Nearly all states that allow a judge to engage in *ex parte* communication with an expert on the law require that certain due process and notice concerns be given to the parties. Indeed, those states generally track the language of the American Bar Association Model Code of Judicial Conduct Canon 3(B)(7) which gives guidance to the judiciary on the use of a disinterested expert.[4] The ABA Model Code of Judicial Conduct Canon 3(B)(7)(b) provides: "A judge may obtain the advice of a disinterested expert on the law

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3. The mission of the Institute of Government located at the University of North Carolina at Chapel Hill is: "To provide to state, county, and municipal officials and employees programs of instruction, research, and consultation to help them improve and maintain their effectiveness, efficiency, and economy. The institute also provides special programs for the news media and non-profit organizations with governmentally related purposes." Institute of Government, *available at* http://www.ncruralcenter.org/guidebook/viewresource.asp?ID=27 (last visited 24 June 2005). The mission statement does not indicate the Institute of Government provides any services for criminal defendants.

4. The following states follow Model Code of Judicial Conduct Canon 3(B)(7): Ala. Canons of Judicial Ethics Canon 3(A)(4); Ark. Code of Judicial Conduct Canon 3; Cal. Code of Judicial Ethics Canon 3(B)(7); Colo. Code of Judicial Conduct Canon 3(A)(4); Conn. Code of Judicial Conduct Canon 3(A)(4); Del. Judges' Code of Judicial Conduct Canon 3(A)(4); Fla. Code of Judicial Conduct Canon 3(B)(7)(b); The Ga. Code of Judicial Conduct Canon 3(B)(7); Haw. Code of Judicial Conduct Canon 3(B)(7); Idaho Code of Judicial Conduct Canon 3(B)(7); Ind. Code of Judicial Conduct Canon 3(B)(8); La. Code of Judicial Conduct Canon 3(A)(4); Me. Code of Judicial Conduct Canon 3(B)(7); Md. Code of Judicial Conduct Canon 3(A)(5); Mich. Code of Judicial Conduct Canon 3(A)(4); Minn. Code of Judicial Conduct Canon 3(A)(4); Miss. Code of Judicial Conduct Canon 3(B)(4); Mo. Code of Judicial Conduct Canon 3(B)(7); Neb. Code of Judicial Conduct Canon 3(B)(7); Nev. Code of Judicial Conduct Canon 3(B)(7); N.J. Code of Judicial Conduct Canon 3(A)(6); N.M. Code of Judicial Conduct Rule 21-300(B)(7); 22 N.Y.C.R.R. § 100.3(B)(6); N.D. Code of Judicial Conduct Canon 3(B)(7); Ohio Code of Judicial Conduct Canon 3(B)(7); Okla. Code of Judicial Conduct Canon 3(B)(6); R.I. Code of Judicial Conduct Canon 3(B)(8); S.C. Code of Judicial Conduct Canon 3(B)(4); S.D. Code of Judicial Conduct Canon 3(B)(7); Tenn. Code of Judicial Conduct Canon 3(B)(7); Tex. Code of Judicial Conduct Canon 3(B)(8); Utah Code of Judicial Conduct Canon 3(B)(7); Vt. Code of Judicial Conduct Canon 3(B)(7); Va. Canons of Judicial Conduct Canon 3(B)(7); W. Va. Code of Judicial Conduct Canon 3(B)(7); Wis. SCR 60.04(1)(g); Wyo. Code of Judicial Conduct Canon 3(B)(7).

applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." Thus, the Model Code requires that the trial judge give the parties notice of the expert consulted and the substance of the advice, as well as requires that the parties be given a chance to respond. *But see* Alaska Code of Judicial Conduct Canon 3(B)(7) (2005) (commentary to rule states "A judge may not ex parte seek advice on the law applicable to a proceeding from a disinterested expert.").

In contrast, our Code of Judicial Conduct does not give any guidance to the judiciary as to who is a "disinterested expert," whether the parties should be notified, whether the parties must be told the substance of the communication, whether the parties must be given a chance to respond to the expert's advice, or what exactly a judge may ask the expert. Instead, Canon 3(A)(4) unrestrictively provides that: "A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him."

Significantly, even in a criminal proceeding in which defendants are constitutionally entitled to be present at every critical stage of the criminal proceeding, U.S. Const. amend. VI; N.C. Const. art. I, § 23, our Code provides for no notice to parties of the *ex parte* communication with a "disinterested expert."[5] This creates a problem as the expert contacted by the trial judge is supposed to be disinterested in the parties, the issues and facts of the proceeding, and the outcome of the proceeding. Giving the parties notice of the *ex parte* communication, as well as the identity of the expert contacted and substance of the advice given, is prudent because

> it cannot be assumed that legal and other experts will give only objective advice. They may have developed philosophical loyalties which affect the advice that they give; as practicing attorneys they may have cases involving the same problems on which they are rendering advice; as consultants they may owe allegiance to business or other interests that could benefit from acceptance by courts of their viewpoints.

In re Fuchsberg, 426 N.Y.S.2d 639, 648 (N.Y. Ct. Jud. 1978).

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5. In this case, the trial judge consulted the Institute of Government. Given that the mission of the Institute of Government is to serve only governmental entities (*see*, *supra*, footnote 3), it is questionable as to whether the Institute of Government qualifies as a "disinterested expert" on the law in a criminal proceeding.

Further, our Code does not require the court to allow parties a chance to respond to the substance of the advice given by the judge. "Unless the parties are given the opportunity to respond to the expert and the substance of his advice, his prejudices and preconceptions may go unchallenged. In short, the practice of judicial consultation with experts without notice to the parties is fraught with dangers." *Id.*; *see also* Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1374 (2000).

Clearly, Canon 3(B)(7) of the ABA Model Code gives a great deal more protection to the parties than does Canon 3(A)(4) of the N.C. Code of Judicial Conduct. But in the interest of protecting the independence, impartiality, and integrity of our judiciary, our judges should be cautious about having an *ex parte* communication with an "expert." At the very least, judges should give notice to the parties of the communication, the identity of the "disinterested expert," the substance of the communication, and afford the parties an opportunity to respond.[6] *See In re Fuchsberg*, 426 N.Y.S.2d at 648 ("*Ex parte* conversations or correspondence with experts, law teachers or otherwise, is unfair and can be misleading. The facts given may be incomplete or inaccurate, the problem can be incorrectly stated or other matters can be incorrectly stated.") (internal citation omitted).

It is essential that the independence, impartiality and integrity of the judiciary in the decision-making process are protected. After all, "[a]n independent and honorable judiciary is indispensable to justice in our society." N.C. Code of Judicial Conduct Canon 1.

STATE OF NORTH CAROLINA v. JEROME CANNON McCOY

No. COA04-209

(Filed 19 July 2005)

Appeal and Error— failure to comply with appellate rules— untimely notice of appeal—purported petition for writ of certiorari

The State's motion to dismiss defendant's appeal concerning motions defendant filed pro se is granted and the Court of

6. It should be noted that in North Carolina, our trial judges are not provided research assistants. In federal courts, and increasingly in many state jurisdictions, trial judges are being provided the assistance of law clerks, which lessens the need to seek advice from "disinterested experts" on the law applicable to proceedings before them.

Appeals declines to exercise its discretion under Rule 2 to correct the defects in defendant's purported petition for writ of certiorari and further denies defendant's purported petition for writ of certiorari, because: (1) defendant failed to give notice of appeal within fourteen days from the entry of the order holding him in contempt as required by N.C. R. App. P. 4(a)(2) and thus the Court of Appeals is without jurisdiction to hear the appeal; (2) N.C. R. App. P. 27(c) prohibits the Court of Appeals from granting defendant an extension of time to file his notice of appeal since compliance with the requirements of Rule 4(a)(2) is jurisdictional and cannot simply be ignored by the Court of Appeals; and (3) it is not the role of the appellate courts to create an appeal for an appellant.

Judge GEER dissenting.

Appeal by defendant from judgment entered 15 September 2003 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 20 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General Margaret P. Eagles, for the State.

Appellate Defender Staples Huges, by Assistant Appellate Defender, Matthew D. Wunsche, for defendant-appellant.

STEELMAN, Judge.

On 15 September 2003, defendant appeared before the Superior Court of Guilford County, along with his court-appointed counsel, Thomas Maddox, concerning motions defendant had filed *pro se*. Defendant was in custody at the time of the hearing. When defendant was leaving the courtroom following the hearing, he stated to Julia Hejazi, the assistant district attorney, "you're going down." The trial judge found defendant to be in direct contempt of court and sentenced him to thirty days in the county jail. The order was reduced to writing and entered on 15 September 2003, with a copy delivered to defendant at the jail on 18 September 2003. Defendant gave notice of appeal on 13 October 2003.

We first consider the State's motion to dismiss defendant's appeal for failure to give notice of appeal within fourteen days from the entry of the order holding him in contempt as required by Rule 4(a)(2) of the North Carolina Rules of Appellate Procedure. Defendant freely

acknowledged that the notice of appeal was not timely given. In a footnote to his Statement of Facts, defendant states the following:

> Defendant acknowledges that notice of appeal was given outside of the 14-day period set by N.C. Rule of Appellate Procedure 4(a)(2). Defendant asserts, however, that the delay was due to the denial of his constitutional and statutory right to counsel and the summary nature of the contempt proceeding, as discussed in arguments I and II below. If this Court does not recognize defendant's notice of appeal, defendant respectfully requests this Court consider this brief as a Petition for a Writ of Certiorari and consider the issues raised on their merits.

We note that when a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal. *See State v. McMillian*, 101 N.C. App. 425, 427, 399 S.E.2d 410, 411 (1991). *See also Sillery v. Sillery*, 168 N.C. App. 231, 234, 606 S.E.2d 749, 751 (2005). Rule 27(c) of the Rules of Appellate Procedure prohibits this Court from granting defendant an extension of time to file his notice of appeal since compliance with the requirements of Rule 4(a)(2) is jurisdictional and cannot simply be ignored by this Court. *See O'Neill v. Bank*, 40 N.C. App. 227, 230, 252 S.E.2d 231, 233-34 (1979).

While this Court cannot hear defendant's direct appeal, it does have the discretion to consider the matter by granting a petition for writ of *certiorari*. "The writ of *certiorari* may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, ..." N.C. R. App. P. 21(a). This rule goes on to specify the contents of a petition for writ of *certiorari*:

> The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

N.C. R. App. P. 21(c) (2005).

The footnote contained in appellant's brief clearly does not meet the requirements set forth in Rule 21(c). "The North Carolina Rules of

Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 360 (2005). In order to correct the deficiencies in defendant's purported petition for writ of *certiorari*, we would have to invoke the provisions of Rule 2 of the Rules of Appellate Procedure.

The authority granted in Rule 2 is discretionary. *State v. Owens*, 160 N.C. App. 494, 498, 586 S.E.2d 519, 522 (2003) (citing to N.C. R. App. P. 2). The provisions of Rule 21 are also discretionary. *State v. Ager*, 152 N.C. App. 577, 585, 568 S.E.2d 328, 333 (2002) (citing *State v. Grundler* and *State v. Jelly*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)).

We decline to exercise our discretion under Rule 2 to correct the defects in defendant's purported petition for writ of *certiorari*. In addition, we further decline to exercise our discretion and deny defendant's purported petition for writ of *certiorari*. "It is 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.

The State's motion to dismiss defendant's appeal is granted.

APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED.

Judge CALABRIA concurs.

Judge GEER dissents.

GEER, Judge, dissenting.

Rule 2 of the Rules of Appellate Procedure provides that "[t]o 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 . . . ." I can conceive of no greater example of "manifest injustice" than to allow a man to be imprisoned based only on unsworn statements, including statements not made on the record. Adding to the "manifest injustice" is the fact that during the course of the proceedings below—which certainly did not amount to a formal hearing—trial counsel stood mute. He said not a word. To allow a man to be con-

victed based literally on no competent evidence and without any representation by trial counsel defines "manifest injustice."

I cannot join in the majority's decision to dismiss this unquestionably meritorious appeal solely because appellate counsel followed the not uncommon approach of requesting in a footnote that this Court treat the appeal as a petition for writ of certiorari. While defendant is hardly sympathetic and his sentence is only 30 days, these facts cannot erase the trial court's departure from the fundamental principles underlying our country's judicial system. To put it bluntly: North Carolina does not administer justice in this manner. I do not believe this Court should turn a blind eye based on a less than two-week delay in the appeal from a defendant who was effectively unrepresented by counsel.

Although the majority relies upon *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005), I do not believe that our Supreme Court intended in *Viar* to eviscerate Rule 2, especially in criminal appeals. Since the Supreme Court has not amended the Rules of Appellate Procedure to eliminate Rule 2, the Rule must still exist to prevent "manifest injustice" or "to expedite decision in the public interest." If Rule 2 is to have any continuing meaning, it must be available in cases such as this one. I would, therefore, deny the State's motion to dismiss, reverse the trial court, and remand to have the trial court conduct contempt proceedings in accordance with N.C. Gen. Stat. § 5A-15 (2003).

Facts

Defendant appeared with his appointed counsel at a hearing on 15 September 2003 to address motions that defendant had filed *pro se* in a criminal matter. After the trial court granted defendant's request for additional time to prepare for a hearing on his motions, defendant was led out of the courtroom. The assistant district attorney then asked the court to "put on the record that as the defendant walked out of the courtroom, he looked at me and said you're going down and continued to mumble to me." Defense counsel is reported as then saying, "I thought you were doing a great job, Judge."

The judge immediately had defendant returned to the courtroom. At this point, according to the transcript, the judge did not place any witnesses under oath. No one testified; no evidence was admitted. Instead, as soon as defendant was again before him, the judge engaged defendant and the assistant district attorney in the following exchange:

THE COURT: Mr. McCoy, I thought I'd give you another opportunity to be heard. . . . When you left the courtroom, the district attorney said that *while you were behind me where I couldn't see you that you looked at her and—what did you say that he mouthed?*

MS. HEJAZI [the assistant district attorney]: I believe he said you're going down. And he continued to make gestures with his face and looking at me making comments.

THE COURT: You're going down. Now, this is following on the heels of a motion that you had made where you indicated he threatened you, Madam District Attorney? Is that true? Which motion was that?

MS. HEJAZI: The motion, Your Honor, that I—

THE COURT: I'm not sure that I ever saw that language in the body.

MS. HEJAZI: Specifically to me was the motion filed September 9. It's titled Motion to Dismiss Frivolous Warrants. On the back page, the last paragraph says Ms. Hejazi, I'm willing to die and meet my creator defending our great United States Constitution and the rights that are guaranteed. Are you willing to die and go to hell to try—trying to mutilate and molest our great constitution?

. . . .

THE COURT: Mr. McCoy, I'm concerned—that's not a direct threat. But it certainly sounds threatening to me.

(Emphasis added.)

The judge then continued:

I'm thinking that you have reduced the dignity of this Court and you turned this courtroom into a ring, an arena for violence and intimidation, and we just can't have that in our courts.

What do you—what would you like to say regarding whether or not I should hold you in contempt for threatening this young lady as you left the courtroom today in light of what has gone on before?

THE DEFENDANT: Well, Your Honor, I didn't threaten her for one—I mean nobody else seems to have heard it but her.

THE COURT: You didn't say it. You mouthed it to her.

THE DEFENDANT: Did anybody else see me mouth it to her?

THE COURT: Got two other, three other defense attorneys. Jim Kimel on the front row there.

Except for Mr. Kimel, the record does not reveal the names of the unidentified attorneys to whom the court was referring; nor does the record indicate what they saw or heard. As the transcript does not reflect any exchange that may have taken place between these attorneys and the judge, I am unable to ascertain how the court knew that they would corroborate the assistant district attorney. At no time did these three individuals testify or even make any unsworn, recorded statements.

Following the judge's reference to Mr. Kimel and the other unnamed attorneys, defendant's father asked to speak and stated that he had not heard defendant say anything to the assistant district attorney. The judge responded:

> *The question is not whether he verbally or orally said something. I could have heard it. I'm right here. We have four people here who are willing to say or who have said that they saw him mouth that threat to her.*
>
> . . . .
>
> Anything else you want to say, Mr. McCoy, . . . with regard to whether I should hold you in contempt for threatening the prosecutor while you were in open court?
>
> THE DEFENDANT: Well, Your Honor, I apologize if anything—any of my actions were mistaken in any way, form, or fashion. It's not my intention at all to disrespect this Court at all. I came here with respect.
>
> THE COURT: She is an officer of the Court. If you threaten her, then you threaten the Court.
>
> THE DEFENDANT: But I did not.

(Emphasis added.)

Defendant's counsel on the pending charge of assault with a deadly weapon inflicting serious injury was present throughout this entire exchange, but he remained silent. The judge proceeded to summarily hold defendant in contempt and sentence him to 30 days

in jail. With respect to defendant's other charge, for which he originally had appeared before the court, the judge increased his bond to $500,000.00 "[i]n light of the obvious threat to the community if released." At this point, defense counsel asked permission to approach the bench to retrieve the copies of defendant's *pro se* motions. He said nothing about the contempt.

On the same day, 15 September 2003, the trial court entered a written contempt order, stating that defendant had threatened an officer of the court and that

> [t]he Court finds as a fact, beyond a reasonable doubt, and concludes as a matter of law that the defendant is guilty of direct criminal contempt, because the defendant committed willful, disruptive conduct, described above, in the Courtroom, within the sight and presence of a presiding judicial official, in violation of G.S. 5a-11(a)(1) & (2). The said willful behavior directly tended to impair the respect due the authority of the Court, and directly interrupted the business of the Court. It was necessary to proceed summarily in order to maintain the dignity and authority of the Court.

A handwritten note at the bottom of the contempt order indicates that a copy of the order was forwarded to the jail on 18 September 2003. On 13 October 2003, defendant gave notice of appeal from the order in open court. Appellate entries followed on the same day.

Defendant's Untimely Appeal

I agree with the majority that the record suggests defendant failed to make a timely notice of appeal. I also agree that appellate counsel's reliance upon a general assertion in a footnote is not adequate. Counsel wrote only: "Defendant asserts, however, that the delay [in appealing] was due to the denial of his constitutional and statutory right to counsel and the summary nature of the contempt proceeding, as discussed in arguments I and II below." Counsel did not file a separate petition for writ of certiorari or any affidavit in support of his request that this Court grant defendant a belated appeal. Nor did counsel file a response to the motion to dismiss, apparently choosing to rely upon his sketchy footnote.

Under Rule 21 of the Rules of Appellate Procedure, a writ of certiorari may be issued "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1). It is, however, well-established that "[*c*]*ertiorari* may not be used as

a substitute for an appeal expressly provided for by law, unless the right of appeal has been lost through no fault of the petitioner." *Johnson v. Taylor*, 257 N.C. 740, 743, 127 S.E.2d 533, 535 (1962). To meet this requirement, defendants should file an affidavit in support of the petition for writ of certiorari, demonstrating a lack of neglect. *State v. Johnson*, 183 N.C. 730, 731, 110 S.E. 782, 782 (1922) ("[O]n an affidavit showing no neglect on [the belated appellant's] part, he should have moved for a *certiorari*."). *See also State v. Angel*, 194 N.C. 715, 716, 140 S.E. 727, 728 (1927) (holding that a petitioner must show not only merit to his claims, but also excusable neglect in failing to timely appeal).

Nevertheless, I believe the evidence apparent on the record is sufficient to indicate that defendant lost his right to appeal through no fault of his own. The trial transcript reveals that trial counsel appointed to represent defendant on the underlying criminal charges took no role during the contempt proceedings. Since defendant was immediately removed from the courtroom and effectively no counsel was available to advise or represent defendant, he did not have a meaningful opportunity to give oral notice of appeal.

Further, once the trial court reduced its order to writing, the record does not contain any evidence that the order was in fact provided to defendant. A handwritten note at the bottom of the contempt order indicates that a copy of the order was forwarded to the jail on 18 September 2003. While this note may establish that the jail received the order, it does not necessarily indicate, standing alone, that defendant received a copy of the order. The record contains no suggestion that defendant's trial counsel on the underlying charges—or any other counsel acting on his behalf—received a copy of the order.

As the Fourth Circuit has held, the availability of counsel at that interim stage is critical to ensuring a defendant access to an appeal:

> [W]e think that counsel is also required in the hiatus between the termination of trial and the beginning of an appeal in order that a defendant know that he has the right to appeal, how to initiate an appeal and whether, in the opinion of counsel, an appeal is indicated. This interim is a critical, crucial one for a defendant because he must make decisions which may make the difference between freedom and incarceration.

Nelson v. Peyton, 415 F.2d 1154, 1157 (4th Cir. 1969), *cert. denied*, 397 U.S. 1007, 25 L. Ed. 2d 420, 90 S. Ct. 1235 (1970). Under the particular

circumstances of this case, I would exercise discretion to treat defendant's appeal as a petition for writ of certiorari and allow it in accordance with N.C.R. App. P. 21(a)(1).

I also do not believe that the majority's dismissal can be reconciled with the United States Supreme Court's holding in *Evitts v. Lucey*, 469 U.S. 387, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985). In *Evitts*, the Supreme Court held for the first time that a criminal defendant is entitled to effective assistance of counsel on appeal. *Id.* at 396, 83 L. Ed. 2d at 830, 105 S. Ct. at 836. The Court held that "if a State has created appellate courts as an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Id.* at 393, 83 L. Ed. 2d at 827-28, 105 S. Ct. at 834 (internal quotation marks and citations omitted). Due Process requires "a State that afford[s] a right of appeal to make that appeal more than a meaningless ritual by supplying an indigent appellant in a criminal case with an attorney." *Id.* at 393-94, 83 L. Ed. 2d at 828, 105 S. Ct. at 834-35 (internal quotation marks omitted).

The *Evitts* Court pointed to a critical aspect of counsel's role as "that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all—much less a favorable decision—on the merits of the case." *Id.* at 394 n.6, 83 L. Ed. 2d at 829 n.6, 105 S. Ct. at 835 n.6. The Court, therefore, concluded: "A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant—the right to effective assistance of counsel—has been violated." *Id.* at 399-400, 83 L. Ed. 2d at 832, 105 S. Ct. at 838.

Here, by dismissing this appeal, the majority denies defendant his right to appeal because he lacked counsel below and because his appellate counsel failed to effectively seek a belated appeal. I agree with the majority's conclusion that appellate counsel should not have relied upon a conclusory and *pro forma* footnote requesting review by writ of certiorari, but I join the United States District Court for the Middle District of North Carolina in believing that the sanction for such a dereliction should not be borne by the criminal defendant:

> When counsel unnecessarily jeopardizes petitioner's right to an appeal, it is incumbent on the state courts to take prophylac-

> tic action to prevent forfeiture of the appeal. No good reason exists to penalize petitioner for his counsel's failure. Upon discovering a dereliction of duty by counsel, the state court would have been better advised to have disciplined counsel rather than visit the retribution on petitioner.

Galloway v. Stephenson, 510 F. Supp. 840, 843-44 (M.D.N.C. 1981). Accordingly, I would exercise our discretion under Rule 2 to suspend the rules and hear defendant's appeal. I am particularly concerned given the extreme and fundamental nature of the error below.

Criminal Contempt

In contempt proceedings, "the trial judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency." *O'Briant v. O'Briant*, 313 N.C. 432, 436-37, 329 S.E.2d 370, 374 (1985). As always, however, the trial court's conclusions of law are reviewable *de novo* by the appellate courts. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

North Carolina recognizes two types of criminal contempt: direct and indirect. According to North Carolina's criminal contempt statute, N.C. Gen. Stat. § 5A-13 (2003):

> (a) Criminal contempt is direct criminal contempt when the act:
>
> (1) Is committed within the sight or hearing of a presiding judicial official; *and*
>
> (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; *and*
>
> (3) Is likely to interrupt or interfere with matters then before the court.

(Emphasis added.) With direct contempt, the judge may summarily punish the contemnor following the procedures of N.C. Gen. Stat. § 5A-14 (2003), which permits "summary" contempt proceedings if they occur contemporaneously with the contemptuous act. The court is only required to give the person charged with contempt "summary notice of the charges and a summary opportunity to respond." *Id.*

Any criminal contempt other than direct criminal contempt is considered indirect criminal contempt. N.C. Gen. Stat. § 5A-13(b).

The court must then, prior to punishing the contemnor, follow the procedure specified in N.C. Gen. Stat. § 5A-15. N.C. Gen. Stat. § 5A-15 "provides for *a plenary hearing* for indirect contempt (and for certain direct contempt), and establishes, *inter alia*, requirements of notice and a hearing." *Cox v. Cox*, 92 N.C. App. 702, 706, 376 S.E.2d 13, 16 (1989) (emphasis added). Further, "[s]ince criminal contempts are crimes, one accused of criminal contempt must be afforded all appropriate procedural safeguards." *Id.*

In the present case, the trial court found defendant guilty of direct contempt and sentenced defendant in accordance with the summary proceedings described in N.C. Gen. Stat. § 5A-14. The record, however, unmistakably reveals that the judge himself neither saw nor heard the conduct that he was punishing. As the trial judge stated when confronting defendant, "the district attorney said that *while you were behind me where I couldn't see you* that you looked at her and—what did you say that he mouthed?" (Emphasis added.) The judge had to learn from others that which he did not directly observe himself.

The State urges us to apply N.C. Gen. Stat. § 5A-13(a)(1) to all actions that occur in the judge's presence, instead of limiting direct contempt to incidents that the judge actually sees and/or hears. The State cites no authority that supports such a construction of North Carolina's contempt statute. In fact, our Supreme Court has held that when "the court has no direct knowledge of the facts constituting the alleged contempt, in order for the court to take original cognizance thereof and determine the question of contempt, the proceedings must follow the procedural requirements as prescribed for indirect contempt . . . ." *Galyon v. Stutts*, 241 N.C. 120, 125, 84 S.E.2d 822, 826 (1954). *See also Cox*, 92 N.C. App. at 707, 376 S.E.2d at 17 (holding that a trial court must employ indirect contempt procedures when "[t]he trial judge had no direct knowledge of facts which would establish" acts of contempt).

If, as here, the trial judge did not see or hear the contemptuous conduct, but instead relied upon the reports of others, he necessarily does not have "direct knowledge" of the contempt. In short, the plain language of N.C. Gen. Stat. § 5A-13(a)(1) requires that an action occur within the actual sight or hearing of the trial judge before it may be the subject of summary contempt proceedings under N.C. Gen. Stat. § 5A-14. *See Groppi v. Leslie*, 404 U.S. 496, 504 n.8, 30 L. Ed. 2d 632, 639 n.8, 92 S. Ct. 582, 587 n.8 (1972) (observing that the Court "has been careful to limit strictly the exercise of the summary contempt

power to cases in which it was clear that all of the elements of misconduct were personally observed by the judge"); *Dorsey v. State*, 295 Md. 217, 226, 454 A.2d 353, 358 (1983) (holding that if the judge has no personal knowledge of some aspect of the contemptuous behavior and must fill in the gaps with evidence from an outside source, then direct contempt summary proceedings are not appropriate); *Ex Parte L.T. Wisdom*, 223 Miss. 865, 872, 79 So. 2d 523, 526 (1955) (holding that when the trial judge had no personal knowledge of the misbehavior occurring in the courtroom, but had to be informed of the misbehavior by the testimony of others, the trial court was not permitted to proceed summarily).

The facts of the present case illustrate why North Carolina's statutory contempt scheme requires that the trial court have personal knowledge of the allegedly contemptuous act before employing summary proceedings. Here, the judge's ruling was based on an unsworn statement by the prosecutor together with unsworn and unrecorded statements of attorneys in the courtroom who apparently were "willing to say or who have said" defendant mouthed a threat. Defendant's conviction is not based on what the judge knew to have happened, but rather on unsworn statements of courtroom observers taken on faith and not subject to cross-examination.

It is beyond argument that unsworn statements by counsel may not serve as evidence. *See, e.g.*, *State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 71 (1986) (holding that "statements made by defense counsel during argument at the sentencing hearing do not constitute evidence in support of statutory mitigating factors"); *State v. Radford*, 156 N.C. App. 161, 164, 576 S.E.2d 134, 137 (2003) (holding that "trial courts cannot find an aggravating factor where the only evidence to support it is the prosecutor's mere assertion that the factor exists"). It is even more fundamental that a defendant may not be convicted on the basis of unsworn remarks of potential witnesses—in this case Mr. Kimel and his unnamed colleagues. *State v. Levy*, 200 N.C. 586, 587, 158 S.E. 94, 95 (1931) (noting that "the testimony of unsworn witnesses" is "illegal evidence").

In short, because the trial court had no personal knowledge of the acts and because of the trial court's summary proceedings, the record contains no evidence at all to support defendant's conviction. No court may convict a criminal defendant and deprive him of his liberty solely on the basis of unsworn statements, volunteered by unidentified individuals, that were made with little or no opportunity for cross-examination or rebuttal.

Since the trial judge did not have personal knowledge of defendant's allegedly contemptuous behavior, this case involves indirect contempt, requiring compliance with the procedural protections of N.C. Gen. Stat. § 5A-15. I would, therefore, reverse the trial court's decision and remand for further proceedings in accordance with N.C. Gen. Stat. § 5A-15.

IN THE MATTER OF JAMES ALEXANDER, AS GUARDIAN AD LITEM FOR SAMANTHA ALEXANDER, PETITIONER v. CUMBERLAND COUNTY BOARD OF EDUCATION, RESPONDENT

No. COA04-1497

(Filed 19 July 2005)

1. **Schools and Education— two-day suspension—subject matter jurisdiction**

   The trial court lacked subject matter jurisdiction to consider the propriety of an initial two-day school suspension imposed under N.C.G.S. § 115C-391(b).

2. **Schools and Education— suspension—due process—hearings—contact between principal and associate superintendent**

   A high school student's due process rights were not violated in the issuance of a suspension where the student and her parents had hearings in school, before an administrative hearing officer, before the associate superintendent, before the board of education, and in the courts. They were represented by counsel and had the opportunity to present evidence, cross-examine witnesses, and make arguments. Moreover, there was no due process violation in an associate superintendent discussing the case with the principal before the initial school hearing.

3. **Schools and Education— disruptive behavior—pulling down gym shorts—substantial evidence**

   There was substantial evidence to support a school board's decision that "shanking" a fellow student, or pulling down her P.E. shorts, including her underwear, constituted disruptive behavior, disorderly conduct, and hazing.

4. Schools and Education— suspension—not arbitrary or capricious—no equal protection violation

A school board's decision to suspend a high school student for 15 days for "shanking" a fellow student by pulling down her P.E. shorts was not arbitrary or capricious even though male football players did not receive similar punishment for the practice.

Appeal by petitioner from an order entered 3 September 2004 by Judge John R. Jolly, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 11 May 2005.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for petitioner-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Mark A. Davis; David H. Phillips for respondent-appellee.

HUNTER, Judge.

James Alexander, the guardian ad litem for Samantha Alexander ("Samantha"), presents the following issues for our consideration: Did the trial court erroneously affirm the Cumberland County Board of Education's ("Board") decision to uphold Samantha's school suspension because (I) Samantha's due process rights were violated, (II) substantial evidence did not support the school board's decision, and (III) the school board's actions were arbitrary and capricious. After careful review, we affirm the order below.

The evidence tends to show that Samantha was a ninth grade student at Cape Fear High School on 6 October 2003. During her fourth period physical education class, Samantha was in a group of approximately five girls that were walking to the track in order to run in preparation for an upcoming examination. Katie Moore ("Katie") was in the group of girls and was also a ninth grade student at the high school. There were at least three students walking behind the group of girls. While the students were walking to the track, Samantha walked behind Katie, placed her hands on the sides of Katie's shorts, and pulled Katie's shorts down, an action commonly referred to as shanking. Katie's undergarments were also pulled down and Katie's rear end was exposed. Katie immediately pulled her shorts up and said an expletive to Samantha out of anger. The three students, two boys and a girl, walking behind Katie and Samantha saw the incident and saw Katie's rear end. Shortly after the incident, Samantha and

Katie ran on the track together, had a conversation, and sat at the same table during lunch. Prior to this incident, Samantha and Katie had been friends for several years and socialized outside of the school environment.

During lunch, Katie informed a substitute teacher that she had been "shanked" by Samantha and that her rear end had been exposed as a result. The substitute teacher advised Katie to report the incident to the school administrators, and after lunch Katie reported the incident to Beth Smith ("Smith"), an administrative intern. After Katie completed a written statement, Smith interviewed several students who corroborated Katie's account of what occurred. Smith then informed Jeff Jernigan ("Jernigan"), the school principal, of the incident and asked how to proceed. Jernigan advised Smith to interview Samantha; however, the interview did not occur as it was near the end of the school day.

At 8:00 a.m. the next morning, Katie's parents discussed the incident with Jernigan. They expressed their displeasure with what occurred and informed Jernigan that they had contacted an attorney and were considering criminal charges. Jernigan asked the school resource officer to participate in the meeting and the officer informed the parents that the only possible criminal charge was assault. The parents declined to file charges and stated they trusted the school to handle the matter. After the meeting, the principal began handling the investigation.

Jernigan discussed the matter with Smith, reviewed the witness statements, talked to Katie twice, and reinterviewed the witnesses. The witnesses corroborated that Samantha "shanked" Katie and that Katie's rear end was exposed as a result. Jernigan then interviewed Samantha. Samantha admitted that she had "shanked" Katie, but denied Samantha's rear end was exposed. Jernigan then asked Samantha if she had any witnesses she wanted Jernigan to interview. After Samantha did not provide any names, he informed Samantha that he was imposing a two-day temporary suspension until a formal hearing could be held and contacted Samantha's father.

Jernigan told Samantha's father that he was imposing a temporary suspension for two days until the formal hearing occurred because Samantha pulled Katie's shorts and panties down. Samantha's father received a copy of two forms—a Notice of Charges and Hearing and a Notice of Temporary Suspension. The Notice of Charges and Hearing document incorrectly stated Samantha had been

fighting with another student in the lunch room. The hearing notice stated a hearing would be held on 9 October 2003 regarding the charges. Later that day, Samantha's father telephoned Jernigan and asked for an expedited hearing. Jernigan informed him that school policy indicated a hearing had to be held between two to five days later.

At the hearing, Samantha's parents informed Jernigan that the notice of charges stated his daughter had been fighting in the lunch room, and Jernigan had the mistake fixed. The parents also expressed concern that prior to the formal hearing they had been receiving phone calls and information that their daughter was going to be suspended for ten days. A Cape Fear High School student submitted a statement to the principal indicating a substitute teacher had informed him Samantha would be suspended for ten days. The parents had also received information from teachers at a middle school that the school planned to impose a ten-day suspension. Jernigan informed Samantha's parents that this matter had not been discussed with any teachers and that a decision had not been made. The parents then asked that another Cape Fear High School student be called as a witness. The student indicated that Samantha had pulled down other female student's pants in the past but that the underwear did not come down in those instances.

After the hearing, Jernigan informed the parents that although Samantha was an honor roll student and did not have any prior disciplinary problems, he was immediately imposing a ten day suspension and recommending to the school superintendent that Samantha be suspended for the remainder of the year. The parents were provided with a form explaining the appeals process.

Samantha's parents contacted a member of the Board regarding the matter. The Board member asked Associate Superintendent Sara Piland ("Piland") to contact Samantha's father. Piland indicated that she had been notified by Jernigan regarding the matter and had discussed possible charges Jernigan could bring against Samantha. She advised Samantha's father to initiate the appeals process as soon as possible so his concerns could be addressed.

On 14 October 2003, a review hearing was held before Joe Twiddy ("Twiddy"), an administrative hearing officer. Twiddy determined the school principal acted in accordance with the Board's policies and administrative procedures. However, Twiddy recommended that the

length of Samantha's suspension be reviewed due to her lack of a disciplinary record at the high school. Upon review by Piland, the suspension was upheld but the length was reduced to fifteen days combined with ten hours of school community service.

Samantha's parents petitioned the superior court and were granted a temporary restraining order to allow Samantha to remain in school. The parents also appealed Piland's decision to the Board. On 6 November 2003, a hearing was held before the Board. In addition to the facts surrounding the "shanking" incident, the investigation, and suspension, the Board was also presented with information that there had been several "shanking" incidents at Cape Fear High School involving football players and other male students. Instead of suspending the football players, the football coaches were allowed to resolve the matter. In the incidents involving male students, the parties involved were both male and one individual had a disciplinary record. However, these students were suspended for three to five days only. Jernigan explained that he recommended Samantha be suspended for the rest of the school year because Katie's rear end was exposed and it was the first female on female incident of which he had heard. The Board also heard testimony that "shanking" was a prevalent and frequent activity at the middle school Samantha and Katie attended, that Katie had "shanked" Samantha during the summer between seventh and eighth grade, and that Samantha and Katie remained friends afterwards. After deliberation, the Board upheld the superintendent's recommendation.

On 5 December 2003, Samantha's parents filed a petition for judicial review with the Cumberland County Superior Court. In a 3 September 2003 order, the trial court affirmed the decision of the Board. James Alexander, as guardian ad litem for Samantha Alexander, appeals.

Pursuant to N.C. Gen. Stat. § 115C-391(e), an appeal of a local school board's decision regarding a suspension of a student for a period of time in excess of ten school days but not exceeding the time remaining in the school year is subject to judicial review in accordance with Article 4 of Chapter 150B of the General Statutes, part of the Administrative Procedures Act ("APA"). N.C. Gen. Stat. § 115C-391(c), (e) (2003). "To obtain judicial review of a final decision under [Article 4 of Chapter 150B], the person seeking review must file a petition in the . . . superior court of the county where the person resides." N.C. Gen. Stat. § 150B-45 (2003). "[A] reviewing superior

court 'sits in the posture of an appellate court' and 'does not review the sufficiency of evidence presented to it but reviews that evidence presented to the [local board].' " *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002) (citations omitted). " 'The proper standard for the superior court's judicial review "depends upon the particular issues presented on appeal." ' " *Id.* at 13, 565 S.E.2d at 17 (citations omitted). Pursuant to N.C. Gen. Stat. § 150B-51(b) (2003):

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

Id. "[W]here the gravamen of an assigned error is that the agency violated subsections 150B-51(b)(1), (2), (3), or (4) of the APA, a court engages in *de novo* review." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 895 (2004). "Under the *de novo* standard of review, the trial court ' "considers the matter anew[] and freely substitutes its own judgment for the agency's." ' " *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120 (2005) (citations omitted). "Where the substance of the alleged error implicates subsection 150B-51(b)(5) or (6), . . . the reviewing court applies the 'whole record test.' " *Carroll*, 358 N.C. at 659, 599 S.E.2d at 895. When sitting as an appellate body, the trial court must " ' "set forth sufficient information in its order to reveal the scope of review uti-

lized and the application of that review." ' " *Mann Media, Inc.*, 356 N.C. at 13, 565 S.E.2d at 17 (citations omitted). When an appellate court reviews

> "a superior court order regarding an agency decision, 'the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' "

Id. at 14, 565 S.E.2d at 18 (citations omitted).

In the petition for judicial review by the trial court, the petitioner alleged Samantha's due process rights were violated, the superintendent and the Board did not follow proper procedure, the Board committed errors of law, the decision of the Board was unsupported by substantial evidence and the superintendent's and the Board's decision to uphold the long term suspension was arbitrary and capricious. In the 3 September 2004 order affirming the Board's decision, the trial court did not state the standard of review it utilized to determine the issues presented by petitioner. As the trial court failed to state the standard of review, this Court is unable to determine whether the trial court utilized the appropriate review standard and if it did so properly. *See id.* However, as stated by our Supreme Court in *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 355 N.C. 269, 559 S.E.2d 547 (2002), "an appellate court's obligation to review a superior court order for errors of law . . . can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Id.* (adopting the dissenting opinion in 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, Judge, dissenting)); *see also N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. at 665, 599 S.E.2d at 898 (stating "it is well settled that the trial court's erroneous application of the standard of review does not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b)"). Although the trial court did not state the standard of review utilized in rendering its decision, this Court can determine from the record in this case whether the Board's decision should be affirmed, reversed, or modified.

I. Procedural Due Process Issues

A. Two-day suspension

[1] Petitioner first argues on appeal that Samantha's due process rights were violated in that the principal immediately and improperly suspended Samantha for two days (1) without discussing the disciplinary issue or possible punishment with her parents, (2) after discussing the incident with Katie's parents and a law enforcement officer, and (3) after discussing the incident with the associate superintendent charged with objectively reviewing the disciplinary decision of the principal. Essentially, Samantha argues the principal's decision was not impartial. The argument that a school board's decision was made upon unlawful procedure is reviewed *de novo*. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 895.

The Board argues a two-day suspension is not subject to appeal or judicial review. N.C. Gen. Stat. § 115C-391(b) (2003) gives the school principal authority to "suspend for a period of 10 days or less any student who willfully violates policies of conduct established by the local board of education[.]" *Id.* However, the statute does not provide for appeal or judicial review of suspensions for ten days or less. *See Stewart v. Johnston County Bd. of Educ.*, 129 N.C. App. 108, 109, 498 S.E.2d 382, 383 (1998) (stating N.C. Gen. Stat. § 115C-391 does not provide for an appeal of a suspension for ten days or less to either the superintendent or to the board of education); *see also* N.C. Gen. Stat. § 115C-391(b), (c), (e). Rather, the existence of an appeal of a two-day suspension, imposed under N.C. Gen. Stat. § 115C-391(b), is governed by N.C. Gen. Stat. § 115C-45 (2003), which provides in pertinent part:

> (c) Appeals to Board of Education and to Superior Court.—An appeal shall lie to the local board of education from any final administrative decision in the following matters:
>
> (1) The discipline of a student under G.S. 115C-391(c), (d), (d1), (d2), (d3), or (d4);
>
> . . .
>
> Any person aggrieved by a decision not covered under subdivisions (1) through (4) of this subsection shall have the right to appeal to the superintendent and thereafter shall have the right to petition the local board of education for a hearing, and the local board may grant a hearing regarding any final decision of school personnel within the local school administrative unit. The local

> board of education shall notify the person making the petition of its decision whether to grant a hearing.

Id. The statute, however, does not provide for further appeal of a two-day suspension imposed pursuant to N.C. Gen. Stat. § 115C-391(b) to the superior court. Therefore, neither the superior court nor this Court had subject matter jurisdiction under N.C. Gen. Stat. § 115C-1 *et seq.* to review the propriety of the initial two-day suspension.

We do note that in *Goss v. Lopez*, 419 U.S. 565, 42 L. Ed. 2d 725 (1975), the United States Supreme Court held in an action brought under 42 U.S.C. § 1983 that prior to imposing a short-term suspension of ten days or less, the school is only required to give the student notice of the charges against her and an opportunity to be heard—i.e., an opportunity to present her version of the incident. *Id.* at 581-84, 42 L. Ed. 2d at 738-40. As N.C. Gen. Stat. § 115C-391 precludes an appeal of a school suspension for ten days or less to the local board of education whose decision is subject to judicial review by the superior court, any claim asserting a student's due process rights were violated when a suspension for ten days or less was imposed would have to be brought in a separate proceeding filed initially in the trial court.

In sum, the trial court lacked subject matter jurisdiction to consider the propriety of the initial two-day suspension imposed under N.C. Gen. Stat. § 115C-391(b). Neither G.S. § 115C-391 nor G.S. § 115C-45 allows an appeal of a two-day suspension to the superior court.

B. Fifteen Day Suspension

[2] Petitioner also challenges the imposition of the fifteen day suspension arguing her due process rights were violated. As indicated in *Goss*, suspensions for longer than ten days or expulsions for the remainder of the school term or permanently require more formal procedures. *Id.* This Court has held that when a school board seeks to impose a long-term suspension, a student not only has the right to notice and an opportunity to be heard, the student also has the right to a full hearing, an opportunity to have counsel present at the hearing, to examine evidence and to present evidence, to confront and cross-examine witnesses supporting the charge, and to call his own witnesses to verify his version of the incident. *In re Roberts*, 150 N.C. App. 86, 92-93, 563 S.E.2d 37, 42 (2002).

After the initial two-day suspension in this case, the principal suspended Samantha for ten days and recommended the superintendent

suspend her for the remainder of the school year. This decision was made after a school hearing during which Samantha's parents were allowed to present witnesses and ask questions. After hearing the principal's decision, the parents were given an opportunity for a speedy appeal, which occurred within five days of the principal's decision. During this appeal before the administrative hearing officer, Samantha and her parents were represented by counsel. The administrative hearing officer heard the parents' complaints, considered the evidence, and recommended the length of the suspension be reviewed.

Piland considered the administrative hearing officer's recommendation and reduced Samantha's suspension to fifteen days. Although the parents have complained that the principal discussed the incident with Piland prior to the initial school hearing, we do not consider that a due process violation. Piland testified that principals often consult her about cases and she informs them what school policies may have been implicated. She does not tell the principal what to charge and does not suggest a suspension length. Such a procedure may actually benefit a student in that a student is not suspended for an action or behavior that does not violate the school code.

After Piland's decision was rendered, the parents were afforded an opportunity to appeal to the Board. During this appeal, the parents were represented by counsel, were able to cross-examine Samantha's accusers and were able to present witnesses on Samantha's behalf. The parents were also able to present documentary evidence and legal arguments to the Board. After the Board rendered its decision, the North Carolina statutes afforded them an opportunity to seek review in the court system and ultimately to appeal to this Court. Accordingly, we conclude Samantha was afforded notice, an opportunity to be heard, and the opportunity to examine and cross-examine witnesses regarding the incident and length of suspension. Therefore, her due process rights were not violated.

II. Evidentiary Issues

A. Did Substantial Evidence Support the Board's Decision

[3] Next, Samantha argues the Board's decision was not supported by substantial evidence. The whole record test applies to this argument. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 895.

> The "whole record" test requires the reviewing court to examine all competent evidence to determine whether the agency decision

> is supported by substantial evidence. The administrative findings of fact, if supported by substantial evidence in view of the entire record, are conclusive upon a reviewing court. Notably, "[t]he '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."

Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 14, 569 S.E.2d 287, 297 (2002) (citations omitted).

In this case, Samantha admitted she "shanked" Katie, which the school determined was a violation of the student code of conduct. Specifically, the school system charged Samantha with the following policy violations:

> **DISRUPTIVE BEHAVIOR**
>
> Disruptive behavior constitutes any physical or verbal action which reasonably could or does substantially disrupt, disturb, or interfere with the peace, order, and/or discipline within the learning environment or during any school related activity and any verbal, physical, or visual forms of a sexual nature that create a hostile or abusive educational environment for other students. No student shall engage in behavior which is indecent, disreputable or of a sexual nature.
>
> **DISORDERLY CONDUCT**
>
> Disorderly conduct is any action that disrupts the peace and order of the school. . . .
>
> **HAZING**
>
> To annoy any student by playing abusive or ridiculous tricks upon him, to frighten, scold, beat, or harass him or subject him to personal indignity is hazing.

As stated, Samantha admits she "shanked" Katie by pulling down her pants. However, she contends she did not intend for Katie's panties to come down. Nonetheless, pulling another student's pants down can be construed as a ridiculous trick that is annoying and harassing which may disrupt the school environment. Samantha argues that because the P.E. class was not disrupted by the incident she did not violate the disorderly conduct and disruptive behavior provisions of the Student Code of Conduct. However, the record indicates students

were discussing the event during exam week and one of the boys that witnessed the event said "do it again" after seeing Samantha "shank" Katie. The principal testified that "[h]aving [Samantha's] presence there and the students continuing to talk about this issue may have become an issue and created a disruption to the learning environment." Thus, Samantha's actions led to some students not focusing upon their exams and to another student encouraging such behavior. Accordingly, we conclude substantial evidence supports the charges of disruptive behavior, disorderly conduct, and hazing.

B. Was the Board's Decision Arbitrary and Capricious

[4] Finally, Samantha argues the Board's decision was arbitrary and capricious because the male students, including football players, did not receive similar punishment. "In all actions brought in any court against a local board of education, the order or action of the board shall be presumed to be correct . . . ." N.C. Gen. Stat. § 115C-44(b) (2003). " '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.' " ' " *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 617 (1991) (citations omitted). We note that the whole record test also applies to an argument that a Board's decision was arbitrary and capricious.

We first note that although Samantha states there was a difference in the suspension length for the girls and boys accused of "shanking," she did not assign the equal protection argument as error. *See* N.C.R. App. P. 10(a) (stating "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal"). We also note that Samantha did not present any authority indicating the Board's actions or decision violated the equal protection clause. See N.C.R. App. P. 28(b)(6) (stating "[t]he body of the argument shall contain citations of the authorities upon which the appellant relies"). Even assuming Samantha had properly presented this issue for our review, we note that Samantha's equal protection rights were not violated in this case. Under equal protection clause analysis, "classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the state to prove that the regulation [or action] is substantially related to an important government interest." *Department of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001) (citing *Clark v. Jeter*, 486

U.S. 456, 100 L. Ed. 2d 465 (1988), and *Craig v. Boren*, 429 U.S. 190, 50 L. Ed. 2d 397 (1976)).

In this case, Samantha was initially suspended for two days. After a hearing, the principal increased Samantha's suspension length to ten days and recommended to the superintendent that Samantha's suspension be extended for the remainder of the school year. In prior "shanking" cases, the football players were not suspended and two students received a three to five day suspension. The principal testified he felt a longer suspension was warranted in Samantha's case because Katie's rear end had been exposed. In the prior cases involving the male students, the shanked student's bottom or genitalia had not been exposed. Thus, the principal articulated a valid reason for the difference in the suspension length.

The principal's decision was reviewed by the school superintendent's office, which determined Samantha's suspension length would be increased to a total of fifteen days. Samantha appealed to the school board, and after hearing testimony and reviewing the evidence, the school board upheld the superintendent's decision. We conclude the Board's decision to uphold the superintendent's recommendation that Samantha's suspension be increased to a total of fifteen days was not arbitrary and capricious in that the decision did not lack reason and was not whimsical. The decision to impose a lengthier suspension had a gender-neutral basis—i.e., the exposure of a student's rear end. Finally, we note that the initial recommendation that Samantha be suspended for the remainder of the school year and the suspension length of fifteen days are within the school system's guidelines for suspension length for disruptive behavior, disorderly conduct, and hazing.

In sum, Samantha's due process rights were not violated. She received notice of the allegations against her, an opportunity to respond, an opportunity to present witnesses, and she was able to appeal the principal's decision to the superintendent's office, the Board, and to the superior court. Second, the Board's decision was supported by substantial evidence and was not arbitrary and capricious.

Affirmed.

Judges HUDSON and GEER concur.

STATE OF NORTH CAROLINA v. MICHAEL LEE DUFF

No. COA04-1241

(Filed 19 July 2005)

1. Appeal and Error— preservation of issues—failure to argue

The original assignments of error that defendant did not present arguments for in his brief are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

2. Confessions and Incriminating Statements— custodial statements—motion to suppress—voluntariness

The trial court did not err in a felonious breaking and entering, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury case by denying defendant's motion to suppress his custodial statement even though defendant contends it resulted from unconstitutional threats or coercion on the part of law enforcement officers, because the totality of circumstances revealed that: (1) defendant was aware of his constitutional right to remain silent when he chose to speak; (2) a detective testified that prior to being asked whether his wife was involved, defendant said he was there and asked officers what the video showed; and (3) both officers testified that at no point did they indicate to defendant that his wife would be charged if he did not confess, nor did they promise defendant anything if he offered a confession.

3. Confessions and Incriminating Statements— custodial statements made by defendant's wife—plain error analysis

The trial court did not commit plain error in a felonious breaking and entering, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury case by permitting a detective to testify regarding the custodial statements made by defendant's wife, because: (1) the State introduced evidence that an employee at the pertinent hotel saw defendant get on the elevator with the victim shortly before she was attacked; (2) the victim identified defendant as the individual who attacked her, and defendant confessed that he attacked the victim in her hotel room in order to obtain money and that he was "cracked up" during the incident; and (3) the jury would not have reached a different verdict absent the alleged error.

4. Robbery— dangerous weapon—motion to dismiss

The trial court erred by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon based on insufficient evidence that defendant possessed or used a dangerous weapon, implement, or means during the attack, and the case is remanded with instructions to enter judgment on the offense of common law robbery, because: (1) fists, hands, and feet cannot be considered dangerous weapons for the purpose of N.C.G.S. § 14-87 despite prior holdings that under certain circumstances a defendant's hands, fists, and feet can be considered deadly weapons for the purposes of an assault conviction; (2) our legislature intended the "means" employed by an armed robber to consist of some extraneous instrument similar to a "firearm," "implement," or "other dangerous weapon;" and (3) there is no indication that the victim's life was threatened or endangered by an armed individual.

5. Assault— deadly weapon with intent to kill inflicting serious injury—motion to dismiss

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury even though defendant contends there was insufficient evidence of his intent to kill, because: (1) although evidence that a defendant threatened to kill his victim unless his demands are met is merely indicative of a conditional intent to kill, in the instant case the State also presented evidence tending to show that after locating her money, defendant began to beat the victim repeatedly with his fists, he kicked and dragged her, and defendant pounded the victim's head on the wall of the hotel until she lost consciousness; and (2) the victim was virtually defenseless during the attack, and she suffered vertigo and a total loss of balance following it.

6. Sentencing— habitual felon—violent habitual felon—reversal of convictions

Defendant's convictions for obtaining habitual felon and violent habitual felon status are vacated because: (1) both indictments 03 CRS 13113 and 03 CRS 13115 relied upon defendant's conviction for armed robbery; and (2) defendant's armed robbery conviction was reversed.

Appeal by defendant from judgment entered 5 May 2004 by Judge E. Penn Dameron in Buncombe County Superior Court. Heard in the Court of Appeals 19 May 2005.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Anne Bleyman for defendant-appellant.

TIMMONS-GOODSON, Judge.

Michael Lee Duff ("defendant") appeals his convictions for felonious breaking and entering, robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and obtaining habitual felon and violent habitual felon status. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error in part, but we reverse defendant's conviction for robbery with a dangerous weapon, remand the case for entry of judgment on the offense of common law robbery, and vacate defendant's convictions for obtaining habitual felon and violent habitual felon status.

The State's evidence presented at trial tends to show the following: On 28 June 2003, Geraldine MacQueen ("MacQueen") was attending a family reunion in Asheville, North Carolina. As she was returning to her room at the Days Inn, MacQueen entered an elevator with defendant, who began talking to her. Defendant and MacQueen rode the elevator to the fifth floor, where MacQueen's room was located. Defendant followed MacQueen to her room, and as MacQueen opened the door to the room, defendant pushed her inside. MacQueen turned and saw defendant standing in her room, and she "screamed and screamed, hoping some of [her] family would hear [her]." Defendant told MacQueen to "shut up[,]" that he "just wanted [her] money[,]" and that "if [she] didn't shut up he would kill" her. Defendant then put his hands on MacQueen's neck and "squeezed and twisted" it.

After she "somehow or other . . . got him to stop[,]" MacQueen located her purse and gave defendant $300.00 in cash. Defendant thereafter attacked MacQueen again, hitting her in the cheek with his fists. After defendant forced MacQueen to the floor, he repeatedly kicked her and began dragging her toward the bathroom. MacQueen believed defendant was going to "hit [her] head on the tile floor and [she] was going to be dead." Instead, defendant grabbed MacQueen

by the hair and "pounded" her head against the wall until she lost consciousness.

MacQueen was transported to a local hospital for treatment of her injuries. As a result of the attack, MacQueen was hospitalized for several days and suffered recurring nausea and vertigo. She experienced a "total loss of balance[,]" and she was unable to stand up or walk any distance. At trial, MacQueen testified that she had lost the full range of motion of her neck, continued to have problems with her balance, and continued to experience lightheadedness.

Asheville Police Department Detective Wayne Welch ("Detective Welch") and Sergeant Daryl Fisher ("Sergeant Fisher") investigated the attack. Detective Welch and Sergeant Fisher interviewed MacQueen and her family members, and they reviewed security camera footage from the Days Inn. The videotape footage depicted defendant following MacQueen into the elevator shortly before the attack. The footage also showed defendant checking into the Days Inn. Detective Welch and Sergeant Fisher showed the videotape to another occupant of the hotel, who informed the officers that the individual on the videotape had approached his room the night before asking for money. The occupant told the officers that the individual was staying in Room 505. According to hotel records, defendant was registered to Room 505 the night before MacQueen was attacked.

Defendant and his wife were subsequently located, taken into custody, and transported to the Asheville Criminal Investigation Division for questioning. Defendant thereafter confessed to taking money from MacQueen. According to Detective Welch and Sergeant Fisher, defendant did not remember kicking MacQueen and he denied choking her, but he did remember MacQueen fighting back during the incident.

On 8 September 2003, defendant was indicted for felonious breaking and entering, felonious assault inflicting serious bodily injury, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury. Through six other indictments, defendant was charged with obtaining habitual felon and violent habitual felon status.

Defendant's case proceeded to trial the week of 3 May 2004. During his trial, defendant moved the trial court to suppress his custodial statement to the law enforcement officers, arguing that his statement was not voluntary and was the result of threats against his

wife and coercion by the officers. The trial court denied defendant's motion, concluding that defendant's statement "was not induced by any promise of reward or threat of possibly bringing charges against his wife, but rather, was knowingly, voluntarily and intelligently made without threat or promise." On 5 May 2004, the jury found defendant guilty of felonious breaking and entering, felonious assault inflicting serious injury, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court subsequently submitted to the jury one charge of obtaining habitual felon status and one charge of obtaining violent habitual felon status. After a jury verdict finding defendant guilty of both charges, the trial court sentenced defendant to two consecutive terms of life imprisonment without parole for robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court arrested judgment on the felonious assault inflicting serious injury conviction, and it sentenced defendant to 133 to 139 months imprisonment for felonious breaking and entering. Defendant appeals.

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[1] We note initially that defendant's brief does not contain arguments supporting each of the original assignments of error on appeal. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those issues argued by defendant in his brief.

The issues on appeal are whether: (I) the trial court erred by denying defendant's motion to suppress his custodial statement; (II) the trial court erred by permitting Detective Welch to testify regarding the custodial statements made by defendant's wife; (III) the trial court erred by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon; (IV) the trial court erred by failing to set aside *sua sponte* the jury's verdict on the charge of robbery with a dangerous weapon; (V) defendant received ineffective assistance of counsel; (VI) the trial court erred by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury; (VII) the trial court erred by sentencing defendant as a violent habitual felon; and (VIII) the trial court erred by denying defendant's motions to dismiss the habitual felon indictments and allowing the State to amend the indictment for obtaining habitual felon status.

[2] Defendant first argues that the trial court erred by denying his motion to suppress his custodial statement to Detective Welch and

Sergeant Fisher. Defendant asserts that his statement was involuntary, in that it resulted from unconstitutional threats or coercion on the part of law enforcement officers. We disagree.

N.C. Gen. Stat. § 15A-977(f) (2003) requires a trial court to make findings of fact and conclusions of law to support its order granting or denying a defendant's motion to suppress evidence. Where a defendant contends that his confession to law enforcement officers was involuntary, "[s]uch findings and conclusions must be determinative on the issue of voluntariness." *State v. James*, 321 N.C. 676, 685, 365 S.E.2d 579, 585 (1988). "In making [its] determination, the trial [court] must find facts; and when the facts are supported by competent evidence, they are conclusive on the appellate courts. However, the conclusions of law drawn from the findings of fact are reviewable by the appellate courts." *State v. Booker*, 306 N.C. 302, 308, 293 S.E.2d 78, 81 (1982).

In the instant case, after hearing *voir dire* testimony from defendant, Detective Welch, and Sergeant Fisher, the trial court found that "the officers who interrogated [defendant] did not threaten to charge his wife . . . with any offense, nor did they promise to release her from custody in the event th[at] defendant were to give them a statement[.]" The trial court also found that "no offers of reward, inducements or promises were made to [] defendant in order to compel him or force him to make a statement." At the request of defendant's counsel, the trial court found further that "it was not suggested to [defendant] by the investigating officers that his wife could be charged unless he made a statement[,]" and "that the conclusion which [defendant] may have reached that his wife would be charged unless he made a confession was not suggested to him by the investigating officers, but rather was a conclusion which he reached independently on the basis of his own interpretation of events." Based upon these findings of fact, the trial court concluded that defendant's statement "was not induced by any promise or reward or threat of possibly bringing charges against his wife, but rather, was knowingly, voluntarily and intelligently made without threat or promise." After reviewing the record, we conclude that the trial court's findings of fact are supported by competent evidence, and the findings of fact support the trial court's conclusion of law.

During *voir dire*, Detective Welch testified that while defendant was in custody, he asked defendant whether his wife was involved in the attack upon MacQueen. Detective Welch testified that after

defendant told him his wife was not involved, he informed defendant that "the only way [he] could believe that she was not involved [would be for defendant] to tell [him] exactly what did happen[.]" Defendant thereafter informed the officers what happened. Detective Welch testified further that he informed defendant "near the end of our interview" that his wife would not be charged in connection with the attack. On cross-examination by the State, Detective Welch testified that he did not promise defendant anything in return for his making the statement, and he did not threaten or coerce defendant in any way.

Sergeant Fisher testified in pertinent part as follows:

Q: What, if anything, was mentioned about [defendant's] wife to [defendant] in the interrogation room?

A: Detective Welch asked [defendant] if his wife was part of this thing, and [defendant] advised that she was not. Detective Welch advised [defendant] the only way to believe him was to tell the truth, and [defendant] agreed.

Q: Did you or Detective Welch at any time say to [defendant] anything to the effect that if he doesn't talk, his wife will be charged?

A: No, sir, we did not.

Q: Did [defendant], at any time during the interrogation, express any concern about his wife and her being charged, if you recall?

A: No, he did not.

Our courts "ha[ve] long recognized the principle that mental or psychological pressure brought to bear against a defendant so as to overcome his will and induce a confession can render such a confession involuntary under the totality of the circumstances attendant." *State v. Branch*, 306 N.C. 101, 107, 291 S.E.2d 653, 658 (1982) (citing *State v. Morgan*, 299 N.C. 191, 261 S.E.2d 827, *cert. denied*, 446 U.S. 986, 64 L. Ed. 2d 844 (1980) and *State v. Roberts*, 12 N.C. 259 (1827)).

A statement by investigating law enforcement officers that a suspect's relatives will be released from custody or not be arrested if the suspect confesses may, under the totality of the circumstances, render the suspect's confession involuntary. It is generally recognized, however, that a confession is "involuntary" in the

> constitutional sense in such cases only when it was produced by wrongful pressure applied by law enforcement officials or others acting for them. Confessions or admissions have not been held inadmissible in evidence merely because the accused in making the confession or admission was motivated by a desire to protect a relative threatened with arrest or in custody when such motivation originated with the accused and was not suggested by law enforcement officials.

Id. at 107-08, 291 S.E.2d at 658 (citations omitted).

In the instant case, as detailed above, the trial court's findings of fact are supported by competent evidence and are thus binding on appeal. Defendant was aware of his constitutional right to remain silent when he chose to speak. Detective Welch testified that prior to being asked whether his wife was involved, defendant said, "I was there[,]" and he asked the officers, "What does the video show?" Both officers testified that at no point did they indicate to defendant that his wife would be charged if he did not confess, nor did they promise defendant anything if he offered a confession. Based upon our review of the totality of the circumstances, we conclude that defendant was not coerced into confession due to threats made against his wife or suggested by law enforcement officials. Accordingly, we overrule defendant's first argument.

[3] Defendant next argues that the trial court committed plain error by permitting Detective Welch to testify regarding statements defendant's wife made to law enforcement officers. The State contends that defendant has not properly preserved this issue for appeal because, in his brief, defendant fails to offer any argument supporting his assignment of plain error to the issue. We note that "[t]he right and requirement to specifically and distinctly contend an error amounts to plain error does not obviate the requirement that a party provide argument supporting the contention that the trial court's [alleged error] amounted to plain error[.]" *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). Therefore, an "empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule." *Id.* at 637, 536 S.E.2d at 61. Nevertheless, in our discretion pursuant to N.C.R. App. P. 2, we have chosen to review defendant's plain error argument.

"A prerequisite to our engaging in a 'plain error' analysis is the determination that the [trial court's action] constitutes 'error' at all."

State v. Torain, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). Once we have determined that the trial court erred, " '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.' " *Id.* (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)). In the instant case, defendant contends that the trial court erred by allowing Detective Welch to testify that defendant's wife informed him that defendant had a cocaine problem and that defendant had told her that he "had done something bad[.]" However, assuming *arguendo* that the trial court erred, we nevertheless conclude that defendant has failed to meet the heavy burden of plain error review. At trial, the State introduced evidence tending to show that defendant was registered at Room 505 of the Days Inn the night before MacQueen was attacked, and that an employee of the hotel saw defendant get on the elevator with MacQueen shortly before she was attacked. MacQueen identified defendant as the individual who attacked her, and, as discussed above, defendant confessed that he attacked MacQueen in her hotel room in order to obtain money and that he "was cracked up" during the incident. In light of the foregoing, we are not convinced that absent the trial court's alleged error, the jury probably would have reached a different verdict. Accordingly, we overrule defendant's second argument.

[4] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of robbery with a dangerous weapon. Defendant asserts that the State failed to demonstrate that he either possessed or used a dangerous weapon, implement, or means during the attack. We agree.

In order to withstand a motion to dismiss a charge of robbery with a dangerous weapon, the State must present substantial evidence that the defendant: (1) unlawfully took or attempted to take personal property from a person or in the presence of another; (2) by the use or threatened use of a dangerous weapon, implement, or means; and (3) thereby endangered or threatened the life of a person. *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002); N.C. Gen. Stat. § 14-87(a) (2003). In the instant case, in the indictment charging defendant with robbery with a dangerous weapon, the State asserted that "defendant committed this act by means of an assault consisting of having in possession and threatening the use of his feet, hands and fists, whereby the life of [MacQueen] was threatened and endangered." Defendant contends that fists, hands, and feet cannot

be considered dangerous weapons for the purposes of N.C. Gen. Stat. § 14-87. We agree.

It is well established that N.C. Gen. Stat. § 14-87 did not create a new offense. *State v. Black*, 286 N.C. 191, 193, 209 S.E.2d 458, 460 (1974); *State v. Hare*, 243 N.C. 262, 263-64, 90 S.E.2d 550, 551 (1955). Instead, the statute provides that "when firearms or other dangerous weapons are used, [a] more severe punishment may be imposed" than that allowed for common law robbery. *Black*, 286 N.C. at 193, 209 S.E.2d at 460. This is because "[t]he gist of the offense of robbery with firearms is the accomplishment of robbery by the use or threatened use of firearms or other dangerous weapons." *Id*. at 194, 209 S.E.2d at 460. A victim of common law robbery is necessarily put in fear by the violence or threat of the defendant. However, when there is an actual danger or threat to the victim's life—by the possession, use, or threatened use of a dangerous weapon—the defendant may be charged and convicted of armed robbery rather than common law robbery. *See State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978); *State v. Moore*, 279 N.C. 455, 459, 183 S.E.2d 546, 548 (1971).

We note that N.C. Gen. Stat. § 14-87 also refers to the possession, use, or threatened use of "means" during the robbery. However, we are not convinced that "means" was included in the statute in order to reach the situation of the instant case, where a robbery was perpetrated by the use of hands, fists, or feet. "It is a recognized principle of statutory construction that when particular or specific words or acts, the subject of a statute, are followed by general words, the latter must as a rule be confined to acts and things of the same kind." *State v. Craig*, 176 N.C. 740, 744, 97 S.E. 400, 401 (1918). In N.C. Gen. Stat. § 14-87, entitled "Robbery with firearms or other dangerous weapons," the term "means" follows the terms "firearm," "other dangerous weapon," and "implement." Therefore, we conclude that our legislature intended the "means" employed by an armed robber to consist of some extraneous instrument similar to a "firearm," "implement," or "other dangerous weapon."

We recognize that this Court has previously concluded that the instrument used or threatened to be used need not be a firearm in order to be considered life-threatening or dangerous under N.C. Gen. Stat. § 14-87. *State v. Funderburk*, 60 N.C. App. 777, 778, 299 S.E.2d 822, 823 (1983). We also recognize that "[s]ince a dangerous weapon is synonymous with a deadly one, cases resolving whether a particular weapon was deadly *per se* are relevant" to the determination of whether a weapon is dangerous under N.C. Gen.

Stat. § 14-87. *State v. Wiggins*, 78 N.C. App. 405, 406, 337 S.E.2d 198, 199 (1985). However, despite our prior holdings that, under certain circumstances, a defendant's hands, fists, and feet can be considered *deadly* weapons for the purposes of an assault conviction, *see State v. Grumbles*, 104 N.C. App. 766, 771, 411 S.E.2d 407, 410 (1991), we have never held that hands, fists, and feet can be considered *dangerous* weapons for the purposes of N.C. Gen. Stat. § 14-87. Although the issue was raised in *State v. Gibbons*, 303 N.C. 484, 488, 279 S.E.2d 574, 577 (1981), our Supreme Court did not rule on the issue, concluding that because "[t]he trial judge in his charge related the facts and law concerning the use of fists as a deadly weapon only to the crime of assault with a deadly weapon[,]" the Court did not need to consider the State's "novel" argument that fists could be considered dangerous weapons.

" 'The layman's phrase "armed robbery" is not at all an inaccurate description of the offense.' " *Wright v. State*, 228 Ga. App. 779, 780, 492 S.E.2d 680, 682 (1997) (quoting *People v. Dozie*, 224 Cal. App. 2d 474, 477, 36 Cal. Rptr. 728, 730 (3rd Dist. 1964)). In the instant case, there is no indication that MacQueen's life was threatened or endangered by an "armed" individual. Defendant's only means of completing the robbery consisted of his own bare hands, fists, and feet. Common sense and the clear intent of N.C. Gen. Stat. § 14-87 lead us to conclude that an individual cannot possess, use, or threaten to use a dangerous weapon during a robbery where that individual is not possessing, using, or threatening to use some external weapon or instrument during the robbery. The "critical difference" between armed and common law robbery "is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985). Were an individual's bare hands, fists, and feet considered dangerous weapons for the purposes of N.C. Gen. Stat. § 14-87, that "critical difference" would be erased, and the crime of common law robbery would in effect merge with the crime of robbery with a dangerous weapon. We are not convinced that this result was contemplated by our legislature in enacting N.C. Gen. Stat. § 14-87. Therefore, in light of the foregoing, we conclude that an individual's bare hands, fists, and feet are not considered dangerous weapons for the purposes of N.C. Gen. Stat. § 14-87. Accordingly, we hold that the trial court erred by failing to dismiss defendant's charge of armed robbery on these grounds, and therefore we reverse defendant's armed robbery conviction. The case is

remanded to the trial court with instructions to enter judgment on the offense of common law robbery. Furthermore, because we have decided this issue in favor of defendant, we need not consider his related contentions that the trial court erred by failing to set aside *sua sponte* the verdict of guilty of robbery with a dangerous weapon or that he received ineffective assistance of counsel when his trial counsel failed to move the trial court to set aside the verdict.

[5] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant asserts that the State produced insufficient evidence that defendant intended to kill MacQueen. We disagree.

In order to withstand a motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury, the State must present substantial evidence that the defendant: (1) assaulted the victim; (2) with a deadly weapon; (3) with an intent to kill; and (4) inflicted serious injury upon the victim which did not result in death. *James*, 321 N.C. at 687, 365 S.E.2d at 586. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

"An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred." *State v. Ferguson*, 261 N.C. 558, 561, 135 S.E.2d 626, 629 (1964) (quotation and citation omitted). Thus "[t]he defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *James*, 321 N.C. at 688, 365 S.E.2d at 586.

In the instant case, the State presented evidence tending to show that defendant approached MacQueen from behind and shoved her into her own hotel room. Once inside, defendant grabbed MacQueen, began "squeez[ing] and twist[ing]" and "wringing" her neck, and demanded her money. Although we note that evidence that a defendant threatened to kill his victim unless his demands are met is merely indicative of a "conditional intent to kill," *State v. Irwin*, 55 N.C. App.

305, 310, 285 S.E.2d 345, 349 (1982), in the instant case, the State also presented evidence tending to show that, after locating her money, defendant began to beat MacQueen repeatedly with his fists. MacQueen testified that defendant "slammed" her on the cheek, causing her to fall to the floor of the hotel room. After MacQueen fell to the floor, defendant began to kick her and drag her towards the bathroom. Defendant grabbed MacQueen by her hair and "pounded" her head on the wall of the hotel room until she lost consciousness. The evidence demonstrates that MacQueen was virtually defenseless during the attack, and she suffered vertigo and a total loss of balance following it. MacQueen testified that she continued to suffer from the injuries at defendant's trial. In light of the foregoing, we conclude that the State offered sufficient evidence to reasonably support the inference that defendant intended to kill, rather than merely injure, MacQueen. Accordingly, we overrule defendant's sixth argument.

[6] Defendant next presents several arguments regarding the propriety of his convictions and sentences for obtaining habitual felon and violent habitual felon status. As discussed above, defendant was charged with obtaining habitual felon status by four separate indictments and obtaining violent habitual felon status by two separate indictments. Prior to submission of the charges to the jury, the State agreed to proceed on only one charge of obtaining habitual felon status and only one charge of obtaining violent habitual felon status. The trial court thereafter submitted indictments 03 CRS 13113 and 03 CRS 13115 to the jury, both of which relied upon defendant's conviction for armed robbery. Because we have reversed defendant's armed robbery conviction, the resulting convictions for obtaining habitual felon and violent habitual felon status are vacated.

In light of the foregoing conclusions, we hold that defendant received a trial free of prejudicial error in part, but we reverse defendant's conviction for robbery with a dangerous weapon, remand the case for entry of judgment on the offense of common law robbery, and vacate defendant's convictions for obtaining habitual felon and violent habitual felon status.

Reversed and remanded in part; vacated in part; no error in part.

Judges McCULLOUGH and TYSON concur.

IN RE A.E., J.E.

[171 N.C. App. 675 (2005)]

IN THE MATTER OF: A.E., J.E., MINOR CHILDREN

No. COA04-406

(Filed 19 July 2005)

1. Child Abuse and Neglect— neglect—time for appeal—order served after time expired

A father lost his right to appeal from a child neglect adjudication through no fault of his own where his counsel was not served with the order until after the time for appeal had passed. The Court of Appeals exercised its discretion to treat the matter as a petition for certiorari.

2. Appeal and Error— preservation of issues—objection at trial—assignments of error

Arguments regarding changes to and the reliability of testimony in a child neglect adjudication were not properly before the Court of Appeals because the father did not object to the testimony during the hearing and failed to specifically assign error to the testimony or the trial court's reliance on the testimony.

Judge TYSON concurring in part and dissenting in part.

Appeal by respondent from judgment and order entered 5 December 2003 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 2 December 2004.

Renae S. Alt for petitioner-appellee.

Carol Ann Bauer for respondent-appellant.

Michael N. Tousey for appellee Guardian ad Litem.

GEER, Judge.

Respondent father E.E. appeals an order of the trial court adjudicating his children, A.E. and J.E., neglected. E.E. argues in his appellate brief only that the trial court should not have relied upon the testimony of Dr. Robert McDonald. Since E.E. neither objected to that testimony at trial nor assigned error to that testimony or the findings of fact related to that testimony, E.E.'s arguments were not properly preserved for review by this Court. We, therefore, affirm.

Timeliness of Appeal

[1] As an initial matter, we must address the guardian ad litem's motion to dismiss this appeal. The trial court's adjudication judgment and dispositional order was entered on 5 December 2003. E.E. filed his notice of appeal on 18 December 2003. The guardian ad litem contends that because the notice of appeal was filed more than 10 days after entry of the order, the appeal was untimely.

Even assuming, without deciding, that respondent's notice of appeal was not timely, respondent has established through affidavits that his appeal was lost, if at all, through no fault of his own since his counsel was not served with the order until after the time for appeal had passed. Appellees have submitted no contrary evidence. We, therefore, exercise our discretion under Rule 21(a)(1) of the Rules of Appellate Procedure to treat the father's appeal as a petition for writ of certiorari and we allow that petition.

Adjudication of Neglect

[2] When a child is alleged to be neglected and taken into temporary custody, DSS has the burden of proving neglect by clear, cogent, and convincing evidence. *In re Evans*, 81 N.C. App. 449, 452, 344 S.E.2d 325, 327 (1986). "Where the trial court sits without a jury and hears the evidence in a neglect adjudication, the facts found by the trial court are binding on an appellate court if supported by clear and convincing competent evidence." *In re McLean*, 135 N.C. App. 387, 394, 521 S.E.2d 121, 125 (1999). Findings of fact that are not challenged on appeal "are deemed supported by competent evidence" and are binding on this Court. *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003).

The respondent father has made only a single assignment of error: "The court erred in finding that the minor children are neglected children by clear, cogent, and convincing evidence." It is well-established that "[a] single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact, as here, is broadside and ineffective." *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Since respondent did not specifically assign error to any of the trial court's findings of fact supporting its order, those findings are deemed to be supported by competent evidence and are conclusive on appeal. Those findings establish the following facts.

A.E. and J.E. lived with their father. In December 2002, the Buncombe County Department of Social Services ("DSS") became involved with the family as a result of reports regarding the father's relationships with women. The father voluntarily placed his children first with one neighbor, then removed them and, four days later, placed them with a second neighbor.

In the course of its investigation, DSS learned that the father had been convicted of taking indecent liberties with a 15-year-old girl and was an untreated sexual offender. Although the father insisted to DSS that he was not untreated, had been cleared by the courts, and had received an assessment for his sex offender status, DSS discovered from his probation officer that the father's probation was revoked due to his failure to seek sexual offender treatment.

On 28 January 2003 and again on 7 February 2003, the father claimed that he had attempted unsuccessfully to schedule a sex offender specific assessment with Dr. Robert McDonald. Dr. McDonald confirmed, however, that he had received no calls from the father. On 13 February 2003, the father refused to sign the "Family Services Case Plan" with DSS, claiming that he did not need any services. On 3 March 2003, the father finally agreed to sign the case plan and "go along" with the results of the sex offender specific assessment.

On 11 March 2003, DSS received the results of the assessment from Dr. McDonald who found the father to be uncooperative and "obviously unreliable" in his recitation of events and facts. Dr. McDonald "recommended that he receive the previously ordered treatment" and that "he not be allowed to be in the presence of post-pubertal females unchaperoned. Failure to comply with treatment is known to be a significant risk factor for repeating similar offenses."

On 18 March 2003, DSS learned that the father had taken the children back into his home although he insisted that his fiancée was always present. On 2 April 2003, a DSS social worker informed the father that he would need to pursue sexual offender treatment. The father, however, refused to undergo treatment. As of 18 June 2003, the father had still not received sex offender specific treatment. On 19 June 2003, DSS filed petitions alleging that the children were neglected, but did not obtain non-secure custody orders.

The trial court conducted an adjudication and dispositional hearing on 27 October 2003. Following that hearing, the court filed an order on 5 December 2003, finding in pertinent part:

> 21. That on or about May 28, 2003, [the father's] daughter [A.E.], (DOB 3-10-95, age 8), within a few years will be a "post pubertal female" as designated by Dr. McDonald in the Assessment, and [the father] will have unrestricted access to [A.E.]. [The father's] refusal to seek sex offender treatment and his unrestricted access to [A.E.] creates a high risk for these children. The current risk assessment indicates high risk and [the father] is refusing to engage in treatment recommended by Dr. McDonald and the Department.
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> . . . .
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> 23. That Dr. McDonald testified, and the Court will find as facts, that [the father] was referred for a [sex offender specific] evaluation. He met with him on 5 occasions and held two interviews and performed 3 tests, the MMPI, MPI and MSI. That he received pretty conflicting information from [the father] and found him not reliable. . . . [The father] has never been treated. This is a significant indicator of recidivism and a significant risk. The recommendations for [the father] were a polygraph test, PPE, treatment for 1-2 years, group therapy and individual therapy. [Dr.] McDonald stated that [the father] should not have unsupervised visits with the minor children and not be allowed to be in the company of post pubertal females. After further research and attending a continuing education seminar one week prior to the adjudication, Dr. McDonald recommended that [the father] have no contact with children at all, neither supervised nor unsupervised.

The court acknowledged that the father had been cooperative with DSS with the exception of the refusal to obtain sex offender treatment.

The court concluded "by clear, cogent, and convincing evidence the minor children are neglected children pursuant to N.C.G.S. §7B-101(15) in that the children live in an environment injurious to their welfare in that their father, [E.E.], is an untreated sex offender." In its dispositional order, the court found that it was not in the best interests of the minor children to be in the custody of their father and granted custody to DSS. The court allowed for supervised visitation, but directed that the father complete sex offender specific treatment as a prerequisite to unsupervised visitation. The court also found that "the best plan to achieve a safe, permanent home for the minor children in a reasonable period of time is reunification."

While in his single assignment of error, the father challenged generally the trial court's finding of neglect, the father in his brief argues only that the opinion of Dr. McDonald is not competent evidence to support the trial court's decision. Specifically, the father objects because Dr. McDonald changed his ultimate conclusion between his written report and trial testimony and because the information he used to formulate his trial testimony was not shown to be reliable.

We hold that the arguments regarding changes to and the reliability of Dr. McDonald's opinion are not properly before us because the father (1) failed to object to Dr. McDonald's testimony during the hearing and (2) failed to specifically assign error to that testimony or the trial court's reliance on that testimony. Rule 10(b)(1) of the Rules of Appellate Procedure provides: "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." N.C.R. App. P. 10(b)(1). If an issue has been properly preserved under Rule 10(b), the appellant must then comply with Rule 10(c)(1)'s requirements for assignments of error:

> A listing of assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. 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. *An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.* Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

N.C.R. App. P. 10(c)(1) (emphasis added).

Our review of the transcript in this case reveals that the father failed to object at the hearing to Dr. McDonald's testimony and failed to argue to the trial court that the testimony was incompetent. *See State v. Call*, 353 N.C. 400, 426, 545 S.E.2d 190, 206-07 (holding that an argument that expert's testimony was unreliable was not properly preserved for appellate review when the defendant failed to object at trial), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548, 122 S. Ct. 628

(2001). Further, since the father's assignment of error does not reference Dr. McDonald's testimony or the findings of fact relating to that testimony, it has not directed the attention of this Court to the error argued in the father's brief, as required by Rule 10(c)(1). *See In re Morales*, 159 N.C. App. 429, 432, 583 S.E.2d 692, 694 (2003) (finding that the argument concerning inadmissible hearsay was not included in an assignment of error and, therefore, was not properly preserved for review). Accordingly, the father's arguments regarding Dr. McDonald's testimony are not properly before this Court.

Our Supreme Court has recently emphasized that once this Court determines that an appeal is flawed for failure to comply with Rule 10(c)(1), this Court is not free to address an issue not raised or argued by the appellant: "It is not the role of the appellate courts, however, 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. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam). The dissenting opinion in this case, however, seeks to do precisely what the Supreme Court has forbidden. It creates an appeal for the appellant by "address[ing an] issue, not raised or argued by [appellant]." *Id.* None of the cases cited by the dissent and, with the exception of the challenge to Dr. McDonald's testimony, none of the arguments made by the dissent appear in appellant's brief. Just as "the Rules of Appellate Procedure must be consistently applied," *id.*, so too the principles in *Viar* must be consistently applied. Since the sole issue argued by the father is not properly before this Court, we affirm the trial court's decision.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge TYSON concurs in part and dissents in part in separate opinion.

Tyson, Judge concurring in part, dissenting in part.

I concur with the majority's opinion to reach the merits of respondent's appeal. Respondent's right of appeal was lost through late delivery of the order appealed from to his counsel and through no fault of his own.

The majority's opinion affirms the trial court's adjudication that A.E. and J.E. are neglected. No clear, cogent, and convincing evidence in the record supports the trial court's findings of fact, leaving its conclusions of law unsupported. I respectfully dissent.

I. Timeliness of Appeal

I concur with the majority's decision to reach the merits of this appeal.

The trial court's adjudication judgment and dispositional order was entered on 5 December 2003, but not delivered to respondent's counsel until 16 December 2003. E.E. filed his notice of appeal on 18 December 2003. The guardian *ad litem's* motion to dismiss respondent's appeal as untimely asserts the notice of appeal was filed more than ten days after entry of the order. However, E.E.'s counsel did not receive the order until after the time for filing a notice of appeal had passed. Upon receiving the order on 16 December 2003, an acceptance of service was signed by counsel for both parties. E.E. promptly filed his notice of appeal two days later on 18 December 2003. Petitioner had the responsibility to file and timely serve the order on respondent. Petitioner's failure to serve an order on respondent until after time for filing a notice of appeal had elapsed cannot be a basis to grant a motion to dismiss respondent's appeal. E.E. should not lose his right to appeal based on petitioner's failure to timely serve the order.

II. Adjudication of Neglect

Respondent assigns as error the trial court's finding that A.E. and J.E. are neglected children by clear, cogent, and convincing evidence. He cites to the trial court's findings of fact on page forty-five and forty-six, and the conclusions of law and decretal on page forty-eight of the record. He argues his conviction of indecent liberties with an unrelated third party minor and subsequent probation violation of that offense are insufficient to adjudicate his minor children neglected.

Evidence in the record shows E.E. is a single father who has cared for and supported his children for the past seven years. E.E. has a stable job and a stable home. DSS stated in their dispositional report to the court that E.E. "seems to love his children and takes very good care of them." E.E. has provided DSS access to his children and to his home. A.E. and J.E. do not show any signs of neglect.

For a determination of neglect, a court must apply principles pursuant to N.C. Gen. Stat. § 7B-101(15). According to the statute, a neglected juvenile is defined in part as:

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

N.C. Gen. Stat. § 7B-101(15) (2003).

While the determination of neglect is a fact specific inquiry, "not every act of negligence" or commission of a crime by a parent constitutes "neglect" under the law and results in a "neglected juvenile." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (an anonymous call reporting an unsupervised, naked, two-year-old in her driveway, standing alone, does not constitute neglect). A parent's conduct must be viewed on a case-by-case basis on the totality of the evidence. *Speagle v. Seitz*, 354 N.C. 525, 531, 557 S.E.2d 83, 86 (2001), *cert. denied*, 536 U.S. 923, 153 L. Ed. 2d 778 (2002).

In determining whether neglect has occurred, "the trial judge may consider a parent's complete failure to provide the personal contact, love, and affection that [exists] in the parental relationship." *In re Yocum*, 158 N.C. App. 198, 204, 580 S.E.2d 399, 403 (quoting *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982)), *aff'd*, 357 N.C. 568, 597 S.E.2d 674 (2003). In addition, this Court requires "there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline" in order to adjudicate a juvenile neglected. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (internal quotations and citations omitted).

Our Supreme Court's review of the numerous cases where a finding of "neglect" or a "neglected juvenile" was substantiated shows that the alleged neglect constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potential injury to the juvenile. *In re Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258.

In *Powers v. Powers*, the evidence showed the mother had a severe alcohol problem. 130 N.C. App. 37, 43, 502 S.E.2d 398, 402, *disc. rev. denied*, 349 N.C. 530, 526 S.E.2d 180 (1998). She drove an

automobile in which her minor children were passengers while impaired due to alcohol. *Id.* She became intoxicated at home to the point of literally falling down and becoming unable to care for her younger children. *Id.* Her drinking also contributed to emotional problems by her older children. *Id.*

A conviction based on acts committed in the home can be sufficient to support a finding of neglect. *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001). In *In re Blackburn*, the evidence showed: (1) domestic violence between the respondent and her live-in boyfriend; (2) the respondent inappropriately leaving the child in the care of others; (3) the respondent's illegal drug use and distribution of drugs in the presence of the child; (4) an overall history of lawlessness; and (5) the respondent's repeated incarcerations were considered sufficient evidence of neglect. 142 N.C. App. at 610, 543 S.E.2d at 909. None of these factors are shown here.

When confronting the situation where a respondent has been convicted of a crime and continues to be incarcerated, our courts have prohibited termination of parental rights solely on those factors. *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (The fact that a parent commits a crime which might result in incarceration is insufficient, standing alone, to show a "settled purpose to forego all parental duties."); *In re Yocum*, 158 N.C. App. at 204, 580 S.E.2d at 403 (the respondent was incarcerated but also did nothing to emotionally or financially support and benefit his children); *In re Shermer*, 156 N.C. App. 281, 290-91, 576 S.E.2d 403, 409 (2003) (willfulness not shown under N.C. Gen. Stat. § 7B-1111(7) where the respondent was incarcerated but wrote letters and informed DSS that he did not want his parental rights terminated); *In re Clark*, 151 N.C. App. 286, 565 S.E.2d 245 (2002) (termination of parental rights reversed where the father was incarcerated and evidence was insufficient to find that he was unable to care for his child), *disc. rev. denied*, 356 N.C. 302, 570 S.E.2d 501 (2002); *In re Bradshaw*, 160 N.C. App. 677, 682, 587 S.E.2d 83, 86 (2003) (it is beyond an imprisoned individual's control how many visitations with his child he is allowed); *In re Williams*, 149 N.C. App. 951, 563 S.E.2d 202 (2002) (the father's parental rights were terminated because he was incarcerated *and* he failed to show filial affection for his child).

A court cannot rely "solely" on the commission of a crime and subsequent incarceration in making its determination of neglect. *In re Williamson*, 91 N.C. App. 668, 678, 373 S.E.2d 317, 322 (1988). In *In re Williamson*, the father was convicted of and subsequently

incarcerated for the murder of his child's mother. *Id.* at 671, 373 S.E.2d at 318. Although this Court considered the father's murder conviction and subsequent incarceration, we also considered the father's "actions and circumstances since the murder in drawing the conclusion that respondent neglected and abandoned his child." *Id.* at 678, 373 S.E.2d at 322.

Here, E.E.'s conviction and probation violation does not rise to the level of harm to his children that was shown in the cases cited above. No evidence was presented that E.E. committed any criminal acts in the home or while his children were present. E.E.'s conviction did not result from any criminal or other inappropriate behavior against his own children. No evidence shows respondent ever abused or neglected his children. No evidence was presented that E.E.'s criminal behavior took place in the company of either A.E. or J.E. or that the children were placed in danger during the commission of his crime.

E.E.'s crime arose out of indecent liberties with a fifteen-year-old minor, who was not shown to be a blood or other type of relative. Although indecent liberties is a strict liability offense and respondent's criminal conduct cannot be condoned, none of respondent's actions involved his children. E.E.'s submission to and completion of the sexual offender evaluation satisfied the condition of his probation.

III. Dr. Robert D. McDonald, Ph.D.

E.E. underwent a thorough and comprehensive evaluation administered by a psychologist, Dr. Robert D. McDonald ("Dr. McDonald"), who was trained in sex offender treatment. After E.E.'s evaluation, Dr. McDonald stated in his report and assessment that the children were not in danger from E.E. Dr. McDonald opined, "there is not reason to conclude that he is at significant risk to sexually offend his children." Dr. McDonald testified that at age forty-seven, E.E. had reached an age where the chance of re-offending "ha[d] gone down."

A DSS social worker confirmed that DSS was "not able to take from Dr. McDonald's evaluation that A.E. and J.E. were in danger at this point." The children always appeared clean, well kept, healthy, and their hair was usually done very well when DSS visited the home. Multiple home visits by DSS never disclosed any neglect of the children. *See Troxel v. Granville*, 530 U.S. 57, 68-69, 147 L. Ed. 2d 49, 58 (2000) ("[S]o long as a parent adequately cares for his or her children

(i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

Prior cases show that convictions and incarceration of a parent for more serious crimes are not, standing alone, sufficient to support a finding and conclusion the child is abused or neglected. *In re Williamson*, 91 N.C. App. at 678, 373 S.E.2d at 322.

Without finding that a parent is "unfit" or has engaged in "conduct inconsistent" with the presumption that he will act in the best interest of the child his parental rights must be respected. *Adams v. Tessener*, 141 N.C. App. 64, 72, 539 S.E.2d 324, 330 (2000) (past misconduct which result in convictions and did not include threatened physical violence, illegal substances, or weapons did not overcome the constitutional presumption that the natural parent will act in the best interest of the child) *overruled on other grounds*, 354 N.C. 57, 550 S.E.2d 449 (2001); *see also In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005).

Although respondent failed to object to or assign error to Dr. McDonald's contradictory testimony, no evidence, findings, or conclusions support the conclusion that respondent has neglected his children. Clear, cogent, and convincing evidence shows otherwise. The sole basis to support the trial court's order is Dr. McDonald's revised opinion at the hearing, two weeks after he submitted his comprehensive written report, that respondent may pose a risk to his children in the future. Not only does his changed testimony directly contradict his earlier opinions and, despite the fact that respondent sought and completed assessments and treatment, Dr. McDonald suggests that the mere possibility or propensity by respondent of another incident in the future supports a past or present finding of neglect of respondent's own children. While the trial court is free to consider and weigh Dr. McDonald's revised *ad hoc* opinion, his contradictory statements about possible future conduct is not clear, cogent, and convincing evidence to support its conclusion of neglect.

IV. Conclusion

Review of respondent's appeal is properly before us. E.E.'s conviction did not stem from any activity within the minor children's home, while they were present, nor was taken against his children. Respondent did not place his children in any form of danger. A.E. and

J.E. do not show any signs of neglect or abuse. Respondent gave DSS access to his children and their home. He consented to the children being placed with relatives, and attended and completed Dr. McDonald's specific evaluation over a number of visits.

The trial court's findings of fact that E.E.'s prior conviction of taking indecent liberties and his subsequent failure to schedule sex offender specific evaluation is not clear, cogent, and convincing evidence to support a finding of fact or conclusion of law that his minor children, A.E. and J.E., are neglected. By the time of the hearing, E.E. had submitted to and completed the sex offender specific evaluation. Contradictory evidence of a mere possibility of future conduct from a changed opinion at hearing is insufficient to support a finding of neglect. I respectfully dissent from that portion of the majority's opinion to affirm the trial court's conclusions that respondent neglected A.E. and J.E.

STATE OF NORTH CAROLINA v. JOHNNY CLAY BREWER

No. COA04-1160

(Filed 19 July 2005)

1. Indecent Liberties; Sexual Offenses— first-degree sexual offense—right to a unanimous jury—allegations of greater number of separate criminal offenses than defendant was charged

The trial court did not err in a double first-degree sexual offense and triple taking indecent liberties with a child case by its instructions to the jury and did not violate defendant's right to a unanimous verdict under the North Carolina Constitution even though defendant contends that the instructions did not clearly specify the alleged offenses the jury was to consider and that evidence was presented of a greater number of separate criminal offenses than those for which defendant was charged, because: (1) in regard to the first-degree sexual offense charges, the evidence at trial gave rise to only two possible incidents of cunnilingus on 31 May 2002 and 8 June 2002 and the trial court's instructions limited the jury's consideration of the first-degree sexual offenses both to the approximate dates on which they

were alleged to have occurred and to the specific acts of cunnilingus; (2) there is no risk of a lack of unanimity where defendant was charged with and convicted of the same number of offenses, and the evidence supported that number of offenses; (3) in regard to the taking indecent liberties with a child charges, the charge, verdict sheets, and jury instructions limited the jury's consideration to "on or about" specific dates; (4) in regard to 02 CRS 55606 and 02 CRS 55580, using the same underlying act of cunnilingus to support convictions for both first-degree sexual offense and indecent liberties does not violate defendant's constitutional protection against double jeopardy and the jury was unanimous in its findings; (5) in regard to 02 CRS 55579, the jury was unanimous as to the "slick-legging" incident; and (6) the trial court carefully associated each charge and jury instruction with a specific case number, date, and verdict sheet.

2. Sentencing— clerical error—wrong statute cited

The judgments in two first-degree sexual offense cases are remanded for correction of a clerical error in incorrectly citing N.C.G.S. § 14-27.7A as the statute under which defendant was convicted, because the victim was under thirteen years of age and the judgment sheets should reflect N.C.G.S. § 14-27.4.

Appeal by defendant from judgment entered 7 November 2003 by Judge James C. Spencer, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 6 June 2005.

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

Staples Hughes, Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant.

MARTIN, Chief Judge.

Defendant was charged with three counts of first-degree sexual offense, three counts of taking indecent liberties with a child, and three counts of crimes against nature. Upon motion by defendant at the close of the State's evidence, the trial court dismissed the three counts of crimes against nature and one count of first-degree sexual offense alleged to have occurred on or about 14 June 2002. The jury found defendant guilty of the five remaining charges. The trial court imposed two consecutive sentences of 384 to 470 months imprisonment.

The State presented evidence at trial which tended to show the following: defendant lived with his girlfriend, S.E., in Alamance County near Burlington, North Carolina. M.E., S.E.'s eight-year-old daughter, lived with her father. After not seeing her mother for over six months, M.E. went to visit her at her home with defendant several times in the spring and early summer of 2002. The first few weekends that M.E. visited, she testified that no "bad touching" occurred. On the fourth weekend she visited, M.E. testified that she walked in on her mother and defendant having sex. Although they saw M.E. enter the room, they did not stop having intercourse or cover their bodies. When they stopped, S.E. asked M.E. if she wanted to do it too. M.E. said no, and then defendant performed oral sex on S.E. in front of M.E. They again asked if M.E. wanted to participate, and this time M.E. agreed. Defendant began to perform oral sex on M.E., but he stopped when M.E. said she did not like it. S.E.'s testimony corroborated M.E.'s description of these events. M.E. did not tell her father or anyone else about what happened that weekend.

Beginning May 31, the last day of school, M.E. went to stay with her mother and defendant for two weeks. At trial, M.E. and S.E. testified to numerous sexual acts that occurred between defendant and M.E. during this two-week visit. M.E. testified that approximately the day after she arrived, defendant put some "slick stuff" on his penis, and while she lay on her stomach, he put his penis between her legs above her knees. He moved his body up and down for about five minutes. He did not put his penis in her vagina. M.E. testified that this happened two or three times during her two-week visit. M.E. also testified that later the same night, defendant licked her breasts.

S.E. testified that on the first or second day of the visit, she talked M.E. into letting defendant perform oral sex on her. At the time, S.E., M.E., defendant, and defendant's six-year-old son, J.D.B., were all in the bedroom naked. After defendant performed oral sex on M.E., he asked J.D.B. if he wanted to try it. According to S.E.'s testimony, J.D.B. put his mouth on M.E.'s vagina.

S.E. further testified that defendant's ten-year-old niece, J.B., came to visit during the middle weekend of M.E.'s two-week visit. That Saturday night, she and M.E. convinced J.B., who was hesitant to participate, to take her clothes off along with them. They went into the bedroom with defendant, and S.E., M.E., and J.B. lay down on the bed with S.E. in the middle. Defendant performed oral sex on all three of them. M.E.'s testimony corroborated this event, but she could not remember exactly when it took place.

S.E. described an act, which she called "slick-legging," that defendant had done to M.E. about three times during the two-week visit. This was the same act M.E. described where defendant, using a lubrication, put his penis between M.E.'s legs while she lay on her stomach. S.E. said one of the times defendant performed this act on M.E. was on the Friday of the last week of the two-week visit, which was 14 June 2002. M.E. went back to her father's house the next day.

S.E. testified as to other sexual acts which occurred during M.E.'s two-week visit, including: M.E. took a shower with defendant two or three times; defendant asked M.E. to put his penis in her mouth, and M.E. put her mouth on the side of his penis because she was afraid she would choke; they watched pornographic movies; and they all walked around the house naked.

The day after M.E. went home, she told her father what had happened. Her father called the sheriff, and the next morning, he took her to Dr. Louis Allen Dean, a family practitioner in Thomasville, North Carolina. Dr. Dean testified that M.E. told him she had slept with her mother and her mother's boyfriend naked on several occasions. At least once, her mother's boyfriend had licked her privates and coerced her into performing oral sex on him.

Defendant was originally arrested on an unrelated charge, and he and S.E. were both subsequently charged in this case. Defendant's parents posted S.E.'s $50,000 bond, mortgaging their property to do so. According to S.E., they told her to say she had made everything up and helped her come up with details of an alternate story. They threatened to go off her bond and let her return to jail if she did not comply. S.E. met with an attorney defendant's parents hired for her and told him she had made up the allegations to get custody of her baby with which she was six months pregnant and M.E. The attorney had her write and sign an affidavit to this effect, but S.E. testified that the affidavit was false and was a product of defendant's parents' coercion. S.E. ultimately entered into a plea agreement with the State in which she agreed to plead guilty to one count of indecent liberties with a child, register as a sexual offender for ten years, and testify against defendant.

At trial, S.E.'s son from a previous marriage, D.C., testified over defendant's objection that S.E. and defendant engaged in fellatio in front of him and defendant's nephew, T.B., once when the two boys were visiting defendant's home. According to D.C., defendant wore a

ring with metal studs around his penis. This conduct did not take place while M.E. was visiting but on a different occasion.

At the close of the State's evidence, defendant moved to dismiss all of the charges against him. The trial court allowed his motion with respect to the three counts of crimes against nature and the count of first-degree sexual offense occurring on or about 14 June 2002. Five charges remained after the motion was allowed, including three charges of indecent liberties occurring on or about 31 May, 8 June, and 14 June 2002, and two charges of first-degree sexual offense occurring on or about 31 May and 8 June 2002.

Defendant presented evidence which tended to show the following: defendant's nephew, T.B., testified that while he was visiting S.E. and defendant when D.C. was also visiting, he never saw defendant's penis, a ring with metal spikes, or any sexual activity. J.B. testified that no one had ever touched her private parts while she was visiting defendant, and that she had never seen anyone touch M.E.'s private parts. She also testified that M.E. told her that M.E., S.E., and the new baby were going to move into defendant's house because defendant was going to jail.

J.B.'s sister, N.B., testified that S.E. told her she had set defendant up in order to move into defendant's house with M.E. and the baby. She said S.E. told her she regretted making everything up, and several times N.B. heard S.E. on the phone with defendant saying she loved him, wanted to marry him, and would recant the allegations. N.B. also testified that J.B. told her nothing inappropriate had happened between her and defendant. J.B.'s mother testified that J.B., upon numerous inquiries, maintained that nothing inappropriate had ever happened to her while visiting defendant.

Octavis White, the attorney hired by defendant's parents to represent S.E., and his law partner, George Hunt, testified that S.E. told them she made up false allegations against defendant to get custody of M.E. and her unborn child. David Harris, another attorney, also testified S.E. told him she made up the allegations. Mr. Harris said S.E. told him she showed pornographic movies and discussed sexual acts with M.E. so that M.E. could describe them to investigators.

Defendant's neighbor, Jean Wakefield, testified that S.E. also told her she had M.E. watch pornographic movies in order to accuse defendant of sexual abuse. Mrs. Wakefield said that when she would stop by defendant's home unannounced, everyone there was dressed

normally. Defendant's mother also testified that S.E. told her the allegations were false. She denied conditioning S.E.'s bond on S.E. recanting the allegations.

The jury found defendant guilty of three counts of taking indecent liberties with a child occurring on or about 31 May, 8 June, and 14 June 2002, and two counts of first-degree sexual offense occurring on or about 31 May and 8 June 2002. The trial court consolidated the five convictions into two judgments, found that defendant had a prior felony conviction record of VI, and imposed two consecutive sentences of 384 to 470 months imprisonment. Defendant appeals.

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[1] Defendant's sole argument on appeal is that the trial court's instructions to the jury were fatally ambiguous and thereby violated defendant's right to a unanimous jury under the North Carolina Constitution. Under the North Carolina Constitution, "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. 1, § 24; N.C. Gen. Stat. § 15A-1237(b) (2003). Although defendant did not object to the jury instructions on the grounds of unanimity at trial, "[v]iolations of constitutional rights, such as the right to a unanimous verdict . . . are not waived by the failure to object at trial and may be raised for the first time on appeal." *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003).

Defendant argues that although the jury only considered five charges of sexual abuse, the evidence presented showed many more incidents of abuse during M.E.'s two-week visit at defendant's home. The jury, defendant contends, could have considered any number of these additional incidents in reaching its verdict. Specifically, the bills of information by which defendant was charged alleged that one count of indecent liberties and one count of first-degree sexual offense occurred on or about 31 May 2002, one count of indecent liberties and one count of first-degree sexual offense occurred on or about 8 June 2002, and one count of indecent liberties occurred on or about 14 June 2002.

We begin by addressing the charges of first-degree sexual offense. First-degree sexual offense is defined as "a sexual act: (1) [w]ith 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." N.C. Gen. Stat. § 14-27.4(a)(1) (2003). A "sexual act" includes "cunnilingus . . . [and] 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).

Because there is no evidence of any act of vaginal penetration of M.E., the two charges of first-degree sexual offense are based on the incidents in which defendant allegedly performed cunnilingus on M.E. The evidence at trial gave rise to only two possible incidents of cunnilingus. Statements made by S.E. and M.E. which may have described additional incidents of cunnilingus were admitted only for corroborative, rather than substantive, purposes.

The first incident described at trial occurred the first or second day of M.E.'s two-week visit. The evidence indicated that M.E. arrived for her two-week visit sometime between 30 May and 1 June 2002. S.E. testified that she convinced M.E. to let defendant perform oral sex on her. At the time, S.E., M.E., defendant, and defendant's son J.D.B. were all in the bed together naked. This testimony corresponds with the bill of information and the verdict sheet submitted to the jury, which each fix the date of the offense as "on or about" 31 May 2002.

The second incident of cunnilingus described at trial took place during the middle weekend of M.E.'s visit when defendant's niece J.B. was also visiting. S.E. testified that Saturday night, she, M.E., and J.B. took off their clothes and lay down on the bed while defendant performed oral sex on all of them. M.E. also described this event, although she could not say when it occurred. The date of the middle Saturday of M.E.'s visit was 8 June 2002. The bill of information alleges that this offense took place "on or about" 8 June 2002, and the verdict sheet clearly directs the jury to consider defendant's guilt or innocence of an offense occurring on that date.

We have previously held that when a question of jury unanimity is raised, "we must examine the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed." *State v. Petty*, 132 N.C. App. 453, 461-62, 512 S.E.2d 428, 434, *disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999). Having examined the verdict, the charge, and the evidence, we now turn to the trial court's jury instructions on first-degree sexual offense, to which defendant assigns error. The trial court instructed the jury twice on the crime of first-degree sexual offense, once for Case No. 02 CRS 55606, in which the offenses were alleged to have occurred on or about 31 May 2002, and once for Case No. 02 CRS 55580, in which the offenses were alleged to have oc-

curred on or about 8 June 2002. In both instructions, the trial court limited the jury's consideration of first-degree sexual offense to the act of cunnilingus, stating that "a sexual act here means cunnilingus, which is any touching, however slight, by the lips or the tongue of one person to any part of the female sex organ of another."

This Court has held that "the trial court may protect the defendant's right to a unanimous verdict by instructing the jury that they must be unanimous as to the particular criminal offense that the defendant committed." *State v. Lawrence*, 165 N.C. App. 548, 559, 599 S.E.2d 87, 95, *temp. stay allowed*, 359 N.C. 73, 603 S.E.2d 885 (2004), *disc. review allowed*, 359 N.C. 413, 612 S.E.2d 634 (2005) (*Lawrence I*). Here, the trial court instructed the jury that it must "agree unanimously" on the particular offense of cunnilingus. The trial court's instructions limited the jury's consideration of the first-degree sexual offenses both to the approximate dates on which they were alleged to have occurred and to the specific act of cunnilingus. These dates and acts correspond with the evidence presented at trial. Defendant's contention that "the trial court's jury instructions did not clearly specify the alleged offenses the jury was to consider" is not supported by the record.

We also reject defendant's contention that there was evidence presented "of a greater number of separate criminal offenses than the defendant is charged with." *See Lawrence I*, 165 N.C. App. at 558, 599 S.E.2d at 95. There is no risk of a lack of unanimity where the defendant was charged with and convicted of the same number of offenses, and the evidence supported that number of offenses. *State v. Wiggins*, 161 N.C. App. 583, 593, 589 S.E.2d 402, 409 (2003). In the present case, defendant was charged with two discrete first-degree sexual offenses, there was evidence of each offense, and defendant was convicted of each. Therefore, defendant's argument that he was denied the right to unanimous verdicts with respect to the charges of first-degree sexual offense is overruled.

We now turn to the charges of indecent liberties. N.C. Gen. Stat. § 14-202.1 states:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under

> the age of 16 years 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 of either sex under the age of 16 years.
>
> (b) Taking indecent liberties with children is punishable as a Class F felony.

N.C. Gen. Stat. § 14-202.1 (2003). We will again examine "the verdict, the charge, the jury instructions, and the evidence" to determine whether, on the charges of indecent liberties, "any ambiguity as to unanimity has been removed." *Petty*, 132 N.C. App. at 461-62, 512 S.E.2d at 434.

Defendant was charged with three counts of indecent liberties. The charge, verdict sheets, and jury instructions limited the jury's consideration of indecent liberties to "on or about" specific dates. Case No. 02 CRS 55606 is limited to "on or about" 31 May 2002; Case No. 02 CRS 55580 is limited to "on or about" 8 June 2002; and Case No. 02 CRS 55579 is limited to "on or about" 14 June 2002.

First we address Case No. 02 CRS 55606, which alleges first-degree sexual offense and indecent liberties took place "on or about" 31 May 2002. M.E. testified at trial that about the second day of her visit, defendant engaged in an act of "slick-legging" with her, and later that same night licked her breasts. S.E. testified that the first or second day of M.E.'s visit, defendant performed cunnilingus on M.E. Because indecent liberties does not merge with and is not a lesser included offense of first-degree sexual offense, the evidence presented in this case on cunnilingus may also support a conviction for indecent liberties. *State v. Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678, *temp. stay allowed*, 359 N.C. 640, —— S.E.2d ——, (June 2, 2005) (No. 293A05) (*Lawrence II*, a case unrelated to *Lawrence I*). Therefore, any of these three acts could support a conviction of indecent liberties under N.C. Gen. Stat. § 14-202.1, and defendant correctly alleges that there was evidence presented "of a greater number of separate criminal offenses than the defendant is charged with." *Lawrence I*, 165 N.C. App. at 558, 599 S.E.2d at 95.

However, we have already determined that the jury unanimously found defendant committed the act of cunnilingus on or near 31 May 2002. This unanimous finding is also sufficient to support the conviction of indecent liberties under Case No. 02 CRS 55606. Using the

same underlying act to support convictions for both first-degree sexual offense and indecent liberties does not violate defendant's constitutional protection against double jeopardy. *State v. Manley*, 95 N.C. App. 213, 217, 381 S.E.2d 900, 902, *disc. review denied*, 325 N.C. 712, 388 S.E.2d 467 (1989). Defendant's argument with respect to Case No. 02 CRS 55606 is overruled.

Case No. 02 CRS 55580 alleges a first-degree sexual offense and a charge of indecent liberties "on or about" 8 June 2002, the middle Saturday of M.E.'s visit. The only sexual incident associated with that particular date was when defendant performed cunnilingus on M.E., J.B., and S.E. on the bed. Again, the conviction in this case on first-degree sexual offense by cunnilingus indicates the jury unanimously found this incident occurred. Because the same act of cunnilingus is sufficient to support a conviction of indecent liberties in addition to first-degree sexual offense, *Manley*, 95 N.C. App. at 217, 381 S.E.2d at 902, and because no other evidence specifically relates to 8 June 2002, we believe the jury was unanimous in its finding of indecent liberties in Case No. 02 CRS 55580.

Finally, in Case No. 02 CRS 55579, the sole count for the jury to consider was indecent liberties alleged to have occurred on or about 14 June 2002, the last Friday of M.E.'s visit. The only evidence at trial specifically relating to that date was S.E.'s description of a "slick-legging" incident. Because the trial court, through the verdict sheets and its instruction, specifically limited the jury's consideration of this charge to on or near 14 June 2002, the end of M.E.'s stay, we conclude the jury was also unanimous as to the "slick-legging" incident that occurred on or about the last Friday of M.E's visit.

The present case is distinguishable from other cases in which error has been found. In *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), defendant was charged with ten counts of statutory rape. The evidence supported five incidents of rape, and the jury convicted defendant of two counts. The trial court "made no attempt to distinguish among the ten different counts submitted to the jury." The indictments were "simply short form indictments . . . alleg[ing] defendant committed first degree statutory rape occurring within a time period between 1 November 1999 and 12 May 2000, without specifying any specific date for any offense." *Id.* at 507, 586 S.E.2d at 516. It was impossible to determine which two incidents of rape the jury actually agreed took place. Similarly, in *Lawrence I* and *Lawrence II*, the trial court made no attempt "to separate the indi-

vidual criminal offenses, or guide the jury to identify a given verdict sheet with a corresponding instance of alleged sexual abuse." *Lawrence I* at 563, 599 S.E.2d at 98; *see also Lawrence II*, *supra* (stating that unanimity is jeopardized if "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").

In the present case, there were numerous acts by defendant in addition to cunnilingus and "slick-legging" which could have supported a conviction on indecent liberties, including licking M.E.'s breasts, showering with M.E., and having M.E. touch his penis with her mouth. Had the trial court submitted this case to the jury for consideration without narrowing the time frame any further than the two-week visit, we would agree that it would be impossible to determine which sexual incidents supported the jury's finding on any given charge of indecent liberties. However, the trial court carefully associated each charge and jury instruction with a specific case number, date, and verdict sheet. The trial court gave three separate instructions on indecent liberties, distinguishing them by date and case number. Here, as in *State v. Wiggins*, 161 N.C. App. 583, 593, 589 S.E.2d 402, 409 (2003), defendant was charged with and convicted of the same number of offenses, and this Court found no lack of jury unanimity in that case.

[2] With respect to the trial court's instructions to the jury and the question of jury unanimity, we find no error. However, we remand for correction of a clerical error in the judgments, which incorrectly cite N.C. Gen. Stat. § 14-27.7A as the statute under which defendant was convicted of first-degree sexual offense. Because M.E. was under 13 years of age, the judgment sheets should reflect N.C. Gen. Stat. § 14-27.4 as the statute violated by defendant. N.C. Gen. Stat. § 14-27.4(a)(1) (2003).

No Error in the trial.

02 CRS 55580 Remanded for correction of clerical error.

02 CRS 55606 Remanded for correction of clerical error.

Judges WYNN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. KEITHEN ALEXANDER CURMON

No. COA04-1480

(Filed 19 July 2005)

1. Arson— first-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree arson even though defendant contends there was insufficient evidence to show that he was the perpetrator of the arson, because the evidence taken in the light most favorable to the State showed: (1) defendant was jealous of his ex-girlfriend's relationship with her new boyfriend and constantly harassed the couple in an attempt to break them up and scare the girl into reconciling with defendant, thus demonstrating defendant's motive to set the fire; (2) defendant left a message a few months before the fire threatening to burn the couple if they did not return his call; (3) on the night of the fire defendant left another threatening message on his ex-girlfriend's cell phone stating they had one more conversation to have and that was going to be it; (4) defendant was in the vicinity of the new boyfriend's apartment at the time the fire occurred, as demonstrated by his cell phone records, thereby establishing he had the opportunity to set the fire; (5) defendant had previously entered his ex-girlfriend's home and threatened to kill her; and (6) the gasoline on the mat indicated the fire was deliberately set.

2. Sentencing— restitution—vacated

The trial court's restitution recommendation included in the judgment in a first-degree arson case that ordered defendant to pay $100 to his ex-girlfriend's new boyfriend for damages sustained as a result of the fire must be vacated because it was not supported by the evidence.

3. Sentencing— no contact recommendation—reasonableness

The trial court's recommendation in a first-degree arson case that defendant have no contact with his ex-girlfriend, her new boyfriend, and her family for the duration of defendant's incarceration was not an unconstitutional form of punishment, because: (1) the "no contact" recommendation was not a mandatory and binding part of the judgment and as such does not violate N.C. Const. art. XI, § 1; (2) considering the nature and extent

of defendant's harassment of the couple, the trial court's recommendation that defendant have no contact with either of them or the ex-girlfriend's family was reasonable; and (3) the recommendation is also reasonable since it is limited to a specific and well-defined group and is limited in duration to defendant's incarceration.

4. Evidence— prior crimes or bad acts—motive—intent—plan—common scheme—identity

The trial court did not abuse its discretion in a first-degree arson case by admitting evidence of defendant's other crimes under N.C.G.S. § 8C-1, Rule 404(b) including the 18 January 2003 incident when he left a voice message threatening to "burn you all up" if his ex-girlfriend did not return his call and the 9 March 2003 incident when the ex-girlfriend and her new boyfriend sought police assistance since defendant was following them and thereafter left a threatening message telling the new boyfriend "you better not come home," because: (1) the first statement was admissible to prove defendant's motive, intent, plan, common scheme, and defendant's identity as the arsonist; (2) the second incident was admissible for the same enumerated purposes when defendant continually harassed the couple by making numerous phone calls, leaving threatening messages, following the couple around, and even hiding in the ex-girlfriend's home and threatening to kill her with a knife; (3) even though the incidents were not the precise type of crimes for which defendant was charged, it shows an alarming trend of defendant's escalating acts of violence toward the couple due to his jealousy over their relationship; (4) although the threatening messages were left within a matter of months prior to the fire, remoteness in time is less significant when the prior conduct is used to show intent, identity, motive, common plan or scheme, or absence of mistake; and (5) the trial court guarded against the possibility of prejudice by instructing the jury to consider the evidence only for the limited purposes of establishing identity, intent, motive, absence of mistake, and common plan.

5. Evidence— prior crimes or bad acts—identity

The trial court did not err in a first-degree arson case by instructing the jury that it could consider the 18 January and 9 March 2003 "other crimes" evidence to prove identity, because: (1) the evidence of these other crimes or wrongs was admissible for the limited purposes enumerated in N.C.G.S.

§ 8C-1, Rule 404(b) and it was proper for the judge to give a limiting instruction concerning what purpose the jury could use the evidence; and (2) the judge's instruction was a correct statement of the law.

Appeal by defendant from judgment entered 8 January 2004 by Judge James C. Spencer in Wake County Superior Court. Heard in the Court of Appeals 9 June 2005.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

STEELMAN, Judge.

Defendant, Keithen Alexander Curmon, appeals his conviction for first-degree arson. For the reasons discussed herein, we find no error.

The evidence presented at trial tended to show that Sharon Bethea and defendant had a romantic relationship, which ended in the fall of 2002. Following their breakup, the two remained on relatively friendly terms. However, when Ms. Bethea began dating David Rochelle, defendant began harassing both of them with unwanted phone calls. Ms. Bethea told defendant not to contact her any further. Defendant continued to call her house attempting to effect a reconciliation and came to her home in December 2002. Ms. Bethea contacted the police who arrived and instructed defendant to leave her alone.

Approximately a week later, Ms. Bethea came home and found defendant under her daughter's bed. When she told him to leave he went to the kitchen, grabbed a knife, and threatened to kill her. Ms. Bethea managed to knock the knife out of defendant's hand and ran to her car. Defendant laid down behind her car, preventing her from leaving. When defendant finally got up, Ms. Bethea drove to a nearby grocery store and called the police. Ms. Bethea waited at the grocery store for the police, who accompanied her back to her home. When they arrived they found defendant in her bed. The following day Ms. Bethea obtained a temporary restraining order against defendant. Following a hearing on 31 December 2002, the trial court entered a domestic violence protective order pursuant to N.C. Gen.

Stat. § 50B-3, which prohibited defendant from contacting Ms. Bethea. Despite the court order, defendant continued to harass her by telephoning her numerous times a day, coming by her home, leaving notes in her mailbox, following her and Mr. Rochelle, and calling Mr. Rochelle's apartment.

On 18 January 2003, defendant phoned Ms. Bethea approximately eighty-six times while she was at Mr. Rochelle's apartment. Mr. Rochelle was able to determine that defendant was the caller by the appearance of his name on Caller ID. Defendant only left one message in which he said, "If you don't call me back in seven minutes, I am going to burn you all up, I'm serious, seven minutes." Ms. Bethea called the police who came to the apartment and transcribed the message. Defendant called six more times that night while the police were there, even though they told him to stop. As a result of the threatening message, Corporal B.D. Allen of the Raleigh Police Department charged defendant on 19 January 2003 for communicating a threat.

In another incident on 9 March 2003, defendant began following Ms. Bethea and Mr. Rochelle when they left her residence to go to Mr. Rochelle's apartment. While following the couple, defendant called Ms. Bethea's cell phone. When Mr. Rochelle answered the phone, defendant repeatedly told him "you better not come home." Upon seeing two police officers at a restaurant the couple stopped and reported the incident, and as a result the officers escorted the couple back to Ms. Bethea's home.

On the evening of 6 April 2003, Ms. Bethea arrived at Mr. Rochelle's apartment around 10:30 or 11:00 p.m. The couple went to bed at around midnight. A few minutes later, defendant called Mr. Rochelle's phone, but he did not answer. Approximately five minutes after the call the smoke alarm inside the apartment went off. The living room and kitchen were filled with smoke. The smoke and fire were coming through the side of the front door of Mr. Rochelle's apartment, and the bottom of his front door was on fire. The door mat had also been burned and pushed under the door. Ms. Bethea called 911 and the police and firefighters arrived shortly thereafter. Following the arrival of the police, Ms. Bethea discovered she had three messages on her cell phone from defendant. Officer D.A. Karlinski of the Raleigh Police Department responded to the 911 call and transcribed one of defendant's messages in which he said, "Give me a call when you get this message. We have got about one

more conversation to have, and that's going to be it. Be a Mom, Sharon. Be a Mom."

The police sent the remains of the doormat to the SBI laboratory for forensic evaluation. The tests revealed that gasoline had been poured on the mat, thus confirming that the fire was intentionally set.

There were no eye witnesses to the crime or fingerprints found. Because of defendant's past threats to Ms. Bethea and Mr. Rochelle, the police questioned him. Defendant denied any involvement and told the police that on the night of the fire he left his mother's home in Raleigh around 10:00 p.m. and that at the time of the fire he was somewhere on Highway 70 going towards New Bern. Defendant said his car broke down on the way so he turned around and drove back to Raleigh.

Police obtained defendant's cell phone records from Sprint, which included phone numbers called, date, time, duration and a list of the cell towers that relayed those calls. Ms. Marilyn Cowlter, an employee of Sprint, testified the range of a cell tower was one to three miles. Defendant's cell phone records showed that at 11:06 p.m. on 6 April 2003 he called Ms. Bethea's cell phone. The call was relayed by the cell tower located at or near 4812 Six Forks Road, which is in northern Raleigh. Defendant placed additional calls from his cell phone at 11:13 p.m. on 6 April 2003 and at 12:38 a.m., 12:40 a.m., 12:45 a.m., 12:55 a.m., 12:59 a.m., and 1:16 a.m. on 7 April 2003. The fire occurred at approximately 12:00 a.m. on 7 April 2003. The calls defendant made that night were relayed by the cell phone towers located at or near Harps Mill Road, Creedmoor Road, and Leesville Road, all located in north Raleigh and in the vicinity of Mr. Rochelle's apartment.

Police arrested defendant and charged him with three counts of first-degree arson, one count of second degree arson, and one count of violating the domestic violence protective order. The cases were joined for trial without objection and were tried at the 5 January 2004 session of superior court. At the close of all the evidence, the trial court dismissed the charge of second degree arson. The jury found defendant guilty of three counts of first-degree arson, as well as violating the domestic violence protective order. The trial court continued prayer for judgment on two of the first-degree arson convictions pertaining to the burning of the residences that adjoined Mr. Rochelle's. The trial court then sentenced defendant to an active sen-

tence of 77 to 102 months imprisonment for first-degree arson of Mr. Rochelle's dwelling and 150 days imprisonment for violation of the domestic violence protective order. Defendant appeals only his conviction for first-degree arson.

[1] In defendant's first argument he contends the trial court erred in denying his motion to dismiss because there was insufficient evidence that he was the perpetrator of the arson. We disagree.

In order to survive a motion to dismiss based on the insufficiency of the evidence, the State must present substantial evidence of (1) each essential element of the charged offense and (2) that the defendant was the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). Substantial evidence refers to such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Lucas*, 353 N.C. 568, 580-81, 548 S.E.2d 712, 721 (2001). When considering such a motion, the court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455. It does not matter whether the State's evidence is direct, circumstantial, or both; the test for resolving a challenge to the sufficiency of the evidence is the same. *Lucas*, 353 N.C. at 581, 548 S.E.2d at 721. "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation and internal quotation marks omitted). If the State's evidence is circumstantial, the court must consider whether the defendant's guilt may reasonably be inferred from those circumstances. *Id.* In addition, the trial judge "may resort to circumstantial evidence of motive, opportunity and capability to identify the accused as the perpetrator of the crime." *State v. Taylor*, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994). Once the trial judge decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, it then becomes a matter for the jury to decide whether the evidence presented satisfies the jury beyond a reasonable doubt that the defendant is guilty. *Id.*

The evidence, taken in the light most favorable to the State, tends to show: (1) defendant was jealous of Ms. Bethea's relationship with Mr. Rochelle and constantly harassed the couple in an attempt to break them up and scare Ms. Bethea into reconciling with him, demonstrating defendant's motive to set the fire; (2) defendant left a message a few months before the fire threatening to burn the couple up if they did not return his call; (3) on the night of the fire

defendant left another threatening message on Ms. Bethea's cell phone stating: "We got about one more conversation to have and that's going to be it[;]" (4) defendant was in the vicinity of Mr. Rochelle's apartment at the time the fire occurred, as demonstrated by his cell phone records, thereby establishing he had the opportunity to set the fire; (5) defendant had previously entered Ms. Bethea's home and threatened to kill her; and (6) the gasoline on the mat indicated the fire was deliberately set.

We hold that this evidence was sufficient to submit the charge of first-degree arson to the jury. " 'In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury . . . .' " *State v. Jenkins*, 167 N.C. App. 696, 701, 606 S.E.2d 430, 433, *aff'd*, 359 N.C. 423, 611 S.E.2d —— (2005) (citations omitted). Therefore, the trial court did not err in denying defendant's motion to dismiss and submitting the matter to the jury for its determination. This argument is without merit.

[2] In defendant's second argument he contends the trial court's restitution recommendation included in the judgment, ordering defendant to pay $100.00 to David Rochelle for damages sustained as a result of the fire, must be vacated because it was not supported by the evidence.

If the trial judge recommends payment of restitution as a condition to defendant's parole or work release, the amount of restitution recommended must be supported by evidence received at trial or sentencing. *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995). The State concedes the trial court's order was not supported by the evidence and must be vacated.

[3] In defendant's third argument he contends the trial court's recommendation that he have no contact with Mr. Rochelle, Ms. Bethea, or her family for the duration of his incarceration is an unconstitutional form of punishment. We disagree.

The State contends defendant is prohibited from raising this issue on appeal because he did not object to the recommendation at sentencing as required by Rule 10(b)(1) of the Rules of Appellate Procedure. An error at sentencing is not considered an error at trial for the purpose of Rule 10(b)(1) because this rule is "directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal." *State v. Hargett*, 157 N.C. App. 90, 93, 577 S.E.2d 703, 705 (2003) (cit-

ing *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991)). Accordingly, defendant was not required to object at sentencing to preserve this issue for appellate review.

In the judgment sentencing defendant on the first-degree arson charge the trial court recommended defendant have "no contact with David Rochelle, Sharon Bethea or family during incarceration." Defendant contends this recommendation violates N.C. Const. art. XI, § 1. which provides:

> The following punishments only shall be known to the laws of this State: death, imprisonment, fines, suspension of jail or prison term with or without conditions, restitution, community service, restraints on liberty, work programs, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.

The trial court's "no contact" recommendation was not a mandatory and binding part of the judgment. Rather, much like an order of restitution, it "constitutes a *recommendation* to the Secretary of the Department of Correction and the Parole Commission, not an order binding defendant . . . upon entry of the judgment in this action," as "neither the Parole Commission nor the Department of Correction is bound by the judge's recommendation . . . ." *Wilson*, 340 N.C. at 725-26, 459 S.E.2d at 195. Since this recommendation is not a binding judgment, it does not run afoul of our state's constitution.

However, since the "no contact" recommendation is analogous to the trial court's authority to recommend a defendant pay restitution, it must be reasonable in light of the evidence adduced at trial or sentencing. *See id.* at 726, 459 S.E.2d at 196 (requiring such support despite the fact the recommendations are not binding because there is " 'no reason to interpret the statutes of this State to allow judges to make specific recommendations that cannot be supported by the evidence before them' ") (citations omitted).

Considering the nature and extent of defendant's harassment of the couple, the trial court's recommendation that defendant have no contact with either of them or Ms. Bethea's family was reasonable. In addition, the recommendation is also reasonable because it is limited to a specific and well-defined group and is limited in duration to defendant's incarceration. This argument is without merit.

[4] In defendant's fourth argument he contends the trial court committed reversible error in admitting the State's evidence of defend-

ant's "other crimes," as it was irrelevant and inadmissible under Rule 404(b) and Rule 403 of the Rules of Evidence. We disagree.

Specifically, defendant objects to the admission of evidence related to the 18 January 2003 incident when he left a voice message threatening to "burn you all up" if Ms. Bethea did not return his call. Defendant also cites the admission of evidence regarding the incident on 9 March 2003 when the couple sought police assistance because defendant was following them and then left a threatening message telling Mr. Rochelle "you better not come home." Defendant objected and the trial court overruled the objection finding the evidence admissible under Rule 404(b) of the Rules of Evidence.

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2004). Rule 404(b) is a rule of inclusion not exclusion. *State v. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001). Accordingly, such evidence will be "admissible so long as it is relevant to any fact or issue other than the character of the accused[,]" and the other crimes or wrongs are connected by both temporal proximity and circumstance. *Id.* (citations and internal quotation marks omitted). "The determination of similarity and remoteness is made on a case-by-case basis, and the required degree of similarity is that which results in the jury's 'reasonable inference' that the defendant committed both the prior and present acts." *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005). "The similarities need not be 'unique and bizarre.' " *Id.* (citations omitted).

Here, defendant's statement that if someone did not call him back he was going to "burn you all up," was admissible to prove a number of the listed purposes, namely defendant's motive, intent, plan, common scheme, as well as defendant's identity as the arsonist. Further, the evidence concerning the incident on 9 March 2003 was also admissible for the same enumerated purposes. Defendant continually harassed the couple. He made numerous phone calls, left threatening messages, followed the couple around, and even hid in Ms. Bethea's home and threatened to kill her with a knife. All of this evidence was

admitted without objection by defendant. While these were not the precise type of crimes for which defendant was charged, it shows an alarming trend of defendant's escalating acts of violence towards the couple due to his jealousy over their relationship.

The threatening messages were left within a matter of months prior to the fire. Remoteness in time is less significant when the prior conduct is used to show intent, identity, motive, common plan or scheme, or absence of mistake, as is the case here. *Id.* at 801, 611 S.E.2d at 210 (noting "remoteness in time generally affects only the weight to be given such evidence, not its admissibility") (quoting *Lloyd*, 354 N.C. at 91, 552 S.E.2d at 610). Thus, the trial court did not err in determining the evidence was admissible under Rule 404(b).

Defendant also asserts that even if the evidence of his "other crimes" was admissible under Rule 404(b), the trial court should have excluded it under Rule 403 of the Rules of Evidence. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2004). "The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court[.]" *Stevenson*, 169 N.C. App. at 801-02, 611 S.E.2d at 210. Accordingly, we will not overturn the trial judge's decision absent a showing that the decision was " 'manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision.' " *Id.* (citations omitted).

In the instant case, the trial court did not abuse its discretion by admitting evidence of defendant's prior crimes or acts. The trial court guarded against the possibility of prejudice by instructing the jury to consider the evidence only for the limited purposes of establishing identity, intent, motive, absence of mistake, and common plan. *Accord id. See also* State *v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 75 (2002) (holding the admission of evidence regarding defendant's prior misconduct was not unduly prejudicial under Rule 403 where the trial court gave a limiting instruction regarding the permissible uses of 404(b) evidence). Thus, this argument is without merit.

[5] In defendant's fifth and final argument he contends the trial court erred in instructing the jury that it could consider the 18 January and 9 March 2003 "other crimes" evidence to prove identity. We disagree.

The trial court instructed the jury that the evidence concerning defendant's previous threats to Ms. Bethea with a knife, stating he

would "burn you all up," and telling the couple they better not go home, should only be considered for the limited purpose of showing the identity of the person who committed the crime, that defendant had a motive for the commission of the crime, that defendant had the intent, which is a necessary element of the crime charged, that there existed in defendant's mind a plan, scheme, system or design involving the crime charged in the case, and the absence of mistake or accident. As we stated above, the evidence of these other crimes or wrongs was admissible for the limited purposes enumerated in Rule 404(b). Therefore, it was proper for the judge to give a limiting instruction concerning what purpose the jury could use the evidence. In addition, the judge's instruction was a correct statement of the law. *See* N.C.P.I.—Crim. 104.15. This argument is without merit.

For the reasons discussed herein, we find defendant received a fair trial, free from error. We remand the case for modification of the portion of the trial court's judgment recommending defendant pay restitution in the amount of $100.00.

NO ERROR AS TO TRIAL; REMANDED FOR STRIKING OF RESTITUTION PROVISION IN THE JUDGMENT.

Judges HUDSON and JACKSON concur.

KELLY GOODWIN CLARK, EXECUTRIX OF THE ESTATE OF JAMES LESTER GOODWIN, PLAINTIFF v. WESLEY FOUST-GRAHAM, DEFENDANT

No. COA04-1266

(Filed 19 July 2005)

1. Annulment; Estates— annulment action—continuing after death—authority of executrix

A marriage annulment action did not abate upon the death of one of the parties (Goodwin) where the action was commenced prior to the Goodwin's passing and substantial property rights hinge on the validity of the marriage. Moreover, N.C.G.S. § 28A-18-1 permits the personal representative of a decedent to bring an action which survives his death and the plaintiff here was entitled to pursue the annulment in her capacity as executrix of the estate.

2. Annulment— grounds—undue influence

A marriage may be annulled on the ground of undue influence when warranted by the facts and circumstances. The trial court here did not err by submitting undue influence as a potential ground for annulment.

3. Annulment— undue influence—right to marry—state's right to regulate marriage

Permitting a marriage to be voided where the consent to marry was procured by undue influence neither significantly interferes with the right to marry nor unconstitutionally exceeds the state's prerogative to impose reasonable regulations upon the right to marry.

4. Annulment— jury findings—consent—undue influence—not inconsistent

Jury findings that the 80-year-old deceased had expressed a willingness to marry the 40-year-old defendant at the ceremony but that the consent was not freely given because of undue influence were not inconsistent.

5. Annulment— no birth of issue—not precluded by statute

A marriage annulment based on undue influence was not precluded by N.C.G.S. § 51-3 where the marriage was followed by cohabitation but not the birth of issue.

Appeal by defendant from judgment entered 5 April 2004 and order entered 11 May 2004 by Judge A. Robinson Hassell in Guilford County District Court. Heard in the Court of Appeals 24 March 2005.

Booth Harrington & Johns, L.L.P., by A. Frank Johns, for plaintiff appellee.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for defendant appellant.

McCULLOUGH, Judge.

Defendant Wesley Foust-Graham appeals from a district court order annulling her marriage to the late James Lester Goodwin. We affirm.

Facts

Wesley Foust-Graham and James Goodwin were married by a Guilford County magistrate on 12 April 2002. At the time of the mar-

riage, Foust-Graham was approximately forty years of age, and Goodwin was eighty. Goodwin died on 23 October 2003.

Prior to Goodwin's death, his daughter Kelly Clark, acting as his guardian *ad litem*, filed an action on his behalf to annul the marriage on the grounds of incompetency, lack of consent, undue influence, and impotence. After Goodwin's death, Clark filed a motion to substitute herself as plaintiff in her capacities as the executrix of Goodwin's estate and beneficiary entitled to take under his will. The trial court permitted Clark to continue the suit in her role as the executrix of Goodwin's estate, but denied her motion to be substituted as a beneficiary under his will.

The evidence at trial tended to show the following: Foust-Graham and Goodwin met in 2001. Goodwin owned a considerable amount of real estate, and Foust-Graham, a real estate broker, inquired as to his willingness to sell some of his property. A business relationship ensued pursuant to which Foust-Graham listed, and occasionally sold, property for Goodwin.

For reasons that Foust-Graham has characterized as "personal and professional," she and defendant began spending more time together during the early months of 2002. In March of 2002, the woman who lived with and cared for Goodwin, Sally Cross, decided that she needed to get away from Goodwin because he began verbally abusing her. Before leaving, Cross telephoned Foust-Graham and asked her to "see to [Goodwin's] needs." Thereafter, Foust-Graham began cooking for Goodwin, doing his grocery shopping, washing his laundry, and helped with the feeding of his animals. She also cleared a room in his house for use as an office. By April of 2002, Foust-Graham was spending as many as ten to twelve hours each day at Goodwin's home and also speaking with him on the telephone each day. According to Foust-Graham, she became so consumed by Goodwin that she had little time to do anything else.

On the day that Foust-Graham and Goodwin were married, Goodwin telephoned a business acquaintance, John Waldrop, and told him, "I need you to come to the magistrate's office immediately. They're locking me up . . . . I'm in trouble. They are locking me up. I need you to come down here and get me." During the same telephone call, Waldrop's girlfriend, Shirley Swaney, ended up speaking to Foust-Graham, who admitted that Goodwin was not in jail but told Swaney that she and Goodwin needed help. Waldrop and Swaney then drove to the magistrate's office; Goodwin and Foust-Graham

were not there to meet them. A few minutes later, Foust-Graham drove up in a black pick-up truck with Goodwin in the passenger's side. Foust-Graham then got out of the truck with "an armful of papers." Once they had all entered the magistrate's office, Foust-Graham asked Waldrop and Swaney to be witnesses for the marriage.

Waldrop and Swaney were concerned because Foust-Graham was African-American, and Goodwin had previously told them that he did not like black people, and he had commonly used derogatory racial epithets in their presence. Prior to the ceremony, Swaney said to Goodwin, "I thought you told me you didn't like n------s," to which Goodwin replied, "I don't." Goodwin later stated, "She's not black." Waldrop and Swaney did not believe that Goodwin was taking the ceremony seriously because, among other things, he danced "a little jig" after the magistrate pronounced Goodwin and Foust-Graham husband and wife. Following the ceremony, Foust-Graham told Waldrop and Swaney not to contact Goodwin's family because they "wouldn't understand."

Plaintiff's witness, Dr. Michelle Haber opined that, by late 2001, Goodwin was exhibiting signs of Stage II dementia and Alzheimer's disease. This opinion was based upon his conduct at the marriage ceremony and information that Goodwin occasionally got lost in familiar places, claimed to know very little about gardening when he had kept a garden all of his life, and stopped talking in favor of permitting Foust-Graham to speak on his behalf. Dr. Haber further opined that because of his condition, Goodwin would have been very inclined to "go along" with sexual advances. There was evidence that Goodwin procured Viagra as early as 22 March 2002, and that Foust-Graham sometimes went to get Goodwin's prescriptions for Viagra filled. There was also evidence that in early May of 2002, after the marriage, Foust-Graham and Goodwin engaged in actual or attempted sexual activity before going to an attorney and having some of Goodwin's property holdings converted into property held by the two of them as a tenancy by the entirety. Foust-Graham provided testimony from which the jury could infer that Goodwin was competent to enter into the marriage, that he freely consented to the marriage, and that she and Goodwin successfully engaged in sexual intercourse approximately one month following the marriage. Likewise, she denied exerting any undue influence over Goodwin.

A jury returned a verdict in Foust-Graham's favor with respect to the issues of competency, consent, and impotence. However, the jury found that Foust-Graham procured the marriage to Goodwin by

exerting undue influence upon him. Accordingly, the trial court entered an order annulling the marriage. The trial court also denied Foust-Graham's motion for judgment notwithstanding the verdict. From these orders, Foust-Graham now appeals.

I.

[1] In her first argument on appeal, Foust-Graham contends that an action to annul her marriage to Goodwin could not be maintained by Goodwin's executrix following his death. We do not agree.

"No action abates by reason of the death of a party if the cause of action survives." N.C. Gen. Stat. § 1A-1, Rule 25(a) (2003). Generally, "[the] right[] to prosecute or defend any action or special proceeding, existing in favor of or against [a deceased] person . . . shall survive to and against the personal representative or collector of his estate." N.C. Gen. Stat. § 28A-18-1(a) (2003). Thus, an annulment action survives unless it is a "cause[] of action where the relief sought could not be enjoyed, or granting it would be nugatory after death." N.C. Gen. Stat. § 28A-18-1(b) (2003). The North Carolina Supreme Court has held that an action for annulment may be commenced after the death of a person entitled to an annulment "by a person or persons whose legal rights depend upon whether [the] marriage is valid or void." *Ivery v. Ivery*, 258 N.C. 721, 730, 129 S.E.2d 457, 463 (1963) (holding that a decedent's brother and heir-at-law could bring an action to annul decedent's marriage based on incompetency).

We note also that the statute which establishes the grounds for annulling a marriage does not preclude an action for annulment based upon the death of one of the wedded parties. Rather, the statute provides that"[n]o marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any . . . cause[] . . . except for bigamy." N.C. Gen. Stat. § 51-3 (2003). A plain reading of this statute evinces the Legislature's intent to bar a postmortem annulment action brought by a sufficiently interested party only if (1) one of the spouses in a void or voidable marriage has died**, and** (2) the marriage was followed by cohabitation and the birth of issue.

Likewise, we observe that, in many cases, the granting of an annulment cannot be considered nugatory relief. Indeed, as a practical matter, the marital status of a decedent may greatly influence the distribution of his estate, and the execution of his testamentary wishes may hinge on whether a challenged marriage is adjudged valid or void. *See*, *e.g.*, N.C. Gen. Stat. § 29-30 (2003) (entitling a surviving

spouse to choose between an intestate share or an elective share and a life estate in one-third of the real estate of which a deceased spouse was seized during coverture); N.C. Gen. Stat. § 30-3.1 (2003) (entitling surviving spouse of a decedent to claim an elective share of the decedent's estate); N.C. Gen. Stat. § 30-15 (2003) (entitling surviving spouse of an intestate or a testator to a year's allowance of $10,000 payable out of the personal property of the deceased spouse); N.C. Gen. Stat. § 31-5.3 (2003) (entitling surviving spouse of a testator to petition for an elective share of the testator's estate if the will was executed prior to the marriage).

In the instant case, Clark initiated annulment proceedings on Goodwin's behalf as his guardian *ad litem* while Goodwin was still living. Following Goodwin's death, Clark moved to substitute herself as plaintiff in her capacity as the executrix for Goodwin's estate, and the trial court granted this motion. Given that the annulment action was commenced on Goodwin's behalf prior to his passing, and substantial property rights hinge on the validity of the marriage between Goodwin and Foust-Graham, we conclude that the action for annulment did not abate upon Goodwin's death. Moreover, given that N.C. Gen. Stat. § 28A-18-1 permits the personal representative of a decedent to bring an action which survives his death, we conclude that Clark, in her capacity as executrix of Goodwin's estate, was entitled to pursue Goodwin's annulment suit.

This assignment of error is overruled.

II.

[2] In her second argument on appeal, Foust-Graham contends that the trial court erred by submitting the issue of undue influence to the jury because a marriage may not be voided based upon a finding of undue influence. We do not agree.

The marriage of a person who "is at the time incapable of contracting from want of will" is voidable. N.C. Gen. Stat. § 51-3 (2003); *Ivery*, 258 N.C. at 730, 129 S.E.2d at 463 (holding that such a marriage "is not void *ipso facto*; but, if and when declared void in a legally constituted action, . . . is void *ab initio*"). Thus, for example, it is generally accepted that in North Carolina a marriage procured by duress is voidable because one of the parties suffered from want of will. *See* SUZANNE REYNOLDS, 3 LEE'S NORTH CAROLINA FAMILY LAW § 3.22 (5th ed. rev. 1993) (applying N.C. Gen. Stat. §§ 51-1 and 51-3 and the common law of contracts); *Taylor v. White*, 160 N.C. 38, 40, 75 S.E. 941, 942 (1912) (" 'All marriages procured by force or fraud, or

involving palpable error, are void[able], for here the element of mutual consent is wanting, so essential to every contract.' ") (citation omitted). Significantly, our Supreme Court has characterized duress as "the extreme of undue influence." *In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674-75 (1974). However, neither the Supreme Court, nor this Court, has addressed whether undue influence is a ground for annulment.

Undue influence is said to exist where there has been "a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result." *Id.* " 'There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence.' " *In re Will of Dunn*, 129 N.C. App. 321, 328, 500 S.E.2d 99, 104 (citation omitted), *disc. review denied in part and dismissed in part*, 348 N.C. 693, 511 S.E.2d 645 (1998). Our Supreme Court has identified the following factors as relevant in determining whether a testamentary document was the result of undue influence:

"1. Old age and physical and mental weakness [of the victim].

2. That the [alleged victim] is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see [the victim].

4. That the will is different from and revokes a prior will.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution."

In re Andrews, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (citation omitted).

Where these circumstances have been present, undue influence has been recognized as a potential ground for the postmortem invalidation of action taken during a decedent's life. *See In re Will of Sechrest*, 140 N.C. App. 464, 469, 537 S.E.2d 511, 515 (2000) (will caveats), *disc. review denied*, 353 N.C. 375, 547 S.E.2d 16-17 (2001); *Dunn*, 129 N.C. App. at 327-28, 500 S.E.2d at 103-04 (will revocations). Significantly, undue influence has also been recognized as a potential ground for nullifying documents executed by persons in anticipation

of marriage or divorce. *Loftin*, 285 N.C. at 722-23, 208 S.E.2d at 674-75 (prenuptial agreement); *Coppley v. Coppley*, 128 N.C. App. 658, 664-66, 496 S.E.2d 611, 617 (separation agreements), *disc. review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998).

Consistent with the definition of undue influence and the application of the doctrine by the courts of this state, we hold that if a person's consent to marry was procured by undue influence, he was "incapable of contracting from want of will," such that the marriage is voidable pursuant to N.C. Gen. Stat. § 51-3. Accordingly, a marriage may be annulled on this ground where the facts and circumstances so warrant.

In the instant case, there was evidence pertaining to each of the factors which our Supreme Court has identified as relevant in analyzing undue influence. *See Andrews*, 299 N.C. at 55, 261 S.E.2d at 200. Specifically, Goodwin was elderly at the time of the marriage, and there was testimony tending to establish that he was suffering from dementia and/or Alzheimer's disease. It is not disputed that he was subject to constant association with, and supervision by, Foust-Graham and that he had little association with his family or friends in the months immediately preceding the marriage. The marriage left Goodwin's previously existing estate plan in doubt and placed Foust-Graham in a position to take action that would substantially reduce the amount that Goodwin's daughter would inherit. Further, there was evidence that Foust-Graham procured the marriage, including Goodwin's apparent confusion as to why he was at the magistrate's office, the fact that Foust-Graham had driven Goodwin to the magistrate's office, and the fact that the marriage was undertaken suddenly. Accordingly, the jury could find that Goodwin was subject to undue influence, that Foust-Graham had the opportunity and disposition to exert undue influence, and that the marriage occurred as a result of undue influence. *See Dunn*, 129 N.C. App. at 328, 500 S.E.2d at 104 (setting forth elements of undue influence). As a finding of undue influence is tantamount to a finding that Goodwin was incapable of contracting from want of will, the trial court did not err by submitting undue influence to the jury as a potential ground for annulment.

This assignment of error is overruled.

III.

Throughout her brief, Foust-Graham also makes several miscellaneous assertions in support of her main arguments on appeal. We note that these assertions also lack merit.

[3] For example, Foust-Graham contends that construing "want of will" to include a decision procured by undue influence is inconsistent with the constitutionally protected status of marriage. Though the United States Supreme Court has held that states may not unreasonably infringe upon the right to marry, it has expressly rejected the notion that "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." *Zablocki v. Redhail*, 434 U.S. 374, 386, 54 L. Ed. 2d 618, 631 (1978). "To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Id.* Permitting a marriage to be voided where the consent to marry was procured by undue influence neither significantly interferes with the right to marry nor unconstitutionally exceeds the state's prerogative to impose reasonable regulations upon the right to marry.

[4] Likewise, Foust-Graham insists that the jury's verdict is inconsistent inasmuch as it found that Goodwin did not marry without giving his consent but also found that Foust-Graham exerted undue influence upon him. In essence, the jury declined to invalidate the marriage due to lack of consent where the evidence tended to show that Goodwin expressed a willingness to marry Foust-Graham at the wedding ceremony, but found that Goodwin's consent, although given, was not freely given because he was the victim of undue influence exerted by Foust-Graham. We are unpersuaded that these findings are inconsistent.

[5] Foust-Graham further argues that, notwithstanding the foregoing analysis, her marriage to Goodwin was unassailable because there was evidence tending to show that their nuptials were followed by cohabitation and sexual intercourse, and such post-marriage activity was sufficient to preclude annulment. As already indicated, N.C. Gen. Stat. § 51-3 provides that "[n]o marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any . . . cause[] . . . except for bigamy." It follows that a marriage procured by the undue influence of one of the spouses is nevertheless invulnerable to an attack on this ground if either of the parties is dead and the marriage was followed by **both** cohabitation **and** the birth of issue. In the instant case, however, there was no evidence tending to show the birth of issue into the union between Foust-Graham and Goodwin. As such, N.C. Gen. Stat. § 51-3 does not preclude an annulment based on undue influence. *See Ivery*, 258 N.C. at 730, 129 S.E.2d at 463 ("In the instant case, the marriage . . . was

followed by cohabitation but not the birth of issue. Hence, the second proviso of N.C. Gen. Stat. § 51-3 does not apply.").

In addition, we have considered the remaining arguments in Foust-Graham's brief and have determined that they lack merit. The corresponding assignments of error are overruled.

IV.

In conclusion, given the facts and circumstances of the instant case, we hold that (1) the executrix of Goodwin's estate was entitled to continue his action for annulment following his death, and (2) the trial court did not err by submitting undue influence to the jury as a potential ground for annulment. This holding makes it unnecessary for us to address the cross assignments of error presented. The trial court's order is

Affirmed.

Judges HUNTER and LEVINSON concur.

STATE OF NORTH CAROLINA v. LARRY CHAMPION

No. COA04-1264

(Filed 19 July 2005)

1. Appeal and Error— appellate rule violations—failure to argue—failure to cite specific assignment of error—failure to attach pertinent portions of proceedings to brief

Defendant's ten assignments of error that he did not support in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6). Although defendant failed to cite the specific assignment of error that he contends supports his one remaining assignment of error and failed to attach to his brief the pertinent portions of the trial proceedings related to the argument in violation of N.C. R. App. P. 28(b)(6) and (d)(1), the Court of Appeals exercised its discretion under N.C. R. App. P. 2 to examine the merits of defendant's argument.

2. Evidence; Constitutional Law— hearsay—residual hearsay exception—right of confrontation—harmless error

The trial court erred in a first-degree murder case by allowing a detective to testify as to what a witness told her on the date of the attack under the residual hearsay exception of N.C.G.S. § 8C-1, Rule 804(b)(5) because the court improperly considered the corroborative nature of the statements in determing their trustworthiness. Defendant's Sixth Amendment right of confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004) was also violated by the admission of those statements because, although the witness had died and was thus unavailable, there was no indication that defendant was given the opportunity to cross-examine the witness regarding the statements. However, the erroneous admission of the statements was harmless beyond a reasonable doubt when: (1) the jury heard similar evidence from other sources and was free to determine defendant's guilt based upon evidence irrespective of the witness's statements; and (2) there was overwhelming evidence establishing defendant's guilt.

Appeal by defendant from judgment entered 13 June 2003 by Judge James C. Spencer in Wake County Superior Court. Heard in the Court of Appeals 6 June 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Center for Death Penalty Litigation, by Shelagh Rebecca Kenney, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Larry Champion ("defendant") appeals his conviction for first-degree murder. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error.

The State's evidence presented at trial tends to show the following: In June 1998, defendant's wife, Lora Champion ("Lora"), and defendant's son, Bryan Champion ("Bryan"), were living at a residence shared by Jennifer Harris ("Jennifer") and her children. On the morning of 8 June 1998, defendant began knocking on Jennifer's front door. Jennifer's ten-year-old son, Jonathan Harris ("Jonathan"), looked out the peephole of the front door and informed Jennifer that defendant was at the front door. Jonathan stood nearby and watched

Lora open the door. Jonathan heard Lora initially refuse to speak with defendant, and then he heard Lora inform defendant that they could speak on the porch of the residence. However, defendant "wanted to come in instead[,]" and he thereafter forced his way past Lora. Shortly after defendant entered the residence, he and Lora began to "struggle." Jonathan saw defendant "trying to come in" the residence and Lora "trying to push him out[,]" and Jonathan then saw Lora fall "backwards" over a couch and land on her stomach. Defendant thereafter "attacked" Lora, and Jonathan initially thought defendant was "punching her." However, after seeing defendant's hand "turned upright" while he attacked Lora, Jonathan and Jennifer fled to Jennifer's bedroom.

Once Jonathan and Jennifer reached Jennifer's bedroom, Jennifer barricaded the door with a dresser and called 9-1-1. While she was on the phone with the 9-1-1 dispatcher, defendant attempted to enter the room. Defendant eventually forced his way inside, and he looked "angered." Jonathan saw a knife in defendant's hand. When Jennifer reached for the knife, defendant bit her on the hand. Jennifer told defendant to "just go on and get [his] son," who was in an adjacent bedroom. Defendant thereafter "grabbed" Bryan and "went out the front door."

Raleigh Police Department Officer Shawn Woolrich ("Officer Woolrich") was dispatched to Jennifer's residence to investigate the 9-1-1 call. As Officer Woolrich approached the residence, he saw defendant exiting the front door. Defendant was holding Bryan in his left arm and concealing his right hand from Officer Woolrich's view. Officer Woolrich noted that defendant's jacket and blue jeans were "heavily blood stained," and he "felt certain [he] was looking at the person who [he] was sent to find." Officer Woolrich drew his weapon and repeatedly ordered defendant to release Bryan. Defendant eventually complied with Officer Woolrich's orders, and Officer Woolrich directed Bryan back inside the residence. After noticing "a bloody knife protruding from [defendant's] back pocket[,]" Officer Woolrich "tossed" the knife away from defendant and handcuffed him.

Defendant was taken into custody and transported to the Raleigh Police Department. After he signed a waiver form and indicated that he understood his rights, defendant answered law enforcement officers' questions about the attack. Defendant initially informed the officers that he had gone to Jennifer's residence to ask Lora to take him to the doctor, and that they soon began arguing. Defendant stated

that Lora thereafter left the room for a moment, but returned with a knife and started pushing and hitting him. Defendant recalled Lora being stabbed in the ensuing struggle, during which he was reaching for the knife to take it away from Lora. Defendant told the officers that after Lora was stabbed, he went to Jennifer's room. Defendant stated that he asked Jennifer for some clothes for Bryan, and he left when she told him to do so.

After listening to defendant's initial version of the events, the interviewing officers "confronted" defendant "on several issues." The officers were confused by defendant's statement that he could not see the knife and that it was dark in the room, and the officers believed "there was no way [Lora] could be stabbed as many times as she was if [defendant] was just reaching for the knife to take it away from her." After the veracity of his first version of the attack was questioned, defendant provided the officers with a second version of the attack. In his second version, defendant stated that he had taken the knife out of his mother's kitchen before going to Jennifer's residence, and that he had done so because Lora was a "violent person." Defendant further stated that when he arrived at Jennifer's residence, he and Lora began arguing, and Lora hit him. Defendant told the officers that as the two "were wrestling around[,]" he "reached into [his] back pocket and pulled the knife out and stabbed her with it." Defendant recalled Lora "mak[ing] some unusual breathing noises as [he] walked past her on [his] way out of the house." Defendant stated that after Lora did not answer him, he "went into [Jennifer's] room to ask her about getting some clothes for [his] son." Defendant recalled "push[ing] the door in" and noticing that Jennifer was "on the phone with the police" when he entered. Defendant stated that as he "was trying [to] get her to calm down[,]" Jennifer "grabbed [his] hand and [he] bit her to get her to let go." Defendant informed the officers that he thereafter went to Bryan's room and "took him and was leaving when the police came."

After the attack, Lora was transported to Wake Medical Center, where she subsequently died. On 20 July 1998, defendant was indicted for the first-degree murder of Lora. A superceding indictment, charging defendant with first-degree murder with aggravating circumstances, was filed on 25 February 2003. Defendant's trial began the week of 9 June 2003.

At trial, defendant objected to the State's presentation of hearsay statements made by Jennifer to Raleigh Police Department Detective H. Faulkner ("Detective Faulkner") the day of the attack. After hear-

ing *voir dire* examination and arguments from both parties, the trial court denied defendant's motion to exclude the statements, concluding that the statements were admissible under the residual hearsay exception. Following the State's presentation of its evidence, defendant presented evidence that he was not mentally competent at the time of the attack and was unable to form the specific intent to kill Lora. In rebuttal, the State presented evidence that defendant was able to form the specific intent to kill Lora.

On 13 June 2003, the jury returned a guilty verdict on the charge of first-degree murder. The trial court thereafter sentenced defendant to life imprisonment without parole. Defendant appeals.

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[1] We note initially that defendant's appeal contains several violations of the North Carolina Rules of Appellate Procedure. First, defendant's brief contains arguments supporting only one of the eleven original assignments of error on appeal. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the omitted assignments of error are deemed abandoned. Furthermore, in his brief, defendant does not cite the specific assignment of error that he contends supports his one remaining argument, and he does not attach to his brief the pertinent portions of the trial proceedings related to the argument. While we recognize that defendant has therefore further violated N.C.R. App. P. 28(b)(6) and (d)(1), and that such violations may result in waiver of the assignment of error, *see State v. Gaither*, 148 N.C. App. 534, 538, 559 S.E.2d 212, 215 (2002) and *State v. Call*, 349 N.C. 382, 408, 508 S.E.2d 496, 513 (1998), in our discretion pursuant to N.C.R. App. P. 2, we have chosen to overlook these errors and examine the merits of defendant's argument.

[2] Defendant's only argument on appeal is that the trial court erred by allowing Detective Faulkner to testify as to what Jennifer told her on the date of the attack. Defendant asserts that the trial court considered improper factors in determining whether Jennifer's statements were admissible under the residual hearsay exception.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2003) allows the introduction of a hearsay statement where, even though the statement is not covered by a specific exception, the statement's declarant is unavailable and the statement possesses "circumstantial guarantees of trustworthiness" equivalent to other hearsay exceptions. In order to allow the admission of a hearsay statement under this "residual" exception, the trial court must find that the declarant is unavailable. *State v.*

Triplett, 316 N.C. 1, 8, 340 S.E.2d 736, 740 (1986). Thereafter, the trial court must determine:

> (1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;
>
> (2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);
>
> (3) That the statement possesses "equivalent circumstantial guarantees of trustworthiness";
>
> (4) That the proffered statement is offered as evidence of a material fact;
>
> (5) Whether the hearsay is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means"; and
>
> (6) Whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence."

State v. Ali, 329 N.C. 394, 408, 407 S.E.2d 183, 191-92 (1991) (quoting N.C. Gen. Stat. § 8C-1, Rule 804(b)(5)) (alterations in original). In deciding whether a hearsay statement possesses the requisite "equivalent circumstantial guarantees of trustworthiness," the trial court considers:

> (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability.

State v. Nichols, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988). "The trial court should make findings of fact and conclusions of law when determining if an out-of-court hearsay statement possesses the necessary circumstantial guarantee of trustworthiness to allow its admission." *State v. Swindler*, 339 N.C. 469, 474, 450 S.E.2d 907, 910-11 (1994).

In the instant case, Detective Faulkner testified during *voir dire* that Jennifer told her that Lora and defendant had been "having problems" and had "split up" approximately three months prior to the attack. Detective Faulkner also testified that Jennifer informed her that Lora had told Jennifer that she had tried to work on their problems, but that "[i]t was time for [Lora and defendant] to go their sep-

arate ways." Detective Faulkner further testified as to what Jennifer remembered about the attack. Following examination of Detective Faulkner by defendant and argument from both parties, the trial court allowed Detective Faulkner to testify regarding Jennifer's statements, concluding that the statements "possess sufficient equivalent circumstantial guarantees of trustworthiness." We conclude that the trial court erred.

Although the trial court's examination of a hearsay statement's trustworthiness is based upon the totality of the circumstances surrounding the statement, *State v. Richmond*, 347 N.C. 412, 436-37, 495 S.E.2d 677, 690, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998), the trial court must not consider the corroborative nature of the statement when determining whether it qualifies as residual hearsay. *See Idaho v. Wright*, 497 U.S. 805, 822-23, 111 L. Ed. 2d 638, 656-57 (1990). Instead, " '[h]earsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.' " *State v. Hinnant*, 351 N.C. 277, 288, 523 S.E.2d 663, 670 (2000) (quoting *Wright*, 497 U.S. at 822, 111 L. Ed. 2d at 657), *cert. dismissed*, —— N.C. ——, 604 S.E.2d 292 (2004), *cert. denied*, —— U.S. ——, 161 L. Ed. 2d 737 (2005); *see Swindler*, 339 N.C. at 475, 450 S.E.2d at 911 ("Corroborating evidence should not be used to support a hearsay statement's particularized guarantee of trustworthiness."). In the instant case, in its "determination [regarding] the trustworthiness of the proffered statements," the trial court found as fact that "[t]he statements made by Jennifer [] appear to be consistent with other evidence concerning the facts as they were—as they have been determined to be, although . . . Jennifer [] did make certain statements which were actually not available from any other source." In light of the foregoing, we conclude that the trial court erred by considering the corroborative nature of Jennifer's statements.[1]

Furthermore, we note that "the Confrontation Clause bars the admission of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her." *State v. Morgan*, 359 N.C. 131, 154, 604 S.E.2d 886, 900 (2004) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004)). Because defendant had filed notice of appeal with this Court and his case was pending when *Crawford* was

1. Because we conclude that the trial court erred by considering the corroborative nature of the statements, we need not address defendant's additional assertions regarding their inadmissibility.

issued, the decision applies to the instant case. *Morgan*, 359 N.C. at 154, 604 S.E.2d at 900. Here, the record reflects that Jennifer died in 2001, after the date of the attack and her interview with Detective Faulkner, but prior to defendant's trial. However, there is no indication that defendant was given an opportunity to cross-examine Jennifer regarding her statements to law enforcement officers. Therefore, defendant's Sixth Amendment right to confrontation under *Crawford* was also violated by the trial court's determination. *See Id.* at 155-56, 604 S.E.2d at 901 (holding that deceased's statement to law enforcement officer was testimonial in nature because knowingly given in response to structured police questioning, and denial of opportunity to cross-examine deceased regarding the statement violated Sixth Amendment right to confront accuser).

We note that not every constitutional violation necessarily requires a new trial. *Id.* at 156, 604 S.E.2d at 901. Instead, where the State demonstrates that the constitutional violation was "harmless beyond a reasonable doubt," the error is deemed nonprejudicial, and reversal of a conviction is not required. *Id*; N.C. Gen. Stat. § 15A-1443(b) (2003). Our courts have previously concluded that "the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988); *State v. McKeithan*, 140 N.C. App. 422, 432, 537 S.E.2d 526, 533 (2000), *disc. review denied and appeal dismissed*, 353 N.C. 392, 547 S.E.2d 35 (2001). After reviewing the record in the instant case, we conclude that the trial court's errors do not necessitate reversal of defendant's conviction.

Defendant contends that Jennifer's statements to Detective Faulkner were used to demonstrate that defendant acted with premeditation and deliberation. However, "[p]remeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence." *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Therefore,

> Among [the] circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased;

> (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. . . . [T]he nature and number of the victim's wounds are circumstances from which premeditation and deliberation can be inferred.

Id. at 430-31, 340 S.E.2d at 693 (citations omitted).

In the instant case, Jonathan testified that defendant knocked on the front door of his residence, began arguing with Lora, and then forced his way inside. Jonathan further testified that after defendant "attacked" Lora, he and Jennifer fled to Jennifer's bedroom. Jonathan recalled defendant forcing his way inside Jennifer's bedroom, holding a knife, and looking "angered." The State introduced into evidence recorded copies and a transcript of Jennifer's call to the 9-1-1 dispatcher, during which a male voice in the background states, "I told you she was going to get it." Officer Woolrich testified that defendant's clothing was "heavily blood stained" when he was arrested, and that defendant was carrying "a bloody knife" in his back pocket. Raleigh Police Department Detective Randy Miller ("Detective Miller") testified that defendant informed him after his arrest that "[h]e had taken a kitchen knife out of his mother's drawer and took it with him" to Jennifer's residence the date of the attack. Defendant also admitted to the officers that he stabbed Lora after "[h]e got mad and began tussling with her[,]" and he recalled hearing Lora "make some unusual breathing noises" afterwards. Detective Miller testified that defendant's mother "acknowledged that [the knife] looked like one of her knives[,]" and, after she searched her kitchen, defendant's mother informed the officers that her "favorite knife" was missing. Doctor Dewey Pate ("Dr. Pate") of Wake Medical Center testified that Lora suffered "approximately 51 stab wounds or lacerations" during the attack, and that the wounds were located on her neck, chest, face, arms, and hands. Dr. Pate stated that Lora suffered a stab wound to her kidney, and he noted that some of the multiple stab wounds on her neck were "deep enough to penetrate [her] voice box and larynx and underlying air tube or trachea[.]" Dr. Pate also testified that two main arteries on the left and right side of Lora's neck had been severed during the attack, and that the severing of these two arteries was the ultimate cause of Lora's death.

Defendant maintains that the State's continual reference to defendant's jealousy and the status of his relationship with Lora demonstrates that the State "relied heavily" upon Jennifer's state-

ments to establish malice, and, therefore, defendant's guilt. However, we note that the jury heard similar evidence from other sources, and was free to determine defendant's guilt based upon evidence irrespective of Jennifer's statements. Defendant's mother informed officers that prior to the attack, defendant and Lora had been arguing "[o]ver their relationship." Defendant told the officers himself that he "wondered if [Lora] had someone else[,]" and he stated that he "knew [he and Lora] would not get back together." Therefore, after reviewing the entire record in the instant case, we conclude that any erroneous admission of Jennifer's statements was harmless in light of the overwhelming evidence establishing defendant's guilt. Accordingly, we hold that defendant received a trial free of prejudicial error.

No error.

Chief Judge MARTIN and Judge WYNN concur.

ASHLEIGH SIMMONS, BY AND THROUGH HER GUARDIAN AD LITEM, HILTON SIMMONS, PLAINTIFF v. COLUMBUS COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA04-916

(Filed 19 July 2005)

1. Tort Claims Act— conflicting evidence—role of Industrial Commission

Deciding among reasonable inferences is the role of the Industrial Commission in a Tort Claims action. Here, there was evidence to support findings by the Industrial Commission in a Tort Claims action concerning the timing of an assault on a school bus.

2. Schools and Education— assault on bus—safe place for driver to stop

As long as there is competent evidence to support the Commission's decision, it does not matter that there is evidence supporting a contrary finding. Here, there was evidence that there was a safe place for a bus driver to pull over so that she could stop an assault.

3. Schools and Education— assault on bus—duty to follow safety rules—returning to school instead of immediately stopping

The evidence and findings in a Tort Claims action supported the conclusion of the Industrial Commission that a school bus driver did not meet her duty to follow the safety rules by not immediately stopping the bus when an assault on a student began instead of returning to school.

4. Tort Claims Act— findings—burden of proof—double negative

The use of a double negative by the Industrial Commission in a Tort Claims finding did not imply that the Commission had shifted the burden of proof concerning the opportunity of a school bus driver to pull over after an assault on a student began.

5. Schools and Education— assault on bus—failure to pull over and stop assault—proximate cause of injuries

The findings supported the conclusion in a Tort Claims action that a school bus driver's failure to pull over when an assault on a student began prolonged the assault and was the proximate cause of plaintiff's severe injuries.

6. Negligence— contributory—eleven-year-old plaintiff

An eleven-year-old plaintiff who was assaulted on a school bus is presumed incapable of contributory negligence.

Appeal by defendant from decision and order entered 23 February 2004 by the Industrial Commission. Heard in the Court of Appeals 22 March 2005.

Britt & Britt, P.A., by Donald Bardes, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for defendant-appellant.

ELMORE, Judge.

This case concerns a claim filed under the Tort Claims Act against the Columbus County Board of Education (defendant). The claim, heard by the Industrial Commission, involves a fight on a school bus resulting in injuries to Ashleigh Simmons (plaintiff). The Industrial Commission ruled in favor of plaintiff after a finding that the bus driver was negligent for not stopping the fight and that her negligence

was a proximate cause of plaintiff's injuries. Defendant appeals from this judgment.

On 20 February 1995, plaintiff boarded her school bus driven by Emma Ford-Williams (Williams) at Evergreen Elementary School in Columbus County, North Carolina. Plaintiff, eleven years old, sat four rows behind Williams. Prior to the bus leaving the school and pulling onto the road, plaintiff called out to Williams that another boy, Andre, was standing. Words were exchanged between Andre and plaintiff and subsequently Andre's older brother, Jasper Williams (Jasper) left his seat and began hitting plaintiff. Jasper, an eighth grader, was over six-feet tall and weighed between 175 to 200 pounds while plaintiff was only four feet tall and weighed 124 pounds.

The facts, as determined by the Commission, are that the attack began before the bus left the school and was noticed by Williams prior to turning onto Old Highway 74. The distance between the bus stop pick-up area (where students loaded onto the buses to return home) and the intersection with Old Highway 74 was approximately 230 feet. When Williams noticed the fight, she responded by yelling behind her: "Y'all stop what you're doing." Although plaintiff initially defended herself, she eventually was overpowered and knocked to the floor. It was then that Jasper began to kick her repeatedly. According to the Commission's findings, this escalation of the attack occurred as the bus turned onto Old Highway 74. As the fight escalated, Williams decided to return to the school which took, according to plaintiff's evidence, about one and one-half minutes from the point that Williams noticed the fight. When the bus returned to the school, Williams motioned for a male teacher to enter the bus. The male teacher stopped the attack. At no point did Williams attempt to stop the bus or separate the fighting children. As a result of the attack, plaintiff suffered a fractured mid-clavicle, hematoma above the right eye, ecchymosis of the left eye, mild traumatic brain injury, head pain, nightmares, and an atypical fear of large men. The Industrial Commission found that Williams was negligent and held defendant liable under the theory of respondeat superior. The Commission awarded plaintiff $8,567.79 for medical expenses as well as $34,000.00 for pain and suffering.

The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act "shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C.

Gen. Stat. § 143-293 (2003). As long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding. *See Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405, 496 S.E.2d 790, 793 (1998). "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). Thus, "when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Simmons*, 128 N.C. at 405-06, 496 S.E.2d at 793. Accordingly, we will first review the record to determine if there is competent evidence supporting the findings of the Full Commission challenged by defendant.

[1] Defendant first challenges the Commission's findings of fact three and five on the grounds that there is no competent evidence supporting them. We disagree. Findings three and five are:

> 3. On the afternoon of February 20, 1995, Ms. [Williams] customarily drove on Evergreen School Road to the stop sign at Old Highway 74. Prior to turning on to Old Highway 74, Ms. [Williams] testified that she looked in her mirror and noticed that plaintiff and another student, Jasper Williams, were "hitting each other back and forth." At that point, Ms. [Williams] yelled back: "Y'all stop what you're doing." Ms. [Williams] testified that the students did not respond to her command.
>
> 5. As the bus turned on to Old Highway 74 from Evergreen School Road, Jasper Williams began to hit plaintiff very hard on her body. Ms. [Williams] neither stopped the bus nor took any further action to address the escalating situation; rather, she resumed driving the bus and continued toward Haynes Lennon Road.

There is competent evidence in the record from which the Full Commission could have inferred that Williams noticed the fight *prior to* turning onto Old Highway 74 and that the fight escalated *as* the bus turned onto Old Highway 74. Plaintiff testified that she and Jasper began fighting prior to the bus turning onto Old Highway 74. It is a reasonable inference that since the fight began before the bus turned onto Old Highway 74 that the fight escalated as the bus

turned onto Old Highway 74 and that Williams noticed the fight prior to turning onto Old Highway 74. She did in fact yell to the children to stop. Defendant argues that this is not a reasonable inference because Williams testified that she did not notice the fight until *after* turning onto Old Highway 74. However, deciding among reasonable inferences remains the role of the Commission and these inferences "may not be overturned on appeal." *Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 224, 588 S.E.2d 42, 51 (2003), *cert. denied*, 358 N.C. 545, 599 S.E.2d 404 (2004). Therefore, this Court accepts the Commission's findings that Williams noticed the fight prior to turning onto Old Highway 74 and that the fight escalated as the bus turned onto Old Highway 74.

[2] Defendant also contends that there is no competent evidence supporting the Commission's finding number ten that states:

> 10. There is no evidence that Ms. [Williams] could not locate a spot to pull over to the side of the road safely to enable her to restore order and safety on her bus. Because Ms. [Williams] decided to return to the school, instead of pulling the bus over safely, Jasper Williams was given additional time in which to continue severely beating plaintiff. The Full Commission finds Ms. [Williams's] decision to return to the school instead of pulling off the roadway to restore order on her bus to be a negligent breach of the duty of care owed to plaintiff. The fact that Ms. [Williams] yelled a solitary warning command ("Y'all stop what you're doing.") toward the back of the bus simply does not rise to the level of care owed to plaintiff. As soon as [Ms. Williams] realized the fight was continuing despite her warning command, she should have taken immediate action to find a safe place to pull over and restore order and safety on her bus.

Defendant disputes that there was a safe place for Williams to stop the bus and restore order. Indeed, Williams testified that she could not pull into the parking lot of a gas station because it was not a designated stop. However, Williams testified that in a previous incident she stopped the bus in order to quell a fight between Jasper and another female student. While Williams was unable to remember whether or not she had stopped at a designated stop, she did remember that after stopping the bus she was able to successfully stop the incident. Further, there is some evidence of an available safe place in which Williams could have stopped. The principal, Mr. Fulk, testified that there was an area near the gas station where she could have

safely stopped the bus. Again, as long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding. *See Simmons*, 128 N.C. App. at 405, 496 S.E.2d at 793.

[3] Because the challenged findings of fact are supported by competent evidence, the only other form of review available to defendant is for this Court to verify that the findings of fact justify the Commission's conclusions of law. *Id.* at 405-06, 496 S.E.2d at 793. Defendant argues that the Commission's conclusions of law are improper because (1) it was not reasonable for Williams to pull off the roadway; (2) the Commission shifted a portion of the burden of proof to defendant; (3) plaintiff was contributorily negligent; and (4) Williams's actions did not proximately cause plaintiff's injuries.

According to N.C. Gen. Stat. § 143-291(a), it is up to the Industrial Commission, as the trier of fact, to determine negligence. The Industrial Commission

> shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

Id.

To prevail on a claim of negligence under the Tort Claims Act, the plaintiff must establish: "(1) that [defendant] owed plaintiff a duty of care under the circumstances; (2) that actions or omissions by at least one of the named employees of [defendant] constituted a breach of that duty; (3) that the breach was the actual and proximate cause of plaintiff's injury; and (4) that plaintiff suffered damages." *Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544, 553, 543 S.E.2d 920, 926 (2001).

"The standard of due care is always the conduct of a reasonably prudent person under the circumstances. Although the standard remains constant, the proper degree of care varies with the circumstances." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988) (internal citation omitted). Therefore, the standard of due care in this case depends on the determination of what a reasonably prudent bus driver would do to stop Jasper's attack on plaintiff.

This analysis includes a consideration of the rules or safety standards that have been adopted by the school system. "[W]here it appears that defendant has voluntarily adopted the rules or safety standards as a guide for the protection of the public, they are admissible as some evidence that a reasonably prudent person would adhere to their requirements." *Slade v. Board of Education*, 10 N.C. App. 287, 296, 178 S.E.2d 316, 322 (1971). Defendant, by not excepting to the Commission's finding of fact thirteen, agrees that "Ms. [Williams] (as defendant's agent) had a duty to follow the rules of safety for school bus drivers, as provided by the NC Department of Transportation, when ensuring the safety and protection of the students on her bus, including plaintiff." The Commission's finding of fact nine, also not excepted to by defendant, provides an excerpt from a handbook given to bus drivers by the North Carolina Department of Transportation. This excerpt gives some guidance on how to handle cases of misbehavior. It states that a "driver should: (1) select a safe place to pull off the roadway; (2) restore order; and (3) report misbehavior to the principal, if necessary."

Defendant claims that it was not reasonable for Williams to pull off the roadway, and therefore Williams had no duty to pull off the roadway. It makes this claim by excepting to the Commission's findings of fact twelve and fourteen:

> 12. The defendant has also argued that Ms. [Williams's] decision to take no action (absent a solitary warning command) toward stopping the fight on the bus in favor of returning to the school for help was reasonable considering that the bus was only a short distance (less than a half-mile) from the school. However, Ms. [Williams] testified that she would have acted in the same manner even if the fight had occurred while the bus was 10 miles from the school. The Full Commission finds this statement as evidence of Ms. [Williams's] total disregard for, or complete ignorance of, the rules of safety established by the NC Department of Transportation.
>
> 14. During the incident on February 20, 1995, Ms. [Williams] breached the duty of care owed to plaintiff by failing to follow safety procedures that require her to pull over to the side of the road safely to restore order on her bus.

These two findings are "mixed questions of law and fact and so are reviewable on appeal from the commission, the designations 'Find-

ing of Fact' or 'Conclusion of Law' by the commission not being conclusive." *Martinez v. Western Carolina University*, 49 N.C. App. 234, 239, 271 S.E.2d 91, 94 (1980).

In this case the findings of fact support the conclusion, identified as finding number fourteen, that Williams did not meet her duty to follow the rules of safety for school bus drivers. First, the Commission found in finding number ten that there was a safe place for Williams to pull off the roadway. Finding of fact fifteen was that the prolonged and severe beating could have been prevented had Williams immediately stopped the bus in a safe place instead of returning to the school. Second, Williams's testimony that she was able to stop Jasper's attack on another female student by stopping the bus and separating the students supports this conclusion. Last, Williams's testimony that she would have acted in the same manner even if the incident occurred ten miles from the school shows a disregard for the established rules. Nowhere in the rules is there a discussion that returning to school as a first response to fighting is reasonable. Although the Commission's finding number twelve is sternly worded, it is within their authority to weigh the evidence. There is competent evidence to support these findings, and these findings support the Commission's conclusion that Williams breached her duty to plaintiff.

[4] Defendant also claims that the double negative "[t]here is no evidence that Ms. [Williams] could not locate a spot to pull over to the side of the road safely" implies that the Commission shifted the burden of proof to defendant. However, the latter part of finding of fact ten shows that the Commission did find that plaintiff proved that there was a safe place to pull over, and as stated previously, there is competent evidence supporting this finding. Moreover, we interpret this finding's wording as a determination that defendant's evidence did not refute the evidence presented by plaintiff, which was that there was a safe place to stop the bus. Because the Commission found that there was a safe place available for Williams to stop the bus, defendant's argument that the Commission shifted the burden of proof does not stand.

[5] The Commission's findings of fact also support its conclusions of law that Williams's breach was a proximate cause of the plaintiff's injuries. While this conclusion is listed as finding of fact fifteen, this Court is not bound by the Commission's classification and in this instance finds the finding to be a conclusion of law. The "conclusion" made by the Commission is:

> 15. The breach of duty proximately caused plaintiff to be subjected to a prolonged and severe beating at the hands of Jasper Williams, which could have been prevented had Ms. [Williams] taken immediate action to pull over and restore order on her bus instead of driving back to the school.

As stated above, Williams knew from a previous incident that she was able to prevent Jasper from further injuring another student by stopping the bus in a safe place and separating the two students. Instead of repeating this previously successful action, Williams continued to drive the bus with only one verbal warning directed at Jasper. Her failure to take any action in this case allowed the fight to escalate to the point that Jasper succeeded in knocking the plaintiff to the ground and kicking her for the remainder of the bus ride back to school. Thus, Williams, by allowing the fight to continue in time and severity, was a proximate cause of plaintiff's severe injuries.

[6] Defendant contends that there was contributory negligence on the part of the eleven-year-old plaintiff that prevents her from the recovery of damages. Section 143-299.1 does deem contributory negligence to be a defense, but "the State department, institution or agency against which the claim is asserted . . . [has] the burden of proving that the claimant or the person in whose behalf the claim is asserted was guilty of contributory negligence." N.C. Gen. Stat. § 143-299.1 (2003). Here, defendant did not meet that burden. In North Carolina, children between the ages of seven and fourteen are presumed to be incapable of contributory negligence. *See Weeks v. Barnard*, 265 N.C. 339, 340, 143 S.E.2d 809, 810 (1965). "This presumption, however, may be overcome by evidence that the child did not use the care which a child of its age, capacity, discretion, knowledge, and experience would ordinarily have exercised under the same or similar circumstances." *Id.* (citation omitted). The plaintiff in this case was eleven years old, and thus is presumed incapable of contributory negligence. Defendant offered no evidence that plaintiff did not handle herself as a normal eleven-year-old girl. As such, the Commission did not err in finding negligence on Williams's part without finding any negligence on plaintiff's part.

This Court finds that there was competent evidence for the Commission's findings of fact and that the findings of fact support the Commission's conclusions of law. Thus, the Commission's decision and order is affirmed.

Affirmed.

Judges WYNN and TYSON concur.

TOTAL RENAL CARE OF NORTH CAROLINA, LLC, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA, INC., RESPONDENT-INTERVENOR

No. COA04-1133

(Filed 19 July 2005)

1. **Hospitals and Other Medical Facilities— certificate of need proceedings—grounds for modification or reversal—appellate review**

Certificate of need proceedings are exempt from the newly amended portions of N.C.G.S. § 150B-51; those decisions are reviewed on appeal under the previous version of the statute, with modification or reversal of the agency decision controlled by the grounds enumerated in N.C.G.S. § 150B-51(b) (1999). The scope of review associated with each of these grounds is discussed in detail in *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649.

2. **Hospitals and Other Medical Facilities— dialysis machines—certificate of need—competition and choice as comparative factors**

Respondent-agency did not exceed its statutory authority by using enhanced competition and increased consumer choice as key comparative factors when awarding a certificate of need for new dialysis machines. Furthermore, no one asserted that the agency relied on new evidence, respondent specified reasons for rejecting the ALJ's findings of fact, and the agency's findings were supported by substantial evidence.

Appeal by respondent-intervenor and cross-appeal by petitioner from the final decision entered 7 May 2004 by Robert J. Fitzgerald, Director of the Facilities Services Division of the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 20 April 2005.

Poyner & Spruill, LLP, by William R. Shenton and Thomas R. West, for petitioner-appellee.

Kennedy Covington Lobdell & Hickman, LLP, by Gary S. Qualls and Colleen M. Crowley, for respondent-intervenor-appellant.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for respondent-appellee.

ELMORE, Judge.

The North Carolina Department of Health and Human Services (NCDHHS) determined that Greene County needed ten new kidney dialysis machines. This case arises from the determination that Total Renal Care (TRC) be awarded the certificate of need over Bio-Medical Applications (BMA).

TRC and BMA, along with one other company that did not appeal, filed applications with the NCDHHS Certificate of Need Section (CON Section). The CON Section reviewed the applications and ultimately determined that the certificate of need should be awarded to BMA. It determined that TRC's application had failed to meet the criteria set out in N.C. Gen. Stat. § 131E-183, in particular N.C. Gen. Stat. § 131E-183(4) (criterion 4). It also determined that BMA's application met the required criteria and was superior on several comparison levels: continuity of care, staff salaries, and patient charges. TRC properly appealed the decision to an administrative law judge (ALJ) by filing a contested case hearing.

The ALJ recommended reversal of the CON Section's decision. The ALJ determined that the CON Section's assessment that TRC did not comply with criterion 4 was erroneous. The CON Section believed that a company named Hillco owned 15% of TRC, and under the NCDHHS's application of criterion 4, Hillco should have been a co-applicant. But at the contested case hearing TRC proved it was independent and its application was complete, conforming to all statutory and regulatory criteria.

The ALJ also found and concluded that BMA's application was non-conforming, reversing the CON Section's determination on that point. The ALJ determined that BMA's application failed to conform or was in conflict with criteria 4, 5, and 12 of section 131E-183. The ALJ found that BMA's application was depending heavily upon "a lessor," to be determined later by competitive bidding. This lessor would "upfit, install, and build" to NCDHHS and BMA specifications

a building that BMA would lease. The ALJ found that BMA had failed to include a necessary co-applicant and properly list its necessary costs, thus making its application nonconforming.

The ALJ further reviewed the CON Section's determination that BMA's application was superior in a comparative analysis. The ALJ reviewed the factors allegedly giving BMA an edge and determined the following: 1) the CON Section had miscalculated staff salaries, TRC actually having higher salaries; 2) there was no clear winner with regard to patient charges; and 3) neither company enjoyed an advantage on continuity of care since both would allow patients to use their current doctors. Following this reasoning, the ALJ recommended a decision to the NCDHHS Director that TRC be awarded the certificate of need instead of BMA. BMA appealed to the Director's appointee for a Final Agency Decision (Agency).

The Agency's decision rejected many of the findings of fact of the ALJ, including *all* the findings addressing a comparative analysis of the two applications, stating that "I am substituting the following Findings of Fact because they more accurately reflect the evidence in the record and a proper implementation of the Certificate of Need Law." The Agency did conclude, in similar fashion to the ALJ, that TRC did not need a co-applicant; TRC met criterion 4. However, the Agency rejected the ALJ's findings and conclusions regarding the fact that BMA's application was not complete, stating that "[b]oth the BMA and TRC applications conform or conditionally conform to every applicable review criterion."

With regard to a comparative analysis, the Agency reviewed the "staff salaries" criterion and noted, like the ALJ did, that the CON Section erred in determining BMA's salaries. The Agency nonetheless rejected this as a comparative factor on the grounds that, while TRC had higher salaries, the difference in salaries of TRC and BMA was not material. The Agency also determined there was no significant difference in patient charges either, another factor the ALJ and CON Section reviewed, but BMA did enjoy a slight advantage on this point. The Agency rejected the "continuity of care" factor as well, noting as did the ALJ, that any new facility would create change for the patients and neither company would shut out doctors. Thus, both applications were comparatively similar on this point.

Instead of the factors that the CON Section used in comparing the applications, the Agency used operating costs, implementation dates, and competition and consumer choice. The Agency found signifi-

cantly lower "operating costs" on behalf of TRC, but ultimately noted that it did not result in lower charges, thereby giving only a slight advantage to TRC. The Agency also compared "implementation dates," finding that TRC would have the facility operational six months ahead of BMA's estimates, giving TRC an advantage. Finally, the Agency took official notice of surrounding counties and facilities already in operation. Of those facilities in operation, the Agency identified that TRC operated far fewer dialysis stations than BMA. Accordingly, the Agency deduced, TRC would create more "competition" and increased "consumer choice," giving them a very clear advantage. The Agency awarded the certificate of need to TRC based on these findings and conclusions.

BMA appealed the Agency's decision to this Court arguing, in relevant part, that the Agency erred in altering the criteria of the previous reviews and coming to a decision that TRC was superior on this new criteria. TRC cross-appealed arguing, in relevant part, that the Agency erred in finding BMA's application conforming. Between the two parties there were fifty-nine assignments of error.

[1] Foremost, any review of a final agency decision is subject to a statutory standard of review before this Court. We deem it appropriate to expound upon that standard as it applies to appeals from cases arising out of Article 9 of Chapter 131E. N.C. Gen. Stat. § 131E-188(b) (2003) authorizes an affected person "who was a party in a contested case hearing" to appeal a final agency decision to this Court. Turning to Article 3 of Chapter 150B, regarding contested cases, and in particular N.C. Gen. Stat. § 150B-34(c), dealing with certificates of need, reveals that:

> in cases arising under Article 9 of Chapter 131E of the General Statutes, the administrative law judge shall make a recommended decision or order that contains findings of fact and conclusions of law. A final decision shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. The final agency decision shall recite and address all of the facts set forth in the recommended decision not adopted by the agency, the agency shall state the specific reason, based on the evidence, for not adopting the findings of fact and the agency's findings shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. *The provisions of* G.S. 150B-36(b), (b1), (b2), (b3), and (d), and *G.S. 150B-51 do not apply to cases decided under this subsection.*

N.C. Gen. Stat. § 150B-34(c) (2003) (emphasis added). The key sentence regarding our standard of review is the last: that section 150B-51, which contains the detailed process of review this Court applies to administrative decisions, does not apply to certificate of need proceedings.

Our Court has already determined that this provision exempts certificate of need proceedings from the newly amended portions of section 150B-51 and requires us to review those decisions under the previous version of section 150B-51, that being N.C. Gen. Stat. § 150B-51 (1999). *See Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't. of Health & Human Servs.*, 169 N.C. App. 641, 647, 611 S.E.2d 431, 436 (2005); *see also* Stephen Allred & Richard Whisnant, *State Government*, in *North Carolina Legislation 2000* 191, 193 (David W. Owen ed., Institute of Government 2000) (The exception to the APA for certificate of need proceedings "essentially preserv[ed] the status quo"; thereby leaving the scope of our review of the final agency's decision governed by the statutory procedures in effect before the amendments in 2001.). Accordingly, we read N.C. Gen. Stat. § 150B-34(c) (2003) in conjunction with N.C. Gen. Stat. § 150B-51 (1999) and our applicable case law to discern the appropriate review necessary under the circumstances.

Our Court will first review an Agency's decision to determine whether the Agency relied on new evidence in making its decision. *See* N.C. Gen. Stat. § 150B-34(c) (2003); N.C. Gen. Stat. § 150B-51(a) (1999); *Mooresville Hosp. Mgmt. Assocs.*, 169 N.C. App. at 647, 611 S.E.2d at 435-36. Under N.C. Gen. Stat. § 150B-51(a) (1999), if the Agency did not adopt the recommended decision, then we would have reviewed the Agency's decision to determine whether it "stat[ed] the specific reasons why the agency did not adopt the recommended *decision*." Now, N.C. Gen. Stat. § 150B-34(c) requires us to conduct a more detailed review of each *finding* in the decision not adopted by the Agency to determine whether 1) a specific reason for rejection was given, and 2) if that finding is "supported by substantial evidence admissible under G.S. 510B-29(a), 150B-30, or 150B-31." *See* N.C. Gen. Stat. § 150B-34(c) (2003). Importantly, and in keeping with legislative intent, we do not review the Agency's decision to reject the recommended decision or its findings *de novo*, as in the current version of section 150B-51. Instead, "[o]n judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004).

Modification or reversal of the Agency decision is controlled by the grounds enumerated in section 150B-51(b); the decision, findings, or conclusions must be:

> (1) In violation of constitutional provisions;
>
> (2) In excess of statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1999). Our Supreme Court in *Carroll* discussed the particular scope of review associated with each of these grounds in detail. *See Carroll*, 358 N.C. at 658-65, 599 S.E.2d at 894-98. Section 150B-34(c) dictates that we maintain the standards of review in place before 2001, and that provision's requirement that we review the sufficiency of the Agency's findings, aligns seamlessly with N.C. Gen. Stat. § 150B-51(b)(5).

[2] Applying this standard of review to the case *sub judice*, we affirm the Agency's decision to award the certificate of need to TRC. First, no party has asserted that the Agency relied on "new evidence." Second, although the Agency decision did reject findings of fact in the recommended decision, 82 out of the 197 to be precise, it stated a specific reason why each was rejected. Third, under the whole record test, we hold that the Agency's findings were supported by substantial evidence, that is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8b) (2003). There was substantial evidence in the record that supported a finding that TRC's application was conforming. There was also substantial evidence in the record to support a decision that BMA's application was conforming, despite conflicting evidence that it did not conform to criteria 4, 5, and 12 of N.C. Gen. Stat. § 131E-183 (2003). Importantly, in certificate of need cases, we cannot substitute our own judgment for that of the Agency if substantial evidence exists. *See Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (citing cases); *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (citing cases).

Finally, we disagree with BMA that the Agency exceeded its statutory authority in using enhanced competition and increased consumer choice as the key comparative factors supporting an award of the certificate of need to TRC. We review this ground *de novo*, freely able to substitute our judgment for that of the Agency.

> Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. 'The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' *Skidmore v. Swift & Company*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124, 129 (1944).

Savings and Loan League v. Credit Union Comm., 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981). If appropriate, some deference to the Agency's interpretation is warranted when we are operating under the "traditional" standards of review and not the standards as amended. *See* N.C. Gen. Stat. § 150B-34(c) (2003); *Cape Med. Transp., Inc. v. N.C. Dep't. of Health and Human Servs.*, 162 N.C. App. 14, 21-22, 590 S.E.2d 8, 13-14 (2004) (under the APA as amended, there is little if any deference on questions of law).

Since *Brithaven*, when this Court laid out the two-stage process of comparative review of competing applications, we have continually held that the Agency's decision "may include not only whether and to what extent the applications meet the statutory and regulatory criteria, but it may also include other 'findings and conclusions upon which it based its decision.' " *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 461 (quoting N.C. Gen. Stat. § 131E-186(b) (1999)), *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995); *Living Centers-Southeast, Inc. v. N.C. Dep't. of Health & Human Servs.*, 138 N.C. App. 572, 574-75, 532 S.E.2d 192, 194 (2000); *Burke Health Investors v. N.C. Dep't. of Hum. Res.*, 135 N.C. App. 568, 577, 522 S.E.2d 96, 102 (1999). We find increased competition and consumer choice to be well within the established criteria in N.C. Gen. Stat. § 131E-183 and not inconsistent with the General Assembly's findings in N.C. Gen. Stat. § 131E-175.

N.C. Gen. Stat. § 131E-183(18a) (2003) addresses some degree of competition. "The applicant shall demonstrate the expected effects of

the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed . . . ." *Id.* Also, this Court has approved of "competition" as a rational means of comparing competing applications and awarding a certificate of need. *See Britthaven*, 118 N.C. App. at 386, 455 S.E.2d at 461. And, while the General Assembly's findings in N.C. Gen. Stat. § 131E-175 discuss how unbridled free-market competition in health care services would have a detrimental impact on the State, the current certificate of need process was created to protect against that danger. *See* N.C. Gen. Stat. § 131E-175 (2003). Yet, there is nothing about those findings, or the statutory criteria, that would preclude identifying the benefits of enhanced competition and consumer choice from among applicants that already qualify for receipt of the certificate. *See id.*

We have reviewed the record and find the remaining assignments of error to be without merit. The Agency's findings were supported by sufficient evidence and it did not exceed its statutory authority in using enhanced competition and consumer choice as key factors in a comparative analysis.

Affirmed.

Judges McGEE and CALABRIA concur.

JAMES S. BROWN, JR. & JACKY A. ROSATI, Plaintiffs v. CENTEX HOMES; MARY KATHRYN KROENING; DODD & ASSOCIATES, INC.; and JERRY OWENS, Defendants

No. COA04-1180

(Filed 19 July 2005)

1. Appeal and Error— appealability—denial of arbitration—substantial right

An interlocutory order denying arbitration affects a substantial right and is immediately appealable.

2. Arbitration and Mediation— sales agreement with home builder—arbitration available to agent as well as builder

An arbitration clause in a sales agreement with a home builder (Centex) extended to a sales representative (Kroening) who was an employee of the builder and acted as an agent for the builder, but did not sign the sales agreement.

Appeal by defendants Centex Homes and Mary Kathryn Kroening from order entered 11 May 2004 by Judge Wade Barber in Orange County Superior Court. Heard in the Court of Appeals 21 April 2005.

Law Office of Robert B. Jervis, P.C., by Robert B. Jervis, for plaintiffs-appellees.

John T. Benjamin, Jr., and William E. Hubbard, for defendant-appellant Centex Homes.

Manning Fulton & Skinner, P.A., by William C. Smith, Jr., for defendant-appellant Mary Kathryn Kroening.

No brief filed for defendant-appellees Dodd & Associates, Inc. and Jerry Owens.

TYSON, Judge.

Centex Homes ("Centex") and Mary Kathryn Kroening ("Kroening") (collectively, "defendants") appeal order entered 11 May 2004 granting Centex's motion to stay and compel arbitration and denying Kroening's motion to stay and compel arbitration. We reverse and remand.

I. Background

On 21 January 2002, James S. Brown, Jr., and Jacky A. Rosati ("plaintiffs") met with Kroening at a sales office owned by Centex located in the Becket's Ridge Subdivision in Hillsborough, North Carolina. Plaintiffs looked at a home located adjacent to a wooded piece of property. Plaintiffs asked Kroening about future plans for the adjacent land. She replied that there were no current plans, but if the property were developed, the construction would be residential. Plaintiffs executed a contract to purchase the home (the "Contract") and paid Centex a deposit. At this time, the Town of Hillsborough had approved construction of a shopping center anchored by a Wal-Mart store on the adjacent wooded tract.

On 22 October 2003, plaintiffs filed a complaint against defendants alleging fraud and unfair and deceptive trade practices and

requesting punitive damages. Defendants filed: (1) a motion to stay and compel arbitration; (2) a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b); and (3) an answer and affirmative defenses. Defendants' motion to stay and compel arbitration was heard in Orange County Superior Court on 3 May 2004. The trial court considered the pleadings, motions, and affidavits submitted by the parties and heard arguments by counsel. On 11 May 2004, the trial court entered an order granting Centex's motion to stay and compel arbitration and denying Kroening's motion to stay and compel arbitration. Defendants Centex and Kroening appeal.

II. Issue

The issue on appeal is whether the arbitration clause included in the Contract between plaintiffs and Centex extends to Kroening.

III. Interlocutory Appeal

[1] This Court has repeatedly held that "an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citations omitted). Pursuant to Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure, defendants properly recognized the interlocutory nature of their appeal and argued the grounds for immediate appellate review. N.C.R. App. P. 28(b)(4) (2004); *see* also *Chicora Country Club, Inc., et al. v. Town of Erwin*, 128 N.C. App. 101, 105, 493 S.E.2d 797, 800 (1997).

IV. Standard of Review

[2] This Court recently outlined the appropriate standard of review for considering the applicability of an arbitration provision:

> "The question of whether a dispute is subject to arbitration is an issue for judicial determination. This determination involves a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.
>
> A dispute can only be settled by arbitration if a valid arbitration agreement exists. The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings

> to the contrary. However, the trial court's determination of whether a dispute is subject to arbitration is a conclusion of law that is reviewable *de novo* on appeal."

Revels v. Miss Am. Org., 165 N.C. App. 181, 188-89, 599 S.E.2d 54, 59 (quoting *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004)) (internal citations and quotations omitted), *disc. rev. denied*, 359 N.C. 191, 605 S.E.2d 153 (2004).

V. Arbitration

Defendants argue the scope of the arbitration agreement included in the Contract between Centex and plaintiffs also extends to Kroening and her relationship with plaintiffs. We agree.

A. Valid Agreement

North Carolina recognizes a strong public policy in favor of arbitration. *Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). However, before a dispute can be ordered resolved through arbitration, there must be a valid agreement to arbitrate. *LSB Fin. Servs., Inc. v. Harrison*, 144 N.C. App. 542, 547, 548 S.E.2d 574, 577-78 (2001) (citations omitted). The law of contracts governs the issue of whether an agreement to arbitrate exists. *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271, 423 S.E.2d 791, 794 (1992) (citing *Southern Spindle and Flyer Co., Inc. v. Milliken & Co.*, 53 N.C. App. 785, 281 S.E.2d 734 (1981), *disc. rev. denied*, 304 N.C. 729, 288 S.E.2d 381 (1982)).

Both our research and that of the parties fail to disclose precedent established by our State appellate courts addressing the issue at bar. We turn our attention to federal decisions and opinions drafted by other jurisdictions. Although we are not bound by federal case law, we may find their analysis and holdings persuasive. *Huggard v. Wake County Hospital System*, 102 N.C. App. 772, 775, 403 S.E.2d 568, 570 (1991) ("As an interpretation of state law by a federal court, this holding is not binding on us; however, we find its analysis persuasive."), *aff'd*, 330 N.C. 610, 411 S.E.2d 610 (1992); *Trust Co. v. R.R.*, 209 N.C. 304, 308, 183 S.E. 620, 622 (1936) ("It may not be amiss to say that the decisions of other jurisdictions are persuasive, but not binding on us."); *Giles v. First Virginia Credit Servs., Inc.*, 149 N.C. App. 89, 99, 560 S.E.2d 557, 564 (2002) ("While cases from other jurisdictions are not binding on our courts, they provide insight . . . and therefore are instructive."), *disc. rev. denied and appeal dismissed*, 355 N.C. 491, 563 S.E.2d 568 (2002).

In *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, the Third Circuit Court of Appeals considered application of an arbitration clause between the employee of a corporation and a suing client. 7 F.3d 1110 (3rd Cir. 1993). The client alleged mishandling of its accounts by the corporation and its employee. *Id.* at 1113. Prior to opening the investment account, the client had signed an agreement with the corporation which included an arbitration clause. *Id.* at 1112. One of the central issues was whether the arbitration agreement extended to the corporation's employee. *Id.* at 1121. The court held, "[u]nder traditional agency theory, [the employee] is subject to contractual provisions to which [the employer] is bound . . . . Because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements." *Id.* (citing *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990); *Letizia v. Prudential Bache Securities*, 802 F.2d 1185, 1187-88 (9th Cir. 1986)). The Third Circuit noted, "[a]n entity . . . can only act through its employees . . . ." *Id.* at 1122 (citing *Trott v. Paciolla*, 748 F. Supp. 305, 309 (E.D. Pa. 1990)).

The United States District Court for the Middle District of North Carolina addressed this issue in *Collie v. Wehr Dissolution Corp.*, 345 F. Supp. 2d 555 (M.D.N.C. 2004). The plaintiff filed a complaint against the defendants, a corporation, its majority shareholder, and general manager, for causes of action arising from his termination of employment. *Id.* at 557. The latter two defendants were individuals. *Id.* at 561. A dispositive issue was whether an arbitration clause in an employment contract signed by the plaintiff and the defendant corporation precluded subject matter jurisdiction for the two individual defendants who did not sign the contract. *Id.*

> Generally, one who is not a party to an arbitration agreement lacks standing to compel arbitration. Non-signatories to an arbitration agreement may be bound by or enforce an arbitration agreement executed by other parties under theories arising out of common law principles of contract and agency law. Under the theory of agency, an agent can assume the protection of the contract which the principal has signed. Courts have applied this principle to allow for non-signatory agents to avail themselves of the protection of their principal's arbitration agreement.

Id. at 561-62 (internal citations and quotations omitted). The court held that although the two individual defendants did not sign the employment contract containing the arbitration clause, "their status

as agents of the Corporate Defendant enables them to use the [arbitration clause] to compel arbitration." *Id.* at 562.

Here, there is no dispute an agreement to arbitrate exists between plaintiffs and Centex. Plaintiffs did not appeal the trial court's order staying their claims against Centex and compelling them to submit their disputes against Centex to binding arbitration. Rather, the issue concerns whether that arbitration agreement extends to Centex's agent, Kroening.

Kroening did not sign the Contract which included the arbitration clause. However, her status as an agent of Centex affords her the right of arbitration. *Id.* The basis for plaintiffs' claims derive from Kroening's representation as an agent for Centex. Plaintiffs' complaint alleges: "At all times relevant to the issues involved in this action, Defendant Kroening was an employee, agent and representative of Defendant Centex and all of Defendant Kroening's acts and omissions complained of herein were committed by her in the course and scope of her employment with Defendant Centex." Plaintiffs' claims against Centex are based exclusively upon the conduct of its employee, Kroening, under vicarious liability. In order to reach Centex, plaintiffs must show Kroening was acting as its agent in furtherance of its business goals during the times at issue. As the Third Circuit noted in *Pritzker*, "An entity . . . can only act through its employees . . . ." 7 F.3d at 1122 (citing *Trott*, 748 F. Supp. at 309). Plaintiffs cannot circumvent the arbitration agreement with Centex by seeking damages from Centex's individual employee. We hold the arbitration clause in the Contract between plaintiffs and Centex extends to Kroening.

B. Dispute at Issue

Arbitration is contractually agreed to and " 'only those disputes which the parties have agreed to submit to arbitration may be so resolved.' " *Collie*, 345 F. Supp. 2d at 562 (quoting *Rodgers Bldrs., Inc. v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 731 (1985), *disc. rev. denied*, 315 N.C. 590, 341 S.E.2d 29 (1986)). "Courts look to the language of an agreement to determine whether the parties agreed to submit a particular dispute or claim to arbitration . . . and ascertain[s] whether the claims fall within its scope[.]" *Id.* (internal quotations omitted).

The Contract included the following language concerning the arbitration clause:

> Arbitration of disputes following closing: Seller prides itself on having many satisfied customers. In the unlikely event that a dispute relating to the marketing, sale, design, construction or conveyance of the residence arises between them after closing of the residence purchase, including a claim for personal injury or *misrepresentation*, Purchaser and Seller agree to resolve the dispute exclusively through binding arbitration. The arbitration will be conducted by the American Arbitration Association, in accordance with its Commercial Arbitration Rules . . . .

(Emphasis supplied).

The basis for plaintiffs' claims is Kroening's alleged misrepresentation concerning the future development and use of adjoining property. Under the terms of the arbitration clause, this dispute clearly falls within the scope of the agreement and is subject to arbitration. *See Revels*, 165 N.C. App. at 188-89, 599 S.E.2d at 59.

VI. Conclusion

This interlocutory appeal is properly before us due to defendants' assertion of the substantial right at issue. The arbitration agreement entered into by plaintiffs and Centex extended to Centex's agent, Kroening. This dispute is covered by the arbitration clause. The trial court's order is reversed and this matter is remanded.

Reversed and Remanded.

Chief Judge MARTIN and Judge LEVINSON concur.

EMMA CARSON POPE, BY AND THROUGH HER GUARDIANS AD LITEM; JIMMY M. POPE AND JEANNIE B. POPE; JIMMY M. POPE, INDIVIDUALLY; AND JEANNIE B. POPE, INDIVIDUALLY, PLAINTIFFS V. CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. FORMERLY CUMBERLAND COUNTY HOSPITAL AUTHORITY, INC., D/B/A CAPE FEAR VALLEY MEDICAL CENTER; LINDA T. MCALISTER, M.D., P.A. AND LINDA T. MCALISTER, M.D., INDIVIDUALLY, DEFENDANTS

No. COA04-1273

(Filed 19 July 2005)

1. Medical Malpractice— labor and delivery nurses—failure to report bleeding

The trial court erred by entering a directed verdict for defendant hospital on a negligence claim involving labor and delivery nurses where plaintiffs presented evidence that the failure of neonatal nurse practitioners to give a blood transfusion during resuscitation was a foreseeable result of the failure of the labor and delivery nurses to report their observations of bleeding.

2. Appeal and Error— cross-assignment of error—admissibility of expert testimony

The admissibility of expert testimony in a medical malpractice action was not an alternative basis in law supporting a directed verdict, and was not the proper subject of a cross-assignment of error.

Appeal by plaintiffs from order entered 15 March 2004 by Judge Ola M. Lewis in Cumberland County Superior Court. Heard in the Court of Appeals 11 May 2005.

Anderson, Daniel & Coxe, by Bradley A. Coxe, for plaintiffs-appellants.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P. by Mark E. Anderson and Kathrine E. Downing, for defendant-appellee.

ELMORE, Judge.

Plaintiff Jeannie Pope was admitted to the Cape Fear Valley Medical Center (CFVMC) in Fayetteville, North Carolina for induction of labor on 2 February 1999. At approximately 4:20 a.m. on 3 February 1999, Dr. Linda McAlister examined the status of Ms. Pope's cervix. Dr. McAlister determined that she would rupture the membranes in order to expedite delivery and then immediately insert a fetal scalp

electrode to monitor the fetal heart rate more accurately. At 4:24 a.m Dr. McAlister artificially ruptured Ms. Pope's membranes. In preparation for the attachment of the fetal scalp electrode, Nurse McLaurin, a labor and delivery nurse, disconnected the external monitor which was recording the heart rate. Dr. McAlister first attempted to insert the electrode at 4:25 a.m., and then a second time, but could not get a consistent reading. Dr. McAlister made a third attempt at 4:31 a.m. and at that time observed blood on her glove as she withdrew her finger from the cervix. The reading of the fetal scalp electrode indicated that the fetal heart rate had crashed, a condition known as bradycardia. Dr. McAlister ordered an emergency Cesarean section delivery. While Dr. McAlister was absent from the room preparing for the procedure, the bleeding from Ms. Pope's uterus intensified.

When plaintiff Emma Pope was born at approximately 4:44 a.m., she was pale and had no heartbeat. A team of neonatal nurse practitioners (NNPs) attempted to resuscitate Emma but did not administer a blood transfusion. Dr. Gallagher, a neonatologist, arrived fifteen minutes after the birth to examine the placenta and consult with Dr. McAlister. Dr. Gallagher then ordered that an emergency blood transfusion take place, and Emma received the transfusions at 5:21 and 5:25 a.m. But, as a result of the fetal bleeding which occurred prior to the blood transfusions, Emma sustained irreversible brain damage.

Plaintiffs filed an action in Cumberland County Superior Court against Cumberland County Hospital System (defendant Hospital) and Dr. Linda McAlister. Plaintiffs' *respondeat superior* claims against defendant Hospital were based upon the care provided by the labor and delivery nurses and by the NNPs on the resuscitation team. The trial began on 23 June 2003. At the close of plaintiffs' evidence, both defendants moved for directed verdicts. The trial court orally granted the motions as follows: a directed verdict in favor of Dr. Linda McAlister on all claims; and a directed verdict in favor of defendant Hospital with respect to the care rendered by the labor and delivery nurses. Thus, the only issue submitted to the jury was the alleged negligence by the neonatal nurses. The jury could not reach a unanimous verdict, and the court declared a mistrial on 9 August 2003.

The trial court entered written orders on 9 October and 14 October 2003 which, respectively, granted a directed verdict on the labor and delivery claims and granted a directed verdict on all claims against Dr. Linda McAlister. Plaintiffs subsequently settled their

appeal against Dr. McAlister. Thereafter, in an order filed 15 March 2004, the trial court denied plaintiffs' motion for relief from judgment and affirmed the 9 October order granting defendant's motion for directed verdict on the claims relating to the labor and delivery nurses. Plaintiffs appeal.

Plaintiffs assign error to the trial court's entry of directed verdict, arguing that there was sufficient evidence presented at trial to defeat defendant's motion for a directed verdict with respect to the labor and delivery care. "When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages." *Felts v. Liberty Emergency Service*, 97 N.C. App. 381, 383, 388 S.E.2d 619, 620 (1990) (internal quotation omitted). A directed verdict is rarely appropriate in a negligence case involving the application of a standard of care. *See Leatherwood v. Ehlinger*, 151 N.C. App. 15, 19, 564 S.E.2d 883, 886 (2002) (the issue of whether the defendant breached the standard of care is ordinarily a factual question for the jury; directed verdict in negligence cases is seldom appropriate), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 368 (2003).

I.

[1] Defendant contends that this Court should affirm the directed verdict on the basis that plaintiffs failed to establish proximate causation. In particular, defendant argues that the failure of the NNPs on the resuscitation team to immediately order and infuse blood into Emma Pope when she did not respond to resuscitation efforts was an intervening cause of her injuries.

As "causation is an inference of fact to be drawn from the circumstances," proximate cause is ordinarily a jury question. *Taylor v. Interim Healthcare of Raleigh-Durham, Inc.*, 154 N.C. App. 349, 353, 574 S.E.2d 11, 14 (2002), *disc. review denied*, 356 N.C. 695, 579 S.E.2d 102 (2003); *see also Leatherwood*, 151 N.C. App. at 24, 564 S.E.2d at 889. North Carolina defines intervening cause as "an independent force which entirely supercedes the original action and renders its effect in the chain of causation remote." *Adams v. Mills*, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984). Thus, "in order for the conduct of the intervening agent to break the sequence of events . . . the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it." *Id.*

Plaintiffs argue that the evidence supports two theories of a breach of the standard of care by the labor and delivery nurses and that each breach was a proximate cause of Emma Pope's injuries.[1] Plaintiffs introduced the deposition testimony of Dr. McAlister, and this testimony was read into the record. Dr. McAlister testified that Nurse McLaurin was present in the room throughout the fetal scalp electrode attempts which resulted in the bleeding and the call for an emergency C-section. Dr. McAlister further testified that she relied upon the labor and delivery nurses to advise the NNPs that there had been a bleeding episode. Plaintiffs also introduced Nurse McLaurin's deposition testimony, which revealed that she was present in the room during the resuscitation efforts of the NNPs and that she did not at any point inform them of the bleeding. Plaintiffs' expert witness Dr. Dillard testified that Nurse McLaurin breached the standard of care by failing to communicate the information to the resuscitation team. He stated that blood could have been available within five minutes of being ordered and that, had the NNPs been aware of the nature of the bleeding, they would have ordered blood immediately. Dr. Dillard further testified that the failure to have blood available and to give it immediately after the birth was the proximate cause of Emma's brain damage.

Defendant argues that the following testimony by Dr. Dillard demonstrates that the conduct of the neonatal nurses was an intervening cause:

> Q: Dr. Dillard, do you have an opinion to a reasonable degree of medical certainty, if the jury finds from the facts in its greater weight [that the NNPs were not given the information about the bleeding] . . . as to whether or not they breached the standard of care in the way they resuscitated this baby even if they were completely in the dark?
>
> A: Yes, because once they realized the baby was not responding to the resuscitation and was pale, they had to assume that the pallor, the pale color, was from blood loss. At that point they would have asked for blood and then immediately given . . . 20 milliliters per kilogram or 60 milliliters of normal saline while waiting for the blood to get from the blood bank. Typically in a hospital such as this, one can run to the blood bank, sign out the blood, get

1. Since the evidence of one of the two theories of negligence was sufficient to support an inference of causation, we do not address the evidence of plaintiffs' second theory.

> back up, and have it available to give within five minutes. So from 4:47 to 4:52 they could have been giving more volume, having realized that the baby had lost a lot of blood, and then by 4:52, they could have been giving blood.
>
> . . . .
>
> Q: All right, so in other words, this is your opinion that reasonable [NNPs] . . . should have recognized by 4:47, this baby needs blood and ordered it?
>
> A: Given the lack of response to the resuscitation over a three-minute period with intubation, chest compressions, and a baby who remained pale, that's—that would have been good evidence for the need to get blood.

However, we must review the evidence in the light most favorable to plaintiffs and deny the motion for directed verdict if there is more than a scintilla of evidence to support each element of plaintiffs' claim. *See Taylor*, 154 N.C. App. at 353, 574 S.E.2d at 14; *Williamson v. Liptzin*, 141 N.C. App. 1, 9-10, 539 S.E.2d 313, 318-19 (2000), *disc. review denied*, 353 N.C. 456, 548 S.E.2d 734 (2001). Moreover, "except in cases so clear that there can be no two opinions among fair-minded people . . . [the jury should] determine whether the intervening act and the resultant injury were such that the original wrongdoer could reasonably have expected them to occur as a result of his own negligence." *Barber v. Constien*, 130 N.C. App. 380, 388-89, 502 S.E.2d 912, 917-18 (internal quotation omitted), *disc. review denied*, 349 N.C. 227, 515 S.E.2d 699 (1998).

Here, plaintiffs presented evidence that the actions of the NNPs were a foreseeable result of the failure of the labor and delivery nurses to report their observations of bleeding associated with the fetal distress. Dr. Dillard testified that the way the resuscitation was conducted indicated that the NNPs had no idea that the baby had lost blood; he stated that if the NNPs had the information of the significant bleeding, that the standard of care required them to order blood for the baby. Defendant has not shown that, as a matter of law, the actions of the NNPs were an independent force which superceded the alleged negligence of the labor and delivery nurses. Plaintiffs' evidence was sufficient to create an inference of causation for the jury, and the trial court erred in entering directed verdict on the negligence claims relating to defendant's labor and delivery nurses.

II.

[2] Defendant sets forth several cross-assignments of error, arguing that the trial court erred in admitting testimony by plaintiffs' experts Dr. Ross and Dr. Dillard on the standard of care for labor and delivery nurses at CFVMC. Defendant contends that it is entitled to a directed verdict on this basis because there were no other expert witnesses to establish negligence by the labor and delivery nurses. However, in reviewing a trial court's order granting a motion for directed verdict, this Court must consider both admissible evidence and inadmissible evidence improperly admitted over the objection of the opposing party. *See Haney v. Alexander*, 71 N.C. App. 731, 733-34, 323 S.E.2d 430, 432 (1984), *cert. denied*, 313 N.C. 329, 327 S.E.2d 889 (1985). As the inadmissibility of plaintiffs' expert testimony is not *an alternative basis in law* to support the directed verdict, this argument is not the proper subject of a cross-assignment of error. *See* N.C.R. App. P. 10(d) (appellee may cross-assign as error only those actions or omissions of the trial court which "deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal was taken"); *see also Welling v. Walker*, 117 N.C. App. 445, 449, 451 S.E.2d 329, 332 (1994) (where evidentiary argument does not provide an alternative basis in law to support the judgment, appellee may not cross-assign error), *disc. review allowed*, 339 N.C. 742, 454 S.E.2d 663, *and review dismissed as improvidently granted*, 342 N.C. 411, 464 S.E.2d 43 (1995).

III.

Plaintiffs have presented evidence sufficient to defeat a motion for a directed verdict on their negligence claims with respect to defendant's labor and delivery nurses. We, therefore, reverse the orders of the trial court granting a directed verdict to defendant Hospital on the labor and delivery claims.

Reversed.

Judges McGEE and CALABRIA concur.

JACK H. WINSLOW FARMS, INC., PLAINTIFF v. T. CARL DEDMON, ET ALS, DEFENDANTS

No. COA04-1679

(Filed 19 July 2005)

Statutes of Limitation and Repose— farm silos—action for fraud two decades after sale—statute of repose

Plaintiff's 1998 action for fraud in the sale of allegedly defective silos in 1976 and 1977 was controlled by N.C.G.S. § 1-50(a)(6), the six-year statute of repose that runs from purchase, rather than N.C.G.S. § 1-52(9), a statute of limitations that accrues upon discovery of the facts and within which plaintiff filed.

Appeal by plaintiff from order entered 28 July 2004 by Judge Dwight L. Cranford in Halifax County Superior Court. Heard in the Court of Appeals 15 June 2005.

Hux, Livermon & Armstrong, L.L.P. by H. Lawrence Armstrong, Jr., and Blackburn & McCune, P.C. by Malcolm McCune, for plaintiff-appellant.

Pinto, Coates, Kyre & Brown, P.L.L.C. by David L. Brown and Bryan G. Scott, for defendant-appellees Dedmon and Dedmon's Harvestore Systems.

Leonard, Street, and Deinard, P.A. by Frederick W. Morris and Jeffrey A. Eyres, and Moore & Van Allen, P.L.L.C. by David E. Fox, for defendant-appellees A.O. Smith Corp.

ELMORE, Judge.

Jack Winslow Farms, Inc. (plaintiff)[1] appeals from an order of summary judgment granted in favor of defendants, a retailer and manufacturer of grain silos. For the following reasons, we affirm the trial court's summary judgment order.

In 1976 plaintiff purchased a Harvestore silo to store high moisture corn to be used as feed for his hogs. Plaintiff, a North Carolina farmer, traveled to farms in Wisconsin and Indiana that were using the Harvestore silo before making his own purchase. He investigated the silos and all the promotional literature associated with them.

1. Although plaintiff is an incorporated business, for the purposes of this opinion we will use "plaintiff" to refer to Jack Winslow individually.

Finally, he contacted Carl Dedmon, a local Harvestore silo dealer, who eventually sold plaintiff his first silo.

Pleased with its performance, plaintiff bought two additional silos in 1977. Throughout the more than twenty years of using the silos, plaintiff never had reason to doubt the quality of his purchases. The size of his farm increased from 300 acres in 1960 to almost 2000 acres in 1999, and at that point involved about 1000 sows. Plaintiff always received market value for his hogs, and the high moisture corn stored in the silos consistently kept its yellow color, did not dry out, and did not spoil.

Then, in 1997, as plaintiff was filling his third silo, it collapsed and fell into the first silo, damaging it as well. Plaintiff attempted to get defendants to repair or replace the silos at defendants' cost, but each denied any agreement or warranty for that purpose. Plaintiff contacted a lawyer to represent him who was already involved in related litigation against defendant A.O. Smith. This lawyer suggested that plaintiff conduct a "test" on the feed being distributed to the hogs from the silos. Plaintiff alleges that the results from this test, which was conducted solely by plaintiff, supported a theory that there were problems with the silos throughout their more than twenty years of use.

In June 1998, plaintiff filed suit against defendants for multiple claims including breach of contract, breach of warranties, fraud, unfair and deceptive trade practices, and products liability. Plaintiff alleged that a design defect had allowed moisture or oxygen to reach the corn causing it to spoil or otherwise fail to be as nutritious for plaintiff's hogs. Plaintiff further alleged that the sole reason in purchasing the silos was because they were designed and marketed as having the ability to prevent spoilage of high moisture corn.

Defendants moved for summary judgment on all claims arguing, in part, that the statute of repose, economic loss doctrine, and plaintiff's failure to adequately show damages entitled them to relief. The trial court granted defendants' motion for summary judgment on 28 July 2004 and plaintiff appeals.

Summary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003).

> Summary judgment is appropriate for the defending party when (1) an essential element of the other party's claim or defense is non-existent; (2) the other party cannot produce evidence to support an essential element of its claim or defense; or (3) the other party cannot overcome an affirmative defense which would bar the claim.

Caswell Realty Assoc. v. Andrews Co., 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998) (internal citation omitted).

> Whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. . . . However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes a question of law, and summary judgment is appropriate.

McCarver v. Blythe, 147 N.C. App. 496, 498, 555 S.E.2d 680, 682 (2001) (internal quotation omitted).

The question presented by this litigation is whether the statute of repose in N.C. Gen. Stat. § 1-50(a)(6) applies to plaintiff's fraud claim. Plaintiff argues that the statute of repose is inapplicable to claims for fraud,[2] which should instead be governed only by the three-year statute of limitations in N.C. Gen. Stat. § 1-52(9). Under that statute, a claim for fraud accrues only when the aggrieved party discovers the facts constituting the fraud. Plaintiff argues that despite twenty years of use, the discovery did not occur until January 1998 and, therefore, his complaint filed June 1998 is not time-barred. On the other hand, defendants argue that all of plaintiff's claims, including fraud, arise out of an alleged defect or failure in a product and are therefore controlled by section 1-50(a)(6), not section 1-52(9).

Section 1-50(a)(6) states that "[n]o action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption." N.C. Gen. Stat. § 1-50(a)(6) (2003). Section 1-50(a)(6), although included among statutes of limitations, is more aptly described as a statute of repose. *See Boudreau v. Baughman*, 322 N.C. 331, 339-40, 368 S.E.2d 849, 856-57 (1988) (construing N.C. Gen. Stat. § 1-50(6), now section 1-50(a)(6), and a Florida statute similar to it).

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2. At oral argument, plaintiff conceded that the other claims brought against defendants were properly decided by the trial court.

> Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover. . . . The statute of repose, on the other hand, acts as a condition precedent to the action itself. . . . Unlike a limitation provision which merely makes a claim unenforceable, a condition precedent establishes a time period in which suit must be brought in order for the cause of action to be recognized. If the action is not brought within the specified period, the plaintiff literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.

Id. at 340-41, 368 S.E.2d at 857 (internal citations and quotations omitted). If section 1-50(a)(6) applies to plaintiff's action, then each claim is one "for which the law affords no redress"; plaintiff filed suit in 1998, more than fourteen years after the statute allows.

In *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 396, 320 S.E.2d 273, 277 (1984), this Court applied what is now section 1-50(a)(6) to bar claims of breach of warranties, negligence, and failure to warn brought against a manufacturer. We stated that "[t]he generality of the language in Section 1-50(6) [now 1-50(a)(6)] indicates that the legislature intended to cover the multiplicity of claims that can arise out of a defective product." *Id.* While several other cases have strongly suggested that fraud arising from the marketing, selling, or advertising of products is also controlled by this statute, none have precisely held as such. *See Bernick v. Jurden*, 306 N.C. 435, 446-47, 293 S.E.2d 405, 412-13 (1982) (noting that the statute of repose in question was enacted to cover actions arising out of Chapter 99B, products liability, which include claims arising out of the marketing, selling, and advertising of a product); *Brown v. Lumbermens Mut. Casualty Co.*, 90 N.C. App. 464, 468-70, 369 S.E.2d 367, 369-71 (noting that fraudulent acts covering up a known defect would "arguably" be barred, but that fraudulent acts relating to providing counsel are hardly those that arise from the product and thus would not be barred by the statute), *disc. review denied*, 323 N.C. 363, 373 S.E.2d 541 (1988); *Davidson v. Volkswagenwerk, A.G.*, 78 N.C. App. 193, 194-95, 336 S.E.2d 714, 715-16 (holding that plaintiff's "tortious concealment" of a defect claim is barred by the plain language of the statute), *cert. denied*, 316 N.C. 375, 342 S.E.2d 892 (1986). In *Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. 438, 444, 444 S.E.2d 423, 427 (1994), our Supreme Court did not apply section 1-50(a)(6) to the case before it but instead applied section 1-50(5), now section 1-50(a)(5). Nonetheless, the

Court stated: "the difference in the two statutes of repose . . . [is that] [t]he real property improvement statute of repose expressly exempts all claims sounding in fraud or willful and wanton misconduct, whereas the products liability statute of repose contains no such exemption." *Id.*

Thus, despite having no case precisely on point, we find no ambiguity in the plain language of N.C. Gen. Stat. § 1-50(a)(6) and its application to claims of fraud arising from or in relation to an allegedly defective product. We too are persuaded by the stark contrast of section 1-50(a)(5), discussing the statute of repose for improvements to real property, and N.C. Gen. Stat. § 1-50(a)(6), dealing with all actions for damages to property "based upon or arising out of any alleged defect or any failure in relation to a product." The precision with which the General Assembly defined the scope of the real property statute of repose, *see* N.C. Gen. Stat. § 1-50(a)(5) (2003), is indicative of their intent to draft the products liability statute of repose broadly. Fraud is specifically noted as an exception to assertion of the statute in real property cases, N.C. Gen. Stat. § 1-50(a)(5)e. (2003), whereas there are no exceptions noted in regards to products liability.

Accordingly, plaintiff's action for fraud is controlled by N.C. Gen. Stat. § 1-50(a)(6). Plaintiff's claim for fraud arises from the alleged failure of a manufactured silo to perform as advertised or indicated by the silo's promotional literature. The silos were purchased in 1976 and 1977. Absent evidence of extended warranties, contracts, or otherwise upon which to base an action, plaintiff had six years from the date of purchase to bring claims against the manufacturer for defects or failures arising from the product. He did not do so, and his claims are now barred. Summary judgment in favor of defendants on this issue is dispositive.

Affirmed.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. PARIS DEMONE BURNS

No. COA04-907

(Filed 19 July 2005)

Probation and Parole— revocation of probation after probationary period—reasonable efforts to notify defendant of hearing

The trial court erred by revoking defendant's probation nearly three years after the probationary period expired without finding that the State made reasonable efforts to notify him and conduct the revocation hearing earlier as required by N.C.G.S. § 15-1344(f), and defendant is discharged, because: (1) the requirement contained in N.C.G.S. § 15-1344(f) does apply to a probation imposed under N.C.G.S. § 90-96, and thus the trial court erred by refusing to make the required findings; (2) at the revocation hearing defendant's probation officer testified she made only one attempt to locate defendant in 2001 at the address he had listed, which was prior to the filing of the probation violation report and issuance of the arrest warrant, and no attempt was made to serve the order for arrest until March 2004; and (3) the mere notation of "absconder" on the order for arrest did not relieve the State of its duty to make reasonable efforts to notify defendant under N.C.G.S. § 15-1344(f)(2).

Appeal by defendant from judgment entered 21 April 2004 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 March 2005.

Attorney General Roy Cooper, by Assistant Attorney General, Joan M. Cunningham, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender, Kelly D. Miller, for defendant-appellant.

STEELMAN, Judge.

On 20 January 2000, defendant pled guilty to felonious possession of cocaine. Because this was defendant's first offense, the trial court placed him on probation for eighteen months pursuant to N.C. Gen. Stat. § 90-96(a) under certain regular and special conditions of probation. The trial court did not enter an adjudication of guilt against

defendant upon the condition that he comply with the conditions of his probation. Defendant's probation was to run for eighteen months from January 2000 until July 2001.

On 1 March 2001, defendant's probation officer filed a probation violation report. The report alleged defendant violated four separate conditions of his probation. On 6 March 2001, an order for arrest was issued based on defendant's probation violations. On 18 March 2004, more than three years later, the police arrested defendant. Defendant was never served with the violation report prior to his arrest. A probation revocation hearing was held at the 21 April 2004 session of superior court, more than three years after defendant's probation period had expired. The trial judge found defendant wilfully violated the terms of his probation pursuant to N.C. Gen. Stat. § 90-96, entered an adjudication of guilt on the original charge, and sentenced defendant to six to eight months imprisonment. The trial court suspended this sentence and placed defendant on supervised probation for twenty-four months. Defendant appeals.

In his first argument defendant contends the trial court erred in revoking his probation after the probationary period expired without finding that the State made reasonable efforts to notify him and conduct the revocation hearing earlier in violation of N.C. Gen. Stat. § 15A-1344(f). We agree.

"A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Hicks*, 148 N.C. App. 203, 204, 557 S.E.2d 594, 595 (2001). Except as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term. *Id.* at 204-05, 557 S.E.2d at 595; *State v. Camp*, 299 N.C. 524, 527-28, 263 S.E.2d 592, 594-95 (1980). In order to revoke a defendant's probation after the probationary period has expired the trial court must "find[] that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier." N.C. Gen. Stat. § 15A-1344(f)(2) (2004). *See also State v. Hall*, 160 N.C. App. 593, 593, 586 S.E.2d 561, 561 (2003).

The facts in this case are undisputed. The trial court revoked defendant's probation nearly three years after it had expired. The trial judge refused to make the findings required under § 15A-1344(f), stating the provision did not apply to this case because "[t]his is not a regular probation case. This is a 90-96 judgment." This is incorrect. The requirement contained in N.C. Gen. Stat. § 15A-1344(f)

does apply to N.C. Gen. Stat. § 90-96, and as a result, the trial court erred in refusing to make findings as required by N.C. Gen. Stat. § 15A-1344(f).

N.C. Gen. Stat. § 90-96(a) provides:

> the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. . . . Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided.

N.C. Gen. Stat. § 90-96(a) (2004). This statute does not discuss in further detail the procedures the court should follow when a defendant violates a term or condition. In the absence of specifically enumerated procedures, those procedures set forth in Article 82 of Chapter 15A of our General Statutes regarding probation violations should apply. A reading of N.C. Gen. Stat. § 90-96 indicates the legislature intended the statutes governing probation and its revocation contained in Article 82 would apply to N.C. Gen. Stat. § 90-96, unless specifically exempted by that statute. This is evidenced by the fact that in drafting § 90-96, the legislature expressly excluded probations imposed under § 90-96 from the requirement of N.C. Gen. Stat. § 15A-1342(c) that a court imposing a probationary sentence also impose a suspended sentence of imprisonment. *See* N.C. Gen. Stat. § 90-96(a). In the absence of a provision to the contrary, and except where specifically excluded, the general probation provisions found in Article 82 of Chapter 15A apply to probation imposed under N.C. Gen. Stat. § 90-96. Accordingly, the trial court in this case was required to make specific findings under N.C. Gen. Stat. § 15A-1344(f), and its failure to do so was error.

The State contends that even though the trial court failed to make any findings as to the reasonableness of the State's efforts to locate defendant, it was not reversible error under the case of *State v. Hall*, 160 N.C. App. 593, 586 S.E.2d 561 (2003) because there is evidence in the record to support such a finding. The State's contention is based on the following language from *Hall*:

> Because the record shows that the trial court did not make any findings *(nor is there evidence in the record to support such findings*) that the State made reasonable effort to conduct the hearing earlier, we are compelled by *State v. Camp* to hold

> that "jurisdiction was lost by the lapse of time and the court had no power to enter a revocation judgment against defendant."

Hall, 160 N.C. App. at 593-94, 586 S.E.2d at 561 (emphasis added).

Even if we were inclined to give this language the tortured construction urged by the State, we find no evidence in the record to support such a finding in this case.

N.C. Gen. Stat. § 15A-1344(f) requires that the State have made a "reasonable effort" to notify the probationer of its intent to hold a probationary revocation hearing and have made a "reasonable effort" to conduct the hearing earlier. When attempting to determine the meaning of a word in a statute, the word must be given its ordinary meaning. *City of Concord v. Duke Power Co.*, 346 N.C. 211, 219, 485 S.E.2d 278, 283 (1997). N.C. Gen. Stat. § 15A-1344 does not define what constitutes a "reasonable effort." "Reasonable effort" has been defined to mean the diligent and timely implementation of a plan of action. N.C. Gen. Stat. § 7B-101(18) (2004). In the context of this statute that would mean those actions a reasonable person would pursue in seeking to notify defendant of his probation violation and conduct a hearing on the matter.

At the revocation hearing, defendant's probation officer testified she only made one attempt to locate defendant in 2001 at the address he had listed, which was prior to the filing of the probation violation report and issuance of the arrest warrant. She turned the file over to a surveillance officer following the issuance of the arrest warrant. No attempt was made to serve the order for arrest until March 2004.

The State contends that since there was a notation on the order for arrest that defendant was an "absconder," it was relieved from making any effort to notify defendant of the pending violation report. We note this violation report lists four violations, none of which were for absconding. Significantly, paragraph 3 of the violation report (DCC-10), which is the place on the form for asserting that a defendant absconded, is not marked as a violation in this case. The information contained in an arrest warrant is an allegation, not a conclusive fact. *See State v. Corbett*, 168 N.C. App. 117, 123, 607 S.E.2d 281, 284 (2005). The mere notation of "absconder" on the order for arrest did not relieve the State of its duty to make reasonable efforts to notify defendant under N.C. Gen. Stat. § 15A-1344(f)(2).

We hold that the State failed to demonstrate that it made reasonable efforts to notify defendant and conduct a hearing as required by N.C. Gen. Stat. § 15A-1344(f)(2).

Because the trial court failed to make the findings required by N.C. Gen. Stat. § 15A-1344, nor is there evidence in the record to support such a finding, we hold the trial court lacked both the jurisdiction and authority to revoke defendant's probation. The judgment appealed from is arrested and defendant is discharged. *Accord Hall*, 160 N.C. App. at 594, 586 S.E.2d at 562.

As a result of our holding, we need not address the remainder of defendant's assignments of error.

JUDGMENT ARRESTED.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA v. VERNELLE LAFARRIS BULLOCK, SR.

No. COA04-665

(Filed 19 July 2005)

1. Homicide— attempted voluntary manslaughter—doctrine of law of case

Although defendant contends his conviction for attempted voluntary manslaughter must be vacated based on the fact that the offense does not exist under North Carolina law, the conviction was not supported by the bill of indictment, the conviction was not supported by the evidence, and the offense was never submitted to a jury, the previous opinion of the Court of Appeals in this case is dispositive of each of those arguments based on the doctrine of the law of the case.

2. Sentencing— aggravating factor—victim suffered a serious injury that is permanent and debilitating—*Blakely* error

Defendant's rights under the Sixth Amendment were violated by the improper enhancement of his sentence for attempted voluntary manslaughter based upon an aggravating factor found by the trial judge by a preponderance of the evidence rather than by a jury beyond a reasonable doubt, and this case is remanded for

a new sentencing hearing, because: (1) *Blakely v. Washington*, 542 U.S. —— (2004), provides that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt; (2) those portions of N.C.G.S. § 15A-1340.16(a),(b), and (c) which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence violate the Sixth Amendment; and (3) defendant's sentence was enhanced by an additional 34 and 41 months' imprisonment based on the aggravating factor found by the trial court that the victim of this offense suffered a serious injury that is permanent and debilitating.

Appeal by defendant judgment entered 14 July 2003 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 7 March 2005.

Roy A. Cooper, III, Attorney General, by Amy C. Kunstling, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Daniel R. Pollitt and Kelly D. Miller, Assistant Appellate Defenders, for defendant.

MARTIN, Chief Judge.

On 28 September 2000, defendant was found guilty by a jury of attempted first degree murder and possession of a firearm by a felon; he thereafter pled guilty to having attained the status of an habitual felon. The charges arose out of an incident occurring on 29 April 2000 when defendant went to the home of his former wife and shot her four times. The trial court entered judgments sentencing defendant to a minimum of 313 months and a maximum of 385 months for attempted first degree murder; and a consecutive sentence, as an habitual felon, of a minimum of 110 months and a maximum of 141 months for possession of a firearm by a felon. Defendant appealed.

By an opinion filed 3 December 2002, a panel of this Court found no error with respect to defendant's conviction of possession of a firearm by a felon and his plea to having attained status as an habitual felon. *State v. Bullock*, 154 N.C. App. 234, 246, 574 S.E.2d 17, 24 (2002), *disc. review denied*, 357 N.C. 64, 579 S.E.2d 396, *cert. denied*,

—— U.S. ——, 157 L. Ed. 2d 231 (2003). With respect, however, to defendant's conviction of attempted first degree murder, this Court held that "because the indictment lacked the phrase 'malice aforethought,' it failed to properly allege the crime charged." *Bullock*, 154 N.C. App. at 244, 574 S.E.2d at 23. Relying on the holding in *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), "that attempted voluntary manslaughter is (1) a crime in North Carolina, and, (2) a lesser-included offense of attempted first-degree murder," this Court arrested judgment on defendant's conviction of attempted first degree murder and remanded the case for entry of judgment of guilty of the lesser included offense of attempted voluntary manslaughter, and re-sentencing, since "the jury found defendant to have been guilty of all elements of attempted first degree murder, including specific intent, but" the indictment failed to support that offense. *Bullock*, 154 N.C. App. at 245-46, 574 S.E.2d at 24.

Upon remand, defendant's trial counsel was permitted to withdraw due to defendant's dissatisfaction with his services and new counsel was appointed. At defendant's re-sentencing hearing, the victim testified that as a result of defendant's attack, she lost permanent sight in her left eye, requiring a prosthesis and preventing her from driving at night; suffers from severe headaches and seizures in her legs; can only open and close her right hand; is unable to cook because she cannot feel her right side and fears burning herself; and has short term memory problems. In addition, she testified that her children have suffered because their father told them that he did not shoot her, and so she had to "battle with them knowing that I was telling the truth."

After hearing the evidence, the trial court sentenced defendant

> for the crime of attempted voluntary manslaughter, Class E offense, however enhanced to the sentence Class C as habitual felon, prior record Level IV. The Court, after reviewing the opinion and the factual basis from the Court of Appeals opinion and hearing from the victim in this case, will elect to find aggravating factor No. 19, the serious and permanent debilitating injury, and would elect under these circumstances to sentence him in the aggravated range to 167 to 210 months. The Court would note that the other sentence ran at the expiration of this sentence. The Court would, of course, give him credit on this first sentence for any time served awaiting this hearing.

The trial court entered judgment accordingly, sentencing defendant to a minimum term of 167 months and a maximum term of 210 months, to begin at the expiration of defendant's sentence as an habitual felon for possession of a firearm by a felon. Defendant again appeals.

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[1] Defendant argues that his conviction for attempted voluntary manslaughter must be vacated because (1) the offense does not exist under North Carolina law, (2) the conviction was not supported by the bill of indictment, (3) the conviction is not supported by the evidence, and (4) the offense was never submitted to a jury. The previous opinion of this Court in this case is dispositive of each of those arguments. "According to the doctrine of the law of the case, once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *State v. Boyd*, 148 N.C. App. 304, 308, 559 S.E.2d 1, 3 (2002) (quoting *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994)). The previous decision of this Court mandating entry of judgment of conviction of attempted voluntary manslaughter and requiring defendant's re-sentencing for that offense is the law of the case. Therefore, these assignments of error are overruled.

[2] Defendant also asserts that his sentence for attempted voluntary manslaughter was enhanced based upon an aggravating factor found by the trial judge by a preponderance of the evidence, rather than by a jury beyond a reasonable doubt, and therefore violates his rights under the Sixth Amendment to the United States Constitution. In *Blakely v. Washington*, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 542 U.S. ——, 159 L. Ed. 2d 403, 412 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)). Our North Carolina Supreme Court applied the rule in *Blakely* to our structured sentencing scheme and determined that "statutory maximum" is equivalent to "presumptive range." *State v. Allen*, 359 N.C. 425, 437, —— S.E.2d ——, —— (July 1, 2005) (No. 485PA04). Further interpreting *Blakely*, our Supreme Court has held that "those portions of N.C.G.S. § 15A-1340.16.(a),(b), and (c) which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence" violate the

Sixth Amendment, *id.* at 438-39, —— S.E.2d at ——, and that such *Blakely* errors are structural errors and are, therefore, reversible *per se*. *Id.* at 444, —— S.E.2d at ——. Because defendant's sentence for attempted voluntary manslaughter was enhanced by an additional 34 and 41 months imprisonment based on the aggravating factor made by the trial court, that "the victim of this offense suffered a serious injury that is permanent and debilitating," we must remand for a new sentencing hearing. In light of our decision, we need not address defendant's other arguments regarding his re-sentencing.

Remanded for a new sentencing hearing.

Judges HUDSON and JACKSON concur.

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Habitual felon—Class I underlying felony—not disproportionate—Defendant's sentence for being an habitual felon was not grossly disproportionate. Sentencing as an habitual felon where the underlying felony is Class I (as here) or Class H has been affirmed on several occasions. **State v. Flemming, 413.**

Habitual felon—jurisdiction of underlying felony—collateral attack—A motion to dismiss an habitual felon charge for insufficient evidence was correctly denied where the motion concerned the jurisdiction of the district court on one of the prior convictions. Questioning the validity of the original conviction is an impermissible collateral attack. **State v. Flemming, 413.**

Habitual felon—miscalculation of prior record level—Defendant was not prejudiced by the trial court's miscalculation of his prior record level for purposes of his habitual felon status, because: (1) his sentence was within the range for a Class C level V felon; and (2) the trial court reviewing the miscalculation found as fact that the District Attorney's office discovered convictions that it failed to include in the initial sentencing worksheet, and including these convictions would place him at nineteen points which is within the presumptive range for level VI. **State v. Ledwell, 314.**

Habitual felon—prior record level—Defendant's sentencing for sale, delivery, and possession with intent to sell or deliver a controlled substance which was enhanced by his status as an habitual felon is remanded for resentencing because a prior record level worksheet did not meet the State's burden of establishing prior convictions. **State v. English, 277.**

Habitual felon—proportionate—not cruel and unusual punishment—The trial court's sentencing of defendant to 142 months to 180 months was not disproportionate to the crime committed and did not violate defendant's Eighth and Fourteenth Amendment rights where he was not sentenced only for stealing a watchband but his sentence was based on his status as an habitual felon. **State v. Ledwell, 314.**

Habitual felon—violent habitual felon—reversal of convictions—Defendant's convictions for obtaining habitual felon and violent habitual felon status are vacated where both relied upon defendant's conviction for armed robbery, and the armed robbery conviction was reversed. **State v. Duff, 662.**

No contact recommendation—reasonableness—The trial court's recommendation in a first-degree arson case that defendant have no contact with his ex-girlfriend, her new boyfriend, and her family for the duration of defendant's incarceration was not an unconstitutional form of punishment. **State v. Curmon, 697.**

TERMINATION OF PARENTAL RIGHTS—Continued

Entry of written order—five month delay—prejudicial—A termination of parental rights order was reversed where there was a five-month delay between the trial court's announcement of its decision and entry of the written order. While entry of the order outside the statutory thirty-day requirement has never been held reversible error without a showing of prejudice, a longer delay means that prejudice is more likely to be readily apparent. Here, closure was delayed for everyone involved, and records and transcripts have been misplaced or are irretrievable. **In re C.J.B. & M.G.B., 132.**

Failure to appoint guardian ad litem for parent—substance abuse—dependency adjudication proceeding—The trial court did not err by failing to appoint respondent mother a guardian ad litem due to her history of substance abuse for either the hearing on termination of parental rights or the dependency adjudication proceedings that occurred nineteen months earlier. **In re O.C. & O.B., 457.**

Failure to make reasonable progress toward correcting conditions that led to removal—clear, cogent, and convincing evidence—The trial court did not err by terminating respondent father's parental rights even though respondent contends that the trial court ignored positive evidence regarding his attempts to correct those conditions which led to his child's removal. **In re D.M., 244.**

Findings of fact—clear, cogent, and convincing evidence—The trial court did not err in a termination of parental rights case by its findings of fact that in turn supported its conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondent mother's parental rights based upon domestic violence and substance abuse. **In re O.C. & O.B., 457.**

Findings of fact—summarizing testimony—The trial court did not err in a termination of parental rights case by its findings of fact 31, 47, 48, 49, 50, and 51 even though respondent mother contends the trial court failed to make findings of fact but simply recited the testimony of witnesses at the hearing and made contradictory findings where the court made the necessary ultimate findings and made findings resolving material disputes. **In re C.L.C., K.T.R., A.M.R., E.A.R., 438.**

Grounds for termination—willfully leaving child in foster care without showing reasonable progress—neglect—willful abandonment—Although respondent mother contends the trial court relied upon an incorrect standard when it found that grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(2) since the statute has been amended so that the focus is no longer solely on the progress made in the twelve months prior to the petition, the error is immaterial because unchallenged grounds of neglect and willful abandonment were sufficient to support the trial court's order. **In re C.L.C., K.T.R., A.M.R., E.A.R., 438.**

Guardian ad litem for child—timeliness of appointment—The termination of respondent's parental rights was reversed and remanded because a guardian ad litem was not appointed for the child in a timely fashion. There should have been a guardian ad litem investigating and determining the best interests of the child from the first petition alleging neglect through the final determination; it was not sufficient that an attorney advocate was appointed for her or that the attorney advocate was appointed as the guardian ad litem during the hearing. The

WORKERS' COMPENSATION

Acceptance of evidence—credibility determination—responsibility of Commission—The acceptance of evidence by the Industrial Commission in a workers' compensation case, and the discounting of other evidence, was a credibility determination rather than the application of a standard of proof, and lies solely with the Commission. Furthermore, the Commission does not have to explain its findings by distinguishing the evidence it does or does not find credible. **D'Aquisto v. Mission St. Joseph's Health Sys., 216.**

Additional findings of fact required—reasonable excuse—causation—The Industrial Commission erred in a workers' compensation case by awarding plaintiff temporary total disability benefits and medical expenses without making adequate findings of fact on: (1) whether plaintiff had a reasonable excuse and the employer was not prejudiced by the delay in giving written notice as required by N.C.G.S. § 97-22; and (2) causation of the injury. Thus, the case is remanded for further findings. **Watts v. Borg Warner Auto., Inc., 1.**

Amount of compensation—aggravation and/or exacerbation caused by automobile accident—A workers' compensation case is remanded for a determination as to the proper amount of compensation to which plaintiff is entitled for his 6 April 2001 work-related injury and its aggravation and/or exacerbation caused by an 18 April 2001 automobile accident. **Cannon v. Goodyear Tire & Rubber Co., 254.**

Appeal—attorney fees—discretion of Commission—The Industrial Commission did not err by denying attorney fees to a workers' compensation plaintiff where the case had been appealed and remanded. Although N.C.G.S. § 97-88 allows the Commission to order payment of attorney fees to the plaintiff for an insurer's unsuccessful appeal, the plain language of the statute and the cases decided under it establish that the decision to award attorney fees is in the discretion of the Commission. **Cox v. City of Winston-Salem, 112.**

Assault at work—arising out of employment—The Industrial Commission properly concluded in a workers' compensation case that an assault arose out of plaintiff's employment as a cancer analyst at a hospital. **D'Aquisto v. Mission St. Joseph's Health Sys., 216.**

Authority of Industrial Commission—agreement transferring obligations—Adjudication of the validity of an agreement transferring workers' compensation liabilities along with a paper mill fell within the delegated authority of the Industrial Commission. N.C.G.S. § 97-6. **Goodson v. P.H. Glatfelter Co., 596.**

Authority of Industrial Commission—discharge of obligation—Determining whether a self-insurer has fully discharged its workers' compensation obligations is the province of the Industrial Commission; the Department of Insurance does not have that authority, by implication or expression. The Department of Insurance in this case improperly released the bond of a self-insured employer which did not secure its obligations in a manner compliant with N.C.G.S. § 97-185(g). **Goodson v. P.H. Glatfelter Co., 596.**

Automobile accident aggravated and/or exacerbated work-related injury—failure to show independent intervening cause—The Industrial Commission did not err in a workers' compensation case by its finding of fact and

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