NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 172

2 AUGUST 2005

16 AUGUST 2005

RALEIGH
2007

CITE THIS VOLUME
172 N.C. APP.

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

DISTRICT ATTORNEYS

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

PUBLIC DEFENDERS

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

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

UNITED STATES 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

IN THE MATTER OF: J.B.

No. COA04-579

(Filed 2 August 2005)

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

The assignment of error that respondent mother omitted from her brief is deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

2. Process and Service— termination of parental rights—service of summons on guardian ad litem's attorney advocate instead of guardian ad litem

The trial court did not err in a termination of parental rights case by exercising personal jurisdiction over respondent mother even though respondent contends the minor child was improperly served when the summons required by N.C.G.S. § 7B-1106(a)(5) was served upon the guardian ad litem's attorney advocate rather than the guardian ad litem, because: (1) assuming arguendo that this was error, the guardian ad litem did not object at trial to the sufficiency of service, nor does the guardian ad litem argue on appeal that the trial court lacked jurisdiction over the minor child; and (2) respondent has failed to demonstrate any prejudice to her resulting from an alleged failure to properly serve the minor child, and thus, it cannot be concluded that respondent was an aggrieved party directly and injuriously affected by the alleged error.

3. Termination of Parental Rights— subject matter jurisdiction—termination of parental rights order entered while prior appeal pending—motion to stay proceedings

The trial court did not err in a termination of parental rights case by denying respondent mother's request for a stay in the proceedings and thus exercising subject matter jurisdiction over the case by entering the instant order terminating respondent's parental rights while respondent's appeal of prior orders was pending before the Court of Appeals, because: (1) a trial court retains jurisdiction to terminate parental rights during the pendency of a custody order appeal in the same case; (2) where a termination order is entered while a prior custody order is pending, the termination order necessarily renders the pending appeal moot; and (3) the trial court provided several findings of fact in support of its decision to exercise jurisdiction over the case in general and the termination proceedings in particular, and respondent does not object to any of these findings of fact on appeal.

4. Termination of Parental Rights; Trials— motion to continue to gather evidence—recent incarceration

The trial court did not abuse its discretion in a termination of parental rights case by denying respondent mother's third motion to continue the trial based on respondent's recent incarceration in Oregon prior to the hearing and alleged insufficient time to gather evidence, because: (1) where the lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue; (2) respondent's incarceration in Oregon was the result of her own actions in abducting the minor child; and (3) the trial court granted respondent a continuance more than one month before her incarceration which was sought by respondent for the express purpose of allowing her to gather the documents she now asserts she was unable to attain. N.C.G.S. § 7B-803.

5. Indigent Defendants— request for expenses—expert witness fees

The trial court did not abuse its discretion in a termination of parental rights case by denying respondent mother's request for expenses related to expert witness fees, because: (1) respondent has failed to demonstrate how the diagnosis and records of a new mental health care provider would materially assist her in her

trial preparation; (2) respondent is unable to demonstrate how she was deprived of a fair trial without the requested expert assistance; and (3) there is no indication in the record that respondent submitted any bills or costs related to depositions and records of her current therapists despite the trial court's instruction allowing respondent to do so. N.C.G.S. § 7A-450.

6. Discovery— termination of parental rights—motion to interview minor child

The trial court did not abuse its discretion in a termination of parental rights case by denying respondent mother's motion to interview the minor child, because: (1) as evidenced by multiple findings of fact contained within multiple court orders, any contact respondent had with her son was disruptive to his own therapeutic progress; (2) the trial court was concerned with respondent's behavior in attempting to learn of her son's whereabouts when in 2001 respondent removed her son from foster care in North Carolina and absconded to a homeless shelter in South Carolina, and the trial court found as fact that respondent abducted her son for the second time on 23 May 2003 after waiting for him at his school bus stop, getting him in her vehicle, and taking him to Oregon; and (3) the trial court did not prevent respondent from subpoenaing her son to testify at the termination hearing.

7. Evidence— prior disposition orders—judicial notice—independent determination

The trial court did not err in a termination of parental rights case by admitting into evidence prior disposition orders in the matter even though respondent mother contends their exclusion is required since they were based upon a lower evidentiary standard, because: (1) respondent failed to cite authority for the contention that judicial notice is inappropriate where the other orders have a lower evidentiary standard, and she is unable to overcome the well-established supposition that the trial court in a bench trial is presumed to have disregarded any incompetent evidence; and (2) nothing in the record indicates that the trial court failed to conduct the independent determination required at a termination hearing when prior disposition orders have been entered in the matter.

8. Evidence— mental health records of parent—hospital medical records—previously admitted into evidence

The trial court did not err in a termination of parental rights case by admitting into evidence respondent mother's mental health records even though respondent contends they were not covered in the definition of hospital medical records under N.C.G.S. Ch. 122C, because: (1) N.C.G.S. § 122C-3(9) defines confidential information as any information, whether recorded or not, relating to an individual served by a facility that was received in connection with the performance of any function of the facility, and N.C.G.S. § 122C-54(a) requires a medical facility to disclose confidential information if a court of competent jurisdiction issues an order compelling disclosure; and (2) the mental health records now challenged were originally admitted into evidence during a permanency planning review hearing held 13 and 15 March 2002, respondent did not appeal the trial court's subsequent order, the trial court did not err by admitting into evidence prior disposition records in the matter, and the trial court's termination of parental rights was based upon a determination independent of the prior disposition orders in the case.

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

Although respondent mother contends the trial court erred in a termination of parental rights case by allowing two therapists to testify and render conclusions regarding their evaluations, respondent waived her right to challenge this issue on appeal because: (1) respondent offered no objection during the hearing to either of the witnesses' qualifications; and (2) on appeal, respondent does not point to any testimony by the witnesses admitted over her objection.

10. Termination of Parental Rights— exclusion of parent from courtroom during child's testimony—*Eldridge* factors

The trial court did not err in a termination of parental rights case by excluding respondent mother from the courtroom during her minor son's testimony without providing specific findings and conclusions regarding the minimum requirements of fundamental fairness and its relation to the trial court's decision to exclude respondent from the courtroom, because: (1) trial courts are not required to make the specific findings and conclusions asserted by respondent; (2) a review of the *Eldridge* factors leads to the

conclusion that the trial court did not err when the risk of error from the procedure employed at trial was slight in light of the fact that respondent was placed in an adjacent room with a television monitor and had telephonic access to her attorneys; and (3) respondent did not suffer prejudice as a result of her exclusion from the courtroom since the trial court preserved respondent's opportunity to cross-examine the minor child through her court-appointed counsel.

11. Termination of Parental Rights— disposition hearing—separate hearing not required

The trial court did not improperly fail to conduct a dispositional hearing prior to concluding that respondent mother's parental rights should be terminated, because: (1) there is no requirement that the adjudicatory and dispositional stages be conducted at two separate hearings; (2) absent affirmative indication to the contrary, appellate courts presume that the judge sitting without a jury is able to consider the evidence in light of the applicable legal standard and to determine whether grounds for termination exist before proceeding to consider evidence relevant only to the dispositional stage; (3) the trial court accepted evidence from both parties for dispositional purposes during the adjudication stage and the trial court conducted a disposition hearing following the adjudicatory stage; and (4) respondent was given ample opportunity to present evidence and provide argument regarding disposition.

12. Termination of Parental Rights— best interests of child—specific oral findings regarding disposition not required

The trial court did not abuse its discretion by concluding that it was in the minor child's best interests to terminate respondent mother's parental rights even though respondent contends the trial court failed to make specific oral findings regarding disposition, because: (1) N.C.G.S. § 7B-1110(a) does not require the trial court to issue oral findings with regard to its determination; (2) the terms of disposition must have been stated with particularity, and following the closing of the proceedings in the instant case, the trial court stated from the bench that it was terminating respondent's parental rights; and (3) the trial court's written order conforms with its oral determination at trial, and its findings of fact are based on competent evidence contained within the record.

13. Termination of Parental Rights— prevailing party drafting order—common practice

The trial court did not err by directing petitioner's attorney to draft the order for termination of parental rights, because: (1) nothing in N.C.G.S. § 1A-1, Rule 58 or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf; and (2) the trial court indicated that it had determined that sufficient grounds exist to terminate respondent's parental rights pursuant to each of the statutory grounds alleged in the petition, and it also designated specific findings of fact that it wanted included in the order.

14. Termination of Parental Rights— delay in entering order—failure to demonstrate prejudice

The trial court did not commit prejudicial error by failing to enter the order terminating respondent mother's parental rights within thirty days as required by N.C.G.S. § 7B-1110(a) when the termination hearing was completed on 23 July 2003 and the order was not filed until 27 October 2003, because respondent failed to sufficiently demonstrate prejudice regarding the delay in the entry of the termination order.

Appeal by respondent from order entered 27 October 2003 by Judge Marvin P. Pope, Jr., in Buncombe County District Court. Heard in the Court of Appeals 26 January 2005.[1]

Charlotte A. Wade, Esq., for petitioner-appellee Buncombe County Department of Social Services.

Judy N. Rudolph, for guardian ad litem-appellee.

Hall & Hall, Attorneys at Law, P.C., by Susan P. Hall, for respondent-appellant.

TIMMONS-GOODSON, Judge.

Respondent-mother appeals the trial court order terminating her parental rights to her minor son, John.[2] For the reasons discussed herein, we affirm the order of the trial court.

1. By order of this Court, the filing of this opinion was delayed pending the outcome of our Supreme Court's decision in *In re R.T.W.*, 359 N.C. 539, —— S.E.2d —— (Filed 1 July 2005) (No. 417PA04).

2. For the purposes of this opinion, we will refer to the minor child by the pseudonym "John."

The facts and procedural history pertinent to the instant appeal are as follows: On 7 October 2002, Buncombe County Department of Social Services ("petitioner") filed a petition to terminate respondent's parental rights to John. The petition asserted that sufficient evidence exists to terminate respondent's parental rights to John pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2) and (6), in that respondent: (i) neglected John by failing to provide him with appropriate care, by subjecting him to an environment injurious to his emotional welfare, and by emotionally abusing John; (ii) willfully left John in foster care or placement out of the home for more than twelve months without making reasonable progress under the circumstances to correct those conditions which led to John's removal; and (iii) was incapable of providing for the proper care and supervision of John. The case proceeded to trial, and, after hearing arguments and receiving evidence from the parties, the trial court concluded that sufficient grounds exist to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6). After concluding that it was in the best interests of John to do so, the trial court entered an order terminating respondent's parental rights on 27 October 2003. It is from this order that respondent appeals.

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[1] We note initially that respondent's brief contains arguments supporting only fourteen of the original fifteen assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the omitted assignment of error is deemed abandoned. Therefore, we limit our present review to those issues properly preserved by respondent for appeal.

The issues on appeal are whether the trial court erred by: (I) exercising personal jurisdiction over respondent; (II) denying respondent's request for a stay in the proceedings and thus exercising subject matter jurisdiction over the case; (III) denying respondent's motion to continue the trial; (IV) denying respondent's request for expenses; (V) denying respondent's motion to interview John; (VI) admitting into evidence prior disposition orders in the matter; (VII) admitting into evidence respondent's mental health records; (VIII) allowing two therapists to testify and render conclusions regarding their evaluations; (IX) excluding respondent from the courtroom during John's testimony; (X) concluding that respondent's parental rights should be terminated prior to a disposition hearing; (XI) concluding that it was in John's best interests to terminate respondent's parental rights; (XII) directing petitioner's attorney to draft the order for ter-

mination of parental rights; and (XIII) failing to enter the order terminating respondent's parental rights within thirty days.

I. Personal Jurisdiction

[2] Respondent first argues that the trial court erred by exercising personal jurisdiction over her. Respondent asserts that the failure to properly serve John prevented the trial court from acquiring jurisdiction over respondent. We disagree.

Upon the filing of a petition to terminate parental rights, the Juvenile Code requires that a summons regarding the proceeding be issued to the juvenile whose rights are to be terminated. N.C. Gen. Stat. § 7B-1106(a)(5) (2003). "[T]he summons and other pleadings or papers directed to the juvenile shall be served upon the juvenile's guardian ad litem if one has been appointed[.]" *Id.* In the instant case, the record reflects that the summons required by N.C. Gen. Stat. § 7B-1106(a)(5) was served upon the guardian *ad litem's* attorney advocate rather than the guardian *ad litem*. Assuming *arguendo* that this was error, we note that the guardian *ad litem* did not object at trial to the sufficiency of service, nor does the guardian *ad litem* argue on appeal that the trial court lacked jurisdiction over John. Instead, respondent objects to the sufficiency of the service, arguing that the failure to properly serve John constitutes grounds for reversal of the trial court order.

"Only a 'party aggrieved' may appeal from an order or judgment of the trial division." *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (quoting N.C. Gen. Stat. § 1-271). "An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court." *Culton*, 327 N.C. at 625, 398 S.E.2d at 324. In the instant case, respondent has failed to demonstrate any prejudice to her resulting from the alleged failure to properly serve John. Thus, we are unable to conclude that respondent was "directly and injuriously" affected by the alleged error, and, accordingly, we overrule this argument.

II. Subject Matter Jurisdiction

[3] Respondent presents two arguments asserting that the trial court erred by exercising subject matter jurisdiction over the case. Respondent first asserts that the trial court erred by denying her request for a stay in the termination proceeding pending this Court's determination of her appeal of previous orders. Respondent also asserts that the trial court did not have subject matter jurisdiction

over the case at the time of the termination hearing, "pursuant to the decision of this [C]ourt captioned as *In re J.B.*, 03-807[.]" Because of the similarity of these two arguments, we have chosen to address them concurrently, and, in light of the record before us, we conclude that the trial court did not err.

In *In re J.B.*, 164 N.C. App. 394, 595 S.E.2d 794 (2004) ("*J.B. I*"), this Court reviewed a previous appeal by respondent stemming from trial court orders changing the permanency plan for John, releasing petitioner from all efforts to reunify respondent with John, and dismissing respondent's previous appeals regarding production of medical records and permanency planning hearings. Respondent contended in *J.B. I* "that the trial court did not possess subject matter jurisdiction in this matter because [John] and respondent were residing outside of North Carolina at the time the proceedings in this case were initiated." *Id.* at 396, 595 S.E.2d at 795. After reviewing the record, we were unable to conclude whether the trial court possessed subject matter jurisdiction. We thus vacated the order and remanded the case with instructions to the trial court to "make specific findings of fact to support its conclusion of law that it possessed subject matter jurisdiction under the [Uniform Child Custody Jurisdiction and Enforcement Act] and [Parental Kidnapping Prevention Act] as outlined in N.C. Gen. Stat. § 50A-201." *Id.* at 398, 595 S.E.2d at 797.

The record in the instant case reveals that, while respondent's prior appeal was pending, the trial court entered the instant order terminating respondent's parental rights. Respondent contends that the trial court was prohibited from entering an order terminating her parental rights while her prior appeal was pending before this Court. However, our Supreme Court has recently issued an opinion in *In re R.T.W.*, 359 N.C. 539, —— S.E.2d —— (Filed 1 July 2005) (No. 417PA04), whereby the Court held that "a trial court retains jurisdiction to terminate parental rights during the pendency of a custody order appeal in the same case." 359 N.C. at 553, —— S.E.2d at ——. The Court noted that "[e]ach 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[,]" *Id.* at 553, —— S.E.2d at ——, and it concluded that, where a termination order is entered while a prior custody order is pending, "[t]he termination order necessarily renders the pending appeal moot." *Id.* at 553, —— S.E.2d at ——. In the instant case, the trial court provided several findings of fact in support of its decision to exercise jurisdiction over the case in general and the termination proceedings in particular.

Respondent does not object to any of these findings of fact on appeal. Therefore, in light of the foregoing, we conclude that the trial court had subject matter jurisdiction over the case and did not err in denying respondent's motion to stay the termination proceeding. Accordingly, this argument is overruled.

III. Motion to Continue

[4] Respondent also argues that the trial court erred by denying her motion to continue the termination hearing. Respondent asserts that the trial court was required to continue the termination hearing due to respondent's recent incarceration. We disagree.

N.C. Gen. Stat. § 7B-803 (2003) provides as follows:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

A trial court's decision regarding a motion to continue is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (citing *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984)). Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation. *Id.* "Where the lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue." *In re Bishop*, 92 N.C. App. 662, 666, 375 S.E.2d 676, 679 (1989).

In the instant case, respondent requested that the trial court continue the termination hearing because she had been incarcerated prior to the hearing and was thus unable to gather evidence located in Oregon. However, as the trial court noted in the order terminating respondent's parental rights, the termination hearing had been rescheduled numerous times prior to that proceeding which eventually occurred the week of 21 July 2003. The termination hearing was originally scheduled for March 2003, but, upon agreement of the parties, the matter was continued until 21 April 2003. On 21 April

2003, respondent requested a continuance on the grounds that she had been injured in an automobile accident in Oregon and was unable to attend the termination hearing in North Carolina. She also expressed that she needed additional time to secure evidence for the hearing. The trial court granted respondent's motion and ordered that the termination hearing be rescheduled for 13 June 2003. However, on or about 23 May 2003, respondent returned to North Carolina from Oregon and allegedly kidnapped John. In its order terminating parental rights, the trial court made the following pertinent finding of fact:

> On or about May 23, 2003, [respondent] came back to North Carolina and abducted [John] by waiting for him at his school bus stop and getting him in her vehicle and taking him to Oregon. This was at least the second time [respondent] had removed [John] from his foster placement and left the state with him. A felony warrant was issued against [respondent] and [respondent] and [John] were located in Oregon. On June 5, 2003 [respondent] was arrested for felony abduction and [John] was returned to North Carolina. [Respondent] initially resisted being ex[tradited] back to North Carolina, but she subsequently agreed to and was ex[tradited] back to North Carolina.

Following her arrest for felony kidnapping, respondent filed a second motion to continue the termination hearing and challenged her extradition to North Carolina. The trial court granted respondent's second motion to continue and ordered that the termination hearing be rescheduled to commence on 21 July 2003.

We note that respondent's incarceration in Oregon was the result of her own actions in abducting John, and we also note that the trial court granted respondent a continuance more than one month before her incarceration—a continuance sought by respondent for the express purpose of allowing her to gather the documents she now asserts she was unable to obtain. In light of the foregoing, we conclude that the trial court did not abuse its discretion by denying respondent's third motion to continue. Therefore, we overrule this argument.

IV. Request for Expenses

[5] Respondent further argues that the trial court erred by denying her request for expenses related to expert witness fees. Respondent asserts that she sufficiently demonstrated her need for assistance

in procuring and paying for expert witness testimony and was thus entitled to expenses from the State. We disagree.

N.C. Gen. Stat. § 7A-450 (2003) provides as follows:

> (b) Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.

"[T]he appointment of experts to assist an indigent in his defense depends really upon the facts and circumstances of each case and lies, finally, within the discretion of the trial judge." *State v. Gray*, 292 N.C. 270, 277, 233 S.E.2d 905, 910-11 (1977) (citing *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976)).

> To establish a particularized need for expert assistance, a defendant must show that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that the expert will materially assist him in the preparation of his case. Although particularized need is a flexible concept and must be determined on a case-by-case basis, "[m]ere hope or suspicion that favorable evidence is available is not enough to require that such help be provided[.]" The trial court has discretion to determine whether a defendant has made an adequate showing of particularized need. In making its determination the trial court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made.

State v. Page, 346 N.C. 689, 696-97, 488 S.E.2d 225, 230 (1997) (citations omitted) (alteration in original), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651 (1998).

In the instant case, on 11 April 2003, respondent filed a pretrial motion requesting "approval of expenses for supporting services; specifically, for the services of expert witnesses and/or expenses related to taking the depositions of mental health treatment providers in the State of Oregon." In support of this motion, respondent asserted that she had "lived in Oregon for some time and her current and most recent mental health providers are all located in the state of Oregon[,]" and that she "need[ed] approval . . . for expenses in order to secure the testimony of the Providers who can establish [her] cur-

rent mental health status . . . ." On 21 April 2003, the trial court denied respondent's request, finding in pertinent part that

> [Respondent] did not provide to the court any showing of need to have the court appoint and pay for expert witnesses in Oregon as [respondent] has her own therapists in Oregon who have been addressing these issues with [respondent]. The court did advise [respondent's] attorney that the attorney can submit any bills for the court's consideration concerning a telephone deposition for [respondent] with her therapist, or with any costs related to providing records concerning [respondent's] relationship with the therapist, the therapist's treatment for [respondent], any diagnosis, and any treatment recommendations, and the court will make a determination at that time.

After reviewing the record in the instant case, we conclude that respondent has failed to demonstrate how the diagnosis and records of a new mental health care provider would "materially assist" her in her trial preparation, and we further conclude that respondent is unable to demonstrate how she was deprived of a fair trial without the requested expert assistance. Moreover, we note that there is no indication in the record that respondent submitted any bills or costs related to depositions and records of her current therapists, despite the trial court's instruction allowing respondent to do so. In light of the foregoing, we conclude that the trial court did not abuse its discretion in denying respondent's request, and, accordingly, we overrule this argument.

V. Motion to Interview John

[6] Respondent also argues that the trial court erred by denying her motion to interview John. Respondent asserts that by preventing her from interviewing John, the trial court denied her the right to fully prepare for the termination hearing. We disagree.

Juvenile proceedings are generally governed by the Rules of Civil Procedure. *See In re Clark*, 303 N.C. 592, 598 n. 3, 281 S.E.2d 47, 52 n. 3 (1981) (proceedings to terminate parental rights are either civil actions or special proceedings, both of which are governed by the Rules of Civil Procedure, "except where a different procedure may be prescribed by statute"); N.C. Gen. Stat. § 7A-193 (2003). N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2003) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim

or defense of any other party." However, Rule 26(b)(1) provides that discovery may be limited by the court if it is "unduly burdensome." According to the Rule, "[t]he court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c)." *Id.* Similarly, under N.C. Gen. Stat. § 7B-700(a) (2003), the trial court may, "upon written motion of a party and a finding of good cause, . . . order that discovery be denied, restricted, or deferred." We review a trial court's ruling on discovery matters under the abuse of discretion standard. *Ritter v. Kimball*, 67 N.C. App. 333, 335, 313 S.E.2d 1, 2 (1984). A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In the instant case, the record indicates that at or prior to a permanency planning and review hearing on 4 February 2002, respondent requested that John be present at all court hearings. In a permanency planning and review order filed 17 April 2002, the trial court found that during supervised visits with John, petitioner required that respondent "keep[] the focus of the visit on [John] and not on her own issues like mental or physical health, felony charges and placement issues for [John], so as to avoid causing [John] undue worry." The trial court thereafter ordered that "[John's] therapist shall provide a written report regarding the appropriateness of [John's] participation in upcoming treatment team meetings and court hearings." In subsequent orders, the trial court continued to require the approval of John's therapists prior to John having contact with respondent. In a permanency planning review order entered 22 October 2002, the trial court extended a restraining order which prevented respondent from contacting John's father. At the time of the permanency planning review hearing, social workers were attempting to extend John's visits with his father, but "this placement" had been "disrupted . . . to the detriment of [John]" by respondent's "continuing and escalating intrusive behaviors of allegedly contacting [John] at the day camp he attended, sending secret messages to [John] though his younger sister . . . , making repeated calls to [John's] new therapist's office, [and] contacting his counselors at the camp wanting information about [John's father's whereabouts]."

In a permanency planning and review order entered 4 June 2003, the trial court granted a request to provide respondent with John's school and medical records, but the trial court required that "any

identifying information concerning the foster parents or where [John] lives" be removed from the records prior to their presentation. The trial court later found that John's guardian *ad litem*, social worker, and therapists were concerned that contact with respondent "has given false hope and information to [John], and that this is causing confusion to [John], and causing him to be mistrustful with his social worker and his therapist."

Respondent's instant argument arises from a Motion To Allow Counsel To Interview Child filed 11 April 2003. In that motion, respondent requested that the trial court allow her an "opportunity to interview [John] in order to determine whether or not to present his testimony to the court." Respondent asserted that John was "a fact witness to a number of allegations contained within the petition." Respondent noted the "alleg[ation] that [respondent] had contact with [John] in violation of a court order during the summer of 2002 and that this contact jeopardized [John's] placement[,]" and she asserted that John "would provide the court the very best evidence as to the truth of these allegations." On 6 June 2003, the trial court entered an order denying respondent's motion to interview John, finding as fact that "this motion has already been heard by this court and [John's] therapist is to inform this court when, and if, [John] should have contact with" respondent.

After reviewing the record in the instant case, we conclude that the trial court did not abuse its discretion by denying respondent's request to interview John. As evidenced by multiple findings of fact contained within multiple court orders, any contact respondent had with John was disruptive to his own therapeutic progress. It is clear from the record that the trial court was concerned with respondent's behavior in attempting to learn of John's whereabouts. As detailed above, in the order terminating respondent's parental rights, the trial court found as fact that respondent abducted John "for the second time" on 23 May 2003, after "waiting for him at his school bus stop and getting him in her vehicle and taking him to Oregon." In 2001, respondent removed John from foster care in North Carolina and absconded to a homeless shelter in South Carolina. As discussed below, the trial court did not prevent respondent from subpoenaing John to testify at the termination hearing. Therefore, in light of the foregoing, we conclude that the trial court did not err by denying respondent's motion to interview John. Accordingly, we overrule this argument.

VI. Prior Disposition Orders

[7] Respondent next argues that the trial court erred by admitting into evidence prior disposition orders in the matter. Respondent contends that the trial court was required to exclude the orders because they were based upon a lower evidentiary standard. We disagree.

"A trial court may take judicial notice of earlier proceedings in the same cause." *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991). N.C. Gen. Stat. § 8C-1, Rule 201(b) (2003) provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." This Court has previously held that in a termination of parental rights proceeding, prior adjudications of abuse or neglect are admissible, but they are not determinative of the ultimate issue. *In re Huff*, 140 N.C. App. 288, 300, 536 S.E.2d 838, 846 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001); *In re Beck*, 109 N.C. App. 539, 545, 428 S.E.2d 232, 236 (1993).

In the instant case, the trial court allowed petitioner to introduce into evidence "judgments and orders in the underlying juvenile court action, File #01 J 124[.]" Respondent contends that this decision was improper, in that the trial court thereby admitted into evidence review orders from hearings where the evidence was subject to a lower standard of evidentiary proof. However, respondent cites no authority for the contention that "judicial notice is inappropriate where the other orders have a lower evidentiary standard[,]" and she is unable to overcome the well-established supposition that the trial court in a bench trial "is presumed to have disregarded any incompetent evidence." *Huff*, 140 N.C. App. at 298, 536 S.E.2d at 845. Furthermore, nothing in the record indicates that the trial court failed to conduct the independent determination required at a termination hearing when prior disposition orders have been entered in the matter. *In re Ballard*, 311 N.C. 708, 715-16, 319 S.E.2d 227, 232-33 (1984). Therefore, we conclude that the trial court did not err by admitting the prior disposition orders, and, accordingly, we overrule this argument.

VII. Respondent's Mental Health Records

[8] Respondent also argues that the trial court erred by allowing petitioner to introduce into evidence respondent's mental health records. We note initially that respondent originally assigned error to the

admissibility of the records on the basis that she was not given an opportunity to cross-examine the mental health officials who provided the records. However, in her brief, respondent asserts that the mental health records were inadmissible at the termination hearing because they were not covered under the statutory definition of "hospital medical records." It is well established that "the law does not permit parties to swap horses between courts in order to get a better mount" in the appellate court. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Nevertheless, in our discretion pursuant to N.C.R. App. P. 2, we have chosen to review respondent's argument, and, as detailed below, we conclude that the trial court did not err.

The record indicates that the trial court ordered the production of respondent's mental health records at a permanency planning review hearing held prior to the termination hearing. N.C. Gen. Stat. § 1A-1, Rule 45(c)(2) (2003) provides that where a custodian of hospital medical records is ordered to produce certain records in the custodian's custody, the custodian may tender to the court certified copies of the records requested. "Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication." *Id.*

N.C. Gen. Stat. § 8-44.1 (2003) provides that copies or originals of hospital medical records

> shall not be held inadmissible in any court action or proceeding on the grounds that they lack certification, identification, or authentication, and shall be received as evidence if otherwise admissible, in any court or quasi-judicial proceeding, if they have been tendered to the presiding judge or designee by the custodian of the records[.]

The statute defines "hospital medical records" as "records made in connection with the diagnosis, care and treatment of any patient or the charges for such services[,]" but it further provides that records covered by N.C. Gen. Stat. §§ 122-8.1 and 90-109.1 are "subject to the requirements of said statutes." *Id.* In the instant case, respondent contends that the challenged medical records were inadmissible based upon the requirements of N.C. Gen. Stat. Chapter 122C, which replaced repealed Chapter 122. We cannot agree.

N.C. Gen. Stat. § 122C-3(9) (2003) defines "confidential information" as "any information, whether recorded or not, relating to an

individual served by a facility that was received in connection with the performance of any function of the facility." N.C. Gen. Stat. § 122C-52(b) (2003) provides that "no individual having access to confidential information may disclose this information." However, N.C. Gen. Stat. § 122C-54 (2003) provides express exceptions to N.C. Gen. Stat. § 122C-52. N.C. Gen. Stat. § 122C-54(a) requires a medical facility to "disclose confidential information if a court of competent jurisdiction issues an order compelling disclosure." In light of these statutory provisions, we conclude that petitioner was not precluded from admitting respondent's mental health records into evidence.

Furthermore, we note that in its order terminating respondent's parental rights, the trial court made the following pertinent findings of fact regarding respondent's mental health records:

> 35. [Respondent's] mental health records were admitted into evidence at this hearing and were previously admitted into evidence in the underlying juvenile court action, 01 J 124, and were summarized by the court in its order of March 13th & 15th, 2002, which was entered by the court May 13, 2002, as follows: [Respondent] has had 10 mental health hospitalizations in this area since April 1999, approximately half of which were involuntary commitments for various periods of time. Approximately six (6) of these admissions involved some sort of self-inflicted injury of [respondent], all of which were not life threatening. Of the remaining voluntary commitments, two (2) involved non-life threatening, self-inflicted injury by [respondent]. In addition, [respondent] has had four (4) prior mental health admissions in Oregon, three (3) for eating disorders and one (1) for depression. The dates of these admissions to the hospital occurred from March 1999 through November 2001. [Respondent] has been diagnosed with bulimia, borderline personality disorder, and major depression. The records also indicate a history of Percoset abuse and post traumatic stress disorder. It was noted that therapeutic trust was a formidable task for [respondent], as well as confusing boundaries between her and her therapist(s). In April 2000 Dr. Mike Hopping, Medical Director of Blue Ridge Center, stated in writing that [respondent] had "successfully evaded all of our attempts to gain any sort of control over her self destructive behavior", that she gave and then retracted releases of information, maintained another psychiatrist[] at one point, with whom Blue Ridge Center was not allowed to communicate with, attempted to prevent communication between

> Blue Ridge Center and in-patient units, and prevented Blue Ridge Center from talking to those who might be supportive to her in the community. It was his opinion that, at that time, long-term in-patient treatment for [respondent] would provide the only possibility for effective containment of her self-destructive or therapy interfering behaviors.
>
> 36. [Respondent] continues to exhibit the same types of behaviors that were concerning to the mental health professionals as stated above, and she has continued in her self-destructive and therapy interfering behaviors. She has never effectively addressed her mental health issues, and her mental health issues remain, her mental health issues are serious, her mental health issues seriously impede her ability to provide minimally acceptable parenting for [John], and her mental health issues have a detrimental impact on [John] when he is in her care.

As detailed in finding of fact number thirty-five, the mental health records now challenged by respondent were originally admitted into evidence during a permanency planning review hearing held 13 March 2002 and 15 March 2002. Respondent did not appeal the trial court's subsequent order, and, as discussed above, we conclude that the trial court did not err by admitting into evidence prior disposition records in the matter. Because we also conclude that the trial court's termination of parental rights was based upon a determination independent of the prior disposition orders in the case, we further conclude that the trial court did not err by considering mental health records contained within the underlying file and previously admitted into evidence. Accordingly, we overrule this argument.

VIII. Testimony of Therapists

[9] Respondent next argues that the trial court erred by allowing Alan Dodson ("Dodson") and Gail Azar ("Azar") to testify and render conclusions regarding their evaluations. Respondent contends that neither therapist was a qualified expert witness, and that their diagnoses were based upon inadmissible evidence. We note that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make[.]" N.C.R. App. P. 10(b)(1). In the instant case, respondent offered no objection during the hearing to either of the witnesses' qualifications, and, on appeal, she does not point to any testimony by the witnesses admitted over her objection. Therefore, we conclude

that respondent has waived the right to challenge the witnesses' testimony on appeal, and, accordingly, we overrule this argument.

IX. Exclusion of Respondent From Courtroom

[10] Respondent next argues that the trial court erred by excluding her from the courtroom during John's testimony. Respondent asserts that the trial court was required to make specific findings of fact and conclusions of law regarding the fundamental fairness of its determination. We disagree.

Because " 'persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs[,]' " this Court has previously held that " '[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures,' which meet the rigors of the due process clause." *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982)), *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992).

> "[T]he nature of process due in parental rights termination proceedings turns on a balancing of the 'three distinct factors' specified in *Mathews v. Eldridge*, 424 US 319, 335, 47 L Ed 2d 18, 96 S Ct 893 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure."

Murphy, 105 N.C. App. at 653, 414 S.E.2d at 397-98 (quoting *Santosky*, 455 U.S. at 754, 71 L. Ed. 2d at 607 (citations omitted)) (alteration in original).

In the instant case, respondent contends that the trial court was required to provide specific findings and conclusions regarding the minimum requirements of fundamental fairness and its relation to the trial court's decision to exclude respondent from the courtroom during John's testimony. However, we note that in *Murphy*, "the record d[id] not disclose whether the trial court balanced the *Eldridge* factors and made specific findings and conclusions regarding the minimum requirements of fundamental fairness." 105 N.C. App. at 654, 414 S.E.2d at 398. Our subsequent decision in *Murphy* to ignore the insufficiency of the record indicates that the trial court is not required to make the specific findings and conclusions asserted by respondent. Nevertheless, " 'because child-custody litigation must be concluded

as rapidly as is consistent with fairness,' " in the absence of specific findings, we may determine *sua sponte* whether the trial court denied respondent due process of law when ruling on respondent's request to be in the courtroom during John's examination. *Id.* (quoting *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 32, 68 L. Ed. 2d 640, 653, *reh'g denied*, 453 U.S. 927, 69 L. Ed. 2d 1023 (1981)).

In the instant case, our review of the *Eldridge* factors leads us to conclude that the trial court did not err by excluding respondent from the courtroom. The first *Eldridge* factor requires us to consider the private interests involved in the decision to exclude the respondent from the courtroom. We recognize that " '[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one[,]' " *Santosky*, 455 U.S. at 758-59, 71 L. Ed. 2d at 610 (citation omitted), and, in light of this interest, we conclude that the first *Eldridge* factor weighs in favor of respondent.

In considering the third *Eldridge* factor—the petitioner's interest in excluding the respondent from the courtroom—we note that the right to be present, to testify, and to confront witnesses at a termination hearing is subject to limitations, *Murphy*, 105 N.C. App. at 658, 414 S.E.2d at 400, including the State's interest "in ensuring a fair hearing and a correct decision and protecting the dignity of the courtroom." *In re Faircloth*, 153 N.C. App. 565, 574, 571 S.E.2d 65, 71 (2002). Thus, where "the excluded party's presence during testimony might intimidate the witness and influence his answers, due to that party's position of authority over the testifying witness, any right . . . to confront the witnesses is properly limited." *In re Barkley*, 61 N.C. App. 267, 270, 300 S.E.2d 713, 715 (1983) (rejecting the respondent's argument that she was denied her constitutional right to confrontation by being excluded from the courtroom while her child testified).

In the instant case, Azar, a licensed professional counselor who worked directly with John regarding his relationship with respondent, testified that John "is very influenced by" respondent, and that respondent "has a tendency to be very enmeshed with [John] when she's with him." Azar testified that respondent was "very manipulative[,]" and that she believed "that there were stories constructed that [John] was asked to corroborate and to justify to." Azar testified that she believed respondent had told John to lie to investigators, and that

> he's faced with a real moral dilemma testifying in front of his mother. There are things that she has asked of him, and he has stated that he needs to tell the truth. And, yes, he cares about his

> mother and cares about her feelings and hurting her and—and I believe that testifying in front of her to the truth would—would really impact—impact him in a very negative way.

The trial court was aware at the time of the termination hearing that respondent had been charged with kidnapping John and absconding to Oregon, and Azar testified that John was "reluctant about testifying" and "ha[d] requested . . . that he not testify in front of his mother . . . ." In light of the foregoing, we conclude that the third *Eldridge* factor weighs as equally in favor of petitioner as the first *Eldridge* factor weighs in favor of respondent. Therefore, our determination of whether respondent's due process rights were violated turns upon the second *Eldridge* factor: the risk of error created by the procedure used by the trial court.

The transcript of the termination hearing indicates that the trial court employed various procedures to allow respondent to view and hear John's testimony as well as communicate with her counsel. Respondent was placed in an adjacent room with a television monitor and had telephonic access to her attorneys. The trial court instructed respondent's guardian *ad litem* to "go in there with [respondent]" to "[m]ake sure she understands how to use the equipment[,]" and the equipment was tested prior to John's testimony. During his cross-examination, John was instructed that respondent was "in another room and can hear the conversation[,]" and respondent's counsel indicated that he was "conferring with" respondent during John's testimony. In light of the foregoing, we conclude that the risk of error from the procedure employed at trial was slight. Because the trial court preserved respondent's opportunity to cross-examine John through her court-appointed counsel, we also conclude that respondent suffered no prejudice as a result of her exclusion from the courtroom during John's testimony. *Barkley*, 61 N.C. App. at 269, 300 S.E.2d at 716. Therefore, in light of *Eldridge* and other relevant case law, we conclude that the trial court did not err by excluding respondent from the courtroom during John's testimony. Accordingly, we overrule this argument.

X. Termination of Parental Rights

[11] Respondent next argues that the trial court erred by concluding that her parental rights should be terminated. Respondent asserts that the trial court did not properly conduct a disposition hearing prior to terminating her parental rights. We disagree.

Termination of parental rights involves a two-stage process. *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 160 (2003). During the adjudication stage, the trial court examines the evidence and determines whether sufficient grounds exist under N.C. Gen. Stat. § 7B-1111 to warrant termination of parental rights. *Id.* The trial court's findings must be supported by clear, cogent, and convincing evidence. *Id.* at 656, 589 S.E.2d at 160-61. If the trial court determines that any one of the grounds for termination listed in § 7B-1111 exists, the trial court then proceeds to the disposition stage, where the trial court may terminate parental rights consistent with the best interests of the child. *Id.* at 656, 589 S.E.2d at 161. "Evidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered by the court during the dispositional stage." *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001).

In the instant case, respondent contends that the trial court did not "afford [her] the opportunity to present any evidence as to disposition." However, the transcript reflects the following pertinent exchange at the adjudicatory stage during the parties' arguments regarding evidence presented:

RESPONDENT'S COUNSEL:	Your Honor, am I correct in understanding we'll argue the best interest argument after disposition since we're just addressing the grounds at this point?
TRIAL COURT:	At this point we're talking about the adjudication.

Following respondent's adjudication argument, the trial court announced that it "would find that there is clear and convincing evidence that the parental rights of [respondent] should be terminated." Following a recitation of its findings related to adjudication, the trial court stated that it would "proceed to the dispositional hearing at this time." When the trial court asked respondent's counsel whether he had anything further to offer, he stated that he would "ask the Court to consider at disposition all of the reports and exhibits submitted at the various review hearings by my client which are contained in the underlying file." Respondent's counsel then proceeded to argue that "we do not think it is in the best interest to terminate this child's relationship with his mother."

"There is no requirement that the adjudicatory and dispositional stages be conducted at two separate hearings." *In re Parker*, 90 N.C.

App. 423, 430, 368 S.E.2d 879, 884 (1988). Furthermore, because termination proceedings are held before a judge sitting without a jury, in the absence of an affirmative indication to the contrary, appellate courts presume that "the judge, having knowledge of the law, is able to consider the evidence in light of the applicable legal standard and to determine whether grounds for termination exist before proceeding to consider evidence relevant only to the dispositional stage." *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986). In the instant case, the trial court accepted evidence from both parties "for dispositional purposes" during the adjudication stage, and, as detailed above, the trial court conducted a disposition hearing following the adjudicatory stage. In light of the record in the instant case, we conclude that respondent was given ample opportunity to present evidence and provide argument regarding disposition. Therefore, we overrule this argument.

XI. Best Interests of the Minor Child

[12] Respondent further argues that the trial court erred by concluding that it was in John's best interests to terminate respondent's parental rights. Respondent contends that the trial court failed to make proper findings of fact regarding John's best interests. We disagree.

We review a trial court's determination regarding the best interests of the juvenile under an abuse of discretion standard. *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995). In the instant case, respondent does not argue that the trial court abused its discretion in making this determination or that the trial court's findings regarding John's best interests are unsupported by competent evidence. Instead, respondent contends that the trial court erred in its determination because it did not enter oral findings regarding John's best interests following the disposition portion of the termination hearing. We cannot agree.

N.C. Gen. Stat. § 7B-1110(a) (2003) provides that, should the trial court determine that conditions authorizing termination exist and that it is in the best interests of the juvenile to do so, the trial court should enter a written, signed order terminating the respondent's parental rights. The statute does not require that the trial court issue oral findings with regard to its determination. In *In re Brim*, 139 N.C. App. 733, 738, 535 S.E.2d 367, 370 (2000), this Court recognized that, under former N.C. Gen. Stat. § 7A-651 (now N.C. Gen. Stat. § 7B-905), the trial court was not required to announce its findings of fact and

conclusions of law in open court. Instead, the terms of disposition must only have been stated with "particularity" in open court. *Id.* (citing *In re Bullabough*, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988)). Referring to former N.C. Gen. Stat. § 7A-289.31 (now N.C. Gen. Stat. § 7B-1110), we noted that "there is no requirement . . . that the court orally state 'with particularity' the exact terms of the disposition." *Brim*, 139 N.C. App. at 739, 535 S.E.2d at 370.

In the instant case, following the close of the proceedings, the trial court stated from the bench that it was terminating respondent's parental rights. The trial court then ordered that John remain in petitioner's custody, and it scheduled a post-termination of parental rights review hearing. In light of the foregoing, we conclude that the trial court satisfied its statutory duties related to disposition. Furthermore, we note that in its written order terminating respondent's parental rights, the trial court made several detailed findings regarding its conclusion that termination of respondent's parental rights is in John's best interests. The trial court's written order conforms with its oral determination at trial, and its findings of fact are based on competent evidence contained within the record. Therefore, we conclude that the trial court did not err by failing to make specific oral findings regarding disposition, and, accordingly, we overrule respondent's argument.

XII. Drafting of Order Terminating Parental Rights

[13] Respondent next argues that the trial court erred in drafting the order terminating her parental rights. Respondent asserts that the trial court was prohibited from directing petitioner's counsel to draft an order containing written findings of fact and conclusions of law on its behalf. We disagree.

"This Court has previously held that pursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 58 of the Rules of Civil Procedure, after 'entry' of judgment in open court, a trial court retains the authority to approve the judgment and direct its prompt preparation and filing." *Hightower v. Hightower*, 85 N.C. App. 333, 337, 354 S.E.2d 743, 745 (citing *Condie v. Condie*, 51 N.C. App. 522, 277 S.E.2d 122 (1981)), *cert. denied*, 320 N.C. 792, 361 S.E.2d 76 (1987). N.C. Gen. Stat. § 1A-1, Rule 58 (2003) provides that a judgment is entered when it is reduced to writing, signed by the trial court, and filed with the clerk of court. Nothing in the statute or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf. Instead, "[s]imilar procedures are routine in civil cases[.]"

Farris v. Burke County Bd. of Educ., 355 N.C. 225, 242, 559 S.E.2d 774, 784 (2002) (citing N.C. Gen. Stat. § 1A-1, Rule 58 and *Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991)); *see also In re Hayes*, 106 N.C. App. 652, 656, 418 S.E.2d 304, 306 (1992) (distinguishing between the "rendering" and "entry" of judgment and noting that judgment is not automatically entered when announced in open court where there is "[a]n instruction by the court that the prevailing party's attorney is to draft the order[.]"). In the instant case, the trial court clearly indicated that it had determined that sufficient grounds exist to terminate respondent's parental rights pursuant to each of the statutory grounds alleged in the petition. The trial court directed petitioner to draft an order terminating respondent's parental rights, and it designated "specific findings of fact" it wanted included in the order. Following presentation of evidence and argument regarding John's best interests, the trial court concluded that "[u]nder the statute I will terminate the parental rights of [respondent]." In light of the foregoing, we conclude that the trial court did not err in directing petitioner to draft the termination order on its behalf. Accordingly, we overrule this argument.

XIII. Entry of Order Terminating Parental Rights

[14] Respondent's final argument is that the trial court erred in entering the order terminating her parental rights. Respondent asserts that the trial court's order must be vacated because it was not filed within thirty days of the completion of the termination hearing. We disagree.

N.C. Gen. Stat. § 7B-1110(a) provides that "[a]ny order [terminating parental rights] shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing." In the instant case, the termination hearing was completed on 23 July 2003 and the order was not filed until 27 October 2003. Thus, the trial court filed the order terminating respondent's parental rights outside of the thirty-day mandate of the statute. This Court has recently found prejudice and reversed termination orders where the orders were entered approximately six to seven months after the conclusion of the termination hearings. *See In re T.L.T.*, 170 N.C. App. 430, 612 S.E.2d 436 (2005); *In re L.E.B.*, 169 N.C. App. 375, 610 S.E.2d 424 (2005). However, after reviewing the record in the instant case, we conclude that respondent has failed to sufficiently demonstrate such prejudice regarding the delay in the entry of the termination order. Accordingly, we overrule respondent's final argument.

XIV. Conclusion

In light of the foregoing conclusions, we affirm the order terminating respondent's parental rights.

Affirmed.

Judges HUDSON and STEELMAN concur.

STATE OF NORTH CAROLINA v. KENNETH WILLIAM BATES

No. COA04-777

(Filed 2 August 2005)

1. Evidence— direct examination—leading questions—child—sexual matters

The trial court did not abuse its discretion in a multiple first-degree statutory sexual offense, double attempted first-degree statutory sexual offense, and multiple taking indecent liberties with a minor case by allowing the State to ask the minor child victim leading questions on direct examination, because: (1) the minor child was eleven years old at the time of trial and her testimony dealt with sexual matters of a delicate nature; and (2) the State did not ask leading questions throughout its examination of the minor child, but only where she was hesitant to answer.

2. Jury— failure to dismiss juror who knew witness—abuse of discretion standard

The trial court did not err in a multiple first-degree statutory sexual offense, double attempted first-degree statutory sexual offense, and multiple taking indecent liberties with a minor case by failing to dismiss one of the jurors when she disclosed during trial that she knew one of the witnesses for the State, because: (1) defendant failed to challenge the juror upon her disclosure at trial; and (2) the determination of whether to dismiss a juror for cause rests in the sound discretion of the trial court, and defendant failed to show any abuse of discretion or prejudice due to the continued service of this juror when the juror stated she believed that she could continue to be fair and impartial to both parties.

3. Indecent Liberties; Sexual Offenses— motion to dismiss— sufficiency of evidence—generic testimony of child sex abuse victim

The trial court did not err in a multiple first-degree statutory sexual offense, double attempted first-degree statutory sexual offense, and multiple taking indecent liberties with a minor case by denying defendant's motion to dismiss all or some of the charges against him at the close of the State's evidence and at the close of all evidence even though defendant contends the evidence was sufficient to support only those charges where the minor child was able to describe defendant's actions in some detail, because: (1) our Court of Appeals has previously upheld the denial of a motion to dismiss where the evidence consisted of similarly generic testimony of a child sex abuse victim; and (2) defendant gave a statement in which he admitted to touching the minor child's vagina three times, licking it three times, and having the minor child squeeze his penis three times.

4. Constitutional Law— denial of unanimous verdict—sexual offenses

Defendant was denied his right to a unanimous verdict with respect to convictions on six counts of first-degree sexual offense where defendant was charged with eleven counts of that offense; evidence of between four and ten possible instances of first-degree sexual offense was presented at trial; the State did not effectively associate each particular offense or incident with a particular indictment or verdict sheet; the trial court did not explain the need for unanimity on each specific sexual incident; and neither the indictments, jury instructions nor verdict sheets associated a given indictment or verdict sheet with any particular incident.

5. Constitutional Law— denial of unanimous verdict—indecent liberties

Defendant was denied his right to a unanimous verdict with respect to convictions on seven counts of indecent liberties with a minor where defendant was charged with ten counts of taking indecent liberties with a minor; more incidents of indecent liberties were presented at trial than the number charged; evidence presented on charges of first-degree sexual offense could also support convictions for indecent liberties; the trial court gave the pattern jury instruction for indecent liberties with no explanation

as to which acts by defendant could support a conviction for indecent liberties; and the jury received no guidance from the trial court and no indication from the State as to which offenses were to be considered for which verdict sheets.

6. Indecent Liberties— multiplicitous indictments—absence of prejudice

Indictments charging defendant with indecent liberties and the alternate crime of lewd and lascivious conduct for each violation of N.C.G.S. § 14-202.1 were multiplicitous, but defendant was not prejudiced because judgment was arrested on each count of defendant's convictions for lewd and lascivious conduct.

7. Constitutional Law— unanimous verdict not denied—attempted sexual offenses

Defendant was not denied his right to a unanimous verdict with respect to convictions on two counts of attempted first-degree sexual offense where defendant was charged with only two counts of this offense and only two instances of this offense were presented to the jury by testimony of the child victim.

Appeal by defendant from judgments entered 31 October 2003 and 4 November 2003 by Judge W. Allen Cobb, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 21 March 2005.

Roy Cooper, Attorney General, by Anita LeVeaux, Assistant Attorney General, for the State.

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

MARTIN, Chief Judge.

Defendant was found guilty by a jury of six counts of first-degree statutory sexual offense, two counts of attempted first-degree statutory sexual offense, seven counts of taking indecent liberties with a minor, and six counts of lewd and lascivious conduct with a minor. Judgment was arrested as to the six counts of lewd and lascivious conduct with a minor. Defendant appeals from judgment imposing two consecutive sentences of not less than 192 months and not more than 240 months of imprisonment and a third consecutive sentence of not less than 125 months and not more than 159 months of imprisonment.

The evidence at defendant's trial tended to show that KG, a ten-year-old child, lived in Fremont, North Carolina in the same neighborhood as defendant, his wife, and her three children from previous marriages. KM, the youngest of defendant's stepchildren, was eight years old at the time of the alleged events, and she was "good friends" with KG. KG testified that she spent one night every other weekend at defendant's house between December, 2002 and March, 2003. In March, KG told another friend on the school bus that defendant had touched her inappropriately, and the friend informed a teacher at KG's school. The teacher contacted the school social worker, who notified the Wayne County Department of Social Services (DSS).

Roseanne Diorio, a social worker with DSS, interviewed defendant at his house with his wife present. Defendant said that KG followed him around, wrote him love letters, and always wanted to sit in his lap. He said she did not have a father figure in her life, and he believed she wanted him to play that role. He said KG had made such accusations before, but when he and his wife talked to her about it, she admitted she had lied. He denied all allegations of inappropriate activity. Ms. Diorio also interviewed defendant's wife and her two oldest children, each of whom stated that KG constantly followed defendant around and wrote him love letters. They said KG also wrote love letters to defendant's stepson.

At trial, KG testified that the second time she visited KM's home, defendant called her into the living room, put his hand down the front of her shirt, and touched her chest through her clothes. The following weekend, when she visited defendant's home again, she testified that "[h]e done the same thing. He went down my shirt again." That same weekend, KG said she and KM were playing in KM's room when defendant walked in and told KM to go talk to her mother. After KM left the room, KG said defendant "was about to pull my pants down," but he heard KM coming back so he stopped. KG said defendant's hands "almost" went inside her pants. Later, she testified that on that occasion he did actually touch her "private" with his hand.

On "another weekend," defendant told KG to go into the bathroom. Once there, KG testified defendant was "pull[ing] my pants down and trying to lick it, but he heard [KM] coming so he didn't get a chance to lick it." Later she testified defendant did actually "lick[] it" while they were in the bathroom. She also testified that one night, she and KM were sleeping on the living room floor. KM was asleep, but KG woke up and heard defendant walking into the living room.

He came over to her and pulled her pants down to her knees. Then, according to KG, he "touched me in the inside." KG testified that defendant had touched her vagina with his hand "[l]ike four times" and with his mouth "[a]bout maybe two times."

KG also testified that she touched defendant's penis on two occasions. Once, KG said she was sitting on the couch when defendant "sat down next to me and . . . took my hand and put it down his pants," touching his "private." Another time in KM's bedroom, defendant "just took my hand and put it down his pants and he told me to squeeze." In all, KG said she had seen defendant's penis "[a]bout six times." When asked if she could say when any of the acts described occurred, KG could only say they happened during the time she was spending the night with KM between December and March.

Detective Tammy Odom of the Wayne County Sheriff's Department investigated the allegations against defendant. During an interview with KG, Detective Odom wrote out a statement for KG in which KG said that on one occasion, defendant "reached up and put his hand down my shirt and inside my bra. He started feeling of my chest." KG stated that on another occasion, defendant "stuck his hand down my pants and rubbed my private part. He did this for about a minute. After that he pulled his private part out. He grabbed my hand and put it on his private part. He told me to squeeze it." She also stated that the following morning defendant "pulled my sweat pants down and my panties. He was bending down to lick my privates when [KM] walked in." In all, KG said in her statement, defendant "touched my private part about six times and he has licked my private part about six times. He has made me touch and squeeze his private part about four times . . . [and he] touched my chest one time . . . ."

Detective Odom also interviewed defendant regarding the allegations. Defendant gave a statement, written by Detective Odom and signed and initialed by defendant, in which he said, in pertinent part,

> While [KG] was spending the night on three different times I pulled the head of my penis out and [KG] squeezed it. On three different times I touched [KG] on her vagina, on the inside of her clothes, with my fingers. One of these times I stuck my fingers inside of her vagina because she told me to. I tried to stop once and she wouldn't let me. This happened one time in the living room, one time in [KM]'s room, and one time in the children's bathroom. I have licked [KG]'s vagina three times. This has hap-

> pened once in the living room, one time in [KM]'s room, and one time in the children's bathroom.

Defendant was subsequently arrested.

While defendant was in jail, Roseanne Diorio interviewed him a second time regarding the allegations. Defendant claimed that Detective Odom tricked him into confessing and had "mixed his words up." He stated, however, that KG had once "tried to stick her hands down his pants to touch his penis." On another occasion, he said, KG "called him into the bathroom and when he got in there she had her pants and underwear pulled down to her knees." When Ms. Diorio asked if he had ever performed oral sex on KG, he stated that "it had only happened once and he was really sorry about it."

Defendant was charged, in true bills of indictment, with eleven counts of first-degree sexual offense, two counts of attempted first-degree sexual offense, ten counts of taking indecent liberties with a minor, and ten counts of lewd and lascivious conduct with a minor. A jury found him guilty of six counts of first-degree sexual offense, two counts of attempted first-degree sexual offense, seven counts of taking indecent liberties with a minor, and six counts of lewd and lascivious conduct. Judgment was arrested on the six counts of lewd and lascivious conduct. The remaining convictions were consolidated into three judgments for which defendant received two consecutive sentences of not less than 192 months and not more than 240 months of imprisonment and a third consecutive sentence of not less than 125 months and not more than 159 months of imprisonment. Defendant appeals.

Defendant makes the following arguments on appeal: (1) the trial court erred in allowing the State to ask KG leading questions on direct examination; (2) the trial court committed plain error by not dismissing one of the jurors when she disclosed during trial she knew one of the witnesses for the State; (3) the trial court erred by "denying the defendant's motion to dismiss all or some of the charges against him at the close of the State's evidence and at the close of all the evidence, due to the insufficiency of the evidence;" (4) the trial court committed plain error by not distinguishing for the jury the charges against the defendant, thereby denying the defendant a unanimous jury verdict; and (5) the trial court committed plain error by entering judgments and other dispositions which were inconsistent with the court's rulings and the jury's verdicts.

[1] We first address whether or not the trial court erred by allowing the State to ask KG leading questions on direct examination. Although leading questions are not generally admitted on direct examination, N.C. Gen. Stat. § 8C-1, Rule 611(c) (2003), "[i]t is within the discretionary power of the trial court to allow leading questions on direct examination, and rulings on the use of such questions are reversible only for an abuse of discretion." *State v. Dalton*, 96 N.C. App. 65, 70, 384 S.E.2d 573, 576 (1989) (citing *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986)). It is well settled that where "the witness has difficulty in understanding the question because of age or immaturity or where inquiry is made into a subject of delicate nature such as sexual matters, leading questions are necessary to develop the witness's testimony." *State v. Oliver*, 85 N.C. App. 1, 9, 354 S.E.2d 527, 532, *disc. rev. denied*, 320 N.C. 174, 358 S.E.2d 64 (1987); *see also State v. Wilson*, 322 N.C. 91, 96, 366 S.E.2d 701, 704 (1988). In *Dalton*, this Court found no abuse of discretion where the prosecuting witness was fifteen years old at the time of trial, and her testimony "pertained to sexual matters of a delicate, sensitive, and embarrassing nature." *Dalton*, 96 N.C. App. at 70, 384 S.E.2d at 576. In the present case, KG was eleven years old at the time of trial, four years younger than the witness in *Dalton*, and her testimony similarly dealt with sexual matters of a delicate nature. Furthermore, the record indicates the State did not ask leading questions throughout its examination of KG, but only where KG was hesitant to answer. We therefore find no abuse of discretion by the trial court in allowing the State to ask KG leading questions on direct examination. This assignment of error is overruled.

[2] Defendant's next argument is that the trial court committed plain error by not dismissing a juror when she disclosed, during trial, that she knew one of the witnesses for the State. During the State's evidence, Juror Three sent a note to the trial court saying she had known Roseanne Diorio in high school and college. Ms. Diorio married since that time, and the juror did not recognize her new name during jury selection. The juror stated in her note that she would "continue to be fair to both sides as my obligation as a juror." The trial court then questioned the juror as follows:

> THE COURT: . . . Do you, in fact, feel like that friendship would have any bearing on your ability to be fair and impartial in this matter?
>
> JUROR: No.

THE COURT: You just felt like that was your obligation to let us know, is that right?

JUROR: Yes, because I didn't recognize the name due to her getting married.

THE COURT: Does the counsel for either side have any questions for this juror?

MR. GURLEY [counsel for defendant]: I do not, your honor.

MS. KABLER [counsel for the State]: No, sir.

N.C. Gen. Stat. § 15A-1212 sets forth reasons for which a party may challenge a juror for cause, including when a juror "is unable to render a fair and impartial verdict." N.C. Gen. Stat. § 15A-1212(9) (2003). Defendant failed to challenge Juror Three upon her disclosure at trial; therefore, he has not preserved this assignment of error for review. N.C. Gen. Stat. § 15A-1211(c); *see also* N.C. R. App. P. 10(b)(1) (2003) (stating that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context").

Apparently recognizing the consequences of his failure to challenge the juror, however, defendant argues the trial court should have excused the juror under N.C. Gen. Stat. § 15A-1211(d), which allows a judge to dismiss a juror for cause "without challenge by any party if he determines that grounds for challenge for cause are present." N.C. Gen. Stat. § 15A-1211(d) (2003). Defendant contends the proper standard of review for failure to dismiss a juror for cause is plain error. However, our Supreme Court has limited the application of plain error analysis to a trial court's instructions to the jury and rulings on the admissibility of evidence. *State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). Instead, "[t]he determination of whether to grant a challenge for cause rests in the sound discretion of the trial court and will not be disturbed [on appeal] absent a showing of abuse of that discretion. In addition to abuse of discretion, defendant must show prejudice to establish reversible error . . . ." *State v. Grooms*, 353 N.C. 50, 68, 540 S.E.2d 713, 725 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001) (internal citations omitted). Here, the juror stated she believed she could continue to be fair and impartial to both parties. Defendant has failed to show either an abuse of discretion by

the trial court or that he suffered any prejudice due to the continued service of this juror. This assignment of error is overruled.

[3] Defendant's third argument is that the trial court erred in denying his motion to dismiss all or some of the charges against him at the end of the State's evidence and at the end of all the evidence. Upon a motion to dismiss criminal charges, the trial court must determine whether there is substantial evidence of defendant's guilt of each essential element of the crime. *State v. Holland*, 161 N.C. App. 326, 328, 588 S.E.2d 32, 34 (2003). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 328, 588 S.E.2d at 34-35 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). The evidence is considered in the light most favorable to the State, and the State is entitled to every reasonable inference arising from it. *Id.* The trial court does not weigh the evidence or determine witnesses' credibility. "It is concerned 'only with the sufficiency of the evidence to carry the case to the jury.' " *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005) (quoting *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983)).

Defendant argues that the evidence was sufficient to support only those charges where KG was able to describe defendant's actions in some detail. Defendant contends the motion to dismiss should have been granted on the charges supported solely by KG's statements that, *e.g.*, defendant touched her "about six times" or "[l]ike four times." Our case law does not support such an interpretation of the standard for a motion to dismiss. We have previously upheld the denial of a motion to dismiss where the evidence consisted of similarly generic testimony of a child sex abuse victim. In *State v. Bingham*, 165 N.C. App. 355, 598 S.E.2d 686, *disc. rev. denied*, 359 N.C. 191, 607 S.E.2d 648 (2004), the victim testified that "between 13 November 2000 and August 2001, defendant engaged in sexual activity with her twenty-five to forty times." *Id.* at 362-63, 598 S.E.2d at 691. She testified that this sexual activity included digital penetration, fellatio, cunnilingus, and vaginal intercourse, but she could not remember details of any specific instance "because it happened so many times." *Id.* at 363, 598 S.E.2d at 691. This Court affirmed the trial court's denial of the defendant's motion to dismiss. *Id.*; *see also State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003), *disc. rev. denied*, 358 N.C. 241, 594 S.E.2d 34 (2004); *State v. Burton*, 114 N.C. App. 610, 442 S.E.2d 384 (1994).

Furthermore, defendant gave a statement in which he admitted to touching KG's vagina three times, licking it three times, and having KG squeeze his penis three times. We conclude there was sufficient evidence to overcome defendant's motion to dismiss all or some of the charges against him.

[4] Defendant also argues, however, that the trial court denied him a unanimous jury verdict. His argument in this respect has merit. 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; *see also* N.C. Gen. Stat. § 15A-1237(b) (2003). When a question of 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. rev. denied*, 350 N.C. 598, 537 S.E.2d 490 (1999).

We begin by addressing the charges of first-degree sexual offense. Defendant was charged with eleven counts of first-degree sexual offense, and the jury convicted him of six of these charges. First-degree sexual offense is defined as "a sexual act: (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]" 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).

In her testimony at trial, KG described in some detail two instances where defendant touched her vagina with his hand and one where he touched her vagina with his mouth. She also said defendant had touched her vagina with his hand "[l]ike four times" and touched her vagina with his mouth "[a]bout maybe two times." Such generic testimony is sufficient to support a single additional charge and conviction of first-degree sexual offense. *State v. Lawrence*, 165 N.C. App. 548, 556-57, 599 S.E.2d 87, 94, *temp. stay allowed*, 359 N.C. 73, 603 S.E.2d 885 (2004), *disc. rev. allowed*, 359 N.C. 413, 612 S.E.2d 634 (2005) (*Lawrence I*) (stating that where a child has been frequently abused over a period of time, and that child can only testify to this pattern of abuse rather than specific instances, such "generic testimony" can only support one charge and conviction of any given offense); *see also State v. Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678, 686, *temp. stay allowed*, 359 N.C. 640, ––– S.E.2d ––– (June 2, 2005) (No.293A05) (*Lawrence II*, a case unrelated to *Lawrence I)*.

KG's testimony, both specific and generic, is sufficient to support a total of four charges of first-degree sexual offense. Defendant's statement, in which he admits to licking KG's vagina three times and touching her vagina three times, is evidence of six acts of first-degree sexual offense. From the record before us, it is clear the jury had no way to determine if any of the acts described by KG at trial were the same instances of abuse as those described by defendant in his statement. Therefore, evidence of anywhere between four and ten possible instances of first-degree sexual offense was presented at trial.

It is impossible to ascertain which of defendant's six convictions correspond with which of these possible instances of abuse. Although the indictment and verdict sheet attempt to identify each offense by date and act, the dates and acts described do not correspond with the evidence presented at trial. KG was only able to testify that the acts of first-degree sexual offense occurred during the period when she was spending the night at KM's house, which was between December, 2002 and March, 2003. Defendant's statement gave no indication as to when each particular act occurred, and no other witness could establish more specifically the dates of the offenses. The indictment and verdict sheet divide the charges of first-degree sexual offense by month, citing four offenses in January, four in February, and three in March. However, this division appears to be arbitrary, as the evidence did not put any of the incidents as occurring in any particular month. Defendant was convicted of the four January offenses, two by cunnilingus and two by inserting his finger into her vagina, and two February offenses, both by cunnilingus.

We recognize that our case law does not require victims of child sexual abuse to allege dates with specificity. *State v. Brothers*, 151 N.C. App. 71, 81, 564 S.E.2d 603, 609 (2002), *disc. rev. denied* 356 N.C. 681, 577 S.E.2d 895 (2003). Here, however, the problem lies not in the lack of specificity with respect to time, but in the ambiguity created by the failure to relate the charges in the indictment and verdict sheet to specific instances of abuse. As in *Lawrence I*, "although the indictments and verdict sheets were validly drawn, they did not remove the ambiguity in the jury's verdict. None of the verdict sheets associated the offense number with a given incident or separate criminal offense." *Lawrence I*, 165 N.C. App. at 563, 599 S.E.2d at 98.

The Court in *Lawrence I* held that a defendant's right to a unanimous verdict will be protected when, before the jury begins deliberations, either "the State elects which particular criminal offense it will proceed on for a given indictment or verdict sheet," or the trial court

"instruct[s] the jury that they must be unanimous as to the particular criminal offense that the defendant committed." *Lawrence I*, 165 N.C. App. at 559, 599 S.E.2d at 95; *see also Lawrence II*, 170 N.C. App. 200, 211, 612 S.E.2d 678, 686-87 (2005). Here, as we have said, the State did not effectively associate each particular offense or incident with a given indictment or verdict sheet. Nor did the trial court adequately instruct the jury on the requirement of unanimity. The trial court stated that defendant was charged with eleven counts of first-degree sexual offense and gave the pattern jury instruction for that crime. It instructed the jury regarding the requirement of unanimity only as follows: "[y]ou may not return a verdict until all 12 jurors agree unanimously as to each charge. You may not render a verdict by majority vote." Thus, the trial court did not explain "the need for unanimity on each specific sexual incident." *Lawrence II*, 170 N.C. App. at 212-13, 612 S.E.2d at 686. Under *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987), the trial court should have "submitted a specific instruction with respect to unanimity of verdict as to *each* indictment and also assigned *correlating specific alleged acts of sexual offense* to each indictment." *Kennedy*, 320 N.C. at 25, 357 S.E.2d at 362 (emphasis added); *see also Lawrence I*, 165 N.C. App. at 559, 599 S.E.2d at 95.

Because the trial court failed to ensure, by either method described above, that each juror had in mind the same six instances of abuse when voting to convict defendant for first-degree sexual offense, defendant's right to a unanimous jury verdict was jeopardized. "[N]either the indictments, verdict sheets, nor the trial court's instructions, associated a given verdict sheet or indictment with any particular incident." *Lawrence I*, 165 N.C. App. at 560, 599 S.E.2d at 96. Therefore, we are compelled to grant defendant a new trial on all six convictions of first-degree sexual offense.

[5] Defendant also argues the trial court denied him a unanimous verdict on the charges of indecent liberties and lewd and lascivious conduct. This argument likewise has merit. N.C. Gen. Stat. § 14-202.1 ("Taking indecent liberties with children") 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). Defendant was indicted with ten counts of taking indecent liberties with a minor and ten counts of lewd and lascivious acts upon a child. We first address the indecent liberties charges.

Where evidence is presented at trial showing a greater number of separate criminal offenses than the defendant is charged with, a risk of a lack of jury unanimity is created. *Lawrence I*, 165 N.C. App. at 558, 599 S.E.2d at 95; *Lawrence II*, 170 N.C. App. at 211, 612 S.E.2d at 684; *State v. Holden*, 160 N.C. App. 503, 508, 586 S.E.2d 513, 517 (2003), *aff'd without precedential value*, 359 N.C. 60, 602 S.E.2d 360 (2004). Defendant was charged with ten counts of taking indecent liberties with a minor, and he was convicted of seven of these charges. Because indecent liberties does not merge with and is not a lesser included offense of first-degree sexual offense, the evidence presented on the charges of first-degree sexual offense may also support a conviction for indecent liberties. *Lawrence II*, 170 N.C. App. at 214, 612 S.E.2d at 687. Thus, again, it is impossible to tell which particular acts correspond with which charges and convictions for indecent liberties. *Id.* For the six convictions, the jury members could have believed defendant guilty of any combination of the following: KG's three descriptions of first-degree sexual offense, her generic testimony about first-degree sexual offense, her testimony that defendant put his hand inside her shirt on two occasions, her testimony that she touched defendant's penis on two occasions, her generic testimony that she saw his penis about six times, or any of the nine acts defendant described in his statement.

The indictment and verdict sheet distinguish the charges of indecent liberties by month, although as we have noted, these months do not correspond with the evidence presented by KG or any other witness. The forms make no attempt to distinguish these charges by incident. As to the jury instructions, the trial court gave the pattern jury instruction for indecent liberties with no explanation as to which acts by defendant might support a conviction on indecent liberties with a minor. As in *Lawrence II*, "the unanimity of a verdict is jeopardized in multiple count trials for . . . indecent liberties . . . if more incidents

of the offenses are presented than the number charged, and the jury receives no guidance from the trial court or indication from the State as to which offenses are to be considered for which verdict sheets." *Lawrence II*, 170 N.C. App. at 211, 612 S.E.2d at 685. Therefore, for both of these reasons, we are compelled to grant defendant a new trial as to each of the seven convictions of indecent liberties with a minor.

[6] In addition to the ten counts of indecent liberties, defendant was charged with ten counts of lewd and lascivious conduct, presumably under subpart (2) of N.C. Gen. Stat. § 14-202.1(a). However, our Supreme Court has held that "the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts." *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990). Parts (a)(1) and (a)(2) of the statute, therefore, do not enumerate "discrete criminal activities," but rather "alternative elements" of "a single wrong." *Id.* at 564, 566, 391 S.E.2d at 179, 180. Charging defendant with two crimes for each violation of N.C. Gen. Stat. § 14-202.1, therefore, resulted in a multiplicitous indictment. *See* Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, *Criminal Procedure* § 19.3(c), at 776-77 (1999); *see also State v. Petty*, 132 N.C. App. 453, 463, 512 S.E.2d 428, 435 (1999); *Lawrence II*, 170 N.C. App. at 210, 612 S.E.2d at 685. Defendant, however, has not been prejudiced because judgment was arrested on each of the six convictions of lewd and lascivious conduct. Defendant did not receive multiple sentences for a single offense, which, as this Court noted in *State v. Petty*, "is the principle [sic] danger in multiplicity," *Petty*, 132 N.C. App. at 463 n.2, 512 S.E.2d at 435 (citing 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.2, at 457-58 (1984)), and his protection against double jeopardy was not violated. *See State v. Tirado*, 358 N.C. 551, 578, 599 S.E.2d 515, 534 (2004) (stating that the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution protects against a defendant receiving "multiple punishments for the same offense").

[7] Defendant was also charged with, and convicted of, two counts of attempted first-degree sexual offense. Defendant alleges he should be granted a new trial on these charges because of the general lack of unanimity and confusion of the jury. We disagree. At trial, KG testified that on one occasion, defendant "tried" to pull her pants down, and his hand "almost" went inside her pants. KG also testified that on another occasion, in the bathroom of defendant's house, defendant was pulling her pants down and "trying to lick it," but was interrupted

when he heard KM coming. These were the only two instances of attempted first-degree sexual offense presented to the jury, and the jury convicted defendant on both charges. We have previously found no risk of a lack of unanimity where the defendant is charged with and convicted of the same number of offenses, and the evidence supports that number of offenses. *State v. Wiggins*, 161 N.C. App. 583, 593, 589 S.E.2d 402, 409 (2003). We find no error in defendant's convictions of these offenses. However, because these offenses were joined, for the purpose of sentencing, with three counts of indecent liberties, as to which we have granted defendant a new trial, we must remand these cases to the trial court for resentencing.

Defendant's fifth and final argument is that judgments in 03 CRS 53259-52 and 03 CRS 53264-52 are inconsistent with the jury's verdict sheets. Because we are granting defendant a new trial on most of the verdicts listed in these judgments, we need not address this argument.

03 CRS 53256	First-Degree Sexual Offense	New Trial
03 CRS 53257	First-Degree Sexual Offense	New Trial
03 CRS 53258	First-Degree Sexual Offense	New Trial
03 CRS 53258	First-Degree Sexual Offense	New Trial
03 CRS 53259	First-Degree Sexual Offense	New Trial
03 CRS 53260	First-Degree Sexual Offense	New Trial
03 CRS 53262	Indecent Liberties	New Trial
03 CRS 53263	Indecent Liberties	New Trial
03 CRS 53264	Indecent Liberties	New Trial
03 CRS 53257	Indecent Liberties	New Trial
03 CRS 53258	Indecent Liberties	New Trial
03 CRS 53259	Indecent Liberties	New Trial
03 CRS 53260	Indecent Liberties	New Trial
03 CRS 53263	Attempted First-Degree Sexual Offense	Remanded for Resentencing
03 CRS 53264	Attempted First-Degree Sexual Offense	Remanded for Resentencing

Judges HUDSON and JACKSON concur.

STATE OF NORTH CAROLINA v. STEPHEN M. DELSANTO

No. COA04-876

(Filed 2 August 2005)

1. Evidence— expert opinion—child sex abuse—credibility

The trial court committed plain error in a first-degree sexual offense case by admitting the testimony of a doctor that she had diagnosed the minor victim as having been sexually abused by defendant, and defendant is entitled to a new trial, because: (1) the only evidence that defendant sexually abused the victim is the victim's own statements to the testifying witnesses; (2) there was no physical evidence, yet the doctor testified that this lack of physical evidence was absolutely consistent with the victim's account; (3) the doctor conclusively stated that defendant sexually assaulted the minor child when the doctor testified that she diagnosed the minor child as having been sexually abused by defendant; (4) the doctor's inadmissible opinion likely had an impact on the jury's finding of guilt; (5) admission of expert testimony on a victim's credibility prejudices defendant in the eyes of the jury when the minor child's credibility is the central issue in the case; (6) there was no other permissible expert testimony, there was no evidence that the victim exhibited behaviors that were consistent with having suffered from sexual assault, and the State did not present other overwhelming evidence of defendant's guilt; and (7) the only physical manifestation of injury suffered by the minor child in this case was pain, which is subjective and not independently verifiable.

2. Evidence— prior crimes or bad acts—child sex abuse

The trial court erred in a first-degree sexual offense case by overruling defendant's objection and permitting a witness to testify that defendant had sexually abused her twenty-three years earlier, because: (1) evidence that a defendant engaged in previous sexual abuse is inadmissible when a significant lapse of time exists between the instances of alleged sexual abuse; (2) the lapse of time between the alleged instances of abuse merits against finding that defendant was engaged in an ongoing plan or scheme of sexual abuse; (3) unlike in *State v. Jacob*, 113 N.C. App. 605 (1994), the State offered no evidence that defendant did not have access to his preferred victim during the twenty-three year time span between the alleged instances of abuse, or that his

plan was interrupted and then resumed twenty-three years later; and (4) although the State for the first time on appeal relies on Rule 404(b) to show identity and intent, this argument is not properly before the Court of Appeals.

3. Evidence— prior crimes or bad acts—possession of pornographic magazines and women's underwear—impermissible character evidence

Although the trial court did not commit plain error in a first-degree sexual offense case by allowing the State to elicit a witness's testimony that defendant possessed pornographic magazines and women's underwear, the admission of the testimony should not be presented at defendant's new trial (granted on other grounds) for the purpose of showing defendant's propensity to commit the crime, because: (1) the State presented no evidence that defendant's possession of pornographic magazines and women's underwear played any part in the alleged offenses; and (2) the evidence was not relevant to prove the charges against him and was merely impermissible character evidence.

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

Assignments of error that were not addressed in defendant's brief are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from judgment entered 15 September 2003 by Judge Mark E. Klass in Superior Court, Davie County. Heard in the Court of Appeals 9 March 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Celia Grasty Lata, for the State.

Daniel Shatz for defendant-appellant.

McGEE, Judge.

Stephen M. Delsanto (defendant) was indicted on one count of first degree sexual offense, in violation of N.C. Gen. Stat. § 14-27.4 (2003), and one count of taking indecent liberties with a child, in violation of N.C. Gen. Stat. § 14-202.1 (2003).

The State's evidence at trial tended to show that defendant stayed at the home of his daughter (Bonnie) from 30 September 2002 to 3

October 2002. Defendant's ex-wife (Brenda), son-in-law (Bobby), and twin grandchildren (H.B. and W.B.) were also living in the home. H.B. and W.B. were three years old at the time.

Bobby testified that on the evening of 3 October 2002, he was watching television with H.B. and W.B., when H.B. began rubbing her genital area. H.B. complained of pain and said "Pawpaw [defendant] touched me down there." H.B. also said "Pawpaw messed with [W.B.'s] penis." Bobby reported this information to Brenda, but did not tell Bonnie because Bonnie was sleeping at the time.

The following day, Brenda told Bonnie what Bobby had learned. Bonnie asked H.B. and W.B. whether they spoke with Bobby the night before. H.B. said yes, and that defendant had touched her "ginny," her shortened term for vagina. Bonnie retrieved a doll and asked H.B. to show Bonnie where defendant had touched H.B. H.B. spread the doll's legs and put her finger on the genital area. Bonnie called the Davie County Department of Social Services and Detective John Stephens (Detective Stephens) with the Davie County Sheriff's Department.

Detective Stephens interviewed H.B. He testified that H.B. told him that her "Pawpaw touched her gina and put his finger in there, and it hurt." H.B. also stated that defendant touched W.B.'s genitals. Detective Stephens was unable to successfully interview W.B. Detective Stephens made an appointment for H.B. to visit a pediatrician, Dr. Kathleen Russo (Dr. Russo), for an evaluation. Detective Stephens did not make an appointment for W.B. because, based on the allegations, there would have been no physical evidence of abuse.

Dr. Russo testified that she had received advanced recognition by the University of North Carolina Child Medical Evaluation Program, which signified that she had received advanced training in child sexual abuse. Dr. Russo testified that she examined H.B. on 18 October 2002. Dr. Russo asked H.B. if anyone had "touched [her] or hurt [her] some place that [she] did not like." H.B. responded that defendant touched her "inside" her genitals. H.B. also demonstrated this act on an anatomically correct doll.

Dr. Russo then completed a physical examination but did not note any trauma or indications of abuse in H.B.'s genital area. Dr. Russo testified that although she did not observe any physical manifestations of sexual abuse, the examination was "absolutely consist-

ent" with H.B.'s assertion that defendant touched her genital area. Dr. Russo explained that the anatomy of the female genital area is such that healing and return to the pre-trauma condition can occur very rapidly. Dr. Russo then testified that she diagnosed H.B. as having "suffered from the sexual abuse that she disclosed to [Dr. Russo] and [H.B.'s] family."

L.B., defendant's twenty-seven-year-old niece, also testified at trial that defendant was her babysitter when she was about four years old. L.B. testified that defendant would tell her to lie on the bed, then he would remove her pants and underwear, touch her genital area and perform oral sex on her. She also stated that on one occasion defendant made her touch and kiss his penis. L.B. testified that she only told her parents and stepmother about this abuse, but that she was aware that other family members had discussed the abuse with Bonnie.

Deborah Gordon (Gordon) testified on behalf of defendant. On cross-examination, Gordon testified that she helped retrieve some of defendant's belongings from Bonnie's home. Gordon testified that defendant had a backpack of "vulgar" magazines and some pairs of women's underwear.

The jury convicted defendant of first degree sexual offense with H.B., but acquitted defendant on the charge of indecent liberties with W.B. The trial court entered judgment on 15 September 2003 and sentenced defendant to a minimum term of 288 months and a maximum term of 355 months in prison. Defendant appeals.

I.

[1] Defendant assigns error to the trial court's admission of Dr. Russo's testimony that she diagnosed H.B. as having been sexually abused by defendant. Defendant argues that this testimony was an impermissible expert opinion on H.B.'s credibility.

" 'In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility.' " *State v. Bush*, 164 N.C. App. 254, 258, 595 S.E.2d 715, 718 (2004) (quoting *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam)); *see also State v. Ewell*, 168 N.C. App. 98, 105, 606 S.E.2d 914, 919, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 327 (2005) (holding that it was error for the trial court to allow expert testimony that it was "probable that [the

child] was a victim of sexual abuse" when the testimony "was not based on physical evidence or behaviors consistent with sexual abuse"); *State v. Couser*, 163 N.C. App. 727, 729, 594 S.E.2d 420, 422-23 (2004) (finding error when the trial court permitted an expert to testify that she diagnosed the victim with "probable sexual abuse" when there was insufficient physical evidence of such abuse); *State v. Dixon*, 150 N.C. App. 46, 53, 563 S.E.2d 594, 598-99, *aff'd per curiam*, 356 N.C. 428, 571 S.E.2d 584 (2002) (concluding that it was improper to allow an expert opinion that the victim had in fact been sexually abused when no physical evidence supported a finding of sexual abuse).

In *Bush*, our Court held that it was plain error for the trial court to permit an expert witness to testify that she diagnosed the victim as having been sexually abused by the defendant. *Bush*, 164 N.C. App. at 260, 595 S.E.2d at 719. The expert witness, who was also Dr. Russo, testified that a lack of physical evidence was "absolutely consistent" with the victim being sexually abused, because physical evidence of abuse is not always present. *Id.* at 259, 595 S.E.2d at 718. Dr. Russo testified that she diagnosed the victim as having been sexually abused by the defendant, stating:

> "I was impressed by [the victim's] sensory recollection. Children cannot fantasize visual and other sensory experiences at the same time and the fact that she could tell me how she felt, how she was feeling that evening, what she felt, and what she did when she realized what was happening, what [the defendant's] response was when she realized he was waking up, where they were, where the other people in the family were at the time, all of that other sensory recollection was very telling and adds to the *credibility* of her story."

Id. at 259, 595 S.E.2d at 718. Our Court held that it was plain error to admit the expert witness' conclusive statement that the defendant had sexually abused the victim since the only evidence that the defendant sexually abused the victim was the victim's own testimony and the corroboration of other witnesses. *Id.* at 259, 595 S.E.2d at 718-19. As a result, "[t]he practical effect of Dr. Russo's testimony was to give [the victim's] story a stamp of credibility by an expert in pediatric gynecology[.]" *Id.* at 259, 595 S.E.2d at 719.

Bush is remarkably similar to the case before us. The only evidence that defendant sexually abused H.B. is H.B.'s own statements to the testifying witnesses. There was no physical evidence that H.B.

had been sexually abused; yet, just like in *Bush*, Dr. Russo testified that this lack of physical evidence was "absolutely consistent" with H.B.'s account. Furthermore, Dr. Russo conclusively stated that defendant sexually assaulted H.B. when she testified that she diagnosed H.B. as having been sexually abused by defendant:

> Q. I want to ask you now, after you conducted the physical examination and you conducted the interview with [H.B.], at some point in time did you form a medical diagnosis of [H.B.] at that time?
>
> A. Yes, I did, sir.
>
> Q. And what was your diagnosis?
>
> A. My diagnosis was that [H.B.] had suffered from the sexual abuse that she disclosed to me and her family. And my feelings were that [H.B.] being a three year old child could not fantasize that these events occurred. She could not make them up. Children that young do not have the ability to fantasize or—
>
> [ATTORNEY FOR DEFENDANT]: Objection.
>
> A. —make up—
>
> THE COURT: Overruled.
>
> A. —an act like that that they have not experienced. It's not within their mental ability to do that. So based on what she told me, the consistency of what she told me, what she told the parents, what she told law enforcement was just all very striking, and that I felt like she was—that she did experience that abuse.

Under *Bush*, Dr. Russo's expert opinion that defendant sexually abused H.B. amounted to an impermissible opinion of H.B.'s credibility. It was error for the trial court to admit the opinion.

The State argues that defendant has failed to preserve this assignment of error because defendant made only a general objection to Dr. Russo's testimony regarding the diagnosis. A general objection is normally not sufficient to preserve an issue for review on appeal. *See* N.C.R. App. P. 10(b)(1). Accordingly, we grant defendant's request to review for plain error. *See State v. Andrews*, 170 N.C. App. 68, 75, 612 S.E.2d 178, 183 (2005); *see also State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983) (applying plain error review to the admissibility of evidence under N.C.R. App. P. 10(b)(1)).

Our Supreme Court has directed that plain error has occurred when an error " ' "had a probable impact on the jury's finding that the defendant was guilty." ' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (footnote omitted)). In this case, we find that Dr. Russo's inadmissible opinion likely had an impact on the jury's finding of guilt.

A trial court commits plain error when it admits expert testimony on a victim's credibility because it prejudices the defendant in the eyes of the jury. *Couser*, 163 N.C. App. at 731, 594 S.E.2d at 423; *see also Ewell*, 168 N.C. App. at 105-06, 606 S.E.2d at 920, *and Bush*, 164 N.C. App. at 259-60, 595 S.E.2d at 719. In *Couser*, the only evidence that the defendant sexually abused the minor victim was the victim's own testimony and the corroborating testimony of witnesses. *Couser*, 163 N.C. App. at 731, 594 S.E.2d at 423. We held that it was plain error for an expert to testify that she diagnosed the victim as having "probably [been] sexually abused." *Id.* at 730-31, 594 S.E.2d at 422-23. We found that the testimony likely impacted the jury's finding of guilt since it was an improper opinion of the victim's credibility, and "the central issue to be decided by the jury was the credibility of the victim." *Id.* at 731, 594 S.E.2d at 423.

Like in *Couser*, the only evidence of H.B.'s allegations were her own statements. H.B.'s credibility was the central issue in the case, and Dr. Russo's inadmissible expert opinion lent great weight to H.B.'s credibility. Had the jury not heard Dr. Russo's inadmissible expert opinion, there is a reasonable possibility that the jury would have reached a different result. In accordance with this Court's previous decisions on this issue, we find plain error. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (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."); *see also In re R.T.W.*, 359 N.C. 539, 542 n3, 614 S.E.2d 489, 491 n3 (2005).

The State argues that *State v. Stancil*, 146 N.C. App. 234, 552 S.E.2d 212 (2001), *modified and aff'd per curiam*, 355 N.C. 266, 559 S.E.2d 788 (2002)), and not *Couser*, controls this case. Although our Supreme Court found that the admission of the expert testimony in *Stancil* was error, it held that the error was not plain error because there was overwhelming evidence of the defendant's guilt. *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789. Our Court rejected a similar argu-

ment in *Couser*, where we noted that, in *Stancil*, "in addition to testimony of the victim and other corroborating evidence[,] there were two permissible expert opinions that the victim exhibited characteristics consistent with sexual abuse." *Couser*, 163 N.C. App. at 730-31, 594 S.E.2d at 423 (citing *Stancil*, 146 N.C. App. at 240, 552 S.E.2d at 215-16). The victim in *Stancil* also "showed intense and immediate emotional trauma after the incident," and continued to show such symptoms five days later. *Couser*, 163 N.C. App. at 731, 594 S.E.2d at 423 (citing *Stancil*, 146 N.C. App. at 240, 552 S.E.2d at 215-16). We then contrasted this "overwhelming" evidence with the evidence in *Couser*: the mere testimony of the victim and the other witnesses's corroboration. *Couser*, 163 N.C. App. at 731, 594 S.E.2d at 423. Unlike in *Stancil*, there was no other permissible expert testimony in *Couser*, nor was there evidence that the victim exhibited behaviors that were consistent with having suffered from sexual assault. *Id.* at 731, 594 S.E.2d at 423.

We find that *Couser*, and not *Stancil*, controls this case. The State did not present other overwhelming evidence of defendant's guilt. Dr. Russo's inadmissible expert opinion was the only expert witness testimony for the State. Although H.B.'s family member testified that H.B.'s behavior had changed since the incident, there was no evidence that this behavior was symptomatic of having suffered sexual abuse. In the absence of overwhelming evidence of defendant's guilt, we find that the admission of Dr. Russo's diagnosis was plain error.

We also distinguish this case from this Court's recent decision in *State v. Goforth*, 170 N.C. App. 584, 614 S.E.2d 313 (2005). In *Goforth*, this Court held that it was not error to admit expert opinion testimony that the victims had been repeatedly sexually abused. *Id.* at 590-91, 614 S.E.2d at 317-18. The expert testified that both victims had physical manifestations of vaginal trauma caused by "intentional" or "not accidental" penetration. *Id.* at 590-91, 614 S.E.2d at 317. Therefore, in *Goforth*, the expert's testimony involved objective physical evidence of sexual abuse. In contrast, the only physical manifestation of injury suffered by H.B. in this case was pain, which is subjective and not independently verifiable. Therefore, it was improper for Dr. Russo to testify that she diagnosed H.B. as having been sexually abused.

Finding plain error, we grant defendant a new trial. However, we elect to address defendant's remaining assignments of error since the issues are likely to recur upon retrial.

II.

[2] Defendant argues that the trial court committed error when it overruled defendant's objection and permitted L.B. to testify that defendant had sexually abused her twenty-three years earlier. At trial, after the parties conducted a voir dire hearing on L.B.'s testimony, defendant objected to the testimony on the grounds that it was improper evidence under Rule 404(b). N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). The trial court admitted the testimony, and instructed the jury that "[t]his evidence will be received solely for the purpose of showing that there existed in the mind of the [d]efendant a scheme, plan, system, or design involving the crime charged in this case."

> 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.

Id. Our Supreme Court has held that, under Rule 404(b), "evidence of prior sex acts may have some relevance to the question of [the] defendant's guilt of the crime charged if it tends to show a relevant state of mind such as intent, motive, plan, or opportunity." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). However, the admissibility of evidence under Rule 404(b) "is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). Furthermore, "[r]emoteness in time between an uncharged crime and a charged crime is more significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan." *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991). Evidence that a defendant engaged in previous sexual abuse is inadmissible when a significant lapse of time exists between the instances of alleged sexual abuse. *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 825 (1988).

In *Jones*, the twelve-year-old victim alleged that the defendant, her stepfather, sexually assaulted her. *Id.* at 586, 369 S.E.2d at 822. A witness testified that the defendant, with whom the witness formerly lived, had sexually assaulted the witness in the same manner. *Id.* at

586, 369 S.E.2d at 822-23. The witness testified that this abuse occurred seven years earlier, beginning when the witness was eleven years old. *Id.* at 586, 369 S.E.2d at 822-23. Our Supreme Court held that the admission of this testimony was in error since the time period between the two acts was "severely attenuated [and] 'substantially negate[s] the plausibility of the existence of an ongoing and continuous plan to engage persistently in such deviant activities.' " *Id.* at 590, 369 S.E.2d at 824 (second alteration in original) (quoting *State v. Shane*, 304 N.C. 643, 656, 285 S.E.2d 813, 821 (1982)). The Court found that the "probative impact [of the evidence] ha[d] been so attenuated by time that it ha[d] become little more than character evidence illustrating the predisposition of the accused." *Id.* at 590, 369 S.E.2d at 825.

Like in *Jones*, the extreme time lapse between the alleged instances of abuse merits against finding that defendant was engaged in an ongoing plan or scheme of sexual abuse. Because the evidence was admitted solely for the purpose of showing a "scheme, plan, system or design," and because of the lapse of twenty-three years, a significant period of time, the trial court erred in admitting this evidence.

The State argues that *State v. Jacob*, 113 N.C. App. 605, 439 S.E.2d 812 (1994), controls this case. In *Jacob*, the victim testified that the defendant, her father, raped her three times when she was ten years old. *Id.* at 606, 439 S.E.2d at 813. Over the defendant's objection, the defendant's twenty-two-year-old daughter testified that the defendant sexually abused her when she was around nine years old. *Id.* at 607, 439 S.E.2d at 813. A witness testified that the defendant had told her "when my daughters get old enough to know about love, [I am] going to be the one to teach them." *Id.* at 609, 439 S.E.2d at 814. We held that the incidents of sexual assault were not too remote in time to show that the defendant had a common scheme or plan to initiate his prepubescent daughters into sex since "the remoteness in time was due to [the] defendant's having almost no access to the daughters of his first marriage following his divorce. . . . [The victim] was not born until [4 years after the defendant's divorce], and did not reach a prepubescent age until several years later." *Id.* at 611, 439 S.E.2d at 815.

We find *Jacob* distinguishable from this case. Unlike in *Jacob*, the State has offered no evidence that defendant did not have any access to his preferred victim during the twenty-three year time span between the alleged instances of abuse. The State has failed to estab-

lish that defendant's plan was interrupted and then resumed twenty-three years later. The admission of this evidence was in error and should not be admitted at his new trial.

In the alternative, the State argues that L.B.'s testimony was admissible under Rule 404(b) to show identity and intent. The trial transcript reveals that the State did not rely on these grounds when it argued for the admissibility of the evidence before the trial court. Rather, the State relied on the theory that the testimony was admissible to show a common scheme or plan. Since the argument of identity and intent has been raised for the first time on appeal, it is not properly before us. *State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997); *see also State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions.").

III.

[3] The final assignment of error addressed in defendant's brief contends that the trial court erred when it allowed the State to elicit Gordon's testimony that defendant possessed pornographic magazines and women's underwear. Defendant failed to object to this evidence at trial, and asks that we review for plain error. In order to determine whether plain error occurred at the trial court, we " 'must examine the entire record and determine if the . . . error had a probable impact on the jury's finding of guilt.' " *State v. Pullen*, 163 N.C. App. 696, 701, 594 S.E.2d 248, 252 (2004) (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983)).

Under Rule 404(b), "evidence of a defendant's prior conduct, such as the possession of pornographic videos and magazines, is not admissible to prove the character of the defendant in order to show that the defendant acted in conformity therewith on a particular occasion." *State v. Smith*, 152 N.C. App. 514, 521, 568 S.E.2d 289, 294, *disc. review denied*, 356 N.C. 623, 575 S.E.2d 757 (2002). Such evidence is only permissible if it is relevant to show something other than a defendant's character or propensity to commit the crime of which he is charged. N.C. Gen. Stat. § 8C-1, Rule 404(b); *Smith*, 152 N.C. App. at 521, 568 S.E.2d at 294.

In *Smith*, the defendant was accused of sexually assaulting his stepdaughter. *Id.* at 516, 568 S.E.2d at 291. Our Court held that the

trial court erred by admitting evidence that the defendant possessed pornographic magazines. *Id.* at 521, 568 S.E.2d at 295. There was no evidence that the defendant had shown the victim pornography or otherwise used the pornography during the alleged assaults, and consequently the defendant's possession of the pornography was not relevant to prove that the defendant committed the charged offenses. *Id.* at 523, 568 S.E.2d at 295. Therefore, we held that the sole purpose of the evidence "was to impermissibly inject [the] defendant's character into the case to raise the question of whether [the] defendant acted in conformity with his character at the times in question." *Id.* at 522, 568 S.E.2d at 295; *accord Bush*, 164 N.C. App. at 262, 595 S.E.2d at 720 (admission of evidence that a defendant accused of sexual assault on a minor possessed and purchased pornographic videos was inadmissible under Rule 404(b) and prejudicial at trial).

As in *Smith*, the State presented no evidence that defendant's possession of pornographic magazines and women's underwear played any part in the alleged offenses. Therefore, the evidence was not relevant to prove the charges against him and was merely impermissible character evidence. The admission of the evidence was in error. However, we do not find that the error amounts to plain error. There is no indication that the error had any impact on the jury's finding of guilt. Nevertheless, the admission of the testimony for the purpose of showing defendant's propensity to commit the crime was in error and should not be presented at defendant's new trial for this same purpose.

[4] We deem those assignments of error not addressed in defendant's brief abandoned. N.C.R. App. 28(b)(6).

New trial.

Judge STEELMAN concurs.

Judge BRYANT concurs in part and dissents in part with a separate opinion.

BRYANT, Judge concurring in part and dissenting in part.

I dissent from the majority opinion granting defendant a new trial upon finding plain error in the admission of Dr. Russo's testimony. I disagree that the trial court committed any error by admitting the testimony of Dr. Russo, and I strongly disagree that there was plain error

committed. The majority states the expert medical opinion of Dr. Russo was impermissible testimony on the victim's credibility. However, the record shows Dr. Russo's expert medical opinion was based on her training and experience. Dr. Russo was tendered and admitted as an expert in "pediatric gynecology" and in "child [sexual] abuse". The record also shows that in addition to extensive medical training in pediatrics and child abuse, Dr. Russo had interviewed and examined child victims of physical and sexual abuse, on average, once a week for seven years prior to her testimony.

Rule 702 provides in part:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702 (2003).

"In determining whether expert medical opinion is to be admitted into evidence the inquiry should be . . . whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Trent*, 320 N.C. 610, 614, 359 S.E.2d 463, 465 (1987). Here, based on training and experience, Dr. Russo was certainly in a better position to have an opinion on whether the child in the instant case had been sexually abused. Dr. Russo evaluates each child's intellectual ability as a part of her examination. As a medical professional she must determine whether a child can accurately relay medical information in order for her to use that information in medically diagnosing or treating a child patient.

When asked at trial if her physical examination of the child was consistent with the history given, Dr. Russo replied:

> It was absolutely consistent. With what [the child] stated happened, I would expect a normal examination. The tissues down there are very elastic. In other words, they can stretch and then return to their normal shape. Also, healing is very rapid in that area . . . and [] takes place very quickly. So with the type of abuse that she disclosed, I would not expect to see signs of trauma or damage. . . .

Dr. Russo was then asked her diagnosis:

> My diagnosis was that [the child] had suffered from the sexual abuse that she disclosed to me and her family. And my feelings were that [the child] being a three[-]year[-]old child could not fantasize that these events occurred. She could not make them up. Children that young do not have the ability to fantasize or [OBJECTION OVERRULED] an act like that they have not experienced. It's not within their mental ability to do that. So based on what she told me, the consistency of what she told me, what she told the parents, what she told law enforcement was just all very striking, and that I felt like she was—that she did experience that abuse.

"[I]t is []well-settled that testimony based on the witness's examination of the child witness and expert knowledge concerning the abuse of children in general is not objectionable because it supports the credibility of the witness or states an opinion that abuse has occurred." *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89 (1997) (internal citations omitted). Here, the child described to Dr. Russo pain inside her vaginal area and described where they were sitting when the incident occurred. She also demonstrated for Dr. Russo using anatomical dolls, where she was touched. Therefore, when Dr. Russo conducted her examination of the vaginal area of the child, the results were consistent with what she had been told. In other words, one would not necessarily expect to see scarring or trauma or other physical evidence of abuse based on the history given.

The majority discusses many cases including *State v. Bush*, 164 N.C. App. 254, 595 S.E.2d 715 (2004), *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004) and *State v. Dixon*, 150 N.C. App. 46, 563 S.E.2d 594 (2002) for the proposition that it is error to admit expert opinion testimony in child sexual assault cases where no physical evidence of abuse exists. To the extent that these cases stand for that proposition, such a conclusion is reasonably applicable only in sexual assault cases where one would expect to find physical evidence of abuse. Such cases might include forcible sexual assault or repeated sexual abuse. *See, e.g.*, *State v. Goforth*, —— N.C. App. ——, ——, —— S.E.2d ——, —— (June 7, 2005) (No. COA04-608) (where child medical expert testified "if there are physical findings [in a child's examination], this is usually indicative of repeated abuse"). The instant case is factually similar to many, many child sexual assault cases where the nature of the assault, a sexual touching, is such that one would not expect physical evidence of abuse. *See, Id.* Therefore,

in those cases where the clinical evidence of sexual abuse is based on expert medical testimony that the acts of sexual abuse alleged are *unlikely* to leave physical evidence, that testimony is valid and states the basis for the expert's opinion. For these reasons, I would hold Dr. Russo's testimony to be permissible medical opinion from an expert in child abuse, and would find no error in its admission.

Nevertheless, even assuming *arguendo* the admission of this expert medical opinion testimony was erroneous, it did not arise to the level of plain error. As our Supreme court has stated time and again, plain error is "error 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) (citations omitted), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). "Plain error does not simply mean obvious or apparent error." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). The plain error rule must be applied cautiously and only in exceptional cases where, " 'after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." ' " *State v. Davis*, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999) (citations omitted).

The majority states that "Dr. Russo's inadmissible opinion likely had an impact on the jury's finding . . ." and that "[i]n the absence of overwhelming evidence of defendant's guilt, . . . the admission of Dr. Russo's diagnosis was plain error." I disagree as there is significant additional evidence in the record regarding the sexual abuse of this three year old child such that absent the testimony of Dr. Russo, the jury would nevertheless have reached a verdict of guilty. The jury heard the testimony of the child's father who testified in pertinent part:

> Q. During that time period while you were in the living room that evening with your children, did you observe anything unusual take place?
>
> A. Well, my little girl, she was messing. . . . She was messing with herself, like rubbing—
>
> Q. Okay. And when you indicate that she was messing with herself and rubbing, what part of her body was she doing that to?
>
> . . .

A. Her private part.

Q. Okay. At that point in time when you observed that, did you say anything to [the child]?

A. I said "[H], what are you doing?" . . . She said, "It hurts[.]"

Q. Okay. Did she make any other comments at that time?

A. She said that—that Pawpaw—she calls him Pawpaw. . . . "Pawpaw touched me down there". . . She said he touched her down there with his finger.

Detective John Stephens of the Davie County Sheriff's Department reported to the home on the date of the incident and spoke to the three-year-old child. Detective Stephens told the jury that: "She was a real sweet young lady. She told me that her Pawpaw touched her 'gina' and put his finger in there and it hurt." He further testified the child got a doll to indicate what her grandfather did to her. "[S]he put the doll on the table . . . [s]he opened the doll's legs and put her finger inside between the doll's legs at the vaginal area."

The mother of the child testified before the jury and stated the child said Pawpaw touched her and that it hurt, and that the child, using a doll, demonstrated where her grandpa touched her. The mother also testified the child's attitude and behavior had changed since the incident in that the child had more "attitude" and she did not want any men in the bathroom with her, even her twin brother. In addition, the mother testified about two conversations with her father; one in which he denied touching the child; and another in which he said "I'm sorry for what I've done. I know what I've done wrong and I'm where I need to be[.]" Given this strong testimonial evidence against defendant, it is not probable the jury would have reached a different verdict absent Dr. Russo's testimony.

In part II the majority holds that admission of evidence that defendant sexually abused his niece twenty-three years ago was in error and "should not be admitted during [defendant's] new trial[.]" As stated *infra*, I would hold defendant is not entitled to a new trial based on the admission of Dr. Russo's testimony. Because of the strong evidence otherwise of defendant's guilt, I would hold the other crimes evidence involving defendant's niece to be harmless error.

As to part III of the majority opinion, I agree with the majority's conclusion that the admission of evidence of defendant's possession

of pornographic magazines and women's underwear did not arise to the level of plain error.

STATE OF NORTH CAROLINA v. CHARLES EUGENE WATTS

No. COA04-874

(Filed 2 August 2005)

1. Evidence— DNA expert testimony—population statistics

The trial court did not commit plain error in a statutory rape case by denying defendant's objection to a witness's testimony concerning his opinion about population statistics when he had been tendered as an expert in forensic DNA analysis, because: (1) given that the Court of Appeals has found that a population-statistical analysis is the third step in DNA analysis, our case law evidences the admissibility of testimony on population statistics by forensic DNA analysis experts; and (2) defendant cites no authority in support of his argument.

2. Evidence— DNA analysis conducted by absent colleague—right to confrontation

The trial court did not commit plain error in a statutory rape case by denying defendant's objection to the testimony of a witness tendered as an expert in forensic DNA analysis about results of a DNA analysis conducted by an absent colleague, because: (1) an expert may base his opinion on tests performed by others in the field; and (2) defendant's right of confrontation was not violated since he was given an opportunity to cross-examine the expert on the basis of his opinion.

3. Constitutional Law— effective assistance of counsel—failure to stipulate to chain of custody

Defendant did not receive ineffective assistance of counsel in a statutory rape case by his counsel's failure to stipulate to the chain of custody of the products of conception in order to avoid the necessity of introducing them into evidence at trial, because: (1) there is no reasonable probability that defense counsel's alleged error affected the outcome of defendant's trial; (2) had defense counsel stipulated to the chain of custody of the products of conception, testimony regarding the results of the pater-

nity would still have come in; (3) a stipulation to the chain of custody could not have negated the overwhelming evidence of defendant's guilt; and (4) notwithstanding the inflammatory manner in which the products were admitted, were the issue preserved for review and assuming the admission amounted to error, there was no prejudicial error given the overwhelming evidence of defendant's guilt.

4. Sentencing— statutory rape—proportionate

The trial court did not err in a statutory rape case by imposing a sentence allegedly grossly disproportionate to the crime, because: (1) our Court of Appeals has previously held that the penalty set by our legislature for statutory rape is not disproportionate to the crime and reflects a rational legislative policy; and (2) defendant has not attempted to explain why this rationale would change under the Eighth Amendment of the United States Constitution.

5. Sentencing— aggravating factors—*Blakely* error—offense while on pretrial release

The trial court erred in a statutory rape case by finding the aggravating factor that defendant committed the offense while on pretrial release on another charge and by sentencing defendant within the aggravated range in violation of his Sixth Amendment right to a jury trial, and defendant's conviction is remanded for resentencing, because: (1) other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt; and (2) the aggravating factor in this case was not a prior conviction, the factor was not admitted by defendant, and the facts for this aggravating factor were not presented to a jury and proved beyond a reasonable doubt.

Appeal by Defendant from conviction and sentence entered 13 June 2003 by Judge B. Craig Ellis in Superior Court, Scotland County. Heard in the Court of Appeals 1 March 2005.[1]

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1. By order of this Court, the filing of this opinion was delayed pending the outcome of the Supreme Court of North Carolina decisions in *State v. Allen*, 359 N.C. 425, —— S.E.2d ——, —— (1 July 2005) (485PA04) and *State v. Speight*, 359 N.C. 602, —— S.E.2d ——, —— (1 July 2005) (491PA04) on issues arising from the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004).

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

Bruce T. Cunningham, Jr., for the defendant-appellant.

WYNN, Judge.

In *State v. Futrell*, 112 N.C. App. 651, 659, 436 S.E.2d 884, 888 (1993), this Court reviewed "the process of DNA analysis[]" and found that a population-statistical analysis is the third part of DNA analysis. Here, Defendant argues, *inter alia*, that a witness tendered as an expert in forensic DNA analysis was not qualified to testify on population statistics. Given that our case law evidences the admissibility of testimony on population statistics by (forensic) DNA analysis experts and Defendant presents no authority to support his argument, we uphold the admission of the testimony on population statistics. But, for reasons given in *Allen*, 359 N.C. at ——, —— S.E.2d at ——, and *Speight*, 359 N.C. at ——, —— S.E.2d at ——, we must remand this case for resentencing because the trial court improperly found an aggravating factor and sentenced Defendant in the aggravated range in violation of the Sixth Amendment to the United States Constitution.

Upon the verdict of a jury, Defendant was convicted of raping a thirteen-year-old female ("the minor") and sentenced to 360 to 441 months imprisonment without parole. The record reflects that the minor moved to North Carolina with her father in 2000 after her parents separated. Defendant, Charles Eugene Watts, is related to the minor. The minor began working for Defendant at his garage because her father was sick, his income was low, and the minor needed things for school. At the time, the minor was thirteen years old; Defendant was forty-seven.

At trial, the minor provided the following testimony: Defendant began sexually assaulting her soon after she started working for him. Defendant kissed her, put his fingers into her vagina, and then raped her twice a day every weekday. Before Defendant raped her, the minor had not had sexual intercourse with anyone. Defendant told the minor that he would hurt her and her family if she told anybody.

On 7 September 2000, while driving the minor to school, Defendant grabbed the back of her head, pushed it into his lap, and forced her to perform oral sex on him. Defendant then drove to his garage, where he again raped the minor before taking her to school. She took the bus home from school, showered, and visited a neigh-

bor, Susan Butler. She told Ms. Butler what had been happening. Testimony at trial established that Ms. Butler immediately talked to the minor's father; he, along with the minor and Ms. Butler, went to the police.

Thereafter, the police sent the minor to the hospital, where her underwear and physical samples were taken. A pregnancy test was administered, with a positive result. The treating obstetrician-gynecologist estimated the time of conception to be somewhere between 9 August and 19 August, during which time the minor was allegedly being raped by Defendant. The fetus was not viable, and an evacuation was performed. The products of conception extracted during the evacuation were preserved and picked up by the police.

Defendant consented to giving a blood sample. He contended that he was sterile, denied having any sexual contact with the minor, contended that the minor had a bad reputation, and accused the minor of making sexual advances toward him.

Defendant was arrested and tried for statutory rape of a thirteen-year-old victim at the 10 June 2003 session of Superior Court, Scotland County. During the trial, the physician who performed the evacuation was asked to identify the products of conception, which were "leaking somewhat." The trial court interrupted the examination, asking that the products be put in a cooler and a lid be placed on the cooler. The trial court recessed for five minutes in order for the bailiff to get "spray" and the trial judge then stated, "For the record State's Exhibit Number 35 has a very unpleasant odor[.]" Thereafter, a forensic DNA analyst who had examined the products of conception and blood samples of Defendant and the minor testified at trial that the probability of Defendant's paternity was 99.99 percent. Special Agent David Freeman, a forensic molecular geneticist with the State Bureau of Investigation, also testified at trial. He discussed DNA analysis conducted primarily by a colleague who was on vacation. Special Agent Freeman testified, *inter alia*, that the profile from the male fraction of the DNA taken from the minor's underwear was 4.48 million trillion times more likely to be from Defendant than from another unrelated individual within North Carolina's Caucasian population, 17.3 million trillion times more likely to be from Defendant than from another unrelated individual within North Carolina's African-American population, 5.59 million trillion times more likely to be from Defendant than from another unrelated individual within North Carolina's Caucasian Lumbee Indian population, and 20.7 million trillion times more likely to be from Defendant than from another

unrelated individual within North Carolina's Hispanic population. Special Agent Freeman testified that, in his opinion, it was scientifically unlikely that the semen found on the minor's underwear originated from anyone other than Defendant.

From the resulting conviction of statutory rape of a thirteen-year-old victim and sentence, Defendant appealed to this Court.

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[1] In his appeal, Defendant first contends that the trial court erred by denying his objection to Special Agent Freeman's testimony concerning his opinion about population statistics when he had not been tendered or qualified in that field. Defendant argued error as to Special Agent Freeman's statements that: (1) the profile from the male fraction of the DNA taken from the minor's underwear was 4.48 million trillion times more likely to be from Defendant than from another unrelated individual within North Carolina's Caucasian population; and (2) in his opinion, it was scientifically unlikely that the semen found on the minor's underwear originated from anyone other than Defendant.

Preliminarily, we point out that Defendant lodged only general objections during Special Agent Freeman's testimony and did not ask to be heard when the objections were overruled. Moreover, defense counsel questioned Special Agent Freeman at length about population statistics. The transcript does not clearly demonstrate the grounds for the objections, and the testimony was not on its face admissible for no purpose. Defendant therefore failed to preserve this issue for appeal. *State v. Tyler*, 346 N.C. 187, 203, 485 S.E.2d 599, 608 ("An objection to a witness's qualifications as an expert in a given field or upon a particular subject is waived if it is not made [] upon this special ground, and a mere general objection to the content of the witness's testimony will not ordinarily suffice to preserve the matter for subsequent appellate review." (quotation omitted)), *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997); *State v. Perkins*, 154 N.C. App. 148, 152-53, 571 S.E.2d 645, 648 (2002) (where "Defendant's counsel gave no basis for the [general] objections and the transcript does not clearly demonstrate grounds for the objections[,]" the issue was not preserved for appeal except for plain error review (quotations and citations omitted)); *State v. Hamilton*, 77 N.C. App. 506, 509, 335 S.E.2d 506, 508 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986) ("We note [] that a general objection, if overruled, is ordinarily not effective on appeal." (citation omitted)).

Because Defendant failed to preserve the issue of Special Agent Freeman's qualifications, the proper standard for review is plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) ("[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court"); *Perkins*, 154 N.C. App. at 152-53, 571 S.E.2d at 648. Defendant failed, however, to assert plain error in both his assignments of error and his appellate brief. Where a defendant fails specifically and distinctly to allege plain error, the defendant waives his right to have the issues reviewed for plain error and we therefore refrain from any review. *State v. Forrest*, 164 N.C. App. 272, 277, 596 S.E.2d 22, 25-26 (2004) ("when a defendant fails to specifically and distinctly allege that the trial court's ruling amounts to plain error, defendant waives his right to have the issues reviewed under plain error[]" (citing *State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994)); *State v. Flippen*, 349 N.C. 264, 274-75, 506 S.E.2d 702, 710 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999) (where defendant failed to assert plain error in his assignments of error, he waived plain error review).

Nonetheless, in the interest of justice and fairness of the judicial process, and given the considerable gravity of Defendant's lengthy sentence to imprisonment, we invoke our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to review the merits of this assignment of error. N.C. R. App. P. 2 ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . ."); *State v. Poplin*, 304 N.C. 185, 282 S.E.2d 420 (1981) (granting review under Rule 2 where the defendant made no arguments and cited no authority in his brief because of the severity of the sentence of life imprisonment); *but see State v. Dennison*, 359 N.C. 312, 608 S.E.2d 756 (2005) (declining to review under Rule 2 where the defendant failed to renew his objection to the admission of evidence after denial of a pretrial motion *in limine*, notwithstanding the defendant's sentence to life imprisonment without parole and moving to strike the evidence at trial and the Court of Appeals' granting a new trial based on admission of improper character evidence at the defendant's trial). Upon our review, we hold that Defendant's contention is without merit.

Defendant contends that Special Agent Freeman, who was qualified as an expert in forensic DNA analysis, was not qualified to testify as to population statistics and argues error as to Special Agent

Freeman's statements that: (1) the profile from the male fraction of the DNA taken from the minor's underwear was 4.48 million trillion times more likely to be from Defendant than from another unrelated individual within North Carolina's Caucasian population; and (2) in his opinion, it was scientifically unlikely that the semen found on the minor's underwear originated from anyone other than Defendant.

In *Futrell*, 112 N.C. App. at 659, 436 S.E.2d at 888, this Court provided a review of "the process of DNA analysis[]" and found that a population-statistical analysis is the third part of DNA analysis. This Court outlined the steps of DNA analysis as:

> First, the "known" and "unknown" samples of DNA molecules are chemically cut into fragments, separated into single strands, and lined up longest to shortest. A "probing step" follows to isolate those portions of DNA molecules which are "variable," that is, differ from one individual to another. Four specific areas of the DNA molecule are usually "probed" in the RFLP procedure. Then a process called autoradiography yields an exposed film called an "autorad" showing a pattern of fuzzy lines or bands, commonly referred to as a "DNA profile."
>
> Bands derived from the known and unknown samples are thereafter compared visually. If the numbers and positions of the bands on the autorad appear consistent with one another (*i.e.*—"line up"), they are then sized by computerized measurement with reference to "size markers" or "sizing ladders" which also appear on autorads in three parallel lanes. After visual examination and computerized measurement, an "interpretation" is made as to whether, within a specified deviation or "match window," a "match" may be declared. Under the F.B.I. protocol, a margin of error of plus or minus 2.5% is permitted.
>
> ***Finally, the statistical significance of the "match," that is, the probability of finding identical strands of DNA in someone other than the accused, is determined. This is accomplished by ascertaining the frequency with which a particular pattern of bands will appear within a relevant population***, this latter being initially established by the race of the individual involved and by references to the pertinent data base compiled by the testing agency.

Id. at 660, 436 S.E.2d at 888 (emphasis added). In *Futrell*, a special agent assigned to the DNA Analysis Unit of the Federal Bureau of

Investigation laboratory testified as an expert in forensic DNA analysis. The special agent, *inter alia*, "compared DNA from defendant's blood sample and the semen to the F.B.I.'s black population data base and concluded the probability of finding a random match of the DNA in the semen and in defendant's blood was approximately 1 in 2.7 million individuals." *Id.* at 656, 436 S.E.2d at 886.

Similarly, in *State v. McKenzie*, 122 N.C. App. 37, 468 S.E.2d 817 (1996), an agent tendered as an expert in forensic DNA analysis testified, *inter alia*, "regarding the statistical analysis concerning the predicted population frequency of the DNA profiles in this case." *Id.* at 44, 468 S.E.2d at 823. While the defendant in *McKenzie* did not argue the agent's lack of qualification to address population statistics, this Court found that "[b]ased on [the agent's] training and experience, his testimony . . . provided a proper basis on which to accept this scientific evidence." *Id.* In a further example, *State v. Hill*, 116 N.C. App. 573, 449 S.E.2d 573, *disc. review denied*, 338 N.C. 670, 453 S.E.2d 183 (1994), an expert in molecular genetics and forensic DNA analysis testified as to population statistics, stating "that the probability of selecting another unrelated individual having the same DNA profile as defendant was approximately 1 in 2.6 million for the North Carolina white population." *Id.* at 578, 449 S.E.2d at 576. While the defendant in *Hill* did not object on the basis of the agent's qualifications, his other objections as to the agent's testimony were found to have no merit.

Here, Defendant does not dispute that Special Agent Freeman was properly tendered as an expert in the field of forensic DNA analysis. Indeed, the trial court established that Special Agent Freeman had a bachelor's degree in biochemistry, a master's and Ph.D. in microbiology, had undergone additional forensic DNA training through the North Carolina Bureau of Investigation, the Federal Bureau of Investigation, and the Armed Forces, and had conducted DNA analysis in over 400 cases.

Defendant asserts that "there are three separate areas of expertise associated with DNA testimony. Those three are forensic serology, forensic DNA analysis, and population statistics[,]" and that, because Special Agent Freeman was qualified only as a DNA analyst, "he can testify about electrophoresis and performing a polymerase chain reaction" but not about population statistics. Significantly, Defendant cites no authority in support of these contentions (in violation of Rule of Appellate Procedure 28(b)(6)). Given that this Court has found that a population-statistical analysis is the third step in

DNA analysis, our case law evidences the admissibility of testimony on population statistics by (forensic) DNA analysis experts, and Defendant cites no authority in support of his argument, we uphold the trial court's ruling that Special Agent Freeman, who was qualified as an expert in DNA analysis, was qualified to testify as to the population statistics in this case.

[2] Defendant next contends that the trial court erred by denying his objection to Special Agent Freeman's testimony about results of a DNA analysis conducted by an absent colleague. The record reflects that the DNA analysis, indicating that the male DNA found in the minor's underwear matched that of the Defendant, was initially conducted by Special Agent Freeman's colleague and was then reviewed by Special Agent Freeman, the leader of the State Bureau of Investigation's molecular genetics section. Defendant alleges that Special Agent Freeman testified as to his absent colleague's "lab conclusion" and thereby violated Defendant's Sixth Amendment right to confrontation, particularly in light of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).[2]

Defendant lodged only a general objection during the relevant testimony and did not ask to be heard when the objection was overruled. The transcript does not clearly demonstrate the grounds for the objection, and the evidence was not on its face admissible for no purpose. Defendant thus failed to preserve this issue for appeal. *State v. Golphin*, 352 N.C. 364, 403-04, 533 S.E.2d 168, 197 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001) ("[T]his Court is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court." (quotations and citations omitted)); *Perkins*, 154 N.C. App. at 152-53, 571 S.E.2d at 648 (where defendant gave no basis for the objections and the transcript did not clearly demonstrate the grounds, the issue was not preserved for appeal). Moreover, Defendant failed specifically and distinctly to allege plain error in his assignment of error and appellate brief. Because Defendant failed specifically and distinctly to allege plain error, he waived his right to

2. In his appellate brief, Defendant also argued that admission of this testimony violated the rules of evidence. However, because Defendant's relevant assignment of error excepted only on the basis of the Confrontation Clause, we do not address the Rules of Evidence. N.C. R. App. P. 10(a) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal"); *Dep't of Transp. v. Elm Land Co.*, 163 N.C. App. 257, 264, 593 S.E.2d 131, 136 (2004) (quoting N.C. R. App. P. 10(a) and refraining from addressing an argument regarding a conclusion of law where the assignment of error in the record excepted to the conclusion under a different theory).

have the issues reviewed for plain error. *Forrest*, 164 N.C. App. at 277, 596 S.E.2d at 25-26; *Flippen*, 349 N.C. at 274-75, 506 S.E.2d at 710. Again however, for the reasons previously stated, we exercise our discretion under Appellate Procedure Rule 2 to reach the merits of Defendant's argument on this issue.

In *State v. Delaney*, 171 N.C. App. 141, 613 S.E.2d 699 (2005), this Court determined that a defendant's right to confrontation was not violated where an expert in analyzing controlled substances relied on a non-present chemist's analyses in forming his expert opinion and testified regarding those analyses. This Court stated:

> 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 [the expert] 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*.

Id. at 144, 613 S.E.2d at 701. And in another recent case, *State v. Walker*, 170 N.C. App. 632, 613 S.E.2d 330 (2005), this court found that the testimony of an expert as to a forensic firearms report conducted by another and admission of such report did not violate a defendant's right to confrontation and stated "where the evidence is admitted for, *inter alia*, corroboration or the basis of an expert's opinion, there is no constitutional infirmity." *Id.* at 635, 613 S.E.2d at 333 (citations omitted).

For the reasons stated in *Delaney* and *Walker*, Special Agent Freeman's using results of a DNA analysis conducted by a colleague to form the basis of his expert opinion and related testimony about that analysis did not violate Defendant's right of confrontation.

[3] Third, Defendant contends that the introduction of foul-smelling products of conception violated Defendant's due process rights under the Fourteenth Amendment of the United States Constitution.[3] Prior

3. We note that (1) Defendant also argues that the products of conception were "irrelevant to any issue," and (2) the trial court allowed testimony, particularly that of Officer William Davis, about the products of conception before the admission of the products themselves during the testimony of Dr. Kohn, the physician who performed the evacuation of the products. Because Defendant's assignments of error fail to raise the issue of relevancy and fail to except to that other testimony, we refrain from addressing those issues. 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"); *Elm Land Co.*, 163 N.C. App. at 264, 593 S.E.2d at 136 (quoting N.C. R. App. P. 10(a) and refraining from addressing an argument regarding a conclusion of law where the

to trial, Defendant made a motion *in limine* to prevent any mention of the products during trial, contending that the evidence was "solely for the purpose of prejudicing the defendant and placing his character in issue." The motion was "insufficient to preserve for appeal the question of admissibility of evidence." *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) (quotation omitted), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998); *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) (same).[4] At trial, Defendant lodged only a general line objection to Dr. Kohn's testimony about the products of conception, did not ask to be heard when the objection was overruled, and failed to indicate that the grounds for the desired exclusion was offensiveness that would violate Defendant's due process rights. The transcript does not clearly demonstrate the grounds for the objection, and the evidence was not on its face admissible for no purpose. Moreover, when the actual products themselves were entered into evidence, Defendant lodged no further objections. Furthermore, in his assignments of error and appellate brief, Defendant did not specifically allege plain error. This issue is therefore not preserved even for plain error review. *Golphin*, 352 N.C. at 403-04, 533 S.E.2d at 197; *Perkins*, 154 N.C. App. at 152-53, 571 S.E.2d at 648; *Forrest*, 164 N.C. App. at 277, 596 S.E.2d at 25-26; *Flippen*, 349 N.C. at 274-75, 506 S.E.2d at 710.

However, Defendant contends that "the failure of defense counsel to stipulate to the chain of custody of the products of conception to avoid the necessity of introducing them into evidence constituted ineffective assistance of counsel[.]" [R. p. 21] Because Defendant "has raised the specter of ineffective assistance of counsel . . . we consider the possible existence of prejudice." *State v. Roache*, 358 N.C. 243, 275, 595 S.E.2d 381, 403 (2004).

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assignment of error in the record excepted to the conclusion under a different theory); N.C. R. App. P. 10(c)(1) (assignments of error shall include "clear and specific record or transcript references").

4. The General Assembly recently amended Rule 103(a) of the Rules of Evidence to provide that "[o]nce 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) (2003). This amendment, however, applies only to rulings made on or after 1 October 2003 and thus does not apply in this case. *State v. Pullen*, 163 N.C. App. 696, 700-01, 594 S.E.2d 248, 251-52 (2004) (citing 2003 N.C. Sess. Laws ch. 101). Moreover, this Court recently held Rule 103 as amended unconstitutional in *State v. Tutt*, —— N.C. App. ——, —— S.E.2d —— (19 July 2005) (COA04-821).

An ineffective assistance of counsel claim is subject to a two-part analysis, where Defendant must show: (1) his "counsel's performance fell below an objective standard of reasonableness as defined by professional norms[,]" and (2) "the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error." *State v. Lee*, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984); *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (same)). "[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." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

After examining the record, we conclude that there is no reasonable probability that defense counsel's alleged error affected the outcome of Defendant's trial. Had defense counsel stipulated to the chain of custody of the products of conception, testimony regarding the results of the paternity would still have come in. A forensic DNA analyst who had examined the products of conception and blood samples of Defendant and the minor testified that the probability of Defendant's paternity was 99.99 percent. Special Agent Freeman testified that the profile from the male fraction of the DNA taken from the minor's underwear was 4.48 million trillion times more likely to be from Defendant than from another unrelated individual within North Carolina's Caucasian population, 17.3 million trillion times more likely to be from Defendant than from another unrelated individual within North Carolina's African-American population, 5.59 million trillion times more likely to be from Defendant than from another unrelated individual within North Carolina's Caucasian Lumbee Indian population, and 20.7 million trillion times more likely to be from Defendant than from another unrelated individual within North Carolina's Hispanic population. Special Agent Freeman testified that, in his opinion, it was scientifically unlikely that the semen found on the minor's underwear originated from anyone other than Defendant. This evidence corroborated the minor's account of Defendant's criminal conduct. A stipulation to the chain of custody of the products of conception could not have negated the overwhelming evidence of Defendant's guilt. We therefore do not need to determine whether counsel's performance was actually deficient. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

We nevertheless note that the admission of the leaking products, which were so malodorous that court needed to be recessed for the bailiff to spray the courtroom, is troublesome.

Our Supreme Court and this Court have found gruesome but relevant physical evidence to be admissible. For example, in *State v. Eason*, 328 N.C. 409, 402 S.E.2d 809 (1991), the defendant argued that the trial court erred by admitting into evidence a plastic cup containing the victim's left pinkie finger. *Id.* at 421, 402 S.E.2d at 814. Our Supreme Court stated that "relevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it as evidence." *Id.* Therefore, in *Eason*, where the victim's body was charred almost beyond recognition and the identity of the body was thus at issue, the finger, the print of which matched that of the victim, was relevant. And the Supreme Court held that the finger's "probative value as to the issue of the identity of the victim was not substantially outweighed by any danger of unfair prejudice." *Id.* at 421, 402 S.E.2d at 815. In *State v. Williams*, 17 N.C. App. 39, 43, 193 S.E.2d 452, 454 (1972), *cert. denied*, 282 N.C. 675, 194 S.E.2d 155 (1973), the defendant claimed that the admission into evidence of a tattooed segment of the deceased victim's skin was "unnecessarily gruesome and repulsive." This Court found no error, holding that the identity of the victim was at issue, and the tattooed skin segment was relevant and thus admissible. *Id.*

While there appears to be no precedent in North Carolina for the admission of products of conception into evidence, other courts have admitted such evidence. For example, in *People v. White*, 621 N.Y.S.2d 728 (1995), where the defendant was charged with statutory rape, the trial court admitted products of conception into evidence to prove chain of custody. *Id.* at 732. In *White*, the defendant asserted that "introduction into evidence of tissue from the remains of the victim's aborted fetus was reversible error because the exhibits were unnecessarily gruesome[.]" The *White* court held:

> Such evidence is admissible at the discretion of the trial court if relevant to an issue at trial (see, *People v Stevens*, 76 NY2d 833; *People v Pobliner*, 32 NY2d 356, *cert. denied*, 416 US 905). The fetal material was introduced to establish the chain of custody relating to the admissibility of the DNA evidence and was, thus, relevant. Any material not used for the DNA test was merely cumulative to that already admitted and was not designed to inflame the passions of the jury.

Id. In another case where a court admitted products of conception, *State v. Mucie*, 448 S.W.2d 879, 887, *cert. denied*, 398 U.S. 938, 26 L. Ed. 2d 271 (Mo. 1970), a "manslaughter by abortion" case, the defendant contended that the trial court erred in admitting uterus and fetal materials into evidence, alleging that their admission "served only to inflame the jury." *Id.* at 887. The Supreme Court of Missouri disagreed and found the materials went to, *inter alia*, pregnancy and cause of death. Moreover, the court noted that the materials "were preserved in clear glass bottles in the manner of laboratory specimens[]"—a manner of presentation likely to minimize leakage and smell. *Id.*

Here, in contrast to the sterile manner in which the *Mucie* materials were admitted, the trial court admitted into evidence a leaking bag of products of conception, including fetal material. The materials were so malodorous that court had to be recessed in order for the bailiff to spray the courtroom, and the trial judge stated "[f]or the record State's Exhibit Number 35 has a very unpleasant odor[.]" The products of conception were relevant as to Defendant's being the perpetrator of the statutory rape, particularly in light of his denying having had any sexual contact with the minor and not stipulating as to the products' chain of custody. However, notwithstanding the inflammatory manner in which the products were admitted, were the issue preserved for review and assuming the admission amounted to error, we would find no prejudicial error given the overwhelming evidence of Defendant's guilt. *See State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784 ("[T]o establish prejudice, defendant must persuade this Court that had the trial court not admitted the [evidence], a different outcome likely would have been reached. Given the overwhelming evidence of defendant's guilt, we are not so persuaded." (citation omitted)), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002); *Hill*, 116 N.C. App. at 580, 449 S.E.2d at 577 ("Even if this Court found error in the trial court's admission of [photograph and physical evidence], defendant has failed to present evidence of prejudice . . . considering the overwhelming evidence presented against him.").

[4] Fourth, Defendant contends the trial court erred by imposing a sentence grossly disproportionate to the crime. This Court has previously held that the penalty set by our legislature for statutory rape is not disproportionate to the crime.

> The General Assembly established a statutory scheme to protect young females from older males. Section 14-27.7A defines two

> offenses in subsections (a) and (b), with a greater penalty corresponding to a greater age differential between the parties. Where the female is even younger, section 14-27.2 provides a penalty yet more severe than that found in section 14-27.7A. This statutory scheme, calibrating sentence severity to the gravity of the offense, reflects a rational legislative policy and is not disproportionate to the crime. See *State v. Green*, 348 N.C. 588, 609, 502 S.E.2d 819, 829 (1998), cert. denied, —— U.S. ——, 142 L. Ed. 2d 783 (1999). This sentencing scheme does not violate the North Carolina Constitution.

State v. Anthony, 133 N.C. App. 573, 578, 516 S.E.2d 195, 198 (1999), *aff'd*, 351 N.C. 611, 528 S.E.2d 321 (2000); *see also State v. Clark*, 161 N.C. App. 316, 319, 588 S.E.2d 66, 67 (2003) (although statutory rape carries "very severe punishment . . . , this is an issue for the legislature and not the courts. Furthermore, this Court has previously held that the sentencing scheme . . . reflects a rational legislative policy and is not disproportionate to the crime and is therefore constitutional." (quotation omitted)), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 81 (2004). Defendant has not even attempted to explain why this rationale would change under the Eighth Amendment of the United States Constitution. This assignment of error is overruled.

[5] Finally, in a motion for appropriate relief, Defendant contends that the trial court erred in finding an aggravating factor and sentencing him within the aggravated range in violation of his Sixth Amendment right to a jury trial. *See Blakely*, 542 U.S. 296, 159 L. Ed. 2d 403. The trial court found the aggravating factor that Defendant committed the offense while on pretrial release on another charge.

Our Supreme Court has recently held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Allen*, 359 N.C. at 437, —— S.E.2d at ——; *see Speight*, 359 N.C. at 606, —— S.E.2d at ——. Therefore "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 to the United States Constitution." *Allen*,

359 N.C. at 438-39, —— S.E.2d at ——. Accordingly, our Supreme Court concluded that "*Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible *per se*." *Allen*, 359 N.C. at 444, —— S.E.2d at ——.

As the aggravating factor here was not a prior conviction, the factor was not admitted by Defendant, and the facts for this aggravating factor were not presented to a jury and proved beyond a reasonable doubt, pursuant to *Allen* and *Speight* we must remand for resentencing.

For the foregoing reasons, we affirm Defendant's conviction but remand for resentencing.

No Error in part, Remand for resentencing in part.

Judges HUDSON and STEELMAN concur.

KENNETH R. BURSELL, EMPLOYEE, PLAINTIFF v. GENERAL ELECTRIC COMPANY, EMPLOYER, ELECTRIC INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA04-1310

(Filed 2 August 2005)

1. Workers' Compensation— injury by accident—depression after being suspended

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff employee failed to show he sustained an injury by accident arising out of plaintiff's depression after being put on crisis suspension from work due to accusations of stealing, and the case is remanded for additional findings, because: (1) the sudden meeting and abrupt suspension of plaintiff due to accusations of stealing were unexpected and not reasonably designed by plaintiff; and (2) it cannot be determined whether plaintiff sustained an injury by accident under the law since the Commission failed to make sufficient findings regarding whether the personnel action leading to plaintiff's injury was the normal work routine or part of an established sequence of operations.

2. Workers' Compensation— occupational disease—depression

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee failed to show he suffered from an occupational disease arising out of plaintiff's depression after being put on crisis suspension due to accusations of stealing, because: (1) plaintiff did not take issue with the Commission's finding that plaintiff is not claiming that he suffers from an occupational disease, and therefore he is bound by it; and (2) plaintiff failed to show that his depression was due to causes and conditions which are characteristic of and peculiar to his employment in the aircraft section of General Electric.

3. Workers' Compensation— findings—accused of theft—actions taken by company's peer review committee—employee fired

Although the Industrial Commission did not err in a workers' compensation case by making the findings that plaintiff was accused of theft, the Commission erred by finding that plaintiff was fired from his position. However, this error does not afford defendants an alternative basis for sustaining the Commission's opinion and award since whether plaintiff was fired or disciplined in some other way, under the circumstances in this case, is not determinative of the issue of whether he suffered an injury by accident.

Appeal by plaintiff from opinion and award entered 25 May 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 June 2005.

Law Offices of George W. Lennon, by George W. Lennon, for plaintiff-appellant.

Young Moore and Henderson P.A., by Jeffrey T. Linder, for defendant-appellants.

MARTIN, Chief Judge.

Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission concluding that plaintiff had failed to show he suffered an injury by accident or an occupational disease. For the reasons that follow, we affirm in part, reverse in part, and remand this case to the Commission.

On 4 October 2001, plaintiff filed a notice of accident to his employer, defendant General Electric Company ("General Electric"), alerting the company he had sustained "psychiatric trauma due to false accusation of theft by the company" on the afternoon of 26 October 1999. General Electric denied plaintiff's claim, and the case came for hearing before the Industrial Commission ("the Commission") on 14 October 2003.

The relevant facts, as found by the Commission, are as follows: plaintiff began employment with General Electric in 1979. In October of 1999, at the time of the alleged injury, plaintiff worked in General Electric's aircraft section, where his duties "mainly consisted of gathering components together to make an engine kit to ship to Ohio." On 26 October 1999, plaintiff assisted other employees in packing laptop computers into boxes. Plaintiff remarked that it was unusual to be packing laptop computers for surplus. At the end of plaintiff's shift, the packed boxes containing the computers were "put to the side for pickup on the next day."

Two days later, managers for General Electric summoned plaintiff for a meeting. Plaintiff believed he was being sought out for receipt of an award. Instead, he was informed that some of the laptop computers he packed were missing from the shipment. Plaintiff denied any knowledge of the missing computers. The Commission found that Andrea Hughes, a human resources manager for General Electric, told plaintiff she had interviewed the other employees who had packed the computers; that "none of their stories matched;" and that she was therefore "firing" him. Plaintiff was then escorted to his locker by a security guard, who took plaintiff's employee identification badge and escorted him to the parking lot, where he removed the parking sticker from plaintiff's vehicle. Plaintiff was "extremely surprised and upset that he had been fired." The other employees were also fired.

The following week, General Electric requested that plaintiff return to work. When he returned, plaintiff was given a document called "decision making leave" and was advised he had been on "crisis suspension" because he was observed away from his work area and in the parking lot without permission on 26 October 1999. He was further cited for failing to secure property under his control. Plaintiff appealed the crisis suspension to a peer review committee. At the review hearing, plaintiff was "visibly shaking." The peer review committee sent plaintiff a letter reminding him of rules regarding

breaks away from the workstation. General Electric found no evidence that plaintiff had stolen anything.

When plaintiff returned to work, many employees asked him about the incident. He was harassed and called "a thief." The Commission found that "[p]eople were constantly pointing at plaintiff" and that he became "nervous, panicky and paranoid." He could not sleep at night and began having panic attacks. Plaintiff sought assistance for his symptoms and was referred through his employment to Dr. Koff, a clinical psychologist, who diagnosed him with "adjustment disorder with mixed features." Dr. Koff testified that, but for the October 1999 incident, plaintiff most likely would not have developed his condition.

Plaintiff also sought treatment with Dr. Robert Weinstein, who diagnosed plaintiff with "major depression with obsessions." Dr. Weinstein treated plaintiff with "supportive therapy and medicines such as antidepressants, sleeping pills, and atypical antipsychotics." Dr. Weinstein testified that plaintiff would need medication and support for the rest of his life and would not be able to maintain regular attendance in any employment. He opined that plaintiff's condition was caused by the circumstances surrounding plaintiff's firing at work. After two years of treatment, Dr. Weinstein placed plaintiff at maximum medical improvement and stated he was permanently and totally disabled from all types of employment. Dr. Weinstein noted that plaintiff was also possibly suffering from post-traumatic stress disorder.

The Commission found that "[a]s a result of being accused of stealing, fired and his treatment after he returned to work, plaintiff developed 'major depression with obsessions' and possibly post-traumatic stress disorder, which led to his incapacity to work . . . ." The Commission also found that "the sudden meeting and abrupt firing of plaintiff due to accusations of stealing were unexpected and not reasonably designed by plaintiff[.]" Nevertheless, the Commission found that plaintiff had failed to show that the events surrounding his alleged injury "were unusual workplace occurrences" so as to constitute an injury by accident. In its conclusions of law, the Commission compared the present case to the facts of *Woody v. Thomasville Upholstery, Inc.*, 355 N.C. 483, 562 S.E.2d 422 (2002) and stated that "[p]laintiff has arguably shown unfair treatment by his employer, which was unexpected, but the fact that the unfair treatment was unexpected does not make it an 'unusual' or 'unforeseen' condition of his employment, under the rationale of *Woody*."

According to the Commission, plaintiff had thus "not shown evidence of either a compensable injury by accident or an occupational disease" and entered an opinion and award denying his claim. Plaintiff appeals. Defendants present several cross-assignments of error on appeal.

Plaintiff argues the Commission erred in concluding that he failed to show he sustained an injury by accident or an occupational disease. By cross-assignments of error, defendants argue the Commission erred in several of its pertinent findings of fact. We hold the Commission's conclusions that plaintiff did not sustain an injury by accident either directly contradict or are unsupported by certain of its findings and that additional findings are required to resolve the question. We conclude, however, that the Commission properly concluded that plaintiff failed to show he suffered from an occupational disease. With regard to defendants' cross-assignments of error, we agree that certain of the Commission's findings are unsupported by the evidence, but such errors do not offer an alternative basis for affirming the Commission's opinion and award. In sum, we affirm in part, reverse in part, and remand the opinion and award to the Commission.

I. Plaintiff's Appeal

[1] Plaintiff argues the Commission erred by concluding he failed to show he sustained an injury by accident or an occupational disease. This Court reviews an opinion and award of the Industrial Commission to determine whether there is competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law. *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 644, 566 S.E.2d 807, 810 (2002). Although plaintiff originally assigned error to several of the Commission's findings as unsupported by the evidence, his brief on appeal contains only arguments pertaining to the Commission's conclusions of law. Thus, plaintiff's assignments of error to the Commission's findings are deemed abandoned. N.C. R. App. P. 28(a) (2005). Therefore, we examine the Commission's findings in this case to determine whether they support the Commission's conclusions of law that plaintiff failed to sustain a compensable mental injury or occupational disease in the course of his employment. We first consider whether plaintiff has shown that he suffered a compensable injury by accident arising out of and in the course of his employment.

A. Injury by Accident

Under the Workers' Compensation Act ("the Act"), a mental or psychological illness may be a compensable injury if it has occurred as a result of an "accident" arising out of and in the course of the claimant's employment. *See Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 118-19, 476 S.E.2d 410, 414 (1996) (stating that, "[w]e cannot conclude that mental injuries by accident are not covered under the Act when we have clearly awarded workers' compensation for mental conditions as occupational diseases"), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 53 (1997). The claimant bears the burden of proving the existence of an accident. *Pitillo*, 151 N.C. App. at 645, 566 S.E.2d at 811. An injury does not arise by accident "[i]f an employee is injured while carrying on his usual tasks in the usual way[.]" *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986). "An accidental cause will be inferred, however, when an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences occurs." *Id.* To be an accident, the incident must have been for the employee an "unlooked for and untoward event." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 70, 399 S.E.2d 104, 106 (1991); *see also Pitillo*, 151 N.C. App. at 645, 566 S.E.2d at 811 (stating that an accident involves " 'an unlooked for and untoward event which is not expected or designed by the person who suffers the injury' " involving " 'the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.' ") (quoting *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 124 (2000)).

In *Pitillo*, this Court held that the Commission's findings of fact supported its conclusion that the plaintiff had failed to show a compensable mental injury. The *Pitillo* plaintiff alleged she suffered a nervous breakdown and stress-induced anxiety after meeting with her supervisor regarding a performance review. The Commission found the plaintiff had initiated the meeting, the meeting was not out of the ordinary, and everyone involved was treated courteously. Specifically, the Commission found that "the discussion was a routine, problem-solving meeting;" that "[n]othing in this meeting was different from other meetings to discuss performance evaluations;" and that "[t]he meeting to discuss plaintiff's job performance evaluation was requested by plaintiff and was an ordinary incident of employment." *Pitillo*, 151 N.C. App. at 646, 566 S.E.2d at 811-12. Based on these find-

ings, the Commission concluded the meeting could not be considered an "unlooked for or untoward event" or an interruption of the work routine so as to be considered an "accident" under the Act.

Similarly, in *Knight v. Abbott Laboratories*, 160 N.C. App. 542, 586 S.E.2d 544 (2003), the Commission denied a mental injury claim by a plaintiff who allegedly developed post-traumatic stress disorder and recurrent major depression after an argument with her supervisor. The Commission found that the plaintiff had initiated the meeting with her supervisor and that "the confrontation . . . did not constitute an unexpected, unusual[,] or untoward occurrence; nor did it constitute an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Id.* at 545, 586 S.E.2d at 546. This Court affirmed the opinion and award of the Commission, stating that "[t]he evidence shows that plaintiff deliberately initiated the meeting with [her supervisor] to voice her disagreement with his decision to award the vacation day to another employee. It is not unexpected that this would lead to a heated discussion involving raised voices on both the part of the supervisor and employee." *Id.* at 546, 586 S.E.2d at 547. The *Knight* Court compared its case to *Pitillo*:

> the evidence at most reveals the events themselves did not result in injury, but rather that it was [the] plaintiff's emotional response to the meeting, which she had initiated, that resulted in her psychological harm. *See Pitillo*, 151 N.C. App. at 645-46, 566 S.E.2d at 811. Thus, we conclude the Commission's findings of fact support its conclusion that [the] plaintiff did not suffer a compensable injury by accident.

Id. at 547, 586 S.E.2d at 547.

In the present case, the Commission found that the "sudden meeting and abrupt firing of plaintiff due to accusations of stealing were unexpected and not reasonably designed by plaintiff[.]" The Commission also found that "[s]ince plaintiff did not steal the computers, he had no expectation of being accused of stealing and was extremely surprised, upset and humiliated by his firing." Notwithstanding these findings, the Commission also found that plaintiff had not shown that such "sudden" meetings and "abrupt" firings were "unusual workplace occurrences" and thus concluded that "the meeting with Ms. Hughes and [plaintiff's] subsequent firing [did not] constitute[] a compensable injury by accident." Plaintiff contends the Commission's conclusion in this regard is unsupported by its findings. We agree.

Unlike *Pitillo* and *Knight*, in this case the Commission made no finding that the meeting with Hughes and the events following that meeting were "routine" or "ordinary." Indeed, the Commission specifically found that the meeting was "sudden," "unexpected," and that plaintiff did not initiate the meeting. Further, the Commission found plaintiff's firing was "abrupt." Although the Commission did find that plaintiff had "not shown that [the sudden meeting and abrupt firing] were unusual workplace occurrences," this single, conclusory finding is contradicted by the Commission's multiple other findings regarding the unexpected nature of the events leading to plaintiff's injury. The Commission's conclusion that plaintiff failed to show he sustained an injury by accident is therefore unsupported by its findings and must be reversed.

Defendants argue that plaintiff's firing was a "legitimate personnel action" which did not interrupt the normal work routine and thus could not give rise to any injury "by accident." *Compare* James R. Martin, Comment, *A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims*, 32 Wake Forest L. Rev. 193, 207 (1997) (arguing that, "[i]f an employer determines that an employee should be transferred, demoted, or dismissed, and does so without violating federal statutes or public policy, then that employer should not be liable for any mental injury resulting from the personnel action. Otherwise, employers would be limited in making their personnel decisions according to which employees they feel are likely to suffer mental injury. Further, insulating employers from liability for legitimate personnel decisions would prevent fired employees from claiming a mental injury due to the suddenness of termination, simply to gain revenge on the employer"). However, the Commission made no findings regarding whether the disciplinary action was a "legitimate personnel action" or part of plaintiff's "normal work routine." This Court may not substitute its own findings for those made by the Commission. We do not agree with defendants that a "legitimate personnel action" can *never* involve the interruption of the work routine. Whether or not a particular personnel action is part of an "established sequence of operations" is a factual matter which must be decided on a case-by-case basis. *See Gunter*, 317 N.C. at 675, 346 S.E.2d at 398. "The Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees and its benefits should not be denied by a narrow, technical and strict construction". *Id.* at 676-77, 346 S.E.2d at 399.

Because the Commission failed to make sufficient findings regarding whether the personnel action leading to plaintiff's injury was the "normal work routine" or part of an "established sequence of operations," we cannot determine whether plaintiff sustained an injury by accident under the law. We therefore reverse that portion of the opinion and award of the Commission concluding that plaintiff failed to show he suffered an injury by accident and remand this case to the Commission for additional findings.

B. Occupational Disease

[2] Plaintiff also argues the Commission erred in concluding he failed to show he is suffering from an occupational disease. We reject plaintiff's argument on several grounds.

First, the Commission specifically found that "plaintiff is not claiming that he suffers from an occupational disease." Plaintiff does not take issue with this finding and is therefore bound by it. Second, plaintiff failed to show that his depression was due to "causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment." N.C. Gen. Stat. § 97-53(13) (2003) (defining occupational disease); *Woody v. Thomasville Upholstery, Inc.*, 355 N.C. 483, 562 S.E.2d 422 (2002); *Clark v. City of Asheville*, 161 N.C. App. 717, 721, 589 S.E.2d 384, 387 (2003) (noting that, in order to qualify as an occupational disease, "a plaintiff has to show that his psychological condition, or the aggravation thereof, was (1) 'due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment' and that it is not (2) an 'ordinary disease[] of life to which the general public is equally exposed' ") (quoting N.C. Gen. Stat. § 97-53(13)). Plaintiff presented no evidence, and the Commission made no findings to support a conclusion, that plaintiff's depression was due to causes and conditions characteristic of and peculiar to his employment in the aircraft section of General Electric. We overrule this assignment of error.

II. Defendants' Cross-Assignments of Error

[3] Defendants cross-assign error to several of the Commission's findings as being unsupported by the evidence. Specifically, defendants assign error to the Commission's findings indicating that plaintiff was accused of theft and that he was "fired." They also argue that the Commission's finding as to the action taken by defendant General Electric's peer review committee was incomplete and misleading as it left the impression that plaintiff was exonerated from wrongdoing. We review the record to determine whether the findings about which

defendants complain are supported by any competent evidence. *Pitillo*, 151 N.C. App. at 644, 566 S.E.2d at 810.

Plaintiff testified that, on 28 October 1999, he was summoned to a conference room where he met with Andrea Hughes, the human resources manager, Todd Best, an ombudsman, and a security guard. Hughes informed plaintiff of the missing computers. Plaintiff "assured [Hughes] right then that [he] didn't have anything to do with the laptop missing." Hughes informed plaintiff that "none of the stories matched up, and that she was going to have to take drastic steps, and she was suspending [plaintiff] from work because of the [theft] of the laptop computers." Plaintiff told Hughes that "what she was doing was wrong" and that "she was questioning [his] integrity." As the security guard escorted plaintiff from the building, plaintiff felt "there were employees looking at me like I was a convict." When plaintiff returned to work, he "was harassed by people." As plaintiff explained:

> People would call back there in the area where the phone was at and if I spoke in it, they would say, "Thief." Several times I've been called at home, harassed on the telephone. People pointing at me. People that had never been back there in—in shipping—that I had never seen—you could see them underneath the tables pointing to me . . . .

Plaintiff became "very paranoid and very nervous and very panicky." He appealed his suspension to a peer review committee, which issued plaintiff a written reminder regarding breaks away from the work station. The peer review committee found no evidence that plaintiff had stolen anything.

From the above-referenced testimony, we conclude there was competent evidence to support the Commission's findings that plaintiff was "accused of theft." Although General Electric may never have directly and explicitly informed plaintiff that it believed he had stolen the missing property, such an accusation was clearly implied in every way. Hughes informed plaintiff he was being suspended "because of the theft of the laptop computers." Certainly, it is obvious from plaintiff's testimony that he believed he was being accused of theft, and that other employees believed the same. Persons harassed plaintiff at work and called him "Thief." The peer review committee specifically found there was no evidence that plaintiff had stolen anything. The Commission's findings that plaintiff was "accused of theft" are therefore supported by the evidence.

Likewise, we find support in the evidence for the Commission's finding that "Plaintiff received a letter from the peer review committee reminding him of rules regarding breaks away from the workstation. Defendant-employer did not find any evidence that plaintiff had stolen anything." Contrary to defendants' argument, we do not agree that the finding was either incomplete or misleading.

However, we agree with defendants that there is no evidence in the record to support the Commission's numerous findings that plaintiff was "fired" from his position at General Electric. Rather, plaintiff testified he was placed on "crisis suspension." Although plaintiff testified he "didn't know what a crisis suspension was[,]" plaintiff never testified that anyone from General Electric informed him he was fired, or that he believed himself to be terminated. As such, the Commission erred in finding that plaintiff was "fired," and these findings must be set aside. Our action in doing so, however, does not afford defendants an alternative basis for sustaining the Commission's opinion and award, *see* N.C. R. App. P. 10(d) (2005), because whether plaintiff was fired or disciplined in some other way, under the circumstances in this case, is not determinative of the issue of whether he suffered a injury by accident. As we have noted above, the issue to be determined is whether the actions taken by defendant General Electric's employees with respect to plaintiff on 26 October 1999 were "unexpected, unusual, or untoward occurrences constituting an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Knight*, 160 N.C. App. at 545, 586 S.E.2d at 546.

III. Conclusion

In conclusion, we hold the Commission erred in concluding plaintiff failed to sustain an injury by accident where it found that the events giving rise to plaintiff's injury were sudden, abrupt, and unexpected by plaintiff, and made no findings regarding whether the events giving rise to plaintiff's injury were ordinary, routine, or in the course of normal business operations. The Commission also erred in finding that plaintiff was fired. We therefore reverse that portion of the opinion and award of the Commission finding that plaintiff was fired and concluding that he failed to show he sustained an injury by accident. Upon remand, the Commission should reconsider whether plaintiff has suffered an injury by accident by determining and making findings regarding whether the events giving rise to plaintiff's injury were a part of the normal work routine or an established

sequence of operations. We affirm that portion of the opinion and award concluding that plaintiff failed to show he sustained an occupational disease.

Affirmed in part, reversed in part, and remanded.

Judges TIMMONS-GOODSON and BRYANT concur.

WILLIAM J. NOLAN III ET AL., PETITIONERS v. VILLAGE OF MARVIN, A NORTH CAROLINA MUNICIPALITY, RESPONDENT

No. COA04-1169

(Filed 2 August 2005)

1. Cities and Towns— annexation—nondiscriminating level of services—additional services not required

The trial court did not err by concluding that respondent municipality's annexation ordinance did not violate public policy even though petitioners contend they receive no additional services despite additional taxation, because: (1) respondent provides independent administrative, engineering, auditing, legal and planning services to its residents; (2) respondent is exploring options for obtaining additional police patrol services and has committed itself to providing its current and future levels of such services to its residents in a nondiscriminatory manner; (3) N.C.G.S. §§ 160A-33 and 160A-35(3) do not require respondent to provide additional services that the current residents of the municipality do not enjoy or to duplicate services already provided to the area to be annexed, but instead a municipality must provide to the annexed area each major municipal service performed within the municipality at the time of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation; and (4) contrary to petitioners' argument, N.C.G.S. § 160A-35(3) does not command municipalities to provide specific services, but ensures that whatever services are provided will be provided in a nondiscriminatory fashion to those areas to be annexed.

2. Cities and Towns— annexation—public information meeting—procedural requirements

The trial court did not err by concluding that respondent municipality abided by the procedural requirements for annexation set forth in N.C.G.S. § 160A-37(c1) even though respondent failed to answer questions regarding its motivation to annex the proposed territory during the public informational hearing about the annexation, because: (1) respondent conducted the informational meeting as required by N.C.G.S. § 160A-37(c1) and answered all questions except those concerning its motivations for annexing the territory; and (2) petitioners failed to demonstrate how they had suffered material injury as a result of respondent's failure to answer one question, the answer to which could have no effect on the validity of the proposed annexation.

Judge TYSON dissenting.

Appeal by petitioners from order entered 2 June 2004 by Judge Albert Diaz in Union County Superior Court. Heard in the Court of Appeals 21 April 2005.

The Brough Law Firm, by Robert E. Hornik, Jr., for petitioners-appellants.

Parker, Poe, Adams & Bernstein L.L.P., by R. Bruce Thompson II and Anthony Fox, for respondent-appellee.

MARTIN, Chief Judge.

Petitioner land owners appeal an order of the trial court affirming involuntary annexation of their property by respondent Village of Marvin. We affirm the order of the trial court.

On 22 September 2003, petitioners filed a petition for review of an annexation ordinance enacted by respondent. The petition alleged, *inter alia*, that respondent had failed to adequately respond to questions regarding the proposed annexation, and that annexation of petitioners' property violated express declarations of public policy as set forth in section 160A-33 of the North Carolina General Statutes. The matter came before the trial court on 3 May 2004. The court, based upon the pleadings, briefs, arguments by counsel and other materials submitted, made the following findings of fact:

1. [Respondent] adopted the annexation ordinance on July 24, 2003. Petitioners William J. Nolan III and Louise C. Hemphill-

Nolan ("the Nolans") filed a petition challenging this annexation on September 22, 2003.

. . . .

5. [Respondent's] Annexation Report and Amended Annexation Report provided information on the level of services [respondent] currently provides. In these reports, [respondent] committed itself to providing substantially the same level of services in the Annexation Area, and it identified how [respondent] will finance the extension of its services into the Annexation Area.

6. [Respondent] provides independent administrative, engineering, auditing, legal and planning services to its residents.

7. After annexation, the Annexation Area will receive services on substantially the same basis and in the same manner as services received elsewhere in [the municipality].

8. . . . [Respondent] is exploring options for obtaining additional police patrol services, and it has committed to providing its current and future levels of such services to its residents in a non-discriminatory manner.

9. [Respondent] conducted an informational meeting under N.C.G.S. § 160A-37(c1). At this meeting, [respondent] representatives declined to answer any questions concerning [its] motivations for annexing the territory. There is no evidence that [respondent] failed to answer any other questions asked.

Based on these findings, the trial court concluded respondent had satisfied statutory requirements regarding the provision of services to the annexation area, and that general policy declarations contained in section 160A-33 of the North Carolina General Statutes created no further procedural steps for respondent, nor created substantive rights for petitioners. The trial court further concluded that petitioners had failed to show any material injury as a result of respondent's refusal to answer questions regarding its motivation for pursuing annexation. The trial court entered an order affirming annexation. Petitioners appeal.

Petitioners argue the trial court erred in affirming annexation on the grounds that (1) such annexation violates state policy, and (2) respondent violated procedural requirements of the annexation

process. Review of an annexation ordinance is limited to resolving the following three issues: (1) whether the annexing municipality has properly complied with the statutory procedures; (2) where the statutory procedures have not been properly followed, whether the petitioners will suffer material injury as a result of such procedural irregularities; and (3) whether the area to be annexed meets the applicable statutory requirements. *See* N.C. Gen. Stat. § 160A-38 (2003); *In re Annexation Ordinance*, 278 N.C. 641, 646-47, 180 S.E.2d 851, 855 (1971).

> Where an appeal is taken from the adoption of an annexation ordinance and the proceedings show *prima facie* that there has been substantial compliance with the statute, the burden is upon the party attacking the annexation to show, by competent evidence, failure on the part of the municipality to comply with the statutory requirements.

Thrash v. City of Asheville, 327 N.C. 251, 255, 393 S.E.2d 842, 845 (1990); *In re Annexation Ordinance*, 278 N.C. at 647, 180 S.E.2d at 855-56; *Hayes v. Town of Fairmont*, 167 N.C. App. 522, 605 S.E.2d 717, 718 (2004), *disc. review denied*, 359 N.C. 410, 612 S.E.2d 320 (2005). "Substantial compliance" is defined as compliance with the essential requirements of the statute. *Thrash*, 327 N.C. at 255, 393 S.E.2d at 845. Findings of fact made by the trial court are binding on this Court if supported by the evidence, even where there may be evidence to the contrary. *Hayes*, 167 N.C. App. at 525, 605 S.E.2d at 719.

[1] Petitioners argue the annexation at issue violates state policy as declared in section 160A-33 of the North Carolina General Statutes. Section 160A-33 declares "as a matter of State policy" the following:

> (1) That sound urban development is essential to the continued economic development of North Carolina;
>
> (2) That municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively used for residential, commercial, industrial, institutional and government purposes or in areas undergoing such development;
>
> (3) That municipal boundaries should be extended, in accordance with legislative standards applicable throughout the State, to include such areas and to provide the high quality of

governmental services needed therein for the public health, safety and welfare; and

(4) That new urban development in and around municipalities having a population of less than 5,000 persons tends to be concentrated close to the municipal boundary rather than being scattered and dispersed as in the vicinity of larger municipalities, so that the legislative standards governing annexation by smaller municipalities can be simpler than those for larger municipalities and still attain the objectives set forth in this section;

(5) That areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality in accordance with G.S. 160A-35(3).

N.C. Gen. Stat. § 160A-33 (2003). Section 160A-35(3), in turn, requires an annexing municipality to prepare a "statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation." N.C. Gen. Stat. § 160A-35(3) (2003). Such plans must:

a. Provide for extending police protection, fire protection, solid waste collection and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. A contract with a rural fire department to provide fire protection shall be an acceptable method of providing fire protection. If a water distribution system is not available in the area to be annexed, the plans must call for reasonably effective fire protection services until such time as waterlines are made available in such area under existing municipal policies for the extension of waterlines. A contract with a private firm to provide solid waste collection services shall be an acceptable method of providing solid waste collection services.

b. Provide for extension of water mains and sewer lines into the area to be annexed so that property owners in the area to be annexed will be able to secure public water and sewer services according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions. If the

> municipality must, at its own expense, extend water and/or sewer mains into the area to be annexed before property owners in the area can, according to municipal policies, make such connection to such lines, then the plans must call for contracts to be let and construction to begin on such lines within one year following the effective date of annexation. In areas where the installation of sewer is not economically feasible due to the unique topography of the area, the municipality may agree to provide septic system maintenance and repair service until such time as sewer service is provided to properties similarly situated.
>
> c. Set forth the method under which the municipality plans to finance extension of services into the area to be annexed.

Id. Petitioners contend sections 160A-33 and 160A-35(3) make clear that the provision of governmental services by municipalities "to help foster growth and economic development" is the "primary public policy behind the involuntary annexation ordinance." They argue that, in the instant case, respondent will provide "no additional services whatsoever" to the annexed property, and that respondent has no current plan to provide such services. Because petitioners will receive no additional services, they contend the present annexation ordinance violates public policy and must be nullified. Petitioners' argument fails on several grounds.

First, the trial court found that respondent provides "independent administrative, engineering, auditing, legal and planning services to its residents." In addition, the trial court found that respondent is "exploring options for obtaining additional police patrol services and it has committed itself to providing its current and future levels of such services to its residents in a non-discriminatory manner." Petitioners made no exception to these findings of fact, and this Court is bound by them. *Hayes*, 167 N.C. App. at 525, 605 S.E.2d at 719. Thus, the trial court found that respondent will provide some additional services to the area to be annexed, notwithstanding petitioners' claim they will receive "no additional services whatsoever."

Second, we agree with the trial court that sections 160A-33 and 160A-35(3) do not require respondent to provide additional services that the current residents of the municipality do not enjoy, or to duplicate services already provided to the area to be annexed. Rather, under the plain language of the statute, a municipality must provide to the annexed area "each major municipal service performed within the municipality at the time of annexation . . . on substantially the

same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation." N.C. Gen. Stat. § 160A-35(3)(a). Contrary to petitioners' argument, section 160A-35(3) does not command municipalities to provide certain specific services, but ensures that whatever services *are* provided, are provided in a non-discriminatory fashion to those areas to be annexed. " 'Providing a *nondiscriminating* level of services within the statutory time is all that is required.' " *Greene v. Town of Valdese*, 306 N.C. 79, 87, 291 S.E.2d 630, 635 (1982) (quoting *Moody v. Town of Carrboro*, 301 N.C. 318, 328, 271 S.E.2d 265, 272 (1980) ("The plan details what services are provided in the Town and states that all such services will be provided in the annexed area. Providing a nondiscriminating level of services within the statutory time is all that is required")); *see also Parkwood Assn., Inc. v. City of Durham*, 124 N.C. App. 603, 607, 478 S.E.2d 204, 206 (1996) (stating that, "The City detailed the police and fire services now available to city residents and committed to provide the same services to the annexed area. The statute and case law require no more"), *disc. review denied*, 345 N.C. 345, 483 S.E.2d 175 (1997); *Chapel Hill Country Club v. Town of Chapel Hill*, 97 N.C. App. 171, 184-85, 388 S.E.2d 168, 176 (holding that the Town of Chapel Hill complied with the annexation statute where the annexation report called for the annexed area to be served by a volunteer fire department on a contract basis in the same manner as service provided to rest of the town), *disc. reviews denied*, 326 N.C. 481, 392 S.E.2d 87-88 (1990).

Here, the trial court found that "[a]fter annexation, the Annexation Area will receive services on substantially the same basis and in the same manner as services received elsewhere in the [municipality]" and that respondent "has committed to providing its current and future levels of such services to its residents in a non-discriminatory manner." Thus, the trial court properly concluded that respondent had satisfied all statutory requirements regarding the provision of services to the annexed area. *See In re Annexation Ordinance*, 304 N.C. 549, 555, 284 S.E.2d 470, 474 (1981) ("We believe that the [annexation] report need contain only the following: (1) information on the level of services then available in the City, (2) a commitment by the City to provide this same level of services in the annexed area within the statutory period, and (3) the method by which the City will finance the extension of these services").

We are not unsympathetic to petitioners' contention they will receive very few additional services despite additional taxation. We

are, however, bound by the plain language of the statute and case precedent. Petitioners must look to the General Assembly, and not the courts, for relief in such matters. We overrule petitioners' first assignment of error.

[2] Petitioners further contend respondent failed to abide by procedural requirements for annexation set forth in section 160A-37(c1) of the North Carolina General Statutes. Specifically, petitioners assert that respondent failed to answer questions regarding its motivation to annex the proposed territory during the public informational hearing about the annexation. As a result of respondent's failure to answer these questions, petitioners argue the annexation ordinance should be nullified. We do not agree.

Section 160A-37(c1) provides as follows:

> Public Informational Meeting.—At the public informational meeting a representative of the municipality shall first make an explanation of the report required in G.S. 160A-35. Following such explanation, all persons resident or owning property in the territory described in the notice of public hearing, and all residents of the municipality, shall be given the opportunity to ask questions and receive answers regarding the proposed annexation.

N.C. Gen. Stat. § 160A-37(c1) (2003).

The trial court found that respondent conducted the informational meeting as required by section 160A-37(c1) and answered all questions except those concerning its motivations for annexing the territory. Petitioners argue this failure to answer questions regarding its motivation invalidates the ordinance. In order to invalidate an annexation based on procedural violations, however, petitioners must demonstrate material injury. *See* N.C. Gen. Stat. § 160A-38(a) (2003); *Sonopress, Inc. v. Town of Weaverville*, 149 N.C. App. 492, 507, 562 S.E.2d 32, 41, *disc. review denied*, 355 N.C. 751, 565 S.E.2d 671 (2002). Here, the trial court concluded, and we agree, that petitioners have failed to demonstrate how they have suffered material injury as a result of respondent's failure to answer one question, the answer to which could have no effect on the validity of the proposed annexation. We overrule this assignment of error.

The order affirming annexation is affirmed.

Affirmed.

Judge LEVINSON concurs.

Judge TYSON dissents.

Tyson, Judge dissenting.

The majority's opinion holds respondent's annexation ordinance satisfies the statutory and case law requirements and affirms the trial court's order. I respectfully dissent.

I. Legislative Intent

Our Supreme Court stated in *Carolina Power & Light Co. v. City of Asheville*:

> "The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). The foremost task in statutory interpretation is " 'to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise.' " *Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 351 N.C. 318, 320, 523 S.E.2d 672, 674 (2000) (quoting *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988)).

358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004).

In 1957, the General Assembly established a Municipal Government Study Commission ("the Commission") to analyze the issue of involuntary annexation. H.R. 1434, Gen. Assem., Reg. Sess. (N.C. 1957) ("It shall be the duty of the Commission to make a detailed and comprehensive study of the problems of municipal government in North Carolina which may include . . . . The procedures, powers and authority which are granted by the General Assembly and are available to municipalities that govern and limit the ability of municipal government to provide for orderly growth, expansion and sound development."). The Commission issued two reports in 1958 and 1959. Municipal Government Study Commission, Report dated 1 November 1958; Municipal Government Study Commission, Report dated 26 February 1959. The Commission recognized that annexation was intended to spur and foster economic growth and development and to provide urban services for rapidly developing areas. The Commission also acknowledged that municipalities should not be allowed to tax without providing services to promote development.

> When a city expands its boundaries, either to take in developed land or land ripe for development, it must be prepared to provide

> services of a quality needed where population density is high. If the land taken does not receive such services, at the time of annexation or shortly thereafter, the impact of municipal taxes discriminates against the landowner.

Commission Report dated 1 November 1958, p.11.

As a matter of State policy, N.C. Gen. Stat. § 160A-33(3) (2003) requires "municipal boundaries should be extended, in accordance with legislative standards applicable throughout the State, to include such areas and to provide the high quality of governmental services needed therein for . . . public health, safety and welfare . . . ."

In N.C. Gen. Stat. § 160A-48, "the General Assembly has carefully specified the standards which must be met in order for any area to be annexed, so as to prevent municipalities from extending their boundaries arbitrarily or without due regard for the policy, reasons, and standards mandated by the legislature." *Carolina Power & Light Co.*, 358 N.C. at 516, 597 S.E.2d at 720.

In *In re Annexation Ordinance*, our Supreme Court also stated:

> The *central purpose* behind our annexation procedure is to assure that, *in return for the added financial burden of municipal taxation, the residents receive the benefits of all the major services available to municipal residents.* The minimum requirements of the statute are that the *City provide information* which is necessary to allow *the public* and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service *and* to allow a reviewing court to determine after the fact *whether the municipality has timely provided such services.*

304 N.C. 549, 554, 284 S.E.2d 470, 474 (1981) (internal citations omitted) (emphasis supplied); *see also Bali Co. v. City of Kings Mountain*, 134 N.C. App. 277, 284, 517 S.E.2d 208, 213 (1999) ("The underlying legislative purpose is to assure that annexed residents will receive all major city services in return for the additional city taxes.") (citation omitted); *Parkwood Assn, Inc. v. City of Durham*, 124 N.C. App. 603, 606, 478 S.E.2d 204, 206 (1996) ("The purpose of the statute is to insure that, in return for the financial burden of city taxes, the annexed residents receive all major city services.") (citation omitted), *disc. rev. denied*, 345 N.C. 345, 483 S.E.2d 175 (1997). The statutes make clear and our Courts have held that a fundamental

requirement of involuntary annexation is the annexing municipality will provide municipal services to the area annexed.

> Involuntary annexation is by its nature a harsh exercise of governmental power affecting private property and so is properly restrained and balanced by legislative policy and mandated standards and procedure. Annexation is initiated upon the decision of a municipal governing board to extend the municipal corporate limits, and upon challenge by a property owner, the extent and implementation of this decision must comply with legislative intent.

Carolina Power & Light Co., 358 N.C. at 515, 597 S.E.2d at 720.

The record indicates respondent does not offer police, fire, streetlight, solid waste, street maintenance, water and sewer, animal control, or parks and recreation services to its residents. Three administrators work part-time for twelve hours per week. Respondent contracts for planning services, engineering services, an auditor, and an attorney. It formerly contracted with the county sheriff's department, but the record shows the contract was not renewed. While respondent will not discriminate between "services" provided to current residents and those located in the annexed area, petitioners already pay for and receive all such "services" from other sources. The only new "service" respondent will provide residents in the annexed area is an additional annual tax bill. *See In re Annexation Ordinance*, 304 N.C. at 554, 284 S.E.2d at 474.

Respondent's plan does not comply with the plain legislative intent and purpose behind involuntary annexation. *Carolina Power & Light Co.*, 358 N.C. at 515, 597 S.E.2d at 720 ("Annexation is initiated upon the decision of a municipal governing board to extend the municipal corporate limits, and upon challenge by a property owner, the extent and implementation of this decision must comply with legislative intent."). There is no evidence the annexation is intended to spur and foster economic growth and development or to provide urban services not currently available to the affected residents. *See* Commission Reports dated 1 February 1958 and 26 February 1959. Respondent's elected officials expressly refused to answer when asked about respondent's motivations to annex during the public hearing.

Respondent has not shown *any* benefit petitioners will receive that is not currently provided in return for the extra tax burden. While

petitioners will receive the same "services" provided to current residents, our inquiry does not end there. Petitioners already receive and pay for such services from other sources.

II. Services Offered

The majority's opinion holds respondent's proposed annexation satisfies the statutory requirements pursuant to N.C. Gen. Stat. § 160A-35. The crux of its holding is N.C. Gen. Stat. § 160A-35(3) solely requires a municipality to provide to the annexed area "each major municipal service performed within the municipality at the time of annexation . . . on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation."

The majority's opinion cites several cases to support the notion that respondent need only provide the same level of no services to petitioners as current residents receive. *See In re Annexation Ordinance*, 304 N.C. at 555, 284 S.E.2d at 474 ("We believe that the report need contain only the following: (1) information on the level of services then available in the City, (2) a commitment by the City to provide this same level of services in the annexed area within the statutory period, and (3) the method by which the City will finance the extension of these services.") (citation omitted).

However, in these and similar cases, each municipality proposing to extend its boundaries offered substantial, significant, and numerous new services not currently provided to the annexed areas. *Id.* at 551-54, 284 S.E.2d at 472-74 (police, fire, street maintenance, garbage collection, and water and sewer services to be provided); *Greene v. Town of Valdese*, 306 N.C. 79, 86-87, 291 S.E.2d 630, 635 (1982) (water and sewer lines or septic systems extended to annexed area); *Parkwood Assn., Inc.*, 124 N.C. App. at 607, 478 S.E.2d at 206 ("[F]ire and police service will be provided to the annexation area on substantially the same bas[is] and in the same manner as provided in the rest of the City."); *Chapel Hill Country Club v. Town of Chapel Hill*, 97 N.C. App. 171, 184-85, 388 S.E.2d 168, 176 (1990) (police, fire, water and sewer services provided to annexed area); *Matheson v. City of Asheville*, 102 N.C. App. 156, 161-68, 402 S.E.2d 140, 143-47 (1991) (police, fire, garbage collection, water and sewer service provided to annexed area); *In re Annexation Ordinance*, 303 N.C. 220, 231, 278 S.E.2d 224, 231 (1981) (police, fire, recreation, water and sewer services, and street maintenance provided to annexed area). Respondent's additional "services" at issue here are insignificant and

offer affected residents solely an additional tax bill for bureaucratic services currently provided to and paid for by residents in the annexed areas.

III. Purpose of the Statute

The legislative purpose and intent behind the statutes governing involuntary annexation is to create and foster economic growth and development and make urban services available to developing areas. *See* Commission Reports dated 1 November 1958 and 26 February 1959. Previous involuntary annexation cases required the introduction of substantial municipal services to the areas subject to involuntary annexation. While respondent is not discriminating between current residents and petitioners, those services are solely administrative and duplicative. The only new "service" respondent intends on providing is another annual *ad valorem* tax bill. Respondent's plan does not satisfy the purpose and intent of our statutes.

IV. Conclusion

Respondent's "harsh exercise" of involuntary annexation offers petitioners nothing in return. *Carolina Power & Light Co.*, 358 N.C. at 515, 597 S.E.2d at 720. Respondent demands the privileges of taxation and involuntary annexation without accepting the responsibility for providing needed urban or meaningful municipal services. *In re Annexation Ordinance*, 304 N.C. at 554, 284 S.E.2d at 474. Respondent's purported involuntary annexation is a flagrant violation of the plain language, intent, and purpose of the statute and supporting case law.

Respondent's plan gives new meaning to the phrase "taxation without representation" and adds to that phrase "or anything else." *See e.g.*, The Declaration of Independence para. 1 (U.S. 1776); *see also Commissioners v. Henderson*, 163 N.C. 114, 120, 79 S.E. 442, 444 (1913) ("Taxation without representation often leads to the exercise of arbitrary and even despotic power, and is not tolerated or permitted in our system of government."). Respondent's illegal conduct is exacerbated by its refusal to answer petitioners' questions at a statutorily required public hearing and denial to petitioners of minimal due process. N.C. Gen. Stat. § 160A-37(c)(1) (2003).

The trial court's order affirming respondent's involuntary annexation of petitioners' property should be reversed. I respectfully dissent.

STATE OF NORTH CAROLINA v. MICHAEL ALLAN LEWIS

No. COA03-1045

(Filed 2 August 2005)

1. Evidence— hearsay—medical diagnosis or treatment exception—videotape interviews of minor children

The trial court did not err in a double taking indecent liberties with a minor case by denying defendant father's motion to suppress and by overruling his objections to the introduction of the interviews of the minor children as substantive evidence on the basis that they were statements made for the purpose of medical diagnosis or treatment pursuant to N.C.G.S. § 8C-1, Rule 803, because: (1) both children testified at trial and were subject to cross-examination, and thus, there was no violation of defendant's right to confrontation; (2) both children were old enough to understand the interviews had a medical purpose and they indicated as such; (3) the circumstances surrounding the interviews created an atmosphere of medical significance; (4) the interviews took place at a medical center with a registered nurse immediately prior to a physical examination; (5) although the examinations took place in a child-friendly room instead of a medical examination room, our Supreme Court has stated that the trial court should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4); (6) the evidence taken in its entirety indicates the statements were made at the children's first visit to a doctor after discovery of these particular allegations of sexual abuse; and (7) both children identified their father as the abuser in their interviews, and such identification was not made simply for trial preparation but also to diagnose psychological problems and prepare a course of treatment.

2. Jury— alleged juror misconduct—foreperson waited to mark verdict sheet—motion for mistrial

The trial court did not err in a double taking indecent liberties with a minor case by failing to declare a mistrial due to alleged jury misconduct arising out of the foreperson having not yet marked the verdict forms on 22 May when it appears from the transcript that the jury may have reached a tentative verdict on one of the charges on 22 May but the jurors indicated to the trial court that they wanted to continue deliberations the next day,

because: (1) the foreperson followed the instructions of the trial court and waited until all members of the jury were satisfied with the verdict before making the verdict final by marking the form; and (2) the foreperson's indication to the trial court on 22 May that the jury had not reached a final verdict was not a calculated lie, as defendant contends, but rather a cautious adherence to instructions.

3. Indecent Liberties— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss charges of taking indecent liberties with a minor at the close of the State's evidence and at the close of all evidence, because: (1) although defendant contends the children's accounts contain conflicting details and therefore lack credibility, it is the province of the jury to weigh the credibility of witnesses; and (2) although defendant presented evidence to contradict the testimony of the children, such discrepancies must be resolved in favor of the State upon a motion to dismiss.

4. Sentencing— aggravating factors—took advantage of a position of trust or confidence to commit indecent liberties— *Blakely* error

Defendant's motion for appropriate relief is allowed and defendant is entitled to a new sentencing hearing because a jury did not find beyond a reasonable doubt that defendant took advantage of a position of trust or confidence to commit indecent liberties in order for defendant to be sentenced in the aggravated range. Such error is structural error that is reversible per se.

Appeal by defendant from judgment entered 23 May 2002 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 20 September 2004.

Attorney General Roy Cooper, by Assistant Attorney General Clinton C. Hicks, for the State.

James P. Hill, Jr. for defendant-appellant.

MARTIN, Chief Judge.

Defendant was found guilty by a jury of two counts of taking indecent liberties with a minor child. The trial court found as a factor in aggravation of sentencing that defendant "took advantage of a

position of trust or confidence to commit the offense." Defendant was sentenced in the aggravated range to two consecutive terms of twenty to twenty-four months imprisonment. Defendant appeals.

The evidence at trial tended to show the following: C.L., a nine-year-old child, lived with her mother; the defendant, who is her father; and her seven-year-old brother, M.L., in Concord, North Carolina. C.L. testified that one night in January or February of 2001 while her mother was at work, defendant showed her and M.L. pornographic movies, pornographic magazines, and pornographic images on his computer. Defendant and M.L. took their clothes off, and they asked C.L. to take off her clothes as well. She complied. M.L., within the hearing of defendant, asked C.L. if she would show him "how [her] private opens." Defendant did not comment on M.L.'s request.

The following night, when her mother left for work, C.L. testified that, "[h]e showed us more sexual movies, and he showed us more things on the computer, and he [brought] out the toys then." The toys, C.L. testified, were "[o]f a man's private and a woman's private," and defendant asked C.L. "to stick the man's private into [her] private." C.L., however, refused. She testified that then defendant "wanted me to make him come," so he "[t]ook my hand and rub[bed] it up and down his private" using a lubricant. Defendant instructed her to do the same to her brother. C.L. testified that later, defendant "taught [her] about a B.J. where a woman sucks on his private, and I had to do that to . . . [m]y brother." Defendant also asked M.L. and C.L. to have sexual intercourse. Defendant told C.L. not to tell anyone about these incidents or he would go to prison.

M.L. testified at trial that he remembered a time when he, C.L., and defendant were all together in the house unclothed. He testified that he and C.L. were coerced by defendant to "touch each other's privates." Defendant also showed them videos of "[p]eople doing sexual things." M.L. testified he saw defendant cleaning his private in the presence of C.L. He stated that defendant was present when M.L. and C.L. touched each other's privates, and that defendant, after describing what a "B.J." was, told C.L. to give her brother a "B.J." C.L. then performed fellatio on M.L.

Defendant testified that one night in February, C.L. and M.L. asked if they could watch a movie. He said yes, and he believed they had put in one of their Disney movies. He was in a different room on the computer at the time. About twenty minutes later, he heard noises inconsistent with a Disney movie, so he went to see what they were

watching. He discovered they were watching some of his pornographic tapes. He continued watching with the children for about a minute, then he took out the tape. After this incident, C.L. and M.L. began asking questions about what they had seen, and defendant tried to answer their questions.

Defendant also testified that he suffers from severe depression and a ruptured disc in his neck. He takes medication for his depression, which causes him to have difficulty achieving an erection and reduces his interest in sex. He denied having his children (1) touch each other, (2) touch his private, or (3) have intercourse with each other. He also denied ever having been naked around his children.

The week after the alleged incidents occurred, C.L. told her mother and maternal grandmother about the sexual acts she performed with her father and brother. They, however, did not immediately report the incidents. Her mother, T.L., testified that she discussed the allegations with her husband, and he told her the children had only seen those acts in the pornographic movie they inadvertently watched. T.L. testified that when questioned again, C.L. admitted to her she had not seen any sexual acts in person but had only seen them on the video tape. Both defendant and his wife testified that they constantly had to discipline their children for not telling the truth.

The alleged abuse was not reported until June, 2001 when C.L. told her aunt, Veronica Lewis, what had happened. Ms. Lewis, the wife of defendant's brother, contacted the Swain County Department of Social Services (DSS), which notified the Concord Police Department of the allegations. John Cunningham, a child protective services social worker with the Swain County DSS, investigated the case and took statements from C.L. and M.L. which corroborated their testimony at trial.

Defendant testified he had a very bad relationship with Ms. Lewis. Defendant and Ms. Lewis had dated before she married his brother. Defendant described Ms. Lewis as being vindictive towards him and said she had threatened him physically on at least one occasion. Defendant's brother, Anthony Lewis, also testified to the "volatile" relationship between defendant and Veronica Lewis.

On 24 July 2001, C.L. and M.L. were taken to the Children's Advocacy Center at the Northeast Medical Center. The Children's Advocacy Center provides medical diagnoses and treatment to chil-

dren who are alleged victims of physical or sexual abuse. C.L. was interviewed by Donna Hinson Brown, a registered nurse, and M.L. was interviewed by Julie Brafford, also a registered nurse. These interviews took place in a "child-friendly" room, not a medical examination room. The interview rooms often have markers or Playdough for the children to play with. Brafford testified that she was wearing a nurse's uniform during the interview.

C.L. and her mother signed a form prior to the interview which stated,

> I have been told that I am here at Northeast Medical Center for a doctor's checkup and that part of that checkup includes talking to Donna Brown, R.N. I also have been told that Donna Brown, R.N., will share what is talked about with the doctor.

M.L. and his mother signed an identical form which identified Julie Brafford as the registered nurse. Each registered nurse also explained to the children and their mother that she would discuss the interview with a medical doctor who would then perform a physical examination. Brown testified that after her interview with C.L., she "shared with [the doctor] my direct recollection of what we had just discussed in the interview room. . . . [and] show[ed] him some diagrams that she had clarified where she had been touched." Brafford also testified that she spoke with the doctor regarding "everything [M.L.] had disclosed" to her.

Brown testified that during the interview she showed C.L. an anatomical drawing of a female and asked where C.L. had been touched that she did not like. C.L. identified the genital area and her mouth. Brown also showed C.L. an anatomical drawing of a male and asked what parts she had touched or had touched her. C.L. identified the genital area as the part she had touched of her father and brother, and she stated that she did not like this touch. During the interview, C.L. again stated that she, her brother, and her father had all been naked one night. She also stated that (1) her father made her brother put his private into her private, (2) her father showed her how to "stroke" his private part, and (3) her father asked her to give her brother a "B.J.", and she thought her father would "whoop" her if she did not comply.

Julie Brafford testified that during the interview, M.L. was unable to speak certain things out loud. She asked him to write what he could not say, and he wrote "he made us perform sexual acts." M.L.

identified a male's "private place" on a drawing as the genital area, and he drew pictures of his private place and his sister's private place. Upon questioning, M.L. said his father had never touched either him or his sister, but he and his sister were made to touch each other. He also said he and his sister had seen "bad things" on the computer and "bad things" on the television with their father. After the interview, the doctor performed a medical examination of M.L. There were no physical findings from the exam.

Both interviews were video-taped. Prior to trial, defendant moved to suppress "any and all evidence resulting from these statements and video and rule the same inadmissible [at] trial," arguing that they "were not made for the purposes of medical diagnosis or treatment." The trial court denied defendant's motion. The tapes were admitted as substantive evidence at trial and shown to the jury, to which defendant made a general objection.

Defendant argues on appeal that the trial court erred in: (1) denying his motion to suppress, and overruling his objections, allowing the video-tapes of the interviews to be admitted as substantive evidence; (2) failing to declare a mistrial due to jury misconduct; and (3) denying his motions to dismiss the charges against him at the close of the State's evidence and at the close of all the evidence. By Motion for Appropriate Relief filed in this Court, defendant also asserts that his sentence, in the aggravated range, was structural error pursuant to the decision of the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). We find no error in defendant's trial but hold he is entitled to a new sentencing hearing.

[1] First, defendant assigns error to the trial court's admission of the video-taped interviews as substantive evidence. Defendant argues that these were hearsay statements not otherwise admissible under any exception in the Rules of Evidence. The trial court allowed the jury to consider the tapes as substantive evidence on the basis that they were statements made for the purpose of medical diagnosis or treatment pursuant to North Carolina Rule of Evidence 803, which states,

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .

> (4) Statements for Purposes of Medical Diagnosis or Treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source therof insofar as reasonably pertinent to diagnosis or treatment.

N.C. Gen. Stat. § 8C-1, Rule 803(4) (2003). This exception to the hearsay doctrine was created because of a "patient's strong motivation to be truthful" when making statements for the purposes of medical diagnosis or treatment. N.C. Gen. Stat. § 8C-1, Rule 803(4) official commentary (2003). We note initially that because both C.L. and M.L. testified at trial and were subject to cross-examination, there was no violation of defendant's right to confrontation under the Sixth Amendment of the United States Constitution. *Crawford v. Washington*, 541 U.S. 36, 59, 158 L. Ed. 2d 177, 198 n.9 (2004) (stating that "[t]he [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it").

In *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000), the North Carolina Supreme Court created the following two-part inquiry to determine if statements are admissible under Rule 803(4): "(1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *Id.* at 284, 523 S.E.2d at 667. The first part of the inquiry seeks to determine the child's purpose in making the statement, not the interviewer's purpose in conducting the interview. *Id.* at 289, 523 S.E.2d at 671. In *Hinnant*, the alleged victim of sexual abuse was a four-year-old child. She was interviewed by a clinical psychologist after a doctor had already conducted an initial medical exam. The record did not "disclose that [the psychologist] or anyone else explained to [the child] the medical purpose of the interview." *Id.* at 289-90, 523 S.E.2d at 671. In that case our Supreme Court could not conclude that the child understood the interviews were conducted in order to provide medical diagnosis or treatment. Because "there [was] no affirmative record evidence indicating that [the child's] statements were medically motivated and, therefore, inherently reliable," the Court found that the first part of the inquiry was not met. *Id.* at 290, 523 S.E.2d at 671.

In the present case, C.L. and M.L. were both interviewed by a registered nurse, at least one of whom was wearing a nurse's uniform.

The interviews took place in a medical center immediately prior to an examination by a doctor. At the time of the interviews, C.L. and M.L. were nine and eight years old, respectively. Both children signed forms stating they understood that the registered nurse would share their statements with a medical doctor. Both nurses testified that they also explained to the children their discussions would be shared with a doctor, who would then perform a medical examination.

The facts of the case *sub judice* are distinguishable from the facts in *Hinnant*. Here, the children were old enough to understand the interviews had a medical purpose, and they indicated as such. Also, the circumstances surrounding the interviews created an atmosphere of medical significance; the interviews took place at a medical center, with a registered nurse, immediately prior to a physical examination. Although the interviews took place in a "child-friendly" room, not a medical examination room, our Supreme Court has stated that "the trial court should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Id.* at 288, 523 S.E.2d at 670. The record before us indicates that both C.L. and M.L. had the requisite intent to make their statements for a medical purpose, and we therefore conclude that the first part of the inquiry is met.

Defendant also contends the interviews took place after both children had received an initial medical examination; therefore, under *Hinnant*, the statements do not fall under Rule 803(4). *Hinnant*, 351 N.C. at 289, 523 S.E.2d at 670 (stating that "Rule 803(4) does not include statements to nonphysicians made after the declarant has already received initial medical treatment and diagnosis"). The record before us, however, does not indicate that the children had previously received medical attention due to this particular incident of alleged sexual abuse. M.L. acknowledged during his interview that he had already had a head-to-toe checkup. However, there is no indication as to the reason for that checkup. He may have had a routine physical examination, which would not include an examination into possible sexual abuse. C.L. stated that she had once had her privates checked because "her daddy had done something." However, she does not indicate whether that examination took place after the abuse in question or on some previous occasion. The evidence before us, taken in its entirety, indicates the statements were made at the children's first visit to a doctor after discovery of these particular allegations of sexual abuse.

The second part of the inquiry in *Hinnant* asks "whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *Id.* at 284, 523 S.E.2d at 667. Defendant argues that because the interviews took place at least five months after the alleged abuse, there was little chance that a medical examination would reveal physical injuries. Instead, defendant contends, the purpose of the interviews was to gather evidence with which to prosecute defendant. However, our Supreme Court has said that "the identity of a perpetrator is pertinent to diagnosis in a child sexual abuse case" for two reasons:

> First, a proper diagnosis of a child's psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home.

State v. Aguallo, 318 N.C. 590, 597, 350 S.E.2d 76, 80 (1986). C.L. and M.L. each identified their father as the abuser in their interviews. Such identification, under *Aguallo*, was not made simply for trial preparation, but also to diagnose psychological problems and prepare a course of medical treatment.

The statements also suggested to the doctor "the nature of the problem, which, in turn, dictated the type of examination . . . performed for diagnostic purposes." *Id.* at 597, 350 S.E.2d at 81. We conclude the present case is sufficiently similar to our Supreme Court's holding in *Aguallo*, and the statements in question were "pertinent to [medical] diagnosis or treatment." *Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667. Therefore, the second part of the inquiry is satisfied, and defendant's argument with respect to the admission of the videotaped statements as substantive evidence is overruled.

[2] Defendant's second argument is that the trial court should have declared a mistrial due to jury misconduct. Defendant claims the jury was "fundamentally flawed" because "the jury foreperson lied to the Trial Court, and the rest of the jury went along with the lie." Upon careful review of the trial transcript, we do not agree with defendant's contention that there was any misconduct or misrepresentation by the jury.

At the end of deliberations on 22 May 2002, the trial court asked the foreperson if the jury had reached a verdict on either of the charges. The foreperson said they had not, adding "[w]e haven't

signed anything," and asked if they could continue deliberations the following morning. The next day, the jury sent a note to the trial court saying it was hung, and the following discourse took place:

The Court: Yesterday, at the end of the day, you didn't say that you had reached a—perhaps reached a verdict as to one case. In fact, had you reached a verdict as to one of the cases and not signed the verdict sheet?

Foreperson: (Nods head affirmatively.)

The Court: Is that still the case?

Foreperson: No.

The Court: So, at this particular point there is no verdict as to either case?

Foreperson: Exactly.

It appears from the transcript that the jury may have reached a tentative verdict on one of the charges on 22 May. However, the jurors wanted to continue deliberations the next day, as they indicated to the trial court, and the foreperson had not yet marked the verdict sheet. In its charge to the jury before deliberations began, the trial court instructed, "[w]hen you have reached a unanimous verdict, have your foreperson mark the appropriate places on the verdict forms." The foreperson, having not yet marked the verdict forms, did not commit "blatant misconduct" as defendant contends. Instead, the foreperson followed the instructions of the trial court and waited until all members of the jury were satisfied with the verdict before making the verdict final by marking the form. N.C. Gen. Stat. § 15A-1237(a) requires that "[t]he verdict must be in writing [and] signed by the foreman." N.C. Gen. Stat. § 15A-1237(a) (2003). The foreperson's indication to the trial court on 22 May that the jury had not reached a final verdict was not a calculated lie, as defendant argues, but rather a cautious adherence to instructions. This argument is overruled.

[3] Defendant also argues the trial court erred by denying his motions to dismiss the charges against him at the close of the State's evidence and at the close of all the evidence due to the insufficiency of the evidence. 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). "The trial court must consider the evidence 'in the light most favorable to the State,' and the State is entitled 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)). " 'The evidence offered by the State must be taken to be true and any contradictions and discrepancies therein must be resolved in its favor.' " *State v. Thompson*, 43 N.C. App. 380, 380, 258 S.E.2d 800, 800-01 (1979) (citations omitted). The trial court, in considering a motion to dismiss, may not weigh the credibility of the witnesses. *State v. Holland*, 161 N.C. App. 326, 328, 588 S.E.2d 32, 35 (2003).

The evidence included testimony and statements from both C.L. and M.L. that defendant had them perform sexual acts on each other and on him. Defendant argues that the children's accounts contain conflicting details and therefore lack credibility. However, it is the province of the jury to weigh the credibility of the witnesses. *See id.* at 328, 588 S.E.2d at 35. Although defendant presented evidence to contradict the testimony of C.L. and M.L., upon a motion to dismiss, such discrepancies must be resolved in favor of the State. *Thompson*, 43 N.C. App. at 380, 258 S.E.2d at 800-01. Considered in the light most favorable to the State, there was sufficient evidence to allow the jury to consider two charges of indecent liberties against defendant. We conclude that the trial court did not err in denying defendant's motion to dismiss. This argument is overruled.

[4] Finally, defendant asserts in his Motion for Appropriate Relief that his sentence, in the aggravated range, was error pursuant to the decision of the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). We agree. The trial court found as an aggravating factor that "defendant took advantage of a position of trust or confidence to commit the offense." Judicial findings of such aggravating factors pursuant to North Carolina's Structured Sentencing Act, specifically N.C. Gen. Stat. § 15A-1340.16(a),(b), and (c), violate defendant's Sixth Amendment right to a jury trial under the United States Constitution. *State v. Allen*, 359 N.C. 425, 438-39, —— S.E.2d ——, —— (July 1, 2005) (No. 485PA04).

In 2000, the U.S. Supreme Court held in *Apprendi v. New Jersey* that "[o]ther than the fact of a prior conviction, any fact that in-

creases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000). In *Blakely*, the Court further stated that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 413-14 (emphasis in original). 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." *Allen*, 359 N.C. at 437, —— S.E.2d at ——. Because a jury did not find beyond a reasonable doubt that defendant "took advantage of a position of trust or confidence" to commit indecent liberties, and such error is structural error, reversible *per se*, under *State v. Allen*, *supra*, we must grant the defendant a new sentencing hearing.

No error in defendant's trial.

Remanded for a new sentencing hearing.

Judges TIMMONS-GOODSON and HUDSON concur.

BRAD BOYLAND, PETITIONER v. SOUTHERN STRUCTURES, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. COA04-1235

(Filed 2 August 2005)

1. Unemployment Compensation— findings of fact—employee discharged for substantial fault

The trial court did not err by concluding that the Employment Security Commission's (ESC) findings of fact did not support the conclusion that petitioner employee was discharged for substantial fault under N.C.G.S. § 96-14(2a), because: (1) the employer did not have an employee handbook nor did it have a list of company rules and regulations, which means the Court must rely on the Commission's findings as to the employer's policy and the statute is construed strictly in petitioner's favor; (2) the Commission's findings of fact do not indicate that the employer used a formal point system or written warning system to repri-

mand its employees; (3) ESC failed to enter specific findings of fact that the employer expressly warned petitioner that failure to submit log notes was a violation of employer's rules and that petitioner continued to violate this requirement after being warned; (4) ESC failed to enter specific findings of fact that the employer expressly warned petitioner that failure to call in was a violation of employer's rules and that continued violation of the rule would result in discharge; (5) the act of advising an employee about the employer's absence policy does not necessarily constitute a warning; and (6) ESC failed to make specific findings that employer warned petitioner that his behavior including failure to follow up on his duties, failure to follow directions, and his poor attitude, was in violation of certain rules and that petitioner continued the behavior after being warned that such behavior could lead to discharge.

2. Unemployment Compensation— qualification for unemployment benefits

The trial court did not err by concluding that petitioner employee was not disqualified from unemployment benefits, because: (1) the Employment Security Commission (ESC) did not properly reach its conclusion of substantial fault under N.C.G.S. § 96-14; and (2) there is no remaining basis for disqualifying petitioner from receiving unemployment benefits once it was determined that ESC's findings did not support its conclusion that petitioner was substantially at fault.

Judge STEELMAN dissenting.

Appeal by respondent Employment Security Commission of North Carolina from judgment entered 23 April 2004 by Judge Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 22 April 2005.

Legal Aid of North Carolina, Inc., by Janet McAuley Blue, for petitioner-appellee.

Employment Security Commission of North Carolina, by Regina S. Adams, for respondent-appellant.

TIMMONS-GOODSON, Judge.

Employment Security Commission of North Carolina ("ESC" or "the Commission") appeals an order of the trial court wherein the trial court held that Brad Boyland ("petitioner") was qualified to

receive unemployment benefits. For the reasons stated herein, we affirm the order of the trial court.

The factual and procedural history of this case is as follows: Petitioner was employed by Southern Structures, Inc. ("employer") as a construction job superintendent from February 2000 until he was discharged in May 2002. On 16 June 2002, petitioner filed a claim with ESC for unemployment insurance benefits. Upon review of the claim, the ESC adjudicator concluded that petitioner was qualified for benefits.

Employer appealed the ruling to an ESC appeals referee. The referee conducted an evidentiary hearing, made findings of fact and entered the following conclusion of law: "It is concluded from the competent evidence in the record that the claimant's job performance did not meet the reasonable expectations of the employer. As such, the claimant was discharged for substantial fault on his part connected with the work." The referee held that "[c]laimant is disqualified for unemployment benefits for a period of nine weeks beginning June 16, 2002 and ending August 17, 2002."

Petitioner appealed the referee's decision to the Commission. Upon review of the case, the Commission concluded "that the facts found by the Appeals Referee are supported by competent and credible evidence contained in the record." The Commission further concluded that "the Appeals Referee properly and correctly applied the Employment Security Law (G.S. §96-1 et seq.) to the facts as found, and the resultant decision was in accordance with law and fact." The Commission affirmed the referee's decision.

Petitioner then filed a petition for judicial review with the superior court, arguing that the evidence did not support the findings of fact, and the findings did not support the conclusion of law that petitioner was discharged for substantial fault. Upon review of the matter, the superior court found as a fact that the Commission failed to find whether petitioner violated an explicit policy and whether petitioner was warned regarding his conduct. The superior court concluded the findings of the Commission were not sufficient to support its conclusions of law that petitioner was discharged for substantial fault. The superior court remanded the matter to ESC for "another evidentiary hearing and the issuance of a new decision."

A second evidentiary hearing was conducted by the appeals referee and additional testimony was admitted into evidence. Upon con-

sideration of this new evidence, the referee made the following pertinent findings of fact:

4. The claimant was discharged from this job for poor job performance.

5. The claimant was hired to train as a construction job superintendent under Ms. Faw and the then superintendent. When the superintendent left in April or May 2001, Ms. Faw left the claimant as the superintendent and continued the training.

6. The employer does not have an employee handbook nor does she have a list of company rules and regulations.

7. On or about October 30, 2001, Ms. Faw gave the claimant his evaluation. Some of the problems with his performance were his attitude towards some of the employees especially when it came to clean up that the claimant did not think was part of his job although everyone was responsible for handling it. She counseled him that he needed to be more observant and organized on the job site. He was to oversee the subcontractors and make sure deliveries were correct. She advised him that taking notes, or better notes, during meetings would help him in his observations and organization and would be something he could refer back to as the project progressed to make sure the work as being properly performed. It was also discussed that punch list items needed to be taken care of sooner, that the credit card was to only be used for business purposes, and that paperwork of what he did each day needed to be kept and turned in on a weekly basis to track what he had done each day.

8. In December 2001, Ms. Faw hired Mr. Rhoades as the project manager because she had not seen an improvement in the claimant's job performance. Ms. Faw told the claimant that he would be working under not only her supervision but also that of Mr. Rhoades.

9. The claimant did not timely follow instructions of Mr. Rhoades. One specific instance related to covering a floor. Ms. Faw had told the claimant in the past that she liked the work he did in covering the floors and that she preferred that he did it rather than another employee. Mr. Rhoades gave the claimant instructions to cover a certain floor at least twice but it was not until Ms. Faw instructed him to do it that he did it.

10. The claimant was sent to a trade show in Atlanta. He was instructed to get information on how to create a daily log of work performed by a superintendent. The claimant got information and beginning February 2001, claimant was instructed to keep a daily log of the work he performed, the amount of time spent, and what was being done at each job site. The claimant was instructed to turn the daily logs in every two weeks with his time sheet. He was given a palm pilot to keep his notes along with a keyboard.

11. Claimant was able to keep detailed daily log notes and was able to turn them in every two weeks for the period of February 2, 2001 through March 14, 2001. Ms. Faw was pleased with the notes.

12. Claimant stopped keeping notes for the period of March 15, 2001 through August 5, 2001.

13. Claimant started to keep notes again beginning August 6, 2001 but failed to turn them in every two weeks as required. Ms. Faw asked him several time[s] to turn them in and even suggested that claimant give Ms. Summey his palm pilot and she would print the notes out. Claimant did not do this. Even Ms. Summey asked claimant for his daily logs but he failed to turn them in when requested. Claimaint[] failed to follow the employer's directive because he unreasonably thought that Ms. Faw and Ms. Summey were joking about the need for him to turn them in.

14. The claimant was out sick one time and did not notify Ms. Faw or Ms. Summey that he was going home sick. He was told in the future that he needed to call if he was going to be absent. Claimant was out again due to the flu and failed to call despite having been warned.

The referee made the following conclusion: "It is concluded from the competent evidence in the record that the claimant's job performance did not meet the reasonable expectations of the employer. As such, the claimant was discharged for substantial fault on his part connected with the work." The referee's decision disqualified petitioner for unemployment benefits for nine weeks.

Once again, petitioner appealed the referee's decision to the Commission. Upon review of the case, the Commission ruled in pertinent part as follows:

the Commission concludes that the facts found by the Appeals Referee are supported by competent and credible evidence contained in the record, and adopts them as its own with the following modifications: . . . in FINDING OF FACT 12—Add the following as concluding sentences—

> Claimant was constantly reminded to keep the daily log notes and turn them in with his time sheets. The log notes for September 21, 2001 though December 12, 2001 were submitted on February 27, 2002. The log notes for February 21, 2002 through May 7, 2002 were not submitted until May 9, 2002, after he was terminated.

Add a new FINDING OF FACT to read—

> 15. In the spring of 2002, Ms. Faw decided to discharge the claimant because of his problems with the timely submission of the log notes, failure to call in when sick, failure to follow up on his duties, failure to follow directions, and for having a poor attitude since [a new superintendent] had been hired.

Furthermore, the Commission concludes that the Appeals Referee properly and correctly applied the Employment Security Law (G.S. §96-1 et seq.) to the facts as found and modified, and the resultant decision was in accordance with law and fact.

The decision of the Appeals Referee is AFFIRMED.

The claimant is DISQUALIFIED for unemployment benefits for a period of nine (9) weeks beginning June 16, 2002, and ending August 17, 2002.

Again, petitioner petitioned the superior court for judicial review of the Commission's ruling. Petitioner argued in pertinent part that "[t]he Commission failed to make findings regarding whether Mr. Boyland violated an explicit policy or was warned regarding his conduct. The Commission was required to make such a finding pursuant to the [superior court's order]." Upon review of the second Commission ruling, the superior court issued an order containing the following:

> [T]he Court finds that the Commission's findings of fact do not support the conclusion that the Petitioner was discharged for misconduct or substantial fault, and further that the record evi-

dence does not support a finding that the Petitioner should be disqualified due to misconduct or substantial fault.

Based on this finding, the trial court ordered "that the decision of the Employment Security Commission finding the Petitioner disqualified for a period of nine weeks due to substantial fault is reversed and the Petitioner is not disqualified from receiving unemployment insurance benefits." It is from this order that ESC appeals.

The issues presented on appeal are whether the trial court erred by concluding that (1) ESC's findings of fact do not support the conclusion that petitioner was discharged for substantial fault;[1] and (2) petitioner was not disqualified for unemployment insurance benefits.

[1] ESC first argues that the trial court erred by concluding that ESC's findings of fact do not support the conclusion that petitioner was discharged for substantial fault. We disagree.

The standard of review for this Court in reviewing the action of ESC is governed by N.C. Gen. Stat. § 96-15(i) which provides as follows: "In any judicial proceeding under [the unemployment insurance statutes], the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." N.C. Gen. Stat. § 96-15(i) (2003). "Accordingly, this Court, like the superior court, will only review a decision by the Employment Security Commission to determine 'whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law.' " *Davis v. Britax Child Safety, Inc.*, 163 N.C. App. 277, 281, 593 S.E.2d 97, 101 (2004) (quoting *RECO Transp., Inc. v. Employment Sec. Comm'n*, 81 N.C. App. 415, 418, 344 S.E.2d 294, 296 (1986)).

In the instant case, ESC specifically argues that the findings of fact are sufficient to support the conclusions of law. ESC does not challenge the competency of the evidence, therefore, the findings of fact are "presumed supported and are binding on appeal." *In Re Dept. of Crime Control and Public Safety v. Featherston*, 96 N.C. App. 102, 104, 384 S.E.2d 306, 307 (1989). Therefore, we limit our review to

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1. We note that the superior court's order addresses petitioner's qualifications for unemployment benefits in terms of "substantial fault" and "misconduct". However, ESC concluded that petitioner was disqualified only on grounds of substantial fault and does not include misconduct as a basis for its ruling. Therefore, on appeal we limit the scope of our analysis to substantial fault as grounds for disqualification.

whether the Commission's findings of fact support its conclusion of law that petitioner was discharged for substantial fault connected with the employment and is disqualified from receiving unemployment benefits.

An employee may be disqualified from receiving unemployment benefits if there is substantial fault connected with the employee's work. N.C. Gen. Stat. § 96-14(2a) (2003).

> Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment.

Id. Section 96-14(2a) is "to be strictly construed in favor of the claimant, and the employer has the burden of proving that the claimant is disqualified." *Featherston*, 96 N.C. App. at 104, 384 S.E.2d at 308 (citing *Barnes v. The Singer Co.*, 324 N.C. 213, 376 S.E.2d 756 (1989)). The essence of the statute is that if an employer establishes a reasonable job policy to which an employee can conform, failure to conform constitutes substantial fault. *Lindsey v. Qualex, Inc.*, 103 N.C. App. 585, 406 S.E.2d 609 (1991). In the present case, the referee found that "[t]he employer does not have an employee handbook nor does she have a list of company rules and regulations." Where there is no formal set of rules to use as a reference, we rely on the Commission's findings as to the employer's policy. *See Doyle v. Southeastern Glass Laminates*, 104 N.C. App. 326, 333, 409 S.E.2d 732, 735-36 (1991) (Cozort, J., dissenting), *rev'd per curiam*, 331 N.C. 748, 417 S.E.2d 236 (1992).

To establish that an employee is substantially at fault for minor infractions, the employer must demonstrate that the employee violated a rule after having been warned by the employer. *Featherston*, 96 N.C. App. at 104, 384 S.E.2d at 308. Therefore, to support a conclusion of law that an employee is substantially at fault for minor rule infractions, ESC must enter specific findings of fact that (1) the employer warned the employee that his actions were in violation of the rules, and (2) the employee violated the rules again after having been warned.

Typically, in substantial fault cases there is a point system for rule violations, *see Lindsey*, or a system of written warnings for rule

violations, *see Davis and Doyle*. The employee is usually notified that he will be discharged upon losing all of his points, or once he has accumulated a certain number of written warnings. However, in the present case, the Commission's findings of fact do not indicate that the employer used a formal point system or written warning system to reprimand its employees. We focus our review on the rules that the Commission notes in finding of fact 15 as giving rise to petitioner's discharge: (1) petitioner was required to timely submit log notes; (2) petitioner was required to call in when sick; (3) petitioner was required to follow up on his duties; (4) petitioner was required to follow directions; and (5) petitioner was required to have a more positive attitude. We review ESC's findings of fact for an indication that employer warned petitioner that he was in violation of each of these rules.

Employer's directive that petitioner keep a daily log was a reasonable requirement of the job, and we recognize that petitioner's failure to timely submit log notes constitutes a violation of this requirement. However, the Commission failed to enter specific findings of fact that (1) employer expressly warned petitioner that failure to submit log notes was a violation of employer's rules, and (2) petitioner continued to violate this requirement after being warned. Finding of fact 13 indicates that employer asked petitioner several times to submit log notes after petitioner failed to do so. However, it is not clear that those requests constituted a warning. As noted *supra*, the substantial fault statute is to be strictly construed in the employee's favor. In cases such as this, where the employer does not have an employee handbook, a list of rules and regulations, or a formal system of reprimand, it is especially important to construe the statute in the employee's favor because the rules and method of reprimand are at the complete discretion of the employee's supervisor. Thus, construing the statute strictly in petitioner's favor, we hold that the findings of fact do not support the conclusion that petitioner was substantially at fault under § 96-14(2a) for failing to timely submit log notes.

Next, we turn to the issue of petitioner's failure to call in when sick. In *Lindsey*, the evidence tended to show that on several occasions when the petitioner had an unreasonable number of absences, the employer warned the petitioner that if the absences continued she would be discharged. 103 N.C. App. at 589, 406 S.E.2d at 611. When the petitioner continued to have absences after the warnings, she was discharged from her position. *Id.*

In the present case, the trial court entered one finding of fact pertaining to petitioner's failure to call in sick:

> 14. The claimant was out sick one time and did not notify Ms. Faw or Ms. Summey that he was going home sick. He was told in the future that he needed to call if he was going to be absent. Claimant was out again due to the flu and failed to call despite having been warned.

Again, we note that employer's requirement that petitioner call in his absences was a reasonable requirement, and we recognize that petitioner's failure to call in constitutes a violation of this rule. However, ESC failed to enter specific findings of fact that (1) employer expressly warned petitioner that failure to call in was a violation of employer's rules, and (2) continued violation of the rule would result in discharge. We note the Commission's use of the term "warned" in finding of fact 14. However, we are not convinced that the act of advising an employee about the employer's absence policy constitutes a warning. Again, construing the statute strictly in petitioner's favor, we hold that the findings of fact do not support the conclusion that petitioner was substantially at fault under § 96-14(2a) for failing to call in sick.

With regard to petitioner's failure to follow up on his duties, failure to follow directions, and his poor attitude, the same analysis applies as in the first two causes for petitioner's discharge. ESC made general findings that referenced petitioner's behavior and indicated that employer told petitioner that his behavior must change. However, ESC failed to make specific findings that employer warned petitioner that his behavior was in violation of certain rules, and that petitioner continued the behavior after being warned such behavior could lead to discharge. Therefore, we hold that the findings of fact do not support the conclusion that petitioner was substantially at fault under § 96-14(2a) for failure to follow up on his duties, failure to follow directions, or for his poor attitude.

[2] ESC next argues that the trial court erred by concluding that petitioner was not disqualified for unemployment insurance benefits. We disagree.

An individual is disqualified for unemployment benefits if the individual meets any of the criteria provided in N.C. Gen. Stat. § 96-14. In the present case, ESC concluded that petitioner met one of the criteria—that he was substantially at fault under § 96-14(2a). The

superior court determined that ESC did not properly reach its conclusion of substantial fault, and reversed the ESC decision. Because we affirm the superior court's conclusion that the Commission's findings do not support its conclusion that petitioner was at substantial fault, there is no remaining basis to disqualify petitioner from receiving unemployment benefits. Therefore, we hold that the trial court properly concluded that petitioner is qualified for unemployment benefits.

Affirmed.

Judge McCULLOUGH concurs.

Judge STEELMAN dissents.

STEELMAN, Judge dissenting.

I must respectfully dissent from the majority opinion in this case.

I agree with the majority that the issue presented is whether the ESC's findings of fact support its conclusions of law, and that our review is *de novo*.

Resolution of this case hinges on whether employer gave employee warnings sufficient to comply with N.C. Gen. Stat. § 96-14(2a). Employer instructed employee to keep a daily log of the work he preformed and turn these in to his employer. Employer gave employee a palm pilot to facilitate this task. Employee kept the log for a while, but then stopped. Both Ms. Faw and Ms. Summey, asked employee to turn in his log notes. Despite their repeated requests, employee failed to do as asked. The majority holds it is unclear whether Ms. Faw and Ms. Summey's multiple requests to turn in his notes constituted a warning. Such a holding would require employer to have told employee that failure to turn in the notes was a violation of employer's rules and this was a "warning." I would not read the requirements of N.C. Gen. Stat. § 96-14(2a) so narrowly. Where an employer makes repeated requests to an employee to perform a task that was clearly assigned to him and the employee continues to ignore the requests, this constitutes a warning for purposes of "substantial fault" under N.C. Gen. Stat. § 96-14(2a). Whether the employer gave a warning should be determined on the facts of each case and should not be determined by whether the employer used the magic word "warning."

As to finding of fact 14 dealing with employee's failure to call in sick, the ESC specifically found that: "Claimant was out again due to the flu and failed to call despite having been warned." The majority takes a unique approach to this finding, holding: "we are not convinced that the act of advising an employee about the employer's absence policy constitutes a warning." The majority previously noted that the ESC's findings were binding on appeal. The ESC found that employer issued employee a warning. It is not the role of the appellate courts to twist the plain meaning of the ESC's findings to achieve a particular result.

I would hold that either of the ESC's findings 13 or 14, standing alone, support its conclusion of substantial fault. As a result, I would reverse the trial court's order in this matter.

MORTON BUILDINGS, INC., PETITIONER-APPELLANT v. E. NORRIS TOLSON, SECRETARY OF REVENUE, STATE OF NORTH CAROLINA, AND HIS SUCCESSORS, RESPONDENT-APPELLEE

No. COA04-1053

(Filed 2 August 2005)

Taxation— refund of sales and use tax—lumber, steel, and materials purchased out of state

A de novo review revealed that the trial court did not err by denying petitioner's request under N.C.G.S. § 105-164.6 for refunds of use tax paid plus interest for lumber, steel, and other materials purchased out of state and assembled in Pennsylvania and Ohio into building components which were incorporated into prefabricated buildings constructed by petitioner in North Carolina, because: (1) contrary to petitioner's argument, the statute does not contain the limitation that the tangible personal property must be in the form in which it was purchased to be taxable; (2) even assuming arguendo that the materials cease to exist when they become part of the building components, the materials as incorporated into building components are still tangible personal property; (3) the Legislature enacted the use tax so that builders could not gain an advantage by purchasing materials outside the state, and the law thus requires that petitioner pay tax on all tangible materials, wherever purchased, which are ultimately used in North Carolina buildings; (4) although the use taxes in

sections (a) and (b) of N.C.G.S. § 105-164.6 are alternative stand alone provisions and petitioner has already been held to be subject to the use tax in section (b), the Court of Appeals nevertheless noted that petitioner would also be subject to the use tax under section (a) since the materials purchased by petitioner were used in North Carolina; (5) contrary to petitioner's assertion, stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate; and (6) while decisions from other jurisdictions may be instructive, they are not binding on the courts of this State.

Appeal by petitioner from judgment dated 14 April 2004 by Judge Wade Barber in Superior Court, Wake County. Heard in the Court of Appeals 23 March 2005.

Maupin Taylor, P.A., by Charles B. Neely, Jr., Nancy S. Rendleman, and Kevin W. Benedict; and Law Offices of Abraham Stanger, by Abraham M. Stanger, for petitioner-appellant.

Attorney General Roy A. Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart, for respondent-appellee.

McGEE, Judge.

Morton Buildings, Inc. (petitioner) is a construction contractor in the business of producing, selling, and erecting prefabricated warehouses and other buildings for use on farms and in industry in forty states. Petitioner seeks a tax refund for the sales and use tax it paid on lumber, steel, and other materials (collectively materials) purchased out of state. These materials were assembled into trusses, columns, purlins, and metal panels (collectively building components[1]) in Pennsylvania and Ohio. The building components were incorporated into buildings constructed in North Carolina.

Petitioner purchased and stored the materials outside of North Carolina. The materials were not purchased by petitioner for use in any particular customer order, whether in or out of North Carolina.

Pursuant to N.C. Gen. Stat. § 105-266.1, petitioner filed an application with the North Carolina Department of Revenue (the Depart-

1. We adopt petitioner's distinction between the terms "materials" and "building components" merely for the sake of clarity throughout this opinion. The distinction has no legal basis.

ment of Revenue) on 18 December 1996 for a refund of use tax paid, plus interest, for the period of 1 November 1993 to 30 June 1996. Petitioner subsequently filed another application for the period of 1 January 1997 to 31 August 1999. The Department of Revenue denied petitioner's second refund request on 3 February 2000 and denied the first request on 31 January 2001.

Petitioner requested and received an administrative hearing by the Secretary of Revenue (respondent), who denied petitioner's requests for refunds in a final decision dated 24 May 2002. Petitioner appealed this final decision to the Tax Review Board pursuant to N.C. Gen. Stat. § 105-241.2. The Tax Review Board sustained respondent's denial of petitioner's requests for refunds and confirmed respondent's final decision on 18 March 2003.

Petitioner petitioned for judicial review of the Tax Review Board's decision on 14 April 2003, pursuant to N.C. Gen. Stat. § 105-241.3. Petitioner argued that both respondent and the Tax Review Board erred in the interpretation and application of N.C. Gen. Stat. § 105-164.6. As statutory interpretation is an issue of law, the trial court reviewed the decision *de novo*, and affirmed the Tax Review Board's decision on 14 April 2004. Petitioner appeals.

Petitioner's sole assignment of error is that the trial court erred in failing to give effect to the plain language of N.C.G.S. § 105-164.6, which governs the imposition of use tax. In reviewing an order from a trial court acting in an appellate capacity, our scope of review is restricted to evaluating the trial court's order for errors of law. *Shackleford-Moten v. Lenoir Cty. DSS*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002) (citing *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)), *disc. review denied*, 357 N.C. 252, 582 S.E.2d 609 (2003). "In those cases where the superior court [was] required to employ a *de novo* standard of review of the agency's decision, appellate review of the superior court's order requires that this Court also review the agency's decision *de novo*." *R.J. Reynolds Tobacco Co. v. N.C. Dep't of Env't & Natural Res.*, 148 N.C. App. 610, 615, 560 S.E.2d 163, 167, *disc. review denied*, 355 N.C. 493, 564 S.E.2d 44 (2002). The trial court employed a *de novo* review in the present case, and petitioner raises questions of law; therefore, we review the trial court's judgment *de novo*.

Petitioner first argues that the use tax does not apply to petitioner's materials or building components, and the trial court erred by

ignoring the plain language of the sales and use tax statute. We disagree. N.C. Gen. Stat. § 105-164.6(b) provides:

> An excise tax at the general rate of tax set in G.S. 105-164.4 is imposed on the purchase price of tangible personal property purchased inside or outside the State that becomes a part of a building or other structure in the State. The purchaser of the property is liable for the tax.

N.C.G.S. § 105-164.6(b) (2003). Tangible personal property is defined as "[p]ersonal property that may be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses." N.C. Gen. Stat. § 105-164.3(46) (2003). Petitioner does not dispute that it purchased materials, nor that the materials petitioner purchased were tangible personal property. Rather, petitioner argues that the materials did not become "part of a building or other structure in the State." *See* N.C.G.S. § 105-164.6(b). Petitioner further argues that the materials were "consumed" and "transformed" into building components outside of North Carolina, and thus it was the building components that became "part of a building or other structure in the State." *See id.* Inherent to petitioner's argument is its belief that the statute only taxes items of tangible personal property that are used "in the form in which they were purchased[.]" Specifically, petitioner asserts that the materials "cease to exist upon their consumption and transformation in the manufacture of building components[.]" Thus, petitioner argues that since it did not purchase the building components, and since the materials purchased by petitioner were not incorporated into a building or structure in their unaltered state, petitioner is not subject to the excise tax set forth in N.C.G.S. § 105-164.6(b).

However, since the plain language of the statute is clear and unambiguous, we are unpersuaded by petitioner's arguments. " 'Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and *limitations* not contained therein.' " *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong, N.C. Index 2d Statutes § 5 (1968)) (emphasis added). Contrary to petitioner's argument, the statute does not contain the limitation that the tangible personal property must be "in the form in which [it was] purchased" to be taxable. We do not agree with petitioner that the materials "cease to exist" when they are assembled into trusses, columns, purlins, and metal panels. However, even

assuming *arguendo* that the materials "cease to exist" when they become part of the building components, the materials as incorporated into building components are still tangible personal property. Therefore, the statute applies to the materials purchased by petitioner because the materials, which are tangible personal property, became "part of a building or other structure in the State." *See* N.C.G.S. § 105-164.6(b).

To hold otherwise would violate the purpose of the use tax. Our Supreme Court has held that the General Assembly intended for the use tax "to impose the same burdens on out-of-state purchases as the sales tax imposes on purchases within the state." *Pipeline Co. v. Clayton, Comr. of Revenue*, 275 N.C. 215, 223, 166 S.E.2d 671, 677 (1969); *see also Robinson & Hale, Inc. v. Shaw, Comr. of Revenue*, 242 N.C. 486, 488, 87 S.E.2d 909, 910-11 (1955) (discussing the predecessor statute to N.C.G.S. § 105-164.6 and stating the statute "discloses a clear legislative intent to make out-of-state purchases of building materials, other than those expressly exempted, subject to the same burdens imposed by the sales tax on purchases within the State"). In the present case, the trial court properly concluded that "[t]he Legislature enacted the use tax so that builders could not gain an advantage by purchasing materials outside the state. The law thus requires that [petitioner] pay tax on all tangible materials, wherever purchased, which are ultimately used in North Carolina buildings." We affirm the decision of the trial court.

Petitioner also argues that it is exempt from the use tax imposed under section (a) of N.C.G.S. § 105-164.6, which provides: "An excise tax . . . is imposed on the storage, use, or consumption in this State of tangible personal property purchased inside or outside the State for storage, use, or consumption in the State[.]" Specifically, petitioner argues that section (a) does not apply because petitioner's raw materials are not stored, used, or consumed in North Carolina. Petitioner contends that while it purchased the raw materials, the raw materials are not only stored outside North Carolina, but that they are "used," "consumed," and "transformed" into building components outside of North Carolina. Petitioner asserts that "[i]t is the [b]uilding [c]omponents, a manufactured product distinct from the [r]aw [m]aterials, that are brought into the State."

Since the use taxes in sections (a) and (b) of N.C.G.S. § 105-164.6 are alternative stand alone provisions, and since petitioner is subject to the use tax in section (b) of N.C.G.S. § 105-164.6, we need not review petitioner's argument that it is not subject to the use tax

set forth in section (a). Nevertheless, we note that petitioner is also subject to the use tax under section (a) because the materials purchased by petitioner were used in North Carolina. "Use" is defined by N.C.G.S. § 105-164.3(49) (2003) as including:

> the exercise of any right or power or dominion whatsoever over tangible personal property by a purchaser thereof and [including, but not limited to] any withdrawal from storage, distribution, installation, affixation to real or personal property, or exhaustion or consumption of tangible personal property by the owner or purchaser thereof, but does not include the sale of tangible personal property in the regular course of business.

By incorporating the lumber and other materials petitioner purchased into the buildings petitioner constructed in North Carolina, petitioner exercised a right, power, and dominion over, and therefore *used* the lumber and other materials. Petitioner is subject to the use tax under both sections (a) and (b) of N.C.G.S. § 105-164.6.

Petitioner next argues that the trial court erroneously ignored stipulated facts. Specifically, petitioner argues that the trial court erred in failing to distinguish between materials and building components when the parties stipulated that the materials were "consumed and transformed by [petitioner] in the manufacture of finished [b]uilding [c]omponents[.]" Petitioner asserts that because N.C.G.S. § 105-164.6 only applies to tangible personal property that is *purchased*, the trial court erred when, despite "[n]umerous references to 'manufacturing processes' or 'manufacture' " throughout the stipulations, it did not recognize that the building components were not purchased but manufactured.

In support of its argument, petitioner cites *Duke Power Co. v. Clayton, Comr. of Revenue*, 274 N.C. 505, 513, 164 S.E.2d 289, 295 (1968), which states: " ' "manufacturing" has been defined as the producing of a new article or use or ornament by the application of skill and labor to the raw materials of which it is composed.' " *Id.* (quoting 55 C.J.S. Manufactures, § 1 at 667 and 670 (1948)). Petitioner further argues that, as the parties stipulated, the materials were "consumed and transformed" into a different tangible personal property, i.e., building components, because skill and labor were applied to the materials "to create a different article with a singular use." Petitioner further argues that because the lumber and steel it purchased as materials lost their identities when they were manufactured into trusses, purlins, and other building components, the trial court erred

in treating both the materials and the building components as the same tangible personal property.

However, petitioner ignores that "[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (citing 73 Am. Jur. 2d Stipulations § 5 (1974); 5 Am. Jur. 2d Appeal and Error § 712 (1962)), *disc. review denied*, 297 N.C. 179, 254 S.E.2d 38 (1979); *see also Carringer v. Alverson*, 254 N.C. 204, 208, 118 S.E.2d 408, 411 (1961). Whether the materials purchased by petitioner were "manufactured" into building components is a question of law. *Hart v. Gregory*, 218 N.C. 184, 193, 10 S.E.2d 644, 650 (1940) (stating "whether [particular] acts constituted the 'manufacture or production of lumber' was a question of law for the court to decide"). Similarly, whether the materials were "consumed and transformed" is a question of law, and the parties' stipulations as to these words are not binding on the trial court or our Court.

"Manufacture implies a change, but every change is not manufacture, but every change in an article is the result of treatment, labor, and manipulation. But something more is necessary[.] . . . There must be transformation; a new and different article must emerge, having a distinctive name, character or use." *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562, 52 L. Ed. 336, 338 (1908) ("A cork put through the claimant's process [of preparing the encasement of the beer] is still a cork."). Though petitioner claims that it transforms the lumber, steel and other materials into a different article by a different name, that being "building components," we are not persuaded that these building components have a distinct character or use. As the trial court found, petitioner constructs trusses in the following manner:

> [T]he lumber for the upper and lower chords of the truss are run through a machine that cuts the chords to the proper lengths and to the proper angles at both ends of each board. Lumber webbing, which is attached between the upper and lower chords, is also cut to the correct length and to the correct angles. The boards for the trusses (chords and webs) are then positioned "face-up" on a fixture table and metal gusset plates are positioned at each joint. The metal gusset plates are made by [petitioner] from rolled steel. The gusset plates are then stitched into position with a pneumatic gun nailer. The truss is then repositioned "face-down" and additional metal gusset plates are positioned onto the joints

> on that side of the truss. The truss is then put through a roller press which imbeds the metal gusset plates into the wooden chords and webs.

The above rudimentary process may change the form of the materials purchased by petitioner, but it is difficult to discern how the building components are a different article with a "distinctive . . . character and use." *See Anheuser-Busch Brewing Ass'n*, 207 U.S. at 562, 52 L. Ed. at 338; *see also Morton Bldgs. v. Vermont Dep't of Taxes*, 705 A.2d 1384, 1388 (1997). *Cf. In re Clayton-Marcus Co.*, 286 N.C. 215, 224, 210 S.E.2d 199, 205 (1974) (concluding that Clayton-Marcus Co. had "manufactured" swatch books because they were "new and different article[s] from the fabrics . . . contained therein"). The trial court did not err in noting that although the parties had stipulated to the word "manufacture," the term "assembly" was more descriptive.

Similarly, although the parties stipulated that the materials purchased by petitioner were "consumed" in petitioner's manufacture process, the trial court did not err in concluding that the materials "were not 'consumed' in the way the word is normally understood." If the statute "contains a definition of a word used therein, that definition controls[.]" *Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 203. However, nothing else appearing, "words must be given their common and ordinary meaning[.]" *Id.* at 219, 210 S.E.2d at 202-03. As the Sales and Use Tax Act does not define "consume," the trial court properly applied the "common and ordinary meaning" of the term. The trial court did not err in noting:

> "Consume" is defined as "to expend or use up," or "to destroy totally; ravage." The American Heritage Dictionary of the English Language (4th ed. 2000). The [m]aterials were not destroyed or expended; they were used by [petitioner] to make [b]uilding [c]omponents that were then brought into North Carolina and incorporated into [petitioner's] buildings.

Accordingly, we affirm the trial court's decision as to the questions of law in the parties' stipulations.

Finally, petitioner argues that the trial court improperly rejected the weight of authority from other jurisdictions. Petitioner argues that it has "previously litigated this very issue in a number of other jurisdictions throughout the United States" and that seven out of ten courts "have rendered final decisions in favor of" petitioner. However, petitioner does not cite any authority for its argument as to why the trial court erred, and this argument is thus abandoned pur-

suant to N.C.R. App. P. 28(b)(6). Furthermore, while decisions from other jurisdictions may be instructive, they are not binding on the courts of this State. *See Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 465, 515 S.E.2d 675, 686 (1999).

Affirmed.

Judges HUNTER and STEELMAN concur.

STATE OF NORTH CAROLINA v. JAMES MEYNARDIE

No. COA04-547

(Filed 2 August 2005)

1. Sentencing— aggravating factors—*Blakely* error—took advantage of position of trust and confidence

The trial court erred in a first-degree sexual offense and double indecent liberties with a minor case by finding the aggravating factor that defendant took advantage of a position of trust and confidence to commit the offense without submitting this issue to the jury, and defendant's convictions are remanded for resentencing, because: (1) defendant was not aware of his right to have a jury determine the existence of the aggravating factor since neither *Blakely v. Washington*, 542 U.S. 296 (2004), nor *State v. Allen*, 359 N.C. 425 (2005), had been decided at the time of defendant's sentencing hearing, and therefore, defendant did not knowingly and effectively stipulate to the aggravating factor nor waive his right to a jury trial on the issue of the aggravating factor when he stipulated to the State's factual basis for his *Alford* plea; (2) the harmless error rule does not apply to sentencing errors which violate a defendant's Sixth Amendment right to jury trial pursuant to *Blakely*; and (3) plain error review is only appropriate when error has occurred in the trial court's instructions to the jury or its ruling on the admissibility of evidence.

2. Sentencing— mitigating factors—voluntarily acknowledged wrongdoing at early stage in criminal process—trial court's failure to record

The trial court committed harmless error in a first-degree sexual offense and double indecent liberties with a minor case by failing to record its finding that defendant voluntarily acknowl-

edged wrongdoing at an early stage in the criminal process, because: (1) the failure of the judgment to reflect this finding is a mere clerical error that does not merit a new sentencing hearing; and (2) the trial court can amend its judgment to accurately reflect the finding in mitigation since this case was remanded for resentencing on other grounds.

3. Sentencing— mitigating factors—accepted responsibility for criminal conduct

The trial court did not err in a first-degree sexual offense and double indecent liberties with a minor case by failing to find in mitigation that defendant accepted responsibility for his criminal conduct under N.C.G.S. § 15A-1340.16(e)(15), because: (1) defendant failed to request that the trial court find this factor in mitigation, and the trial court has a duty to find the factor only when the evidence offered at the sentencing hearing supports the existence of a mitigating factor specifically listed in N.C.G.S. § 15A-1340.16(e) and when defendant meets the burden of proof; (2) a defendant's apology at a sentencing hearing does not lead to the sole inference that defendant has accepted responsibility for his criminal conduct; (3) defendant's *Alford* plea merits against finding that defendant accepted responsibility for his conduct; and (4) defendant's confession and psychiatric treatment do not necessarily lead to the conclusion that defendant has taken responsibility for his conduct.

4. Sentencing— weighing of aggravating and mitigating factors

The trial court's finding in a first-degree sexual offense and double indecent liberties with a minor case that the aggravating factor outweighed the mitigating factor was not manifestly unsupported by reason and there is no evidence that it failed to give the appropriate weight to either factor. The trial court properly exercised its discretion and the Court of Appeals defers to its balance of the factors.

Appeal by defendant from judgment entered 20 May 2002 by Judge William C. Griffin, Jr. in Superior Court, Beaufort County. Heard in the Court of Appeals 16 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Emery E. Milliken, for the State.

Daniel F. Read for defendant.

McGEE, Judge.

James Meynardie (defendant) entered an *Alford* guilty plea on 20 May 2002 to one charge of first degree sexual offense and two charges of indecent liberties with a minor. Pursuant to the plea agreement, the trial court consolidated all three charges into one judgment. Defendant stipulated to the State's factual basis for entry of the plea, which tended to show the following. Defendant's stepson, J.F., reported to J.F.'s father that defendant had shown J.F. a pornographic magazine and had told J.F. that he wanted J.F. to do what was depicted in the magazine. Defendant then touched J.F.'s penis underneath J.F.'s clothes and "tr[ied] to get [J.F.] to do what the girls in the magazine were doing." J.F. refused.

J.F.'s father reported what J.F. had told him to J.F.'s mother, defendant's wife, who called law enforcement. Child Protective Services (CPS) interviewed J.F. and J.F.'s brother, M.C. Both J.F. and M.C. stated that defendant had touched their genitalia. Defendant subsequently admitted to CPS that he had sexually molested both J.F. and M.C.

While defendant was being held for trial, law enforcement discovered that defendant had also molested B.H., the daughter of defendant's former girlfriend. When confronted, defendant also admitted to sexually molesting B.H.

At sentencing, the State requested that the trial court find as an aggravating factor that defendant took advantage of a position of trust and confidence to commit the offenses. Defendant requested that the trial court find in mitigation that defendant voluntarily acknowledged his wrongdoing prior to his arrest and at an early stage in the criminal process. The trial court, without submitting the issue of the aggravating factor to a jury, found the aggravating factor that defendant took advantage of a position of trust and confidence to commit the offenses. In open court, the trial court also found in mitigation that defendant admitted wrongdoing at an early stage in the criminal process. Also in open court, the trial court found that the aggravating factor outweighed the mitigating factor. However, the written judgment only reflects the trial court's finding in aggravation and omits the finding in mitigation. The written judgment also omits the trial court's weighing of the factors. Defendant was sentenced to 280 to 345 months in prison. Defendant appeals.

I.

[1] After defendant filed his brief with this Court on 16 June 2004, the United States Supreme Court decided *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004) on 24 June 2004. Defendant thereafter filed a Motion for Appropriate Relief with this Court, arguing that the trial court's finding of an aggravating factor was unconstitutional, since a jury did not find the aggravating factor by a reasonable doubt and defendant did not admit to the factor.

The North Carolina Supreme Court recently held that N.C. Gen. Stat. § 15A-1340.16 was unconstitutional to the extent that it permitted a trial court to find a factor in aggravation when the factor was not submitted to a jury or admitted to by the defendant. *State v. Allen*, 359 N.C. 425, 438-39, 615 S.E.2d 256, 265 (2005). Since the trial court did not submit the issue of the aggravating factor to a jury, its finding of the aggravating factor was error unless defendant admitted to the factor.

The State argues that defendant stipulated to the existence of the aggravating factor when he stipulated to the State's factual basis for his plea. The State argues that the factual basis, which showed that defendant sexually abused the children of women with whom he was romantically involved, necessarily established that defendant took advantage of a position of trust and confidence. The State also points to defendant's failure to object to the State's request that the trial court find the aggravating factor, and to the following statement made by defense counsel at the sentencing hearing:

> [COUNSEL FOR DEFENDANT]: Your Honor, I understand the State's position, their position for an aggravating factor. There would also be, Your Honor, the—as a counterbalance towards any of that—the—the fact that he voluntarily acknowledged his wrongdoing at an early stage . . . .

Blakely and *Allen* established that a criminal defendant has a constitutional right to a jury trial on whether an aggravating factor exists. *Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 414-15; *Allen*, 359 N.C. at 437, 615 S.E.2d at 264-65. In order for a defendant to effectively waive the right to a jury trial, the waiver "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 25 L. Ed. 2d 747, 756 (1970).

Since neither *Blakely* nor *Allen* had been decided at the time of defendant's sentencing hearing, defendant was not aware of his right to have a jury determine the existence of the aggravating factor. Therefore, defendant's stipulation to the factual basis for his plea was not a "knowing [and] intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748, 25 L. Ed. 2d at 756. We hold that defendant did not knowingly and effectively stipulate to the aggravating factor, nor waive his right to a jury trial on the issue of the aggravating factor.

The State argues that if any *Blakely* error occurred, the error was harmless. However, our Supreme Court held in *Allen* that "the harmless-error rule does not apply to sentencing errors which violate a defendant's Sixth Amendment right to jury trial pursuant to *Blakely*." *Allen*, 359 N.C. at 449, 615 S.E.2d at 272. We accordingly do not review the finding of the aggravating factor for harmless error.

In the alternative, the State requests that we review the *Blakely* issue for plain error. Not only have our Courts consistently held that plain error review is only appropriate when error has occurred in the trial court's instructions to the jury or its ruling on the admissibility of evidence, *see, e.g.*, *State v. Roache*, 358 N.C. 243, 275, 595 S.E.2d 381, 403 (2004), our Supreme Court held in *Allen* that "*Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible per se." *Allen*, 359 N.C. at 444, 615 S.E.2d at 269. We grant defendant's Motion for Appropriate Relief and remand this case for resentencing in accordance with *Blakely* and *Allen*.

Although we remand for resentencing, we elect to review defendant's assignments of error in order to provide guidance to the trial court on remand.

II.

[2] Defendant first assigns error to the trial court's failure to record its finding that defendant voluntarily acknowledged wrongdoing at an early stage in the criminal process. The State concedes that the trial court did in fact find the mitigating factor. However, the State argues that the failure to record the finding is merely a clerical error and is not error that merits a new sentencing hearing. *See State v. Gell*, 351 N.C. 192, 218, 524 S.E.2d 332, 349, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000) (finding that when a judgment mistakenly indicated that the trial court found an aggravating factor, it was "an obvi-

ous clerical error because it [wa]s inconsistent with the trial court's actual findings[,]" and the defendant was not entitled to a new sentencing hearing).

The transcript of the plea proceedings indicates that the trial court clearly found the mitigating factor in open court when it stated: "Find in mitigation that at an early—that [defendant] admitted wrongdoing. Find the aggravating factor outweighs the mitigating factor." The failure of the judgment to reflect this finding is a mere clerical error that does not merit a new sentencing hearing. However, since we remand this case for resentencing on other grounds, we direct the trial court to amend its judgment to accurately reflect the finding in mitigation.

III.

[3] Defendant next assigns error to the trial court's failure to find in mitigation that defendant accepted responsibility for his criminal conduct, under N.C. Gen. Stat. § 15A-1340.16(e) (15). In support of his argument, defendant points to the evidence that defendant confessed that he committed the crimes, was receiving psychiatric treatment for his condition, and entered an *Alford* guilty plea. After entering his *Alford* plea, but prior to sentencing, defendant made the following statement: "I'm just sorry for what I did, and I just hope the family will forgive me for what I did, and I'm really working hard at getting my life straight."

At the sentencing hearing, defendant failed to request that the trial court find in mitigation that defendant accepted responsibility for his criminal conduct. When a defendant fails to request that a trial court find a factor in mitigation, the trial court has a duty to find the factor "only when the evidence offered at the sentencing hearing supports the existence of a mitigating factor *specifically listed in N.C. Gen. Stat. § 15A-1340.4(a)(2)* [now N.C. Gen. Stat. § 15A-1340.16(e)] and when the defendant meets the burden of proof established in *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983)." *State v. Gardner*, 312 N.C. 70, 73, 320 S.E.2d 688, 690 (1984). Under *Jones*,

> [a defendant's] position is analogous to that of a party with the burden of persuasion seeking a directed verdict. [The defendant] is asking the court to conclude that "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn," and that the credibility of the evidence "is manifest as a matter of law."

Jones, 309 N.C. at 219-20, 306 S.E.2d at 455 (quoting *Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979)).

A defendant has accepted responsibility for his criminal conduct "when he accepts that he is 'answerable [for] . . . the result' of his criminal conduct." *State v. Godley*, 140 N.C. App. 15, 28, 535 S.E.2d 566, 576 (2000), *disc. review denied*, 353 N.C. 387, 547 S.E.2d 25, *and cert. denied*, 532 U.S. 964, 149 L. Ed. 2d 384 (2001) (alterations in original) (quoting Webster's Third New International Dictionary 1935 (1968)). A defendant's apology at a sentencing hearing does not lead to the sole inference that the defendant has accepted responsibility for the defendant's criminal conduct. *State v. Norman*, 151 N.C. App. 100, 106, 564 S.E.2d 630, 634 (2002); *see also Godley*, 140 N.C. App. at 29, 535 S.E.2d at 576. In *Norman*, the defendant gave the following apology in open court:

> I just want to apologize for my wrongdoing and whatever. I understand how you feel and I know your mom will never be back with you and I kind of feel the same way, that I will never be with my one[-]year-old son again because of the actions that I took part in[,] and I just wanted—just wanted to let you know that I am sorry for the part that I took in it and I hope that you will forgive me.
>
> And for the rest of the things that I have been included in, I apologize for that, too.

Norman, 151 N.C. App. at 102-03, 564 S.E.2d at 632 (alterations in original). The defendant argued that this apology supported a finding in mitigation that the defendant had taken responsibility for his criminal conduct. *Id.* at 106, 564 S.E.2d at 634. While recognizing that the defendant was "remorseful," our Court held that defendant's "statement does not lead to the sole inference that he accepted he was answerable for the result of his criminal conduct." *Id.*; *see also Godley*, 140 N.C. App. at 29, 535 S.E.2d at 576 (finding that the defendant's apology "[wa]s not so persuasive that [the] [d]efendant's acceptance of responsibility for his conduct [wa]s the only reasonable inference that c[ould] be drawn from the statement.").

Like the defendant in *Norman*, we find that defendant has failed to meet the *Jones* burden of proving the factor in mitigation. *Jones*, 309 N.C. at 219-20, 306 S.E.2d at 455. Defendant's apology does not definitively establish that defendant took responsibility for his criminal conduct such that " 'no reasonable inferences to the contrary can be drawn.' " *Id.* at 220, 306 S.E.2d at 455 (quoting *Burnette*, 297 N.C.

at 536, 256 S.E.2d at 395). In addition, we find that defendant's *Alford* plea merits against finding that defendant accepted responsibility for his conduct. The *Alford* plea permitted defendant to "consent to the imposition of a prison sentence even if he [wa]s unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970). Defendant's *Alford* plea indicates a reluctance to take full responsibility for his criminal conduct. Finally, defendant's confession and psychiatric treatment do not necessarily lead to the conclusion that defendant has taken responsibility for his conduct. Therefore, we cannot find that the trial court erred in failing to find in mitigation that defendant took responsibility for his criminal conduct.

IV.

[4] Defendant's final assignment of error contends that the trial court erred when it found that the aggravating factor outweighed the mitigating factor. Defendant argues that the trial court did not accept his *Alford* plea as a legitimate and constitutional guilty plea, and that this predisposition negatively affected the mitigating evidence.

At trial, after defendant requested that the trial court find in mitigation that defendant voluntarily acknowledged his wrongdoing at an early stage in the criminal process, the trial court made the following statements:

> Well, [counsel for defendant], I—you make a sound argument for mitigation. The only thing that troubles me about that is that he's entered a—he—he voluntarily told the police about this other offense that has put him in the position of facing this long sentence. He ought to get some credit for that, but yet he's entered an [*Alford*] [p]lea which I don't really follow[,] you know. You want me to find that he's admitted his wrongdoing, yet he's entered a plea here where he's—he doesn't admit it, and—you know—I don't really understand the rationale behind what's gone on here.
>
> . . . .
>
> [Defendant has] come into court and entered a plea where he doesn't admit his guilt. I just find that sort of inconsistent that—I just don't understand it[,] you know.

Defendant contends that, considering the trial court's statements, it is impossible to know whether the trial court gave appropriate weight to the mitigating factor. We disagree.

A trial court has sound discretion in weighing aggravating and mitigating factors. *State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502-03 (1985). A trial court's balance of the factors will only be disturbed when manifestly unsupported by reason. *State v. Butler*, 341 N.C. 686, 694, 462 S.E.2d 485, 489 (1995). Furthermore, a trial court "need not justify the weight [it] attaches to any factor. . . . [The appellate courts] defer to the wisdom of the trial [court] the appropriateness of the severity of punishment imposed on the particular offender." *State v. Ahearn*, 307 N.C. 584, 597-98, 300 S.E.2d 689, 697-98 (1983).

In this case, we cannot find that the trial court's finding that the aggravating factor outweighed the mitigating factor was manifestly unsupported by reason. There is no evidence that the trial court failed to give the appropriate weight to either the factor in aggravation or the factor in mitigation. The trial court properly exercised its discretion and we defer to its balance of the factors.

Affirmed, remanded for resentencing.

Judges TYSON and GEER concur.

STATE OF NORTH CAROLINA v. RASHAWN DREAN YARRELL

No. COA03-1454

(Filed 2 August 2005)

1. Jury— denial of challenge for cause—death penalty views

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's challenge for cause of a juror whose beliefs about the death penalty allegedly rendered her unqualified to sit on the jury, because the trial court carefully questioned the juror as to her views about the death penalty versus life imprisonment and determined that she was capable of following the law.

2. Assault; Homicide— assault with deadly weapon inflicting serious injury—assault with deadly weapon—first-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of double assault with a deadly weapon

inflicting serious injury, assault with a deadly weapon, and first-degree murder, because: (1) the State demonstrated how defendant's hands and feet were used as deadly weapons in the attack of one of the victims who was undressed and facing downward in an unlit bedroom when he was hit from behind, dragged to the ground, and then kicked while facing downward; (2) the State provided substantial elements for the assault with a deadly weapon inflicting serious injury of another victim who was also undressed and lying in bed in an unlit bedroom where she was struck, was bleeding, and blacked out; (3) the State showed that defendant used his hands and a rubber mallet to hit one victim and that during this attack another victim was hit in the head while she was trying to stop the attack which caused her to get a deep laceration over her left eye that required stitches, antibiotics, and a tetanus shot; and (4) with regard to the first-degree murder, the State showed substantial evidence that defendant attacked the victim after the victim had been knocked to the ground by another, defendant retrieved a rubber mallet from his vehicle and beat the victim with it, defendant stole the shoes from the victim's feet and fled the scene, and defendant told others during his flight that he had killed the victim.

3. Homicide— first-degree murder—sufficiency of indictment

Although defendant contends the trial court erred by denying defendant's motion to dismiss the charge of first-degree murder because the indictment failed to allege every element of the offense, he concedes that our Supreme Court has ruled against his position.

4. Sentencing— aggravating factors—*Blakely* error

The trial court erred by finding aggravating factors and sentencing defendant in the aggravating range for two counts of assault with a deadly weapon inflicting serious injury, because: (1) the aggravating factors that defendant committed the offense while on pretrial release on another charge and that defendant joined with more than one other person in committing the offense and was not charged with committing conspiracy were not prior convictions, the factors were not admitted by defendant, and the facts for these aggravating factors were not presented to a jury and proved beyond a reasonable doubt; and (2) the aggravating factor that defendant had previously been adjudicated delinquent does not constitute a prior conviction pursuant to

N.C.G.S. § 7B-2412 and was neither presented to a jury and proved beyond a reasonable doubt nor admitted by defendant.

Appeal by Defendant from conviction and sentencing entered 10 December 2002 by Judge Jerry Cash Martin in Superior Court, Randolph County. Heard in the Court of Appeals 13 September 2004.[1]

Attorney General Roy Cooper, by Special Deputy Attorney General Ralf F. Haskell, for the State.

Daniel Shatz, for the defendant-appellant.

WYNN, Judge.

Defendant, Rashawn Drean Yarrell, argues that the trial court erred by: (1) denying his challenge for cause of juror Mildred Williams, whose beliefs about the death penalty rendered her unqualified to sit on the jury; (2) denying his motion to dismiss the charges because the State failed to present sufficient evidence as to every element of the charged offenses; (3) denying his motion to dismiss the charge of first-degree murder because the indictment failed to allege every element of that offense; and (4) finding aggravating factors and sentencing Defendant in the aggravated range. After careful review, we conclude that no error was committed by the trial court below, except as to the trial court's finding aggravating factors and sentencing Defendant in the aggravated range. We therefore remand for resentencing.

A brief procedural and factual history of the instant appeal is as follows: On 16 September 2000, Defendant attended a party at the home of Reannon Wilkes ("Wilkes") and Melissa Thiele ("Thiele"). Michael Robbins ("Robbins") and Quincy McKinney ("McKinney") were also present. The party descended into chaos when Defendant and others burst into Thiele's bedroom, where Thiele was getting intimate with Robbins, to attack Robbins. As a result of the assault, Robbins was cut over his right eye—an injury requiring stitches—and had knots in the back of the head. Thiele incurred a nasal fracture, sinus fracture, and closed head injury, and required surgery on her nose, out of which she still cannot breathe.

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1. By order of this Court, the filing of this opinion was delayed pending the outcome of the Supreme Court of North Carolina decisions in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) and *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005) on issues arising from the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004).

Following the assault on Robbins and Thiele, Wilkes instructed the party attendants to leave the house. Outside the house, party attendants began assaulting McKinney. Defendant got a rubber mallet, beat McKinney with the mallet while McKinney lay on the ground, and thereafter stole McKinney's shoes from his feet. McKinney was taken to the hospital, where he was declared brain-dead. An autopsy revealed blunt force injuries, including severe tearing injuries to the left ear, a split skull, extensive fracturing of the left skull, fracturing on the inner surface of the skull, bleeding over the surface of the brain, hemorrhaging of the brain, a rib fracture, and lung damage. Defendant also struck Wilkes as Wilkes attempted to stop Defendant's assault on McKinney. Wilkes incurred a laceration over her left eye and required stitches, antibiotics, and a tetanus shot.

Defendant and others fled the scene, throwing the rubber mallet at a nearby building, where it was later found. Defendant was seen wearing McKinney's shoes and stated to others "I killed him, I killed him." Defendant was also seen in possession of Robbins' coat.

Defendant was arrested and indicted for first-degree murder of McKinney, assault of Thiele with a deadly weapon inflicting serious injury, assault of Robbins with a deadly weapon, and assault of Wilkes with a deadly weapon with the intent to kill and inflicting serious injury. Defendant pleaded not guilty and went before a jury. Defendant was convicted of first-degree murder of McKinney, assault with a deadly weapon inflicting serious injury on Thiele, assault with a deadly weapon on Robbins, and assault with a deadly weapon inflicting serious injury on Wilkes. On 10 December 2002, Defendant was sentenced to life imprisonment without parole for the first-degree murder count, thirty-one to forty-seven months imprisonment for each of the counts of assault with a deadly weapon inflicting serious injury, and sixty days for the count of assault with a deadly weapon. Defendant appeals from these convictions and sentences.

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[1] On appeal, Defendant first contends that the trial court erred by denying his challenge for cause of juror Mildred Williams, whose beliefs about the death penalty rendered her unqualified to sit on the jury. "The decision 'whether to allow a challenge for cause in jury selection is . . . ordinarily left to the sound discretion of the trial court which will not be reversed on appeal except for abuse of discretion.' " *State v. Bowman*, 349 N.C. 459, 471, 509 S.E.2d 428, 436 (1998) (quoting *State v. Stephens*, 347 N.C. 352, 365 493 S.E.2d 435, 443 (1997)). "An abuse of discretion occurs where the trial

judge determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *State v. Reed*, 355 N.C. 150, 155, 558 S.E.2d 167, 171 (2002) (quotations omitted).

Here, the record shows that the trial court carefully questioned Williams as to her views about the death penalty versus life imprisonment. The court ensured that Williams understood, *inter alia*, the difference between the guilt and sentencing phases of trial, the burden of proof on the State, and her duty as a juror to listen to and fully consider both sides' arguments and evidence. The trial court determined to its satisfaction that Williams was capable thereof; this decision was not an abuse of discretion. *See State v. Hedgepeth*, 350 N.C. 776, 791-98, 517 S.E.2d 605, 615-19 (1999) (holding that the trial court did not abuse discretion by denying a challenge for cause of a juror who favored the death penalty in a murder case but whom the court determined was nevertheless able to consider life imprisonment).

[2] Next, Defendant contends that the trial court erred by denying his motion to dismiss the charges because the State failed to present sufficient evidence as to every element of the charged offenses. To survive a motion to dismiss, the State must present substantial evidence of each element of the offense charged and the defendant's being the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). In considering whether such substantial evidence, *i.e.*, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) (citations omitted), exists, the trial court must view the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference." *State v. Price*, 344 N.C. 583, 587, 476 S.E.2d 317, 319 (1996).

An assault with a deadly weapon requires that there have been an assault, during the course of which a deadly weapon was utilized. N.C. Gen. Stat. § 14-33 (2003). "[H]ands and fists may be considered deadly weapons, given the manner in which they were used and the relative size and condition of the parties involved." *State v. Rogers*, 153 N.C. App. 203, 211, 569 S.E.2d 657, 663 (2003) (citing *State v. Krider*, 138 N.C. App. 37, 530 S.E.2d 569 (2000); *State v. Grumbles*, 104 N.C. App. 766, 770-71, 411 S.E.2d 407, 410 (1991); *State v. Jacobs*, 61 N.C. App. 610, 611, 301 S.E.2d 429, 430 (1983)). "[W]here [an] instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce

[death or great bodily harm], its allegedly deadly character is one of fact to be determined by the jury." *Id.* (quoting *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373 (1978), and citing *Grumbles*, 104 N.C. App. at 770-71, 411 S.E.2d at 410).

In this case, the State provided substantial evidence that, in the light most favorable to the State, demonstrated Defendant assaulted Robbins and Defendant's hands and/or feet were used as deadly weapons. Testimony at trial revealed that Defendant went into the room where Robbins and Thiele were getting intimate, and Defendant later reemerged from the room wearing Robbins' jacket. Other testimony revealed that at the time of the assault, Robbins was undressed and facing downward in an unlit bedroom. Robbins was hit in the head from behind and dragged to the ground, where he was then kicked while facing downward. As a result of the assault, Robbins received knots in the back of his head and required stitches above his right eye. We conclude that the State provided substantial evidence as to all elements of the assault with a deadly weapon offense.

The crime of assault with a deadly weapon inflicting serious injury entails: (1) an assault, (2) with a deadly weapon, and (3) infliction of a serious injury not resulting in death. N.C. Gen. Stat. § 14-32. In this case, the State provided substantial evidence that, in the light most favorable to the State, demonstrated Defendant assaulted Thiele. Testimony at trial revealed that Defendant went into the room where Robbins and Thiele were getting intimate, and Defendant later reemerged from the room wearing Robbins' jacket. Other testimony revealed that at the time of the assault, Thiele was undressed and lying in bed in an unlit bedroom. Thiele was struck, was bleeding, and blacked out. As a result of the assault, Thiele incurred a nasal fracture, sinus fracture, and closed head injury, and required surgery on her nose, out of which she still cannot breathe. We conclude that the State provided substantial evidence as to all elements of this assault with a deadly weapon inflicting serious injury offense.

Regarding the assault with a deadly weapon inflicting serious bodily injury on Wilkes, the State provided substantial evidence that, in the light most favorable to the State, demonstrated Defendant assaulted McKinney, which resulted in an assault on Wilkes, during which Defendant used a rubber mallet as a deadly weapon that inflicted serious injuries. Testimony at trial revealed that Defendant swung his hands and a rubber mallet at McKinney, that during the attack on McKinney Defendant hit Wilkes in the head, and that Wilkes then fell to the ground. As a result of the assault, Wilkes incurred a

deep laceration over her left eye and required stitches, antibiotics, and a tetanus shot. We conclude that the State provided evidence as to all elements of this assault with a deadly weapon inflicting serious bodily injury offense.

A "willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any [specific intent] felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree[.]" N.C. Gen. Stat. § 14-17 (2003). "The elements required for conviction of first degree murder are (1) the unlawful killing of another human being; (2) with malice; and (3) with premeditation and deliberation." *State v. Haynesworth*, 146 N.C. App. 523, 531, 553 S.E.2d 103, 109 (2001) (citing N.C. Gen. Stat. § 14-17; *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991)).

In this case, the State provided substantial evidence that, in the light most favorable to the State, demonstrated, *inter alia*, that Defendant attacked McKinney after McKinney had been knocked to the ground by another. Defendant retrieved from a vehicle a rubber mallet and beat McKinney with it. Defendant then stole the shoes off McKinney's feet and fled the scene. During his flight, Defendant stated to others "I killed him, I killed him." We conclude that the State provided substantial evidence as to all elements of the first-degree murder offense.

[3] Defendant also contends that the trial court erred by denying his motion to dismiss the indictment for first-degree murder because the indictment failed to allege all of the elements of the offense. Defendant concedes, however, that our Supreme Court has ruled against his position. *See State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003). Accordingly, we find no error.

[4] Finally, in a motion for appropriate relief, Defendant contends that, regarding the two counts of assault with a deadly weapon inflicting serious injury, the trial court erred in finding aggravating factors and sentencing him within the aggravated range in violation of his Sixth Amendment right to a jury trial. *See Blakely*, 542 U.S. 296, 159 L. Ed. 2d 403. The trial court found the aggravating factors that: (1) Defendant committed the offense while on pretrial release on another charge; (2) Defendant joined with more than one other person in committing the offense and was not charged with committing conspiracy; and (3) Defendant had previously been adjudicated delin-

quent for an offense that would be a Class A, B, C, D, or E felony if committed by an adult.

Our Supreme Court recently held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Allen*, 359 N.C. at 437, 615 S.E.2d at 265; *see Speight*, 359 N.C. at 606, 614 S.E.2d at 264. Therefore,

> [T]hose 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 to the United States Constitution.

Allen, 359 N.C. at 438-39, 615 S.E.2d at 265. Accordingly, our Supreme Court concluded that "*Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible *per se*." *Id.* at 444, 615 S.E.2d at 269.

The aggravating factors that Defendant committed the offense while on pretrial release on another charge and that Defendant joined with more than one other person in committing the offense and was not charged with committing conspiracy were not prior convictions, the factors were not admitted by Defendant, and the facts for these aggravating factors were not presented to a jury and proved beyond a reasonable doubt. Further, the aggravating factor that Defendant has previously been adjudicated delinquent does not constitute a prior conviction pursuant to section 7B-2412 of our General Statutes and was neither presented to a jury and proved beyond a reasonable doubt nor admitted by Defendant. N.C. Gen. Stat. § 7B-2412 (2004) ("An adjudication that a juvenile is delinquent . . . shall neither be considered conviction of any criminal offense nor cause the juvenile to forfeit any citizenship rights."). Therefore, pursuant to *Allen* and *Speight* we must remand for resentencing.

In sum, we hold that the trial court did not err in denying Defendant's challenge for cause of juror Mildred Williams, Defendant's motion to dismiss the charges at the close of evidence, or Defendant's motion to dismiss the first-degree murder indictment. Defendant failed to argue his other assignments of error, which are therefore deemed abandoned. See N.C. R. App. P. 28(b)(6). The trial court did, however, err in finding impermissible aggravating factors and sentencing Defendant in the aggravated range; accordingly, we remand for resentencing.

No Error in part, Remanded for resentencing in part.

Chief Judge MARTIN and Judge McGEE concur.

STATE OF NORTH CAROLINA v. KEVIN WAYNE PHILLIPS

No. COA04-1006

(Filed 2 August 2005)

1. Possession of Stolen Property— multiple convictions erroneous—single continuous transaction

The trial court erred by sentencing defendant on five counts of felonious possession of stolen goods, and the case is remanded for entry of conviction on only one charge, because: (1) the number of stolen items that a defendant possesses does not necessarily dictate the proper number of charges for possession of stolen goods; (2) when, as part of one continuous act or transaction, a perpetrator comes into possession of several stolen items at the same time and place, only one count of possession of stolen goods may be sustained even though defendant in the instant case could not have physically taken all five ATVs at one time from the same victim during one break-in occurring on the same night when there was no interruption in the events once the transaction began; and (3) the time at which defendant acquires stolen property, not when he is dispossessed of it, more correctly controls the number of offenses that may be sustained.

2. Sentencing— aggravating factors found but not submitted to jury—*Blakely* error

The trial court erred by sentencing defendant in excess of the statutory maximum based on aggravating factors not submitted to the jury and not admitted by defendant, and defendant is entitled to a new sentencing hearing pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004).

3. Sentencing— prior record level—felonious possession of stolen goods

The trial court must reexamine defendant's prior record level during resentencing since defendant was a prior record level III offender at the time of sentencing with respect to the offense of felonious possession of stolen goods.

Appeal by defendant from judgment entered 29 April 2004 by Judge Mark E. Klass in Richmond County Superior Court. Heard in the Court of Appeals 21 April 2005.

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

Amos Granger Tyndall for defendant.

LEVINSON, Judge.

Defendant (Kevin Phillips) appeals from judgments entered on convictions of five counts of felonious possession of stolen goods. Defendant was also sentenced as an habitual felon. We arrest judgment on four of the five convictions, and remand the remaining one for resentencing.

Defendant was originally tried in September of 2002. The State's evidence at trial is summarized as follows: During the nighttime hours on 10 December 2001, defendant and three companions broke into the premises of Parker Marine and Outdoors, Richmond County, North Carolina. The men cut a hole in a perimeter fence, then stole five All-Terrain-Vehicles (ATVs). They pushed the ATVs through the hole in the fence and into a nearby wooded area. Two of the ATVs were taken to a house in Marlboro, North Carolina, and the remaining three were taken to defendant's house. Because the ATVs were large and unwieldy, the men had to make at least four separate trips before all the ATVs were secured.

Defendant was indicted on five counts of felonious larceny and five counts of felonious possession of stolen goods, all arising out of the 10 December 2001 theft of the ATVs. He was also separately indicted for being an habitual felon. At trial, defendant's motion to dismiss the substantive charges was denied, and he was convicted of all charges. The trial court arrested judgment on the possession of stolen goods counts, and consolidated four of the five counts of larceny, sentencing defendant to two consecutive terms. *See State v. Phillips*, 162 N.C. App. 719, 592 S.E.2d 272 (2004) (*Phillips I*). Defendant appealed to this Court, which issued its opinion on 17 February 2004 in *Phillips I*. The Court vacated the larceny convictions for defects in the indictments, and remanded the case to the trial court. *Id.*

On remand, the State moved to enter judgments on the five guilty verdicts for possession of stolen property, and the trial court granted

the same. During this hearing, defendant asked the trial court to find several mitigating factors, none of which the court found. The State did not ask the court to find any aggravating factors, nor did the State submit new evidence to support aggravating factors. The court nonetheless found the following statutory aggravating factors under N.C.G.S. § 15A-1340.16(d): number one, "The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants"; and number two, "The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." The court entered a consolidated judgment for four counts of felonious possession of stolen goods in the aggravated range (01 CRS 54077, 01 CRS 54084, 01 CRS 54085, and 01 CRS 54092), and also entered a separate judgment on the remaining count of felonious possession of stolen goods in the aggravated range (01 CRS 540076).

From these judgments defendant appeals.

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[1] Defendant argues that the trial court erred by sentencing him on five counts of felony possession of stolen goods, on the grounds that the evidence is insufficient to support more than one charge. We agree.

The essential elements of the offense of felony possession of stolen goods are: "(1) possession of personal property; (2) having a value in excess of $400.00 [now $1,000]; (3) which has been stolen; (4) the possessor knowing or having reasonable grounds to believe the property was stolen; and (5) the possessor acting with a dishonest purpose." *State v. Martin*, 97 N.C. App. 19, 25, 387 S.E.2d 211, 214 (1990); *see also* N.C.G.S. §§ 14-71.1 and 14-72 (2003).

We next consider the law governing the determination of the proper number of separate charges for the crime of possession of stolen property. The North Carolina Supreme Court has established that "[t]he statute individuates crimes of possession by the time at which the stolen goods came into the criminal's possession." *State v. White*, 322 N.C. 770, 778, 370 S.E.2d 390, 395 (1988). Accordingly, the number of stolen items that a defendant possesses does not necessarily dictate the proper number of charges for possession of stolen goods. In *White*, the defendant's possession began "at different times of receipt following break-ins over a six-week period." *Id.* On those facts, the Court held the defendant had properly been charged with eight "separate counts of possession[,]" because he acquired the

stolen property at separate times. *Id.* Based on the reasoning of *White*, we logically conclude that when, as part of one continuous act or transaction, a perpetrator comes into possession of several stolen items at the same time and place, only one count of possession of stolen goods may be sustained. *See id.; see also State v. Marr*, 342 N.C. 607, 467 S.E.2d 236 (1996).

By analogy, the determination of the proper number of larceny charges is also based on an analysis of the transaction: "[A] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *Marr*, 342 N.C. at 613, 467 S.E.2d at 239 (quoting *State v. Froneberger*, 81 N.C. App. 398, 401, 344 S.E.2d 344, 347 (1986)). Further, we note that crimes of possession and larceny are closely related; receiving stolen goods is a "secondary crime based upon a prior commission of the primary crime of larceny." *State v. Muse*, 280 N.C. 31, 39, 185 S.E.2d 214, 220 (1971) (citation omitted). Accordingly, larceny cases shed light on the analysis that determines when "one continuous act or transaction" has occurred. *Marr*, 342 N.C. at 613, 467 S.E.2d at 239. On facts similar to the instant case, this Court in *State v. Hargett*, 157 N.C. App. 90, 577 S.E.2d 703 (2003), held that multiple larceny charges were improper and arrested judgment on all but one charge. There, defendant stole items from two different vans, but the court held that he could properly be charged with only one count of larceny, because the vans "[were] in close proximity . . . [and the crime occurred] within the same general time period." *Id.* at 96, 577 S.E.2d at 707. In *Hargett*, as in the instant case, defendant "could not have physically taken all of the [goods] at the same time[.]" *Id.* The court deemed the larcenies "part of a single continuous transaction," and held that the "trial court erred in convicting and sentencing defendant for two separate larcenies." *Id.*

Concepts concerning criminal possession also relate to the number of possession charges that may be sustained under a given set of facts. Possession is not "a single, specific act occurring at a specific time"; rather, "possession . . . is a continuing offense beginning at the time of receipt and continuing until divestment." *State v. Davis*, 302 N.C. 370, 374, 275 S.E.2d 491, 494 (1981). Furthermore, "possession [of stolen goods] . . . may be either actual or constructive." *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996) (citation omitted). "Constructive possession exists when the defendant, 'while not having actual possession [of the goods], . . . has the intent and capability to maintain control and dominion over' the[m]." *State v.*

Matias, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)).

> [I]t is not always necessary that the stolen property should have been actually in the hands or on the person of the accused, it being sufficient if the property was under his exclusive personal control. . . . It may be of things elsewhere deposited, but under the control of a party. It may be in a storeroom or barn when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence.

State v. Lilly, 25 N.C. App. 453, 455, 213 S.E.2d 418, 419 (1975) (quoting *State v. Foster*, 268 N.C. 480, 487, 151 S.E.2d 62, 67 (1966) (other citations omitted)).

All the foregoing concepts concerning possession can be illustrated by the following, which we find helpful to our evaluation of this case: One who drives a vehicle to work, parks the vehicle, and retains the ignition key during the workday is not divested of possession of the vehicle by virtue of leaving it for numerous hours. Nor does she subsequently repossess it when she returns to the car to drive home at the end of the workday. While she was, at times, in actual possession of the vehicle and, at other times, in constructive possession, the facts nonetheless suggest one continuous possession.

In the instant case, the undisputed evidence is that defendant and his companions stole all five ATVs from the same victim during one break-in, occurring on the same night. There was no interruption in the events once the transaction began such that he was divested of possession and then came back into possession. The same four individuals worked until they completed the task. The ATVs were stolen at approximately the same time. The men pushed the machines into a secluded, wooded area before transporting them to two different places. The men left the ATVs only temporarily while transporting them. We conclude that defendant's actions were part of a single, continuous transaction. *See Hargett*, 157 N.C. App. 90, 577 S.E.2d 703. Further, *Matias* supports the conclusion that after defendant came into possession of all five ATVs, he maintained either actual or constructive possession of the ATVs for the entire series of events, even while making separate trips to transport them. *See Matias*, 354 N.C. 549, 556 S.E.2d 269. Defendant and his companions retained the "intent and capability to maintain control and dominion over [the ATVs][.]" *Matias*, 354 N.C. at 552, 556 S.E.2d at 270. Altogether, the

evidence is sufficient to conclude that the defendant committed only one offense of possession of stolen property, not five.

The State argues that the evidence does not show that defendant came into possession of all of the ATVs as part of one continuous transaction, but that the defendant's possessions were, instead, distinct and "separate events that stretched out through the evening and over the course of the next four days[.]" The State's argument is based on evidence that defendant made separate trips to secure all of the ATVs on the night they were stolen, hid them in different places, and disposed of them separately. On this evidence, the State reasons, it can bring multiple charges of possession. However, the evidence that defendant and his companions made several trips to move the large and cumbersome ATVs does not convert this offense into five separate offenses. Again, all of these actions occurred after the defendant's possession of all five ATVs had already begun and constructive possession had been maintained. We conclude that evidence concerning defendant's system of transporting the stolen ATVs does not support multiple charges of possession.

The State also contends that multiple charges of possession may be brought because the defendant disposed of the ATVs separately. The State offers no support for this proposition in case law, and we find none. In fact, *White* emphasizes the opposite, that the time at which defendant acquires stolen property, not when he is dispossessed of it, more correctly controls the number of offenses that may be sustained. *Id.* at 778, 370 S.E.2d at 395.

In summary, the undisputed evidence shows that defendant's acts were part of a single, continuous transaction during the course of one night. The evidence further shows that the men maintained constructive possession of the ATVs throughout the night and until ultimate divestment. The trial court erred by sentencing defendant on five, rather than one, counts of felony possession of stolen goods.

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[2] Defendant argues next that the trial court erred by sentencing him in excess of the statutory maximum based on aggravating factors not submitted to the jury and not admitted by defendant. Defendant argues he is entitled to a new sentencing hearing pursuant to *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004). We agree.

In the instant case, the court found the following statutory aggravating factors under G.S. § 15A-1340.16(d): number one, "The defend-

ant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants"; and number two, "The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." The trial court sentenced defendant as an habitual felon, at the top of the aggravated range, to a term of 167 to 210 months. The aggravating factors were not found beyond a reasonable doubt by the jury, and were not admitted by defendant. Therefore, we remand for resentencing in conformity with the rulings in *Blakely* and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005).

[3] Finally, defendant contends, and the State agrees, that with respect to the offense of felonious possession of stolen goods, defendant was a prior record level III offender at the time of sentencing. We agree, and instruct the trial court to reexamine defendant's prior record level during resentencing.

In summary, we arrest judgment on four convictions of felony possession of stolen goods (01 CRS 54077, 01 CRS 54084, 01 CRS 54085, and 01 CRS 54092), and remand the fifth (01 CRS 54076) for resentencing.

Judgment arrested in part, remanded in part.

Chief Judge MARTIN and Judge TYSON concur.

TERRY BOWLES, EMPLOYEE, PLAINTIFF v. BCJ TRUCKING SERVICES, INC., EMPLOYER, N.C. SELECTIVE FUND, RELIANCE NATIONAL INSURANCE COMPANY (DENNIS INSURANCE GROUP, SERVICING AGENT), AND N.C. INSURANCE GUARANTY ASSOCIATION, N.C. SELF INSURANCE GUARANTY ASSOCIATION, CARRIERS, DEFENDANTS, AND NORTH CAROLINA DEPARTMENT OF INSURANCE, INTERVENOR

No. COA04-1059

(Filed 2 August 2005)

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

Defendant Insurance Guaranty Association's (IGA) assignments of error asserting the Industrial Commission erred in a workers' compensation case by its finding of fact number seven

and its order assessing costs to IGA were not argued and are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

2. Insurance; Workers' Compensation— assumption reinsurance agreement—novation—insolvent insurer—liability of IGA

Plaintiff's workers' compensation claim was a "covered claim" under N.C.G.S. § 58-48-20 for which the Insurance Guaranty Association was responsible where plaintiff was injured in the course of his employment with BCJ Trucking Services (BCJ) and was awarded temporary total disability benefits; BCJ's workers' compensation insurer, Selective, experienced financial difficulties and entered into an assumption reinsurance agreement with Reliance under which Selective transferred and Reliance assumed 100 percent of Selective's workers' compensation liability claims and obligations; Reliance became insolvent and was ordered into liquidation by a Pennsylvania court; and the Insurance Guaranty Association thereafter assumed payment of plaintiff's benefits. The assumption reinsurance agreement constituted a novation which did not create a new contract for insurance coverage but substituted a new party, Reliance, for Selective as if Reliance had issued the original contract of insurance to BCJ, Reliance is thus a "direct insurer," and the Insurance Guaranty Association is liable for all claims on policies of direct insurance companies which have been found insolvent. N.C.G.S. § 58-48-35(a)(2).

Appeal by defendant N.C. Insurance Guaranty Association from opinion and award entered 16 April 2004 and order entered 21 April 2004 by Commissioner Dianne C. Sellers for the North Carolina Industrial Commission. Heard in the Court of Appeals 9 May 2005.

Janet H. Downing, PA, by Janet H. Downing, for plaintiff-appellee.

Charlot F. Wood, for defendant-appellee BCJ Trucking Services, Inc.

Johnston, Allison & Hord, P.A., by Patrick E. Kelly, for defendant-appellee N.C. Selective Fund.

Nelson Mullins Riley & Scarborough, LLP, by Christopher J. Blake and Joseph W. Eason, for defendant-appellant N.C. Insurance Guaranty Association.

Stuart Law Firm, PLLC, by Catherine R. Stuart and Charles C. Kyles, for defendant-appellee N.C. Self Insurance Guaranty Association.

Attorney General Roy Cooper, by Assistant Attorney General E. Clementine Peterson, for intervenor-appellee.

TYSON, Judge.

N.C. Insurance Guaranty Association ("IGA") appeals from the opinion and award entered by the full North Carolina Industrial Commission ("Commission") awarding Terry Bowles ("plaintiff") benefits for an injury he sustained at work. We affirm.

I. Background

Plaintiff was injured on 3 March 1998 in the course of his employment with BCJ Trucking Services ("BCJ"). On 11 April 2001, plaintiff was awarded ongoing temporary total disability benefits beginning 6 December 1999 from BCJ's workers' compensation insurance company, North Carolina Selective ("Selective"). Selective was comprised of various employers who pool their workers' compensation liabilities to create a licensed self-insured group.

Selective began experiencing financial trouble in early 1997. On 29 April 1997, the North Carolina Department of Insurance ("NCDOI") informed Selective of its financial concerns and by letter dated 21 January 1998 informed Selective of its need to obtain additional capital or a commitment from a commercial insurance company to reinsure them. Shortly thereafter, NCDOI informed Selective it would be in the "best interest" of the public and Selective's members to transfer its obligations and liabilities to a commercial insurer.

Selective entered into a NCDOI approved assumption reinsurance agreement with Reliance National Insurance Company ("Reliance") effective 31 December 1998. Selective transferred and Reliance assumed 100 percent of Selective's workers' compensation liability claims and obligations. Reliance began and continued to pay plaintiff's benefits per the assumption agreement.

Reliance was an active member of IGA, which is a statutorily created reinsurance association which covers claims of insolvent insurance companies pursuant to N.C. Gen. Stat. § 58-48-1 *et seq*. On 3 October 2001, Reliance became insolvent and was ordered into liq-

uidation by the Pennsylvania Commonwealth Court. After Reliance was liquidated, IGA assumed payments of plaintiff's benefits.

IGA commenced this action by filing a Form 33 request with the Commission to determine its responsibility for paying plaintiff's claim. The Commission issued an opinion and award holding IGA responsible for paying plaintiff's workers' compensation claim. The Commission held: (1) the claim arose when Selective was the insurance carrier for BCJ; and (2) Reliance had assumed the insurance contract through novation and IGA was liable for the claim due to Reliance's insolvency. IGA appeals.

II. Issues

IGA argues the Commission erred by: (1) finding plaintiff's claim met the definition of a "covered claim" under N.C. Gen. Stat. § 58-48-20; and (2) finding plaintiff's claim was within IGA's obligations by N.C. Gen. Stat. § 58-48 *et seq*.

III. Abandoned Assignments of Error

[1] IGA's assignments of error asserting the Commission erred in its finding of fact number seven and its order assessing costs to IGA were not argued and are deemed abandoned. *Brown v. Kroger Co.*, 169 N.C. App. 312, 316, 610 S.E.2d 447, 450 (2005) ("Pursuant to N.C.R. App. P. 28(b)(6) (2004), the omitted assignments of error are deemed abandoned").

IV. Standard of Review

"Opinions and awards of the Commission are reviewed to determine whether competent evidence exists to support the Commission's findings of fact, and whether the findings of fact support the Commission's conclusions of law." *Bondurant v. Estes Express Lines, Inc.*, 167 N.C. App. 259, 263, 606 S.E.2d 345, 348 (2004) (citing *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 114, 530 S.E.2d 549, 552 (2000)). As IGA failed to take exception to the Commission's findings of fact, they are binding on appeal. *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480-81 (1997) (citing *Mabe v. Granite Corp.*, 15 N.C. App. 253, 255, 189 S.E.2d 804, 806 (1972)). Our review is limited to a *de novo* review of the Commission's conclusions of law. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 63, 546 S.E.2d 133, 139 (2001) (quoting *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000)).

V. Covered Claim

[2] IGA argues the Commission erred in finding plaintiff's claim met the definition of a "covered claim" as defined by N.C. Gen. Stat. § 58-48-20.

N.C. Gen. Stat. § 58-48-20(4) (2003) defines a "covered claim" as

> an unpaid claim, including one of unearned premiums, which is in excess of fifty dollars ($50.00) and arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies as issued by an insurer, if such insurer becomes an insolvent insurer . . . .

An insolvent insurer is:

> (i) an insurer licensed and authorized to transact insurance in this State either at the time the policy was issued or when the insured event occurred and (ii) against whom an order of liquidation with a finding of insolvency has been entered after the effective date of this Article by a court of competent jurisdiction in the insurer's state of domicile or of this State under the provisions of Article 30 of this Chapter, and which order of liquidation has not been stayed or been the subject of a writ of supersedeas or other comparable order.

N.C. Gen. Stat. § 58-48-20(5) (2003).

The Commission concluded IGA's liability for plaintiff's claim arose when Reliance assumed Selective's obligations and rested its conclusion on applying the law of novation.

It is well established that

> "[t]he essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract" . . . . "Ordinarily . . . in order to constitute a novation the transaction must have been so intended by the parties."

Anthony Marano Co. v. Jones, 165 N.C. App. 266, 269, 598 S.E.2d 393, 395 (2004) (quoting *Tomberlin v. Long*, 250 N.C. 640, 644, 109 S.E.2d 365, 368 (1959) (citations omitted)).

> Novation may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished . . . [n]ovation implies the extinguishment of one obligation by the

> substitution of another. Where the question of whether a second contract dealing with the same subject matter rescinds or abrogates a prior contract between the parties depends solely upon the legal effect of the latter instrument, the question is one of law for the courts . . . .

Tomberlin, 250 N.C. at 644, 109 S.E.2d at 367-68 (quotations omitted).

> Here, the Commission found as fact:
>
> [t]he Assumption Reinsurance Agreement approved by the Commissioner of Insurance that became effective on December 31, 1998 resulted in a novation of the original contract for insurance entered into by the Selective Fund and BCJ Trucking Services, Inc. Reliance National Indemnity Company substituted for the Selective Fund as a party to the original contract for insurance between the Selective Fund and BCJ Trucking Services, Inc. No new contract of insurance was formed as a result of this novation. No separate negotiations between Reliance National Indemnity Company and BCJ Trucking Services, Inc. took place resulting in a new and separate contract for insurance between the parties.

The Commission concluded as a matter of law the novation resulted only in a change of the parties to the original contract, while the terms and obligations of the original insurance contract remained unchanged.

As noted above, IGA failed to make exceptions to the Commission's findings of fact and they are binding on appeal. *Creel*, 126 N.C. App. at 552, 486 S.E.2d at 480-81 (citation omitted). The Commission found as fact the assumption reinsurance agreement was a novation. It held the novation extinguished the contract between Selective and BCJ and that Reliance expressly assumed 100 percent of Selective's obligations. *Tomberlin*, 250 N.C. at 644, 109 S.E.2d at 367-68. The agreement did not create a new contract for insurance coverage but solely substituted a new party, Reliance for Selective, to the contract. Through novation, Reliance is deemed to have replaced Selective as if Reliance had issued the original contract of insurance to BCJ. *Id.* The novation replaced the parties to the contract, did not change the obligations under the contract for insurance itself, and the agreement did not operate retroactively to cover known or unknown losses.

Plaintiff's claim for injury occurred after the original contract for insurance was entered into by BCJ and Selective, now BCJ and

Reliance. Reliance, through novation, became BCJ's insurance company beginning 1 November 1994 to the time of plaintiff's claim. Plaintiff's claim is a "covered claim" within the coverage of the insurance policy issued by Reliance, a direct insurer as defined by N.C. Gen. Stat. § 58-48-20. After Reliance became insolvent and was ordered into liquidation by the Pennsylvania Commonwealth Court, IGA became liable for all covered claims issued by an insolvent direct insurer. N.C. Gen. Stat.§ 58-48-20; N.C. Gen. Stat. § 58-48-35(a)(1) (2003). The Commission correctly concluded plaintiff's claim met the definition of a "covered claim" under N.C. Gen. Stat. § 58-48-20 and holding IGA to be liable for plaintiff's claim. This assignment of error is overruled.

VI. Statutory Obligation of IGA

IGA argues the Commission erred in finding plaintiff's claim rests within the statutory obligations of IGA under the North Carolina Insurance Guaranty Association Act. N.C. Gen. Stat. § 58-48 *et seq*.

Under N.C. Gen. Stat. § 58-48-20(4), a " 'Covered claim' means an unpaid claim, . . . arises out of and is within the coverage . . . [of] an insurance policy to which this Article applies as issued by an insurer, if such insurer becomes an insolvent insurer . . . ." Under N.C. Gen. Stat. § 58-48-20(5), an " 'Insolvent insurer' means (i) an insurer licensed and authorized to transact insurance in this State either at the time the policy was issued or when the insured event occurred and (ii) against whom an order of liquidation with a finding of insolvency has been entered . . . ."

Under N.C. Gen. Stat. § 58-48-35(a)(2), IGA stepped into the shoes of the insurance company found to be insolvent and is deemed the insurer having "all rights, duties, and *obligations* of the insolvent insurer as if the insurer had not become insolvent." (Emphasis supplied).

Under N.C. Gen. Stat. § 58-48-35, IGA is liable for all claims on policies of direct insurance companies which have been found insolvent. Reliance is a direct insurance company who is deemed to have *issued* an insurance policy to BCJ and is an active member of IGA. Plaintiff's claim is a "covered claim" in that it arose out of Reliance's coverage of BCJ. The Pennsylvania Commonwealth Court found Reliance insolvent and ordered it liquidated. After Reliance was found to be insolvent, IGA stepped into the shoes of Reliance and must pay its claims. The Commission properly concluded plaintiff's

claim is within the statutory obligations of IGA. This assignment of error is overruled.

VII. Conclusion

The original insurance policy between BCJ and Selective became a direct insurance obligation when Reliance expressly assumed Selective's book of business. Through novation, Reliance is deemed to have issued the insurance policy. Reliance is a "direct insurer" placing it within the obligations of IGA by N.C. Gen. Stat. § 58-48-35. Reliance became insolvent triggering the application of N.C. Gen. Stat. § 58-48-1 *et seq*. to IGA. Plaintiff's claim is a "covered claim" issued by an "insolvent insurer" and became IGA's obligation. The Commission properly concluded plaintiff's claim is within the statutory obligations of IGA. The Commission's opinion and award is affirmed.

Affirmed.

Chief Judge MARTIN and Judge LEVINSON concur.

BEACHCRETE, INC., Plaintiff-Appellant v. WATER STREET CENTER ASSOCIATES, L.L.C. and AMERICAN HOME ASSURANCE COMPANY, Defendants-Appellees

No. COA04-557

(Filed 2 August 2005)

Construction Claims— breach of contract—unjust enrichment—payment bond—contractual limitations period

The trial court did not err in a breach of contract and unjust enrichment case by granting defendant surety's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(c) plaintiff subcontractor's action to collect money owed from the general contractor under provisions of a payment bond arising out of a construction project based on the one-year contractual limitations period contained in the payment bond, because: (1) although plaintiff contends the document attached to defendant's answer referring to a final request for payment on the project should not have been considered, it was specifically referred to in defendant's answer on four separate occasions and could properly be considered part of the

pleadings in ruling upon defendant's motion to dismiss; (2) plaintiff lost the right to contest the issue of when the one-year limitations period set forth in the payment bond commenced since plaintiff failed to argue in its brief that the trial court erred by stating the parties stipulated that plaintiff failed to file this action prior to the expiration of the one-year contractual limitations period contained within the payment bond, nor does it argue that it did not enter into the stipulation or that it was somehow invalid; (3) although plaintiff contends the one-year limitations period contained in the payment bond is unenforceable, plaintiff who is seeking the benefit of the payment bond must also accept its burdens and by its own stipulation, plaintiff did not present its claim in a timely manner; (4) although plaintiff argues that insurance contracts are to be construed in favor of the insured and against the insurer, a payment bond is a contract of suretyship and plaintiff is a third-party beneficiary of the payment bond, and there is no need to apply rules of construction when the provision in the contract is clear; (5) although plaintiff contends that the one-year limitations period is void as a violation of N.C. Gen. Stat. § 58-3-35 which prohibits insurers from limiting the time in which suit may be commenced to less than the period prescribed by law, insurance and suretyship are not synonyms; and (6) although plaintiff argues that the one-year limitations period contained in the payment bond is not a limitations period for filing suit, the pertinent provision explicitly limited the time in which plaintiff could file suit under the payment bond and plaintiff's own stipulation acknowledged that this was a one-year contractual limitations period.

Appeal by plaintiff from judgment entered 2 March 2004 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 1 February 2005.

Scott T. Slusser, for plaintiff-appellant.

Parker Poe Adams & Bernstein, LLP, by Brian D. Darer and Farah Rodenberger, for defendant-appellee, American Home Assurance Company.

STEELMAN, Judge.

Water Street Center Associates, L.L.C. (Water Street) is the owner of the Water Street Center, Wilmington (the Project), which is a private construction project consisting of offices and condominiums.

Miller Building Company (Miller) was general contractor on the project. On 15 December 1999, Miller gave to Water Street a payment bond on the project in the amount of $8,269,954.00. American Home Assurance Company (defendant) was the surety on this bond. By the terms of the bond, Miller agreed to pay "all lawful claims of sub-contractors, materialmen or laborers for labor performed or materials furnished directly to the principal in performance of said contract." The payment bond also contained the following provision:

> No suit or action shall be commenced hereunder by any claimant: (a) After the expiration of one (1) year following the date on which Principal ceased work on said Contract, it being understood, however, that if any limitation embodied in this bond is prohibited by any law controlling the construction hereof such limitation shall be deemed to be amended to as to be equal to the minimum period of limitation permitted by such law.

Plaintiff is a North Carolina corporation in the business of commercial concrete construction. On 18 April 2000, Miller entered into an agreement with plaintiff as a subcontractor, whereby plaintiff agreed to furnish labor for the installation of pile cap foundations at the project. Plaintiff's total contract price for this work was $358,818.44. Plaintiff completed all work required of it pursuant to contract and was paid by Miller for all the work except $35,881.77 representing a ten percent (10%) retainage of the total contract price. This retainage was due upon unqualified written acceptance and full and final payment by Water Street to Miller.

Miller allegedly received final payment, from Water Street, in the amount of $25,289.39 on or about 11 December 2001. On 30 August 2002, plaintiff filed suit against Miller in a separate action for money owed on the project. This was approximately nine months after the alleged final payment to Miller by Water Street. On 2 September 2003, the Superior Court of New Hanover County entered judgment against Miller for monies owed under the subcontract agreement.

Plaintiff filed this suit against defendant and Water Street on 28 May 2003. Plaintiff first learned of the existence of the payment bond immediately prior to filing this action. Plaintiff's complaint sought to recover $35,881.77 from Water Street under theories of breach of contract and unjust enrichment. It also sought to collect from defendant the same amount under the provisions of the payment bond. On 26 June 2003, plaintiff voluntarily dismissed its claims against Water Street. By order filed 2 March 2004, the trial court denied plaintiff's

motion for summary judgment and granted defendant's motion for judgment on the pleadings, dismissing plaintiff's action. The trial court specifically held that the basis of this ruling was the one year contractual limitations period contained in the payment bond. From this order, plaintiff appeals.

In its first argument, plaintiff contends that the trial court erred in granting defendant's motion to dismiss pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. We disagree.

Plaintiff first argues that the court improperly considered a document that was attached to defendant's answer. The document in question was Miller's final request for payment to Water Street Center and was specifically referred to in defendant's answer on four separate occasions. The court properly considered that document to be a part of the pleadings in ruling upon defendant's motion to dismiss pursuant to Rule 12(c). *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867 (1984).

Plaintiff next argues that there are contradictory allegations in the pleadings as to when the one year limitations period set forth in the payment bond commenced.

Judge Henry's order contains the following language: "The parties stipulated that Plaintiff failed to file this action prior to the expiration of the one (1) year contractual limitations period contained within the Payment Bond." Plaintiff did not assign this statement in the order as error in the record, and does not argue that it did not enter into the stipulation, or that it was somehow invalid, in its brief. Plaintiff has lost the right to contest this issue. N.C. R. App. P. Rule 10(c)(1); *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999).

Plaintiff next argues that the one year limitations period contained in the payment bond is unenforceable. Plaintiff acknowledges that there is no case law in North Carolina supporting this proposition, but urges this Court to liberally construe the payment bond to protect its interests.

The payment bond was given by Miller as principal and defendant as surety to Water Street to insure that lawful claims of subcontractors, materialmen, or laborers for labor performed on the project were paid. The payment bond expressly states that it was for "the benefit of any subcontractor, materialman or laborer." Thus, although plaintiff was not a party to the payment bond, its express

terms allow it to institute an action against the surety if it is not paid by the contractor. However, those same terms which give the plaintiff the right to seek payment from the surety, place explicit limitations upon this right. The payment bond specifically provides: "No suit or action shall be commenced hereunder by any claimant a) after the expiration of one (1) year following the date on which Principal ceases work on said contract . . . ." Plaintiff, seeking the benefit of the payment bond, must also accept its burdens. *See RGK, Inc. v. United States Fidelity & Guaranty Co.*, 292 N.C. 668, 684-85, 235 S.E.2d 234, 244 (1977).

Plaintiff then contends that its claims against Miller are controlled by a three year statute of limitations and that this should control over the provisions of the payment bond. This argument is specious. Defendant's obligations to plaintiff are specifically limited by the terms and conditions of the payment bond, which provide for a one year period to present claims. By its own stipulation, plaintiff did not present its claim in a timely manner.

Plaintiff further argues that insurance contracts are to be construed in favor of the insured and against the insurer. A payment bond is a contract of suretyship, not insurance. Plaintiff is a third-party beneficiary of the payment bond, not an insured. Further, rules of construction are used to interpret ambiguities in contracts. They are not used to rewrite provisions to fit the needs of a litigant. Where a provision in an agreement (such as the limitations provision) is clear and unambiguous on its face, there is no need to apply rules of construction. *Jones v. Palace Realty Co.*, 226 N.C. 303, 305, 37 S.E.2d 906, 907 (1946); *North Carolina Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95 (2000).

Plaintiff next argues that the one year limitations period is void as a violation of N.C. Gen. Stat. § 58-3-35 (2004). This statute prohibits insurers from limiting the time in which suit may be commenced to less than the period prescribed by law. Again, insurance and suretyship are not synonyms. " 'While insurance contracts are in many respects similar to surety contracts, there is a very wide difference between them.' 44 C.J.S. Insurance § 1, p. 473. The statutory provisions that control and regulate insurance in this state are contained in Chapter 58 of the General Statutes entitled: 'Insurance'; those that regulate suretyship in Chapter 26 entitled 'Suretyship.' " *Henry Angelo & Sons, Inc. v. Property Dev. Corp.*, 63 N.C. App. 569, 574, 306 S.E.2d 162, 166 (1983).

Finally, plaintiff argues that the one year limitations period contained in the payment bond is not a limitations period for filing suit, citing the case of *MCI Constructors, Inc. v. Hazen & Sawyer*, P.C., 310 F. Supp. 2d 754 (M.D.N.C., 2004), *aff'd in part, rev'd in part on other grounds*, 125 Fed. Appx. 471 (4th Cir. 2005).

In *MCI*, there was a provision in a performance bond stating "bond must be valid until one year after the date of issuance of the Certificate of Completion." The District court held that this constituted a period for making demand on the performance bond, not a limitations period. The language of the payment bond in the instant case is completely different from that discussed in *MCI*. Here, the bond explicitly states: "No suit or action shall be commenced hereunder." This provision explicitly limited the time in which plaintiff could file suit under the payment bond. Further, plaintiff's own stipulation acknowledged that this was a "one (1) year contractual limitations period."

We find all of plaintiff's arguments to be without merit, and affirm the trial court's dismissal of plaintiff's action.

AFFIRMED.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. ROBIN MEDFORD JONES

No. COA04-967

(Filed 2 August 2005)

Embezzlement— public officer—local ABC board employee—subject matter jurisdiction

The Court of Appeals concluded ex mero motu that the trial court lacked subject matter jurisdiction over defendant local ABC board employee, and the judgments finding defendant guilty of ten counts of embezzlement by a public officer under N.C.G.S. § 14-92 are vacated, because: (1) the Asheville ABC Board is not a political subdivision of a city, county, or the Commission; (2) although defendant is an employee of a local ABC board and is

subject to statutes that are applicable to a local ABC board's employees, defendant is not a public officer of any county, unit or agency of local government, or local board of education; and (3) as a local ABC Board employee, defendant should have been charged under N.C.G.S. § 14-90.

Appeal by defendant from judgments entered 3 November 2003 by Judge J. Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 21 April 2005.

Attorney General Roy Cooper, by Assistant Attorney General J. Douglas Hill, for the State.

Reita P. Pendry, for defendant-appellant.

TYSON, Judge.

Robin Medford Jones ("defendant") appeals from judgments entered after a jury found her to be guilty of ten counts of embezzlement by public officer under N.C. Gen. Stat. § 14-92. We vacate the trial court's judgments.

I. Background

Defendant was employed by the Asheville Board of Alcohol Control ("Asheville ABC") in 1990 and worked at the Mixed Beverage Outlet ("MBO"). The MBO's sole function is to sell and distribute alcohol to restaurants and bars in the City of Asheville and surrounding areas.

The selling process is uncomplicated: Customers place orders, the MBO prepares orders, and customers pick up their orders. When customers retrieve their orders, payment is made by cash or check. Checks are accepted for payment only if a check guarantee letter is on file from the customer's bank. Once the transaction is complete, an invoice is printed showing payment has been made by either cash or check.

In 1993 or 1994, defendant became the Assistant Manager of the MBO. During this time, defendant and Gale Cole ("Cole"), the MBO Manager, were the only employees working at the MBO. This relationship continued for seven years. During this time, Cole did not report any issues with deposits from the MBO. Cole became aware of potential problems after Frank Worley ("Worley"), supervisor of all employees of the Asheville ABC, questioned her in May 2002. Worley had been advised of late deposits at the MBO by the Asheville ABC's

accountant, John Bradford ("Bradford"). Several times Bradford reported late deposits to Worley from the MBO before a shortage was detected.

On 1 June 2002, Worley advised Cole that the MBO's bank account was $32,000.00 short. When Worley inquired of Cole about the MBO's invoices, he was told defendant had taken them home to file. Once the invoices were retrieved from defendant's home, Worley and Cole found discrepancies. At this point, Rick Matthews ("Investigator Matthews"), chief investigator for the Asheville ABC, was notified. Investigator Matthews asked Cole to retrieve additional records. Cole told him some of the records were missing.

Investigator Matthews continued his investigation and spoke with defendant on 11 June 2002. After defendant was told of the missing records and shortages, she assured Investigator Matthews that she had no knowledge of discrepancies with the deposits and if problems existed, Cole would know about them.

In July 2002, an arrest warrant was issued for defendant. On 4 November 2002, defendant was indicted under N.C. Gen. Stat. § 14-92 for ten counts of embezzlement by public officer. Defendant was found by a jury to be guilty of all ten counts of embezzlement on 3 November 2003. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying her motion to dismiss at the close of the State's evidence; (2) permitting handwriting identification without laying a proper foundation; and (3) finding as fact an element of the crime charged.

III. Jurisdiction

The dispositive issue is whether the trial court possessed subject matter jurisdiction over defendant.

"The question of subject matter jurisdiction may properly be raised for the first time on appeal. Furthermore, this Court may raise the question on its own motion even when it was not argued by the parties in their briefs." *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978) (citing *Jenkins v. Winecoff*, 267 N.C. 639, 148 S.E.2d 577 (1966); N.C. Gen. Stat. § 1A-1, Rule 12(h)(3)), *cert. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979). Defendant alleges the trial court erred by finding as fact an element of the crime charged but fails to specifically allege the trial court

lacked subject matter jurisdiction. We raise the question of subject matter jurisdiction *ex mero motu*. *Id.*

IV. Embezzlement

" '[E]mbezzlement is a criminal offense created by statute to cover fraudulent acts which did not contain all the elements of larceny.' " *State v. Weaver*, 359 N.C. 246, 255, 607 S.E.2d 599, 604 (2005) (quoting *State v. Griffin*, 239 N.C. 41, 79 S.E.2d 230 (1953)). Over the past 130 years, embezzlement statutes have been revised "expanding the class of individuals who are capable of committing the offense . . . ." *Weaver*, 359 N.C. at 253, 607 S.E.2d at 603 (citations omitted). During this time, statutes were enacted defining more specific incidences of embezzlement as applicable to certain classes of individuals. *Id.*

Defendant was indicted under N.C. Gen. Stat. § 14-92 entitled, "Embezzlement of funds by public officers and trustees," which states in part:

> If an officer, agent, or employee of an entity listed below, or a person having or holding money or property in trust for one of the listed entities, shall embezzle or otherwise willfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of a felony . . . [i]f any clerk of the superior court or any sheriff, treasurer, register of deeds or other public officer of any county, unit or agency of local government, or local board of education shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held . . . .

Local Alcoholic Beverage Control ("ABC") Boards are governed by N.C. Gen. Stat. §§ 18B-700 through 18B-703. N.C. Gen. Stat. §§ 18B-101(3) and 18B-101(8) (2003) defines a "local board" as "an independent local political subdivision of the State" and not an "agency of a city or county or of the Commission." N.C. Gen. Stat. § 18B-702 (2003) provides in pertinent part:

> Financial operations of local boards
>
> (a) Generally.—A local board may transact business as a corporate body, except as limited by this section. A local board shall not be considered a public authority . . . .
>
> . . . .

> (f) Applicability of Criminal Statutes.—The provisions of G.S. 14-90 and G.S. 14-254 shall apply to any person appointed to or employed by a local board, and any person convicted of a violation of G.S. 14-90 or G.S. 14-254 shall be punished as a Class H felon.

In *Fowler v. Valencourt*, our Supreme Court stated, "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." 334 N.C. 345, 349, 435 S.E.2d 530, 532 (1993) (citations omitted).

In *State v. Thompson*, this Court upheld an embezzlement conviction although the defendant was indicted under an incorrect statute. 50 N.C. App. 484, 487, 274 S.E.2d 381, 383, *cert denied*, 302 N.C. 633, 280 S.E.2d 448 (1981). "The indictments against defendant do not refer specifically to any statute, and they are sufficient to charge defendant with violations of either G.S. 14-90 or 14-92." *Id.* Each indictment before us specifically charges defendant for violations of N.C. Gen. Stat. § 14-92. *Id.* The Asheville ABC is not a political subdivision of a city, county, or the Commission. N.C. Gen. Stat. § 18B-101.

It is undisputed that defendant is an employee of a local ABC board and is subject to statutes that are applicable to a local ABC board's employees. Defendant is not a public officer of any county, unit or agency of local government, or local board of education.

As a local ABC Board employee, defendant should have been charged under N.C. Gen. Stat. § 14-90. *See* N.C. Gen. Stat. § 18B-702(f). The trial court lacked jurisdiction to hear this case where defendant was charged with violation of N.C. Gen. Stat. § 14-92. The trial court's judgments are vacated.

V. Conclusion

Defendant is a local "ABC Board" employee charged with embezzlement under N.C. Gen. Stat. § 14-92. The appropriate statute to charge a local "ABC Board" employee is N.C. Gen. Stat. § 14-90. The trial court lacked subject matter jurisdiction to hear the State's case against defendant.

Defendant's conviction and the trial court's judgments are vacated.

Chief Judge MARTIN and Judge LEVINSON concur.

JESSIE BILL CHILDRESS, PETITIONER v. FLUOR DANIEL, INC., AND BROADSPIRE (FORMERLY KEMPER INSURANCE COMPANY), RESPONDENTS

No. COA04-1436

(Filed 2 August 2005)

Jurisdiction— superior court—setting amount of workers' compensation lien

A de novo review revealed that the trial court erred by dismissing plaintiff's petition for reduction of workers' compensation lien based on lack of jurisdiction under N.C.G.S. § 97-10.2, because: (1) the amount of an employer's lien on recovery from a third-party tortfeasor can be reduced or eliminated pursuant to N.C.G.S. § 97-10.2; (2) N.C.G.S. § 97-10.2(j) permits the superior court to adjust the amount of a subrogation lien if the agreement between the parties has been finalized so that only performance of the agreement is necessary to bind the parties; and (3) N.C.G.S. § 97-10.2(f)(1) does not govern liens, but merely requires the Commission to enter an order allowing distribution of the proceeds of a third party settlement once an award of workers' compensation benefits becomes final.

Appeal by plaintiff from an order entered 27 May 2004 by Judge Zoro J. Guice, Jr. in the Superior Court in Haywood County. Heard in the Court of Appeals 11 May 2005.

Wallace & Graham, by Edward L. Pauley, for petitioner-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe and Edward A. Sweeney, for respondent-appellees.

HUDSON, Judge.

The case arises from an attempt by plaintiff Jessie Bill Childress to reduce the amount of a workers' compensation lien held by defendants Fluor Daniel, Inc. (Employer) and Broadspire (Carrier) on plaintiff's recovery from a third-party tort-feasor. On 8 May 1997, plaintiff filed a Form 18B with the Commission alleging asbestosis and seeking benefits. Plaintiff later amended his Form 18B to include a claim for colon cancer. Defendants denied liability. On 16 April 2002, the Full Commission entered an opinion and award, awarding $20,000 each for three permanent injuries to three internal organs

pursuant to N.C. Gen. Stat. § 97-31(24) (2001). The Commission also directed defendants to pay all medical expenses incurred or to be incurred by plaintiff as a result of the asbestosis and colon cancer. Defendant appealed the opinion and award to this Court, arguing in part that the Commission should have addressed issues concerning the distribution of settlements with third parties, pursuant to N.C. Gen. Stat. § 97-10.2 (2001). *Childress v. Fluor Daniel*, 162 N.C. App. 524, 590 S.E.2d 893 (2004) (*Childress I*). This Court held that the Commission did not have jurisdiction to address these issues until a final award was entered. *Id.* at 527, 590 S.E.2d at 897.

Following this Court's decision, defendant filed a request for distribution of settlement proceeds with the Commission and, thereafter, plaintiff filed a petition for reduction of the lien ("the petition") in the superior court in Haywood County. Following a hearing, the superior court dismissed the petition on grounds that it lacked jurisdiction in the matter. Plaintiff appeals. As discussed below, we reverse and remand to the superior court.

Plaintiff argues that the court erred in dismissing his petition due to lack of jurisdiction pursuant to N.C. Gen. Stat. § 97-10.2. We agree.

We begin by noting that "whether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *Ales v. T. A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004). In its order of 14 May 2004 dismissing plaintiff's petition, the court concluded that because plaintiff's claim was final, the superior court did

> not have jurisdiction to consider [plaintiff's] request for adjustment or elimination of [defendants'] workers' compensation claim. Rather, any questions concerning the rights and liabilities of the parties with regard to liens in third-party settlements now rest with the North Carolina Industrial Commission pursuant to the provisions of N.C. Gen. Stat. § 97-10.2(f)(1).

Plaintiff contends that this conclusion misapplies the statutory provisions of N.C. Gen. Stat. § 97-10.2 (2003) and the holding in *Childress I*. We agree.

"The purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers." *Radzisz v. Harley Davidson*, 346 N.C. 84, 89, 484 S.E.2d 566, 569

(1997). "Section 97-10.2 and its statutory predecessors were designed to secure prompt, reasonable compensation for an employee and simultaneously to permit an employer who has settled with the employee to recover such amount from a third-party tort-feasor." *Id.* However, the amount of an employer's lien on recovery from a third-party tort-feasor can be reduced or eliminated pursuant to N.C. Gen. Stat. § 97-10.2. Subsection (j) provides in pertinent part:

> Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, *either party may apply to the resident superior court judge* of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, *the judge shall determine, in his discretion, the amount, if any, of the employer's lien*, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer.

N.C. Gen. Stat. § 97-10.2(j) (2003) (emphasis supplied). "We interpret N.C. Gen. Stat. § 97-10.2(j) as permitting the superior court to adjust the amount of a subrogation lien if the agreement between the parties has been finalized so that only performance of the agreement is necessary to bind the parties." *Ales*, 163 N.C. App. at 353, 593 S.E.2d at 455.

The conclusion of the trial court in its order dismissing plaintiff's petition cites N.C. Gen. Stat. § 97-10.2(f)(1). This subsection does not govern liens, but merely requires the Commission to enter an order allowing distribution of the proceeds of a third party settlement once an award of workers' compensation benefits becomes final:

> If the employer has filed a written admission of liability for benefits under this Chapter with, or *if an award final in nature* in favor of the employee has been entered by the Industrial Commission, *then any amount* obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death *shall be disbursed by order of the Industrial Commission* . . . [sets forth order of priority]

N.C. Gen. Stat. § 97-10.2 (2003) (emphasis supplied). Thus, the superior court, in its discretion, determines whether to order any reduction in the lien (the amount the workers' compensation carrier or employer may recover from the third party settlement), pursuant to N.C. Gen. Stat. § 97-10.2(j). In a separate proceeding, pursuant to N.C. Gen. Stat. § 97-10.2(f)(1), the Commission then issues an order detailing to whom and in what amounts the funds will be distributed, including the amount of distribution to satisfy the workers' compensation lien if any, once the worker's compensation award is final. N.C. Gen. Stat. § 97-10.2 specifies that while the power to set the amount of the lien is in the superior (or federal) court pursuant to N.C. Gen. Stat. § 97-10.2(j), the Commission orders distribution under N.C. Gen. Stat. § 97-10.2(f)(1). The court erred by applying the latter provision, when it should have looked to N.C. Gen. Stat. § 97-10.2(j), which explicitly gives it jurisdiction over setting the amount of the lien.

Reversed and remanded.

Judges HUNTER and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 AUGUST 2005

BLUE RIDGE SAVINGS BANK, INC. v. BEST & BEST, P.L.L.C. No. 04-1357	Buncombe (03CVS4082)	Dismissed
BLUM v. VINCENZ No. 04-1624	Mecklenburg (00CVD2982RMM)	Appeal dismissed
CITICORP TR. BANK, FSB v. VAUGHAN No. 04-1364	Gaston (03CVS2756)	Appeal dismissed
DOSHER v. MORETZ No. 04-1519	Brunswick (00CVS1215)	Affirmed
DUFF v. LINEBERGER No. 04-335	Mecklenburg (03CVD18920)	Affirmed
FAKHOURY v. FAKHOURY No. 04-1514	Wake (02CVD15522)	Dismissed
HARRIS-OFFUT v. N.C. BD. OF LICENSED PROF'L COUNSELORS No. 04-1417	Ind. Comm. (I.C. # TA-17028)	Affirmed
HOLZWORTH v. NATIONWIDE MUT. FIRE INS. CO. No. 04-1062	Gaston (02CVS1224)	Affirmed
IN RE C.J. No. 04-1575	Robeson (03J492)	Affirmed
IN RE C.P.D. & K.C.D. & T.M.D. No. 04-966	Onslow (02J412) (02J413) (02J414)	Affirmed
IN RE D.E.L. No. 04-1430	Alamance (03J296)	Affirmed in part, reversed in part, and remanded
IN RE S.T.G. No. 04-919	Rutherford (03J27)	Affirmed
IN RE T.M.K. & T.Q.M.M. & T.M.M. No. 04-1019	Wayne (03J108) (03J109) (03J110)	Affirmed
IN RE T.S.A. & D.S.G. No. 04-1057	Union (01J227) (01J228)	Affirmed

MITCHELL v. HICKS No. 04-1405	Person (04CVS298)	Dismissed
MITCHUM v. GASKILL No. 04-977	Carteret (02CVS295)	No error
PARKER v. WACKENHUT CORP. No. 04-1354	Ind. Comm. (I.C. # 210741)	Affirmed
PARRETT v. GORE No. 04-1316	Columbus (02CVS399)	Affirmed
PEDEN GEN. CONTR'R, INC. v. BENNETT No. 04-744	Wake (98CVS14297)	Affirmed
POWERS v. POWERS No. 04-987	Iredell (01CVD2720)	Reversed and remanded
SHUPING v. VALENTINE No. 04-1322	Stanly (02CVS1017)	Dismissed
STATE v. ANDERSON No. 04-1547	Iredell (01CRS52663)	No error
STATE v. ANDREWS No. 04-1369	New Hanover (03CRS63872) (03CRS63873)	No error
STATE v. ASKEW No. 04-1011	Gates (02CRS50000)	Remanded
STATE v. BEST No. 04-1382	Wake (02CRS84534) (02CRS84535) (02CRS84536) (02CRS84537) (02CRS84538) (02CRS84539) (02CRS84540) (02CRS84541) (02CRS84542) (02CRS84543) (02CRS84544) (03CRS74932)	No error
STATE v. BROWN No. 04-737	New Hanover (02CRS25841) (02CRS25843)	No error in defendant's trial; remanded for resentencing
STATE v. BROWN No. 04-970	Iredell (99CRS14689)	Affirmed
STATE v. BURCH No. 04-1082	Cabarrus (03CRS53704) (03CRS53831)	Affirmed

STATE v. BURCH No. 04-1124	Guilford (00CRS94875)	New trial
STATE v. CAIN No. 05-76	Durham (00CRS64848)	Affirmed; remanded for correction of clerical error
STATE v. CAPLE No. 04-860	Robeson (02CRS21015)	Remanded
STATE v. CASSELMAN No. 05-33	McDowell (01CRS3332) (01CRS3333) (01CRS3334) (01CRS3427)	New trial
STATE v. CEARLEY No. 04-1172	Yadkin (03CRS1543) (03CRS1544) (03CRS1545) (03CRS1546) (03CRS1547) (03CRS1548)	No error
STATE v. COBB No. 04-508	Guilford (02CRS23421) (02CRS23422) (02CRS23423) (02CRS23424) (02CRS23425) (02CRS23426)	No error in part; remanded for resentencing
STATE v. CUMMINGS No. 04-1228	Polk (02CRS50986) (02CRS50988)	No error
STATE v. CUNNINGHAM No. 04-1052	Cabarus (96CRS1923)	No error
STATE v. CUTLER No. 05-22	Wake (03CRS74038)	No error
STATE v. EUSEBIO No. 04-1564	Wake (03CRS39456) (03CRS39457) (03CRS39458)	No error
STATE v. GALLOWAY No. 04-1487	Person (03CRS54358)	No error
STATE v. GERALD No. 04-1661	Cumberland (02CRS61060)	Vacated and remanded for correction of clerical error
STATE v. GOODMAN No. 04-1411	Gaston (99RS5480)	No error

STATE v. GREEN No. 04-1201	Cumberland (01CRS50233)	Remanded
STATE v. GREEN No. 04-1637	New Hanover (02CRS20177)	No error
STATE v. HARRINGTON No. 05-55	Union (99CRS14021)	Dismissed
STATE v. HELLER No. 04-1551	Buncombe (01CRS52648) (02CRS7051) (02CRS7052) (02CRS7053) (02CRS7054) (02CRS7055) (02CRS7056) (02CRS7057) (04CRS2120) (04CRS2122)	No error
STATE v. HILL No. 04-1126	Henderson (01CRS51032)	No error
STATE v. HOLLEY No. 04-1314	Henderson (03CRS5404) (04CRS322)	No error
STATE v. HYMAN No. 04-1058	Bertie (01CRS50423)	No error in part; remanded
STATE v. JAMES No. 04-1633	Buncombe (03CRS62374) (04CRS2740)	No error
STATE v. JIMERSON No. 04-1030	Guilford (00CRS98289) (00CRS98291)	No error
STATE v. KEMP No. 04-1664	Craven (99CRS11996) (02CRS55674) (02CRS55675)	No error
STATE v. KEY No. 04-940	Wilkes (03CRS52232)	No error
STATE v. LAMM No. 03-336	Wake (98CRS3871)	Remanded
STATE v. LATTIMORE No. 04-1246	Guilford (02CRS102682) (02CRS102683)	No error
STATE v. LENSIE No. 04-1094	Lenoir (02CRS54786)	No error

STATE v. LITTLE No. 04-1559	Beaufort (03CRS51655) (03CRS3552)	No error
STATE v. McDUFFIE No. 04-1191	Harnett (00CRS10262)	Affirmed
STATE v. PRITCHARD No. 04-453	Beaufort (02CRS1664) (02CRS50925)	Remanded
STATE v. RHODES No. 04-193	Halifax (02CRS56543)	No error in trial; remanded for resentencing
STATE v. RICE No. 04-657	Alamance (03CRS56603) (03CRS56604)	Remanded for resentencing
STATE v. RUTLEDGE No. 04-328	Forsyth (03CRS3816 (03CRS54669)	No error; motion for appropriate relief denied
STATE v. SELDON No. 04-1404	Brunswick (02CRS3043) (03CRS1785)	No error
STATE v. SKIPPER No. 04-1530	Forsyth (03CRS6139)	No error
STATE v. SMITH No. 04-1247	Mecklenburg (02CRS248312)	No error in part, remanded for re-sentencing in part
STATE v. STEELE No. 04-1295	Iredell (03CRS50852) (03CRS50853)	No error
STATE v. STONE No. 04-525	Forsyth (03CRS55230)	No error
STATE v. WHITAKER No. 04-1612	Rowan (02CRS52985)	Affirmed
STATE v. WILDER No. 04-589	Durham (95CRS634)	Affirmed in part; remanded for resentencing
STATE v. WILLIAMS No. 04-1677	Mecklenburg (03CRS230846) (03CRS230847)	No error
STRAIGHT EDGE CONSTR., INC. v. D.W. WARD CONSTR. CO. No. 04-1073	Wake (02CVS8878)	Reversed and remanded

WAITE v. HELIG MEYERS No. 04-1296	Ind. Comm. (I.C. # 955034)	Affirmed in part, reversed and remanded in part
WALLACE v. TLP INT'L, INC. No. 04-1326	Durham (02CVS5202)	Affirmed
WEST SIDE LTD. P'SHIP v. W.B.Y. VENTURES, L.L.C. No. 04-1458	Orange (04CVD1185)	Affirmed
WILLIS v. ALLSTATE INS. CO. No. 04-877	Guilford (02CVS9786)	Affirmed
WILSON v. VENTRIGLIA No. 04-885	New Hanover (01CVD4500)	Reversed in part, affirmed in part
YALLUM v. HAMMERLE No. 04-1622	Gaston (03CVS1955)	Appeal dismissed

DUSTY RENFRO, EMPLOYEE, PLAINTIFF v. RICHARDSON SPORTS LTD. PARTNERS D/B/A CAROLINA PANTHERS, EMPLOYER AND LEGION INSURANCE COMPANY (CAMERON M. HARRIS & COMPANY, SERVICING AGENT), CARRIER, DEFENDANTS

No. COA04-1407

(Filed 2 August 2005)

1. Workers' Compensation— professional football player—wrist injury during practice—unusual move—compensable

A professional football player suffered a compensable injury by accident to his wrist during a practice, his normal work duty, when he was forced by another player into an unusual and awkward position and used a technique not used in his normal work routine.

2. Workers' Compensation— professional athlete—weekly compensation—use of future earnings—sufficiency of evidence

There were exceptional reasons for using an injured professional football player's future earnings under his contract rather then his prior earnings to determine his average weekly wage for workers' compensation.

3. Workers' Compensation— professional football player—ability to make the team without injury—greater weight of the evidence

The Industrial Commission's finding in a workers' compensation case that the greater weight of the evidence was that a professional football player injured in training camp would have made the team but for his wrist injury was supported by the testimony of plaintiff and a team position coach.

4. Workers' Compensation— disability—professional athlete—diminished earnings

Under the Workers' Compensation Act, disability is not defined as an injury or infirmity, but as a diminished capacity to earn wages. The Industrial Commission did not err by finding that a professional football player was partially disabled after a wrist injury where plaintiff demonstrated his diminished wage earning capacity by presenting evidence that he obtained other employment (as a realtor) at less than he earned before his injury.

5. Workers' Compensation— professional football player— inability to earn same income—sufficiency of the evidence

Competent evidence supported an Industrial Commission finding, which supported a conclusion, that a professional football player was unable to obtain employment for a time after he hurt his wrist, and then worked only as a real estate broker on a commission basis.

6. Workers' Compensation— professional football player— fractured wrist—sufficiency of evidence

There was competent evidence in a workers' compensation case supporting the Industrial Commission's determination that a professional football player had suffered a fractured wrist.

7. Workers' Compensation— hearsay evidence—coaches and employees of professional football team—agency exception

The Industrial Commission correctly heard testimony about statements made by a professional football team's director of pro scouting and two position coaches in a workers' compensation case, even though defendant contended that those statements were hearsay. There is a hearsay exception in N.C.G.S. § 8C-1, Rule 801(d) for statements made by agents or a person authorized to make a statement on the subject.

8. Workers' Compensation— professional football player— post-injury grievance settlement—credit

The Industrial Commission did not err in a workers' compensation case involving an injured professional football player by determining that defendant was entitled to a dollar-for-dollar credit for a post-injury grievance settlement. N.C.G.S. § 97-42 allows an employer to include language in a wage-replacement plan that allows a dollar-for-dollar credit.

Appeal by plaintiff and defendants from an Opinion and Award entered 2 July 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 June 2005.

R. James Lore for plaintiff-appellant.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Hatcher B. Kincheloe and Shannon P. Herndon, for defendant-appellants.

HUNTER, Judge.

Dusty Renfro ("plaintiff") and Richardson Sports Limited Partners ("defendant") present cross-appeals from the Opinion and Award of the North Carolina Industrial Commission awarding plaintiff workers' compensation benefits. Defendant presents the following issues for our consideration: Whether the Commission erroneously (I) found that plaintiff sustained a compensable injury by accident arising out of and in the course and scope of his employment on 7 August 2001; (II) determined plaintiff's average weekly wage; (III) awarded plaintiff 300 weeks of benefits pursuant to N.C. Gen. Stat. § 97-30; and (IV) allowed hearsay testimony into evidence. In the cross-appeal, plaintiff contends the Commission erroneously determined defendant was entitled to a dollar-for-dollar credit. After careful review, we affirm the Commission's Opinion and Award.

The evidence tends to show that plaintiff suffered a wrist injury during a 7 August 2001 pre-season practice with the Carolina Panthers. Prior to this injury, plaintiff played football at the University of Texas as a middle linebacker and backup deep snapper from 1995-1998. After graduating in 1999, plaintiff signed as a free agent with the Buffalo Bills, attended the Buffalo Bills training camp, and played in three pre-season football games. After the third pre-season game, plaintiff was released from the Buffalo Bills and did not become a member of that team's 1999 active roster. Plaintiff did not play professional football for any NFL team during the 1999 season. The following spring, plaintiff was drafted by the Rhine Fire, an NFL Europe team located in Dusseldorf, Germany. Plaintiff played as a middle linebacker and deep snapper for the Rhine Fire from March through July 2000. During the 2000 NFL season, plaintiff did not play for any NFL teams. However, plaintiff did sign a contract with the Las Vegas Outlaws, an XFL team, but did not make the Outlaws' active roster for the 2000 season. The next winter, plaintiff signed a one-year contract with the Carolina Panthers in late January or early February 2001. The Carolina Panthers sent plaintiff to Glascoe, Scotland to play for the Scottish Claymores, an NFL Europe football team. After playing in NFL Europe from March to July 2001, plaintiff reported to the Carolina Panthers's training camp in late July 2001.

During the Carolina Panthers's training camp, plaintiff practiced with the linebackers. Before and after practice, plaintiff would demonstrate and practice his deep snapping technique with the other long snappers and special teams coaches. During practice on 7 August 2001, plaintiff injured his left wrist while blocking an offen-

sive lineman. Plaintiff indicated that after initiating his blocking technique in the normal fashion, his left wrist was forced into an awkward position. Whereas players typically utilize an upward motion to block the other player, plaintiff's left hand and wrist was forced into a downward motion. Plaintiff immediately felt pain in his left wrist and sought treatment with the trainers.

Dr. Patrick Connor ("Dr. Connor"), the Panthers's team physician, initially believed plaintiff's wrist was possibly broken after reviewing plaintiff's x-ray. After reviewing an MRI, Dr. Connor opined plaintiff's wrist was sprained, and not fractured. A spica cast was placed on plaintiff's left hand and wrist. Plaintiff continued to practice and participated in the four pre-season games. Plaintiff's wrist continued to hurt and on 28 August 2001, plaintiff obtained a second opinion with Dr. Steven Sanford ("Dr. Sanford") in Charlotte, North Carolina. Dr. Sanford opined plaintiff's left wrist was fractured. A few days later on 2 September 2001, the Carolina Panthers notified plaintiff that he was being released. Plaintiff informed the Panthers that he had sought a second opinion and that Dr. Sanford indicated his wrist was broken. The Panthers then conducted further tests and the team doctors opined plaintiff's wrist was sprained and not broken.

Plaintiff returned to Texas, where he resided with his wife, and sought treatment with Dr. Bobby Wroten ("Dr. Wroten") on 26 September 2001. Plaintiff filed an injury grievance against the Panthers within a month after his release from the team. The injury grievance process is characterized as binding arbitration. Dr. Bruce Prager ("Dr. Prager"), an orthopedic surgeon, was designated as a neutral physician by the NFL Players' Association and his opinion would be utilized in the injury grievance process. Plaintiff was assessed by Dr. Prager on 26 September 2001 and he opined that plaintiff's wrist was broken. In November 2002, plaintiff, defendant, and Legion Insurance Company (collectively "defendants") settled the injury grievance for $35,294.00.

On 10 August 2001, the Panthers filed a Form 19, Employer's Report of Injury to Employee, with the Commission. A few months later, on 30 October 2001, plaintiff filed a Form 18, Notice of Accident to Employer and Claim of Employee. The Panthers denied plaintiff's workers' compensation claim on 16 November 2001 by filing a Form 61, Denial of Workers' Compensation Claim. Plaintiff requested the claim be assigned for a hearing, defendants filed a response, and Deputy Commissioner Bradley W. Houser filed an Opinion and Award denying plaintiff's claim on 3 October 2002. Plaintiff appealed to the

Full Commission and in a 2 July 2004 Opinion and Award, the Commission awarded plaintiff partial disability compensation at the maximum rate of $620.00 per week for a period of 300 weeks beginning from the date of his injury by accident. Defendants were awarded a dollar-for-dollar credit for the injury grievance settlement amount of $35,294.00 to be deducted from the end of the 300-week period. Defendants were also required to pay attorney's fees, medical and related costs, and the court costs. Plaintiff and defendants appeal.

I. Defendants' Appeal

[1] Defendants first contend the Commission erroneously found that plaintiff sustained a compensable injury by accident arising out of and in the course and scope of his employment on 7 August 2001. Specifically, the Panthers argue that plaintiff is not entitled to workers' compensation benefits because plaintiff was engaged in his normal work routine when he was injured.

N.C. Gen. Stat. § 97-2(6) (2003) of the Workers' Compensation Act limits recovery to "injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. . . ." *Id.* As explained in *Searsey v. Construction Co.*, 35 N.C. App. 78, 79-80, 239 S.E.2d 847, 849 (1978):

> An "accident" is an unlooked for and untoward event not expected or designed by the employee. An "accident" is not established by the mere fact of injury but is to be considered as a separate event preceding and causing the injury. No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by accident.

Id. (citations omitted). "[U]nusualness and unexpectedness are its essence." *Smith v. Creamery Co.*, 217 N.C. 468, 472, 8 S.E.2d 231, 233 (1940). "To justify an award of compensation, the injury must involve more than the carrying on of usual and customary duties in the usual way." *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 116, 292 S.E.2d 763, 766 (1982).

"The issue of whether a particular accident arises out of and in the course of employment is a mixed question of fact and law[.]" *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982). As recently explained by our Supreme Court,

when reviewing Industrial Commission decisions, appellate courts must examine "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). The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, "even though there [is] evidence that would support findings to the contrary." *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965). However, evidence tending to support a plaintiff's claim is to be viewed in the light most favorable to the plaintiff, and "plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998); *see also Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968) (holding that "our Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees . . . , and its benefits should not be denied by a technical, narrow, and strict construction"). The Commission's conclusions of law are reviewed *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).

McRae v. Toastmaster, Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 700-01 (2004) (emphasis added).

The Commission rendered the following pertinent findings of fact:

9. At practice on August 7, 2001, plaintiff was playing defense at a linebacker position. During a particular play, plaintiff became engaged by a block from an offensive lineman.

10. At the point when the offensive player engaged plaintiff with the block, the impact caused plaintiff's left hand and wrist to be moved down and around, forcing it into what plaintiff described as an awkward position.

11. It was unexpected and unusual for the offensive player to block plaintiff with an impact that caused his left hand and wrist into an awkward position. At the time of injury, plaintiff was engaged in an activity within the scope of his employment contract and was taking reasonable measures to protect himself from injury, given the nature of the game. Plaintiff was required

to do what he was doing at the time of injury and had no choice but to perform his job as best he could, notwithstanding the risk of injury.

Our review of the record indicates these findings were supported by some competent evidence. First, the parties do not dispute that plaintiff injured his wrist during practice on 7 August 2001 while plaintiff was engaged in a block with an offensive lineman. Second, plaintiff testified as follows regarding his injury:

A. I was playing line backer, and a blocker came out, an offensive lineman, and I went to shed the block, to get around the blocker, and my hand was forced down to the left very vigorously, and it couldn't hold up to the strain that was put on it in that position, whenever a three hundred fifteen pound offensive lineman comes out on you.

. . .

Q. Had your hand ever been put in that position before to your knowledge?

A. No.

He further explained during cross that although he initiated the block using the normal technique, this time his hand was forced into an awkward position, and that "[u]sually whenever you're in an awkward position, you get injured." Plaintiff explained that "[t]here's a technique that you try to use each time." Plaintiff demonstrated the technique with his hands and showed the Commission that the wrist should be in an upward position when utilizing proper blocking technique. This testimony supports the findings of fact and the findings of fact support the following pertinent conclusion of law:

1. Plaintiff sustained a compensable injury by accident arising out of and in the course of his employment with defendants on August 7, 2001. N.C. Gen. Stat. § 97-2(6). Although an injury sustained while playing football may not be an unusual occurrence, such injury is not a probable, intended consequence of the employment and constituted an unlooked for and untoward event that was not expected or designed by plaintiff. *See*, *Searsey v. Construction Co.*, 35 N.C. App. 78, 239 S.E.2d 847 (1978); *Pro-Football, Inc., T/A Washington Redskins and Gulf Insurance Company v. Jeffrey A. Uhlenhake*, 37 Va. App. 407, 558 S.E.2d 571 (2002), *aff'd*, 265 Va. 1, 574 S.E.2d 288 (2003).

(Emphasis omitted.) Indeed, plaintiff's testimony indicates that although he was engaging in his normal work duty of blocking an offensive lineman, he was injured because he was forced by another player into utilizing an unusual and awkward blocking or work technique that was not normally used in plaintiff's normal work routine. Therefore, plaintiff suffered a compensable injury by accident. *See Searsey*, 35 N.C. App. at 79-80, 239 S.E.2d at 849 (indicating that the injury must have been caused by an event that was not part of a claimant's normal working conditions or routine).

[2] Next, defendants contend the Commission erroneously determined plaintiff's average weekly wage by not basing its determination upon the money plaintiff earned as a professional football player prior to his injury.

> Under N.C. Gen. Stat. § 97-2(5):
>
> "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.

Id.; *see also Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 254-55, 540 S.E.2d 768, 770 (2000). " '[T]he intent of [G.S. § 97-2(5)] is to make certain that the results reached are fair and

just to both parties. . . . "Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls the decision." ' " *Larramore*, 141 N.C. App. at 255, 540 S.E.2d at 771 (citations omitted).

We reiterate that

> when reviewing Industrial Commission decisions, appellate courts must examine "whether *any* competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, "even though there [is] evidence that would support findings to the contrary." However, evidence tending to support a plaintiff's claim is to be viewed in the light most favorable to the plaintiff, and "plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." The Commission's conclusions of law are reviewed *de novo*.

McRae v. Toastmaster, Inc., 358 N.C. at 496, 597 S.E.2d at 700-01 (citations omitted) (emphasis added).

In this case, the Commission determined exceptional reasons existed to justify the use of a different method of computing the average weekly wage in order to obtain an average weekly wage fair and just to both parties. In its findings of fact and conclusions of law, the Commission stated in pertinent part:

> 5. Pursuant to plaintiff's contract with defendants, had he made the team, he would have been entitled to an annual salary of $193,000.00 whether on the active or inactive rosters and would have been entitled to $111,000.00 if he were placed on the injured reserve list.
>
> 6. Plaintiff was paid his salary in weekly installments, and had an average weekly wage of $2,134.61 per week which would entitle him to the maximum compensation rate for 2001 of $620.00.
>
> 7. Following the signing of his contract, defendants requested that plaintiff be allocated from March 2001 through July 2001 to the Scottish Claymores Football team in Europe. Plaintiff reported to that team, played and had a productive season, earn-

> ing approximately $1,100.00 per week, for a season of approximately ten weeks.
>
> . . .
>
> 24. The nature of the NFL players' contract creates exceptional reasons as to why it is not unfair to either plaintiff or defendants to use the future earnings covered by his contract as a basis for calculating plaintiff's average weekly wage. . . .

In its conclusions of law, the Commission stated:

> 4. Exceptional reasons exist for using the method used herein for calculating plaintiff's average weekly wage that most accurately approximates the amount which plaintiff would be earning were it not for the injury he sustained. N.C. Gen. Stat. § 97-2(5). Plaintiff's average weekly wage should be determined from the amount he would have earned if he had continued to play football for defendants. This is the approach previously applied by the Commission for professional football players, which was affirmed on appeal. *Larramore v. Richardson Sports Ltd. Partners*, *supra.*

Defendants argue the Commission erroneously used the earnings plaintiff would have received under his contract with the Panthers to determine his average weekly wage because exceptional reasons did not exist in this case which would justify the use of plaintiff's future earnings. Defendants argue that unlike the circumstances in *Larramore* where the claimant did not have any prior earnings as a professional football player during the fifty-two weeks prior to the claimant's injury, in this case plaintiff played in NFL Europe and earned $1,100.00 per week during the relevant fifty-two week time period. Defendants also reference the $4,929.00 plaintiff earned during the six weeks plaintiff participated in practices and training camp.

Contrary to defendants' assertions regarding the *Larramore* opinion, this Court in *Larramore* indicated the Commission properly utilized a different method for calculating the claimant's average weekly wage because "given the circumstances and short duration of [the] plaintiff's employment, it was appropriate 'to resort to such other method of computing average weekly wages as [would] most nearly approximate the amount which the injured employee would be earning were it not for the injury.' " *Larramore*, 141 N.C. App. at 255, 540 S.E.2d at 770-71. Similar to plaintiff, the claimant in *Larramore*

participated in pre-season mini-camps and training camps and was paid a per diem amount for expenses and work performed. *Larramore*, 141 N.C. App. at 252-53, 540 S.E.2d at 769. The claimant was injured during one of the mini-camps and was released from the team during training camp. *Id.* Also, the claimant in *Larramore* had played professionally with the Buffalo Bills, but injured his ankle and was placed on the inactive roster. *Id.* at 257, 540 S.E.2d at 772. It is unclear from the facts in *Larramore* as to whether the claimant was on the inactive roster with the Buffalo Bills during the relevant fifty-two week time period. Nonetheless, similar to plaintiff, the claimant in *Larramore* had some earnings as a professional football player during the fifty-two week time period prior to his injury. In rejecting the use of the claimant's earnings during the fifty-two week time period prior to his injury to determine the average weekly wage, the Commission in *Larramore* determined that it would be fair and just to both parties to use the earnings Larramore would have earned under the contract to determine the average weekly wage.

In the present case, plaintiff earned $1,100.00 each week for ten weeks while playing in NFL Europe in the spring and early summer of 2001. Plaintiff also earned $4,929.00 during the six weeks he was in the Panthers's training camp. These amounts equal $15,929.00 for sixteen weeks of work during the fifty-two weeks prior to his injury. In contrast, plaintiff would have been entitled to an annual salary of $193,000.00 if he had made the Panthers's team and would have been entitled to $111,000.00 if he were placed on the Panthers's injured reserve list. Given the fact that plaintiff only worked sixteen weeks out of the fifty-two weeks prior to his injury and only earned approximately $16,000.00, the Commission's finding that exceptional reasons existed for using plaintiff's future earnings under the contract to determine the average weekly wage is supported by some competent evidence.

[3] Defendants also argue that it was not certain that plaintiff would have made the Panthers football team and therefore the Commission should not have used the potential earnings under the contract to determine the average weekly wage. In support of this argument, defendants reference the facts that plaintiff had never made the roster of any NFL team, that he had been cut during the training camp of the Buffalo Bills, the Carolina Panthers, and an XFL football team, and that all of his earnings as a professional football player were made while playing on two NFL Europe teams or in training camps.

As stated in *Larramore*:

> We acknowledge as true defendants' argument that the record does not contain direct evidence establishing to a certainty that, but for plaintiff's injury, he would have made the Panthers' active roster. However, just as the Commission is entitled to use circumstantial evidence in determining the existence of a causal link between an injury and a worker's employment, we believe the Commission is entitled to the use of circumstantial evidence here.

Id. at 256, 540 S.E.2d at 771. In this case, the Commission made the following pertinent findings of fact:

> 16. Subsequent to the date of his injury, while participating in practices or games for defendants, plaintiff wore a splint or thumb spica case to immobilize his left hand and wrist. Evidence was presented that other linebackers in the NFL have played while wearing splints or thumb spica casts for the hands and wrists, and as a linebacker, plaintiff continued to be able to perform all of the activities associated with that position. While his hand was in a cast it was difficult to shed blockers or tackle and when his hand was knocked around during play, it resulted in a great deal of pain. Plaintiff's injury prevented him from being able to practice or otherwise display his abilities as a deep snapper.
>
> 17. On September 2, 2001, plaintiff was released by defendants for the stated reason that his skills or performance had been unsatisfactory as compared with other players competing for his positions on the team's roster. Plaintiff contends that his being released by defendants was directly related to his wrist injury. The greater weight of the evidence tends to show that plaintiff would have made the team but for his wrist injury and related inability to display his abilities as a deep snapper.

The record indicates that plaintiff had been informed that the Panthers's deep snapper position was vacant and that the backup linebacker position was available. Plaintiff testified that he believed he was performing better than the other deep snappers during training camp prior to his injury. He also testified that Sam Mills ("Mills"), a position coach, informed him that he was progressing well and to " '[k]eep up the good work.' " Mills also told plaintiff it was good that he was watching film because that was the kind of thing that helped a player make the team. This testimony provided a basis upon which

the Commission could determine whether or not plaintiff would have been placed on the Panthers' roster.[1]

> While this Court may disagree with the inference which the Commission drew, the determination of whether, but for his injury, plaintiff would have continued in his employment with the Panthers is a question of fact most appropriately resolved by the Commission. . . . [W]e decline to substitute our judgment for that of the Commission[.]

Id. at 257, 540 S.E.2d at 772.

Next, defendants contend the Commission erroneously awarded 300 weeks of temporary partial disability benefits pursuant to N.C. Gen. Stat. § 97-30. Specifically, defendants argue plaintiff did not suffer a fractured wrist on 7 August 2001, that he did not have a permanent disability as he did not return to a doctor after November 2001, and that there is no reason why plaintiff could not look for other employment with other NFL teams.

N.C. Gen. Stat. § 97-30 (2003) states in pertinent part:

> **Partial incapacity.**
>
> Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury. . . .

Id.

" ' "In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent." ' 'Under the Workers' Compensation Act, disability is defined by a diminished capacity to earn wages, not by physical infirmity.' " *Knight v. Wal-Mart Stores*,

1. Defendants also argue that any testimony from the Panthers's coaches and scouts regarding plaintiff's performance, likelihood of making the Panthers's team, and any vacant positions on the team was hearsay. See *infra* for a discussion of this issue.

Inc., 149 N.C. App. 1, 7, 562 S.E.2d 434, 439 (2002) (citations omitted); *see also Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (stating "disability as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement").

> The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment, (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment, or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457 (citations omitted).

> In order to support a conclusion of disability, the Commission must find:
>
> "(1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury."

White v. Weyerhaeuser Co., 167 N.C. App. 658, 670, 606 S.E.2d 389, 398 (2005) (citation omitted).

[4] Defendants first contend plaintiff was not partially disabled because he did not seek further medical treatment after 29 November 2001. Specifically, defendants argue plaintiff neither sustained a fractured wrist nor a career-ending injury. However, as previously stated, under the Workers' Compensation Act, disability is not defined as an injury or physical infirmity, rather it is a diminished capacity to earn wages. *See Knight*, 149 N.C. App. at 7, 562 S.E.2d at 439. In this case, plaintiff has demonstrated his diminished wage earning capacity by presenting evidence that he has obtained other employment at a wage

less than that earned prior to his injury. Indeed, the record indicates that plaintiff obtained employment on a commission basis as a real estate broker in January 2002. At the time of the hearing before the Commission, plaintiff had earned approximately $2,300.00, an amount substantially less than his pre-injury wages.

[5] Defendants also argue that plaintiff's failure to return to a doctor after 29 November 2001 implies that his wrist had completely healed. Therefore, defendants argue, plaintiff could have sought employment with other NFL teams. First, defendants' argument that plaintiff had completely healed by November 2001 is not supported by the record. During the 29 November 2001 visit with Dr. Wroten, plaintiff was told that his wrist pain should subside within the next two months and, if the pain did not subside, to return to Dr. Wroten for another x-ray. Plaintiff testified that his wrist began feeling better during January and February of 2002. Around that time, plaintiff testified he began exercising, training, and lifting weights again. At the time of the hearing before the Commission in May 2002, plaintiff weighed 220 pounds and could not lift the same amount of weight post-injury as he could pre-injury. In other words, he was not as strong as he was prior to his injury and not many NFL teams would be willing to give him a tryout for a middle linebacker or deep snapper position in his post-injury condition. Prior to the injury, at the time plaintiff signed the contract with the Panthers, plaintiff weighed 247 pounds. Notwithstanding plaintiff's weight and strength loss, plaintiff's agent had sent plaintiff's bio and current weight information to all of the NFL teams, but had not received any inquiries or tryout requests regarding plaintiff.

Based upon this evidence, the Commission made the following pertinent findings of fact and conclusion of law:

> 32. Following his return to Texas, plaintiff looked for work but was unable to obtain other employment until approximately January 2002. At that time, plaintiff became employed on a commission basis as a real estate broker, which yielded one sale for which he had not been paid of approximately $100.00, and a second sale, which resulted in two payments of $1,100.00.
>
> . . .
>
> 34. As the result of the compensable injury by accident, plaintiff was partially disabled from employment and was earning reduced wages when he returned to employment in January

2002. His diminished ability to earn wages is due to his disability resulting from the compensable injury by accident.

CONCLUSIONS OF LAW

. . .

2. As the result of the compensable injury, plaintiff was partially disabled and is entitled to partial disability compensation for 300 weeks dating from August 7, 2000, the date of his initial injury by accident, at the rate of $620.00 per week, the maximum rate in effect during the year 2001. N.C. Gen. Stat. § 97-30.

Competent evidence supports these findings of fact, which in turn supports the conclusion of law that plaintiff was partially disabled.

Nonetheless, defendants contend the Commission erroneously determined plaintiff was entitled to 300 weeks of partial disability payments. "[O]nce an employee initially establishes a loss of wage-earning capacity, a presumption of 'ongoing' or 'continuing' disability arises, and the burden shifts to the employer to show that the employee is capable of earning wages." *Knight*, 149 N.C. App. at 11, 562 S.E.2d at 441. As previously stated, the evidence before the Commission demonstrated plaintiff had obtained employment at a wage less than that earned prior to his injury. Defendants have not demonstrated that plaintiff is capable of earning the same pre-injury wages post-injury. Defendants only argue that he has not tried out for any NFL teams. However, as previously stated, plaintiff was not in professional football player condition due to his injury. Due to his wrist injury, plaintiff could not train and his physicians advised against it. When plaintiff was capable of training, his agent contacted all of the NFL teams, but none of the teams were interested in plaintiff's services due to his weight and strength at that time. Therefore, defendants have not shown plaintiff is capable of earning his pre-injury wages post-injury. If defendants can make this showing in the future, they are entitled to file a motion with the Commission pursuant to N.C. Gen. Stat. § 97-47 for a modification of plaintiff's award.

[6] Although it is unnecessary for this Court to address defendants' challenge to the Commission's findings of fact that plaintiff suffered a fractured left wrist in order to resolve the issues presented on appeal, we choose to address defendants' arguments. Defendants contend that plaintiff neither suffered a fractured wrist nor a career ending injury on 7 August 2001.

In Finding of Fact 31, the Commission stated: "The greater weight of the medical evidence of record supports a finding that plaintiff sustained a fracture to his left wrist as the result of the incident occurring on August 7, 2001." This finding of fact is supported by the testimony of Dr. Prager, a specialist in orthopedic surgery and a member of the NFL's panel of neutral physicians, and Dr. Wroten. Dr. Prager opined that plaintiff "sustained a fracture to the left scaphoid" and stated "[t]he scaphoid bone is notorious for taking a long time to heal . . . ." According to Dr. Wroten's medical records, he initially assessed plaintiff on 26 September 2001 and, based upon an x-ray, believed plaintiff had a fractured scaphoid bone. After reviewing a CT scan, he opined that plaintiff had a healed scaphoid bone.

Defendants reference the medical opinions of Dr. Brian A. Howard and Dr. James Coumas, which indicate plaintiff did not sustain a fracture, for support of their argument that plaintiff neither sustained a fractured wrist or a partial disability. As previously stated by this Court: "We stress that ' "the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." ' 'Thus, the Commission may assign more weight and credibility to certain testimony than other.' " *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 61, 546 S.E.2d 133, 138 (2001) (citations omitted). Therefore, the Commission's determination that plaintiff suffered a fractured wrist is supported by competent evidence.

[7] Finally, defendants contend the Commission erroneously allowed plaintiff and Rob Nelson ("Nelson"), plaintiff's agent, to testify regarding statements made by Mark Koncz ("Koncz"), the Panthers's Director of Pro Scouting, Mills, a Panthers's position coach, and Darren Simmons ("Simmons"), the Panthers's assistant special teams coach. Defendants contend those statements were hearsay and not admissible under the doctrine of apparent authority.

Under N.C. Gen. Stat. § 8C-1, Rule 801(d) (2003):

> A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or *(C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship* or

> (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy.

Id. (emphasis added).

> [T]he extra-judicial statement or declaration of [an] alleged agent may not be given in evidence, unless (1) the fact of agency appears from other evidence, and also unless it be made to appear by other evidence that the making of such statement or declaration was (2) within the authority of the agent, or (3) as to persons dealing with the agent, within the apparent authority of the agent.
>
> When these preliminary factors have been proved by evidence *aliunde*, then evidence of extra-judicial statements of the agent, when otherwise relevant and competent, may be introduced as corroborative of other evidence, or as substantive evidence bearing on the main issue in suit as a part of the *res gestae*.

Commercial Solvents v. Johnson, 235 N.C. 237, 241, 69 S.E.2d 716, 719 (1952) (citations omitted).

Plaintiff testified that he had a conversation with Koncz on the day of his tryout. Koncz indicated that because the Panthers's deep snapper had retired, the deep snapper position was open and that someone coming into training camp would get that position. Koncz also informed him that the backup middle linebacker role was open. Plaintiff also testified that during training camp, Mills, the position coach, came into a room and had a brief discussion with him about his progress and told him to " '[k]eep up the good work.' " Mills also told him that it was good that he was watching extra film, that was the kind of thing that helps a person make the team, and that his performance was good thus far.

Nelson testified that Koncz and Simmons informed him that plaintiff was a good linebacker and that they believed he could fill a role with the team as a long snapper. They also informed him that the Panthers's long snapper was retiring and that they needed somebody that could play both roles, backup linebacker and long snapper. Nelson testified that Koncz convinced him that the Panthers was a good situation for plaintiff. Simmons told Nelson that plaintiff's chances were good at making the roster as a long snapper and for contributing on special teams. Based upon those conversations, arrangements were made for plaintiff to tryout with the Panthers.

Defendants contend plaintiff did not establish the preliminary factors for the admission of a statement made by an alleged agent of a party, and therefore, plaintiff's and Nelson's testimony regarding statements made by Mills, Koncz, and Simmons was inadmissible.

First, Marty Hurney ("Hurney"), the Panthers' General Manager, testified that Koncz was the Panthers's Director of Pro Scouting, and that Koncz made the initial contact with plaintiff regarding a tryout. Hurney also testified that he was not there during the tryout and that he was not even sure a tryout occurred. He also testified that although he signed plaintiff's termination notice, he did not have any contact with plaintiff regarding his termination; rather, Koncz was the person that informed plaintiff he was terminated. As to who makes the determinations regarding which players makes the Panthers's final roster, Hurney testified as follows: "The head coach basically has the final say, but it—the decision is reached by obviously a lot of communication between the personnel department, myself, the head coach and the assistant coaches."

Nelson, the president of Pro-Line Management, was plaintiff's agent. Nelson testified that he has managed approximately seventy players over the past ten years and had negotiated over fifty NFL contracts. Nelson testified that "[w]e deal with personnel guys and coaches on a regular basis to determine whether or not we think a particular team is a good fit for our client." He also testified

> it's virtually crucial for us to rely on the representations made by a team when it comes to whether or not we send a client there, because obviously, that's the only representation we can rely on, are the ones that we hear from anybody on—that we believe is—you know, works for the Panthers in a role that we think is going to tell us whether or not our client has a chance to make it.
>
> And that in my opinion, obviously, always includes the people that I've mentioned, the assistant coaches, the personnel people. Those are the people that have the authority, and they can tell us. And we—we rely on that very regularly, whether or not they think our client can make a roster, or has a good opportunity to make a roster.

Nelson further testified that scouts, personnel guys, and coaches are the authorized agents of a team "that have the authority to tell [a player's agent] whether or not [the player] has a legitimate opportunity to make their team." As director of pro scouting, Nelson testified that he "would rely on anything Mark Koncz told me about [plaintiff]

or any other client of mine when it came to deciding whether or not I would send him to the Carolina Panthers."

Based upon the Panthers's general manager's testimony that the final roster would be determined by the head coach with input from all of the assistant coaches, the personnel department (which includes scouts), and the general manager, and Nelson's testimony that it was industry practice to rely upon the representations made by scouts and coaches regarding a player's chances of making a team, the testimony regarding what the coaches and scouts stated regarding the team's needs and plaintiff's performance was admissible. Indeed, these individuals had authority to discuss the team's needs and a player's performance as their opinion would be considered in determining the team's final roster. Moreover, Koncz, the director of pro scouting, handled all of the communication between plaintiff and the Panthers regarding vacancies on the team roster, a tryout, and termination. Mills, as the position coach, also had the authority to tell a player that it was good he was watching film and to give an assessment about how a player was progressing in practice. Accordingly, plaintiff's and Nelson's testimony regarding the statements made by Koncz, Simmons, and Mills regarding plaintiff's performance and the open deep snapper position was admissible.

II. Plaintiff's Appeal

[8] Plaintiff presents the following issue for our consideration: Whether the Commission erroneously determined defendant was entitled to a dollar-for-dollar credit for a post-injury $35,294.00 injury grievance settlement. The application of N.C. Gen. Stat. § 97-42 in the context of a highly paid professional athlete presents an issue of first impression. Upon the injury to plaintiff that occurred during the performance of his contractual duties, he was entitled to medical care and his yearly salary during the 2001 NFL football season pursuant to his contract with the Panthers. Workers' compensation cases involving highly paid professional athletes present rare and unique issues for this Court. Unlike the typical workers' compensation cases, cases such as this usually involve complex collective bargaining agreements and individualized player contracts. Often the injured professional athlete receives compensation post-injury for which the team-employer seeks a credit under N.C. Gen. Stat. § 97-42. The credit issues arising in this context are complicated, and unlike some other states with professional teams, North Carolina does not have a statute specifically addressing highly paid professional athletes and workers' compensation.

In this case, plaintiff (I) contends the Commission's award of a dollar-for-dollar credit is not supported by the applicable statutory and case law, and (II) argues defendants were not entitled to a credit because plaintiff contributed to the fund from which the injury grievance settlement was paid. The NFL Standard Player Contract states:

> 9. INJURY. Unless this contract specifically provides otherwise, if Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and will continue to receive his yearly salary for so long, during the season of injury only and for no subsequent period covered by this contract, as Player is physically unable to perform the services required of him by this contract because of such injury. If Player's injury in the performance of his services under this contract results in his death, the unpaid balance of his yearly salary for the season of injury will be paid to his stated beneficiary, or in the absence of a stated beneficiary, to his estate.
>
> 10. WORKERS' COMPENSATION. Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workers' compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workers' compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workers compensation.

The Commission rendered the following pertinent findings of fact and conclusions of law regarding paragraph 10 of the player contract:

> 30. . . . In the case at bar, paragraph 10 of the plan (player's contract) does provide for a method other than the statutory method and states that the credit shall be the amount of the payment made under the contract. Therefore, because the plan provides for a credit based upon the payment itself, pursuant to N.C. Gen. Stat. § 97-42 the credit is not based upon the number of weeks for which plaintiff was paid, but rather defendants are entitled to a credit for the $35,294.00 settlement paid to plaintiff on a dollar-for-dollar basis.

CONCLUSIONS OF LAW

. . .

3. Defendants are entitled to a dollar-for-dollar credit for the settlement amount of $35,294.00 paid to plaintiff under the player's contract which shall be deducted from the end of the 300-week period under N.C. Gen. Stat. §§ 97-30 and 97-42. *Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 540 S.E.2d 768 (2000), *aff'd per curiam*, 353 N.C. 520, 546 S.E.2d 87 (2001).

The Commission relied upon *Larramore*, 141 N.C. App. 250, 540 S.E.2d 768, in awarding defendants a credit in this case. In *Larramore*, however, this Court did not address the issue of whether an employer was entitled to a dollar-for-dollar credit for the amounts paid to an employee after his injury. Moreover, this Court does not even discuss a dollar-for-dollar credit in *Larramore*. The only reference to a credit in *Larramore* is in this Court's summary of the Commission's Opinion and Award. This Court stated: "The Commission calculated plaintiff's average weekly wage as $1,653.85, yielding a weekly compensation rate of $478.00, minus appropriate credits to defendants." *Id.* at 253, 540 S.E.2d at 770. Accordingly, we conclude this Court's opinion in *Larramore* does not hold an employer is entitled to a dollar-for-dollar credit for any amounts paid to an employee after his injury. Rather, this issue is governed by N.C. Gen. Stat. § 97-42 (2003).

N.C. Gen. Stat. § 97-42 provides in pertinent part that:

> *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.

Id. (emphasis added).

Typically, under N.C. Gen. Stat. § 97-42, any credit an employer receives for payments made pursuant to an employer-funded salary continuation, disability, or other income replacement plan is awarded by reducing the number of weeks of workers' compensation awarded to the claimant by the number of weeks in which an employer made

payments under the plan. However, the language "[u]nless otherwise provided by the plan" indicates an employer may include language in the wage-replacement plan that modifies N.C. Gen. Stat. § 97-42 to allow for a dollar-for-dollar credit. Defendants contend paragraph 10 of the player contract modifies the provisions of N.C. Gen. Stat. § 97-42 and allows for a dollar-for-dollar credit.

> In interpreting a contract, the court's principle objective is to determine the intent of the parties to the agreement. Generally, "[w]hen the language of a contract is plain and unambiguous then construction of the agreement is a matter of law for the court." "However if the terms of the contract are ambiguous then resort to extrinsic evidence is necessary and the question is one for the jury."

Holshouser v. Shaner Hotel Grp. Props. One, 134 N.C. App. 391, 397, 518 S.E.2d 17, 23 (1999) (citation omitted). The language in paragraph 10 of the player contract is unambiguous. The terms plainly state that:

> Any compensation paid to player . . . for a period during which he is entitled to workers' compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workers' compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workers' compensation.

Thus, the Standard Player Contract unambiguously provides for a dollar-for-dollar credit.

Plaintiff does not argue the terms of paragraph 10 are ambiguous; rather, plaintiff argues that several arbitration decisions compel a different result. In *Kyle Freeman v. Los Angeles Raiders* (December 28, 1994) and *In the Matter of Arbitration Between Miami Dolphions, Ltd. v. Smith* (April 21, 1997), an arbitrator determined paragraph 10 of the NFL Player Contract provides for an offset for time for the period of the contract and not a dollar-for-dollar credit of the claimant's post-injury payment against all indemnity payments under the workers' compensation law. While the context of these decisions were discussed during the depositions of Dennis Curran ("Curran") and Richard Berthelsen, the actual decisions were not presented to the Commission for consideration. Therefore, these decisions are not properly before us.

Finally, plaintiff argues that because the players' percentage of the gross NFL revenue was the source of funds for the injury grievance settlement, defendants were not entitled to a credit. The Commission made the following pertinent finding of fact:

> 27. The NFL Management Council and the NFL Players' Association differ on their interpretation of paragraph 10 of the player's contract. Dennis Curran, senior vice-president of the NFL Management Council, testified that the settlement amount was paid out of defendants' gross revenues and that therefore defendants are entitled to a credit. Mr. Curran interprets paragraph 10 to entitle defendants to a dollar-for-dollar offset for workers' compensation paid to plaintiff. Richard Berthelsen, general counsel for the NFL Players' Association, testified that since the settlement under the Injury Grievance was paid out of the players' share of gross revenues, defendants are not entitled to any credit for this payment. In the alternative Mr. Berthelsen interprets paragraph 10 not to entitle defendants to a dollar-for-dollar credit, but a credit for the number of weeks which a player is paid under paragraph 9. Mr. Berthelsen further testified that there is no requirement that a player make the team to be entitled to recover under paragraph 9.
>
> 28. The Full Commission finds that the Injury Grievance monies paid to plaintiff came from the gross revenue earned by the Panthers from professional football games. The gross revenue is put into a mathematical formula to determine the players' salary cap for each football season. Plaintiff did not contribute to the salary cap for the Panthers. The salary cap is an aggregate limit on what can be paid to the players. Individual players negotiate their own salaries, depending upon their skill and abilities. All the players' salaries and benefits on the team cannot exceed the limit mandated by the salary cap. Plaintiff was paid salary and benefits out of money that was designated as money that can be paid to players, but no percentage of his salary was put into the fund to pay for benefits. Therefore, defendants are entitled to a credit for payments "made by the employer" pursuant to N.C. Gen. Stat. § 97-42.

"[W]hen reviewing Industrial Commission decisions, appellate courts must examine 'whether *any* competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law.' " *McRae*, 358 N.C. at 496,

597 S.E.2d at 700 (citations omitted) (emphasis added). "The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there [is] evidence that would support findings to the contrary." *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965). After careful review of the record, we conclude the testimony of Curran provided competent evidence upon which the Commission's findings of fact regarding the funding of the injury grievance settlement were based.

In sum, we conclude the Commission properly determined plaintiff suffered a compensable injury by accident arising out of and in the course of his employment. We also conclude the Commission properly determined plaintiff's average weekly wage and awarded plaintiff 300 weeks of benefits. Finally, we affirm the Commission's decision to award defendants a dollar-for-dollar credit for the $35,294.00 injury grievance settlement.

Affirmed.

Judges McGEE and LEVINSON concur.

CHARLES H. SMITH, III, EMPLOYEE, PLAINTIFF v. RICHARDSON SPORTS LTD. PARTNERS D/B/A CAROLINA PANTHERS, EMPLOYER
LEGION INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA03-1130-2

(Filed 2 August 2005)

1. Workers' Compensation— injured professional football player—bonuses and fees—due and payable—no workers' compensation credit for paying

Payments received by a professional football player for a game in which he played, for signing and roster bonuses, and for making public appearances and attending team mini-camps and workouts were due and payable when made under N.C.G.S. § 97-42 and were properly classified as plaintiff's earnings, for which defendants were not entitled to a workers' compensation credit.

2. Workers' Compensation— professional football player— injury protection plan payments

The evidence did not support an Industrial Commission workers' compensation determination that payments from an injury protection plan to a professional football player were from an employee-funded plan (which affects the way credits are given to defendants).

3. Workers' Compensation— professional football player— payments from injury guarantee clause

A workers' compensation case involving a professional football player was remanded for a finding as to whether defendants would be allowed a credit for payments made pursuant to a Skill and Injury Guarantee Clause.

4. Workers' Compensation— professional football player— injured reserve payments—credits

A workers' compensation award to a professional football player was remanded where the Industrial Commission did not render any findings of fact or conclusions of law as to whether injured reserve pay agreements modified N.C.G.S. § 97-42 so that defendants would be entitled to a dollar-for-dollar workers' compensation credit for those payments.

5. Workers' Compensation— professional football player— post-injury earnings potential—findings supported by evidence

There was competent evidence in a workers' compensation case supporting the Industrial Commission's finding about plaintiff's post-injury wage earning capacity.

Appeal by defendants from an opinion and award entered 3 June 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2004. Opinion filed 15 February 2005. Petition for rehearing granted 22 April 2005. The following opinion supersedes and replaces the opinion filed 15 February 2005.

R. James Lore for plaintiff-appellee.

Hedrick, Eatmon, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe and Shannon P. Herndon, for defendant-appellants.

HUNTER, Judge.

Richardson Sports Ltd. Partners, d/b/a The Carolina Panthers, et al. ("defendants") present the following issues for our consideration: whether the North Carolina Industrial Commission ("Commission") erred in (I) only allowing defendants a fourteen-week credit, with an approximately $8,000.00 value, for approximately six million dollars in post-injury payments to plaintiff and not allowing a dollar-for-dollar credit for the total amount paid to plaintiff post-injury,[1] (II) awarding plaintiff an automatic right to receive 300 weeks of partial disability benefits, and (III) finding that the $225,000.00 paid to plaintiff pursuant to a contractual injury protection plan represents payments made from revenue designated as "employee revenue" and not funded by the defendants. We affirm the opinion and award in part and remand this case to the Commission for the reasons stated herein.

This is a rare case in which a highly paid individual suffered a compensable injury and occupational disease and received several million dollars after his injury pursuant to his employment contract. In order to determine whether the Panthers were entitled to a credit for the monies paid to plaintiff post-injury requires this Court to interpret and apply N.C. Gen. Stat. § 97-42. The application of this statutory provision in the context of a highly paid professional athlete presents an issue of first impression. Unlike the typical workers' compensation cases, cases such as this usually involve complex collective bargaining agreements and individualized player contracts. Thus, the credit issues arising in this context are complicated, and unlike some other states with professional teams, North Carolina does not have a statute specifically addressing highly paid professional athletes and workers' compensation.

Charles H. Smith, III ("plaintiff"), entered into a contract with defendants on 1 March 2000 to play professional football for the Carolina Panthers ("Panthers") of the National Football League ("NFL"). The contract was scheduled to end on 28 or 29 February 2005, unless the contract was terminated, extended, or renewed as specified by the contract. The contract provided that defendants would pay plaintiff (1) $800,000.00 for the 2000 season,

1. Our calculation of the sum of the payments for which defendants seek a credit does not equal $6,172,135.40. We also note that some of the stipulated exhibits do not equal some of the amounts stated by defendants in their briefs. However, we choose to use the numbers and figures used by the parties in their brief for the sake of clarity. If necessary, on remand the parties and the Commission may address any discrepancies.

(2) $1,500,000.00 for the 2001 season, (3) $2,700,000.00 for the 2002 season, (4) $3,500,000.00 for the 2003 season, and (5) $4,000,000.00 for the 2004 season. In addition to the salary, plaintiff would receive financial bonuses such as a $4,500,000.00 signing bonus, a $1,000,000.00 roster bonus for each season he was placed on the team's roster starting in 2001, and payments for making public appearances and attending the team mini-camps and workouts. A one-year skill and injury guarantee addendum to the contract provided plaintiff would receive $750,000.00 in 2002 if the team determined plaintiff's skill for performance was unsatisfactory when compared with other players competing for positions on the roster or if plaintiff was unable to pass the team's 2002 preseason physical due to a football-related injury occurring prior to the 2002 season. The Collective Bargaining Agreement ("CBA") between the NFL clubs and the NFL Players Association was also a part of plaintiff's contract, and it contained several benefits, including an injury protection provision. Under certain conditions, this provision provides a one-time benefit to injured players during the season after a player's injury. Plaintiff received $225,000.00 under this provision.

Prior to entering into a five-year contract with defendants, plaintiff played football for four years in college and played with the Atlanta Falcons ("Falcons") of the NFL from 1992 until 2000. With the Falcons, plaintiff received awards, including being voted greatest defensive lineman in Falcon history, being selected to the All-Pro Bowl NFL team, and being chosen as co-captain in Super Bowl XXXIII. While playing for the Falcons, plaintiff sustained a knee injury and had knee reconstruction surgery in 1994. He only missed one game with the Falcons related to that injury.

After joining the Panthers in 2000, plaintiff passed the preemployment physical examination performed by defendants' physician, which made him eligible to play football. After passing the physical examination, defendants allowed plaintiff to undergo another surgical procedure to get his knee "cleaned out." Plaintiff continued rehabilitation treatment and attended practices sporadically. After playing the first two games of the season, plaintiff sustained another knee injury during the third game on 17 September 2000, and plaintiff was placed on injured reserve. While on injured reserve, plaintiff continued to receive his salary. During the 2000 season, plaintiff was paid $800,000.00 in installments of $47,059.00 for seventeen weeks. Three of these installment payments were for the three games in which plaintiff played, including the third game in

which he was injured. The remaining fourteen installment payments, totaling $658,826.00, were injured reserve pay.

Plaintiff had knee surgery towards the end of the 2000 regular football season. Defendants decided to place plaintiff on their 2001 roster. As a result, plaintiff received a $1,000,000.00 roster bonus in April 2001. From 2 April 2001 to 21 May 2001 plaintiff participated in mini-camps, workouts, and training camps, for which plaintiff was paid $1,985.72. Plaintiff also made appearances during this time period, for which defendants paid him $2,500.00. According to defendants, on 23 July 2001, plaintiff's contract was terminated due to unsatisfactory skill or performance as compared with that of other players competing for positions on the club's roster. Defendants paid plaintiff $87,500.00 in severance pay, an amount based on his years of service with the NFL. As the conditions of the contractual injury protection provision were met, plaintiff also received $225,000.00 in installments during the 2001 regular season. In 2002, plaintiff received $750,000.00 pursuant to the one year skill and injury guarantee addendum to his contract.

At the time of the Commission's review, plaintiff earned $40,000.00 per year as a radio announcer for 790 Zone Radio in Atlanta, Georgia. The Commission determined that if it were not for plaintiff's compensable injury, he would have likely made the Panthers's roster and would have had the capacity to earn at least $20,000,000.00 under the contract.[2] This figure included his signing bonus of $4,500,000.00, his salary each year, and his projected roster bonus each year. In the Pre-trial Agreement, defendants agreed to pay $588.00 per week, the maximum workers' compensation rate in effect for 2000, until the hearing.

Defendants denied plaintiff's injury was compensable by filing a Form 61 with the Commission on 11 October 2001. Thereafter, on 5 March 2002, defendants filed a Form 60 admitting compensability. The parties then proceeded before the deputy commissioner regarding the amount of workers' compensation, if any, to which plaintiff was entitled. Defendants argued they were entitled to credits for post-injury payments made to plaintiff. In a 1 July 2002 opinion and award, Deputy Commissioner Phillip A. Holmes determined plaintiff was entitled to 300 weeks of compensation at a rate of $588.00 per week. Defendants were awarded a fourteen week credit. Thus, plaintiff was

2. "Where an appellant fails to assign error to the trial court's findings of fact, the findings are 'presumed to be correct.' " *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) (citation omitted).

awarded compensation at the rate of $588.00 per week for 286 weeks and medical expenses. On appeal, the Commission affirmed the opinion and award with some modifications. The Commission concluded "[p]laintiff sustained a compensable injury by accident and developed compensable occupational disease(s) as a result of an admittedly compensable event arising out of and in the course of his employment with defendants on September 17, 2000." In the award, plaintiff was awarded partial disability compensation of $588.00 for 300 weeks with a fourteen-week credit to defendants. This would result in a total award of $168,168.00. Plaintiff was also awarded payment for past and future medical coverage for injuries, diseases, and conditions resulting from the injury. Defendants appeal.

[1] Defendants assert that they are entitled to a greater credit than that awarded by the Commission. Specifically, defendants contend they should have been awarded either a period credit or dollar-for-dollar credit for the following payments:

- fifteen payments of $47,059.00 totaling $705,885.00 paid during the 2000 season post-injury,
- $1,000,000.00 roster bonus paid on 3 April 2001,
- $1,985.72 paid in 2001 for workouts and mini-camps,
- a $2,500.00 appearance fee paid on 7 March 2001,
- $225,000.00 in injury protection payments for the 2001 season,
- $750,000.00 paid during the 2002 season pursuant to the One-Year Skill and Injury Guarantee which is Addendum C to the 2001 contract, and the
- $4,500,000.00 signing bonus.

Whether an employer is awarded a credit for payments made to an employee post-injury is governed by N.C. Gen. Stat. § 97-42 (2003), which states:

> 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.

This provision "expressly provides that payments made by the employer which were 'due and payable' when made are not deductible." *Moretz v. Richards & Associates*, 316 N.C. 539, 541, 342 S.E.2d 844, 846 (1986); *see also Thomas v. B.F. Goodrich*, 144 N.C. App. 312, 318-19, 550 S.E.2d 193, 197 (2001) (stating "[i]f payments made by an employer are due and payable, the employer may not be awarded a credit for the payments under section 97-42"). Our appellate courts have determined there are at least three instances where a payment is "due and payable."

First, a payment is due and payable when the Commission has entered an opinion awarding benefits to a claimant. *See Foster v. Western-Electric Co.*, 320 N.C. 113, 115, 357 S.E.2d 670, 672 (1987).

Second, a payment is due and payable after the employer has admitted the worker's injury is compensable and therefore entitled to workers' compensation benefits.[3] *Moretz*, 316 N.C. at 541-42, 342 S.E.2d at 846. As explained by our Supreme Court in *Moretz*,

> [t]he Workers' Compensation Act provides that a policy insuring an employer against liability arising under that Act must contain an agreement by the insurer to pay promptly all benefits conferred by its provisions, and that such agreement is to be construed as a direct promise to the person entitled to compensation. N.C.G.S. § 97-98 (1985). By virtue of this promise, once the employer has accepted an injury as compensable, benefits are "due and payable." *See also* N.C.G.S. § 97-18(b) (1985). Because defendants accepted plaintiff's injury as compensable, then initiated the payment of benefits, those payments were due and payable and were not deductible under the provisions of section 97-42, *so long as* the payments did not exceed the amount deter-

3. In the present case, plaintiff was injured on 17 September 2000. Although the parties stipulated that defendants admitted compensability by filing a Form 60 with the Commission, the record indicates the Form 60 was not filed until 5 March 2002. The record also indicates that defendants initially denied compensability by filing a Form 61 on 10 October 2001. On remand, the Commission should determine whether any of the payments for which defendants seek a credit were due and payable when made.

> mined by statute or by the Commission to compensate plaintiff for his injuries.

Id. In *Moretz*, the Commission determined the plaintiff was entitled to 180 weeks of disability payments. *Id.* at 542, 342 S.E.2d at 847. However, the employer had admitted compensability and had already paid the plaintiff nearly 255 weeks of disability payments. *Id.* Thus, our Supreme Court held that "[p]laintiff has therefore already received more than he was entitled by statute to receive. . . . Plaintiff has already been fully compensated for his injury, and we hold that defendants owe plaintiff no additional compensation." *Id.* Thus, if the payments exceed the amount to which the plaintiff is entitled, the employer will not have to pay any additional compensation. *See id.* at 542, 342 S.E.2d at 847 (stating the employer did not have to pay any additional compensation because the plaintiff had already been fully compensated for his injury).

Third, a payment is due and payable when made if the employee has earned the compensation or benefit. In *Christopher v. Cherry Hosp.*, 145 N.C. App. 427, 550 S.E.2d 256 (2001), the employer denied the employee's workers' compensation claim and the injured employee used fifty-two days of accrued sick leave and vacation leave while she was out of work. *Christopher*, 145 N.C. App. at 427, 550 S.E.2d at 257. This Court explained that "an employee's accumulated vacation and sick leave could be used by the plaintiff for purposes other than those served by the [Workers' Compensation] Act, [and] were not tantamount to workers' compensation benefits." *Id.* at 430, 550 S.E.2d at 258. We further explained that:

> "Such benefits have nothing to do with the Workers' Compensation Act . . . . [P]laintiff in the instant case cannot be held to have received duplicative payments for his injury or to have received more than he was entitled by the Workers' Compensation Act to receive."

Id. (citation omitted). Based upon our analysis, we held in *Christopher* "that payments for such vacation and sick leave are 'due and payable' when made because they have been earned by the employee and are not solely under the control of the employer." *Id.* at 432, 550 S.E.2d at 260.

> When, however, an employer makes payments that are not due and payable, the Commission may in its discretion award the employer a credit for the payments pursuant to section 97-42. . . .

> Thus, this Court's review of the Commission's decision to grant or deny a credit for payments made by an employer that were not due and payable "is strictly limited to a determination of whether the record affirmatively demonstrates a manifest abuse of discretion" by the Commission.

Thomas, 144 N.C. App. at 319, 550 S.E.2d at 197 (footnote omitted).

Unless otherwise provided by an employer funded salary continuation, wage replacement, or disability plan, when a credit is awarded, the deduction "shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment." N.C. Gen. Stat. § 97-42. If the payment was made pursuant to an employer-funded salary continuation, disability, or other income replacement plan, different rules apply.

In *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670, our Supreme Court indicated that if an employer pays an employee wage-replacement benefits at a time when workers' compensation benefits are not due and payable, the employer is entitled to a credit. Allowing a credit for these payments is in accord with the public policies behind our Workers' Compensation Act, i.e., "to relieve against hardship," "to provide payments based upon the actual loss of wages[,]" and the avoidance of "duplicative payments." *Id.* at 116-17, 357 S.E.2d at 673.

In *Evans v. AT&T Technologies*, 332 N.C. 78, 418 S.E.2d 503 (1992), our Supreme Court indicated that the credit for payments made pursuant to an employer-funded wage replacement plan should be a dollar-for-dollar credit. In response to this holding, the General Assembly amended N.C. Gen. Stat. § 97-42 in 1994 to add the following provision:

> *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 (emphasis added). The statute "was amended to modify the decision of the Supreme Court [of North Carolina] in *Evans v. AT&T Technologies*, 332 N.C. 78, 418 S.E.2d 503 (1992),

which provided a dollar-for-dollar credit against workers' compensation due for payments received under an employer-funded disability program." Henry N. Patterson, Jr. and Maxine Eichner, *1994 Workers' Compensation Reform Act*, pp. 27-28.

> Under the new language, unless otherwise provided by the plan, payments made under an employer-funded salary continuation, disability or other income replacement plan will be deducted from payments due from the employer in each week during which compensation is payable "without any carry-forward or carry-back for credit for amounts paid in excess of the compensation rate in any given week." The employer, therefore, is now entitled only to a credit against compensation payable for weeks during which the employer-funded disability benefits were paid unless otherwise provided in the employer's disability plan.

Id. Therefore, unless otherwise provided by a plan, under N.C. Gen. Stat. § 97-42, any credit an employer receives for payments made pursuant to an employer-funded salary continuation, disability, or other income replacement plan is awarded by reducing the number of weeks of workers' compensation awarded to the claimant by the number of weeks in which an employer made payments under the plan.[4] If the payment made by the employer was more than what the employee was to receive under the Workers' Compensation Act, the excess cannot be used towards an additional week of credit. However, the language "[u]nless otherwise provided by the plan" indicates an employer may include language in the wage-replacement plan which modifies the application of this amendment to N.C. Gen. Stat. § 97-42.

In this case, the Commission granted defendants a credit for fourteen weeks of compensation payments at the weekly rate of $588.00, to be deducted from the end of the 300-week period. As previously stated, defendants contend they should have been awarded a credit for the following payments:

- fifteen payments of $47,059.00 totaling $705,885.00 paid during the 2000 season post-injury,
- $1,000,000.00 roster bonus paid on 3 April 2001,
- $1,985.72 paid in 2001 for workouts and mini-camps,

4. We reiterate, however, that an employer is not entitled to a credit for any type of payment if the payments were due and payable when made. *See* N.C. Gen. Stat. § 97-42.

- a $2,500.00 appearance fee paid on 7 March 2001,
- $225,000.00 in injury protection payments for the 2001 season,
- $750,000.00 paid during the 2002 season pursuant to the One-Year Skill and Injury Guarantee which is Addendum C to the 2001 contract, and the
- $4,500,000.00 signing bonus.

In this case, our review of the record indicates that five of the payments received by plaintiff post-injury had been earned by the plaintiff, and were due and payable when made. Thus, defendants cannot seek a credit for these five payments: (1) one of the fifteen payments of $47,059.00 paid during the 2000 season, (2) the $1,000,000.00 roster bonus paid on 3 April 2001, (3) $1,985.72 paid in 2001 for workouts and mini-camps, (4) a $2,500.00 appearance fee paid on 7 March 2001, and (5) the $4,500,000.00 signing bonus.

1. The $47,059.00 Payment Received in 2000

Plaintiff was injured on 17 September 2000 and the next day, on 18 September 2000, the plaintiff received $47,059.00. In finding of fact 16, the Commission found in pertinent part: "The payment made on September 18, 2000, represented earnings for playing in the September 17, 2000, game in which plaintiff was injured, and was not paid as a disability payment." According to Article XXXVIII, Section 9 of the NFL CBA: "Unless agreed upon otherwise between the Club and the player, each player will be paid at the rate of 100% of his salary in equal weekly or bi-weekly installments over the course of the regular season commencing with the first regular season game. . . ." Plaintiff's payment history indicates he was receiving his salary weekly. As the CBA indicates a player would begin receiving his salary weekly after the first regular season game, the Commission's conclusion that the 18 September 2000 payment reflected plaintiff's earnings for playing in the 17 September 2000 game is supported by competent evidence, as the players were paid after the weekly football game. Thus, defendants cannot seek a credit for this payment because it was due and payable when made.[5]

2. The $1,000,000.00 Roster Bonus Paid in 2001

Defendants seek a credit for the $1,000,000.00 roster bonus paid on 3 April 2001. In finding of fact 19, the Commission found in pertinent part:

5. For a discussion of the remaining installment payments which constituted injured reserve pay, *see infra*.

> The roster signing bonus of $1,000,000.00 paid April 3, 2001, to plaintiff was the result of a unilateral decision on the part of the Panthers to place plaintiff on the 2001 roster, most likely to keep him from being picked up by another team if he had been able to recover from his injury and play again. This payment is deemed as earnings to plaintiff.

Paragraph 27 of Addendum B to plaintiff's Player Contract states:

> If Player is a member of the 80-man roster on the following dates of the respective seasons below, he will be paid as follows:
>
> April 1, 2001—$1,000,000 payable April 1, 2001.
>
> March 1, 2002—$1,000,000 payable March 1, 2002.
>
> March 1, 2003—$1,000,000 payable March 1, 2003.
>
> March 1, 2004—$1,000,000 payable March 1, 2004.

Thus, plaintiff was contractually entitled to the $1,000,000.00 roster bonus when the Panthers decided to place him on the roster for the 2001 season. In explaining the decision to place plaintiff on the roster and to reduce plaintiff's salary from $1,500,000.00 to $500,000.00 for the 2001 season, Marty Hurney, General Manager for the Panthers, testified:

> Q. . . . Did you have any part in the consideration of that renegotiation of the contract?
>
> A. Yes, sir.
>
> Q. Why did that occur?
>
> A. Because we wanted to give Chuck extra time to rehab from the injury, to see if—see if he could get healthy enough to play for us, since we had invested money into him, to play for us over a long term. And his salary cap number was too high to keep him. We had a March roster that we had to pay in consideration for him to play for us that year, and we asked him to reduce his Paragraph 5 salary by a million dollars.
>
> Q. What would be the incentive for him to reduce it by a million dollars?
>
> A. To get a chance to still play for us, and to receive the million-dollar roster bonus that was part of that contract to play for us that season.

Q. So if he had not been accepted onto the team in March of 2001, what would have happened to the roster bonus that would have otherwise been payable?

A. Well, if we would have released him before March 1, he wouldn't have received a roster bonus.

The general manager's testimony indicates that the roster bonus was neither paid as a result of plaintiff's workers' compensation claim nor was it a part of a wage replacement plan for employees unable to work. Rather, plaintiff was contractually entitled to the bonus because the Panthers decided to place him on the roster. Thus, the Commission's finding that the bonus should be classified as earnings is supported by competent evidence. As this bonus was due and payable when made, defendants cannot seek a credit for the roster bonus.

3. and 4. The $1,985.72 Payment for Mini-Camps and Workouts and the $2,500.00 Appearance Fee

In finding of fact 15, the Commission found:

> Post injury payments in the sum of $4,805.72 were made to plaintiff during the period of April 2, 2001, to May 21, 2001, for plaintiff's participation in the Workout, MiniCamp and Training Camps, as well as an Appearance Fee pursuant to his contract. These payments constitute post-injury earnings.

Plaintiff's payment history indicates he received six $320.00 payments between 2 April 2001 and 21 May 2001 for workouts, one payment of $385.72 for mini-camp, and $2,500.00 on 7 May 2001 for an appearance. According to plaintiff's contract, he was obligated to participate in mini-camps, workouts, and to make appearances on behalf of the team. As plaintiff's payment history indicates these payments between 2 April and 21 May 2001 were for participating in these activities, the Commission's conclusion that these were post-injury earnings is supported by competent evidence. As such, defendants cannot seek a credit for these payments because they were due and payable when made.

5. The $4,500,000.00 Signing Bonus

Defendants contend they are entitled to a credit of $4,500,000.00 for the signing bonus because "[e]ven though the signing bonus was paid in two lump sums, for salary cap purposes and pursuant to the

Collective Bargaining Agreement, that $4,500,000.00 signing bonus is considered to be spread over the five-year length of Employee-Plaintiff's Contract." In finding of fact 14, the Commission found: "The payment of a deferred 3.5 million dollar signing bonus on April 3, 2001, relates back as an amount plaintiff earned, though later paid, for signing with the Panthers in February of 2000." According to plaintiff's contract:

> As additional consideration for the execution of NFL Player Contract(s) for the year(s) 2000, 2001, 2002, 2003, and 2004, and for the Player's adherence to all provisions of said contract(s), Club agrees to pay Player the sum of Four Million Five Hundred Thousand Dollars $4,500,000.
>
> The above sum is payable as follows:
>
> $1,000,000 PAID ON 2/22/00. . . .
>
> $3,500,000 on April 1, 2001.

According to the Panthers's general manager, plaintiff would have received the remainder of his signing bonus even if he had not been placed on the 2001 roster. The general manager also explained that even though the signing bonus was paid in two lump sums in 2000 and 2001, for salary cap purposes, the signing bonus amount is spread over the length of the contract. Notwithstanding this testimony, however, plaintiff became entitled to the signing bonus upon signing the contract, which occurred pre-injury. Therefore, finding of fact 14 is supported by competent evidence. As such, defendants may not seek a credit for the signing bonus because it was due and payable when made.

We now turn to the remaining payments for which defendants seek a credit: (a) the $225,000.00 injury protection provision payments paid during the 2001 regular season, (b) the $750,000.00 one year skill and injury guarantee payments paid in 2002, and (c) the injured reserve pay of fourteen $47,059.00 installments in 2000.

> It is well-established that our standard of review of an opinion and award of the Commission is limited to a determination of "(1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law."

Larramore, 141 N.C. App. at 254, 540 S.E.2d at 770 (citation omitted).

a. The $225,000.00 Injury Protection Payments

[2] Defendants contend plaintiff received $225,000.00 in seventeen installments between 20 September 2001 and 31 December 2001 for which they are entitled a credit. In finding of fact 17, the Commission found:

> Payments in the sum of $225,000.00 pursuant to the injury protection plan running from September 20, 2001, to approximately December 31, 2001 (made in installments of $13,235.30) represent payments made from revenue designated as employee revenue under the division of revenue between management and the players' union pursuant to the collective bargaining agreement. The source of the injury protection plan monies were paid *in toto* by all NFL player-employees, including plaintiff, and is for a type of disability plan. The revenues that funded this plan, which was the source of the payments made to plaintiff, were not paid by the employer.

Defendants also contend that the Commission's finding the injury protection plan was employee-funded is unsupported by competent evidence. We agree this finding of fact is not supported by competent evidence.

In this case, Tim English ("English"), staff counsel for the NFL Players' Association, gave the following explanation of how the injury protection plan was funded. First, he explained that NFL revenue generated from television and ticket sales is the "designated gross revenue"[6] for the League. Then, according to English, pursuant to the CBA, the portion of the defined gross revenue that can be used for player salary and benefits is limited by a salary cap, which was sixty-three percent (63%) in 2000. The injury protection plan is part of the benefits a player receives under the CBA. Then, English testified as follows:

> Q. Now, what is the source of the injury protection payments that are listed on this document, beginning on 9-20, 2001, and you may presume that it went up through 12-31, 2001?
>
> A. Well, the player's side of the revenue, the sixty-three percent or so, is divided up generally into two categories. The vast majority of the money goes into the salary cap, which the play-

6. The CBA refers to this money as "defined gross revenue," not "designated gross revenue." As the CBA uses the term "defined gross revenue," we will use the same term for clarity.

> ers'—all the players' salaries come out of. And a smaller amount goes into what's called the benefit cap.
>
> . . .
>
> Q. Well, stated alternatively for purposes of the question, did Chuck Smith's injury protection money come out of the players' side of the revenue, the sixty-three percent, or the management side of the revenue, the thirty—thirty-seven percent?
>
> A. Yeah, the players' side of the revenue.

Although English testified that the injury protection plan is funded out of the players' side of the revenue used for the salary cap, he did not testify that sixty-three percent (63%) of the defined gross revenue generated belonged to the players. Indeed, the CBA indicates the defined gross revenue belongs to the NFL and the NFL teams. In Article XXIV, Section 1(a)(i), the agreement states in pertinent part:

> "Defined Gross Revenues" (also referred to as "DGR") means the aggregate revenues received or *to be received* on an accrual basis, for or with respect to a League Year during the term of this Agreement, *by the NFL and all NFL Teams* (and their designees), from all sources, whether known or unknown, derived from, relating to or arising out of the performance of players in NFL football games, with only the specific exceptions set forth below. The NFL and each NFL Team shall in good faith act and use their best efforts, consistent with sound business judgment, so as to maximize Defined Gross Revenues for each playing season during the term of this Agreement. . . .

(Emphasis added.)

In this case, the testimony regarding the salary cap and revenue did not provide a clear explanation of how the process worked. The lack of a clear explanation led to contradictory results. According to English, all of the players' salary and benefits in 2000 were paid out of the sixty-three percent (63%) salary cap. The salary and benefits included, among other things, the injury protection plan and the injured reserve pay. Thus, the $47,059.00 weekly injured reserve payments plaintiff received were paid out of the sixty-three percent (63%) salary cap. Similarly, the injury protection plan payments received by plaintiff in 2001 would have been paid out of

the salary cap.[7] However, the Commission determined in finding of fact 16 that the injured reserve payments were made pursuant to an employer totally funded disability plan. Then in finding of fact 17, the Commission determined the injury protection plan was employee funded. These findings of fact are contradictory as the injured reserve pay and the injury protection plan payments were part of the salary cap. The Commission's findings of fact do not clarify the contradiction.

Therefore, we conclude the determination that the injury protection plan payments were from an employee-funded plan is unsupported by competent evidence as there is insufficient evidence upon which a determination can be made. Accordingly, we remand to the Commission for the hearing of additional evidence and further findings of fact as to whether the injury protection plan is employee funded, employer funded, or both. If the injury protection plan is employer funded, then the Commission must determine if a credit should be awarded in accordance with this opinion. The Commission shall consider whether the injury protection plan provisions modify the terms of N.C. Gen. Stat. § 97-42. As plaintiff did not appeal the Commission's determination in finding of fact 16, that the injured reserve pay was part of an employer-funded disability plan, the Commission shall not address whether injured reserve pay was employer-funded or employee-funded on remand.

b. The $750,000.00 Payment

[3] Defendants also contend they are entitled to a credit for the $750,000.00 paid to plaintiff in 2002 pursuant to the One-Year Skill and Injury Guarantee which is Addendum B to plaintiff's 2001 contract. This guarantee stated:

> Despite any contrary language in this NFL Player contract, Club agrees that for 2002 only it will pay Player Seven Hundred Fifty Thousand Dollars ($750,000) of the salary provided in Paragraph 5, if, in Club's sole judgment Player's skill for performance is unsatisfactory as compared with that of other players competing for positions on Club's roster and Player's contract is terminated via the NFL waiver system, or, if, due to an injury suf-

7. Defendants also argue that under English's interpretation of the NFL CBA, all of the players' salaries and benefits would have been paid out of money belonging to the players. According to defendants, this would mean the players paid themselves. We express no opinion on the merits of defendants' argument as the Commission may consider it on remand.

> fered while participating or playing for the Club prior to the 2002 season Player, in the sole discretion of Club's physician, is unable to pass Club's pre-season physical examination for 2002 and Player's contract is terminated via the NFL waiver system.
>
> This guarantee by Club only applies for the 2002 season, regardless of whether Player is under contract or option to Club for a subsequent year; and regardless of whether Player passes Club's physical examination for a year subsequent to 2002.
>
> This guarantee is for one year only and in no way supersedes or obviates the applicability of the League's waiver system to Player.

Although the parties stipulated that plaintiff would receive $750,000.00 in seventeen equal payments during the 2002 football season, the Commission did not render any findings of fact or conclusions of law as to whether it would award defendants a credit for these payments. Thus, this case must be remanded to the Commission for a determination of whether defendants are entitled to a credit for these guarantee payments.

c. Fourteen Payments of $47,059.00 in 2001

[4] In finding of fact 16, the Commission found defendants made fourteen post-injury weekly payments of $47,059.00 pursuant to an employer totally funded disability plan. As stated, plaintiff did not appeal the determination that these payments were from an employer totally funded disability plan. In conclusion of law 4, the Commission determined "[d]efendant is entitled to a credit for 14 weeks of compensation payments at the weekly rate of $588.00, to be deducted from the end of the 300-week period under N.C. Gen. Stat. §§ 97-30 and 97-42."

Defendants contend they are entitled to a dollar-for-dollar credit for the fourteen payments of $47,059.00, instead of a time credit. In the alternative, defendants argue that if a dollar-for-dollar credit is not allowed, they are entitled to additional weeks of credit for the time period between the last regular season game in 2000 through the end of plaintiff's yearly contract on the last day of February 2001. Although defendants did not make any payments to plaintiff during this time period, they argue that because plaintiff was paid his yearly salary during the seventeen week regular season, as earnings and injured reserve pay, they should be awarded a credit extending to the end of the contractual year.

First, defendants contend they are entitled to a dollar-for-dollar credit because this Court has previously affirmed a dollar-for-dollar credit in *Larramore*, a workers' compensation case involving a professional football player. *See Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 540 S.E.2d 768. In *Larramore*, however, this Court did not address the issue of whether an employer was entitled to a dollar-for-dollar credit for the amounts paid to an employee after his injury. Moreover, this Court does not even discuss a dollar-for-dollar credit in *Larramore*. The only reference to a credit in *Larramore* is in this Court's summary of the Commission's opinion and award. This Court stated: "The Commission calculated plaintiff's average weekly wage as $1,653.85, yielding a weekly compensation rate of $478.00, minus appropriate credits to defendants." *Id.* at 253, 540 S.E.2d at 770. Accordingly, we conclude this Court's opinion in *Larramore* does not hold an employer is entitled to a dollar-for-dollar credit for any amounts paid to an employee after his injury. Rather, this issue is governed by N.C. Gen. Stat. § 97-42 (2003).

N.C. Gen. Stat. § 97-42 allows an employer to modify how a credit is applied by including the modification in its benefits or wage continuation plan. Defendants argue they are entitled to a dollar-for-dollar credit pursuant to Paragraph 10 of the NFL Player Contract entered into by the parties, which states:

> WORKERS' COMPENSATION. Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workers' compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workers' compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workers' compensation.

Defendants argue that this contractual provision "specifically sets forth that the types of payments that were made to Employee-Plaintiff in this action are deemed advances against any award of workers' compensation." In support of this contention defendants cite *Pittsburgh Steelers Sports, Inc. v. Workmen's Compensation Appeal Board*, 604 A.2d 319 (Pa. 1992) and *Station v. Workmen's Compensation Appeal Board*, 608 A.2d 625 (Pa. 1992). In *Steelers* and *Station*, the Commonwealth Court of Pennsylvania explained the Workmen's Compensation Board should have determined the credit owed to the professional football team for payments made to an

injured player on a dollar-for-dollar basis. *See Steelers*, 604 A.2d at 323; *Station*, 608 A.2d at 632. In each of these decisions, the Pennsylvania court based its decision upon Paragraph 10 of the NFL Player Contract. *Steelers*, 604 A.2d at 322-23; *Station*, 608 A.2d at 632.

While the same contractual provision is present in this case, *Station* and *Steelers* do not provide relevant guidance. In North Carolina, unless otherwise provided by an employer-funded disability plan, N.C. Gen. Stat. § 97-42 precludes a dollar-for-dollar credit. The Commission did not render any findings of fact or conclusions of law as to whether Paragraph 10 of the CBA or the CBA injured reserve pay provisions modify N.C. Gen. Stat. § 97-42. Therefore, on remand, the Commission may hear additional evidence and may make further findings of fact as to whether the effect of N.C. Gen. Stat. § 97-42 has been modified in this case.

[5] Finally, defendants challenge finding of fact 18 which states: "Plaintiff's post injury wage earning capacity outside of the NFL is $40,000.00 per year during the relevant 300-week time period covered by N.C. Gen. Stat. § 97-30." At the time of the hearing on 22 March 2002, plaintiff was earning $40,000.00 a year as a radio announcer. Defendants argue the Commission's determination that plaintiff would only make $40,000.00 a year throughout the entire 300 week compensation period was speculative. Defendants argue plaintiff could obtain employment making the same or greater amount of money that he was making with the Panthers. Therefore, defendants argue finding of fact 18 is not supported by the evidence. We disagree.

Plaintiff's uncontradicted testimony that he was making $40,000.00 a year was competent evidence upon which the Commission could determine plaintiff's wage-earning capacity. Second, "once an employee initially establishes a loss of wage-earning capacity, a presumption of 'ongoing' or 'continuing' disability arises, and the burden shifts to the employer to show that the employee is capable of earning wages." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 11, 562 S.E.2d 434, 441 (2002). Therefore, the Commission did not erroneously award 300 weeks of disability compensation as plaintiff is presumed to have an ongoing or continuing disability once disability, as defined under the Workers' Compensation Act, is established. If plaintiff's income changed and plaintiff began making more than $40,000.00 a year during the 300 week period, such that he was no longer entitled to the maximum compensation rate, defendants could move to terminate or diminish the amount of compensation pursuant to N.C. Gen. Stat. § 97-47. *See*

also Smith v. Swift & Co., 212 N.C. 608, 194 S.E. 106 (1937) (indicating a party can move for a modification of an award if the claimant began receiving a higher salary post injury than his average weekly wage prior to injury as the change in salary could constitute a change in condition).

In sum, we conclude the Commission properly classified the roster bonus, signing bonus, mini-camp, workout, and appearance fees as plaintiff's earnings for which defendants were not entitled to a credit, as these payments were due and payable when made. Similarly, the Commission correctly found the 18 September 2000 $47,059.00 payment was for services rendered during the prior week, including the 17 September 2000 game in which plaintiff was injured. Also, the Commission's finding that plaintiff was entitled to 300 weeks of compensation was supported by competent evidence. However, the Commission did not make any findings of fact or conclusions of law regarding the $750,000.00 payments to be received by plaintiff in 2002. Also, the Commission's finding that the $225,000.00 injury protection payments were paid out of an employee-funded plan was unsupported by competent evidence. Finally, the parties are allowed to present argument to the Commission as to whether additional credit should be awarded for the fourteen weeks of injured reserve pay, totaling $658,826.00, paid to plaintiff in 2000. Accordingly, this case is remanded to the Commission for further proceedings in accordance with this opinion.

Affirmed in part, remanded for further proceedings in part.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. CURLEY JACOBS

No. COA04-963

(Filed 2 August 2005)

1. Kidnapping— to terrorize victim—evidence sufficient

The test for sufficiency of the evidence of kidnapping to terrorize the victim is whether defendant's purpose was to terrorize, not whether the victim was in fact terrorized. Here, there was sufficient evidence that defendant kidnapped the victim

to terrorize her even though he apologized to her during the incident, and the trial court did not err by failing to instruct on false imprisonment.

2. Witnesses— reluctant witness—reasons for reluctance—recross-examination limited

The trial court did not abuse its discretion by limiting the recross-examination of a kidnapping victim about her reluctance to testify and the State's threat of a contempt charge. There was no indication of an offer of favorable treatment, the reasons behind her reluctance did not bear on her credibility, and defendant did not show that the verdict was improperly influenced.

3. Jury— improper contact—conversation possibly overheard in courtroom

There was no abuse of discretion in the trial court's investigation or ruling on an improper contact with a juror where a juror remained seated during a recess and may have overheard a conversation between the prosecutor and the clerk. The alleged inappropriate contact occurred in the presence of the judge, who was about the same distance from the conversation as the juror and did not hear what was discussed; defense counsel was not certain what was discussed; and there is no indication of any influence on the juror or the verdict.

4. Evidence— deferred ruling—no abuse of discretion

The trial court did not abuse its discretion by deferring a ruling where it had granted a motion in limine to exclude certain State's evidence, the court indicated at trial that it might allow the excluded evidence if defendant offered evidence which opened the door but would not rule in advance, and defendant made an offer of proof but did not introduce its evidence.

5. Sentencing— aggravating factor—*Blakely* error—jury required

The trial court erred by sentencing defendant in the aggravated range for kidnapping by unilaterally finding as an aggravating factor that defendant committed the offense to disrupt and hinder the lawful exercise of a governmental function or the enforcement of the laws without submitting this aggravating factor to the jury for proof beyond a reasonable doubt.

6. Indigent Defendants— attorney fees—notice and opportunity for hearing

A judgment for attorney fees against an indigent defendant pursuant to N.C.G.S. § 7A-455 was remanded where it did not include his appointed attorney's total hours or the total amount of the fee and there was no indication in the record that defendant was notified of and given an opportunity to be heard regarding those matters.

Appeal by defendant from judgment entered 21 November 2003 by Judge Donald Jacobs in Robeson County Superior Court. Heard in the Court of Appeals 10 March 2005.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, P.L.L.C., by C. Scott Holmes, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Curley Jacobs ("defendant") appeals his conviction for second-degree kidnapping. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error, but we vacate the trial court's imposition of attorney's fees and we remand the case for resentencing.

The State's evidence presented at trial tends to show the following: On 3 April 2002, Holly Powers ("Powers") was in Maxton, North Carolina, visiting a friend when she was informed that someone was waiting outside to see her. When Powers walked outside, she saw defendant standing beside a vehicle "hollering and screaming" and holding a "mini 14" rifle. Defendant asked Powers why she had obtained another restraining order against him. Defendant told Powers that she was going to go with him to get the restraining order dropped, and he grabbed Powers and forced her into the vehicle. Defendant thereafter placed Powers in "something like a head lock" and drove away.

Defendant drove Powers to a residence where he was living and "snatched" her out of the vehicle by her arm. Defendant then began pointing the gun at Powers and throwing "20 ounce bottles" at her. Defendant hit Powers in the head with a bottle, and he tore Powers' shirt off of her. Defendant choked Powers "[l]ong enough" to make

her "lose [her] breath" as well as her consciousness. Defendant then "snapped out or something" and apologized to Powers. Defendant drove Powers back to her vehicle but then instructed her to drive her vehicle back to the residence. Defendant told Powers that if she tried to leave, "he would shoot [her] car up." Defendant followed Powers in his vehicle with the rifle "out the window a little bit." After Powers dropped her vehicle off at the residence, defendant drove Powers to his mother's residence in Laurinburg, North Carolina.

Following their arrival at his mother's residence, defendant and Powers sat in defendant's vehicle and talked until defendant's mother came outside and approached the vehicle. Defendant's mother was "kind of ill" with Powers and was "fussing" at her. Defendant told his mother that Powers was not there "on [her] own free will," and that she needed to go back inside the residence. Defendant's mother asked Powers to come inside and, while defendant was in another room, Powers explained the events to her.

As Powers was talking to defendant's mother, Michelle Locklear ("Locklear"), Powers' roommate, called the residence and asked to speak to Powers. Defendant's mother attempted to give the telephone to defendant, but defendant refused to come out of the room to answer it. Powers thereafter located another telephone and called Locklear herself. Powers told Locklear to call the police, and she then asked defendant if she could see their dog, which was located in a pen in the yard. Once outside, Powers ran to a nearby residence where she called the police herself. As Powers was waiting for law enforcement officials to arrive, she noticed Locklear approaching in her vehicle. Powers entered Locklear's vehicle and the two drove to pick up Powers' vehicle at defendant's residence.

Law enforcement officers subsequently located defendant driving his vehicle a short distance away from his mother's residence. Scotland County Sheriff's Department Lieutenant Richard J. Best ("Lieutenant Best") approached defendant's vehicle and saw "an assault rife that was in the floor board behind the driver's seat[.]" Lieutenant Best took custody of the rifle and thereafter transferred it to Robeson County Sheriff's Department Detective Anthony Thompson ("Detective Thompson").

After taking her vehicle back to her residence, Powers traveled to a police station in Scotland County. She later went to a police station in Robeson County, where she was interviewed by Detective Thompson as well as Robeson County Sheriff's Department

Deputy Stuart Williams ("Deputy Williams"). The officers took a statement from Powers regarding the incident, and they photographed her injuries.

Defendant was subsequently arrested and indicted for first-degree kidnapping. Defendant's trial began the week of 19 November 2003, and on 21 November 2003, the jury found defendant guilty of second-degree kidnapping. Following the jury verdict, the trial court found as an aggravating factor that defendant committed the offense to disrupt and hinder the lawful exercise of a governmental function or the enforcement of laws. The trial court thereafter sentenced defendant to fifty-eight to seventy-nine months incarceration. Defendant appeals.

We note initially that defendant's brief contains arguments supporting only six of the nineteen original assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the thirteen omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by defendant for appeal.

The issues on appeal are whether the trial court erred by: (I) refusing to instruct the jury on false imprisonment; (II) limiting the scope of defendant's recross-examination of Powers; (III) refusing to inquire further into an alleged communication with a juror; (IV) refusing to rule on an evidentiary issue; (V) sentencing defendant in the aggravated range; and (VI) imposing attorney's fees upon defendant.

[1] Defendant first argues that the trial court erred by refusing to instruct the jury on false imprisonment. We disagree.

N.C. Gen. Stat. § 14-39 (2003) provides in pertinent part as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person . . . .
>
> . . . .

> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

"Our courts have long held that false imprisonment is a lesser-included offense of the crime of kidnapping." *State v. Baldwin*, 141 N.C. App. 596, 605, 540 S.E.2d 815, 822 (2000). "The difference between kidnapping and the lesser-included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another person." *State v. Lancaster*, 137 N.C. App. 37, 44, 527 S.E.2d 61, 66, *disc. review denied in part*, 352 N.C. 680, 545 S.E.2d 723 (2000). "If the purpose of the restraint was to accomplish one of the purposes enumerated in N.C. Gen. Stat. § 14-39, then the offense is kidnapping. However, if the unlawful restraint occurs without any of the purposes specified in the statute, the offense is false imprisonment." *State v. Claypoole*, 118 N.C. App. 714, 718, 457 S.E.2d 322, 324 (1995).

In the instant case, defendant was charged with kidnapping Powers for the purpose of terrorizing her. "Terrorizing is defined as 'more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension.' " *State v. Davis*, 340 N.C. 1, 24, 455 S.E.2d 627, 639 (1995) (quoting *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986)). Defendant contends that sufficient evidence was presented to demonstrate that he acted with some other purpose than to terrorize Powers. In support of this contention, defendant cites Powers' trial testimony, in which she stated that she was "[a] little bit frightened" during the incident, that defendant told her that he was kidnapping her to force her to drop the restraining order against him, and that defendant apologized to her and stated "he would quit doing drugs and stuff like that" after they reached his mother's residence.

In determining whether sufficient evidence supports a charge of kidnapping for the purpose of terrorizing, "the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize" the victim. *Moore*, 315 N.C. at 745, 340 S.E.2d at 405. "The pres-

ence or absence of the defendant's intent or purpose to terrorize [the victim] may be inferred by the fact-finder from the circumstances surrounding the events constituting the alleged crime." *Baldwin*, 141 N.C. App. at 605, 540 S.E.2d at 821. In the instant case, the State's evidence tends to show that defendant approached Powers with a rifle, grabbed her by her hair, and forced her into his vehicle. Once she was inside his vehicle, defendant placed Powers in a headlock, choked her, and caused her to hit her head against the side of the vehicle. Defendant held Powers in a headlock and hit her with his fists as he drove to his residence, and, once at the residence, defendant threw objects at Powers and choked her, causing her to lose consciousness. Defendant waved the rifle at Powers during the incident, "pulling the trigger off and letting it snap" while the rifle was facing Powers. Powers testified that the rifle was equipped with a laser-pointed scope and that she was scared of it. After forcing Powers to retrieve her vehicle, defendant told Powers that he would shoot her vehicle if she "tried to get away," and he held the rifle out of the window of his vehicle while he followed Powers. Detective Thompson testified that Powers was crying and was "very emotional and tearful" when he interviewed her following the incident. Powers' statement to Detective Thompson was introduced into evidence for corroborative purposes, and it provides the following pertinent narrative of the incident:

> [Defendant] made me walk in the building. My back was to [defendant] and he hit me in the head with his fist three to four times. I fell to the couch. [Defendant] put the gun to my face with the infrared and told me he would kill me. [Defendant] pulled the trigger and it snapped. [Defendant] put the gun down, came back over to me and snatched my shirt off and ripped it off of me. After [defendant] ripped my shirt off, I had my bra on. I got up off of the couch and I went towards the bedroom to see if I could find something to put on. [Defendant] hit me with his open hand hard on the back of my neck. I fell on the bed. I stood back up, [defendant] grabbed me around the throat and was choking me. [Defendant] was saying I was not going to do him like that. [Defendant] shoved me down on the bed by my throat, and he fell on top of me. I passed out for about ten seconds. [Defendant] was hitting me in the head with 20 ounce plastic drink bottles.

In light of the foregoing, we conclude that the State introduced sufficient evidence to demonstrate that defendant restrained Powers

for the purpose of terrorizing her. Although we recognize that defendant apologized to Powers during the incident and told Powers that he wanted her to drop the restraining order against him, "none of the acts he committed within the residence [or during the incident] furthered these asserted goals." *State v. Mangum*, 158 N.C. App. 187, 194, 580 S.E.2d 750, 755, *disc. review denied*, 357 N.C. 510, 588 S.E.2d 378 (2003).

In *Mangum*, the defendant was charged with kidnapping for the purpose of raping the victim. On appeal, he argued that the evidence also tended to show that he merely wished to use the telephone and engage in "horseplay" with the victim when he entered her home. This Court noted that although the defendant asked to use the telephone when he entered the victim's home, evidence introduced at trial also tended to show that, after asking to use the telephone, the defendant forced the victim to the bedroom, pinned her down, and fondled her until law enforcement officials arrived. *Id.* In light of this evidence, we "fail[ed] to see how [the] defendant's restraint of the victim and the repeated touching of the breast and vagina furthered his stated intent of using the telephone or restroom." *Id.* at 197, 580 S.E.2d at 757. We concluded that the defendant's "overtly sexual actions also belie his assertion that he was merely engaging in 'horseplay' with the victim." *Id.* Therefore, we held that the trial court did not err by failing to instruct on false imprisonment. *Id.* In the instant case, we are likewise unpersuaded that defendant's continual threats, restraint, and blows upon Powers advanced his asserted goal of forcing her to drop the restraining order against him. Accordingly, we overrule defendant's first argument.

[2] Defendant next argues that the trial court erred by limiting his recross-examination of Powers. Defendant asserts that he was denied the right to effective cross-examination. We disagree.

"Cross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right. Jurors are to consider evidence of any prejudice in determining the witness' credibility." *State v. Grant*, 57 N.C. App. 589, 591, 291 S.E.2d 913, 915, *disc. review denied*, 306 N.C. 560, 294 S.E.2d 225 (1982). Thus, during cross-examination, a defendant may question an opposing witness regarding "particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation." *State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 902 (1954).

In the instant case, during recross-examination of Powers, defense counsel asked Powers whether she had informed the district attorney that she did not want to testify in the case. Powers answered in the affirmative, and defense counsel then asked Powers whether any "threats" were made against her in connection with her testimony. The State objected, arguing that the line of questioning was "opening new ground that is inappropriate for [defense counsel] to open." During the subsequent *voir dire* conference, defense counsel argued that Powers had indicated to him that "she was told what would happen to her if she didn't testify" and that "she had been threatened or forced to testify by being told what would happen if she didn't." Powers informed the trial court that "[t]he only thing it was is I said I do not want to testify, and I was told if I did not testify that I would be sent to jail." Powers informed the trial court that the assistant district attorney "told me that and a couple of other people told me that because this was the Superior Court, that I could get contempt of court or something like that." The State noted that it "did instruct her that an order to show cause was being prepared if she refused to appear," but that Powers "changed her mind, largely based on discussions with her mother and, if I'm not mistaken, her friend, not based on what I told her." When asked why she did not want to testify, Powers informed the trial court that she had "been through a lot," that she "didn't want to go through with it, relive it again[,]" and that she "figured that with all the other cases and the other charges that [defendant] had on him, it was enough." The trial court thereafter sustained the State's objection.

"The right to cross examine a witness to expose the witness' bias is not unlimited." *State v. Hatcher*, 136 N.C. App. 524, 526, 524 S.E.2d 815, 816 (2000). " '[W]hile it is axiomatic that the cross-examiner should be allowed wide latitude, the trial judge has discretion to ban unduly repetitious and argumentative questions, as well as inquiry into matters of tenuous relevance.' " *Id.* (quoting 1 Brandis & Broun on North Carolina Evidence § 170 (5th ed. 1998)) (alteration in original). "The trial judge may and should rule out immaterial, irrelevant, and incompetent matter." *State v. Stanfield*, 292 N.C. 357, 362, 233 S.E.2d 574, 578 (1977). On appeal, the trial court's decision to limit cross-examination is reviewed for abuse of discretion, and "rulings in controlling cross examination will not be disturbed unless it is shown that the verdict was improperly influenced." *Hatcher*, 136 N.C. App. at 526, 524 S.E.2d at 816.

In the instant case, we conclude that the trial court did not abuse its discretion in sustaining the State's objection. There is no indication that Powers was offered leniency or favorable treatment from the State in exchange for her testimony. The reasons for her unwillingness to testify and the possibility of her being held in contempt do not bear on her credibility or bias toward defendant, nor is whether she believed defendant had been tried "enough" relevant to any matter at issue in the trial. Furthermore, defendant has failed to demonstrate how the trial court's ruling regarding Powers' initial hesitation to testify improperly influenced the jury's verdict. Accordingly, we overrule defendant's second argument.

[3] Defendant next argues that the trial court erred by refusing to inquire further into an alleged communication with a juror. We disagree.

The record reflects that during jury deliberations, the trial court asked defense counsel whether there was "anything" he wanted "to put on the record[.]" Thereafter, defense counsel asked the trial court to "note for the record that during the recess the juror number seven was seated and I observed [the assistant district attorney] talking to the clerk." Defense counsel informed the trial court that he "thought" he heard the assistant district attorney "mention something about a statement." After the trial court noted that the juror sat in the jury box "the entire time by himself," defense counsel stated that "then there was conversation over there about three or four feet from them between [the assistant district attorney] and the clerk, and I thought I heard him mention something about a statement." The trial court noted that it was the same distance away from the clerk as the juror and "did not hear it." The trial court then concluded that "[w]ithout some showing that the juror heard it," it would not "make any inquiries." Nevertheless, the trial court did thereafter inquire as to whether defense counsel knew "what they were talking about[.]" Defense counsel responded that he believed the assistant district attorney mentioned "something about a statement." The trial court confirmed that defense counsel did not overhear "mention [of] anything about the facts of the case," and subsequently concluded that "[w]ithout more, it's denied."

When a trial court learns of alleged improper contact with a juror, "the trial court's inquiry into the substance and possible prejudicial impact of the contact is a vital measure for ensuring the impartiality of the juror." *State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910-11, *cert. denied*, 519 U.S. 1013, 136 L. Ed. 2d 409 (1996). The trial court is

given "the responsibility to conduct investigations to this effect, including examination of jurors when warranted[.]" *State v. Barnes*, 345 N.C. 184, 226, 481 S.E.2d 44, 67, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). "An inquiry into possible misconduct is generally required only where there are reports indicating that some prejudicial conduct has taken place." *Id.* However, the trial court retains sound discretion over its scope of the inquiry, and its decision is "given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991). " 'The circumstances [surrounding an allegedly inappropriate communication] must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge.' " *State v. Johnson*, 295 N.C. 227, 234-35, 244 S.E.2d 391, 396 (1978) (quoting *Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279 (1915)).

In the instant case, the alleged inappropriate contact occurred in the courtroom and in the presence of the trial court. The trial court noted that it could not hear what was discussed between the assistant district attorney and the clerk, and it was the same distance away as the juror. Defense counsel was not certain what was discussed, and could only state that he "thought" he overheard the assistant district attorney mention "something" about "a statement," which defense counsel "assume[d]" was related to the case. There is no indication that the alleged inappropriate communication had any influence on the respective juror or the verdict of the entire jury. In light of the foregoing, we conclude that the trial court did not abuse its discretion either in investigating or ruling upon the alleged inappropriate communication. Accordingly, defendant's third argument is overruled.

[4] Defendant next argues that the trial court erred by deferring its ruling on an evidentiary issue. Defendant asserts that the trial court chilled his right to present evidence by refusing to rule on the issue of whether the State could introduce evidence of his other bad acts. We disagree.

The record reflects that prior to trial, the State filed a motion requesting that it be allowed to introduce into evidence other bad acts involving Powers to which defendant had pled guilty on 29 October 2002. The acts occurred within two months following the incident giving rise to the instant case, and they included defendant's

alleged discharge of a weapon into a dwelling occupied by Powers and the alleged theft and subsequent burning of Powers' vehicle. In a pretrial hearing, the trial court determined that defendant had not been provided with a record of the relevant convictions until the date of the hearing. The trial court thereafter ruled that the State was prohibited from using the evidence during the instant case.

During trial, defendant's father, Frank Jacobs, Jr. ("Frank"), testified on defendant's behalf. Frank testified that he had seen defendant and Powers together on 5 April 2002 or 6 April 2002, while defendant was on bonded release for the instant charge. The State objected to Frank's testimony, arguing that defendant was "getting into a dangerous area" and that defendant's examination of Frank was entering "that temporal area" of defendant's relationship with Powers following the incident. The State asserted that, in light of the trial court's pretrial ruling, defendant was relying on "the idea that he w[ould] prevent [the State] from eliciting the real story of [defendant and Powers'] relationship after" the incident, namely, the bad acts defendant had pled guilty to prior to trial. During a *voir dire* hearing on the matter, the following exchange occurred between the trial court and defense counsel:

THE COURT: If you open that door, the D.A.'s going to come back with all of these convictions that he [pled] guilty to. I don't know that I'm going to allow it, but I've kept it out so far. But if you open that door, I don't know, then. I'm not going to tell you, but I think maybe you and your client ought to discuss that strategy. At this point I'm going to rule that immaterial. That confused the jury on the issues under 403.

DEFENSE COUNSEL: Your Honor, but what about the testimony of a witness about she taking her and [defendant]—they were together and they took her to get her license? How—I guess I need a ruling on that.

. . . .

THE COURT: Well, then you're going to argue that they were good and this, that and the other, and I think you're—if you open that door that they were

> getting along after this incident, then I think there is a chance, not saying I'd allow it, but I'm saying there's a chance of rebuttal on behalf of the District Attorney that needs to be weighed before you do anything like that. I'm going to hold it out right now.

After ensuring that defendant had participated in the decision not to offer further evidence from Frank, the trial court reminded defendant that "I don't know what I'd do with that. I'm not telling you I'd let it in; I'm not telling you I'd keep the D.A. from doing it." Defense counsel thereafter made an offer of proof on *voir dire*, during which Frank testified that Powers visited defendant at Frank's residence less than a week after defendant was released on bond. Frank testified that during the visit, defendant and Powers "r[o]de off someplace" for a short period of time. Frank further testified that he saw Powers and defendant together again near the end of April, when Powers and defendant spoke in front of Frank's residence for "15-20 minutes." Following this testimony, the trial court stated that it would overrule the State's objection, would deny defendant's motion *in limine*, but would not rule on whether the State would be allowed to impeach Frank with the prior bad acts. Defendant refused the offer to elicit further testimony from Frank in the jury's presence.

"The decision whether to grant a motion *in limine* rests in the discretion of the trial court." *State v. Holman*, 353 N.C. 174, 184, 540 S.E.2d 18, 25 (2000), *cert. denied*, 534 U.S. 910, 151 L. Ed. 2d 181 (2001). In *Holman*, the defendant pled guilty to the first-degree murder of his estranged wife. During his sentencing proceeding, the defendant attempted to introduce evidence tending to show that, at the time he killed his wife, he was acting under a mental or emotional disturbance spawned by an indication that his wife was rekindling a relationship with her ex-husband. The defendant moved the trial court for a ruling that the introduction of the evidence would not open the door to the State to introduce evidence previously ruled irrelevant. The trial court deferred its ruling on the motion until it heard the defendant's questions and their context, stating that "[w]ell, I think that door—while it might get open—I don't think it automatically flies open . . . . Neither can I say that the door would not be opened, depending on what's asked. So, I mean, that's a matter they'll have to consider, I suppose." *Id.* On appeal, our Supreme Court noted that it had consistently permitted evidence to be introduced in rebuttal of a particular fact on cross-examination, even if the evidence

would be incompetent or irrelevant when initially offered. *Id.* (citing *State v. Bishop*, 346 N.C. 265, 389, 488 S.E.2d 769, 782 (1997)). The Court further noted that "[a]t the point when the trial court deferred its ruling in the present case, it did not have sufficient information to decide upon the motion knowledgeably." *Holman*, 353 N.C. at 184, 540 S.E.2d at 25. Accordingly, the Court held that "the trial court did not abuse its discretion by deferring its ruling on the motion until sufficient information was presented to allow the trial court to make a proper and informed decision." *Id.*

We conclude that the reasoning of *Holman* is applicable to the instant case. Following defendant's offer of proof, the trial court stated that it would deny the State's objection to Frank's testimony but could not ensure that it would not allow the State to cross-examine Frank with the bad acts. Defendant nevertheless refused to offer the testimony to the jury, stating that he was concerned he would "run the risk of 404(b) evidence" if the testimony was offered. The trial court reminded defendant that it had not ruled upon whether such evidence would be allowed during cross-examination and was "not going to cross bridges until I come to them because I don't know what anybody's going to do." In light of *Holman*, we conclude that the trial court did not abuse its discretion in its determination.

Defendant relies on *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988) to support his contention that the trial court's decision not to rule upon the motion *in limine* chilled defendant's right to present evidence. However, we conclude that defendant's reliance on *Lamb* is misplaced. In *Lamb*, the Court held that a defendant's right to testify could be "impermissibly chilled" if, in response to a motion *in limine* to prohibit cross-examination of impermissible evidence of other crimes, the trial court issues a "bald denial" and never provides the defendant with "any assurance that, should she testify, provided she did not open the door, she would be protected from impermissible evidence being used to impeach her." *Id.* at 649, 365 S.E.2d at 609. In the instant case, the trial court did not issue a "bald denial" of defendant's motion. Instead, it merely deferred its ruling on whether the State would be allowed to cross-examine Frank about defendant's bad acts following the incident. Defendant recognized "the risk" at trial, and decided that he did not "want to take that chance[.]" "Defendant's decision not to introduce the evidence in question was a purely tactical one based on the possibility that the questioning might open the door to undesired cross-examination. Defendant's choice of tactics in this instance did not implicate any of his rights." *Holman*,

353 N.C. at 185, 540 S.E.2d at 26. Accordingly, we overrule defendant's fourth argument.

[5] Defendant next argues that the trial court erred by sentencing him in the aggravated range. Defendant asserts that the trial court was prohibited from sentencing him in the aggravated range without first submitting an aggravating factor to the jury for proof beyond a reasonable doubt. We agree.

In *State v. Allen*, 359 N.C. 425, —— S.E.2d —— (Filed 1 July 2005) (No. 485PA04), our Supreme Court recently examined the constitutionality of North Carolina's structured sentencing scheme in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). The Court noted initially that its holding would "apply to cases 'in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final.' " 359 N.C. at 427, —— S.E.2d at —— (quoting *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001)). As defendant's instant appeal was pending on direct review when *Allen* and *Blakely* were decided, we conclude that their reasoning and holdings are applicable to the instant case.

After reviewing the applicable case law, the Court in *Allen* concluded that, when "[a]pplied to North Carolina's structured sentencing scheme, the rule of *Apprendi* and *Blakely* is: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." 359 N.C. at 437, —— S.E.2d at —— (citing *Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 413-14; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455; N.C. Gen. Stat. §§ 15A-1340.13, 15A-1340.14, 15A-1340.16, 15A-1340.17). In the instant case, following defendant's conviction for second-degree kidnapping, the trial court found as an aggravating factor that defendant committed the offense to disrupt and hinder the lawful exercise of a governmental function or the enforcement of laws. The trial court found this factor unilaterally, thereby aggravating defendant's sentence without submitting the issue to the jury for proof beyond a reasonable doubt. In light of our Supreme Court's decision in *Allen*, we conclude that the trial court committed reversible error.[1] Therefore, we remand the case for resentencing.

1. Defendant also asserts that the trial court was prohibited from sentencing him in the aggravated range because the State failed to allege the aggravating factor in

[6] Defendant next argues that the trial court erred by imposing attorney's fees upon him. Defendant asserts that he was not provided with sufficient notice of or an opportunity to be heard concerning the fees of his court-appointed attorney. We agree.

N.C. Gen. Stat. § 7A-455 (2003) provides that the trial court may enter a civil judgment against a convicted indigent defendant for the amount of fees incurred by the defendant's court-appointed attorney. In *State v. Crews*, 284 N.C. 427, 201 S.E.2d 840 (1974), our Supreme Court noted that there was no evidence in the record supporting or negating the defendant's contention that a judgment imposing attorney's fees was entered without notice or opportunity for him to be heard. Accordingly, the Court vacated the judgment "without prejudice to the State's right to apply for a judgment in accordance with G.S. 7A-455 after due notice to defendant and a hearing[.]" *Id.* at 442, 201 S.E.2d at 849-50. Similarly, in *State v. Stafford*, 45 N.C. App. 297, 300, 262 S.E.2d 695, 697 (1980), this Court vacated a civil judgment imposing attorney's fees on the defendant where, notwithstanding a signed affidavit of indigency, there was "no indication [in the record] that [the] defendant received any opportunity to be heard on the matter" of attorney's fees.

In the instant case, following the imposition of defendant's sentence, the trial court inquired as to whether defendant's counsel was appointed. Defense counsel replied that he was court-appointed, but he informed the trial court that he had not yet calculated his hours of work related to defendant's representation. After the trial court instructed defense counsel to calculate his hours and submit them to the court, the following exchange occurred between defendant and the trial court:

> THE COURT: Well, now, let me say to you, Mr. Jacobs, I'm going to give you notice of this now, he's going to submit a bill, an hourly bill. I don't know how much that hourly bill is going to total up, how many hours he's

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defendant's indictment. However, our Supreme Court expressly rejected the same assertion by the defendant in *Allen*. 359 N.C. at 437-38, —— S.E.2d at —— (overruling language in *Lucas* "requiring sentencing factors which might lead to a sentencing enhancement to be alleged in an indictment[,]" finding no error in the State's failure to include aggravating factors in the defendant's indictment, and noting that in *State v. Hunt*, "[T]his Court concluded that 'the Fifth Amendment would not require aggravators, even if they were fundamental equivalents of elements of an offense, to be pled in a state-court indictment.' " (quoting *State v. Hunt*, 357 N.C. 257, 272, 582 S.E.2d 593, 603, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003)). Accordingly, defendant's assertion in the instant case is overruled as well.

got. I know he's got two days, more than two days work here in the courtroom. But whatever, it's going to be at a rate of $65 an hour that the State allots. I'll use the multiple $65 times the hours that he submits that I find to be reasonable, and I'm certain that he will be honest in that regard. Whatever that is I'm going to order—enter an order that the State of North Carolina pay him the amount for representing you. I also will be signing a judgment, possibly, to be used against you that will require you some day in the future, maybe, to have to reimburse the State that amount of money. You've heard all this before, haven't you?

DEFENDANT: Yes, sir.

THE COURT: That's called the notice. You got the notice now. You know what I'm talking about. Now you've got your right to say anything reasonable about my award of attorney's fees. You got any problem with it?

DEFENDANT: No, sir.

THE COURT: Sir?

DEFENDANT: No, sir.

THE COURT: Well, now you've been told, and in open court you've been advised of that.

This exchange clearly demonstrates that defendant was given notice of the trial court's intention to impose attorney's fees upon him. However, while the transcript reveals that attorney's fees were discussed following defendant's conviction, there is no indication in the record that defendant was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed. Therefore, in light of the foregoing, we vacate the trial court's imposition of attorney's fees in this matter. On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that defendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney.

In light of the foregoing conclusions, we hold that defendant received a trial free of prejudicial error, but we vacate the trial

court's imposition of attorney's fees, and we remand the case for resentencing.

No error in part; vacated in part; remanded for resentencing.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. HASEEN HERMAN EVERETTE

No. COA03-858

(Filed 2 August 2005)

1. Firearms and Other Weapons— firing into occupied property—knowledge that closed restaurant was occupied

A defendant charged with firing into an occupied building had reasonable grounds to believe that the building was occupied at the time of the shooting, and the trial court did not err by denying his motion to dismiss. Defendant was shooting at a police officer in the street, the building was a restaurant closed for the night but in a busy area with other businesses remaining open, the owner was still inside, and it is significant that some light was emanating from the restaurant.

2. Sentencing— aggravating factors—allegation not required

It was not necessary to allege aggravating factors for assault and other crimes in the indictment.

3. Sentencing— aggravating factors—*Blakely* error—jury finding required

Defendant's Sixth Amendment right to a jury trial was violated where the court unilaterally found aggravating factors without submitting them to the jury.

4. Sentencing— aggravating factors—right to jury determination—pending cases

A defendant who did not raise the issue at trial did not waive appellate review of whether a jury should have determined his aggravating factors where his case was pending on direct review when the *Blakely* and *Allen* cases were decided.

5. Sentencing— stipulation to aggravating factor—unaware of right to jury determination—not a knowing and intelligent waiver

Defendant's stipulation to an aggravating factor was not knowing and intelligent and did not result in a waiver of his right to have the jury determine aggravating factors, because the cases establishing that right had not yet been decided.

6. Sentencing— aggravating factors—right to jury determination—harmless error rule not applicable

The harmless error rule does not apply to sentencing errors which violate a defendant's Sixth Amendment right to a jury trial under *Blakely*.

7. Sentencing— *Blakely* error—remand for resentencing

Although defendant argued that he could be resentenced after a *Blakely* error at no greater than the mitigated range since a mitigating factor was properly found, the proper procedure when appellate review reveals a *Blakely* error is simply to remand for resentencing.

8. Sentencing— weight of aggravating and mitigating factors—discretion of court.

The trial court did not abuse its discretion by finding that each aggravating factor alone outweighed the mitigating factor.

Judge TIMMONS-GOODSON concurring in part and dissenting in part.

Appeal by defendant from judgments dated 20 February 2003 by Judge Jerry R. Tillett in Superior Court, Pitt County. Heard in the Court of Appeals 21 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Daniel S. Johnson, for the State.

Richard E. Jester, for defendant-appellant.

McGEE, Judge.

Haseen Herman Everette (defendant) was convicted on 20 February 2003 of two counts of assault with a deadly weapon inflicting serious injury, in violation of N.C. Gen. Stat. § 14-32(b); assault with a firearm on a law enforcement officer, in violation of N.C. Gen. Stat. § 14-34.5; and discharging a firearm into occupied property, in

violation of N.C. Gen. Stat. § 14-34.1. The trial court entered judgment and found that defendant had a prior record level II. The trial court sentenced defendant to a minimum term of thirty-six months and a maximum term of fifty-three months in prison for each of the three charges, the terms to run consecutively. Defendant appeals.

The State's evidence tended to show that Officer Charles Savage (Officer Savage) of the Greenville Police Department was off duty, but was working as a security guard at a downtown Greenville store from 10:30 p.m. on 3 November 2001 until 2:30 a.m. on 4 November 2001. He was wearing his police uniform at the time. Officer Savage testified that during his shift, he told defendant to leave the store parking lot on four occasions. On his way home after his shift ended, Officer Savage saw girls fighting in the street near a restaurant. Officer Savage recognized three of the girls as having been with defendant earlier in the evening. Officer Savage broke up the fight, and as he dispersed the crowd, Officer Savage saw defendant standing a couple of feet from him. Officer Savage heard defendant say three times, "F—- the police." Officer Savage testified that he told defendant that defendant needed to " 'shut [his] mouth and disappear or [defendant would be] going to jail.' " Defendant started walking across the street and was escorted by another officer. Shortly thereafter, Officer Savage heard gunshots and saw smoke in the air that appeared to be from the gunshots.

Officer William Allen Holland (Officer Holland) of the Greenville Police Department was on duty around 2:30 a.m. on 4 November 2001. He went to assist Officer Savage in breaking up the fight in front of the restaurant. When Officer Holland arrived at the scene, he saw defendant being held back by an off-duty detention officer. Officer Holland took defendant from the detention officer and told defendant to leave. Officer Holland walked with defendant across the street. A black vehicle pulled up and defendant got into the front seat. The vehicle departed and as Officer Holland walked across the street, he heard gunfire. Officer Holland testified that he saw defendant "hanging out of the top of the sunroof of that vehicle shooting" in the direction of Officer Holland. Officer Holland chased the vehicle on foot. Officer Holland testified that "bullets [were] . . . impacting the wall on the side of Evans Street" and that he could "hear glass or something[.]" Officer Holland eventually lost sight of the vehicle.

Sergeant John Curry (Sergeant Curry) of the Greenville Police Department testified that he also responded to the fight near the

restaurant on 4 November 2001. Sergeant Curry helped disperse the crowd and he saw Officer Holland walking a man across the street. Soon after, Sergeant Curry heard gunshots and saw the same man who had been walking with Officer Holland standing up through the sunroof of a vehicle firing shots.

Officer Keith Knox (Officer Knox) of the Greenville Police Department also responded to the fight. He helped disperse the crowd and saw defendant being escorted across the street by Officer Holland. Officer Knox heard shots being fired and he saw that the shots were coming from an individual who was standing through the sunroof of a dark-colored vehicle. Officer Knox could not identify the person but could tell that the person was wearing a burgundy shirt. Officer Knox also testified that defendant was wearing a burgundy shirt. Officer Knox found seven shell casings at the scene.

Officer J.P. Valevich (Officer Valevich) of the Greenville Police Department testified about the differences between revolvers and semi-automatic weapons. He stated that revolvers generally fire only five or six rounds and that shell casings do not discharge automatically. In contrast, a semi-automatic weapon discharges its spent shell casings each time it is fired.

Officer Michael Ross (Officer Ross) of the Greenville Police Department testified that he went to the scene of the downtown Greenville shootings. He documented the seven shell casings that had been found.

Jonathan Allen Williams (Williams) testified that he was in downtown Greenville at 2:30 a.m. on 4 November 2001. Williams had gone to the restaurant for food and went outside because there were some girls fighting outside the restaurant. Williams testified that he "heard the shots and ran for the front door." Williams was struck by a bullet in the lower midsection of his left thigh. Williams was not able to identify the shooter, but he did testify that he saw a dark-colored vehicle and puffs of smoke.

Howard Lee Howell (Howell) testified that he was also in downtown Greenville at a nightclub on 4 November 2001. Howell went outside and heard what sounded like a firecracker. Howell was immediately hit in the stomach with a bullet but testified that he was unable to tell from where the shot came.

Brad F. Herring (Herring) testified that he was at the Flying Salsa, a health food restaurant he owned, on 4 November 2001 at 2:30 a.m.

Herring had just ended his practice of keeping the Flying Salsa open until 3:00 a.m. He stayed at the Flying Salsa after closing on 4 November 2001 in order to estimate how much business he was losing by closing earlier. Herring testified that the Flying Salsa "lights were down," but were not turned off because the lights could not be completely turned off. Herring testified that he "heard a sound that sounded like a chain hitting a big metal sheet." On cross-examination, Herring testified that he immediately left the Flying Salsa after hearing the noise. The next morning when he opened the Flying Salsa, Herring found "glass everywhere" and "jackets and slugs from two bullets." Herring further testified that two windows at the Flying Salsa had holes in them.

Defendant presented no evidence.

We note that defendant has failed to present an argument in support of assignments of error numbers one, two, and six, and they are deemed abandoned pursuant to N.C.R. App. P. 28(b)6).

I.

[1] Defendant argues in assignments of error numbers three and four that the trial court erred in denying defendant's motion to dismiss and defendant's motion to set aside the verdict on the charge of discharging a firearm into occupied property. Specifically, defendant argues that the State failed to present evidence that defendant had reasonable grounds to believe that the Flying Salsa might have been occupied. For the reasons stated below, we find this argument has no merit.

"When considering a motion to dismiss on the grounds of insufficiency of the State's evidence, the trial court must determine whether there is substantial evidence of each element of the offense and that defendant committed that offense." *State v. Coleman*, 161 N.C. App. 224, 232, 587 S.E.2d 889, 894 (2003). "Substantial evidence is such relevant evidence as is necessary to persuade a rational juror to accept a conclusion." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004). " 'In determining the sufficiency of the evidence we consider it in the light most favorable to the State.' " *State v. Shaw*, 164 N.C. App. 723, 728, 596 S.E.2d 884, 888, *disc. review denied*, 358 N.C. 737, 602 S.E.2d 676 (2004) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)).

The crime of discharging a firearm into occupied property has been defined by the North Carolina Supreme Court in the following manner:

> "[A] person is guilty of [discharging a firearm into occupied property] if he intentionally, without legal justification or excuse, discharges a firearm into *an occupied building* with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons."

State v. Fletcher, 125 N.C. App. 505, 512, 481 S.E.2d 418, 423, *disc. review denied*, 346 N.C. 285, 487 S.E.2d 560, *cert. denied*, 522 U.S. 957, 139 L. Ed. 2d 299 (1997) (quoting *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973)). Although the statute defining this crime, N.C. Gen. Stat. § 14-34.1 (2003), does not contain an express knowledge requirement regarding whether a building is occupied, the North Carolina Supreme Court has interpreted the statute as requiring knowledge. *See State v. James*, 342 N.C. 589, 595-96, 466 S.E.2d 710, 714-15 (1996); *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973).

In the case before our Court, it is undisputed that two bullets struck the front windows of the Flying Salsa. Several police officers identified defendant as the individual who was standing through the sunroof of a vehicle intentionally firing a weapon in the direction of the crowd and the officers. It is also not disputed that Herring was in the Flying Salsa when the bullets struck the windows. Defendant's only argument is that neither he nor anyone else at the scene knew, or had reason to know, that the Flying Salsa was occupied at the time of the shooting.

There was substantial evidence from which a jury could find that defendant had reasonable grounds to believe that the Flying Salsa was occupied. Prior to this incident, the Flying Salsa had stayed open until 3:00 a.m. Further, it was located in downtown Greenville, an area which Officer Knox described as typically "pretty crowded" at 2:30 a.m. on Sunday mornings. The restaurant and a nightclub were both located in downtown Greenville in close proximity to the Flying Salsa. The fact that the Flying Salsa was located in an area where other establishments were open until the early morning hours shows that it was reasonable to believe that the Flying Salsa was also open and occupied at the time of the shooting. Other evidence tending to support the assertion that defendant should have had reason to

believe the Flying Salsa was occupied was the fact that the Flying Salsa was not completely dark when the shooting occurred. We recognize that Herring testified that the lights could not be turned off completely. Nonetheless, we find it significant that some light was emanating from the Flying Salsa when the shooting occurred. In light of this evidence, we hold there was substantial evidence that defendant had reasonable grounds to believe the Flying Salsa was occupied at the time of the shooting. Accordingly, the trial court did not err in denying defendant's motion to dismiss at the close of the evidence.

"The denial of a motion to set aside the verdict on the basis of insufficient evidence is within the discretion of the trial court and is reviewable on appeal under an abuse of discretion standard." *State v. Fleming*, 350 N.C. 109, 146, 512 S.E.2d 720, 745, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). As discussed above, there was substantial evidence regarding each element of discharging a firearm into occupied property. We thus hold that the trial court did not abuse its discretion in refusing to set aside the verdict on this charge. Accordingly, this argument is overruled.

II.

Defendant next assigns error to the trial court's finding of four aggravating factors at defendant's sentencing hearing. The trial court found the following statutory aggravating factors: (1) the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws; (2) defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person; and (3) defendant committed the offense while on pretrial release on another charge. In addition, the trial court found as a non-statutory aggravating factor that "PURSUANT TO STATE V. JONES, [104 N.C. App. 251, 409 S.E.2d 322 (1991)], . . . DEFENDANT SHOT MORE THAN ONE TIME AND IN MORE THAN ONE OCCUPIED PROPERTY. . . . DEFENDANT MADE REPEATED ACTS WHICH WERE MORE THAN REQUIRED FOR THE OFFENSE."

In his original brief to this Court, defendant argued that the State failed to prove the statutory aggravating factors by a preponderance of the evidence. *See* N.C. Gen. Stat. § 15A-1340.16(a) (2003). Defendant also argued that the trial court erred in finding the non-statutory aggravating factor since the same evidence to establish this aggravating factor was also used to establish the statutory aggravating factors. Defendant subsequently filed a Motion for Appropriate

Relief with this Court, seeking either resentencing in the presumptive range or resentencing in compliance with the United States Constitution and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). In the alternative, defendant requested an order that the parties submit supplemental briefs on the *Blakely* issue.

Our Court denied defendant's Motion for Appropriate Relief on 12 August 2004, but allowed defendant's Motion for Supplemental Briefing for the limited purpose of addressing defendant's *Blakely* arguments. In his supplemental brief, defendant argues that the trial court erred by finding the factors in aggravation when defendant did not admit to them and a jury did not determine them. In addition, defendant argues that the aggravating factors must have been alleged in an indictment.

[2] We first address defendant's argument that the aggravating factors must have been alleged in an indictment. Our Supreme Court recently rejected this argument in *State v. Allen*, 359 N.C. 425, 437-38, —— S.E.2d ——, —— (July 1, 2005). In *Allen*, the Court recognized that language in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), on which *Blakely* is based, indicates that " 'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment . . . .' " *Apprendi*, 530 U.S. at 476, 147 L. Ed. 2d at 446 (quoting *Jones v. United States*, 526 U.S. 227, 243 n6, 143 L. Ed. 2d 311, 326 n6 (1999)). However, the Court noted that *Blakely* made no reference to the Fifth Amendment indictment guarantee, and instead relied on the Sixth Amendment right to a jury trial. *Allen*, 359 N.C. at 438, —— S.E.2d at ——. The Court then reiterated its holding in *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003), wherein it stated that " 'to this date, the United States Supreme Court has not applied the Fifth Amendment indictment requirements to the states.' " *Allen*, 359 N.C. at 438, —— S.E.2d at —— (quoting *Hunt*, 357 N.C. at 273, 582 S.E.2d at 604). The Court then concluded that aggravating factors need not be pled in a state court indictment. *Id.* at 438, —— S.E.2d at ——. Therefore, we hold that it was not error for defendant's aggravating factors not to have been alleged in an indictment.

[3] We do, however, find that it was error for the trial court to find the aggravating factors without submitting them to a jury. In *Allen*, our Supreme Court held that

> those portions of N.C. [Gen. Stat.] § 15A-1340.16 which require trial [courts] 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 are unconstitutional.

Id. at 433, —— S.E.2d at ——. In this case, the trial court unilaterally found each of the aggravating factors without submitting them to a jury, thus violating *Blakely* and defendant's Sixth Amendment right to a jury trial. *Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 414-15. We hold that it was error for the trial court to find the aggravating factors in defendant's case.

[4] The State argues that defendant waived his right to appellate review of this issue. The State acknowledges that defendant's case was pending on direct appeal at the time *Blakely* was decided. However, the State argues that based on *Ring v. Arizona*, 536 U.S. 584, 609, 153 L. Ed. 2d 556, 577 (2002) (holding that a jury, and not a sentencing judge, must find the aggravating factor that permits the imposition of the death penalty), *Apprendi*, 530 U.S. at 476, 147 L. Ed. 2d at 446 (holding that a jury must make the factual determination that authorizes an increase in the maximum prison sentence based on a "hate crime" enhancement), and *State v. Lucas*, 353 N.C. 568, 597, 548 S.E.2d 712, 731 (2001) (applying *Apprendi* to N.C. Gen. Stat. § 15A-1340.16A), defendant was on notice of his rights under *Blakely* and should have raised this argument at the trial court.

Our Supreme Court has directed that *Blakely* and *Allen* "apply to cases . . . 'that are now pending on direct review or are not yet final.' " *Allen*, 359 N.C. at 427, —— S.E.2d at —— (quoting *Lucas*, 353 N.C. at 598, 548 S.E.2d at 732). *Blakely* was decided on 24 June 2004, and *Allen* was decided on 1 July 2005. Since defendant's case was still pending on direct review to this Court at the time *Blakely* and *Allen* were decided, defendant is entitled to raise this argument for the first time before this Court.

[5] The State also argues that defendant is not entitled to relief under *Blakely* because defendant stipulated to a fact supporting an aggravating factor. Since the trial court found that each aggravating factor in and of itself outweighed the mitigating factor, the State argues that defendant's stipulation to the single aggravating factor was sufficient to uphold defendant's sentence in the aggravated range.

At trial, the State requested that the trial court find in aggravation that defendant committed the current offense while on pre-trial

release on another charge. The following colloquy occurred at the sentencing hearing:

> [COUNSEL FOR DEFENDANT]: I just want [the trial court] to know that in considering—the other charges, Your Honor, were pending at the time. He was on pre-trial release at the time—
>
> [COUNSEL FOR THE STATE]: So you stipulate that he was out on bond on those five charges?
>
> [COUNSEL FOR DEFENDANT]: Yes. . . .

Defendant argues that the above dialogue is not sufficient to amount to a stipulation under *Blakely*. Defendant argues that in order to effectively stipulate to the existence of an aggravating factor, a trial court must make a specific inquiry of a defendant.

We recognize that *Blakely* and *Allen* state that the maximum sentence a judge may impose is a sentence that is either supported by "*the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at ––, 159 L. Ed. 2d at 413; *see also Allen*, 359 N.C. at 439, –– S.E.2d at ––. We also note that in order to effectively waive the constitutional right to a jury trial, the waiver "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 25 L. Ed. 2d 747, 756 (1970). At the time of defendant's trial, neither *Blakely* nor *Allen* had been decided; hence, defendant was not aware of his right to have a jury determine the existence of the aggravating factors. Defendant's stipulation to the aggravating factor that he was on pre-trial release at the time the offense was committed was not a "knowing [and] intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748, 25 L. Ed. 2d at 756. We hold that defendant did not knowingly and effectively stipulate to an aggravating factor nor waive his right to a jury trial on the issue of the aggravating factors.

[6] The State finally argues that if any error occurred under *Blakely*, the error was harmless. Our Supreme Court held in *Allen* that "the harmless-error rule does not apply to sentencing errors which violate a defendant's Sixth Amendment right to jury trial pursuant to *Blakely*." *Allen*, 359 N.C. at 449, –– S.E.2d at ––. We accordingly do not review the findings of aggravating factors for harmless error.

[7] Since the trial court's determination of the aggravating factors violated defendant's constitutional rights, we remand for resentencing. We note that defendant argues that there is no provision in the North Carolina General Statutes providing for a process by which juries can determine whether aggravating factors exist. Defendant therefore contends that defendant can be resentenced at no greater than the mitigated range, since the trial court correctly found a mitigating factor. However, our Supreme Court stated in *Allen* that the proper procedure when appellate review reveals a *Blakely* error is to simply remand for resentencing. *Allen*, 359 N.C. at 449, —— S.E.2d at ——. Pursuant to the Supreme Court's directive, we remand for resentencing in accordance with this opinion.

III.

[8] Although we remand for resentencing, we elect to address defendant's remaining assignment of error in order to provide guidance to the trial court on remand. Defendant assigns as error the trial court's finding that each aggravating factor was independently sufficient to outweigh the single mitigating factor.

At the sentencing hearing, the trial court stated:

> I find that each one of the aggravating factors in and of itself independently outweighs all mitigating factors. I find specifically that each one of the aggravating factors independently is in and of itself a sufficient basis for the imposition of the sentence or sentences that are hereinafter imposed and outweighs all mitigating and justifies a sentence from within the aggravated range.

"[A] trial [court's] weighing of mitigating and aggravating factors will not be disturbed absent a showing that the [trial court] abused [its] discretion." *State v. Daniels*, 319 N.C. 452, 454, 355 S.E.2d 136, 137 (1987). We have previously held that a trial court has the discretion to "properly determine that each of several aggravating factors is in and of itself sufficient to outweigh all mitigating factors." *State v. Norman*, 151 N.C. App. 100, 104, 564 S.E.2d 630, 633 (2002). In keeping with our precedent, we find that the trial court did not abuse its discretion by finding that each aggravating factor alone outweighed the mitigating factor in this case.

No error; remanded for resentencing.

Judge TYSON concurs.

Judge TIMMONS-GOODSON concurs in part and dissents in part with a separate opinion.

TIMMONS-GOODSON, Judge, concurring in part and dissenting in part.

I agree with the holding of parts II and III of the majority opinion. However, because I disagree with the holding of part I of the majority opinion, I concur in part and dissent in part.

The evidence presented at trial tends to show that defendant fired a weapon at several law enforcement officers working in a "pretty crowded" area of Greenville at a typically crowded time. Two of defendant's gunshots struck the Flying Salsa, a restaurant which had previously been open, but which was closed at the time of the shooting. In part I of its opinion, the majority determines that the State offered substantial evidence to support a conclusion that defendant had reasonable grounds to believe the restaurant was occupied at the time of the shooting. I disagree.

"The terms 'more than a scintilla of evidence' and 'substantial evidence' are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed[,] . . . even though the suspicion so aroused by the evidence is strong." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citations omitted). "If the evidence presented is circumstantial, 'the question for the court is whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances.' " *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)).

In the instant case, even when viewed in the light most favorable to the State, I am unable to conclude that the evidence supports a reasonable inference of defendant's guilt. The majority deems it significant that some light was emanating from the Flying Salsa at the time of the shooting, and that the Flying Salsa was located in an area where other establishments were open until the early morning hours. Although I recognize that there was likely some light emanating from the restaurant, I note that Herring testified that the "lights were down" at the Flying Salsa at the time of the shooting, and that he was

unable to completely shut the lights off. Herring also testified that his restaurant was a "new business," and that it was not open at the time of the shooting. Herring stated that "no one came in" to the restaurant after the shooting, and on cross-examination, he recalled that he was about "mid-way back, probably six feet" when he heard the noise from the bullets striking the front of the restaurant.

After reviewing the record in the instant case, I am unable to conclude that a reasonable inference of defendant's guilt may be drawn from the circumstances. Instead, I conclude that evidence tending to show that the Flying Salsa was dimly lit at a time and in an area that is typically crowded creates only a suspicion or conjecture that defendant had reasonable grounds to believe it was occupied. Therefore, because I am not convinced that the State satisfied its burden of demonstrating that defendant had reasonable grounds to believe that the restaurant was occupied at the time of the shooting, I dissent from that portion of the majority opinion holding that the trial court did not err by denying defendant's motion to dismiss.

STATE OF NORTH CAROLINA v. JERRY LOCKLEAR

No. COA04-1365

(Filed 2 August 2005)

1. Rape— second-degree—child victim—force—sufficiency of evidence

It has been held that the child's knowledge of her father's power may alone induce fear sufficient to overcome her will. Evidence that defendant began molesting his daughter when she was four years old, that he threatened and frighted her, and that she became pregnant twice was sufficient to support denial of defendant's motion to dismiss charges of second-degree rape.

2. Sexual Offenses— incest—sufficiency of evidence—discrepancies in dates

Testimony that defendant was the victim's father, that he started molesting her when she was four years old, and hospital records indicating intercourse were sufficient to deny a motion to dismiss charges of incest. Discrepancies between the dates of the offenses were credibility issues for the jury.

3. Evidence— statements to detective—corroboration

A rape and incest victim's statements to a detective were admissible for corroborative purposes. Inconsistencies were for the jury to consider and weigh.

4. Evidence— statements from mother of incest victim—additional facts—corroboration

Statements from the mother of a rape and incest victim were properly admitted for corroboration. The mother's statements tended to strengthen and add credibility to her trial testimony, although they included additional facts not referred to in her testimony.

5. Evidence— prior crimes or bad acts—rape and incest—testimony from victim's sister

The trial court did not err by allowing testimony from a rape and incest victim's older sister about defendant's abuse of her when she was a child. This illustrated a continuing pattern and an intent to commit incest.

6. Evidence— prior crimes or bad acts—rape and incest—mother's testimony—independent evidence of guilt

There was no plain error in a rape and incest prosecution in allowing the victim's mother to testify about defendant's prior bad acts. Assuming that defendant's argument was sufficient to raise plain error, there was strong, independent evidence of defendant's guilt.

7. Appeal and Error— preservation of issues—jury instructions—necessity for objection at trial

Defendant must present an issue to the trial court and obtain a ruling to preserve that issue for appellate review. The defendant here waived appellate review of jury instructions where he did not object but pointed out a concern, the judge reworded the instructions, and defendant did not then object.

Appeal by defendant from judgments entered 24 June 2004 by Judge Ola M. Lewis in Robeson County Superior Court. Heard in the Court of Appeals 8 June 2005.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Haral E. Carlin, for defendant-appellant.

TYSON, Judge.

Jerry Locklear ("defendant") appeals from judgments entered after a jury found him to be guilty of: (1) two counts of second-degree rape; and (2) five counts of felony incest. We find no error.

I. Background

A. State's Evidence

V.L. is defendant's daughter. The State's evidence tended to show in April 1995, defendant came home drunk while V.L., fifteen years old, was home alone. Defendant began touching V.L. and she attempted to get away from him. When V.L. tried to telephone for help, defendant pulled the telephone wire from the wall. V.L. and defendant wrestled. Defendant eventually overpowered and engaged in sexual intercourse with her.

V.L. drove defendant's car to her mother's job site in tears. Her mother returned home and discovered the telephone wire had been torn from the wall. V.L.'s mother also observed the bedcovers were off the bed and defendant was lying across the bed drunk. The following day V.L.'s mother took her to the hospital. A rape kit indicated sexual activity but failed to detect the presence of semen. V.L. reported the rape to the Robeson County Department of Social Services ("DSS"), but recanted a short time later because defendant threatened to hurt her and her mother.

A second incident also occurred in 1995 when V.L. wrecked the car she was driving. V.L. was accompanied by defendant, her brother, and a cousin. V.L. was driving because defendant was too drunk to drive. V.L. and defendant hid from the police in the woods while her brother and cousin fled. While hiding, defendant and V.L. engaged in sexual intercourse. V.L. testified she believed this event occurred in Spring 1995 because it was warm outside.

V.L. testified that sexual intercourse with defendant became "an ongoing thing," occurring "about four and five times a month," although she had difficulty remembering specific dates. In 1997, V.L., then seventeen years old, engaged in sexual intercourse with defendant on the living room couch. V.L. subsequently became pregnant with her son, J.L., born 26 June 1998. V.L. identified defendant as the father of her son.

Four months after the birth of her son, V.L., then eighteen years old, went out on a date. Defendant insisted on "checking her"

when she returned home to see if she had engaged in sexual intercourse. Defendant subsequently engaged in sexual intercourse with V.L. who became pregnant and gave birth to K.L., a daughter, on 12 August 1999.

V.L. told hospital employees and DSS of defendant's actions and the assaults that had taken place over several years. The hospital and DSS helped V.L. enter a shelter. In November 2002, V.L. spoke to Detective Vincent Sinclair ("Detective Sinclair") of the Robeson County Sheriff's Office Juvenile Task Force. DSS had taken V.L.'s children from her home until she filed charges against defendant, who continued to visit her. V.L. recalled telling Detective Sinclair about the incident where she wrecked the car but could not remember telling him the dates of the other incidents. V.L. stated defendant started inappropriately touching her when she was four years old.

M.L., V.L.'s older sister, testified over defendant's objection that defendant had touched her private parts with his hands before she was old enough to start school. M.L. could not recall exactly what happened to her, but remembered the events. M.L. could not recall specific times, dates, places, or other precise information. In addition to M.L.'s testimony, V.L.'s mother testified defendant had beaten and shot at her, put knives to her throat, pulled her hair out by the roots, and had raped her.

Detective Sinclair interviewed V.L., her mother, and M.L. During trial, their statements were read to the jury over defendant's objection. Detective Sinclair also had LabCorp perform a DNA analysis to determine the paternity of V.L.'s children. Anthony Winston testified he analyzed the specimens and in his opinion, the tests showed a 99.99% probability defendant had fathered both of V.L.'s children.

After his arrest, defendant gave a statement to Detective Sinclair during which, at certain points, he admitted to having sex with V.L. after her children were born. At other times during his statement, defendant denied remembering placing his penis inside V.L.

B. Defendant's Evidence

Defendant testified on his own behalf, denied any wrongdoing with his daughter, M.L., and denied any type of sex with V.L. Defendant denied some of the statements he made to Detective Sinclair. When asked if he ever engaged in sex in any way with V.L. at any time, defendant responded, "not that I can remember."

The jury found defendant guilty of two counts of second-degree rape and five counts of felony incest. Defense counsel did not object to the sentencing worksheet finding defendant a record level II for purposes of sentencing. The trial court sentenced defendant to seven consecutive sentences totaling a minimum of 275 months and a maximum of 348 months. Defendant appeals.

II. Issues

Defendant argues the trial court erred in: (1) not dismissing the charges of second-degree rape for insufficient evidence; (2) not dismissing the charges of incest for insufficient evidence; (3) allowing Detective Sinclair to read statements of V.L. and V.L.'s mother into evidence for the purposes of corroboration; (4) allowing M.L.'s testimony on defendant's prior bad acts; (5) allowing V.L.'s mother to testify to remote past acts; (6) giving a disjunctive jury instruction concerning second-degree rape and incest; (7) not requiring the State to meet its burden of proof of defendant's existing criminal conviction record in sentencing defendant.

III. Abandonment of Assignments of Error

Defendant voluntarily abandoned assignments of error numbers seven, nine, eleven, twelve, and thirteen by failing to argue them in his brief. N.C.R. App. P. 10 (2004). We decline to review these abandoned assignments of error and dismiss.

IV. Motion to Dismiss

Defendant argues the trial court erred in not dismissing the charges of second-degree rape and felony incest due to insufficient evidence. We disagree.

In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to and give the State every reasonable inference to be drawn from the facts and evidence presented. *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citations omitted). We uphold a trial court's ruling on a motion to dismiss if the State presents 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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted)). "Substantial evidence is . . . relevant evidence which a

reasonable mind could accept as adequate to support a conclusion." *Lee*, 348 N.C. at 488, 501 S.E.2d at 343 (citing *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). "[T]he evidence need only give rise to a reasonable inference of guilt for the case to be properly submitted to the jury." *State v. Barnett*, 141 N.C. App. 378, 383, 540 S.E.2d 423, 427 (2000), *disc. rev. denied and appeal dismissed*, 353 N.C. 527, 549 S.E.2d 552, *aff'd per curiam*, 354 N.C. 350, 554 S.E.2d 644 (2001).

A. Second-Degree Rape

[1] Defendant argues insufficient evidence was tendered to support the charges of second-degree rape.

To establish the crime of second-degree rape, the State must prove the defendant "engage[d] in vaginal intercourse with another person [b]y force and against the will of the other person." N.C. Gen. Stat. § 14-27.3 (2003); *see also State v. Hosey*, 79 N.C. App. 196, 199-200, 339 S.E.2d 414, 416, *cert. granted*, 316 N.C. 382, 342 S.E.2d 902, *modified by* 318 N.C. 330, 348 S.E.2d 805 (1986). We have held that

> [c]onstructive force in the form of fear, fright, or coercion [is sufficient] to establish the element of force in second-degree rape and may be demonstrated by proof of a defendant's acts which, in the totality of the circumstances, create the reasonable inference that the purpose of such acts was to compel the victim's submission to sexual intercourse.

State v. Parks, 96 N.C. App. 589, 593, 386 S.E.2d 748, 751 (1989) (citing *State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987)). Our Supreme Court held "illicit advances at an age when [a child] could not yet fully comprehend the implications of defendant's conduct[] . . . ." has "conditioned [the child] to succumb" to the illicit advances are sufficient to establish the element of force. *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681. The Court further held when the sexual activity between a parent and child "creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose[] . . . the child's knowledge of [her] father's power may alone induce fear sufficient to overcome [her] will to resist . . . ." *Id.* at 48, 352 S.E.2d at 681-82.

Here, V.L. alleged defendant engaged in vaginal intercourse with her on 26 September 1997 and 11 November 1998, both of which resulted in V.L. becoming pregnant. Forensic DNA testing showed a high probability that defendant is the father of V.L.'s children. V.L.

stated defendant started molesting her when she was four years old. V.L. testified she was "scared" and stated, "[defendant] threatened me before if I tell anybody he would beat me and try to kill me."

Taken in the light most favorable to the State, substantial evidence supports each element of the charges against defendant and tends to show defendant committed the offenses. The trial court did not err in denying defendant's motion to dismiss. This portion of defendant's assignment of error is overruled.

B. Incest

[2] Defendant asserts the trial court erred in not dismissing the charges of incest due to insufficient evidence. Defendant argues the indictment dates and the dates of the alleged intercourse V.L. testified to are not the same.

In order to establish the crime of incest, the State must prove the defendant engaged in carnal intercourse with his parent or child or stepchild or legally adopted child. N.C. Gen. Stat. § 14-178 (2003). In *State v. Cameron*, our Court addressed the issue of inconsistent dates on an indictment for incest and those testified to at trial. 83 N.C. App. 69, 72, 349 S.E.2d 327, 329-30 (1986). The facts in *Cameron* showed discrepancies between the alleged occurrence date and the date the child testified that she was raped by her father. We held, "failure to state accurately the date or time an offense is alleged to have occurred does not invalidate a bill of indictment nor does it justify reversal of a conviction obtained thereon." *Id.* at 72, 349 S.E.2d at 329 (citing N.C. Gen. Stat. § 15-155). We noted this rule may not apply in cases where the defendant claimed an alibi defense. *Id.* at 72, 349 S.E.2d at 330 (citations omitted).

Here, V.L., her mother, and M.L. all testified defendant was V.L.'s father. V.L. stated defendant started molesting her when she was four years old. Hospital records were introduced into evidence showing the presence of bruising and other indications of intercourse during April 1995, one of the dates defendant was charged with incest.

Defendant further argues the dates contained in the indictment and those testified to at trial were inconsistent. Defendant did not argue an alibi for the alleged time of the encounters. Defendant's only asserted defense was that V.L. was the aggressor in all sexual activity between them. Defendant was placed on notice by the indictments of multiple allegations of sexual offense with his daughter and suffered

no prejudice as a result of her imperfect memory of specific dates. *Id.* at 73, 349 S.E.2d at 330. Any discrepancies were credibility issues for the jury to weigh in determining defendant's guilt.

Taken in the light most favorable to the State, substantial evidence supports the elements of felony incest and tends to show defendant committed the offenses. The trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

V. Hearsay

Defendant argues the trial court erred by allowing Detective Sinclair to read into evidence statements of V.L. and her mother for the purposes of corroboration. We disagree.

> Corroboration is the process of persuading the trier of the facts that a witness is credible. We have defined "corroborate" as "to strengthen; to add weight or credibility to a thing by *additional and confirming* acts or evidence." Prior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached. However, the prior statement must in fact corroborate the witness' testimony.
>
> In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. *Our prior statements are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence.* However, the witness's prior statements as to facts not referred to in his trial testimony *and not tending to add weight or credibility* to it are not admissible as corroborative evidence. Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.

State v. Ramey, 318 N.C. 457, 468-69, 349 S.E.2d 566, 573-74 (1986) (internal citations and quotations omitted) (emphasis supplied).

A. V.L.'s Statements

[3] Defendant asserts V.L.'s statements to Detective Sinclair were inconsistent with her testimony at trial and should not have been allowed into evidence for corroboration. Defendant argues two spe-

cific instances: (1) V.L. told Detective Sinclair defendant had molested her since she was "seven" and later testified defendant's molestation began when she was "four;" and (2) V.L. inverted the order in her testimony of an alleged sexual encounter and a fight between her mother, defendant, and herself.

V.L.'s testimony clearly indicated a long term and continuing sexual abuse by defendant. Although V.L.'s statements included additional facts not referred to in her testimony, V.L.'s prior oral and written statements to Detective Sinclair tended to strengthen and add credibility to her trial testimony. Any inconsistencies were for the jury to consider and weigh. These statements were admissible as corroborative evidence. *See State v. Higginbottom*, 312 N.C. 760, 769, 324 S.E.2d 834, 840 (1985), *superseded by statute on other grounds by State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998); *see also State v. Burns*, 307 N.C. 224, 231-32, 297 S.E.2d 384, 388 (1982).

"The jury could not be allowed to consider this evidence for any other purpose, however, and whether it in fact corroborated the victim's testimony was, of course, a jury question." *Ramey*, 318 N.C. at 470, 349 S.E.2d at 574. We find no error in the admission of Detective Sinclair's testimony regarding V.L.'s prior statements for corroborative purposes. This portion of defendant's assignment of error is overruled.

B. V.L.'s Mother's Statements

[4] Defendant argues V.L.'s mother's statements made to Detective Sinclair contained different information from her testimony at trial. Defendant asserts these statements should not be allowed into evidence for corroboration purposes.

The only examples defendant asserts in his brief in support of not allowing V.L.'s mother's statement are: (1) the reversal of events by V.L.; (2) whether defendant was drunk and passed out when V.L. and her mother returned home to get some clothes; and (3) whether defendant woke up and a fight ensued when V.L. and her mother were trying to get some clothes.

V.L.'s and her mother's prior oral and written statements to Detective Sinclair tended to strengthen and add credibility to her trial testimony although they included additional facts not referred to in her testimony. They were admissible as corroborative evidence. *See Higginbottom*, 312 N.C. at 769, 324 S.E.2d at 840; *see also Burns*, 307 N.C. at 231-32, 297 S.E.2d at 388.

"The jury could not be allowed to consider this evidence for any other purpose, however, and whether it in fact corroborated the victim's testimony was, of course, a jury question." *Ramey*, 318 N.C. at 470, 349 S.E.2d at 574. We find no error in the admission of Detective Sinclair's testimony of V.L.'s mother's prior statements for corroborative purposes. This assignment of error is overruled.

VI. Prior Bad Acts

[5] Defendant argues the trial court erred by allowing the testimony of M.L. regarding defendant's prior bad acts.

Our Supreme Court held in *State v. Shamsid-Deen* that testimony of an older sister about the father's sexual abuse of herself or siblings before they left home was permissible. 324 N.C. 437, 447-48, 379 S.E.2d 842, 848-49 (1989). The Court explained the law of evidence of other crimes and acts before and since its codification of Rule 404(b) of the North Carolina Rules of Evidence. *Id.* at 444, 379 S.E.2d at 847. 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) (2003). Evidence of prior acts of sexual misconduct may be admissible to show the defendant's intent, motive, or plan to commit the crime charged. *Shamsid-Deen*, 324 N.C. at 446, 379 S.E.2d at 848 (citing *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)) (facts tended to show a pattern of sexual abuse by the defendant just before his daughters reached puberty, which continued into their early adulthood). Generally, if another victim testifies to the defendant's past acts and a substantial lapse in time has occurred, the testimony may be considered too remote in time and will not fall within the Rule 404(b) exception to be admitted. *State v. Jones*, 322 N.C. 585, 589-91, 369 S.E.2d 822, 824-25 (1988), *disc. rev. denied and appeal dismissed*, 328 N.C. 95, 402 S.E.2d 423 (1991). However, in *Shamsid-Deen*, the Court stated:

> the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of

> time serves to prove, rather than disprove, the existence of a plan. We thus hold that the prior acts were not too remote to be considered as evidence of defendant's common scheme to abuse the victim sexually.

324 N.C. at 445, 379 S.E.2d at 847 (citing *State v. Browder*, 252 N.C. 35, 38, 112 S.E.2d 728, 730-31 (1960)).

Here, V.L. stated defendant began fondling her at age four and such acts continued throughout her adolescence. V.L. described being beaten and threatened with beatings if she did not comply or keep quiet. M.L. testified defendant began touching her in her private parts before she started school. M.L. testified defendant grabbed her and beat her during these sexual assaults. M.L. testified she went to the hospital to be examined for sexual abuse around the age of eight or nine.

M.L.'s testimony concerning defendant's actions towards her when she was a child illustrate a continuing pattern of sexual abuse and an intent to commit incest with M.L. during the same approximate age defendant began to molest V.L. *Shamsid-Deen*, 342 N.C. at 446-47, 379 S.E.2d at 848. This assignment of error is overruled.

VII. Past Acts

[6] Defendant argues the trial court committed plain error by allowing V.L.'s mother to testify regarding defendant's past acts which were irrelevant, prejudicial, and incompetent.

"Where, as here, a criminal defendant fails to object to the admission of certain evidence, the plain error analysis, rather than the *ex mero motu* or grossly improper analysis, is the applicable standard of review." *State v. Ridgeway*, 137 N.C. App. 144, 147, 526 S.E.2d 682, 685 (2000) (citing *State v. Gary*, 348 N.C. 510, 501 S.E.2d 57 (1998)). If "we are not persuaded that the jury probably would have reached a different result had the alleged error not occurred, we will not award defendant a new trial." *Id.* (citing *State v. Bronson*, 333 N.C. 67, 75, 423 S.E.2d 772, 777 (1992)).

In *State v. Odom*, our Supreme Court adopted the plain error rule exception to Rule 10 of the North Carolina Rules of Appellate Procedure. 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (applying to assignments of error regarding jury instructions). A defendant seeking plain error review must "specifically and distinctly" argue the alleged error committed by the trial court amounted to plain error.

State v. Nobles, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999), *vacated and remanded*, 357 N.C. 433, 584 S.E.2d 765 (2003).

Here, defendant fails to argue plain error "specifically and distinctly" in his brief. *Id.* Defendant fails to cite any rules or authority to permit this Court to ascertain the grounds upon which defendant bases his plain error argument. Defendant broadly mentions Rules 401, 402, 403, and 404(b) of the North Carolina Rules of Evidence. Defendant does not apply these rules to any facts or evidence in his analysis to allow this Court to review his argument.

Presuming, without deciding, defendant's broad listing and quoting of evidence rules would be specific enough for this Court to review defendant's argument, we find there would be no probable impact on the jury's decision in light of other overwhelming evidence of defendant's guilt. *Ridgeway*, 137 N.C. App. at 147, 526 S.E.2d at 685.

The State tendered strong evidence of defendant's guilt independent of V.L.'s mother's testimony concerning when she left defendant and why she did not take her children with her. Defendant was the father of two children born of V.L. and admitted having sex with V.L. Furthermore, V.L. and M.L. both testified about defendant's violent nature and illicit sexual advances. This evidence tends to show and prove a longstanding and recurrent pattern of abuse of V.L. by defendant. We find no probability the jury would have reached a different conclusion had V.L.'s mother's testimony been excluded. *Id.* This assignment of error is dismissed.

VIII. Jury Instructions

[7] Defendant argues the trial court erred in: (1) giving a disjunctive jury instructions concerning second-degree rape and felony incest; and (2) not requiring the State to meet its burden of proof of defendant's existing criminal conviction record used during sentencing. We disagree.

Defendant failed to object to the jury instructions but pointed out a concern to the trial court. The trial judge reworded the instructions and defendant failed to object. Defendant failed to object at all during the sentencing phase.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires a defendant present an issue to the trial court and obtain a ruling in order to preserve that issue for appellate review. N.C.R.

App. P. 10(b)(1) (2004). Defendant failed to object to the jury instructions and the sentencing phase during trial and has waived appellate review. *State v. Scott*, 343 N.C. 313, 332, 471 S.E.2d 605, 616-17 (1996) (citing *State v. Moseley*, 338 N.C. 1, 36, 449 S.E.2d 412, 433-34 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995); N.C.R. App. P. 10(c)(4)). These assignments of error are dismissed.

IX. Conclusion

Taking the evidence in the light most favorable to the State and allowing it all reasonable inferences, substantial evidence tends to show all essential elements of second-degree rape and felony incest and defendant was the perpetrator of each offense charged. The trial court did not err in denying defendant's motion to dismiss these charges for insufficient evidence.

The trial court did not err in allowing Detective Sinclair to read into evidence statements of V.L. and her mother for corroboration or allowing the testimony of M.L. to show defendant's prior bad acts. M.L.'s testimony tends to show defendant's longstanding and consistent pattern of sexual abuse of his daughters.

Defendant waived appellate review of his remaining assignments of error after failing to either object or specifically allege plain error on appeal.

Defendant received a fair trial free from any errors he assigned and argued.

No error.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. TONEY CAUDLE

No. COA03-1576

(Filed 2 August 2005)

1. Assault— knife—deadly weapon per se

There was no plain error in an assault prosecution where the court instructed the jury that the kitchen knife used by defendant was a deadly weapon per se. The definition of a deadly weapon

clearly encompasses a wide variety of knives, and the actual effects produced by the weapon may be considered in determining whether it is deadly.

2. Assault— knife—length of blade—inaccurate statement of blade length

There was no plain error in an assault prosecution where the court described the defendant's knife as having a six-inch blade even though there was no evidence to that effect (there was testimony that the blade was about four inches long). However, the deadly nature of the knife was not in issue and the mischaracterization of the blade length was not so fundamental an error as to amount to a miscarriage of justice or change the jury verdict.

3. Assault— description of wounds as serious injury—not plain error

The trial court's descriptions of an assault victim's stab wounds as a serious injury did not amount to plain error where the victim suffered injuries to her cheek, lip, head, neck, and hands, required thirty to forty stitches, and was hospitalized for two days.

4. Assault— with a deadly weapon inflicting serious injury—refusal to charge on lesser offense—evidence of deadly weapon

There was no plain error in the trial court's refusal to instruct on the lesser included offense of assault inflicting serious injury in a prosecution for assault with a deadly weapon inflicting serious injury.

5. Sentencing— aggravating factors—*Blakely* error—jury finding required

Any fact that increases the penalty beyond the presumptive range (other than the fact of a prior conviction) must be submitted to the jury and proven beyond a reasonable doubt. An assault defendant received a new sentencing hearing because the court itself found the aggravating factor that defendant had committed the offense while on pretrial release.

6. Sentencing— aggravating factors—allegation not required

Aggravating factors need not be alleged in the indictment.

Appeal by defendant from judgment entered 10 July 2003 by Judge W. Russell Duke, Jr., in Halifax County Superior Court. Heard in the Court of Appeals 11 October 2004.[1]

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

Kevin P. Bradley for defendant-appellant.

TIMMONS-GOODSON, Judge.

Toney Caudle ("defendant") appeals his conviction for assault with a deadly weapon inflicting serious injury. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error, but we remand the case for resentencing.

The State's evidence presented at trial tends to show the following: Defendant and Martha Hendricks ("Hendricks") were "[c]lose friends" who had become "intimate" in December 2002 or January 2003. On the night of 9 February 2003, defendant and Hendricks were at a residence occupied by defendant's sister, Mary Jane Caudle ("Mary Jane"). Defendant's cousin, Ronnie Caudle ("Ronnie"), and Mary Jane's boyfriend, Boot Hunter ("Boot"), were also at the residence. According to Hendricks, everyone but defendant was drinking alcohol, and Mary Jane, Ronnie, and Boot were "probably" using crack cocaine. There was no electricity or telephone service at the residence, and the occupants had lit candles in the living room for light.

At some point during the evening, defendant and Hendricks went to the bedroom. According to Hendricks, while she and defendant were in the bedroom, defendant "flipped" and accused Hendricks of "watching" Ronnie. Hendricks denied "watching" Ronnie, but defendant nevertheless "started grabbing and slapping and stabbing [Hendricks] at the same time." Defendant slapped Hendricks one time and stabbed her eleven times with a short-handled kitchen knife. Hendricks recognized the knife as a steel-bladed knife that defendant used to "cut[] his rocks."

Shortly after the altercation began, Hendricks screamed for help. However, "[b]ecause it didn't look like [defendant] was going to stop stabbing" her, Hendricks "had to pretend [that she] was dead."

1. By order of this Court, the filing of this opinion was delayed pending our Supreme Court's decision in *State v. Allen*, 359 N.C. 425, —— S.E.2d —— (Filed 1 July 2005) (No. 485PA04).

Hendricks "started getting weak" from losing "a lot of blood[,]" so she "just fell to the floor and held [her] breath like [she] was dead." Shortly thereafter, defendant helped put Hendricks in a vehicle and drove her to Halifax Regional Medical Center ("Halifax Regional"). Hendricks lost consciousness on the way to Halifax Regional, but she remembered defendant telling her that "he would see [her] dead before he'd see [her] with anybody else."

During the incident, Mary Jane heard Hendricks "call twice" from the bedroom. When she entered the room, Mary Jane "saw [defendant] standing over top of [Hendricks]." Mary Jane then "saw [defendant's] hand go up like that [indicating], and then it came back down." Mary Jane "saw the blood" but "didn't see no weapon or no nothing." Although there were no candles in the bedroom, "it was light enough" for Mary Jane to see clearly, and she noted "a bottle [that] had been broken on the bed" next to Hendricks.

Hendricks was admitted to Halifax Regional via the emergency room. During her emergency room treatment, Hendricks told police officers that she was assaulted by defendant. Dr. Mark A. Bernat ("Dr. Bernat") treated Hendricks and noted that she had cuts on her cheek, lip, head, neck, shoulder, and hands. Hendricks' wounds required approximately thirty to forty stitches. Dr. Bernat noted on his medical report that Hendricks' heart rate was fast and her blood count was low. After he inquired about her low blood count, Hendricks told Dr. Bernat that she was anemic.

On 31 March 2003, defendant was indicted for assault with a deadly weapon inflicting serious injury. Following presentation of the evidence, the trial court denied defendant's motion to submit to the jury the offense of simple assault. On 10 July 2003, the jury returned a verdict of guilty on the assault with a deadly weapon inflicting serious injury charge. The trial court subsequently found as an aggravating factor that defendant committed the offense while on pretrial release of another charge. The trial court also found defendant to be a prior record level IV offender. Accordingly, the trial court sentenced defendant to fifty-eight to seventy-nine months imprisonment, a term within the aggravated range of N.C. Gen. Stat. § 15A-1340.17. Defendant appeals.

We note initially that defendant's brief contains arguments supporting only five of the seven original assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the two omitted assignments

of error are deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by defendant for appeal.

The issues on appeal are: (I) whether the trial court erred in instructing the jury; (II) whether the trial court erred by refusing to submit the lesser-included offense of assault inflicting serious injury to the jury; and (III) whether the trial court erred by sentencing defendant in the aggravated range.

[1] Defendant first argues that the trial court erred in instructing the jury. Defendant asserts that the trial court committed plain error by instructing the jury that the knife allegedly used to commit the assault was a deadly weapon. We disagree.

Our courts apply the plain error rule cautiously and only in exceptional cases. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "A prerequisite to [an appellate court's] engaging in a 'plain error' analysis is the determination that the instruction complained of 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). "To reach the level of 'plain error' . . . the error in the trial court's jury instructions must be '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. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (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)).

In the instant case, the trial court gave the following pertinent jury instruction:

> The defendant has been charged with assault with a deadly weapon inflicting serious injury. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> . . . .
>
> Second, that the defendant used a deadly weapon. A deadly weapon is a weapon that is likely to cause death or serious bodily injury. A knife with a six-inch blade is a deadly weapon.

Defendant contends that by instructing the jury that "[a] knife with a six-inch blade is a deadly weapon[,]" the trial court "effectively took the deadly weapon element of assault with a deadly weapon

inflicting serious injury away from the jury." However, in *Torain*, our Supreme Court recognized that

> It has long been the law of this state that "[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . *is one of law, and the Court must take the responsibility of so declaring.*"

316 N.C. at 119, 340 S.E.2d at 470 (quoting *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924)) (alterations and emphasis in original). After reviewing the record in the instant case, we conclude that the evidence presented at trial leads to only one conclusion: that the knife used by defendant was a deadly weapon.

A deadly weapon "is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981). "The definition of a deadly weapon clearly encompasses a wide variety of knives. For instance, a hunting knife, a kitchen knife and a steak knife have been denominated deadly weapons *per se*." *Id.* (citing *State v. Brady*, 299 N.C. 547, 264 S.E.2d 66 (1980); *State v. Lednum*, 51 N.C. App. 387, 276 S.E.2d 920 (1981); *State v. Parker*, 7 N.C. App. 191, 171 S.E.2d 665 (1970)). "[T]he evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death." *Sturdivant*, 304 N.C. at 301, 283 S.E.2d at 726. "Only 'where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury.' " *Torain*, 316 N.C. at 120, 340 S.E.2d at 470 (quoting *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373 (1978)). "The actual effects produced by the weapon may [] be considered in determining whether it is deadly." *State v. Roper*, 39 N.C. App. 256, 258, 249 S.E.2d 870, 871 (1978).

In the instant case, the evidence tends to show that Hendricks was stabbed eleven times and her wounds required approximately thirty to forty stitches. Dr. Bernat testified that when Hendricks was admitted to the hospital, he "noticed [Hendricks] had blood on her head and arms" and that "[t]here was some concern over how much blood she might have lost[.]" Dr. Bernat testified that Hendricks had suffered multiple wounds to her face, shoulder, head, neck, and

hands. Mary Jane testified that she saw defendant's hand go up and down while defendant was "standing up over [Hendricks]," and although she admitted to seeing a broken bottle on the bed beside Hendricks, she maintained that Hendricks had been "stabbed" because of the blood she saw. Hendricks testified that she was hospitalized for two days because of her low blood pressure, and she further testified that she recognized the knife defendant used to stab her as the one he used to "cut[] his rocks." We conclude that this evidence amply supports the trial court's instruction that the knife was a deadly weapon *per se*. Therefore, we hold that the trial court did not err in its instruction regarding the deadly character of the knife.

[2] Defendant also contends that the trial court committed plain error in its jury instructions by stating that the knife was a "knife with a six-inch blade" and that "[s]tab wounds around the head, neck, and the hand requiring 32 stitches would be a serious injury." Defendant asserts that the trial court's statements constitute an impermissible expression of opinion. We disagree.

N.C. Gen. Stat. § 15A-1222 (2003) provides that the trial court "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." Similarly, N.C. Gen. Stat. § 15A-1232 (2003) provides that in instructing the jury, the trial court "shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence."

In the instant case, the trial court stated that the knife used by defendant was six inches long. Defendant asserts that this was plain error "because there was no evidence of use of a knife with a six-inch blade[,]" and therefore the trial court's statement "amounted to an expression of opinion that the victim's demonstration was of a knife with a six-inch blade." With respect to the knife's length, the transcript reveals that on cross-examination, Hendricks responded in the affirmative when defendant's counsel asked if the knife blade was about "four inches." The record does not contain any testimony or evidence tending to show that the knife had a six-inch blade. However, as discussed above, the deadly character of the knife was not an issue of fact to be determined by the jury. The trial court did not err by instructing the jury that the knife was a deadly weapon and leaving to the jury the determination of whether the deadly weapon was used by defendant. Therefore, we are not convinced that the trial court's mischaracterization of the knife's length was an error "so fun-

damental 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." *Bagley*, 321 N.C. at 213, 362 S.E.2d at 251.

[3] Similarly, after reviewing the evidence introduced at trial regarding Hendricks' stab wounds, we are unconvinced that the trial court's statement regarding the nature of the wounds amounted to plain error. Our Supreme Court "has not defined 'serious injury' for purposes of assault prosecutions, other than stating that '[t]he injury must be serious but it must fall short of causing death' and that '[f]urther definition seems neither wise nor desirable.' " *State v. Ramseur*, 338 N.C. 502, 507, 450 S.E.2d 467, 471 (1994) (quoting *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962)) (alterations in original). However, in *State v. Hedgepeth*, 330 N.C. 38, 54, 409 S.E.2d 309, 318-19 (1991), our Supreme Court adopted this Court's standard regarding "serious injury" in jury instructions, holding that "[i]n the absence of conflicting evidence, a trial judge may instruct the jury that injuries to a victim are serious as a matter of law if reasonable minds could not differ as to their serious nature."

In the instant case, defendant offered no evidence at trial to contradict the serious nature of Hendricks' injuries. Defendant's assertion in his brief that Dr. Bernat's testimony would support a finding that the wounds penetrated "only slightly below the skin and not so deeply as to cause substantial bleeding or any other significant injury" is without merit. Dr. Bernat testified at trial that six of Hendricks' wounds reached the subcutaneous tissue under the skin, "where if you cut yourself, you see a little fat and things underneath." Dr. Bernat testified further that when he "looked in the wound" at the base of Hendricks' thumb, he "could see the tendon close to her thumb that helps you bend your thumb and straighten it out." Hendricks suffered injuries to her cheek, lip, head, neck, and hands, and as a result of her injuries, Hendricks required approximately thirty to forty stitches and was hospitalized for two days. We conclude that this evidence is sufficient to support a determination that reasonable minds could not differ as to the serious nature of Hendricks' injuries, and therefore, the trial court's instructions did not contain an impermissible expression of opinion. Accordingly, defendant's first argument is overruled.

[4] Defendant next argues that the trial court committed plain error by refusing to submit to the jury the lesser-included offense of assault inflicting serious injury. Defendant contends that sufficient evidence was presented to support the submission of the offense. We disagree.

"A defendant 'is entitled to an instruction on lesser included offense[s] if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *State v. Uvalle*, 151 N.C. App. 446, 452-53, 565 S.E.2d 727, 731 (2002) (quoting *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000)) (alteration in original), *disc. review denied*, 356 N.C. 692, 579 S.E.2d 95 (2003). However, a lesser-included offense should not be submitted to the jury where "the evidence is sufficient to support a finding of all the elements of the greater offense, and there is no evidence to support a finding of the lesser offense." *State v. Nelson*, 341 N.C. 695, 697, 462 S.E.2d 225, 226 (1995). Thus, "[w]hether [a] defendant is entitled to an instruction on an offense which is a lesser included offense depends upon the evidence presented at trial." *Uvalle*, 151 N.C. App. at 454, 565 S.E.2d at 732.

Defendant asserts that the evidence in the instant case required an instruction on assault inflicting serious injury because the evidence presented "reasonable doubts about whether a knife was used at all." In *State v. Bell*, 87 N.C. App. 626, 635, 362 S.E.2d 288, 293 (1987), this Court held that it was plain error for the trial court not to submit the lesser-included offense of assault inflicting serious injury where there was "conflicting evidence" regarding whether the defendant used a firearm to assault the victim. We recognized that "[b]ased on the [evidence], the jury could have disbelieved that a weapon was involved at all, or could have believed that any shot fired was not the result of [the] defendant's use of a weapon[,]" and we concluded that "[t]here is simply no way to ascertain what verdict the jury might have reached had they been given an alternative which did not include the use of a deadly weapon." *Id.* However, after reviewing the record in the instant case, we conclude that the evidence did not require that the jury be instructed regarding a lesser-included offense.

Defendant contends that the presence of the broken bottle on the bed beside Hendricks was sufficient to demonstrate that her wounds may have been caused by the bottle rather than the knife. On cross-examination, defendant's counsel asked Dr. Bernat whether Hendricks' injuries were "consistent with glass from a broken bottle[.]" Dr. Bernat replied as follows:

> They could have been cuts from a broken bottle; they could have been cuts from a knife. When I was doing the wounds, I didn't find any broken glass. And they were all very clean, very straight. They weren't all jagged and things as if someone puts their hand

> through a window or something. So if somebody had been cut with a clean piece of glass straight, I wouldn't have been able to tell the difference.

On redirect examination, the State asked Dr. Bernat to further describe Hendricks' wounds. Dr. Bernat replied as follows:

> Ms. Hendricks' injuries were just very linear, very straight. They weren't like jagged, like a jagged piece of glass had cut it. I did not find any glass in her. I mean, there could be somebody who might have been holding a piece of glass and like the glass being slid on their hand, so they would have a nice clean cut with no glass in it. But the majority of glass injuries are usually because of a car accident or they fell onto a glass window or something like that.

Although Dr. Bernat testified that Hendricks' wounds "could have been cuts from a broken bottle," Dr. Bernat twice stated that he "didn't find any broken glass" in Hendricks' wounds, and he stated that Hendricks' wounds were "very clean, very straight[,]" not "like a jagged piece of glass had cut [them]." Dr. Bernat testified that "[t]he length of [Hendricks' wounds] was the same; the depth was the same." Dr. Bernat further testified that eighty percent of the patients with wounds on their head from shattered glass have "a little piece of glass or something" in their hair. According to Dr. Bernat, "somebody could get cut with a sharp clean piece of glass and get a linear cut, if someone went like this [indicating] and made very straight movements." However, Hendricks described the instrument used to wound her in detail, claiming that it was a short-handled kitchen knife with a steel blade that defendant used to "cut[] his rocks." She described defendant as "holding [her] down with one hand and stabbing [her] with the other." Although Mary Jane testified that she saw a broken bottle on the bed beside Hendricks, Mary Jane also testified that she saw defendant's hand "go up" and then "c[o]me back down" while defendant was "standing over top of [Hendricks]." Neither Hendricks nor Mary Jane testified that defendant cut Hendricks linearly with a piece of broken glass.

In light of the foregoing, we conclude that the evidence in the instant case is not so conflicting as to require the trial court to submit to the jury the issue of assault inflicting serious injury. The evidence is sufficient to support a finding of all the elements of assault with a deadly weapon inflicting serious injury, but insufficient to support a finding that defendant did not use a deadly weapon during the alter-

cation. Therefore, the trial court did not err by refusing to submit the lesser-included offense to the jury. Accordingly, defendant's second argument is overruled.

[5] Defendant's final argument is that the trial court erred by sentencing him in the aggravated range. Defendant asserts that the trial court was prohibited from sentencing him in the aggravated range because the issue was not submitted to the jury. We agree.

In *State v. Allen*, 359 N.C. 425, —— S.E.2d —— (Filed 1 July 2005) (No. 485PA04), our Supreme Court recently examined the constitutionality of this state's structured sentencing laws and procedures in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). The Court concluded in *Allen* that, when "[a]pplied to North Carolina's structured sentencing scheme, the rule of *Apprendi* and *Blakely* is: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." 359 N.C. at 437, —— S.E.2d at —— (citing *Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 413-14; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455; N.C. Gen. Stat. §§ 15A-1340.13, 15A-1340.14, 15A-1340.16, 15A-1340.17). In the instant case, following defendant's conviction for assault with a deadly weapon inflicting serious injury, the trial court found as an aggravating factor that defendant committed the offense while on pretrial release on another charge. The trial court unilaterally found this factor and failed to submit it to the jury for proof beyond a reasonable doubt. Although the State contends that defendant admitted to the aggravating factor at sentencing, after careful review of the transcript, we are unable to conclude that defendant affirmatively admitted that the aggravating factor applies to the instant case. Therefore, in light of our Supreme Court's decision in *Allen*, we conclude that the trial court committed reversible error.[2] Accordingly, we remand the case for resentencing.

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[6] 2. Defendant also asserts that the trial court was prohibited from sentencing him in the aggravated range because the State failed to allege the pertinent aggravating factor in the indictment. However, our Supreme Court expressly rejected the same assertion by the defendant in *Allen*. 359 N.C. at 438, —— S.E.2d at —— (overruling language in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), "requiring sentencing factors which might lead to a sentencing enhancement to be alleged in an indictment[,]" finding no error in the State's failure to include aggravating factors in the defendant's indictment, and noting that in *State v. Hunt*, "[T]his Court concluded that 'the Fifth Amendment would not require aggravators, even if they were fundamental equivalents of elements of an offense, to be pled in a state-court indictment.' " (quoting

No error in part; remanded for resentencing.

Chief Judge MARTIN and Judge HUDSON concur.

IN THE MATTER OF: HAYWARD ROBINSON A/K/A HAYWOOD ROBINSON

No. COA04-956

(Filed 2 August 2005)

Criminal Law— expungement of criminal records—multiple unrelated charges

The plain language of N.C.G.S. § 15A-146 does not allow expungements of the records of multiple unrelated dismissed charges for offenses occurring over a number of years, and the trial court here erred by expunging six separate offenses from petitioner's record.

Judge TYSON dissenting.

On writ of certiorari from order entered 25 November 2002 by Judge Joseph Williams in Anson County District Court. Heard in the Court of Appeals 9 May 2005.

Attorney General Roy Cooper, by Assistant Attorney General Ashby T. Ray, for the State.

No brief filed for petitioner-appellee.

MARTIN, Chief Judge.

The State of North Carolina applied for writ of certiorari to review an order of the trial court expunging six separate charged offenses from the record of petitioner. A unanimous panel of this Court allowed the petition by order dated 18 May 2004. Upon review, we reverse the order of the trial court.

On 18 July 2002, petitioner filed six "Requests and Reports Convictions/Expunctions Dismissals and Discharge" in the Anson County District Court, seeking expungement of six separate criminal

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State v. Hunt, 357 N.C. 257, 272, 582 S.E.2d 593, 603, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003)). Accordingly, defendant's assertion in the instant case is overruled as well.

charges pursuant to section 15A-146 of the North Carolina General Statutes. Specifically, petitioner sought to expunge the following: (1) an arrest and charge of DWI on 31 December 1994; (2) charges for two counts of robbery with a dangerous weapon on 9 February 1995; (3) an arrest and charge of DWI and no insurance on 17 October 1997; (4) an arrest and charge of expired registration card/tag on 12 June 1999; and (5) an arrest and charge of expired registration card/tag and expired inspection sticker on 20 May 2000. Petitioner verified that each of the charges had ultimately been dismissed. The State Bureau of Investigation ("SBI") and the Office of Administrative Courts also certified that petitioner did not have a felony record and had received no previous expungement.

The matter came before the trial court on 14 November 2002. Upon reviewing the petition, arguments by counsel, as well as a written objection by the respondent State, the trial court entered an order granting expungement of all six charges. The State failed to timely appeal the order of the trial court. On 18 May 2004, this Court entered an order allowing the State's petition for writ of certiorari for the purpose of reviewing the order of expungement.

We review the present case to address the narrow issue of whether section 15A-146 allows the expungement of multiple charges which neither arose from the same facts and circumstances nor were consolidated for judgment. We hold it does not and therefore reverse the order of the trial court.

Section 15A-146 of the North Carolina General Statutes provides for the expunction of records when charges are dismissed or there are findings of not guilty as follows:

> (a) If any person is charged with a crime, either a misdemeanor or a felony, or was charged with an infraction under G.S. 18B-302(i) prior to December 1, 1999, and the charge is dismissed, or a finding of not guilty or not responsible is entered, that person may apply to the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the application and, upon finding that the person had not previously received an expungement under this section, G.S. 15A-145, or G.S. 90-96, and that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be

> held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

N.C. Gen. Stat. § 15A-146(a) (2003). "G.S. § 15A-146 authorizes the court, in certain instances, to order expunction from all official records of entries relating to the arrest or trial of a person seeking the order." *State v. Jacobs*, 128 N.C. App. 559, 569, 495 S.E.2d 757, 764 (1998). Pursuant to section 15A-146, a person charged with a crime which is later dismissed, or who is found to be not guilty or not responsible, may apply for an order of expungement for that charge. "The purpose of the statute is to clear the public record of entries so that a person who is entitled to expunction may omit reference to the charges to potential employers and others, and so that a records check for prior arrests and convictions will not disclose the expunged entries." *Id.* Notably, expungement is only available where the trial court finds that the person has not previously received an expungement. *See* N.C. Gen. Stat. § 15A-146(a).

In the present case, the trial court concluded that section 15A-146 was intended "to provide for an expungement of all arrests and dismissal records even if multiple charges arose at different times." We disagree.

The instant case is one of statutory construction. It is well established that "where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Union Carbide Corp. v. Offerman*, 351 N.C. 310, 314, 526 S.E.2d 167, 170 (2000). Such statutory construction is vital to "ensure accomplishment of the legislative intent." *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999). The Court must first look to the words chosen by the legislature, and "if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 896 (1998).

The plain language of section 15A-146 does not allow for the expungements of multiple unrelated offenses occurring over a number of years. On the contrary, the plain language of the statute

expressly prohibits more than one expunction. *See* N.C. Gen. Stat. § 15A-146(a) (allowing expunction only after a finding that no previous expunction has been entered). Such prohibition demonstrates the legislative intent to limit the expunction of records, allowing individuals to avail themselves of a court-ordered expunction on only one occasion. The trial court's interpretation of the statute would allow an individual who has numerous unrelated charges over a number of years to wait for an appropriate time to obtain a single expunction for unlimited numbers of arrests and charges occurring over the course of many years. If the legislature wished to provide for the expungement of multiple offenses occurring over a number of years, there would be no reason to limit expunction to a one-time event. The trial court's interpretation to the contrary contravenes the rules of statutory construction by rendering meaningless the statute's express limitation. *See Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) (stating that, "It is well established that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage"). We note that whether section 15A-146 permits the one-time expunction of multiple related charges arising from a single occurrence or which have been consolidated for trial is an issue not directly before us, and we therefore do not address it.

Because we conclude that section 15A-146 does not permit the expunction of multiple unrelated offenses occurring over a number of years, we hold the trial court erred in entering an order expunging six separate charged offenses from the record of petitioner. We therefore reverse the order of the trial court.

Reversed.

Judge LEVINSON concurs.

Judge TYSON dissents.

Tyson, Judge dissenting.

The majority's opinion holds N.C. Gen. Stat. § 15A-146 "does not permit the expunction of multiple unrelated offenses occurring over a number of years" and reverses the trial court's order. I respectfully dissent.

I. Expungements

The Clerks of Superior Court are required by law to maintain certain records, including "civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court and all other records required by law to be maintained." N.C. Gen. Stat. § 7A-180(3) (2003). The General Assembly has enacted statutory exceptions to this rule. *See* N.C. Gen. Stat. § 15A-145 through § 15A-148 (2003); *see also* N.C. Gen. Stat. § 90-113.14 (2003) (expunction of records for first offenses under the Toxic Vapors Act).

N.C. Gen. Stat. § 15A-146(a) provides in part:

> If any person is charged with a crime, either a misdemeanor or a felony[] . . . and the charge is dismissed, or a finding of not guilty or not responsible is entered, that person may apply to the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the application and, upon finding that the person *had not* previously received an expungement under this section, G.S. 15A-145, or G.S. 90-96, and that the person had not *previously* been convicted of any felony under the laws of the United States, this State, or any other state, the court *shall order* the expunction.

(Emphasis supplied).

The majority's opinion correctly recognizes:

> The purpose of the statute is to clear the public record of *entries* so that a person who is entitled to expunction may omit reference to the *charges* to potential employers and others, and so that a records check for prior *arrests* and *convictions* will not disclose the expunged *entries*.

State v. Jacobs, 128 N.C. App. 559, 569, 495 S.E.2d 757, 764 (1998) (emphasis supplied). Notwithstanding this language, the majority's opinion expressly declines to address whether N.C. Gen. Stat. § 15A-146 permits "expunction of multiple related charges arising from a single occurrence or which have been consolidated for trial . . . ." However, this issue is directly before us since two of the dismissed charges against petitioner, 95 CRS 700 and 95 CRS 701 that were expunged, are interrelated.

Petitioner was charged with six separate crimes in Anson County between December 1994 and May 2000: 95 CRS 31, 95 CRS 700, 95

CRS 701, 97 CRS 4126, 99 CRS 2750, and 00 CRS 2140. 95 CRS 700 and 95 CRS 701 were interrelated charges stemming from "the same transaction or occurrence." Neither the State's argument on appeal nor the majority's opinion considers these two charges as eligible for expungement under their interpretation of N.C. Gen. Stat. § 15A-146. Even if the majority's opinion is otherwise affirmed, charges 95 CRS 700 and 95 CRS 701 should remain expunged as multiple offenses arising out of the "same transaction or occurrence."

" '[C]riminal statutes are to be strictly construed against the State.' " *State v. Raines*, 319 N.C. 258, 263, 354 S.E.2d 486, 489 (1987) (quoting *State v. Glidden*, 317 N.C. 557, 561, 346 S.E.2d 470, 472 (1986)).

> Under the canons of statutory construction, the cardinal principle is to ensure accomplishment of the legislative intent. To that end, we must consider "the language of the statute . . ., the spirit of the act and what the act seeks to accomplish." Moreover, undefined words are accorded their plain meaning so long as it is reasonable to do so. Further, the Court will evaluate the statute as a whole and will not construe an individual section in a manner that renders another provision of the same statute meaningless.

Polaroid Corp. v. Offerman, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998) (internal citations and quotations omitted), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2001). Nothing in the statute limits expunction of a single charge or multiple charges arising in "one transaction or occurrence," or where multiple charges were consolidated for judgment. N.C. Gen. Stat. § 15A-146.

N.C. Gen. Stat. § 15A-146 is not limited to a *single* charge as the majority's opinion holds. Construing the statute narrowly against the State, an individual is not limited to expunging solely *one* charge of "*a* crime, either *a* misdemeanor or *a* felony . . . ." N.C. Gen. Stat. § 15A-146(a) (emphasis supplied). The statute otherwise expressly limits the granting of an expungement:

> upon finding that the person had not previously received an expungement under this section, G.S. 15A-145, or G.S. 90-96, and that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction.

Id.

A qualified individual is entitled to *one* grant of expunction under this statute, but the expunction order may address or include more than one charge. Nothing in the statute requires that multiple charges expunged must either arise out of one transaction or occurrence, or they were consolidated for judgment.

The Attorney General's Opinion cited by the State in support of its petition for writ of *certiorari* and ignored by the majority's opinion recognizes that multiple charges may be expunged. *See* 1995 N.C. AG LEXIS 12. As the State concedes through its Attorney General, allowing multiple charges to be expunged satisfies the statute's purpose. Nothing in the statutes requires the multiple charges expunged to arise out of the same or related transaction or have been consolidated for trial or judgment. The statute's absolute limiting language requires only the applicant may not have previously received an expungement under N.C. Gen. Stat. § 15A-146 or N.C. Gen. Stat. § 90-96, or have been previously convicted of a felony.

This interpretation corresponds with the General Assembly's recent addition of two statutes permitting expunctions in identity theft and DNA defense cases. *See* N.C. Gen. Stat. § 15A-147 (2003) (expunctions for charges arising out of a victim's identity theft); *see also* N.C. Gen. Stat. § 15A-148 (2003) (expunctions for dismissal of charges or grant of pardon due to DNA evidence). Neither statute limits the number of expungements permitted and both include singular language like "a crime," "a misdemeanor," "a felony," "the charge," "the conviction," and "an offense" which is cited by the State and the majority's opinion. *See* N.C. Gen. Stat. § 15A-147(a) ("If any person is named in *a charge* for *an* infraction or *a crime*, either *a misdemeanor* or *a felony*, as a result of another person using the identifying information of the named person to commit *an infraction* or *crime* and *the charge* against the named person is dismissed, a finding of not guilty is entered, or the conviction is set aside . . . .") (emphasis supplied); *see also* N.C. Gen. Stat. § 15A-148(a) ("Upon a motion by the defendant following the issuance of a final order by an appellate court reversing and dismissing *a conviction* of *an offense* for which a DNA analysis was done in accordance with Article 13 of Chapter 15A of the General Statutes, or upon receipt of a pardon of innocence with respect to *any such offense*, the court shall issue an order of expungement of the DNA record and samples . . . .") (emphasis supplied).

Here, petitioner applied for and received expunction of six charges. All charges expunged occurred within Anson County and

were either dismissed by the district attorney or by the trial court for lack of probable cause. Petitioner's application was properly reviewed and certified by the State Bureau of Investigation and Administrative Office of the Courts that petitioner complied with the limiting language in the statute and had not previously received an expungement nor had he been previously convicted of a felony. The trial court properly granted petitioner's application for expunction of 95 CRS 31, 95 CRS 700, 95 CRS 701, 97 CRS 4126, 99 CRS 2750, and 00 CRS 2140.

II. Arguments in Petition and on Appeal

Citing the Attorney General's Opinion, the State asserted and acknowledged in its petition for writ of *certiorari* that where "multiple offenses arise out of the same transaction or occurrence, or were consolidated for trial and judgment, . . . an expunction of more than one offense [is] appropriate." 1995 N.C. AG LEXIS 12. However, on appeal, the State's principal argument is N.C. Gen. Stat. § 15A-146 "only allows for expunctions where the individual was charged and that charge was dismissed or the individual was found not guilty . . . . [and] N.C.G.S. § 15A-146 states *that only one such charge may be expunged.*"

The State now argues the "plain language of N.C.G.S. § 15A-146 does not allow for expungements of multiple offenses." This position is inconsistent with the State's petition for writ of *certiorari*, the Attorney General's Opinion, and the clear legislative intent of the statute. *See* 1995 N.C. AG LEXIS 12; *see also* N.C. Gen. Stat. § 15A-146; *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("the law does not permit parties to swap horses between courts in order to get a better mount [on appeal].").

III. Purpose of the Statute

Virtually all employers, licensing agencies, educational institutions, and military recruiters now require or routinely perform criminal background checks as a condition of employment, licensure, admission, or military service. Computerization of records into easily searchable databases allows immediate and comprehensive reports to be generated. While an individual charged with, but not convicted of, a crime legally retains a clean criminal record and history, the stigma of being arrested and charged without being proved to be guilty carries significant impacts on decisions of employment, licensure, educational opportunities, or military service and denies the applicant the presumption of innocence.

When those alleged charges are determined to be without probable cause, foundation, or proof, and the charges are dismissed or the defendant is acquitted, "the effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information." N.C. Gen. Stat. § 90-96(b) (2003). Expunction allows the petitioner's presumption of innocence to remain and to remove the stigma of unsubstantiated and dismissed charges.

Our General Assembly has statutorily created a *one time* mechanism under N.C. Gen. Stat. § 15A-146 and N.C. Gen. Stat. § 90-96 to remedy and remove potential negative consequences of unsubstantiated and dismissed charges if: (1) no previous felony conviction is shown; and (2) no prior expunction has been granted. Our General Assembly used identical language to that contained in N.C. Gen. Stat. § 15A-146 and has not placed limits on other expungements of multiple dismissed charges *or even convictions* for certain expungements. *See* N.C. Gen. Stat. § 15A-147; *see also* N.C. Gen. Stat. § 15A-148. The statute also provides for a confidential record of the expunction to be maintained to ensure that each applicant has not been previously convicted of a felony and receives only one expungement under N.C. Gen. Stat. § 15A-146 and N.C. Gen. Stat. § 90-96.

IV. Conclusion

The statute specifically allows an individual to apply for and receive a *one time* expunction of multiple charges under N.C. Gen. Stat. § 15A-146, so long as he has not previously received an expunction under N.C. Gen. Stat. § 15A-146 or N.C. Gen. Stat. § 90-96 or been previously convicted of a felony. Petitioner's application for an expungement was certified to be his first application. The State's argument of *one expunction* for *one charge* on appeal varies significantly from the stated opinion by the Attorney General and that asserted in its petition for writ of *certiorari*.

I further recognize the inherent prejudice in the State's arguments on appeal to seek reversal in petitioner's order for expunction. The trial court granted the expungement on 25 November 2002. The State failed to appeal. Following entry of the order and the State's failure to appeal, petitioner is allowed to represent his background without disclosing the six expunged charges. Now, the State seeks reversal over two and one-half years after the expungement order was entered and on grounds different from those asserted in its petition for writ of *certiorari*. Adopting the State's position, petitioner is now liable for

potential "misrepresentations" and non-disclosure of the six charges in reliance of the order entered and not appealed from.

Nothing in the statute limits multiple charges to be expunged to have arisen out of the "same occurrence or transaction," or that were "consolidated for judgment." The State Bureau of Investigation and Administrative Office of the Courts certified petitioner had not previously received an expungement or been convicted of a felony. The Attorney General's and the majority's opinions write restrictive language and further conditions into the plain language of the statute. The trial court properly granted petitioner's application and its order should be affirmed. Even under the Attorney General's and the majority's analysis, petitioner's interrelated charges, 95 CRS 700 and 95 CRS 701, should remain expunged and the trial court's order should be affirmed. I respectfully dissent.

EXCEL STAFFING SERVICE, INC., PLAINTIFF v. HP REIDSVILLE, INC., HP/MANAGEMENT SERVICES, INC., HP/OPERATIONS GROUP, INC. AND HEALTHPRIME, INC. COLLECTIVELY D/B/A REIDSVILLE HEALTH CARE & REHABILITATION A/K/A REIDSVILLE REHABILITATION AND CARE CENTER, DEFENDANTS

No. COA04-1047

(Filed 2 August 2005)

1. Discovery— request for admissions—answer—sufficiency of response

An answer to allegations in a complaint does not serve as a response to a request for admissions, even if the matters addressed in both are identical. The trial court did not err by ruling that defendants failed to respond and deeming the requests admitted.

2. Discovery— request for admissions—deemed admitted—motion to withdraw denied

The trial court did not abuse its discretion by not allowing defendants to withdraw admissions (plaintiff's requests for admissions had been deemed admitted when defendants did not answer). Defendants made an oral motion six months after the requests were deemed admitted, did not file a written motion until over six weeks after the court had entered summary judgment for plaintiff, and there were no signs of excusable neglect.

3. Contracts— breach—deemed admissions—alter ego rule—time of admissions—partial summary judgment

The trial court did not err by granting partial summary judgment for plaintiff on its breach of contract claim where defendants admitted the breach and the deemed admissions demonstrated that all the other defendants were mere instrumentalities of defendant-HealthPrime.

4. Contracts— amount of debt—specific pleading—general denial—summary judgment

There was no genuine issue of material fact as to the amount of a contract debt where plaintiff's verified complaint included the exact amount it contended that defendant owed, and defendants only generally denied the amount of the debt.

5. Unfair Trade Practices— intent—irrelevant—summary judgment

Intent is irrelevant to unfair and deceptive trade practices, and the trial court did not err by granting summary judgment for plaintiffs on such a claim even though defendants argued that they lacked the necessary intent.

6. Unfair Trade Practices— establishment of subsidiary corporation—not per se an unfair practice

The mere establishment of a subsidiary corporation for the purpose of limiting the parent corporation's liability is not per se an unfair and deceptive trade practice, and summary judgment for plaintiff on this ground was reversed.

Appeal by defendant from judgment entered 10 October 2003, 19 December 2003, and 8 January 2004 by Judge Michael E. Helms, and from judgment entered 4 March 2004 by Judge W. Douglas Albright, in Guilford County Superior Court. Heard in the Court of Appeals 13 April 2005.

Nexsen Pruet Adams Kleemeir, PLLC, by J. Scott Hale, Eric H. Biesecker, and Stephanie R. Ennis, for plaintiff-appellee.

Alexander Ralston, Speckhard & Speckhard, LLP, by Stanley E. Speckhard, and Allman Spry Leggett & Crumpler, PA, by Roger E. Cole, for defendants-appellants.

STEELMAN, Judge.

Filing an unverified answer to a complaint does not constitute a response to requests for admissions, even though some of the matters addressed are identical. Further, a corporation's establishment of a subsidiary corporation for the purpose of limiting its liability is not *per se* an unfair and deceptive trade practice under Chapter 75.

Plaintiff, Excel Staffing Service, Inc., is a North Carolina corporation with its principal office in Greensboro. Defendants, HP Reidsville, Inc., HP/Management Services, Inc., HP/Operations Group, Inc., and HealthPrime, Inc., are Georgia corporations authorized to transact business in North Carolina. Defendants operate a health care facility in Reidsville, North Carolina known as Reidsville Health Care & Rehabilitation or Reidsville Rehabilitation and Care Center. Defendant HealthPrime, Inc. is the parent corporation of defendants HP Reidsville, Inc., HP/Management Services, Inc., and HP/Operations Group, Inc. Plaintiff entered into a contract with Reidsville Health Care & Rehabilitation (Reidsville) to provide supplemental nursing services. On 10 February 2003, plaintiff filed suit against defendants alleging breach of contract by defendants in failing to pay for the services provided, and a claim for quantum meruit and for unfair and deceptive trade practices. On 6 March 2003, prior to defendants filing an answer, plaintiff served discovery upon defendants, which included requests for admissions. Plaintiff filed the requests for admissions with the clerk of superior court as required by Rule 5(d) of the Rules of Civil Procedure. Defendants' registered agent received the discovery requests on 7 March 2003, and defendants' corporate counsel received them on 12 March 2003. Defendants never responded to plaintiff's request for admissions.

On 17 September 2003, both parties filed motions for summary judgment. At the hearing of these motions, Judge Michael E. Helms found that defendants had failed to respond to plaintiff's requests for admissions and deemed each of the requests admitted under Rule 36(a) of the Rules of Civil Procedure. Immediately following the trial court's ruling granting partial summary judgment in favor of plaintiff, defendants made an oral motion pursuant to Rule 36(b) requesting the court relieve them of the effect of not responding to the request for admissions. The trial court denied defendants' motion. On 10 October 2003, the trial court filed a written order granting summary judgment in favor of plaintiff on its breach of contract claim against all defendants, jointly and severally, for the principal sum of $70,034.10, plus interest at the rate of eighteen percent per annum. On

19 December 2003, the trial court amended its order to clarify that plaintiff's claims for unfair and deceptive trade practices and attorney's fees were left open for future disposition. The trial court amended its order yet again on 8 January 2004 to reflect that defendants orally moved on 6 October 2003 for relief from the effect of their failure to respond to plaintiff's requests for admissions and that the trial judge denied that motion.

On 3 December 2003, plaintiff moved for summary judgment on its claim for unfair and deceptive trade practices. On 8 December 2003, defendants filed a written motion renewing their motion for relief from their failure to respond to the requests for admissions. Judge Helms denied this motion by order dated 8 January 2004.

On 4 March 2004, Judge W. Douglas Albright entered summary judgment against all defendants, jointly and severally, on plaintiff's claim for unfair and deceptive trade practices. Judge Albright held that defendants' conduct was conclusively established by Judge Helms' Corrected Order of Summary Judgment and the matters deemed admitted by defendants' failure to answer plaintiff's request for admissions, and that this conduct violated N.C. Gen. Stat. § 75-1.1 as a matter of law. The trial judge determined plaintiff had sustained damages of $78,495.75 and trebled the damages. Defendants appeal.

[1] In defendants' first assignment of error, they contend the trial court erred in determining that defendants had failed to respond to plaintiff's request for admissions. We disagree.

While defendants readily admit they failed to respond to plaintiff's request for admissions, they contend the matters requested to be admitted were the same as the allegations in the complaint, to which they timely filed an answer, and therefore, this was the functional equivalent of responding to plaintiff's request for admissions. We disagree.

Rule 36(a) of the Rules of Civil Procedure provides that either party may serve upon any other party a written request for admission of certain matters specified within the rule. N.C. Gen. Stat. § 1A-1, Rule 36(a) (2004). The plaintiff may serve a defendant with request for admissions concurrently with or after service of the summons and complaint upon that party. *Id.* If the party to whom the request is directed fails to respond within the time allowed the matter is deemed admitted. *Id.* "Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated

from the case, and secondly, to narrow the issues by eliminating those that can be." N.C. Gen. Stat. § 1A-1, Rule 36 official commentary. "Thus, it is imperative that a timely response be served." 1 G. Gray Wilson, *North Carolina Civil Procedure* § 36-3, at 603 (1995).

Defendants' contention that an unverified answer to a complaint is the same as a response to a request for admission that contains matters "identical" to the allegations in the complaint contravenes the express purpose of Rule 36. Rule 36 means exactly what it says. *Rutherford v. Air Conditioning Co.*, 38 N.C. App. 630, 636, 248 S.E.2d 887, 892 (1978). In order to avoid having the requests deemed admitted, a party must respond within the specified time period. *Id. See also WXQR Marine Broadcasting Corp. v. JAI, Inc.*, 83 N.C. App. 520, 521, 350 S.E.2d 912, 913 (1986) ("Litigants in this state are *required* to respond to . . . requests for admission with *timely*, good faith answers.") (emphasis added).

It is true that our Supreme Court instructed that when construing the Rules of Civil Procedure "[t]echnicalities and form are to be disregarded in favor of the merits of the case[]" and that "[l]iberality is the canon of construction." *Lemons v. Old Hickory Council, Boy Scouts, Inc.*, 322 N.C. 271, 275, 367 S.E.2d 655, 657 (1988). However, to read Rule 36 as liberally as defendants ask us to do would effectively eviscerate the rule, a result we refuse to endorse. We hold that an answer to allegations in a complaint does not serve as a response to a request for admission, even if the matters addressed in both are identical. This argument is without merit.

[2] In defendants' second argument, they contend the trial court abused its discretion in refusing to permit them to withdraw their admissions. We disagree.

Rule 36(b) provides that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." N.C. Gen. Stat. § 1A-1, Rule 36(b) (2004). The standard of review of a trial court's ruling on a motion to amend or withdraw a party's admission is abuse of discretion. *Eury v. N.C. Employment Sec. Comm.*, 115 N.C. App. 590, 603, 446 S.E.2d 383, 391 (1994). This means that the trial court's decision will not be overturned absent a showing that the decision was so arbitrary that it could not have been the result of a reasoned decision. *Id.* Defendants first made their motion under Rule 36(b) orally, following the trial court's ruling that each of the requests for admissions were deemed admitted under Rule 36(a) for failure to answer and that it

was granting summary judgment in favor of plaintiff. At that time, defendants had filed no written motion, given no notice of the motion, nor did they file any documents in support of the motion. Instead, they made an oral motion six months after the requests were deemed admitted. Defendants did not file a written motion until over six weeks after the trial court's entry of a written order granting summary judgment in favor of plaintiff. Further, the record is devoid of anything indicating defendants' failure to respond was the result of excusable neglect. Rather, defendants' written Rule 36 motion asserted the requests were not properly served and their answer to the complaint constituted a denial of the Request for Admissions. We hold that under these circumstances, the trial court did not abuse its discretion in denying defendants' oral and written motions to withdraw their admissions. This argument is without merit.

[3] In defendants' third argument, they contend the trial court erred in granting partial summary judgment in favor of plaintiff regarding its breach of contract claim.

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) (2004). "Facts that are admitted under Rule 36(b) are sufficient to support a grant of summary judgment." *Goins v. Puleo*, 350 N.C. 277, 280, 512 S.E.2d 748, 750 (1999).

Defendants admitted in their answer that: (1) HP/Reidsville contracted with plaintiff for the provision of supplemental nursing services; (2) plaintiff provided those services to the benefit of HP/Reidsville, for which plaintiff was not paid; and (3) HP/Reidsville is indebted to plaintiff for monies owed for services rendered. The requests for admissions further establish that: (1) HP/Reidsville, HP/Management, and HP/Operations are all mere instrumentalities and/or alter egos of HealthPrime and have no separate minds, will or existences of their own, and (2) defendants made financial, policy, and business decisions regarding the operation of Reidsville Rehab.

Where a corporation is found to be the mere instrumentality of another, "the two are treated as one for purposes of assessing liability for the alleged wrong, and are jointly and severally liable." *Muse v. Charter Hospital of Winston-Salem*, 117 N.C. App. 468, 473, 452 S.E.2d 589, 594 (1995). In *Monteau v. Reis Trucking & Constr., Inc.*,

we applied this rule in the context of a breach of contract action. 147 N.C. App. 121, 126, 553 S.E.2d 709, 712 (2001). The alter ego doctrine applies to contractual debts as well as to tort claims. 18 Am. Jur. 2d *Corporations* § 52 (2004).

Defendants argue, however, that despite the admissions, they are not liable because the admissions only establish they were instrumentalities as of the date such admissions were deemed effectively made, namely 14 April 2003, thus, the admissions do not establish their liability at the time of the admitted breach of contract by Reidsville. We disagree.

The definitions and instructions contained in plaintiff's discovery requests state that "[u]nless otherwise indicated, the Interrogatories refer to the time, place, and circumstances of the occurrences mentioned or complained of in the pleadings." Although the instruction refers to interrogatories, the instructions are included with plaintiff's discovery requests, which contained plaintiff's request for admissions. Further, defendants could not reasonably believe the request for admissions referred to any time period other than the time of the occurrences referenced in the pleadings, otherwise the requests would be irrelevant.

In addition, the request for admissions sent to HP/Reidsville, HP/Operations, and HP/Management services refer to time periods before, during and after the breach of contract.

> 3. Admit that you made financial, policy and business decisions regarding the operation of Reidsville Rehab.
>
> 4. Admit that you have no identity separate and apart from HealthPrime.
>
> 5. Admit that you are a mere instrumentality and/or alter ego of HealthPrime and have no separate mind, will or existence of your own.
>
> 6. Admit that you were a mere instrumentality and/or alter egos [sic] of HealthPrime used to deprive creditors such as Plaintiff from having any source of recovery in the event Reidsville Rehab ceased to operate.
>
> 7. Admit that when Plaintiff demanded payment from Reidsville Rehab, Plaintiff was told to make all demands upon and conduct all negotiations for payment with representatives of HealthPrime.

> 8. Admit that HealthPrime entered into a letter agreement and signed a Confession of Judgment in favor of Plaintiff with respect to previous debts owed to Plaintiff as a result of services rendered by Plaintiff at Reidsville Rehab.

(emphasis added). The request for admissions sent to HealthPrime contained substantially the same language.

Thus, the trial court did not err in granting partial summary judgment in favor of plaintiff against defendants HP/Reidsville, HP/Management, HP/Operations, and HealthPrime, jointly and severally, on their breach of contract claim, as defendants admitted to the breach, and the deemed admissions demonstrated all the other defendants were mere instrumentalities of HealthPrime.

[4] Defendants also contend the trial court erred when granting plaintiff partial summary judgment on its breach of contract claim when it held defendants were liable in the amount of $70,034.10, plus interest at eighteen percent per annum.

When a motion for summary judgment is properly supported, the burden shifts to the nonmoving party to set forth specific facts showing there is a genuine issue of fact. *Stephenson v. Jones*, 69 N.C. App. 116, 119, 316 S.E.2d 626, 629 (1984). The nonmoving party cannot simply rely on mere denials in an affidavit, but must at least bring forth facts which forecast that a genuine issue of material fact still exists. *Id. See also Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 718, 338 S.E.2d 601, 602 (1986) ("An answer filed by defendant which only generally denies the allegations of the complaint fails to raise a genuine issue of fact," as does "an affidavit which merely reaffirms the allegations of the defendant's answer").

In this case, defendants attempt to rely on the general denial in their answer to defeat plaintiff's motion for summary judgment. In plaintiff's verified complaint, it includes the exact amount it contends defendants owe it for services rendered. In defendants' unverified answer, they admit that HP/Reidsville is indebted to plaintiff, but only generally deny the amount of the debt. However, after plaintiff served defendants with its motion for summary judgment, defendants offered an affidavit contradicting their earlier admission, stating, defendants "owe nothing to the plaintiff." Defendants' general denial as to the amount owed contained in their answer, coupled with their general denial in their affidavit that they owe plaintiff anything, is insufficient to raise a genuine issue of material fact as to the amount

of the debt. The trial court did not err in granting partial summary judgment in favor of plaintiff on its breach of contract claim and determining that defendants owed plaintiff $70,034.10, plus interest at eighteen percent per annum.

[5] In their fourth and final argument, defendants contend the trial court erred by granting plaintiff's summary judgment motion with respect to its claim for unfair and deceptive trade practices. We agree in part.

Relying on the corrected order of summary judgment, which held the requests for admissions served on defendants were deemed admitted due to defendants' failure to respond, Judge Albright granted plaintiff's motion for summary judgment on the Chapter 75 unfair and deceptive trade practices claim. We review a 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).

As stated above, a trial court may grant summary judgment where "there is no genuine issue as to any material fact" and "any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). Although it is permissible for the court to consider " 'the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials' " when ruling on such a motion, the court must consider such evidence in the light most favorable to the nonmovant. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citations omitted).

North Carolina law forbids unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. N.C. Gen. Stat. § 75-1.1(a) (2004). " 'In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.' " *Howerton*, 358 N.C. at 470, 597 S.E.2d at 693 (citations omitted).

Defendants first argue the trial court erred because they did not have the intent necessary for an unfair and deceptive trade practices claim. This argument is without merit, as the "intent of the actor is irrelevant." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).

[6] Next, defendants argue there are no admissions which establish any conduct on the part of defendants that would permit the trial

court to determine they committed an unfair or deceptive act or practice. We agree.

The admission relevant to this issue provides:

> 7. [D]efendants HP/Reidsville, HP/Management and HP/Operations were mere instrumentalities and/or alter egos of HealthPrime used to deprive creditors such as Plaintiff from having any source of recovery in the event HealthPrime decided to cease operating Reidsville Rehab.

One of the primary motivations for the incorporation of a business is to limit the liability of the corporation's shareholders. Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 11.01 (7th ed. 2004). This is true whether the shareholders are individuals or another corporation. Further, it is clearly not illegal for a corporation to establish a subsidiary corporation. One of the reasons for doing so is to insulate the parent corporation from liability for particularly risky business ventures.

Request for Admission 7 merely establishes that defendants set up Reidsville for the purpose of limiting their liability. To hold as a matter of law that this constitutes an unfair and deceptive trade practice would be to expose every parent corporation or holding company in this state to liability under Chapter 75 for organizing their business in a manner that has heretofore been held to be legal.

We hold as a matter of law that the mere establishment of a subsidiary corporation for the purpose of limiting the parent corporation's liability is not *per se* an unfair and deceptive trade practice under Chapter 75. This portion of the trial court's judgment finding such a violation and awarding treble damages is reversed.

We remand this portion of the case to the lower court for a trial before a jury to determine whether defendants' conduct, as to this specific plaintiff, constituted an unfair and deceptive trade practice under Chapter 75.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges McGEE and BRYANT concur.

BILLY MEARES, EMPLOYEE/PLAINTIFF v. DANA CORPORATION/WIX DIVISION, EMPLOYER, AND SPECIALTY RISK SERVICES, CARRIER, DEFENDANTS

No. COA04-1196

(Filed 2 August 2005)

Workers' Compensation— severance pay—job eliminated—no workers' compensation credit

Defendant was not entitled to a workers' compensation credit for severance payments to plaintiff when his job was eliminated because those payments were calculated solely by reference to plaintiff's years of employment, and were paid pursuant to a written severance agreement. They were an earned benefit of a contractual nature, due and payable when received, and not compensation for plaintiff's disability. N.C.G.S. § 97-42.

Appeal by plaintiff from Opinion and Award entered 13 July 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 March 2005.

The Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Paul C. Lawrence and Adam E. Whitten, for defendant-appellees.

LEVINSON, Judge.

Plaintiff (Billy Meares) appeals from an Opinion and Award of the Industrial Commission granting defendant Dana Corporation a credit for certain payments to plaintiff. We reverse and remand.

The relevant facts are largely undisputed, and are summarized as follows: Plaintiff was born in 1934, and was 68 years old at the time of the hearing before the Industrial Commission. He was employed by defendant for twenty nine years, from 1972 to 2001. In October 1999 plaintiff suffered an injury to his right knee, which defendant accepted as compensable by filing an Industrial Commission Form 60. In January 2000, plaintiff underwent arthroscopic surgery on his right knee. He received disability compensation from 17 January 2000 through 15 March 2000, the period of disability associated with his surgery. Plaintiff returned to work in March 2000, and worked for defendant until March 2001. After his return to work, plaintiff continued to experience problems with his right knee;

additionally, the injury to his right knee aggravated a preexisting injury to his left knee.

In February of 2001 plaintiff's supervisor, Ed Nicholson, met with plaintiff and informed him that plaintiff's job was being eliminated effective 3 March 2001, and that he would not be offered a replacement position. Nicholson also gave plaintiff a Severance Agreement, setting out the details of plaintiff's job termination, including a statement that "[y]ou have 29 years of service and according to the schedule above will be entitled to 10 months pay, beginning 3-1-01, your termination date."

Plaintiff started receiving severance pay 1 March 2001, when his position was terminated, and continued to receive severance pay through 31 December 2001, the official date of his retirement.

On 18 June 2001 plaintiff had knee replacement surgery on his right knee. Plaintiff became disabled as a result of the surgery and associated complications, and filed an Industrial Commission Form 18 seeking disability benefits. Plaintiff and defendant were unable to agree on plaintiff's compensation, and on 9 September 2002 plaintiff filed an Industrial Commission Form 33 requesting a hearing. Following a hearing, Industrial Commission Deputy Commissioner Theresa Stephenson issued an Opinion and Award concluding, in pertinent part, that "Defendant is entitled to a credit for . . . amounts paid to plaintiff pursuant to the severance package from 18 June 2001 through 31 December 2001." Both parties appealed to the Full Commission, which affirmed the Deputy Commissioner in an Opinion and Award issued 13 July 2004. Plaintiff appeals from this Opinion.

Standard of Review

"This Court's review is limited to a determination of (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the Commissioner's conclusions of law are supported by the findings of fact. The Commission's findings of fact are conclusive on appeal if supported by competent evidence, even where there is evidence to support contrary findings. The Commission's conclusions of law, however, are reviewable *de novo* by this Court. The Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testimony." *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109-10, 561 S.E.2d 287, 291 (2002) (citations omitted).

Plaintiff's sole argument on appeal is that the Industrial Commission erred by giving defendant a credit for the severance pay he received between 18 June 2001 and 30 December 2001.

In the instant case, the Industrial Commission found, in relevant part, that:

> 4. On 1 February 2001 defendant notified plaintiff his job was eliminated due to company downsizing. Plaintiff received salary continuation, which was not offered to all employees affected by the downsizing. The reason plaintiff received this continuation was in appreciation of his years of service to the company. It was not part of plaintiff's employment contract. Plaintiff received this full salary continuation through 31 December 2001. Plaintiff's resignation officially became effective on 1 January 2002.
>
> . . . .
>
> 12. Plaintiff has been disabled since the right knee replacement surgery performed on 18 June 2001 and [is] unable to work. The full salary continuation he received from 18 June 2001 through 30 December 2001 was not due and payable at the time he received it.
>
> . . . .
>
> 14. When plaintiff's salary continuation ended on 31 December 2001, defendant reinstated total disability.

Based on these and other findings of fact, the Commission concluded in part that:

> 7. Defendant is entitled to a credit for amounts paid to plaintiff as a severance package for the period 18 June 2001 through 31 December 2001. G.S. § 97-42.

Plaintiff argues on appeal that findings Number 4 and 12 are not supported by competent evidence, that the Commission erred by finding that plaintiff's severance pay was not due and payable, and that conclusion of law Number 7 is erroneous. We agree.

"This Court has held that N.C.G.S. § 97-42 [(2003)] is the only statutory authority for allowing an employer in North Carolina any credit against workers' compensation payments due an injured employee." *Effingham*, 149 N.C. App. at 119, 561 S.E.2d at 296 (citing *Johnson v. IBM*, 97 N.C. App. 493, 494-95, 389 S.E.2d 121, 122 (1990)). Section 97-42 provides in relevant part that:

> Payments made by the employer to the injured employee during the period of his disability, . . . 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.

"Whether the Commission may grant defendant *any* credit thus depends on whether defendant's payments to plaintiff . . . were 'due and payable' when made." *Christopher v. Cherry Hosp.*, 145 N.C. App. 427, 429, 550 S.E.2d 256, 258 (2001). Therefore, we next consider the correct interpretation of the phrase "due and payable." In this regard, we note that "[a]lthough the Commission purported to find as a fact that defendant's payments to plaintiff were 'due and payable' when made, that determination was actually a conclusion of law and we review it as such." *Id.*

"Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently." *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986) (citation omitted). And, " 'in interpreting the meaning of a statute, all parts of a single statute will be read and construed as a whole to carry out the legislative intent.' " *Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 465, 406 S.E.2d 856, 867 (1991) (quoting *Martin v. Thornburg*, 320 N.C. 533, 547, 359 S.E.2d 472, 480 (1987)).

This Court has held that the general intent of G.S. § 97-42 is "to encourage voluntary payments by the employer while the worker's claim is being litigated and he is receiving no wages[.]" *Gray v. Carolina Freight Carriers*, 105 N.C. App. 480, 484, 414 S.E.2d 102, 104 (1992). Further, the phrase "due and payable" should not be analyzed in isolation, but in the context of G.S. § 97-42 overall, which refers to "[p]ayments made by the employer . . . which by the terms of this Article were not due and payable when made[.]"

We conclude that the plain meaning of this statutory language is that the Industrial Commission may credit an employer for payments that were not due or payable under the terms of the Workers' Compensation statutes, at the time they were made, thus restricting credits to payments for workers' compensation benefits and monies

that were not due or payable. *See Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 427, 557 S.E.2d 104, 109 (2001):

> Defendant's argument that N.C.G.S. § 97-42 grants the Commission the broad power to award any and all credits the Commission may desire is without merit. N.C.G.S. § 97-42 specifically authorizes the Commission to award credits for payments the *employer* has made which at the time of payment had not been ordered payable by the Commission.

Because the Industrial Commission may credit an employer only for payments not due or payable "under the terms of [the workers' compensation statute]," an employer is not automatically entitled to a credit for any and every payment to a claimant:

> These provisions are typically limited to situations where, for example, an employer pays a disabled employee wages intended as compensation . . . or where the employer pays the employee a lump sum in settlement of an anticipated award[.] . . . In North Carolina, this [does not] . . . apply to fringe benefits or to insurance proceeds that are of a contractual nature rather than proceeds that are grounded in the workers' compensation law.

Moretz v. Richards & Associates, 316 N.C. 539, 541, 342 S.E.2d 844, 846 (1986) (citation omitted).

This Court has held that disability wage replacement payments are not due and payable, and may be credited, if an employer denies the compensability of an employee's injury, but then pays plaintiff under a disability insurance plan. *Foster v. Western-Electric Co.*, 320 N.C. 113, 116-17, 357 S.E.2d 670, 673 (1987):

> [W]here compensability under the Act is disputed, it may be some time before the injured worker begins to receive workers' compensation benefits. . . . Payment by the employer under a private disability plan accomplishes sound policy objectives by providing immediate financial assistance to the disabled worker *while she* is disabled. Through its plan, defendant affords a much-needed continuity of income to injured employees fully consistent with the expressed policies of workers' compensation.

However, payments are due and payable if made after an employer admits the compensability of a claim. *Moretz*, 316 N.C. at 542, 342 S.E.2d at 846 ("Because defendants accepted plaintiff's injury

as compensable, then initiated the payment of benefits, those payments were due and payable and were not deductible under the provisions of section 97-42[.]").

Further, N.C.G.S. § 97-42 does not authorize a credit for payment of " 'benefits [that] have nothing to do with the Workers' Compensation Act and are not analogous to payments under a disability and sickness plan.' " *Christopher*, 145 N.C. App. at 430, 550 S.E.2d at 258 (quoting *Estes v. N.C. State University*, 102 N.C. App. 52, 59, 401 S.E.2d 384, 388 (1991)). In *Christopher*, this Court held that an employer may not receive a credit for a claimant's vacation pay:

> an employee's accumulated vacation and sick leave could be used by the plaintiff for purposes other than those served by the [Workers' Compensation] Act, [and] were not tantamount to workers' compensation benefits. . . . [P]ayments for such vacation and sick leave are 'due and payable' when made because they have been earned by the employee and are not solely under the control of the employer.

Id. at 430, 432, 550 S.E.2d at 258, 260.

The plaintiff herein received severance pay pursuant to defendant's Severance Agreement, which stated in relevant part that:

> 1. In the course of managing our business in a competitive environment, it occasionally becomes necessary to address adjustments in our work force. The purpose of this plan is to minimize the impact of these workforce reductions on our people while maximizing the best utilization of our remaining people resources. . . .
>
> . . . .
>
> [5.] Separation Benefit: Should an affected person not be available to accept other opportunities for placement within the Company, separation benefits will apply as outlined below: A) Normal pay will continue until the effective date of termination.
>
> . . . .
>
> F) On the effective date, separation pay will commence and will be paid monthly in accordance with the following

> schedule of benefits: . . . 26 to 29 years [Dana Service]—10 months pay [Separation Benefit].
>
> . . . .
>
> You have 29 years of service and according to the schedule above will be entitled to 10 months pay, beginning 3-1-01, your termination date. If you have any questions, please contact me. Tim Zorn

At the hearing on this matter, defendant's human resources manager, Tim Zorn, testified that the Severance Agreement was based on "how we had treated some of the other district managers" and that his decision to award plaintiff severance pay was based on plaintiff's position as a district manager. Moreover, on cross-examination, Zorn testified in part as follows:

> Q. Under this severance package, how do you determine the amount that is payable to an employee whose job is terminated[?]
>
> A. Well, we put a chart together, as far as years of service goes. And then, we provided months of separation based on their years of service.
>
> Q. So, the benefit amount is a function of the years of service only?
>
> A. Yes.
>
> Q. Is it a function of the employee's health condition?
>
> A. No.
>
> Q. Is it a function of the employee's ability to work with Dana Corporation because of a health condition?
>
> A. No.
>
> . . .
>
> Q. Okay. Interrogatory number four asked for you to identify all qualifying events for which Dana Corporation employees could become entitled to the separation pay that was paid to Mr. Meares. Is that correct?
>
> A. Yes.
>
> Q. And what are—or give me a description of all the qualifying events, as you put forth in that answer.

A. I answered that an employee would become entitled to separation pay due to plant closings, layoffs, workforce reductions or job elimination.

Q. Those are all the qualifying events?

A. As I determined, yes.

Q. Disability is not one of those qualifying events, is it?

A. That's right.

Q. So, the severance package does not compensate an employee for disability. Is that right?

A. That's right.

We also note that, in response to plaintiff's request for a hearing, defendants filed Industrial Commission Form 33R, stating in relevant part that:

> The employee-plaintiff received a severance package after March 1, 2001, that was on a contractual obligated benefit. The employee-plaintiff was not disabled under the Workers' Compensation Act and rather, the time period he was out of work from March 1, 2001, through December 31, 2001, was due to economic circumstances of the company.

We conclude that the record contains no evidence that plaintiff's severance pay was in any way associated with his injury, disability, or workers' compensation claim. Defendant's severance agreement contains no indication that severance pay was part of a disability insurance plan or disability wage-replacement plan, or that it might be paid to compensate plaintiff for injury or disability. And, it is undisputed that plaintiff's severance pay began several months before his disabling surgery, and was calculated on the basis of his years of service to the company. The record evidence all suggests that plaintiff's severance pay had nothing to do with workers' compensation, and that he would have received the same amount of severance pay for the same duration if he had not been disabled.

Defendants, however, argue that "the determinative issue is not whether the Plaintiff was compensated for his disability," and that "[t]he court does not need to make a finding that the payment was tantamount to workers' compensation or that the benefits compensated him for his disability." Defendant cites no authority for this assertion, and relevant jurisprudence suggests otherwise. *See Rice*

v. City of Winston-Salem, 154 N.C. App. 680, 684-85, 572 S.E.2d 794, 798 (2002):

> The issue remaining in this case is whether defendant's payments to plaintiff . . . constituted a wage replacement program such that it . . . could form the basis of an offset against workers' compensation benefits. . . . [I]n *Evans*, payments for which an employer was seeking an offset were made pursuant to the employer's sickness and accident disability plan. That plan allowed for payments regardless of the cause of an employee's injury, and 'operate[d] as a wage replacement program['] [that was] tantamount to workers' compensation.[] Therefore, the Court held the employer was entitled to an offset as was necessary to avoid duplicative payments.

(quoting *Evans v. AT&T Technologies, Inc.*, 332 N.C. 78-79, 85, 418 S.E.2d 503-04, 508 (1992)).

Defendants also attach great significance to (1) whether other employees were also offered severance pay, and (2) whether or not the Severance Agreement was an enforceable contract. Regarding the job classification, or the number, of other employees receiving severance pay, we conclude this issue is not germane to whether plaintiff's severance pay was tantamount to workers' compensation disability compensation and could properly be credited against defendants' workers' compensation obligation.

We conclude further that the enforceability of the Severance Agreement as a contract was not before the Commission. Moreover, with respect to this conclusion, defendant essentially argues that it is entitled to a credit for any and all monies paid to plaintiff unless plaintiff proves that a payment was made pursuant to a written contract which would be enforceable in a civil suit. However, defendant cites no authority for such an expansive reading of G.S. § 97-42, and "[i]n North Carolina, this section has been held not to apply to fringe benefits or to insurance proceeds that are of a contractual nature rather than proceeds that are grounded in the workers' compensation law." *Moretz*, 316 N.C. at 541, 342 S.E.2d at 846 (citation omitted). Plaintiff's severance pay clearly was "of a contractual nature"; it was paid pursuant to a written Severance Agreement and was calculated solely by reference to his years of employment with defendant. As discussed above, "payments . . . are 'due and payable' when made . . . [if] they have been earned by the employee and are not solely under the control of the employer." *Christopher*, 145 N.C. App. at 432, 550 S.E.2d at 260.

We conclude (1) that plaintiff's severance pay was an earned benefit of a contractual nature, which was due and payable when received, and (2) that plaintiff's severance pay was not compensation for his disability. Accordingly, the Industrial Commission erred by concluding that defendant was entitled to a credit for its payment to plaintiff of severance pay.

Reversed in part and remanded.

Judges HUNTER and McCULLOUGH concur.

IN THE MATTER OF: D.R., MINOR CHILD

No. COA04-953

(Filed 2 August 2005)

1. Constitutional Law— right to confront witnesses—termination of parental rights—civil proceeding

Termination of parental rights is a civil proceeding in which the Sixth Amendment is not applicable. Here, respondents' right to confront witnesses was not violated by introduction of statements of the child to social workers, a foster parent and psychologists.

2. Discovery— funds for expert witness—motion for deposition—reasons insufficient

The trial court did not abuse its discretion in a termination of parental rights hearing by denying respondent-father's motions for funds to employ an expert witness and for a telephone deposition of the foster parents. Respondent-father did not sufficiently identify the information sought or the material assistance it would provide.

3. Termination of Parental Rights— order not timely—no prejudice

Failure of the trial court to enter the order terminating respondents' parental rights within thirty days after the hearing was completed as required by N.C.G.S. §§ 7B-1109(e) and 7B-1110(a) was not per se prejudicial, and respondents failed to show they were prejudiced by the thirty-nine day delay in entry of the order.

IN RE D.R.

[172 N.C. App. 300 (2005)]

Appeals by respondent mother and respondent father from judgment entered 22 January 2004 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals 22 March 2005.

Charlotte W. Nallan, for petitioner-appellee Buncombe County Department of Social Services.

David Childers, for respondent mother-appellant.

Richard E. Jester, for respondent father-appellant.

TYSON, Judge.

S.J.R. ("respondent-father") and P.R. ("respondent-mother") (collectively, "respondents") appeal a judgment terminating their parental rights over their child, D.R. We affirm.

I. Background

D.R. was born on 16 October 1996 to respondents and at the time of the hearing, was seven-and-one-half years old. Buncombe County Department of Social Services ("DSS") became involved with D.R. in December 2000 when it received reports of overly severe discipline by respondent-father. DSS learned of ongoing domestic violence between respondents, substance abuse by respondents, and unstable living arrangements. The record shows respondent-mother obtained a domestic restraining order against respondent-father in Fall 2001. DSS attempted to help respondents care for D.R. at their residence. Physical and recurring substance abuses in the home led to the removal of D.R. and his placement with his paternal grandmother in January 2002.

D.R. exhibited serious mental health problems and aggressive behavior which prevented the paternal grandmother from caring for him. DSS took custody of D.R. on 25 January 2002 and placed him with foster parents where he has since remained. DSS petitioned the trial court to find D.R. neglected. On 18 April 2002, the trial court ordered: (1) D.R. neglected; (2) D.R. to remain in DSS's custody; (3) respondents and D.R. undergo psychological evaluations and treatment; (4) respondents complete anger management, substance abuse, and parenting classes; (5) respondents maintain employment and provide financial support to D.R.; and (6) respondents receive weekly visitation with D.R.

While D.R. remained in foster care, DSS received reports of inappropriate sexual discussions and behavior by D.R. He told his foster parents that he had watched respondents engage in sexual intercourse and participated with them in sexual activities. D.R. also reported that a step-brother had engaged in oral sex with him at respondent-mother's home. The foster parents learned D.R. had instigated sexual conduct with another boy at church. In August 2002, DSS petitioned the trial court to find D.R. an abused juvenile, alleging the facts as provided by the foster parents. In response, respondents moved the trial court for expenses to cover expert psychological evaluations, which was denied. The petition was not immediately heard due to discovery motions, requests for continuances, and the trial court's calendar. DSS later voluntarily dismissed the abuse petition, without prejudice, on 28 August 2003.

D.R. underwent extensive psychological evaluations and treatment during placement with his foster parents. He was treated for depression, anxiety, conflict, aggressiveness, abusiveness, Post Traumatic Stress Disorder, and inappropriate sexual knowledge and conduct.

In January 2003, respondents were arrested and charged with multiple counts of first-degree sexual offense and taking indecent liberties against a child. Their criminal trial is pending. A permanency planning and review hearing was held in March 2003. The trial court ordered D.R. to remain in DSS's custody and for reunification efforts with respondents to continue. Based on respondents' failure to address the issues causing D.R.'s removal and D.R.'s continued emotional problems, the trial court changed the permanency plan for D.R. from reunification to adoption in August 2003. This permanency plan was reviewed and renewed in September and November 2003.

On 4 September 2003, DSS petitioned the trial court to terminate respondents' parental rights alleging D.R. was: (1) emotionally and sexually abused; (2) neglected; and (3) left in foster care for more than twelve months without respondents making reasonable efforts towards correcting the conditions leading to D.R.'s removal.

A hearing was held on 10, 12, 13, and 14 November 2003. In response to evidence raised during previous hearings, respondents asserted none of the sexual activities D.R. spoke of were true and accused the foster parents of "coaching" D.R. to make the allegations. Respondent-father argued the problems arose after D.R. was removed from respondent-mother's home. Respondents offered

evidence that both were sober and had completed physical and substance abuse programs.

The trial court found respondents' evidence "lacked credibility" and determined the allegations in the petition to be true. The trial court determined the following grounds existed to terminate respondents' parental rights: (1) neglect under N.C. Gen. Stat. § 7B-1111(a)(1); (2) abuse under N.C. Gen. Stat. § 7B-1111(a)(1); and (3) willful abandonment in foster care placement for more than twelve months. It further concluded that it was in D.R.'s best interest to terminate respondents' parental rights. The termination order was entered on 22 January 2004. Both respondents appeal.

II. Issues

Respondents argue the trial court erred by: (1) allowing testimony in violation of their Sixth Amendment rights; (2) finding facts and making conclusions of law without clear, cogent, and convincing evidence; (3) denying respondents' motion for funds for an expert witness and a telephone deposition; (4) entering the termination of parental rights order after the statutory thirty day time limit.

III. Sixth Amendment

[1] Respondents argue the trial court erred by admitting statements made by D.R. through the testimony of social workers, a foster parent, and psychologists. Specifically, they contend the testimony was admitted in violation of their Sixth Amendment right to confront witnesses against them. We disagree.

The Sixth Amendment to the United States Constitution states in part, "[i]n all *criminal prosecutions*, the accused shall enjoy the right . . . to be confronted with witnesses against him." U.S. Const. Amend. VI (emphasis supplied). The United States Supreme Court held in *Crawford v. Washington*, the Confrontation Clause from the Sixth Amendment bars admission of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). "A termination of parental rights hearing is a civil rather than criminal action, with the right to be present, to testify, and to confront witnesses subject to 'due limitations.' " *In re Faircloth*, 153 N.C. App. 565, 573, 571 S.E.2d 65, 71 (2002) (citing *In re Murphy*, 105 N.C. App. 651, 658, 414 S.E.2d 396, 400, *aff'd*, 332 N.C. 663, 422 S.E.2d 577 (1992); *In re Barkley*, 61 N.C. App. 267, 270, 300 S.E.2d 713, 715 (1983)).

Here, DSS's workers, D.R.'s foster parents, and psychologists testified concerning statements D.R. made to them and D.R.'s questionable activities. Respondents assert this testimony violated their Sixth Amendment rights since they were not afforded an opportunity to confront and cross-examine D.R. However, the Sixth Amendment is not applicable to this matter as it is a civil action. *See In re Faircloth*, 153 N.C. App. at 573, 571 S.E.2d at 71.

Respondents only assert the constitutional argument in their briefs regarding the statements. Our review is limited to arguments presented by parties in their briefs supported by citations of authority. *See* N.C.R. App. P. 28(b)(6) (2004); *see also Melton v. Family First Mortgage Corp.*, 156 N.C. App. 129, 132, 576 S.E.2d 365, 368 (2003) ("[P]laintiff has only presented arguments in her brief regarding [some of] her claims . . . . Accordingly, our review will be limited to those issues.") (citation omitted), *aff'd per curiam*, 357 N.C. 573, 597 S.E.2d 672 (2003). This assignment of error is overruled.

IV. Clear, Cogent, and Convincing Evidence

Respondents contend that without the evidence admitted in violation of their Sixth Amendment rights, there was no clear, cogent, and convincing evidence supporting the trial court's findings of fact and conclusions of law. In light of our earlier holding that respondents' Sixth Amendment rights were not violated and the trial court properly admitted the testimony, we dismiss this assignment of error as moot.

V. Motion for Funds

[2] Respondents assert the trial court erred by denying respondent-father's motions for funds to employ an expert witness and complete a telephone deposition. We disagree.

Article 36 of Chapter 7A of our General Statutes proscribes the practices, procedures, and entitlements for indigent persons. N.C. Gen. Stat. § 7A-450 *et seq.* (2003). The scope of this Article extends to a "proceeding to terminate parental rights . . . ." N.C. Gen. Stat. § 7A-451(a)(14) (2003). N.C. Gen. Stat. § 7A-454 (2003) states, "[f]ees for the services of an expert witness for an indigent person and other necessary expenses of counsel shall be paid by the State in accordance with rules adopted by the Office of Indigent Defense Services." "There is no requirement that an indigent defendant be provided with investigative assistance merely upon the defendant's request." *State v. Brown*, 59 N.C. App. 411, 416, 296 S.E.2d 839, 842 (1982) (citation

omitted), *cert. denied*, 310 N.C. 155, 311 S.E.2d 294 (1984). Rather, it is in the trial court's discretion whether to grant requests for expenses to retain an expert witness or to conduct a deposition. *State v. Sandlin*, 61 N.C. App. 421, 426, 300 S.E.2d 893, 896-97 ("[T]he grant or denial of motions for appointment of associate counsel or expert witnesses lies within the trial court's discretion and a trial court's ruling should be overruled only upon a showing of abuse of discretion."), *cert. denied*, 308 N.C. 679, 304 S.E.2d 760, *cert. denied*, 464 U.S. 995, 78 L. Ed. 2d 685 (1983).

> "As in the case of providing private investigators or other expert assistance to indigent defendants, we think the appointment of additional counsel is a matter within the discretion of the trial judge and required only upon a showing by a defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial."

Id. at 427, 300 S.E.2d at 897 (quoting *State v. Johnson*, 298 N.C. 355, 362-63, 259 S.E.2d 752, 758 (1979) (citations omitted)). "Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided." *State v. Holden*, 321 N.C. 125, 136, 362 S.E.2d 513, 522 (1987) (citing *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976)), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988).

A. Expert Witness

Respondent-father moved the trial court for funds to retain an expert witness to examine D.R., review his medical records, and assist in preparation for the termination hearing. In support of his motion, respondent-father asserted the interviews with D.R. leading to evidence about his sexual abuse were conducted improperly and "to determine the impact of the techniques used in questioning of the minor child, an expert in the field of child sexual abuse should be appointed to review the various interviews of the minor child and to conduct a physical and/or mental examination of the minor child[.]"

Our review of the record, including respondent-father's motion, does not show "there [was] a reasonable likelihood that it will materially assist [respondents] in the preparation of [their] defense or that without such help it is probable that [respondents] will not receive a fair trial." *Sandlin*, 61 N.C. App. at 427, 300 S.E.2d at 897. The trial court properly received briefs from both parties and heard their arguments in open court. Respondent-father failed to show the trial court abused its discretion in denying his motion.

B. Telephone Deposition

Respondent-father also moved the trial court to allow and pay for a telephone deposition of D.R.'s foster parents. He argued the investigation of respondents' alleged sexual abuse of D.R. resulted from the foster parents' improper questioning of D.R. regarding his conduct and behavior. However, respondent-father did not include in his motion his reasons for deposing the foster parents, the information he sought, or that "there [was] a reasonable likelihood that it will materially assist [respondents] in the preparation of [their] defense or that without such help it is probable that [respondents] will not receive a fair trial." *Id.*

Our review of the record and respondent-father's motion fails to show the trial court abused its discretion in denying his motion for expenses to conduct a telephone deposition. This portion of the assignment of error is overruled.

VI. Statutory Time Limit

[3] Respondents argue the trial court erred by not entering its order terminating respondents' parental rights within the statutory time frame. We agree, but find respondents failed to show any prejudice.

Sections 7B-1109 and 7B-1110 of our General Statutes require a trial court "*shall*" reduce to writing, sign, and enter its decision on termination "no later than 30 days following the completion of the termination of parental rights hearing." N.C. Gen. Stat. § 7B-1109(e) (2003); N.C. Gen. Stat. § 7B-1110(a) (2003) (emphasis supplied). Here, the termination hearing was completed on 14 November 2003. The trial court did not reduce to writing, sign, and enter its order terminating respondents' parental rights until 22 January 2004, sixty-nine days later.

This Court has addressed the issue of prejudicial error resulting from untimely completion of statutory requirements in juvenile proceedings. *In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 172 (2004) (adjudication and dispositional orders entered over forty days after the hearing in violation of N.C. Gen. Stat. § 7B-807(b) and § 7B-905(a) not reversible error without a showing of prejudice), *disc. rev. denied*, 359 N.C. 189, —— S.E.2d —— (2004); *In re J.L.K.*, 165 N.C. App. 311, 315-16, 598 S.E.2d 387, 390 (2004) (termination order entered eighty-nine days after the hearing not reversible error without a showing of prejudice), *disc. rev. denied*, 359 N.C. 68, 604

S.E.2d 314 (2004); *In re B.M.*, 168 N.C. App. 350, 354, 607 S.E.2d 698, 701-02 (2005) (delay in filing petition seeking termination of parental rights in violation of N.C. Gen. Stat. § 7B-907(e) not reversible error without a showing of prejudice); *In re L.E.B.*, 169 N.C. App. 375, 379, 610 S.E.2d 424, 426 (2005) (six month delay in entry of termination of parental rights order held prejudicial), *disc. rev. denied*, 359 N.C. 632, —— S.E.2d —— (June 30, 2005) (No. 218P05); *In re A.D.L.*, 169 N.C. App. 701, 706, —— S.E.2d ——, —— (April 19, 2005) (No. COA03-1333) (delay in entry of order terminating parental rights not reversible error without a showing of prejudice); *In re T.L.T.*, 170 N.C. App. 430, 432, 612 S.E.2d 436, 438 (2005) (seven month delay in entry of order terminating parental rights held prejudicial); *In re C.J.B. & M.G.B.*, 171 N.C. App. 132, 135, —— S.E.2d ——, —— (June 21, 2005) (No. COA04-992) (five month delay in entry of order terminating parental rights held prejudicial).

A review of these decisions shows this 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.

In re C.J.B., 171 N.C. App. at 134, —— S.E.2d at —— (citing *In re J.L.K.*, 165 N.C. App. at 315-16, 598 S.E.2d at 390-91; *In re B.M.*, 168 N.C. App. at 353-55, 607 S.E.2d at 700-02).

Respondents do not argue how they or the other parties were prejudiced by the thirty-nine day delay. Their argument rests solely on the assertion that the delay in entering the order, in violation of N.C. Gen. Stat. § 7B-1109(e) and § 7B-1110(a), was *per se* prejudicial. This Court has expressly overruled this argument. *See In re C.J.B.*, 171 N.C. App. at 134, —— S.E.2d at —— ("[P]rejudice *must be* shown before the late entry will be deemed reversible error.") (emphasis supplied). Our decision does not condone the delay in entering the adjudication and dispositional order beyond the time limits in the statutes. *See In re B.M.*, 168 N.C. App. at 355, 607 S.E.2d at 702 (Although this Court did not find prejudice, we stated, "[w]e strongly caution against this practice, as it defeats the purpose of the time requirements specified in the statute, which is to provide parties with a speedy resolution of cases where juvenile custody is at issue."). This assignment of error is overruled.

VII. Conclusion

Respondents' Sixth Amendment confrontation rights were not violated by the admission of testimony during a civil matter. The trial court did not abuse its discretion in denying respondent-father's motions for expenses to retain an expert witness and to conduct a telephone deposition of the foster parents.

Although the trial court entered its termination order sixty-nine days after the hearing in violation of N.C. Gen. Stat. § 7B-1109(e) and N.C. Gen. Stat. § 7B-1110(a), respondents failed to argue how the delay was prejudicial. We affirm the trial court's order terminating respondents' parental rights.

Affirmed.

Judges WYNN and ELMORE concur.

STATE OF NORTH CAROLINA v. LARRY DONNELL JONES

No. COA04-399

(Filed 2 August 2005)

1. Criminal Law— continuance denied—new evidence—not prejudicial

The denial of defendant's motion for a continuance was not an abuse of discretion where his counsel first saw incriminating letters from defendant at the beginning of the trial for statutory rape and indecent liberties, but there was overwhelming evidence that defendant fathered the victim's child and defendant did not explain why he needed a continuance.

2. Evidence— videotape—foundation

A statutory rape and indecent liberties defendant failed to lay a proper foundation for admission of a videotape in which the victim denied having sex with defendant, and the trial court did not err by excluding it.

3. Indecent Liberties— two charges—same act

Defendant was erroneously convicted of two charges of indecent liberties, one characterized as "indecent liberties" and the other as "lewd and lascivious act," based on the same act.

Although N.C.G.S. § 14-202.1(a) sets out alternative acts (indecent liberties and lewd and lascivious acts), a single act can support only one conviction.

4. Sentencing— aggravating factors—*Blakely* error—jury finding required

Defendant's sentence was remanded because it was aggravated based on a factor not found by a jury and not admitted by defendant.

5. Constitutional Law— rape and indecent liberties—not double jeopardy

Defendant was not subjected to double jeopardy by sentences for first-degree rape and indecent liberties.

Appeal by defendant from judgment entered 20 November 2003 by Judge W. Russell Duke, Jr., in Wayne County Superior Court. Heard in the Court of Appeals 17 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General Lauren M. Clemmons, for the State.

Parish & Cooke, by James R. Parish for defendant.

LEVINSON, Judge.

Defendant (Larry Jones) appeals from judgments entered upon his convictions of one count of first degree statutory rape and two counts of indecent liberties. We find no error in part, vacate in part, and remand.

The State's evidence at trial tended to show, in pertinent part, the following: "Bonnie"[1] testified that she was born on 25 January 1989, and was in the ninth grade. She met the defendant when she was a young child and he was dating her mother. The defendant first touched her private parts when she was six or seven years old. After Bonnie turned eleven, she and the defendant started having sexual intercourse on a regular basis so many times that Bonnie could not estimate the total number of incidents. They engaged in sexual relations in a variety of locations, including their respective homes, several different motels, and at an abandoned dwelling in the country. On occasion, defendant would "sign her out" of middle school so they

1. To preserve the victim's privacy, we will refer to her by the pseudonym "Bonnie."

could have intercourse at a motel. Bonnie also identified approximately fifteen letters from the defendant, in which he generally professed his love for her and his desire to see her and be with her.

When she was twelve years old, Bonnie became pregnant. The defendant continued to engage her in sexual intercourse, and he accompanied her to prenatal medical appointments. On 3 April 2002 Bonnie gave birth to a son, "Zeke"[2] who was later adopted. After she got pregnant, Bonnie was interviewed by local law enforcement authorities and caseworkers with the Wayne County Department of Social Services (DSS). Bonnie testified that defendant instructed her to lie about their relationship, so she initially told her mother, Goldsboro Police Investigator Page Learnard, and a DSS social worker that she never had a sexual relationship with defendant. Defendant also directed her to make a videotape recording: he set up the recording equipment, and her mother wrote down what she should say. Bonnie testified that on the tape she had denied having sex with defendant, but that she had lied on the videotape and in her initial statements to law enforcement officers, her mother, and DSS workers.

Bonnie's father testified to the contents of a letter from the defendant, in which he admitted he was Zeke's father, and expressed a wish that the child not be given up for adoption. Bonnie had confided to her father that she had a sexual relationship with the defendant.

Terry Harne, DSS case worker for Bonnie's son Zeke, testified to the contents of several letters the defendant had sent her. In his letters, defendant professed his love and concern for the baby, his hope that the child would not be adopted, and his wish to fight the pending termination of parental rights proceeding. The defendant did not deny paternity in any of these letters, and in one he suggested that Zeke be placed with defendant's other children, "his brothers."

Goldsboro Police Officer Page Learnard testified that when she first talked with Bonnie in 2001, Bonnie denied any improper physical contact with defendant. However, when Bonnie became pregnant the case was reopened, at which time Bonnie disclosed her relationship with defendant. Bonnie's statements to Learnard corroborated Bonnie's trial testimony that defendant started having sex with her when she was eleven years old, and that he had told her to lie to various adults and to lie on the videotape. Learnard

2. We refer to Bonnie's son by the pseudonym "Zeke" to protect his privacy.

also corroborated earlier testimony on the locations where the two had met to have sex.

Other evidence provided further proof that defendant was the father of Bonnie's child. The State offered evidence that Bonnie, Zeke, and the defendant had submitted samples for DNA testing. The results of this testing indicated to a 99.99% certainty that defendant was Zeke's father, and that the chances that someone else had fathered the child were ten million to one. Additionally, attorney Gordon Parker testified that he represented Wayne County DSS in a child support action brought against defendant to obtain child support for Zeke. After defendant was shown the results of DNA testing, he signed an acknowledgment of paternity in the case. Finally, two DSS social workers testified that defendant had called their office asking why he had to take a DNA test, inasmuch as he admitted paternity.

Defendant's evidence may be summarized, in pertinent part, as follows: Defendant recalled DSS worker Terry Harne and elicited testimony from her that defendant had denied fathering Bonnie's child on at least one occasion. Defendant's mother, Mary Elliott, testified that Bonnie's mother had brought her a videotape on 5 June 2001. The defendant testified that he knew Bonnie because he had once been engaged to her mother. He denied ever having sex with Bonnie. Other evidence will be discussed as it becomes relevant to the issues raised on appeal.

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[1] Defendant argues first that the trial court erred by denying his motion to continue. Defense counsel moved for a continuance at the beginning of trial, on the grounds that he had just been provided with two new letters written by defendant which the State intended to introduce at trial. Counsel claimed that he needed a continuance in order to study these letters and discuss them with the defendant. The trial court denied his motion, and at trial the letters were introduced without objection. On appeal, defendant argues that the court's denial of his continuance motion "was an abuse of discretion" and denied the defendant "his due process rights and rights to effective assistance of counsel." We disagree.

The standard of review of a trial court's ruling on a motion for continuance is well-established:

> Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the

> trial court's ruling is not subject to review. When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error.

State v. Taylor, 354 N.C. 28, 33-34, 550 S.E.2d 141, 146 (2001) (citing *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981), and *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982)). Further, to establish that the denial of a continuance motion was prejudicial,

> "a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. To demonstrate that the time allowed was inadequate, the defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion."

State v. Williams, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002) (quoting *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993)).

In the instant case, we find dispositive the question of whether the defendant has shown that the court's denial of his continuance motion, even if error, in any way prejudiced the defendant. The two letters at issue were written by the defendant and addressed to Terry Harne, the DSS caseworker for Bonnie's son Zeke. The letters generally contain declarations of defendant's love and concern for the baby. In addition, each includes certain statements that might be interpreted as oblique acknowledgments of paternity. For example, one letter proposes that Zeke be placed with defendant's other sons, whom he refers to as "his brothers"; the other letter argues against termination of his parental rights, in part so that Zeke might receive "the love and respect . . . that only a mother and father can give[.]"

The defendant failed to articulate, either at trial or on appeal, how a continuance would have helped him. The letters' legal relevance was primarily in relation to the issue of paternity, and to the extent that the letters admit paternity, they support the State's case. However, the State also offered overwhelming additional evidence that defendant was Zeke's father, including: (1) Bonnie's testimony that defendant fathered her child; (2) Bonnie's statements to Learnard; (3) defendant's numerous other letters, including a letter to

Bonnie's father admitting paternity; (4) defendant's acknowledgment of paternity in the child support action; and (5) the results of DNA testing showing a 99.99% probability that defendant was the baby's father. This evidence was largely available to defendant before trial; therefore, the discovery of these two additional letters should not have changed defendant's trial strategy. Moreover, defendant does not explain why he needed a continuance, other than to "discuss this damaging new evidence." We conclude that "[d]efendant has been unable to show that he was materially prejudiced or that he would have been better prepared had the continuance been granted. Therefore, we conclude that the trial court did not abuse its discretion, and we thus overrule this assignment of error." *Williams*, 355 N.C. at 541, 565 S.E.2d at 632-33.

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[2] Defendant argues next that the trial court committed reversible error by excluding a videotape in which Bonnie denied having sex with the defendant. The court ruled that the defendant had failed to lay a proper foundation for admission of the tape. We agree with the trial court.

The standard for admission of a videotape is stated in *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988) (citations and internal quotation marks omitted), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990):

> The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed, (illustrative purposes); (2) proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . .; (3) testimony that the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing (substantive purposes); or (4) testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area "photographed."

In the instant case, the evidence failed to meet any of the *Cannon* criteria. None of the witnesses offered testimony about the operation or testing of the recording equipment. Bonnie testified that defendant and her mother set up videotaping equipment before leaving her alone to make a recording. She did not know if the tape offered in court was the original or one of some six copies that were made. She did not testify that she viewed the tape right after it was made, and

did not testify that the tape proffered by defendant accurately depicted what she had filmed. Defendant's mother testified only that Bonnie's mother gave her a videotape, but she had no first-hand knowledge pertaining to the contents of the tape or to the chain of custody. The defendant was absent during most of the filming, and did not watch the tape after it was made. We conclude that the trial court did not err by ruling that defendant failed to lay a proper foundation for admission of the videotape. This assignment of error is overruled.

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[3] Defendant next argues that the trial court erred by submitting to the jury two separate charges of indecent liberties based on the same act. We agree.

Bonnie testified at trial that she had sexual intercourse with the defendant on many occasions, but did not identify any specific dates. The indictment alleged that the offenses occurred on 1 June 2001, which was nine months before Zeke's birth and thus represents an approximate date of his conception. There was no evidence of multiple sexual acts on that or any other date. However, defendant was charged in a single indictment with first degree statutory rape in violation of N.C.G.S. § 14-27.7A (2003), and with two violations of N.C.G.S. § 14-202.1 (2003), one characterized as "indecent liberties" and the other as "lewd and lascivious act." We conclude this was error.

G.S. § 14-202.1 provides in relevant part that:

> (a) A person is guilty of taking indecent liberties with children if . . . he either:
>
> > (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child 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.

The State argues that Subsections (a)(1) and (a)(2) are separate criminal offenses with different elements because one's commission of a "lewd and lascivious act" does not require proof of an immoral purpose. The State cites no cases in support of this posi-

tion, and we find none. To obtain a conviction for a violation of G.S. § 14-202.1(a)(1):

> [T]he State must present substantial evidence of each of the following elements: "(1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire."

State v. Every, 157 N.C. App. 200, 205, 578 S.E.2d 642, 647 (2003) (quoting *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987)). "The first four elements may be proved by direct evidence[.]" *State v. Roberts*, 166 N.C. App. 649, 653, 603 S.E.2d 373, 376 (2004), *disc. review denied*, 359 N.C. 325, 611 S.E.2d 843 (2005). "The fifth element, that the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions." *Rhodes*, 321 N.C. at 105, 361 S.E.2d at 580. Indeed:

> our Supreme Court has stated that "the evil the legislature sought to prevent in this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child 'for the purpose of arousing or gratifying sexual desire.' Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial."

State v. Shue, 163 N.C. App. 58, 61, 592 S.E.2d 233, 235 (quoting *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990)), *disc. review denied*, 358 N.C. 380, 597 S.E.2d 773 (2004).

In *Hartness*, the Court held that G.S. § 14-202.1 states disjunctively two alternative means of proving **one element** of the offense of indecent liberties:

> [In t]he case *sub judice* . . . a single wrong [may be] established by a finding of various alternative elements. . . . [T]he crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts. . . .

Hartness, 326 N.C. at 566-67, 391 S.E.2d at 180. Accordingly, although the statute sets out alternative acts that might establish an element of the offense, a single act can support only one conviction.

In the instant case, the defendant was convicted of two separate violations of G.S. § 14-202.1 arising out of a single act on 1 June 2001.

We conclude that this was error, and that judgment may be properly entered on Count II of the indictment in 02 CRS 57952, but that no such conviction may be entered as to Count III of the same.

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[4] Defendant argues next that the trial court erred by sentencing him in excess of the statutory maximum based on an aggravating factor not submitted to the jury and not admitted by defendant. Defendant argues he is entitled to a new sentencing hearing pursuant to *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004). We agree.

In the instant case, defendant's sentence was aggravated based on a finding that "[t]he defendant took advantage of a position of trust or confidence to commit the offense." The trial court sentenced defendant at the top of the aggravated range to a term of 480 to 585 months. The aggravating factor was not found beyond a reasonable doubt by the jury and was not admitted by defendant. Therefore, we must remand for resentencing in conformity with the rulings in *Blakely* and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005).

[5] Defendant next contends that his sentences on the first degree rape and indecent liberties offenses violate his right to be free from double jeopardy. Defendant argues that, because the conduct tending to prove these two offenses was "identical," and because the date of offense alleged in the indictment for these offenses was the same, judgment may not be entered on the indecent liberties offense. We disagree.

Our appellate courts have uniformly rejected defendant's contention. *See, e.g.*, *State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987); *State v. Fletcher*, 322 N.C. 415, 368 S.E.2d 633 (1988); *Rhodes*, 321 N.C. 102, 361 S.E.2d 578. This assignment of error is overruled.

No error in part, vacated in part, and remanded.

Judges HUNTER and CALABRIA concur.

REBECCA HOYLE ELLEN, ANGELA ELLEN, FLORENCE OAKLEY, PLAINTIFFS v. A.C. SCHULTES OF MARYLAND, INC., A.C. SCHULTES OF CAROLINA, INC., A.C.S. & SONS, INC., JOHN O'BRIEN, AND WILLIAM JEFFERYS, DEFENDANTS

No. COA04-1320

(Filed 2 August 2005)

Arbitration and Mediation— motion to compel denied—claims not based on contract

Defendants' motion to compel arbitration was properly denied where plaintiffs were not seeking any direct benefits from the contracts containing the relevant arbitration clause.

Appeal by defendants from order entered 14 June 2004 by Judge John B. Lewis, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 12 May 2005.

Shipman Gore Mason & Wright, L.L.P., by Gary K. Shipman, William G. Wright, and Nicole Moss, for plaintiffs-appellees.

Daniel Lee Brawley and Barbara A. Samples, and Maupin Taylor, P.A., by Gilbert C. Laite, III, for defendants-appellants.

TIMMONS-GOODSON, Judge.

A.C. Schultes of Maryland, Inc. ("AC Schultes"), A.C.S. & Sons, Inc. ("ACS"), John O'Brien ("O'Brien"), and William Jefferys ("Jefferys") (collectively, "defendants") appeal the trial court order denying their motions to compel arbitration of a suit filed by Rebecca Hoyle Ellen ("Rebecca"), Angela Ellen ("Angela"), and Florence Oakley ("Oakley") (collectively, "plaintiffs").[1] Because we conclude that the arbitration clause at issue is not enforceable against plaintiffs, we affirm the order of the trial court.

The facts and procedural history pertinent to the instant appeal are as follows: Plaintiffs are shareholders in Atlantic Coast Construction & Utility, Inc. ("ACCU"), a construction company specializing in water and sewer utilities work. In 1999, ACCU entered into a series of agreements with AC Schultes, whereby ACCU would serve as subcontractor on several construction projects awarded to and supervised by AC Schultes. Five of these projects were referred to as the "Water Wells," "SJAFB," "Potable Water Lines," "Burton,"

1. A.C. Schultes of Carolina, Inc. was dismissed pursuant to the trial court order and thus is not a party to the instant appeal.

and "Wash Racks" projects. The subcontracts of these five projects contained the following pertinent arbitration clause:

> Any controversy or claim between the Contractor and the Subcontractor arising out of or related to this Subcontract, or the breach thereof, shall be settled by arbitration . . . .

On several occasions in Spring 2000, officers of ACCU and AC Schultes met to discuss the proposed partial purchase of ACCU by AC Schultes. ACCU eventually turned down AC Schultes' proposals, and ACCU and AC Schultes continued to work with one another. However, the relationship between ACCU and AC Schultes subsequently deteriorated, and on 12 September 2001, AC Schultes filed a complaint against ACCU, requesting that the trial court require arbitration of all claims arising out of the Water Wells, SJAFB, Potable Water Lines, Burton, and Wash Racks projects. AC Schultes also requested a declaration of the financial obligations and liabilities of the parties on a sixth project, the North Lenoir project. The trial court thereafter ordered the parties to arbitrate all claims and controversies arising out of the projects.

On 3 January 2004, plaintiffs filed a complaint against defendants, alleging unfair and deceptive trade practices and tortious interference with prospective business advantages. In their complaint, plaintiffs allege that at or around the time ACCU declined AC Schultes' purchase attempts, O'Brien "began a course of inappropriate and unwanted sexual advances" toward Angela. Plaintiffs allege that although Angela "attempted to ignore [O'Brien's] behavior and continue the business relationship" between ACCU and AC Schultes, O'Brien continued to contact and harass Angela by "professing his love" for her and by "follow[ing] her to . . . pursue his desired illicit relationship." Plaintiffs assert that after repeated rejections, O'Brien "apparently got the message that [Angela] would not give in to his carnal desire" in December 2000. However, AC Schultes nevertheless "failed and refused to pay ACCU for work performed by ACCU and for materials supplied by ACCU on virtually all projects ACCU was working on."

According to plaintiffs' complaint, the relationship between ACCU and AC Schultes subsequently "broke down further, to the point that the principals of ACCU were taking personal money and obtaining personal loans to complete the projects ACCU had with [AC Schultes][.]" Jefferys and O'Brien thereafter allegedly "contacted ACCU vendors and subcontractors and slandered ACCU by stating

that ACCU would not pay its bills even though it had been paid by [AC Schultes], which they knew not to be true." Jefferys and O'Brien also allegedly "asked at least some vendors not to do further business with ACCU[,]" and "stated to ACCU vendors that [AC Schultes] was going to put ACCU out of business." Plaintiffs assert that Jefferys and O'Brien also "contacted ACCU employees and told them that ACCU was going to be put out of business and told them they should come to work for [AC Schultes] while they could[,]" and "filed fraudulent documentation with the Federal Government to obtain payment for work performed by ACCU, and then continued to withhold payment to ACCU for the work performed." According to plaintiffs, "[t]he actions of Jefferys and O'Brien were taken with the deliberate purpose of destroying the plaintiffs'[] business and reputations in the very limited field of utilities contracting[,]" and the actions "were taken in retaliation for [Angela's] refusal of [O'Brien's] illegal, unwanted and adulterous sexual advances toward her." Plaintiffs contend that the actions of Jefferys and O'Brien were on behalf of AC Schultes, and because ACS received profits from the operation of AC Schultes, it was a "knowing beneficiary" of the actions and thus should be responsible for the damages resulting from the alleged actions.

As a result of the alleged actions, plaintiffs assert that by August 2001, "all of ACCU's funds were exhausted, all of [plaintiffs'] funds were depleted, and all of their ability to obtain credit was depleted as well." Plaintiffs further assert that after the parties' "last attempt to resolve the payment issues" was unsuccessful, AC Schultes "almost immediately filed for arbitration on five projects for which it owed ACCU money and filed a lawsuit in Lenoir County[.]" AC Schultes thereafter allegedly "paid exorbitant amounts of money to other contractors for the purported purpose of completing the outstanding work[,]" in an effort to "establish[] enough 'back charges' against ACCU [so] as to cancel out all amounts owed to ACCU." Plaintiffs allege that "[a]s a direct result of the foregoing illegal actions, plaintiffs have lost their entire investment in the company as well as incurred substantial additional damages for loss of future earnings and return on capital," and further "lost the prospective business advantage of having vendors and subcontractors that will work with them to conduct future business in the utilities field, in a manner customary for that field."

On 19 February 2004, defendants filed a motion to dismiss plaintiffs' claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The trial

court subsequently denied defendants' motion, and on 23 April 2004, defendants filed separate answers to plaintiffs' complaint as well as separate motions to compel arbitration of the issues in the complaint. Following a hearing on the matter, on 14 June 2004, the trial court issued an order denying defendants' motions to compel arbitration. It is from this order that defendants appeal.

The only issue on appeal is whether the trial court erred by denying defendants' motions to compel arbitration. Defendants argue that plaintiffs and their complaint are subject to arbitration. We disagree.

We note initially that a trial court's decision to deny a motion to compel arbitration is interlocutory in nature. *See Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 677 (2001). Nevertheless, this Court has previously held that " '[t]he 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) (quoting *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881, *disc. review denied*, 350 N.C. 832, 539 S.E.2d 288 (1999), *cert. denied*, 528 U.S. 1155, 145 L. Ed. 2d 1072 (2000)) (alteration in original). Accordingly, we will address the merits of defendants' instant appeal.

Determination of whether a dispute is subject to arbitration involves a two-pronged analysis. *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003), *aff'd per curiam*, 358 N.C. 146, 593 S.E.2d 583 (2004). The trial court must determine whether the specific dispute is covered by the " 'substantive scope of th[e] agreement[,]' " and whether " 'the parties had a valid agreement to arbitrate[.]' " *Id.* (quoting *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678 (citation and quotation marks omitted)). "The obligation and entitlement to arbitrate 'does not attach only to one who has personally signed the written arbitration provision.' Rather, '[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.' " *Washington Square Securities, Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004) (quoting *Inter. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 416-17 (4th Cir. 2000)) (alteration in original).

In the instant case, Angela and Rebecca signed the contracts between ACCU and AC Schultes only in their capacity as officers of

ACCU. Nevertheless, defendants assert that the doctrine of equitable estoppel requires plaintiffs to arbitrate the issues of their individual complaint against defendants. "Equitable estoppel precludes a party from asserting rights 'he otherwise would have had against another' when his own conduct renders assertion of those rights contrary to equity." *Schwabedissen*, 206 F.3d at 417-18 (quoting *First Union Commercial Corp. v. Nelson, Mullins, Riley & Scarborough (In re Varat Enterprises, Inc.)*, 81 F.3d 1310, 1317 (4th Cir. 1996)).

> In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. "To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."

Schwabedissen, 206 F.3d at 418 (quoting *Avila Group, Inc. v. Norma J. of California*, 426 F. Supp. 537, 542 (S.D.N.Y. 1977)) (alteration in original).

In *Schwabedissen*, the Fourth Circuit Court of Appeals noted that "[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it [is seeking or] receives a "direct benefit" from a contract containing an arbitration clause.' " 206 F.3d at 418 (citations omitted). In that case, International Paper agreed to buy an industrial saw from Wood Systems, who in turn engaged Schwabedissen to build the saw according to specifications set forth in a contract. After the saw delivered to International Paper failed to work properly, International Paper filed suit against Schwabedissen, alleging breach of contract and breach of warranties based upon the Wood Systems-Schwabedissen contract. On appeal of the trial court order enforcing an arbitration award, International Paper argued that it was not bound to arbitrate its claim against Schwabedissen because it was not a signatory to the contract between Wood Systems and Schwabedissen. The Fourth Circuit Court of Appeals disagreed, holding that because International Paper was seeking to gain a direct benefit from the provisions of the Wood Systems-Schwabedissen contract, it was estopped from avoiding the contract provisions requiring arbitration of its claims. *Id.* The Court explained its reasoning as follows:

> The Wood-Schwabedissen contract provides part of the factual foundation for every claim asserted by International Paper against Schwabedissen. . . . International Paper alleges that Schwabedissen failed to honor the warranties in the Wood-Schwabedissen contract and it seeks damages, revocation, and rejection "in accordance with" that contract. International Paper's entire case hinges on its asserted rights under the Wood-Schwabedissen contract; it cannot seek to enforce those contractual rights and avoid the contract's [arbitration] requirement . . . .

Id.

In the instant case, defendants cite *Schwabedissen* in support of their argument that plaintiffs are estopped from refusing to arbitrate their claims. However, although we note that the contract between ACCU and AC Schultes "provides part of the factual foundation" for plaintiffs' complaint, we also note that in *Schwabedissen*, International Paper's "entire case hinge[d] on its asserted rights under the Wood-Schwabedissen contract[.]" *Id.* In the instant case, plaintiffs are not seeking any direct benefits from the contracts containing the relevant arbitration clause, nor are they asserting any rights arising under the ACCU-AC Schultes contracts. Neither plaintiffs' allegations of unfair and deceptive trade practices nor plaintiffs' allegations of tortious interference depend upon the contracts containing the arbitration clause. Both of the claims are dependent upon legal duties imposed by North Carolina statutory or common law rather than contract law. *See United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 320, 339 S.E.2d 90, 93 (1986) ("[A]n action for unfair and deceptive trade practices is a distinct action separate from fraud, breach of contract, and breach of warranty."); *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 656 (1945) ("We think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant's own right, but with design to injure the plaintiffs, or gaining some advantage at his expense."). Thus, defendants' liability will be determined by its duties under North Carolina statutory and common law, not by its duties under the contracts between ACCU and AC Schultes. Unlike in *Schwabedissen*, plaintiffs' "entire case" does not "hinge[] on [any] asserted rights under the . . . contract." 206 F.3d at 418. Therefore, because plaintiffs are not seeking a direct benefit from the provisions of the ACCU-AC Schultes contracts, we conclude that the doctrine of

equitable estoppel cannot be used to force plaintiffs to arbitrate their individual claims. Accordingly, we hold that the trial court did not err in denying defendants' motions to compel arbitration.

Affirmed.

Judges McCULLOUGH and STEELMAN concur.

STATE OF NORTH CAROLINA v. ANTIONNE LEMEL LYLES

No. COA04-969

(Filed 2 August 2005)

1. Evidence— lab report—performing chemist unavailable—basis of expert opinion—right of confrontation

Lab reports performed by an unavailable chemist were properly admitted as the basis of the expert opinion of a Charlotte-Mecklenburg supervising chemist that substances taken from defendant were cocaine. Furthermore, there was no confrontation clause violation where the expert witness was available for cross-examination.

2. Evidence— hearsay—lab reports—exceptions—public records and business records—law enforcement exclusion

The law enforcement exclusion in the public records hearsay exception does not limit the business records exception. N.C.G.S. § 8C-1, Rules 803(8) and 803(6).

3. Constitutional Law— right to remain silent—quiet demeanor during questioning—closing argument not an impermissible comment

A detective's testimony and the prosecutor's jury arguments about defendant's quiet demeanor during questioning did not constitute improper comments on defendant's right to remain silent.

4. Evidence— codefendant charged—admission not plain error

There was no plain error in a cocaine trafficking prosecution from the admission of evidence that a codefendant was also charged. There was no testimony suggesting that the codefendant had been found guilty, pleaded guilty, or pleaded nolo contendere,

and nothing to indicate that the jury would have reached a different result without this testimony.

Appeal by defendant from judgment signed 14 January 2004 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 March 2005.

Attorney General Roy Cooper, by Assistant Attorney General Tina Lloyd Hlabse, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kelly D. Miller, for defendant.

BRYANT, Judge.

Antionne Lemel Lyles (defendant) appeals his judgment signed 14 January 2004, entered consistent with a jury verdict finding him guilty of two counts of trafficking in cocaine.

Defendant was arrested at the airport located in Charlotte, North Carolina (Charlotte Airport) on 29 January 2002, after a search revealed a pellet on his person and two packages in his shoes which field-tested positive for cocaine. Defendant was charged and subsequently indicted for trafficking in 400 or more grams of cocaine by transportation and trafficking in 400 or more grams of cocaine by possession.

These matters came for hearing at the 12 January 2004 criminal session of Mecklenburg County Superior Court with the Honorable Robert P. Johnston presiding. At trial, the State introduced expert testimony by Charlotte-Mecklenburg Police Department Crime Lab supervising chemist Tony Aldridge. Aldridge's testimony was based on the test results of Willie Rose, a Charlotte-Mecklenburg Police Department Crime Lab chemist. Rose analyzed the contents of both the pellet and two packages seized from defendant's shoes. The results of Rose's tests consisting of two Crime Laboratory Reports, indicated that the substance in the two shoe packets was "Cocaine, 735.86 grams," and that the substance in the pellet was "Cocaine, 7.53 grams."

Before trial, Rose relocated and was not available to testify. Aldridge testified it was the regular practice of the Charlotte-Mecklenburg Police Department Crime Lab Chemistry section to make and keep Crime Laboratory Reports of the type written by Rose. Over defendant's objection, the trial court allowed the Crime

Laboratory Reports to be received into evidence under N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 803(6) (Rule 803(6)), the business records exception to the hearsay rule.

Defendant was found guilty as charged on 14 January 2004. The trial court ordered the convictions consolidated for judgment and sentenced defendant to 175-219 months imprisonment and imposed a mandatory fine of $250,000.00. Defendant appealed.

The issues on appeal are whether the trial court erred in: (I) admitting into evidence the Crime Laboratory Reports prepared by a non-testifying chemist, and in admitting the expert testimony of a chemist whose opinion was based on the analysis of the non-testifying chemist; (II) admitting evidence regarding defendant's exercise of his right to remain silent; and (III) admitting evidence that a co-defendant was also charged in connection with the search and seizure at the airport which resulted in defendant's arrest.

I

[1] Defendant asserts the trial court erred by admitting into evidence the Crime Laboratory Reports under the business records exception to the hearsay rule, arguing the reports were inadmissible hearsay, and that admission of the reports and testimony of Aldridge were in violation of the rules of evidence and the Confrontation Clause of the United States Constitution. The State argues the reports were properly admitted as business records under Rule 803(6). We conclude, however, the reports were properly admitted as the basis of the expert opinion given by Aldridge[1].

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[2] 1. Defendant argues that the language of N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 803(8) (Rule 803(8)) regarding public records and reports restricts the business records exception of Rule 803(6). We find defendant's argument unpersuasive.

In support of his argument, defendant cites the case of *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), in which the Court of Appeals for the Second Circuit held that exhibits purporting to be the official report and accompanying worksheet of a United States customs service chemist were inadmissible under the "law enforcement official" exception [Rule 803(8)] and the business records exception [Rule 803(6)]. *Oates* at 84. In *Oates*, the chemist had analyzed a white powdery substance and determined it to be heroin. His official report to the same effect was ruled inadmissible. *Id.* The court in *Oates* reasoned that the restrictions in Rule 803(8) overrode the language of Rule 803(6). *Id.* at 83-84.

In *State v. Smith*, 312 N.C. 361, 323 S.E.2d 316 (1984), our Supreme Court expressly rejected the rationale of *Oates*. In *Smith*, the defendant argued that a statute permitting the use of a chemical analyst's affidavit to prove blood alcohol concentration, in lieu of the analyst's live appearance, violated the defendant's constitutional right to confrontation. In deciding the issue and considering the relationship between

Our Supreme Court has considered the admissibility of the basis of an expert opinion:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

State v. Golphin, 352 N.C. 364, 467, 533 S.E.2d 168, 235 (2000) (citing N.C.G.S. § 8C-1, Rule 703 (1999)) (allowing the admission of a doctor's report as the basis of expert opinion when that report contained several hearsay statements not offered for the truth of the matter asserted). The Court continued:

> Allowing disclosure of the bases of an expert's opinion "is essential to the factfinder's assessment of the credibility and weight to be given to it." *State v. Jones*, 322 N.C. 406, 412, 368 S.E.2d 844, 847 (1988). Testimony as to matters offered to show the basis for a physician's opinion and not for the truth of the matters testified to is not hearsay . . . . Its admissibility does not depend on an exception to the hearsay rule, but on the limited purpose for which it is offered. *State v. Wood*, 306 N.C. 510, 516-17, 294 S.E.2d 310, 313 (1982); *see also Jones*, 322 N.C. at 412, 368 S.E.2d at 847; *State v. Allen*, 322 N.C. 176, 184, 367 S.E.2d 626, 630 (1988).

Id.

At trial, Aldridge was tendered and admitted as an expert in the field of forensic chemistry without objection. Aldridge then testified that, in his expert opinion, based on his review of Rose's findings, both packets and the pellet tested positive for cocaine. The reports themselves were properly admitted as the basis of Aldridge's opinion. *State v. Fair*, 354 N.C. 131, 162, 557 S.E.2d 500, 522 (2001) ("[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."). Further, Aldridge testified that the methods

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Rule 803(6) and Rule 803(8), our Supreme Court inferred that the state legislature adopted Rule 803(8) without intending to change the common law rule allowing admission of public records of purely "ministerial observations." *Smith* at 381, 323 S.E.2d at 327. Instead the N.C. Supreme Court agreed with a majority of other courts that the intended purpose of Rule 803(8) was to prevent prosecutors from attempting to prove their cases through police officers' reports of their observations during the investigation of crime. *Id.* (citing *State v. Smith*, 675 P.2d 510, 512 (Or. App. 1984); *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976)).

employed by Rose were those reasonably relied upon by other forensic chemists, that Aldridge had actually calibrated Rose's machines, used the same machines for similar experiments, and reviewed Rose's work after the analysis was completed.

As our Supreme Court held in *State v. Daughtry*, 340 N.C. 488, 511, 459 S.E.2d 747, 758 (1995), "inherently reliable information is admissible to show the basis of an expert's opinion, even if the information would otherwise be inadmissible hearsay." There is no evidence in the instant case suggesting the information contained in Rose's test results was not inherently reliable. During *voir dire* and during the trial, Aldridge testified about the types of tests Rose performed on the packages, how those tests were conducted, and how Aldridge reviewed the results of those tests. Those results were used by Aldridge in forming his expert opinion and were admissible at trial to show the basis of that opinion. Further, there was no Confrontation Clause violation where, as here, the expert was available for cross-examination. "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. Delaney*, 613 S.E.2d 699, 2005 N.C. App. LEXIS 1160, *1 (N.C. Ct. App., 2005) (quoting *State v. Huffstetler*, 312 N.C. 92, 108, 322 S.E.2d 110, 120-21 (1984)).

In the instant case, defendant had ample opportunity to cross-examine Aldridge about the basis of his expert opinion testimony. In fact, defendant's entire cross-examination centered on the fact that Aldridge reviewed the test results of another analyst and did not perform the tests himself. As a result, any credibility issues regarding the basis of Aldridge's expert opinion testimony were thoroughly explored before the jury. We hold that defendant's Sixth Amendment right to confront his accusers was not violated by the admission of Rose's Criminal Laboratory Reports or Aldridge's expert opinion testimony.

II

[3] Defendant next argues the trial court committed plain error by allowing into evidence testimony regarding defendant's exercise of his right to remain silent[2]. Specifically, defendant points our attention

2. Because defendant failed to object at trial, this assignment or error is reviewed under the plain error standard. *See State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

to the testimony of Detective James Kolbay of the Charlotte-Mecklenburg Police Department that defendant was quiet during questioning and often would not respond to questions. Defendant also argues the prosecutor's reference to this testimony during closing arguments constituted plain error[3].

Plain error is error so fundamental as to amount to a miscarriage of justice, or error that probably resulted in the jury reaching a different verdict than it otherwise would have reached. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). The plain error rule applies only in truly exceptional cases. *State v. Dyson*, 165 N.C. App. 648, 651, 599 S.E.2d 73, 75 (2004) (citation omitted). The appellate court must be convinced that, absent the error, the jury probably would have reached a different result. *See, e.g.*, *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986) (holding cross-examination of a defendant about his silence after he was arrested and advised of his constitutional rights was not plain error).

The transcript reveals that Detective Kolbay was not questioned regarding defendant's exercise of his right to remain silent. Instead, Detective Kolbay was asked about defendant's demeanor during questioning. Detective Kolbay testified that defendant waived his *Miranda* rights and agreed to speak with him. He testified that defendant was never upset during questioning, only quiet and slightly unresponsive.

During closing argument, the prosecutor mentioned that defendant did not answer some of Detective Kolbay's questions and did not react when the drugs were found on his person. Defendant specifically draws the court's attention to the following remarks of the prosecutor during closing argument:

> Well, you know, maybe you heard Detective Kolbay say the co-defendant was crying, that was his demeanor.
>
> Well, the Defendant did not show any emotion. He was not upset like the co-defendant was.
>
> . . .
>
> First of all, no eye contact with Inspector Knight-Norwood. Defense Counsel asked wasn't it normal for someone to be nervous when you're being interviewed by Customs?

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3. Defendant did not object to the prosecutor's closing argument, nor did he originally assign it as error. Defendant's motion to amend the record on appeal to add a new Assignment of Error 18 regarding the prosecutor's remarks during closing arguments was allowed on 21 September 2004.

> You're not nervous, if you're not trying to hide anything. Sure he was nervous, he had 738 grams of cocaine in his shoes. He had a pellet, 7.5 grams in his stomach. Yes, he was nervous. No eye contact. How about no reaction when it was found?
>
> . . .
>
> Now, as far as knowingly, again, we're not able to prove that the Defendant said yes, I knew it was there, and I knew it was cocaine. And that is not what we're required to prove.
>
> . . .
>
> Rarely are you going to have a Defendant who stands up and says, I knew it was cocaine, I knew I had it. That would be direct evidence of knowledge.
>
> Circumstantial evidence of knowledge, all the things we just mentioned. I ask you to consider those, and find circumstantial evidence can support he knowingly possessed, and he knowingly transported.

These closing statements do not amount to an impermissible comment on defendant's right to remain silent. Moreover, given the evidence before the jury, we cannot say the jury would likely have reached a different result had Detective Kolbay's testimony and the prosecutor's closing statements regarding defendant's demeanor not been allowed. The trial court did not commit plain error.

III

[4] Finally, defendant argues the trial court committed plain error by admitting evidence that co-defendant Marcus McCoy was also charged as a result of the seizure at the airport.

Evidence of convictions, guilty pleas, and pleas of nolo-contendere of non-testifying co-defendants is inadmissible unless offered for some legitimate purpose. *State v. Rothwell*, 308 N.C. 782, 303 S.E.2d 798 (1983). This Court has previously determined that this rule applies equally to co-defendants who are charged and tried. *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985). In *State v. Batchelor*, 157 N.C. App. 421, 579 S.E.2d 422 (2003), we held that *Gary* applies where there is only evidence that a co-defendant was charged with similar crimes as the defendant, but not evidence that the co-defendant was tried. *Batchelor* at 431, 579 S.E.2d 429. In *Batchelor* we held the admission of such testimony did not rise to the level of plain

error where there was no testimony that the co-defendant had been found guilty, pleaded guilty, or pleaded nolo contendere to the charges. *Id.* Specifically, the Court wrote:

> [W]e conclude the trial court erred in admitting evidence that Mr. Harris was charged with similar offenses as defendant. However, this error did not amount to plain error . . . Detective Bowes testified that the charges were still pending against Mr. Harris and thus, there was no testimony that Mr. Harris had been found guilty, pleaded guilty, or pleaded nolo contendere to the charges. It is unlikely that the jury inferred defendant's guilt from the evidence that his co-defendant had been charged with similar offenses.

Id.

Much like *Batchelor*, we can find no testimony in the record before us suggesting the co-defendant had been found guilty, pleaded guilty, or pleaded nolo contendere. There is nothing to indicate that a jury would have reached a different result had it not been for the admission of the testimony. As a result, the admission of testimony involving the co-defendant, while error, does not rise to the level of plain error. This assignment of error is overruled.

No error.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. JOSE SANCHEZ

No. COA04-518

(Filed 2 August 2005)

1. Witnesses— cross-examination—priest—testimony about confession

A defendant charged with indecent liberties was not deprived of his right to a fair trial by not being able to adequately cross-examine a priest who testified about his general practice when hearing confessions from abuse victims, but did not testify about this victim's confession. Any error was rendered harmless by other overwhelming evidence of guilt.

2. Sentencing— aggravating factor—*Blakely* error—jury finding required

Any fact (other than a prior conviction) that increases the penalty beyond the presumptive range must be submitted to a jury and proven beyond a reasonable doubt. A sentence in the aggravated range for indecent liberties based on a unilateral finding by the judge was remanded.

Appeal by defendant from judgment entered 26 August 2003 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 2005.

Attorney General Roy Cooper, by Assistant Attorney General Diane G. Miller, for the State.

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

TYSON, Judge.

Jose Sanchez ("defendant") appeals from judgment entered after a jury found him to be guilty of taking indecent liberties with a child. We hold that defendant received a fair trial free from error, vacate defendant's sentence, and remand for resentencing.

I. Background

E.S. ("the minor") was born on 15 April 1986. In September 1999 when she was thirteen years old, she moved from her grandparents' home in El Salvador to North Carolina to live with her mother, Ana Sanchez ("Sanchez"), and her father, defendant.

The minor dated seventeen-year-old Salvadore Ruiz ("Ruiz"), who worked with defendant. Ruiz and the minor had a sexual relationship, which resulted in the minor becoming pregnant in September 2001.

On 24 September 2001, the minor signed herself out of school and called Ruiz to pick up her. While with Ruiz, the minor wrote a letter to Sanchez stating that she had run away with Ruiz and requested her not to call the police. The minor left the note at home and spent the rest of the day with Ruiz.

On 25 September 2001, defendant reported that his daughter was missing and informed Officer Gilberto Narvaez ("officer Narvaez") he believed his daughter was with Ruiz. Officer Narvaez located Ruiz at a job site, questioned him about his relationship with the minor, and

informed Ruiz that the minor was fifteen years old. Ruiz escorted Officer Narvaez to his apartment where both had spent the night.

When Officer Narvaez began questioning the minor, she became very upset and stated that her father had been "having relations" with her for over a year. Officer Carmen Mendoza ("Officer Mendoza"), a female, was called to the scene. The minor informed Officer Mendoza that her father began having sexual intercourse with her in January 2000, when she was thirteen years old. She claimed that several times a week, her father would come into her room in the middle of the night, take off her clothes, and have sex with her. The minor stated intercourse ceased in March 2001, but defendant continued to touch her breasts and buttocks. The minor's testimony at trial was consistent with her statement.

The minor testified she first informed Father Joseph Elzi ("Father Elzi") of the abuse during a Mass near her fifteenth birthday. Father Elzi testified at trial, but refused to reveal whether the minor had participated in confession or what she had told him. He testified that when a confessant tells him of sexual abuse, he advises them to speak to another priest, counselor, or other person to report to authorities.

Sanchez testified she informed social service personnel that defendant did not leave the marital bedroom during the night and that she had never found defendant alone with the minor in the minor's bedroom. Sanchez later testified to one incident where she woke up and defendant was not in their bed. She found him on top of the minor, who was wearing only underwear. On another occasion, Sanchez observed defendant lying on top of the minor on the couch. She also recalled that after hearing the minor screaming in her room, she ran to the minor, who told her defendant had touched her breasts. Sanchez did not inform the social worker about these incidents in September 2001 and was living with a new boyfriend by the time of trial.

No physical evidence was admitted. Defendant was found to be not guilty of felonious incest and statutory rape, and guilty of taking indecent liberties with a child. Defendant appeals.

II. Issues

The issues on appeal are whether the trial court erred in: (1) admitting testimony by Father Elzi relating to the minor's statements to him; and (2) sentencing defendant in the aggravated range without a finding by the jury of aggravating factors.

III. Sixth Amendment Right of Confrontation

[1] Defendant contends he was deprived of a fair trial because he was unable to adequately cross-examine Father Elzi. We disagree.

On 2 May 2003, Judge Yvonne Mims-Evans heard a motion to quash the subpoena filed by Father Elzi. During the hearing, Father Elzi testified that although North Carolina law allows a penitent to waive the penitent-priest privilege, to reveal the confession would compromise his religious beliefs. Judge Mims-Evans denied the motion to quash and ordered that admissibility of any questions concerning confidential communication would be determined by the trial court.

Prior to Father Elzi testifying at trial, the trial court ruled he could be questioned regarding his practice and customs in general, but that the State could not question him regarding any individual's and specifically the minor's confession to him. Father Elzi testified that upon hearing "that some sort of sexual assault has occurred," he advises a victim to "report it to proper authorities." Defendant objected but did not cross-examine Father Elzi, or make any offer of proof.

Defendant argues the trial court erred by allowing Father Elzi's testimony regarding the advice he gives to alleged victims of sexual abuse that corroborated the minor's testimony. Defendant argues he was denied his Sixth Amendment right of confrontation because he was not allowed to fully cross-examine Father Elzi regarding the minor's confession.

Our United States Supreme Court has held:

> In all criminal prosecutions, state as well as federal, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution to be confronted with the witnesses against him. The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.

Lilly v. Virginia, 527 U.S. 116, 123-24, 144 L. Ed. 2d 117, 126 (1999) (internal quotations and citations omitted); *see also Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). "Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary

interest secured by it is the right of cross-examination.' " *Davis v. Alaska*, 415 U.S. 308, 315, 39 L. Ed. 2d 347, 353 (1974) (quoting *Douglas v. Alabama*, 380 U.S. 415, 13 L. Ed. 2d 934, 937 (1965)); *see also Crawford*, 541 U.S. 36, 158 L. Ed. 2d 177. A defendant must be afforded "an adequate opportunity to cross-examine adverse witnesses." *United States v. Owens*, 484 U.S. 554, 557, 98 L. Ed. 2d 951, 956 (1988). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316, 39 L. Ed. 2d at 353.

Here, defendant neither attempted to cross-examine Father Elzi nor did he request a *voir dire* or make an offer of proof regarding the questions he would have asked or what Father Elzi's testimony would have revealed. *See State v. Williams*, 355 N.C. 501, 534, 565 S.E.2d 609, 629 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). Based on the transcript before us, we find that no testimony was erroneously admitted or excluded. Father Elzi did not testify to the contents of any statements the minor made to him. Presuming error in admitting Father Elzi's testimony, other overwhelming evidence of defendant's guilt based on the testimony by Officers Navarez and Mendoza, the victim, and Sanchez renders any error harmless beyond a reasonable doubt. This assignment of error is overruled.

IV. Aggravated Sentencing

[2] Defendant contends the trial court erred by sentencing him in the aggravated range based on a finding by the trial court that "defendant took advantage of a position of trust of confidence to commit the offense."

Our Supreme Court recently addressed and ruled on this issue in *State v. Allen*, 359 N.C. 425, ——, —— S.E.2d ——, —— (July 1, 2005) (No. 485PA04) and *State v. Speight*, 359 N.C. 602, 606, —— S.E.2d ——, —— (July 1, 2005) (No. 491PA04). In vacating the defendant's aggravated sentence in *Allen*, our Supreme Court held "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." 359 N.C. at 437, —— S.E.2d at ——.

The Court later stated in *Speight*, "the rationale in *Allen* applies to all cases in which (1) a defendant is constitutionally entitled to a jury trial, and (2) a trial court has found one or more aggravating factors and increased a defendant's sentence beyond the presumptive

range without submitting the aggravating factors to a jury." 359 N.C. at 606, —— S.E.2d at ——.

Based on our Supreme Court's holding in *Allen* and *Speight*, the trial court erred by sentencing defendant in the aggravated range without submission to or a finding by the jury beyond a reasonable doubt to support the aggravated sentence. Defendant's sentence is vacated and remanded for imposition of a sentence consistent with our Supreme Court's decisions in *Allen* and *Speight*.

V. Conclusion

The trial court did not err in admitting Father Elzi's testimony regarding his customs and practices upon learning information of abuse. We hold defendant received a fair trial free from error. The trial court erred by sentencing defendant in the aggravated range without submitting the aggravating factors to a jury. Defendant's sentence is vacated and remanded for imposition of a sentence consistent, with our Supreme Court's decisions in *Allen* and *Speight*.

No Error at trial; Sentence Vacated and Remanded for Resentencing.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. LAVORIS MONTEIZ BATTLE

No. COA03-484

(Filed 2 August 2005)

1. Appeal and Error— preservation of issues—grounds for objection—difference between trial and appeal

Defendant did not preserve for appeal his contention that a detective's opinion amounted to an impermissible opinion about guilt where his objection at trial was based on hearsay.

2. Appeal and Error— preservation of issues—sufficiency of evidence—motion at trial required

A defendant must move to dismiss a criminal charge in the trial court to preserve sufficiency of evidence for appellate review; here, defendant's assignment of error alleging plain error in this regard was dismissed.

3. Sentencing— aggravating factor—*Blakely* error—jury finding required

Defendant was awarded a new sentencing hearing where his sentence was enhanced beyond the presumptive range based upon a factor not submitted to the jury and proven beyond a reasonable doubt.

Appeal by defendant from judgment entered 27 September 2002 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 15 November 2004.

Roy Cooper, Attorney General, by Sonya M. Calloway, Assistant Attorney General, for the State.

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

MARTIN, Chief Judge.

Defendant was found guilty by a jury of robbery with a dangerous weapon. The trial court determined that defendant had a Prior Record level II and found as a factor in aggravation of sentencing that defendant "joined with more than one other person in committing the offense and was not charged with committing a conspiracy." Defendant was sentenced in the aggravated range to imprisonment for a minimum term of 95 months and a maximum term of 123 months. Defendant appeals.

The evidence before the trial court tended to show that on 23 December 2001, an individual wielding a sawed-off shotgun robbed the Citgo Food Mart in Grimesland, North Carolina. The robber ordered the two employees to open the cash register and then lie on the floor, and he took $1,665 from the register. Two surveillance cameras captured the robbery on tape. The gunman was wearing dark pants and a long black coat, and his face was covered by a t-shirt or towel.

Three similar robberies occurred between December 2001 and March 2002. Police believed the three robberies were committed by the same perpetrator since the robber wore a long black coat and hid his face in at least three of the four robberies. Detective Phillip Moore of the Pitt County Sheriff's Department testified that he arrested Quincy Taft, Reginald Daniels, and defendant for the robbery in question.

Detective Moore testified, based on information provided to him by Daniels, that his investigation revealed defendant to have been the gunman at the December 23rd robbery. Upon defendant's objection based on hearsay, the trial court admitted the testimony for the limited purpose of corroborating the testimony of Daniels, who had not yet testified, and instructed the jury accordingly. Detective Moore also testified that Daniels had not been truthful with him about the robbery in question on several occasions and had attempted to minimize his involvement.

Daniels testified at trial that defendant called him and asked him for a ride so he could rob the Citgo store. Daniels picked up defendant and Quincy Taft at defendant's house; defendant was carrying a sawed-off shotgun and was wearing dark clothes. Daniels drove defendant to a place near the store and let him out of the car. Defendant wrapped a t-shirt around his head and ran toward the store; Daniels drove a distance, then turned around and returned to the area and saw defendant running down the road. He picked defendant up and took him back to his house, where the three men counted the money. Defendant gave Daniels about $200.

Defendant denied any participation in the robbery. He testified that on the evening in question he was at his mother's house. He left to go to Western Union at Kroger's grocery store to take out money, but it had already closed. On his way back, he stopped to get gas at the Citgo between 10:20 and 10:30 p.m. He returned home, and Sheretha Jones drove him and Quincy Taft to a cousin's house and then to the airport for an early morning flight to Connecticut. The surveillance tapes confirmed that he was at the Citgo buying gas at 10:15 p.m. Ms. Jones's testimony was similar to defendant's, and defendant's cousin confirmed that defendant stopped by his house a little before 11:00 p.m.

Quincy Taft testified that he went with defendant to the Western Union, to the Citgo for gas, and back to defendant's mother's house. Reginald Daniels came to the house, and Daniels and defendant left. When they returned, Taft saw some money lying on a bed, but he did not know where it came from or how it got there. Taft said he did not ride anywhere with Reginald Daniels that night.

In the record on appeal, defendant assigns plain error to the admission of Detective Moore's testimony that defendant had been the gunman. He also assigns plain error to the trial court's entry of

judgment, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt. Neither of these assignments of error has been properly preserved. By Motion for Appropriate Relief filed in this Court, defendant also asserts that his sentence, in the aggravated range, was "invalid as a matter of law" pursuant to the decision of the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). We hold defendant is entitled to a new sentencing hearing.

[1] Defendant first argues that the trial court erred in allowing Detective Moore of the Pitt County Sheriff's Department to testify that his investigation had revealed that defendant committed the robbery. On appeal, he argues that such testimony amounted to an impermissible opinion concerning defendant's guilt. His objection at trial, however, was based on hearsay.

Our Courts have consistently held that a defendant may not advance a theory on appeal which was not first argued at trial. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (citation omitted) (" 'The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions.' . . . Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal"); *State v. Smarr*, 146 N.C. App. 44, 56, 551 S.E.2d 881, 888 (2001), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 500 (2002). Because defendant's objection at trial was based on hearsay, a theory different from that advanced on appeal, we must hold that defendant has not properly preserved the issue for review and we will not consider his argument.

[2] Defendant next argues that the trial court committed plain error in entering judgment when insufficient evidence existed to support his conviction. Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure mandates that a defendant must move to dismiss a criminal charge in the trial court in order to preserve the issue of the sufficiency of the evidence for appellate review. N.C.R. App. P. 10(b)(3) (2004) ("A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial"). In the instant case, defendant did not move to dismiss the charge at the close of the State's evidence nor at the close of all the evidence. Accordingly, this assignment of error is dismissed.

[3] Defendant has filed a Motion for Appropriate Relief requesting this Court to vacate his sentence and remand the case for resentenc-

ing pursuant to the decision of the United States Supreme Court in *Blakely v. Washington*, *supra.* In 2000, the U.S. Supreme Court held in *Apprendi v. New Jersey* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000). In *Blakely*, the Court further stated:

> the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

Blakely, 542 U.S. at ——, 159 L. Ed. 2d at 413-14 (citations omitted) (emphasis in original). The holdings in *Apprendi* and *Blakely* apply to cases in which direct appellate review was pending and the conviction had not yet become final on the date *Blakely* was decided, 24 June 2004. *U.S. v. Booker*, 543 U.S. ——, 160 L. Ed. 2d 621, 665 (2005); *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001).

In *State v. Allen*, 359 N.C. 425, —— S.E.2d ——(July 1, 2005) (No. 485PA04), the North Carolina Supreme Court held, interpreting *Blakely*, that the provisions of North Carolina's Structured Sentencing Act, specifically N.C. Gen. Stat. § 15A-1340.16(a),(b), and (c), which require the trial court to consider evidence of statutory aggravating factors, other than the fact of a prior conviction, that are not admitted by defendant or found beyond a reasonable doubt by a jury, and that permit the imposition of an aggravated sentence based thereon, violate the Sixth Amendment to the United States Constitution. Moreover, the removal of aggravating factors from jury consideration for sentencing purposes was held by the Court to be structural error, and therefore, reversible *per se. Id.* at 440-41.

In the present case, defendant's sentence was enhanced beyond the prescribed presumptive range based upon a factor which was not submitted to the jury and proved beyond a reasonable doubt. Therefore, the sentence was imposed in violation of defendant's Sixth Amendment right, pursuant to *Blakely*, and such error is reversible *per se*, pursuant to *Allen.* Defendant is entitled to a new sentencing hearing.

No error in defendant's trial.

Remanded for a new sentencing hearing.

Judges McCULLOUGH and STEELMAN concur.

KEITH ALEXANDER CRAVEN, JR., PLAINTIFF v. CHASITY NICOLE DEMIDOVICH, GEICO INDEMNITY COMPANY, ALAMO FINANCING, ORVAL K. WING, JR., GREENSBORO NEWS AND RECORD, AND ALLSTATE INSURANCE COMPANY, DEFENDANTS

No. COA04-1193

(Filed 2 August 2005)

Insurance— passenger in wrecked auto—failure to timely adjust claim—no privity with driver's insurer

There was no privity between a passenger in a rented automobile and the driver's insurance company, and a 12(b)(6) motion to dismiss plaintiff passenger's claim against the insurance company for unfair and deceptive trade practices and bad faith in its refusal to timely adjust plaintiff's claim was properly granted.

Appeal by plaintiff from an order entered 29 April 2004 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 10 May 2005.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for plaintiff-appellant.

Frazier & Frazier, L.L.P., by Torin L. Fury, for defendant-appellee.

JACKSON, Judge.

Plaintiff appeals from the order granting defendant GEICO Indemnity Company's ("GEICO") motion to dismiss entered 29 April 2004 in Guilford County Superior Court. This appeal arises out of claims filed by plaintiff resulting from an automobile accident on 3 December 2000. Plaintiff, along with Nahikulani Kerekes ("Kerekes"), was a passenger in a vehicle driven by defendant Chasity Demidovich ("Demidovich") which collided with a vehicle driven by defendant Orval Wing ("Wing") resulting in serious and permanent injuries to plaintiff and Kerekes.

At the time of the accident Demidovich was covered by an automobile liability insurance policy provided by GEICO and was driving a rental car belonging to defendant Alamo Financing. The policy limits were $50,000 bodily injury per person and $2000 medical payments per person. Demidovich attempted to make a left turn across Wing's lane of travel and her vehicle was struck by Wing's vehicle, resulting in plaintiff's injuries.

Plaintiff made a demand on GEICO for payment under the policy issued to Demidovich on 1 July 2002. GEICO paid plaintiff $2000 for medical payments under the policy on 20 November 2003 and plaintiff filed the instant action 3 December 2003. On the same date GEICO offered a settlement amount less than the $50,000 policy limit, which plaintiff refused.

Plaintiff bases his claims of unfair and deceptive trade practices and bad faith in refusal to timely adjust his claim on the delay in time for GEICO's response to his claim and the fact that Kerekes' demand for payment was satisfied on or about 20 November 2001 in the amount of $50,000 for bodily injury and $2000 for medical payments—the policy limits. GEICO answered plaintiff's complaint and asserted various defenses including failure to state a claim upon which relief could be granted. GEICO then made a motion to dismiss plaintiff's claims against it pursuant to Rule 12(b)(6). GEICO's motion was heard on 26 April 2004 in the Superior Court of Guilford County. After hearing oral arguments and without taking evidence the trial court granted GEICO's motion and dismissed plaintiff's claims as to GEICO with prejudice. Plaintiff timely appeals from this order.

On appeal, plaintiff argues that the trial court erred in granting GEICO's motion to dismiss his claims of bad faith and unfair and deceptive trade practices. The standard of review for a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (internal quotations and citations omitted). Further, "[t]he complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief. *Id.*, at 277-78, 540 S.E.2d at 419.

"North Carolina does not recognize a cause of action for third-party claimants against the insurance company of an adverse

party based on unfair and deceptive trade practices under N.C.G.S. § 75-1.1." *Wilson v. Wilson*, 121 N.C. App. 662, 665, 468 S.E.2d 495, 497 (1996). Nothing in plaintiff's complaint asserts that there is any privity between plaintiff and GEICO, and therefore, even liberally construing the complaint and taking it as true, plaintiff cannot set forth any set of facts which would entitle him to relief.

Plaintiff argues in his brief that he was an intended third-party beneficiary under the automobile liability policy issued to Demidovich by GEICO. Plaintiff relies on *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 472 S.E.2d 358 (1996), in support of this position. Plaintiff's reliance on *Murray* in this case is misplaced. In *Murray* we stated, "[t]he injured party in an automobile accident is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party." 123 N.C. App. at 15, 472 S.E.2d at 366. In support of this statement we cited *Lavender v. State Farm Mut. Auto. Ins. Co.*, 117 N.C. App. 135, 136, 450 S.E.2d 34, 35 (1994). In both *Murray* and *Lavender* a significant factual distinction with the instant case exists—specifically, that in both of those cases the third-party plaintiff already had obtained a judgment against the defendant insurance company's insured. In fact, in *Lavender* we stated, "[i]t is settled law that *where 'the liability of the insured has been established by judgment*, the injured person may maintain an action [as a third-party beneficiary] on the [insured's] policy of [liability] insurance.' " 117 N.C. App. at 136, 450 S.E.2d at 35 (emphasis added) (quoting *Hall v. Harleysville Mut. Casualty Co.*, 233 N.C. 339, 340, 64 S.E.2d 160, 161 (1951)).

The facts of the case *sub judice*, with regard to the relationship between plaintiff and GEICO, are more similar to those in *Wilson*. In *Wilson* the plaintiff was the wife of Nationwide's insured who was injured in an automobile accident resulting from her husband's negligence. The *Wilson* plaintiff brought her claim for unfair and deceptive trade practices, seeking punitive damages, against the insurer prior to obtaining a judgment against her husband and this Court held that her claim was not recognized in North Carolina. *Wilson*, 121 N.C. App. at 667, 468 S.E.2d at 499. Similarly here, plaintiff brought his claim against GEICO prior to Demidovich's liability having been established judicially.

Plaintiff contends that his right to bring a claim of bad faith against GEICO also is based on our holding in *Murray*. As we have held *supra*, *Murray* is not applicable under the facts of this case.

We hold that because plaintiff's claims against GEICO are not recognized in North Carolina prior to a judicial determination of the insured's liability, the complaint demonstrates, without question, that no set of facts can be established which would entitle plaintiff to relief for either the bad faith or the unfair and deceptive practices claims. Accordingly, plaintiff's claims were properly dismissed for failure to state a claim for which relief can be granted.

Affirmed.

Judges WYNN and BRYANT concur.

MARSHA A. EARLY, PETITIONER v. COUNTY OF DURHAM DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. COA04-35

(Filed 16 August 2005)

1. Public Officers and Employees— dismissal—just cause requirement—permanent employee

The applicability of the just cause requirement for termination to local government employees is determined by the permanency of employment and not by months of service. The language of N.C.G.S. § 126-5(a)(2) is straightforward in subjecting all employees of certain types of local entities to the provisions of the SPA.

2. Public Officers and Employees— termination—contested case petition—timeliness

DSS's motion to dismiss a terminated employee's contested case petition as untimely was properly denied because DSS did not provide the employee with the notice required by N.C.G.S. § 150B-23(f). The letter sent by DSS simply reiterated facts without reaching any conclusions, expressed sympathy for plaintiff's medical condition, and could be read as leaving open the possibility of further negotiation.

3. Public Officers and Employees— dismissal—judicial review—standards

The decision of the State Personnel Commission is advisory to the local appointing authority in appeals involving local government employees subject to the State Personnel Act. The local appointing authority's final decision is subject to judicial review, with the trial court acting in the capacity of an appellate court. The trial court here correctly first addressed the inquiries in N.C.G.S. § 150B-51(a); as to grounds for reversal under N.C.G.S. § 150B-51(b), some appellate inquiries receive de novo review and some are under the whole record test.

4. Administrative Law— dismissed DSS employee—standard of review—remand not required

The standard of review for a dismissed DSS employee involved both the whole record test and de novo review. However, even if the trial court did not apply the precise analysis required, the case need not be remanded if it can be reasonably

determined from the record whether the dismissed employee's asserted grounds for challenging the agency's final decision warranted reversal.

5. Public Officers and Employees— dismissal of DSS employee—final decision a DSS responsibility—just cause not raised on appeal

The trial court's reversal of a DSS decision finding just cause to terminate an employee was upheld. Although DSS argued that the matter should be remanded because the Administrative Law Judge dismissed the just cause claim for lack of jurisdiction rather than addressing it on the merits, the final decision was for DSS rather than the ALJ. Moreover, DSS did not argue on appeal that just cause was established by the findings on which it relied.

6. Public Officers and Employees— dismissed DSS employee—back pay

N.C.G.S. § 126-37 indicates that the General Assembly intended that employees of local appointing authorities be treated as State employees and be able to seek back pay upon prevailing in a claim under the State Personnel Act. The trial court's determination that a dismissed DSS employee should receive back pay was affirmed.

7. Costs— attorney fees—dismissed local employee—authority to award

A superior court is authorized by N.C.G.S. § 6-19.1 to award attorney fees to an employee of a county Department of Social Services who has prevailed under the State Personnel Act.

Appeal by respondent from order entered 11 July 2003 by Judge Evelyn Werth Hill in Wake County Superior Court. Heard in the Court of Appeals 15 September 2004.

Patrice Walker for petitioner-appellee.

County Attorney S. C. Kitchen, by Deputy County Attorney Lowell L. Siler, for respondent-appellant.

GEER, Judge.

Respondent Durham County Department of Social Services ("DSS"), appeals from the decision of the trial court upon a petition for judicial review, holding that DSS terminated the employment of

petitioner Marsha A. Early without just cause. DSS argues on appeal: (1) that Early was not entitled to file a contested case alleging a lack of just cause, (2) that Early's contested case petition was not timely filed, (3) that this Court should order further proceedings on the just cause claim, and (4) that, in any event, a local governmental employee is not entitled to recover back pay or attorneys' fees. We hold that the trial court had subject matter jurisdiction over Early's just cause claim and that the contested case was timely. Further, we hold that the issue of just cause has been fully litigated and determined and DSS has offered no justification for additional proceedings or for reversal of the trial court's conclusion that DSS lacked just cause for terminating Early's employment. Finally, because Early prevailed below, we hold that the trial court could properly decide to award her back pay and attorneys' fees. Accordingly, we affirm.

Facts

Marsha Early began work on 3 January 2000 as a Child Support Agent II in the Establishment Unit of the DSS Child Support Department. Her immediate supervisor was Laurie Hasty, who in turn reported to Jerome Brown, the Program Manager. Approximately three months after she began work, on 4 April 2000, Early underwent emergency surgery. Early and her husband called Hasty, notified her why Early would not be reporting to work, and requested leave without pay ("LWOP") for the time necessary to recover from the surgery. On 6 April 2000, Early submitted the required paperwork to Hasty. On 17 April 2000, DSS approved LWOP for the period 4 April 2000 through 4 May 2000. Subsequently, Early requested and was granted an extension until 22 May 2000. She received additional time off through 29 May 2000 because of the death of her father.

On 4 August 2000, Early was involved in a car accident on her way to work. On 17 October 2000, a doctor advised Early that she required back surgery and that she would need approximately eight to twelve weeks to recover from the surgery. Early testified that her doctor gave her the choice of having the surgery on the following day, 18 October 2000, or at a later date of Early's choosing. Early telephoned Hasty, told her of the doctor's diagnosis, and asked Hasty if she would grant Early leave so that she could have the surgery the next day. Hasty replied, "no problem." Based on Hasty's response, Early elected to have the surgery on 18 October 2000. Early testified that she would not have chosen to have the surgery then if Hasty had not verbally approved the leave request.

On the morning of 18 October 2000, Hasty faxed the appropriate LWOP forms to Early's doctor. Early underwent her surgery on the same day. On 19 October 2000, Early's doctor completed the LWOP forms and Early's husband faxed the forms to three different fax numbers provided by Hasty. On the forms, the doctor indicated that it would be necessary for Early to be absent from work for approximately eight to twelve weeks. On 23 October 2000, Early's husband also hand-delivered the completed forms to Hasty. DSS did not indicate to Early or her husband any problem with the leave request. Based on her doctor's projection, Early anticipated returning to work on 17 January 2001.

In a pleading filed with the Office of Administrative Hearings, DSS stated: "Although [DSS] initially granted [Early's] LWOP through January 17, [Early's] absence was creating a hardship on the unit such that it was not in the best interest of [DSS] for [Early] to remain on LWOP." Approximately one to two weeks after Early's communications with Hasty, Hasty met with Brown to discuss the potential impact of Early's absence. Hasty told Brown that her unit could only handle Early's caseload through 13 December 2000 without there being a hardship on her unit. Brown and Hasty then recommended to DSS' director, Daniel C. Hudgins, that Early's LWOP extend only until 13 December 2000.

Accordingly, on 14 November 2000, Hudgins mailed Early a letter stating that her LWOP would last only until 13 December 2000. Specifically, the letter stated: "You are on Leave Without Pay due to a medical condition effective October 19, 2000. . . . Since you are not eligible for Family Medical Leave, you will be expected to return to work full-time no later than December 13, 2000. You must bring a Fitness for Duty Statement from your medical doctor indicating that you are able to work with no limitations." The letter did not state what would happen if Early was unable to obtain a "Fitness for Duty Statement" from her doctor indicating no work limitations as of 13 December 2000.

Early waited to reply to the letter until after her post-operation appointment with her doctor in early December. At that doctor's visit, Early's doctor recommended that she not return to work on 13 December 2000 in order to ensure that her spinal alignment remained intact. The doctor faxed a letter to DSS indicating that Early was still under his care and would be able to return to work on 29 January 2001, but that, after that date, she would have two restrictions lasting

for an additional four weeks: (1) no prolonged bending, stooping, standing, or sitting, and (2) no lifting of more than 10 pounds.

On 13 December 2000, Early called Hasty at work and left a message on her voice mail, stating that she was calling to see if Hasty had received the doctor's letter. Hasty returned Early's call that day, confirmed that she had received the doctor's fax, and stated that she was placing it in Early's personnel file. During the course of this conversation with plaintiff, Hasty made no comment suggesting that plaintiff had exhausted her LWOP or that her employment was at risk.

Nevertheless, on the same day, 13 December 2000, Director Hudgins mailed Early a letter notifying her:

> This is a follow-up letter to inform you that your employment with the County of Durham is terminated effective December 13, 2000.
>
> Unless an extension has been approved, any employee who fails to report to work at the expiration of a leave of absence, shall be considered Absent Without Leave (AWOL) and will be separated from the County without notice.

Hudgins also attached a copy of the appeals process at DSS.

In accordance with that process, Early submitted a grievance to her immediate supervisor, Hasty, within 15 days of receiving her termination letter. On 22 December 2000, Hasty responded: "Leave without pay is granted only with the approval of the Department Head and supervisor and is based on the needs of the agency such as workload, need to fill the employee's job, etc. These factors were used in determining that we could only grant your leave without pay request until December 13, 2000." Within five days, Early then appealed to Hudgins. Hudgins responded in a letter dated 4 January 2001.

On 19 February 2001, Early filed a contested case petition with the State Office of Administrative Hearings ("OAH"), alleging (1) that she was dismissed without just cause contrary to N.C. Gen. Stat. § 126-35(a) (2003) and (2) that she was discriminated against based on her gender, age, and handicapping condition. An administrative law judge ("ALJ") denied DSS' motion to dismiss the petition as untimely after finding that DSS had failed to follow the required procedures outlined in N.C. Gen. Stat. § 150B-23(f) (2003) regarding notification of appeal rights.

Following a two-day hearing, the ALJ rendered an opinion containing 73 findings of fact. Based on those findings, the ALJ (1) dismissed Early's just cause claim for lack of subject matter jurisdiction on the ground that Early lacked sufficient months of service to assert a claim for just cause and (2) concluded that Early had failed to meet her burden of proving intentional discrimination based on gender, age, or handicapping condition. She, therefore, recommended that DSS' decision to discharge Early from employment be affirmed.

On 4 February 2002, the State Personnel Commission issued an "Amended Recommendation for Decision to Local Appointing Authority." The Commission adopted the ALJ's 73 findings of fact in their entirety with the addition of one sentence relating to Early's just cause claim: "However, there is no statutory requirement in Chapter 126 that County employees subject to the provision of Chapter 126 work a certain amount of time before becoming entitled to appeal a termination under Chapter 126."

Based on the findings, the Commission reached the same conclusion as the ALJ that Early had failed to prove discrimination based on gender, age, or handicapping condition. With respect to the just cause claim, however, the Commission concluded:

> Petitioner was entitled to bring a just cause claim. Based on Petitioner's supervisor's statement to her "no problem" when she discussed having the surgery with her on October 17, 2000, it is clear that Petitioner reasonably expected to be able to take sufficient leave to complete the recuperation process from the surgery. Respondent did not have just cause to terminate her employment for failing to return to work on December 13, 2000.

The Commission, therefore, recommended that DSS adopt the ALJ's decision regarding Early's claims of discrimination, but that DSS conclude "that there is jurisdiction for Petitioner's just cause claim and that Respondent's disciplinary action with regard to the Petitioner's employment be reversed for lack of just cause . . . ."

The Commission further recommended that DSS reinstate Early to her former position or a comparable position with back pay and back benefits. In the event that DSS did reinstate Early, the Commission ordered that Early could petition for attorneys' fees, "which shall be awarded in any amount to be determined by the Commission upon receipt and consideration of a Petition for Attorneys Fees and the required documentation."

On 18 April 2002, DSS issued its opinion, signed by Hudgins, stating that "[t]he Respondent does not adopt the entire recommendation of the Office of State Personnel . . . ." DSS specifically rejected only one sentence in the Commission's 73 findings of fact: the sentence that the Commission had added to the ALJ's findings of fact, stating that there was no months-of-service prerequisite to appealing a termination under the State Personnel Act. DSS concluded that OAH lacked subject matter jurisdiction to hear Early's just cause claim, but that, even if jurisdiction existed, DSS had just cause to terminate Early. In support of its decision, DSS stated that it was relying upon five specified findings of fact of the ALJ, which it then set forth. DSS did not mention the remaining findings of fact of the ALJ and the State Personnel Commission. DSS made a "final decision" that:

> The Petitioner failed to meet her burden with regards to the following:
>
> (i) that the Respondent discriminated against her;
>
> (ii) that the Court had jurisdiction to consider her dismissal for just cause;
>
> (iii) that Respondent lacked just cause for her dismissal.

DSS, therefore, affirmed the decision to discharge Early from employment.

On 29 May 2002, Early filed a petition for judicial review in Wake County Superior Court. On 11 July 2002, Judge Evelyn Werth Hill filed an order, concluding that the reasons given by DSS for not adopting the entire recommendation of the Commission were without merit; that Early's discharge was not supported by substantial evidence; that her discharge was arbitrary, capricious, and an abuse of discretion; that DSS did not have just cause to terminate Early's employment; and that OAH had subject matter jurisdiction to hear Early's just cause claim.[1] Judge Hill ordered DSS to reinstate Early into her former position or a comparable position and awarded her back pay and benefits and attorneys' fees. DSS appeals to this Court.

Subject Matter Jurisdiction

On appeal, DSS contends that the trial court and this Court lack subject matter jurisdiction for two reasons: (1) Early was not entitled to file a contested case based on a lack of just cause, and (2) Early did not timely file her contested case. We disagree as to each contention.

1. Early has not pursued her discrimination claims.

A. Local Government Employees and Just Cause

[1] The State Personnel Act ("the SPA"), Chapter 126 of the North Carolina General Statutes, describes in detail the procedures that state and certain local government employees may use to appeal personnel decisions. N.C. Gen. Stat. § 126-5 (2003) specifies the employees to whom the SPA applies:

> (a) The provisions of this Chapter shall apply to:
>
> (1) All State employees not herein exempt, and
>
> (2) All employees of the following local entities:
>
> a. Area mental health, developmental disabilities, and substance abuse authorities.
>
> *b. Local social services departments.*
>
> c. County health departments and district health departments.
>
> d. Local emergency management agencies that receive federal grant-in-aid funds.

(Emphasis added.)

Early, being an employee of DSS, a local social services department, falls under § 126-5(a)(2)(b) and, therefore, "[t]he provisions of" the SPA—Chapter 126—apply to her. DSS contends nonetheless that those provisions of the SPA that allow an employee to file a contested case alleging that his or her termination of employment lacked just cause should not apply to Early. Specifically, N.C. Gen. Stat. § 126-34.1 (2003) provides:

> (a) A State employee or former State employee may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes only as to the following personnel actions or issues:
>
> (1) Dismissal, demotion, or suspension without pay based upon an alleged violation of G.S. 126-35, if the employee is a career State employee.

N.C. Gen. Stat. § 126-35(a) in turn provides: "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause."

DSS does not dispute that N.C. Gen. Stat. § 126-35(a) applies to the local employees specified in N.C. Gen. Stat. § 126-5(a)(2) even though § 126-35(a) refers only to State employees or former State employees. It argues, however, that in order for § 126-34.1(a)(1) to apply to a local employee, that employee must meet the same months-of-service requirement that any state employee must meet in order to become a "career State employee." The SPA defines a "career State employee" as "a State employee who: (1) [i]s in a permanent position appointment; and (2) [h]as been continuously employed by the State of North Carolina in a position subject to the State Personnel Act for the immediate 24 preceding months." N.C. Gen. Stat. § 126-1.1 (2003). DSS argues that since plaintiff has worked for DSS for less than 24 months, she is not entitled to the benefit of N.C. Gen. Stat. §§ 126-34.1(a) and 126-35.

DSS' argument, however, overlooks N.C. Gen. Stat. § 126-5's provisions regarding the scope of the SPA's coverage. As indicated above, with respect to State employees, § 126-5(a)(1) specifies that the provisions of Chapter 126 apply to "[a]ll State employees not herein exempt." N.C. Gen. Stat. §§ 126-5(c), (c1), (c2), (c3), (c7), and (c8) then specifically exempt certain categories of State employees from coverage under various portions of the SPA. In other words, § 126-5 specifies certain classes of State employees and identifies what portions of the SPA, if any, apply with respect to each class. N.C. Gen. Stat. § 126-5(c)(1) specifically exempts "[a] State employee who is not a career State employee as defined by this Chapter" from the SPA, with the exception of "the policies, rules, and plans" established by the State Personnel Commission pursuant to N.C. Gen. Stat. §§ 126-4(1)-(6) (2003) and 126-7 (2003) and with the exception of "the provisions of Articles 6 and 7 of this Chapter," relating to equal opportunity for employment and compensation and the privacy of state employee personnel records. N.C. Gen. Stat. § 126-35, the just cause provision, falls within Article 8—an Article not included within the list of those portions of the SPA applicable to non-career State employees.

By contrast, N.C. Gen. Stat. § 126-5(a)(2) asserts that the provisions of the SPA "shall apply to . . . (2) All employees of the following local entities," including local social services departments. It does not include any qualification of the "[a]ll employees" language comparable to the "not herein exempt" limiting language used for State employees. Further, none of the exemptions set out in N.C. Gen. Stat. § 126-5 refer to any local government employees. We are, therefore,

left with the statute's specification that "[t]he provisions of this Chapter [126] shall apply to . . . [a]ll employees of the following local entities" without any express limitation. The language of § 126-5(a)(2) is straightforward in subjecting *all* employees of certain types of local entities to the provisions of the SPA. The language of the statute, moreover, does not suggest that these local employees are state employees, but only that the provisions of the SPA apply to them as well as to state employees.

DSS appears to be arguing that this Court should craft what amounts to a new sub-categorization of local government employees included in N.C. Gen. Stat. § 126-5(a)(2)'s list based on the categorization of State employees in N.C. Gen. Stat. § 126-1.1. According to DSS' proposal, the class of local employees in N.C. Gen. Stat. § 126-5(a)(2) would be subdivided into "career local employees" and "non-career local employees," in the same way that State employees are categorized.[2] The selection by the General Assembly of 24 months as the necessary length of service to be a career employee required the weighing of policy considerations involving State government needs and State employee interests. We have identified no expression of intent by the General Assembly to differentiate among local government employees in the same manner that it chose to differentiate among State employees. Nor may this Court engage in policymaking, as defendant requests, and, on our initiative, decide that it would be appropriate to superimpose this structure on local government employees.

We note that the Office of State Personnel, in its regulations, has not adopted such an approach. Instead, the applicable regulations divide local employees into the following categories: permanent, probationary, trainee, time-limited, temporary, pre-vocational student, or emergency employees. 25 N.C. Admin. Code 1I.2002 (2005). The regulations then provide, with respect to local government employees, that "[a]ny employee, regardless of occupation, position, or profession may be warned, demoted, suspended or dismissed by the ap-

2. The fact that N.C. Gen. Stat. § 126-5 specifies that "[t]he provisions of this Chapter shall apply to" the specified local government employees does not suggest that N.C. Gen. Stat. 126-1.1, defining the phrase "career State employee," applies to local government employees. The latter statute provides a definition of a specified phrase rather than substantive rights or procedures. This definition applies "unless the context clearly indicates otherwise." The definition set out in N.C. Gen. Stat. § 126-1.1 cannot be readily imposed on local government employees since it requires not only "a permanent position appointment," § 126-1.1(a), but also that the employee have been "continuously employed by the State of North Carolina" for a specified period of time, § 126-1.1(b). *Id.*

pointing authority. Such actions may be taken against employees with permanent status, as defined in 25 NCAC 1I.2002[c], only for just cause." 25 N.C. Admin. Code 1I.2301(a) (2005). "A permanent appointment is an appointment to a permanently established position when the incumbent is expected to be retained on a permanent basis." 25 N.C. Admin. Code 1I.2002(c).

In short, under the Office of State Personnel regulations, the applicability of the just cause requirement to local government employees is determined by the permanency of employment and not by months of service. This Court has previously looked to these regulations for assistance in construing the SPA, including N.C. Gen. Stat. § 126-35. *See, e.g.*, *Steeves v. Scotland County Bd. of Health*, 152 N.C. App. 400, 406-08, 567 S.E.2d 817, 821-22 (construing the phrase "just cause"), *disc. review denied*, 356 N.C. 444, 573 S.E.2d 157 (2002); *Fuqua v. Rockingham County Bd. of Soc. Servs.*, 125 N.C. App. 66, 71, 479 S.E.2d 273, 276 (1997) (discussing when warnings are not required prior to termination for cause).[3]

Further, this Court has also held broadly: "Local government employees . . . are subject to the State Personnel Act. As such, they cannot be 'discharged, suspended, or demoted for disciplinary reasons, except for just cause.' G.S. § 126-35." *Gray v. Orange County Health Dep't*, 119 N.C. App. 62, 75, 457 S.E.2d 892, 901, *disc. review denied*, 341 N.C. 649, 462 S.E.2d 511 (1995). Despite repeated decisions applying N.C. Gen. Stat. § 126-35 to local government employees falling within N.C. Gen. Stat. § 126-5(a)(2), this Court has never suggested that a local government employee must have been employed for a particular period of time before N.C. Gen. Stat. § 126-35 becomes applicable. *See, e.g.*, *Leeks v. Cumberland County Mental Health*, 154 N.C. App. 71, 76, 571 S.E.2d 684, 688 (2002); *Steeves*, 152 N.C. App. at 408, 567 S.E.2d at 822; *Souther v. New River Area Mental Health*, 142 N.C. App. 1, 5, 541 S.E.2d 750, 753, *aff'd per curiam*, 354 N.C. 209, 552 S.E.2d 162 (2001).

In the absence of any indication of a contrary intent by the General Assembly and in light of the language of the statute, the applicable administrative regulations, and this Court's prior decisions, we are compelled to reject DSS' request that we apply the substance of N.C. Gen. Stat. § 126-1.1 to local government employees. Accordingly, we overrule DSS' first assignment of error, in which it contends that N.C. Gen. Stat. § 126-35 does not apply to this plaintiff.

3. Significantly, DSS acknowledged in its brief that "Subchapter I of the North Carolina Administrative Code rules apply to local government employees."

B. The Timeliness of Early's Contested Case Petition

[2] DSS also argues on appeal that the ALJ committed error in twice denying DSS' motion to dismiss Early's contested case petition as untimely. Under N.C. Gen. Stat. § 126-38 (2003), an employee must file her petition with the Office of Administrative Hearings "no later than 30 days after receipt of notice of the decision or action which triggers the right of appeal." DSS did not, however, base its final decision on any untimeliness; nor did it argue this issue before the trial court.

Nevertheless, the timeliness issue is properly before us because it goes to the question of our subject matter jurisdiction. *See Nailing v. UNC-CH*, 117 N.C. App. 318, 324-25, 451 S.E.2d 351, 355 (1994) (holding that a failure to comply with the 30-day deadline set out in N.C. Gen. Stat. § 126-38 deprives OAH, and thus this Court, of subject matter jurisdiction), *disc. review denied*, 339 N.C. 614, 454 S.E.2d 255 (1995). "The question of subject matter jurisdiction may be raised at any time." *Lemmerman v. A. T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85-86 (1986).

DSS argues that Early received Director Hudgins' letter dated 4 January 2001 on 8 January 2001 and, therefore, was required to file her contested case by 8 February 2001. Early actually filed her contested case petition with OAH on 19 February 2001. Thus, DSS argues, she filed 11 days late, and OAH did not have subject matter jurisdiction to hear her contested case.

DSS was, however, required to comply with N.C. Gen. Stat. § 150B-23(f) when notifying Early of its final decision. That provision of the Administrative Procedure Act specifies that the time limitation for filing a contested case does not begin to run until notice is given of the final decision. It specifies that "[t]he notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition." *Id.* If the employer does not comply with the requirements for notice set out in N.C. Gen. Stat. § 150B-23(f), then a motion to dismiss a contested case petition as untimely is properly denied. *Jordan v. N.C. Dep't of Transp.*, 140 N.C. App. 771, 774, 538 S.E.2d 623, 625 (2000) ("The 30-day limitation period of N.C. Gen. Stat. § 126-38 does not begin to run until notice is provided in accordance with these requirements [of N.C. Gen. Stat. § 150B-23(f)]."), *disc. review denied*, 353 N.C. 376, 547 S.E.2d 412 (2001).

The 4 January 2001 letter does not meet the requirements of N.C. Gen. Stat. § 150B-23(f). First, it did not set forth the agency action. It

simply recited as "accurate and relevant to the present situation" general information regarding leave policies provided to Early, the fact that she was "expected to return to work full time no later than December 13, 2000" with no work restrictions, and the factors considered in determining that LWOP could be granted through 13 December 2000. Nothing in the letter explicitly stated an outcome regarding Early's appeal of her termination or even mentioned that Early was terminated. The letter closed with:

> I sincerely hope that you will experience a full recovery from your medical condition and will be able to resume your activities soon. For your information, I am enclosing another copy of the two documents referenced in #1 and #2 above [regarding LWOP policies].

In short, the letter simply reiterated facts that Hudgins believed pertinent without reaching any conclusions and expressed sympathy for plaintiff's medical condition. The letter did not finally resolve the grievance by stating that Early's dismissal was being upheld, but rather could be read as leaving open the possibility for further negotiation. This vagueness, while perhaps an understandable human response in delivering the bad news of a harsh result, cannot be reconciled with the requirements of N.C. Gen. Stat. § 150B-23(f).

As the Fourth Circuit held in construing N.C. Gen. Stat. § 150B-23(f):

> To satisfy these requirements, the written notice must communicate that the agency has acted and that this action is one that triggers the right to file . . . a contested case petition. . . . Unless the [agency does] this, [petitioners,] who will often have already engaged in lengthy negotiations with the [agency], will likely (and understandably) conclude that [the agency] is simply stating its present bargaining posture, which is open to further negotiation and does not trigger any limitations period.

CM v. Bd. of Educ. of Henderson County, 241 F.3d 374, 386 (4th Cir.), *cert. denied*, 534 U.S. 818, 151 L. Ed. 2d 18, 122 S. Ct. 48 (2001). A petitioner "cannot be expected to divine that such correspondence communicates conclusive agency action, . . . which triggers a short limitations period to pursue such a challenge." *Id.* We agree and accordingly hold that the 4 January 2001 letter did not constitute sufficient "notice of the decision or action which triggers the right of appeal" for purposes of N.C. Gen. Stat. § 126-38.

Further, that letter did not inform Early "of the right, the procedure, and the time limit to file a contested case petition." While DSS contends that it provided this information in its first 13 December 2000 letter, N.C. Gen. Stat. § 150B-23(f) requires that it be contained in the decision triggering the running of the 30-day time limit. If we were to adopt DSS' position, we would, in effect, be holding that an employer need only notify an employee at some point during her employment of her appeal rights in order to comply with N.C. Gen. Stat. § 150B-23(f). That is not, however, what the statute provides.

In any event, the material attached to the 13 December 2000 letter stated only that "[i]f the results are not satisfactory [after the internal grievance procedure], the employee may then appeal to the State Personnel Commission within 30 days." While this statement provided notice of the right to further review and the time limit, it cannot be considered by any stretch to be notification of "the procedure" to file a contested case petition. *Compare Gray v. N.C. Dep't of Env't, Health & Natural Res.*, 149 N.C. App. 374, 379, 560 S.E.2d 394, 398 (2002) (holding that agency did not comply with § 150B-23(f) when it specified that the petitioner had 30 days to file a contested case petition with OAH pursuant to N.C. Gen. Stat. § 130A-24, but gave an incorrect address for OAH).

In sum, DSS failed to provide Early with the notice required under N.C. Gen. Stat. § 150B-23(f). Accordingly, the ALJ properly denied DSS' motion to dismiss. Both OAH and this Court have subject matter jurisdiction over Early's claims.

Just Cause

A. Standard of Review

[3] DSS asks us to examine two conclusions reached by the trial court: (1) that DSS did not have just cause to terminate plaintiff's employment and (2) that plaintiff was entitled to back pay and attorneys' fees. N.C. Gen. Stat. § 126-37(b1) (2003) provides:

> In appeals involving local government employees subject to [the SPA], . . . the decision of the State Personnel Commission shall be advisory to the local appointing authority. . . . The local appointing authority shall, within 90 days of receipt of the advisory decision of the State Personnel Commission, issue a written, final decision either accepting, rejecting, or modifying the decision of the State Personnel Commission. If the local appointing authority rejects or modifies the advisory decision, the local appointing

> authority must state the specific reasons why it did not adopt the advisory decision.

The local appointing authority's final decision is then "subject to judicial review pursuant to Article 4 of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 126-37(b2) (2003).

Article 4 of Chapter 150B is entitled "Judicial Review" and N.C. Gen. Stat. § 150B-51 (2003), within that Article, sets forth the "[s]cope and standard of review":

> (a) In reviewing a final decision in a contested case in which an administrative law judge made a recommended decision and the State Personnel Commission made an advisory decision in accordance with G.S. 126-37(b1), the court shall make two initial determinations. First, the court shall determine whether the applicable appointing authority heard new evidence after receiving the recommended decision. . . . Second, if the applicable appointing authority did not adopt the recommended decision, the court shall determine whether the applicable appointing authority's decision states the specific reasons why the applicable appointing authority did not adopt the recommended decision. . . .
>
> . . . .
>
> (b) . . . [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.

As our Supreme Court recently observed, "[w]hen the trial court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004).

The trial court below correctly first addressed the inquiries in N.C. Gen. Stat. § 150B-51(a). The court found and the record reflects that DSS did not hear any new evidence in reaching its final decision. Likewise, we agree with the trial court that DSS' final decision states the specific reasons why it did not adopt the State Personnel Commission's recommended decision.

With respect to the grounds for reversal or modification in N.C. Gen. Stat. § 150B-51(b), *Carroll* observes that subsections (b)(1)-(4) involve " 'law-based' inquiries," whereas the grounds listed in subsections (b)(5) and (6) involve " 'fact-based' inquiries." *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 (quoting Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. Rev. 1571, 1592 n.79 (2001)). As such, appellate inquiries under N.C. Gen. Stat. § 150B-51(b)(1)-(4) receive *de novo* review and inquiries under N.C. Gen. Stat. § 150B-51(b)(5) and (6) receive review under the "whole record test." *Id.* at 659-60, 599 S.E.2d at 895.

Carroll explains each of these separate standards of review in greater detail:

> Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's. When the trial court applies the whole record test, however, it may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—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.

Id. at 660, 599 S.E.2d at 895 (internal citations and quotation marks omitted).

B. The Just Cause Determination

[4] In arguing that the trial court erred in concluding that it lacked just cause to terminate Early, DSS first contends that the trial court applied the wrong standard of review. Specifically, DSS contends that Judge Hill erred by addressing both *de novo* review and the whole record test. *Carroll*, however, confirms that such a dual standard of review is appropriate when considering the question whether an employee was fired for just cause.

Our Supreme Court held in *Carroll* that "[d]etermining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for [the disciplinary action taken.]" 358 N.C. at 665, 599 S.E.2d at 898 (internal quotation marks omitted). The first half of the inquiry, *Carroll* instructs us, is a question of fact to be examined under the whole record test. *Id.* at 665-66, 599 S.E.2d at 898. The second half, by contrast, is a question of law to be examined *de novo*. *Id.* The trial court, therefore, was correct to apply both tests.

Even if the trial court's order could be viewed as not applying *Carroll's* precise analysis, reversal is not necessarily required or appropriate. *Id.* at 665, 599 S.E.2d at 898. According to *Carroll*, the task for this Court is simply to " 'address[] the dispositive issue(s) before the agency and the superior court' and determin[e] how the trial court *should have* decided the case upon application of the appropriate standards of review." *Id.* at 664-65, 599 S.E.2d at 898 (quoting *Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting), *adopted per curiam by* 355 N.C. 269, 559 S.E.2d 547 (2002)). We need not remand for reconsideration if we 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)." *Id.* at 665, 599 S.E.2d at 898.

[5] DSS next argues that the trial court should not have rendered a decision on the issue whether Early was terminated for just cause because the ALJ dismissed the claim rather than addressing it on the merits. DSS requests: "[I]f this Court concludes that there is jurisdiction to hear this case, this matter should be remanded back to the

OAH for the receipt of evidence and the preparation of findings of fact[], conclusions of law and a recommended decision on the issue of whether there was just cause to terminate the Petitioner."

Contrary to DSS' contention, the trial court not only appropriately considered the issue of just cause; it was, in fact, required to do so. The decision being reviewed by the trial court was not the ALJ's decision, but rather DSS' final decision. DSS specifically decided that "even if the Office of Administrative Hearings had subject matter jurisdiction to hear Petitioner's just cause claim, there was just cause to terminate Petitioner." DSS then recited the five findings of fact of the State Personnel Commission upon which it relied in support of this conclusion. In a section of the decision entitled "Final Decision," DSS stated "[t]he Petitioner failed to meet her burden with regards to the following: . . . (iii) that Respondent lacked just cause for her dismissal." Since Early specifically challenged this determination in its petition for judicial review, the issue was squarely before the trial court.[4]

Further, there is no need to remand for a new evidentiary hearing, additional findings of fact and conclusions of law, or a recommended decision. DSS does not argue that it was in any way prevented from fully litigating the issue of just cause before the ALJ and does not explain why additional evidence is necessary. Moreover, the State Personnel Commission disagreed with the ALJ on the jurisdictional question and, therefore, actually made findings of fact and conclusions of law regarding just cause. It then submitted an advisory opinion to DSS on that issue. The State Personnel Commission was not, of course, bound by the ALJ's findings or conclusions:

> "It is well established that an agency has the ability to reject the recommended decision of an administrative law judge. . . . Even though the administrative law judge ha[s] already made findings of fact and conclusions of law, the Personnel Commission ha[s] the ability to make its own findings of fact and conclusions of law if it cho[oses] to do so."

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4. We observe that DSS applied the incorrect burden of proof in its final decision. In 2000, 2000 N.C. Sess. Laws ch. 190 § 13, the General Assembly amended N.C. Gen. Stat. § 126-35(d) to provide that the burden of showing that an employee was discharged, suspended, or demoted for just cause rests with the employer. N.C. Gen. Stat. § 126-35(d). This amendment was applied to all contested cases commenced on or after 1 January 2001. 2000 N.C. Sess. Laws ch. 190 § 14. Since Early's contested case was filed 19 February 2001, the amended N.C. Gen. Stat. § 126-35(d) applied and DSS bore the burden of proving just cause.

Eury v. N.C. Employment Sec. Comm'n, 115 N.C. App. 590, 597, 446 S.E.2d 383, 388 (quoting *Davis v. N.C. Dep't of Human Res.*, 110 N.C. App. 730, 737, 432 S.E.2d 132, 136 (1993)), *appeal dismissed and disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). Here, the State Personnel Commission adopted the ALJ's findings of fact and reiterated them as its own, but then concluded that those facts did not establish just cause—an issue that was a question of law, as *Carroll* indicates. The trial court then agreed with the State Personnel Commission's analysis.

As Early points out, nowhere in its brief on appeal does DSS present any argument that the trial court erred in deciding as a matter of law that the conduct set forth in the State Personnel Commission's findings of fact did not amount to just cause or that those findings of fact—which have not been specifically rejected by DSS at any time—were incorrect. Further, DSS does not attempt to defend its own determination regarding whether just cause existed by explaining to the Court why the findings of fact upon which it relied were sufficient to establish just cause. While DSS contended in oral argument that it had just cause, we are precluded from addressing this issue since its brief contained no such argument. *See* N.C.R. App. P. 28(a) ("Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.").

DSS does, in requesting a remand to OAH, state generally in its brief that "[t]here was conflicting evidence on the issue of just cause." DSS, however, had the opportunity in its final decision to resolve any conflict in the evidence by rejecting the State Personnel Commission's findings of fact and making its own findings based on the record. It chose not to do so and instead relied, in support of its determination that Early's dismissal was supported by just cause, on only five findings of fact of the State Personnel Commission. Four of those findings relate only to the fact that Early was notified that she was fired and that her termination was then upheld through the appeal process, while the fifth relates to a meeting that occurred within DSS one to two weeks after Early's surgery and does not address (1) what DSS told Early, (2) whether Early reasonably believed that her request for leave had been granted, or (3) DSS' acknowledgment before OAH that the leave had originally been granted through 17 January 2001.

DSS does not make any argument on appeal that these findings of fact establish just cause. DSS' brief, in fact, cites no authority suggesting that it had just cause to terminate Early or that it should be given an opportunity to supplement its existing findings of fact. Under Rule 28(b)(6) of the Rules of Appellate Procedure, "[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned."

While it might be tempting to address the question whether DSS had just cause to terminate Early, our Supreme Court has recently held: "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). We, therefore, uphold the trial court's reversal of DSS' decision that it possessed just cause to terminate Early.

C. Back Pay and Attorneys' Fees

[6] DSS' final assignment of error pertains to the trial court's award of back pay and attorneys' fees. In addition to reiterating its contention that a local government employee is not entitled to challenge her termination based on a lack of just cause, an argument rejected above, DSS also contends "that it was never the intention of the legislature to award back pay and attorney's fees to local DSS employees." DSS further argues: "[The] ALJ and the [State Personnel] Commission render advisory opinions. Neither they, nor Superior Court Judges have the authority to award back pay and attorney fees to local government employees pursuant to N.C.G.S. Chapter 126 or the North Carolina Administrative Code."

As DSS notes, any decision by the State Personnel Commission regarding back pay and attorneys' fees was advisory with respect to DSS. The trial court was required to review DSS' decision to reject that recommendation under N.C. Gen. Stat. § 150B-51. While DSS presents arguments regarding the Commission's lack of authority to require a "local appointing authority" to pay back pay or attorneys' fees, it does not cite any authority for its contention that the "the state cannot order when the County should compensate an employee for back pay and/or attorney fees." To the contrary, our courts have long held that "counties[] make up the state and are, literally, the state itself. . . . Simply stated, '[c]ounties are creatures of the General

Assembly and constituent parts of the State government.' " *Archer v. Rockingham County*, 144 N.C. App. 550, 553, 548 S.E.2d 788, 790 (2001) (quoting *Harris v. Bd. of Comm'rs*, 274 N.C. 343, 346, 163 S.E.2d 387, 390 (1968)), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002). The General Assembly may, therefore, decide when a county may be sued and when it may be required to pay back pay and attorneys' fees.

With respect to back pay, N.C. Gen. Stat. § 126-37 provides the best indication whether the General Assembly intended for employees of "local appointing authorit[ies]" to be treated like State employees and be able to seek back pay upon prevailing in a claim under the SPA. Subsection (c) of that statute states:

> If the local appointing authority is other than a board of county commissioners, the local appointing authority must give the county notice of the appeal taken pursuant to subsection (a) of this section. Notice must be given to the county manager or the chairman of the board of county commissioners by certified mail within 15 days of the receipt of the notice of appeal. The county may intervene in the appeal within 30 days of receipt of the notice. If the action is appealed to superior court the county may intervene in the superior court proceeding even if it has not intervened in the administrative proceeding. *The decision of the superior court shall be binding on the county even if the county does not intervene.*

N.C. Gen. Stat. § 126-37(c) (emphasis added). A major reason that a county would need to be informed and to have the opportunity to intervene is if a monetary award could be entered that would be paid from the county's coffers. There would also be little need for the provision making the superior court's decision binding on the county in the absence of the possibility of a monetary award.

Indeed, this Court has held that a county is an aggrieved party under the Administrative Procedure Act for purposes of appealing to superior court an award of back wages and attorneys' fees. *In re Appeal of Brunswick County*, 81 N.C. App. 391, 396, 344 S.E.2d 584, 587 (1986). Similarly, in *Lincoln County Dep't of Soc. Servs. v. Hovis*, 150 N.C. App. 697, 701, 564 S.E.2d 619, 621-22 (2002), this Court affirmed an ALJ's award of back pay and attorneys' fees against a Department of Social Services as a sanction for failure to comply with procedural requirements under N.C. Gen. Stat. § 150B-36(c)(3).

Because DSS presents no other argument as to why local government employees found to have been wrongfully discharged should not have the traditional back pay remedy available to them like other employees covered by the SPA, we hold that the trial court properly considered whether DSS' decision to reject the State Personnel Commission's recommendation of back pay should be reversed. *See* 25 N.C. Admin. Code 1B.0421 (2005) (discussing the State Personnel Commission's ability to award back pay and setting out a method for calculating it). Further, DSS has not offered any argument why, under the facts of this case, Early should not receive back pay. Accordingly, we affirm the trial court's determination that Early should receive back pay.

[7] With respect to attorneys' fees, DSS' contention that the trial court had no authority to award attorneys' fees disregards N.C. Gen. Stat. § 6-19.1 (2003). That statute provides:

> In any civil action . . . brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

Id. This Court held in *McIntyre v. Forsyth County Dep't of Soc. Servs.*, 162 N.C. App. 94, 96-97, 589 S.E.2d 745, 747, *disc. review denied*, 358 N.C. 377, 598 S.E.2d 136 (2004), that this statute authorizes a superior court to award fees to the employee of a county Department of Social Services who has prevailed under the SPA. *McIntyre*, therefore, establishes the trial court's authority in this case to award attorneys' fees.[5]

5. Although *McIntyre* indicated that fees were not available in SPA cases for services rendered prior to judicial review, *id.* at 97, 589 S.E.2d at 747, N.C. Gen. Stat. § 6-19.1 was amended to permit such an award with respect to contested cases filed on or after 1 January 2001. 2000 N.C. Sess. Laws ch. 190 §§ 1, 14. The trial court in this case was, therefore, authorized to award fees for representation during the administrative proceedings.

Affirmed.

Judges HUNTER and LEVINSON concur.

LEIGH ANN CHAVIS, EMPLOYEE-PLAINTIFF v. TLC HOME HEALTH CARE, EMPLOYER-DEFENDANT, AND PHARMACISTS' MUTUAL INSURANCE COMPANY, CARRIER-DEFENDANT

No. COA04-1454

(Filed 16 August 2005)

1. Workers' Compensation— home health nursing assistant—injury while traveling—course of employment

Under the Workers' Compensation Act, a traveling employee is in the course of employment once a personal deviation has been completed and the direct business route has been resumed. A certified nursing assistant working for a home health care agency had resumed her direct business route at the time of her accident where she went to the patient's home, the patient had to leave for about twenty minutes, plaintiff's employer did not permit waiting in the patient's home when the patient was not there but had no written policy on what to do during the wait, plaintiff ran an errand, and she was injured as she returned to the patient's home.

2. Workers' Compensation— home health nursing assistant—blackout while driving—arising out of employment

A car accident arose out of a home health nursing assistant's job, even though her blackout may have been a contributing cause, because the accident occurred while she was driving in the course of her employment.

3. Workers' Compensation— average weekly wage—home health nurse—mileage included

Mileage was properly included in the calculation of the average weekly wage of a nursing assistant who was injured in a car accident on the way to a patient's house. She was performing her job duties in driving from one house to another, she was not paid an hourly wage while driving, and there is competent evidence to support the finding that she was paid mileage in lieu of wages.

4. Workers' Compensation— disability—nursing assistant—capability for sedentary work—lack of skills

Competent evidence in the record in a workers' compensation hearing supported an Industrial Commission finding that plaintiff was unable to earn the same wages as before her injury, either as a certified nursing assistant or in other employment, although she was capable of sedentary work. Evidence that she had no computer, receptionist, or secretarial skills supported the finding that looking for sedentary work would have been futile.

5. Workers' Compensation— delayed written notification—employer's actual knowledge

An employer's actual knowledge of a workers' compensation injury prevented prejudice from any delay in written notification.

6. Workers' Compensation— evidence excluded—discretion of Commission

Determining credibility is the responsibility of the full Commission, and the Commission does not have to explain its findings by distinguishing credible witnesses and evidence. Here, there was no error in a workers' compensation case where the Industrial Commission excluded evidence regarding the employer's policies.

Judge TYSON dissenting.

Appeal by Defendants from Opinion and Award entered 1 April 2004 by North Carolina Industrial Commission. Heard in the Court of Appeals 8 June 2005.

Jones Martin Parris & Tessener Law Offices, PLLC, by J. Michael Riley and Gregory M. Martin, for plaintiff-appellee.

Young Moore & Henderson, P.A., by J. Aldean Webster, III, for defendant-appellants.

WYNN, Judge.

Under the Workers' Compensation Act, a traveling employee is in the course of employment once a personal deviation has been completed and the direct business route has been resumed. *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 529, 477 S.E.2d 678, 679 (1996), *disc. review denied*, 345 N.C. 751, 485 S.E.2d 49 (1997). In this case, Plaintiff-Employee traveled to a patient's home, left on a personal

errand, and was injured in an automobile accident on her return to the patient's home. Because the personal errand was complete and Plaintiff had resumed her business travel route, we hold that the accident occurred in the course of her employment making her injury compensable. Accordingly, we affirm the full Commission's Opinion and Award on this and other issues presented on appeal.

The evidence from the record on appeal tends to show that Plaintiff Leigh Ann Chavis, a certified nursing assistant ("CNA"), worked as a "runner" for Defendant TLC Home Health Care. As a "runner," Ms. Chavis traveled to multiple patients' homes in a single day. TLC Home Health Care reimbursed Ms. Chavis for the mileage she incurred from her home to the first patient's home, to and from each patient's home, and from her last patient's home to her home. TLC Home Health Care paid Ms. Chavis an hourly wage only for the time she spent in-home with the patient and not for the travel time.

On 26 October 2000, Ms. Chavis drove to her first patient's home at 8:00 a.m. to perform three-and-a-half hours of work. However, upon arriving at the home, the patient, Linda Galegos, informed Ms. Chavis that she was leaving to take care of some business at school. Ms. Galegos informed Ms. Chavis that she would be back home in approximately twenty minutes.

TLC Home Health Care had a policy that did not permit Ms. Chavis to wait in a patient's home when the patient was not there. But TLC Home Health Care had no written policy on what Ms. Chavis should have done when a patient told her to wait twenty minutes. Ms. Chavis testified that, on a previous occasion, Barbara Locklear, TLC Home Health Care's scheduling supervisor, informed her to "just go get something to eat or just do something till the time she come (sic) back, but if she's going to be gone more than an hour or two, you have to go to another client." But Ms. Locklear testified that in that situation Ms. Chavis should have called TLC Home Health Care to see if she should be immediately assigned to another patient.

Ms. Chavis told Ms. Galegos that she would meet her back at her home. Ms. Chavis then drove directly to her father's place of employment, dropped off his wallet, and drove directly back to Ms. Galegos's house. While driving back to Ms. Galegos's house, Ms. Chavis blacked out and ran her car off the road into the side of a church, sustaining injuries to her right foot. Ms. Chavis's father contacted Ms. Locklear that day to inform her of the accident.

Ms. Chavis came under the care of George Dawson, III, M.D. for the injuries to her right foot. Dr. Dawson applied a soft cast, and Ms. Chavis was unable to walk without crutches for several months. On 10 November 2000, Dr. Dawson recommended that Ms. Chavis be out of work for a four-month period. On 6 April 2001, Dr. Dawson gave her a note to return to working regular duty on 9 April 2001. Before returning to work in April 2001, Ms. Chavis contacted TLC Home Health Care to inquire about sedentary work but was told none was available. Nonetheless, Ms. Chavis's contract was not terminated. Ms. Chavis filed a claim for workers' compensation which TLC Home Health Care denied. The claim came for a hearing before Deputy Commissioner Ronnie E. Rowell, who awarded Ms. Chavis temporary total disability from 26 October 2000 to 9 April 2001 and for an additional 43.2 weeks thereafter. TLC Home Health Care appealed to the full Commission. On 1 April 2004, the full Commission filed an Opinion and Award affirming Deputy Commissioner Rowell's award including all travel expenses. TLC Home Health Care was also ordered to pay all medical expenses and attorney's fees. TLC Home Health Care appeals from this Opinion and Award.

On appeal, TLC Home Health Care argues that the full Commission erred by concluding that (1) Ms. Chavis's injury "arose out of" and "in the course of" her employment; (2) Ms. Chavis's average weekly wage should include what she was paid in milage reimbursement; (3) TLC Home Health Care must provide medical treatment should it become necessary; (4) Ms. Chavis was temporarily and totally disabled from 26 October 2000 to 9 April 2001; (5) Ms. Chavis gave notice of her injury to TLC Home Health Care; and (6) evidence should be excluded. We disagree.

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 compe-

tent 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.

[1] First, TLC Home Health Care argues that the full Commission erred in concluding that Ms. Chavis's accident arose out of her and in the course of her employment. We disagree.

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 per curium*, 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 the "arising out of" and "in the course of" requirements to be entitled to compensation. *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988).

TLC Home Health Care argues that Ms. Chavis was not "in the course" of her employment when the accident occurred because she was on a personal errand. "The words 'in the course of' refer to the time, place, and circumstances under which an accident occurred. The accident must occur during the period and place of employment." *Ross v. Young Supply Co.*, 71 N.C. App. 532, 536-37, 322 S.E.2d 648, 652 (1984). North Carolina adheres to the rule that employees whose work requires travel away from the employer's premises are within the course of their employment continuously during such travel, except when there is a distinct departure for a personal errand. *Creel v. Town of Dover*, 126 N.C. App. 547, 556, 486 S.E.2d 478, 483 (1997); *Cauble*, 124 N.C. App. at 528, 477 S.E.2d at 679.

Ms. Chavis's work required her to continuously travel to and from different patients' homes. Therefore, she was "in the course" of her employment while traveling unless on a personal errand. *Id.*

Indeed, we cannot agree with the dissent's claim that Ms. Chavis does not fit into this "traveling salesman" exception because she had

fixed hours of employment. Ms. Chavis's job duty, "designated runner", required her to work for multiple patients in a day. She did not have a guarantee of a fixed number of patients in a day, and was only paid for the actual in-home time with the patients. Moreover, she did not have fixed work hours, as the number of patients she worked with in a day varied, which varied her hours.

Furthermore, TLC Home Health Care had a policy that did not permit Ms. Chavis to wait at a patient's home when the patient was not there. On a previous occasion, Ms. Locklear informed Ms. Chavis to "just go get something to eat or just do something till the time she come back, but if she's going to be gone more than an hour or two, you have to go to another client." This policy was in effect to prevent claims of theft against TLC Home Health Care employees and to comply with government regulations. By leaving the Galegos home, Ms. Chavis complied with the orders of TLC Home Health Care and furthered her employer's interests. *See Cauble*, 124 N.C. App. at 529, 477 S.E.2d at 680 (employee's death was "in the course of" employment where his travel, which included eating in a restaurant, was to further his employer's business and at the direction of his employer even though his death was caused by his supervisor's negligent driving while returning to a hotel).

"It is well-established that a traveling employee will be compensated under the Workers' Compensation Act 'for injuries received . . . while returning to work after having made a detour for his own personal pleasure.' " *Cauble*, 124 N.C. App. at 529, 477 S.E.2d at 679 (quoting *Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 770, 281 S.E.2d 718, 721 (1981), *aff'd*, 305 N.C. 292, 287 S.E.2d 890 (1982)). Once the deviation has been completed and the direct business route has been resumed, the injury is compensable. *Creel*, 126 N.C. App. at 557, 486 S.E.2d at 483 (the plaintiff's injury occurred "in the course" of his employment when on his way to work the plaintiff stopped off for a drink but had resumed his travel to work when the accident occurred); *Martin v. Georgia-Pac. Corp.*, 5 N.C. App. 37, 43-44, 167 S.E.2d 790, 794 (1969) (the plaintiff's death occurred "in the course" of his employment where, although going to see yachts was a personal detour, once he began to proceed to dinner he "had abandoned his personal sight-seeing mission" and was back within the scope of his employment).

As in *Creel* and *Martin*, Ms. Chavis had completed her personal deviation. Ms. Chavis had resumed the direct business route as she was driving on the fastest route to Ms. Galegos's home. Since Ms.

Chavis had resumed her direct business route after completing her personal deviation when the accident occurred, the accident occurred "in the course" of her employment. *Creel*, 126 N.C. App. at 557, 486 S.E.2d at 483.

[2] TLC Home Health Care also argues that the accident did not "arise out of" Ms. Chavis's employment because the accident was caused by her idiopathic condition, not 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. "[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." *Culpepper*, 93 N.C. App. at 248, 377 S.E.2d at 781 (emphasis omitted) (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 532 (citations omitted). Where a plaintiff's job requires him or her to travel from his or her place of work to various places in the community, the job exposes the plaintiff to the risk of travel. *Warren v. City of Wilmington*, 43 N.C. App. 748, 750, 259 S.E.2d 786, 788 (1979).

In this case, Ms. Chavis's job required her to travel to and from different patients' homes, exposing her to the risk of travel. This increased travel time is an "increased risk" inherent to the employment. *Culpepper*, 93 N.C. App. at 248, 377 S.E.2d at 781.

However, TLC Home Health Care argues that Ms. Chavis's accident was caused by her idiopathic condition, *i.e.*, blackout, and not her increased travel risk. "[W]here the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable. But not so where the idiopathic condition is the sole cause of the injury." *Vause v. Vause Farm Equip. Co., Inc.*, 233 N.C. 88, 92-93, 63 S.E.2d 173, 176 (1951). The general rule is that

> where an employee falls from a building, scaffold, ladder, or other place of danger where his employment places him, the accident, if it appears to be incident to and a natural result of a particular risk of the work, may be said to arise out of the employment, even though illness or some pre-existing infirmity may have been a contributing cause of the fall.

Vause, 233 N.C. at 96, 63 S.E.2d at 179 (citing *Rewis v. N.Y. Life Ins. Co.*, 226 N.C. 325, 38 S.E.2d 97 (1946); *DeVine v. Dave Steel Co.*, 227 N.C. 684, 44 S.E.2d 77 (1947); *Robbins v. Bossong Hosiery Mills, Inc.*, 220 N.C. 246, 17 S.E.2d 20 (1941)).

The full Commission found that "Plaintiff's October 26, 2000 injury arose out of both her idiopathic condition and the hazards incident to her employment with defendant-employer." Ms. Chavis testified that "[t]he only thing I remember was I was fixing to hit the side of the road. I know I was going around a curve, the next thing I know I was hitting the side of the church. That's the only thing I can remember." Ms. Chavis had previously described this incident as having a "blackout." But the accident occurred while Ms. Chavis was driving in the course of her employment. Ms. Chavis's job duties required her constantly to travel in her car, increasing her travel risk. Since Ms. Chavis's work required her to face the increased risk of constant road travel on her job, we hold that the car accident "arose out of" her employment, even though her idiopathic condition may have been a contributing cause. *Vause*, 233 N.C. at 96, 63 S.E.2d at 179.

[3] Next, TLC Home Health Care argues that the full Commission erred in concluding that Ms. Chavis's average weekly wage should include what she was paid in mileage reimbursement. We disagree.

Section 97-2(5) of the North Carolina General Statutes provides in pertinent part that "[w]herever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings." N.C. Gen. Stat. § 97-2(5) (2004). On this issue the full Commission found the following finding of fact:

> 25. Plaintiff's average weekly wage cannot be determined based upon the Form 22 wage chart alone, because it does not reflect what plaintiff was paid for mileage. Plaintiff's mileage reimbursement must be included in the calculation of her average weekly wage because she was paid mileage in lieu of wages.

Because we are bound by the findings of the full Commission so long as there is some evidence of record to support them, we must disagree with TLC Home Health Care's argument. *See Morrison*, 304 N.C. at 6, 282 S.E.2d at 463. On all forms submitted to the Industrial Commission, TLC Home Health Care indicated that Ms. Chavis's average weekly wage was "to be determined." TLC Home Health Care submitted Form 22 to the Industrial Commission indicating "N/A" in

response to the question: "Was this employee given free rent, lodging, or board or other allowances made in lieu of wages?" But Ms. Chavis testified that she was paid mileage reimbursement rather than an hourly wage when driving to and from different patients' houses during the work day. Ms. Locklear confirmed this payment arrangement. As Ms. Chavis was performing her job duties while driving from one patient's house to another, but was not paid an hourly wage during this time, there is competent evidence to support the finding that Ms. Chavis was paid mileage in lieu of wages, and the full Commission properly included the mileage in her average weekly wage. *See*, *e.g.*, *Shah v. Howard Johnson*, 140 N.C. App. 58, 66, 535 S.E.2d 577, 582 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001) (full Commission properly included the value of the plaintiff's hotel room provided to him in lieu of wages).

Next, TLC Home Health Care argues that the full Commission erred in concluding that TLC Home Health Care must provide medical treatment should it become necessary. TLC Home Health Care failed to cite any authority in support of this argument in its brief; therefore, it is deemed abandoned. N.C. R. App. P. 28(b)(6).

[4] Next, TLC Home Health Care argues that the full Commission erred in concluding that Ms. Chavis was temporarily and totally disabled from 26 October 2000 to 9 April 2001 because she was capable of performing sedentary work. We disagree.

To receive compensation under section 97-29 of the North Carolina General Statutes, a claimant has the burden of proving the existence of a disability as well as its extent. N.C. Gen. Stat. § 97-29 (2004). Section 97-2(9) of the North Carolina General Statutes defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2004). Thus, the claimant's burden is to show that because of injury his earning capacity is impaired. *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). "Once the burden of disability is met, there is a presumption that disability continues until 'the employee returns to work at wages equal to those he was receiving at the time his injury occurred.' " *Simmons v. Kroger Co.*, 117 N.C. App. 440, 443, 451 S.E.2d 12, 14

(1994) (quoting *Watkins v. Cent. Motor Lines, Inc.*, 279 N.C. 132, 181 S.E.2d 588 (1971)). The burden then shifts to the employer to produce evidence that the claimant is employable. *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994). The employer must "come forward with evidence to show not only that suitable jobs are available, but also that the [claimant] is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990).

The full Commission found the following pertinent findings of fact on the issue of temporary total disability:

> 12. Prior to April 9, 2001, plaintiff contacted defendant-employer to request sedentary work. Plaintiff was told there was no light duty work available. Plaintiff's employment with defendant-employer was not terminated, and she returned to work for defendant-employer in April 2001 earning the same wages she was earning at the time of the injury.
>
> 13. Plaintiff was on crutches through March 2001. Her prior work experience was limited to jobs which would have required her to work on her feet. She did not look for sedentary work between October 26, 2000 and April 9, 2001, because she was still an employee of defendant-employer. It would have been futile in any event for her to have looked for sedentary work, given her restrictions and her past work experience.
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> ***
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> 21. As a result of the injury she sustained on October 26, 2000, plaintiff was unable to earn the same wages she was earning at the time of the injury in the same or any other employment, from October 26, 2000 to April 9, 2001.

There is competent evidence in the record to support the full Commission's findings of fact that Ms. Chavis was unable to earn the same wages she earned prior to her injury, either in the same employment or in other employment. On 10 November 2000, Dr. Dawson recommended that Ms. Chavis be out of work for a four-month period. Also, prior to 9 April 2001, Ms. Chavis contacted TLC Home Health Care to inquire about sedentary work but was told none was available. This supports the full Commissions finding that Ms. Chavis was incapable of earning the same wages in the same employment as a CNA. *See Moore v. Davis Auto Serv.*, 118 N.C. App. 624, 628, 456

S.E.2d 847, 850 (1995) ("[E]vidence of an employer's refusal to allow an employee to return to work because there was no 'light' work available supports a finding that the employee was not capable of earning wages in the same employment." (citation omitted)).

Also, Ms. Chavis testified that she was twenty-seven-years-old, had a high school diploma, CNA certificate, and lobotomy certificate. All of her previous employment had required her to work on her feet. Ms. Chavis had no computer, receptionist, or secretarial skills. This is competent evidence to support the full Commission's finding of fact that "[i]t would have been futile in any event for her to have looked for sedentary work[.]" *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986) ("Where, however, an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist."). As there is competent evidence to support the full Commission's findings of fact on the issue of temporary total disability, we find TLC Home Health Care's argument to be without merit.

[5] Next, TLC Home Health Care argues that the full Commission erred in concluding that Ms. Chavis gave notice of her injury to TLC Home Health Care because she filed Form 18 after the thirty-day time period required by section 97-22 of the North Carolina General Statutes. We disagree.

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 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 Ms. Chavis did not give written notice of injury to her employer until she filed Form 18, more than thirty days after the accident. Since Ms. Chavis failed to provide writ-

ten notice within the thirty-day time period, (1) she must provide a reasonable excuse for not giving the written notice, and (2) the employer must fail to 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 ("[U]nless 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 Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 173, 573 S.E.2d 703, 706 (2002), *disc. review denied*, 357 N.C. 251, 582 S.E.2d 271 (2003) (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.

The full Commission found the following pertinent finding of fact on the issue of notice:

> 24. Plaintiff's father reported the injury to defendant-employer on the date of injury. Defendant-employer had actual notice of the injury on the date it occurred, as evidenced by defendant-employer's own written incident report. Under these circumstances, plaintiff had no reason to believe she had to follow-up with a written report of injury. Plaintiff has offered reasonable excuse for failing to give written notice of the injury within 30 days. Defendants offered no evidence that might tend to show that they were prejudiced by plaintiff's failure to file a written report within thirty days of the injury.

Ms. Locklear testified that, on the date of the injury, Ms. Chavis's father notified her of Ms. Chavis's accident and injury. Ms. Locklear is

TLC Home Health Care's scheduling supervisor. This is competent evidence to support the full Commission's finding that on the date of the injury, TLC Home Health Care had actual notice of Ms. Chavis's accident and injury. Actual notice by the employer has been previously held by this Court to be a reasonable excuse for not giving written notice within thirty days. *See, e.g.*, *Davis v. Taylor-Wilkes Helicopter Serv.*, 145 N.C. App. 1, 11, 549 S.E.2d 580, 586 (2001) (employee's failure to provide written notice within thirty days did not bar his claim when his employer had actual notice of the injuries on the date they occurred).

Section 97-22 of the North Carolina General Statutes also requires that the full Commission be satisfied that the employer has not been prejudiced by the delay in written notification. N.C. Gen. Stat. § 97-22; *Lakey*, 155 N.C. App. at 173, 573 S.E.2d at 706 ("Possible prejudice occurs where the employer is not able to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury and where the employer is unable to sufficiently investigate the incident causing the injury."). The burden is on the employer to show prejudice. *Peagler*, 138 N.C. App. at 604, 532 S.E.2d at 214; *Jones*, 103 N.C. App. at 76, 404 S.E.2d at 167.

Here, the full Commission found that TLC Home Health Care had actual notice of Ms. Chavis's accident on the day it occurred. The full Commission found also that TLC Home Health Care "offered no evidence that might tend to show that they were prejudiced" by any delay in written notification. Although TLC Home Health Care now argues it was prejudiced because it was unable to direct Ms. Chavis's medical treatment, it did not argue this to the full Commission. Also, TLC Home Health Care fails to assert how it was prejudiced by Ms. Chavis seeking medical treatment from her own doctor. We find competent evidence to support the full Commission's finding that TLC Home Health Care had actual knowledge of Ms. Chavis's injury and was not prejudiced by any delay in written notification. *See Lakey*, 155 N.C. App. at 173, 573 S.E.2d at 706 (the defendants failed to assert how they were prejudiced by a delay in written notification).

[6] Finally, TLC Home Health Care argues that the full Commission erred by erroneously excluding evidence of Ms. Locklear's testimony regarding TLC Home Health Care's policies. 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. We find this argument to be without merit.

Affirmed.

Judge McCULLOUGH concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

The majority's opinion holds Ms. Chavis's "accident occurred in the course of her employment making her injury compensable." Ms. Chavis was not at work or "on-duty" and was completing a personal errand when the accident occurred. Also, this single car accident occurred after Ms. Chavis "blacked out," an idiopathic condition that was the sole cause of the accident. Ms. Chavis's injury did not "arise out of" her employment. I respectfully dissent.

I. Standard of Review

The standard of review of an appeal from a decision by the Commission is well-established. "In reviewing an order and award of the Industrial Commission in a case involving workmens['] 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) (citation 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).

However, "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)). Under *de novo* review, the appellate court "considers the matter anew and freely substitutes its own judgment for the agency's judgment." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation omitted).

II. "Arising Out of and in the Course of" Employment

This Court has held that an employee who is injured in an accident while on a personal errand does not have a compensable claim. *Bowser v. N.C. Dep't of Corr.*, 147 N.C. App. 308, 311, 555 S.E.2d 618, 621 (2001), *disc. rev. denied*, 355 N.C. 283, 560 S.E.2d 796 (2002) (A traveling employee whose lodging and meals are provided by the employer at a specific location without reimbursement for meals taken at a different location is not within the course and scope of her employment while going to or returning from a meal taken at that different location.) Ms. Chavis's injuries that occurred during a purely personal errand to deliver her father's wallet to him did not "arise out of" or occur "in the course of" her employment.

TLC Home Care argues and the majority's opinion agrees a plaintiff must prove her injury occurred under both conditions of "arising out of" and "in the course of" employment to receive workers' compensation. *See Ross v. Young Supply Co.*, 71 N.C. App. 532, 536-37, 322 S.E.2d 648, 652 (1984).

> The words 'arising out of' refers to the origin or cause of the accident. The employee must be about his masters' business. *Taylor v. Wake Forest*, 228 N.C. 346, 45 S.E. 387 (1947). The words 'in the course of' refer to the time and place and circumstances under which an accident occurred. The accident must occur during the period and place of employment. *Plemmons v. White's Service*, 213 N.C. 148, 195 S.E. 370 (1938).

Id.

Here, Ms. Chavis was engaged in a purely personal errand to "drop off her father's wallet," was not at work, and was "off-duty" when her accident occurred. The accident did not occur while Ms. Chavis was at work or while she was on the employer's premises. Ms. Chavis was off-duty and on a purely personal errand at the time and place the accident occurred.

III. Compensability

A. "Going and Coming" Rule

Under the "going and coming" rule, accidents which occur while an employee travels to and from work generally do not arise out of or in the course of employment. *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996). The injury is not compensable unless the injured employee proves her injury occurred by showing one of the

exceptions to the "going and coming" rule, *i.e.* "traveling salesman," "contractual duty," "special errand," and "dual purpose." *Dunn v. Marconi Communications, Inc.*, 161 N.C. App. 606, 611, 589 S.E.2d 150, 154 (2003).

Generally, the employee must be injured while at work or on the employer's premises to receive workers' compensation. *Hunt v. Tender Loving Care Home Care Agency, Inc.*, 153 N.C. App. 266, 269, 569 S.E.2d 675, 678, *disc. rev. denied*, 356 N.C. 436, 572 S.E.2d 784 (2002); *see also Stanley v. Burns Int'l Sec. Servs.*, 161 N.C. App. 722, 725, 589 S.E.2d 176, 178 (2003) (citing *Ellis v. Service Co., Inc.*, 240 N.C. 453, 456, 82 S.E.2d 419, 421 (1954)) ("An 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 return home."). In *Stanley*, "[t]he [employee] was driving her own vehicle at the time of the accident, and her employer did not pay [her] for travel time to and from work or reimburse her for mileage[, and] . . . the [employee] was no longer on the employer's premises." 161 N.C. App. at 725, 589 S.E.2d at 178. There, we held the employee was subject to the "going and coming" rule and affirmed the Commission's denial of compensation. Here, Ms. Chavis has also failed to show she falls within any exception to the "going and coming" rule. *See Royster*, 343 N.C. at 281, 470 S.E.2d at 31. Exceptions to the "going and coming" rule do not allow compensate for injuries that occur while an employee is engaged in purely personal errands.

B. "Traveling Salesman"

The "traveling salesman" exception allows compensation for injuries to employees "whose work requires travel away from the employer's premises are within the course of their employment *continuously* during such travel, except when there is a distinct departure for a personal errand." *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996), *disc. rev. denied*, 345 N.C. 751, 485 S.E.2d 49 (1997); *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 179, 123 S.E.2d 608, 611 (1962). In *Jacobs v. Sara Lee Corp.*, an employee fell and injured his knee on an employer-sponsored trip while coming from a baseball game not included on his employee itinerary. 157 N.C. App. 105, 106-07, 577 S.E.2d 696, 698 (2003). "The Commission concluded as a matter of law, 'plaintiff's injury while on a deviation to a baseball game is not compensable. Plaintiff had not ended his personal deviation when he was injured leaving the ballpark.' " *Id.*

This Court has also held, "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 v. Town of Dover*, 126 N.C. App. 547, 556-57, 486 S.E.2d 478, 483 (1997); *see also Hunt*, 153 N.C. App. at 270, 569 S.E.2d at 678. ("The applicability of the 'traveling salesman' rule to the facts at bar depends upon the determination of whether plaintiff had fixed job hours and a fixed job location.").

The majority's opinion holds Ms. Chavis has proven she is entitled to compensation under the "traveling salesman" exception simply because she was required to travel "continuously" throughout the day to different patients. Their opinion also asserts Ms. Chavis had no "fixed" place of employment.

Ms. Chavis has failed to prove she is entitled to compensation under the "traveling salesman" exception for several reasons. Ms. Chavis was not on an overnight trip as is usually required by this exception. *See Jacobs*, 157 N.C. App. at 106-07, 577 S.E.2d at 698. While Ms. Chavis did not have one fixed place of employment, she did have fixed hours of employment. She was not compensated for time when she was not on duty. An employee must simultaneously have no definite place of work *and* no definite hours to be considered a traveling employee. *Hunt*, 153 N.C. App. at 270, 569 S.E.2d at 678. Here, Ms. Chavis was "off-duty" and was engaged in a personal errand while "off-duty" for her personal gain. *See Bowser*, 147 N.C. App. at 311, 555 S.E.2d at 621 (A traveling employee was denied compensation when on a personal errand to lunch.). Ms. Chavis failed to call her employer for a new assignment when her patient left the house. Although Ms. Chavis was told not to remain in the patient's house, nothing required her to leave the patient's premises, particularly where the patient would be gone for only "20 minutes."

C. "Contractual Duty"

"The 'contractual duty' exception states that 'injuries received by an employee while traveling to or from his place of employment are usually not covered . . . unless the employer furnishes the means of transportation as an incident of the contract of employment.' " *Dunn*, 161 N.C. App. at 612, 589 S.E.2d at 155 (quoting *Strickland v. King and Sellers v. King*, 293 N.C. 731, 733, 239 S.E.2d 243, 244 (1977)). Even where the employer provides transportation to the employee, if the employee is on a personal errand neither the accident nor injury is compensable. In *Dunn*, an employee's injuries from a car accident

were found not to be compensable by the Commission, even though he drove a company car and claimed he was going home for the sole intent and purpose of retrieving his employer's equipment for a job site. 161 N.C. App. at 613, 589 S.E.2d at 155.

Like any other employee who commutes to work at personal expense, Ms. Chavis was required by TLC Home Care to provide her own reliable transportation to maintain employment. Additionally, " '[i]f the transportation is provided permissively, gratuitously, or as an accommodation, the employee is not within the course of employment while in transit.' " *Hunt*, 153 N.C. App. at 270, 569 S.E.2d at 679 (citing *Robertson v. Construction Co.*, 44 N.C. App. 335, 337, 261 S.E.2d 16, 18 (1979)).

TLC Home Care assigned error to the Commission's finding of fact number four: "[P]laintiff was reimbursed for mileage incurred from her home to the first patient, from one patient's home to the next, and then from her last patient to her home at the end of the day." The transcript shows and Ms. Chavis admitted that during the week of her accident, "the rule applicable to [her] at TLC was that [she was] not reimbursed from [her] home to [her] first client." Ms. Chavis did not seek reimbursement for mileage from TLC Home Care from her home to her first patient on her reimbursement slip for the day of the accident. TLC Home Care did not substitute mileage reimbursement for wages, but gave Ms. Chavis a mileage reimbursement in addition to her wage for travel *between patients*, not travel from Ms. Chavis's home to her first patient. Ms. Chavis never sought reimbursement or was paid mileage reimbursement from her home to her first patient. The Commission's conclusion of law number four is unsupported by competent evidence.

D. "Special Errand" and "Dual Purpose"

Ms. Chavis is not eligible for compensation under the remaining exceptions to the "going and coming" rule. The "special errand" exception allows an employee to recover for injuries sustained while traveling to or from work if the injuries occur while the employee is engaged in a special duty or errand for his employer. *See Schmoyer v. Church of Jesus Christ of Latter Day Saints*, 81 N.C. App. 140, 142, 343 S.E.2d 551, 553, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 600 (1986); *Felton v. Hospital Guild*, 57 N.C. App. 33, 34, 291 S.E.2d 158, 159, *aff'd by an equally divided court*, 307 N.C. 121, 296 S.E.2d 297 (1982); *Dunn*, 161 N.C. App. at 612, 589 S.E.2d at 155.

In *Dunn*, the "dual purpose" exception is defined as follows:

> "When a trip serves both business and personal purposes, it is a personal trip if the trip would have been made in spite of the failure or absence of the business purpose and would have been dropped in the event of failure of the private purpose, though the business errand remained undone; it is a business trip if a trip of this kind would have been made in spite of the failure or absence of the private purpose, because the service to be performed for the employer would have caused the journey to be made by someone even if it had not coincided with the employee's personal journey."

161 N.C. App. at 612-13, 589 S.E.2d at 155 (quoting *Felton*, 57 N.C. App. at 37, 291 S.E.2d at 161 (quotation omitted)).

Ms. Chavis was not on a "special errand" for her employer, nor was she on an out-of-town business trip for a "dual purpose." She was not on an errand for a patient, but purely for her personal benefit. Since Ms. Chavis has never made an overnight trip for her employer and was not being paid or traveling to her next patient, the employer received no benefit from her personal errand. The "special errand" and the "dual purpose" exceptions are inapplicable.

IV. Idiopathic Condition

The facts are undisputed and the majority's opinion acknowledges, "While driving back to Ms. Galegos's house, Ms. Chavis blacked out and ran her car off the road into the side of a church sustaining injuries to her right foot." TLC Home Care argues Ms. Chavis's accident did not "arise out of" her employment because the accident was solely caused by her idiopathic condition. I agree. " 'Arising out of the employment' refers to the origin or cause of the accidental injury." *Roberts v. Burlington Industries*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988). Sustaining injuries from a single car accident after Ms. Chavis "blacked out" was a risk that she was equally exposed to and was not due to her employment. "[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." *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 248, 377 S.E.2d 777, 781, *aff'd*, 325 N.C. 702, 386 S.E.2d 174 (1989) (citing *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 404, 233 S.E.2d 529, 533 (1977)). "[T]he causative danger must be peculiar to the work and not com-

mon to the neighborhood." *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 532. Ms. Chavis's injuries are not compensable on these facts.

TLC Home Care also argues that Ms. Chavis's single car accident was caused when she "blacked out," an idiopathic condition and not from any increased travel risk. Again, I agree. "[W]here the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable. But not so where the idiopathic condition is the *sole cause* of the injury." *Vause v. Equipment Co.*, 233 N.C. 88, 92-93, 63 S.E.2d 173, 176 (1951) (emphasis supplied).

Ms. Chavis testified, "[t]he only thing I remember was I was fixing to hit the side of the road. I know I was going around a curve, the next thing I know I was hitting the side of the church. That's the only thing I can remember." Ms. Chavis testified she experienced a blackout. The majority's opinion asserts, "Ms. Chavis's job duties required her to constantly travel in her car, increasing her travel risk." This notion is unsupported by any facts. Ms. Chavis commuted to and from work in her personal vehicle. She was off-duty and engaged in a purely personal errand when the accident occurred. Her risk was no greater than any other commuting employee or where an off-duty employee leaves work to get a meal, go to the bank, or engage in any other personal pursuit where all employees who drive are "equally exposed apart from the employment." *Culpepper*, 93 N.C. App. at 248, 377 S.E.2d at 781. Ms. Chavis's injuries were caused solely by an accident as a result of her blackout, which the Commission acknowledged was an "idiopathic condition." The Commission's opinion and award should be reversed.

V. Conclusion

Nothing in these facts show Ms. Chavis's injuries "arose out of" or occurred "in the course of" her employment. Her injuries occurred when "going and coming" to work and while she was on a purely personal errand. A distinguishable line exists to "constitute a 'distinct' and 'total' departure on a personal errand" from the normal work routine or route. *Munoz v. Caldwell Memorial Hospital*, 171 N.C. App. 386, 388, 614 S.E.2d 448, 450 (2005). Ms. Chavis was off-duty and returning to her original job site to resume work when the accident occurred. She was not at work or reimbursed for mileage when the accident occurred. The "going and coming" rule precludes compensation and Ms. Chavis has failed to prove she comes within any exception to the rule.

The majority's decision will allow any off-duty employee who is injured while traveling on a purely personal errand to assert a workers' compensation claim. Workers' compensation insurance is not general liability insurance and requires a causal relation of the injury to the employment. *See Bryan v. Church*, 267 N.C. 111, 115, 147 S.E.2d 633, 635 (1966) ("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.") (citation omitted).

The majority's opinion is an unprecedented and unwarranted extension of employers' liability for workers who are injured while not at work and while engaging in a purely personal pursuit. I cannot distinguish the facts here from when an off-duty employee leaves work in their personal vehicle and engages in an activity that has no connection to or benefit for their employer.

Millions of workers leave and return to work daily in their personal vehicles for personal meals, doctor's appointments, banking, and any other personal errands that have no connection to or benefit for their employer. If an accident or injury occurs during these purely personal trips, the coming and going rule applies and no workers' compensation liability accrues to their employer. The cause of Ms. Chavis's injury was solely from a single car accident after she "blacked out." The Commission's opinion and award is erroneous and should be reversed. I respectfully dissent.

JAMES AND CHARLOTTE COKER, ROBERT AND REBECCA DARCONTE, AND DONALD AND BONITA SHOE, PLAINTIFFS V. DAIMLERCHRYSLER CORPORATION, DEFENDANT

No. COA04-523

(Filed 16 August 2005)

1. Pleadings— judgment on—standard of review

Judgment on the pleadings is proper when all of the material issues of fact are admitted in the pleadings and only questions of law remain. Appellate review of judgments on the pleadings determines whether moving parties have shown that no material issue of fact exists on the pleadings and that the moving parties are clearly entitled to judgment.

2. Appeal and Error— judgment on pleadings—de novo review

Appellate review of a Business Court order granting judgment on the pleadings for defendant is de novo.

3. Jurisdiction— standing—injury in fact

Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction; whether standing exists most often turns on whether the party has alleged an injury in fact in light of the applicable statutes or case law. Plaintiffs here alleged that defendant should have installed brake shift interlock devices on minivans marketed as the safest in the world; however, the sole remedy plaintiffs seek is for possible future expenses not yet incurred. Their claims are too speculative and illusory to show a legal injury in fact.

Judge HUDSON dissenting.

Appeal by plaintiffs from order entered 5 January 2004 by Judge Ben F. Tennille in Rowan County Superior Court. Heard in the Court of Appeals 25 January 2005.

Mauriello Law Offices, by Christopher D. Mauriello; and Wallace and Graham, PA, by Marc P. Madonia, for plaintiffs-appellants.

Smith Moore LLP, by Sidney S. Eagles, Jr. and Allison O. Van Laningham; and Bush Seyferth Kethledge & Paige PLLC, by Raymond M. Kethledge, Troy, Michigan, pro hac vice, for defendant-appellee.

TYSON, Judge.

James and Charlotte Coker, Robert and Rebecca Darconte, and Donald and Bonita Shoe (collectively, "plaintiffs") appeal order granting judgment on the pleadings to DaimlerChrysler Corporation ("defendant"). We affirm.

I. Background

On 8 May 2001, plaintiffs filed an amended complaint against defendant as owners of model years 1995 through 2000 minivans manufactured by defendant. These minivans did not include a brake shift interlock device ("BSI"). Plaintiffs sought damages to install BSIs, to compel defendant to both notify its customers of the lack of BSIs and

install them, treble damages, attorneys' fees, compensatory damages, punitive damages, interest, and costs of suit.

Plaintiffs' amended complaint defines a BSI as "a device that prevents a vehicle with an automatic transmission from being moved out of 'park,' which keeps the transmission from being engaged, until the driver depresses the brake pedal." Plaintiffs assert the BSI ensures that "the vehicle is not inadvertently moved into reverse or drive, whether by a driver or a passenger, including a child who may attempt to move the transmission lever while playing in the vehicle."

Plaintiffs allege defendant promoted its minivans to be the "safest in the world" and emphasized their vehicles go "beyond government requirements to ensure that the best available safety devices are used to protect its customers." Plaintiffs argue defendant intentionally failed to disclose to its customers that its minivans for the years stated did not include BSIs. Plaintiffs assert defendant declined to include BSIs despite both its own safety leadership team recommending them and that BSIs were becoming an industry standard. Plaintiffs also allege defendant continued to market its minivans as "the safest in the world" even without installing BSIs.

Plaintiffs' amended complaint sought recovery for: (1) violations of the North Carolina Unfair and Deceptive Trade Practices Act ("NC UDTPA"); and (2) common law fraud and demanded: (1) compensation for their "ascertainable loss" which "includes the cost of installing the BSI in Chrysler minivans and/or the difference in value between minivans with the BSI and those without it;" and (2) defendant "to install the BSI in the minivans of Plaintiffs and Class members."

Plaintiffs expressly excluded from their amended complaint any allegation of personal injury or property damage. Plaintiffs also did not allege: (1) they had already installed the BSIs and were seeking reimbursement compensation; (2) they sold, or attempted to sell, their vehicles at a diminished price; (3) they have ever "inadvertently moved [their vehicles] into reverse or drive;" or (4) their vehicles have been damaged by any "inadvertent" shifting into reverse or drive.

On 15 April 2003, the Chief Justice of the North Carolina Supreme Court designated this case as a complex business matter under Rules 2.1 and 2.2 of the North Carolina General Rules of Practice, and referred it to the North Carolina Business Court ("Business Court"). On 20 April 2003, defendant filed a motion for judgment on the plead-

ings under Rule 12(c) of the North Carolina Rules of Civil Procedure. Plaintiffs filed a "motion" and memorandum in opposition. Following oral argument, the Business Court concluded: (1) plaintiffs lack standing to bring the action since they have suffered no injury in fact; (2) the economic loss rule bars plaintiffs' claims; and (3) plaintiffs' claims are preempted and barred by the doctrine of primary jurisdiction. It entered an "Opinion and Order" on 5 January 2004 granting defendant's motion and dismissing plaintiffs' claims. Plaintiffs appeal.

II. Issue

The issue before this Court is whether the trial court erred in granting defendant's motion for judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure.

III. Abandoned Assignments of Error

Plaintiffs voluntarily abandoned assignment of error number three, regarding preemption by the National Traffic and Motor Vehicle and Safety Act of 1966, and number four, preemption under the doctrine of primary jurisdiction. *See* N.C.R. App. P. 28(b)(6) (2004). These assignments of error are dismissed.

IV. Standard of Review

[1] Plaintiffs argue the Business Court erred in granting defendant's motion for judgment on the pleadings when it concluded: (1) plaintiffs lack standing; and (2) plaintiffs' claims are barred by the economic loss doctrine.

Under a motion for judgment on the pleadings:

> [t]he trial court may consider, "only the pleadings and exhibits which are attached and incorporated into the pleadings" in ruling on the motion. *Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996) (citing *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867, *disc. rev. denied*, 312 N.C. 495, 322 S.E.2d 558 (1984)). " 'No evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings.' " *Helms*, 124 N.C. App. at 633, 478 S.E.2d at 516 (quoting *Minor*, 70 N.C. App. at 78, 318 S.E.2d at 867).

Davis v. Durham Mental Health/Development Disabilities/Substance Abuse Area Auth., 165 N.C. App. 100, 104, 598 S.E.2d 237, 240 (2004).

The purpose of Rule 12(c) is "to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974); *see* N.C. Gen. Stat. § 1A-1, Rule 12(c) (2003). Judgment on the pleadings is proper when all of the material issues of fact are admitted in the pleadings, and only questions of law remain. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

This Court reviews such a grant by determining "whether the moving party has shown that no material issue of fact exists upon the pleadings and that he is clearly entitled to judgment." *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002) (citing *Garrett v. Winfree*, 120 N.C. App. 689, 463 S.E.2d 411 (1995)). "All factual allegations in the nonmovant's pleadings are deemed admitted except those that are legally impossible or not admissible in evidence." *Governor's Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 247, 567 S.E.2d 781, 786 (2002) (citing *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 359 S.E.2d 792 (1987)), *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003).

Here, neither party asserts any issue of material fact exists based on the pleadings considered by the Business Court. Rather, defendant argues whether the Business Court properly concluded as a matter of law: (1) plaintiffs lack standing to assert claims under the NC UDTPA and common law fraud; and (2) the economic loss doctrine bars plaintiffs' claims. *See Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 224-25 (2001) (whether a complainant has standing is a question of law), *disc. rev. denied*, 356 N.C. 161, 568 S.E.2d 191 (2002).

[2] Our review of the Business Court's order is *de novo*. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001); *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [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)).

V. Standing

[3] "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 omitted). "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), *disc. rev. denied*, 357 N.C. 61, 579 S.E.2d 283 (2003). It requires " 'that the plaintiff have been injured or threatened by injury or have a statutory right to institute an action.' " *Bruggeman v. Meditrust Co., L.L.C.*, 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). "The 'irreducible constitutional minimum' of standing contains three elements: (1) 'injury in fact' . . . ; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992)), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 628 (2003); *Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 823, 611 S.E.2d 191, 193 (2005). Whether standing exists most often turns on whether the party has alleged an "injury in fact" in light of the applicable statutes or case law. *Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 52 (citations omitted). As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing. *Id.*

A. Injury in Fact

An injury in fact is required for both standing and to support claims under the NC UDTPA and fraud. An injury in fact is " 'an invasion of a legally protected interest that is (a) concrete and particularized and (b) *actual or imminent*, not conjectural or hypothetical . . . .' " *Id.* (quoting *Lujan*, 504 U.S. at 560-61, 119 L. Ed. 2d at 364) (emphasis supplied). To be imminent, an injury must "proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Lujan*, 504 U.S. at 564, n.2. The injury in fact must be "distinct and palpable—and conversely that it not be abstract or conjectural or

hypothetical." *In re Ezzell*, 113 N.C. App. 388, 392, 438 S.E.2d 482, 484 (1994) (internal citations and quotations omitted).

B. Scope of Review

Plaintiffs argue three theories as evidence that they have suffered "injuries in fact." First, they contend their loss is the future "cost of installing the brake shift interlock in Chrysler minivans and/or the difference in value between minivans with the brake shift interlock device and those without it." Second, plaintiffs assert they are at "a heightened risk of injury" due to their minivans not including a BSI. Third, they assert their "injury in fact" occurred upon their purchase of the vehicles.

Under our review of the Business Court's order dismissing plaintiffs' amended complaint, we consider the same allegations and arguments present at the trial level and properly presented here. *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 102 (2002) (the pleadings have a binding effect as to the underlying theories of the case); *Parrish v. Bryant*, 237 N.C. 256, 259, 74 S.E.2d 726, 728 (1953) ("The theory upon which a case is tried in the lower court must prevail in considering the appeal and interpreting the record and determining the validity of the exceptions."); *see also Davis*, 165 N.C. App. at 104, 598 S.E.2d at 240 (under a Rule 12(c) judgment on the pleadings, the trial court considers *only* the pleadings before it).

Plaintiffs' amended complaint fails to allege their last two arguments on appeal: (1) "heightened risk of injury;" and (2) any injury in fact upon purchase of their vehicles. *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions.")

Our review of plaintiffs' assertion of an injury in fact is limited to their sole argument in the amended complaint and before the Business Court, "the cost of installing the brake shift interlock in Chrysler minivans and/or the difference in value between minivans with the brake shift interlock device and those without it." Plaintiffs cannot assert a new and different theory here. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("An examination of the record discloses that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]."); *see also State v. Sharpe*, 344 N.C. 190, 195, 473 S.E.2d 3, 6 (1996) ("[I]t is well settled in this juris-

diction that [a party] cannot argue for the first time on appeal [a] new ground . . . that he did not present to the trial court."), *cert. denied*, 350 N.C. 848, 539 S.E.2d 647 (1999); *see also Anderson*, 356 N.C. at 417, 572 S.E.2d at 102 (the pleadings have a binding effect as to the underlying theories of the case).

C. Plaintiffs' Alleged Injuries in Fact

Plaintiffs argue they have suffered injuries in fact due to the future "cost of installing the brake shift interlock in Chrysler minivans and/or the difference in value between minivans with the brake shift interlock device and those without it." Plaintiffs rely heavily on *Coley v. Champion Home Builders Co.* as authority to support their allegation that they have suffered an injury-in-fact. 162 N.C. App. 163, 590 S.E.2d 20, *disc. rev. denied*, 358 N.C. 542, 599 S.E.2d 41 (2004).

In *Coley*, the plaintiffs purchased a mobile home from the defendant, a mobile home manufacturer. 162 N.C. App. at 165, 590 S.E.2d at 21. The United States Department of Housing and Urban Development required "all mobile home manufacturers to designate in their consumer manual at least one method to support and anchor their mobile homes." *Id.* at 164-65, 590 S.E.2d at 21. The defendant set forth in its consumer manuals and instructed "retailers of its mobile homes to inform purchasers that the homes are safe and secure when installed with the soil anchor tie-down system . . . ." *Id.* at 165, 590 S.E.2d at 21. The defendant made these recommendations and instructions despite knowing "the soil anchor tie-down system [was] defectively designed and [did not] safely secure a mobile home in high winds." *Id.*

The plaintiffs in *Coley* brought suit against the defendant for unfair and deceptive trade practices under Chapter 75 of the North Carolina General Statutes, deriving from the misrepresentation. *Id.* at 164, 590 S.E.2d at 21. They argued the defendant should pay "the costs [the plaintiffs] . . . incurred to purchase and install the defective soil anchor/tie-down system or . . . the costs [to] retro-fit their tie-down system to one that provides a safe and reliable method to secure the homes . . . ." *Id.* at 166, 590 S.E.2d at 22. The trial court granted the defendant's motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6), due to the plaintiffs not making a "sufficient allegation of actual injury . . . ." *Id.* at 165-66, 590 S.E.2d at 22.

> On appeal, this Court determined:
>
> The soil anchor tie-down system specified for use with their mobile homes is "defective and unreasonably dangerous in that it does not meet the minimum resistance standards set forth by federal and state regulations." As a result of this defect, plaintiffs are exposed to the risk of personal injury and property damage during high winds. This risk is exacerbated by the fact that Champion has led plaintiffs to believe that their homes are safe and secure when the soil anchor tie-down system is in use. Plaintiffs have been damaged by purchasing a system that does not meet HUD standards, and they will incur expenses to procure a replacement system to properly secure their homes.

Id. at 165, 590 S.E.2d at 21-22. "When viewed in the light most favorable to [the] plaintiffs," this Court determined the complaint set forth "a sufficient allegation of actual injury to state a claim . . . ." *Id.* at 167, 590 S.E.2d at 22.

Coley is readily distinguishable from the facts at bar. First, federal safety regulations do not require use of BSIs in vehicles for the years at issue. Second, defendant never specifically claimed nor warranted that its minivans were equipped with BSIs. Third, plaintiffs present no allegations or argument that defendant's vehicles are defective without BSIs. Fourth, plaintiffs admit they did not request, contract for, or even know about BSIs when purchasing their vehicles. Fifth, plaintiffs received exactly what they contracted for, a minivan without a BSI. Sixth, none of plaintiffs ever purchased a BSI or sold their vehicle at a diminished value. Based on these distinguishing factors, *Coley* does not compel reversal of the Business Court's order under Rule 12(c).

Plaintiffs cite as persuasive authority *Angelino v. DaimlerChrysler Corp.*, Case No. GIC 785729 (Ca. Super. Ct., Dec. 11, 2002), *Bell v. DaimlerChrysler Corp.*, Case No. CV003457 (Ten. Cir. Ct., June 4, 2002), and *Solarz v. DaimlerChrysler Corp.*, Case No. 2033 (Penn. CCP, Mar. 13, 2002). All three cases are factually similar and involve the same alleged injury issue. *See Trust Co. v. R.R.*, 209 N.C. 304, 308, 183 S.E. 620, 622 (1935) (although we are not bound by decisions from other jurisdictions, we may find their analysis and conclusions persuasive in deciding the issue).

In *Angelino*, the plaintiffs filed a complaint against the defendant alleging unlawful business practices, unfair and fraudulent business

practices, and fraud for the lack of BSIs. On the defendant's motion for summary judgment, the California Superior Court dismissed the plaintiffs' claims of fraud and unlawful business practices for lack of actual loss or injury. The court allowed the claim for unfair and fraudulent business practices because California's statute did not require plaintiffs' showing actual loss or injury in fact to sustain their claim.

In *Bell*, the matter before the Tennessee Circuit Court was the plaintiffs' requested class certification. The plaintiffs in *Bell* filed a complaint against the defendant for fraud, misrepresentation, and violations of the Tennessee Consumer Protection Act due to the lack of BSIs in the defendant's vehicles. The court briefly considered the issue of whether the plaintiffs suffered a legally cognizable issue. The *Bell* court concluded the plaintiffs "stated a sufficient a [sic] 'legally cognizable injury' to satisfy class certification." The court cited *Vance v. Schulder*, 547 S.W.2d 927 (Tenn. 1977) as authority that loss in value is a legal injury. Our review of *Vance* shows the plaintiff in that case actually suffered monetary damages due to the defendants' fraud and misrepresentations prior to filing his complaint. Like the plaintiffs in *Bell*, plaintiffs here had not realized any monetary loss and solely alleged a potential *future* injury.

In *Solarz*, the plaintiffs filed a complaint against the defendant for breach of implied warranties, breach of express warranty, breach of contract, breach of duty of good faith and fair dealing, and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Act ("UTPCPA"). The complaint alleged one of the plaintiffs' daughter knocked the gear selector from "park" into "drive" on a minivan manufactured by defendant, causing it to roll down the street. The *Solarz* plaintiffs requested the defendant install a BSI pursuant to warranties received with the minivan. The defendant refused. The class included other owners of similar minivans who alleged future injuries of diminution of value and installation costs. On review of the defendant's "preliminary objections" to the plaintiffs' complaint, the court determined each plaintiff alleged sufficient "ascertainable losses" to satisfy the UTPCPA. However, the court noted a UTPCPA claim "does not fail as a matter of law even where damages are not easily quantified or where a claim has failed to quantify the damages suffered." The court also dismissed the plaintiffs' remaining claims that alleged solely future injuries of diminution of value and installation costs for lack of any actual injury or damages.

Angelino, *Bell*, and *Solarz* are each distinguishable from the facts at bar due to differing facts and the underlying case law and statutes.

The *Angelino* court allowed the claim for unfair and state fraudulent business practices because California's statute did not require a showing of actual loss or injury in fact. Case No. GIC 785729 (Ca. Super. Ct., Dec. 11, 2002). We are not persuaded the legal precedent in *Vance* the *Bell* court cites to find a "legally cognizable injury" supports that determination and *Bell* is not controlling here. Case No. CV003457 (Ten. Cir. Ct., June 4, 2002). In addition, the issue in *Bell* arose during a class certification hearing, not during a hearing for judgment on the pleadings.

Finally, the *Solarz* court concluded future expenses caused by a lack of a BSI were an "ascertainable loss." However, the court acknowledged Pennsylvania's UTPCPA did not require quantifiable damages and it also dismissed plaintiffs' remaining claims for lack of damages. These courts considered the injury in fact issue from the perspective of satisfying the elements of the claims asserted and not standing. Here, the injury in fact alleged is the same for both standing and the claims plaintiffs asserted. *Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 51-52 (standing); N.C. Gen. Stat. § 75-1.1 (2003) (unfair and deceptive trade practices); *Davis v. Sellers*, 115 N.C. App. 1, 10, 443 S.E.2d 879, 884 (1994) (common law fraud), *disc. rev. denied*, 339 N.C. 610, 454 S.E.2d 248 (1995).

After reviewing plaintiffs' arguments, numerous citations to authority, and their pleadings in a light most favorable to them under Rule 12(c), plaintiffs have not alleged a legally sufficient injury in fact to survive defendant's motion for judgment on the pleadings. *Mabrey*, 144 N.C. App. at 124-25, 548 S.E.2d at 187-88. Plaintiffs' amended complaint demanded

> damages in an amount sufficient to repair and/or install brake shift interlock [sic] on each vehicle, Chrysler to install the brake shift interlock in the minivans of the Plaintiffs and Class members, and to provide appropriate notice to all Class members of the dangers in the minivans in the absence of the brake shift interlock.

Plaintiffs did not allege in their amended complaint, before the business court, or here "an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical . . . ." *Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 52. Plaintiffs do not assert or allege they incurred expenses or were damaged by: (1) installing a BSI on their vehicles; or (2) selling their vehicles and realizing a loss due to the absence of

BSIs. In addition, plaintiffs specifically disclaimed and the amended complaint contains no allegations of personal injuries or damage to personal property by plaintiffs.

The sole remedy plaintiffs seek is for possible *future* expenses not yet incurred. Plaintiffs' "damages" are a hypothetical and an unsubstantiated diminution of value allegedly caused by a purported "defect" and the cost of "supposed" remedial measures. Plaintiffs admit none of these alleged "damages" are realized. Plaintiffs have not suffered a "concrete and particularized" injury in fact that is "actual or imminent." *Id.* Their claims are too speculative and illusory to show a legal injury in fact. *In re Ezzell*, 113 N.C. App. at 392-93, 438 S.E.2d at 484-85.

Our holding is consistent with the great majority of other jurisdictions which have considered identical claims. *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556, 565 (N.D. 2002) (trial court did not err in dismissing complaint for failure to plead a legally cognizable injury); *Bowers v. DaimlerChrysler Corp.*, No. 01 CV 877 (Colo. Dist. Ct., Dec. 23, 2002) (dismissing case because the plaintiff did "not make any allegation that he sold his vehicle at a reduced value, or incurred costs to 'fix' the problem"); *Ingram v. DaimlerChrysler Corp.*, No. 01-3684 (Fla. Cir. Ct., May 7, 2002) (dismissing case because the plaintiff failed to "allege compensable losses, injuries, or damages"); *Cox v. DaimlerChrysler Corp.*, No. LACV080519 (Iowa Dist. Ct., June 5, 2002) (dismissing claims because plaintiff failed to allege any legally cognizable damages); *Seim v. DaimlerChrysler Corp.*, No. CI01-384 (Neb. Dist. Ct., July 22, 2002) (granting summary judgment in favor of the defendant and denying class certification because the plaintiffs failed to allege damages); *Marsh v. DaimlerChrysler Corp.*, Docket No. MON-L-892-01 (N.J. Super. Ct., May 6, 2003) (dismissing case because the plaintiffs failed to allege any tort injury or ascertainable loss); *Oltmans v. DaimlerChrysler Corp.*, CV-2001-03236 (N.M. Dist. Ct., July 24, 2003) (dismissing case for failure to allege legally cognizable damages); *BP Painting, Inc., et al. v. DaimlerChrysler Corp.*, CIV. 01-350 (S.D. Jud. Ct., Yankton County, Mar. 27, 2003) (the plaintiffs' "claim . . . that their vehicle might malfunction and cause injury in the future . . . is too speculative to constitute a legally cognizable tort injury"). These great majority of cases represent the better reasoned approach and are consistent with North Carolina's requirement of injury in fact. *Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 52.

VI. Arguments Raised by Dissenting Opinion

Contrary to the dissenting opinion's assertions otherwise, we have addressed all issues properly before us on appeal and applicable to the issue at hand: whether plaintiffs have standing to assert their claims of unfair and deceptive trade practices and fraud. Plaintiffs did not argue statutory standing for their claim of unfair and deceptive trade practices either before the Business Court or this Court. None of the arguments presented by the dissenting opinion concerning N.C. Gen. Stat. § 75-1.1 as a "creature of statute" were asserted by plaintiffs. It is not the role of this Court to fabricate and construct arguments not presented by the parties before it. *In re Appeal of Mount Shepherd Methodist Camp*, 120 N.C. App. 388, 390, 462 S.E.2d 229, 231 (1995) (Appellate review is "limited to the . . . arguments presented in the briefs to this Court."); *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 632, 224 S.E.2d 580, 588 (1976) ("[A]ppellate review is limited to the arguments upon which the parties rely in their briefs."); N.C.R. App. P. 28(a) (2004) ("Review is limited to questions so presented in the several briefs").

The dissenting opinion further addresses the Business Court's consideration of the economic loss doctrine. We specifically decline to address this issue in light of our holding that plaintiffs lack standing to assert either fraud or unfair and deceptive trade practices claims.

VII. Conclusion

Plaintiffs bear the burden of proving the elements of standing. *Neuse River Found., Inc.*, 155 N.C. App. 113, 574 S.E.2d at 51 (citation omitted). Plaintiffs fail to show they have been "injured or threatened by injury or have a statutory right to institute an action." *Bruggeman*, 165 N.C. App. at 795, 600 S.E.2d at 511 (quotation omitted). Plaintiffs failed to assert a present injury in fact and do not meet the "irreducible constitutional minimum" of standing to assert causes of action. *Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 52 (quotation omitted). Without standing, "a court has no subject matter jurisdiction to hear the claim." *Estate of Apple*, 168 N.C. App. at 177, 607 S.E.2d at 16 (citations omitted).

The Business Court properly determined defendant was entitled to judgment as a matter of law under Rule 12(c). *Affordable Care, Inc.*, 153 N.C. App. at 532, 571 S.E.2d at 57; N.C. Gen. Stat. § 1A-1, Rule 12(c). In light of our holding, it is unnecessary to consider the

other issues addressed by the Business Court and the parties. The Business Court's order is affirmed.

Affirmed.

Judge ELMORE concurs.

Judge HUDSON dissents.

HUDSON, J., dissenting.

Plaintiffs here appeal the trial court's order granting defendant's motions to dismiss their claims for violations of Chapter 75, the Unfair and Deceptive Trade Practices Act (UDTPA), and for common law fraud. Because I conclude that the majority (1) has not addressed the issues presented by the appellants, (2) has misapplied principles of common law standing instead of addressing whether the pleadings sufficiently allege their statutory claims, and (3) has filed to follow applicable precedent in disposing of both claims, I respectfully dissent.

In their Amended Complaint, plaintiffs have set forth numerous factual allegations, culminating in two substantive claims for relief for the class they seek to represent. Count I seeks relief in the form of damages and/or injunctive relief for violations of Chapter 75, the UDTPA. Among the allegations under this claim are the following:

> 76. Chrysler's wrongful conduct resulted in an ascertainable loss to Plaintiffs and Class members. The ascertainable loss includes the cost of installing the brake shift interlock in Chrysler minivans and/or the difference in value between minivans with the brake shift interlock device and those without it.

Count II seeks damages for "Common Law Fraud."

The briefs to this Court, the order, and the transcript all refer to defendant's motion for judgment on the pleadings and accompanying memoranda to the trial court, but no such motion appears in the record on appeal. The only pleading which includes any such motions is the Answer, which lists some twenty-four defenses, only a few of which appear to relate to any of the issues before us. They are:

> FIRST DEFENSE
>
> Plaintiffs have failed to state a claim upon which relief may be granted . . .

FIFTEENTH DEFENSE

Plaintiff's tort claims and those of the putative class members are barred by the economic loss doctrine . . .

NINETEENTH DEFENSE

Plaintiff's have not complied and cannot comply, with all prerequisites for maintaining a claim under the N.C. Gen. Stat. 75-1.1, et seq . . .

TWENTY-THIRD DEFENSE

Some or all of the claims of plaintiffs and members of the putative class may be preempted by federal law and regulation.

In the prayer for relief, defendant seeks a "judgment in its favor dismissing Plaintiff's . . . Complaint." The first specific mention of standing appears in the oral arguments before the trial court.

First, I do not agree with the majority's statement of the standard of review and the issues. It is well established that upon review of a dismissal on the pleadings, this Court is to review the pleadings (here, the complaint and answer) in the light most favorable to the plaintiff, to determine whether plaintiffs have alleged any legal theory under which they could prevail. "In ruling on a motion to dismiss under Rule 12(b)(6), a court must determine whether, taking all allegations in the complaint as true, relief may be granted under *any* recognized legal theory." *Coley v. Champion Home Builders Co., et al.*, 162 N.C. App. 163, 166, 590 S.E.2d 20, 22, *disc. review denied*, 358 N.C. 542, 599 S.E.2d 41 (2004) (emphasis in original).

Instead of conducting this review, the majority, citing *Parrish v. Bryant*, asserts that because part of plaintiffs' argument differs from the theory "upon which [the] case was tried" in the trial court, those matters are not properly before us. 237 N.C. 256, 259, 74 S.E.2d 726, 728 (1953). Since the case has not been tried at all, I believe that this analysis is misplaced. Rather, as to each of plaintiffs' claims, our task is to determine whether plaintiffs have set forth a legal theory under which they could prevail. As the plaintiffs' two claims require separate analysis, they are discussed in turn.

First, plaintiffs have set forth a statutory claim under Chapter 75, alleging that defendants have engaged in unfair and deceptive acts and practices in or affecting commerce. The majority uphold the dismissal of this claim, applying common law principles of standing.

However, since this is a statutory claim, I conclude that such analysis is inappropriate, and the proper analysis requires determining whether plaintiffs have alleged a basis for the claim as created by the statute. Essentially, plaintiffs contend that the defendants advertised their minivans as the safest in the world, when they knew that they were not, and that plaintiffs purchased the van based on these representations, resulting in damages. The pertinent statutory provisions of the UDTPA are:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.
>
> (c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.
>
> (d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

N.C. Gen. Stat. § 75-1.1 (2001). In addition, treble damages are authorized under this chapter:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

N.C. Gen. Stat. § 75-16 (2001). Standing to bring a claim under this chapter has been conferred by the legislature, and the nature of

such claims has been further clarified by decisions interpreting these sections.

> An action for unfair or deceptive acts or practices is 'the creation of . . . statute. It is, therefore, sui generis.' . . .
>
> In discussing the purpose of the statute, our Supreme Court has stated: Such legislation was needed because common law remedies had proved often in effective . . . .

Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 230, 314 S.E.2d 582, 584, *disc. review denied*, 311 N.C. 751, 321 S.E.2d 126 (1984) (internal citations omitted).

Most recently in *Coley*, this Court explained Chapter 75 claims as follows:

> Unfair or deceptive acts or practices in or affecting commerce are unlawful in North Carolina. N.C. Gen. Stat. 75-1.1 (2003). To prevail on a claim for unfair and deceptive trade practices, plaintiffs must show: (1) an unfair or deceptive act or practice; (2) in or affecting commerce; (3) which proximately caused actual injury to plaintiffs. *Canady v. Mann*, 107 N.C. 252, 260, 419 S.E.2d 597, 602 (1997). Thus, to recover damages, plaintiffs must prove they suffered actual injury as a result of defendant's unfair and deceptive act. *See Mayton v. Hiatt's Used Cars, Inc.*, 45 N.C. 206, 212, 262 S.E.2d 860, 864, *disc. rev. denied*, 300 N.C. 198, 269 S.E.2d 624 (1980).
>
> Actual injury may include the loss of the use of specific and unique property, the loss of any appreciated value of the property, and such other elements of damages as may be shown by the evidence. *Poor v. Hill*, 138 N.C. App. 19, 34, 530 S.E.2d 838, 848 (2000).

Coley, 162 N.C. App. at 166, 590 S.E.2d at 22. In *Coley*, as here, the issue on appeal was whether the plaintiffs had sufficiently alleged damages to survive a motion to dismiss. The plaintiffs alleged that they had purchased mobile homes which lacked a required safety feature. Plaintiffs alleged that they were damaged

> by purchasing a system that does not meet HUD standards, and they will incur expenses to procure a replacement system to properly secure their homes.

> The sole issue argued by the parties to this appeal is whether plaintiffs have made a sufficient allegation of actual injury to survive a motion to dismiss for failure to state a claim . . . .

Id at 165, 590 S.E.2d at 22. This Court then held that the plaintiffs' allegations of costs that they had incurred or would incur to repair the defect were "sufficient allegation[s] of actual injury to state a claim for unfair and deceptive trade practices." *Id* at 167, 590 S.E.2d at 22.

Because I see no meaningful distinction between *Coley* and the case before us, I conclude that we are bound to follow *Coley* and reverse the order of dismissal as to Count I of plaintiffs' complaint. None of the purported distinctions listed by the majority relate to the issue before us, which is whether the complaint sufficiently alleged injury to proceed as an unfair and deceptive trade practice claim. Indeed, the majority at no point actually addresses this issue. In addition, the majority rejects the plaintiffs' allegations for future expenses as "hypothetical," "speculative" and not yet realized. Because the types of damages alleged are virtually identical to those deemed sufficient in *Coley*, I do not believe we have the authority to hold otherwise. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). Thus, I cannot agree with the analysis.

Plaintiffs also cite several unpublished opinions from other states, involving identical claims and the very same defendants, brought under the unfair and deceptive trade practices statutes of California, Tennessee and Pennsylvania. *Angelino v. Daimler-Chrysler Corp.*, No. GIC 785729 (Cal. Sup. Ct., San Diego County (11 December 2002)); *Bell v. DaimlerChrysler Corp.*, No. CV003457 (Tenn. Cir. Ct., Cumberland County (4 June 2002)); *Solarz v. DaimlerChrysler Corp.*, No. 2033 (Penn. CCP (13 March 2002)). Although we are not bound by these decisions, they add further support for my conclusion that the allegations here are sufficient to withstand dismissal. Indeed, the allegations of actual injury in *Solarz* are identical to those here, and the court there held that the plaintiffs had sufficiently alleged damages for their claims of violations of the relevant unfair and deceptive trade practices statute.

In addition, although the majority contends that plaintiffs did not argue statutory standing for their claims of unfair and deceptive trade practices either before the business court or this Court, the record reflects otherwise. The first specific mention of standing in this record is in the oral argument before the business court. "A challenge

to standing is an affirmative defense. . . ." 61A Am Jur 2d PLEADING § 316 (2004); *see also Woolard v. Davenport*, 166 N.C. App. 129, 133, 601 S.E.2d 319, 322 (2004); *Merrick v. Peterson*, 143 N.C. App. 656, 658, 548 S.E.2d 171, 173 (2001). The first opportunity for plaintiff to address this issue after alleging their causes of action in the complaint, came after the defendants raised the defense. Assuming arguendo that the defendant has adequately raised this defense, plaintiffs responded. The transcript of the argument shows defense counsel stated the following:

> And in the absence of any other actual injury . . . there is no—there is simply no standing.
>
> There was some discussion in the plaintiffs' opposition brief about the standing cases that we relied on being factually inapposite, but—and they are to some extent factually different scenarios. . . .

Thus, it is apparent that plaintiffs did respond when necessary to the allegations of lack of standing, both in the opposition brief and in the oral argument to the business court, and again in their brief to this Court. Here, the first two sections of argument in plaintiffs' brief on appeal address the issue of their standing to pursue their statutory claims under Chapter 75. The issue was appropriately raised and argued both in the business court and here.

To the extent that the majority treats the issue of the sufficiency of the pleadings to state a statutory Chapter 75 claim as an issue of standing to pursue a tort claim, I conclude that the discussion is misplaced. A claim under Chapter 75 is not a tort claim, but is a creature of the legislature, with a distinct purpose. That purpose has been described as follows:

> We think it was the clear intention of the 1969 General Assembly in enacting Ch. 833, among other things, to declare deceptive acts or practices in the conduct of any trade or commerce in North Carolina unlawful, to provide civil means to maintain ethical standards of dealing between persons engaged in business and the consuming public within this State, and to enable a person injured by deceptive acts or practices to recover treble damages from a wrongdoer.

Hardy v. Toler, 24 N.C. App. 625, 630-31, 211 S.E.2d 809, 813, *modified*, 288 N.C. 303, 218 S.E.2d 342 (1975). Because I conclude that plaintiffs sufficiently allege a claim for violations of this statute and

for damages, consistent with these precedents and with the purpose of Chapter 75, I would reverse the dismissal of this claim.

Turning to plaintiffs' claim for fraud, Count II in the complaint, I dissent on this issue as well. The majority opinion does not address the determinative issue on this count, which is whether the complaint alleges common law fraud sufficiently to survive a motion to dismiss under Rule 12(c). The plaintiffs argue on appeal that the business court erred by dismissing their fraud claims. They maintain that the "economic loss doctrine" has never been applied to common law fraud claims in North Carolina and should not be extended to do so here. Although the majority does not address this issue, I would reverse the dismissal of plaintiffs' fraud claim on the pleadings, and would specifically hold that the economic loss doctrine does not apply to claims for common law fraud.

As defendant points out, "North Carolina has adopted the economic loss rule, which prohibits recovery for economic loss" in some kinds of tort actions. *Moore v. Coachman Industries*, 129 N.C. App. 389, 401, 499 S.E.2d 772, 780 (1998). This Court in *Moore* applied the doctrine to the negligence claims brought against a manufacturer, which plaintiffs here have not claimed. *Id.* at 402, 499 S.E.2d at 780. The defendant here concedes that the North Carolina appellate courts have not applied the economic loss rule to claims based on fraud or Chapter 75. I do not believe that we should extend the doctrine, as such a holding is not justified by precedent, nor by logic or sound policy.

In *Moore*, for example, the Court applied the doctrine to bar the claim for negligence which resulted in no personal injury. However, our courts have often allowed fraud claims in which the damage was economic. *See Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 391 S.E.2d 211, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990) (adopting the doctrine and applying it to claims for negligence); *Wilson v. Dryvit Systems, Inc.*, 206 F. Supp.2d 749 (E.D.N.C. 2003) (declining to apply the doctrine to claims for fraud); *Canady v. Mann*, 107 N.C. App. 252, 419 S.E.2d 597 (1992) (holding that the economic losses were recoverable when plaintiff was fraudulently induced to purchase a worthless piece of land). In *Wilson*, the Court was given the opportunity to apply the rule to claims for fraud and unfair and deceptive trade practices, but declined to do so. In fact, the only ruling that we can locate which applies the economic loss doctrine to bar a claim for fraud is the decision of the business court below.

Aside from the lack of precedent to justify such a ruling, I conclude that the majority decision is contrary to sound reasoning and to the policy considerations that underlie fraud and the economic loss doctrine, as well as Chapter 75. In claims for negligence, where the doctrine has been applied, the wrong for which plaintiffs seek redress is the breach of a duty of reasonable care in design and traditionally the harm is either personal injury or property damage. In claims for fraud on the other hand, the wrong addressed is the alleged misrepresentation by a defendant, relied upon by the plaintiff and typically resulting in an expenditure of money. Thus, the loss involved in a fraud claim is very often economic.

> Under the [economic loss] rule, a plaintiff who can claim only economic damages without being able to show any personal or property damage will not be allowed to bring a tort action for the loss, and must look to contract, warranty, and statutory actions instead. Courts use the rule to separate contract law, 'which is designed to enforce the expectancy interests of the parties,' from tort law" which is designed to keep persons from 'causing physical harm' to others.

National Consumer Law Center, *Unfair and Deceptive Trade Practices Manual*, S. 4.2.16.2. (6th Edition 2004) (quoting *Casa Clara Condo Ass'n v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244, 1246 (Fla. 1993)).

> Most courts will not apply the economic loss rule to bar claims that the defendant fraudulently induced the transaction. These courts reason that the purpose of the rule, to limit parties to contract remedies, is not promoted when fraud has undermined the consumer's ability to freely negotiate the terms and remedies of the contract.

Id. I would apply the same reasoning here and hold that the economic loss rule does not bar plaintiffs' claims for fraud.

Further, to the extent that the ruling below implicitly applies the economic loss doctrine to the Chapter 75 claim, I would specifically reject that application as well.

> The rule has generally been used to bar only tort claims; most courts have held that the economic loss rule does not apply to UDAP [UDTPA] claims. UDAP claims are exempt from the economic loss rule because the rule is judicial, not legislative, and must give way to specific legislative policy pronouncement allow-

> ing damages for economic loss. In other words, by enacting a remedy for economic losses suffered by reason of an act deemed wrongful by the statute, the legislature has effectively preempted the economic loss rule for those cases covered by the act. *To apply the economic loss rule to UDAP claims would effectively eviscerate the statute. The legislature could hardly have intended that the rule would bar the very claims the UDAP statute created.*

Id. (emphasis added). Since, in North Carolina, unfair and deceptive trade practices claims include, but are not limited to, claims involving fraud, this reasoning applies to the fraud claim as well. *See Holley v. Coggin Pontiac*, 43 N.C. App. 229, 241, 259 S.E.2d 1, 9, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

In sum, I would reverse the dismissal on the pleadings of both claims and remand for further proceedings.

GARRY LEE SKINNER, AND WIFE JUDY COOPER SKINNER, INDIVIDUALLY AND ON BEHALF OF OTHER SIMILARLY SITUATED INDIVIDUALS, PLAINTIFFS v. PREFERRED CREDIT, ALSO KNOWN AS PREFERRED CREDIT CORPORATION, ALSO KNOWN AS PREFERRED MORTGAGE COMPANY, ALSO KNOWN AS T.A.R. PREFERRED MORTGAGE CORPORATION; US BANK N.A.; US BANK NA, ND; IMPERIAL CREDIT INDUSTRIES, INC; ICIFC SECURED ASSETS CORPORATION 1997-1; MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1997-1; ICIFC SECURED ASSETS CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1997-2; ICIFC SECURED ASSETS CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1997-3; EMPIRE FUNDING HOME LOAN OWNER TRUST 1998-1; CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORPORATION; CS FIRST BOSTON MORTGAGE SECURITIES CORPORATION PREFERRED MORTGAGE ASSET-BACKED CERTIFICATES, SERIES 1996-2; CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORPORATION PREFERRED CREDIT ASSET-BACKED CERTIFICATES, SERIES 1997-1; BANKERS TRUST COMPANY; GMAC-RESIDENTIAL FUNDING CORPORATION; LIFE BANK; LIFE FINANCIAL HOME LOAN OWNER TRUST 1997-3; UNITED MORTGAGE C.B., LLC; BANC ONE FINANCIAL SERVICES; IMH ASSETS CORP. COLLATERALIZED ASSET-BACKED BONDS SERIES 1999-1; AND WILMINGTON TRUST COMPANY, DEFENDANTS

No. COA04-1450

(Filed 16 August 2005)

1. Jurisdiction— long-arm—trust holding mortgage

Long-arm jurisdiction was not extended to defendant Trust 1997-1 in an action for usury and unfair trade practices in connection with a mortgage, and plaintiff's complaint was properly

dismissed. Defendant, which was assigned the loan after the closing, is a New York common law trust which receives and distributes income from mortgages to its certificate holders. It has back offices in New York and California but no employees; and its mortgage notes are serviced by an independent contractor in California. It had no connection with the origination of this loan and did not directly collect or direct the collection of the payments. The only connection defendant has to North Carolina is that less than three percent of its mortgage notes are secured by North Carolina real property. N.C.G.S. §§ 1-75.4(1)(d), 1-75.4(5)(d), 1-75.4(6)(b).

2. Statutes of Limitation and Repose— usury and unfair trade practices—accrual at closing

In an action decided on other grounds, the trial court did not err by dismissing claims for usury and unfair trade practices arising from a mortgage for expiration of the statute of limitations. The statute of limitations for usury is two years and for unfair trade practices four years, with accrual on closing date. Plaintiffs' complaint was filed over four years from the closing date. N.C.G.S. § 1-52(2), (3), N.C.G.S. § 75-16.2.

3. Unfair Trade Practices— subsequent purchaser of mortgage note

It has been held that a subsequent purchaser of a mortgage note who did not participate in alleged improprieties during the execution of the mortgage is not liable under N.C.G.S. § 75-1.1.

Judge BRYANT dissenting.

Appeal by plaintiffs from order entered 9 June 2004 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 15 June 2005.

Shipman Gore Mason & Wright, LLP, by Gary K. Shipman and William G. Wright, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Hada V. Haulsee and Ronald R. Davis; Leslie A. Greathouse, Santa Ana, California, pro hac vice, for defendants-appellees Preferred Credit Trust 1997-1 and Bankers Trust Company.

TYSON, Judge.

Garry Lee Skinner and Judy Cooper Skinner ("Skinners"), as individuals and on behalf of all other individuals similarly situated (collectively, "plaintiffs"), appeal an order dismissing plaintiffs' complaint against Preferred Credit Trust 1997-1 ("Trust 1997-1") and Bankers Trust Company (collectively, "defendants") under Rule 12(b)(1), Rule (2), and Rule (6) of the North Carolina Rules of Civil Procedure. We affirm.

I. Background

The Skinners obtained a second mortgage loan from defendant Preferred Credit on 22 January 1997. The loan was secured by a lien on their residential real property. After the closing date, the loan was assigned to Trust 1997-1. Trust 1997-1 holds mortgage loans, receives income from the mortgage loans, and distributes that income to holders of its certificates.

The Skinners allege defendant Preferred Credit charged excessive loan origination fees and interest rates for the loan in violation of North Carolina's usury law. Plaintiffs filed a class action complaint on 3 December 2001 against multiple defendants asserting violations of North Carolina's Usury Statutes and Unfair and Deceptive Trade Practices Act.

On 12 May 2003, the Chief Justice of the North Carolina Supreme Court designated this case as "exceptional" and assigned Judge Hight to hold sessions. Defendants' motions to dismiss under Rule 12(b)(1), Rule (2), and Rule (6) were heard by Judge Hight. The trial court reviewed the pleadings, read briefs submitted by plaintiffs and defendants, and heard statements and arguments in open court by both plaintiffs and defendants.

On 9 June 2004, the trial court entered its order which determined: (1) plaintiffs voluntarily dismissed claims against defendants Credit Suisse First Boston Mortgage Securities Corporation, Imperial Credit Industries, Inc., Banc One Financial Services, Life Bank, Life Financial Home Loan Owner Trust 1997-3, Wilmington Trust Company, and GMAC-Residential Funding Corporation; (2) plaintiffs voluntarily dismissed all claims against defendant U.S. Bank, N.A., ND. with prejudice; (3) plaintiffs conceded lack of standing against defendants US Bank N.A., Empire Funding Home Loan Owner Trust 1998-1, ICIFC Secured Assets Corporation Mortgage Pass-Through Certificates, Series 1997-1, ICIFC Secured Assets

Corporation Mortgage Pass-Through Certificates, Series 1997-2, ICIFC Secured Assets Corporation Mortgage Pass-Through Certificates, Series 1997-3, Preferred Mortgage Trust 1996-2, United Mortgage C.B., LLC, and IMH Assets Corp. Collateralized Asset-Backed Bonds Series 1999-1; (4) plaintiffs lack personal jurisdiction over IMPAC Mortgage Holdings, Inc., IMPAC Secured Assets Corporation, IMPAC Secured Assets CMN Trust Series 1998-1 Collateralized Asset-Backed Notes, Series 1998-1, and Trust 1997-1; (5) plaintiffs lack standing to assert claims against defendants IMPAC Funding Corporation, IMPAC Mortgage Holdings, Inc., IMPAC Secured Assets Corporation, Bankers Trust Company of California, NA, and Bankers Trust Company; and (6) plaintiffs' complaint fails to state any claim upon which relief may be granted against any of defendants. Plaintiffs appeal.

II. Issues

The issues on appeal are whether: (1) plaintiffs have personal jurisdiction over Trust 1997-1; and (2) the applicable statute of limitations periods have expired concerning plaintiffs' claims against defendants for violations of N.C. Gen. Stat. § 24-10 and N.C. Gen. Stat. § 75-1.1.

III. Parties Before the Court

After filing its notice of appeal, plaintiffs filed with this Court a motion to dismiss its appeal with respect to: (1) IMPAC Funding Corporation; (2) IMPAC Mortgage Holdings, Inc.; (3) IMPAC Secured Assets Corporation; (4) IMPAC Secured Assets CMN Trust Series 1998-1 Collateralized Asset-Backed Notes, Series 1998-1; and (5) Bankers Trust Company of California, N.A. We allowed this motion pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 37 (2004). The sole remaining defendants are Trust 1997-1 and its trustee, Bankers Trust Company.

IV. Personal Jurisdiction

[1] Plaintiffs assert the trial court erred in determining they lacked personal jurisdiction over Trust 1997-1. We disagree.

A. Standard of Review

> "The standard of review of an order determining jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Better Business Forms, Inc. v.*

> *Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995). "If presumed findings of fact are supported by competent evidence, they are conclusive on appeal despite evidence to the contrary." *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986).
>
> A court must engage in a two-part inquiry to determine whether personal jurisdiction over a non-resident defendant is properly asserted. *Better Business Forms, Inc.*, 120 N.C. App. at 500, 462 S.E.2d at 833. First, the court must determine whether North Carolina's 'long-arm' statute authorizes jurisdiction over the defendant. N.C. Gen. Stat. § 1-75.4 (2003). If so, the court must determine whether the court's exercise of jurisdiction over the defendant is consistent with due process. *Better Business Forms, Inc.*, 120 N.C. App. at 500, 462 S.E.2d at 833.

Tejal Vyas, LLC v. Carriage Park, Ltd. P'ship, 166 N.C. App. 34, 37, 600 S.E.2d 881, 884-85 (2004), *aff'd per curiam*, 359 N.C. 315, 608 S.E.2d 751 (2005).

B. Long-Arm Statute

Plaintiffs assert three subsections of North Carolina's long-arm statutes provide them personal jurisdiction over Trust 1997-1: (1) N.C. Gen. Stat. § 1-75.4(1)(d); (2) N.C. Gen. Stat. § 1-75.4(5)(d); and (3) N.C. Gen. Stat. § 1-75.4(6)(b).

N.C. Gen. Stat. § 1-75.4(1)(d) (2003) provides that if the defendant is "engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise[,]" personal jurisdiction exists. N.C. Gen. Stat. § 1-75.4(5)(d) (2003) states that if the plaintiff shipped "goods, documents of title, or other things of value from [North Carolina to the defendant on its] order or direction," personal jurisdiction exists. Under N.C. Gen. Stat. § 1-75.4(6)(b) (2003), personal jurisdiction exists

> [i]n any action which arises out of: A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced[.]

1. "Substantial Activity" and "Things of Value"

Trust 1997-1 correctly notes and our review of the record shows plaintiffs' claims against defendants arose out of allegedly "excessive

and illegal origination fees" and "unfair and deceptive acts associated with the making and collection of the loans." Trust 1997-1 had no connection with the origination of the loans, payment of the origination fees, and does not directly collect or direct the collection of loan payments. Trust 1997-1 has no employees and merely holds payments for the benefit of its certificate holders after receipt from its servicer in California. Trust 1997-1 neither engages in "substantial activity within this State" to satisfy N.C. Gen. Stat. § 1-75.4(1)(d) nor receives "shipped goods, documents of title, or other things of value" from North Carolina under N.C. Gen. Stat. § 1-75.4(5)(d).

2. Tangible Property

This Court addressed the applicability of N.C. Gen. Stat. § 1-75.4(6)(b) to a nonresident defendant who only had an interest in a note secured by a deed of trust on real property in North Carolina in *Whitener v. Whitener*, 56 N.C. App. 599, 601, 289 S.E.2d 887, 889, *disc. rev. denied*, 306 N.C. 393, 294 S.E.2d 221 (1982). In *Whitener*, the plaintiff filed a complaint in North Carolina state court against his exwife, a Florida resident. *Id.* He sought an accounting of payments she received in Florida from a purchase money note related to a predivorce sale of North Carolina real property. *Id.* at 602, 289 S.E.2d at 889. The defendant challenged the existence of personal jurisdiction. *Id.* at 600, 289 S.E.2d at 888.

The defendant's only connection to North Carolina was receipt of payments based on her sale of real property in North Carolina and the note she received secured by the deed of trust. *Id.* at 601, 289 S.E.2d at 889. Recognizing the "serious constitutional problems that would arise were we to hold otherwise," this Court granted the defendant's motion to dismiss stating, "[w]e believe that if we read G.S. 1-75.4(6)(b) to give the North Carolina court jurisdiction for a suit against the defendant for an accounting of money she received on the note it would violate the rule of *Shaffer*." *Id.* at 602, 289 S.E.2d at 889-90 (following the minimum contacts analysis in *Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683 (1977)).

Here, the only connection Trust 1997-1 has to North Carolina is less than three-percent of the mortgage notes it holds are secured by North Carolina real property. Trust 1997-1 is a New York common law trust with back offices in New York and California. It has no employees. Its servicer of the mortgage notes is an independent contractor located in California. *See Wyatt v. Walt Disney World, Co.*, 151 N.C. App. 158, 166, 565 S.E.2d 705, 710 (2002) (actions of an inde-

pendent contractor alone are not enough to establish jurisdiction). Trust 1997-1 is an assignee holder of second mortgage notes. Trust 1997-1's connections to and contacts with North Carolina are even more tenuous than those asserted in *Whitener*. We hold these connections are not sufficient to satisfy North Carolina's long-arm statute.

Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina's law. In *Frazier v. Preferred Credit*, the United States District Court for the Western District of Tennessee, held Trust 1997-1, the same nonresident assignee defendants as here, did not engage in sufficient contacts with the forum state to justify the exercise of personal jurisdiction, and dismissed the plaintiff's claims. No. 01-2714 GB, 2002 WL 31039856 at 6-7 (W.D. Tenn., 2002) (Unpublished). The court relied on the facts that: (1) the defendants had no employees or agents in the state; (2) the defendants had no representatives that traveled to the state; (3) the defendants had not entered into any contracts, including second mortgage loans, in the state; and (4) the loans the defendants held secured by property in the state did not exceed two percent of the total loans they held. *Id.*

Under very similar facts and law, the Tennessee Court of Appeals held personal jurisdiction could not be extended to the defendants and dismissed the plaintiffs' claims. *See Hollingsworth, Inc. v. Johnson*, 138 S.W.3d 863, 869 (Tenn. Ct. App., 2003) ("One of the general principles of the law of assignments is that the assignee steps into the shoes of the assignor with regard to the matters covered by the assignment.") (internal quotation omitted), *appeal denied*, 2004 Tenn. LEXIS 289 (Tenn. Mar. 22, 2004). Here, the dissenting opinion notes we focus on the Trust's quantity, rather than the quality, of defendants' contacts as the basis to establish jurisdiction. Plaintiffs failed to establish either.

In light of our discussion that the subsections of N.C. Gen. Stat. § 1-75.4, as argued by plaintiffs, do not extend the long-arm statute to Trust 1997-1, we need not address the due process considerations. *See Tejal Vyas, LLC*, 166 N.C. App. at 37, 600 S.E.2d at 884-85 ("A court must engage in a two-part inquiry to determine whether personal jurisdiction over a non-resident defendant is properly asserted."). We hold the trial court properly dismissed plaintiffs' complaint against Trust 1997-1 for lack of personal jurisdiction. This assignment of error is overruled.

V. Statute of Limitations

[2] Although we hold plaintiffs did not have personal jurisdiction over Trust 1997-1, we also consider plaintiffs' assertion that the trial court erred in granting the Rule 12(b)(6) motion to dismiss due to expiration of the statute of limitations. We disagree.

Orally argued the same day and filed simultaneously with this opinion is *Shepard v. Ocwen Federal Bank, FSB, et al.*, 172 N.C. App. 475, 617 S.E.2d 61 (2005). In *Shepard*, we addressed the issue of accrual of the statute of limitations for claims of usury violations and unfair and deceptive trade practices in the same factual scenario. *Id.* at 477, 617 S.E.2d at 63. *Shepard* holds the statute of limitations accrues on the date of closing. Our holding in *Shepard* provides an alternative basis to affirm the trial court's dismissal of plaintiffs' complaint.

The discussion in *Shepard* was limited to the usury claim due to the plaintiffs stipulating that their claim under N.C. Gen. Stat. § 75-1.1 was time-barred under the applicable statute of limitations. *Id.* at 482, 617 S.E.2d at 66. Plaintiffs do not so stipulate. Our analysis and discussion as applied to the usury statute of limitations in *Shepard* is equally applicable to plaintiffs' unfair and deceptive trade practices claim. *Id.*

The Skinners closed on their second mortgage on 22 January 1997. Their complaint was not filed until 3 December 2001, over four years after the closing date. The statute of limitations for both the usury and unfair and deceptive trade practices had expired. *See* N.C. Gen. Stat. § 1-52(2)-(3) (2003) (statute of limitations for usury claims is two years); *see also* N.C. Gen. Stat. § 75-16.2 (2003) (statute of limitations for unfair and deceptive trade practices claims is four years). As an alternative basis to affirm the trial court's order, the trial court properly granted defendants' Rule 12(b)(6) motion to dismiss on expiration of the statute of limitations on both claims.

[3] We further recognize this Court has addressed the issue of mortgage holder/assignee's liability to borrowers for claims of unfair and deceptive trade practices based on execution of the original loan. In *Melton v. Family First Mortgage Corp.*, the plaintiff filed a complaint against the original lender and subsequent assignees of the mortgage note for unfair and deceptive trade practices, fraud, and civil conspiracy. 156 N.C. App. 129, 132-34, 576 S.E.2d 365, 368-69, *aff'd per curiam*, 357 N.C. 573, 597 S.E.2d 672 (2003). The allegations arose

from activities occurring prior to and on the date of closing. *Id.* at 131, 576 S.E.2d at 367-68. With regards to the bank that purchased the mortgage shortly after its execution, we noted the plaintiff did not meet with the defendant's representatives, did not correspond with the defendant, and had no relationship with the defendant until after the defendant bought the mortgage subsequent to the closing date. *Id.* at 133, 576 S.E.2d at 369. As here, "there is no evidence that [the defendant] committed improprieties with regard to the execution of the mortgage." *Id.* We held a subsequent purchaser of a mortgage note who did not participate in alleged improprieties during the execution of the mortgage is not liable under N.C. Gen. Stat. § 75-1.1. *Id.*

There are no allegations that Trust 1997-1, as a subsequent purchaser of a mortgage note, had any connection to the execution of the mortgage note. Under *Melton*, plaintiffs' claim of unfair and deceptive trade practices against Trust 1997-1 fails. In light of our holding, we decline to address plaintiffs' remaining assignments of error.

VI. Conclusion

The trial court properly dismissed plaintiffs' claims against defendants for lack of personal jurisdiction. As an alternative basis to affirm the trial court's order, the applicable statute of limitations governing both causes of action plaintiffs asserted accrued on the closing date and expired prior to plaintiffs filing this action. Trust 1997-1 is not liable under N.C. Gen. Stat. § 75-1.1 for allegations involving the execution of the mortgage. The trial court's order is affirmed.

Affirmed.

Judge McCULLOUGH concurs.

Judge BRYANT dissents.

BRYANT, Judge dissenting.

The majority holds the trial court properly dismissed plaintiffs' claims against Preferred Trusts 1997-1 (hereafter "the Trust" or "defendants") for lack of personal jurisdiction, finding that plaintiffs had not satisfied any of the sections of North Carolina's long-arm statute that plaintiffs asserted. I strongly disagree and therefore respectfully dissent from the majority opinion because I believe North Carolina has personal jurisdiction over the Trust pursuant to both N.C. Gen. Stat. §§ 1-75.4 (1)(d) and (6)(b). Furthermore, I am of

the opinion that to allow out-of-state defendants, who are associated with enforcing contracts charging usurious loan fees to in-state residents, to escape the purview of North Carolina jurisdiction, would not only hinder the purpose and effect of our long-arm statute, but would also contravene North Carolina's strong public policy against predatory lending practices, and deny North Carolina citizens the protections guaranteed by the laws of this State.

I. **Existence of Personal Jurisdiction**

In determining whether a North Carolina court may exercise personal jurisdiction over a defendant, the court must undertake a two-part inquiry: "First, the North Carolina long-arm statute must permit the exercise of personal jurisdiction. Second, the exercise of personal jurisdiction must comport with the due process clause of the Fourteenth Amendment of the United States Constitution." *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 358, 583 S.E.2d 707, 710 (2003). The majority opinion states, because "the subsections of N.C. Gen. Stat. § 1-75.4, as argued by plaintiffs, do not extend the long-arm statute to 1997-1 Trust, we need not address the due process considerations." (at p. 8). I disagree because I believe two of the subsections of N.C.G.S. § 1-75.4 alleged by plaintiffs do, in fact, extend personal jurisdiction to defendants.

A. **N.C. Gen. Stat. § 1-75.4 Permits the Exercise of Personal Jurisdiction**

i. **1-75.4(1)(d)**

N.C. Gen. Stat. § 1-75.4(1)(d) provides that jurisdiction exists "[i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party . . . [i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise."

There is a clear mandate that the North Carolina long-arm statute is to be construed liberally in favor of finding jurisdiction over a defendant. *See*, *Strother v. Strother*, 120 N.C. App. 393, 395, 462 S.E.2d 542, 543 (1995) ("In determining whether the "long-arm" statute permits our courts to entertain an action against a particular defendant, the statute should be liberally construed in favor of finding jurisdiction."); *See also*, *Marion v. Long*, 72 N.C. App. 585, 586, 325 S.E.2d 300, 302 (1985) ("The statute [N.C.G.S. § 1-75.4] should receive liberal construction, in favor of finding jurisdiction."); *See*

also, *Starco, Inc. v. AMG Bonding & Ins. Servs.*, 124 N.C. App. 332, 338, 477 S.E.2d 211, 216 (1996) ("Our courts have reminded us on numerous occasions that section 1-75.4 should receive liberal construction, favoring the finding of jurisdiction."); *See also*, *De Armon v. B. Mears Corp.*, 67 N.C. App. 640, 643, 314 S.E.2d 124, 126 (1984) ("This statute [G.S. § 1-75.4] is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process."), *rev'd in part on other grounds*, 312 N.C. 749, 325 S.E.2d 223 (1985).

According to the majority, defendants do not engage in substantial business activity with North Carolina because the Trust "had no connection with the origination of the loans, payment of the origination fees, and does not directly collect or direct the collection of the loan payments," and further, the Trust "has no employees and merely holds payments for the benefit of its certificate holders after receiving them from its servicer in California." I would hold, however, for the reasons which follow, that N.C.G.S. § 1-75 confers jurisdiction over the Trust.

In *W. Conway Owings and Assoc., Inc. v. Karman, Inc.*, 75 N.C. App. 559, 331 S.E.2d 279 (1985), the defendant, a clothing store, was incorporated and had its principal place of business in Colorado. The plaintiff, a North Carolina resident, purchased clothing from the defendant at its showroom in Denver, Colorado. *Id.* The clothing was shipped to North Carolina and, without being opened by the plaintiff, then shipped to Germany for resale. The order forms and invoices served as the contracts between the parties. *Id.* The plaintiff sued the defendant for alleged defects with the clothing, which were discovered once the shipment reached Germany. The defendant filed a motion to dismiss for lack of personal jurisdiction and the trial court denied the motion. *Id.* On appeal, this Court affirmed the trial court's decision, finding the exercise of personal jurisdiction proper because "[t]he goods . . . were delivered to North Carolina, the payments for the goods were made from North Carolina and the [plaintiff] corporation which claims a breach of warranty is domiciled in this State." *Id.* at 564, 331 S.E.2d at 282.

The instant case is similar in many respects to *Conway*. The loan agreements were initiated in North Carolina, the payments on the notes owned by the Trust were made from North Carolina, and plaintiffs to the class-action are domiciled in North Carolina. Further, like the Trust, the *Conway* defendant "ha[d] no sales or business office, telephone listing, bank account, mailing address, or employees in

North Carolina." *Id.* The contacts with our forum state are also similar. However, there is one significant difference—the interest in North Carolina property. The Trust defendants admit they maintain an interest in the property in North Carolina due to their ownership of the second mortgage notes. Conversely, the *Conway* defendant "ha[d] no interest in any property in North Carolina and [did] not receive or use textiles from North Carolina." *Id.* at 599, 331 S.E.2d 279. It is reasonable to conclude the defendant in *Conway* had a more tenuous relationship with this State than the Trust, given the lack of interest the *Conway* corporation had in North Carolina property. Nevertheless, this Court held the corporation was engaged in sufficient substantial activity to confer jurisdiction pursuant to N.C.G.S. § 1-75.4(1)(d). *Id.* at 561-62, 331 S.E.2d at 281.

The record in the case *sub judice* reveals that while only three-percent of the mortgage notes owned by the Trust are secured by North Carolina real property, that three-percent constitutes 114 loans in North Carolina with an aggregate value of over four million dollars ($4,001,614.61). The Trust is engaged in substantial activity within the State of North Carolina such that jurisdiction clearly exists under N.C.G.S. § 1-75.4(1)(d).

ii. **N.C.G.S. § 1-75.4(6)(b)**

N.C.G.S. § 1-75.4(6)(b) provides that personal jurisdiction exists:

> [i]n any action which arises out of: A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced [.]

The majority relies on *Whitener v. Whitener*, 56 N.C. App. 599, 289 S.E.2d 887, *disc. rev. denied*, 306 N.C. 393, 294 S.E.2d 221 (1982), to support its conclusion that N.C.G.S. § 1-75.4 (6)(b) does not provide a basis of jurisdiction. However, the majority omits key elements of the reasoning and holding in its application of *Whitener*.

In *Whitener*, the plaintiff and the defendant were married and residing in Florida when they sold a piece of real estate they owned in North Carolina. The parties accepted payment from the buyer through a purchase note secured by a deed of trust. *Id.* After the parties divorced, the defendant remained domiciled in Florida while the plaintiff moved back to North Carolina. The plaintiff later brought an action against the defendant to enforce an accounting of all monies

the defendant received toward payment on the note. The defendant challenged the existence of personal jurisdiction. *Id.* Similar to the case at bar, the plaintiff alleged N.C.G.S. § 1-75.4(6)(b) brought the defendant within the purview of North Carolina personal jurisdiction. *Id.* at 601, 289 S.E.2d at 889. The trial court granted the plaintiff's motion to dismiss, and this Court affirmed that decision on appeal. *Id.* at 603, 289 S.E.2d at 890.

The majority interprets *Whitener* to mean N.C.G.S. § 1-75.4(6)(b) does not permit jurisdiction over a non-resident defendant whose only interest in North Carolina is a note secured by a deed of trust on real property in this State. (at p. 7). According to the majority, *Whitener* suggests such a connection is not sufficient to satisfy North Carolina's long-arm statute, and to read the statute so as to give the Court jurisdiction in that instance would violate the minimum contacts requirement of *Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683 (1977). (at p. 7). I disagree.

The *Whitener* court held there was a lack of personal jurisdiction over the defendant because there was no relationship between the property in North Carolina and the controversy between the parties. The Court referenced three cases to support its holding: *Shaffer*; *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978); and *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

In *Shaffer*, the Court held "the fact that the defendants relied on Delaware law to protect their interests as stockholders did not give the Delaware court jurisdiction of the defendants in an action unrelated to their rights as stockholders." *Whitener* at 602, 289 S.E.2d at 889 (citing *Shaffer*, *supra*). In following *Shaffer*, *Balcon* held "there was not [] sufficient minimum contact[s] to support jurisdiction over a Maryland resident who owned real estate in this state when the plaintiff, also a Maryland resident, brought an action . . . on a claim that arose in Maryland and was unrelated to the North Carolina real estate." *Id.* at 601, 289 S.E.2d at 889 (citing *Balcon*, 36 N.C. App. 322, 244 S.E.2d 164). In *Holt*, "this Court held that the district court had jurisdiction over a resident of another state who owned real estate in North Carolina . . . [because] there were several factors which showed there was a relationship between the defendant's North Carolina property and the controversy between the parties." *Id.* (citing *Holt*, 41 N.C. App. 344, 255 S.E.2d 407).

From these cases, the *Whitener* Court perpetuated the following rule and applied it to the facts: in order for North Carolina's long-arm

statute to obtain personal jurisdiction over non-residents having an interest in real property in the state, there must be some relationship between that interest and the cause of action. *Whitener* at 601-02, 289 S.E.2d at 889-90; *See also*, *Balcon* at 326, 244 S.E.2d at 167 ("Where real property has *some* relation to the controversy, the interest of the State in realty within its borders, and the defendant's substantial relationship with the forum should support jurisdiction.") (emphasis added). The *Whitener* Court held that to "read [N.C.]G.S. § 1-75.4(6)(b) to give the North Carolina court jurisdiction for a suit against the defendant for an accounting of money she received on the note" would violate the *Shaffer* rule only because "[t]here [was] no dispute between the parties as to whether the note should be paid. The only dispute [was] what [] the defendant [did] with the payments." *Whitener* at 602, 289 S.E.2d at 889. In other words, "there was no indication that the sale [of the North Carolina property] was connected with the Florida action." *Id.* at 602, 289 S.E.2d at 890.

The majority's focus on the Trust's **quantity** of contacts with the State is irrelevant to the analysis in *Whitener*, which addressed the determination of a defendant's **quality** of contacts as the basis of establishing jurisdiction. In applying what I believe to be the correct rule of *Whitener* to the case *sub judice*, we must determine if there is some relationship between the Trust's interest in North Carolina property and the cause of action. Defendants' brief and the majority opinion both stress the notion that the Trust only *holds* the notes. However, they overlook the ownership factor. The Trust maintains ownership over the second mortgage notes, which means in the event the borrowers default on their loan payments, the Trust can foreclose on the property, collect the proceeds, and eventually take sole ownership. Therefore, defendant has a substantial interest in North Carolina property. As such, the notes defendant claims to merely hold for the benefit of the certificate holders, are connected to North Carolina property and the residents who live there. While the notes may continually change hands, the property to which they are affixed remains within the State.

The majority notes this cause of action arose out of "excessive and illegal origination fees" and "unfair and deceptive acts associated with the making and collection of the loans." (at p. 6). While the Trust was not involved in the initiation of the loans or setting the terms of the agreements, as an assignee of the notes, they assumed all rights, obligations, liabilities and benefits to which Preferred Credit would have been entitled. Once the notes were assigned, the Trust took the

place of Preferred Credit, and are treated as if the loans actually originated with the Trust. This has been a long-standing principle in North Carolina contract law. *Smith v. Brittain*, 38 N.C. 347, 354, 1844 N.C. LEXIS 157, 13 (1844) ("an assignee stands absolutely in the place of his assignor, and it is . . . as if the contract had been originally made with the assignee, upon precisely the same terms as with the original parties."); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 664, 194 S.E.2d 521, 535 (1973) ("The assignee steps into the shoes of the assignor . . . .") (quoting *Cook v. Eastern Gas and Fuel Assocs.*, 129 W. Va. 146, 155, 39 S.E.2d 321, 326 (1946)); *Turner v. Beggarly*, 33 N.C. 331, 334, 1850 N.C. LEXIS 66, 7 (1850) ("an assignee is affected by the liabilities of his assignor"). Consequently, defendants cannot hide behind the argument that "the Preferred Trusts have not engaged in or transacted any business in . . . North Carolina [and] . . . have not made any contracts with any resident of . . . North Carolina[.]"

In its affidavit, defendants state that one of the purposes of the Preferred Trusts is to "receive income from the mortgage loans, including second mortgage loans." Through the servicers, the Trust receives monthly payments based on the terms of the original loan agreement. By receiving those payments, defendants are enforcing the loans. The borrowers initiated this cause of action to seek recovery of the usurious fees. These factors evidence the requisite relationship between defendants' interest in the North Carolina property and the cause of action to satisfy *Shaffer* and N.C.G.S. § 1-75.4(6)(b). For the above reasons, I believe plaintiffs satisfied the first step in the two-part personal jurisdiction inquiry, showing facts sufficient to establish jurisdiction pursuant to either N.C.G.S. §§ 1-75.4(1)(d) or (6)(b) of North Carolina's long-arm statute. Next, it is necessary to explore whether the exercise of personal jurisdiction violates defendants' due process rights.

B. **Due Process Analysis**

A personal jurisdiction analysis is not complete until the court analyzes both elements of the two-part inquiry. By not engaging in the due process analysis, the majority overlooks the rule that due process "is the crucial inquiry and the ultimate determinative factor in assessing whether jurisdiction may be asserted under the 'long-arm' statute." *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 530, 265 S.E.2d 476, 479 (1980); *see also*, *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 706, 208 S.E.2d 676, 680 (1974) ("due process, and not the language of the statute, is the ultimate test of "long-arm" jurisdiction over a nonresident").

For the exercise of personal jurisdiction to comport with the Due Process Clause of the Fourteenth Amendment, *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945), a nonresident defendant must have minimum contacts with the forum state so as not to offend "traditional notions of fair play and substantial justice." It is a well-settled principle that the determination of minimum contacts with the forum is not calculated by a mechanical test, but rather it varies depending on the facts of the particular case. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 679, 231 S.E.2d 629, 632 (1977). Generally, there are five factors taken into consideration when determining the existence of minimum contacts: "(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties." *Rosenhaus* at 358, 583 S.E.2d at 710.

i. **Quantity of Contacts**

Defendants have a substantial connection with the forum. As previously mentioned, defendants own the notes to 114 North Carolina mortgage loans worth over $4 million. The loan agreements serve as contracts between the borrowers and defendants, who are the assignees of Preferred Credit. A single contract is enough to satisfy the "minimum contacts" necessary to permit jurisdiction over a nonresident corporate defendant, so long as that defendant has purposefully availed itself of the benefits and privileges of the laws of the forum. *B. F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132-33, 341 S.E.2d 65, 67 (1986) (citations omitted). Here, defendants purposefully availed themselves of the privileges of North Carolina law. The loan agreements were initiated in North Carolina, and the Deed of Trust explicitly stated North Carolina law would govern the mortgage. Therefore, should any of the borrowers default on their monthly payments, the Trust would take advantage of North Carolina law to ensure payment. Should the default lead to foreclosure, the Trust would expect the full support of North Carolina law in the acquisition of the properties. Defendants would expect these protections as to each of the 114 loan agreements. However, it is common practice in our courts to require a foreign corporation doing business in North Carolina and accepting the benefits of our laws to be subject to jurisdiction. *See, Central Motor Lines Inc. v. Brooks Transp. Co.*, 225 N.C. 733, 739, 36 S.E.2d 271, 275 (1945), *questioned in Atlantic C. L. R. Co. v. J. B. Hunt & Sons, Inc.*, 260 N.C. 717, 133 S.E.2d 644 (1963) ("to the extent that a corporation exercises the priv-

ilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."); *See also*, *State Highway & Public Works Com. v. Diamond S.S. Transp. Corp.*, 225 N.C. 198, 203, 34 S.E.2d 78, 81 (1945) ("[North Carolina law] prevent[s] a foreign corporation from accepting the protection of our laws in the transaction of its ordinary business, create obligations, and by reason of its remoteness from any forum available to a local citizen, secure immunity from liability.").

ii. **Quality and Nature of Contacts**

It is reasonable to conclude the Trust's activities in North Carolina were continuous and systematic. *See*, *e.g.*, *Jaeger v. Applied Analytical Indus. Deutschland GMBH*, 159 N.C. App. 167, 582 S.E.2d 640 (2003) (If a foreign corporation engages in continuous and systematic activities within the state, minimum contacts sufficient to comport with due process exist). Defendants have been in contact with the forum for a considerable period of time and have established longevity. The "Origination Months" table, found within the Prospectus Supplement submitted in the record, reveals that the collection of HLTV mortgage loans purchased by the Trust were originated by Preferred Credit between June 1995 and February 1997. When those loans were consolidated under the 1 March 1997 Pooling Service Agreement, the notes became the official property of Preferred Trusts 1997-1. While it is well-settled law that the mere ownership of property in the forum state is not enough to establish minimum contacts (*see e.g.*, *Georgia Railroad Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980)), the Trust has been admittedly "receiv[ing] income from the mortgage loans" since March 1997. As such, defendants have been in contact with North Carolina residents, and have owned notes attached to North Carolina property, for approximately four years prior to the initiation of litigation.[1] Also, defendants will be in contact with the state for a lengthier period since the notes ensure that the borrowers are locked into making payments on the loans for a term of fifteen years or more.

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1. This action was filed 30 November 2001. However, it should be noted that had the action been filed in 2005, the Trust would have been in contact with North Carolina for approximately eight years.

In addition, defendants' activities span the entire state. This is a "class action on behalf of the *statewide class* of North Carolina residential real estate owners . . . ." (emphasis added). The 114 second mortgage loans originated by Preferred Credit are secured by real property located in several counties throughout North Carolina.

iii. **Source and Connection of Cause of Action to Contacts**

The discussion regarding the relationship between the Trust's interest in North Carolina property and the borrower's cause of action set out in the *Whitener* discussion *supra*, applies to this factor as well.

iv. **Forum State's Interest in Litigation**

This class action involves North Carolina residents. Furthermore, the loans are governed by North Carolina law, and the notes are secured by North Carolina real property. Also, this action involves predatory lending, an area of public concern in which North Carolina has pioneered legislation.

iv. **Convenience to Parties**

The forum is convenient for the named plaintiffs and other class members as they are residents of North Carolina and filed their claims in North Carolina. The loans were originated and recorded in North Carolina, and the real properties securing the loans are located in North Carolina. Clearly, it is more convenient for plaintiffs to have their claims heard in a North Carolina forum.

Moreover, defendants would not be unreasonably burdened if North Carolina exercised personal jurisdiction over this matter. Even though defendants have corporate offices exclusively in New York and California, when Preferred Credit assigned the notes to the Trust, it absorbed all benefits and liabilities. Just as Preferred Credit would have expected to be hailed into the courts of North Carolina in the event of a dispute, the Trust, in taking the assigned notes, assumes the same obligations and liabilities as Preferred Credit. *Turner* at 334, 1850 N.C. Lexis at 7. Therefore, there is no unreasonable inconvenience placed upon defendants to appear in a North Carolina court.

In assessing the Trust's activities and contacts with the State in its totality, the exercise of personal jurisdiction would not violate "traditional notions of fair play and substantial justice"; thereby, comporting with defendants' due process rights. Therefore, I believe the trial court erred in granting defendants' motion to dismiss.

C. **Persuasive Authorities**

The exercise of personal jurisdiction over a consolidated trust that owns mortgage notes secured to North Carolina property presents an issue of first impression in our courts. Therefore, we look to other jurisdictions to find persuasive authority that coincides with North Carolina policy. First, we distinguish a case addressed in defendants' brief, *Frazier v. Preferred Credit*, No. 01-2714 GB, 2002 WL 31039856 at *5-7 (W.D. Tenn. July 31, 2002). In *Frazier*, the Western District Court of Tennessee held that the non-resident assignee defendants, 1997-1 Trust, did not have sufficient contacts with the forum to justify the exercise of personal jurisdiction, relying on the fact that 1997-1 Trust had no agents in the forum state, had no representatives that traveled to the state, did not enter into any contracts with any state residents, and did not contract to supply any service or thing in the state. *Id.* at *6-7. Acknowledging that the defendant 1997-1 Trust is the same defendant in the instant case, it is important to note that the *Frazier* court said it was irrelevant and did not discuss "whether assignees of [] loans can be held liable for the actions of the original lenders" or determine "whether an assignment of a mortgage constitutes an ownership interest in the property." *Id.* at *2.

Therefore, a key portion of this important analysis concerning the rule that an assignee steps into the shoes of the assignor and assumes all obligations and liabilities, was omitted. *See*, *Smith* at 354, 1844 N.C. Lexis at 13; *See also*, *Rose* at 664, 194 S.E.2d at 535; *See also*, *Turner* at 334, 1850 Lexis at 7. Hence, even if our sister state, Tennessee, does not follow that rule, it is nevertheless a firmly rooted principle of North Carolina contract law.

Further, neither *Frazier* nor other cases cited by defendant for the same rationale[2] reflect North Carolina's long-standing public policy against predatory lending schemes and the charging of usurious fees. The rationale and holding in *Easter v. Am. West Fin.*, 381 F.3d 948 (9th Cir. 2004), is more in line with North Carolina cases discussing personal jurisdiction. The *Easter* court held as follows:

> Here, the Trust Defendants have availed themselves of the protections of Washington law because they are beneficiaries of deeds of trust, which hypothecate Washington realty to secure

2. *See*, *e.g.*, *Williams v. Firstplus Home Loan Owner Trust 1998-4*, 310 F. Supp. 2d 981, 993-94 (W.D. Tenn. 2004) and *Pilcher v. Direct Equity Lending*, 189 F. Supp. 2d 1198 (D. Kan. 2002).

> payments on notes owned by the Trust Defendants. The deeds of trust convey a property interest in Washington realty, which interest the Trust Defendants expect Washington law to protect. In *Sher v. Johnson*, 911 F.2d 1357, 1363 (9th Cir. 1990), this court noted that holding a deed of trust "represents a significant contact with [the forum]." The Trust Defendants also receive money from Washington residents, albeit routed through the loan servicing companies who actually bill the payors. The Trust Defendants' income stream is derived from loans negotiated and executed in Washington and made to Washington residents.
>
> Moreover, Borrowers' actions arise out of the Trust Defendants' contacts with the forum because the suit is for recovery of the allegedly excessive interest payments Borrowers made on their notes. Defendants bear the burden of proving that the exercise of jurisdiction would be unreasonable. *Bancroft & Masters*, 223 F.3d at 1088. They have produced no evidence to show that exercise of jurisdiction over them would fail to "comport with fair play and substantial justice." *Id.* Therefore, the district court erred in finding that it lacked specific personal jurisdiction over the Trust Defendants and we reverse the district court's order on this ground.

Easter, 381 F.3d at 960-61.

II. **Public Policy**

North Carolina has a strong public policy of protecting its resident consumers and borrowers from any illegal transactions. *See Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 633-34, 394 S.E.2d 651, 656 (1990) ("North Carolina has a legitimate interest in the establishment and *operation of enterprises* and trade within its borders and the protection of its residents in the making of contracts with persons and agents who enter the state for that purpose.") (emphasis in original) (citation omitted); *See also* N.C. Gen. Stat. § 24-2.1 ("It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws."). The North Carolina General Assembly, in furtherance of the consumer protection laws made.

North Carolina the first state in the nation to enact anti-predatory lending legislation. That legislation is preceded by the usury statutes discussed in this opinion. The goal of the usury statutes is to protect borrowers from falling prey to usurious lending practices. The

majority opinion as written contravenes the public policy of our Interest Statutes.

Further, the North Carolina long-arm statute is to be construed liberally in favor of finding jurisdiction over a foreign defendant. It is designed to enable the courts to assert personal jurisdiction over non-resident defendants to the full extent permitted by the due process clause of the Constitution. *De Armon*, 67 N.C. App. at 643, 314 S.E.2d at 126; *First Citizens Bank & Trust Co. v. McDaniel*, 18 N.C. App. 644, 646, 197 S.E.2d 556, 558 (1973), *overruled on other grounds*, *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 517-18, 251 S.E.2d 610, 615-16 (1979).

III. **Conclusion**

For the foregoing reasons, I believe the trial court erred in dismissing plaintiff's claims for lack of personal jurisdiction.

PHELPS-DICKSON BUILDERS, L.L.C., PLAINTIFF v. AMERIMANN PARTNERS, AMERIMANN PARTNERS IV, L.L.C., AMERIMANN HOMES, L.L.C., STERLING PROPERTIES, L.L.C. F/K/A MALPASO REALTY, L.L.C., AND RON MIKESH, DEFENDANTS

No. COA04-520

(Filed 16 August 2005)

1. Discovery— motion to compel denied—review of documents permitted

The trial court did not err by denying a motion to compel discovery where the court reviewed the materials, but allowed a 24-hour review of the documents. Although plaintiff argues that this limitation on discovery was tantamount to the imposition of sanctions, nothing indicated such an intent.

2. Discovery— motion to compel denied—existence of key issues

The existence of key issues alone does not necessarily entitle plaintiff to further discovery responses, and plaintiff's assertions about the information were merely conclusory. The affirmative defenses about which plaintiff sought information were irrelevant because defendant's pleadings were never amended to assert these defenses.

3. Discovery— motion to compel denied—review of documents permitted

The trial court did not abuse its discretion when denying a motion to compel discovery by allowing the inspection of the documents for a twenty-four hour period two days before the hearing on defendant's summary judgment motion. Plaintiff did not present an argument as to why the time allowed for inspection was insufficient, and plaintiff cannot be heard to complain that it was granted one of the means of discovery expressly denominated under Rule 26.

4. Civil Procedure— summary judgment—timeliness—amended answer

There was no merit to a contention of error in the granting of summary judgment before the time for responding to an amended answer where the amended answer was not filed.

5. Agency— existence—developer and sales agent

There was an agency relationship between a sales agent who spoke with a builder and the developer where the agent exercised sweeping powers with the developer's knowledge and consent.

6. Contracts— merger clause—valid

An attempt by plaintiff (a builder) to enlarge or vary the duties of defendant (a developer) based upon oral representations was barred by a merger clause in the written contract between the parties.

7. Fraud— allegations—knowledge and intent—inferred from facts

While knowledge and intent must be alleged in a complaint for fraud, it is sufficient if fraudulent intent may reasonably be inferred, presumed, or necessarily results from the facts alleged.

8. Fraud— representations—opinions or statements of fact—summary judgment

Summary judgment for defendant-developer could not be upheld on a fraud claim by a builder against the developer where there was a jury question as to whether representations by the developer's agent were intended and received as expressions of opinion or statements of material fact.

9. Fraud— representations—opportunity to investigate—summary judgment

A fraud claim should not have been barred by summary judgment on the ground that plaintiff had some lesser opportunity to investigate representations by defendant's agent, who had superior knowledge.

10. Unfair Trade Practices— representations by developer to builder—summary judgment

An unfair and deceptive trade practice claim by a builder against a developer was sufficient to survive summary judgment.

11. Compromise and Settlement— existence of global settlement—summary judgment

There was a genuine issue of material fact concerning whether there had been a global settlement of claims between a builder and a developer, and summary judgment should not have been granted for defendants on that basis.

12. Civil Procedure— summary judgment with sanctions—no findings

The trial court did not err by not making findings in a summary judgment order which included sanctions. This is not the rare case which warrants findings concerning undisputed facts or conclusions.

Appeal by plaintiff from orders entered 24 and 26 November 2003 by Judge Narley J. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 16 February 2005.

Hopper Law Firm, by Kevin P. Hopper, for plaintiff-appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Ronald C. Dilthey and Kathrine E. Downing, for defendant-appellees Amerimann Partners, Ameriman Partners IV, L.L.C., and Amerimann Homes, L.L.C.

Brown, Crump, Vanore, & Tierney, L.L.P., by W. John Cathcart and Michael W. Washburn, for defendant-appellees Sterling Properties, L.L.C. f/k/a Malpaso Realty, L.L.C. and Ron Mikesh.

CALABRIA, Judge.

Phelps-Dickson Builders ("plaintiff") is a North Carolina residential construction company. In an effort to gain exposure in north

Raleigh, plaintiff talked to several developers in that area to discuss becoming part of their building team, including Amerimann Partners, the developer of the La Ventana subdivision, and was able to start construction on a house in that subdivision. Amerimann Partners was also developing two subdivisions named Savannah and Savannah Village at Wakefield Plantation (collectively "Savannah"), a theme community with eight pre-selected house plans for high-end, custom, Charleston-style homes.

Ron Mikesh ("Mikesh") of Sterling Properties,[1] the sales agent in La Ventana representing Amerimann Partners, also assisted Amerimann Partners in the development of Savannah. After plaintiff's involvement in La Ventana, Mikesh approached plaintiff with the prospect of becoming a builder in Savannah in early June 1999. During ensuing meetings between Mikesh and Brad Phelps, an ownership partner of plaintiff, plaintiff alleges Mikesh represented, *inter alia*, (1) Greenbriar, a current exclusive builder in Savannah at that time, "could not build its presale homes fast enough"; (2) "presale customers were lined up and waiting to meet" with exclusive builders in Savannah; (3) there were currently seven presales and additional "strong, solid contacts" in Savannah; (4) plaintiff would be one of two exclusive builders permitted to build in Savannah and there would be no competitive bidding; and (5) "the 63 lots in [Savannah] would be divided between the exclusive builders." Mikesh also noted there would be extensive landscaping, mass advertising, and publication articles in magazines. In order to become an exclusive builder with Greenbriar in Savannah, plaintiff was required to purchase four lots, two of which were available for presale opportunities and two of which plaintiff was required to build a model house according to specifications provided by Amerimann. Many of these understandings on the part of plaintiff were set out in a faxed letter to Mikesh, which included the main points of their discussion at a 15 June 1999 meeting, and was sent approximately two days after the meeting.

On 8 October 1999, plaintiff and Amerimann entered into four contracts for the sale of four lots located in Savannah. None of the contracts included Mikesh's oral representations to plaintiff. However, the contract did contain a merger clause, which provided as follows: "This instrument (together with any Exhibits attached)

1. For purposes of this appeal, both Malpaso Realty and Sterling Properties will be referred to as Sterling Properties, the current name for the realty business involved in this appeal.

constitutes the entire agreement between parties, and supersedes any and all prior agreements and understandings, whether oral or written, between the parties."

Plaintiff started construction of the two model homes, and shortly thereafter, problems arose between the parties. In October 1999, Amerimann brought a third builder into Savannah, who began construction of a house on one of the lots that had been allocated to plaintiff. Plaintiff said in his deposition that the construction activities of this third builder had the dual effect of decreasing plaintiff's potential presales and saturating the market. Despite Mikesh's representations concerning consumer interest in Savannah, presale opportunities were nonexistent, and plaintiff did not meet with any potential clients. Other disputes arose as well. For example, when Greenbriar started experiencing financial difficulties and was unable to build one of its presales, Amerimann created Amerimann Homes, L.L.C. to build the home for the client and, ultimately, brought in another builder to finish the house. In addition, only three presale contracts existed at the time Mikesh represented there were seven. Moreover, when Mikesh did approach plaintiff concerning a possible presale client for a lot assigned to plaintiff and the houseplan associated with that lot, the presale client ultimately declined plaintiff's bid when Amerimann and Mikesh allowed the desired houseplan to be "reallocated" to another lot for another builder with a lower bid to construct.

Tensions escalated between the parties, and on 12 July 2000, plaintiff met with Amerimann to discuss the issues that had arisen. When the parties could not reach a resolution, plaintiff sought legal assistance and demanded that Amerimann repurchase the two undeveloped lots and purchase the homes plaintiff built on the other two lots. Amerimann responded with an offer to purchase only the two undeveloped lots. Plaintiff threatened to permit foreclosure proceedings, which would eliminate Amerimann's second mortgage on plaintiff's lots. Plaintiff failed to make the required payments for the lots with the intention of purchasing the lots after the bank foreclosed on them and sold them at the foreclosure sale. In order to prevent this action, Amerimann repurchased the two unimproved lots but not the two houses constructed by plaintiff in Savannah, which were foreclosed on by the bank. Plaintiff's partner purchased the two houses at the foreclosure sale and sold them back to plaintiff. Amerimann asked for a written release for all claims upon repurchasing the two unimproved lots, but plaintiff refused. Despite the fact that Amerimann was aware that plaintiff

refused to sign a global settlement agreement, Amerimann proceeded with the closing to repurchase the two lots.

On 5 September 2002, plaintiff filed suit against Mikesh, Sterling Properties, and the Amerimann defendants alleging breach of contract against the Amerimann defendants and material misrepresentation and unfair and deceptive trade practices against all defendants. Defendants moved to dismiss and answered the complaint. Amerimann counterclaimed for unfair and deceptive trade practices based on the friendly foreclosure on the two houses in Savannah. On 3 July 2003, the Sterling defendants moved to amend their answer to include the defenses of estoppel, laches, payment, release, and settlement. All defendants moved for summary judgment. Plaintiff filed a motion to compel or review *in camera* certain documents which the Amerimann defendants claimed were protected by the attorney-client privilege. In addition, plaintiff filed a motion to compel further discovery responses by Mikesh and Sterling Properties (the "Sterling defendants").

On 7 October 2003, the trial court (1) allowed the Sterling defendants' motion to amend; however, no amended answer was ever filed; (2) denied plaintiff's motion to compel or review *in camera* certain documents held by the Amerimann defendants on the grounds that such documents were protected by the attorney-client privilege and were attorney work product; and (3) denied plaintiff's motions to compel discovery responses from Sterling Properties and Mikesh but required those parties to make available all discoverable documents for review and comparison to that which had been produced in discovery with the caveat that such review had to occur not later than 5:00 p.m. on 8 October 2003. On 10 October 2003, the trial court heard defendants' motions for summary judgment and granted summary judgment in orders entered 25 and 26 November 2003. Plaintiff moved the court to make findings of fact and conclusions of law, which the trial court denied. In that order, the trial court found that plaintiff's motions were "not well grounded in fact, not warranted by existing law or a good faith argument . . . [and] were interposed for an improper purpose . . ." Accordingly, the trial court imposed monetary sanctions of $550.00 in favor of defendants for "the legal fees generated in defense of the motion." Plaintiff appeals.

I. Motion to compel

[1] Plaintiff contends the trial court erred in denying his motion to compel discovery. We disagree. General provisions governing dis-

covery are set forth in N.C. Gen. Stat. § 1A-1, Rule 26 (2003). Discovery methods include, *inter alia*, depositions, interrogatories, and production of or permission to inspect documents. N.C. Gen. Stat. § 1A-1, Rule 26(a). Regarding the scope and limits of discovery, our Legislature has provided, in pertinent part, as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .
>
> The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or . . . (iii) the discovery is unduly burdensome or expensive . . .

N.C. Gen. Stat. § 1A-1, Rule 26(b)(1). "Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994).

Plaintiff's second and third motions to compel were directed towards Mikesh and Sterling Properties, respectively.[2] The trial court read and reviewed the materials offered, including the responses to plaintiff's discovery requests, and heard arguments. In two orders dated 7 October 2003, the trial court denied plaintiff's motions to compel but permitted plaintiff to review all discoverable documents not later than 5:00 p.m. the following day. Plaintiff first argues the trial court's actions in limiting its discovery in this manner were tantamount to the impositions of sanctions. Nothing in the record or in the trial court's order indicates an intent to impose sanctions on plaintiff concerning the motions to compel, and this argument is summarily rejected.

[2] Plaintiff next asserts that there

> are several key issues in this matter in support of [plaintiff's] allegations[,] [that plaintiff was seeking] to identify all information [the Sterling defendants] asserted constituted the basis for their affirmative defenses [contained in their motion to amend their

2. Plaintiff's first motion to compel, directed towards Amerimann and concerning documents produced by Amerimann's attorneys, was denied by the trial court on the grounds that such documents were both privileged and attorney work product. Plaintiff's argument has not challenged this denial on appeal.

> answer, that] the information sought by Plaintiff was timely and relevant to the Motion for Summary Judgment[,] [and that] no documents had been produced and . . . the responses to the interrogatories [were] not good faith answers[.]

First, the existence of "key issues" does not necessarily entitle plaintiff to further discovery responses, standing alone. Second, plaintiff's desire to identify information regarding the affirmative defenses to be asserted in an amended answer to plaintiff's complaint is irrelevant in light of the fact that defendants never, in fact, amended their complaint to include these affirmative defenses, and such defenses could not have been the basis upon which the trial court predicated its summary judgment order. Third, plaintiff's unsupported assertions, (1) that the information sought was timely and relevant and (2) that the received responses to discovery requests were insufficient, merely state plaintiff's conclusory opinion. Without more, plaintiff has failed to show an abuse of discretion on the part of the trial judge.

[3] Plaintiff additionally argues the trial court erred in denying the motion but allowing inspection of the relevant documents for only a twenty-four hour period two days before the hearing on defendants' summary judgment motion. While denying the motion and allowing the inspection may appear, on the surface, to be contradictory, we have found no abuse of discretion on the part of the trial court in denying plaintiff's motion to compel, and plaintiff cannot be heard to complain that it was, nonetheless, granted one of the expressly denominated means of discovery under Rule 26. Moreover, regarding the twenty-four hour time period permitted by the trial court, plaintiff has presented no argument as to why that amount of time was insufficient to conduct the review; accordingly, plaintiff has failed to show the trial court abused its discretion.

[4] Plaintiff's related argument, that the trial court erred in granting summary judgment on the grounds that "the time period [for plaintiff] to respond to the Amended [answer] had not expired[,]" is without merit because, as we held *supra*, no amended answer was filed, and the additional affirmative defenses could not have formed the basis upon which the trial court predicated its summary judgment orders.

II. Summary Judgment

Plaintiff asserts the trial court erred in granting summary judgment on his claims in favor of defendants. Summary judgment is a

"somewhat drastic remedy," *see Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971), appropriate only where, viewing the evidence in the light most favorable to the non-moving party, " '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.' " *Citifinancial, Inc. v. Messer*, 167 N.C. App. 742, 744, 606 S.E.2d 453, 455 (2005) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003)).

[5] In dealing with the issue of whether the trial court properly granted summary judgment, we must first address and determine the issue of whether there was an agency relationship between the Amerimann defendants and the Sterling defendants. An agent is one who, with another's authority, undertakes the transaction of some business or the management of some affairs on behalf of such other, and to render an account of it. *SNML Corp. v. Bank*, 41 N.C. App. 28, 36, 254 S.E.2d 274, 279 (1979). "There are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Vaughn v. Dep't of Human Resources*, 37 N.C. App. 86, 91, 245 S.E.2d 892, 895 (1978). Where the principal held the agent out as possessing authority or permitted the agent to represent that he possessed authority, it is said that the agent was clothed with apparent authority, and the principal may be held liable if a third person, in the exercise of reasonable care, justifiably believed the principal had conferred such authority on the agent. *Zimmerman v. Hogg & Allen, Professional Assoc.*, 286 N.C. 24, 31, 209 S.E.2d 795, 799 (1974).

In the instant case, the evidence of record indicates that, besides being a listing agent in Savannah, Mikesh (1) was involved in development, sales, and closing issues in Savannah, as well as infrastructure issues such as sewer lines and easements; (2) was considered to be a member of Amerimann's staff; (3) supervised the daily activities of the subcontractors in Savannah and received direct remuneration from Amerimann for such services; and (4) signed certain documents, including construction agreements for residential housing, on behalf of Amerimann Homes. Indeed, Rocky Manning, the President of Amerimann, deposed he "delegated the majority of the responsibilities" in the construction of a home for Amerimann Homes. Given the sweeping powers exercised by Mikesh with Amerimann's knowledge and consent, we hold that there remains a genuine issue of material

fact as to the existence of an agency relationship and, for purposes of this appeal, assume such existence for determination of the issues presented.

A. Breach of Contract

[6] Regarding plaintiff's breach of contract claim against Amerimann, plaintiff asserts that the "complete agreement with [Amerimann]" consists not only of the written agreement containing the merger clause but also the oral representations by Mikesh. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of [the] contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). Plaintiff's assertions, that the duties as contemplated by the express provisions of the contract do not fully encompass the obligations of the parties, rely on parol evidence. "The parol evidence rule excludes prior or contemporaneous oral agreements which are inconsistent with a written contract if the written contract contains the complete agreement of the parties." *Cable TV, Inc. v. Theatre Supply Co.*, 62 N.C. App. 61, 64-65, 302 S.E.2d 458, 460 (1983) (applying the parol evidence rule where the written contract included a merger clause similar to the one in the instant case). We hold the contract contains the complete agreement of the parties, and plaintiff's attempt to enlarge or vary Amerimann's duties from those expressly undertaken in the contract is barred by the written terms of the contract and the merger clause, which provides that "all prior agreements and understandings, whether oral or written, between the parties" are superseded. Accordingly, the merger clause bars the parol evidence concerning an oral contract upon which plaintiff premises his breach of contract claim.

Plaintiff argues, in the alternative, that the merger clause should not be given effect. Plaintiff, citing *Zinn v. Walker*, 87 N.C. App. 325, 334, 361 S.E.2d 314, 319 (1987), asserts that "giving effect to the merger clause would frustrate and distort the parties' true intentions and understanding regarding the contract." The contracts in the instant case were for the sale of four lots located in Savannah, and the provisions in that contract fully carry out that intent. Plaintiff's unilateral expectations with respect to the contracts' terms do not indicate that the purpose of the contracts has been frustrated. Rather, plaintiff desires to add certain obligations and duties to those to which Amerimann expressly agreed. Giving effect to the merger clause, under these facts, neither frustrates nor distorts the parties' true intentions regarding the contractual sale of the lots. Accordingly,

this assignment of error is overruled, and the trial court properly entered summary judgment in favor of Amerimann on plaintiff's breach of contract claim.

B. Fraud

[7] To preclude "crafty men [from] find[ing] a way of committing fraud which avoids the definition[,]" our appellate courts have abstained from defining fraud in favor of setting forth the following essential elements: "(1) False representation or concealment of a [past or existing] material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974).[3] Defendant first asserts summary judgment was appropriate because plaintiff did not sufficiently plead fraud in his complaint. Specifically, defendant contends plaintiff did not sufficiently allege that defendants made any alleged misrepresentations with knowledge of their falsity. While knowledge and intent must be alleged in the complaint, our Supreme Court has noted that it is sufficient if fraudulent intent may reasonably be inferred, presumed, or necessarily results from the facts alleged. *See Cotton Mills v. Manufacturing*, 218 N.C. 560, 562, 11 S.E.2d 550, 551 (1940). Such is the case where, as here, plaintiff alleged that only three homes were sold at the time Mikesh represented seven homes had been sold. In addition, plaintiff alleged Mikesh misrepresented, *inter alia*, that additional exclusive builders were needed because the current builder could not build homes fast enough and customers were "lined up and waiting to meet" plaintiff.

[8] Defendant also argues the trial court's summary judgment on plaintiff's claim of fraud must be upheld on the grounds that there was no misrepresentation regarding a past or existing material fact. Defendant's argument is manifestly in error with respect to Mikesh's representation as to the actual number of sales which had already occurred in Savannah. Mikesh's representations as to the current demand in Savannah likewise survive summary judgment under our

3. Unlike in plaintiff's breach of contract claim, where " '[t]he parol evidence rule presupposes the existence of a legally effective written instrument,' " *Mackey v. McIntosh*, 270 N.C. 69, 73, 153 S.E.2d 800, 803-04 (1967), and precludes use of parol evidence to vary or contradict the terms of that instrument, the parol evidence rule does not bar the admission of parol evidence "to prove that a written contract was procured by fraud because 'the allegations of fraud challenge the validity of the contract itself, not the accuracy of its terms[.]' " *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 78, 598 S.E.2d 396, 403 (2004) (quoting *Fox v. Southern Appliances*, 264 N.C. 267, 270, 141 S.E.2d 522, 525 (1965)).

Supreme Court's holding in *Ragsdale*, 286 N.C. at 138-39, 209 S.E.2d at 500-01 (disallowing summary judgment in favor of a president of a corporation who had peculiar knowledge of the facts and knew that the business had lost money, yet made positive representations that the corporation was a "gold mine" and a "going concern" on the grounds that it was a jury question as to whether such representations were intended and received as expressions of opinion or statements of material fact).

[9] Defendants next argue that summary judgment was appropriate because plaintiff "had [and availed itself of] the opportunity to independently investigate the viability of the Savannah project." Defendants cite *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999) for the proposition that where one relies on a "misleading representation, [but] could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence."

"Even if there is no duty to disclose information, if a seller does speak then he must make a full and fair disclosure of the matters he discloses." *Freese v. Smith*, 110 N.C. App. 28, 35, 428 S.E.2d 841, 846 (1993). In replying to claims that a false representation was not justifiably or reasonably relied upon, our Supreme Court has stated that "[t]he law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract[.]" *Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965) (citations and quotation marks omitted). Our Supreme Court further elaborated that reliance may be unreasonable, but, in close cases, sellers intentionally and falsely representing material facts so as to induce a party to action "should not be permitted to say in effect, 'You ought not to have trusted me. If you had not been so gullible, ignorant, or negligent, I could not have deceived you.' " *Id.* In another case, our Supreme Court examined a defendant's demurrer on the grounds that the plaintiffs "could have ascertained by an accurate survey of the lines and boundaries of the land whether [certain land with timber] was included" and determined that "the defendants cannot complain if the plaintiffs relied upon the defendants' positive representation . . . that the timber on this parcel of land was a part of that being sold." *Keith v. Wilder*, 241 N.C. 672, 676, 86 S.E.2d 444, 447 (1955).

Based on the precedent laid down by our Supreme Court, we hold plaintiff's fraud claim is not barred on the grounds that plaintiff had some lesser opportunity to investigate the various representations made by Mikesh, who possessed superior knowledge on such matters. Indeed, certain representations by Mikesh could not be readily or easily verified. Moreover, we hold, in light of the scope and nature of Mikesh's positive assertions and our standard of review, that defendants are not entitled, as a matter of law, to summary judgment on plaintiff's claim of fraud.

C. Unfair and Deceptive Trade Practices

[10] The elements for a claim for unfair and deceptive trade practices are (1) defendants committed an unfair or deceptive act or practice, (2) in or affecting commerce and (3) plaintiff was injured as a result. *Edwards v. West*, 128 N.C. App. 570, 574, 495 S.E.2d 920, 923 (1998). Concerning trade practices, unfair denotes a practice that "is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers[,]" and deceptive denotes a practice that "has the capacity or tendency to deceive." *Id.* (internal citations and quotation marks omitted). Whether facts that are proven establish an unfair or deceptive trade practice is a question of law addressed by the court. *Id.*, 128 N.C. App. at 574, 495 S.E.2d at 923-24. Given our discussion *supra* and taking the evidence in the light most favorable to the nonmoving party, plaintiff's unfair and deceptive trade practice claim is sufficient to survive summary judgment.

D. Settlement

[11] Defendants alternatively assert that plaintiff's claims are susceptible to summary judgment because the parties fully settled all claims when Amerimann purchased the two undeveloped lots from plaintiff. Defendants point out that Phelps testified he procured an attorney to negotiate a pullout from Savannah and those negotiations resulted in the agreement to buy back the two undeveloped lots. Defendants further correctly point out that they responded to plaintiff's demand that they repurchase all four lots, including the two constructed houses with the offer to purchase only the two lots. Nonetheless, the evidence of record does not support the conclusion that summary judgment was appropriate on the basis of any global settlement of plaintiff's claims.

First, as noted above, at the time of closing on the two undeveloped lots, defendants unsuccessfully sought a written settlement agreement yet proceeded with the closings on the two lots regardless

of having failed to procure such a settlement. Second, a letter from Amerimann's attorney regarding the repurchase of the two lots stated that "the primary reason for purchasing those two lots was to protect [Amerimann's] purchase money second deeds of trust . . . in the amount of $40,000.00 [on each lot] from being extinguished by friendly foreclosures and losing that amount of principal." That letter goes on to also note plaintiff's refusal to sign a written release and Amerimann's decision to "ultimately proceed[] with buying [the two undeveloped lots] to protect [its] equity in those two lots." Third, plaintiff unequivocally testified in his deposition that, at no time, did plaintiff consider the repurchase of the undeveloped lots to be a settlement of all claims. At the very least, these facts present a genuine issue concerning settlement, and summary judgment cannot be premised upon this ground.

III. Sanctions

[12] Plaintiff asserts the trial court erred in imposing, *sua sponte*, sanctions in response to plaintiff's motion to amend the summary judgment order to include findings of fact and conclusions of law. The imposition of sanctions by the trial court under N.C. Gen. Stat. § 1A-1, Rule 11 (2003) is reviewed *de novo*. *Williams v. Hinton*, 127 N.C. App. 421, 423, 490 S.E.2d 239, 240 (1997). Plaintiff points out that this Court has conceded that "in rare situations it can be helpful for the trial court to set out the *undisputed* facts which form the basis for his judgment." *Capps v. City of Raleigh*, 35 N.C. App. 290, 292, 241 S.E.2d 527, 529 (1978). However, our long-standing rule has been, and remains, that findings of fact are superfluous in summary judgment orders. We are unpersuaded that this is one of those rare cases which warrants findings concerning the undisputed facts or conclusions of law by the trial court and uphold the sanctions imposed.

Affirmed in part, reversed in part and remanded.

Judges HUNTER and JACKSON concur.

DIANNE CATER AND LYNNE O'CONNOR, PLAINTIFFS v. CATHERINE BARKER (NOW MCKEON), DEFENDANT

No. COA04-795

(Filed 16 August 2005)

1. Vendor and Purchaser— real estate escrow agreement— repairs

Language in an real estate escrow agreement that defendant would "cause" repairs to be made to the building meant that summary judgment was correctly awarded to plaintiffs on an action for damages when the repairs were not completed, even though defendant offered an affidavit that she had authorized and agreed to pay for the work. Reading the escrow language with its ordinary meaning, defendant must fully complete the repairs rather than merely pay for them.

2. Laches— damages—defense not applicable

The defense of laches was not applicable to an action in which damages were awarded for failing to complete repairs to a building under an escrow agreement.

Judge GEER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 18 March 2004 by Judge Zoro J. Guice, Jr., in Macon County Superior Court. Heard in the Court of Appeals 2 February 2005.

Ronald Stephen Patterson, for plaintiffs-appellees.

Creighton W. Sossomon, for defendant-appellant.

TYSON, Judge.

Catherine Barker (now McKeon) ("defendant") appeals from the trial court's judgment granting Dianne Cater and Lynne O'Connor (collectively, "plaintiffs") summary judgment on their claim for breach of contract. We affirm.

I. Background

Plaintiffs purchased residential real property from defendant on 21 November 2000 in Macon County, North Carolina. Prior to closing, defendant began making repairs to the home. These repairs were either incomplete or had not begun at the time of the closing. The par-

ties entered into an "Escrow Agreement to Make Repairs" ("the Agreement") that provided in its entirety:

> CATHERINE BARKER as Seller of the lands being conveyed this date to DIANE CATER, LYNNE O'CONNOR and KATHLEEN C. O'CONNOR, Buyers, in consideration of Buyers' agreeing to complete the closing subject to this agreement, rather than wait for certain repairs to be completed by Seller on the house being sold hereby agrees, covenants and promises Buyers as follows:
>
> 1. Seller at her expense shall cause the repairs listed on Exhibit A to be made to the house, some of which have already been started.
>
> 2. The foundation footing for that portion of the house that has been formed and poured onto the ground and over tree stumps shall be repaired and/or replaced at Seller's expense so that the foundation for the entire house meets standards of the North Carolina Building Code and good residential construction standards.
>
> 3. The sum of $4,000.00 for the foundation work and $200.00 for the other repairs shall be escrowed by Philo, Spivey & Henning, P.A. at closing from Seller's net sales proceeds to be applied to these expenses. If the expenses of the repairs exceeds the sum being escrowed, Seller shall pay for any and all additional costs.

The record on appeal does not include Exhibit A to the Agreement. The parties have not specified what additional repairs other than the foundation were subject to the Agreement. Despite the repairs being incomplete, plaintiffs relied on the Agreement and agreed to close on the property.

On 13 January 2003, plaintiffs filed a verified complaint alleging defendant had breached the Agreement by failing to complete the repairs. Defendant answered and admitted the parties entered into the Agreement, but denied she failed to perform her obligations in accordance with the terms of the Agreement. Defendant also asserted the affirmative defenses of performance of the contract and laches.

Plaintiffs moved the trial court for summary judgment on 28 January 2004. Attached to their motion were sworn affidavits by both plaintiffs and Mr. Don Bates ("Mr. Bates"). Plaintiffs' affidavits both stated generally that they have been "damaged by the breach of the

repair agreement by the Defendant" and sought $14,500.00 in damages and $2,900.00 in attorney's fees and costs.

Mr. Bates's affidavit stated: (1) he had worked in the residential homebuilding and construction industry for twenty-eight years; (2) he had personal knowledge "of the repair work sought by the Plaintiffs in the above-captioned action;" and (3) the cost of the repairs would be $14,500.00 in labor and materials.

On 30 January 2004, defendant filed a motion for summary judgment alleging no issues of material fact exist and she is entitled to judgment as a matter of law. She attached her own affidavit, which stated in pertinent part:

> 6. That following closing, on or about December 9, 2000, a report from a qualified civil engineer had been obtained by my real estate broker, Larry Davis, regarding the necessary work to repair the foundation mentioned in the Escrow Agreement. Copy of this report is attached as Exhibit "2."
>
> 7. Following the receipt of this report, Mr. Larry Davis obtained an estimate to perform the necessary work from Shayne Boatwright in the amount of $5,500.00. At the time of the estimate, in late 2000 or early or [sic] 2001, Mr. Boatwright was able to perform the work during the spring of 2001 and as far as I know, no action was undertaken by Plaintiffs or their attorney to authorized [sic] the work to be performed at any time during the year 2001. I did not refuse to pay for the work required to be done at any time and in fact, authorized Mr. Davis to have the work performed.
>
> I have no further information regarding what has transpire[d] with regard to this escrow account except for copy of letter [sic] received on or about May 29, 2002 from my attorney. This letter is attached as Exhibit "3" and includes a copy of a letter from Plaintiff's then-attorney, the holder of the escrow monies outlining the fact that some of the monies placed into escrow had been expended, namely $200.00 for other repairs which was proper under the Escrow Agreement and $475.00 for the engineering report attached hereinabove dated December 9, 2000.

The trial court granted plaintiffs' motion and awarded damages in the amount of $14,500.00, plus attorney's fees. Defendant appeals solely the trial court's grant of plaintiffs' motion for summary judgment.

II. Issues

The issues on appeal are whether the trial court properly granted plaintiffs summary judgment on: (1) the merits of plaintiffs' claim; and (2) defendant's defense of laches.

III. Standard of Review

Our review of a trial court's grant of summary judgment is well-established. 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); *see also Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, —— N.C. ——, 276 S.E.2d 283 (1981).

In deciding the motion, " 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 *Moore's Federal Practice* § 56-15[3], at 2337 (2d ed. 1971); *accord*, *United States v. Diebald, Inc.*, 369 U.S. 654, 8 L. Ed. 2d 176 (1968)).

"The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citing *Caldwell*, 288 N.C. 375, 218 S.E.2d 379). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* (citing *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981)). In opposing a motion for summary judgment, the non-moving 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." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2003); *see also Nasco Equipment Co. v. Mason*, 291 N.C. 145, 149, 229 S.E.2d 278, 281 (1976).

We review *de novo* a trial court's grant of summary judgment. *Va. Electric & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191 (citation omitted), *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). "Under a *de novo* review, the court considers the matter anew[] and freely substitut[es] its own judgment for [that of] the" trial

court. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (quotation omitted).

IV. Breach of Contract

[1] Defendant argues the trial court erred by granting plaintiffs' motion for summary judgment on their claim for breach of contract. We disagree.

A party asserting breach of contract must show: (1) existence of a valid contract; and (2) breach of the terms of that contract. *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citing *Jackson v. California Hardwood Co.*, 120 N.C. App. 870, 871, 463 S.E.2d 571, 572 (1995)). The existence of the Agreement is not disputed by either party. Further, defendant does not claim plaintiffs failed to perform their obligations under the Agreement. *See Boyd v. Watts*, 73 N.C. App. 566, 570, 327 S.E.2d 46, 49 (a party asserting breach of contract must have first performed his promise or offered to do so in order to preserve his rights under the contract (citations omitted)), *disc. rev. allowed*, 314 N.C. 114, 332 S.E.2d 479 (1985), *rev'd on other grounds*, 316 N.C. 622, 342 S.E.2d 840 (1986). The issue here is whether defendant breached the terms of the contract.

"It is a well-settled principle of legal construction that '[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.' " *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987) (quoting *Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (citations omitted)).

> When a court is called upon to interpret, it seeks to ascertain the intent of the parties at the moment of execution. To ascertain this intent, the court looks to the language used, the situation of the parties, and objects to be accomplished. Presumably the words which the parties select were deliberately chosen and are to be given their ordinary significance.

Briggs v. Mills, Inc., 251 N.C. 642, 644, 111 S.E.2d 841, 843 (1960) (citations omitted); *see also Corbin v. Langdon*, 23 N.C. App. 21, 25, 208 S.E.2d 251, 254 (1974) ("Where the language is clear and unambiguous, the court is obliged to interpret the contract as written, and cannot, under the guise of construction, 'reject what parties inserted . . . .' " (quotation and internal citation omitted)). "Under the general rules of contract construction, where an agreement is clear and unambiguous, no genuine issue of material fact exists and sum-

mary judgment is appropriate." *Carolina Place Joint Venture v. Flamers Charburgers, Inc.*, 145 N.C. App. 696, 699, 551 S.E.2d 569, 571 (2001) (citing *Corbin*, 23 N.C. App. at 27, 208 S.E.2d at 255).

The pertinent provision of the Agreement states, "Seller at her expense *shall cause* the repairs listed on Exhibit A to be made to the house, some of which have already started." (Emphasis supplied). Defendant contends the Agreement "does not require me . . . to do anything with respect to repairs to the foundation footing, other than deposit the sum of $4,000.00 in Plaintiff's [sic] attorneys['] escrow account and be responsible for any and all additional costs." She asserts that "all things required to be performed under . . . the agreement have been fully performed." However, defendant acknowledges that "[s]o far as I know, no repairs have been prepared by anyone to the subject premises . . . ."

The specific language chosen and agreed to by the parties was: "shall cause the repairs . . . to be made." Interpreting that language under its "ordinary significance" and "construed to mean what on its face it purports to mean" requires defendant to do more than just pay for the repairs; she must fully complete them as well. *Briggs*, 251 N.C. at 644, 111 S.E.2d at 843; *Hagler*, 319 N.C. at 294, 354 S.E.2d at 234. Under the specific terms of the Agreement, defendant has not "caused" the completion of the repairs and is in breach.

Defendant offered pleadings and evidence suggesting she attempted to perform her obligations under the Agreement. Her affidavit stated she authorized and agreed to pay Mr. Boatwright to complete the repairs, but never received authorization from plaintiffs. Defendant further asserts that she could not have done more without being in possession of the premises.

Under the terms of the Agreement, defendant was obligated to complete the repairs. Defendant does not allege plaintiffs prevented or frustrated her performance. Plaintiffs' activities did not rise to the level of discharge by prevention. *Propst Construction Co. v. Dept. of Transportation*, 56 N.C. App. 759, 762, 290 S.E.2d 387, 388 (1982) ("The doctrine of prevention is that 'one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance.' In order to excuse nonperformance, the conduct on the part of the party who allegedly prevented performance 'must be wrongful, and . . . in excess of his legal rights.' " (internal citations and quotations omitted)).

"Non-performance of a valid contract is a breach thereof . . . unless the person charged . . . shows some valid reason which may excuse the non-performance; and the burden of doing so rests upon him." *Blount-Midyette v. Aeroglide Corp.*, 254 N.C. 484, 488, 119 S.E.2d 225, 228 (1961) (quotation omitted). The Agreement was entered into by the parties on 21 November 2000. Plaintiffs commenced this action on 13 January 2003. Defendant's one attempt at performance over the course of two years cannot discharge her obligation.

Our review of the pleadings and evidence supporting plaintiffs' motion for summary judgment discloses a sufficient factual basis to support their claim of breach of contract. Plaintiffs supplied the trial court with the valid and enforceable Agreement, including each parties' obligations, and alleged "[d]efendant has willfully and without justifiable excuse refused to perform the terms of the agreement . . . ." and the "agreement has not been adhered to with the repairs being made . . . ." Defendant admits the repairs have not been completed. Plaintiffs satisfactorily showed the trial court that defendant has not performed her obligation.

After *de novo* review of the matter, we hold: (1) plaintiffs proffered sufficient pleadings and evidence to show defendant breached the Agreement and no genuine issues of material fact exist; and (2) defendant did not "set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e).

In consideration for plaintiffs agreeing to close on the real property prior to completion of agreed upon necessary repairs, defendant promised to "cause the repairs . . . to be made to the house." Plaintiffs fully performed their obligations under the Agreement. Defendant admits the repairs have been completed. We hold the trial court properly granted plaintiffs' motion for summary judgment. *See Carolina Place Joint Venture*, 145 N.C. App. at 699, 551 S.E.2d at 571 ("Under the general rules of contract construction, where an agreement is clear and unambiguous, no genuine issue of material fact exists and summary judgment is appropriate."). This assignment of error is overruled.

V. Laches

[2] Defendant contends issues of fact exist concerning her defense of laches against plaintiffs' claim. We disagree.

We previously held, "[l]aches is an equitable defense and is not available in an action at law." *City-Wide Asphalt Paving, Inc. v. Alamance County*, 132 N.C. App. 533, 537, 513 S.E.2d 335, 338 (1999) (citations omitted), *disc. rev. denied and appeal dismissed*, 350 N.C. 826, 537 S.E.2d 815 (1999). When a "[p]laintiff's claims are legal in nature, not equitable[,]" laches cannot support judgment for the defendant. *Id.*

Plaintiffs initially sought specific performance and in the alternative, damages, for defendant's breach of the Agreement. The trial court's summary judgment awarded plaintiffs' damages, a legal remedy, not specific performance. The defense of laches is not applicable. The trial court did not err in granting summary judgment to plaintiffs on the defense of laches. This assignment of error is overruled.

VI. Conclusion

Plaintiffs and defendant entered into a binding, enforceable, and unambiguous Agreement. Plaintiffs performed their obligation under the Agreement. Despite having over two years to perform her duty, defendant did not complete the repairs and breached the Agreement. Defendant was not prevented, excused, or discharged from performing her obligation.

Plaintiffs were awarded damages, a legal remedy. Defendant's defense of laches is inapplicable to the facts at bar. Plaintiffs' motion for summary judgment was properly granted. The trial court's judgment is affirmed.

Affirmed.

Judge McGEE concurs.

Judge GEER concurs in part and dissents in part.

GEER, Judge, concurring in part and dissenting in part.

I agree with the majority that since plaintiffs seek no equitable relief in this case, the trial court did not err in granting summary judgment to plaintiffs on the defense of laches. I believe, however, that issues of fact remain regarding whether defendant breached the parties' agreement and, therefore, respectfully dissent.

The parties' agreement provided in its entirety:

> CATHERINE BARKER as Seller of the lands being conveyed this date to DIANE CATER, LYNNE O'CONNOR and KATHLEEN C. O'CONNOR, Buyers, in consideration of Buyers' agreeing to complete the closing subject to this agreement, rather than wait for certain repairs to be completed by Seller on the house being sold hereby agrees, covenants and promises Buyers as follows:
>
> 1. Seller at her expense shall cause the repairs listed on Exhibit A to be made to the house, some of which have already been started.
>
> 2. The foundation footing for that portion of the house that has been formed and poured onto the ground and over tree stumps shall be repaired and/or replaced at Seller's expense so that the foundation for the entire house meets standards of the North Carolina Building Code and good residential construction standards.
>
> 3. The sum of $4,000.00 for the foundation work and $200.00 for the other repairs shall be escrowed by Philo, Spivey & Henning, P.A. at closing from Seller's net sales proceeds to be applied to these expenses. If the expenses of the repairs exceeds the sum being escrowed, Seller shall pay for any and all additional cost.

The record on appeal does not include Exhibit A to the agreement and the parties have not specified what repairs other than the foundation were subject to the agreement.

In support of their motion for summary judgment, plaintiffs submitted their own affidavits with each stating only generally "[t]hat she has been damaged by the breach of the repair agreement by the Defendant" and seeking $14,500.00 in damages and $2,900.00 in attorneys' fees and costs. The affidavits supplied no facts whatsoever about the breach apart from the conclusory claim that the agreement was breached. Plaintiffs also submitted the affidavit of Don Bates, who stated (1) that he had worked in the residential homebuilding and construction industry for 28 years, (2) that he had personal knowledge "of the repair work sought by the Plaintiffs in the above-captioned action," and (3) that the cost of the repair would be $14,500.00 in labor and materials. Thus, Mr. Bates' affidavit supplied no information about any breach of contract either. In short,

plaintiffs sought summary judgment based on their bare assertion that defendant breached the agreement and based on evidence of their damages.

Defendant responded with her own affidavit, which stated in pertinent part:

> 6. That following closing, on or about December 9, 2000, a report from a qualified civil engineer had been obtained by my real estate broker, Larry Davis, regarding the necessary work to repair the foundation mentioned in the Escrow Agreement. Copy of this report is attached as Exhibit "2".
>
> 7. Following the receipt of this report, Mr. Larry Davis obtained an estimate to perform the necessary work from Shayne Boatwright in the amount of $5,500.00. At the time of the estimate, in late 2000 or early or [sic] 2001, Mr. Boatwright was able to perform the work during the spring of 2001 and as far as I know, no action was undertaken by Plaintiffs or their attorney to authorized [sic] the work to be performed at any time during the year 2001. I did not refuse to pay for the work required to be done at any time and in fact, authorized Mr. Davis to have the work performed.
>
> I have no further information regarding what has transpire[d] with regard to this escrow account except for copy of letter [sic] received on or about May 29, 2002 from my attorney. This letter is attached as Exhibit "3" and includes a copy of a letter from Plaintiff's then-attorney, the holder of the escrow monies outlining the fact that some of the monies placed into escrow had been expended, namely $200.00 for other repairs which was proper under the Escrow Agreement and $475.00 for the engineering report attached hereinabove dated December 9, 2000.

The North Carolina Rules of Civil Procedure provide that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). In deciding the motion, " 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James W. Moore et al., *Moore's Federal Practice* § 56-15[3], at 2337 (2d ed. 1971)).

The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* In opposing a motion for summary judgment, the non-moving 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." N.C.R. Civ. P. 56(e).

On appeal, this Court's task is to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981). A trial court's ruling on a motion for summary judgment is reviewed *de novo* as the trial court rules only on questions of law. *Va. Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 384-85, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

In this case, the parties agree that a valid contract existed. The primary question before this Court is whether a genuine issue of material fact exists regarding whether defendant breached that contract. The agreement specified that "Seller at her expense shall cause the repairs listed on Exhibit A to be made to the house"; that "[t]he foundation footing . . . shall be repaired and/or replaced at Seller's expense"; and that Seller would place $4,200.00 in escrow to be applied to the cost of the foundation work and other repairs, with Seller being responsible for any additional sums necessary to complete the repairs. In response to plaintiffs' conclusory assertion that defendant breached that agreement, defendant submitted her own affidavit stating that she paid $4,200.00 into the escrow account; that she obtained (1) a report specifying the work necessary to repair the foundation and (2) an estimate from Shayne Boatwright of $5,500.00 for completion of that work; that Mr. Boatwright was available to perform the work; and that defendant authorized that the work be done. Defendant asserts that plaintiffs did not, however, authorize Mr. Boatwright to do the work.

When the evidence is viewed in the light most favorable to defendant, as the non-moving party, I believe that it supports a find-

ing that defendant had located a contractor and authorized that the work be done. Since defendant was no longer in possession of the premises, it is difficult to see what more defendant could do to comply with the agreement.

The majority suggests that defendant has failed to offer evidence that plaintiffs interfered with defendant's causing the repairs to be made. Defendant's affidavit, however, states: "[N]o action was undertaken by Plaintiffs or their attorney to authorize[] the work to be performed at any time during the year 2001." The majority does not explain how repairs could be performed on plaintiffs' property without plaintiffs' authorization. Given the brevity of plaintiffs' evidentiary showing, defendant's affidavit should be sufficient to defeat summary judgment.

I believe that the majority substitutes itself for the jury when it asserts that "[d]efendant's one attempt at performance over the course of two years cannot discharge her obligation." A reasonable jury could decide that defendant's efforts in obtaining a report identifying the repairs necessary, locating a contractor to perform the work, authorizing the contractor to begin work, and notifying plaintiffs was sufficient to comply with her obligations under the agreement. It is not for this Court to make that determination especially given the almost non-existent nature of plaintiffs' evidentiary showing.

While undoubtedly there is more to this story, plaintiffs chose not to present their version of the facts and their theory of their claim to the trial court. Neither plaintiffs' summary judgment materials nor their brief on appeal demonstrate why defendant's actions constituted as a matter of law a breach of the agreement. Simply asserting that a breach has occurred, without adding any factual details to support such a claim, should be insufficient to establish entitlement to judgment as a matter of law on a breach of contract claim when the defendant has offered evidence suggesting that no breach occurred.

STATE OF NORTH CAROLINA v. ANTONIO LAMARQUISA RIPLEY

No. COA04-924

(Filed 16 August 2005)

1. Constitutional Law— double jeopardy—robbery and kidnapping—standard

In determining whether a movement or restraint during an armed robbery can support an independent charge of kidnapping, so that convictions for both do not violate double jeopardy, the question is whether the defendant's actions exposed the victim to a danger greater than that inherent in the armed robbery and to the kind of danger and abuse the kidnapping statute was designed to prevent.

2. Constitutional Law— double jeopardy—robbery and kidnapping—movement during robbery

Defendant was subjected to double jeopardy by being convicted of armed robbery and kidnapping arising from a string of hotel robberies, and his second-degree kidnapping convictions were reversed. The victims were moved from hotel parking lots to lobbies, were instructed not to move while others were robbed, or were moved from the front desk to a manager's office or a break room while defendant and his accomplices sought surveillance tapes or access to a safe. The victims were not exposed to harm beyond the threatened use of a firearm inherent in the armed robbery or to the kind of danger the kidnapping statute was designed to represent.

Judge TYSON concurring part, dissenting in part.

Appeal by defendant from judgment entered 19 March 2004 by Judge Jack. W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 12 April 2005.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Thomas R. Sallenger for defendant-appellant.

ELMORE, Judge.

Antonio Lamarquisa Ripley (defendant) was convicted of fifteen counts of second degree kidnapping, seven counts of robbery with a

firearm, and three counts of attempted robbery with a firearm. Defendant appeals nine of his convictions for second degree kidnapping. For the reasons that follow, we vacate these convictions.

I.

At trial, the State presented evidence tending to show that, on 30 May 2003, the then thirty-two-year-old defendant gathered together four young men, who were then all under the age of eighteen, and drove them from Wilmington to Jacksonville, North Carolina in his SUV. Upon arriving at the Hampton Inn in Jacksonville sometime after 9:00 p.m., three of the four departed the SUV and targeted a hotel guest, Mr. Donald Annoni (Mr. Annoni). Mr. Annoni and his son Stephen were returning to their car to retrieve some pillows when Mr. Annoni noticed someone on the ground under an adjacent car. Two black males wearing masks and brandishing handguns then approached and instructed him to proceed to his car with his hands up. Mr. Annoni and Stephen were ordered at gunpoint to climb into the trunk of the vehicle. After roughly ten to fifteen minutes during which they could hear the car being searched, the Annonis were freed when the perpetrators opened the trunk by remote and threw the keys back to Mr. Annoni.

According to the evidence presented at trial, the criminal spree of defendant and his associates continued into the lobby of the Hampton Inn, where Ms. Tamara Basden (Ms. Basden) and Mr. Sean Barnett (Mr. Barnett) were managing the front desk. Upon entering the lobby, three armed men ordered everyone to the floor. The lobby contained three patrons, including Ms. Lacee Zornes, who would testify at trial for the State. One robber pointed a gun at Mr. Barnett's head as the cash drawer was emptied of its contents, approximately $260.00. Mr. Barnett was then removed to the manager's office to join Ms. Basden, who had previously been led to the office, and both were questioned as to the whereabouts of surveillance cameras and keys to the hotel safe. The robbers took a cell phone off of Mr. Barnett and departed without gaining access to either the safe or any surveillance devices.

The State's evidence at trial further showed that defendant then drove his criminal contingent to the Extended Stay America Motel, also in Jacksonville. As had occurred at the Hampton Inn, three masked and armed men entered the lobby and approached the front desk. Laketria Sharpless (Ms. Sharpless), the front desk clerk, immediately supplied the money demanded from the cash drawer, which totaled roughly $300.00. After she heard the robbers ask about a tape,

Ms. Sharpless led one of the robbers to the break room where she ejected from a VCR what she believed to be the surveillance tape.[1] Ordered to stay on the floor in the break room, Ms. Sharpless was initially able to observe the men searching the lobby via a closed-circuit television. The men then ordered Ms. Sharpless to return to the front desk and "act normal." Ms. Sharpless later reported the loss of $60.00 from her own purse.

The robbers hid as the Rodriguez family entered the lobby with friends Alvaro Perez (Mr. Perez) and Peter Lucas (Mr. Lucas). Ms. Sharpless engaged in small talk with the Rodriguez family while she attempted to find a way to flee, but, when she left the front desk, the men leapt out and demanded money of all persons present. The men obtained $250.00 from Mr. Ricardo Rodriguez, Sr. (Mr. Rodriguez), $250.00 from Mr. Perez, and $200.00 from Mr. Lucas. The two young Rodriguez children, as well as Ms. Rodriguez, were ordered at gunpoint to get onto and remain on the floor.

Another group of hotel guests with friends would then enter the scene from the parking lot. As Tracy and Dennis Long (Mr. and Ms. Long) approached the lobby door with their friends, Skylar and Adrian Panter (Mr. and Ms. Panter), they observed the robbery in progress and attempted to turn and walk away. But, when one of the armed robbers saw the group, he forced them to enter the lobby where they were told to empty their wallets and purses. These efforts, however, yielded $8.00 from Ms. Long.

Police began arriving as the three perpetrators returned to defendant's SUV in which he and the fourth youth, fifteen-year-old Jonathan Battle (Mr. Battle), had been waiting. They deposited the money and guns in the car. Given the number of police officers in the area, defendant told the three young robbers to get out of the vehicle and that he would pick them up later. The three then ran into a field where they were apprehended by the police. Defendant and Mr. Battle abandoned efforts to retrieve their colleagues when it became apparent that the authorities had captured them. The pair stopped for food at a Burger King and tossed away some items from the night's crimes. The police pulled over the SUV and arrested defendant and Mr. Battle just outside of Wilmington.

Mr. Battle and another accomplice, Jamar D. McCarthur, testified as to how defendant instructed them on conducting a robbery at the

1. Ms. Sharpless testified at trial that her belief was mistaken and that the tape was not for the surveillance camera but was in fact a video on housekeeping instructions.

hotels. At the close of the State's evidence, defendant moved to dismiss the second degree kidnapping convictions and argued that in each case any movement of the victim was not an offense separate and independent from the robbery of these victims. The court denied defendant's motion to dismiss the kidnapping charges. Defendant chose to present no evidence at trial. Upon defendant's conviction of the aforementioned crimes, the trial court sentenced defendant to four consecutive terms of imprisonment of 117 to 150 months. Defendant appeals.

II.

[1] On appeal, defendant contends that the trial court erroneously denied his motions to dismiss charges of second degree kidnapping with respect to certain victims. Defendant argues that being convicted of both the robbery offense and the kidnapping offense with respect to these victims violates his constitutional protection against double jeopardy.

N.C. Gen. Stat. § 14-39 establishes the offense of kidnapping in pertinent part as follows:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over . . . shall be guilty of kidnapping if such confinement, restraint, or removal is for the purpose of . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person . . .

N.C. Gen. Stat. § 14-39(a) (2003). In *State v. Fulcher*, our Supreme Court recognized it as "self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim." 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Thus, the Court in *Fulcher* "construe[d] the word 'restrain,' as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony." *Id.*; *see also State v. Irwin*, 304 N.C. 93, 102-03, 282 S.E.2d 439, 446 (1981). In *Irwin*, a store employee was ordered at knifepoint to proceed from the cash register to the back of the store so that the defendant and his accomplice could gain access to the drug prescription counter and the store's safe. 304 N.C. at 103, 282 S.E.2d at 446. Our Supreme Court

found that this movement was "a mere technical asportation," which did not support an independent charge of kidnapping consistent with the defendant's protection against double jeopardy. *Id.*

In determining whether a movement or restraint during an armed robbery can support an independent charge of kidnapping, we ask whether the defendant's actions exposed the victim to a "greater danger than that inherent in the armed robbery itself" and to "the kind of danger and abuse the kidnapping statute was designed to prevent." *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446. Thus, as recognized by this Court in *State v. Muhammad*, 146 N.C. App. 292, 295, 552 S.E.2d 236, 237 (2001), "the key question [in a double jeopardy analysis] is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping exposed the victim to greater danger than that inherent in the underlying felony itself." *Id.* at 295, 552 S.E.2d at 237.

III.

[2] Defendant first argues that being convicted of both second degree kidnapping and robbery with a firearm with respect to Mr. Rodriguez violates his constitutional protection from double jeopardy. We agree.

Mr. Rodriguez testified that he entered the lobby with his family and friends and that the men then jumped out from behind the counter. He stated that he thought the robbery was a joke at first, but that one of the robbers unchambered a gun to show it was loaded. Mr. Rodriguez testified that after seeing that the gun was loaded, he backed away from the counter and got down onto the floor. He further testified that after he gave the robbers the money from his wallet, another group of guests entered the lobby and were immediately robbed.

The State contends that restraint of Mr. Rodriguez went beyond that necessary to complete a robbery because he was restrained after his own robbery and was forced to wait as the other patrons were also robbed. However, the State's position deviates from established case law, in particular our Supreme Court's decision in *State v. Beatty*, 347 N.C. 555, 495 S.E.2d 367 (1998). In *Beatty*, a defendant's conviction for second degree kidnapping was affirmed where the assailants bound the victim's wrists with duct tape and kicked him in the back twice. 347 N.C. at 559, 495 S.E.2d at 370. The Court stated that this act of restraint "increased the victim's helplessness and vulnerability beyond what was necessary to enable him and his com-

rades to rob the restaurant." *Id.* (citation omitted). With respect to another victim, however, the Court reversed the defendant's conviction of second degree kidnapping where that victim was simply held at gunpoint during the robbery but was not injured in any way. *Id.* at 560, 495 S.E.2d at 370.

The Supreme Court's holding in *Beatty* addresses the State's argument in the case *sub judice* that restraint of a victim by threatened use of a firearm during an armed robbery of another party necessarily increases the danger to that victim. *Beatty* rejected this possibility, and therefore controls on this issue. We refuse the State's invitation to allow a separate kidnapping charge to arise out of any armed robbery in which the perpetrator does more than simply display a weapon, such as instructing the victim not to move while he undertakes to rob other victims. No matter how reprehensible we find the actions of defendant and his agents, we cannot hold that the restraint exposed the victim to a "greater danger than that inherent in the armed robbery itself." *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446.

IV.

Defendant next contends that his convictions for second degree kidnapping and robbery with a firearm with respect to Peter Lucas and Alvaro Perez violate his protection against double jeopardy. We agree with defendant that both second degree kidnapping convictions must be reversed.

Both men entered the lobby with the Rodriguez family. They were soon thereafter instructed to get onto the floor and surrender their money. The State again contends on appeal that the restraint of these men was unnecessary because it extended to include the time needed to conduct the robbery of the second group of guests to enter the lobby. As discussed above with respect to the restraint of Mr. Rodriguez, the threatened use of a firearm upon these two victims did not expose them to any danger greater than that inherent in the robberies for which defendant has been convicted. Accordingly, defendant's convictions of second degree kidnapping with respect to Mr. Lucas and Mr. Perez must be reversed.

V.

We next consider defendant's argument that his convictions for second degree kidnapping with respect to Mr. and Ms. Long and Mr. and Ms. Panter violate double jeopardy. Defendant was convicted of second degree kidnapping and robbery with a firearm with respect to

Ms. Long; he was convicted of second degree kidnapping and attempted robbery with a firearm with respect to Mr. Long and Mr. and Ms. Panter. We agree with defendant that all four second degree kidnapping convictions must be reversed.

Ms. Long testified that as her party approached the lobby of the hotel, they observed a robbery in progress. When they attempted to turn around, a robber holding a gun ordered them to go inside and empty their wallets. The State contends that it was not necessary to move these four victims inside the hotel lobby in order to commit armed robbery against them. Specifically, the State argues that the robbers already had control of the victims prior to them entering the lobby. However, the State has failed to show that the removal was separate from the robbery or that it increased the danger beyond that inherent in the robbery. Significantly, the victims were not physically injured, nor were they subjected to restraint beyond that of the threatened use of a firearm. *Cf. State v. Smith*, 359 N.C. 199, 213, 607 S.E.2d 607, 618 (2005) (after grabbing the victim by the neck and rendering him unconscious, the defendant was free to steal the items; the additional steps of binding the victim's wrists and ankles and taping his mouth were separate from the robbery and exposed the victim to a greater danger).

Here, the victims had already been exposed to the danger inherent in the robbery as they approached the hotel door. We decline to equate the fact of their movement into the hotel lobby as anything more than a "mere technical asportation" also inherent in the armed robbery. *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446.

VI.

Next, defendant contends that his convictions for second degree kidnapping and robbery with a firearm with respect to Ms. Basden violate his protection against double jeopardy. We agree.

The State's evidence indicates that the robbers took the money from the cash register and then removed Ms. Basden to the manager's office where they demanded the keys to the safe. Mr. Barnett was then also led into the office, and the robbers started asking about the location of surveillance cameras.

The State argues that the facts are similar to those of *State v. Warren*, 122 N.C. App. 738, 471 S.E.2d 667 (1996), wherein this Court affirmed the defendant's second degree kidnapping convictions. We disagree. In *Warren*, the defendant and his accomplice forced two

victims from the front of the store into storage areas in the rear of the store. *Id.* at 741, 471 S.E.2d at 669. Additionally, the victims were physically abused: the defendant broke one victim's nose and hit him on the head so forcefully that he required fourteen to twenty staples to seal the wound; and either the defendant or his accomplice choked the same victim with a chain until he was unconscious. *Id.* This Court held that the victims "were exposed to greater danger than that inherent in the armed robbery and were subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Id.* (citing *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446).

The facts of the instant case are not comparable, as Ms. Basden was not physically attacked. Notably, she was not bound or terrorized after being removed to the back office. *Cf. State v. Thompson*, 129 N.C. App. 13, 16, 497 S.E.2d 126, 128 (1998) (victims forced into meat room in rear of store, tied up, and told that they would be killed if any one of them moved; when one victim attempted to turn around, assailant held gun to back of her head); *State v. Davidson*, 77 N.C. App. 540, 543, 335 S.E.2d 518, 520 (1985) (victims removed to dressing room in back of store and bound with tape), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986). Thus, Ms. Basden was not exposed to the kind of danger and abuse that the kidnapping statute was designed to prevent. Rather, the only harm Ms. Basden was exposed to was the harm inherent in the armed robbery, the threatened use of a firearm. Accordingly, we hold that Ms. Basden's removal was a mere technical asportation inherent in the armed robbery.

VII.

Finally, defendant argues that his convictions for second degree kidnapping and robbery with a firearm with respect to Ms. Sharpless violate double jeopardy. Once again, we agree.

The State's evidence shows that one of the robbers proceeded with Ms. Sharpless to the break room to retrieve the supposed surveillance tape and instructed her to remain there. A few minutes later, the robbers then led her back to the front desk and ordered her to "act normal." When Ms. Sharpless attempted to flee, the men jumped out of hiding and proceeded to rob the patrons present.

Once again, there is no evidence that Ms. Sharpless was exposed to any danger separate from that inherent in the robbery or the kind that the kidnapping statute was designed to prevent. She was not bound or physically injured in any way while restrained in the break

room. Also, we cannot ignore the fact that Ms. Sharpless volunteered the information to the robbers that there was a surveillance tape and that she knew where it was located. Indeed, Ms. Sharpless testified that she led one of the robbers into the break room. Under these circumstances, we cannot hold that Ms. Sharpless was exposed to a danger greater than and independent from that inherent in the robbery for which defendant was already convicted.

VIII.

For the above stated reasons, we reverse defendant's second degree kidnapping convictions with respect to the following victims: Ricardo Rodriguez, Sr., Peter Lucas, Alvaro Perez, Adrian Panter, Skylar Panter, Tracy Long, Dennis Long, Tamara Basden, and Laketria Sharpless (Nos. 03 CRS 10254, 10257, 10258, 10248, 10249, 10252, 10251, 10245, and 10247). Accordingly, this case is remanded to the Superior Court, Onslow County, for entry of an order arresting judgment on defendant's aforementioned convictions.

Reversed and remanded in part, no error in part.

Judge TYSON concurs in part; dissents in part.

Judge WYNN concurs.

TYSON, Judge concurring in part, dissenting in part.

I concur in the portion of the majority's opinion reversing defendant's second-degree kidnapping convictions with respect to: (1) Ricardo Rodriguez, Sr., 03 CRS 10254; (2) Peter Lucas, 03 CRS 10257; (3) Alvaro Perez, 03 CRS 10258; (4) Tamara Basden, 03 CRS 10245; and (5) Laketria Sharpless, 03 CRS 10247.

I respectfully dissent from the majority's reversal of defendant's convictions for second-degree kidnapping of: (1) Adrian Panter, 03 CRS 10248; (2) Skylar Panter, 03 CRS 10249; (3) Tracy Long, 03 CRS 10252; and (4) Dennis Long, 03 CRS 10251.

I. Movement Inherent and Integral to Robbery

The majority's opinion holds the movement of the Longs and Panters by the masked man from outside in the parking lot to inside the hotel lobby was inherent in the armed robbery and not sufficient to support the second-degree kidnapping convictions. I disagree.

Numerous precedents recognize a clear distinction between a defendant's asportation of a victim necessary to complete a crime, other than kidnapping, and removal of a victim that is incidental to the commission of the crime. *State v. Davidson*, 77 N.C. App. 540, 543, 335 S.E.2d 518, 520 ("Since none of the property was kept in the dressing room, it was not necessary to move the victims there in order to commit the robbery. Removal of the victims to the dressing room thus was not an inherent and integral part of the robbery. Rather, . . . [defendant engaged in] a separate course of conduct designed to remove the victims from the view of passersby who might have hindered the commission of the crime."), *disc. rev. and cert. denied*, 314 N.C. 670, 337 S.E.2d 583 (1985), *disc. rev. denied*, 315 N.C. 393, 338 S.E.2d 882 (1986); *State v. Joyce*, 104 N.C. App. 558, 567, 410 S.E.2d 516, 521 (1991) ("All victims in the case at bar were moved from one room to another room where they were confined. The removals were not an integral part of the crime nor necessary to facilitate the robberies, since the rooms where the victims were ordered to go did not contain safes, cash registers or lock boxes which held property to be taken."), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992); *State v. Warren*, 122 N.C. App. 738, 741, 471 S.E.2d 667, 669 (1996) ("the removals by defendant were not an integral part of the crime nor necessary to facilitate the robbery. Indeed . . . the rooms where the victims were ordered to go did not contain safes, cash registers or lock boxes which held property to be taken." (citation omitted)).

Our Courts have consistently applied this analysis to other crimes committed in conjunction with a kidnapping. *See State v. Newman and State v. Newman*, 308 N.C. 231, 239-40, 302 S.E.2d 174, 181 (1983) ("Removal of [the victim] from her automobile to the location where the rape occurred was not such asportation as was inherent in the commission of the crime of rape. Rather, it was a separate course of conduct designed to remove her from the view of a passerby who might have hindered the commission of the crime."); *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987) ("Asportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape."); *State v. Mebane*, 106 N.C. App. 516, 532, 418 S.E.2d 245, 255 ("[R]estraint, confinement, and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape."), *disc. rev. denied*, 332 N.C. 670, 424 S.E.2d 414 (1992).

Here, the evidence shows two couples were returning to the hotel after dinner when Mrs. Long noticed a robbery in progress in the lobby. All four persons attempted to run when one of the masked men exited the hotel and forced them inside at gunpoint, ordered them to their knees, and demanded their money. The masked men could have robbed the Longs and the Panters outside of the hotel. The money and valuables taken from them were located on their persons, not inside the hotel. It was not necessary to move them inside the hotel, the movement was not "an inherent and integral part" of the armed robbery, and the victims were restrained in the hotel lobby, where the robbery was accomplished. *Davidson*, 77 N.C. App. at 543, 335 S.E.2d at 520. Instead, the masked man forced them inside into a more secretive location to commit the crime. *See id.* ("Since none of the property was kept in the dressing room, it was not necessary to move the victims there in order to commit the robbery. Removal of the victims to the dressing room thus was not an inherent and integral part of the robbery. Rather, . . . it was a separate course of conduct designed to remove the victims from the view of passersby who might have hindered the commission of the crime.").

The majority's opinion cites *Irwin* to equate the movement of the four victims inside the hotel as nothing more than a "mere technical asportation." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). My review of *Irwin* shows the defendant and an accomplice forced a drugstore employee to walk from her position near the fountain cash register to the back of the store where the prescription counter and safe were located. *Id.* at 96-97, 282 S.E.2d at 442. Our Supreme Court reversed the kidnapping conviction due to the employee's removal to the back of the store was "an inherent and integral part of the attempted armed robbery," since the employee was needed to open the safe. *Id.* at 103, 282 S.E.2d at 446. *Irwin* does not mandate defendant's convictions for kidnapping the Panters and the Longs be vacated. Numerous and consistent precedents cited above support a holding of no error for defendant's kidnapping of the Longs and the Panters.

II. Conclusion

The movement of the Longs and the Panters from outside the hotel to its lobby was not "an inherent and integral part" of the armed robberies and was a sufficient and separate asportation apart from the robbery to support convictions for second-degree kidnapping. I find no error in defendant's convictions for second-

degree kidnapping, 03 CRS 10248, 03 CRS 10249, 03 CRS 10251, and 03 CRS 10252. I respectfully dissent.

STATE OF NORTH CAROLINA v. DOUGLAS SHANE WRIGHT

No. COA04-689

(Filed 16 August 2005)

Judges— remarks to defense counsel—prejudicial negative atmosphere

Defendant was awarded a new trial where the trial judge's numerous negative comments to the defense counsel, both in and out of the presence of the jury, created a negative atmosphere at the trial to the prejudice of defendant. It is fundamental to due process that every defendant be tried before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.

Judge TYSON concurring in part, dissenting in part.

Appeal by Defendant from judgments entered 20 October 2003 by Judge Evelyn W. Hill in Superior Court, Alamance County. Heard in the Court of Appeals 12 April 2005.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Robert T. Newman, Sr., for defendant-appellant.

WYNN, Judge.

"It is fundamental to due process that every defendant be tried 'before an impartial judge and an unprejudiced jury in an *atmosphere of judicial calm*.' " *State v. Brinkley*, 159 N.C. App. 446, 450, 583 S.E.2d 335, 338 (2003) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)). In this case, the trial judge's numerous negative comments to the defense counsel, both in and out of the presence of the jury, created a negative atmosphere at the trial to the prejudice of Defendant. Accordingly, we must remand for a new trial.

Following his convictions on charges on two counts of taking indecent liberties with a child and sentence to two active consecutive aggravated sentences of twenty-six months to thirty-two months

imprisonment, Defendant brought this appeal contending that the trial court erred by: (1) denying his motion *in limine* to prohibit evidence of prior bad acts; (2) violating his constitutional and statutory rights to have a fair and non-prejudicial trial by the trial judge's conduct and statements towards defense counsel in the presence of the jury; and (3) aggravating his sentence beyond the presumptive maximum without submitting that issue to a jury.

As to the first issue, we summarily hold that the trial court did not abuse its discretion by allowing evidence of Defendant's prior bad acts. But regarding the second issue, we hold that the trial judge's conduct and statements at trial amounted to prejudicial error which we address in detail.

Defendant cites several incidents in which he argues the trial judge's extraneous comments to his counsel were improper and deprived him of a fair and impartial trial. The following took place in front of the jury:

Defense counsel: Okay.

Court: Excuse me, what did you just say? Excuse me. I asked you a question. What did you just say?

Defense counsel: I said okay, Your Honor, under my breath.

Court: Well, if it was under your breath, why was I able to hear it, and also the Court Reporter. I don't know what to do, Mr. Thompson. I have done everything I can possibly do, except end your cross examination. We're not moving along. Whatever you need to do, as I have now told you three times, whatever you need to do to help yourself not do that, do it.

When defense counsel began to formulate a question in front of the jury, the trial judge interrupted him, and the following conversation transpired:

Defense counsel: Yes, Your Honor.

Court: This is the way a question would go. For example: Isn't it true that you asked her what clothes: Did you take off? What were you wearing on Friday? You are just reading the question, and it's a statement. And there's no question for the Sergeant to answer.

Defense counsel: I apologize, Your Honor. I thought the inflection.

Court: I don't think I asked you for any explanation. I don't think I desire to hear any. Just try and do it right and move along.

* * *

Court: She's already indicated through her testimony. We're not going to beat a defunct equine. Okay. She's already testified that she did not call in any crime scene people whatever. So do you have another question you want to ask? Do you have any other questions?

Defense counsel: May I have one second?

Court: You've had your second.

The jury had been dismissed from the court room and the trial judge called for the jury to be escorted back in when this exchange took place, prior to the jury returning:

Defense counsel: May I be heard?

Court: Sit down, Mr. Thompson. I am tired of your cavalier attitude and your feeling that whatever you want to do in a courtroom is okay. It's not.

***

Court: Madame Court Reporter, take the following please. Yesterday on numerous occasions, the Court had to ask Mr. Craig Thompson to stop saying okay at the end of every witness's answer. In spite of the court's admonition and request, he continued to do so. He continues to do so today. The Court finds that Mr. Thompson for the defendant has intentionally and purposely pretended ignorance at what the Court was telling him with a meanest look on face as if he didn't understand. I did not ask for a response from you, sir. Today the court sat here and did not once ask him to stop saying okay, although he continued to do it. Although he now continues to make faces while the

court's speaking. Sir, you're not going to speak. You can just sit back and stop using your body language to interrupt me. It is rude, discourteous, uncivil and contemptuous. You might do well to listen to what people say instead of planning your response.

***

Court: There are several options open to the Court. The Court does not plan at this time to cite any of the attorneys for contempt, but the Court believes if the attorneys cannot comply with the rules of law and are going to continually act bemused, and confused as if they don't understand what it means, they subject themselves to that. If you don't know when you're saying okay at the end of a sentence, then learn to find out, because if a Judge tells you to stop doing it, you stop doing it. When I sat in that chair, if a judge told me to stop doing it, I stopped doing it. And you're no more above the law than anyone else, and you've been warned.

During direct examination of Ray Wright, a witness for Defendant, the following exchange ensued in the presence of the jury:

Court: No. What did you just say?

Defense counsel: I asked him if he recalled what day.

Court: What did you just say? I think that you.

Defense counsel: I said "okay," Your Honor. I apologize, Your Honor.

Court: Exactly. It's not my job to draw it to your attention, sir.

Defense counsel: Your Honor, I apologize for apparently an unfortunate speech habit that I've had for a number of years.

Court: Ladies and gentleman of the jury, please step to the jury room. Don't discuss . . .

The Jury exited the court room and Judge Hill stated:

Court: Madame Clerk, take the following, I mean Madame Court Reporter. I am 54 almost 55 years old. I have practiced law since 1979. I have practiced law for 21 years as a trial attorney in Superior Court before numerous Superior Court Judges including but not limited to James H. Pugh Bailey . . . to name just a few. I was taught as a trial attorney to show respect to the court and to follow the court's directions whether I agreed with them or not, whether I thought they were reasonable or not. When a Superior Court Judge for whatever reason points out to a litigant a certain behavior, whether it's clicking a pen, chewing gum, saying okay at the end of every witness's answer, my experience has been that I, as a litigant and the vast majority of the litigants with whom I practice law and have appeared before me, make some effort to comply with what the Court has asked. To make matters worse in this case, Mr. Thompson has by his facial expressions questioned whether he's even said the things that I've said he said, and has actually yesterday questioned that he did say them. At this point, I feel that there's no point in me even trying to communicate about this with Mr. Thompson, since he shrugs it off cavalierly as quote "an unfortunate speech habit." Therefore, he can't possibly be responsible for it. I asked yesterday, I asked again yesterday, I asked a third time yesterday, I asked again today and I have pointed it out today, and I even stopped at the end of question to ask him to see whether or not he realized what he was doing. But clearly Mr. Thompson's message to the Court is this is an unfortunate speech habit. Get over it, judge. So I'm not going to point it out again. I'm going to keep count. And at the end of trial, it will be a hundred dollar fine for each time you do it. And we can use the

Court Reporter's notes to go back and see if you did it. But I won't bother anymore to point it out. Bring the jury back in please.

Defense counsel: Judge, may I have, may I be heard briefly?

Court: I'm sorry.

Defense counsel: May I be heard briefly?

Court: No, sir.

A trial judge's unique position and duties in court commands respect and deference. " '[J]urors entertain great respect for [a judge's] opinion, and are easily influenced by any suggestion coming from him [or her]. As a consequence, he [or she] must abstain from conduct or language which tends to discredit or prejudice' any litigant in his [or her] courtroom." *Brinkley*, 159 N.C. App. at 447, 583 S.E.2d at 337 (ordered a new trial based on comments made by Judge Evelyn W. Hill in the Superior Court, Durham County that were inappropriate when the questioning was in the presence of the jury and could potentially prejudice the jury's view of the defendant and his counsel) (quoting *McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 429, 368 S.E.2d 619, 622 (1988) (quoting *Carter*, 233 N.C. at 583, 65 S.E.2d at, 10)); *see also* N.C. Gen. Stat. § 15A-1222 (2003).

"It is fundamental to due process that every defendant be tried 'before an impartial judge and an unprejudiced jury in an *atmosphere of judicial calm*.' " *Brinkley*, 159 N.C. App. at 450, 583 S.E.2d at 338 (quoting *Carter*, 233 N.C. at 583, 65 S.E.2d at 10). "The judge's duty of impartiality extends to defense counsel. He [or she] should refrain from remarks which tend to belittle or humiliate counsel since a jury hearing such remarks may tend to disbelieve evidence adduced in defendant's behalf." *State v. Coleman*, 65 N.C. App. 23, 29, 308 S.E.2d 742, 746 (1983), *cert. denied*, 311 N.C. 404, 319 S.E.2d 275 (1984).

This Court has recognized that, " '[w]hether the accused was deprived of a fair trial by the challenged remarks [of the trial judge] must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant.' " *State v. Faircloth*, 297 N.C. 388, 392, 255 S.E.2d 366, 369 (1979) (citation omitted).

In *Brinkley*, the trial judge made numerous comments to defense counsel regarding the counsel's repetitive questions. *Brinkley*, 159 N.C. App. at 449, 583 S.E.2d at 337. This Court found the most preju-

dicial comment made after the counsel's questioning regarding an inadmissible statement, the trial judge said, "You moved to admit it and the Court denied admitting it into evidence. Then you deliberately went and asked a question using the information from that, which is not only *improper*, *unethical*, *but also in flagrant violation of what the Court ruled. I'm at my wit's end.*" *Id.* at 450, 583 S.E.2d at 338. This Court found that "[w]hen all the incidents raised by defendant, particularly the three cited above, are viewed in light of their cumulative effect upon the jury, we are compelled to hold that the atmosphere of the trial was tainted by the trial judge's comments to the detriment of defendant." *Id.*

Like in *Brinkley*, the trial judge in this case made negative comments about the defense counsel by stating, "The Court finds that Mr. Thompson for the defendant has intentionally and purposely pretended ignorance at what the Court was telling him with a meanest look on face as if he didn't understand. . . . It is rude, discourteous, uncivil and contemptuous." Although not all of the trial judge's negative comments to defense counsel were made in the presence of the jury, they created a negative atmosphere at trial, which became apparent upon the questioning of an alternate juror after the jury went into deliberations.

THE COURT: And I, you all paid rapt attention. I noticed that. I certainly do appreciate that.

ALTERNATE 2: We were scared not to.

THE COURT: That's good. Were you scared of me?

ALTERNATE 2: Yes, Your Honor.

THE COURT: Oh, that's good. I always want jurors to be scared.

See Faircloth, 297 N.C. at 392, 255 S.E.2d at 369 ("[W]hether the accused was deprived of a fair trial by the challenged remarks [of the court] must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances[.]"). Apparently, the trial judge's remarks to the defense counsel had the effect of setting a tone of fear at the trial.

Moreover, the cumulative nature of the trial judge's inappropriate comments to the defense counsel regarding his speech pattern, along with the fine imposed for the counsel's use of the word "okay," tainted the atmosphere of the trial to the detriment of Defendant. *Brinkley*, 159 N.C. App. at 450, 583 S.E.2d at 338. The record shows that the

exchanges created an impermissibly chilling effect on the trial process and most likely affected defense counsel's ability to question the remaining witnesses, thereby prejudicing Defendant.

Every Defendant is entitled to a fair and impartial trial. *See State v. Miller*, 288 N.C. 582, 598, 220 S.E.2d 326, 337 (1975) ("The substantive and procedural due process requirements of the Fourteenth Amendment mandate that every person charged with a crime has an absolute right to a fair trial before an *impartial judge* and an unprejudiced jury." (emphasis added)). In this case, the trial judge's conduct and statements deprived Defendant of a fair and impartial trial; accordingly, we must remand for a new trial.

Since we grant Defendant a new trial, the trial court's error in sentencing Defendant in the aggravated range on factors not submitted to the jury should not arise again in light of *State v. Allen*, 359 N.C. 425, ——, —— S.E.2d —— , —— (2005) and *State v. Speight*, 359 N.C. 602, 606, —— S.E.2d —— , —— (2005).

New trial.

Judge ELMORE concurs.

Judge TYSON concurs in part, dissents in part.

TYSON, Judge concurring in part, dissenting in part.

The majority's opinion holds the trial court did not err by denying defendant's motion *in limine* to prohibit evidence of defendant's prior bad acts. The majority further holds the trial court erred in aggravating defendant's sentence beyond the presumptive maximum without submitting that issue to the jury. I concur with the analysis and holding in the majority's opinion concerning defendant's motion *in limine* and the decision to remand for resentencing.

The majority's opinion further holds the trial court erred and violated defendant's constitutional and statutory rights to have a fair and non-prejudicial trial by the trial judge's conduct and statements toward defense counsel in the presence of the jury. I respectfully dissent from the majority's holding to award defendant a new trial.

I. Trial Court's Comments Before the Jury and During Trial

A trial judge's unique position and duties in court commands respect and deference. " '[J]urors entertain great respect for [a

judge's] opinion, and are easily influenced by any suggestion coming from him [or her]. As a consequence, he [or she] must abstain from conduct or language which tends to discredit or prejudice' any litigant in his [or her] courtroom." *State v. Brinkley*, 159 N.C. App. 446, 447, 583 S.E.2d 335, 337 (2003) (quoting *McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 429, 368 S.E.2d 619, 622 (1988) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)).

This Court has recognized that "not every improper remark made by the trial judge requires a new trial. When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error." *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361 (citation omitted), *disc. rev. denied*, 327 N.C. 143, 394 S.E.2d 183 (1990). "Whether the accused was deprived of a fair trial by the challenged remarks [of the trial judge] must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, *the burden of showing prejudice being upon the appellant*." *State v. Faircloth*, 297 N.C. 388, 392, 255 S.E.2d 366, 369 (1979) (emphasis supplied).

Defendant argues, and the majority's opinion agrees, the trial judge's comments belittled defense counsel before the jury and prejudiced defendant to warrant a new trial. All comments defendant contends were prejudicial were addressed solely to his counsel. None were directed at him.

We have instructed that "care should be taken to conduct such reprimands [of counsel] outside the presence of the jury to ensure the court does not prejudice the jury against defendant." *Brinkley*, 159 N.C. App. at 450, 583 S.E.2d at 338 (comments were made in the presence of the jury). As in previous cases,

> when all the incidents raised by defendant, particularly . . . [those done in the presence of the jury], are viewed in light of their cumulative effect upon the jury, we are compelled to hold that the atmosphere of the trial was tainted by the trial judge's comments to the detriment of defendant.

Id.

The majority's opinion awards defendant a new trial based on five cited comments by the presiding judge and a statement made by alternate juror number two. Unlike the cases cited in the majority's opinion, the record here shows the majority of the judge's comments were

not in the jury's presence. Comments made were in the presence of the jury may have been inappropriate, but defendant has failed to show the comments made were so prejudicial to justify awarding defendant a new trial.

Every defendant is entitled to "a fair trial before an impartial judge." *State v. Miller*, 288 N.C. 582, 598, 220 S.E.2d 326, 337 (1975). As in *State v. Mack*, defendant here failed to "met his heavy burden of proving the trial judge's remarks deprived him of a fair trial and caused a prejudicial effect on the outcome." 161 N.C. App. 595, 600, 589 S.E.2d 168, 172 (2003) (citing *State v. Waters*, 87 N.C. App. 502, 504, 361 S.E.2d 416, 417 (1987)).

The majority's opinion sets out a conversation between the trial judge and alternate juror number two as further grounds to grant defendant a new trial, quoting alternate juror number two as being "scared of the judge." Alternate juror number one also participated in that conversation. Alternate juror number one stated:

> Alternate 1: I've never been scared.
>
> Court: Well, you should be.
>
> Alternate 1: Oh, really. I've enjoyed this. But I'm not frightened or anything. I've certainly enjoyed it.
>
> Court: Really. That's good. We rarely hear anything positive . . . .

The majority's opinion cites *Faircloth* and considers their notion of the effect of the judge's comments on the jury and juror number two's answers to the judge's question as evidence of any alleged negative effect. The majority's opinion disregards alternate juror number one's comments and inordinately weighs alternate juror number two's response as the pulse of the jury. In *Faircloth*, the trial judge's prejudicial comments were made in the presence of the jury. 297 N.C. at 392, 255 S.E.2d at 369. The comments the majority holds to be prejudicial were not said in front of the jury.

Defendant has not met his heavy burden in proving any prejudicial effect of the comments. *Mack*, 161 N.C. App. at 600, 589 S.E.2d at 172 (holding the burden of showing prejudice is upon the appellant). A judge cannot know the "fear" or lack of fear jurors may hold. One alternate juror's opinion or alleged fears are insufficient to dictate a new trial.

Defendant was tried for two counts of statutory rape, two counts of indecent liberties with a minor, and two counts of statutory sex offense. The jury convicted defendant only on the lesser offenses of taking indecent liberties with a child. The jury's acquittal of defendant for the far more serious charges he faced is evidence the jury was not "scared" or in "fear" of the trial judge.

The majority's opinion further states the fine imposed for defense counsel's repeated use of the word "okay" tainted the atmosphere or the "judicial calm" of the trial. *Brinkley*, 159 N.C. App. at 450, 583 S.E.2d at 338. The conversation between the trial judge and defense counsel about this fine did *not* occur in the presence of the jury. Defense counsel was told at the close of the trial no fine would be imposed.

Since our holding in *Mack*, our Supreme Court, citing *Mack* and several other cases, has again censured this trial judge for inappropriate comments and conduct during trials. *In Re Hill*, 359 N.C. 308, 308, 609 S.E.2d 221, 221 (2005) ("we conclude that Judge Hill's actions constitute conduct in violation of Canons 1, 2A, 3A(2), and 3A(3) of the North Carolina Code of Judicial Conduct.").

A trial judge should avoid inappropriate and unprofessional renditions of personal opinions or experiences which are extraneous to the issues at trial and issue reprimands, if necessary, to parties or their counsel out of the jury's presence. *Brinkley*, 159 N.C. App. at 450, 583 S.E.2d at 338. Procedures are available to this Court, the Bar, and the public to challenge inappropriate judicial conduct and to recommend appropriate remedial measures. N.C. Gen. Stat. § 7A-376 (2003).

The trial court's comments in the presence of the jury may have been inappropriate, but defendant has failed to show these comments were prejudicial to warrant a new trial. *Mack*, 161 N.C. App. at 600, 589 S.E.2d at 172.

II. Conclusion

I concur with the majority's opinion to: (1) affirm the trial court's denial of defendant's motion *in limine* as to a prior bad act; (2) vacate the aggravated sentence and remanding for a new sentencing hearing. *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005); *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005).

Defendant has failed to show the trial court's comments to his counsel either in or out of the presence of the jury prejudiced his case

to warrant a new trial. *Summerlin*, 98 N.C. App. at 174, 390 S.E.2d at 361. Defendant has failed to meet his "heavy burden" to show a violation of his constitutional and statutory rights to have a fair and nonprejudicial trial. Any alleged error was harmless beyond reasonable doubt. I respectfully dissent from awarding defendant a new trial.

WAYNE SHEPARD AND ROSEMARY SANDERS SHEPARD, PLAINTIFFS V. OCWEN FEDERAL BANK, FSB AND WELLS FARGO BANK MINNESOTA, AND DONALD T. RITTER, IN HIS CAPACITY AS TRUSTEE, DEFENDANTS

No. COA04-1634

(Filed 16 August 2005)

Statutes of Limitation and Repose— usury—loan origination fee—accrual at closing

Plaintiffs' claim for usury arising from a loan origination fee was properly dismissed for violation of the statute of limitations where plaintiffs filed their complaint more than two years after the closing date and accrual of the cause of action. Plaintiffs were on notice of the origination fees, had all the necessary information before and on the closing date, and could have paid the loan origination fee up front with cash, check, or credit card rather than financing it with their loan proceeds. The loan origination fee was "fully earned" by the mortgage broker on the closing date, when it was paid in full. N.C.G.S. § 24-10(g).

Judge BRYANT dissenting.

Appeal by plaintiffs from order entered 8 July 2004 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 15 June 2005.

Financial Protection Law Center, by Mallam J. Maynard, Maria D. McIntyre, and Chandra T. Taylor, for plaintiffs-appellants.

Kellam & Pettit, P.A., by William Walt Pettit, for defendants-appellees.

Hartzell & Whiteman, LLP, by J. Jerome Hartzell, for Amicus Curiae The North Carolina Academy of Trial Lawyers.

Seth P. Rosebrock, for Amicus Curiae Center for Responsible Lending.

Carlene McNulty, for Amicus Curiae North Carolina Justice Center.

Hazel Mack-Hilliard, for Amicus Curiae Legal Aid of North Carolina, Inc.

Andrea Young Bebber, for Amicus Curiae Legal Services of Southern Piedmont, Inc.

William J. Whallen, for Amicus Curiae Pisgah Legal Services.

TYSON, Judge.

Wayne Shepard and wife, Rosemary Sanders Shepard ("plaintiffs") appeal from the trial court's grant of Rule 12(b)(6) motions to dismiss filed by Wells Fargo Bank Minnesota, N.A. ("Wells Fargo") and Ocwen Federal Bank, FSB ("Ocwen") (collectively, "defendants"). We affirm.

I. Background

Plaintiffs obtained a second mortgage loan secured by their residential real property from Chase Mortgage Brokers, Inc. ("Chase"). The closing date for the loan was 25 July 1997. Plaintiffs were charged a loan origination fee by Chase. This fee was deducted from the loan proceeds and "wrapped" into the loan to be repaid over the course of several months. The loan was first assigned to Ocwen and later to Wells Fargo.

Plaintiffs filed this action against defendants on 3 May 2002 alleging the loan origination fee was usurious and illegal. The complaint asserted violations of N.C. Gen. Stat. § 24-1 *et seq.*, N.C. Gen. Stat. § 75-1.1, sought reformation of the loan itself, treble damages, and attorneys' fees. Defendant Donald T. Ritter was the trustee of the original deed of trust and was joined as a party in the action for the reformation claim.

On 9 January 2004, Wells Fargo moved to dismiss plaintiffs' complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Wells Fargo affirmatively asserted and argued plaintiffs' claims were precluded by expiration of the applicable statute of limitations. The trial court heard Wells Fargo's motion and a similar motion to dismiss filed by Ocwen during its 3 May 2004 civil session.

The trial court granted defendants' motions to dismiss on 8 July 2004 based on plaintiffs' failure to file within the expiration of the applicable statute of limitations. Plaintiffs appeal.

II. Issue

The sole issue before this Court is whether the trial court properly determined the statute of limitations for plaintiffs' claims had expired and dismissed plaintiffs' complaint.

III. Usury Law

Plaintiffs argue the trial court erred by dismissing their claims under N.C. Gen. Stat. § 24-1 *et seq*. for expiration of the applicable statute of limitations. We disagree.

A. Standard of Review

In reviewing the trial court's grant of a Rule 12(b)(6) motion to dismiss, we must determine whether "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Considine v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 316-17, 551 S.E.2d 179, 181 (citing *Lynn v. Overlook Development*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)), *aff'd*, 354 N.C. 568, 557 S.E.2d 528 (2001); *see also* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003). The trial court's dismissal is affirmed only if " 'it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief.' " *Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997) (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)).

> Dismissal of a complaint under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim.

Jackson v. Bumgardner, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)).

B. Statute of Limitations

The trial court dismissed plaintiffs' complaint under Rule 12(b)(6) on the ground it disclosed a defect to defeat plaintiffs'

claims. "A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Id.* (citations omitted).

Here, defendants asserted the affirmative defense of expiration of the applicable statute of limitations to plaintiffs' claims. The statute of limitations for a claim under the usury statutes of N.C. Gen. Stat. § 24-1 *et seq.* is two years. N.C. Gen. Stat. § 1-53(2)-(3) (2003). The issue before us is the date the two year period accrues. "Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed." *Davis v. Wrenn*, 121 N.C. App. 156, 158-59, 464 S.E.2d 708, 710 (1995) (quotation omitted), *cert. denied*, 343 N.C. 305, 471 S.E.2d 69 (1996).

Generally, the question of when a cause of action accrues is a factual determination. *Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d 483, 485 (2001). However, "where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover" the underlying issue but failed to do so, "the absence of reasonable diligence is established as a matter of law." *Grubb Properties, Inc. v. Simms Investment Co.*, 101 N.C. App. 498, 501, 400 S.E.2d 85, 88 (citing *Moore v. Casualty Co.*, 207 N.C. 433, 177 S.E. 406 (1934)), *aff'd*, 328 N.C. 267, 400 S.E.2d 36 (1991). We review *de novo* questions of law. *In re Appeal of the Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Id.* (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

The United States District Court for the Middle District of North Carolina addressed this issue in *Faircloth v. Nat'l Home Loan Corp.*, 313 F. Supp. 2d 544 (M.D.N.C. 2003), *aff'd*, 87 Fed. Appx. 314 (4th Cir. 2004) (unpublished). There, the class action plaintiffs asserted the identical causes of action for violations of North Carolina's Usury Statutes and Unfair and Deceptive Trade Practices Act as plaintiffs do here. *Id.* at 548. The defendants in *Faircloth* asserted the plaintiffs'

causes of action accrued on the closing date and the plaintiffs' complaint was filed after expiration of the applicable statutes of limitation. *Id.* at 552. The court agreed. "[T]he wrong that continues over time, however, is different from a wrong which comes into existence or becomes known only after a passage of time . . . . [T]he alleged statutory violation, though continuing, is solitary and that a solitary action is distinguishable from wrongs that are perpetrated seriatim." *Id.* at 552-53 (citing and quoting *Miller v. Pac. Shore Funding*, 224 F. Supp. 2d 977 (M.D.Md. 2002), *aff'd*, 92 Fed. Appx. 93 (2004)). The *Miller* court concluded:

> More than three years before filing his suit, at the closing of the loan, [the plaintiff] had sufficient knowledge of circumstances indicating he might have been harmed. The allegedly illegal fees were itemized on the face of the loan documents he signed on that date. The continued charging, collecting, and receiving of those fees by the lender or its assignees do not continuously renew the accrual of his cause of action.

224 F. Supp. 2d at 990, n. 6.

Citing *Miller*, the *Faircloth* court determined, "the running of the statute of limitations for the plaintiff's cause of action began at the loan closing because the alleged wrong was not of a type that could become known only after a passage of time and because the alleged wrong, though continuing, arose from one unitary action." 313 F. Supp. 2d at 553. The court held the statutes of limitation for both causes of action accrued on the closing date and expired prior to the plaintiffs filing their complaint. *Id.* at 554.

Although we are not bound by federal case law, we may find their analysis and holdings persuasive. *Soderlund v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 ("With the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State."), *disc. rev. denied*, 353 N.C. 729, 551 S.E.2d 438 (2001); *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); *House v. Hillhaven, Inc.*, 105 N.C. App. 191, 195, 412 S.E.2d 893, 896 (Federal cases, although not binding on this Court, are instructive and persuasive authority.), *disc. rev. denied*, 331 N.C. 284, 417 S.E.2d 251 (1992). We hold the Middle District's analysis and resolution of the issue at bar is correct.

Plaintiffs' claim against defendants arises out of alleged misrepresentations of terms and conditions of the loans, excessive loan origination fees and costs, and inflated expenses. However, all details of the loan, including interest rate, fees, and expenses, were fully disclosed in the loan documents to plaintiffs prior to closing. This shows plaintiffs had "both the capacity and opportunity to discover" their claim, but failed to do so. *Grubb Properties, Inc.*, 101 N.C. App. at 501, 400 S.E.2d at 88. Plaintiffs were on notice of the pertinent terms and conditions of the loan. We further note that N.C. Gen. Stat. § 24-10(g) (2003) states in part, "The fees . . . are *fully earned* when the loan is made . . . ." The alleged wrongdoing by defendants accrued and was complete upon the closing of the loan. Plaintiffs' right to initiate an action accrued. *See Davis*, 121 N.C. App. at 158-59, 464 S.E.2d at 710 ("Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed.").

Plaintiffs assert the interest and expenses associated with the loan origination fee should be treated the same as interest based on the underlying loan. Thus, the statute of limitations would accrue on the date of payment, not the date of closing. As authority, they cite our Supreme Court's decisions in *Hollowell v. B. & L. Association*, 120 N.C. 286, 26 S.E. 781 (1897) and *Swindell v. Federal National Mortgage Assn.*, 330 N.C. 153, 409 S.E.2d 892 (1991). In *Hollowell*, the plaintiff borrowed $1,000.00 from the defendant. 120 N.C. at 287, 26 S.E. at 781. The defendant charged plaintiff both interest and "dues" to be paid each month, as required by the loan contract. *Id.* The plaintiff argued that the combination of the required interest and "dues" were usurious. *Id.* The defendant asserted the monthly "dues" did not count towards the usury limit. *Id.* at 288, 26 S.E. at 781-82. The Court held, "whatever is collected over and above 6 per cent, whether called interest or "dues" is, in fact, interest and usurious." *Id.* at 287, 26 S.E. at 781. Our review of *Hollowell* indicates an important distinction from plaintiffs' complaint. There, the defendant *required* the plaintiff to pay the "dues" every month during the term of the loan. *Id.* Here, plaintiffs were free to pay the loan origination fee up front and not to finance it with proceeds from the loan.

In *Swindell*, the plaintiff "executed an adjustable rate note secured by a deed of trust on a home for $112,500.00" from a mortgage lender. 330 N.C. at 155, 409 S.E.2d at 893. The defendant pur-

chased the note from the mortgage lender. *Id.* The loan contract included a provision for late payment penalties for untimely payments toward the note. *Id.* The late payment interest rate exceeded the State's usury limits and the plaintiffs filed a complaint seeking declaratory relief. *Id.* at 155-56, 409 S.E.2d at 893-94. The defendant argued the late charge was not usurious under the statutes. *Id.* at 156, 26 S.E. at 894. The Court held differently, interpreting late fees governed by N.C. Gen. Stat. § 24-10.1 to be interest and subject to the usury laws. *Id.* at 157-58, 409 S.E.2d at 895. Like *Hollowell*, we hold a distinction exists between a *required* late payment fee that may or may not be charged and a loan origination fee that plaintiffs have the option and right to pay up front to avoid accrued interest.

Plaintiffs also argue the two year statute of limitations accrues individually for each date of payment of interest and runs forward. Plaintiffs cite this Court's decisions in *Haanebrink v. Meyer*, 47 N.C. App. 646, 267 S.E.2d 598 (1980) and *Merritt v. Knox*, 94 N.C. App. 340, 380 S.E.2d 160 (1989). However, our review of *Haanebrink* and *Merritt* shows the usurious interest rates at issue were related to the actual promissory notes, not an origination fee. 47 N.C. App. at 650, 267 S.E.2d at 600; 94 N.C. App. at 342, 380 S.E.2d at 162. Here, the purported illegal loan and interest at issue derives from a loan origination fee. Although plaintiffs make periodic payments toward the loan, the fee was paid on the date of closing out of the loan proceeds.

We hold the closing date, 25 July 1997, is the date of accrual of plaintiffs' claim as a matter of law. *Grubb Properties, Inc.*, 101 N.C. App. at 501, 400 S.E.2d at 88. Plaintiffs were on notice of the origination fees and had all the necessary information prior to and on the date of closing. Chase did not *require* plaintiffs to finance the loan origination fee. Plaintiffs legally had the option of paying the loan origination fee up front with cash, check, or credit card, rather than financing it with their loan proceeds. Chase "fully earned" the loan origination fee on the closing date, when it was paid in full.

Plaintiffs did not file their complaint until 3 May 2002, more than two years after the closing date and accrual of the cause of action. The statute of limitations elapsed on 25 July 1999. The trial court properly dismissed plaintiffs' claim under N.C. Gen. Stat. § 24-1 *et seq.* *See Jackson v. Bumgardner*, 318 N.C. at 175, 347 S.E.2d at 745 (A trial court's grant of a 12(b)(6) motion to dismiss is proper when some fact disclosed in the complaint necessarily defeats plaintiff's claim.). This assignment of error is overruled.

IV. Unfair and Deceptive Trade Practices

Plaintiffs concede their unfair and deceptive trade practices claim derives from their usury claim. Thus, they stipulated should this Court hold the trial court erred in determining the usury claim was time-barred the same would apply to their unfair and deceptive trade practices claim. In light of our holding that plaintiffs' usury claim was barred by the applicable statute of limitations, plaintiffs' argument is moot. Plaintiffs stipulate in their brief that their claim under N.C. Gen. Stat. § 75-1.1 is otherwise time-barred under the applicable statute of limitations. In light of our holding on plaintiffs' usury claim and plaintiffs' stipulation, we do not reach the issue of whether the trial court properly dismissed plaintiffs' claim under N.C. Gen. Stat. § 75-1.1. This assignment of error is dismissed.

V. Conclusion

Defendants properly asserted the affirmative defense of expiration of the applicable statute of limitations to plaintiffs' cause of action for usury under N.C. Gen. Stat. § 24-1 *et seq*. The accrual date for claims based on loan origination fees fully earned and paid on the closing date is the closing date. Plaintiffs' stipulation to the correctness of the trial court's dismissal of their unfair and deceptive trade practices claim renders this argument moot and precludes our review of that issue. The trial court's order granting defendants' motions to dismiss is affirmed.

Affirmed.

Judge McCULLOUGH concurs.

Judge BRYANT dissents.

BRYANT, Judge dissenting.

The majority holds the statute of limitations for plaintiffs' claims under Chapter 24 (N.C. Gen. Stat. § 24-1 *et seq.*) had expired and therefore plaintiffs' complaint was properly dismissed. For the reasons which follow, I respectfully dissent from the majority opinion.

Plaintiffs brought their action alleging the loan origination fee, charged by defendant and rolled back into plaintiff's high-end second mortgage loan was usurious and illegal under Chapter 24. There are two statutory penalties for usury in N.C.G.S. § 24-2 and each penalty

has a two-year statute of limitations. See N.C. Gen. Stat. § 1-53(2) (2003). However, the point at which the statute of limitations begins to run is different depending on whether the plaintiff seeks forfeiture or double recovery. "The statute runs from the date of payment for the double-recovery remedy, and from the date of the agreement for the forfeiture remedy." *Merritt v. Knox*, 94 N.C. App. 340, 342, 380 S.E.2d 160, 162 (1989) (citing *Haanebrink v. Meyer*, 47 N.C. App. 646, 267 S.E.2d 598 (1980)). Here, plaintiffs seek only the double-recovery remedy, yet the majority holds the statute of limitations runs from the date of the loan closing. That holding is contrary to our statutory and common law. As our court has stated:

> It is well settled that the statute of limitations on the recovery of twice the amount of interest paid begins to run upon **payment** of the usurious interest. The right of action to recover the penalty for usury paid accrues upon each payment of usurious interest giving rise to a separate cause of action to recover the penalty therefor, which action is barred by the statute of limitations at the expiration of two years from such payment.

Haanebrink v. Meyer, 47 N.C. App. 646, 648, 267 S.E.2d 598, 599 (1980) (citations omitted) (emphasis added).

The dispositive issue concerns when the two-year statute of limitations period begins to accrue. The majority cites a North Carolina federal district court case, which was upheld by the Fourth Circuit in support of its conclusion that the statute of limitations accrues on the loan closing date. *Faircloth v. Nat'l Home Loan Corp.*, 313 F. Supp. 2d 544 (M.D.N.C. 2003), *aff'd*, 87 Fed. Appx. 314 (4th Cir. 2004) (unpublished) (holding the plaintiff's cause of action began at loan closing because no time had to pass before the plaintiff could discover a wrong had been committed against him, because the illegal fees were itemized on the face of the loan documents the day he signed them). It is well established in our jurisprudence that decisions from the Fourth Circuit and other federal appeals courts are not binding on North Carolina state courts as to issues involving North Carolina law. *See*, *e.g. Harter v. Vernon*, 101 F.3d 334, 342 (4th Cir. 1996); *and State v. Guice*, 141 N.C. App. 177, 187, 541 S.E.2d 474, 481 (2000). In fact, the *Faircloth* court ignored well-settled North Carolina law and used a peculiar analysis in attempting to distinguish "interest" and "fees". Nevertheless, the majority, relying on *Faircloth*, states the limitations period in the instant case began to accrue on the loan closing date because the usurious origination fee

was disclosed on the face of the loan, giving plaintiffs the opportunity to discover that a wrong had been committed against them.

The majority, incorrectly applies a "reasonable diligence" standard when stating plaintiffs' lack of reasonable diligence can be established as a matter of law because plaintiffs had the opportunity on the loan closing date to discover a wrong had been committed against them. Our Supreme Court has made it clear that the purpose of the Interest Statutes in Chapter 24 is to protect North Carolina borrowers, and the burden of expertise to know the legality of rates is placed on the lender.

> The purpose of chapter 24 is to further "the "paramount policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws". N.C.G.S. § 24-2.1 (1986). . . . The statute relieves the borrower of the necessity for expertise and vigilance regarding the legality of rates he must pay. That onus is placed instead on the lender, whose business it is to lend money for profit and who is thus in a better position than the borrower to know the law.

Swindell v. Federal Nat'l Mortg. Ass'n, 330 N.C. 153, 160, 409 S.E.2d 892, 896 (1991). Because the Interest Statutes as interpreted by our Supreme Court clearly avoid placing the burden on borrowers to know a wrong has been committed against them when it relates to usurious interest rates, the absence of reasonable diligence cannot be established as a matter of law. In addition, any attempt to impose such an onus on the borrower to discover illegal fees is not only against the plain reading of the statute, but would set a dangerous precedent. The General Assembly could not have intended to leave borrowers unprotected from lenders who circumvent usury penalties by charging illegal fees, then claim the borrower had the opportunity to discover the wrong on the closing date, and therefore the borrower's failure to discover precludes any action brought more than two years after the closing date. Such a result is exactly what the statutes were designed to prevent.

The majority seems to conclude the wrong is complete because the fees are "fully earned", referring to a portion of the statute which sentence reads, "The fees . . . are fully earned when the loan is made and are not a prepayment penalty under this Chapter or any other law of this State." N.C. Gen. Stat. § 24-10(g) (2003). Here, however, the usurious loan origination fee is in the nature of a prepayment penalty because the borrower has to pay a loan origination fee based on a

usurious interest rate, which fee is then wrapped back into the mortgage loan, all of which has an interest component required to be paid each month. Therefore, I would hold the "fully earned" language in N.C.G.S. § 24-10(g) does not apply to the consideration of whether an alleged wrong is complete when the fees are fully earned.

The majority also attempts to distinguish *Hollowell* and *Swindell* in determining why the loan origination fee in the instant case should not be considered interest, stating a borrower has an option to pay a loan origination fee whereas a late fee payment is *required.* Neither *Hollowell* nor *Swindell* was based on such a distinction. In fact, both cases clearly stated "[a]ny charges made against a borrower in excess of the lawful rate of interest, whether called fines, charges, dues or interest, are, in fact, interest and usurious." *Swindell* at 158, 409 S.E.2d at 895 (quoting *Hollowell v. Southern Bldg. & Loan Ass'n*, 120 N.C. 286, 287, 26 S.E. 781, 781 (1897)).

Finally, the majority attempts to distinguish *Haanebrink* and *Merritt* to establish that the two-year statute of limitations does not accrue on the date of each payment. However, as earlier stated, "the statute of limitations on the [double recovery penalty] begins to run upon **payment** of the usurious interest. The right of action . . . **accrues upon each payment** of usurious interest giving rise to a separate cause of action to recover the penalty[.]" *Haanebrink*, 47 N.C. App. at 648, 267 S.E.2d at 599 (emphasis added). The majority's claim that those two cases are distinguishable because they related to actual promissory notes, as opposed to an origination fee, relies on the premise that the fee was paid on the loan closing date. To adopt the majority's line of reasoning is to ignore several decades of legal precedent which establishes the statute of limitations for the double recovery remedy begins to run on the date of payment. *See*, *e.g. Id.* Such a perspective as put forth by the majority does not apply the Interest Statutes in the manner intended by the General Assembly so as to protect borrowers. As mandated by the legislature, "It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws." N.C. Gen. Stat. § 24-2.1 (2003). " 'The entire subject of the rate of interest and penalties for usury rests in legislative discretion, and the courts have no power other than to interpret and execute the legislative will.' " *Swindell* at 156, 409 S.E.2d 892, 894 (quotation omitted).

For all the reasons stated herein, I believe the trial court erred in dismissing claims under N.C.G.S. § 24-1 *et seq.* based on the statute of

limitations as plaintiffs' right to recover accrued upon each payment. Therefore, the trial court's order granting defendants' motion to dismiss should be reversed. Because plaintiffs' unfair and deceptive trade practices (UDTP) claim under N.C. Gen. Stat. § 75-1.1 derives from the usury claim the UDTP claim should remain viable.

THE KNIGHT PUBLISHING CO., D/B/A THE CHARLOTTE OBSERVER, PLAINTIFF-APPELLEE v. THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, D/B/A CAROLINAS HEALTHCARE SYSTEM, DEFENDANT-APPELLANT

No. COA04-1252

(Filed 16 August 2005)

Public Records— public hospitals—salary information

Summary judgment should have been granted for a public hospital (defendant) seeking to protect all but the current salary information of certain employees from a public records request. The Public Hospital Personnel Act (N.C.G.S. § 131E-257.2(a)) is very specific; the language used by the General Assembly shows that it was concerned about protecting the confidentiality of public hospital personnel records, thereby exempting the information from broad public access.

Appeal by defendant from order and judgment entered 2 August 2004 by Judge David S. Cayer in Superior Court, Mecklenburg County. Heard in the Court of Appeals 11 May 2005.

Brooks, Pierce, McLendon, Humphrey, & Leonard, L.L.P., by Mark J. Prak, Marcus W. Trathen and Charles E. Coble, for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by Mark W. Merritt and Blake W. Thomas, for defendant-appellant.

Linwood L. Jones for North Carolina Hospital Association, amicus curiae.

McGEE, Judge.

The Charlotte-Mecklenburg Hospital Authority d/b/a, Carolinas Healthcare System (defendant) is a "public body and a body corporate and politic" organized and existing under the Hospital

Authorities Act, N.C. Gen. Stat. § 131E-15 *et seq*. *See* N.C. Gen. Stat. § 131E-17(c) (2003). Knight Publishing Co., d/b/a *The Charlotte Observer* (plaintiff), sent a letter to defendant on 18 October 2002, requesting access to certain records of defendant pursuant to the Public Records Act, N.C. Gen. Stat. § 132-1 *et seq*., and the Public Hospital Personnel Act, N.C. Gen. Stat. § 131E-257 *et seq*. Specifically, plaintiff sought (1) the "current compensation (in any form) currently paid to" seventeen of defendant's existing and former employees; (2) "records describing the last compensation to" such individuals if they were not currently being paid; (3) "[r]ecords describing the date and amount of the most recent increase or decrease in salary" for the seventeen individuals; (4) "[r]ecords describing any additional monetary or other benefits (including but not limited, to retirement benefits, severance package, or pension benefits) paid or promised to" three of the seventeen named individuals; and (5) "[d]ocuments relating to expense reimbursement requests" for these three individuals.

Ten days after receiving plaintiff's request for information, defendant sent a letter to plaintiff explaining that defendant was governed by N.C. Gen. Stat. § 131E-257.2, which defendant argued expressly limited to "current salary" the compensation information that a public hospital could release regarding its employees. Defendant thereby only provided plaintiff with: (1) the current salary paid to each current employee of defendant identified by plaintiff; (2) the last salary paid to each former employee of defendant requested by plaintiff; and (3) the dates and amounts of the most recent increase or decrease in salary for the identified individuals. Defendant stated in its letter that the additional information requested by plaintiff did not, "in the opinion of Carolinas Health Care System, fall within the definition of 'salary.' "

Plaintiff took no further action until 12 January 2004, when plaintiff filed suit against defendant under the Public Records Act and the Public Hospital Personnel Act seeking production of the documents and information it had requested earlier. Plaintiff also sought a declaratory judgment that N.C.G.S. § 131E-257.2 "requires the disclosure of, among other personnel information, information concerning any retirement benefits or severance pay promised to or received by former . . . employees [of defendant]." Defendant filed its answer to plaintiff's complaint on 19 February 2004, and plaintiff moved for summary judgment on 26 May 2004.

In an order and judgment entered 2 August 2004, the trial court granted summary judgment in favor of plaintiff, concluding that the

Public Hospital Personnel Act, when read *in pari materia* with the Public Records Act, did not cover the documents and information requested by plaintiff. The trial court ordered defendant to provide the requested personnel information and documents to plaintiff. Defendant filed and served notice of appeal on 4 August 2004 and moved the trial court to stay the proceedings pending appeal. The trial court denied defendant's motion on 16 August 2004. Our Court temporarily stayed the 2 August 2004 order and judgment on 18 August 2004 and granted defendant's writ of supersedeas on 31 August 2004.

A summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). A moving party "has the burden of establishing the lack of any triable issue of fact." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976). As our Supreme Court has stated:

> The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue. Two types of cases are involved: (a) Those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial.

Kessing v. Mortgage Corp., 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). In cases "[w]here there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment." *Id.* at 534, 180 S.E.2d at 830.

In the present case, defendant does not argue that there are genuine issues of material fact for trial, nor has defendant assigned error on this ground. This is a proper case for summary judgment because a question of law, being the interpretation of N.C. Gen. Stat. § 131E-257.2 and its legal effect on the undisputed facts, was in controversy. *See Blades v. City of Raleigh*, 280 N.C. 531, 545, 187 S.E.2d 35, 43 (1972) (ruling summary judgment was proper where there was "no substantial controversy as to the facts[,]" only as to the "legal significance of those facts"). While it is undisputed that the information requested from defendant by plaintiff constitutes public records

under the Public Records Act, it is disputed whether the information requested is protected from disclosure under the Public Hospital Personnel Act. The specific issue before this Court is what compensation information regarding public hospital employees is a matter of public record.

Under the Public Records Act, the public generally has liberal access to public records. *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999). "[I]n the absence of clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records [Act] must be made available for public inspection." *News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 486, 412 S.E.2d 7, 19 (1992); *see also* N.C. Gen. Stat. § 132.6 (2003) (providing for the inspection and examination of public records). "Public records" are defined as

> all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

N.C. Gen. Stat. § 132-1(a) (2003).

Defendant, in the present case, asserts that its personnel records, including the documents requested by plaintiff, are exempted from the Public Records Act by the Public Hospital Personnel Act, and therefore the trial court erred in ordering defendant to produce the documents requested by plaintiff. The Public Hospital Personnel Act provides the following with regard to the privacy of public hospital employee personnel records:

> (a) Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees and applicants for employment maintained by a public hospital are subject to inspection and may be disclosed only as provided by this section. For purposes of this section, an employee's personnel file consists of any information in any form gathered by the public hospital with respect to an employee and, by way of illustration but not limitation, relating to the employee's application, selection or nonselection, performance, promotions, demotions, transfers, suspensions and other

> disciplinary actions, evaluation forms, leave, salary, and termination of employment. As used in this section, "employee" includes both current and former employees of a public hospital.

N.C. Gen. Stat. § 131E-257.2(a) (2003).

Defendant argues that the General Assembly intended the Public Hospital Personnel Act to be a statutory exception to the Public Records Act, thereby affording greater privacy protection to public hospitals' personnel records than to personnel records of other public entities. To determine a statute's purpose, we must first examine the statute's plain language. *State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004). " 'Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.' " *Id.* (quoting *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). Defendant correctly asserts that N.C.G.S. § 131E-257.2 clearly and unambiguously limits what and when information in the personnel records of public hospitals can be disclosed publicly, notwithstanding the Public Records Act.

The Public Hospital Personnel Act is a very specific statute regarding public hospitals. In the section providing for the privacy of public hospital employee personnel records, the statute explicitly provides that "personnel files of employees and applicants for employment maintained by a public hospital are subject to inspection and may be disclosed *only as provided by this section*." N.C.G.S. § 131E-257.2(a) (emphasis added). The statute then broadly defines an employee's personnel file as consisting of "*any* information in *any* form gathered by the public hospital with respect to an employee *and*, by way of illustration but not limitation, *relating to* the employee's application, selection or nonselection, performance, promotions, demotions, transfers, suspensions and other disciplinary actions, evaluation forms, leave, salary, and termination of employment." *Id.* (emphasis added).

The plain language of the statute, especially the definition of "personnel file," is virtually identical to the plain language of N.C. Gen. Stat. § 126-22, and to the definition of "personnel file" included therein. *See* N.C. Gen. Stat. § 126-22 (2003). Our Supreme Court, in evaluating N.C.G.S. § 126-22, which provides for the privacy of state employee personnel records, concluded that the General Assembly intended for the personnel files of state employees to be exempt from the Public Records Act. *News and Observer Publishing Co.*, 330 N.C.

at 476, 412 S.E.2d at 14. Therefore, in the present case, like in *News and Observer Publishing Co.*, "[u]nder the plain meaning of the statutory language, any information satisfying the definition of 'personnel file' is excepted from the Public Records Law." *See id.*

Six types of information "with respect to each public hospital employee" listed in subsection (b) of N.C.G.S. § 131E-257.2 are a matter of public record:

(1) Name.

(2) Age.

(3) Date of original employment.

(4) Current position title, current salary, and the date and amount of the most recent increase or decrease in salary.

(5) Date of the most recent promotion, demotion, transfer, suspension, separation or other change in position classification.

(6) The office to which the employee is currently assigned.

N.C. Gen. Stat. § 131E-257.2(b) (2003). Subsection (c) of the statute provides that "[a]ll information contained in a public hospital employees's personnel file, other than the information made public by subsection (b) of this section, is confidential and shall be open to inspection only" in certain instances. N.C. Gen. Stat. § 131E-257.2(c) (2003). When read together, these subsections show that not all of the information or documents included in the personnel file of a public hospital employee is public record. Rather, only the information[1] listed in section (b) is public record. Thus, with regard to a public hospital employee's compensation, only the employee's "current salary, and the date and amount of the [employee's] most recent increase or decrease in salary" are public records.

The determination that N.C.G.S. § 131E-257.2 is an exception to the Public Records Act, is supported by the plain language of additional statutes relating to health care facilities. First, the General Assembly explicitly provided that "[t]he purpose of [the Public Hospital Personnel Act] is to protect the privacy of the personnel records of public hospital employees[.]" N.C. Gen. Stat. § 131E-257(b)

1. The plain language of subsection (b) of the statute requires only the *information* with regard to these six items relating to a public hospital employee be public record. The statute does not require specific *documents* to be disclosed except as provided in subsection (c).

(2003). Second, in the Hospital Licensure Act, the General Assembly enacted a statute to address the confidentiality of personnel information, which provides: "the personnel files of employees or former employees, and the files of applicants for employment maintained by a public hospital as defined in G.S. 159-39 . . . are not public records as defined by Chapter 132 of the General Statutes." N.C. Gen. Stat. § 131E-97.1(a) (2003).

Plaintiff argues that the information it requested from defendant, such as "contract and payroll documents," is not included in the definition of "personnel file" in N.C.G.S. § 131E-257.2 because that information is not "gathered" by defendant. Plaintiff further asserts that by using the words "information . . . gathered by the public hospital," *see* N.C.G.S. § 131E-257.2(a), the General Assembly intended to exempt from the Public Records Act *only* "information actually collected by the public hospital about its own employees, such as internal performance reviews or evaluations." Plaintiff thus argues that "personnel file," as it is defined in N.C.G.S. § 131E-257.2, does not cover "contract and payroll documents[,]" which "relate to the expenditure of public monies and to the terms and conditions of public employment," but rather covers only performance information about public hospital employees "for use in making employment or disciplinary decisions."

Plaintiff does not cite any authority supporting its contention. Moreover, plaintiff's narrow definition of "gathered" is not consistent with rules of statutory construction. If a statute "contains a definition of a word used therein, that definition controls," but nothing else appearing, "words must be given their common and ordinary meaning[.]" *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974). Since "gathered" is not defined by the Public Hospital Personnel Act, we must employ its common and ordinary meaning. "Gather" is defined as: (1) "[t]o cause to come together; convene[,]" (2) "[t]o accumulate gradually; amass[,]" (3) "[t]o harvest or pick: *gather flowers*[,]" or (4) "[t]o collect in one place; assemble." The American Heritage Dictionary 550 (2d college ed. 1991). Logically, a personnel file, in the "commonly understood definition of a personnel file," *see Elkin Tribune, Inc. v. Yadkin County Bd. of Commissioners*, 331 N.C. 735, 737, 417 S.E.2d 465, 466 (1992), is comprised of information and documents, including employee contracts and payroll documents, which are amassed, accumulated, and collected into one place by the employer. Contrary to plaintiff's argument in this case, the documents it requested from defendant were

"gathered" by defendant if the documents were amassed or assembled in an employee's personnel file.

The definition of "gathered" in the present case follows our Supreme Court's interpretation of "gathered" in *Elkin Tribune, Inc.* In addressing a question similar to the one before us in the present case, our Supreme Court analyzed N.C. Gen. Stat. § 153A-98, which provides for the privacy of county employee personnel records. *Elkin Tribune, Inc.*, 331 N.C. 735, 417 S.E.2d 465. N.C. Gen. Stat. § 153A-98 contains almost identical language as is contained in N.C.G.S. § 131E-257.2. *See* N.C. Gen. Stat. § 153A-98 (2003). The plaintiffs in *Elkin Tribune, Inc.* argued that a county employee's application for employment was not included in the personnel file because the applications were *sent* to the county, not "gathered" by the county. *Elkin Tribune, Inc.*, 331 N.C. at 737-38, 417 S.E.2d at 467. The plaintiffs therefore argued that the applications they sought were not protected from public disclosure by N.C.G.S. § 153A-98. *Elkin Tribune, Inc.*, 331 N.C. at 737-38, 417 S.E.2d at 467. Our Supreme Court ruled, however, that "gathered" included the applications that were *sent* to the county. *Id.* Although not explicitly defining the term "gathered," the Supreme Court clearly did not interpret "gathered" narrowly, but rather, read "gathered" to mean amassed or collected in one place, which, as discussed above, is how we must now read "gathered" in N.C.G.S. § 131E-257.2.

Having determined, in light of our Supreme Court's decision in *News and Observer Publishing Co.*, that the General Assembly intended N.C.G.S. § 131E-257.2 to be a "clear statutory exemption or exception" to the Public Records Act, and having determined, in light of our Supreme Court's decision in *Elkin Tribune, Inc.*, that the General Assembly intended "gathered" to mean amassed or collected in one place, we now evaluate what compensation-related records are included in a personnel file of a public hospital employee. Defendant contends that " 'current salary' is the *only* compensation information about a public hospital employee that is public record." Specifically, defendant argues that the trial court erred in ordering defendant to produce employment contracts, severance agreements, and "any other documents that describe[d] in whole or in part compensation paid (in any form) to [the persons listed in plaintiff's complaint]," when these documents exceeded the scope of "current salary."

Prior to the enactment of the Public Hospital Personnel Act in 1997, the confidentiality of personnel records for public hospital employees was governed by N.C.G.S. § 131E-97.1, which provided

that "total compensation," among other things, was a matter of public record subject to disclosure. N.C. Gen. Stat. § 131E-97.1(b) (1994). In 1997, the General Assembly repealed this provision in subsection (b) of N.C.G.S. § 131E-97.1, and enacted the Public Hospital Personnel Act, which, as discussed above, provides that with regard to compensation, only an employee's "[c]urrent salary, and the date and amount of the most recent increase or decrease in salary" is a matter of public record. We agree with defendant that because "[t]he legislature is always presumed to act with full knowledge of prior and existing law[,]" *A&F Trademark, Inc. v. Tolson*, 167 N.C. App. 150, 156, 605 S.E.2d 187, 192 (2004), making only "current salary," rather than "total compensation," a matter of public record indicates that the General Assembly deliberately chose to limit public disclosure of a public hospital employee's compensation to the employee's current salary.

The General Assembly's deliberate choice not to have "total compensation" be a matter of public record is further evidenced by the fact that the General Assembly used the broader term "compensation" in other sections of the Public Hospital Personnel Act, enacted at the same time as N.C.G.S. § 131E-257.2. For instance, the General Assembly provided in N.C.G.S. § 131E-257(b) that part of the purpose of the Public Hospital Personnel Act was "to authorize public hospitals to determine employee compensation[.]" N.C.G.S. § 131E-257(b). The General Assembly also used "compensation" in N.C. Gen. Stat. § 131E-257.1, which provides that "[a] public hospital shall determine the pay, expense allowances, and other compensation of its officers and employees[.]" N.C. Gen. Stat. § 131E-257.1(a) (2003). As defendant asserts, "[i]n the absence of contrary indication, it is presumed that no word of any statute is a mere redundant expression. Each word is to be construed upon the supposition that the Legislature intended thereby to add something to the meaning of the statute." *Transportation Service v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973). The General Assembly distinguished between "compensation" and "current salary," and consciously chose to use the term "current salary" in deciding what parts of a public hospital employee's personnel file was a matter of public record.

Defendant contends that the "common and ordinary meaning" of "salary" is "[a] fixed compensation for services, paid to a person on a regular basis." *See* The American Heritage Dictionary 1085. Plaintiff advocates for a broader reading of "current salary," arguing that defendant's reading of "salary" is inconsistent. Specifically, plaintiff asserts that defendant is trying to have "personnel file" encompass all

forms of compensation, but to narrowly define "salary" as "fixed compensation." Because subsection (a) of N.C.G.S. § 131E-257.2 defines "personnel file" as consisting of "any information in any form gathered by the public hospital with respect to an employee and, by way of illustration but not limitation, relating to . . . salary," plaintiff argues that "salary" in section (a) and (b) must be read consistently; i.e., "salary" cannot mean "total compensation" in section (a) and mean "fixed compensation" in section (b). We agree. However, the list of items in subsection (a), to which the information in a personnel file must relate, is merely illustrative. The statute explicitly qualifies the list with the phrase: "by way of illustration but not limitation." Other forms of compensation, such as severance agreements, are documents that would normally be included in what is "the commonly understood definition of a personnel file." *See Elkin Tribune, Inc.*, 331 N.C. at 737, 417 S.E.2d at 466. Furthermore, forms of compensation, other than salary, would *relate to* a public hospital employee's "selection or nonselection, performance, promotions," and possibly to the employee's "termination of employment." *See* N.C.G.S. § 131E-257.2(a). Therefore, we are not persuaded by plaintiff's argument that forms of compensation, other than salary, are not part of a public hospital employee's personnel file.

Plaintiff also argues that it offends common sense to "allow public institutions to avoid revealing how public officials are paid simply by shifting the form of pay from fixed salary to bonuses, lump-sum payments, or other forms of compensation." However, plaintiff ignores, as we have established above, that the General Assembly deliberately chose to treat public hospitals differently from other public institutions, by excepting personnel records of public hospital employees from the Public Records Act. Defendant asserts that the General Assembly enacted the Public Hospital Personnel Act to strike a balance between the public's interest in having access to financial information of government entities and the public hospital's need to compete effectively for qualified personnel with private hospitals that are not subject to public records laws. Whatever the General Assembly's policy considerations, the language employed by the General Assembly shows that it was concerned about protecting the confidentiality of public hospital personnel information, thereby specifically exempting this information from broad public access. *Cf. Virmani*, 350 N.C. at 477, 515 S.E.2d at 693 (discussing N.C. Gen. Stat. § 131E-95 and stating "the legislature has determined that this right of access is outweighed by the compelling

countervailing governmental interest in protecting the confidentiality of the medical peer review process").

We reverse the order of the trial court granting plaintiff summary judgment and remand for entry of an order granting summary judgment in favor of defendant.

Reversed and remanded.

Judges CALABRIA and ELMORE concur.

EILEEN C. PAYNE, ADMINISTRATRIX OF THE ESTATE OF HERBY S. PAYNE, DECEASED, EMPLOYEE, PLAINTIFF v. CHARLOTTE HEATING & AIR CONDITIONING, EMPLOYER, EMPLOYERS MUTUAL INSURANCE COMPANY, CARRIER, AND/OR ROSS AND WITMER, INC., EMPLOYER, TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA03-1651

(Filed 16 August 2005)

1. Appeal and Error— assignment of error—supporting authority required

Defendants' contention that workers' compensation death benefits were not properly before the Industrial Commission was not addressed because they failed to cite authority supporting their assignment of error.

2. Workers' Compensation— death benefits—opportunity to present evidence

Although defendants contended that they had not had the opportunity to present evidence on a workers' compensation death benefit claim, the record shows that defendants had notice that death benefits would be at issue and chose to rely on the contention that the question was not properly before the Commission.

3. Workers' Compensation— asbestosis—death benefit—time limit—equal protection violation

The time limitation for filing a claim for workers' compensation death benefits involving asbestosis and silicosis (N.C.G.S. § 97-61.6) violates the Equal Protection Clause under the rational

basis test. Since the parties here agreed that plaintiff's claim was within the time limit applicable to other occupational diseases, plaintiff's claim was timely filed.

4. Workers' Compensation— asbestosis—cause of death—finding by Commission—supported by evidence

The Industrial Commission's finding in a workers' compensation case that the deceased suffered from asbestosis is supported by competent evidence and is binding on appeal. The Commission extensively reviewed the medical evidence and is entitled to resolve questions of credibility and weight in plaintiff's favor.

5. Workers' Compensation— asbestosis—cause of disability—contributing cause of death—supported by evidence

There was evidence in the record to support the Industrial Commission's decision in a workers' compensation case that the deceased's asbestosis caused his disability and significantly contributed to his death.

6. Workers' Compensation— asbestosis—last exposure—findings supported by evidence

The evidence is sufficient to support the Industrial Commission's finding in a workers' compensation case that a deceased's last injurious exposure to asbestos occurred during his employment with defendant Ross & Witmer. There was testimony that the deceased worked directly with and supervised people cutting and installing asbestos wallboard and asbestos cloth and the deceased's supervisor testified that the deceased would have been exposed to asbestos any time he was on the job site.

Appeal by defendants Ross and Witmer, Inc. and Travelers Insurance Company from Opinion and Award of the North Carolina Industrial Commission entered 14 July 2003. Heard in the Court of Appeals 12 October 2004.

Wyrick, Robbins, Yates & Ponton, L.L.P., by K. Edward Greene and Kathleen A. Naggs; Wallace & Graham, P.A., by Mona Lisa Wallace, Richard L. Huffman; and M. Reid Acree, for plaintiff-appellee.

Nexsen, Pruet, Adams, Kleemeier, P.L.L.C., by Sean M. Phelan, for defendants-appellees Charlotte Heating & Air Conditioning and Employers Mutual Insurance Company.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by C. J. Childers, for defendants-appellants Ross and Witmer, Inc. and Travelers Insurance Company.

GEER, Judge.

This appeal arises out of Herby S. Payne's workers' compensation claim for disability benefits based on asbestosis. Subsequent to the hearing on his claim, but before a decision was rendered, Mr. Payne died and his wife Eileen C. Payne, the administratrix of his estate, was substituted as plaintiff. Defendants Ross and Witmer, Inc. ("R&W") and Travelers Insurance Company have appealed from the Industrial Commission's opinion and award (a) granting total disability benefits for a period preceding Mr. Payne's death and death benefits under N.C. Gen. Stat. § 97-39 (2003) and (b) finding that Mr. Payne was last injuriously exposed to the hazards of asbestosis while employed at R&W.

The primary issues on appeal are whether the death benefits claim was properly before the Commission and, if so, whether it is time-barred by N.C. Gen. Stat. § 97-61.6 (2003). We hold that the Full Commission had authority to decide the death benefits claims. Further, because we have concluded that N.C. Gen. Stat. § 97-61.6 violates the Equal Protection Clause, we hold that the claim for death benefits was timely. With respect to defendants' arguments regarding the merits of plaintiff's claim for benefits, since the Commission's findings are supported by competent evidence, the appropriate standard of review compels that we affirm the Commission's opinion and award.

Facts

Mr. Payne worked at Charlotte Heating & Air Conditioning from 1960 through 1966. He was responsible for servicing furnaces and boilers, during the course of which he was exposed to asbestos products. Mr. Payne mixed "asbestos mud" by pouring asbestos powder into buckets and adding water. He used the mud to repair boilers and insulate pipes. He also worked with asbestos rope and asbestos millboard, cutting it to size and installing it. Although he was, as a result, exposed to airborne asbestos dust, he was not provided and never used any form of respiratory protection.

After working for other companies in positions not involving significant asbestos exposure, Mr. Payne was employed by R&W from

1972 to 1975. At R&W, Mr. Payne primarily fabricated and installed duct work from sheet metal, but he also "set some furnaces." At one point during his employment with R&W, Mr. Payne worked on an apartment complex construction project involving furnace installations in 160 to 170 apartment units. Each furnace was surrounded by asbestos millboard and asbestos cloth. Mr. Payne was the supervisor of the crew and the Commission found was exposed to airborne asbestos dust without having respiratory protection.

After Mr. Payne's employment with R&W ended, his subsequent jobs did not expose him to asbestos products to any significant extent. In 1989, Mr. Payne developed back problems that required surgery. After the surgery, he remained symptomatic and did not return to work, but rather began receiving Social Security disability. Mr. Payne and his wife both testified that ultimately his back symptoms were no longer the cause of his disability.

In January 1994, Mr. Payne saw a pulmonologist regarding a notable worsening of his ability to breathe. Mr. Payne had smoked one to two packages of cigarettes daily until quitting in 1993. Pulmonary function studies indicated very severe obstructive lung disease and severe emphysema. Upon further x-rays and examinations, Mr. Payne was diagnosed with emphysema, asbestosis, and pleural plaques related to asbestos exposure. Two National Institute of Occupational Safety and Health ("NIOSH") certified "B readers," who evaluate whether workers exposed to dust in their work environments have dust-related disease, also found that Mr. Payne had asbestosis or disease related to asbestos exposure. A third certified "B reader" found pulmonary abnormalities caused by asbestosis, but concluded that asbestos exposure probably did not contribute to Mr. Payne's pulmonary impairment.

In February 1996, Mr. Payne filed an Industrial Commission Form 18B seeking total disability benefits based on asbestosis. A hearing was conducted on Mr. Payne's claim on 3 May 2000 by deputy commissioner Morgan S. Chapman. On 16 October 2000, Mr. Payne died. The deputy commissioner ultimately ordered that the record remain open until 15 September 2001, almost a year later. On 21 November 2001, the deputy commissioner issued an opinion and award, sustaining defendants' objection to any ruling on the issue of death benefits; holding that, in any event, death benefits were barred by N.C. Gen. Stat. § 97-61.6; and finding that Mr. Payne did not contract asbestosis and did not suffer any disability as a result of his exposure to asbestos.

On 14 July 2003, the Full Commission filed an opinion and award, finding that the issue was properly before the Commission; that Mr. Payne did indeed have asbestosis; that his asbestosis caused his total disability and significantly contributed to his death; and that his last injurious exposure occurred during his employment with R&W. Accordingly, the Commission awarded total disability compensation from 19 October 1999 through 16 October 2000 and death benefits under N.C. Gen. Stat. § 97-39. Defendants R&W and Travelers have appealed.

I

[1] Defendants first contend that the issue of death benefits was not properly before the Commission for determination. When a hearing was first requested, Mr. Payne was still alive. He died after the hearing, but prior to the entry of the deputy commissioner's opinion and award. On 28 February 2001, the deputy commissioner substituted Mrs. Payne, the administratrix for Mr. Payne's estate, as plaintiff and, on 6 September 2001, Mrs. Payne filed an amended Form 18B to assert a claim for death benefits.[1] The Full Commission concluded that as a result of the amended Form 18B, "the issue of decedent's eligibility for death benefits is before the Full Commission."

Defendants contend that the amended Form 18B and the substitution of Mrs. Payne as administratrix were insufficient to bring the issue of death benefits before the Commission. Defendants have not, however, cited any authority to support this contention. Under Rule 28(b)(6) of the Rules of Appellate Procedure, "[a]ssignments of error . . . in support of which no reason or argument is stated *or authority cited*, will be taken as abandoned." (Emphasis added.) We are not, therefore, free to revisit the Commission's determination that the amended Form 18B allowed the Commission to address the issue of death benefits.

[2] Defendants have, however, cited authority for their contention that they "were not afforded an opportunity to present evidence or investigate the matter in light of a claim for death benefits." Nonetheless, the record reveals that defendants questioned plaintiff's expert witness extensively regarding Mr. Payne's death and that plaintiff filed her amended Form 18B on or about 6 September 2001, prior to the closing of the record and more than two months before the

1. That amended Form 18B stated: "Plaintiff's asbestosis has either caused or significantly contributed to Decedent's death from emphysema and pulmonary fibrosis. Decedent died on October 16, 2000 as testified to by Dr. Stephen D. Proctor."

deputy commissioner filed her opinion and award. While on notice that plaintiff intended to pursue death benefits, defendants did not ask the deputy commissioner to extend the time for completing the record. Defendants apparently chose to rely upon their contention that the issue was not properly before the Commission.

After the deputy commissioner declined to address the issue of death benefits, plaintiff, in her Form 44 "Application for Review," specifically assigned as error the deputy commissioner's decision to "sustain[] the Defendant's objection on the issue of death benefits being a part of the claim since Plaintiff died subsequent to the hearing, since the death certificate was admitted into evidence and since Plaintiff filed an Amended I.C. Form 18B specifically alleging death benefits on account of his asbestosis." It is well established that "the full Commission has the duty and responsibility to decide all matters in controversy between the parties, and, if necessary, the full Commission must resolve matters in controversy even if those matters were not addressed by the deputy commissioner." *Crump v. Independence Nissan*, 112 N.C. App. 587, 589, 436 S.E.2d 589, 592 (1993) (internal citations omitted). Specifically, a "plaintiff, having appealed to the full Commission pursuant to G.S. 97-85 and having filed his Form 44 'Application for Review,' is entitled to have the full Commission respond to the questions directly raised by his appeal." *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 639, 414 S.E.2d 771, 774 (1992).

Thus, once plaintiff included the issue of death benefits in her Form 44, defendants were on notice that the Full Commission would be required to address that issue. At that point, defendants had a strategic choice to make. They could (1) rest on their contention—accepted by the deputy commissioner—that the question of death benefits was not properly before the Commission or (2) request that the Full Commission allow them an opportunity to present evidence with respect to death benefits. "The Commission, when reviewing an award by a deputy commissioner, may receive additional evidence, even if it was not newly discovered evidence." *Cummins v. BCCI Constr. Enters.*, 149 N.C. App. 180, 183, 560 S.E.2d 369, 371-72, *disc. review denied*, 356 N.C. 611, 574 S.E.2d 678 (2002). If the Full Commission chose to address the issue of death benefits on the merits and determined that the transcript and record were insufficient to resolve that issue, then the Commission would have been required to "conduct its own hearing *or remand* the matter for further hearing." *Crump*, 112 N.C. App. at 589, 436 S.E.2d at 592.

Defendants, however, chose not to ask the Commission for the opportunity to present additional evidence. The record contains no request by defendants at any time (1) for an opportunity to supplement the record with medical evidence or other testimony regarding death benefits, (2) for a remand to the deputy commissioner for a hearing on that issue, or (3) for an evidentiary hearing before the Full Commission. In defendants' brief to the Full Commission, included in the record on appeal, defendants argue only (1) that the death benefits issue was not properly before the Commission because Mr. Payne died after the hearing before the deputy commissioner and (2) that plaintiff's evidence was insufficient to support an award of death benefits. Defendants' brief contains no suggestion that additional evidence should be taken on the death benefits issue.

The record thus reflects that defendants had notice that death benefits would be at issue at a time when they still could have offered evidence. Defendants have not established that they were denied an opportunity to be heard because they did not ask to present additional evidence. *See Cummins*, 149 N.C. App. at 185, 560 S.E.2d at 373 (defendants were not denied an opportunity to be heard when they had a doctor's records for two years and made no motion to depose that doctor until after the Full Commission entered its opinion and award). *Compare Allen v. K-Mart*, 137 N.C. App. 298, 302, 528 S.E.2d 60, 63-64 (2000) (defendants were denied an opportunity to be heard when the Full Commission admitted evidence of two independent medical examinations ("IMEs") submitted by plaintiff, but did not rule until after filing its opinion and award on defendants' five objections to the allowance of the IMEs, defendants' request to depose two physicians, and on defendants' six requests to have plaintiff submit to an IME by a physician of defendants' choosing). We, therefore, hold that defendants have not demonstrated that they were denied notice and an opportunity to be heard on the issue of death benefits.

II

[3] Defendants argue that, even if the issue of death benefits was properly before the Commission, the claim was barred by N.C. Gen. Stat. § 97-61.6. Plaintiff argues in response that the statute violates the Equal Protection Clause and is, therefore, unconstitutional. The Full Commission awarded death benefits to plaintiff without specifically addressing the constitutionality of this statute. The parties agree, however, that if N.C. Gen. Stat. § 97-61.6 controls, then plaintiff is barred from seeking death benefits.

Paragraph 4 of N.C. Gen. Stat. § 97-61.6 sets out the time frame within which a claim for death benefits may be brought if the death resulted from asbestosis and silicosis:

> [S]hould death result from asbestosis or silicosis *within two years from the date of last exposure*, or should death result from asbestosis or silicosis, or from a secondary infection or diseases developing from asbestosis or silicosis *within 350 weeks from the date of last exposure* and while the employee is entitled to compensation for disablement due to asbestosis or silicosis, either partial or total, then in either of these events, the employer shall pay, or cause to be paid compensation in accordance with G.S. 97-38.

(Emphasis added.) In comparison, for occupational diseases other than asbestosis or silicosis, N.C. Gen. Stat. § 97-38 (2003) provides for payment of death benefits "[i]f death results proximately from a compensable injury or occupational disease and *within six years thereafter, or within two years of the final determination of disability*, whichever is later . . . ." (Emphasis added). Thus, for asbestosis and silicosis, the time limitation runs from the date of last exposure, while for all other occupational diseases, the focus is on the occurrence of the occupational disease and the final determination of disability.

Plaintiff contends that N.C. Gen. Stat. § 97-61.6 deprives those with asbestosis and silicosis of equal protection under the law. Plaintiff points out: "Victims of [asbestosis and silicosis], because of paragraph 4 of N.C. Gen. Stat. §97-61.6, are the only group of individuals suffering from occupational diseases whose claims must be diagnosed within a certain time period from date of last exposure; thus to preserve their future death benefits, these individuals would have to file claims prior to diagnosis or death." Plaintiff argues that there is no rational basis for providing a substantially shorter time frame for death benefit claims based on asbestosis or silicosis than death benefits claims based other latent occupational diseases.

The principles governing our decision in this case were set out by this Court—and approved by the North Carolina Supreme Court—in *Walters v. Algernon Blair*, 120 N.C. App. 398, 462 S.E.2d 232 (1995), *aff'd per curiam*, 344 N.C. 628, 476 S.E.2d 105 (1996), *cert. denied*, 520 U.S. 1196, 137 L. Ed. 2d 700, 117 S. Ct. 1551 (1997). *Walters* addressed the question whether N.C. Gen. Stat. § 97-63 (1991), "which treats employees with asbestosis and silicosis differently from

employees with other occupational diseases," violated the Equal Protection Clause. *Id.* at 400, 462 S.E.2d at 234.

N.C. Gen. Stat. § 97-63 provided that:

> Compensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this State, *provided no part of such period of two years shall have been more than 10 years prior to the last exposure.*

(Emphasis added.) The Commission in *Walters* had denied the plaintiff's claim for benefits based on asbestosis because he had not been exposed to asbestos dust for a period of two years in North Carolina during the 10 years prior to his last exposure.

In *Walters*, the Court first determined that the case implicated the Equal Protection Clause because "[t]he plaintiff suffers from asbestosis, a specifically enumerated occupational disease, N.C.G.S. § 97-53(24) (1991), and is therefore situated similarly to all other persons with occupational diseases." *Walters*, 120 N.C. App. at 400, 462 S.E.2d at 234. Once the Equal Protection Clause came into play, the question before the Court became "whether N.C. Gen. Stat. § 97-63, which treats employees with asbestosis and silicosis differently from other occupational diseases, furthers some legitimate state interest." *Id.*

The defendants in *Walters* argued that N.C. Gen. Stat. § 97-63 prevented forum shopping and ensured that North Carolina employers are not burdened with paying workers' compensation claims for which they are not responsible. The Court, however, noted that "[a]lthough the prevention of forum shopping and the protection against claims for which the employer is not responsible are legitimate state interests and are served by N.C. Gen. Stat. § 97-63, the statute is grossly underinclusive in that it does not include all who are similarly situated." *Walters*, 120 N.C. App. at 401, 462 S.E.2d at 234. The Court explained: "There are . . . many other serious diseases, such as byssinosis, that develop over time and to which N.C. Gen. Stat. § 97-63 does not apply and the defendants have not asserted any justification for treating asbestosis and silicosis differently from these other serious diseases." *Id.* at 401, 462 S.E.2d at 233 (internal quotation marks omitted). The Court, therefore, concluded that "the constitutionality of N.C. Gen. Stat. § 97-63 cannot be sustained and this case must be remanded to the Commission." *Id.*

Walters establishes the applicability of the Equal Protection Clause to this case based on its holding that a plaintiff suffering from asbestosis is "situated similarly to all other persons with occupational diseases." *Id.* at 400, 462 S.E.2d at 234. Further, N.C. Gen. Stat. § 97-61.6 treats people suffering from asbestosis and silicosis differently than people suffering from other latent occupational diseases. *See Walters*, 120 N.C. App. at 400, 462 S.E.2d at 233-34 ("The principle of equal protection of the law is explicit in both the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the Constitution of North Carolina and requires that all persons similarly situated be treated alike." (internal citations omitted)). As in *Walters*, the question before this Court is whether the distinction between employees suffering asbestosis or silicosis and employees suffering from other latent occupational diseases "bears a rational relationship to or furthers some legitimate state interest (minimum scrutiny)." *Id.*, 462 S.E.2d at 234.

In arguing that N.C. Gen. Stat. § 97-61.6 furthers a legitimate state interest, defendants contend that it is a statute of repose and thus advances the State's interest in finality. This contention begs the real question: what is the State's rationale for imposing a harsher statute of repose for claims involving asbestosis than for other latent occupational diseases, including other diseases resulting from exposure to asbestos? *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 434-35, 302 S.E.2d 868, 877 (1983) ("The equal protection clauses do not take from the state the power to classify persons or activities when there is a reasonable basis for such classification and for the consequent difference in treatment under the law." (internal quotation marks omitted)).

Defendants have presented no justification for the distinction made here between asbestosis/silicosis and other latent occupational diseases and we can conceive of none. As was true in *Walters*, the general goals articulated by defendants for the statute are legitimate state interests, but N.C. Gen. Stat. § 97-61.6—like the statute at issue in *Walters*—is "grossly underinclusive in that it does not include all who are similarly situated." *Walters*, 120 N.C. App. at 401, 462 S.E.2d at 234.

While defendants point to asbestosis as "unique" because of its incurable and latent nature, our Supreme Court has already observed:

> A disease presents an intrinsically different kind of claim. Diseases such as asbestosis, silicosis, and chronic obstructive

> lung disease normally develop over long periods of time after multiple exposures to offending substances which are thought to be causative agents. . . . The first *identifiable* injury occurs when the disease is diagnosed as such, and at that time it is no longer latent. . . . Even with diseases which might be caused by a single harmful exposure such as, for example, hepatitis, it is ordinarily impossible to determine which of many possible exposures in fact caused the disease. . . . Both the Court and the legislature have long been cognizant of the difference between diseases on the one hand and other kinds of injury on the other from the standpoint of identifying legally relevant time periods.

Wilder v. Amatex Corp., 314 N.C. 550, 557-58, 336 S.E.2d 66, 70-71 (1985). Thus, many occupational diseases, because of their latency or need for repeated exposure to hazardous conditions, give rise to concerns about "finality." Indeed, paragraph 4 of N.C. Gen. Stat. § 97-61.6 does not even encompass other asbestos-related deaths, such as deaths from mesothelioma, a terminal asbestos cancer caused by exposure to asbestos, but not secondary to asbestosis. *See Robbins v. Wake County Bd. of Educ.*, 151 N.C. App. 518, 566 S.E.2d 139 (2002) (addressing claim based on mesothelioma arising out of exposure to asbestos).

As this Court has since explained, in discussing the application of the Equal Protection Clause, "[t]he statute at issue in *Walters* imposed upon claimants suffering from asbestosis or silicosis an additional burden for recovery not so imposed on claimants with other occupational diseases. The purposes for which the statute was enacted were equally applicable to all claimants suffering from occupational diseases." *Jones v. Weyerhaeuser Co.*, 141 N.C. App. 482, 488, 539 S.E.2d 380, 383-84 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 525, 549 S.E.2d 858 (2001). This analysis is equally true in this case. N.C. Gen. Stat. § 97-61.6 imposes an additional burden for recovery—a shorter time frame for death benefits claims—for asbestosis or silicosis when no rational basis exists for treating such occupational diseases differently from other latent occupational diseases.

Because defendant has failed to suggest a justification for treating asbestosis differently than other latent occupational diseases, such as byssinosis, we hold that the time limitation in the fourth paragraph of N.C. Gen. Stat. § 97-61.6 violates the Equal Protection Clause under the rational basis test. Since the parties agree that plaintiff's claim was within the time limitation applicable to other occupational

diseases, N.C. Gen. Stat. § 97-38, we uphold the Commission's determination that plaintiff's claim for death benefits was timely filed.

III

[4] Defendants R&W and Travelers next contend that the Commission's determination that Mr. Payne's asbestosis caused or significantly contributed to his disability and death is not supported by the evidence. In reviewing decisions by the Commission, "we are limited to the consideration of two questions: (1) whether the Full Commission's findings of fact are supported by competent evidence; and (2) whether its conclusions of law are supported by those findings." *Calloway v. Mem'l Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000). If the findings are supported by any competent evidence, they are conclusive on appeal, even if other evidence would support contrary findings. *Id.* Additionally, "[t]he evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

On this issue, defendants first contend that the evidence does not support a finding that Mr. Payne suffered asbestosis as defined by N.C. Gen. Stat. § 97-62 (2003) (defining "asbestosis" as "a characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust"). In support of this argument, defendants quote at length from Commissioner Sellers' dissent below, which purports to set out the definition of asbestosis developed by the American Thoracic Society and then applies that test to the evidence presented in this case. Significantly, defendants did not present expert witness testimony regarding the American Thoracic Society standard or the application of that standard to Mr. Payne.[2] Unquestionably, the standard by which asbestosis should be diagnosed and application of that standard in a specific case are questions requiring expert testimony. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (requiring expert testimony "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen"). The argument of defendants that Mr. Payne's condition does not meet the American Thoracic Society standard—as adopted by the dissenting Commissioner below—is unsupported by

2. Defendants' sole expert witness was Dr. Michael Alexander, a radiologist, who acknowledged that he was not a diagnosing physician for asbestosis and could not refute the diagnosis of a pulmonologist such as plaintiff's expert, Dr. Stephen Proctor.

any evidence in the record. As the Supreme Court recently reiterated by adopting Judge Steelman's dissenting opinion, "It is not the role of the Commission to render expert opinions." *Edmonds v. Fresenius Med. Care*, 165 N.C. App. 811, 819, 600 S.E.2d 501, 506 (2004) (Steelman, J., dissenting), *rev'd per curiam*, 359 N.C. 313, 608 S.E.2d 755 (2005).

This Court has previously rejected bare reliance "on a statement from the American Thoracic Society and other medical literature" as support for overturning the Commission's determination that a plaintiff had asbestosis as defined in N.C. Gen. Stat. § 97-62. *Austin v. Cont'l Gen. Tire*, 141 N.C. App. 397, 402, 540 S.E.2d 824, 828 (2000), *rev'd on other grounds*, 354 N.C. 344, 553 S.E.2d 680 (2001). Instead, after observing that the Commission made extensive findings regarding the medical evidence and expert testimony, this Court concluded that "[a] review of the deposition transcripts and medical evidence presented to the Commission shows plenary evidence to support the Commission's findings of fact. Accordingly, those findings are conclusive on appeal." *Id.* at 403, 540 S.E.2d at 828.

Likewise, in this case, the Commission extensively reviewed the medical evidence, including the diagnosis of Dr. Proctor that Mr. Payne suffered from emphysema and "asbestosis and pleural plaques related to asbestos exposure"; the opinion of Dr. Fred Dula, a NIOSH certified B-reader, that Mr. Payne's chest films were "entirely consistent with asbestosis"; and the opinion of Dr. Richard Bernstein, a NIOSH certified B-reader, that Mr. Payne's x-rays showed "[p]leural disease consistent with long standing asbestos exposure." While the Commission noted the testimony of Dr. Michael Alexander, also a certified B-reader, that any pulmonary impairment was caused by emphysema, the Commission concluded: "Given that Dr. Alexander is not a pulmonologist, did not examine plaintiff personally and is not a diagnosing physician, the Full Commission gives greater weight to the diagnostic conclusions of Dr. Proctor and the x-ray and CT interpretations of Drs. Dula and Bernstein."

While defendants argue with Dr. Proctor's diagnosis, they present questions of credibility and weight that the Commission was entitled to resolve in favor of plaintiff. An appellate court reviewing a workers' compensation claim " 'does not have the right to weigh the evidence and decide the issue on the basis of its weight.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). Rather, the Court's duty goes no further than to determine " 'whether the record contains

any evidence tending to support the finding.' " *Id.* (quoting *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274). Because the Commission's finding that Mr. Payne suffered from asbestosis is supported by competent evidence, it is binding on appeal.

[5] Defendants next challenge the Commission's finding that Mr. Payne's asbestosis either caused or significantly contributed to his disability and his subsequent death. Defendants argue that there is no competent evidence that asbestosis caused plaintiff's death, and any findings made by the Commission were based upon pure speculation. To the contrary, Dr. Proctor, a specialist in pulmonary medicine, testified in his deposition to a reasonable degree of medical certainty that Mr. Payne's asbestosis significantly contributed to his death. Further, Dr. Proctor testified that Mr. Payne's asbestosis also severely impaired his ability to conduct daily activities and that he would have been unable, because of the asbestosis, to maintain employment, "[p]articularly if there were any—if there was any activity involved, he would not be able to do that." While defendants point to the fact that Mr. Payne had originally stopped working because of his back injury, both Mr. Payne and his wife testified that he subsequently ceased being disabled as a result of his back problem. It was for the Full Commission to decide whether that testimony was credible. Because there is evidence in the record that supports the Commission's finding that Mr. Payne's asbestosis caused his disability and significantly contributed to his death, these assignments of error are overruled.

IV

[6] Finally, defendants R&W and Travelers assign error to the Full Commission's finding that "[d]ecedent's last injurious exposure to asbestos occurred during his employment with defendant-employer Ross & Witmer." According to N.C. Gen. Stat. § 97-57 (2003), "the employer in whose employment the employee was last injuriously exposed to the hazards of such disease" shall be liable. Under the statute, with respect to asbestosis or silicosis, the worker must have been exposed for 30 working days within seven consecutive months in order for the exposure to be deemed injurious. *Id.* Our review 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).

Defendants argue first that plaintiff "provided no scientific evidence tending to show the presence of asbestosis [sic] in any

environment in which he worked at Ross & Witmer or, for that fact, any other employer." This Court has squarely held that "there is no need for such expert testimony." *Vaughn v. Insulating Servs.*, 165 N.C. App. 469, 473, 598 S.E.2d 629, 631, *disc. review denied*, 359 N.C. 75, 605 S.E.2d 150 (2004). *See also Abernathy v. Sandoz Chems./Clariant Corp.*, 151 N.C. App. 252, 259, 565 S.E.2d 218, 223, *cert. denied*, 356 N.C. 432, 572 S.E.2d 421 (2002) (holding that scientific evidence was not required regarding the extent of exposure to asbestos when deciding where the plaintiff was last injuriously exposed under N.C. Gen. Stat. § 97-57).

In *Abernathy*, this Court held that "competent evidence" existed to support a finding of liability under N.C. Gen. Stat. § 97-57 when (1) the plaintiff testified "that he worked around asbestos in one way or another up until the day he retired" and that he worked directly with asbestos approximately four days a week from 1991 to 1993, (2) another employee testified that the plaintiff would take down pipe containing asbestos two or three times a week, and (3) the yard where the plaintiff worked "was very dusty with levels of asbestos present." *Abernathy*, 151 N.C. App. at 259, 565 S.E.2d at 223. Plaintiff offered comparable evidence in this case.

Mr. Payne testified that as part of R&W's apartment complex project, he worked directly with and supervised people cutting and installing asbestos wallboard and asbestos cloth. Mr. Payne was either cutting or standing close to people cutting asbestos boards and cloth "roughly twice a week." Don Sloop, Mr. Payne's supervisor at the Barcelona Apartments Construction Project, testified that Mr. Payne would have been exposed to asbestos material any time he was on the job site. Mr. Payne specifically testified that any cutting of the asbestos board would cause asbestos dust to cover his clothes, face, and hair and he would breathe it in. Under *Abernathy*, this evidence is sufficient to support the Commission's finding that Mr. Payne's last injurious exposure to asbestos occurred during his employment with R&W.

For this reason and the reasons above, we affirm the Commission's opinion and award directing defendants R&W and Travelers to pay total disability and death benefits to plaintiff.

Affirmed.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

JANET BRANCH, EMPLOYEE, PLAINTIFF v. CAROLINA SHOE COMPANY, EMPLOYER, N.C. INSURANCE GUARANTY ASSOCIATION (FORMERLY RELIANCE INSURANCE COMPANY, CARRIER), STATUTORY INSURER, DEFENDANTS

No. COA04-1097

(Filed 16 August 2005)

1. Workers' Compensation— interlocutory order—reconsideration—notice

The Industrial Commission was not precluded in a workers' compensation case from revisiting an earlier order which did not determine all of the issues between the parties; however, the parties should have had notice that an issue might be reached and should have had an opportunity to present pertinent evidence.

2. Workers' Compensation— unauthorized treatment—physician's testimony—competent

The fact that a physician is not authorized by the Commission means that the employer and carrier cannot be required to pay for treatment, but does not render the physician's evidence incompetent.

3. Workers' Compensation— remand—law of the case

Determinations about an injury which were not appealed by plaintiff became the law of the case and, although addressed by defendant in its brief on appeal, may not be revisited on a remand on other grounds.

Appeal by defendants from Opinion and Award entered 6 April 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 April 2005.

Wayne W. Martin for plaintiff-appellee.

Orbock, Ruark & Dillard, PC, by Barbara E. Ruark, for defendants-appellees.

GEER, Judge.

Defendants Carolina Shoe Company and N.C. Insurance Guaranty Association appeal from an opinion and award of the Industrial Commission, awarding plaintiff Janet Branch total disability compensation based on a change of condition under N.C. Gen. Stat. § 97-47 (2003). On appeal, defendants argue that the Full Commission was bound by its decision remanding the case for an evidentiary hearing

on specified issues and that the Commission, therefore, erred when its subsequent opinion and award went beyond those specified issues. Although we hold that the Full Commission was not limited by its earlier decision, it was obligated to give the parties notice and an opportunity to be heard prior to basing its decision on issues that the parties had no reason to believe would be addressed. We, therefore, reverse the Commission's decision and remand for further proceedings to allow the parties an adequate opportunity to present evidence on the question whether there was a change of condition under N.C. Gen. Stat. § 97-47.

Facts

Sometime before March 1994, while working as a "utility person" for Carolina Shoe, Branch began to experience pain in her right foot.[1] After she was diagnosed as having a Morton's neuroma, defendants accepted that condition as a compensable occupational disease. Branch ultimately underwent two surgeries on her right foot.

On 26 September 1994, the parties entered into a Form 21 agreement for payment of temporary partial disability that was approved by the Commission on 11 October 1994. Throughout most of these proceedings, Branch continued to work part-time for Carolina Shoe, primarily in a position in the company's tag room where her duties included sorting papers and tags, hand stamping papers, and stapling papers.

Following her second surgery in 1995, Branch continued to experience pain in her right foot, and beginning in April 1996, Branch also began complaining about pain in her upper extremities. Her ongoing pain in her foot was diagnosed as reflex sympathetic dystrophy ("RSD"). Her doctors variously found no medical explanation for her upper extremity pain, found her upper extremities to be normal, or concluded that the upper extremity problems were the result of poor posture and deconditioning because of Branch's inactivity and lack of use of her right foot. From March 1995 through September 1997, in addressing Branch's conditions, her approved treating physicians each recommended that Branch increase her activity, including a gradual increase in her working hours until she was working eight hours a day. Branch did not comply with these recommen-

1. These facts are drawn from the findings of fact of the Full Commission in a 17 February 1999 opinion and award that neither party appealed. In the opinion and award that is the subject of this appeal, the Commission concluded that these findings are binding on the parties. That conclusion has not been challenged on appeal.

dations but rather worked between two to four hours per day, five days a week.

In addition to seeing her approved physicians, Branch consulted with Dr. Gary Poehling beginning in December 1996. Dr. Poehling has never been authorized by the insurer or the Commission as a treating physician. With respect to her right foot, he agreed with the diagnosis of RSD and recommended that Branch be as active as possible, but approved a modified work schedule. In May 1997, Dr. Poehling saw Branch for complaints of pain in her upper extremity. He recommended work restrictions of light duty, less than five pounds lifting, no repetitive use of the right extremity, and no vibrating tools. Dr. Poehling next saw Branch on 4 September 1997. He diagnosed complex regional pain syndrome in both the upper and lower right extremities. He recommended that she continue to work on light duty and that she increase her work time from four to six hours per day.

In an opinion and award filed 31 December 1997, following a hearing in February 1997, deputy commissioner W. Bain Jones, Jr. found that Branch's condition at that point was "the result of her failure to comply with the treatment recommendations of all of her physicians, by failing to increase her activities, including increasing the number of hours she daily works at her job." He concluded that "[p]laintiff has unjustifiably refused to return to work pursuant to her physicians' instructions; therefore her eligibility for wage loss compensation under the Act is suspended as of 22 May 1997."

On 9 January 1998, plaintiff appealed to the Full Commission. In an opinion and award filed 17 February 1999, the Commission made the following pertinent findings of fact:

> 29. Plaintiff's condition is the result of her failure to comply with the treatment recommendations of her physicians that she increase her level of activity, including increasing the number of daily hours she works at her job. The tag room position did not aggravate or contribute to her continuing complaints of pain, and she is physically able to perform the tasks of the job. The primary reason for her condition is inactivity and resulting deconditioning.
>
> 30. Plaintiff's upper extremity complaints are not medically substantiated and are not caused by the compensable foot injury. The tag room position did not cause plaintiff's upper extremity pain.

31. The physicians' findings of various points of maximum medical improvement in this case demonstrate how plaintiff's self-limitations on her physical activity have worsened her condition and prevented her recovery. These self-limitations were out of proportion to her pain and were unjustified. Plaintiff did not demonstrate a motivation to improve. She did not demonstrate a willingness to return to work full time in the tag room or in any other available light duty positions. Absent her self-imposed limitations, plaintiff likely would have improved and would have been able to return to work full time. Given plaintiff's noncompliance, it is unlikely that further medical intervention will improve her condition.

32. Plaintiff reached maximum medical improvement no later than 16 September 1997. She has a permanent impairment rating of 20% to her left foot.

Based on its findings, the Commission concluded that Branch had unjustifiably refused to comply with her physicians' recommendations that she increase her level of activity, including her work hours, in order to improve. It, therefore, suspended her eligibility for wage loss compensation as of 16 September 1997. The Commission also concluded that Branch was not entitled, for the same reasons, to payment for medical treatment after that date.

The Commission directed that "[i]n order to reinstate benefits, plaintiff must comply with the following work schedule: Plaintiff must begin working four hours a day regularly for a period of two weeks, then increase her daily work schedule by one hour each successive week until she reaches a regular schedule of eight hours per day." Neither party appealed from this opinion and award.

One month later, on 5 April 1999, Branch filed a Form 18 that alleged a "worsening in her pain syndrome from the work related injury." The nature and extent of this injury was reported to be "[c]omplex regional pain syndrome involving the predominantly right lower extremity as well as right upper extremity secondary to work related injury to the right lower extremity." Plaintiff claimed her disability started on 6 November 1997.

On 25 September 2000, deputy commissioner Richard B. Ford filed an order addressing two motions of plaintiff: (1) a motion to combine plaintiff's original claim (I.C. No. 453005) with her new claim (I.C. No. 921804) for purposes of hearing, and (2) a motion to

reopen I.C. No. 453005 for change of condition. The deputy found that Branch had not appealed from the prior opinion and award and had not complied with it, that the terms and conditions in I.C. No. 453005 were the law in the case, that there had been no change of condition with respect to plaintiff's right foot, and that I.C. No. 921804 sought recovery for an upper extremity injury occurring on 5 November 1997. He ordered that the 31 December 1997 opinion and award was still in full force and effect and that I.C. No. 921804 would be set for hearing. Plaintiff appealed this decision to the Full Commission on 5 October 2000.

In an opinion and award filed 20 March 2002, the Full Commission concluded first that "[p]laintiff is entitled to file a motion to modify the Commission's Award based on a change of condition under Section 97-47 and is entitled to present evidence relevant to this issue." After concluding that the findings of fact and conclusions of law in the 17 February 2000 opinion and award were final and could not be relitigated, the Commission observed that "this fact does not preclude plaintiff from asserting and presenting relevant evidence on a change of condition under Section 97-47."

The Commission then concluded that this case differed from the usual N.C. Gen. Stat. § 97-47 change of condition claim because of the Commission's prior findings that (1) plaintiff has self-imposed limitations and failed to comply with her physicians' treatment plan, (2) the benefits had been suspended, and (3) plaintiff's upper extremity pain syndrome, as argued in I.C. No. 453005, is not related to her compensable lower extremity injury. The Commission, therefore, concluded that evidence that plaintiff's condition had gotten worse would not "purge the prior finding that plaintiff failed to accept suitable employment and thereby is not entitled to benefits under Section 97-32. Therefore, mere evidence that plaintiff's condition has worsened is not relevant to the issues before the Commission."

The Commission then remanded to the deputy commissioner for a hearing on specified issues:

> [T]he issues raised by plaintiff's Form 18 in I.C. No. 921804 and the motion for change of condition in I.C. No. 453005 are: (1) whether plaintiff has complied with her physician's treatment plan and reasonably sought employment sufficient to remove the Section 97-32 suspension of benefits; (2) whether plaintiff has sustained a compensable injury to her right upper extremity in I.C. No. 921804 that is different from the condi-

tion for which compensation was previously sought and denied in I.C. No. 435005; and if so, (3) what benefits, if any, is plaintiff entitled to receive.

On remand, a hearing took place before deputy commissioner Ronnie E. Rowell, and the parties took the depositions of Dr. Mark McManus, Dr. Gary Poehling, and Dr. Hans Hansen. Following the closing of the record, the deputy commissioner transferred the matter to the Full Commission.

The Full Commission entered its opinion and award on 6 April 2004. The Commission first observed that the medical depositions would support findings that plaintiff's complex regional pain syndrome migrated from her lower extremity to the upper extremity, that the tag room position exacerbated the upper extremity pain syndrome and that, as of December 1997, plaintiff was unable to work in any job due to the complex regional pain syndrome in her upper and lower extremities. The Commission then found (1) that plaintiff had presented no evidence that she had made any effort to seek employment or to comply with the 17 February 1999 opinion and award, (2) that plaintiff presented no evidence of a new onset of an occupational disease or new injury in I.C. No. 921804, and (3) that the issues concerning plaintiff's upper extremity condition and its relationship to her compensable right foot condition and the tag room job "have previously been litigated and ruled upon by the Full Commission. The Full Commission decisions on these issues were not appealed and therefore are final and binding on the parties."

The Commission then ruled that the only remaining issue was whether plaintiff had sustained a change of condition. The Commission acknowledged that its 20 March 2002 opinion and award had stated that "mere evidence that plaintiff's condition has worsened is not relevant to the issues before the Commission," but found that "the recently submitted uncontroverted medical evidence in the deposition testimony of Drs. Poehling, Hansen and McManus shows that plaintiff was not capable of work in any employment after December 18, 1997 due to the pain syndrome in both upper and lower extremities." The Commission added that "[t]here is no medical evidence in the record that since December 1997 plaintiff was capable of returning to work in any employment or that working would improve her condition."

Based on these findings, the Commission concluded that plaintiff's upper extremity condition was not compensable under either

I.C. No. 453005 or I.C. No. 921804. The Commission concluded, however, that as of 18 December 1997, plaintiff was no longer capable of work in any employment due to the combination of her compensable complex regional pain syndrome in her lower extremity and her non-compensable complex regional pain syndrome in her upper extremity. Because no medical evidence was presented to apportion the extent of disability between the compensable condition and the non-compensable condition, the Commission concluded that plaintiff was entitled to a resumption of total disability compensation after 18 December 1997 "and continuing until further Order of the Commission."

The Commission also concluded that plaintiff was entitled to authorized medical treatment related to the compensable right foot condition, but because Drs. Poehling, McManus, and Hansen were not authorized treating physicians, plaintiff was not entitled to payment by defendants of the care provided by those physicians. The Commission then directed that a Commission nurse be assigned to manage plaintiff's treatment, to assist the parties in the designation of an authorized treating physician, and to schedule a vocational assessment as recommended by Dr. Hansen.

Defendants filed a timely notice of appeal of the Full Commission's opinion and award. Plaintiff has not appealed any aspect of the opinion and award.

Discussion

[1] Defendants argue on appeal that the Commission was precluded by its 20 March 2002 decision from concluding in its 6 April 2004 opinion and award that plaintiff had sustained a change of condition. We disagree.

"This Court has held that when the matter is 'appealed' to the full Commission pursuant to G.S. 97-85, it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties." *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992). In appealing to the Full Commission, a plaintiff "is entitled to have the full Commission respond to the questions directly raised by [its] appeal." *Id.* at 639, 414 S.E.2d at 774.

Despite the Commission's responsibility to consider all the issues before it, "[t]he doctrine of *res judicata* precludes relitigation of final orders of the Full Commission and orders of a deputy commissioner

which have not been appealed to the Full Commission." *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 138, 502 S.E.2d 58, 61, *disc. review denied*, 349 N.C. 228, 515 S.E.2d 700 (1998). In *Bryant*, similarly to this case, the plaintiff did not appeal from a deputy commissioner's initial opinion and award suspending the plaintiff's compensation benefits until the plaintiff cooperated with reasonable vocational rehabilitation efforts. *Id.* at 136, 502 S.E.2d at 59. Subsequently, a deputy commissioner and, on appeal, the Full Commission found that the plaintiff was incapable of participating in a vocational rehabilitation program. *Id.* at 137, 502 S.E.2d at 60.

This Court, in reviewing the defendant's contention that the Commission's decision was barred by *res judicata*, held that "[t]he essential elements of *res judicata* are: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in the prior suit and the present suit; and (3) an identity of parties or their privies in both suits." *Id.* at 138, 502 S.E.2d at 61. The Court concluded that the doctrine of *res judicata* was not implicated in *Bryant* because "the Full Commission did not relitigate whether Plaintiff must comply with 'reasonable' vocational rehabilitation, but merely determined that Plaintiff was incapable of complying with the available vocational rehabilitation program." *Id.*

In this case, because the 20 March 2002 opinion and award did not conclusively determine the issues between the parties, but rather ordered further proceedings, it was an interlocutory order and not a final judgment on the merits. " '[A]n interlocutory order or decree is provisional or preliminary only. It does not determine the issues joined in the suit, but merely directs some further proceedings preparatory to the final decree.' " *Poore v. Swan Quarter Farms, Inc.*, 57 N.C. App. 97, 101, 290 S.E.2d 799, 802 (1982) (emphasis omitted) (quoting *Johnson v. Roberson*, 171 N.C. 194, 196, 88 S.E. 231, 231-32 (1916)). *See also Plummer v. Kearney*, 108 N.C. App. 310, 312, 423 S.E.2d 526, 528 (1992) ("An order is not final, and therefore interlocutory, if it fails to determine the entire controversy between all the parties."). Since the 20 March 2002 decision was not a final judgment on the merits, but rather an interlocutory decision, the doctrine of *res judicata* does not apply.

The Commission has the ability to modify its interlocutory decisions prior to rendering a final decision on the merits. As our Supreme Court observed in *Russ*, "[a]n interlocutory order or judgment differs from a final judgment in that an interlocutory order or judgment is subject to change by the court during the pendency of the

action to meet the exigencies of the case." *Russ v. Woodard*, 232 N.C. 36, 41, 59 S.E.2d 351, 355 (1950) (internal quotation marks omitted). *See also Welch v. Kingsland*, 89 N.C. 179, 181 (1883) ("We think authority to vacate or modify previous orders ascertained to be erroneous or wrong, when discovered during the progress of the cause and before final judgment, does reside in the court, and on proper occasions should be exercised to promote the ends of justice."). The Commission was, therefore, free to revisit its 20 March 2002 decision prior to filing a final opinion and award on the merits.

Defendants point to *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 309 S.E.2d 273 (1983), *disc. review denied*, 311 N.C. 407, 319 S.E.2d 281 (1984), in which this Court held:

> By order of the full Commission, the initial hearing was limited to defendant's motion to dismiss for lack of jurisdiction. Given the limited scope of the hearing, it was patently improper for the deputy commissioner to find and conclude that plaintiff had suffered an injury arising from his employment with defendant. It was similarly improper for the full Commission, on appeal from the Opinion and Award of the deputy commissioner, to find and conclude that plaintiff had a compensable injury, regardless of its ruling with respect to jurisdiction. To hold otherwise would deny both parties their rights under the law. We therefore express no opinion as to the substantive merits of plaintiff's claim but limit our opinion to the question of whether the Industrial Commission had jurisdiction to consider the claim.

Id. at 312, 309 S.E.2d at 275. The Court then proceeded to conclude that the Industrial Commission had no jurisdiction to consider the plaintiff's claim and that the defendant's motion to dismiss should have been granted. *Id.* at 315, 309 S.E.2d at 277. We read this opinion as holding in part that the Commission must first decide whether it has jurisdiction prior to reaching the merits. *See Bryant v. Hogarth*, 127 N.C. App. 79, 83, 488 S.E.2d 269, 271 ("Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy."), *disc. review denied*, 347 N.C. 396, 494 S.E.2d 406 (1997).

We also believe that the Court's reference to a denial of the rights of the parties concerned the lack of notice and opportunity to be heard. *See Allen v. K-Mart*, 137 N.C. App. 298, 304, 528 S.E.2d 60, 64 (2000) ("The opportunity to be heard . . . [is] tantamount to due process and basic to our justice system. . . . Therefore, we hold that

where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence."). The requirement of due process does not, however, mean that the Commission may not revisit its interlocutory decisions. Instead, the Commission must, prior to making its decision, ensure that the parties have notice that an issue may be reached and an opportunity to present evidence pertinent to that issue.

In this case, because of the Commission's interlocutory opinion and award remanding to the deputy commissioner, defendants had no notice that the Commission would be addressing a change of condition or plaintiff's inability to comply with the mandated work schedule until after the Commission filed its 6 April 2004 opinion and award. Defendants, therefore, had no opportunity to obtain and present medical evidence on those issues. The Commission then relied upon this lack of evidence when it found: "There is no medical evidence in the record that since December 1997 plaintiff was capable of returning to work in any employment or that working would improve her condition." Defendants justifiably contend that they "have now been penalized" by their adherence to the Commission's prior decisions. Accordingly, we reverse the Commission's decision and remand for further proceedings to allow the parties to present evidence on the questions whether plaintiff experienced a change of condition under N.C. Gen. Stat. § 97-47, whether plaintiff is capable of working in any employment, and whether working would improve plaintiff's condition.

[2] Since the issue may arise upon remand, we note that defendants have argued that the Commission erred in making its findings by relying upon the testimony of unauthorized physicians, but cite no authority in support of this position. The fact that a physician is not authorized by the Commission means that the employer and carrier cannot be required to pay for treatment by that physician. *See Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 627, 540 S.E.2d 785, 789-90 (2000) (Commission could deny claim for medical expenses if physician not approved by Commission). It does not render the physician's evidence incompetent. The Commission did not, therefore, err in relying upon the opinions of Drs. Poehling, Hansen, and McManus even though they were not authorized treating physicians of plaintiff.

[3] Defendants have also addressed in their brief the question of the compensability of plaintiff's upper extremity condition. The Com-

mission ruled in its 6 April 2004 opinion and award that (1) "[t]he findings and conclusions [in the 17 February 1999 opinion and award] that plaintiff's upper extremity complaints are not causally related to the compensable foot injury or to the tag room position are final and may not be relitigated," and (2) "[p]laintiff did not sustain an injury by accident or contract a compensable occupational disease involving her right upper extremity in I.C. No. 921804." Neither of these determinations has been appealed by plaintiff, and they are, therefore, the law of the case and may not be revisited on remand.

Reversed and remanded.

Judges TIMMONS-GOODSON and CALABRIA concur.

RONALD C. ROGERS, PLAINTIFF-APPELLANT v. SMOKY MOUNTAIN PETROLEUM COMPANY, EMPLOYER, FEDERATED INSURANCE COMPANY, DEFENDANT-APPELLEES

No. COA04-58

(Filed 16 August 2005)

1. Workers' Compensation— back injury—specific traumatic incident—evidence not sufficient

The Industrial Commission's finding that a workers' compensation plaintiff had not met his burden of establishing that he suffered a back injury from a specific traumatic incident was supported by the evidence where there were inconsistencies in the medical information plaintiff shared with his treating physicians.

2. Workers' Compensation— back injury—pre-existing condition

The Industrial Commission did not err by finding that a preexisting condition barred a workers' compensation plaintiff from recovery where the expert medical testimony failed to establish that plaintiff's current back problem was either caused or aggravated by an accident or specific traumatic incident.

3. Workers' Compensation— back injury—causation—speculation

The Industrial Commission's finding and conclusion that a workers' compensation plaintiff failed to prove that he sustained a work-related injury to his back was proper where the evidence of causation was little more than speculation.

4. Workers' Compensation— credibility—findings

The Industrial Commission must consider all of the evidence presented to it in a workers' compensation case, but is the sole judge of credibility, is not required to make specific findings on credibility, and is not required to find facts as to all credible evidence. The Commission instead must find those facts necessary to support its conclusion, and did not err here.

Appeal by plaintiff from an Opinion and Award dated 12 September 2003 by the Full Commission. Heard in the Court of Appeals 23 September 2004.

Gary A. Dodd for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Sharon E. Dent, for defendant-appellees.

BRYANT, Judge.

Ronald C. Rogers (plaintiff) appeals from an Opinion and Award from the Full Commission dated 12 September 2003 denying benefits for his back injury under the North Carolina Workers' Compensation Act.

On 16 May 2001, plaintiff was employed as a duct cleaner for Smoky Mountain Petroleum Company and Federated Insurance Company (defendants). In fulfillment of his job duties as a "helper" on that day, he assisted installers Todd Fountain (Fountain) and Art Hollis (Hollis) in replacing an old furnace with a new heating and air conditioning system. To complete the task, they used a hand truck to move heavier items. Plaintiff testified he felt pain across his back and down his leg as he assumed the weight of the heat pump; however, Fountain and Hollis both testified they noticed no change in his performance, nor did plaintiff mention he had hurt himself.

At the time of the alleged injury, plaintiff was receiving treatment for back problems and had discontinued work from a different

employer in November 2000 due to low back pain. He began working for defendant in February 2001. On 17 May 2001, one day after the alleged injury, plaintiff received an epidural steroid injection from Dr. Cleveland Thompson. This was one injection in a series of three that had been planned in advance to treat plaintiff's existing back pain. However, during the visit, plaintiff did not mention to Dr. Thompson the alleged injury on the preceding day and, according to Dr. Thompson, plaintiff tolerated the procedure well. On 18 May 2001 plaintiff saw Dr. Terry White, his treating physician, complaining of more intense back pain and attributing the increased pain to having worked two days earlier. On 18 May 2001, Dr. White wrote plaintiff out of work until 24 May 2001. Despite Dr. White's work release plaintiff returned to work that same day. Plaintiff continued to work with defendant until he was referred by Dr. White to Dr. Keith Maxwell in September 2001 for continued back problems.

On 25 May 2001, plaintiff filed a Form 18, thereby initiating his claim against defendants for benefits pursuant to the Workers Compensation Act. Plaintiff's claim was denied by defendants.

This matter was heard before a Deputy Commissioner in Asheville on 29 April 2002. The deposition testimony of Dr. Maxwell and Dr. White was taken. After the hearing, on 8 May 2002, the Deputy Commissioner considered Dr. Maxwell's deposition testimony, in addition to Dr. White's testimony, to determine whether plaintiff was entitled to receive benefits. By Opinion and Award filed 27 November 2002, the Deputy Commissioner rejected plaintiff's testimony as not credible and denied plaintiff's claim concluding plaintiff failed to meet his burden of proving by competent evidence that he sustained a compensable injury on 16 May 2001.

In its Opinion and Award dated 12 September 2003, the Full Commission affirmed the Opinion and Award of the Deputy Commission with minor modifications.

Plaintiff raises five issues on appeal: whether the Commissioner erred in (I) finding plaintiff failed to prove by the greater weight of the evidence that he sustained a work-related back injury on 16 May 2001; (II) finding plaintiff's pre-existing condition to be a bar to recovery; (III) determining as a matter of law plaintiff failed to meet his burden of proof supported by competent evidence that his back injury resulted from a traumatic incident on 16 May 2001; (IV) determining as a matter of law that plaintiff's testimony lacked credibility;

(V) failing to consider all the competent (and material) evidence of record in making its findings of fact and conclusions of law.

I

[1] Plaintiff first argues the Commission erred in finding plaintiff failed to prove by a greater weight of the evidence that he sustained a work-related back injury on 16 May 2001.

> Pursuant to N.C. Gen. Stat. § 97-2(6):
>
> "Injury" . . . shall mean only injury by accident arising out of and in the course of the employment. . . . With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

N.C.G.S. § 97-2(6) (2003). Our Supreme Court has consistently held that "[o]n appeal from the Industrial Commission, the findings of the Commission are conclusive if supported by competent evidence and when the findings are so supported, appellate review is limited to review of the Commission's legal conclusions." *Pittman v. Twin City Laundry & Cleaners*, 61 N.C. App. 468, 471, 300 S.E.2d 899, 901 (1983) (citations omitted). Under the North Carolina Workers' Compensation Act, an employee seeking benefits "bears the burden of proving every element of compensability." *Gibbs v. Leggett & Platt*, 112 N.C. App. 103, 107, 434 S.E.2d 653, 656 (1993) (citation omitted). The degree of proof required of a claimant is the "greater weight" or the preponderance of the evidence. *Phillips v. U.S. Air*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995) (citations omitted). The Court's "duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

Here, the Commission did not err in finding plaintiff failed to meet his burden of proof to establish that he suffered a back injury resulting from a specific traumatic incident on 16 May 2001. Plaintiff's testimony revealed several inconsistencies in the medical information he shared with his treating physicians.

In assessing plaintiff's credibility, the Commission made the following pertinent findings of fact:

2. Plaintiff was employed by defendant . . . since February 1998 as a duct cleaner . . . [plaintiff] occasionally . . . assist[ed] install[ing] heating and air conditioning systems. On 16 May 2001, plaintiff was employed as a helper for defendant [to] assist . . . installers [Fountain and Hollis] . . . in removing an old furnace and installing a new heating and air conditioning system.

3. Plaintiff had pre-existing back problems. While working for a different employer, he suffered a back injury in October 1996 and following treatment, was released to return to work in March 1997 with a 5% permanent partial disability rating to his back. Upon his release, plaintiff continued to complain of pain while sitting, and was diagnosed with disc degeneration at L5-S1. Plaintiff returned to work in March 1997, but continued to receive chiropractic treatment.

4. Plaintiff continued to receive treatment for low back pain into 1998. . . . In July 1998, [his treating physician] Dr. Robertson diagnosed plaintiff with probable fibromyalgia. . . .

5. On 24 November 1999, [after receiving an epidural block to control his back and neck pain] plaintiff [saw] Dr. Terry White, upon referral by Dr. Robertson . . . who reviewed an MRI of plaintiff's lumbar region and diagnosed [him] with fibromyalgia and sacroiliac pain secondary to . . . degenerative disc disease [and prescribed plaintiff with medications]. . . .

6. Plaintiff continued to receive treatment [and physical therapy] by Dr. Robertson [and] Dr. White throughout 2000[.]

. . .

8. Plaintiff alleges that he injured his back while lowering the new unit [on 16 May 2001 and] . . . maintains [having] reported the incident to his supervisor, Sammy Parker on 18 May 2001. However, both [Fountain and Hollis] testified that plaintiff did not mention an injury to them . . . [on] 16 May 2001, nor did they notice any change in plaintiff's physical activities during the day.

9. There is no mention in Dr. Thompson's report of a work-related injury [on 17 May 2001, when plaintiff went to receive a previously scheduled epidural injection from him.]

. . .

11. Plaintiff continued to work for defendant . . . doing primarily light duty. On 4 June 2001, Dr. Robertson restricted plaintiff to

lifting no more than 50 pounds due to plaintiff's continuing complaints of back pain.

12. On 7 September 2001, plaintiff [saw Dr. Maxwell] for evaluation and treatment upon referral from Dr. White. Plaintiff did not inform Dr. Maxwell that he had been undergoing treatment for back pain prior to [16 May 2001], nor did Dr. Maxwell receive any medical records of plaintiff's prior back treatment. In addition, Dr. Maxwell's notes indicate that plaintiff informed him that he had been out of work since May 2001 despite information to the contrary in Dr. Robertson's treatment notes of June 2001.

"The Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony[.]" *Faison v. Allen Canning Co.*, 163 N.C. App. 755, 757, 594 S.E.2d 446, 448 (2004) (quotation omitted). In the instant case, plaintiff's statements to both Drs. White and Maxwell, when compared to plaintiff's recorded history of treatment for back problems, cast serious doubt on whether a work-related injury occurred as plaintiff represented. The findings of fact as determined by the Commission are supported by competent evidence. We overrule this assignment of error.

II

[2] Plaintiff next argues the Commission erred in finding his pre-existing condition to be a bar to recovery.

Plaintiff must prove a work-related accident was a causal factor [of his injury] by a "preponderance of the evidence." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158-59, 357 S.E.2d 683, 685 (1987). "Although medical certainty is not required, an expert's 'speculation' is insufficient to establish causation" between a pre-existing condition and a work-related injury. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). Our Supreme Court has held:

(1) [A]n employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses. (2) When 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 or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent. (3) On the other hand, **when a pre-existing, nondisabling, non-job-related disease or infirmity eventually causes an incapacity for work without**

> **any aggravation or acceleration of it by a compensable accident or by an occupational disease, the resulting incapacity so caused is not compensable**. . . .

Morrison v. Burlington Indus., 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981) (emphasis added).

As found by the Commission, plaintiff had pre-existing back problems, due to a 1996 workplace injury with a former employer. In 1999, plaintiff was diagnosed with fibromyalgia and sacroiliac pain due to degenerative disease. Through the year, plaintiff received pain treatment and physical therapy, including the series of epidural injections plaintiff was undergoing at the time of the alleged injury on 16 May 2001. Plaintiff's testimony of an injury by accident on 16 May 2001 was not supported by other competent evidence. The expert medical testimony failed to establish plaintiff's current back problem was either caused or aggravated by an accident or specific traumatic work-related event. This assignment of error is overruled.

III

[3] Plaintiff's third assignment of error is substantially related to his first two arguments. Plaintiff contends the Commission erred in determining as a matter of law that no competent evidence supports a conclusion that plaintiff's back injury occurred as a result of a traumatic incident on 16 May 2001.

Plaintiff argues the Commission improperly concluded that in order for back injuries to be compensable there must be a specific traumatic incident that occurred at a cognizable time and that back injuries occurring gradually are not compensable. We disagree.

Plaintiff relies on *Fish v. Steelcase* to support his argument that if he shows his injury was caused by an event occurring within a "judicially cognizable" period, and is not simply a gradual deterioration, then a work-related compensable back injury exists. *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 708, 449 S.E.2d 233, 237 (1994). In *Fish*, the plaintiff testified he felt a pull in his back while moving a desk at work, thought he would be fine, and continued working. Later the pain worsened, and finally his condition was diagnosed as a herniated disc. The Industrial Commission concluded plaintiff suffered no injury as a matter of law, holding plaintiff had failed to show a traumatic incident had occurred. This Court reversed the Industrial Commission and held the event causing the injury must be "judicially cognizable", but the event does not have to be "ascertainable on an

exact date." *Fish*, 116 N.C. App. at 709, 449 S.E.2d at 238. The case *sub judice* is distinguishable from *Fish* in that the actual date of the alleged injury is not in issue. Rather it is plaintiff's credibility as it relates to his testimony about the events that caused his back injury as well as the competency of his medical causation evidence that is at issue.

Despite the Commission's broad ability to determine its factual findings, "where the exact nature and probable genesis of a particular type of injury involves 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." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 598, 532 S.E.2d 207, 210-11 (2000) (quotations and citation omitted). "However, when such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) (citations omitted). In this case, the causation of plaintiff's particular back injury is at issue. Therefore, only an expert can render an opinion regarding causation. The two medical experts who were asked to testify in the case failed to present clear evidence as to the cause of plaintiff's back injury. Dr. White, plaintiff's treating physician, stated he "assumed plaintiff's back pain had come from moving the unit at work." Dr. White also said he observed muscle spasms on both sides of plaintiff's back on 18 May 2001 and that "he had never seen the spasms, especially visible [muscle] spasms until that time." On cross-examination, Dr. White testified that he had observed plaintiff "hav[ing] some spasm[s] in his back intermittently" prior to 18 May 2001. Meanwhile, Dr. Maxwell stated, and the Commission found:

> On 7 September 2001 . . . plaintiff did not inform Dr. Maxwell that he had been undergoing treatment for back pain prior to the alleged work-related injury. . . . In addition, Dr. Maxwell's notes indicate[d] that the plaintiff informed [Dr. Maxwell] that he had been out of work since May 2001, despite information to the contrary in . . . treatment notes of June 2001.

Under these circumstances, the evidence regarding the causation of plaintiff's alleged back injury amounts to little more than speculation. Since the medical evidence of causation here is not competent evidence, the Commission's finding of fact and conclusion that plaintiff failed to prove he sustained a work-related injury to his

back on 16 May 2001 was proper. Therefore, this assignment of error is overruled.

IV & V

[4] In his fourth and fifth assignments of error, plaintiff contends the Commission erred in failing to consider all the competent (and material) evidence of record in making its findings of fact and conclusions of law and determining as a matter of law that plaintiff's testimony lacked credibility.

Plaintiff accurately asserts the Commission must consider the evidence presented to it. "Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. Am. Nat'l Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (citation omitted); *see also Lineback v. Wake County Bd. of Comm'rs*, 126 N.C. App. 678, 486 S.E.2d 252 (1997). The Industrial Commission "is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness'[s] testimony entirely if warranted by disbelief of that witness." *Lineback*, 126 N.C. App. at 680, 486 S.E.2d at 254 (citing *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993)).

> This Court in *Adams* made it clear that the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

Deese v. Champion Int'l Corp., 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000); *see also Sheehan v. Perry M. Alexander Constr. Co.*, 150 N.C. App. 506, 563 S.E.2d 300 (2002).

Plaintiff also argues the Commission erred in finding his testimony lacked credibility as a matter of law. Just as the Commission is not required to make specific findings on the credibility of evidence, "[t]he Commission is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead the Commission must find those facts which

are necessary to support its conclusions of law." *Peagler*, 138 N.C. App. at 602, 532 S.E.2d at 213 (2000) (quotation and citation omitted).

Therefore, we find the following conclusion of the Commission to be supported by its findings of fact: "Plaintiff has failed to carry the burden of proof to establish by competent evidence that he suffered a back injury resulting from a specific traumatic incident on 16 May 2001 . . . [and his] testimony regarding the alleged injury is not accepted as credible." Accordingly, plaintiff's assignments of error are overruled.

Affirmed.

Judges TYSON and LEVINSON concur.

NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, PETITIONER-APPELLEE v. SHARON F. GREENE, RESPONDENT-APPELLANT

No. COA04-1261

(Filed 16 August 2005)

1. Administrative Law— judicial review—whole record test

The whole record test was to be applied by the trial court where a petitioner contesting a State hiring decision argued that the Administrative Law Judge's findings were not supported by substantial evidence. The whole record test requires that the trial court take all evidence into account, including the evidence which supports and evidence which contradicts the agency's findings. If the agency's findings are not supported by substantial evidence, the court may make its own, but the whole record test is not a tool of judicial intrusion.

2. Appeal and Error— assignments of error—too broadsided

An assignment of error involving application of the whole record test and the court's substitution of its own judgment could not be reviewed where respondent's assignments of error were too broadsided. None were followed by citations to the record or transcript, none specified which findings were being challenged, and the Court of Appeals could not determine the findings respondent was challenging.

3. Administrative Law— judicial review—improper determination of credibility—no prejudice

The improper substitution of the trial court's judgment about credibility for that of the Administrative Law Judge was not prejudicial where the finding had no bearing on the ultimate issue of whether respondent suffered age discrimination in not receiving a promotion at a state agency.

4. Appeal and Error— preservation of issues—Administrative Law Judge's conclusion

A state agency (petitioner) preserved appellate review of an Administrative Law Judge's conclusion that respondent established a prima facie case of age discrimination where it specifically excepted to many of the ALJ's conclusions, and, furthermore, drafted recommended conclusions of law that respondent had not made a prima facie case.

5. Employer and Employee— age discrimination—nondiscrimination reason for hiring—"substantially younger" not defined

A state agency (petitioner) established a legitimate, nondiscriminatory reason for not promoting an employee (respondent), and respondent did not show that this reason was a pretext for age discrimination. Although the trial court found that an inference of age discrimination did not arise because the successful applicant was not substantially younger than respondent, the issue of whether the selected applicant is substantially younger was not decided in this appeal.

Appeal by respondent from order entered 2 July 2004 by Judge Robert H. Hobgood in Superior Court, Wake County. Heard in the Court of Appeals 7 June 2005.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, for the State.

Alan McSurely for respondent-appellant.

McGEE, Judge.

Sharon F. Greene (respondent) appeals from the trial court's order reversing an order of the State Personnel Commission (the SPC) and affirming the action of the North Carolina Department of Crime Control and Public Safety (petitioner) in declining to promote respondent to a Personnel Analyst I position.

A Personnel Analyst II employee resigned from employment with petitioner in October 2002. Weldon Freeman (Freeman), petitioner's Personnel Director, posted the job opening as a Personnel Analyst I position. Respondent applied for the Personnel Analyst I position on 25 October 2002. Respondent was forty-six years old, had more than twenty years of experience in State government personnel administration, and was employed by petitioner as a Personnel Technician III/EEO Officer. In this role, respondent supervised two employees, including Shawnda Brown (Brown). Respondent had hired Brown to work for petitioner one year previously.

Brown also applied for the Personnel Analyst I position. Brown was thirty-nine years old, had obtained a B.A. from the University of South Florida, and had approximately six and a half years of experience in various personnel administration positions. A third person also applied for the position.

Each applicant was interviewed by a panel of three. The panel consisted of Freeman, Human Resources Partner Jerry McRae (McRae), and Director of Personnel Hanna Gilliam (Gilliam). Each interview lasted between thirty and forty-five minutes and each applicant was asked the same twenty questions. Gilliam asked the first seven questions, McRae asked the next nine questions, and Freeman asked the last four questions. At the conclusion of each interview, the applicant completed a ten-minute writing exercise. The selection criteria was based fifty percent on the interview, twenty-five percent on the writing exercise, and twenty-five percent on the applicant's work history.

Following each interview, the panel discussed the applicants' responses and writing exercises and gave each applicant a numerical score. Respondent received a score of thirty-one, the third applicant received a score of thirty-two, and Brown received a score of thirty-nine. Freeman sent an email announcement on 7 November 2002 stating that Brown was selected for the Personnel Analyst I position.

Crystal Goodman (Goodman), a Human Resources Associate, received Brown's Personnel Action Clearance package for processing. Goodman told McRae that she questioned the package because she did not believe that Brown was qualified for the Personnel Analyst I position. McRae reviewed Brown's application and determined that Brown should be given credit for two years of relevant experience based on her previous employment in the personnel department of Sam's Club. McRae's supervisor,

Nellie Riley, and State Personnel Director Thom Wright signed off on McRae's decision.

Respondent filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings on 21 November 2002. Respondent alleged that petitioner discriminated against her on the basis of her age when it selected Brown, a younger applicant, over respondent for the Personnel Analyst I position. A hearing was held on 29 August 2003 before an Administrative Law Judge (ALJ). The ALJ found that petitioner did discriminate against respondent because of respondent's age. The ALJ ordered that petitioner instate respondent to the Personnel Analyst II position; adjust respondent's employment record to reflect respondent as being a Personnel Analyst II as of 29 October 2002; remit all back pay, raises and other benefits respondent would have received; and pay respondent's reasonable attorney's fees. The SPC adopted, in total, the ALJ's decision and remedies. Petitioner filed a Petition for Judicial Review of the administrative decision of the SPC on 12 December 2003 with the trial court. The trial court reversed the final decision of the SPC. The trial court also affirmed the action of petitioner in declining to promote respondent to the Personnel Analyst I position.

We note at the outset that since respondent has failed to present an argument in her brief in support of assignment of error number eight, we deem it abandoned. N.C.R. App. P. 28(b)(6).

I.

[1] Respondent first contends that the trial court erred when it failed to limit its application of the whole record test in determining whether the decision of the SPC was supported by substantial competent evidence in view of the entire record and had a rational basis in the record. Under North Carolina's Administrative Procedure Act, a trial court may reverse or modify a SPC 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 [N.C. Gen. Stat. §] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2003). Our Supreme Court has directed that the first four grounds for reversal or modification are "law-based" inquiries that receive *de novo* review. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004). The last two grounds are "fact-based" inquiries and are reviewed under the whole record test. *Id.*

At the trial court, petitioner argued that the ALJ's findings of fact, as adopted by the SPC, were not supported by substantial evidence. Therefore, the trial court was to apply the whole record test when it reviewed the SPC's decision. N.C. Gen. Stat. § 150B-51(b)(5); *see also King v. N.C. Environmental Mgmt. Comm.*, 112 N.C. App. 813, 816, 436 S.E.2d 865, 868 (1993).

Application of the whole record test "requires the examination of all competent evidence to determine if the administrative agency's decision is supported by substantial evidence." *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). The whole record test requires that the trial court take all evidence into account, including the evidence that both supports and contradicts the agency's findings. *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 344, 342 S.E.2d 914, 919, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). When the agency's findings of fact are not supported by substantial evidence, the trial court may make its own findings of fact that may be "at variance with those of the agency." *Scroggs v. N.C. Justice Standards Comm.*, 101 N.C. App. 699, 702-03, 400 S.E.2d 742, 745 (1991). "However, the 'whole record' test is not a tool of judicial intrusion" and a court is "not permitted to replace the agency's judgment with [its] own, even though [it] might rationally justify reaching a different conclusion." *Floyd v. N.C. Dept. of Commerce*, 99 N.C. App. 125, 129, 392 S.E.2d 660, 662, *disc. review denied*, 327 N.C. 482, 397 S.E.2d 217 (1990).

[2] In her first two assignments of error, respondent argues that the trial court misapplied the whole record test when it determined whether the SPC's findings of fact were supported by substantial competent evidence. Respondent contends that the trial court erred by independently weighing the evidence of record and thus exceeded its role of determining whether the SPC's findings had a rational basis in the record. However, we determine that due to a violation of our Rules of Appellate Procedure, we cannot review this assignment of error.

This Court's review is "limited by properly presented assignments of error and exceptions." *N.C. Dept. of Correction v. Hodge*, 99 N.C. App. 602, 609, 394 S.E.2d 285, 289 (1990). Under N.C.R. App. P. 10(c)(1), "[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, *with clear and specific record or transcript references*." (emphasis added). Failure to comply with the Rules of Appellate Procedure subject an appeal to dismissal, since "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

In the case before us, respondent's assignments of error are extremely broadsided. None of the assignments of error are followed by citations to the record or transcript. More importantly, none of the assignments of error specify which findings respondent challenges. As a result, we are unable to determine which findings of fact respondent specifically contends evidence misapplication of the whole record test. We are thus unable to address respondent's first two assignments of error.

Similarly, in assignment of error number four, respondent argues that "[t]he trial court erred when it substituted its judgment for the special expertise of the [SPC] in determining whether [Brown] was 'qualified' for the position." This assignment of error is also not followed by any citation to the record or transcript, nor does it indicate which finding or findings respondent challenges. Several of the ALJ's and the trial court's findings of fact discuss Brown's qualifications for the position. We cannot determine which findings of fact respondent challenges and therefore cannot review this assignment of error.

[3] In assignments of error numbers three and seven, respondent specifically cites the ALJ's finding of fact number 25 and the trial court's finding of fact number 38. Therefore, we are able to

conduct a meaningful review of assignments of error numbers three and seven.

In those two assignments of error, respondent contends that the trial court erred when it replaced the ALJ's finding of fact number 25. The finding of fact stated that Freeman and McRae were not credible when they testified about Brown's qualifications and previous personnel experience:

> 25. Based on the undersigned's observations of [Freeman] and . . . McRae, neither witness was credible when questioned about [Brown's] qualifications and the evidence that her clerical experience in the Sam's Club and Fayetteville personnel departments did not approach the minimal qualification requirements for even the Personnel Analyst I position.

On review, the trial court made the following finding of fact:

> 38. Given that the interview panel had approximately seventy (70) years of combined experience in personnel functions and were serving or had served in top level personnel management positions, [the trial court] finds that the ALJ's Finding of Fact No. 25 relating to the "credibility" of . . . Freeman and . . . McRae is not supported by the record as a whole.

We agree that the trial court erred in finding that the ALJ's determination of the witnesses' credibility was not supported by the record. "The credibility of the witnesses and the resolution of conflicts in their testimony is for the [agency], not a reviewing court[.]" *In re Wilkins*, 294 N.C. 528, 549, 242 S.E.2d 829, 841 (1978); *see also White v. N.C. Bd. of Examiners of Practicing Psychologists*, 97 N.C. App. 144, 154, 388 S.E.2d 148, 154, *disc. review denied*, 326 N.C. 601, 393 S.E.2d 891 (1990). On review of an agency's decision, a trial court "is prohibited from replacing the Agency's findings of fact with its own judgment of how credible, or incredible, the testimony appears to [the trial court] to be, so long as substantial evidence of those findings exist in the whole record." *Little v. Board of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983).

In this case, although the trial court impermissibly replaced the ALJ's judgment of the credibility of Freeman and McRae with its own, we find that this error was not prejudicial. The ALJ's finding of incredibility concerned the issue of whether Brown was qualified for the position. The finding had no bearing on the ultimate issue in the

case: whether respondent was the victim of age discrimination. We find that the error did not affect the outcome of the case and overrule this assignment of error.

II.

[4] In assignments of error numbers five and six, respondent contends that the trial court erred when it substituted its judgment for that of the SPC and concluded as a matter of law that respondent had failed to establish a *prima facie* case of age discrimination. The trial court concluded that respondent had failed to establish a *prima facie* case of age discrimination because the age difference between respondent and Brown was not "substantial."

Respondent first argues that the trial court erred in making conclusions of law in conflict with the ALJ's conclusion of law number seven, as adopted by the SPC. The ALJ's conclusion of law number seven stated that respondent established a *prima facie* case of age discrimination "by proving: [1] she applied for and was qualified for a vacant position, [2] she was rejected, [3] she was over 40 years of age, [4] after she was rejected the employer filled the position with a younger employee below 40 years of age." Respondent argues that petitioner did not except to this conclusion of law at the trial court, and therefore waived review of the issue. We disagree. In its petition for judicial review, petitioner specifically excepts to many of the ALJ's conclusions of law, as adopted by the SPC, that support the conclusion that respondent had established a *prima facie* case of age discrimination. Furthermore, petitioner drafted recommended conclusions of law, which state: "[Respondent] did not establish a [*prima facie*] case. . . . [Respondent] has failed to meet her burden of proving that she was denied the promotion to Personnel Analyst I on account of her age." We find that petitioner properly excepted to the conclusion of law and we may review this issue on appeal.

[5] Respondent argues that the trial court erred in concluding as a matter of law that respondent had not established a *prima facie* case of age discrimination. We apply *de novo* review to a trial court's conclusions of law. *Campbell v. N.C. Dep't of Transp.*, 155 N.C. App. 652, 660, 575 S.E.2d 54, 60, *disc. review denied*, 357 N.C. 62, 579 S.E.2d 386 (2003).

The United States Supreme Court has established a scheme by which employees may prove discrimination in employment. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668

(1973); *see also Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 142, 147 L. Ed. 2d 105, 116 (2000) (applying the *McDonnell Douglas* framework to an age discrimination case); *and Dept. of Correction v. Gibson*, 308 N.C. 131, 136-37, 301 S.E.2d 78, 82-83 (1983). Under this framework, an employee must first establish a *prima facie* case of discrimination. *Reeves*, 530 U.S. at 142, 147 L. Ed. 2d at 116. Once an employee establishes a *prima facie* case of discrimination, the burden shifts to the employer to prove a legitimate, non-discriminatory basis for the employer's action. *McDonnell Douglas*, 411 U.S. at 802, 36 L. Ed. 2d at 678. If the employer succeeds, the burden shifts back to the employee to show that the employer's reason for the action is a mere pretext for discrimination. *Id.* at 804, 36 L. Ed. 2d at 679. However, " '[t]he ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [employee] remains at all times with the [employee].' " *Reeves*, 530 U.S. at 143, 147 L. Ed. 2d at 117 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 215 (1981)); *see also Gibson*, 308 N.C. at 138, 301 S.E.2d at 83.

An employee can establish a *prima facie* case of age discrimination when the employee shows that (1) the employee is a member of the protected class, or over forty years old; (2) the employee applied or sought to apply for an open position with the employer; (3) the employee was qualified for the position; and (4) the employee "was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 959-60 (4th Cir. 1996). An inference of unlawful discrimination arises when an employee is replaced by a "substantially younger" worker. *O'Connor v. Consol. Coin Caterers*, 517 U.S. 308, 312-13, 134 L. Ed. 2d 433, 438-39 (1996); *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420, 430 (4th Cir. 2000).

In the case before us, the trial court found that respondent failed to establish a *prima facie* case of discrimination because she failed to show that she "was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." *Evans*, 80 F.3d at 959-60. The trial court found that Brown was not "substantially younger" than respondent, and as such, an inference of age discrimination did not arise.

This Court has not established a bright-line rule for determining whether an applicant who was selected is "substantially younger" than an employee who was not selected. We need not decide this

issue today because even if respondent did establish a *prima facie* case of discrimination, petitioner has established a legitimate, nondiscriminatory reason for its action, and respondent has not shown that this reason was a pretext for discrimination.

The evidence before the SPC showed that, based on the interview and writing sample scores, respondent ranked lowest out of all of the applicants. All three panel members ranked the applicants similarly, and two of the panel members testified that based on these rankings, they considered Brown to be the best applicant for the Personnel Analyst I position. Freeman gave the following testimony at the hearing before the ALJ:

> Q. Okay. After the—taking you back, once again, to the interview panel, in addition to the rankings—the numerical rankings, did the—did you have some discussion with . . . [Gilliam] and . . . [McRae] about who they thought would make the best employee in that particular position?
>
> A. I think we all agreed afterwards that, again, based on the selections, the interview questions, that [Brown] answered the questions most appropriately, very clear and concise. And [respondent], you know, she kind of rambled and, you know, avoided answering some of the questions directly.

In addition, McRae gave the following testimony:

> Q. How did you rate the applicants for those positions? Do you recall?
>
> A. I recall that [Brown] was rated higher than the other two, and the reason for that, based on my personnel experience—professional personnel experience, is that she seemed to have a much broader and diverse personnel background, and in a personnel analyst position, that is, the beginning of a professional level of human resource work and what you're looking for or at least what I'm looking for is people that are able to use good judgment and discretion in interpreting and applying policies.

This testimony and the applicants' scores establish that petitioner had a legitimate, nondiscriminatory reason for its action. Under the *McDonnell Douglas* framework, the burden then shifts back to respondent to prove that this reason was a pretext for discrimination. In order to prove that a reason for an employer's action is a pretext

for discrimination, an employee must prove "*both* that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515, 125 L. Ed. 2d 407, 422 (1993). "It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the [employee's] explanation of intentional discrimination." *Id.* at 519, 125 L. Ed. 2d at 424.

We find that respondent has not established that petitioner's reason for its action was false. There is no evidence in the record that the reason was false or that the real reason for petitioner's action was to discriminate against respondent based on respondent's age.

Since respondent has failed to show that the trial court erred in its application of the whole record test and has failed to meet her burden of proving age discrimination, we affirm the trial court's order.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

HUBERT CHAMBERS, Plaintiff-Employee v. TRANSIT MANAGEMENT, Defendant-Employer, SELF INSURED (Compensation Claims Solutions, Servicing Agent)

No. COA04-677

(Filed 16 August 2005)

1. Workers' Compensation— appellate review—standard of review

Review of an Industrial Commission decision by the Court of Appeals is limited to whether there is competent evidence to support the Commission's findings of fact and whether those findings support the conclusions of law.

2. Workers' Compensation— specific traumatic injury—compensable occupational disease

There was sufficient evidence in a workers' compensation hearing to support findings by the Industrial Commission that a bus driver who developed a cervical spine condition and an ulnar neuropathy was entitled to disability income as compensation for an injury resulting from a specific traumatic incident as well as for injuries resulting from a compensable occupational disease.

The Commission judges the credibility of witnesses and determines the weight to be given the testimony.

Judge JACKSON concurring in part and dissenting in part.

Appeal by defendant from Opinion and Award of the North Carolina Industrial Commission filed 3 February 2004 for the Full Commission by Commissioner Thomas J. Bolch. Heard in the Court of Appeals 27 January 2005.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Robert A. Whitlow, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by John Brem Smith and Jennifer I. Mitchell, for defendant-appellant.

BRYANT, Judge.

Hubert Chambers (plaintiff) was a fifty-nine-year-old high school graduate who had been employed as a bus driver for Transit Management (defendant) since 9 April 1970. Plaintiff's job duties consisted of driving two types of buses: the Nova bus and the Flexible bus, both of which required plaintiff to operate the parking brake, destination box, toggle switch (for activating the bus' four-way flashers) and adjusting both interior and exterior mirrors on the bus. Plaintiff normally worked seven hour shifts, six days per week. Plaintiff estimated that driving the bus required the use of both hands ninety to one hundred percent of the time, but greater use of his left hand was required to operate the various controls located on the left side of the bus. Drivers were assigned bus routes every three to four months.

On 4 December 2000, plaintiff was assigned a new bus route and began work at approximately 4:00 p.m. Plaintiff began experiencing neck and shoulder problems sometime that afternoon and between 10:00 and 11:00 p.m. he reported his difficulties to his dispatcher and requested a replacement. Plaintiff was unsure whether the cause of his injury was actually work related and did not fill out an injury/illness report until 18 December 2000 at which time he listed only having problems with his left arm.

Plaintiff initially sought treatment from his family physician who subsequently referred plaintiff to Charlotte Orthopedic Specialists. From 29 December 2000 through 16 March 2001, plaintiff was seen by several doctors at Charlotte Orthopedic Specialists and on 2 April

2001, plaintiff was seen by a neurologist, Dr. Tim E. Adamson. An MRI ordered by Dr. Adamson showed plaintiff had, among other things, neural foraminal narrowing at the C5-6 level on the left. Dr. Adamson subsequently performed two surgeries on plaintiff. Following the first surgery, Dr. Adamson cleared plaintiff to return to work on 30 July 2001. Without attempting to return to work, plaintiff contacted Dr. Adamson and told him he felt he could not return to work with defendant. Plaintiff then underwent nerve conduction studies that revealed ulnar neuropathy for which plaintiff underwent surgery on 28 September 2001. On 5 March 2002 plaintiff had a Functional Capacity Evaluation (FCE) which indicated his level of function most closely resembled the category of sedentary to light physical demand. Dr. Adamson gave plaintiff a thirty percent permanent partial impairment rating for his left arm.

On 20 September 2002, plaintiff's claim was heard before Deputy Commissioner Nancy W. Gregory, who filed an Opinion and Award on 24 February 2003 denying plaintiff's claims for workers' compensation benefits. Deputy Commissioner Gregory concluded plaintiff did not sustain an injury by accident or a specific traumatic incident arising out of and in the course of his employment. Plaintiff appealed to the Full Commission (Commission) which filed an Opinion and Award on 3 February 2004, reversing Deputy Commissioner Gregory's denial of workers' compensation benefits to plaintiff. The Commission concluded plaintiff had sustained a cervical spine injury as a result of a specific traumatic incident and that plaintiff's ulnar nerve entrapment neuropathy and cervical spine condition constituted occupational diseases. The Commission ordered defendant to pay plaintiff disability income and his medical expenses arising from the injury and disease. Defendant appeals the Opinion and Award of the Commission.

On appeal, defendant raises three issues: (I) whether the Commission erred in determining plaintiff suffered a cervical spine injury as a result of a specific traumatic incident during the course of his employment on 4 December 2000; (II) whether the Commission erred in determining plaintiff's ulnar neuropathy and cervical spine condition were compensable occupational diseases; and (III) whether the Commission erred in concluding plaintiff is entitled to continuing disability benefits. For the following reasons, we find no error.

[1] It is well-settled that review of an Industrial Commission decision by this Court is limited to the determination of whether there is com-

petent evidence to support the Commission's Findings of Fact and whether those findings support the Conclusions of Law. *Cox v. City of Winston-Salem*, 157 N.C. App. 228, 232, 578 S.E.2d 669, 673 (2003); *Pernell v. Piedmont Circuits*, 104 N.C. App. 289, 292, 409 S.E.2d 618, 619 (1991). The Commission's findings of fact are conclusive on appeal even where there is contrary evidence, and such findings may only be set aside where there is a "complete lack of competent evidence to support them." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (citation omitted); *see also Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Our review " 'goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Id.*

[2] In his deposition, Dr. Adamson provided the following testimony:

> Q. And would you have an opinion about whether the type of job duties that have been identified would have placed him at an increased risk of developing these types of symptoms and problems, or aggravation of the condition in the cervical spine as opposed to the general population?
>
> A: I would believe so, yes.

This testimony clearly states, in Dr. Adamson's opinion, that the plaintiff's occupation as a bus driver placed him at higher risk than the general public of developing a cervical spine condition. Admittedly there was conflicting testimony from Dr. Dover as to whether plaintiff's occupation placed him at increased risk. However, the Commission, not the appellate court, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 834 (1998).

Additionally, the Commission made the following significant finding of fact concerning plaintiff's claims that his injuries were the result of a compensable occupational disease and qualified as originating from a specific traumatic incident:

> 9. Dr. Adamson rendered opinions, which the Full Commission finds to be fact, that plaintiff's job duties with defendant caused or aggravated the conditions for which treatment was rendered and that plaintiff's job placed him at an increased risk of developing these conditions. The sudden pain to plaintiff's neck on December 4, 2000, qualifies under North Carolina law as a specific traumatic incident of the work assigned.

The Commission also made the following Conclusions of Law:

1. The medical and testimonial evidence supports compensability of plaintiff's ulnar nerve entrapment neuropathy condition, "double crush syndrome", and aggravation of cervical spine condition as occupational diseases under N.C. Gen. Stat. § 97-53(13). Additionally, since the disabling aggravation of the cervical spine occurred within a cognizable time period, it qualifies as a specific traumatic incident. N.C. Gen. Stat. § 97-2(6).

2. Disability caused by, or death resulting from, a disease is compensable only when 'the disease is an occupational disease, **or aggravated or accelerated by**' causes and conditions characteristic of and peculiar to claimant's employment. [(emphasis in original) (citations omitted).] Where, as here, there is evidence of both causation and aggravation connected to particular aspects of an employee's job duties (i.e. repetitious activity) to which the general public is not exposed, compensability is logically and legally warranted . . . .

3. The medical and testimonial evidence supports compensability of plaintiff's cervical injury as a specific traumatic incident under N.C. Gen. Stat. § 97-2(6).

This record contains sufficient evidence to support the facts found by the Commission. Acknowledging the Commission's duty to judge the credibility of the witnesses and to determine the weight given to testimony, these facts are sufficient to support the conclusion of the Commission that plaintiff is entitled to disability income as compensation for his injury resulting from a specific traumatic incident as well as for injuries resulting from a compensable occupational disease.

Affirmed.

Judge HUNTER concurs.

Judge JACKSON concurring in part; dissenting in part.

JACKSON, Judge, concurring in part; dissenting in part.

For the reasons stated below, I must respectfully dissent from the majority's decision to affirm the Opinion and Award of the Industrial Commission in its entirety.

The majority addresses only defendant's assignment of error that the Commission erred in determining plaintiff's ulnar neuropathy and cervical spine condition were compensable occupational diseases. While I concur with the majority's conclusion that there is competent evidence to support the Commission's finding that plaintiff's ulnar neuropathy was compensable, I am unable to concur with that conclusion regarding plaintiff's cervical spine condition.

The majority bases its decision with regard to plaintiff's cervical spine condition upon Dr. Adamson's response, on direct examination, to the question:

> And would you have an opinion about whether the type of job duties that have been identified would have placed him at an increased risk of developing these type of symptoms and problems, or aggravation of the condition in the cervical spine as opposed to the general population?
>
> This question clearly asks if Dr. Adamson had an opinion as to whether plaintiff's job duties would have placed him at a greater risk of *either* causing *or* aggravating his cervical spine conditions. A plaintiff's job duties must place him at a greater risk of developing the condition than the general population for it to be compensable under our Workers Compensation Act. N.C. Gen. Stat. § 97-53(13); *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-95, 301 S.E.2d 359, 365-66 (1983). Dr. Adamson's response to this question, "I, would believe so, yes," is not sufficient to support compensability. Dr. Adamson's response is ambiguous, as it relates to compensability, since it is unclear if Dr. Adamson's opinion is that plaintiff's job duties placed him at a greater risk of developing the condition, aggravating it, or both.

This ambiguity is resolved, however, by Dr. Adamson's testimony upon cross-examination. With regard to the specific testimony cited by the majority, Dr. Adamson was asked:

> In response to Mr. Whitlow's question in which he asked you to assume that the job site analysis is accurate and the accuracy of what's in the videotape concerning questions about the left ulnar neuropathy, *I want to make sure I'm clear on what you have indicated, am I correct in understanding that in your opinion, you're not able to say that the bus driving activities caused the ulnar neuropathy, but that it could have aggravated the ulnar neuropathy?*

(Emphasis added.) Dr. Adamson responded, "I think that's correct." Dr. Adamson was then asked, "[a]nd the same thing was basically true for the neck condition, the condition as treated there?" He responded, "[s]ure." This testimony makes clear that, in Dr. Adamson's opinion, plaintiff's job duties placed him at a greater risk of aggravating the conditions, but not of developing them. This testimony is not in conflict with Dr. Adamson's testimony on direct examination, but rather clarifies his response to the compound question asked by plaintiff's attorney.

Nor does this testimony create a conflict between the testimony of different witnesses thus requiring the Commission to weigh the testimony and determine the credibility of conflicting witnesses. There is no conflict between the testimony of Dr. Adamson and Dr. Dover regarding whether plaintiff was at an increased risk of developing his cervical disease due to his job duties. Both doctors' testimony was clear that plaintiff was not at greater risk than the general public. Consequently, the Commission's decision was not based on its judgment of the weight and credibility of witnesses and therefore beyond our scope of review, but rather it was based upon insufficient evidence and is subject to reversal.

Focusing on one portion of a witness' testimony, to the exclusion of other testimony by the same witness that develops or clarifies that testimony, sets a dangerous precedent. To do so will allow a witness' misstatement, an answer based on a misunderstanding of the question, or, as in this case, a simple answer to a compound question to be the basis for an Opinion and Award of the Commission even if the testimony is later corrected or clarified on cross-examination. This clearly would frustrate one of the primary purposes of cross-examination. These are not two separate pieces of evidence to be considered separately, but rather interrelated parts of the same evidence which must be considered in conjunction with each other.

In addition to the assignment of error discussed above, defendant assigned error to the Commission's finding that plaintiff suffered a compensable cervical spine injury on 4 December 2000. Two theories exist upon which a compensable back injury can be based: "(1) injury by accident . . . or (2) injury . . . [resulting] from a specific traumatic incident." *Livingston v. James C. Fields & Co.*, 93 N.C. App. 336, 337, 377 S.E.2d 788 (1989). Plaintiff's cervical spine injury was found to be compensable by the full Commission under the second theory. Defendant contends plaintiff's cervical spine injury cannot be compensable as arising from a specific traumatic injury since the evi-

dence must show that there was some event which caused the injury. *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 709, 449 S.E.2d 233, 238 (1994), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995). The *Fish* Court explained that a worker is required only to show the injury occurred at a "judicially cognizable" point in time to prove a specific traumatic incident. *Id.* The Court continued:

> *Judicially cognizable* does not mean "ascertainable on an exact date." Instead, the term should be read to describe a showing by plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred. The evidence must show that there was some event that caused the injury, not a gradual deterioration. If the window during which the injury occurred can be narrowed to a judicially cognizable period, then the statute is satisfied.

Id.

The full Commission found the pain in plaintiff's neck, left arm, and shoulder occurred within a judicially cognizable period of time on 4 December 2000 while he was performing his job-related duties. This finding was supported by uncontroverted testimony and documentation identifying the onset of the symptoms of plaintiff's injury to have manifested themselves during his work shift on 4 December 2000.

Although the onset of plaintiff's symptoms relating to his cervical spine condition were found to have occurred in a judicially cognizable period of time, they still must have "aris[en] out of and in the course of his employment" in order to be compensable. N.C. Gen. Stat. § 97-2(6) (2003). In his deposition testimony, Dr. Adamson stated, regarding plaintiff's cervical condition, "the general abnormality is not considered a work-related event. . . ." This statement is unequivocal that plaintiff's cervical spondylosis was not considered a work-related injury and there is no other evidence in the record to the contrary. Therefore, I would hold that the full Commission erred in concluding that plaintiff suffered a compensable cervical spine injury as a result of a specific traumatic incident during the course of his employment on 4 December 2000.

Defendant also assigns as error the Commission's conclusion that plaintiff is entitled to continuing disability benefits. Defendant presents two alternative bases for its contention: (1) plaintiff failed to prove that he is disabled as defined by North Carolina General

Statutes section 97-2(9) and (2) plaintiff refused to accept suitable alternative employment and is, therefore, not entitled to receive continuing benefits even if it is determined that he is disabled.

The Workers' Compensation Act defines "disability" as: "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2003). Our Supreme Court has held that for an employee to be "disabled" under our Workers' Compensation Act the Commission must find that: (1) the employee "was incapable after his injury of earning the same wages he had earned before his injury in the same employment"; (2) the employee "was incapable after his injury of earning the same wages he had earned before his injury in any other employment"; and (3) the employee's "incapacity to earn was caused by [his] injury." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

As the Commission has exclusive original jurisdiction over workers' compensation hearings, it must hear the evidence and file an award, "together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue." N.C. Gen. Stat. § 97-84 (2003). The Commission is not required to make findings regarding each fact in the evidence presented, however, it must make findings regarding the specific facts which are crucial to the determination of the right of compensability in order to allow a reviewing court to determine if the Commission's award is adequately supported by the evidence. *Johnson v. Southern Tire Sales and Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 511 (2004) (*citing Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 551, 85 S.E.2d 596, 599 (1955)).

The only findings of fact made by the Commission regarding plaintiff's ability to work are the following:

> 18. Plaintiff underwent a functional capacity evaluation on March 5, 2002. Dr. Adamson reviewed the functional capacity evaluation and concurred with the results. On May 13, 2002, he rated plaintiff with a 30% permanent partial impairment of the left upper extremities, which Dr. Adamson later clarified to be the arm and not merely the hand. Furthermore, according to Dr. Adamson, plaintiff is capable of sedentary to light work, but not of driving the bus due to the use of the left hand and public safety issues.
>
> 19. Plaintiff has not returned to work for defendant or another employer. The greater weight of the evidence demonstrates

> that plaintiff is incapable of returning to his former employment. Defendant has neither offered work to plaintiff within his restrictions, nor offered or provided vocational rehabilitation or retraining.

There is evidence in the record to support the findings that plaintiff has not returned to work with any employer and that he currently is unable to return to his former employment. However, whether or not plaintiff is able to return to his former employment is not the correct standard for determining disability. The correct standard is whether plaintiff is incapable of earning the same wages he was earning at the time of the injury in the same or alternate employment. N.C. Gen. Stat. § 97-2(9) (2003); *see Hilliard*, 305 N.C. at 395, 290 S.E.2d at 683. The Commission failed to find facts sufficient to allow this Court to review whether the award of continuing disability compensation to plaintiff is adequately supported by the evidence. Therefore, I would remand this matter to the Commission for further findings of fact regarding this issue.

CAROLINAS MEDICAL CENTER, DUKE MEDICAL CENTER, FORSYTH MEMORIAL HOSPITAL, HIGH POINT REGIONAL HOSPITAL, MISSION-ST JOSEPH'S HEALTH SYSTEM, INC., MOSES H. CONE MEMORIAL HOSPITAL, THE NORTH CAROLINA BAPTIST HOSPITALS, INC., UNIVERSITY HOSPITAL, WAKE MEDICAL CENTER, AND WESLEY LONG COMMUNITY HOSPITAL, MEDICAL PROVIDERS, PLAINTIFF-APPELLANTS V. EMPLOYERS AND CARRIERS LISTED IN EXHIBIT A, DEFENDANT-APPELLEES

No. COA04-707

(Filed 16 August 2005)

Constitutional Law— administrative agency—no authority to declare statute unconstitutional

The North Carolina Industrial Commission is an administrative agency without authority to declare statutes unconstitutional, and it erred by doing just that with a statutory revision of N.C.G.S. § 97-26(b) concerning workers' compensation payments to hospitals. Other avenues to challenge the constitutionality of the statute were not taken and there was no alternative basis for supporting the Commission's ruling.

Judge WYNN concurring.

Appeal by defendants from opinion and award entered 16 February 2004 by a panel of the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 12 January 2005.

Ott Cone & Redpath, P.A., by Laurie S. Truesdell, Wendell H. Ott, and Melanie M. Hamilton, for plaintiff-appellants.

Charles R. Hassell, Jr., Root and Root, P.L.L.C., by Allan P. Root, Young Moore and Henderson P.A., by Dawn D. Raynor, for defendant-cross appellants.

STEELMAN, Judge.

The North Carolina Industrial Commission entered an order on 18 December 2003 declaring that the provisions of N.C. Gen. Stat. § 97-26(b) as they existed from 1 July 1995 to 1 April 1996 were unconstitutional. We hold that the North Carolina Industrial commission is without authority to declare statutes of the State unconstitutional and vacate its order.

Factual Background

On 6 May 1994, the North Carolina Supreme Court filed its decision in the Case of *Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n*, 336 N.C. 200, 443 S.E.2d 716 (1994), declaring that the North Carolina Industrial Commission did not have authority under N.C. Gen. Stat. § 97-26 to require hospitals to accept payment for medical services on a *per diem* basis. In response to the questions surrounding its authority to set hospital rates leading up to the *Charlotte-Mecklenburg* decision, the Industrial Commission sought additional authority from the North Carolina General Assembly. The result of these efforts was an amendment to N.C. Gen. Stat. § 97-26. Act of April 19, 1993, ch. 679, sec. 2.3, 1993 N.C. Sess. Laws 398. As amended N.C. Gen. Stat. § 97-26(b), effective 1 October 1994, read as follows: "Hospital Fees.—Payment for medical compensation rendered by a hospital participating in the State Plan shall be equal to the payment the hospital receives for the same treatment and services under the State Plan."

At the time of this amendment to N.C. Gen. Stat. § 97-26(b), the State Plan utilized a complex diagnostic related grouping-based reimbursement system (DRG) to compute amounts due to hospitals for treatment of patients under N.C. Gen. Stat. § 135-40.4. Hospitals compute patient charges on a standard UB-92 form, which states the

amount that a patient is expected to pay for hospital services. However, under the DRG reimbursement system, the actual charges set forth in the UB-92 form are modified, based upon how efficiently a hospital provides services for patients. To the extent that a patient is hospitalized for a shorter period of time, the DRG will reward that hospital with a greater payment. Conversely, if the patient is hospitalized for a greater period of time, that hospital is penalized. The result of the DRG system is that for some patients the hospital is reimbursed more than the UB-92 amount, and in some cases, the hospital is reimbursed less than the UB-92 amount.

As the DRG system was implemented, the Administrator of the Industrial Commission began to receive complaints from the worker's compensation insurance carriers that the amount of payments approved by the Industrial Commission was exceeding the amount shown on the UB-92 forms. At some point, the Administrator directed the Industrial Commission to stop approving payments to hospitals in excess of the amounts shown on the UB-92 form. Prior to this decision, a number of payments to hospitals were approved by the Industrial Commission for an amount in excess of the amount shown on form UB-92.

Plaintiffs are hospitals that provided services to workers whose injuries were covered under the North Carolina Worker's Compensation Act (Chapter 97 of the North Carolina General Statutes). Defendants are the employers of the injured workers, or their worker's compensation insurance carriers. The parties have stipulated that all workers suffered injuries that were compensable under Chapter 97, and received treatment from the hospitals for those injuries. There was a further stipulation that in each case, the Industrial Commission approved payment to the hospital in an amount in excess of the amount shown on form UB-92. Finally, defendants stipulated that they would not challenge that

> the payment amount approved by the Industrial commission is the amount the hospital would have received under the DRG reimbursement system as implemented by the administrators of the State Health Plan for the services described by the UB-92 claims form, if those had been covered by the State Health Plan.

Defendants refused to pay the amounts approved by the Industrial Commission in excess of the amounts shown on form

UB-92. Plaintiffs sought payment for the full amount approved by the Industrial Commission. A large number of cases, involving hospital treatment provided between 1 July 1995 and 1 April 1996, were consolidated for hearing before the Industrial Commission.

In the conclusions of law of its opinion and award, the Industrial Commission ultimately concluded that the "changes to N.C. Gen. Stat. § 97-26 enacted in 1994 did not reasonably or rationally relate to the purpose of the statute and were patently unfair to the employers and their carriers who were subject to the Worker's Compensation Act, [and therefore] the statute violated the due process clause of the Constitution. U.S. CONST. amend. XIV; 16B Am Jur 2d, Constitutional Law § 912." The Commission based this ultimate conclusion on additional conclusions of law in which they determined that under the provisions of N.C. Gen. Stat. § 97-26(b) they were required to authorize payments according to the State Health Plan, and that these mandated payments were fundamentally unfair in that they were "not directly related to the actual cost of the care provided." They further concluded that the system as mandated by statute included no adequate remedy to address the individual situations where employers or their insurance carriers were required under the system to pay out "sums which were not otherwise due as payment for relevant hospital treatment and services[,]" and therefore N.C. Gen. Stat. § 97-26(b), as it was then written, "deprived employers and their carriers of property without due process of law."

The Commission ordered that "plaintiff hospitals are not entitled to receive the additional amounts approved by the Industrial Commission over and above the actual hospital charges." Commissioner Pamela T. Young dissented, asserting that the Industrial Commission had no authority to determine the constitutionality of acts of the General Assembly.

From this opinion and award, plaintiffs appeal, asserting that the Industrial Commission lacked authority to declare an act of the General Assembly unconstitutional, and erred in doing so. Defendants purported to cross-appeal asserting additional bases that would support the Commission's decision in favor of defendants.

Discussion of Legal Issues Presented

In plaintiffs' first argument they contend that the Full Commission erred in ruling that it had the authority to decide the constitutionality of former N.C. Gen. Stat. § 97-26(b). We agree.

The Industrial Commission is not a court of general jurisdiction, it is an administrative agency of the State, created by statute. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985). It is a "well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board." *Meads v. North Carolina Dep't of Agric., Food & Drug Protection Div., Pesticide Sec. (In re Pesticide Bd. File Nos. IR94-128, IR94-151, IR94-155)*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998); *see also State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 673-74, 446 S.E.2d 332, 341-42 (1994); *Gulf Oil Corp. v. Clayton*, 267 N.C. 15, 20, 147 S.E.2d 522, 526 (1966); *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 796 (1961). The Industrial Commission had no authority to pass on the constitutionality of N.C. Gen. Stat. § 97-26(b) (1994).

We note that there were at least two avenues available to defendants to properly challenge the constitutionality of the statute in a lower tribunal. They could have brought an action under the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.* (2004). *Woodard v. Carteret County*, 270 N.C. 55, 60, 153 S.E.2d 809, 813 (1967) ("A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties desire and the public need requires a speedy determination of important public interests involved therein.") (citation omitted). Alternatively, pursuant to N.C. Gen. Stat. § 97-86 the Industrial Commission of its own motion could have certified the question of the constitutionality of the statute to this Court before making its final decision.

The Industrial Commission acknowledged this option in its decision in *Carter v. Flowers Baking Co.*, 1996 N.C. Wrk. Comp. LEXIS 5284, in which it held that "the Commission does not have the authority to find that enactments of the Legislature are unconstitutional[,]" and that:

> If the Commissioners feel strongly that a statute is unconstitutional and that it would clearly offend their oath to apply it, or that applying it would cause irreparable prejudice, or that the question would not otherwise be reviewed in the courts, etc., the Commission "may certify questions of law to the Court of Appeals for decision and determination" [pursuant to N.C. Gen. Stat. § 97-86], which would "operate as a supersedeas except as provided in G.S. 97-86.1."

Id. at 11-12. The record in this matter contains no such certification. Rather, the Industrial Commission chose, contrary to its own prior decision and the established case law of this state, to declare a statute passed by the General Assembly to be unconstitutional.

The parties in their oral arguments before this Court suggested that we proceed to decide the constitutional question, even though it is not properly before us. It is not the role of the appellate courts to render advisory opinions in matters that are not properly before them. *Wiggins v. Pyramid Life Ins. Co.*, 3 N.C. App. 476, 478, 165 S.E.2d 54, 56 (1969).

There has been no petition for certiorari filed in this case. N.C. R. App. P. Rule 21. There has been no motion filed by any party requesting that we suspend the Rules of Appellate Procedure under Rule 2 and treat the appeals of appellants and appellees as a certification by the Industrial Commission under N.C. Gen. Stat. § 97-86. The record in this matter is devoid of any indication that the parties requested that the Industrial Commission certify the constitutional question to this Court.

N.C. Gen. Stat. § 97-96 allows this Court to consider questions of law certified to it by the Industrial Commission. It does not presume to allow this Court to certify matters to itself for review and consideration. The provisions of Rule 2 are discretionary, and cannot be used to confer jurisdiction upon this Court in the absence of jurisdiction. *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994).

We decline to attempt to utilize Rule 2 to confer jurisdiction upon this Court in the absence of a certification from the Industrial Commission under N.C. Gen. Stat. § 97-86.

The Industrial Commission was completely without authority to declare a statute enacted by the General Assembly unconstitutional.

Defendants' Cross-Assignments of Error

Defendants argue in cross-assignments of error (incorrectly designated a cross-appeal) that there were alternative bases supporting the Industrial Commission's opinion and award. We disagree.

First, defendants argue that N.C. Gen. Stat. § 97-26(b) (1994) was unconstitutional for uncertainty and vagueness and was an unlawful delegation of legislative power to an administrative agency. Having held that the Commission was without authority to determine the

constitutionality of N.C. Gen. Stat. § 97-26(b) (1994), we must also hold that this cross-assignment of error is without merit.

Second, defendants argue that the "legislation creating the State Teachers' and Employees' Health Plan expressly prohibits charges in excess of what hospital patients not covered by the Plan would be required to pay[,]" and that this, in turn, prohibits charges assessed under N.C. Gen. Stat. § 97-26(b) (1994) from exceeding those authorized for patients not covered by the Plan.

N.C. Gen. Stat. § 97-26(b) (1994) states: "Hospital Fees.—Payment for medical compensation rendered by a hospital participating in the State Plan shall be equal to the payment the hospital receives for the same treatment and services under the State Plan." Defendants rely on N.C. Gen. Stat. § 135-40.7 (1996), which outlines general limitations and exclusions for the State Plan, and states:

> The following shall in no event be considered covered expenses nor will benefits described in G.S. 135-40.5 through G.S. 135-40.11 be payable for:
>
> (8) Charges for any services with respect to which there is no legal obligation to pay. For the purposes of this item, any charge which exceeds the charge that would have been made if a person were not covered under this Plan shall, to the extent of such excess, be treated as a charge for which there is no legal obligation to pay . . . .

Defendants argue that because they were required to pay amounts for services greater than that which people not covered under the Plan would have been required to pay, under N.C. Gen. Stat. §135-40.7(8) they were only obligated for payments up to the UB-92 amounts. However, N.C. Gen. Stat. § 135-40.4 (1996) (emphasis added) states in relevant part:

> *Notwithstanding the provisions of this Article*, the Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan may contract with providers of institutional and professional medical care and services to established preferred provider networks. . . . The Executive Administrator and Board of Trustees shall implement a refined diagnostic-related grouping or diagnostic-related grouping-based reimbursement system for hospitals as soon as practicable, but no later than January 1, 1995.

> (b) As used in this section the term "preferred provider contracts or networks" includes, but is not limited to, a refined diagnostic-related grouping or diagnostic-related grouping-based system of reimbursement for hospitals.

This statute required the Plan to set up a DRG based system for preferred providers. Defendants' interpretation of N.C. Gen. Stat. § 135-40.7(8) would render N.C. Gen. Stat. § 135-40.4 inoperable. As Garry Bowman, who was qualified as an expert in hospital charges and billing procedures, testified, UB-92 charges for services in the hospital billing context do not necessarily directly correspond with the amounts the hospitals are reimbursed for those services. For this reason, "charge" is not synonymous with "payment" in Chapter 135. Defendants were "charged" the same amounts that would have been charged to individuals not covered by the Plan (and not covered by N.C. Gen. Stat. § 97-26(b) (1994)), however they were then required to reimburse plaintiffs pursuant to the negotiated rates under the Plan's DRG system. Though this result may be unfair, it is authorized by Chapters 97 and 135. N.C. Gen. Stat. § 135-40.7(8) provides defendants no relief.

Third, defendants argue this Court should hold that the decision of Thomas Bolch, then Administrator of the North Carolina Industrial Commission, "to withhold approval of DRG bills submitted to defendant payors was necessary to preserve the integrity and proper functioning of the workers' compensation system."

This argument is nothing more than a restatement of defendants' argument that N.C. Gen. Stat. § 97-26 was unconstitutional, because it violated due process. As previously discussed, this argument is not properly before this Court. In addition, to adopt this argument would require us to sanction Administrator Bolch's decision to deliberately violate an act of the General Assembly. This we refuse to do. Finally, this argument is premised upon the fallacious assumption that the bills in question were not approved by the Industrial Commission following Administrator Bolch's decision to withhold approval of bills in excess of the UB-92 amount. However, in each of the cases before the Commission, the parties stipulated that the Commission approved payment to the plaintiffs in the amount that they would have received under the DRG reimbursement system.

Defendants' cross-assignments of error are without merit. The opinion and award of the Industrial Commission is vacated.

VACATED.

Judge BRYANT concurs.

Judge WYNN concurring with separate opinion.

WYNN, Judge concurring with separate opinion.

While I agree with the majority that the Industrial Commission had no authority to pass on the constitutionality of N.C. Gen. Stat. § 97-26(b) (1994), I would treat the full Commission's Opinion and Award as a certification to this Court and address the issues on appeal.

N.C. Gen. Stat. § 97-86 (2004) provides that "[t]he Industrial Commission of its own motion may certify questions of law to the Court of Appeals for decision and determination by said Court." I would treat the Opinion and Award as a certification on the constitutionality of N.C. Gen. Stat. § 97-26(b) (19944) to this Court. A determination of the constitutionality of section 97-26(b) in the instant appeal is in the interest of judicial economy. Upon remand of this case to the Industrial Commission, the Commission will most likely immediately certify the constitutionality of this statute to this Court for determination. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (in the interests of judicial economy and fairness to the parties the Supreme Court addressed the substantive issues on appeal). Furthermore, Rule 2 of the North Carolina Rules of Appellate Procedure allows us to reach the issues on appeal in the interest of judicial economy. N.C. R. App. P. 2 ("[T]o expedite decision in the public interest, either court of the appellate division may, . . . 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*[.]" (emphasis added)).

I would decide the issues on appeal, or at the very least, remand this case to the Industrial Commission for a determination of whether the constitutional issue should be certified to this Court.

CREEKSIDE CONSTRUCTION COMPANY, PLAINTIFF v. JOHN DOWLER AND WIFE, CARLA DOWLER, DEFENDANTS

No. COA04-1225

(Filed 16 August 2005)

1. Arbitration and Mediation— validity of clause—evidence consideration

Arbitration was not erroneously compelled where defendants argued that they did not have the opportunity to present evidence of the invalidity of the arbitration clause, but the trial court expressly noted that it considered pleadings, evidence, and the contentions of counsel, defendants offered no suggestion of the evidence they were precluded from presenting, defendants make no argument about why the evidence before the court was not sufficient, and there was no infirmity in the evidence that would preclude the court from summarily determining that the contract had not been induced by fraud and the arbitration clause was enforceable.

2. Arbitration and Mediation— contract clause—validity

An arbitration clause was clear, unambiguous, and valid.

3. Appeal and Error— citation of authority—required

Arguments concerning the validity of an arbitration clause were unavailing where defendants failed to support any of their theories with citation to authority. Moreover, defendants' claims concerning the impartiality or suitability of the arbitrators lacked merit.

4. Arbitration and Mediation— multiple arbitrator documents—document for judicial action

The proper document upon which further judicial action should be taken in a disputed arbitration was the "arbitration award," one of several documents signed by the arbitrators and the case was remanded because the trial court did not confirm that award.

5. Arbitration and Mediation— majority vote of arbitrators—sufficient under agreement

In a disputed arbitration remanded on other grounds, a majority vote of the three arbitrators should have been sufficient under this arbitration clause.

6. Arbitration and Mediation— damages—multiple arbitrator documents—premises

In an action remanded on other grounds, assignments of error concerning treble damages in an arbitration award depended upon an arbitrator's decision which was supplanted by an arbitrator's award. Moreover, defendant's assertion involving the amount of the award was based on a premise about the amount of its damages, which was for the arbitration panel to decide.

7. Arbitration and Mediation— attorney fees—refused—no abuse of discretion

In an action remanded on other grounds, there was no abuse of discretion by the trial court in refusing to award defendants attorney fees in a disputed arbitration, assuming that attorney fees were otherwise available to defendants, where it was defendants who resisted arbitration.

Appeal by plaintiff and defendants from judgment entered 5 April 2004 by Judge J.D. Hockenbury in Carteret County Superior Court. Heard in the Court of Appeals 20 April 2005.

Richard L. Stanley for plaintiff.

Julie E.D. Shepard for defendants.

CALABRIA, Judge.

Creekside Construction Company ("plaintiff") and John and Carla Dowler ("defendants") appeal from the entry of judgment confirming an arbitration award. We affirm in part and reverse and remand in part.

Defendants are the owners of a condominium unit located in Carteret County. Defendants sought bids concerning desired renovation work to the condominium unit. Plaintiff's initial estimate for the work to be performed was approximately $35,000.00 but did not include estimates for plumbing fixtures. Subsequent meetings between plaintiff and defendants resulted in changes to the work to be performed, and the parties agreed that the contract work would be done "on a cost plus 15%" basis. Based on the scope of work at that time, the estimate for the work to be performed was in the low to mid-$50,000.00 range. On 4 September 2002, Barry E. Snipes ("Snipes"), as President on behalf of plaintiff, executed a construc-

tion contract ("contract") with defendants for renovations of defendants' condominium unit in accordance with certain specifications. In addition, the contract contained the following arbitration clause:

> 14. Arbitration. Any disagreements arising out of this Contract or the application of any provisions hereunder shall be submitted to binding arbitration by three arbitrators who shall be licensed general contractors in the State of North Carolina. Owner and Contractor shall each select one, and the two arbitrators shall then agree as to the third arbitrator. Any decision reached by a majority vote of the three shall be binding on the parties hereto and shall have the weight as a legal decision on any difference arising herein. Either party may invoke the process of arbitration by giving the other party notice in writing that the arbitration procedures herein are being instituted. Thereafter each party shall have five working days to select his arbitrator, and the two so selected shall have a period of five working days thereafter in which to select the third arbitrator. The three arbitrators shall then have a period of fourteen days thereafter in which to investigate this matter and to render their decision concerning any disagreements. The cost of the arbitration shall be borne equally between Owner and Contractor.

As renovation work progressed, plaintiff alleged defendants continued to make changes to the scope of work to be performed and plaintiff complied with the requested changes, all of which fell under the payment provisions in the contractual agreement of cost plus fifteen percent. At the completion of the renovation, the total billing for the project came to $92,848.03. Defendants paid $38,228.04 but refused to pay the balance. Defendants and plaintiff initially agreed to arbitrate the matter, and plaintiff appointed an arbitrator. Defendants, thereafter, refused to appoint an arbitrator, and plaintiff filed a claim of lien as well as an action to foreclose the lien. In addition, plaintiff's complaint contained a cause of action for breach of contract and a request for an order compelling arbitration. Finally, plaintiff changed the locks on the condominium unit to prevent defendants' access.

Defendants answered the complaint and alleged several counterclaims, including trespass, fraud, and unfair and deceptive trade practices. Defendants asserted in their answer that the arbitration clause was unenforceable and that plaintiff failed to properly assert it. At the 17 November 2003 hearing, the trial court heard arguments from the parties, received documents, briefs, affidavits, and considered the pleadings. Defendants argued that the contract containing the arbi-

tration clause had been procured by fraud and the trial court had to conduct a jury trial on the factual issues concerning fraud before it could proceed to compel arbitration.

On 15 December 2003, the trial court entered findings of fact and conclusions of law in an order compelling arbitration. The matter went before a panel of three arbitrators chosen in accordance with the contract. In a document signed by all three arbitrators and dated 4 March 2004, plaintiff was awarded "the total sum of $67330.00 . . . less $38228.04 already paid by [defendants] for a balance due of $29101.96[.]" An undated document signed by all three arbitrators on 5 March 2004 and entitled "Arbitrator's Decision," listed the following: (1) plaintiff did not commit fraud, did commit an unfair trade practice, and did trespass; and (2) both plaintiff and defendants breached the contract. For each wrongdoing, the arbitrators found "nominal or actual damages" in the amount of $1.00. Thus, this document purportedly set forth net "nominal or actual" damages to defendants in the amount of $2.00. Yet another document, signed by the three arbitrators and indicating a date of 18 March 2004 was entitled "Arbitration Award." This document contained the arbitration panel's request that the trial court "confirm this award and adopt the same as the judgment of the Court." Recapitulating the reasoning contained in the document of 4 March, the "arbitration award" awarded plaintiff $29,101.96 and noted that the award "is over and above all other issues and nominal damages which have been considered or awarded by the panel." The "arbitration award" stated nothing with respect to the "arbitrator's decision" that specified the panel's findings with respect to each wrongdoing by the parties and that awarded damages of $1.00 for each wrongdoing the panel found to have occurred. In addition, the "arbitrator's award" contained additional language not in the 4 March 2004 document as follows:

> [T]his award shall draw interest at the legal rate as allowed by North Carolina law, and the judgment and award as confirmed by the Court should order the sale of the property owned by the Defendants under the provisions of Chapter 44A of the North Carolina General Statutes in order to satisfy Plaintiff's lien and this award.

On 12 March 2004, defendants filed a motion for treble damages and an award of attorney fees based on the arbitral determination of the unfair trade practice. Defendants argued that the difference between the amount claimed by plaintiff to be owed under the contract (approximately $96,000.00) and the arbitral award to plaintiff

($67,330.00) constituted damages awarded by the arbitral panel to defendants on their counterclaims. At the hearing, plaintiff asked the trial court to confirm the "arbitration award" document. With respect to the three documents produced by the arbitration panel, the trial court disregarded the "arbitrator's decision" and gave it no effect. The trial court further noted that the "arbitration award" was "not part of the order that is in the file" and that it was "not part of their order."

In an order entered 5 April 2004, the trial court confirmed the monetary award of $67,330.00, which accorded with both the 4 March 2004 document and the monetary award in the "arbitration award." The trial court denied defendants' motion to treble damages and award attorney fees. From that order, defendants appeal, asserting the trial court erred in (1) compelling arbitration due to the lack of an opportunity to present evidence concerning the invalidity of the arbitration clause and (2) confirming the arbitration award. Plaintiff appeals the trial court's failure to provide that the real property should be sold under Chapter 44A of the North Carolina General Statutes to enforce plaintiff's lien as set forth in the "arbitration award."

I. Order Compelling Arbitration

[1] In their first assignment of error, defendants assert the trial court erred in compelling arbitration because they were deprived of an opportunity to present evidence of the invalidity of the arbitration clause. Specifically, defendants argue the contract was induced by fraud concerning the disparity between the original bid on the renovation project and the final total cost of the project. At the hearing, defendants argued they were entitled to a jury trial on the issue of whether the arbitration clause was enforceable on the grounds that the contract was induced by fraud. On appeal, defendants have abandoned that argument, and we note that such argument is supported by neither statutory nor case law. *See* N.C. Gen. Stat. § 1-567.3 (2001) (emphasis added) (providing that "if the opposing party denies the existence of the agreement to arbitrate, *the court* shall proceed *summarily* to the determination of the issue . . .")[1]; *Barnhouse v. American Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 508, 566 S.E.2d 130, 131-32 (2002) (observing that "the court may . . . properly resolve preliminary issues surrounding the agreement, such as whether or not the agreement was induced by fraud").

1. North Carolina General Statute §§ 1-567.3 to 1-567.20 have been repealed; however, it remains applicable to the instant contract because it was entered into before 1 January 2004. N.C. Gen. Stat. § 1-569.3 (2003).

Instead, defendants argue the trial court deprived them of the opportunity to present evidence of the invalidity of the arbitration clause. However, the trial court expressly noted in its order compelling arbitration that it reviewed and considered "evidence and documents presented by the parties, the pleadings, briefs, and affidavits [as well as] the arguments and contentions of counsel[.]" After considering such evidence, the trial court entered an order compelling arbitration supported by findings of fact and conclusions of law, none of which defendants have assigned as error on appeal. Moreover, defendants offer no suggestion as to what specific evidence they were precluded from offering at trial in their brief to this Court and make no argument why the evidence before the trial court was not sufficient to allow the trial court to summarily determine the issue of whether the contract containing the arbitration clause was induced by fraud and, therefore, unenforceable. Furthermore, after reviewing the record and the transcript of the proceeding, we find no infirmity in the evidence before the trial court that would preclude it from summarily determining that the contract had not been induced by fraud and the arbitration clause was enforceable. This assignment of error is overruled.

[2] By their next assignment of error, defendants contend that the "rudimentary and ambiguous arbitration clause" failed to provide "guidance or procedures for a hearing, the taking of evidence, or a right to be heard." The public policy of North Carolina strongly supports the settlement of disputes via arbitration. *Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). Moreover, as plaintiff correctly points out, the arbitration clause in the instant case is sufficiently similar to that considered in *Red Springs Presbyterian Church v. Terminix Co.*, 119 N.C. App. 299, 300-01, 458 S.E.2d 270, 272 (1995) to warrant the same result.[2]

In *Red Springs*, this Court considered the following arbitration clause:

> It is agreed between Purchaser and Terminix that any controversy or dispute arising between them relating to: (1) any treatment

2. The arbitration clause in *Red Springs* did contain the additional language providing that the arbitration would be "controlled by and conducted under" the North Carolina Uniform Arbitration Act. *Id.*, 119 N.C. App. at 301, 458 S.E.2d at 272. The lack of such language in the instant case is irrelevant. Our Supreme Court, based on the language contained in N.C. Gen. Stat. § 1-567.2 (2001), has noted that the Uniform Arbitration Act provides only two exceptions to which it will not apply, neither of which are operative in the instant case. *Crutchley v. Crutchley*, 306 N.C. 518, 522-23, 293 S.E.2d 793, 796 (1982).

> or service rendered by or allegedly required to be rendered by Terminix, or (2) any damage or injury to person or to property, whether direct, incidental, or consequential, allegedly caused by Terminix, or (3) the enforcement of or any claim under the 'GUARANTY AND EXCLUSIONS' provisions hereof, shall be settled and resolved exclusively by arbitration. It is further agreed the said arbitration shall be controlled by and conducted under the provisions of the North Carolina Uniform Arbitration Act, North Carolina General Statutes 1-567.1 through 1-567.20, as said statutes may be amended or replaced from time to time, and said North Carolina statutes are hereby incorporated into this Contract by reference as if fully set forth herein. It is further agreed that there shall be a total of three (3) arbitrators, one to be chosen by Purchaser, one by Terminix, and a third by the first two arbitrators. It is also agreed that the arbitrators shall render their written award or decision within thirty days after the conclusion of the arbitration hearing.

Id., 119 N.C. App. at 300-01, 458 S.E.2d at 272. This Court went on to state that the "language [of the arbitration clause] is clear and unambiguous . . . [and] a valid agreement to arbitrate exists." *Id.*, 119 N.C. App. at 302, 458 S.E.2d at 272-73. Likewise, in the instant case, we find the language to be clear and unambiguous.

[3] We also find unavailing defendants' remaining arguments, including, *inter alia*, inherent bias, public policy, and comments by the trial court after arbitration was complete regarding the trial court's concern that the arbitrators might not have sufficient knowledge of the law of unfair and deceptive trade practices to properly determine the issue. Dispositively, defendants have failed to support any of these various theories with citation to authority in violation of our appellate rules. N.C. R. App. P. 28(b)(6) (2005) (providing that assignments of error "in support of which no reason or argument is stated or authority cited[] will be taken as abandoned").

We note in passing that these claims lack merit. As noted *supra*, North Carolina's public policy strongly favors arbitration. Defendants' contention regarding appearance of impartiality starkly contravenes this Court's holding in *Carteret County v. United Contractors of Kinston*, 120 N.C. App. 336, 343, 462 S.E.2d 816, 821 (1995) (rejecting outright arguments of "inherent" or "fundamental" unfairness against an arbitration panel consisting solely of contrac-

tors without direct ties to a party construction company).[3] Finally, the language by the trial court reflecting its concerns as to the suitability of the arbitrators in the instant case is immaterial. This Court has previously held that an unfair and deceptive practices claim pursuant to N.C. Gen. Stat. § 75-1.1 (2003) is proper for arbitration. *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 731 (1985). This assignment of error is overruled.

II. Order Compelling Arbitration

[4] The remaining issues concern the trial court's judgment purporting to confirm the award of the arbitral panel. As a preliminary matter, we must determine which document was the award of the arbitral panel. We conclude the document captioned "arbitration award" was the award of the arbitral panel.

First, the monetary award contained in the 4 March 2004 document and the "arbitration award" is identical and based on identical reasoning. Neither document accords with the "arbitrator's decision" awarding "nominal or actual damages" of $1.00 for the individual wrongdoings found by the panel. In addition, the award contained in the "arbitration award" was expressly stated to be "over and above all other issues and nominal damages which have been considered or awarded by the panel." Notably, the "arbitration award" also expressly contained a "request" from the "arbitration panel . . . that the Court confirm *this award and adopt the same* as the judgment of the Court." Finally, the "arbitration award" is the most complete embodiment of the arbitral panel's determination.[4] We are also of the opinion that the panel, in the "arbitration award" denoted that it had considered the listed wrongdoings of the parties, as contained in the "arbitrator's decision" as well as the monetary damages flowing from the breach of contract, and distilled their award into the "simple announcement of the result of their investigation" in accordance with their own "notion of justice" that has been previously approved of by our Supreme Court. *Bryson v. Higdon*, 222 N.C. 17, 19-20, 21 S.E.2d 836, 837 (1942) (noting that "[a]rbitrators are

3. Our analysis in *Carteret County* involved a plaintiff's motions to vacate or modify the award based on bias under N.C. Gen. Stat. § 1-567.13(a)(2). Notably, defendants have not moved to vacate the award on these grounds and nothing in the record indicates defendants raised the issue of bias during arbitration.

4. We are cognizant of defendants' assertion that the "arbitration award" does not expressly comment on the counterclaims raised. The award does, however, expressly note it is in lieu of "all other issues and nominal damages" that comprises entirely the document entitled "arbitrator's decision[.]"

no[t] bound to go into particulars and assign reasons for their award . . . but may award according to their notion of justice and without assigning any reason").

We hold the "arbitration award" as opposed to the document dated 4 March 2004 is the proper document upon which further judicial action should be taken. The trial court's action with respect to the "arbitration award" is reasonable as that document, signed on 18 March 2004, was unavailable at the time defendants moved for a hearing on 12 March 2004. Nonetheless, having held that the award of the arbitral panel was contained in the "arbitration award" and given that the trial court did not confirm that award, we remand for further proceedings.

[5] Due to the possibility that certain issues may occur upon remand, we additionally address three other arguments. First, the record reveals that the trial court, in part, dismissed a portion of the "arbitration award" containing language for the sale of the property under Chapter 44A on the grounds that only two out of three arbitrators agreed to it. Under the facts of this case, the majority, notwithstanding the lack of unanimity, is sufficient. The arbitration clause in the contract made binding on the parties "[a]ny decision reached by a majority vote of the three" arbitrators, which accords with the applicable provisions of the Uniform Arbitration Act. *See* N.C. Gen. Stat. § 1-567.5 (2001) (providing that the "powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this Article").

[6] Second, defendants assert the trial court erred in denying the motion for treble damages and award for attorney fees. Both of these assignments depend on the inclusion of the "arbitrator's decision" as a part of the arbitral award. Having determined the trial court correctly confirmed the "arbitration award," which supplanted the "arbitrator's decision," we note these assignments of error fail. Moreover, defendants' assertion is based upon the premise that the arbitral panel awarded them over $29,000.00 based on the difference between the panel's award to plaintiff ($67,330.00) and the full amount plaintiff claimed was due under the contract ($96,720.98). We disagree. While plaintiff may have presented evidence that $96,720.98 was due, whether plaintiff was able to establish that amount sufficiently was for the arbitration panel to decide.

[7] Regarding defendants' assertion that the trial court abused its discretion in failing to award attorney fees under N.C. Gen. Stat.

§ 75-16.1 (2003), defendants must prove, *inter alia*, that "there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit . . . ." N.C. Gen. Stat. § 75-16.1. It was plaintiff that moved to compel arbitration, and it was defendants who resisted arbitration up to and including at the hearing from which the trial court finally compelled arbitration. Assuming attorney fees were otherwise available to defendants, we find no abuse of discretion by the trial court in refusing to award them.

Affirmed in part, reversed and remanded in part.

Judges McGEE and ELMORE concur.

LISA LINCOLN & HONEYBEES CREATIVE CENTER, Petitioner v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, NUTRITION BRANCH, Respondent

No. COA04-1194

(Filed 16 August 2005)

1. Administrative Law— ALJ decision—judicial review—standard

The standard of superior court review for an administrative law judge's final decision issued pursuant to N.C.G.S. § 150B-36(c) is that stated in N.C.G.S. § 150B-51(b).

2. Administrative Law— failure to prosecute contested case—findings—supported by evidence

There was substantial evidence to support an administrative law judge's findings concerning petitioners' failure to prosecute their case (resulting in dismissal by the ALJ).

3. Administrative Law— dismissal of contested case—authority—no error of law

Dismissal of a contested case is drastic but within the plain language of the ALJ's statutory and regulatory power, and there was no error of law in the ALJ's dismissal in this case. The errors cited by petitioners concerned inapplicable regulations, were not prejudicial, or involved actions not required of the ALJ.

Appeal by petitioner from order entered 10 May 2004 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 20 April 2005.

Attorney General Roy Cooper by Assistant Attorney General Elizabeth L. Oxley, for respondent-appellee.

Allen and Pinnix, P.A., by M. Jackson Nichols and Angela Long Carter, for petitioner-appellant.

ELMORE, Judge.

Lisa Lincoln and her childcare company Honeybees Creative Center (petitioners), appeal from the dismissal of a contested case brought against the Nutrition Division of North Carolina Health and Human Services (respondent) for its determination that petitioners have not complied with federal law regarding reimbursement for low cost school meals.

Respondent is charged with administering the Child and Adult Care Food Program, financed by the United States Department of Agriculture. In order to receive reimbursement money from respondent, petitioners must comply with all the federal requirements for funds. Respondent audited petitioners' records for the program and found that they were in noncompliance; many required records were missing and others did not coincide. As a result, respondent demanded repayment of $60,279.45, representing the amount respondent had paid out to petitioners during the period of noncompliance.

On 24 June 2003, petitioners filed for a contested case hearing to dispute the money owed. This was after petitioners had received a letter from one of respondent's employees informing them that an informal process of resolution might be available. Petitioners served notice of the filing on the author of the letter; however, this individual was not respondent's listed agent for service of process.

On 25 June 2003, the parties received notice that the Office of Administrative Hearings (OAH) had assigned Judge Augustus B. Elkins (the ALJ) to hear the contested case. The notice also made reference to a possible forthcoming order for prehearing statements. In accordance with N.C. Admin. Code tit. 26, r. 3.0104 (June 2004), and on the same day, the ALJ filed an order giving both parties thirty days to file and serve prehearing statements. Respondent complied with the order, submitting its pretrial statement and other required documentation supporting its claim.

Petitioners failed to respond within thirty days, and in fact filed nothing more after the petition for the contested case hearing. On 20 October 2003, respondent filed a motion to dismiss the contested case for petitioners' failure to respond to a court order and failure to properly effect service of process. The ALJ sent petitioners notice of his order giving them ten days to file objections to the motion to dismiss. No response was received. The contested case was scheduled for hearing on 3 November 2003. On 22 October 2003, respondent filed a request to continue the hearing along with a request for the ALJ to hear its motion to dismiss. The next day the ALJ sent notification that he had continued the case and a new hearing date would be set. On 13 November 2003, the ALJ granted respondent's motion to dismiss, citing the facts that petitioners had failed to prosecute their case, other sanctions had been considered, and dismissal was appropriate.

On 15 December 2003, nearly six months after their initial filing, petitioners filed a petition for judicial review in Wake County Superior Court, requesting review of the final decision of the ALJ dismissing the case. Petitioners took exception to findings 2 and "3" (actually numbered 4 in the ALJ's order) and argued that the order violated all six grounds listed in N.C. Gen. Stat. § 150B-51(b). On 10 May 2004, after reviewing the whole record, the trial court entered its order affirming the findings and conclusions of the ALJ and also determining that the ALJ's decision was not arbitrary or capricious. Petitioners filed notice of appeal to this Court.

[1] Neither party has briefed the appropriate standard of review this Court should apply when reviewing an order of the superior court, sitting in appellate capacity, that reviewed a final decision of an administrative law judge issued pursuant to N.C. Gen. Stat. § 150B-36(c) (2003). Since we are reviewing a "review proceeding" in the superior court and petitioners are appealing pursuant to N.C. Gen. Stat. § 7A-27, we will apply N.C. Gen. Stat. § 150B-52 (2003):

> A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases.

Id. See also N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 658, 664, 599 S.E.2d 888, 894, 898 (2004) (stating section 150B-52 is applicable to appellate review of a superior court decision).

Recently, our Court has previously characterized the standard of review called for by this statute in at least two ways. In *Diaz v. Division of Soc. Servs.*, the Court described the review contemplated by section 150B-52 as:

> 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. Findings of fact by the trial court in a non-jury trial . . . are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

166 N.C. App. 209, 211, 600 S.E.2d 877, 879 (2004) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)), *Medina v. Division of Social Servs.*, 165 N.C. App. 502, 505, 598 S.E.2d 707, 709 (2004). Yet, in *Hardee v. N.C. Bd. of Chiropractic Exam'rs*, 164 N.C. App. 628, 633, 596 S.E.2d 324, 328, *disc. review denied*, 359 N.C. 67, 604 S.E.2d 312 (2004), we characterized the operable standard of review under this statute slightly differently, noting that it involved a twofold determination: "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* (citing *Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 597, 446 S.E.2d 383, 387-88 (1994)).

Our appellate court's principal cases discussing the standard of review have dealt with review of a final agency or board decision that the superior court reviewed, *see Carroll*, 358 N.C. at 652, 599 S.E.2d at 890; *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 565 S.E.2d 9 (2002); *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 355 N.C. 269, 559 S.E.2d 547 (2002) (per curiam) (adopting the dissent in 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001)); *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 483 S.E.2d 388, (1997); *Shackleford-Moten v. Lenoir Cty. DSS*, 155 N.C. App. 568, 572 S.E.2d 767 (2002); *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994), not the review of a final decision of an ALJ issued pursuant to N.C. Gen. Stat. § 150B-36(c) that has no agency or board action.[1]

1. The best case dealing with this procedural scenario is *Lincoln Cty. DSS v. Hovis*, 150 N.C. App. 697, 564 S.E.2d 619 (2002), in which this Court reviewed a superior court order affirming an ALJ's decision made pursuant to section 150B-36(c)(3) that resolved the contested case against respondent Department of Social Services for its failure to respond to discovery orders. *See* N.C. Admin. Code tit. 26, r. 3.0114(a)(1) (June 2004) (also allowing the ALJ to find against a party failing to respond to inter-

Nonetheless, consistent with this case law, when reviewing an order from a superior court acting in an appellate capacity, our scope of review is restricted to evaluating the trial court's order for errors of law. *Shackleford-Moten*, 155 N.C. App. at 572, 573 S.E.2d at 770 (citing *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392). "[A]n appellate court's obligation to review for errors of law, see N.C.G.S. §§ 7A-27(b), 150B-52, N.C.R. App. P. 16(a), 'can be accomplished by addressing the dispositive issue(s) before the agency and the superior court' and determining how the trial court *should have* decided the case upon application of the appropriate standards of review." *Carroll*, 358 N.C. at 664-65, 599 S.E.2d at 898 (quoting *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting)). Although these cases deal with our standard of review of contested cases reaching a final agency decision, we find it authoritative for cases arising from section 150B-36(c) as well. Further, although the superior court's scope of review regarding an ALJ's final decision issued pursuant to section 150B-36(c) does not fall precisely within the plain language of any provision of N.C. Gen. Stat. § 150B-51, we determine, as the superior court did here, that the standard of review is that stated in section 150B-51(b).

[2] Here, the dispositive issue on review to the superior court and on appeal to this Court is whether the ALJ erred in dismissing petitioners' contested case pursuant to section 150B-36(c)(3) for failure to prosecute. This issue requires both a factual inquiry as well as a legal inquiry; to that extent we will review the ALJ's findings of fact under the whole record test and its conclusions of law *de novo* in order to determine if the superior court erred. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894-95. We hold that the superior court should have affirmed the ALJ's order under section 150B-51(b) and thus find no errors of law in the superior court actually doing so.

The ALJ found that, after filing a petition for a contested case on 24 June 2003, petitioners filed nothing until 15 December 2003 despite receiving several orders from the ALJ to file and serve prehearing statements and other responses to motions. The ALJ further found that:

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locutory orders). There, the Court stated that the superior court reviews final decisions issued by an ALJ pursuant to section 150B-36(c) "under G.S. § 150B-51(b) includ[ing] determining whether the decision of an ALJ contains errors of law, is supported by substantial evidence, and is neither arbitrary nor capricious." *Hovis*, 150 N.C. App. at 701, 564 S.E.2d at 621-22 (citation omitted). Yet, *Hovis* swiftly determined that the trial court did not err by upholding the ALJ's order without expressing what standard of review it was applying. *See id.*

> 2. Petitioner, by failure to respond through a Prehearing Statement or respond to Respondent's motion, despite orders by the [ALJ], has appeared . . . to have abandoned interest in this contested case. By Petitioner's failure to set forth its version of the facts and other items as required by the Prehearing Statement or respond to Respondent's motion, [sic] appears to concur with Respondent's assertions.
>
> [3.] The [ALJ] has considered actions less drastic for disposing of this contested case and determines that less drastic actions will not suffice. The lack of meaningful response to the Office of Administrative Hearings prohibits even an examination by the ALJ of excusable neglect by Petitioner. Therefore, no less drastic action other than disposing of this case by dismissal would be effective in ensuring compliance with the Orders of the [ALJ] and would best serve the interests of justice.

After a thorough review of the record we conclude that there is substantial evidence in the record to support the ALJ's findings. Petitioners argue that there was no evidence supporting a finding that their failure to respond was anything other than mere delay. We cannot agree; petitioners filed nothing in this contested case, they did not merely delay filing of the requested documents. Accordingly, having found substantial evidence supporting the ALJ's findings, we will review the dismissal for errors of law.

[3] Despite petitioners' arguments to the contrary, we discern no errors of law in the ALJ's order. The ALJ's order in this case was quite thorough, citing numerous cases and noting that its decision was pursuant to N.C. Admin. Code tit. 26, r. 3.0114(a) (June 2004) and N.C. Gen. Stat. § 1A-1, Rule 41(b). Dismissal of a contested case is admittedly a drastic sanction, but one within the plain language of the ALJ's statutory and regulatory power to sanction a party for failure to comply with an order.

The administrative code provides that "[i]f a party fails . . . to comply with an interlocutory order of an administrative law judge, the administrative law judge may . . . [d]ismiss or grant the motion or petition[.]" N.C. Admin. Code tit. 26, r. 3.0114(a) (June 2004). Additionally, the administrative code also provides that the Rules of Civil Procedure "shall apply" to contested cases. N.C. Admin. Code tit. 26, r. 3.0101(a) (June 2004). Rule 41(b) of the Rules of Civil Procedure allows a court to dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with these

rules or any order of court[.]" N.C. Gen. Stat. § 1A-1, Rule 41(b) (2003). This Court has reversed orders of dismissal under Rule 41(b) if the order did not include findings that plaintiff's delay was deliberate and less drastic sanctions were unavailable. *See Page v. Mandel*, 154 N.C. App. 94, 102, 571 S.E.2d 635, 640 (2002); *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001). Here though, the ALJ's order included all the necessary findings to support a legal conclusion of dismissal.

But, petitioners contend that the trial court erred in affirming the ALJ's order because the Notice of Hearing did not comply with N.C. Gen. Stat. § 150B-23(b) (2003), which states:

> The parties to a contested case shall be given a notice of hearing not less than 15 days before the hearing by the Office of Administrative Hearings. If prehearing statements have been filed in the case, the notice shall state the date, hour, and place of the hearing. If prehearing statements have not been filed in the case, the notice shall state the date, hour, place, and nature of the hearing, shall list the particular sections of the statutes and rules involved, and shall give a short and plain statement of the factual allegations.

Id. The notice of hearing filed in this case did not list the statutes and rules involved or give a short and plain statement of the facts, but those details were not necessary. According to the plain language of the statute, those details are only necessary if prehearing statements have not been filed. Here, an order was issued for prehearing statements, to which respondent replied, and the notice of hearing was in accordance with prehearing statements having been filed. We cannot agree with petitioners that the ALJ should be required to issue a notice of hearing as if he had not ordered that the prehearing statements be filed and, indeed, the only party dealing with the OAH had filed its prehearing statement.

Next, petitioners argue that since the final decision of the ALJ was not served via certified mail, it was improper, an error of law, and the trial court should have reversed. We disagree. Petitioners argue that since N.C. Gen. Stat. §§ 150B-36(b3) and 150B-42(a) require an agency to mail its final decision certified mail, absent a statute of exemption, the ALJ's final decision should be mailed in the same manner. There is no support for that deductive logic since the plain language of those statutes applies to agencies, not the OAH. However, the administrative code does state that "[a] copy of a final decision

issued by an administrative law judge shall be served on each party in accordance with G.S. 150B-36." N.C. Admin. Code tit. 26, r. 3.0131 (June 2004). There is only one sentence dealing with service listed within section 150B-36, and although addressed in the statute to an agency, it states that service shall be "personally or by certified mail addressed to the party at the latest address given by the party . . ." N.C. Gen. Stat. § 150B-36(b3) (2003). In order to give the administrative code section any validity, the final decision must be served personally or by certified mail. Here it was not. Yet we cannot hold that this violation prejudiced petitioners' substantial rights in any way; petitioners do not deny receiving a copy of the final decision and received full judicial review of the decision in superior court. *See* N.C. Gen. Stat. § 150B-51(b)(3) (2003) (reversal, modification, or remand are available "if the substantial rights of the petitioners may have been prejudiced because . . . [the decision was] [m]ade upon unlawful procedure[.]").

Lastly, based mainly on the fact that petitioners were proceeding *pro se*, they argue that the ALJ's decision was arbitrary and capricious and a violation of due process. We find these contentions wholly without merit; the ALJ's order was well reasoned and followed all applicable law in determining whether to dismiss petitioners' contested case. Petitioners argue that the OAH should have sent additional requests for prehearing statements, as evidenced in other contested cases they cite. While laudable in the child support cases cited by petitioners, nothing in the statutes or regulations requires this action, especially in a contested case against a childcare company allegedly owing over $60,000.00 in reimbursement money from a federal program requiring the recipient to, among other things, keep accurate business records.

In conclusion, we have reviewed the superior court's order for errors of law as required by N.C. Gen. Stat. § 150B-52 and interpreted by *Carroll* and *Capital Outdoor, Inc.* We hold that the superior court did not err in affirming the ALJ's order dismissing petitioners' contested case for failure to prosecute.

Affirmed.

Judges McGEE and CALABRIA concur.

FRANK H. CHRISTENSEN, PLAINTIFF v. TIDEWATER FIBRE CORP., DEFENDANT

No. COA04-717

(Filed 16 August 2005)

1. Landlord and Tenant— transfer of tenant's interest—sublease—no privity with landlord

A landlord's sole remedy for unpaid rent for the balance of a lease was against the original tenant, SunShares, where the transfer agreement between SunShares and its successor conveyed less than SunShares' entire interest. The agreement was a sublease with no privity between the landlord (plaintiff) and the new tenant (defendant), and plaintiff waived his right to prior notice by depositing defendant's checks.

2. Landlord and Tenant— damage to property—implicit in testimony

There was sufficient evidence to support the trial court's finding (sitting without a jury) that damage to plaintiff's rental property was caused by defendant where it was implicit in plaintiff's testimony that the damage was not present before defendant occupied the property.

3. Landlord and Tenant— award for damages by tenant—sufficiency of evidence

There was competent evidence at a trial without a jury to support a finding as to the difference in the value of the property due to damage by the tenant, and the findings supported the conclusion and award of damages.

Appeal by defendant from judgment entered 6 January 2004 by Judge Stafford G. Bullock in Durham County Superior Court. Heard in the Court of Appeals 1 February 2005.

Stark Law Group, by Thomas H. Stark and W. Russell Congleton, for plaintiff-appellee-cross-appellant.

Kennon, Craver, Belo, Craig & McKee, PLLC, by Joel M. Craig and Erin M. Locklear, for defendant-appellant-cross-appellee.

STEELMAN, Judge.

Plaintiff was the owner of property located at 700 Mallard Avenue, Durham (the property). On 30 June, 1997, plaintiff entered

into a Lease Agreement with SunShares, Inc. (SunShares), a North Carolina nonprofit corporation which conducted curbside recycling services for the City of Durham. The term of the Lease was 1 July 1997 to 30 June 2000, with monthly rental payments of $4,716.25. Defendant is a family-owned corporation engaged in the business of recycling. In the spring of 1998, defendant learned that SunShares was unable to continue to perform recycling services for Durham. Defendant subsequently entered into a contract with Durham to perform the curb-side recycling services previously performed by SunShares. Defendant entered into an agreement with SunShares on 31 October 1998. In the Agreement, defendant agreed to pay rent on the property for the 60-day period immediately following 31 October 1998 as a temporary measure until defendant could locate another property more suitable for the operation of its business.

Plaintiff had no knowledge of the negotiations between SunShares and defendant and at no time gave explicit consent to any agreement between SunShares and defendant. The lease agreement between plaintiff and SunShares required plaintiff's prior written consent for any such agreement to be valid. Plaintiff did not become aware of defendant's use of the property until a difference in the physical appearance of the rent check was brought to his attention by his staff. Plaintiff consulted with counsel and was advised that his negotiation of the November and December rent checks precluded him from evicting defendant. Plaintiff subsequently accepted and deposited a rent check from defendant for January 1999.

Once a suitable location became available at the end of January, 1999, defendant transferred its operations away from the property. Defendant paid rent to plaintiff from 1 November 1998 through January, 1999. Defendant ceased active recycling operations on the property in late January or early February, 1999. No payments were made to plaintiff after January, 1999. Quantities of recyclable material belonging to defendant remained at the property until the middle of May, 1999, when they were removed by APB, Inc., a contractor engaged by defendant. Other, non-recyclable materials were left on the site by defendant until September of 2000. Plaintiff filed this action on 28 February 2002, seeking to recover rent due under the lease agreement and reimbursement for expenses incurred for the repair of the property and the clean-up of trash left on the premises.

The case was tried before the Honorable Stafford G. Bullock, sitting without a jury, at the 3 November, 2003 civil term of the Superior

Court for Durham County. Judge Bullock entered a judgment in favor of plaintiff in the amount of $66,510.50 together with interest from 1 August 1999 and costs. These damages were broken down as follows: (1) $28,297.50 plus interest from 1 August 1999 for unpaid rent for the period of 1 February, 1999 through 31 July, 1999; (2) prorated taxes for 1999 in the amount of $1,838.00 and insurance in the amount of $733.00; (3) defendant's share of the expense in changing all locks for the property amounting to $642.00; (4) the diminution in value to the property resulting from the damage done to the building and surrounding structures in the amount of $35,000.00; and (5) defendant's share of the cleanup expenses incurred by plaintiff in the amount of $190.00. From this judgment defendant appeals. Plaintiff cross-appeals.

Defendant's Appeal

[1] Defendant first argues that the trial court erred in determining defendant assumed the lease between plaintiff and SunShares, and is obligated for additional payment of rent, as well as other obligations under the lease between plaintiff and SunShares. We agree.

Defendant failed to except to certain findings of fact made by the trial court, and they are thus binding on appeal. *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001). These facts are as follows:

- The lease between plaintiff and SunShares ran from 1 July 1997 to 30 June 2000, and included a provision prohibiting SunShares from assigning or sub-letting its interest without the prior written approval of plaintiff.

- "The October 31, 1998 agreement between [defendant] and SunShares also provided that [defendant] assumed liability for the lease . . . but purported to limit that assumption of the lease to a period of sixty (60) days."

- "[Plaintiff] was not a party to [that agreement], had no knowledge of the agreement, and did not provide assent to even a limited assignment of the lease."

- Defendant took possession of the property on 1 November 1998, and paid rent directly to Plaintiff through January of 1999.

- Plaintiff did not realize that the rent had come from defendant, and not SunShares, until after he had negotiated the November

check. Plaintiff also negotiated the December 1998 and January 1999 rent checks from defendant without protest, though he did contact his attorney in December 1998 concerning the change in tenancy.

• Plaintiff's attorney instructed plaintiff that due to his acceptance of the first two rent checks, he was prevented from objecting to defendant's agreement with SunShares concerning the lease.

• At no time did defendant or SunShares contact plaintiff in regard to the change in tenancy.

Based on these findings of fact, the trial court made the following contested conclusions of law: 1) "[Defendant] agreed with SunShares that it was assuming the lease . . . ." And: 2) "Because [plaintiff] was not a party to the [agreement between defendant and SunShares], any attempted limitation on the term of the assumption is ineffective in the absence of proof that plaintiff knew of and accepted the limited term."

The determinative issue in the instant appeal is whether the lease agreement between SunShares and defendant constituted an assignment or a sublease.

> [O]ur courts have adopted the traditional "bright line" test for determining whether a conveyance by a tenant of leased premises is an assignment or a sublease. Under this test, a conveyance is an assignment if the tenant conveys his "entire interest in the premises, without retaining any reversionary interest in the term itself." A sublease, on the other hand, is a conveyance in which the tenant retains a reversion in some portion of the original lease term, however short.

Northside Station Assoc. P'ship v. Maddry, 105 N.C. App. 384, 388, 413 S.E.2d 319, 321 (1992) (internal citations omitted). "If the conveyance is an assignment, 'privity of estate' is created between the original lessor and the assignee with regard to lease covenants that run with the land, and the original lessor has a right of action directly against the assignee. The original lessor has no such right against a sublessee." *Id.* at 389, 413 S.E.2d at 322.

> In general: "[P]rivity of estate" is not established between the original landlord and the sublessee and the landlord has no direct action with respect to the covenants in the original lease as

> against the sublessee; there is neither privity of estate nor privity of contract as between the original landlord and a sublessee, and the sublessee can sue only his immediate lessor . . . with respect to the lease.

Neal v. Craig Brown, Inc., 86 N.C. App. 157, 162, 356 S.E.2d 912, 915 (1987) (citation omitted); *Krider v. Ramsay*, 79 N.C. 354 (1878).

In the instant case, SunShares and defendant executed an agreement whereby defendant agreed to "assume" SunShares' lease obligations for the months of November and December, 1998. SunShares' lease with plaintiff was not due to terminate until 30 June 2000. Thus there was no agreement by SunShares to convey its entire interest in the property to defendant. This conveyance could not be an assignment; it was a sublease.

By depositing defendant's checks, plaintiff waived his right to receive prior written notice of the sublease, and thus validated the agreement to sublet between SunShares and defendant. *See Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 466, 98 S.E.2d 871, 877 (1957). As a sublessee of SunShares, there was no privity of estate or contract between defendant and plaintiff; defendant was not bound by the terms of the lease between SunShares and plaintiff; and plaintiff had no recourse against defendant for any violations thereof. *Neal*, 86 N.C. App. at 162, 356 S.E.2d at 915. Plaintiff's sole remedy for unpaid rent for the balance of the lease term was against SunShares. *Id.*

Defendant was liable only to SunShares pursuant to their agreement. SunShares remained liable to plaintiff for all the terms of its lease with plaintiff until its expiration. Defendant was not liable to plaintiff for the breach of any covenants in the lease, and thus was not liable to plaintiff for the payment of rent, property taxes or insurance under the lease. These portions of the trial court's judgment must be vacated.

Though defendant assigned as error the trial court's award of $642.00 for replacing locks at the property, it does not argue this assignment of error in its brief and thus it is deemed abandoned. N.C. R. App. P. Rule 28(b)(6); *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 568, 500 S.E.2d 752, 755 (1998). Defendant did not assign as error the trial court's award of $190.00 to plaintiff as cleanup expenses, and thus this award is not affected by our decision. *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991).

[2] Defendant next argues that the trial court erred in finding that defendant is responsible for damage to plaintiff's property. We disagree.

This argument is based upon the following assignments of error:

1. Trial Court's Finding of Fact Number 16 that the property was damaged during the course of [defendant's] occupancy on the grounds that the evidence presented was insufficient to support such a finding.

5. Trial Court's Finding of Fact Number 20 that the value of the property was decreased by damage to the structure on the grounds that the evidence presented was insufficient to support such a finding.

13. Trial Court's Conclusion of Law Number 12 that [defendant] caused damage to the structure of the building resulting in damage of $35,000.00 on the grounds that the evidence presented was insufficient to support such a conclusion.

In support of its first assignment of error, defendant argues that the evidence presented at trial was not sufficient to support the trial court's finding of fact that "[d]uring the course of [defendant]'s occupancy of the property, overhead doors on the warehouse building at Mallard Avenue were damaged, a fence was damaged and at least one truck ran into the exterior wall of the building, causing damage to the exterior wall. [Defendant] did not notify [plaintiff] of the damage and made no effort to repair the damage." Defendant further argues that the trial court's finding of fact setting the amount of the damage at $35,000.00 was based on insufficient evidence.

When a case is tried without a jury, the judge's findings of fact will be binding on appeal "absent a total lack of substantial evidence to support" them. *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998). This is true "even though the evidence might sustain a finding to the contrary." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citations omitted). It is the province of this Court to determine if the trial court's proper findings of fact support its judgment. *Alpar v. Weyerhaeuser Co.*, 20 N.C. App. 340, 345, 201 S.E.2d 503, 507 (1974).

At trial, plaintiff testified that he inspected the property in response to a call from American Dry Cleaners (which occupied a separate portion of the property) while defendant was operating

its business on it. In an area occupied by defendant, plaintiff observed a large hole in the side of the building, as well as severely damaged electric garage doors and damage to the gate and fence surrounding the property. Terry Weekly, who was employed by defendant and worked at the property, acknowledged that the damage to the gate and fence was caused by one of defendant's trucks. Implicit in plaintiff's testimony concerning the hole in the building and the garage doors is that this damage was not present before defendant occupied the property. We hold that this constitutes sufficient evidence to support the trial court's finding that this damage was caused by defendant.

[3] We next address defendant's fifth assignment of error. Plaintiff sold the property in April of 2001 for $235,000.00. Plaintiff testified that this amount was $35,000.00 less than his estimated value of the property, and he further offered uncontroverted testimony that this diminution in value was attributable to the damage sustained to the property while under defendant's control, and that the purchaser of the property agreed to repair the damage itself in return for a reduction in sales price.

Diminution in value is a proper measure of damage to real property. *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 484, 157 S.E.2d 131, 141 (1967). " 'Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value.' *Highway Comm'n v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974)." *Goodson v. Goodson*, 145 N.C. App. 356, 361, 551 S.E.2d 200, 204 (2001). Because there was competent evidence at trial as to the difference in value of the property resulting from the above mentioned damage, we hold that the trial court did not err in making this finding of fact. We further hold that these findings of fact support the trial court's Conclusion of law number twelve, and its judgment and award of $35,000.00. This argument is without merit.

Plaintiff's Appeal

In light of our holding in defendant's Appeal, plaintiff's appeal is moot.

AFFIRMED IN PART, VACATED IN PART.

Judges WYNN and HUDSON concur.

JOHN HARVEY, Plaintiff v. PATRICK D. McLAUGHLIN, D.C., d/b/a McLaughlin Chiropractic Center, Defendant

No. COA04-1597

(Filed 16 August 2005)

Estoppel— judicial—positions not clearly inconsistent

The trial court abused its discretion by barring a chiropractic malpractice claim as judicially estopped based on a discrepancy with earlier workers' compensation assertions. The plaintiff in this case did not take clearly inconsistent positions, a required element for judicial estoppel.

Appeal by plaintiff from order entered 27 August 2004 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 15 June 2005.

Donald J. Dunn for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Meredith Black, for defendant-appellee.

CALABRIA, Judge.

John Harvey ("plaintiff") appeals an order of the trial court dismissing his malpractice claim against Patrick D. McLaughlin, D.C. ("defendant") for chiropractic treatment. The trial court dismissed plaintiff's claim on the grounds that it was barred by the doctrine of judicial estoppel. We reverse.

According to a final compromise settlement agreement (the "agreement") entered into between plaintiff and his employer on 15 August 2002, plaintiff sustained an injury to his back on 9 June 1997 in the course and scope of his employment while trying to move heavy cabinets. The agreement represented the culmination and settlement of all of plaintiff's claims as against the employer and carrier arising from the workers' compensation claim filed by plaintiff following the accident. The agreement additionally set forth that, following the 9 June injury, (1) plaintiff sought treatment from defendant, (2) defendant performed a "violent" manipulation to plaintiff's neck, (3) plaintiff alleged defendant's manipulation was "connected to his treatment for his work related injury[,]" and (4) said manipulation "led to [plaintiff's] disability." The agreement detailed a truncated treatment history as well as other factors relevant to a

determination of a workers' compensation award and settled all claims between plaintiff and his employer for $457,254.84.

On 5 October 2000, plaintiff commenced a civil action against defendant for malpractice relating to the chiropractic treatment provided by defendant. In the factual assertions, plaintiff generally alleged he was in good health, pain free, and actively engaged in the construction business prior to 11 June 1997. Plaintiff, however, also specifically alleged that "[a] few days before June 11, 1997, [he] pulled his upper back." Plaintiff stated he developed back pain on 9 June 1997, which precluded his participation in a fishing tournament the next day, and went on to detail that those symptoms precipitated his visit to defendant's practice. In his complaint, plaintiff again reiterated the "violent" manipulation employed by defendant to treat plaintiff and comprehensively explained the subsequent diagnoses and treatments following his visit to defendant. Plaintiff was ultimately diagnosed with a severely ruptured right C6-7 cervical disk, which necessitated multiple surgeries and left plaintiff with a forty-nine percent permanent partial disability to his back, neck, and one arm.

Defendant answered the complaint and moved to dismiss the complaint based on lack of subject matter jurisdiction and on the doctrine of judicial estoppel. Defendant's motions were heard by the trial court on 12 August 2004. On 27 August 2004, the trial court dismissed plaintiff's complaint, concluding it was barred by the doctrine of judicial estoppel. Plaintiff moved for reconsideration under Rule 60(b) of the North Carolina Rules of Civil Procedure, which the trial court denied. In denying plaintiff's motion, the trial court found that plaintiff had "intentionally asserted contrary legal positions" in the workers' compensation claim and before the trial court. Specifically, the trial court cited the dichotomy between plaintiff's complaint, alleging plaintiff was pain free, in good health, and actively engaged in physical and construction activities prior to 11 June 1997. The trial court also cited the Form 21 Agreement, which set forth that plaintiff was injured by accident and that the onset of disability occurred on 10 June 1997. The trial court also contrasted plaintiff's complaint, that prior to 11 June 1997, he had never experienced pain in his neck or cervical region, with discovery materials that included a medical history form plaintiff completed on 11 June 1997 prior to being treated by defendant in which plaintiff described his condition or problem as "pain in [the] upper neck." Plaintiff appeals the dismissal of his claim by the trial court on the doctrine of judicial estoppel.

Judicial estoppel is an equitable, gap-filling doctrine that "provid[es] courts with a means to protect the integrity of judicial proceedings" from "individuals who would play fast and loose with the judicial system." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 26, 591 S.E.2d 870, 887 (2004) (citation and internal quotation marks omitted)). The doctrine "prohibit[s] parties from deliberately changing positions [on factual assertions] according to the exigencies of the moment[.]" *Id.*, 358 N.C. at 28, 591 S.E.2d at 888 (citations and internal quotation marks omitted). While observing that the circumstances allowing for the invocation of judicial estoppel "are probably not reducible to any general formulation of principle," our Supreme Court enumerated the following three factors as guidance concerning whether application of the doctrine would be appropriate: (1) whether a party has taken a subsequent position that is clearly inconsistent with its earlier position, (2) whether the party successfully persuaded a court to accept the earlier, inconsistent position raising a threat to judicial integrity by inconsistent court determinations or the appearance that the first or the second court was misled, and (3) whether the inconsistent position gives the asserting party an unfair advantage or imposes on the opposing party an unfair detriment if not estopped. *Id.*, 358 N.C. at 28-29, 591 S.E.2d at 888-89 (citations and internal quotation marks omitted). Only the first of these factors is an essential and required element. *Id.*, 358 N.C. at 29, n.7, 591 S.E.2d at 888, n.7. The invocation of the doctrine of judicial estoppel is addressed to the sound discretion of the trial court, *id.*, 358 N.C. at 33, 591 S.E.2d at 891, and our review of a trial court's application of the doctrine is limited to determining whether the trial court abused its discretion. *Id.*, 358 N.C. at 38, 591 S.E.2d at 894.

Initially, we note the order of the trial court is couched in terms of whether plaintiff "intentionally asserted contrary legal positions" in the various proceedings. This language is consistent with this Court's formulation of the doctrine of judicial estoppel in *Medical Rentals, Inc. v. Advanced Services*, 119 N.C. App. 767, 771, 460 S.E.2d 361, 364 (1995). However, our Supreme Court criticized this formulation insofar as it suggested that the doctrine could be reduced to an inflexible prerequisite or exhaustive formula. *Whitacre P'ship*, 358 N.C. at 28, 591 S.E.2d at 888. Stating that this formulation "fail[ed] to adequately recognize the inherently flexible nature of th[e] discretionary equitable doctrine [of judicial estoppel,]" our Supreme Court declined to accept it in favor of the three-part factors test set forth, *supra*. *Id.*

Turning to the test adopted by our Supreme Court and looking at the pleadings and record as a whole, we conclude plaintiff has not taken "clearly inconsistent" positions. With respect to the first enumerated inconsistency, the trial court noted plaintiff had differing assertions regarding the date of the onset of pain in his complaint as compared with the date of disability in his Form 21 Agreement. However, as noted previously, plaintiff's complaint was candid about his condition. While the complaint initially stated that, prior to 11 June 1997, plaintiff was "in good health and pain free" and active in both his work and recreational activities, the very next sentence provides that a "few days before June 11, 1997, the plaintiff pulled his upper back." The following sentences further note that on "the afternoon of June 9, 1997, plaintiff began experiencing pain in his back" and declined, due to the pain, to participate in a fishing tournament. The complaint, read as a whole, is entirely consistent with the onset of pain prior to 11 June 1997 and that, in fact, plaintiff suffered a back injury on 9 June and developed increasing pain that interfered with his recreational activities and prompted him to seek chiropractic intervention.

Turning to the second enumerated inconsistency, the trial court contrasted plaintiff's allegation in his complaint that he had "never experienced pain in his neck or cervical region" with the discovery materials indicating that plaintiff's complaint upon presenting to defendant was "pain in [his] upper neck." This single discrepancy fails to indicate plaintiff was playing "fast and loose" with the judicial system or changing factual assertions due to circumstantial exigencies. This is especially true where, as here, plaintiff consistently represented in the proceedings before the trial court and Industrial Commission that he (1) hurt his back on 9 June 1997, (2) experienced increasing pain, (3) sought treatment from defendant on 11 June 1997 because of the increasing pain, and (4) suffered, at the hands of defendant, a "violent" maneuver instantaneously causing plaintiff markedly increased pain. The single internal discrepancy noted by the trial court neither overcomes the striking similarities common in the two proceedings nor represents "clearly inconsistent" positions taken by plaintiff.

Having determined an essential element of judicial estoppel is not present, we hold the trial court abused its discretion in barring plaintiff's claim on this ground.

Reversed.

Judges ELMORE and GEER concur.

CITY OF ASHEVILLE, A NORTH CAROLINA MUNICIPAL CORPORATION, PLAINTIFF V. KENNETH BOWMAN, JOSEPH BOERNER, CHAD BRIDGES, CHRISTIAN BRENZEL, CHARLES BURCHETT, MARK BYRD, TRACY CROWE, IRIS DURELL, SCOTT EARLY, DONALD EBERHARDT, HENRY FULCHER, STONY GONCE, JANICE HAWKINS, MICHAEL LAMB, JOHN LONG II, JAMES LYDA, STEVE RIDDLE, RONNIE ROBERSON, CHARLES SAMS, JOSEPH SORRELLS, DONALD STOUT, DIANA STUMPF, STASON TYRELL, WILLIAM YELTON, AND THE CITY OF ASHEVILLE CIVIL SERVICE BOARD, DEFENDANTS

No. COA04-1546

(Filed 16 August 2005)

Public Officers and Employees— jurisdiction of Civil Service Board—pay raise to new hires

Summary judgment was correctly granted for plaintiff city on a grievance by a group of existing police officers with post-secondary degrees to the increased pay levels offered to new hires with post-secondary degrees. The officers (defendants at trial) contend that they alleged a personnel action within the scope of the Asheville Civil Service Act sufficient to invoke the Civil Service Board's jurisdiction because they were entitled to a raise in pay, but no evidence indicates that defendants were eligible for this pay policy and defendants did not show that any such pay policy was approved by the City Council, as required by statute.

Appeal by defendants from order entered 7 July 2004 by Judge E. Penn Dameron, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 8 June 2005.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle Rippon, for defendants-appellants.

Curtis W. Euler and William C. Morgan, Jr. for plaintiff-appellee.

ELMORE, Judge.

Defendants are employees of the Asheville Police Department (APD) who were hired prior to 1 July 2000 and who hold post-secondary degrees. The dispute between defendants and the City of Asheville arose out of changes that the APD made in its recruitment and hiring policies. On 19 June 2000, APD Chief of Police Will Annarino (Annarino) distributed a memorandum entitled "Changes in Policies and Procedures Regarding Recruitment, Retention and Career Development" to all APD employees. A subsection of this memo outlined the APD's new policy of increasing the entry level of pay for new employees based upon education. The memo stated that "[a]fter July 1, any new candidate hired with a Bachelors Degree will receive 5% above the minimum starting salary" and that "[a]ny candidate hired with a Masters Degree will receive 10% above the minimum starting salary."

In response to these changes, defendants filed a grievance with the City Manager on 16 September 2000, asserting that existing officers should likewise receive additional compensation. The City Manager held a grievance conference on 9 October 2000 and, after reviewing the details of defendants' grievance, determined that "the City does not have a policy that awards additional compensation for obtaining post-secondary job-related degrees." Accordingly, the City Manager denied defendants' request for additional salary.

Defendants appealed to the Civil Service Board of the City of Asheville (the Board), and a hearing was held on 3 January 2001. On 5 January 2001, the Board dismissed the grievance based upon its conclusion that it had no jurisdiction to grant relief. In support of this conclusion, the Board found that defendants had not been denied a promotion or pay raise to which they were entitled. Defendants then appealed to Buncombe County Superior Court. In an order entered 1 May 2001, Judge Zoro Guice denied the City's motion to dismiss; determined that the Board had jurisdiction to hear the grievance; reversed the 5 January 2001 decision of the Board; and remanded to the Board for a determination of whether the City's action of denying additional compensation to current employees is justified where the City grants additional compensation to new employees hired after 1 July 2000 with the same degrees.

On remand, the Board heard defendants' grievance on 25 February 2002. In compliance with the trial court's order, the Board considered whether the City's action in providing additional compen-

sation to new employees while denying similar consideration to defendants was justified. The Board concluded that the City was not justified in this action. From this decision of the Board entered 3 March 2002, the City appealed to the Buncombe County Superior Court for a trial *de novo* pursuant to Section 8(f) of the Asheville Civil Service Act. In its complaint filed 13 March 2002, the City (plaintiff)[1] alleged two claims for relief: (1) that the Board did not have subject matter jurisdiction to hear defendants' grievance; and (2) that the Board's refusal to recuse one of its members from participation created a conflict of interest. Defendants filed an answer and moved to dismiss both claims. On 9 July 2002, Judge Charles C. Lamm, Jr. denied this motion. Both parties moved for summary judgment on the issue of whether the Board has subject matter jurisdiction over defendants' grievance. Plaintiff argued that there was no genuine issue of material fact as to whether defendants were entitled to a pay raise and, therefore, the Board lacked jurisdiction. On 7 July 2004, Judge E. Penn Dameron, Jr. entered an order granting plaintiff's motion for summary judgment and denying defendants' motion. Defendants appeal.

Defendants argue that the trial court erred in determining that the Board does not have jurisdiction to hear their grievance. As described by this Court previously in interpreting Section 8(a) of the Asheville Civil Service Act, in deciding whether the Board has jurisdiction to consider a party's grievance, the trial court must first determine if that party has alleged a personnel action within the scope of the Act. *See Harper v. City of Asheville*, 160 N.C. App. 209, 215, 585 S.E.2d 240, 244 (2003) (citing *O'Donnell v. City of Asheville*, 113 N.C. App. 178, 180, 438 S.E.2d 422, 423 (1993)). Thereafter, the opposing party can challenge the factual basis for the allegation. *Id.* at 216, 585 S.E.2d at 244. The party requesting the hearing has the burden of showing that the Board has subject matter jurisdiction over the personnel action in dispute. *Id.* at 217, 585 S.E.2d at 245.

Under Section 8(a) of the Asheville Civil Service Act, a person has a right to a hearing before the Civil Service Board if he or she "is denied any promotion or raise in pay which he or she would be entitled to[.]" 1999 N.C. Sess. Laws ch. 303, § 8(a). Defendants contend that they have alleged a personnel action within the scope of the Act sufficient to invoke the Board's jurisdiction. As evidence to support

1. The City became the plaintiff in the proceedings when it filed its complaint and notice of appeal from the 3 March 2002 decision of the Board. We will hereinafter refer to the City as "plaintiff."

their allegation that they were "entitled to" a raise in pay, defendants offer the APD pay incentive policy outlined in the Annarino memo. However, this memo is insufficient to create an entitlement to a pay raise. No evidence indicates that defendants, as *current* employees, were eligible for this pay policy directed towards new candidates for employment. Moreover, defendants have failed to show that any such APD pay policy based upon educational degree was approved by the Asheville City Council. In cities which operate pursuant to a council-manager form of municipal government, any new increase in salary for a class of employees must be approved by the city council prior to becoming effective. *See* N.C. Gen. Stat. § 160A-162(a) (2003) (city manager shall administer pay plans for employees after approval by city council). In *Newber v. City of Wilmington*, 83 N.C. App. 327, 330-31, 350 S.E.2d 125, 127 (1986), this Court applied N.C. Gen. Stat. § 160A-162 and determined that payment policies for city employees are invalid without the approval of the city council. Thus, the Court concluded that plaintiff was not entitled to additional compensation under an administrative policy of the Wilmington Police Department where the policy had not been approved by the Wilmington City Council. *Id.*

The reasoning of the *Newber* Court is equally applicable to the City of Asheville, as Asheville also operates under a council-manager form of government. Thus, in order for any increase in salary for a class of employees to be valid and create an entitlement, the increase must be budgeted for and approved by the Asheville City Council. *See id.* Here, the record contains evidence that the Asheville City Council has not approved any pay raise for APD employees with post-secondary degrees. In support of its motion for summary judgment, plaintiff submitted an affidavit from Ben Durant, the Budget Director for the City of Asheville. Mr. Durant stated that if the APD requests a pay increase for a group of employees which would increase the City's salary obligations, this pay increase must be included in the proposed budget and approved by the City Council prior to becoming a "funded pay increase." Mr. Durant stated that, based upon his personal knowledge in his position as Budget Director beginning in January 1998, the City Council has never passed a budget amendment that awarded police officers a pay increase for holding a post-secondary degree.

Plaintiff also included with its motion for summary judgment an affidavit of Jeffrey B. Richardson, the Assistant City Manager of the City of Asheville. Mr. Richardson stated that he held the position of

Human Resources Director for the City for three and one-half years prior to his current position. He stated that, based upon his personal knowledge of the City's pay and personnel policies, the City Council has not approved any pay policy or included in any budget a pay increase for employees who hold post-secondary degrees. Defendants do not contest the accuracy of these affidavits or offer any evidence to contradict these facts. No evidence in the record indicates that the pay incentive policy announced in the Annarino memo could become a funded increase without approval from the Asheville City Council. Thus, the facts of this case fall squarely within the Court's holding in *Newber*. Defendants have failed to meet their burden of showing that they were entitled to a raise in pay.

As the evidence before the trial court on plaintiff's motion for summary judgment does not raise a genuine issue of material fact as to whether defendants were entitled to a pay increase, the trial court properly granted summary judgment in favor of plaintiff. *See Worley v. City of Asheville*, 100 N.C. App. 596, 598, 397 S.E.2d 370, 370-71 (1990) (summary judgment for city affirmed where no genuine issue of material fact existed with respect to evidence that city employee was not entitled to pay increase), *disc. review denied*, 328 N.C. 275, 400 S.E.2d 463 (1991). We affirm the order of the trial court.

Affirmed.

Judges STEELMAN and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 AUGUST 2005

BESSEMER CITY EXPRESS, INC. v. CITY OF KINGS MOUNTAIN No. 04-1050	Cleveland (00CVS2135)	Affirmed
CALLANAN v. WALSH No. 04-1027	Transylvania (01CVD129)	Affirmed in part, reversed in part and remanded for additional findings regarding the date of separation valuation of all items of marital property
CAROLINA BUILDERS CORP. v. BROWN No. 04-1222	Wake (02CVS2517)	Affirmed
CUMMINGS v. CARRIAGE CLUB OF CHARLOTTE No. 04-1278	Mecklenburg (04CVS7351)	Reversed and remanded
DIXON v. DIXON No. 04-1446	Forsyth (98CVD3181)	Affirmed
ENVIROSAFE PAINTS, INC. v. CONKLIN No. 04-1234	Wake (03CVS1917)	Affirmed
GARLAND v. HATLEY No. 04-1131	Lincoln (02CVS1380)	Affirmed
GILLIAM v. HAWKINS No. 04-1327	Wake (03CVS11132)	Affirmed
HASH v. HENNIGAN No. 04-1543	Warren (02CVS342)	No error
HASTINGS v. EASTERN CAROLINA PATHOLOGY No. 04-994	Ind. Comm. (I.C. # 16472)	Affirmed
IN RE A.P.R. & A.C.R. No. 04-1372	Alamance (02J50) (02J51)	Affirmed
IN RE I.O.E. No. 04-825	Mecklenburg (98J549)	Affirmed
IN RE R.G. No. 04-1323	Mecklenburg (04J196)	Affirmed

IN RE R.K.J., R.J. & W.J. No. 04-331	Jones (02J5) (00J3) (03J1)	Affirmed
KEYZER v. AMERLINK, LTD. No. 04-1095	Nash (02CVS2461)	Affirmed
LANEY v. PENN-AMERICA INS. CO. No. 04-1690	Mecklenburg (04CVS3102)	Affirmed
MEDSTAFF CAROLINAS, LLC v. NORWOOD NURSING CENTER, INC. No. 04-1281	Mecklenburg (02CVS1541)	Affirmed
METCALF v. MPW CARPENTRY & CONSTR. No. 04-1333	Ind. Comm. (I.C. # 144351)	Affirmed
MOORE v. GASTON MEM'L HOSP., INC. No. 04-1263	Gaston (03CVS4181)	Affirmed
MORAN v. TURNAMICS, INC. No. 04-1339	Ind. Comm. (I.C. # 72028)	Affirmed
NEUSE RIVER VETERINARY HOSP. v. BENNETT No. 04-1171	Wake (02CVD6317)	Dismissed
OSETEK v. JEREMIAH No. 04-742	Wake (02CVS3036)	Affirmed
REYES v. RAY No. 04-1129	Robeson (02CVS1235)	Reversed and remanded
SCHAFFNER v. USAA CAS. INS. CO. No. 04-1041	Mecklenburg (01CVS4362)	Affirmed
SOUTHEASTERN OUTDOOR PRODS., INC. v. LAWSON No. 04-1545	Sampson (04CVS825)	Reversed
STATE v. BRODIE No. 04-1355	Wake (03CRS6223) (03CRS33740)	Reversed
STATE v. CAMPBELL No. 04-1490	New Hanover (03CRS21668)	New trial
STATE v. CHERRY No. 04-1598	Edgecombe (02CRS50847) (02CRS50848) (02CRS50849)	No error

STATE v. EZZELL No. 04-1205	Nash (02CRS8318) (02CRS8319)	No error
STATE v. FILL No. 04-150	Caldwell (03CRS50157)	No error at Trial, Sentence Vacated
STATE v. HENDRICKSON No. 04-142	Wake (02CRS58208)	No error at trial, remanded for resentencing
STATE v. HERRING No. 03-1138	Guilford (01CRS2600) (01CRS2601) (01CRS2602)	No error at trial, remanded for resentencing
STATE v. HOCKADAY No. 05-160	Halifax (01CRS52748) (03CRS53210)	Affirmed
STATE v. McNEAIR No. 04-1358	Davidson (03CRS8923) (03CRS8924) (03CRS54085) (03CRS54087) (03CRS54089)	No error
STATE v. MOORE No. 04-1200	Brunswick (03CRS53662) (04CRS1673)	No error; remanded for resentencing
STATE v. OLIVER No. 04-1697	Carteret (03CRS54226) (03CRS6075)	Affirmed
STATE v. PETERSON No. 04-1371	Forsyth (03CRS52222)	No error
STATE v. POOR No. 04-1113	Guilford (02CRS86014)	Dismissed
STATE v. RICHARDS No. 04-1029	Buncombe (03CRS4450) (03CRS4451) (03CRS4452) (03CRS4453)	No prejudicial error
STATE v. SAWYER No. 04-1118	Forsyth (02CRS61303)	No error
STATE v. STATON No. 04-1408	Buncombe (02CRS4636) (02CRS4637) (02CRS4638) (02CRS4639)	Reversed and remanded

	(02CRS4640) (02CRS4641) (02CRS4642) (02CRS4643) (02CRS4644) (02CRS4645) (02CRS4646) (02CRS4647) (02CRS4648) (02CRS3482) (02CRS3483) (02CRS59298)	
STATE v. THOMAS No. 04-1139	Pitt (03CRS11273)	No error in part, remanded for resentencing
STATE v. WEBB No. 04-103	Pitt (02CRS5685) (02CRS5687) (02CRS5688) (02CRS54018)	No error in trial; remanded for resentencing
STATE v. WHITE No. 04-841	Wake (03CRS86377) (03CRS86378)	No error in part, vacated in part and remanded for resentencing
STATE v. WOODBURY No. 05-73	Guilford (01CRS92083)	Affirmed
THRASH v. ZIMBELMAN No. 04-1419	Graham (03CVS111)	Affirmed in part; vacated in part
WAGONER v. N.C. BD. OF EXAM'RS FOR ENG'RS & SURVEYORS No. 03-1489	Surry (01CVS1366)	Affirmed
WALDON v. BURRIS No. 04-598	Union (01CVS1455)	Affirmed in part, reversed in part and remanded for recalculation of the damage award
WARREN v. HOME DEPOT, U.S.A., INC. No. 04-1265	Catawba (03CVS3826)	Affirmed
WENDT v. TOLSON No. 03-1680	Carteret (02CVS1146)	Vacated and remanded in part
WILSON v. McCURDY No. 04-1623	Iredell (04CVS457)	Dismissed

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

I. Rule 3 of the North Carolina Rules of Appellate Procedure is amended as described below:

Rule 3(b) is amended to read:

(b) Special Provisions. Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and appellate rules sections noted:

(1) ~~Termination of Parental Rights, G.S. 7B-1113.~~ Juvenile matters, G.S. 7B-2602.

(2) ~~Juvenile matters, G.S. 7B-1001 or 7B-2602.~~ Appeals pursuant to G.S. 7B-1001 shall be subject to the provisions of N.C. R. App. P. 3A.

For appeals filed pursuant to these provisions and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced by the use of initials only in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). Appeals filed pursuant to these provisions shall specifically comply, if applicable, with Rules 9(b), 9(c), 26(g), 28(d), 28(k), 30, 37, 41 and Appendix B.

II. Rule 3A is added to the North Carolina Rules of Appellate Procedure as described below:

Rule 3A is added to read:

Rule 3A. APPEAL IN QUALIFYING JUVENILE CASES—HOW AND WHEN TAKEN, SPECIAL RULES

(a) Filing the Notice of Appeal. Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal

with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the special provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) Special Provisions. For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(1) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) **Transcripts.** Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcriptionist to the case. Within thirty-five days from the date of the assignment, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the office of the Clerk of the Court of Appeals and provide copies to the respective parties to the appeal at the addresses provided. Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) **Record on Appeal.** Within ~~twenty~~ ten days after ~~the notice of appeal has been filed~~ receipt of the transcript, the

appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. ~~, except there shall be no requirement to set out references to the transcript under the assignments of error.~~ Trial counsel for the appealing party~~, together with~~ shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, ~~shall have joint responsibility for~~ in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties: (1) a notice of approval of the proposed record; (2) specific objections or amendments to the proposed record on appeal, or (3) a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within ~~thirty~~ twenty days after ~~notice of appeal has been filed,~~ receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after ~~notice of appeal has been filed,~~ receipt of the transcript, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement: (1) the appellant shall file his or her proposed record on appeal, and (2) an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals as provided herein.

(3) **Briefs.** Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or

her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(c) Calendaring priority. Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 1st day of ~~March~~ May, 2006, and shall apply to cases appealed on or after that date.

Adopted by the Court in Conference this the ~~3rd~~ ~~26th~~ ~~28th~~ 27th day of ~~November, 2005~~ ~~January~~ ~~February,~~ April, 2006. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

_____

~~Lake~~ Parker, C.J.
For the Court

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, PLAINTIFF v.
JOHN M. BOURLON, DEFENDANT

No. COA04-245

(Filed 16 August 2005)

1. Appeal and Error— appealability—motion to compel discovery—interlocutory order

Although an order denying a motion to compel discovery is generally interlocutory in nature, this appeal is properly before the Court of Appeals because it denied defendant's motion to dismiss the instant appeal as an appeal from an interlocutory order in an order dated 25 March 2004.

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

Although both parties assigned error to the trial court's order, defendant's cross-assignments of error are deemed abandoned under N.C. R. App. P. 28(b)(6) because defendant failed to offer any support for them in his brief.

3. Attorneys— attorney-client relationship—joint or dual representation—counsel employed by insurance company to defend insured against claim

The trial court erred by concluding that no attorney-client relationship existed between plaintiff insurance company and the attorney assigned by plaintiff to defend defendant insured against claims for personal injuries sustained after one of defendant's dogs bit another man in the face, because whenever defense counsel is employed by an insurance company to defend an insured against a claim, he represents both the insurer and the insured in a joint or dual representation.

4. Discovery— common interest or joint client doctrine—insurance litigation—communications between attorney and insured—privilege

The trial court erred by concluding that the attorney-client relationship between defendant insured and an attorney, assigned by plaintiff insurance company to defend defendant against claims for personal injuries sustained after one of defendant's dogs bit another man in the face, prevented the attorney from disclosing to plaintiff any communications between the attorney and defendant, because the common interest or joint client doc-

trine applies to the context of insurance litigation in North Carolina and provides that communications between the insurer and the retained attorney are not privileged to the extent that they relate to the defense for which the insurer has retained the attorney. However, the attorney-client privilege still attaches to those communications unrelated to the defense of the underlying action as well as those communications regarding issues adverse between the insurer and the insured such as communications that relate to an issue of coverage. In the instant case in light of defendant's challenges to the attorney's representation, defendant waived the privilege with respect to those communications unrelated to the underlying action and which involved questions of coverage.

5. Discovery— insurance litigation—entire file—attorney-client privilege

The trial court did not err by concluding that an attorney, assigned by plaintiff insurance company to defend defendant against claims for personal injuries sustained after one of defendant's dogs bit another man in the face, breached the attorney-client relationship by providing the entire file from the underlying action to plaintiff, because some communications contained in the file may have been privileged including those communications unrelated to the underlying action or defendant's counterclaims, those communications regarding coverage issues made prior to defendant's counterclaims, and those communications unrelated to the conduct forming the basis of defendant's counterclaims. The file should have been submitted to the trial court for an in camera review aimed at determining which documents in the file were privileged.

6. Discovery— refusal of sanctions—refusal to answer certain questions based on privilege—premature termination of deposition

The trial court did not abuse its discretion by refusing to grant plaintiff insurance company's motion for sanctions based on defendant insured's alleged unjustifiable refusal to answer certain questions and premature termination of his deposition where the trial court noted that the privilege issue involved in the motion was a question of first impression, because plaintiff failed to demonstrate that the trial court's decision was arbitrary and unreasoned. N.C.G.S. § 1A-1, Rule 37.

7. Appeal and Error— sealing of documents pending further orders—privilege

Although plaintiff contends the trial court erred by ordering that the attorney assigned by plaintiff insurance company to defend defendant insured have his files relating to defendant's case and all copies of documents contained therein sealed pending further orders, the merits of this argument are not reached in light of the Court of Appeals' prior conclusions regarding those portions of the attorney's file which were discoverable and whether defendant waived his privilege with respect to the remaining portions.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff from order entered 5 September 2003 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 4 November 2004.

Bailey & Dixon, L.L.P., by Gary S. Parsons and David S. Wisz, for plaintiff-appellant.

Stark Law Group, P.L.L.C., by W. Russell Congleton, Thomas H. Stark, and Fiona V. Ginter, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Nationwide Mutual Fire Insurance Company ("plaintiff") appeals the trial court order denying its motion for sanctions and/or discovery and requiring the parties to maintain certain documents under seal. For the reasons discussed herein, we affirm in part and reverse in part.

The facts and procedural history pertinent to the instant appeal are as follows: On 24 September 1996, Dimitri Axarlis ("Axarlis") filed a complaint against John M. Bourlon ("defendant") and his wife, seeking damages for personal injuries Axarlis sustained after one of defendant's dogs bit him in the face ("the underlying action"). In addition to his claim for personal injuries, Axarlis alleged that defendant maliciously prosecuted him and abused the criminal process by securing a second-degree trespass charge against him. Axarlis admitted that he was on defendant's property when he was attacked, but he asserted that he entered defendant's property in an effort to rescue his girlfriend's dog, which was being chased and attacked by defendant's dogs.

At the time of these incidents, defendant had a homeowners' insurance policy ("the policy") with plaintiff. The policy had a personal liability limit of $300,000.00, and it provided as follows:

> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the occurrence equals our limit of liability.

Following the filing of Axarlis' complaint, defendant notified plaintiff of the claims against him. On 11 October 1996, plaintiff informed defendant that it had assigned Lee A. Patterson, II ("Patterson"), to represent him. Plaintiff further informed defendant that the malicious prosecution and abuse of process claims in Axarlis' complaint were not covered by the policy, and that therefore it would not provide indemnity to defendant with regard to those claims. However, plaintiff informed defendant that it would provide legal representation against all of Axarlis' claims, including the malicious prosecution and abuse of process claims.

Efforts of the parties to reach a pretrial settlement failed, and the case proceeded to trial. On 28 October 1998, the jury returned a verdict against defendant and his wife, concluding that Axarlis was injured by a vicious animal wrongfully kept by defendant, that Axarlis was injured by the negligence and willful or wanton conduct of defendant, and that defendant maliciously prosecuted Axarlis for trespass. The jury awarded Axarlis $321,000.00 in compensatory and punitive damages, which included an award of $1,000.00 in compensatory damages and $150,000.00 in punitive damages, each arising out of the malicious prosecution verdict. The jury's verdict made no mention of or award for Axarlis' claim for abuse of process.

Following entry of the verdict, Patterson filed post-trial motions on defendant's behalf. Prior to a hearing on the motions, Axarlis communicated to Patterson an offer to settle all claims in the underlying action for $236,000.00. Plaintiff offered to contribute $200,000.00

toward the settlement, if defendant would pay the remaining $36,000.00. Defendant thereafter instructed Patterson to inform plaintiff that he would contribute $20,000.00 to the settlement. Plaintiff refused defendant's offer of contribution, and, allegedly without defendant's prior knowledge, plaintiff subsequently settled the covered claims separately. Axarlis thereafter demanded from defendant full payment of the jury's award for malicious prosecution. Defendant and Axarlis subsequently reached a separate settlement agreement, whereby defendant personally paid Axarlis for the malicious prosecution verdict.

In January 2001, defendant contacted Patterson via new counsel and requested a copy of his file. Patterson advised plaintiff of the request, and plaintiff's counsel thereafter contacted the North Carolina State Bar, seeking advice regarding whether defendant was entitled to a copy of the file. The State Bar advised plaintiff that defendant was entitled to a copy of the file, and plaintiff subsequently made arrangements to provide defendant with the file through Patterson's office.

On 8 February 2001, plaintiff filed a declaratory judgment complaint against defendant, seeking *inter alia* a determination that it was not obligated to indemnify defendant for any sums paid in settlement of the malicious prosecution verdict. On 3 December 2001, defendant filed an answer denying plaintiff's allegations and asserting counterclaims for breach of contract, negligence, bad faith refusal to settle, negligent misrepresentation, fraud, breach of fiduciary duty, and unfair or deceptive trade practices. The trial court subsequently granted partial summary judgment in favor of plaintiff, dismissing defendant's breach of contract counterclaim and concluding that plaintiff was not obligated to indemnify defendant for either the malicious prosecution verdict against defendant or defendant's settlement with Axarlis.

Following the order granting partial summary judgment, plaintiff sought to depose defendant regarding his remaining counterclaims. On 11 April 2003, defendant appeared for his deposition with counsel. Although he had not sought a protective order or filed a motion to limit the scope of the deposition, prior to commencement of the deposition, defendant's counsel stated as follows:

> I'm [] going to object to taking of this deposition by your firm because I believe that there is a conflict. We have addressed

> this with [plaintiff's counsel], and [plaintiff's counsel] has assured us there is none. However, in our review of the correspondence, it appears to us that your firm has been privy to confidential communications between the trial counsel and [defendant], and therefore is in a conflict position when it tries to represent Nationwide.

The deposition proceeded until defendant was questioned regarding his communications with Patterson. In response, defendant asserted the attorney-client privilege and refused to answer questions regarding his conversations with Patterson. Defendant's counsel thereafter terminated the deposition.

On 28 April 2003, plaintiff filed a motion requesting that the trial court sanction defendant and/or require defendant to "fully and adequately respond to all questions concerning his communications with [] Patterson." Following presentation of evidence and arguments by both parties, the trial court entered an order concluding in pertinent part as follows:

> 2. There is nothing in the Nationwide Policy which suggests that [plaintiff's] providing counsel to an insured waives attorney-client privilege.
>
> 3. There was an attorney-client relationship between [defendant] and [Patterson] in [the underlying action].
>
> 4. There was no attorney-client relationship between [Patterson] and [plaintiff] in [the underlying action].
>
> . . . .
>
> 7. The file maintained by [Patterson] in the defense of [the underlying action] was generated as attorney-client materials with respect to [defendant] as a result of the contractual duty [plaintiff] was fulfilling in providing a defense to [defendant].
>
> . . . .
>
> 10. It was a breach of the attorney-client relationship for confidential communications by and between [defendant] and [Patterson] in [the underlying action] to be disclosed to [plaintiff].
>
> . . . .

16. The Court in the exercise of its discretion deems that the imposition of sanctions and/or an order compelling discovery are not justified under the facts and circumstances of the facts of this case.

Based in part upon these conclusions of law, the trial court denied plaintiff's motion. It is from this order that plaintiff appeals.

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[1] We note initially that an appeal from an order denying a motion to compel discovery is generally interlocutory in nature. *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 80, 347 S.E.2d 824, 827 (1986); *Mack v. Moore*, 91 N.C. App. 478, 480, 372 S.E.2d 314, 316 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). However, by order issued 25 March 2004, this Court denied defendant's motion to dismiss the instant appeal as interlocutory. Therefore, we conclude that plaintiff's appeal is properly before us.

[2] We also note that both parties assigned error to the trial court's order in the instant case. However, because defendant failed to offer any support in his brief for his cross-assignments of error, those assignments of error are deemed abandoned. N.C.R. App. P. 28(b)(6) (2005). Accordingly, we limit our present review to those assignments of error properly preserved by plaintiff for appellate review.

The issues on appeal are whether the trial court erred by: (I) concluding that no attorney-client relationship existed between plaintiff and Patterson; (II) concluding that the attorney-client relationship between defendant and Patterson prevented Patterson from disclosing to plaintiff any communications between Patterson and defendant; (III) concluding that Patterson breached the attorney-client relationship by providing the entire file from the underlying action to plaintiff; (IV) refusing to grant plaintiff's motion for sanctions; (V) ordering that Patterson's file and all copies of documents contained therein be sealed pending further orders.

"[I]t is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 27, 541 S.E.2d 782, 788 (citations omitted), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001). To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, *Clark v. Penland*, 146 N.C. App. 288, 291, 552 S.E.2d 243, 245 (2001), or could not be the product of a reasoned decision. *Chavis v. Thetford Prop.*

Mgmt., Inc., 155 N.C. App. 769, 771, 573 S.E.2d 920, 921 (2003). This Court is not allowed to substitute its own judgment for that of the trial court. *Id.*

I. Attorney-Client Relationship Between Plaintiff and Patterson

[3] Plaintiff first argues that the trial court erred by concluding that no attorney-client relationship existed between it and Patterson. Plaintiff asserts that this conclusion was counter to the ethics opinions of our State Bar and the established standards of insurance law practice. We agree.

Our Supreme Court has previously noted that while " 'questions of propriety and ethics are ordinarily for the consideration of the [North Carolina State] Bar' because that organization was expressly created by the legislature to deal with such questions, . . . the power to regulate the conduct of attorneys is held concurrently by the Bar and the court." *Gardner v. N.C. State Bar*, 316 N.C. 285, 287-88, 341 S.E.2d 517, 519 (1986) (quoting *McMichael v. Proctor*, 243 N.C. 479, 485, 91 S.E.2d 231, 235 (1956)). In North Carolina State Bar RPC 92 (January 17, 1991) ("RPC 92"), the State Bar recognized that although the attorney's primary allegiance must remain with the insured, an attorney may enter into dual representation of both an insurer and an insured. In such an instance, "[t]he attorney should keep the insurance company informed as to the wishes of the insured concerning the defense of the case and settlement." *Id.* This ruling was consistent with North Carolina State Bar RPC 91 (January 17, 1991) ("RPC 91"), which noted that "[w]henever defense counsel is employed by an insurance company to defend an insured against a claim, he or she represents both the insurer and the insured." In a recent Formal Ethics Opinion, the State Bar noted that its "[p]rior ethics opinions ha[d] firmly established that a lawyer defending an insured at the request of an insurer represents both clients." 2003 Formal Ethics Opinion 12 (October 21, 2004) ("FEO 12").

In the instant case, despite this well-established doctrine, the trial court concluded that no attorney-client relationship existed between plaintiff and Patterson. In support of this conclusion, the trial court relied upon the contractual nature of Patterson's hiring, in that plaintiff "provided counsel to [defendant] . . . pursuant to the Nationwide Policy issued to [defendant]." However, we note such a contractual provision of counsel is not unlike the employment of counsel referred to by RPC 91 and endorsed by FEO 12, which, along with RPC 92, "envisioned that . . . work product would be shared

with the insurance company [as well as the insured] so that *both clients* are fully informed of their lawyer's opinion" on representation issues. (emphasis added). In light of the foregoing, we conclude that a tripartite attorney-client relationship existed in the instant case, whereby Patterson provided "joint" or "dual" representation to both plaintiff and defendant. Accordingly, the trial court erred by determining that no attorney-client relationship existed between plaintiff and Patterson.

II. Attorney-Client Relationship Between Defendant and Patterson

[4] Plaintiff next argues that the trial court erred by concluding that the attorney-client relationship between defendant and Patterson prevented Patterson from disclosing to plaintiff any communications between Patterson and defendant. Plaintiff asserts that the attorney-client privilege is inapplicable to those communications related to the underlying action. We agree.

This Court has previously recognized that "the attorney-client privilege may result in the exclusion of evidence which is otherwise relevant and material." *Evans*, 142 N.C. App. at 31, 541 S.E.2d at 790. Our courts are obligated to "strictly construe" the attorney-client privilege, and to limit it to the purpose for which it exists: " 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' " *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 591 (1981)).

In construing the effect of the tripartite relationship between an attorney, an insurer, and an insured, several courts across the country have held that the "common interest" or "joint client" doctrine applies. Under this doctrine, communications between the insured and the retained attorney are not privileged to the extent that they relate to the defense for which the insurer has retained the attorney. *See, e.g., Northwood Nursing & Convalescent Home, Inc. v. Continental Ins. Co.*, 161 F.R.D. 293, 297 (E.D. Pa. 1995) ("Because [the insurer] has agreed to defend this action, [the insureds] have no reasonable expectation of privilege."); *North River Ins. v. Philadelphia Reinsurance*, 797 F. Supp. 363, 366 (D.N.J. 1992) ("The common interest doctrine has been recognized in the insured/insurer context when counsel has been retained or paid for by the insurer, and allows either party to obtain attorney-client communications related to the underlying facts giving rise to the claim, because the interests of the insured and insurer in defeating the third-party claim against the

insured are so close that 'no reasonable expectation of confidentiality' is said to exist." (citation omitted)); *Pittston Co. v. Allianz Ins. Co.*, 143 F.R.D. 66, 69 (D.N.J. 1992) ("It seems clear that use of the [common interest] doctrine is warranted when there is a dispute between [an] insurer and [an] insured regarding underlying litigation in which the insured was represented by an attorney appointed by the insurer."); *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 193, 579 N.E.2d 322, 328 (1991) (holding that common interest doctrine applies as between insurer and insured); *Brasseaux v. Girouard*, 214 So. 2d 401, 410 (recognizing that in suits between an insurer and an insured, communications made by the insured to the insurer's counsel during a period of simultaneous representation are not privileged where the issue to which the communications relate concerns matters of the legal representation of the insured), *cert. denied*, 253 La. 60, 216 So. 2d 307 (1968); *Goldberg v. American Home Assurance Co.*, 80 A.D.2d 409, 413, 439 N.Y.S.2d 2, 5 (1981) (common interest doctrine "especially" applies "where an insured and his insurer initially have a common interest in defending an action against the former[.]"). *See also* 81 Am. Jur. 2d *Witnesses* § 434 (2004) ("When an insurer, as required by its contract of insurance, employs counsel to defend its insured, any communication with the lawyer concerning the handling of the claim against the insured is necessarily a matter of common interest to both the insured and the insurer, and the attorney-client privilege is inapplicable.").

In North Carolina, our courts have previously recognized the common interest or joint client doctrine, noting that "as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged *inter sese*." *Dobias v. White*, 240 N.C. 680, 685, 83 S.E.2d 785, 788 (1954) (citing *Carey v. Carey*, 108 N.C. 267, 12 S.E. 1038 (1891) (noting that privilege rule does not apply to communications between parties and to a joint attorney) and *Michael v. Foil*, 100 N.C. 178, 189, 6 S.E. 264, 269 (1888) ("[A] communication made to counsel for two defendants is not privileged from disclosure in a subsequent suit between the two.") (internal quotation marks omitted)); *accord Brown v. Green*, 3 N.C. App. 506, 512, 165 S.E.2d 534, 538 (1969). The rationale for the doctrine rests upon the non-confidential nature of communications between the parties during the tripartite relationship. "If it appears by extraneous evidence or from the nature of a transaction or communication that they were not regarded as confidential, or that they were made for the purpose of being conveyed by the attorney to others, [communications] are stripped of the

idea of a confidential disclosure and are not privileged." *Dobias*, 240 N.C. at 684-85, 83 S.E.2d at 788 (citation omitted).

In light of the foregoing, we are persuaded that the common interest or joint client doctrine applies to the context of insurance litigation in North Carolina. Therefore, where, as here, an insurance company retains counsel for the benefit of its insured, those communications related to the representation and directed to the retained attorney by the insured are not privileged as between the insurer and the insured. Nevertheless, we note that application of the common interest or joint client doctrine does not lead to the conclusion that all of the communications between defendant and Patterson were unprivileged. Instead, the attorney-client privilege still attaches to those communications unrelated to the defense of the underlying action, as well as those communications regarding issues adverse between the insurer and the insured. Specifically, "[c]ommunications that relate to an issue of coverage . . . are not discoverable . . . because the interests of the insurer and its insured with respect to the issue of coverage are always adverse." *North River Ins.*, 797 F. Supp. at 367 (citations omitted).

Under this analysis, Exhibit 4 in the instant case—a letter from defendant to Patterson discussing discovery responses to the underlying action—was not privileged. The letter is directly related to plaintiff's defense of the underlying action, and thus clearly covered by the common interest doctrine. However, defendant was correct in declining to answer the following question from his deposition: "So did [Patterson] give you any advice as to whether the claims of malicious prosecution or punitive damages were covered or not covered under the policy?" This question involves an issue of coverage, which, as detailed above, is adverse to plaintiff's representation of defendant and unrelated to plaintiff's defense of the underlying action.

Plaintiff maintains that even those communications unrelated to plaintiff's defense of the underlying action and concerning issues of coverage should be discoverable in the instant case. In support of this assertion, plaintiff contends that by asserting counterclaims against plaintiff based upon his alleged improper representation by Patterson, defendant has waived the privilege which covers the communications. We agree.

We note initially that our review of this issue is limited by the premature termination of the deposition and the appeal of the trial court order prior to further discovery motions. As discussed above, defend-

ant terminated the deposition prior to its completion, citing the attorney-client privilege. While we recognize the need to be vigilant in protecting the attorney-client privilege, in the instant case, because of the early termination of the deposition and the immediate appeal of the trial court's order, we are left with no idea of the degree to which defendant concedes the attorney-client privilege has been waived. A better practice would have been to have proceeded with the deposition, with defendant asserting the privilege as to each question he deemed inappropriate in light of the privilege. By failing to follow this approach, both the trial court and this Court must apply the attorney-client privilege in the abstract. Nevertheless, we have examined the record in the instant case, and, in light of defendant's challenges to Patterson's representation, we conclude that defendant has waived the privilege with respect to those communications unrelated to the underlying action and adverse to plaintiff.

As discussed above, in his answer to the declaratory judgment complaint, defendant asserts eight counterclaims against plaintiff. In his second counterclaim, defendant alleges that plaintiff "failed to properly assess and evaluate the claims" against him and breached its duty "to defend and handle" the claims against him "competently and with due regard to" his rights. To the extent defendant contends that Patterson negligently defended him in the underlying action and negligently failed to resolve the claims, such allegations constitute a waiver of the attorney-client privilege. *See State v. Taylor*, 327 N.C. 147, 152, 393 S.E.2d 801, 805 (1990) (concluding that a defendant making a claim that an attorney rendered ineffective assistance of counsel waives the attorney-client privilege with respect to those matters relevant to his allegations). This counterclaim refers to what plaintiff led defendant to believe, and it alleges that plaintiff failed to keep defendant "properly advised of the status of the settlement negotiations[.]" Similar allegations are contained within defendant's fourth counterclaim, which states that defendant "justifiably relied on the information supplied by [plaintiff]" regarding the "status of the settlement negotiations . . . ." Moreover, in his affidavit, defendant repeatedly recites communications he received from Patterson regarding plaintiff's position with respect to settlement and detailing how the settlement negotiations were proceeding. *See Blackmon v. Bumgardner*, 135 N.C. App. 125, 141, 519 S.E.2d 335, 345 (1999) (concluding that attorney-client privilege is waived when client offers testimony concerning the substance of the communication). In light of the foregoing, we conclude that defendant has waived the attorney-client privilege with respect to those issues

which were unrelated to the underlying action and which involved questions of coverage.

III. Patterson's Breach of the Attorney-Client Relationship

[5] Plaintiff next argues that the trial court erred by concluding that Patterson breached his attorney-client relationship with defendant when he provided plaintiff with the entire file from the underlying action. Plaintiff asserts that the trial court's conclusion results from improper determinations that no attorney-client relationship existed between plaintiff and Patterson and that all communications between defendant and Patterson were privileged from disclosure. However, while the trial court's conclusion might have been based upon prior improper determinations, we are not persuaded that the trial court erred by concluding that Patterson was prohibited from providing the file to plaintiff in a wholesale manner. As discussed above, some communications contained in the file may have been privileged, including those communications unrelated to the underlying action or defendant's counterclaims, those communications regarding coverage issues made prior to defendant's counterclaims, and those communications unrelated to the conduct forming the basis of defendant's counterclaims. Therefore, we agree that Patterson's file should not have been provided to plaintiff in a wholesale manner. Instead, the file should have been submitted to the trial court for *in camera* review aimed at determining which documents in the file were privileged. Accordingly, we conclude that the trial court did not err by ruling that Patterson breached his attorney-client relationship with defendant when he provided plaintiff with the entire file from the underlying action.

IV. Trial Court's Refusal To Sanction Defendant

[6] Plaintiff next argues that the trial court erred by refusing to grant plaintiff's motion for sanctions. Plaintiff asserts that because defendant was unjustified in refusing to answer certain questions and prematurely terminated his deposition, the trial court abused its discretion by refusing to sanction him. We disagree.

The record reflects that with respect to this issue, the trial court concluded as follows:

> 14. The refusal of [defendant] and his counsel to respond to the questions posed concerning the communications between [defendant] and [] Patterson, as well as the termination of the deposition of [defendant] for the breach of the attorney-client

privilege, was substantially justified within the meaning of the Commentary to Rule 37(a)(4) of the North Carolina Rules of Civil Procedure[.]

15. The refusal of [defendant] and his counsel to respond to the questions posed concerning the communications between [defendant] and [] Patterson as well as the termination of the deposition of [defendant] for the breach of the attorney-client privilege were actions taken in good faith and not for the mere purpose of delay and/or obfuscation.

16. The Court in the exercise of its discretion deems that the imposition of sanctions and/or an order compelling discovery are not justified under the facts and circumstances of the facts of this case.

"The choice of sanctions under Rule 37 lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion." *Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E.2d 793, 795 (1984). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995). In the instant case, in its order denying sanctions, the trial court noted that "the privilege issue involved in this motion is a question of first impression[,]" and the trial court concluded that defendant was "substantially justified" in relying on the attorney-client privilege in terminating the deposition. After reviewing the record, we conclude that plaintiff has failed to demonstrate that the trial court's decision was arbitrary and unreasoned. Accordingly, the trial court's decision not to impose sanctions is affirmed.

V. Trial Court's Decision To Seal Patterson's File

[7] Plaintiff's final argument is that the trial court erred by requiring that Patterson's file remain sealed pending further orders from the court. However, in light of our prior conclusions regarding those portions of Patterson's file which were discoverable and whether defendant waived his privilege with respect to the remaining portions, we need not reach the merits of this argument. Accordingly, plaintiff's final argument is dismissed.

VI. Conclusion

In summary, we conclude that the trial court erred by determining that (a) no attorney-client relationship existed between plaintiff

and Patterson, and (b) the attorney-client relationship between defendant and Patterson prevented Patterson from disclosing to plaintiff his communications with defendant. As detailed above, Patterson, plaintiff, and defendant were engaged in a tripartite relationship, whereby Patterson served as attorney for both plaintiff and defendant. By virtue of this relationship, any communications between Patterson and defendant related to plaintiff's defense of the underlying action were discoverable, while those communications unrelated to the underlying action and those communications involving issues of coverage were not discoverable. Thus, we also conclude Patterson breached his attorney-client relationship by turning over the file to plaintiff wholesale. However, while we further conclude that the trial court did not err in refusing to sanction defendant for failing to answer questions and prematurely terminating the deposition, under the facts of the instant case, we nevertheless conclude that defendant has waived his right to assert his attorney-client privilege with respect to those communications relevant to his counterclaims although unrelated to the underlying action and involving issues of coverage. Therefore, we hold that plaintiff is entitled to discovery regarding those matters, and, accordingly, we affirm the trial court's order in part and reverse it in part.

Affirmed in part; reversed in part.

Judge GEER concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge concurring in part, dissenting in part.

I concur with the majority's opinion that: (1) the trial court did not err by ruling Patterson breached his attorney-client relationship with defendant by providing plaintiff with the entire file from the underlying action; and (2) the trial court's decision to deny plaintiff's motion for sanctions should be affirmed.

Under the facts and posture of the appeal before us, I respectfully dissent from the majority opinion's holding that: (1) an attorney-client relationship existed between plaintiff and Patterson; (2) the attorney-client relationship between defendant and Patterson is inapplicable to those communications related to the underlying action; and (3) defendant waived the attorney-client privilege.

I. Standard of Review

This Court has previously stated, it "is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 27, 541 S.E.2d 782, 788 (citations omitted), *cert. denied and appeal dismissed*, 353 N.C. 371, 547 S.E.2d 810 (2001). As stated in *Evans*, we "examine the trial court's application of . . . the attorney-client privilege under an abuse of discretion standard." 142 N.C. App. at 27, 541 S.E.2d at 788. To show an abuse of discretion and reverse the trial court's order, Nationwide, as appellant, has the burden to show the trial court's rulings are "manifestly unsupported by reason," *Clark v. Penland*, 146 N.C. App. 288, 291, 552 S.E.2d 243, 245 (2001) (quotation omitted), or "could not be the product of a reasoned decision," *Chavis v. Thetford Prop. Mgmt. Inc.*, 155 N.C. App. 769, 771, 573 S.E.2d 920, 921 (2003) (citing *Long v. Harris*, 137 N.C. App. 461, 464-65, 528 S.E.2d 633, 635 (2000)). We all agree our review at bar is not *de novo*. The appellate court is not allowed to substitute our judgment for that of the trial court on the grounds we may have arrived at a different conclusion and result based on the evidence presented and findings of fact. *Id.*

II. Attorney-Client Privilege

Plaintiff argues the trial court erred by concluding no attorney-client privilege existed between plaintiff and Patterson. Under: (1) our standard of review; (2) the specific facts here; and (3) the procedural posture of this appeal, at this time, I disagree.

Our Supreme Court recently addressed the importance of the attorney-client relationship and its attendant privileges.

> The public's interest in protecting the attorney-client privilege is no trivial consideration, as this protection for confidential communications is one of the oldest and most revered in law. The privilege has its foundation in the common law and can be traced back to the sixteenth century. The attorney-client privilege is well-grounded in the jurisprudence of this State. When the relationship of attorney and client exists, all confidential communications made by the client to his attorney on the faith of such relationship are privileged and may not be disclosed.

In re Investigation of Death of Eric Miller, 357 N.C. 316, 328, 584 S.E.2d. 772, 782 (2003) (internal citations and quotations omitted).

This Court has recognized, "the attorney-client privilege may result in the exclusion of evidence which is otherwise relevant and material." *Evans*, 142 N.C. App. at 31, 541 S.E.2d at 790.

In asserting the privilege, the claimant carries the burden of showing:

> (1) the relation of attorney and client existed at the time the communication was made[;] (2) the communication was made in confidence[;] (3) the communication relates to a matter about which the attorney is being professionally consulted[;] (4) the communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated[;] and (5) the client has not waived the privilege.

Id. at 32, 541 S.E.2d at 791 (internal citations and quotations omitted).

"[T]he power to regulate the conduct of attorneys is held concurrently by the Bar and the court." *Gardner v. N.C. State Bar*, 316 N.C. 285, 288, 341 S.E.2d 517, 519 (1986) (citing with approval CPR 326). Rule 1.8(f) of the North Carolina State Bar Revised Rules of Professional Conduct (2005) provides:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

Rule 1.6 of the North Carolina State Bar Revised Rules of Professional Conduct (2005) states:

> (a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent . . . .
>
> (b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:
>
> (1) to comply with the Rules of Professional Conduct, the law or court order;

> (2) to prevent the commission of a crime by the client;
>
> (3) to prevent reasonably certain death or bodily harm;
>
> (4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;
>
> (5) to secure legal advice about the lawyer's compliance with these Rules;
>
> (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client . . . .

The North Carolina State Bar issued guidance to insurers who are under a contractual duty to hire counsel to defend insureds.

> While Rule 6(b)(1) obligates an attorney to keep the client reasonably informed about the status of the case and to comply with reasonable requests for information, there is nothing in the rules that requires defense counsel to furnish to the insured correspondence directed to the insurer during defense counsel's active representation of the insured. The representation of insured and insurer is a dual one, *but the attorney's primary allegiance is to the insured, whose best interest must be served at all times.* The attorney should keep the insurance company informed as to the wishes of the insured concerning the defense of the case and settlement. *The attorney should also keep the insured informed of his or her evaluation of the case as well as the assessment of the insurance company, with appropriate advice to the insured with regard to the employment of independent counsel whenever the attorney cannot fully represent his or her interest.* Further, if the attorney reasonably believes that it is in the best interest of the insured to provide him or her with work product directed to the insurer, such *information may be disclosed to the insured without violating any ethical duty to the insurer.*

North Carolina State Bar RPC 92 (January 17, 1991) ("RPC 92") (emphasis supplied). Clearly under the last sentences of RPC 92, plaintiff cannot claim or assert any attorney-client privilege to prevent disclosure to defendant of its communications with Patterson,

who was under a continuing date to act in defendant's "best interests" and to advise defendant to employ "independent counsel." *Id.*

In *Harleysville Mut. Ins. Co. v. Berkley Ins. Co.*, we recently stated, "when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend." 169 N.C. App. 556, 562, 610 S.E.2d 215, 219 (2005). Here, although plaintiff reserved its rights to indemnify defendant for the malicious prosecution judgment, it does not dispute the policy contained coverage for other claims and a duty to defend defendant that triggered an attorney-client privilege. "[T]he insurer's duty to defend the insured is broader than its obligation to pay damages . . . ." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). Plaintiff's contractual duty to provide an attorney to defend defendant's "best interests" existed throughout Patterson's representation. RPC 92.

A. Attorney-Client Relationship

Plaintiff's brief concedes it "does not dispute that the relationship between Mr. Patterson and defendant was one of attorney and client." The trial court's findings of fact and conclusion of law that defendant established the first factor under *Evans* is stipulated. 142 N.C. App. at 32, 541 S.E.2d at 791 (citation omitted) ("[T]he relation of attorney and client existed at the time the communication was made.").

B. The Insurer

Under these facts, plaintiff fails to show the trial court abused its discretion in upholding the attorney-client privilege between defendant and Patterson. In finding of fact number five, the trial court found "[plaintiff] retained the late Lee A. Patterson, II, to represent [defendant] in the [underlying] Civil Action." Plaintiff did not except to this or *any* other findings of fact and they are binding on appeal. *See Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) ("Where findings of fact are challenged on appeal, each contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding." (citations omitted)).

Plaintiff also recognizes, under RPC 92, that "[t]he representation of insured and insurer is a dual one, but the attorney's *primary allegiance is to the insured*, whose *best interest* must be served

at all times." (Emphasis supplied). Patterson's "primary" allegiance and duty was to represent defendant's "best interests" in the underlying litigation. *Id.*

As plaintiff: (1) failed to except to the trial court's findings of fact that Patterson was hired to represent defendant on all claims asserted by Axarlis; (2) concedes it "continued to provide a defense to [defendant], through [] Patterson, as to all claims asserted against him in the Civil Action;" and (3) failed to show defendant waived or consented to disclosure, plaintiff has failed to show the trial court erred in finding no attorney-client privilege extended between it and Patterson. Under the facts here, the trial court's ruling is not "manifestly unsupported by reason" as between the attorney, the insured, the insurer with adverse interests to the insured, and the attorney-client privilege existed between defendant and Patterson, and not between Patterson and plaintiff. *Clark*, 146 N.C. App. at 291, 552 S.E.2d at 245 (quotation omitted).

C. The Insured

Plaintiff also contends the trial court erred in concluding that the attorney-client privilege prevents disclosure of communications made between Patterson and defendant during the course of the underlying action. I disagree.

1. Confidential Communication

The law regarding what type of communication is confidential and privileged is well-established:

> 'Only confidential communications are protected. If it appears by extraneous evidence or from the nature of a transaction or communication that they were not regarded as confidential, or that they were made for the purpose of being conveyed by the attorney to others, they are stripped of the idea of a confidential disclosure and are not privileged.'

Evans, 142 N.C. App. at 32, 541 S.E.2d at 791 (quoting *Dobias v. White*, 240 N.C. 680, 684-85, 83 S.E.2d 785, 788 (1954) (citation omitted)). Plaintiff demanded in its motion for sanctions and/or to compel discovery that it was entitled to compel defendant "to fully and adequately respond *to all questions* concerning his communications with [] Patterson." (Emphasis supplied).

Plaintiff argues a letter written from defendant to Patterson regarding "draft responses to discovery requests served by Axarlis'

counsel" and "defendant's apparent concern about the possibility of an excess verdict" was not privileged communications. Plaintiff asserts defendant was not permitted to seek legal advice from Patterson regarding "the excess exposure issue." I disagree.

As noted earlier, plaintiff did not assign error to finding of fact number five, which states, "[plaintiff] further notified [defendant] that although it would defend all of Mr. Axarlis' claims against [defendant] in the [underlying] Civil Action, [plaintiff] was reserving its right to decline to indemnify [defendant] for any damages [in the malicious prosecution claim]," or to finding of fact number six, which states "[plaintiff] continued to provide a defense to [defendant], through [] Patterson as to all claims asserted against him in the [underlying] Civil Action." Plaintiff concedes in its brief that it "provided a defense to defendant throughout the pendency of the Prior Civil Action." Defendant asserts in his sworn affidavit he was "informed that plaintiff would in fact provide legal representation for both the dog bite case and the claim for malicious prosecution."

These findings and plaintiff's concession that an attorney-client privilege existed throughout Patterson's representation of defendant in the underlying action support the trial court's conclusion that such communication was "made in anticipation that [it] would be confidential . . ., made at a time that an attorney-client relationship existed . . . in the course of . . . seeking legal advice and for a proper purpose, and made regarding a matter for which [the attorney] was being professionally consulted." *In re Investigation of Death of Eric Miller*, 358 N.C. 364, 367-68, 595 S.E.2d 120, 122 (2004); *see also Evans*, 142 N.C. App. at 32, 541 S.E.2d at 791.

The entire heart of defendant's claims is plaintiff's failure to settle all claims in Axarlis's complaint within the policy limits and its indemnity of defendant for the malicious prosecution judgment. All other claims, except the malicious prosecution judgment arising in the underlying action, were settled by plaintiff. The sole remaining issue between plaintiff and defendant involves a claim where the parties' interests were in conflict and adverse *ab initio*. Plaintiff and the majority's opinion do not offer any controlling authority to show it was entitled access to *all* communications between defendant and Patterson. The facts plainly show that plaintiff's and defendant's interests in the policy's coverage or indemnity for any sums recovered by Axarlis from the malicious prosecution judgment were in conflict from the beginning of Patterson's representation. RPC 92.

Plaintiff and the majority's opinion cites cases discussing "common interests" and "joint client." None of these cases directly address the issue before us where the parties represented have adverse interests that were present from the beginning of the representation. In 1888, our Supreme Court in *Michael v. Foil* addressed the issue of an attorney testifying who jointly represented the parties as a scrivner. 100 N.C. 178, 6 S.E. 264 (1888). The attorney prepared a deed that omitted a reference to a division of payment for mineral rights. *Id.* at 182-83, 6 S.E. at 266. In a later trial to collect one-half of the proceeds from the sale of the mineral rights, the attorney was tendered as a witness. *Id.* at 182, 6 S.E. at 266. At trial, the defendant objected. *Id.* The Court stated, "the general rule that a legal adviser will not be permitted to disclose communications or information derived from clients as such . . . ." *Id.* at 189, 6 S.E. at 269. The Court continued that as

> between the parties themselves, [] the attorney is under the same obligations to both of them. The matter communicated was not, in its nature, private as between *these parties*, *who were both present at the time*, and consequently, so far as they are concerned, it cannot, in any sense, be deemed the subject of a confidential communication made by one which the duty of the attorney prohibited him from disclosing to the other. The reason of the rule has no application in such case. The *statements of parties made in the presence of each other may be proved by their attorneys* as well as by other persons, because such statements are not, in their nature, confidential, and cannot be regarded as privileged communications. The testimony of the attorney was therefore properly admitted in this case.

Id. at 190, 6 S.E. at 269 (quotation omitted) (emphasis supplied).

"[A]s a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged *inter sese*." *Dobias*, 240 N.C. at 685, 83 S.E.2d at 788 (citations omitted); *accord Brown v. Green*, 3 N.C. App. 506, 512, 165 S.E.2d 534, 538 (1969) (quotations omitted). In *Michael*, *Dobias*, and *Brown*, the parties jointly represented did not have adverse interests at the time the communications were made to common counsel. The attorneys in all cases were employed to act solely as a scrivner to memorialize agreements the parties had previously reached. In neither case were privileged communications disclosed after adverse interests arose between the parties jointly represented. *Michael*, 100 N.C. at 189, 6 S.E. at 269;

Dobias, 240 N.C. at 684-85, 83 S.E.2d at 788-89; *Brown*, 3 N.C. App. at 512, 165 S.E.2d at 538.

Plaintiff seeks to compel disclosure of *all* communications between defendant and Patterson and asserts *no* communications between them were made in confidence or were privileged. Plaintiff and defendant both cite a passel of cases from other jurisdictions regarding the attorney-client relationship between the insurer, the insured, and the attorney.

Courts across the country are divided on whether the "common interest" or "joint client" doctrine applies to the tripartite relationship between the insurer, the insured, and the retained attorney. Some courts hold that communications between the insured and the retained attorney are not privileged to the extent that they relate to the defense for which the insurer has retained the attorney. *See*, *e.g.*, *Northwood Nursing Home v. Continental Ins.*, 161 F.R.D. 293, 297 (E.D. Pa., 1995) ("Because [the insurer] has agreed to defend this action, [the insureds] have no reasonable expectation of privilege."); *North River Ins. v. Philadelphia Reinsurance*, 797 F. Supp. 363, 366 (D.N.J. 1992) ("The common interest doctrine has been recognized in the insured/insurer context when counsel has been retained or paid for by the insurer, and allows either party to obtain attorney-client communications related to the underlying facts giving rise to the claim, because the interests of the insured and insurer in defeating the third-party claim against the insured are so close that no reasonable expectations of confidentiality is said to exist." (internal quotation marks omitted) (quotation omitted)), *aff'd in part*, *rev'd in part by*, *sub nomine at* 52 F.3d 1194 (3d Cir. N.J. 1995); *Pittston Co. v. Allianz Ins. Co.*, 143 F.R.D. 66, 69 (D.N.J. 1992) ("It seems clear that use of the ["common interest"] doctrine is warranted when there is a dispute between insurer and insured regarding underlying litigation in which the insured was represented by an attorney appointed by the insurer." (citations omitted)), *rev'd and remanded on other grounds*, 124 F.3d 508 (3d Cir. N.J. 1997); *Waste Management v. Intern. Surplus Lines*, 144 Ill. 2d 178, 193, 579 N.E.2d 322, 328-29 (1991) (holding that "common interest" doctrine applies as between insurer and insured); *Brasseaux v. Girouard*, 214 So. 2d 401, 410 (recognizing that in suits between an insurer and the insured, communications made by the insured to the insurer's counsel during a period of simultaneous representation are not privileged where the issue to which the communications relate concerns matters of the legal representation of the insured), *cert. denied*, 253 La. 60, 216 So. 2d 307 (1968);

Goldberg v. American Home Assur. Co., 80 App. Div. 2d 409, 413, 439 N.Y.S.2d 2, 5 (1981) (citations omitted) (common interest doctrine "especially" applies "where an insured and his insurer initially have a common interest in defending an action against the former . . . .").

Defendant responds and argues that jurisdictions that recognize the "common interest" or "joint representation" of the attorney to the insured and insurer hold the *primary* ethical duty of the attorney is *always* to the insured. *See*, *e.g.*, *Prevratil v. Mohr*, 145 N.J. 180, 183, 678 A.2d 243, 245 (1996); *Lieberman v. Employers Ins. of Wausau*, 84 N.J. 325, 419 A.2d 417 (1980); *Employer's Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973); *Paradigm Ins. v. Langerman Law Offices*, 196 Ariz. 573, 2 P.3d 663 (Ariz. Ct. App. 1999), *vacated in part and remanded*, 200 Ariz. 146, 24 P.3d 593 (Ariz. 2001); *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 131 N.Y.S.2d 393 (N.Y. Sup. Ct. 1954); *Bogard v. Employers Casualty Co.*, 164 Cal. App.3d 602, 210 Cal. Rptr. 578 (Cal. App. 2d Dist. 1985).

Defendant also cites *In re: Petition of Youngblood*, 895 S.W.2d 322 (Tenn. 1995) (holding that employment of attorney by insurer does not create attorney-client relationship between insurer and attorney, and also does not impose any duty of loyalty to the insurer); *Church v. Hofer, Inc.*, 844 P.2d 887, 888 (Okl. App., 1992) (holding although the insured became the attorney's client, with all the ethical considerations that are part of the attorney-client relationship, the insured was not obligated to pay for the attorney's services after the insurer declared bankruptcy); *Pine Island Farmers v. Erstad & Riemer*, 649 N.W.2d 444, 452 (Minn. 2002) (holding the insurer only becomes a co-client of the attorney it hires to represent the insured if there is no conflict of interest and the insured gives express consent to dual representation after full consultation). Defendant argues under either analysis of "primary duty to the insured" or "no duty to the insurer," the trial court's order must be affirmed. I agree.

Without reviewing the specific rules of professional responsibility and the statutory, administrative, and common law in each of these jurisdictions, we do not know the context and basis for each of these holdings.

However, in addition to the North Carolina precedents cited above, the North Carolina State Bar has published Rules of Professional Conduct Opinions ("RPC") to advise counsel under the 1985 Rules of Professional Conduct, effective from 1 January 1986

until 24 July 1997, and Formal Ethics Opinions ("FEO") under the Revised Rules of Professional Conduct, effective 25 July 1997 until present. In addition to RPC 92 previously set out in full above, the State Bar has issued additional rulings regarding multiple clients, attorneys hired by the insurers to represent the insured, and conflicts or adverse interests among multiple clients represented.

The State Bar has consistently advised counsel that their "primary allegiance" is to the insured, directed the attorney to uphold the insured's "best interests," and required the attorney to advise the insured to retain separate counsel in the event the attorney hired to defend the insured cannot exercise independent "professional judgment" or maintain "the client-lawyer relationship." N.C. State Bar Rule 1.8(f)(2); *see* RPC 56 (April 14, 1989) (an attorney may represent a plaintiff against an insurance company's insured while defending other persons insured by the company in unrelated matters); RPC 91 (January 17, 1991) (an attorney employed by the insurer to represent the insured and its own interest may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits); RPC 103 (January 18, 1991) (an attorney for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent); RPC 111 (July 12, 1991) (an attorney retained by a liability insurer to defend its insured may not advise [the] insured or [the] insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim); RPC 112 (July 12, 1991) (an attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability); RPC 153 (January 15, 1993) (in cases of multiple representation, an attorney who has been discharged by one client must deliver to that client as part of that client's file information entrusted to the attorney by the other client); RPC 154 (January 15, 1993) (an attorney may not represent the insured, her liability insurer and the same insurer relative to underinsured motorist coverage carried by the plaintiff); RPC 172 (April 15, 1994) (an attorney retained by an insurance carrier to defend an insured has no ethical obligation to represent the insured on a compulsory counterclaim *provided* the attorney apprises the insured of the counterclaim in sufficient time for the insured to retain separate counsel); RPC 177 (July 21, 1994) (an attorney may represent the insured, his liability insurer, and the same insurer relative to underinsured motorist coverage carried by the plaintiff *if* the insurer

waives its subrogation rights against the insured and the plaintiff executes a covenant not to enforce judgment); RPC 178 (October 21, 1994) (an attorney's obligation to deliver the *file* to the client upon the termination of the representation when the attorney represents multiple clients in a single matter); RPC 207 (October 20, 1995) (an attorney may represent an insured in a bad faith action against his insurer for failure to pay a liability claim brought by a claimant who is represented by the same lawyer); RPC 209 (January 12, 1996) (provides guidelines for the disposal of closed client files); RPC 210 (April 4, 1997) (provides circumstances in which it is acceptable for an attorney to represent the buyer, the seller, and the lender in the closing of a residential real estate transaction); RPC 229 (July 26, 1996) (an attorney who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affects adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse); RPC 251 (July 18, 1997) (an attorney may represent multiple claimants in a personal injury case, even though the available insurance proceeds are insufficient to compensate all claimants fully, *provided* each claimant, or his or her legal representative gives informed consent to the representation, and the attorney does not advocate against the interests of any client in the division of the insurance proceeds); 98 Formal Ethics Opinion 17 (January 15, 1999) (an attorney may not comply with an insurance carrier's billing requirements and guidelines if they interfere with the attorney's ability to exercise his or her independent professional judgment in the representation of the insured); 99 Formal Ethics Opinion 14 (January 21, 2000) (when an insured fails to cooperate with the defense, as required by the insurance contract, the insurance defense lawyer may follow the instructions of the insurance carrier *unless* the insured's lack of cooperation interferes with the defense *or* presenting an effective defense is *harmful* to the interests of the insured); 2003 Formal Ethics Opinion 12 (October 22, 2004) (an insurance defense attorney may give the insured and the insurance carrier an evaluation of a pending case, including settlement prospects, but may not recommend that the carrier decline to settle and go to trial if this recommendation is contrary to the wishes of the insured).

Our Supreme Court addressed the deference and weight accorded to administrative interpretations of statutes and rules adopted by agencies responsible for their enforcement and held:

> [When the legislature] chooses not to amend a statutory provision that has been interpreted in a specific way, we assume that it is satisfied with [the administrative] interpretation. *Polaroid Corp. v. Offerman*, 349 N.C. 290, 303, 507 S.E.2d 284, 294 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999). Nevertheless, it is ultimately the duty of courts to construe administrative statutes; [courts cannot] defer that responsibility to the agency charged with administering those statutes. *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E.2d 435 (1983).
>
> This does not mean, however, that courts, in construing those statutes, cannot accord great weight to the administrative interpretation, especially when, as here, the agency's position has been long-standing and has been met with legislative acquiescence. *Polaroid Corp.*, 349 N.C. at 303, 507 S.E.2d at 294 (citing *State v. Emery*, 224 N.C. 581, 587, 31 S.E.2d 858, 862 (1944)); *see Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 164 (1999) (holding that the interpretation of a statute given by the agency charged with carrying it out is entitled to great weight). Moreover, according great weight to the administrative interpretation in the face of legislative acquiescence is all the more warranted when, as [in the instant case, the subject is a complex legislative scheme] . . . necessarily requiring expertise. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 415 (1994).

Wells v. Consolidated Jud'l Ret. Sys. of N.C., 354 N.C. 313, 319-20, 553 S.E.2d 877, 881, *reh'g denied*, 354 N.C. 580, 559 S.E.2d 553 (2001); *see also McMichael v. Proctor*, 243 N.C. 479, 485, 91 S.E.2d 231, 235 (1956) ("questions of propriety and ethics are ordinarily for the consideration of the North Carolina Bar, Inc., which is now vested with jurisdiction over such matters"); *Gardner*, 316 N.C. at 288, 341 S.E.2d at 519 ("the power to regulate the conduct of attorneys is held concurrently by the Bar and the court").

In addition, the United States Court of Appeals for the Fourth Circuit set out its and the American Bar Association's position on the attorney's duty to the insured and the insurer in *In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir. 1989), *cert. denied*, *Anderson v. Aetna Casualty & Surety Co.*, 493 U.S. 959, 107 L. Ed. 2d 362 (1989). The Court stated:

> It is universally declared that such counsel represents the insured and not the insurer. Repeated opinions issued by the American

> Bar Association [ABA], as illustrated by ABA Comm. on Ethics and Professional Responsibility, Informal Opinion 1476 (1981) declare: "*When a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client.*" *See also* the following opinions in ABA/BNA Lawyers' Manual on Professional Conduct (1984): Connecticut, Informal Opinion 83-5, at 801:2059; Delaware Opinion 1981-1 at 801:2201; Michigan Opinion CI-866 at 801:4856. *See also Point Pleasant Canoe Rental v. Tinicum TP.*, 110 F.R.D. 166, 170 (E.D. Pa. 1986); *Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 682 P.2d 725, 736 (1984).

Id. at 751 (emphasis supplied).

The undisputed facts show plaintiff reserved its rights to indemnify defendant for any recovery from Axarlis's malicious prosecution claim, but that Patterson represented and defended defendant against all asserted claims. Plaintiff's assertion that defendant could not confidentially consult Patterson on his excess exposure liability after it reserved its rights to indemnify within the policy limits is without merit. Plaintiff failed to except to the finding of fact or demonstrate the trial court's finding and conclusion that defendant's communication to Patterson was a "confidential communication" was error. *Evans*, 142 N.C. App. at 32, 541 S.E.2d at 791.

As it relates to the specific facts and issues before us and applying the applicable abuse of discretion standard of review, I vote to overrule this assignment of error. N.C. State Bar Rule 1.8(f).

2. Waiver

The majority's opinion concludes defendant waived his right to assert the attorney-client privilege. I disagree.

In *In re Investigation of Death of Eric Miller*, our Supreme Court set out instances of non-confidential attorney-client communications and waiver. 357 N.C. at 328, 584 S.E.2d at 782. The Court listed four instances where the privilege is waived, including: (1) "where uncontroverted evidence showed the defendant consulted with his attorney solely to facilitate his surrender, such communication relating to the surrender was not privileged," (citing *State v. McIntosh*, 336 N.C. 517, 524, 444 S.E.2d 438, 442 (1994)); (2) "when a client alleges ineffective assistance of counsel, the client waives the attorney-client privilege as to the matters relevant to the allegation," (citing *State v. Taylor*, 327 N.C. 147, 152, 393 S.E.2d 801, 805 (1990)); (3) "communications are not privileged when made in the presence of a third person not

acting as an agent of either party," (citing *State v. Brown*, 327 N.C. 1, 21, 394 S.E.2d 434, 446 (1990)); and (4) "the privilege is not applicable when an attorney testifies regarding the testator's intent to settle a dispute over an estate," (citing *In re Will of Kemp*, 236 N.C. 680, 684, 73 S.E.2d 906, 909-10 (1953)). *Id.*; *see* N.C. State Bar Rule 1.7 (Even if a concurrent conflict of interest exists, a lawyer may represent a client if: (1) he reasonably believes he will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.)

Here, the trial court found and concluded, "There is nothing in the Nationwide Policy which suggests that [plaintiff] providing counsel to an insured waives attorney-client privilege." This conclusion is supported by the trial court's unchallenged findings of fact that: (1) plaintiff hired Patterson to represent defendant; (2) plaintiff's concession that an attorney-client relationship was established between defendant and Patterson; and (3) the State Bar's ruling that Patterson's "primary allegiance" was to represent defendant's "best interest." RPC 92. As plaintiff failed to except to any of the trial court's findings of fact, these findings and conclusions are supported by competent evidence and applicable law. *See Okwara*, 136 N.C. App. at 591, 525 S.E.2d at 484.

I. Sending a Letter

Plaintiff asserts, and the majority's opinion agrees, that defendant's letter to Patterson waived his right to assert the privilege because it included statements to be directed to plaintiff, a third-party. Defendant's letter to Patterson stated in part, "I have also been advised to request that you communicate to plaintiff, in no uncertain terms, that, if this matter is not settled . . . then I have every intention of pursuing any and all claims available to me against plaintiff."

While this communication, standing alone, may not be privileged, it reinforces the adverse relationship that existed between defendant and plaintiff from the beginning of Patterson's representation and is insufficient to establish a waiver of all the remaining communications contained within defendant's letter to Patterson. *See Dobias*, 240 N.C. at 684-85, 83 S.E.2d at 788. Plaintiff has not carried its burden to show that defendant waived privileged communications to Patterson under

either of the four factors set out in *In re Investigation of Death of Eric Miller*. 357 N.C. at 328, 584 S.E.2d at 782.

ii. Asserting Counterclaims

The majority's opinion also holds "[t]o the extent defendant contends that Patterson negligently defended him in the underlying action and negligently failed to resolve the claim, such allegations constitute a waiver of the attorney-client privilege." Defendant argues in his brief, "[t]he disclosures at issue here have absolutely nothing to do with the issues remaining in the lawsuit and clearly are not necessary to the defense of [] Patterson's conduct even if it were at issue."

At bar, defendant: (1) made no allegations regarding any misconduct by Patterson; (2) has not asserted any claims against Patterson; and (3) made no adverse allegations against Patterson or even mentioned his name in the counterclaims. During the hearing, defense counsel conceded that the statute of limitations for defendant to assert claims against Patterson had expired. Defendant's counterclaim asserts failure to settle and breach of duty *only* on the part of plaintiff.

While *some* communications defendant made to Patterson may be discoverable and disclosed, defendant has not waived his right to assert the privilege until he asserts claims against Patterson's estate. Even then, defendant would not waive his privilege to all their communications. *See State v. Buckner*, 351 N.C. 401, 407, 527 S.E.2d 307, 311 (2000) (Holding the defendant, by asserting a claim for ineffective assistance of counsel, waived his right to the attorney-client privilege *only* as to matters relating to the allegations.).

Being bound by the trial court's unchallenged findings of fact and the record before us, plaintiff has failed to show and I would hold the trial court did not abuse its discretion in finding and concluding the existence of the attorney-client privilege. I would also hold that such privilege protects communications between defendant and Patterson during his representation of defendant in the underlying action and defendant did not waive his privilege. I vote to overrule this assignment of error.

III. Possession of Patterson's File by Plaintiff

Plaintiff argues the trial court erred in ordering Patterson's file and all copies of the documents contained therein to be sealed pending further orders. In his cross assignments of error numbers three

and four, defendant asserts the trial court erred by not finding: (1) it was inappropriate for Patterson or his counsel to make the file or any of its contents known to plaintiff, concluding that it was not appropriate for Patterson to turn over his file to defendant; and (2) plaintiff's attorney had a conflict of interest in representing Patterson, while at the same time representing plaintiff.

During the trial court's oral rendition of its judgment, it ordered, "[plaintiff's counsel] seal [the file] and provide it to the Court to be kept in the Court file sealed, and unsealed only by order at the appropriate time." Plaintiff's counsel responded, "I can just keep them in my office and not make them available." The trial court agreed to counsel's offer and stated, "I just want an affidavit from you sworn under oath that those matters are sealed and are available in your office. You can even put that in an envelope and seal it."

Defense counsel requested, "with respect to the sealed documents in [plaintiff's counsel's] office, there may be portions of that file that were communicated to the client, that need to be somehow retrieved from the client, his client, plaintiff." Plaintiff's counsel responded, "I'd ask that we let that abide until such time as this appeal's decided." The trial court responded, "You're going to have to call plaintiff and tell them what happened here. When you call them, would you please ask them to kindly . . . put it under seal until the appeal, somewhere."

Subsequently in its written order, the trial court stated in decreetal paragraph number three, "Defendant's counsel is directed to maintain his copy of Lee A. Patterson's file from the Civil Action under seal in his offices and not to provide the contents of that file to other persons pending further orders of the Court." Complicating this matter is Patterson, who would normally seal and hold the file pending further discovery orders, is deceased, and plaintiff's counsel represents Patterson's estate. During the hearing, plaintiff's counsel represented to the trial court, "I'm still the lawyer for [Patterson]'s estate."

The parties do not dispute that defendant was entitled to a copy of his entire file. Plaintiff's counsel stated at the hearing, "it's my opinion [Patterson]'s got an obligation to go ahead and give [defendant] a copy of the file." Plaintiff's counsel sought advice from the State Bar whether defendant was entitled to a copy of his file and was advised, under RPC 153, he was entitled to his file. Defendant's file was made available for him to pick up at Patterson's office and was delivered to defendant and his current counsel in October 2001.

In light of the issues previously discussed and the present circumstances of this case, I vote the trial court's conclusion of law number nine stating, "It was not appropriate for Lee A. Patterson, II, to turn over his file regarding the Civil Action to Defendant," should be reversed. I vote to vacate paragraph number three in the decreetal portion of the order. The trial court's order requiring plaintiff's counsel to seal Patterson's file and all copies made therefrom should be affirmed. Plaintiff's counsel should deliver the file to the trial judge to be maintained pending further discovery motions by either party. Upon further motions by either party, the presiding judge should conduct an *in camera* review and enter appropriate findings of fact supporting its conclusions of law.

IV. Summary

The United States Supreme Court and our Supreme Court has recognized that "the attorney-client privilege is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 141 L. Ed. 2d 379, 384 (1998). " 'Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' " *Evans*, 142 N.C. App. at 32, 541 S.E.2d at 790 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 591 (1981)).

Plaintiff's and defendant's interests on coverage and indemnity of Axarlis's malicious prosecution and abuse of process claims were initially in conflict and remained adverse throughout the underlying action and the present action. *Gardner*, 316 N.C. at 288, 341 S.E.2d at 519. Based on a careful review of the record and the limited facts and issues presently before this Court, plaintiff: (1) failed to assign error to any of the trial court's findings of fact that are deemed to be supported by substantial evidence and are binding on appeal; (2) concedes or fails to argue any authority to reverse the trial court's conclusion of law that an attorney-client privilege existed between Patterson and defendant and that Patterson breached the attorney-client relationship by delivering defendant's file to plaintiff without defendant's consent; and (3) failed to show any abuse of discretion in the trial court's denial of plaintiff's motions to compel discovery or for sanctions and that the trial court's rulings are "manifestly unsupported by reason," *Clark*, 146 N.C. App. at 228, 552 S.E.2d at 245, or "could not be the product of a reasoned decision," *Chavis*, 155 N.C. App. at 772, 573 S.E.2d at 921 (citation omitted).

Plaintiff failed to show the trial court abused its discretion not allowing disclosure of privileged material under their discovery motion.

V. Conclusion

Inherent tensions arise where an attorney has an established and continuing business relationship with an insurer and represents the insured as a onetime event. While multiparty representation can be described as "tiptoeing on a tightrope," all attorneys are bound to exercise independent professional judgment on behalf of all clients. An attorney who recognizes a divided loyalty between clients or who represents joint clients whose interests are or become adverse, must disclose that fact, advise each to obtain separate counsel, and constantly be vigilant and protective of each client's interests without harming the other client. RPC 92.

Where representation of multiple clients reveals conflicts, the attorney should, and must give, "appropriate advice to the insured with regard to the employment of independent counsel whenever the attorney cannot fully represent his or her interest." *Id.* Nothing in the record shows Patterson told defendant he could not fully represent his interests or that he recommended the employment of independent counsel. To the contrary, the facts show and plaintiff concedes Patterson represented defendant on *all* claims throughout the underlying action, including filing of post-trial motions.

Plaintiff's duty to zealously defend its insured is not based on grace or gratuity, but rather in fulfillment of a bargained-for and compensated contractual duty contained within its policy with the insured. Here, plaintiff launched a preemptive action in seeking a declaratory judgment of its duty to indemnify the insured and coopted the attorney it hired to defend its insured's "best interests" to hand over the client's entire file to them. The trial judge correctly stated during the hearing, "the attorney should have advised the parties to consider employing separate counsel."

While Lord Chesterfield's adage that "he who pays the piper calls the tune" (Letter from Lord Chesterfield to his son, of 1792) may be acceptable in other relationships, it control and directly contrary to the attorney-client relationship. N.C. State Bar Rule 1.8(f).

The potential of an inherent conflict of interest arises where an attorney accepts representation of a client and accepts compensation for such representation from another. However, this is a conscious

choice by the attorney, and it is the attorney's conduct we, in our inherent authority, and the State Bar regulate. North Carolina State Bar Rules, Subchapter 1B (2005).

The ancient axiom of "no one can serve two masters: for either he will hate the one and love the other or else he will be loyal to the one and despise the other" represents an universal truth. Matthew 6:24 (New King James). Our and the State Bar's role is to promote and protect the essential core of the primary of the attorney's obligation to the client. Since plaintiff's contractual duty is to indemnify and to defend its insured, its contractual duty does not equate to and cannot arise to equal status with its insured where their interests are adverse.

While I recognize North Carolina's "dual representation" of the insured and the insurer by one attorney, dual representation does not include a right of the insurer to privileged communications between the insured and his attorney. RPC 92. Where the interests of the insured and the insurer on indemnity are adverse, the insurer cannot assert the attorney-client privilege against its insured. *Id.*

I vote to affirm the trial court's order except for conclusion of law number nine and the decreetal paragraph number three that allows plaintiff's counsel to retain possession of Patterson's sealed file. This file should remain sealed and should be delivered to and deposited with the presiding judge on remand. An affidavit should be prepared under oath that all documents in the file originally delivered to plaintiff, along with all copies of documents made therefrom after delivery, are contained therein. I vote to affirm in part, reverse and vacate in part and remand. I concur in part and respectfully dissent in part from the majority's opinion as discussed above.

STATE OF NORTH CAROLINA v. MASOUD RASHIDI

No. COA04-311

(Filed 16 August 2005)

1. Search and Seizure— anticipatory search warrant—probable cause—failure to demonstrate false statements

Although defendant contends the trial court erred in a trafficking in opium by possessing twenty-eight grams or more and possessing drug paraphernalia case by denying defendant's

motion to suppress evidence based on alleged false statements contained in an affidavit supporting an application for a search warrant, the Court of Appeals does not need to decide whether defendant sufficiently established knowing or reckless falsehoods because: (1) defendant failed to demonstrate that any false statements were material; and (2) the other statements in the affidavit were sufficient to support the issuance of an anticipatory search warrant.

2. Drugs— trafficking in opium by possession—motion to dismiss—sufficiency of evidence—constructive possession

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in opium by possession, because: (1) the State was not required to show who placed the opium in the pertinent parcel, but instead was required to show defendant knew or expected that the package contained opium and intended to control its disposition or use; (2) defendant received the package addressed to him at his residence, and before or shortly after the officers announced their presence, hid the opium contained in a United States Customs bag in a trash bag of clothes in a bedroom; (3) officers found multiple similarly addressed packages in defendant's carport and defendant admitted that he had expected to receive a package from his brother-in-law containing a picture; (4) defendant admitted he had used opium and officers found a film cannister containing traces of opium in his front pocket; and (5) during a search of defendant's car, officers found in its console hand-held scales of a type frequently used to weigh drugs, a safety pin or "wire stem" coated in opium, and $1,160 in cash, and prior precedents have determined that such evidence is sufficient to allow a jury to find constructive possession.

3. Constitutional Law— referencing defendant's invocation of right to counsel—harmless error

Assuming arguendo that the trial court erred in a trafficking in opium by possessing twenty-eight grams or more and possessing drug paraphernalia case by allowing an officer to testify regarding defendant's request for an attorney, the error was harmless beyond a reasonable doubt because: (1) there was overwhelming evidence of defendant's guilt of drug trafficking and the State's evidence left no reasonable doubt that defendant knowingly possessed thirteen times the statutory amount; (2) the State made no reference to defendant's invocation of his right to coun-

sel in closing arguments which makes this case distinguishable from others where a new trial was required; (3) no other witnesses were questioned about defendant's invocation and defendant was not cross-examined about invoking his constitutional rights; and (4) the fact that the State asked the witness directly whether defendant invoked his right to counsel is not sufficient, standing alone, to overcome the overwhelming evidence of defendant's guilt.

4. Criminal Law— prosecutor's argument—flight—written display—motion for mistrial—request for curative instruction

The trial court did not abuse its discretion in a trafficking in opium by possessing twenty-eight grams or more and possessing drug paraphernalia case by denying defendant's motion for a mistrial or, in the alternative, his request for a curative instruction when the State displayed to the jury, on two 8½ by 11 inch paper panels, information outside the record during closing arguments regarding defendant's alleged flight to Canada, because: (1) assuming arguendo that the displays constituted a spoken argument or remark, the disputed displays were apparently visible to the jury for just about thirty seconds, the prosecutor never commented on them to the jury, and the State removed them immediately after defendant objected to their content; and (2) no evidence shows these displays were persistently confronting the jury when they were two of sixteen 8½ by 11 paper panels visible for less than a minute, and thus, the displays were not more prejudicial than a fleeting remark once voiced but not repeated.

Judge GEER concurring in part and dissenting in part.

Appeal by defendant from judgments entered 15 August 2003 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

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

TYSON, Judge.

Masoud Rashidi ("defendant") appeals from judgments entered after a jury found him guilty of trafficking in opium and possessing drug paraphernalia. We find no prejudicial error.

I. Background

The State's evidence tended to show that on 8 November 1999, United States Customs Special Agent Patrick McDavid ("Agent McDavid") was working in the Charlotte office. He was contacted by customs agents working in New York's JFK International Airport, who stated they had intercepted a package sent from Iran addressed to "M. Rashidi" at 2408 Margaret Wallace Road, Matthews, North Carolina. The New York customs agents had determined that the package contained two pictures or plaques with unusually thick frames. A probe inserted into one of the frames revealed that the frames contained opium estimated to weigh approximately 412 grams.

The New York customs agents sent the package to Agent McDavid in Charlotte for a controlled delivery. After receiving the package, Agent McDavid confirmed through Division of Motor Vehicles' records that defendant lived at the address indicated on the package. Agent McDavid drafted an affidavit in support of an application for an anticipatory search warrant for defendant's address. The United States District Court for the Western District of North Carolina issued the search warrant.

On 17 November 1999, United States customs agents and Charlotte police officers attempted to deliver the package by a postal inspector posing as a postal carrier. When the inspector first attempted to deliver the package at 11:21 a.m., no one was home to receive it. The officers set up a surveillance of the house. At approximately 2:30 p.m., a red Mustang vehicle pulled up to the residence. The driver got out of the car and went inside. The postal inspector delivered the package to a male located inside the residence. After delivery, the inspector radioed the surveillance team and stated the man who received the package matched defendant's drivers' license photo.

The officers waited a few minutes to allow defendant an opportunity to open the package. At that point, Agent McDavid knocked on the door and yelled loudly, "Police with a search warrant." Thirty to forty-five seconds later after having received no response, the officers forced the door open and found defendant talking on a cell phone. Officers asked defendant to get on the floor, frisked him, seized a film cannister, and handcuffed him. They found the package just delivered opened on the kitchen stove, surrounded by broken pieces of the picture frames.

Defendant was advised of his *Miranda* rights and verbally waived them. In response to an officer's question whether the package had contained opium, defendant told the officers that he had been expecting a package of pictures from his brother-in-law, Ramin Sarmist ("Sarmist"), who lived in Iran. Defendant explained that he had previously received packages from Sarmist containing pictures and rugs for resale in the Charlotte area. Defendant stated he had not expected Sarmist to send opium, although he acknowledged having used opium before. Defendant admitted that when he opened the package this time from Sarmist, he realized from its odor that it contained opium. Defendant claimed that when he heard a knock on the door, he thought his wife and child were coming home, and he hid the opium in the bedroom so that his child would not see it. Defendant then directed the officers to a trash bag of clothes under a desk in a bedroom. After searching the trash bag, the officers found an United States Customs' evidence bag, containing 381.93 grams of opium.

Defendant suggested to the officers that a telephone call to Sarmist could exonerate him. The officers allowed defendant to make the call, believing defendant would incriminate himself. After the telephone conversation, defendant reported to the officers that Sarmist did not admit to sending the opium.

The conversation, which was conducted in Farsi, was taped and subsequently translated. In the call, Sarmist told defendant that he had taken two rugs and one picture to the Teheran Post Office to be boxed and mailed. Defendant told Sarmist that the package had instead contained two pictures and "something unreal." Sarmist suggested that someone was trying to frame defendant and said he would find out who prepared and sent the package.

In addition to the opium in the United States Customs bag, the officers determined that the film canister seized from defendant contained trace amounts of opium. While searching defendant's vehicle, the officers also found a safety pin or "wire stem" coated in opium, $1,160.00 in cash, and scales normally used to weigh drugs in the vehicle's console. Officers discovered empty mailing boxes in the carport of defendant's house that were addressed similarly to the one containing the opium.

Defendant was indicted with trafficking in drugs, possession of drug paraphernalia, and maintaining a dwelling for the purpose of keeping controlled substances. At trial, defendant did not offer any evidence. On 15 August 2003, a jury found defendant guilty of traf-

ficking in opium by possessing twenty-eight grams or more and possessing drug paraphernalia, but acquitted defendant on the maintaining a dwelling charge. Defendant was sentenced to a term of 225 to 279 months for the trafficking conviction and forty-five days for the possession of paraphernalia conviction.

II. Issues

Defendant argues that the trial court erred by: (1) denying his motion to suppress due to false statements contained in an affidavit supporting an application for a search warrant; (2) denying defendant's motion to dismiss; (3) allowing a witness to testify regarding defendant's request for an attorney; and (4) denying his motion for a mistrial or, in the alternative, his request for a curative instruction when the State displayed information outside the record during closing arguments.

III. Denial of Motion to Suppress

[1] Defendant assigns error to the trial court's denial of his motion to suppress. Defendant argues that Agent McDavid's affidavit submitted in support of the application for an anticipatory search warrant was fatally flawed because it contained material falsehoods and was made in bad faith in violation of *Franks v. Delaware*, 438 U.S. 154, 165, 57 L. Ed. 2d 667, 678 (1978). We disagree.

In applying *Franks*, our Supreme Court held, "[i]t is elementary that the Fourth Amendment's requirement of a factual showing sufficient to constitute 'probable cause' anticipates a truthful showing of facts." *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997). If the defendant shows in support of an application for a search warrant that: (1) the affiant knowingly or with reckless disregard for the truth made false statements; and (2) the false statements are necessary to the finding of probable cause, then "the warrant is rendered void, and evidence obtained thereby is inadmissible . . . ." *Id.*

Defendant argues that his motion to suppress should have been granted under *Franks* and *Fernandez* because Agent McDavid's testimony at trial established that statements in his affidavit supporting the application for the search warrant were false. Agent McDavid's affidavit stated in pertinent part:

> Customs Inspector Gattulli opened the parcel and found it to contain two large decorative plaques. Inspector Gattulli observed that the pictures were unusually thick and coated with fiberglass.

> The Inspector probed through tape on the picture, the probe revealed a black substance contained within. The substance was field tested . . . to be opium. The opium was estimated to be 412 grams. The opium was kept within the picture to maintain the integrity of the parcel.

At trial, Agent McDavid testified that the customs inspectors in New York, told him the box being sent to him in Charlotte contained pictures and approximately 412 grams of opium. He denied the inspectors told him what they did with the pictures and the opium before they sent the package to him.

Defendant's showing that an affidavit contains false statements standing alone is not sufficient to meet the showing required by *Franks*. 438 U.S. at 165, 57 L. Ed. 2d at 678. We need not decide whether defendant sufficiently established knowing or reckless falsehoods because defendant has failed to demonstrate that any false statements were material. If a defendant meets his burden under *Franks* and *Fernandez*, the "false information must be then set aside." *State v. Severn*, 130 N.C. App. 319, 322-23, 502 S.E.2d 882, 884 (1998). At that point, the court must determine whether the affidavit's remaining content is sufficient to establish probable cause. *Id.* at 323, 502 S.E.2d at 884. If probable cause does not exist without the false statements, then " 'the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.' " *Id.* (quoting *Franks*, 438 U.S. at 156, 57 L. Ed. 2d at 672).

This case involves an anticipatory search warrant and our analysis of the affidavit is slightly different. We recently explained, "[a]n anticipatory search warrant, by definition, is 'not based on present probable cause, but on the expectancy that, at some point in the future[,] probable cause will exist.' " *State v. Baldwin*, 161 N.C. App. 382, 387, 588 S.E.2d 497, 502 (2003) (quoting *State v. Smith*, 124 N.C. App. 565, 571, 478 S.E.2d 237, 241 (1996)). This Court held in *Smith*,

> 'affidavits supporting the application for an anticipatory warrant must show [on their face], not only that the agent believes a delivery of contraband is going to occur, but also *how* he has obtained this belief, how reliable his sources are, and what part government agents will play in the delivery.'

124 N.C. App. at 573, 478 S.E.2d at 242 (quoting *United States v. Garcia*, 882 F.2d 699, 703 (2d Cir. 1989)).

When the allegedly false statements contained in Agent McDavid's affidavit are disregarded, the affidavit indicates: (1) customs agents in New York intercepted a parcel addressed to "M. Rashidi" at 2408 Margaret Wallace Road, Matthews, North Carolina; (2) the agents opened the parcel and found approximately 412 grams of opium; (3) the agents forwarded the parcel to Agent McDavid by registered mail for enforcement action; (4) Agent McDavid confirmed through Division of Motor Vehicles' records that a Mousad Rashidi resided at the Matthews address written on the parcel; (5) that an United States Postal Inspector would attempt to deliver the parcel to defendant at the address of "2408 Margaret Wallace Rd." on or about 16 November 1999; and (6) the officers would execute the search only after the parcel was taken into the residence and several minutes had elapsed in order to allow the parcel to be opened. Without the allegedly false statements defendant complains of, the other statements were sufficient under *Smith* to support the issuance of an anticipatory search warrant. The statements to which defendant objects are immaterial and do not void the warrant. This assignment of error is overruled.

IV. Denial of Motion to Dismiss

[2] Defendant also assigns error to the trial court's denial of his motion to dismiss the charge of trafficking in opium by possession. Defendant argues, "[t]he State failed to prove who put opium in the package, when it was put in, or at whose request." Defendant contends the State offered insufficient evidence that he intended to control the disposition or use of the opium. We disagree.

When considering a motion to dismiss, the trial court must determine whether the State has presented substantial evidence of every essential element of the crime and that the defendant is the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002). We consider the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

A person is guilty of the Class C felony of trafficking in opium when he "sells, manufactures, delivers, transports, or possesses" twenty-eight grams or more of opium. N.C. Gen. Stat. § 90-95(h)(4) (2003). To prove trafficking by possession, a "defendant's conviction must be based upon his *knowing* possession of the drugs." *State v.*

Rosario, 93 N.C. App. 627, 636, 379 S.E.2d 434, 439, *disc. rev. denied*, 325 N.C. 275, 384 S.E.2d 527 (1989). A State cannot obtain a conviction based on drugs being "surreptitiously introduc[ed] . . . into a defendant's residence." *Id.* On the other hand, "[t]he source of the [controlled substance] is immaterial so long as defendant knowingly possessed it." *Id.*

The State was not required to show who placed the opium in the parcel. It was required to show defendant knew or expected that the package contained opium and intended to control its disposition or use. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972) ("An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use."). The State must show more than the package was addressed to defendant and contained opium, since such proof does not necessarily establish defendant's knowledge of the contents of the package and his intent to exercise control over the opium. *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976) ("Necessarily, power and intent to control the contraband material can exist only when one is aware of its presence."). *See also United States v. Zandi*, 769 F.2d 229, 235 (4th Cir. 1985) (holding, under the analogous federal statute, that the government must prove beyond a reasonable doubt that the recipient of a package had knowledge that it contained a controlled substance to prove possession).

Receipt of a package, without more, is analogous to a person being in proximity to drugs on premises over which he does not have exclusive control. When a person does not have exclusive possession of the place where narcotics are found, "the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (citation omitted); *see State v. Balsom*, 17 N.C. App. 655, 659, 195 S.E.2d 125, 128 (1973) ("[M]ere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession." (internal quotation marks omitted)).

Reviewing the record in the light most favorable to the State, we hold sufficient evidence was presented to allow a jury to find that defendant knowingly possessed the opium. Defendant received the package addressed to him at his residence and, before or shortly after the officers announced their presence, hid the opium contained in an United States Customs bag in a trash bag of clothes in a bedroom.

This evidence supports an inference of knowing possession. *See Rosario*, 93 N.C. App. at 638, 379 S.E.2d at 440 (evidence that the defendant took delivery of a package from a courier, placed it in his freezer, and then put it in a trash can when he learned that police were in the area provided evidence that defendant "possessed the package and knew what it contained").

This delivery to defendant was not a random, unexpected occurrence. Officers found multiple, similarly addressed packages in defendant's carport and defendant admitted that he had expected to receive a package from his brother-in-law containing a picture.

Defendant only argues that he did not expect for those pictures to contain opium. The State also offered evidence of other incriminating circumstances that would permit a jury to conclude otherwise. Defendant admitted that he had used opium and officers found a film cannister containing traces of opium in his front pocket. In addition, during a search of defendant's Mustang, officers found in its console hand-held scales of a type frequently used to weigh drugs, a safety pin or "wire stem" coated in opium, and $1,160.00 in cash.

Prior precedents have determined such evidence to be sufficient to allow a jury to find constructive possession. *See*, *e.g.*, *State v. Jackson*, 137 N.C. App. 570, 573-74, 529 S.E.2d 253, 256 (2000) (finding sufficient evidence of possession to support a trafficking in cocaine charge based on cocaine located in the bathroom of a motel room inhabited by three people when the defendant had $800.00 in cash and 2.22 grams of cocaine on his person); *State v. Givens*, 95 N.C. App. 72, 78, 381 S.E.2d 869, 872 (1989) (holding evidence was sufficient to establish constructive possession when the defendant exercised some control over the premises where the cocaine was found and the defendant arrived at the location with cocaine on his person and, when searched, had a set of scales in his pocket); *Rosario*, 93 N.C. App. at 638, 379 S.E.2d at 440 (holding that evidence of the defendant's receipt and hiding of a package ultimately found to contain cocaine together with: (1) his possession of smaller bags of cocaine, cocaine grinders, and scales; and (2) testimony that defendant sold cocaine was sufficient to support an inference of constructive possession). The trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

V. Allowing Testimony Concerning Invocation of Right to Counsel

[3] Defendant contends the trial court erred by allowing the State to question Agent McDavid about defendant's invocation of his right to

counsel, and this error violated his constitutional rights. Defendant argues this error merits a new trial. We disagree.

It is well-established that "a defendant's exercise of his constitutionally protected rights to remain silent and to request counsel during interrogation may not be used against him at trial." *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994) (citation omitted). "[A] defendant *must* be permitted to invoke [his Fifth Amendment right to counsel] with the assurance that he will not later suffer adverse consequences for having done so." *State v. Ladd*, 308 N.C. 272, 283-84, 302 S.E.2d 164, 172 (1983). Allowing testimony concerning defendant's invocation of right to counsel can be error on the trial court's part. *See id.* at 284, 302 S.E.2d at 172 (allowing testimony of the defendant's invocation of right to counsel found to be error).

Presuming the trial court erred by allowing the testimony, a two part analysis is used to decide whether defendant is entitled to a new trial on the basis of this error. *See id.* (holding first that a constitutional violation had occurred and then conducting analysis to determine if it was harmless beyond a reasonable doubt); *Elmore*, 337 N.C. at 792, 448 S.E.2d at 502 (conducting the same analysis). First, the court must determine if a constitutional violation has occurred. The burden of proof is on the defendant. N.C. Gen. Stat. § 15A-1443(a); *see Ladd*, 308 N.C. at 284, 302 S.E.2d at 172. Second, presuming the court finds a constitutional violation, the State has the burden of proving the error was harmless beyond a reasonable doubt. If the State fails to meet this burden, the violation is deemed prejudicial and a new trial is required. N.C. Gen. Stat. § 15A-1443(b); *see Elmore*, 337 N.C. at 792, 448 S.E.2d at 502.

Defendant argues that the trial court erred when it allowed Agent McDavid to answer questions regarding whether defendant requested an attorney. When the prosecutor was questioning Agent McDavid about what happened at the residence and what defendant told the officers, he further asked:

> Q: . . . At anytime, talking about all these statements the defendant made, and your conversation with the defendant, at anytime during any of those conversations, did he ever ask for a lawyer to be present?
>
> MR. LEE: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes, he did.

Q: . . . And when did he tell you, or tell someone that he wanted a lawyer to be present?

A: I was conducting a search of the house—

MR. LEE: Objection. Request to be heard, Your Honor.

[Bench conference.]

THE COURT: That objection is overruled.

Q: . . . Inspector McDavid, when the defendant invoked his rights to an attorney, was he asked anymore questions about this incident?

A: No, he wasn't.

These three questions thus specifically reference defendant's invocation of his right to an attorney. Presuming *arguendo*, as the court did in *Elmore*, that defendant's constitutional rights were violated, we must consider only whether the State has shown this error to be harmless beyond a reasonable doubt. 337 N.C. at 792, 448 S.E.2d at 502.

"To find harmless error beyond a reasonable doubt, we must be convinced that there is no reasonable possibility that the admission of this evidence might have contributed to the conviction." *Ladd*, 308 N.C. at 284, 302 S.E.2d at 172 (citing *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 11 L. Ed. 2d 171, 173 (1963); *State v. Castor*, 285 N.C. 286, 292, 204 S.E.2d 848, 853 (1974)). In deciding whether a reasonable possibility exists that testimony regarding a defendant's request for counsel contributed to his conviction, the lynchpin in our analysis is whether other overwhelming evidence of guilt was presented against defendant. *See Ladd*, 308 N.C. at 284-85, 302 S.E.2d at 172 (holding that the overwhelming nature of other evidence the State had arrayed against the defendant sufficient to prove that admission of the defendant's request for counsel was harmless beyond a reasonable doubt); *see also Elmore*, 337 N.C. at 793, 448 S.E.2d at 503 (listing overwhelming nature of evidence the State had compiled against the defendant as a major reason in holding that admission of the defendant's request for counsel was harmless beyond a reasonable doubt). Other factors the Court in *Elmore* considered were: (1) whether the reference was volunteered by a witness or elicited by counsel; (2) whether the State emphasized that the defendant had invoked his right to counsel; and (3) whether the State sought to cap-

italize on the defendant's invocation of his right. 337 N.C. at 792-93, 448 S.E.2d at 503.

As noted, defendant was found to be in possession of 381.93 grams of opium. His vehicle contained drug paraphernalia, trace amounts of opium, and a large quantity of cash. He possessed a film canister on his person which contained trace amounts of opium. He attempted to hide the opium within moments of receiving the package. Officers also found similarly addressed packages in defendant's carport, indicating that this drug delivery was not an isolated incident.

All these factors show other overwhelming evidence for defendant's guilt of drug trafficking. The State needed only to prove knowing possession of more than twenty-eight grams of opium. By showing defendant possessed the opium and attempted to hide it, the State's evidence left no reasonable doubt that defendant knowingly possessed more than thirteen times the statutory amount. *See Rosario*, 93 N.C. App. at 638, 379 S.E.2d at 440 (showing the defendant received a package containing a controlled substance and then hid it upon learning that the police were nearby proved "that defendant actually possessed the package and knew what it contained").

The State made no reference to defendant's invocation of his right to counsel in closing arguments. That fact distinguishes this case from those defendant cites as authority for ordering a new trial. *See*, *e.g.*, *State v. Reid*, 334 N.C. 551, 557, 434 S.E.2d 193, 197 (1993) (holding that the State's direct reference in closing argument to the defendant's failure to testify and the trial court's refusal to give a curative order were sufficient to mandate a new trial). No other witnesses were questioned about defendant's invocation and defendant was not cross-examined about invoking his constitutional rights. This case differs from *Elmore* in that the State asked Agent McDavid directly whether or not defendant had invoked his right to counsel. This difference, standing alone, is not sufficient to overcome other overwhelming evidence of guilt to grant defendant a new trial.

The dissenting opinion disagrees with our assessment of "the evidence as overwhelming" against defendant. To support this assertion, it states defendant, in hiding the opium before officers entered his home, was acting as any other person would if he or she "unexpectedly receive[d] contraband in a United States Customs bag and hear[d] the police knocking at the door." However, defendant told

officers he hid the opium in the bedroom because he believed his wife and child were outside, not the police.

Due to other overwhelming evidence of defendant's guilt, the other factors listed, and presuming the trial court erred, we hold such error was harmless beyond a reasonable doubt.

VI. Denial of Motion for Mistrial or Curative Instruction

[4] Defendant also contends that the trial court abused its discretion by not granting a motion for mistrial or, alternatively, by not issuing a curative order after the State placed two 8½ by 11 inch sized displays in front of the jury before its closing argument. We disagree.

Following the charge conference, defense counsel stated:

> And again, I just want to make it clear, that as I recall the facts, the only evidence of flight is, he had a court date. He didn't show up. He was arrested later, that's it. There was no reference in the record about Canada or anything else. We would ask the State to be mindful of that when it makes its closing arguments and stick to the facts of the record.

The State responded that he would "be mindful" and that he "would not intend to introduce" any information on this subject unless defense counsel put forth evidence of defendant's leaving the country and his reasons why. Defendant subsequently chose not to present any evidence.

During the State's closing argument, the prosecutor displayed to the jury a number of typewritten panels summarizing its case. The display was placed six feet in front of the jury box so that all the jurors could view the material. Panels 15 and 16—which were each on 8½ by 11 inch paper and printed in a 48-point font—stated:

> 15. D went to Canada when he KNEW he had a trial court date back on 6/11/01—he knew that he needed to get out of the US b/c he knew he was guilty.
>
> 16. D didn't return to the US and turn himself in, he hid (sound familiar?)—Officer Kolbay had to find him and arrest him to make sure he would make his next court date.

Defendant objected on the grounds that the material in panels 15 and 16 was not supported by any evidence presented at the trial. Since the closing argument was not recorded in the transcript, we do not know exactly how long the panels remained before the jury. The State con-

tends that the panels remained visible for only thirty seconds. When defendant placed his objection on the record, he requested a mistrial or, in the alternative, a curative instruction. The trial court denied both requests.

It is well-established that counsel's closing argument must "be constructed from fair inferences drawn only from evidence properly admitted at trial." *State v. Jones*, 355 N.C. 117, 135, 558 S.E.2d 97, 108 (2002); *see* N.C. Gen. Stat. § 15A-1230(a) (2003) ("During a closing argument to the jury an attorney may not . . . make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice."). "During closing arguments, attorneys are given wide latitude to pursue their case." *State v. Prevatte*, 356 N.C. 178, 237, 570 S.E.2d 440, 473 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003) (citation omitted). But, "wide latitude has its limits." *Jones*, 355 N.C. at 129, 558 S.E.2d at 105 (internal quotation marks omitted). A trial court's ruling on improper closing arguments timely objected to is reviewed for abuse of discretion. *Id.* at 131, 558 S.E.2d at 106. Under such a level of review, "[a] prosecutor's improper remark during closing arguments does not justify a new trial unless it is so grave that it prejudiced the result of the trial." *State v. Glasco*, 160 N.C. App. 150, 158, 585 S.E.2d 257, 263 (citing *State v. Westbrooks*, 345 N.C. 43, 70, 478 S.E.2d 483, 500 (1996)), *disc. rev. denied*, 357 N.C. 580, 589 S.E.2d 356 (2003).

The State concedes the information shown on the disputed panels was outside of the record. Instead, the State argues that the display did not amount to a "spoken" argument by counsel because it was placed in front of the jury only momentarily. The State also asserts that counsel never spoke to the jury about the information on the panels. Assuming *arguendo* that the display did constitute a "spoken" argument or remark, the inquiry becomes whether this error prejudiced the result of defendant's trial.

The disputed displays were apparently visible to the jury for less than a minute. The State said that they were visible to the jury for just thirty seconds and defense counsel does not argue otherwise. The contested displays consisted of two 8½ by 11 inch paper panels placed in front of the jury before the State began its closing argument. The prosecutor never commented on them to the jury. The State removed them immediately after defendant objected to their content.

In *Glasco*, this Court confronted remarkably similar facts. 160 N.C. App. at 158, 585 S.E.2d at 263. There, the State twice declared in

its closing argument that the defendant was fleeing the scene of the crime. *Id.* The evidence only showed that the defendant was seen jumping over "a nearby fence." *Id.* The trial court refused to grant a motion for mistrial and refused to issue a flight instruction. *Id.* This Court remonstrated the State for twice mentioning the defendant's alleged flight, but we declined to order a new trial. We distinguished the case from others where the courts had found prejudicial error consistent with the abuse of discretion level of review. *Id.* at 158-59, 585 S.E.2d at 263-64; *see, e.g.*, *State v. Allen*, 353 N.C. 504, 508-11, 546 S.E.2d 372, 374-76 (2001) (new trial granted where the prosecutor told the jury during closing arguments that the trial court found some evidence "trustworthy and reliable;" disclosing legal opinion or ruling of trial court on "admissibility and credibility of evidence" deemed prejudicial); *State v. Jordan*, 149 N.C. App. 838, 843, 562 S.E.2d 465, 468 (2002) (Mistrial granted where the prosecutor "thoroughly undermined [the defendant's] defense by casting unsupported doubt on counsel's credibility and erroneously painting defendant's defense as purely obstructionist."). In *Glasco*, this Court also found a lack of prejudicial error from the fact that the jury was discerning enough "to find defendant not guilty of discharging a firearm into occupied property, while finding him guilty of possessing a firearm." 160 N.C. App. at 159, 585 S.E.2d at 264. Here, the jury was discerning enough to convict defendant of the possession charge, while acquitting him of maintaining a dwelling for the purpose of keeping controlled substances.

Here, as in *Glasco*, the State should not have set up the displays containing assertions not in evidence. We admonish the State's attorney for placing these panels before the jury, particularly after defense counsel raised the issue and the State's attorney agreed he would "be mindful" not to argue defendant's flight to the jury. Defendant, however, failed to show how the error prejudiced the result of the trial. Having held that the trial court did not abuse its discretion by denying defendant's motion for mistrial, we also hold the court did not abuse its discretion by denying defendant the lesser remedy of a curative instruction.

The dissenting opinion would grant a new trial because "a written display persistently confronting a jury may be more prejudicial than a fleeting remark once voiced, but not repeated." No evidence shows these displays were "persistently confronting" the jury when they were two of sixteen 8½ by 11 paper sized panels were visible for less than a minute. The displays, therefore, were not more prejudicial than a "fleeting remark once voiced, but not repeated."

VII. Conclusion

We hold that the trial court did not err in denying defendant's motion to suppress based upon allegedly false information contained in Agent McDavid's affidavit supporting the anticipatory search warrant for defendant's residence. We hold that the trial court did not err in denying defendant's motion to dismiss. The State produced sufficient evidence to prove the necessary elements of opium trafficking and possession of drug paraphernalia. Presuming the trial court erred in allowing testimony about defendant's invocation of his right to counsel, we hold any error was not prejudicial due to the overwhelming nature of the other evidence against defendant. We hold that the trial court did not abuse its discretion by denying defendant's motion for mistrial or, alternatively, for a curative instruction. Defendant received a fair trial free from prejudicial errors he assigned and argued.

The dissenting opinion declines to address the issue of whether denial of the alternative motion for a curative instruction merits a new trial because it would hold "in light of the improper closing argument, the State cannot demonstrate that its questions regarding defendant's exercise of his Fifth Amendment rights were harmless beyond a reasonable doubt." The dissenting opinion would award a new trial by linking these two errors under the rubric "post-arrest" conduct. Although the dissenting opinion implies the combination of an error not harmless beyond a reasonable doubt and a non-prejudicial error justifies a new trial, no authority is cited for that proposition. We do not perceive a connection between these two alleged errors sufficient to warrant a new trial.

No prejudicial error.

Judge McGEE concurs.

Judge GEER concurs in part and dissents in part.

GEER, Judge, concurring in part and dissenting in part.

I agree with the majority's analysis regarding the denial of defendant's motion to suppress and his motion to dismiss. I respectfully dissent, however, because I believe the trial court erred in not giving a curative instruction when the State presented information outside the record during closing arguments and by allowing testimony regarding

defendant's request for an attorney. I would hold that the combination of these errors mandates a new trial.

Defendant argues that the trial court erred when it allowed McDavid to answer questions as to whether defendant requested an attorney. When the prosecutor was questioning McDavid about what happened at the residence and what defendant told the officers, he further asked:

> Q: . . . At anytime, talking about all these statements the defendant made, and your conversation with the defendant, at anytime during any of those conversations, did he ever ask for a lawyer to be present?
>
> MR. LEE: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes, he did
>
> Q: . . . And when did he tell you, or tell someone that he wanted a lawyer to be present?
>
> A: I was conducting a search of the house
>
> MR. LEE: Objection. Request to be heard, Your Honor.
>
> [Bench conference.]
>
> THE COURT: That objection is overruled.
>
> Q: . . . Inspector McDavid, when the defendant invoked his rights to an attorney, was he asked anymore questions about this incident?
>
> A: No, he wasn't.

These three questions thus specifically reference defendant's invocation of his right to an attorney.

It is error to allow questions regarding a defendant's request for an attorney because

> [b]y giving the *Miranda* warnings, the police officers indicated to defendant that they were prepared to recognize his right to the presence of an attorney should he choose to exercise it. Therefore, we conclude that the words chosen by defendant to invoke this constitutional privilege should not have been admitted into evidence against him.

State v. Ladd, 308 N.C. 272, 284, 302 S.E.2d 164, 172 (1983). Yet, in this case, the trial court allowed the prosecutor to ask three times about defendant's request for an attorney.

I believe that allowing the State's questions, over defendant's objections, regarding defendant's invocation of his right to counsel violated defendant's Fifth Amendment rights. *See State v. Jones*, 146 N.C. App. 394, 399, 553 S.E.2d 79, 82 (2001) (holding under *Ladd* that it was error when the prosecutor questioned a detective regarding the defendant's request for counsel), *cert. denied*, 355 N.C. 754, 566 S.E.2d 83 (2002). Under N.C. Gen. Stat. § 15A-1443(b) (2003), this violation is deemed prejudicial unless the State demonstrates *beyond a reasonable doubt* that this error was harmless. *Ladd*, 308 N.C. at 284, 302 S.E.2d at 172 (holding that the defendant was "entitled to a new trial unless we determine that the erroneous admission of this evidence was harmless beyond a reasonable doubt"). In my view, the majority errs by considering the harm caused by these questions in isolation and not assessing it in conjunction with the harm caused by the State's closing argument.

As the majority explains, defense counsel specifically noted prior to closing arguments that the record contained no evidence of flight apart from defendant's having failed to appear at a court date. He stressed specifically that there was no evidence of defendant's having fled to Canada. The prosecutor assured defense counsel and the trial court that he would "be mindful" and that he "would not intend to introduce" any information on this subject unless defendant's counsel put forth evidence of defendant's leaving the country and his reasons why. Moments after this discussion, even though defendant had presented no evidence, the prosecutor displayed to the jury typewritten panels, stating:

> 15. D went to Canada when he KNEW he had a trial court dated back on 6/11/01—he knew that he needed to get out of the US b/c he knew he was guilty
>
> 16. D didn't return to the US and turn himself in, he hid (sound familiar?)—Officer Kolbay had to find him and arrest him to make sure he would make his next court date

It is undisputed that the material contained in panels 15 and 16 went outside the record.

The State suggests that the typewritten material was not error because our appellate courts' prior opinions have dealt only with

spoken comments from the prosecutor and not written displays in front of the jury. This supposed distinction is immaterial. Indeed, a written display persistently confronting a jury may be more prejudicial than a fleeting remark once voiced, but not repeated. *See* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 252, at 298-99 (6th ed. 2004) (observing with respect to illustrative evidence that jurors "are quite likely to be influenced by what they see, without being overly concerned about whether it precisely illustrates what they hear").

I agree with the majority that defendant has not shown that the trial court abused its discretion in denying the motion for a mistrial. Nevertheless, because the court refused to issue a curative instruction directing the jury to disregard the information on the panels, the jury may well have considered defendant's flight to Canada and his subsequent hiding in reaching its verdict. The panels were before the jury long enough to be read, as demonstrated by the fact defendant's counsel had time to read them and object.

It appears from the record that the trial court attempted to remedy the error by refusing to give an instruction on flight. Unless, however, instructed not to do so, a jury could conclude on its own, as a matter of common sense, that the fact defendant went to Canada and hid after being charged suggested he was guilty. The only method by which the court could have fully cured the error was to specifically tell the jury that they were shown information that was not part of the evidence and to instruct the jurors to disregard the panels. *See*, *e.g.*, *State v. Lake*, 305 N.C. 143, 150-51, 286 S.E.2d 541, 545 (1982) (when the district attorney tried to discredit witnesses with facts outside of the record, the court did not abuse its discretion in failing to grant a mistrial because its "curative instruction adequately averted any possible prejudice to defendant"); *State v. Jordan*, 149 N.C. App. 838, 844, 562 S.E.2d 465, 468 (2002) (holding that the trial court erred in not granting a mistrial when the court did not instruct the jury to disregard the prosecutor's improper comments); *State v. Riley*, 128 N.C. App. 265, 270, 495 S.E.2d 181, 185 (1998) (holding that where evidence against the defendant was not overwhelming and the prosecutor made comments "concerning Defendant's failure to testify," a new trial was required because the error was "not timely corrected by the trial court").

In contrast to the majority, I would not consider whether the failure to give the curative instruction standing alone was harmless

error[1] since I believe, in light of the improper closing argument, the State cannot demonstrate that its questions regarding defendant's exercise of his Fifth Amendment rights were harmless beyond a reasonable doubt. When considering whether the mention of defendant's post-*Miranda* request for an attorney is harmless beyond a reasonable doubt, our courts have looked at: (1) whether the reference was made by the witness or in a question by counsel; (2) whether the State emphasized or made additional comments or references to the defendant invoking his constitutional rights; (3) whether the State attempted to capitalize on defendant's request; and (4) whether the evidence against the defendant was overwhelming. *State v. Elmore*, 337 N.C. 789, 792-93, 448 S.E.2d 501, 503-04 (1994).

In this case, a witness did not simply mention defendant's request for an attorney in passing. Instead, the State asked three separate questions of McDavid that elicited three times the fact that defendant had asked to have a lawyer present, causing all questioning to cease. The State on appeal has offered no reason that the prosecutor would ask three such questions in a row other than to hammer home the fact that defendant had asked to have a lawyer present while the officers were searching his house and car (where incriminating evidence was found). The jury could readily conclude that this request suggested guilt. Then, in the closing argument, the State again focused the jury's attention on defendant's post-arrest conduct. The improper panels indicated that defendant had fled to Canada and hid because, according to the panel, "he knew that he needed to get out of the US b/c he knew he was guilty."

I disagree with the majority's characterization of the evidence in this case as overwhelming. No one with personal knowledge testified regarding what the package looked like in New York, where the opium came from, or how it ended up in a United States Customs bag. Defendant's conduct in hiding the opium is not necessarily evidence of guilt since someone who unexpectedly receives contraband in a United States Customs bag and hears the police knocking at the door would likely behave in identical fashion. Although the officers uncovered additional incriminating material in defendant's car, the jury apparently did not view that evidence as compelling since the jury found defendant not guilty of the charge of maintaining a dwelling for the purpose of keeping controlled substances. The jury could well

1. *See State v. Westbrooks*, 345 N.C. 43, 70, 478 S.E.2d 483, 500 (1996) (holding that an improper remark made during a closing argument does not justify a new trial unless defendant can show prejudice).

have turned to defendant's post-arrest behavior—including the request for a lawyer as the search progressed and the flight to Canada—and decided that this behavior tipped the scales as to guilt on the trafficking charge. As a result, "we cannot say that there is or can be no reasonable possibility that a different result would have been reached" if these errors had not been made. *State v. Allen*, 353 N.C. 504, 511, 546 S.E.2d 372, 376 (2001). Accordingly, I would hold that defendant is entitled to a new trial.

STATE OF NORTH CAROLINA v. KEITH LAMAR BELLAMY AND LEON McCOY

No. COA04-550

(Filed 16 August 2005)

1. Robbery— dangerous weapon—taking property of individual and employer—one offense

The trial court erred by failing to dismiss one of the charges of robbery with a dangerous weapon against each defendant and the cases are remanded for resentencing, because the robbery of an individual of her own property and the property of her employer, occurring at the same time, constitutes only one offense of robbery with a dangerous weapon.

2. Sexual Offenses— first-degree—motion to dismiss—sufficiency of evidence—penetration

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree sexual offense even though defendant contends there was insufficient evidence of penetration, because: (1) N.C.G.S. § 14-27.1(4) provides that a sexual act can be defined as penetration, however slight, by any object into the genital or anal opening of another person's body; (2) in the context of rape, our Supreme Court has held that evidence that defendant entered the labia is sufficient to prove the element of penetration, and the Court of Appeals finds no reason to establish a different standard for sexual offense; and (3) the evidence in the instant case shows that defendant used the barrel of his gun to spread the labia of the victim.

3. Evidence— surveillance video—probative value—authentication—relevancy

The trial court did not err in a robbery with a dangerous weapon and first-degree sexual offense case by admitting into evidence a surveillance video from another store that faced in the direction of the pertinent store, because: (1) any argument that the video should have been excluded under N.C.G.S. § 8C-1, Rule 403 is not properly before the Court of Appeals when defendants did not object to the admission of the video at trial on the ground that its probative value was outweighed by its prejudicial effect and defendants did not argue on appeal that the prejudicial effect of the video amounted to plain error; (2) the State presented proper authentication under N.C.G.S. § 8C-1, Rule 901(a) including testimony establishing that the video recorder was in working order, that it was recording the night in question, that it was viewed the following day, that it had not been altered prior to trial, and that the chain of custody had not been broken; and (3) the video was relevant evidence potentially corroborating a witness's testimony and it was the province of the jury to determine what weight, if any, to give to the evidence.

4. Evidence— narrative of video shot—opinion testimony

The trial court did not err or commit plain error in a robbery with a dangerous weapon and first-degree sexual offense case by allowing a detective to narrate the video shot inside the store at the time of the crime and by allowing him to express his opinion regarding the significance of the events depicted, because: (1) assuming arguendo that it was error to allow the detective to narrate the video footage and that each instance of testimony defendants complain of constitutes improper opinion testimony, there was no prejudicial error in light of the substantial evidence of guilt; (2) nothing in the record indicates the Court of Appeals was required to consider the contested evidence cumulatively; (3) the Court of Appeals declined to treat defendants' sparse and sometimes unrelated objections in the instant case as a continuing objection to all the contested evidence; and (4) even assuming arguendo that each piece of testimony individually was improper, defendants have failed to show it was plain error.

5. Witnesses— vouching for credibility—plain error analysis

The trial court did not commit plain error in a robbery with a dangerous weapon and first-degree sexual offense case by

allowing a detective to vouch for a witness's credibility in his testimony, because: (1) assuming arguendo that the detective's testimony (that the video corroborated the witness's statements concerning his actions as he reentered the restaurant and that he believed the witness had been truthful in that particular testimony) was improper, it did not rise to the level of plain error when the detective explicitly testified that he had doubts about the witness and that he still considered the witness a suspect; and (2) assuming arguendo that the detective's three other contested statements were improperly admitted, they also did not rise to the level of plain error.

6. Evidence— cash—ski masks

The trial court did not commit plain error in a robbery with a dangerous weapon and first-degree sexual offense case by admitting over objection certain physical evidence at trial including $1,000 in cash found at one defendant's residence and two green ski masks found in such defendant's car, because assuming arguendo that the items were improperly admitted, defendants make no argument on appeal as to how the admission of these items of evidence has prejudiced them in any way.

7. Appeal and Error— preservation of issues—limiting instruction

Although defendant contends the trial court erred in a robbery with a dangerous weapon and first-degree sexual offense case by denying defendant's request that an instruction be given limiting the jury's consideration of evidence to the codefendant including $1,000 in cash found at the codefendant's residence and two green ski masks found in the codefendant's car, this issue has not been properly preserved because: (1) although defendant requested a limiting instruction with regard to the photograph of the two masks, he did not request such an instruction for the admission of the actual masks or the $1,000; and (2) defendant does not argue on appeal that the trial court committed plain error by failing to give a limiting instruction ex mero motu.

8. Sexual Offenses— first-degree—failure to instruct on lesser-included offenses

The trial court did not commit plain error by failing to instruct the jury on any lesser-included offenses of first-degree sexual offense including assault on a female and attempted first-degree sexual offense, because: (1) assault on a female is not a

lesser-included offense of first-degree sexual offense; and (2) where there is no evidence that the sexual offense was not accomplished, the court has no duty to instruct on an attempted sexual offense.

9. Evidence— alleged false testimony—observations of videotape

The trial court did not err in a robbery with a dangerous weapon and first-degree sexual offense case by failing to overturn defendant's convictions based on the State allegedly allowing a detective to give testimony involving his observations of the videotape evidence that it knew to be false without correcting the testimony, because: (1) where the judge, jury, and defendants all had the opportunity to view the video themselves, the possibility of misleading the jury is slight; (2) it is exceedingly unlikely that the State would intentionally proffer false evidence in a situation where the falsity of the evidence could be easily discovered; and (3) even assuming arguendo the testimony was false, defendant failed to show the evidence was material and knowingly and intentionally used by the State to obtain his conviction.

10. Evidence— prior crimes or bad acts—preparation of photographic lineup

The trial court did not err by permitting a detective to testify concerning the method he used to put together a photographic line-up containing a photograph of defendant even it this testimony may have allowed the jury to infer that defendant had a prior arrest.

11. Sexual Offenses— first-degree—codefendant's act during robbery—acting in concert—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of first-degree sexual offense committed during the course of a robbery of a fast food restaurant under the theory of acting in concert, because: (1) based on the facts of this case, a sex offense committed in the course of a robbery of a public business by a codefendant was not a natural or probable consequence of the robbery; and (2) a reasonable person in defendant's position would not have foreseen that the codefendant would take the time to deviate from the planned robbery to commit this type of bizarre sexual assault on the victim.

12. Criminal Law— joinder of cases—motion to sever

The trial court did not abuse its discretion in a robbery with a dangerous weapon and first-degree sexual offense case by joining defendant's cases for trial with those of a codefendant and by denying defendant's motion to sever, because: (1) the conflict in defendants' respective positions at trial, to the extent there was any, was minimal; (2) defendants were not each claiming the other was the guilty party; and (3) this defendant failed to show that he was deprived of a fair trial.

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

Assignments of error that defendants have not argued in their briefs are deemed abandoned under N.C. R. App. P. Rule 28(b)(6).

Appeal by defendants from judgment entered 15 August 2003 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 1 February 2005.

Attorney General Roy Cooper, by Assistant Attorneys General William B. Crumpler and Christopher W. Brooks, for the State.

Brian Michael Aus, for defendant-appellant Bellamy.

Daniel Shatz, for defendant-appellant McCoy.

STEELMAN, Judge.

The robbery of an individual of her own property and the property of her employer, occurring at the same time, constitutes only one offense of robbery with a dangerous weapon. A sex offense committed in the course of a robbery of a public business by a robber was not a natural or probable consequence of the robbery. The conviction of the co-defendant on the theory of acting in concert must be reversed.

On 23 September 2002, C.B. was working the evening shift as the assistant manager of a McDonald's at Long Leaf Mall in Wilmington. On her crew during the shift were defendant Leon McCoy (McCoy) and Andre Randall (Randall), who frequently worked together on the same shift. C.B. closed the lobby and locked the doors at 10:00 that night, though the drive-thru window remained open until 11:00. Ordinarily McCoy took out the trash, however on that night Randall took it out, and, contrary to policy, failed to notify C.B. that he was doing so. The manager should have opened and shut the locked door for Randall, however Randall simply turned the deadbolt in a way that

kept the door ajar. It was through this open door that an armed assailant entered at around 11:30, as McCoy was mopping the hallway and C.B. was preparing the night deposit. The assailant went into the office and put a gun to the side of C.B.'s head. He wore a green ski mask, but she could tell it was a black male who was about her height. He demanded the deposit money, and also took C.B.'s personal cash. He demanded a bag for the cash. McCoy, who was lying on the floor outside the office, went to the front near the service counter and got a bag. Though there were several silent alarms in this area, McCoy did not activate any of them.

Once he bagged the money, the robber told C.B. to undress. As she was unbuttoning her shirt, he said it was taking too long and he told her to just drop her pants and underwear. He then demanded that she spread her labia apart. He stooped down to inspect her genitals, and used the barrel of his gun to pull her labia further apart. He noticed that she had a tampon inserted, and told her that she was "lucky". The assailant then departed with the money. After the assailant left, McCoy went to the front of the store and hit a silent alarm.

McCoy and Randall often rode to work together. At trial, Randall testified that: He saw no one outside as he took out the trash that night, but he did see a white Mitsubishi Galant in the parking lot. Defendant Keith Lamar Bellamy (Bellamy) owned a burgundy Honda automobile, but at the time of the robbery he was driving his cousin's 1995 white Mitsubishi Galant. Bellamy and McCoy knew each other and were friends. Randall knew Bellamy from seeing him around the neighborhood and from playing basketball with him. McCoy was having financial problems before the robbery. McCoy lived in a boarding house and at times would be late with his rent and get locked out of his room. McCoy was upset about his work hours being cut because he was not going to have enough money to pay his rent. A few weeks before the robbery, Randall learned that McCoy was contemplating robbing the McDonald's. A couple of days before the robbery, having been locked out of his room for non-payment, McCoy spoke more specifically about robbing the McDonald's to get money to pay his rent. McCoy was looking for Bellamy to help him commit the robbery. He told Randall not to interfere with the robbery. A couple of days or so before the robbery, McCoy left work early. Around 11:30 p.m. that night, Randall saw McCoy and Bellamy in the parking lot in the burgundy Honda. Randall believed the robbery was supposed to have taken place that night, but was called off because of police presence

in the area. When Randall took the trash out on the night of the robbery and saw the white Galant in the parking lot, he knew it was Bellamy. Upon reentering the restaurant, Randall encountered a person wearing a green mask. The person pointed a gun at Randall's head and told him to get down on the floor. Randall recognized the robber's voice as Bellamy's.

Detective Overman of the Wilmington Police Department arrived at McDonald's about 12:20 a.m. McCoy told him that he could not identify the perpetrator's voice. He said the robber pointed the gun directly at him and ordered him to lie down immediately when the robber entered the restaurant. The assertion that McCoy was immediately ordered to the floor was contradicted by videotapes, which showed the office, hall, and kitchen area of the McDonald's during the robbery.

Randall and McCoy left McDonald's together, before 1:58 a.m. According to Randall, McCoy asked Randall to take him to where Bellamy lived, and used Randall's cell phone to call Bellamy's residence but no one answered. Phone records showed a call from Randall's phone to that residence at 1:58 a.m. McCoy said he needed to find Bellamy, and directed Randall to drop him off at a location where he thought Bellamy might be located. Randall testified that within a few days of the robbery, McCoy offered him $400 not to say anything to the police about the robbery and his role in it. He attempted to hand the money to Randall, but Randall refused.

A store near the McDonald's, Pets Plus, had a surveillance system with a camera that faced in the direction of McDonald's. The videotape shows a light colored car leaving the area around the time the assailant left the McDonald's. The assailant had a handgun that appeared to be a .45 caliber automatic. During a search of Bellamy's residence in Wilmington on 14 November 2002, six .45 caliber bullets were found in his jacket. Police also found a lockbox containing fifty twenty dollar bills. On 31 October 2002 in Wilmington, Bellamy fled from the police in his burgundy Honda and subsequently escaped on foot. The police found a green ski mask in the far right side of the trunk of the Honda. Another green ski mask was found in the trunk under a computer monitor.

Sgt. Dean Daniels of the New Hanover County Sheriff's Department had known Bellamy since 1992. He was familiar with Bellamy's walk, dress and mannerisms. He reviewed the McDonald's videotapes and observed that the perpetrator walked and dressed

in a manner similar to Bellamy, and also used his hands similarly to Bellamy when talking.

Defendants were tried before a jury in New Hanover County Superior Court, and were found guilty of all charges on 15 August 2003. Bellamy was convicted of two counts of robbery with a dangerous weapon, which were consolidated for judgment, and first-degree sexual offense. The two sentences were ordered to run consecutively, and resulted in a total active prison sentence of 439 months to 546 months. McCoy was convicted of two counts of robbery with a dangerous weapon and one count of first-degree sexual offense, which were consolidated for judgment, resulting in an active prison term of 307 months to 378 months. From these judgments each defendant appeals.

Defendants' Joint Arguments on Appeal

In Bellamy's fifth argument, and McCoy's first argument, they contend that the trial court erred in denying their motions to dismiss. We agree in part.

Both defendants argue that the State failed to establish by sufficient evidence that there were two distinct robberies supporting two robbery convictions for each defendant, and that the State failed to present sufficient evidence to support the element of penetration needed to prove first-degree sexual offense.

"When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 66, 296 S.E.2d at 652.

[1] The defendants argue that the trial court erred in failing to dismiss one of the charges of robbery with a dangerous weapon against each of them. The defendants were both charged with two counts of robbery with a dangerous weapon, one count for robbing C.B. personally, and one count for robbing McDonald's. The State concedes, and we agree, that one of the judgments for robbery with a dangerous weapon against each defendant should have been arrested by the trial court because there was only one robbery with a dangerous weapon. This Court, commenting on *State v. Beaty*, 306 N.C. 491, 293 S.E.2d

760 (1982) (citation omitted), *overruled on different grounds*, *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988), stated:

> In *Beaty*, there were two indictments for armed robbery arising out of the assault of a single employee, during which assault property was taken from both the employee and the business. The *Beaty* Court stated that, "[t]he controlling factor in this situation is the existence of a single assault," not the two sources (the store and the employee) from which the money was taken. The fact there were two indictments was deemed irrelevant. The Court therefore concluded only one armed robbery had occurred.

State v. Suggs, 86 N.C. App. 588, 596, 359 S.E.2d 24, 29 (1987). We therefore arrest judgment on 02 CRS 23396, one count of robbery with a dangerous weapon against Bellamy, and we arrest judgment on 02 CRS 23435, one count of robbery with a dangerous weapon against McCoy, and remand the cases of each defendant for resentencing.

[2] As to the convictions for first-degree sexual offense, we find that there was sufficient evidence of penetration for that charge to be submitted to the jury. N.C. Gen. Stat. § 14-27.4(a)(2)a. provides: "A person is guilty of a sexual offense in the first-degree if the person engages in a sexual act: With another person by force and against the will of the other person, and: Employs or displays a dangerous or deadly weapon . . . ." "Sexual act [can be defined as] 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). "N.C.G.S. § 14-27.1(4) requires only slight penetration of the genital opening." *State v. Watkins*, 318 N.C. 498, 502, 349 S.E.2d 564, 566 (1986).

Defendants argue that the evidence at trial was insufficient on the element of penetration to allow this charge to be submitted to the jury. We disagree.

C.B. testified at trial that the assailant ordered her to drop her pants and underwear at gunpoint and asked her to spread open her labia so he could inspect her vagina. The assailant then used the barrel of his gun to separate her labia. C.B. further testified that she "felt the gun up against my private area right where the tampon would be entered." She clarified this statement by adding: "He didn't shove the . . . barrel of the gun directly into me. However, I did feel the barrel of the gun, the force of it in the vicinity of the area where you would put the tampon in." She further clarified that she felt the barrel of the gun on the *inside* of her labia.

Our Supreme Court has held that in the context of rape, evidence that the defendant entered the labia is sufficient to prove the element of penetration. *State v. Johnson*, 317 N.C. 417, 434, 347 S.E.2d 7, 17 (1986), *superseded by statute as stated in*, *State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994). We find no reason to establish a different standard for sexual offense. We hold that all of the evidence in the instant case shows that Bellamy used the barrel of his gun to spread the labia of C.B. This evidence supported the element of penetration for the first-degree sexual offense. The trial court properly denied the motions of the defendants to dismiss this charge, on this basis.

[3] In Bellamy's first argument, and McCoy's fifth argument, they contend that the trial court erred in admitting into evidence a video from Pets Plus because the State was unable to authenticate it as "accurately depicting anything which was relevant to any issue in the case." We disagree.

McCoy adopts the argument of Bellamy on this issue. Defendants argue that the video was improperly admitted on three grounds: 1) the video was not properly authenticated, 2) the video did not accurately portray the events of that evening, and 3) the video was unduly prejudicial. We first note that neither defendant objected at trial to the admission of the Pets Plus video on the grounds that it was unduly prejudicial. The defendants did not object to the admission of the video for illustrative purposes. They did object to the admission of the video into evidence for substantive purposes based on a lack of proper authentication, arguing it did not accurately portray the events of that night, and that it was irrelevant to the case. The trial court overruled their objections.

Because the defendants did not object to the admission of the video at trial on the grounds that its probative value was outweighed by its prejudicial effect (North Carolina Rules of Evidence Rule 403), and because they do not argue on appeal that the prejudicial effect of the video was such as to amount to plain error, any argument that the video should have been excluded under Rule 403 is not properly before us. *State v. Flippen*, 349 N.C. 264, 274-75, 506 S.E.2d 702, 709 (1998).

Defendants argue that the trial court violated North Carolina Rules of Evidence Rule 901(a) by admitting the video tape in question. Rule 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is

what its proponent claims." This Court has established a four-pronged test addressing the admissibility of a videotape:

> The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or video tape [sic] fairly and accurately illustrates the events filmed (illustrative purposes); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . ."; (3) testimony that "the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing," (substantive purposes); or (4) "*testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area 'photographed.'* "

State v. Mewborn, 131 N.C. App. 495, 498, 507 S.E.2d 906, 909 (1998) (quoting *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990)). In *Mewborn*

> The state offered testimony from Tonya Jenkins and Sergeant Harrell of the Kinston Police Department that the camera, VCR, and monitor in the Mallard Food Store were operating properly on the day of the robbery. Sergeant Harrell testified that he watched the tape shortly after his arrival at the crime scene. Realizing that it depicted the robbery, Harrell showed the tape to Lieutenant Boyd of the Kinston Police Department when she arrived at the store. Lieutenant Boyd then followed standard procedures to safeguard the tape as evidence. At trial, during *voir dire* outside the jury's presence, Lieutenant Boyd stated that the images on the tape had not been altered and were in the same condition as when she had first viewed them on the day of the robbery. Because Lieutenant Boyd viewed the tape on both the day of the robbery and at trial and testified that it was in the same condition and had not been edited, there is little or no doubt as to the videotape's authenticity. When taken as a whole, the testimony of Boyd, Harrell, and Jenkins satisfy the test enunciated in *Cannon*.

Mewborn, 131 N.C. App. at 498-99, 507 S.E.2d at 909. In the instant case the State presented testimony establishing that the video recorder was in working order; that it was recording the night in question; that it was viewed the following day; that it had not been altered prior to trial; and that the chain of custody had not been bro-

ken. The video tape was properly authenticated, and accurately portrayed the events within its field of view on the night in question.

Though defendants argued at trial that the video should have been excluded for lack of relevance, they do not specifically address that argument in their briefs. We note, however, that the video shows a light colored vehicle passing in front of the Pets Plus store on the night in question, around the time that the perpetrator of the robbery would have been fleeing the scene. The vehicle bore a resemblance to the vehicle which Bellamy drove away from the scene of the robbery. This video was relevant evidence potentially corroborating Randall's testimony. It was the province of the jury to determine what weight, if any, to give to that evidence. The trial court properly admitted the video as corroborative and substantive evidence. These arguments are without merit.

[4] In Bellamy's second argument, and McCoy's fourth argument, they contend that the trial court committed error or plain error in allowing Detective Overman to narrate the videos shot inside the McDonald's at the time of the crime, and in allowing him to express his opinion regarding the significance of the events depicted. We disagree.

We first note that though defendants contend testimony by Sergeant Dean Daniels of the New Hanover County Sheriff's Department that he believed the masked man in the video was Bellamy constituted error, neither defendant has assigned Sergeant Daniels' testimony as error in the record as required by Rule 10(a) of the North Carolina Rules of Appellate Procedure, and thus they have not preserved this argument for appellate review. *State v. White*, 82 N.C. App. 358, 360, 346 S.E.2d 243, 245 (1986).

Defendants list thirty-nine specific instances where they contend Detective Overman's testimony constituted plain error. Assuming *arguendo* that it was error to allow Detective Overman to narrate the video footage, and that each instance of testimony defendants complain of constitutes improper opinion testimony, we find no prejudicial error. *State v. McElroy*, 326 N.C. 752, 756, 392 S.E.2d 67, 69 (1990).

Of the thirty-nine separate instances of testimony complained of, defendants only objected to three, and one of these objections was sustained. Of the remaining two, Bellamy objected once, and McCoy objected once. Upon objection,

> [a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2003); *McElroy*, 326 N.C. at 756, 392 S.E.2d at 69. Bellamy objected to the following question and answer concerning a chair that the gunman positioned in a way that obstructed his exit:

> Q. Why is the position of this chair significant in this particular investigation to you?
>
> A. You would think that the suspect would want a clear line—[of flight.]
>
> MR. DAVIS: Objection to what 'you would think', your honor.

In light of the substantial evidence presented at trial indicating Bellamy's guilt, much of which we have related above, we hold there is no reasonable possibility that the jury would have reached a different verdict had this evidence been excluded.

McCoy objected to the following testimony by Detective Overman:

> At the beginning of this cement median there started a trail of money, one-dollar bills. And they extended from right before the median, through the median, headed in a southerly direction. $40, I believe, is what was recovered. It indicated to me that the suspect [Bellamy] took his time getting every cent from the interior of the office. He appeared, you know, concerned about getting every cent. I couldn't understand why he left $40 lying on the ground out here unless he was hearing some type of alarm go off and he was concerned about the police being in route.

This testimony concerns Bellamy, and could only prejudice McCoy if there is a reasonable possibility that it caused the jury to reach a different verdict for Bellamy, thus supporting McCoy's conviction based on acting in concert. We hold that McCoy fails to meet his burden concerning this testimony, which merely states Detective Overman's opinion that the suspect wanted to get "every cent" and must have been aware that the police were *en route*.

The remaining thirty-six instances complained of by defendants were not objected to and are thus subject to plain error analysis. Where, as here, defendant contests separate admissions of evidence under the plain error rule, each admission will be analyzed separately for plain error, not cumulatively. *State v. Riley*, 159 N.C. App. 546, 550-51, 583 S.E.2d 379, 383 (2003); *State v. Holbrook*, 137 N.C. App. 766, 768-69, 529 S.E.2d 510, 511-12 (2000).

Defendants argue that because the trial court repeatedly overruled their objections, further objection was futile and this Court should evaluate all of the contested to testimony under N.C. Gen. Stat. § 15A-1443(a) analysis pursuant to *State v. Mills*, 83 N.C. App. 606, 612, 351 S.E.2d 130, 134 (1986). In *Mills*, this Court determined that a pattern of objections related to prior bad act evidence constituted a continuing objection, and decided in its discretion to consider evidence admitted without objection. There is nothing in *Mills* indicating that the Court was required to consider this evidence cumulatively. We decline to treat defendants' sparse and sometimes unrelated objections in the instant case as a continuing objection to all the contested evidence, and thus apply plain error analysis.

"The plain error rule applies only in truly exceptional cases." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). "[T]he term 'plain error' does not simply mean obvious or apparent error . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "[T]o reach the level of 'plain error' contemplated in *Odom*, the error . . . must be '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. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (citations omitted).

> In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

Walker, 316 N.C. at 39, 340 S.E.2d at 83. We have considered each piece of testimony individually, as we are required to do, and hold even assuming *arguendo* that all were improper, defendants have

failed in their burden of showing any of them rise to the level of plain error. These arguments are without merit.

[5] In Bellamy's eighth argument, and McCoy's third argument, they contend that the trial court committed plain error by allowing Detective Overman to vouch for Randall's credibility in his testimony. We disagree.

It is improper for one witness to vouch for the veracity of another. *State v. Robinson*, 355 N.C. 320, 334-35, 561 S.E.2d 245, 255 (2002). In the instant case, defendants argue that the trial court committed plain error by allowing Detective Overman to make four statements of his opinion regarding the credibility of Randall. Randall had testified earlier at trial that he had removed a key from a keypad next to the door when he returned from taking the trash out. The security video shows Randall doing something near the door after he reentered the McDonald's. Detective Overman testified that this footage was significant because "it corroborates what he has to say. It shows me that he's telling the truth."

Assuming *arguendo* that this testimony was improper, we hold that it does not rise to the level of plain error. It is clear from the transcript that Detective Overman was simply stating that the video corroborated Randall's statements concerning his actions as he reentered the restaurant; that he believed Randall had been truthful in that particular testimony. Detective Overman's statements do not suggest that he was of the opinion that Randall had been truthful in all of his testimony; specifically in his statements directly implicating the defendants in the crimes.

In fact, Detective Overman explicitly testified that he had doubts about Randall: that he felt Randall was holding something back, and that he still considered Randall a suspect. In light of this testimony questioning Randall's truthfulness, we hold that when considering all the evidence, any error in the admission of the complained of testimony does not rise to the level of plain error. Defendants further argue plain error in Detective Overman's testimony that 1) cell phone records corroborated Randall's statements that McCoy used his cell phone after the robbery to call Bellamy; 2) the video from Pets Plus corroborated Randall's statements concerning a white Mitsubishi Gallant he claimed to have seen in the parking lot just before the robbery, and 3) the statement that without Randall "and the information he was giving me, this investigation never would have been solved." Assuming *arguendo* these statements were improperly admitted, we

hold that they do not rise to the level of plain error. This argument is without merit.

[6] In Bellamy's seventh argument, and McCoy's sixth argument, they contend that the trial court erred or committed plain error in admitting over objection certain physical evidence at trial. We disagree.

Defendants argue that the trial court erred in admitting $1000.00 in cash found in Bellamy's residence, and two green ski masks found in Bellamy's car. Defendants admit that they did not object at trial to the admission of the $1000.00, but contend that they did object to the admission of the ski masks. Our review of the record indicates that defendants objected initially to the admission of a photograph of the two masks. The trial court allowed the witness (C.B.) to look at the photo and testify whether the masks were similar to the one worn by the gunman during the robbery, but the State was not allowed to admit the photo as evidence at that time. Defendants did not object to the later introduction of the photograph for illustrative purposes, nor did they object to the admission of the actual ski masks. Therefore, defendants have not preserved this issue for normal appellate review, and we are limited to plain error analysis for the admission of both the $1000.00 and the masks. *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999).

Assuming *arguendo* that the items were improperly admitted, defendants make no argument on appeal as to how the admission of these items of evidence has prejudiced them in any way. It is the defendants' burden in plain error analysis to prove that the jury "probably would have reached a different verdict" absent the error. *State v. Riley*, 159 N.C. App. 546, 551, 583 S.E.2d 379, 383 (2003) (citations omitted). Defendants fail to carry this burden.

[7] McCoy also argues that the trial court erred in denying his request that an instruction be given limiting the jury's consideration of this evidence to Bellamy, since the evidence was recovered from Bellamy. Though McCoy requested a limiting instruction with regard to the photograph of the two masks, he did not request such an instruction for the admission of the actual masks or the $1000.00. McCoy does not argue on appeal that the trial court committed plain error by failing to give a limiting instruction *ex mero motu*, thus this issue has not been properly preserved on appeal. *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000), *cert. denied*, *Cummings v. North Carolina*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). This argument is without merit.

Defendant Bellamy's Appeal

[8] In Bellamy's sixth argument he contends that the trial court committed plain error in failing to instruct the jury on any lesser included offenses to first-degree sexual offense. We disagree.

Because Bellamy did not request an instruction on any lesser included offense, our review of this issue is limited to plain error. *State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993). Our Supreme Court has stated "that to reach the level of 'plain error' . . . the error in the trial court's jury instructions must be '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.' " *Id.* at 62, 431 S.E.2d at 193.

Bellamy argues that the trial court should have instructed the jury on the lesser included offenses of assault on a female and attempted first-degree sexual offense. We first note that assault on a female is not a lesser included offense of first-degree sexual offense. *State v. Bagley*, 321 N.C. 201, 210, 362 S.E.2d 244, 249 (1987). Therefore, our analysis is limited to attempted first-degree sexual offense. Bellamy presented no evidence at trial. Generally, when there is no evidence that the sexual offense was not accomplished, the court has no duty to instruct on an attempted sexual offense. *State v. Hensley*, 91 N.C. App. 282, 284, 371 S.E.2d 498, 499 (1988).

Bellamy argues that C.B.'s testimony was equivocal, and that the State's evidence could allow a jury to find that there was no penetration, and that he was guilty of the lesser offense of attempted first-degree sexual offense. As we discussed above, all of the evidence showed that Bellamy used the barrel of his gun to spread the labia of C.B. This constituted the penetration of C.B.'s vagina, and thus the sexual offense was completed. The trial court was not required to submit attempted first-degree sexual offense to the jury as a lesser offense, and thus committed no error and no plain error. This assignment of error is without merit.

[9] In Bellamy's third argument he contends that his conviction should be overturned because the State allowed Detective Overman to give testimony it knew to be false and did not correct it. We disagree.

"When a defendant shows that 'testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction,' he is entitled to a new trial." *State v. Sanders*, 327 N.C.

319, 336, 395 S.E.2d 412, 423 (1990) (citations omitted). Testimony is material in this context if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*, 395 S.E.2d at 424, *quoting United States v. Augurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 349-50 (1976).

In Bellamy's assignments of error, he argues that Detective Overman submitted false testimony on three separate occasions, each involving his observations of the videotape evidence. We first note that the danger from which this rule seeks to protect defendants is the intentional misleading of the jury through the introduction of false evidence. Where, as here, judge, jury, and defendants (including their counsel) all had the opportunity to view the video themselves, the possibility of misleading the jury, (and thus affecting the outcome of the trial) must necessarily be slight. Further, it is exceedingly unlikely that the State would intentionally proffer false evidence in a situation where the falsity of the evidence could be easily discovered.

First, Bellamy challenges testimony that a white Mitsubishi Gallant was recorded on videotape passing in front of the Pets Plus store at around the time the masked gunman was fleeing the McDonald's. Detective Overman admitted at trial that he could not be certain the car was a white Gallant. Therefore, even if the car was not a white Gallant, Detective Overman's testimony when read in full was not false. Second, Bellamy challenges testimony that the masked gunman had his finger off the trigger when he was aiming the gun at McCoy and ordering him to the ground, and that the masked gunman in the video had distinctive fingernails similar to those of Bellamy. Bellamy argues that the video was not of sufficient quality for Detective Overman to make these observations. We hold that, even assuming *arguendo* the testimony was false, Bellamy fails in his burden of proving the evidence was material and knowingly and intentionally used by the State to obtain his conviction.

Bellamy's only remaining argument in this regard is that it should have been obvious to the State that the above testimony by Detective Overman was false because it reviewed the video, and the video is of insufficient quality to make such a determination. If the video is of insufficient quality, then it would have also been obvious to the jury that Detective Overman was over-reaching in his testimony, and thus there is no reasonable likelihood that the false testimony could have affected their decision. Further, we do not find this evidence sufficient to prove that the State knowingly and intentionally allowed this

testimony to go uncorrected in order to obtain a conviction. This argument is without merit.

[10] In Bellamy's fourth argument he contends that the trial court committed plain error by permitting Detective Overman to testify regarding Bellamy's prior arrests.

At trial Detective Overman testified that in response to statements from Randall that he believed the voice of the masked gunman belonged to a man he knew as "Keith," Detective Overman conducted a search of the police database, and turned up a photo of Bellamy. Detective Overman testified to the method he used to put together a photographic line-up, and further testified that he showed the line-up to Randall, and that Randall identified the photo of Bellamy as the man he believed robbed the McDonald's.

Bellamy argues that this testimony was improper and requires a reversal of his conviction because it allowed the jury to infer that he had prior arrests. Our appellate courts have held on similar facts that when evidence is admitted for a proper purpose, the fact that the evidence may have allowed the jury to infer that the defendant had a prior arrest does not require a new trial. *See State v. Jackson*, 284 N.C. 321, 331-35, 200 S.E.2d 626, 633-35 (1973). We hold that this testimony was not improper. Further, assuming *arguendo* that it was improper, we hold that the admission of this testimony does not rise to the level of plain error.

Defendant McCoy's Appeal

[11] In McCoy's first argument, he contends that the trial court erred in denying his motion to dismiss the charge of first-degree sexual offense. At trial, the State proceeded against McCoy on this charge under a theory of acting in concert. The State's theory at trial was that Bellamy was the masked gunman who actually robbed the McDonald's, and who perpetrated the sexual assault on C.B., but that McCoy was his inside help, and that they planned the robbery together. As a party to the robbery, the State contends that McCoy is liable as a principal under the theory of acting in concert for Bellamy's sexual assault on C.B.. The law of acting in concert in North Carolina is as follows:

> If "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pur-

> suance of the common purpose . . . or as a natural or probable consequence thereof."

State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997), *quoting State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) (quoting *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972)). In the instant case, the State did not argue at trial, and does not argue on appeal, that the sexual assault was done "in pursuance of the common purpose" of the robbery with a dangerous weapon. The record is completely devoid of evidence that the defendants discussed any potential sexual assault prior to the robbery. The State argues that the sexual assault was "a natural or probable consequence thereof." Whether a sexual assault is a natural or probable consequence of a robbery with a dangerous weapon of a fast food restaurant is a question of first impression in North Carolina.

The State asserts that any sexual assault perpetrated in the course of any robbery with a dangerous weapon is a natural or probable consequence thereof. Clearly, a murder committed during the course of a robbery with a dangerous weapon is normally a natural or probable consequence of that robbery with a dangerous weapon. *See State v. Dudley*, 151 N.C. App. 711, 714, 566 S.E.2d 843, 846 (2002). Conversely, a murder to conceal a previous arson might not be such a consequence. *See Everritt v. State*, 588 S.E.2d 691, 693 (Ga. 2003). The question is one of foreseeability: if one takes the property of another at the point of a loaded gun, the violent use of that gun is a foreseeable consequence. *See United States v. Johnson*, 730 F.2d 683, 690 (11th Cir. 1984); *Everritt*, 588 S.E.2d 691; *People v. Hickles*, 56 Cal. App. 4th 1183, 1193-94 (Cal. Ct. App., 1997); *State v. Linscott*, 520 A.2d 1067, 1069-70 (Me. 1987). Some jurisdictions have determined that whether a consequence of a robbery with a dangerous weapon was natural or probable is judged by an objective standard. *See People v. Nguyen*, 21 Cal. App. 4th 518, 531, 26 Cal. Rptr. 2d 323, 331 (1993) ("the issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the" principal crime).

Our Supreme Court has expressly rejected the concept that for a defendant to be convicted of a crime under an acting in concert theory, he must possess the *mens rea* to commit that particular crime. *Barnes*, 345 N.C. 184, 481 S.E.2d 44 (overruling *State v.*

Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994) and *State v. Straing*, 342 N.C. 623, 466 S.E.2d 278 (1996)). Based upon the holding in *Barnes*, it would not be appropriate to adopt a standard based upon the defendant's subjective state of mind or intent. Rather, the appropriate standard for evaluating whether a crime was a reasonable or probable consequence of a defendant's joint purpose should be an objective one.

We decline to adopt a *per se* rule that any sexual assault committed during the course of a robbery is a natural or probable consequence of a planned crime. Rather, this determination must be made on a case by case basis, upon the specific facts and circumstances presented. *See State v. Trackwell*, 458 N.W.2d 181, 183-84 (Neb. 1990). The issue in the instant case is whether the sex offense Bellamy committed was a natural or probable consequence of the robbery with a dangerous weapon of the McDonald's.

> "Natural" has many meanings, but the most apposite dictionary definition is "in accordance with or determined by nature." A natural consequence is thus one which is within the normal range of outcomes that may be expected to occur if nothing unusual has intervened. We need not define "probable," except to note that, even standing alone, this adjective sets a significantly more exacting standard than the word "possible." Accordingly, if we accord to the words of our cases their ordinary everyday meaning, it is not enough for the prosecution to show that the accomplice knew or should have known that the principal might conceivably commit the offense which the accomplice is charged . . . .

Roy v. United States, 652 A.2d 1098, 1105 (D.C. 1995); *see also Howell v. State*, 339 So. 2d 138, 140 (Ala. Crim. App. 1976).

Concerning the foreseeability of robbery turning into a sexual offense, the California Court of Appeals has stated:

> Robbery is a crime that can be committed in widely varying circumstances. It can be committed in a public place, such as on a street or in a market, or it can be committed in a place of isolation, such as in the victim's home. It can be committed in an instant, such as in a forcible purse snatching, or it can be committed over a prolonged period of time in which the victim is held hostage. During hostage-type robberies in isolated locations, sexual abuse of victims is all too common. . . . "When robbers enter

> the home, the scene is all too often set for other and more dreadful crimes such as that committed on [the victim] in this case. In the home, the victims are particularly weak and vulnerable and the robber is correspondingly secure. The result is all too often the infliction of other crimes on the helpless victim. Rapes consummated during the robbery of a bank or supermarket appear to be a rarity, but rapes in the course of a residential robbery occur with depressing frequency."

Nguyen, 21 Cal. App. 4th at 532-33 (internal citation omitted). In the *Nguyen* case, the California Court of Appeals held that though in general a sexual assault in the course of an robbery of a business would not be foreseeable, on particular facts it could be. Specifically, they held that a sexual assault was a natural or probable consequence of a robbery where:

> The defendants and their cohorts chose to commit robberies in businesses with a sexual aura, both from the types of services they held themselves out as providing and from the strong suspicion, repeatedly expressed by the participants at the trial, that they were actually engaged in prostitution. The businesses were arranged much like a residence, with separate rooms furnished as bedrooms might be. The businesses operated behind locked doors, which both added to their sexual aura and gave the robbers security against intrusion or discovery by outsiders. The robbers went to the businesses in sufficient numbers to easily overcome any potential resistance and to maintain control over the victims for as long as they desired.

Id. at 533. We agree that in certain factual circumstances a sexual assault in the course of a robbery of a business may be a natural or probable circumstance, but that it is less likely to be so than in the context of a robbery taking place in a home.

In the instant case, Bellamy entered McDonald's at around 11:30 at night. Though that particular McDonald's was closed (the interior closed at 10:00 p.m. and the drive-thru closed at 11:00 p.m.), in light of the fact that many McDonald's stay open later than 11:30 p.m., it would not be unusual for prospective customers to arrive at or after 11:30. The very public nature of a fast food restaurant creates a significant risk that the masked gunman or the employees lying on the floor inside might be noticed by someone outside. This is a fact of which McCoy, as an employee, would have been well aware. McCoy

was also aware that there were security cameras in the store recording events during the robbery, and that there were silent alarms which other employees might have activated before Bellamy obtained control of the employees. In light of these facts, a reasonable person in McCoy's position would expect Bellamy to get in and out of the restaurant as quickly as possible to avoid capture or recognition. On these facts, and in this kind of a public business, we cannot find that a reasonable person in McCoy's position would have foreseen that Bellamy would take the time to deviate from the planned robbery to commit this type of bizarre sexual assault on C.B. It was the State's burden to prove beyond a reasonable doubt that this sexual assault was a natural and probable result of the robbery with a dangerous weapon, and it has failed to meet this burden. The trial court erred in failing to dismiss the first-degree sexual offense charge against McCoy. We reverse judgment on the conviction under 02 CRS 23434 and remand McCoy's case to the trial court for resentencing on a single count of robbery with a dangerous weapon.

[12] In McCoy's seventh argument he contends that the trial court erred in joining Bellamy's and McCoy's cases for trial, and in denying McCoy's motions to sever. We disagree.

> N.C.G.S. § 15A-926(b)(2)(a) provides for joinder of defendants where, as here, the State seeks to hold each defendant accountable for the same offenses. The propriety of joinder depends upon the circumstances of each case and is within the sound discretion of the trial judge. "Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed." *State v. Nelson*, 298 N.C. 573, 586, 260 S.E.2d 629, 640 (1979), *cert. denied sub nom. Jolly v. North Carolina*, 446 U.S. 929, 64 L. Ed. 2d 282, 100 S. Ct. 1867 (1980).

State v. Pickens, 335 N.C. 717, 724, 440 S.E.2d 552, 556 (1994). "The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial. G.S. 15A-927(c)(2)." *State v. Nelson*, 298 N.C. 573, 587, 260 S.E.2d 629, 640 (1979).

> In the instant case,
>
> the events from which all defendants were charged clearly were part of the same transaction and were so closely connected that

> it would be difficult to separate proof of one charge from proof of the others. *We perceive no unfairness in the conduct of defendant's trial* with his co-defendants. Thus, there is no error in the joinder for trial of all defendants.

State v. Melvin, 57 N.C. App. 503, 505, 291 S.E.2d 885, 887 (1982) (emphasis added). The conflict in defendants' respective positions at trial, to the extent there was any, was minimal. Defendants were not each claiming the other was the guilty party as may often occur when two defendants are tried for the same crimes. In this case both defendants claimed that they were innocent individually, and neither accused the other of a crime. Though McCoy argues in his brief that certain evidence prejudicial to him was admitted at trial that would not have been admitted had the trials been severed, we have either determined that the contested evidence did not prejudice McCoy, or that McCoy has failed to properly preserve objection to the evidence and it is therefore not before us for consideration. We hold that defendant has failed to show that he was deprived of a fair trial by joinder, therefore, the trial judge's discretionary ruling on the question will not be disturbed. This argument is without merit.

[13] Because defendants have not argued their other assignments of error in their briefs, these assignments of error are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2003).

NO ERROR IN PART, REVERSED AND REMANDED IN PART.

AS TO DEFENDANT BELLAMY, JUDGMENT ARRESTED ON ONE COUNT OF ROBBERY WITH A DANGEROUS WEAPON (02 CRS 23396), REMANDED FOR RESENTENCING.

AS TO DEFENDANT McCOY, JUDGMENT ARRESTED ON ONE COUNT OF ROBBERY WITH A DANGEROUS WEAPON (02 CRS 23435), CONVICTION FOR FIRST-DEGREE SEXUAL OFFENSE REVERSED, REMANDED FOR RESENTENCING.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. TONY EARL STATEN

No. COA03-1216

(Filed 16 August 2005)

1. Constitutional Law— capacity to stand trial—failure to sua sponte grant competency hearing

The trial court was not required to sua sponte grant defendant a competency hearing during defendant's January 2003 trial for first-degree felony murder and armed robbery, because: (1) evidence before the trial court was not so substantial as to indicate defendant was mentally incompetent when throughout the trial proceedings defendant acted in a manner exhibiting competence; (2) in the instant case, with the exception of the initial screening, defendant had no evaluations finding him to be incompetent to proceed to trial; (3) neither defendant's behavior nor demeanor implicated the necessity of a bona fide doubt inquiry even though defendant suffered from mental retardation and intellectual deficiencies throughout his life with intermittent mental illness when defendant had the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to assist his counsel; and (4) where, as here, defendant has been examined relative to his capacity to proceed and all evidence before the court indicates that he has that capacity, he is not denied due process by the trial court's failure to hold a competency hearing.

2. Criminal Law— insanity—directed verdict

The trial court did not err in a first-degree felony murder and armed robbery case by denying defendant's motion for a directed verdict on the issue of insanity because if evidence of insanity is offered by defendant, even if uncontroverted, the credibility of that testimony is for the jury and thus precludes the entry of a directed verdict for defendant on insanity.

3. Robbery— armed—instruction—diminished capacity—specific intent

The trial court did not err by denying defendant's request for a special instruction on diminished capacity for intent to commit armed robbery, because defendant failed to show he did not have the specific intent to permanently deprive the victim of his car.

4. Robbery— armed—heart attack—use of hands—lesser-included offense of common law robbery

The evidence was insufficient to support defendant's conviction of armed robbery and the case is remanded for entry of conviction on the lesser-included offense of common law robbery, because: (1) autopsy reports indicated the victim died of a heart attack; (2) a forensic pathologist testified that the victim sustained minor cuts and abrasions prior to his death that were not life threatening, and that the victim's death was caused by a combination of the victim's weak heart and the stress caused by defendant stealing his car; and (3) defendant used only his hands to overtake the elderly victim and remove him from his car.

5. Homicide— felony murder—underlying felony merges with felony murder conviction

The trial court erred in a first-degree felony murder case by failing to arrest judgment on the underlying armed robbery conviction, because: (1) the underlying offense merged with the felony murder conviction; and (2) the Court of Appeals' decision to reverse and remand the conviction with instructions to the trial court to impose a verdict as to common law robbery means the judgment is arrested on the common law robbery conviction.

Appeal by defendant from judgment dated 29 January 2003 by Judge J. Richard Parker in Gates County Superior Court. Heard in the Court of Appeals 26 May 2004.

Attorney General Roy Cooper, by Joan M. Cunningham, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for the defendant.

BRYANT, Judge.

Tony Earl Staten (defendant) appeals from a judgment consistent with a jury verdict dated 29 January 2003 finding him guilty of first-degree (felony) murder and armed robbery.

Facts

Defendant reported to Hertford County Superior Court on the morning of 6 September 2000 to settle three traffic tickets. While in the courtroom, defendant became upset with the courtroom staff. The trial judge asked defendant to leave the courtroom and return when he calmed down. Instead, defendant walked out of the courtroom and away from the courthouse, heading north on U.S. High-

way 13 from Hertford County toward Gates County. At about 10:30 a.m., Trooper Jason Jones of the North Carolina State Highway Patrol, was patrolling U.S. Highway 13 near Winton, North Carolina, when he saw defendant. Thinking defendant may have had car trouble, Trooper Jones asked defendant if he needed help. Defendant, who was holding a Bible, responded by asking Trooper Jones whether he knew "the Lord?" Trooper Jones responded, "Yes" and again asked defendant if he needed any help. Defendant said, "No" and Trooper Jones left. Defendant was not aggressive, nor did he appear to be angry or frightened.

Later that morning at 11:45 a.m., Trooper Michael Warren saw defendant walking down U.S. Highway 13. Defendant motioned for Trooper Warren to pull over and he did so. Trooper Warren asked defendant his name and where he was going. Defendant asked Trooper Warren for a ride but did not indicate where he wanted to go. Trooper Warren then pulled away, heading north on U.S. Highway 13 and observed defendant also continue walking north.

At about noon that same day, Penny Atkins Rose was driving north on U.S. Highway 13. After crossing the bridge at Winton, Rose saw Abraham Boone at the side of the road on his hands and knees. He was missing one shoe and was not wearing a hat or glasses. She stopped and called 911 for assistance. She attempted to talk to him, but failed to understand Boone's responses as "he seemed to slip into unconsciousness." Rose returned to her car and, concerned for Boone's survival, again called for assistance.

Alice Sharpe, who was also driving by, realized there was an emergency and stopped to help. By that time, Boone was completely unconscious. Emergency personnel testified Boone had no pulse and was not breathing by the time he arrived at the hospital. Medical testimony revealed Boone died as a result of a heart attack and that the scrapes and abrasions on Boone were consistent with a confrontation.

Isaiah Harrell testified that on the afternoon of 6 September 2000 while at a stop sign his car was hit in the rear end by defendant. Defendant jumped out of the car he was driving, opened Harrell's door, hit Harrell in the stomach and pulled him out of his car. Defendant then got in Harrell's car and sped off, leaving Harrell standing in the intersection.

Deputy Tim Lassiter, of the Hertford County Sheriff's Department received a call reporting a car jacking at about noon on 6 September 2000. Meanwhile, officers from the Ahoskie Police Department were

chasing defendant who was driving recklessly at a high rate of speed. Deputy Lassiter saw defendant turn his car and crash directly into the vehicle of Deputy Mike Stephenson also of the Hertford County Sheriff's Department. After struggling with several officers, defendant was arrested and taken into custody.

Later that afternoon, defendant spent approximately half an hour giving a detailed statement to law enforcement officials. Defendant said he recalled seeing Troopers Jones and Warren, stating he thought at the time they were going to kill him. He also recalled flagging down Boone, pulling him out of the car and then driving off, leaving Boone "beside the road laying down." He remembered observing that the car he had stolen from Boone was "hot" and wanting to get rid of it. Finally, he recounted taking Harrell's car.

Procedural History

Defendant was served with warrants issued 6 September 2000 charging him with common law robbery and first-degree (felony) murder of Boone. Defendant was later indicted for one count of felony murder and one count of armed robbery as to Boone. Defendant was not charged with any offenses as to Harrell. On 18 September 2000, Gates County District Court Judge Carlton Cole issued an order for a forensic screening examination of defendant over defense counsel's objection. Three days later, on 21 September 2000, Ms. Chamberlee Trowell, forensic screening examiner and Licensed Psychologist Associate (L.P.A.), found defendant incapable of proceeding to trial, noting defendant "would not cooperate" during the assessment and was "noncompliant with treatment and . . . medications" for his previously diagnosed paranoid schizophrenia. In a report dated 28 May 2001, Dr. Hilkey, a forensic psychologist, indicated defendant was competent to stand trial after having interviewed him on 24 January and again on 21 March 2001. On 11 February 2002, defendant's motion for a pre-trial hearing to determine mental retardation came on for hearing in Chowan County[1]. Superior Court Judge J. Richard Parker ruled on defendant's motion and, on 18 February 2002, ordered the case tried as noncapital, finding defendant to be mentally retarded.

Thereafter, defendant was evaluated by Dr. James G. Groce, a forensic psychiatrist who, in a report dated 18 June 2002, found defendant capable of proceeding to trial. Defendant was again examined on 2 July 2002 by Dr. Hilkey, who concluded defendant op-

1. Attorneys for the State and defendant agreed to a change of venue for the purpose of conducting the hearing on defendant's motion.

erated under a delusional belief system on the date of the offenses, but deferred assessment of his competency to stand trial until a date closer to trial. The day before trial on 4 August 2002, Dr. Hilkey evaluated defendant and reported "despite defendant's apparent competency to proceed [to trial], he remains fixed in his delusional belief system."

Defendant's first trial, held on 5 August 2002 in Gates County Superior Court before Judge Jerry Tillett, ended in a mistrial when the jury was unable to reach a unanimous verdict. The case was retried on 21 January 2003, before Judge J. Richard Parker. On 28 January 2003, the jury found defendant guilty of first-degree (felony) murder and armed robbery. The trial court sentenced defendant to life in prison without parole on the first-degree (felony) murder conviction, and to a concurrent sentence of 100 to 129 months on the armed robbery conviction. Defendant appeals.

Defendant raises five issues on appeal: (I) whether the trial court was required to *sua sponte* grant defendant a competency hearing at trial; (II) whether the trial court erred by denying defendant's motion for a directed verdict on the issue of insanity; (III) whether the trial court erred by denying defendant's request for jury instructions on diminished capacity; (IV) whether the trial court erred by instructing the jury that defendant's use of hands constituted armed robbery; and (V) whether the trial court failed to arrest judgment on the underlying armed robbery conviction.

I

[1] Defendant asserts the trial court was required to *sua sponte* grant defendant a competency hearing; that the trial court in fact had a constitutional duty to conduct a competency hearing during his January 2003 trial. We disagree. In reviewing the evidence before the trial court of defendant's competency and the applicable law, we are persuaded the trial court was not required to *sua sponte* conduct a competency hearing, and therefore, did not err in failing to do so.

Pursuant to N.C. Gen. Stat. § 15A-1001:

> (a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C.G.S. § 15A-1001 (2003).

The question of capacity may be raised at any time by motion of the prosecutor, the defendant or defense counsel, or the court. N.C. Gen. Stat. § 15A-1002(a) (2003). Once a defendant's capacity to stand trial is questioned, the trial court must hold a hearing pursuant to N.C. Gen. Stat. § 15A-1002(b) (2003). "A defendant has the burden of proof to show incapacity or that he is not competent to stand trial." *State v. O'Neal*, 116 N.C. App. 390, 395, 448 S.E.2d 306, 310 (1994) (citing *State v. Gates*, 65 N.C. App. 277, 283, 309 S.E.2d 498, 502 (1983)).

"The test for capacity to stand trial is whether a defendant has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed." *State v. Jackson*, 302 N.C. 101, 104, 273 S.E.2d 666, 669 (1981) (citations omitted). It is well established that the court gives significant weight to defense counsel's representation that a client is competent, since counsel is usually in the best position to determine if his client is able to understand the proceedings and assist in his defense. *State v. McRae*, 163 N.C. App. 359, 369, 594 S.E.2d 71, 78, *disc. review denied*, 358 N.C. 548, 599 S.E.2d 911 (2004) (hereinafter *McRae II*)[2]. So long as there is competent evidence to support the findings of fact, a trial court's conclusion that a defendant is competent to proceed to trial will not be disturbed, even if there is evidence to the contrary. *State v. Heptinstall*, 309 N.C. 231, 234, 306 S.E.2d 109, 111 (1983).

"A trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence that the accused may be mentally incompetent*." *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977) (emphasis added) (internal quotation marks omitted). In other words, a trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency even absent a request. *Meeks v. Smith*, 512 F. Supp. 335, 338 (W.D.N.C. 1981).

"Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a *bona fide* doubt inquiry." *McRae I*, 139 N.C. App. at

2. We use *McRae I* and *II* to distinguish the two appeals. In *McRae I*, (*State v. McRae*, 139 N.C. App. 387, 533 S.E.2d 557 (2000) (hereinafter *McRae I*)), this court ordered a Retrospective Competency Hearing (RCH) following defendant's first-degree murder conviction. In *McRae II*, (*State v. McRae*, 163 N.C. App. 359, 594 S.E.2d 71 (2004)), the defendant appeals a second time following an RCH. An RCH serves as a substitute for the hearing provided under N.C.G.S. § 15A-1002.

390, 533 S.E.2d at 559 (quoting *Drope v. Missouri*, 420 U.S. 162, 180, 43 L. Ed. 2d 103, 118 (1975)). "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *State v. Snipes*, 168 N.C. App. 525, 529, 608 S.E.2d 381, 385 (N.C. Ct. App. 2005) (quoting *Drope*, 420 U.S. 162, 180, 43 L. Ed. 2d 103, 118); *see also Heptinstall* at 233-34, 306 S.E.2d at 110-11 (where forensic psychologist testified the defendant was alert, aware of his surroundings, able to understand the seriousness of the charges against him and capable of assisting his attorneys in preparing his defense, this was sufficient evidence to support a trial court's determination the defendant was capable of proceeding to trial despite the defendant's "bizarre and nonsensical" testimony and substantial testimony from numerous family members regarding defendant's lengthy history of mental illness).

A review of the court proceedings in the instant case indicates defendant was competent and fit to proceed to trial. When defense counsel informed the trial court defendant would be testifying, the trial court on *voir dire* conducted a colloquy concerning the voluntariness of defendant's testimony and defendant's understanding of possible outcomes:

> THE COURT: Have you got some witnesses here to testify?
>
> [DEFENSE COUNSEL]: Yes, sir, Your Honor, and before we proceed any further . . . I have talk[ed] to Mr. Staten . . . again and he has told me he definitely wants to take the witness stand and testify in his own behalf.
>
> I have gone over the pros and cons of that with him, but would ask the Court to make inquiry of him at this point in time with the jury being out of the room so that it would be on the record.
>
> THE COURT: All right. Mr. Staten, you have talked to your attorney concerning the question of whether or not you should testify or not [sic] in this case?
>
> MR. STATEN: Yes sir.
>
> THE COURT: And you understand that if you do testify the State can ask you a lot of questions on cross-examination about your prior record and things of that nature?
>
> MR. STATEN: Yes sir.

THE COURT: And you understand that may sway the jury somewhat? Sometimes it does. And it could be that it doesn't work out to your advantage.

MR. STATEN: Yes sir.

THE COURT: Are you telling me now that even though you understand the consequences of your decision to testify you still want to go through with it?

MR. STATEN: I want to testify and tell everybody like came [sic] behind me and testified after I already testified and say something about me and I want to testify again to clear up what they have said like we did the last time.

. . .

THE COURT: All right. You want to do it again today?

MR. STATEN: Yes, sir.

THE COURT: All right. I just want you to understand what the consequences are of your decision.

MR. STATEN: Thank you.

During the colloquy, defendant's replies were lucid and responsive, demonstrating his desire to testify and displaying his understanding of the consequences of doing so. In fact, such inquiry and response between the trial court and defendant are in the very nature of a competency hearing. *See*, *e.g.*, *State v. Gates*, 65 N.C. App. 277, 282, 309 S.E.2d 498, 502 (1983) (Noting "although [N.C. Gen. Stat. § 15A-1002 (b)(3)] requires the court to conduct a hearing when a question is raised as to a defendant's capacity to stand trial no particular procedure is mandated. The method of inquiry is still largely within the discretion of the court."). However, we refrain from making a determination of whether such a colloquy between the trial court and defendant was sufficient to conform to the type of competency hearing anticipated under N.C.G.S. § 15A-1002(b)(3), as the arguments in the briefs of the State and defendant appear to assume no competency hearing was held by the trial court.

Therefore, our inquiry centers on whether constitutional due process required the trial court to *sua sponte* conduct a competency hearing in this case. In considering this inquiry we acknowledge there are many cases which discuss capacity to proceed to trial, and note the dual nature courts face: on the one hand "our Supreme Court has

recognized that a defendant may waive the benefit of statutory constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." *Young* at 567, 231 S.E.2d at 580 (1997) (internal quotation marks omitted). On the other hand our Supreme Court "has also recognized that a trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *Snipes* at 529, 608 S.E.2d at 384 (emphasis added) (internal quotation marks omitted).

In the instant case, evidence before the trial court was not so substantial as to indicate defendant was mentally incompetent. Throughout the trial proceedings, defendant acted in a manner exhibiting competence. In his testimony he recounted in chronological order the events leading to Boone's death. He gave rational, responsive answers to questions during direct and cross examination and was able to recall and describe events in detail. In response to the trial court's request to "simply answer counsel's questions" defendant "apologize[d] for [his] lengthy responses as [he was] only trying to explain." Although sometimes a bit bizarre, defendant's testimony for the most part was coherent and displayed defendant's understanding of the proceedings.

Nevertheless, defendant argues his "psychotic testimony" and mental health history raised a *bona fide* doubt, as was found in *McRae I*, such that he is entitled to a new trial. *See McRae I*. Based on the reasoning and result of *McRae I*, defendant would be entitled at most to an RCH, not a new trial. In *McRae I*, the defendant was deemed competent to stand trial after undergoing at least six psychiatric evaluations and three competency hearings, all finding him incompetent. A mistrial resulted when the jury was unable to reach a verdict. McRae was retried immediately, and even though he underwent a psychiatric evaluation between the two trials, the trial court did not conduct another competency hearing prior to the second trial. McRae was convicted of murder. On appeal, this Court in *McRae I* remanded the case back to the trial court to conduct an RCH, which RCH subsequently determined McRae was indeed competent to stand trial. McRae then appealed the RCH determination of competency and this Court, in *McRae II*, affirmed the judgment of the trial court, holding there was sufficient evidence McRae was competent to stand trial based on the medical evidence of competency and where his trial attorney never raised the competency issue. *McRae II* at 369, 594

S.E.2d at 78. The Court said, "[w]e hold this to be 'competent evidence' [that defense counsel raised no question of competency and therefore presented his client as competent] supporting the trial judge's determination that defendant was competent during the 11 May 1998 trial." *Id.* (the trial court's conclusions at an RCH are reviewed under an abuse of discretion standard).

Our Court in *McRae II* acknowledged the trial court's discretion and recognized the important role of the trial court.

> The trial court is in the best position to determine whether it can make such a retrospective determination of defendant's competency. Thus, if the trial court concludes that a retrospective determination is still possible, a competency hearing will be held, and if the conclusion is that the defendant was competent, no new trial will be required.

McRae II at 367, 594 S.E.2d at 77-78 (citing *McRae I* at 392, 533 S.E.2d at 560-61 (2000)). The *McRae* opinions illustrate why our appellate courts must carefully evaluate the facts in each case in determining whether to reverse a trial judge for failure to conduct *sua sponte* a competency hearing where the discretion of the trial judge, as to the conduct of the hearing and as to the ultimate ruling on the issue, is manifest.[3] *See McRae II* at 367, 594 S.E.2d at 77 (noting the RCH "remedy is disfavored due to the inherent difficulty in making such *nunc pro tunc* evaluations").

While we acknowledge *McRae's* procedural history in our Court and the constitutional underpinnings upon which it is based, we decline to order an RCH in the instant case based on *McRae*. In so doing we note that in *McRae I* this Court determined a *bona fide* doubt existed based on seven prior and conflicting evaluations and three prior competency hearings in which defendant was found by the trial judge to be incompetent to proceed to trial. *McRae I* said the trial court's failure to conduct a competency hearing under these circumstances violated defendant's constitutional due process rights. *McRae II* at 361, 594 S.E.2d at 74; *see also Meeks*, 512 F. Supp. at 338 (court required to conduct hearing where defendant had seven conflicting

3. Pursuant to N.C.G.S. § 15A-1002(a), the issue of capacity (or competency) is within the "trial court's discretion, and [the] determination thereof, if supported by the evidence, is conclusive on appeal." *State v. Wolfe*, 157 N.C. App. 22, 30, 577 S.E.2d 655, 661, *disc. review denied*, 357 N.C. 255, 583 S.E.2d 289 (2003); *State v. Reid*, 38 N.C. App. 547, 548-49, 248 S.E.2d 390, 391 (1978), *disc. review denied*, 296 N.C. 588, 254 S.E.2d 31 (1979).

psychiatric examinations, at least three finding him to be incompetent to proceed).

In the instant case, on at least four occasions defendant was evaluated and conclusions entered regarding his competency to proceed to trial. Defendant's first evaluation was actually an assessment conducted more than two years prior to trial by a forensic screener who determined defendant to be incompetent to stand trial, acknowledging that defendant would not cooperate with the assessment and that he refused to take his medication. In the other three evaluations, conducted by a psychologist and a psychiatrist, defendant was determined to be competent to stand trial. The other three psychological and psychiatric evaluations finding defendant competent to stand trial were conducted over the two years prior to defendant's trial, with the last one conducted on 4 August 2002, one day before defendant's first trial.[4] Therefore, unlike *Meeks* and *McRae*, with the exception of the initial screening, defendant had no evaluations finding him to be incompetent to proceed to trial.

Moreover, neither defendant's behavior nor demeanor implicates the necessity of a *bona fide* doubt inquiry. While it is true defendant suffered from mental retardation and intellectual deficiencies throughout his life, and experienced periods of intermittent mental illness which was based in a delusional belief system, the evidence in the record pertaining to defendant's competency at the time of his trial, including the trial transcript, defendant's voluntary testimony and the extensive medical records and expert testimonies, all suggest there was never a "*bona fide* doubt" as to defendant's competency to stand trial. Here, defendant took the stand willingly in his own defense and testified clearly to the events leading up to Boone's death. He exhibited proper courtroom decorum and a desire to cooperate in the process. In his testimony, defendant tried to convince the court and the jury that his hallucinations were real, denying all crim-

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4. Dr. Hilkey on 28 May 2001 stated: "It is my opinion that while Mr. Staten has significant psychological disorders, these problems do not currently interfere with his ability [to] consult with his attorneys, to understanding the charges lodged against him and comprehend the potential penalties."

Dr. Groce on 21 May 2002 found: "Mr. Staten is currently capable of proceeding to trial. He understands the charges against him, the seriousness of those charges, and his own position relative to the proceedings. He is currently capable of working with an attorney in the preparation of a defense."

Dr. Hilkey on 4 August 2002 determined defendant competent to proceed to trial despite the fact defendant remained "fixed in his delusional belief system."

inal culpability throughout, and apologizing when his explanations were too lengthy.

Reviewing the trial transcripts and other records of this proceeding we cannot conclude the trial court had before it sufficient objective facts showing defendant "lack[ed] the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense at the time his trial commenced." *Snipes* at 530, 608 S.E.2d at 384. Instead, we hold that defendant had the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to assist his counsel. *Heptinstall* at 236, 306 S.E.2d at 112. As we stated in *Young*, "where, as here, the defendant has been . . . examined relative to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing." *Young* at 568, 231 S.E.2d at 581. This assignment of error is overruled.

II

[2] Defendant next argues the trial court erred by denying his motion for a directed verdict on the issue of insanity. We disagree. "If evidence of insanity is offered by the defendant, even if un-controverted, the credibility of that testimony is for the jury and thus precludes the entry of a directed verdict for defendant on insanity." *State v. Dorsey*, 135 N.C. App. 116, 118, 519 S.E.2d 71, 72 (1999).

A defense of insanity may absolve defendant of criminal responsibility if he proves to the satisfaction of the jury that at the time of the act, he was laboring under such a defect of reason caused by disease or a deficiency of the mind that he was incapable of knowing the nature and quality of his act, or, if he did know the quality of his act, he was incapable of distinguishing between right and wrong in relation to the act. *State v. Bonney*, 329 N.C. 61, 78, 405 S.E.2d 145, 155 (1991); *State v. Mancuso*, 321 N.C. 464, 469, 364 S.E.2d 359, 363 (1988); *State v. Evangelista*, 319 N.C. 152, 161, 353 S.E.2d 375, 382 (1987); *State v. Mize*, 315 N.C. 285, 289, 337 S.E.2d 562, 565 (1985). Every person is presumed sane and the burden of proving insanity is "properly placed on the defendant in a criminal trial." *State v. Leonard*, 296 N.C. 58, 64, 248 S.E.2d 853, 856 (1978) (diagnosis of mental illness by expert is not conclusive on issue of insanity).

Defendant presented medical expert testimony through Dr. Groce and Dr. Hilkey. Dr. Groce testified defendant knew the nature and

quality of his actions on the day of the offense but did not "understand that what he was doing was wrong." Also, and perhaps more significantly, Dr. Groce stated if he were to offer any opinion as to defendant's state of mind on the date of the offense that opinion would only be his "best guess" and not a medical conclusion.

Dr. Hilkey testified he had changed his mind during the course of the (second) trial and thereafter gave his opinion that defendant satisfied both prongs of the insanity test, stating defendant was insane at the time of the offense. This testimony at the second trial was different from his testimony at the first trial where Dr. Hilkey testified defendant was incapable of understanding the nature and quality of his actions and therefore insane under only one prong of the insanity test.

On the issue of insanity, the jury was left to weigh the credibility of the evidence as presented by the experts in the second trial. *See Dorsey* at 118, 519 S.E.2d at 73. The trial court properly denied defendant's motion for a directed verdict. This assignment of error is overruled.

III

[3] Defendant next argues the trial court erred in denying his request for a special instruction on diminished capacity, contending the evidence of defendant's mental illness was sufficient to support a diminished capacity instruction on intent to commit armed robbery. We disagree.

"An instruction on diminished capacity is warranted where evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the rational trier of fact as to whether defendant has the ability to form the necessary specific intent." *State v. Clark*, 324 N.C. 146, 163, 377 S.E.2d 54, 64 (1989). The defense of diminished capacity neither justifies nor excuses the commission of an offense, but rather negates only the element of specific intent, and the defendant could still be found guilty of a lesser included offense. *See*, *e.g.*, *State v. Holder*, 331 N.C. 462, 473-74, 418 S.E.2d 197, 203-04 (1992).

In *State v. Lancaster*, 137 N.C. App. 37, 44, 527 S.E.2d 61, 66-67, *disc. review denied in part and allowed in part on other grounds*, 352 N.C. 680, 545 S.E.2d 723 (2000), this Court found that despite the defendant's testimony about alcohol and drug use on the night of the offense, there was insufficient evidence of his mental condition at the time to support the diminished capacity instruction.

In the instant case, defendant testified at trial and provided chronologically and factually accurate testimony as to his actions leading up to his arrest on 6 September 2000. Further, after his arrest defendant gave a detailed statement describing how he pulled Boone out of his car and left him lying beside the road as he drove away in Boone's car. Dr. Groce and Dr. Hilkey both gave expert testimony that defendant's behaviors were influenced by his belief that he was fleeing for his life on 6 September 2000. Dr. Groce testified that when defendant took Boone's car, he knew he could get away faster in a car than on foot, knew he was taking a car, knew he was on a highway and knew he had just spoken with a police officer. Defendant was aware of what he was doing, he rationalized his actions as they occurred and he recounted the sequence of events at trial. Defendant has failed to present substantial evidence of diminished capacity; specifically, defendant failed to show he did not have the specific intent to permanently deprive Boone of his car. The trial court's denial of the diminished capacity instruction was proper. This assignment of error is overruled.

IV

[4] Defendant next argues the armed robbery judgment should be overturned because hands cannot be deemed dangerous weapons.

N.C. Gen. Stat. § 14-87, Robbery with firearms or other dangerous weapons states:

> (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night. . . .

N.C.G.S. § 14-87 (2003).

If there is insufficient evidence of the greater offense but sufficient evidence of the lesser included offense, the court should treat the jury's verdict as a verdict of guilty of the lesser included offense. *See* N.C. Gen. Stat. § 15-170 (2003) ("Upon the trial of any indictment the prisoner may be convicted of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser

degree of the same crime."); *see also State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979).

Autopsy reports indicate Boone died of a heart attack. The autopsy reports also indicate the scrapes, abrasions and bruises on Boone's body show that, because his heart stopped, there was not enough time for the blood to flow to these wounds before Boone's death. Forensic pathologist Dr. M.G.F. Gilliland testified Boone sustained minor cuts and abrasions prior to his death that were not life threatening; that Boone's death was caused by a combination of his weak heart and the stress caused by defendant stealing his car.

Here, defendant testified he used only his hands to overtake Boone and remove him from his car:

> [Boone] was coming from the Gates County war. I stuck my hand out. I am flagging him down for him to stop. Not that I ever did assault him, all I did—when I was in front of this car, he tried—he tried to drive around me and keep going because there was a whole lot of cars in the street. [Boone] pulled over to the right. That is when I went around to the passenger side. He tried to take off and the car wouldn't even move. And so then after I said, I need your car. I need your car. He still tried to take off. I undone his seat belt and I took my hand and pulled him (Defendant standing up.) . . . I pulled my hand—I pulled him out to the side and jumped in the car and took off . . . [i]f I would have hit a man that old, I would really did more than put a little scratch on his nose.

Taking the evidence in the light most favorable to the State, the evidence is insufficient to support a conviction of armed robbery. *See State v. Easterling*, 300 N.C. 594, 604, 268 S.E.2d 800, 806-07 (1980) (evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference therefrom). However, the evidence is sufficient to support a conviction of the lesser-included offense of common law robbery. Common law robbery is a lesser-included felony offense of armed robbery. *See State v. Norris*, 264 N.C. 470, 473, 141 S.E.2d 869, 871-72 (1965). Common law robbery requires proof of four elements: (1) felonious, non-consensual taking of (2) money or other personal property (3) from the person or presence of another (4) by means of force. *State v. Hedgecoe*, 106 N.C. App. 157, 161, 415 S.E.2d 777, 780 (1992). Therefore, although the evidence fails to support a conviction of armed robbery, it nevertheless is sufficient to support a conviction of the lesser included offense of common law robbery, which can prop-

erly serve as the underlying felony for defendant's first-degree felony murder conviction. *State v. Vance*, 328 N.C. 613, 623, 403 S.E.2d 495, 502 (1991). Therefore we reverse defendant's armed robbery conviction and remand to the trial court with instructions to enter a judgment against defendant as a verdict finding him guilty of common law robbery.

V

[5] Defendant next argues the trial court erred when it failed to arrest judgment on the underlying armed robbery conviction. We agree the trial court erred in not arresting judgment and sentencing defendant on the underlying armed robbery conviction.

It is undisputed that when a defendant is convicted of first-degree murder pursuant to the felony murder rule, and a verdict of guilty is returned on the underlying felony, this latter conviction provides no basis for an additional sentence, hence it merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested. *State v. Silhan*, 302 N.C. 223, 261-62, 275 S.E.2d 450, 477 (1981), *overruled in part by State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133 (1997).

Here, the trial court properly sentenced defendant to life imprisonment for the first-degree (felony) murder of Boone. However, because the underlying offense merged with the felony murder conviction, it was error to sentence defendant for the underlying offense. Because we have reversed and remanded the conviction of armed robbery with instructions to the trial court to impose a verdict as to common law robbery, we arrest judgment on the common law robbery conviction.

Conclusion

In conclusion, we find there was no error at trial, we reverse defendant's armed robbery conviction and remand with instructions for entry of a verdict on common law robbery. Judgment is arrested and the sentence vacated as to common law robbery.

No error in part; Reversed and remanded in part; Vacated in part.

Judges TYSON and STEELMAN concur.

IN RE: L.L., A MINOR CHILD

No. COA04-783

(Filed 16 August 2005)

1. Appeal and Error— preservation of issues—jurisdiction

Although petitioner Department of Social Services contends the trial court erred in a child neglect case by improperly retaining jurisdiction over the case when another judge was assigned to hear juvenile cases on that date, this issue was not properly preserved for appellate review because the parties did not object to the district court judge conducting the review hearing.

2. Appeal and Error— preservation of issues—motion to intervene

Although respondent parents assign error to the granting of the foster parents' oral motion to intervene at the 19 March 2003 hearing in a child neglect case, this assignment of error is dismissed because: (1) assuming arguendo that respondent father's assignment of error to finding of fact number 33 that specifically addresses the foster parents' intervention provides jurisdiction to the Court of Appeals over the issue of intervention, no party objected to the foster parents' oral request to intervene; and (2) in the absence of an objection at trial, a question may not be reviewed on appeal. N.C. R. App. P. 10(b)(1).

3. Child Abuse and Neglect— neglect—trial court failure to comply with time limitation for filing written order

The trial court's order following a review hearing in a child neglect case is reversed because it was not filed within the time limitation set forth in N.C.G.S. § 7B-906(d) and the nine-month delay was prejudicial because: (1) the aggrieved parties (Department of Social Services and the parents) could not appeal when there was no written order; (2) the delay was directly contrary to the permanent plan of reunification and the minor child's best interests; (3) without a filed order, there was no order with which anyone had to comply since an order entered in open court is not enforceable until it is entered; and (4) the bonding of the child with the foster parents caused by the delay will either afford the foster parents increased leverage in the best interests analysis or will cause greater trauma to the child if the plan for reunification prevails.

4. Child Abuse and Neglect— findings of fact—priority placement to relatives—best interests of child

The trial court erred in a child neglect and custody case by failing to make findings to justify not giving priority in placement to the minor child's relatives, because: (1) exempting review hearings from the requirement that relatives be given first consideration risks undermining the Interstate Compact on the Placement of Children; (2) N.C.G.S. § 7B-906 incorporates the requirement under N.C.G.S. § 7B-903 that the court give first consideration to placement of a child with relatives; and (3) the trial court made no specific findings that placement with the child's relatives would not be in her best interests, but instead recites facts about the relatives and the foster parents' views without drawing any factual conclusions.

5. Child Abuse and Neglect— findings of fact—goals of foster care placement—role foster parents should play in planning for the juvenile

The trial court erred in a child neglect and custody case by failing to make findings of fact required under N.C.G.S. § 7B-906(c)(3) & (4) that the court address the goals of the foster care placement and the role that the foster parents should play in the planning for the juvenile since the trial court did not expressly indicate any intention to change the status of the foster parents. Even if the trial court determines on remand to change the status of the foster parents, the trial court would be required under N.C.G.S. § 7B-906(c)(9) to make findings regarding the role of the foster parents in conjunction with the existing permanent plan of reunification.

Appeal by petitioner and respondents from an order entered 21 January 2004 by Judge Marcia K. Stewart in Johnston County District Court. Heard in the Court of Appeals 2 March 2005.

Holland & O'Connor, by W. B. Holland, Jr. and Jennifer S. O'Connor, for petitioner-appellant.

Richard Croutharmel for respondent-appellant mother.

Peter Wood for respondent-appellant father.

Wyrick, Robbins, Yates & Ponton, LLP, by K. Edward Greene and Kathleen A. Naggs, for intervenors-appellees.

GEER, Judge.

Petitioner Johnston County Department of Social Services ("JCDSS") and the parents of L.L. ("the respondents") appeal from an order of the trial court transferring custody from JCDSS to the intervenor foster parents ("the Maples"). Our review of the record suggests that the trial court and the parties may have gotten sidetracked by the dispute between JCDSS and the Maples to the point that L.L. has become less the focus of attention and more a pawn in the dispute.

Perhaps as a result, the order on appeal was filed eight months late to the prejudice of L.L., the parents, and JCDSS. For this reason, we reverse. We also hold that the trial court erred in its order by not complying with the provisions of N.C. Gen. Stat. § 7B-906 (2003) and by not explaining why it declined to give preference to the child's relatives when considering placement of the child. Accordingly, we reverse the trial court's order and remand for a new review hearing and entry of an order consistent with this opinion.

Facts

L.L. was born to respondents on 4 October 2002. Because respondents' first child had been removed from respondents' custody and adjudicated abused, neglected, and dependent in December 2001, JCDSS obtained custody of L.L. on 16 October 2002 pursuant to an order for nonsecure custody. On that same day, JCDSS placed L.L. with the Maples.

Following a hearing on 20 November 2002, Judge Marcia K. Stewart entered an order on 19 December 2002 adjudicating L.L. to be neglected and dependent. In the dispositional order, the court "direct[ed] the JCDSS, despite the recommendations of the agency, to work towards reunification with the parents." The court also entered an order for an expedited Interstate Compact on the Placement of Children ("ICPC") home study to explore relative placement with L.L.'s maternal great-great aunt and uncle, Gerald and Sandra Spears, in Virginia.

On approximately 30 January 2003, the Maples learned that JCDSS had changed its plan from foster care placement to relative placement with the Spears. The Maples subsequently met with the Spears to assist with L.L.'s move to the Spears' home, but the Maples—according to the trial court—"grew extremely concerned with [L.L.'s] placement with the Spears, given their age and the fact

that they already had three other children in their custody under the age of seven and a limited family income."

On 12 February 2003, the court held a 90-day review hearing. Since JCDSS had not yet received a response from the State of Virginia regarding the home study of the Spears, the court determined that it was in L.L.'s best interest to remain in a foster care placement with the Maples. The court provided that the goal of the foster care placement was "to provide a temporary placement for the juvenile, pending reunification or location of a relative placement possibility." The court specifically stated that termination of parental rights should not be pursued because "the court determines that it is in the juvenile's best interest to continue to work towards reunification with the parents."

The 12 March 2003 90-day review hearing was continued until 19 March 2003 because the mother's attorney could not be present. At the 19 March 2003 hearing, the Maples made an oral motion to intervene that Judge Stewart granted without objection by JCDSS or the parents. The 90-day review hearing was then continued until 9 April 2003 because the guardian ad litem could not be present. A written order allowing the motion to intervene was not entered until 9 June 2004, 15 months later.

On the same day, 19 March 2003, the Maples filed petitions to terminate the parental rights of both respondent parents and to adopt L.L. On 20 March 2003, because of these petitions, JCDSS removed L.L. from the Maples' home and placed her in the care of another foster family. JCDSS filed a motion to dismiss the petitions to terminate respondents' parental rights on 7 April 2003 on the grounds that the court had ordered JCDSS to work towards reunification and that the Maples did not have standing to file the petitions.

At the 9 April 2003 hearing, Judge Franklin F. Lanier was assigned to hold juvenile court. Counsel for the Maples informed Judge Lanier that Judge Stewart, who was assigned that day to civil district court, had told him on the day before the hearing that she wanted to retain jurisdiction of the matter. Judge Lanier consulted with Judge Stewart and counsel for the parties and transferred the case to the courtroom in which Judge Stewart was presiding.

At the 9 April 2003 hearing before Judge Stewart, counsel for JCDSS, the guardian ad litem, and counsel for the parents informed the court that they had all stipulated to an order placing L.L. in the

custody of her maternal relatives, the Spears. The Maples objected to the recommendation and the trial court then conducted a two-day hearing. At the conclusion of the hearing, on 10 April 2003, the court stated in open court that L.L. was removed from the custody of JCDSS and was placed in the custody of the Maples. The court, however, further ordered JCDSS to continue to work towards reunification with the parents and granted visitation to the parents. Judge Stewart also stated, at the close of the hearing, that she retained jurisdiction over the matter.

Although no written order had been entered, JCDSS and the parents each filed notices of appeal from the review hearing order rendered in open court. Simultaneously with its notice of appeal filed 17 April 2003, JCDSS filed a motion for a stay pending appeal, contending that granting custody to the Maples compromised the agency's ability to work towards reunification. The parents filed similar motions on 6 May 2003. On 7 May 2003, the parents also filed motions seeking recusal of Judge Stewart on the grounds that Judge Stewart had improperly retained jurisdiction of the case and also lived in the same neighborhood as the Maples.

JCDSS had noticed its motion to dismiss the Maples' petitions for termination of parental rights for hearing on 30 April 2003. On 28 April 2003, however, the Maples moved to continue that motion on the grounds "that an Order related to this matter had not been signed by the Judge as yet and the Department of Social Services has filed the enclosed Notice of Appeal which has a material effect on this action . . . ."

On 27 May 2003, Judge Stewart denied JCDSS' and the respondents' motions for a stay pending appeal. After hearing arguments of counsel, Judge Stewart "reaffirm[ed] the decision of April 9, 2003, to place the child in the home of Mr. and Mrs. Maples." She entered a single conclusion of law stating that the matter was properly before the court, was within the exclusive jurisdiction of the district court, and was properly calendared with notice to all parties. Based on that conclusion of law, she ordered that the motion for a stay pending appeal be denied. On the next day, 28 May 2003, the Maples filed amended petitions for termination of respondents' parental rights to L.L.

On 30 May 2003, Judge Stewart denied the motions for recusal in an order stating that "[c]ase law does not allow the retention of jurisdiction in a District Court case" and that "although the Intervenors in

this action, Mr. and Mrs. Maples, are nearby neighbors, the undersigned does not know them personally and has had no contact with them." She, therefore, denied the motion for recusal, but allowed the motion "that the court not retain jurisdiction."

With respect to the April 2003 review hearing, no written order was filed through the summer and fall of 2003. On 30 December 2003, JCDSS filed a notice of hearing for 14 January 2004 "for the purpose of reviewing this file and determining the best interest of the child." On 21 January 2004, the trial court entered its written order regarding the 9 and 10 April 2003 review hearing. JCDSS and the parents filed new notices of appeal from the written order.

Discussion

I. The Transfer of the Review Hearing to Judge Stewart.

[1] JCDSS argues that the trial court's order should be reversed because the court erred by improperly retaining jurisdiction over the case. Specifically, JCDSS asserts that Judge Stewart improperly presided over the review hearing when she had no authority to act because Judge Lanier was the judge assigned to hear juvenile cases on that date. Judge Stewart was assigned to preside over Johnston County civil district court.

JCDSS and respondents did not, however, object to Judge Stewart's presiding over the review hearing. In fact, counsel for JCDSS expressly stated that he had no objection and acknowledged that the hearing had been calendared for 9 April 2004 specifically because the parties believed it to be Judge Stewart's term of juvenile court. N.C.R. App. P. 10(b)(1) states that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." Appellants thus did not properly preserve this issue for appellate review.

Nevertheless, JCDSS contends that because Judge Stewart was not assigned to preside over juvenile court on 9 April 2003, she lacked subject matter jurisdiction over the review hearing. The question of subject matter jurisdiction "may be raised at any point in the proceeding, and such jurisdiction cannot be conferred by waiver, estoppel or consent." *Sloop v. Friberg*, 70 N.C. App. 690, 692-93, 320 S.E.2d 921, 923 (1984).

JCDSS cites *Wolfe v. Wolfe*, 64 N.C. App. 249, 255, 307 S.E.2d 400, 404 (1983), *disc. review denied*, 310 N.C. 156, 311 S.E.2d 297 (1984), in which this Court held that an individual judge may not retain exclusive jurisdiction over a case. More recently, in *In re McLean*, 135 N.C. App. 387, 399, 521 S.E.2d 121, 129 (1999), this Court acknowledged "that as a matter of practice some trial courts have [retained jurisdiction for future hearings] for reasons of consistency and efficiency, particularly in family law cases," but pointed out that there is no express statutory authority for the practice. The Court therefore held that the trial court "erred in attempting to retain exclusive jurisdiction over future hearings in this matter and that portion of the dispositional order must be vacated . . . ." *Id.* at 400, 521 S.E.2d at 129.

Nothing in *Wolfe* or *McLean* suggests that retention of jurisdiction implicates subject matter jurisdiction. In fact, the Court in *Wolfe* found the error to be harmless, a result that is not consistent with a lack of subject matter jurisdiction. Moreover, neither *Wolfe* nor *McLean*—nor any other authority cited by JCDSS—precludes parties from consenting to a particular judge's hearing a case. *Cf. Circle J. Farm Center, Inc. v. Fulcher*, 57 N.C. App. 206, 207, 290 S.E.2d 798, 799 (1982) ("In the absence of a proper objection, an action begun in the wrong division may continue in that division to its conclusion."). Accordingly, because the parties did not object to Judge Stewart's conducting the review hearing, that issue was not properly preserved for appellate review and the assignment of error is dismissed.

II. Order Allowing Intervention by the Foster Parents.

[2] The respondent parents assign error to the granting of the Maples' oral motion to intervene at the 19 March 2003 hearing. The respondent parents argue that allowing the Maples to intervene was not in the best interests of the child and was an abuse of discretion. As with the prior assignment of error, this issue is not properly before this Court.

The Maples contend that respondents did not file a notice of appeal with respect to the intervention order. Rule 3(d) of the North Carolina Rules of Appellate Procedure requires that the notice of appeal "designate the judgment or order from which appeal is taken." While the parties did file a timely notice of appeal with respect to the 21 January 2004 review order, this notice of appeal did not mention the order allowing intervention. At that point, there was no written order of intervention; the court had simply orally allowed the oral request for intervention. The intervention order was not entered until

9 June 2004—15 months after the oral order and three months after the notices of appeal.

In order for this Court to review the order of intervention, either (1) the intervention order must have been referenced in the notice of appeal filed 20 February 2004, or (2) another notice of appeal needed to be filed following the entry of the written order. *See Stachlowski v. Stach*, 328 N.C. 276, 278, 401 S.E.2d 638, 640 (1991) (holding that rendering of judgment in open court, when oral ruling leaves no matters undetermined, is the earliest point from which a party *may* appeal while entry of the written judgment marks the beginning of the period during which a party *must* file notice of appeal). Ordinarily, because "[t]he provisions of Rule 3 are jurisdictional," the failure to notice appeal from the intervention order would "require[] dismissal of [this] appeal." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737, *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997).

The respondent father, however, has assigned error to finding of fact number 33 of the 21 January 2004 review order from which the appellants have properly appealed. It specifically addresses the Maples' intervention:

> While the Maples as foster parents may not advocate the position of Johnston County DSS in possibly reuniting the [parents and L.L.] or in placement with L.L.'s great-great maternal aunt and uncle in Virginia, their intervention does not prejudice the adjudication of the rights of the original parties and the best interest [sic] of the child is served by allowing them to intervene. The Maples had and continue to cooperate with the Johnston County DSS by taking the child to all scheduled visits and even volunteering to transport the child when a DSS visit had to be canceled due to weather.

Assuming *arguendo* that the father's assignment of error as to this finding provides jurisdiction in this Court over the issue of intervention, review is still precluded because no party objected to the Maples' oral request to intervene. In the absence of an objection at trial, a question may not be reviewed on appeal. N.C.R. App. P. 10(b)(1). This assignment of error is dismissed.

III. The Timeliness of the Review Hearing Order.

[3] JCDSS next argues that the trial court's order should be reversed because it was not filed within the time limitation set forth in the

Juvenile Code. The review hearing concluded on 10 April 2003, but the court did not enter its order until 21 January 2004—over nine months after the hearing. N.C. Gen. Stat. § 7B-906(d) requires that the order following a review hearing "must be reduced to writing, signed, and entered within 30 days of the completion of the hearing." Therefore, in order to be timely filed, the order in this case should have been filed by 10 May 2003. It was eight months late.

This Court has held that a trial court's failure to adhere to the time requirements set out in certain portions of the Juvenile Code is not reversible error absent a showing of prejudice. *See In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391 (no prejudice shown by respondent parent from the entry of an order terminating parental rights 59 days late), *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, 171 (holding that a court's failure to enter adjudication and disposition orders in accordance with N.C. Gen. Stat. §§ 7B-807(b) and -905(a) was not reversible error because "the trial court's failure to timely enter the orders did not prejudice [respondent]"), *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903 (2004).

Recently, this Court, in applying N.C. Gen. Stat. § 7B-1109 (2003), held that a delay of over six months between a termination of parental rights hearing and the resulting order was "highly prejudicial." *In re L.E.B.*, 169 N.C. App. 375, 379, 610 S.E.2d 424, 426 (2005) (emphasis omitted), *disc. review denied*, 359 N.C. 632, —— S.E.2d ——, 2005 N.C. LEXIS 698 (June 30, 2005). In *L.E.B.*, the concurring judge noted that the six-month delay required reversal because the "juveniles, their foster parents, and their adoptive parents are each affected by the trial court's inability to enter an order within the proscribed time period." *Id.* at ——, 610 S.E.2d at 428 (Timmons-Goodson, J., concurring).

Similarly, we hold that the nine-month delay in this case was prejudicial and requires reversal. First, because of the failure to enter an order, the aggrieved parties—in this case JCDSS, the mother, and the father—could not appeal. *Compare In re B.M.*, 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005) (finding that delay in filing a petition to terminate parental rights under N.C. Gen. Stat. § 7B-907(e) (2003) was not prejudicial since respondents could effectively appeal from the order changing the permanent plan from reunification and, therefore, "[r]espondents' right to appeal was not affected by the untimely filing"). The appellants attempted to appeal by filing notices of appeal

after the hearing, but could not perfect the appeal because no written order existed. *Abels*, 126 N.C. App. at 803, 486 S.E.2d at 737 ("This Court is without authority to entertain appeal of a case which lacks entry of judgment.").

In addition, this delay was directly contrary to the permanent plan of reunification and L.L.'s best interests. In appeals from a termination of parental rights, there has, at least, been a judicial determination that the permanent plan should be changed from reunification to termination and a second judicial determination that the parents' rights should be terminated. Here, to the contrary, the only judicial determination has been that reunification should continue to be the permanent plan. Yet, the court failed to provide any specific direction to ensure that *all* the parties worked towards reunification instead of their own individual, adverse interests. The Maples' interests became adverse to the parents and JCDSS once they filed their petition to terminate parental rights in the face of the permanent plan of reunification. The nine-month delay in entry of the order left the parties in limbo as to exactly what the plan was to be—since the oral findings simply told JCDSS to continue to work with the parents—and also significantly delayed the date by which the child might be reunited with the parents.

Further, without a filed order, there was no order with which anyone had to comply because " 'an order rendered in open court is not enforceable until it is "entered," *i.e.*, until it is reduced to writing, signed by the judge, and filed with the clerk of court.' " *Carland v. Branch*, 164 N.C. App. 403, 405, 595 S.E.2d 742, 744 (2004) (quoting *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998)). Without any written order providing direction to the Maples, the appellants had no means to compel the Maples to cooperate in reunification efforts. Mr. Maples' testimony established that such cooperation could not be taken for granted:

> Q. So right here and now today, you're not willing to cooperate in any kind of reunification plan, are you?
>
> A. I assume not if we filed termination of parental rights.
>
> Q. In fact, really—I mean, you would be unable to do it due to your feelings and the things that led you to file these actions.
>
> A. We feel like we didn't act any different than DSS since termination of parental rights had already been pursued with another child.

Thus, given the unusual circumstances of this case and the nature of the oral order, the delay undermines the permanent plan of reunification and prejudices L.L., the parents, and JCDSS.

Although the Maples were not prejudiced by the delay, any cognizable interest of the Maples "derives from the child's right to have his or her best interests protected." *In re Baby Boy Scearce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410, *disc. review denied*, 318 N.C. 415, 349 S.E.2d 589 (1986). Yet, because of the permanent plan of reunification, the delay may well harm L.L. Here, from the time of the review hearing until the present, L.L. has aged from being six months old to being almost three years old while living with a couple committed to adopting her and opposing reunification. As Judge Becton noted in a dissenting opinion:

> Given the tender ages of the children involved in most of these cases and the length of time it generally takes from temporary removal to termination . . . bonding between the child and the foster parents is likely to occur and is, therefore, likely to be unduly weighted when balanced against the interest of parents . . . .

In re Webb, 70 N.C. App. 345, 359, 320 S.E.2d 306, 314 (1984) (Becton, J., dissenting), *aff'd per curiam*, 313 N.C. 322, 327 S.E.2d 879 (1985). Because of the bonding, the delay will either afford the Maples increased leverage in the "best interests" analysis or will cause greater trauma to the child if the plan for reunification prevails. We cannot condone a mode of proceeding that risks making a termination of parental rights a *fait accompli*.

JCDSS and the parents attempted to call the potential prejudice to the attention of the trial court by moving to stay the order and preserve the status quo pending appeal. In its motion, JCDSS noted (1) that the Maples, who had been granted custody, did not support the plan of reunification and intended to adopt L.L., (2) that JCDSS was nonetheless under a duty, pursuant to the court's order, to continue efforts to reunify L.L. with her biological family, and (3) that placement in the Maples' home, pending the appeal, would compromise JCDSS' ability to work towards reunification. JCDSS also stated that "upon information and belief, if execution of the Order is not stayed, the child's IV-E eligibility funding will be affected in the future . . . ." JCDSS specifically noted that it could take one to two years for the appeal to be resolved. Not only did the trial court deny the stay, but despite the concerns expressed by JCDSS, the court further delayed any appeal by not entering its order for another eight months.

We acknowledge that the record also suggests that had JCDSS requested another review hearing earlier or petitioned for writ of mandamus, some of the delay may have been avoided. Nevertheless, the circumstances of this case demonstrate prejudice to L.L., the parents, JCDSS, and the statutorily-mandated permanency planning process. *See In re R.T.W.*, 359 N.C. 539, 547, 614 S.E.2d 489, ––– 2005 N.C. LEXIS 646, at *17 (July 1, 2005) (observing that "protracted custody proceedings that leave the legal relationship between parent and child unresolved and the child in legal limbo . . . thwart the legislature's wish that children be placed 'in . . . safe, permanent home[s] within a reasonable amount of time' " (quoting N.C. Gen. Stat. § 7B-100(5) (2003)). Accordingly, we reverse the order of the trial court and remand for a new review hearing.

IV. Failure to Make Adequate Findings.

We address the appellants' arguments regarding the adequacies of the order's findings of fact because the issues are likely to recur on remand. Appellants contend that the trial court erred (1) in failing to make findings to justify not giving priority in placement to L.L.'s relatives, the Spears; and (2) in failing to make findings of fact required under N.C. Gen. Stat. § 7B-906. We agree.

A. Priority Placement to Family Members.

[4] At the review hearing, appellants notified the trial court that JCDSS had received an approved ICPC home study for the Spears and that JCDSS, the parents, and L.L.'s guardian ad litem all had stipulated to placement of L.L. with the Spears. In arguing that the trial court failed to make sufficient findings of fact to support its rejection of that stipulation, appellants point to N.C. Gen. Stat. § 7B-903(a)(2)(c) (2003). N.C. Gen. Stat. § 7B-903(a)(2)(c) mandates that "[i]f the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile." Appellants argue that the trial court's order must be reversed because the court neither placed L.L. with her relatives, the Spears, nor made any findings of fact that placement with the Spears would be contrary to L.L.'s best interests.

The Maples contend that trial courts entering orders following review hearings are not required to comply with N.C. Gen. Stat. § 7B-903(a)(2). "The primary rule of statutory construction is to ef-

fectuate the intent of the legislature." *In re Estate of Lunsford*, 359 N.C. 382, 392, 610 S.E.2d 366, 373 (2005).

N.C. Gen. Stat. § 7B-906, which the parties agree governed the hearing below, specifically provides that "[t]he court, after making findings of fact, . . . may make any disposition authorized by G.S. 7B-903, including the authority to place the juvenile in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interests of the juvenile." N.C. Gen. Stat. § 7B-906(d). The plain language of the statute thus incorporates N.C. Gen. Stat. § 7B-903's dispositional alternatives, which, with respect to placement of the child, give priority to a suitable relative "unless the court finds that the placement is contrary to the best interests of the juvenile." N.C. Gen. Stat. § 7B-903(a)(2).

To interpret N.C. Gen. Stat. § 7B-906 in the manner urged by the Maples would be inconsistent with the overall scheme adopted by the General Assembly to comply with federal law. In 1996, in the Personal Responsibility and Work Opportunity Reconciliation Act, Congress provided that a State, as a condition for receiving federal foster care funds, must have a plan for foster care that, in pertinent part, "provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards." 42 U.S.C. § 671(a)(19) (2003).

Consistent with that requirement, N.C. Gen. Stat. § 7B-505 (2003) (emphasis added) specifically requires that the trial court in entering a nonsecure custody order for placement outside the home "*shall* first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home." If so, then "the court *shall* order placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to the best interests of the juvenile." *Id.* (emphasis added). N.C. Gen. Stat. § 7B-506(h) (2003) (emphasis added) then provides that, following that initial order, "*[a]t each hearing* to determine the need for continued custody, the court *shall*: . . . (2) [i]nquire as to whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home." Again, "[i]f the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court *shall* order temporary placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to

the best interests of the juvenile." *Id.* (emphasis added). As noted above, N.C. Gen. Stat. § 7B-903—setting out dispositional alternatives for abused, neglected, or dependent children—contains an identical provision. N.C. Gen. Stat. § 7B-903(a)(2). We do not believe that the General Assembly intended to require trial courts to give priority consideration to relatives in the initial nonsecure custody proceedings, at "each hearing" to determine the need for continued custody, and in dispositions for abused, neglected, or dependent children, but—despite its express reference to N.C. Gen. Stat. § 7B-903—did not intend to incorporate a similar requirement when trial courts are reviewing custody placements.

In addition, each of the statutes further provides that "[p]lacement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children," as set out in Article 38 of the Juvenile Code (the "ICPC"). N.C. Gen. Stat. §§ 7B-505, 7B-506(h)(2), and 7B-903(a)(2). Exempting review hearings from the requirement that relatives be given first consideration risks undermining the ICPC. Under the ICPC, a "child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child." N.C. Gen. Stat. § 7B-3800, Art. III(d) (2003). In other words, a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study. Further, the policies underlying the ICPC anticipate that states will cooperate to ensure that a state where a child is to be placed "may have full opportunity to ascertain the circumstances of the proposed placement" and the State seeking the placement "may obtain the most complete information on the basis of which to evaluate a projected placement before it is made." *Id.*, Art. I(b), (c).

In short, compliance with the ICPC may take time and often may not be completed until a review hearing is held, as this case demonstrates. The order for nonsecure custody was entered on 17 October 2002 and the order under N.C. Gen. Stat. § 7B-506 for continued nonsecure custody was dated 23 October 2002. On 20 November 2002, following the adjudication of L.L. as neglected and after finding that the Spears had expressed a desire and willingness to provide care for L.L., Judge Stewart entered an order for a "Priority Placement Request from the State of North Carolina to the State of Virginia, pursuant to Article III of I.C.P.C.," requesting a home study of the Spears.

If the Maples' argument were accepted, the trial court, at the point when the ICPC home study had only just been ordered, would no longer have been required to give any consideration to placement with the Spears. In fact, JCDSS did not receive the approved home study from Virginia until immediately before the April 2004 review hearing. Thus, the trial court could not have given consideration to relative placement until the very hearing at which the Maples contend consideration was no longer required.

The Maples' proposed construction of the statute thus creates a conflict between the requirements of the ICPC and the mandate for priority consideration of relatives. We can, however, avoid any such conflict by construing N.C. Gen. Stat. § 7B-906 as incorporating N.C. Gen. Stat. § 7B-903's requirement that the court give first consideration to placement of a child with relatives. *See State v. Boltinhouse*, 49 N.C. App. 665, 667-68, 272 S.E.2d 148, 150 (1980) (" 'Statutes dealing with the same subject matter must be construed in *pari materia* and harmonized, if possible, to give effect to each. Any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent.' " (quoting 12 Strong's North Carolina Index 3d, *Statutes* § 5.4, pp. 69-70)).

Accordingly, we hold that the trial court was required to first consider placing L.L. with the Spears unless it found that such a placement was not in L.L.'s best interests. The trial court's review order does not, however, include the necessary findings of fact. Although L.L.'s guardian ad litem, JCDSS, and the parents all agreed to placement with the Spears and Virginia approved the Spears for placement, the trial court's order included only two findings of fact regarding the Spears as a possible placement:

> 19. . . . As stated above, the Spears have custody of [L.L.'s] half siblings via Lenoir County DSS. Mr. Spears testified at trial that he lives in Virginia, approximately four hours away; he is 53 years old with a 12th grade education, has a deceased father and currently has 3 children, ages 7, 4 and 3 residing with he and his wife, who is not employed outside the home and who has an 11th grade education. The total family income is $30,000.00 per year.
>
> . . . .
>
> 24. After meeting with the Spears, the Maples grew extremely concerned with [L.L.'s] placement with the Spears, given their age and the fact that they already had three other children

> in their custody under the age of seven and a limited family income. Mr. Spears's father is already deceased and Mr. Spears would be 70 by the time [L.L.] could get a driver's license.[1]

The trial court made no specific finding that placement with Mr. and Mrs. Spears would not be in L.L.'s best interests. Further, the above findings recite certain facts about the Spears and the Maples' views, but draw no factual conclusions. *See Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required (internal quotation marks omitted)); *Appalachian Poster Adver. Co. v. Harrington*, 89 N.C. App. 476, 479, 366 S.E.2d 705, 707 (1988) (holding that the trial court failed to find the "ultimate facts" where "[f]or the greater part, [the findings of fact] are only recitations of the evidence"). We also note that the Maples' concerns—which cannot substitute for a finding by the trial court—address the question of a permanent placement and not the question before the trial court: who should have custody pending reunification efforts?

On remand, the trial court must give first consideration to placement with the Spears. Before placing L.L. with the Maples or with anyone else, the court must make specific findings of fact explaining why placement with the Spears is not in L.L.'s best interests. *See Shore v. Norfolk Nat'l Bank of Commerce*, 207 N.C. 798, 799, 178 S.E. 572, 572-73 (1935) (holding that the trial court must specifically find the facts and cannot simply "indicate from what source the facts may be gleaned").

B. Findings of Fact Required Under N.C. Gen. Stat. § 7B-906.

[5] In a review hearing pursuant to N.C. Gen. Stat. § 7B-906, the trial court is required to consider the following criteria and make written findings regarding those that are relevant:

> (1) Services which have been offered to reunite the family, or whether efforts to reunite the family clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time.

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1. One finding of fact does acknowledge the need to make findings regarding relative placement: "DSS Requirement [sic] to work toward relative placement priority can be followed by allowing [L.L.] to remain in this area where her only full sister lives and with whom the Maples will continue a relationship." Placement with non-relatives who live in the same area as a child's sibling does not equate to placement with a relative. This fact may, however, be a consideration in deciding L.L.'s best interests.

(2) Where the juvenile's return home is unlikely, the efforts which have been made to evaluate or plan for other methods of care.

(3) Goals of the foster care placement and the appropriateness of the foster care plan.

(4) A new foster care placement, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile.

(5) Reports on the placements the juvenile has had and any services offered to the juvenile and the parent, guardian, custodian, or caretaker.

(6) An appropriate visitation plan.

(7) If the juvenile is 16 or 17 years of age, a report on an independent living assessment of the juvenile and, if appropriate, an independent living plan developed for the juvenile.

(8) When and if termination of parental rights should be considered.

(9) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-906(c).

An examination of the 23 January 2004 order reveals that the order fails to meet the requirement of N.C. Gen. Stat. § 7B-906(c)(3) & (4) that the court address the goals of the foster care placement and the role that the foster parents should play in the planning for the juvenile. The trial court ordered JCDSS to continue reasonable efforts at reunification, but at the same time granted legal and physical custody to the Maples, who had confirmed their determination to terminate the respondent parents' parental rights by amending their petitions shortly after the review hearing in which they obtained custody. Yet, the court's order imposes no requirements on the Maples at all; it does not even direct the Maples to cooperate with JCDSS in connection with the court-ordered "reasonable reunification efforts." Without specification of the goal for the placement with the Maples and the role they were to play in connection with L.L.'s permanent plan of reunification, the purposes of a permanent plan and a review hearing could not be met.

The Maples contend that N.C. Gen. Stat. § 7B-906(c)(3) & (4) were not relevant because they were no longer foster parents. The

Maples rely on N.C. Gen. Stat. § 131D-10.2(8) (2003), which defines a "Family Foster Home" as "the private residence of one or more individuals who permanently reside as members of the household and who provide continuing full-time foster care for a child or children *who are placed there by a child placing agency* . . . ." (Emphasis added.) The Maples reason that they are not a "Family Foster Home" because L.L. was placed with them by the court and not by a child placing agency.

Assuming, *arguendo*, that the definitions in N.C. Gen. Stat. § 131D-10.2 are relevant to the Juvenile Code,[2] it is undisputed that L.L. was originally placed with the Maples by JCDSS, a child placing agency as defined by N.C. Gen. Stat. § 131D-10.2(4). Further, they continue to provide "foster care" within the meaning of N.C. Gen. Stat. § 131D-10.2(9):

> "Foster Care" means the continuing provision of the essentials of daily living on a 24-hour basis for dependent, neglected, abused, abandoned, destitute, orphaned, undisciplined, or delinquent children or other children who, due to similar problems of behavior or family conditions, are living apart from their parents, relatives, or guardians in a family foster home or residential child-care facility. The essentials of daily living include but are not limited to shelter, meals, clothing, education, recreation, and individual attention and supervision.

In addition, a "foster parent" is simply "any individual who is 18 years of age or older who is licensed by the State to provide foster care." N.C. Gen. Stat. § 131D-10.2(9a). The Maples have not argued that they are not "foster parents."

Our review of the trial court's order reveals no intent to alter the original status of the Maples as that of being foster parents. The ramifications of such a change of status could be profound. For example, L.L. might be denied foster care benefits under N.C. Gen. Stat. § 108A-49 (2003). Further, the Maples would no longer be regulated under Article 1A of Chapter 131D. In light of the potential consequences, we do not construe the trial court's order as making such

2. The definitions contained in N.C. Gen. Stat. § 131D-10.2 apply only for the purposes of Article 1A of Chapter 131D, which has the stated purpose of "assign[ing] the authority to protect the health, safety and well-being of children separated from or being cared for away from their families." N.C. Gen. Stat. § 131D-10.1 (2003). The provisions of the Article relate to licensure and other regulatory requirements for persons and entities providing foster care or placing children with residential care facilities, foster homes, or adoptive homes.

a fundamental change, especially when the order consistently refers to the Maples as "foster parents."

Since the trial court did not expressly indicate any intention to change the Maples' status from that of foster parents, it was required to make findings of fact under N.C. Gen. Stat. § 7B-906(c)(3) & (4). Even if the trial court determines on remand that the Maples should not be considered foster parents, but should play some other currently unspecified role, the trial court would be required under N.C. Gen. Stat. § 7B-906(9), given the circumstances of this case, to make findings regarding the role of the Maples in conjunction with the existing permanent plan of reunification. The order itself establishes the ongoing animosity between JCDSS and the Maples. The order must provide a workable plan for all parties to cooperate in achieving L.L.'s best interests.

On remand, we remind all parties that policing a game of tit-for-tat between a Department of Social Services and foster parents is not the function of a review hearing. Nor should disagreement with an agency's policies, practices, or casework distract from L.L.'s best interests. Our review of the review hearing order indicates that more than a third of the 38 findings of fact relate in whole or in part to a discussion of JCDSS' treatment of the Maples, the effect of JCDSS' actions on the Maples, the Maples' beliefs regarding their ability to adopt, or disapproval of JCDSS. Significantly, L.L.'s guardian ad litem is only mentioned in fleeting fashion, with no description of his recommendation and no explanation as to why the court found the guardian ad litem's recommendation not to be worthy of consideration or, alternatively, entitled to less weight than the views of the Maples. The guardian ad litem is, however, appointed and present solely to represent L.L.'s best interests.

Reversed and remanded.

Judges McGEE and TYSON concur.

IN RE J.A.G.

[172 N.C. App. 708 (2005)]

IN THE MATTER OF: J.A.G.

No. COA04-1257

(Filed 16 August 2005)

1. Appeal and Error— appealability—mootness

Although respondent mother contends the trial court abused its discretion by denying the mother's motion to dismiss the charge of child abuse at the close of petitioner's evidence, this argument is moot because: (1) the trial court dismissed the abuse allegation at the close of all evidence and the issue of whether the trial court should have dismissed the abuse allegation at the close of petitioner's evidence will not have any practical effect on this case; and (2) under N.C.G.S. § 1A-1, Rule 41(b), the trial court has the discretion to decline to rule upon a motion to dismiss until the close of all evidence.

2. Child Abuse and Neglect— proper care and supervision— environment injurious to health

Although the trial court did not err by adjudicating the minor child neglected on the grounds that he did not receive proper care and supervision from his father and lived in an environment injurious to his health, it erred by adjudicating that respondent mother neglected the child, because: (1) the trial court's finding that the child had not been appropriately cared for in the past was not supported by clear, cogent, and convincing evidence based upon the parents' habit of placing the child on the sofa without surrounding the infant with pillows or other form of restraint when the infant was unable to roll over and was not otherwise mobile during the prior instances when the parents placed him on the sofa, and further evidence indicated that the child had never missed any appointments with his pediatrician, was developing appropriately, and had no prior injuries; (2) the trial court's finding of fact that respondent was not willing to investigate the needs of the child in a safe environment is not supported by clear, cogent, and convincing evidence when in the one-week allotted time respondent provided DSS with at least four names of individuals who could potentially care for the child; (3) the trial court's findings of fact indicate that respondent was not at home when the child suffered his injuries, she was at the grocery store and summoned medical personnel upon learning of his injuries, and there was no evidence that respondent knew or reasonably

should have known the father would harm the child; and (4) there were no allegations, evidence, or findings of fact related to any of the other bases for a finding of neglect as defined under N.C.G.S. § 7B-101(15).

3. Child Abuse and Neglect— dependency—parent capable of providing care and supervision

The trial court erred by adjudicating the minor child dependent and the portion of the order adjudicating him as such is reversed, because respondent mother neither abused nor neglected the child, and thus, the child had a parent capable of providing care and supervision.

4. Child Abuse and Neglect— custody with DSS—no showing of neglect or dependency

The trial court abused its discretion by ordering the minor child's custody should remain with the Department of Social Services (DSS), because: (1) the trial court erred by finding and concluding that respondent mother neglected her son and by adjudicating the child dependent; (2) the record does not indicate that the mother was unwilling to comply with a trial court order directing that the father not have any contact with the child; and (3) at the time of the hearing, respondent was no longer residing with the father and was complying with the DSS family services case plan.

Judge LEVINSON concurring in a separate opinion.

Appeal by respondent-mother from orders entered 30 April 2004 by Judge Addie Harris Rawls in Johnston County District Court. Heard in the Court of Appeals 24 March 2005.

Holland & O'Connor, by W. A. Holland, Jr. and Jennifer S. O'Connor, for petitioner-appellee Johnston County Department of Social Services; James D. Johnson, Jr. for Guardian ad Litem.

James R. Levinson for respondent-appellee.

Richard Croutharmel for respondent-appellant.

HUNTER, Judge.

Respondent-mother presents the following issues for our consideration: Whether the trial court (I) abused its discretion in denying

her motion to dismiss at the close of petitioner's evidence; (II) erroneously adjudicated her son neglected and dependent; and (III) abused its discretion in ordering the custody of her son to remain with the Johnston County Department of Social Services (hereinafter "DSS"). After careful review, we reverse in part the order below.

The pertinent facts of the instant appeal are as follows: DSS filed a juvenile petition on 30 January 2004 concerning J.A.G., a three-month-old infant. In the petition, DSS alleged J.A.G. was abused, in that he had sustained serious physical injuries by other than accidental means. DSS further alleged J.A.G. was neglected, on the grounds he did not receive proper care and supervision and lived in an environment injurious to his health. The petition also alleged the child to be dependent. The trial court issued a nonsecure custody order the same day.

The case came before the trial court for adjudication on 31 March 2004. The evidence presented at the adjudication hearing tended to show that J.A.G. suffered a severe head injury while in the sole care of his father. J.A.G. had no prior injuries and there were no prior concerns regarding abuse, neglect, or dependency. At the time of his injuries, J.A.G. resided with his mother and father, who were unmarried and unemployed.

On 22 January 2004, J.A.G. was returned home at approximately 5:00 p.m. after spending the previous night with his maternal grandmother. J.A.G. was acting normally and appeared to be fine. The maternal grandmother informed J.A.G.'s mother that she had observed J.A.G. roll over. This was the first time anyone had observed J.A.G. roll over on his own. Later that evening, J.A.G.'s mother went to the grocery store with her sister and niece at approximately 8:30 p.m. J.A.G.'s father remained at home and took care of his son. J.A.G.'s father contended he placed J.A.G. on the sofa and went to the kitchen to prepare a bottle for the child. When the father returned to the sofa, he found the baby on the carpeted floor, lying on his back and crying. The baby's arms and legs began to twitch. After J.A.G. began to twitch, his father called J.A.G.'s mother on her cellular telephone and explained what happened. As J.A.G.'s father did not speak English very well, J.A.G.'s mother called emergency personnel and immediately went home. While awaiting the arrival of the ambulance, J.A.G. began having a seizure. The paramedics determined J.A.G. needed to be airlifted to Pitt Memorial Hospital for assessment and treatment.

Dr. Elaine Cabinum-Foeller testified she assessed J.A.G. and determined that he had a subdural hemorrhage in the front part of his brain, swelling, and a prominent retinal hemorrhage. In her expert opinion, J.A.G's injuries were not consistent with a short fall off of a sofa onto a rug and carpet; rather, his injuries were caused by an inflicted traumatic brain injury. She testified that, due to his injuries, J.A.G. was at risk for developmental problems and that long-term monitoring would be required. A social worker for DSS testified that J.A.G. had no visible external injuries and that he was moving his extremities as would be expected for a child his age (six months old).

While J.A.G. was in the hospital, DSS informed his mother that he would not be allowed to return home and asked for names of individuals who could appropriately care for J.A.G. The mother provided DSS with several names; however, DSS determined none of the potential placements were appropriate, and J.A.G. entered foster care after his discharge from the hospital. Shortly after J.A.G.'s release from the hospital, his father was arrested and charged with felony child abuse.

At the conclusion of the evidence, the trial court entered an order concluding there was clear, cogent, and convincing evidence that J.A.G. "was neglected [and dependent] . . . as it pertains to both parents" and "abused . . . as it pertains to the father[.]" The trial court entered a disposition order placing legal and physical custody of J.A.G. with DSS and relieving DSS of any reunification efforts with the father. The trial court did not cease reunification efforts with the mother, and she was allowed visitation. J.A.G.'s father has not appealed from the orders of adjudication and disposition. Respondent-mother now appeals from the adjudication and disposition orders of the trial court.

I. Motion to Dismiss

[1] Respondent first contends the trial court abused its discretion in denying her motion to dismiss at the close of petitioner's evidence. Respondent moved to dismiss the abuse, neglect, and dependency allegations at the close of petitioner's evidence. After the trial court denied the motion, respondent presented evidence and then renewed her motion to dismiss. The trial court dismissed the abuse allegation, but denied respondent's motion on the remaining allegations. Instead of dismissing the abuse allegation at the close of all evidence, respondent argues the trial court should have dismissed the abuse allegation at the close of petitioner's evidence. We conclude this argument is moot.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). As the trial court dismissed the abuse allegation at the close of all evidence, whether the trial court should have dismissed the abuse allegation at the close of petitioner's evidence will not have any practical effect on this case. Moreover, under Rule 41(b) of the North Carolina Rules of Civil Procedure, the trial court has the discretion to decline to rule upon a motion to dismiss until the close of all evidence.

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his 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 evidence.*

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2003) (emphasis added). We overrule this assignment of error.

II. Adjudication

[2] By further assignment of error, respondent challenges several findings of fact and a conclusion of law regarding the trial court's determination that J.A.G. was neglected. "The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2003). " 'A proper review of a trial court's finding of . . . neglect entails a determination of (1) whether the findings of fact are supported by "clear and convincing evidence," and (2) whether the legal conclusions are supported by the findings of fact.' " *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002) (citations omitted). The "[c]lear and convincing" standard " 'is greater than the preponderance of the evidence standard required in most civil cases.' " *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (citation omitted). Clear and convincing evidence is evidence which should " ' "fully convince." ' " *Id.* (citations omitted).

First, respondent challenges the portion of Finding of Fact 8 which states: "The Court further finds that infarctions suffered by the child is . . . permanent as those brain cells will not regenerate." We

conclude this finding of fact is supported by clear and convincing evidence. Dr. Elaine Cabinum-Foeller, an expert in pediatric medicine and child abuse, testified that J.A.G. had "a[] defuse infarction or an area where the brain had not gotten good oxygen flow or blood supply for a period of time . . . that area of the brain was probably going to die." She explained that with an infarction, part of the brain tissue begins to swell, will become damaged, and will either scar down and/or just go away. The damaged portion of the brain typically will not regenerate. Based upon this expert testimony, the trial court's finding of fact that the areas affected by the infarctions will not regenerate is supported by clear and convincing evidence.

Respondent also argues "the trial court inappropriately found that the parents had neglected in the past to ensure that the child was appropriately cared for." Respondent contends this finding is not supported by clear and convincing evidence because the evidence indicates the infant did not have any prior injuries, was developing appropriately, had only lived in one residence, and had never missed any medical appointments with his pediatrician.

Finding of Fact 10 states in pertinent part:

> The Court further finds that there exists concerns [sic] as to the parents[']' ability to supervise the juvenile based upon a previous instance whereby the child fell out of a swing while under the care of the parents. Based upon the mother's testimony describing the child's previous fall from an infant swing, the Court finds that the fall was minor and that the child was not injured. The Court further finds that the injuries diagnosed on or about January 22, 2004 were not a result of the child falling out of the infant swing. The Court further finds that on or about January 22, 2004, the child did have a crib in the family home, however the crib was not utilized by the father on that occasion and further finds that the parents had previously placed the child on the sofa without appropriate restraint or pillows. The Court further finds that the injuries suffered by the juvenile were not consistent with the child falling off of the sofa and that the parents have neglected in the past to ensure that the juvenile was appropriately cared for.

Our review of the pertinent portion of Finding of Fact 10 indicates the trial court's finding that J.A.G. had not been appropriately cared for in the past was based upon the parents' habit of placing J.A.G. on the sofa without surrounding the infant with pillows or

other form of restraint. Respondent testified that she and J.A.G.'s father generally placed J.A.G. on the sofa with his back or side parallel to the back of the sofa. She also testified that she neither placed any devices on the sofa to prevent J.A.G. from falling off nor placed any pillows in front of the sofa in the event J.A.G. did roll off. However, J.A.G. was unable to roll over, and was not otherwise mobile during the prior instances when the parents placed him on the sofa. Furthermore, it is not unusual for parents to place an immobile infant on a sofa, couch, or bed. The evidence indicates J.A.G. had never missed any appointments with his pediatrician, was developing appropriately, and had no prior injuries. We conclude the finding of fact that the parents had neglected to appropriately care for J.A.G. in the past is not supported by clear and convincing evidence.

Respondent further challenges a portion of Finding of Fact 10, which states: "The Court further finds that while [DSS] was attempting to make a plan of care, the parents were not willing to investigate the needs of the child in [a] safe environment." In Finding of Fact 10, the trial court states:

> [DSS] attempted to work with the parents to identify alternative care arrangements for the juvenile. The mother informed [DSS] that she wanted to contact the relatives before they were explored as placement considerations by [DSS]. At the time of the child's discharge, the parents had provided names to the [DSS] for alternative care, however due to the timing of the parents providing the names to [DSS], [DSS] did not have sufficient time to fully explore those placements prior to the discharge.

The evidence at the hearing tended to show that J.A.G. was in the hospital for one week, 22 January 2004 through 30 January 2004. DSS became involved on 23 January 2004. During the week, DSS discussed with the parents possible relatives who could care for J.A.G. in the event he could not return home upon discharge from the hospital. Respondent provided DSS with the names of two relatives; however, DSS did not approve these relatives as appropriate placements. Respondent then provided at least two additional names, but DSS could not conduct a home study on these individuals prior to J.A.G.'s discharge from the hospital. Thus, in one week, respondent provided DSS with at least four names of individuals who could potentially care for J.A.G., if necessary. Based upon this evidence, we conclude the trial court's finding of fact that respondent was not willing to investigate the needs of the child in a safe environment is not supported by clear and convincing evidence.

Respondent next contends the trial court's findings of fact do not support the conclusion of law that J.A.G. was neglected "as it pertains to both parents[.]" Respondent contends there was no clear and convincing evidence that she neglected her son. A neglected juvenile is one

> who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2003). Here, the trial court concluded "by clear, cogent and convincing evidence that the juvenile was neglected pursuant to [N.C. Gen. Stat. §] 7B-101(15) as it pertains to both parents as the child lived in an environment injurious to his health and welfare and did not receive proper care and supervision." We conclude that, insofar as this conclusion reflects the trial court's determination that respondent neglected her child, it is not supported by the findings of fact.

First, we have already determined the trial court's finding of fact that respondent failed to appropriately care for J.A.G. was not supported by clear and convincing evidence. Second, the evidence and the trial court's findings of fact indicate that respondent was not at the home when J.A.G. suffered his injuries. Indeed, respondent was at the grocery store and summoned medical personnel upon learning of his injuries. Although the father indicated the child was injured by a fall from the sofa, the medical expert opined that J.A.G.'s injuries could not have occurred in that manner and opined his injuries were non-accidental in nature. Respondent's placement of J.A.G. on the sofa during the first few months of his life when he was immobile was therefore not the cause of his injuries and had not led to any prior injuries. Third, the evidence indicates J.A.G. was developing appropriately and had never missed any doctor's appointments. Fourth, there were no allegations, evidence, or findings of fact related to any of the other bases for a finding of neglect as defined in section 7B-101(15) of the General Statutes. Finally, there was no evidence

presented indicating respondent knew or reasonably should have known the father would harm J.A.G. Thus, the trial court erred in finding and concluding that respondent neglected J.A.G.

We note that our determination that the trial court erred in finding and concluding that respondent neglected her child does not alter the trial court's adjudication of J.A.G. as a neglected juvenile. The trial court made detailed findings, many of which respondent has not challenged, based on clear and convincing evidence that J.A.G. sustained a severe head injury as a result of abuse by his father. Thus, we conclude the trial court did not err in adjudicating J.A.G. a neglected child on the grounds he did not receive proper care and supervision from his father and lived in an environment injurious to his health.

[3] Respondent next challenges the trial court's conclusion of law that J.A.G. was dependent. The trial court stated in its order:

> The Court further finds by clear, cogent and convincing evidence that the child is a dependent child pursuant to N.C.G.S. 7B-101(9) as it pertains to both parents, as the parents were unable to provide proper care for the care or supervision [sic] and lacked an appropriate alternative care arrangement at the time of removal.

Under section 7B-101(9) of the North Carolina General Statutes, a dependent juvenile is defined as: "A juvenile 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).

As previously discussed, the trial court's finding of fact that respondent had not appropriately cared for him was not supported by clear and convincing evidence. Similarly, we have concluded the finding of fact that respondent was not willing to investigate the needs of J.A.G. in a safe environment was not supported by clear and convincing evidence. We have also concluded that respondent did not neglect her son. As respondent neither abused nor neglected J.A.G., we conclude J.A.G. was not dependent, because he had a parent capable of providing care and supervision. The trial court therefore erred in adjudicating J.A.G. dependent, and we reverse that portion of the order adjudicating him as such.

III. Disposition

[4] Finally, respondent contends the trial court abused its discretion in its dispositional order by ordering J.A.G.'s custody to remain with DSS. We agree.

We have concluded that the trial court erred in finding and concluding that respondent neglected her son, and in adjudicating J.A.G. dependent. The trial court therefore had no grounds, under the facts and holding of this case, to support its decision to place custody of the child with DSS.

We note, however, that the trial court determined J.A.G. was abused and neglected as to his father; and therefore, the trial court relieved DSS of any efforts at reunification of the father and J.A.G. Indeed, a medical expert opined J.A.G. suffered serious injuries from a non-accidental incident while in the father's sole care. Thus, the trial court and DSS needed to ensure J.A.G. would suffer no further harm by the father. At the time of J.A.G.'s injuries, J.A.G. resided with his mother and father. However, by the time of the hearing, respondent lived with her mother and no longer resided with the father. Although respondent indicated she still believed her son was injured by a fall off of the sofa, the record does not indicate respondent was unwilling to comply with a trial court order directing that the father not have any contact with J.A.G. Indeed, as the trial court adjudicated J.A.G. abused and neglected, the trial court had full authority to order respondent to comply with such a directive. *See* N.C. Gen. Stat. § 7B-904(d1)(3) (2003) (granting the trial court authority to order that a parent of an abused, neglected or dependent child "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication"). At the time of the hearing, respondent no longer resided with the father and was complying with the DSS family services case plan. As there were no grounds to prolong J.A.G.'s removal from the custody of his mother, the trial court abused its discretion in finding and concluding it was in the juvenile's best interest that his custody remain with DSS. We therefore reverse the portion of the order of disposition placing custody of J.A.G. with DSS.

In conclusion, we agree with respondent that the trial court erred in finding and concluding she neglected her child, and we therefore reverse that portion of the adjudication order. We also reverse the adjudication of dependency and the portion of the order of disposition placing custody of J.A.G. with DSS. We otherwise affirm the

order of adjudication. We remand this case to the trial court for proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judge McCULLOUGH concurs.

Judge LEVINSON concurs in a separate opinion.

LEVINSON, Judge concurring.

I concur in the lead opinion, but write separately to explain the unusual appellate posture of this matter more fully, and to comment generally on the trial court's role in adjudicating petitions alleging abuse, neglect, and dependency.

As a preliminary matter, I first review the trial court's conclusions of law and the limited issues preserved for our consideration. The trial court concluded J.A.G. was a dependent juvenile "as to both parents" and, further, that the child was (1) neglected "as to" mother, and (2) neglected and abused "as to" father. Mother's appeal challenges, as unsupported, the conclusion of law that J.A.G. was a dependent juvenile, and that J.A.G. was neglected "as to" her. In making these arguments on appeal, she neither assigns error to, nor argues that (1) many findings related to father's conduct are unsupported by the evidence, or (2) the conclusions of law that J.A.G. was neglected and abused "as to" father are somehow infirm.

In her brief, mother presented the following question for review concerning whether the conclusion of neglect "as to" her could be sustained on appeal:

> Did the trial court commit reversible error and violate Respondent-Mother's substantial rights when it found and concluded that she had neglected the child?

The following is illustrative of mother's arguments on appeal, which focus on whether the juvenile can even attain the status of a neglected juvenile without first considering her own conduct:

> An abuse, neglect or dependency proceeding is inherently a multi-party case involving the petitioner, the respondent-parents, and the child. Thus, treating the outcome only as a conclusion of the child's status is inappropriate. In order for a parent to abuse, neglect, or render dependent a child, there must be

> some nexus between the child's injuries and a parent's act or failure to act.
>
> Here, the evidence showed that Respondent-Mother neither harmed the child nor did she have any idea that [father] could have or would have harmed the child. . . . Borrowing a page from tort law, a master is not responsible for an agent's intentional tort where the agent's act is outside the scope of the master's business, the master has not authorized the agent to act tortiously, and the master has not ratified the agent's tortious act. *Snow v. DeButts*, 212 N.C. 120, 122, 193 S.E. 224, 226 (1937). Likewise, here Respondent-Mother did not condone or authorize an assault on the child, if that is in fact what happened.
>
> One must assume that the trial court believed JAG's injuries were non-accidental and that Respondent-Father was the perpetrator of JAG's injuries. . . . However, . . . there is no evidence showing that Respondent-Mother had previously failed to supervise JAG properly[.]

In support of her argument that the trial court may conclude that a child is abused, neglected, or dependent "as to" a parent, mother cites only *In re McCabe*, 157 N.C. App. 673, 580 S.E.2d 69 (2003). The *McCabe* panel did hold that "there was clear, cogent and convincing evidence to support the trial court's adjudication of neglect and abuse by respondent." *Id.* at 680, 580 S.E.2d at 74 (emphasis added). The fact the *McCabe* panel utilized the words "by respondent" is not persuasive authority that this Court evinced an intention to convert the subject of these adjudications—the status of the juvenile—into an inquiry about the individual or individuals who may or may not have contributed to the circumstances which support the juvenile's status as abused, neglected, or dependent. Moreover, mother's use of master-servant concepts from our body of tort law is, of course, completely inapposite to these juvenile matters.

The trial court's function, when confronted with petitions for abuse, neglect, and/or dependency, is to adjudicate whether the subject juvenile has the status of one or more of these conditions. *See* N.C.G.S. § 7B-101(1) (2003) ("abused juvenile"); N.C.G.S. § 7B-101(9) (2003) ("dependent juvenile"); and N.C.G.S. § 7B-101(15) (2003) ("neglected juvenile"). In doing so, the trial court will oftentimes make findings related to the commission and/or omission of acts on the part of parent(s) or other caretakers. This, however, changes nei-

ther the nature of what the court is adjudicating, nor the central issue on appeal: the juvenile's status. Indeed, the presence or absence of culpability of a particular parent or other caretaker in an adjudication of abuse, neglect, or dependency is not necessarily associated with whether the statutory thresholds of these conditions are present. *Compare* N.C.G.S. § 7B-1111 (2003) (in termination of parental rights proceeding, petitioner must prove that the parent's individual conduct satisfies one or more grounds). Alternatively stated, it doesn't necessarily matter who did what. This has long been the law in North Carolina:

> In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent.

In re Montgomery, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) (discussing neglect generally). In my view, the same holds true of adjudications of abuse and dependency.

Frankly, it is as unsound for adjudications to be "as to" any parent or caretaker, as it is equally clear that findings concerning persons' individual responsibility or culpability are relevant to the disposition. In short, mother's argument, that "for a parent to abuse, neglect, or render dependent a child, there must be some nexus between the child's injuries and a parent's act or failure to act[,]" misses entirely the nature of these adjudication proceedings. Accepting mother's argument would amount to recasting adjudications into hearings about the adult caretakers in J.A.G.'s life when these "*In re*" proceedings are, instead, about the conditions and circumstances surrounding the child. In her brief, mother boldly asserts that "treating the outcome only as a conclusion of the child's status is inappropriate." This contention is, in my view, simply contrary to the law of North Carolina.

When a parent takes an appeal from the order on adjudication and disposition of a petition alleging abuse, neglect, and/or dependency, and she challenges the adjudicatory conclusions of law, it necessarily follows that the status of the juvenile is before this Court irrespective of whether the same depended, in part or in full, on the appealing parent's individual conduct. Notwithstanding the dual "as to" conclusions of law by the trial court in the instant case, mother could nonetheless have challenged all the findings of fact and conclusions of law in the order on adjudication and disposition.

Fashioning adjudication orders on abuse, neglect, and dependency "as to" anyone misapprehends our juvenile statutes. In my view, the words "as to" are nothing more than surplusage. Our trial courts should avoid fashioning adjudication orders in this way and should, instead, continue to follow the paramount practice of not concluding juveniles are anything "as to" anyone. Although our panel endeavored to resolve the issue of whether mother's conduct contributed to the status of neglect in this appeal, subsequent appeals that do not fully preserve for appellate review the juvenile's status as abused, neglected, or dependent may yield dismissals by this Court.

Finally, I review the status of this juvenile matter. In addition to reversing the trial court's conclusion that mother's conduct contributed to the circumstances giving rise to J.A.G.'s status as a neglected juvenile, this Court has also reversed the court's conclusion that J.A.G. was a dependent juvenile. The findings of fact that we have concluded are unsupported by the evidence, and the conclusions of law reversed by this Court, cannot be utilized in later juvenile proceedings to collaterally establish any one or more of these things. J.A.G. retains his status as an abused and neglected juvenile by virtue of conclusions of law that are not challenged on appeal. Moreover, while I have agreed with my colleagues that the current record on appeal only supports the return of custody of J.A.G. to mother, it is also my view that, because the order of disposition was based, in large measure, on findings and conclusions of law that have now been reversed on appeal, the trial court should necessarily be directed to enter a new disposition order after giving all persons an opportunity to be heard. Significantly, though, in reversing the order of disposition insofar as it continued custody of J.A.G. with DSS, this Court has not held that the trial court either lacks jurisdiction over this child, *see* N.C.G.S. § 7B-201 (2003), or that it does not still have the authority and means to fashion a new dispositional order and subsequent custody review orders that comport with the best interests of the juvenile. *See* N.C.G.S. § 7B-903 (2003) (dispositional alternatives); N.C.G.S. § 7B-1000 (2003) (modification); N.C.G.S. § 7B-906 (2003) (custody review).

STATE OF NORTH CAROLINA v. NATHAN NORWOOD NORRIS, JR.

No. COA04-574

(Filed 16 August 2005)

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

Defendant's assignments of error that were not argued in his brief are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

2. Arson— first-degree—charring—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree arson, because: (1) the residence in the instant case was described as a double-wide mobile home with a vinyl exterior, and the melting of vinyl constitutes a change in the identity of the material beyond a mere scorching or discoloration by heat; (2) evidence tending to show that the vinyl on the exterior of a residence is melted substantiates the charring element of arson; and (3) the owner of the residence testified that she could see flames out her window and an investigator noted damage to the residence including smoke damage and charring.

3. Arson— first-degree—instruction—attempted arson

The trial court did not err in a first-degree arson case by denying defendant's request for a jury instruction on attempted arson, because: (1) there was sufficient evidence from which the jury could find that there was an actual burning of the residence; and (2) there was no evidence presented at trial from which the jury could find an attempt to burn the house which failed.

4. Sentencing— presumptive range—failure to submit aggravating factor to jury—*Blakely* error

The trial court erred in a first-degree arson case by failing to submit the aggravating factor to the jury that the offense created a great risk of death to more than one person even though it sentenced defendant in the presumptive range after balancing the aggravating and mitigating factors, and the case is remanded for resentencing, because: (1) the Court of Appeals is unable to speculate whether the jury would have found the aggravating factor found by the trial court; (2) assuming arguendo that the jury did not find the aggravating factor, the trial court would then be left to balance only the three mitigating factors it found; and (3) although the trial court would retain the discretion to sentence

defendant in the presumptive range despite the presence of the mitigating factors, there is the possibility that defendant might be sentenced in the mitigated range due to the absence of aggravating factors.

Judge STEELMAN concurring in part and dissenting in part.

Appeal by defendant from judgment entered 3 October 2003 by Judge Gary L. Locklear in Robeson County Superior Court. Heard in the Court of Appeals 12 January 2005.[1]

Attorney General Roy Cooper, by Assistant Attorney General James C. Holloway, for the State.

Nora Henry Hargrove for defendant-appellant.

TIMMONS-GOODSON, Judge.

Nathan Norwood Norris, Jr. ("defendant"), appeals his conviction for first-degree arson. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error, but we remand the case for resentencing.

The State's evidence presented at trial tends to show the following: On 29 January 2003, defendant's wife, Jessica Wood ("Jessica"), told defendant that she no longer loved him and that she wanted to separate and move in with her mother, Peggy Wood ("Peggy"). That evening, defendant drove Jessica to Peggy's residence. Defendant and Jessica argued during the drive. As Jessica was exiting defendant's automobile, defendant told her, "If I was you, I'd sleep light tonight."

At approximately 1:30 a.m. the next morning, Peggy awoke to the sound of an "explosion" outside her residence. Peggy observed flames through her bedroom window and evacuated all occupants from the residence. Robeson County Sheriff's Department Investigator Rory McKeithan ("Investigator McKeithan"), an arson investigator, responded to a call regarding a fire at Peggy's residence. Upon arriving at the scene, Investigator McKeithan parked his automobile approximately fifty yards from the residence. As he approached the residence, Investigator McKeithan smelled a "strong odor of what appeared to be gasoline." The odor intensified as Investigator McKeithan neared the residence.

1. By order of this Court, the filing of this opinion was delayed pending our Supreme Court's decision in *State v. Allen*, 359 N.C. 425, —— S.E.2d —— (Filed 1 July 2005) (No. 485PA04).

Investigator McKeithan interviewed Jessica and Peggy inside Peggy's residence. During the interview, Peggy's telephone rang. Peggy answered the telephone and told Investigator McKeithan that it was defendant calling. Investigator McKeithan spoke to defendant on the telephone and explained that he needed to interview defendant about the fire. Defendant told Investigator McKeithan that he could not have been at the residence that evening because he had been drinking all day, had passed out, and had awoken just before making the telephone call.

After Investigator McKeithan finished gathering evidence, he returned to the Robeson County Sheriff's Office. Defendant was brought in for questioning, and, after advising him of his rights, Investigator McKeithan interviewed defendant. Defendant's statement to Investigator McKeithan contains the following pertinent narration:

> On the way back to Lumberton, Jessica told me that she did not love me any more and that she did not want to be with me any more. I asked how she could want to end this marriage when we had been together for four years. Jessica looked as if she didn't care.
>
> . . . .
>
> I took Jessica back to her mother's house . . . . When we arrived at Peggy's house, I called Jessica a bitch. I also told Jessica on the way . . . that she better sleep light tonight. I then laughed and said that she was just not worth it.
>
> . . . .
>
> When I arrived in St. Pauls, I went to the Amoco Gas Station on Highway 20 and purchased four dollars worth of gas for my van. I had a plastic 20 ounce Coca-Cola bottle in my van. I filled the bottle half full of gasoline. I put the bottle in the van.
>
> I then drove to Peggy's house and parked the van on a dirt road beside her house. I got the bottle of gas from the van and walked to Peggy's house. I went to the side of Peggy's house and poured the gasoline on the side of her home. I then took a lighter and set the gas on fire. The fire flamed up and I got scared and ran.
>
> As I ran away, I looked back and saw flames. Then the flames looked as if they had died down. I was scared. I got back in my van and drove back to Lumberton.
>
> . . . .

I told the police officer that I did not know what was going on. I was trying to play stupid. I told the officer that I had been drinking all day and that I had passed out. Then the police returned and picked me up.

On 5 May 2003, defendant was indicted for the first-degree arson of Peggy's residence. Defendant's trial began the week of 30 September 2003. The State presented testimony from Jessica, Peggy, and Investigator McKeithan, who read defendant's statement into evidence. Defendant presented no evidence. On 3 October 2003, the jury found defendant guilty of first-degree arson. The trial court subsequently found as an aggravating factor that, during the commission of the offense, defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. As mitigating factors, the trial court found that defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer prior to arrest, that defendant had a support system in the community, and that defendant had a positive employment history or was gainfully employed. After concluding that the aggravating and mitigating factors balanced one another out, the trial court sentenced defendant to fifty-one to seventy-one months imprisonment, a term within the presumptive range. Defendant appeals.

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[1] As an initial matter, we note 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 assignments of error properly preserved by defendant for appeal.

The issues on appeal are whether the trial court erred: (I) by denying defendant's motion to dismiss; (II) by denying defendant's request for a jury instruction on attempted arson; and (III) in sentencing defendant.

[2] Defendant first argues that the trial court erred by denying his motion to dismiss the charge of first-degree arson. Defendant asserts that the State failed to produce sufficient evidence tending to show that the residence was burned. We disagree.

In ruling on a motion to dismiss, "the trial court must determine whether there is substantial evidence of each element of the offense charged . . . ." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387

(1984). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The trial court must consider the evidence in the light most favorable to the State, granting the State the benefit of every reasonable inference. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

Arson is a common law crime, and has been defined as "the willful and malicious burning of the dwelling house of another person." *State v. Eubanks*, 83 N.C. App. 338, 339, 349 S.E.2d 884, 885 (1986). Where the building is occupied at the time of the burning, the offense is first-degree arson. N.C. Gen. Stat. § 14-58 (2003). Similarly, where the building is a "mobile home or manufactured-type house or recreational trailer home which is the dwelling house of another and which is occupied at the time of the burning, the same shall constitute the crime of arson in the first degree." N.C. Gen. Stat. § 14-58.2 (2003).

> [S]ome portion of the [building] itself, in contrast to its mere contents, must be burned to constitute arson; however, the least burning of any part of the building, no matter how small, is sufficient, and it is not necessary that the building be consumed or materially damaged by the fire.

State v. Oxendine, 305 N.C. 126, 129, 286 S.E.2d 546, 548 (1982). In order for a building to be "burned" within the definition of arson, the building must be " 'charred, that is, when the wood is reduced to coal and its identity changed, but not when merely scorched or discolored by heat.' " *Id.* (quoting *State v. Hall*, 93 N.C. 571, 573 (1885)).

In *Oxendine*, the defendant argued that the State produced insufficient evidence to show he burned the structure, rather than the interior, of a residence. On appeal, our Supreme Court noted that evidence was introduced at trial tending to show that the fire was accompanied by a large amount of smoke, was visible from the highway, and was responsible for the loosening of the building's electrical wiring. 305 N.C. at 130, 286 S.E.2d at 548. The Court concluded that from this evidence alone, "one could reasonably infer that the fire inside the house was substantial enough to cause *at least some charring* of the structure[.]" *Id.* (emphasis in original). The Court noted that the State's case was "further strengthened" by testimony that the curtains of the building were burned, that dark or burned patches appeared on the wall, that the wallpaper was burned, that there was a heavy odor of kerosene in the area, and that smoke was present throughout the building. *Id.* The Court concluded that

> Surely, this evidence plainly showed that the dwelling itself, and not merely something in it (the curtains), had been burned. It is difficult to perceive how dark, *burned* patches could appear on a wall absent the prior incidence of at least minor charring of that wall's substantive material. Defendant's additional argument that the presence of burnt wallpaper in the dwelling had no rational tendency to indicate the charring of the building's structure simply defies good sense and logic. Wallpaper affixed to an interior wall is unquestionably a part of the dwelling's framework. If the wallpaper is burning, it would perforce suggest that the house is also burning. Hence, we hold that where, as here, the evidence discloses that the wallpaper in a dwelling has been *burned*, it competently substantiates the charring element of arson.

Id. at 130-31, 286 S.E.2d at 548-49 (footnotes omitted) (emphasis in original).

In the instant case, Peggy's residence was described at trial as a double-wide mobile home with a vinyl exterior. Peggy testified that a "poof, explosion" woke her up the morning of the incident, and that she could "see the flames" which "burnt" her residence. Investigator McKeithan testified to the presence of a strong odor of gasoline in the area of the residence, and he noted "damage to the left end" of Peggy's residence. Investigator McKeithan testified that "[f]ire and smoke damage had occurred" to Peggy's residence, as well as charring. The State presented photographs of the residence taken the day after the fire. During defense counsel's argument regarding the motion to dismiss, the trial court reviewed the photographs and noted the following:

> I don't know if you can tell from those photographs that the wood was burned. . . . But unless my eyes are deceiving me, I guess you would say wood chars, vinyl melts away when it is heated under a flame or intense heat. And I think melting in this instance is the equivalent of charring.

In light of *Oxendine*, we conclude that, when viewed in the light most favorable to the State, the evidence in the instant case tends to show that Peggy's residence was burned within the common law meaning of arson. The melting of vinyl constitutes a change in the identity of the material beyond a mere scorching or discoloration by heat. Thus, evidence tending to show that the vinyl on the exterior of a residence is melted substantiates the charring element of arson. Furthermore, as detailed above, Peggy testified that

she could see flames out her window, and Investigator McKeithan noted damage to Peggy's residence, including smoke damage and charring. Therefore, in light of the foregoing, we conclude that the trial court did not err by denying defendant's motion to dismiss the charge of first-degree arson.

[3] Defendant next argues that the trial court erred by denying his request for a jury instruction on attempted arson. Defendant asserts that the evidence introduced at trial required that the trial court instruct the jury on the lesser-included offense. We disagree.

In *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982), the defendant was convicted for the first-degree arson of a residence occupied by his wife and three nieces. On appeal, the defendant sought a new trial because the trial court denied his request to instruct the jury on attempted arson. The Supreme Court noted that "[w]here there is evidence of defendant's guilt of a lesser degree of the crime set forth in the bill of indictment, the defendant is entitled to have the question submitted to the jury . . . ." *Id.* at 338, 289 S.E.2d at 331 (citing *State v. Moore*, 300 N.C. 694, 268 S.E.2d 196 (1980)). However, with respect to arson, the Court concluded that

> If there [i]s sufficient evidence from which the jury could find that there was an actual "burning" of the [victim's] house, and if there is *no* credible evidence from which the jury could find an attempt to burn which failed, [the] defendant would not be entitled to an instruction on the lesser included offense of attempt to commit arson.

305 N.C. at 339, 289 S.E.2d at 332 (footnote omitted) (emphasis in original).

In the instant case, based on the evidence detailed above—including the melting of the vinyl siding discussed *supra*—there was sufficient evidence from which the jury could find that there was an actual burning of Peggy's residence. Furthermore, there was no evidence presented at trial from which the jury could find an attempt to burn the house which failed. As the Court noted in *Shaw*, " '[t]he trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of [the] defendant's guilt of such lesser degrees.' " *Id.* at 342, 289 S.E.2d at 333 (quoting 4 N.C. Index 3d, Criminal Law § 115 (1976)). Accordingly, in light of *Shaw* and the record in the instant case, we conclude that the

trial court did not err by refusing to instruct the jury on the lesser-included offense of attempted arson.

[4] In his brief as well as in a motion for appropriate relief filed with his appeal, defendant argues that the trial court erred in sentencing him. Defendant asserts that his sentence should be remanded due to the trial court's failure to submit the aggravating factor to the jury for proof beyond a reasonable doubt. We agree.

In *State v. Allen*, 359 N.C. 425, —— S.E.2d —— (2005), our Supreme Court recently examined the constitutionality of North Carolina's structured sentencing scheme in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). After reviewing the applicable case law, the Court in *Allen* concluded that, when "[a]pplied to North Carolina's structured sentencing scheme, the rule of *Apprendi* and *Blakely* is: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." 359 N.C. at 437, —— S.E.2d at —— (citing *Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 413-14; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455; N.C. Gen. Stat. §§ 15A-1340.13, 15A-1340.14, 15A-1340.16, 15A-1340.17). In the instant case, as detailed above, following defendant's conviction for first-degree arson, the trial court found as an aggravating factor that, during the commission of the offense, defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. As mitigating factors, the trial court found that defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer prior to arrest, that defendant had a support system in the community, and that defendant had a positive employment history or was gainfully employed. After balancing the aggravating and mitigating factors, the trial court concluded that "both aggravating and mitigating factors balance out one another," and it therefore sentenced defendant in the presumptive range. We conclude that the trial court erred.[2]

2. Defendant also asserts that the trial court erred by finding the aggravating factor because the State failed to allege it in defendant's indictment. However, our Supreme Court expressly rejected a similar assertion by the defendant in *Allen*. 359 N.C. at 438, —— S.E.2d at —— (overruling language in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), "requiring sentencing factors which might lead to a sentencing enhancement to be alleged in an indictment[,]" finding no error in the State's failure to include aggravating factors in the defendant's indictment, and noting that in *State v.*

We note that in *Allen*, the Court provided the following pertinent limitation to its holding:

> We emphasize that *Blakely*, which is grounded in the Sixth Amendment right to jury trial, affects only those portions of the Structured Sentencing Act which require the sentencing judge to consider the existence of aggravating factors not admitted to by a defendant or found by a jury and which permit the judge to impose an aggravated sentence after finding such aggravating factors by a preponderance of the evidence. *Those portions of N.C.G.S. § 15A-1340.16 which govern a sentencing judge's finding of mitigating factors and which permit the judge to balance aggravating and mitigating factors otherwise found to exist are not implicated by Blakely and remain unaffected by our decision in this case.*

359 N.C. at 439, —— S.E.2d at —— (emphasis added). However, we are not convinced that the circumstances of the instant case are implicated by the above-quoted limiting language. Defendant's appeal asks us to decide whether a defendant sentenced in the presumptive range after a balancing of aggravating and mitigating factors is nevertheless prejudiced by the trial court's failure to submit the aggravating factor or factors to the jury for proof beyond a reasonable doubt. The issue does not involve the general ability of the trial court to balance properly found aggravating and mitigating factors, which we recognize remains a discretionary decision. *Id.* at 439, —— S.E.2d at ——. Instead, the issue involves a "structural error" by the trial court, whereby the "safeguards [for] participation of jurors in sentencing" are affected. *Id.* at 440, —— S.E.2d at ——.

In the instant case, the trial court found that defendant knowingly created a great risk of death to more than one person by means of a hazardous weapon or device. This determination was made unilaterally, without first submitting the issue to the jury for proof beyond a reasonable doubt. The State emphasizes that defendant was nevertheless sentenced in the presumptive range, and that therefore the trial court's failure to submit the aggravating factor to the jury was effectively cured by defendant's sentence in the presumptive—and admittedly constitutionally-approved—range. However, we are not

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Hunt, "[T]his Court concluded that 'the Fifth Amendment would not require aggravators, even if they were fundamental equivalents of elements of an offense, to be pled in a state-court indictment.' " (quoting *State v. Hunt*, 357 N.C. 257, 272, 582 S.E.2d 593, 603, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003)). Accordingly, defendant's assertion in the instant case is overruled as well.

convinced that the ultimate disposition of the case cured the underlying Sixth Amendment error. Instead, we note the similarities of the State's argument and the "harmless error" argument our Supreme Court refused to apply to sentencing errors in *Allen*. Recognizing that " '[s]peculation on what juries would have done if they had been asked to find different facts' is impermissible," the Court held that " '[h]armless error analysis cannot be conducted on *Blakely* Sixth Amendment violations.' " 359 N.C. at 448, —— S.E.2d at —— (quoting *State v. Hughes*, 154 Wash. 2d 118, 148, 110 P.3d 192, 208 (2005)) (alterations in original).

We conclude that the same reasoning applies to the instant case. Just as the Court in *Allen* was unable to speculate as to whether the jury would have found the aggravating factor at issue, this Court is unable to speculate whether the jury would have found the aggravating factor found by the trial court in the instant case. Assuming *arguendo* that the jury did not find the aggravating factor, the trial court would then be left to "balance" only the three mitigating factors it found. Although the trial court would retain the discretion to sentence defendant in the presumptive range despite the presence of the mitigating factors, we are nevertheless persuaded by the possibility that defendant might be sentenced in the mitigated range due to the absence of aggravating factors.

Defendant's sentence in the presumptive range for first-degree arson—based in part upon a unilateral finding that the offense created a great risk of death to more than one person—contains the same defect as a sentence in the aggravated range based upon a unilaterally found aggravating factor. In both situations, the trial court violated a defendant's Sixth Amendment right by failing to submit for jury determination a factor which permitted the trial court to impose a longer sentence than that set forth in the provisions defining the underlying offense. Thus, after reviewing the record and circumstances of the instant case, we conclude that defendant is entitled to a new sentencing hearing, notwithstanding the trial court's decision to sentence him the presumptive range. On remand, the trial court is instructed to submit any factor in aggravation to the jury for proof beyond a reasonable doubt. Following the jury's determination, the trial court may then balance the properly found aggravating and mitigating factors in accordance with the discretion granted it by N.C. Gen. Stat. § 15A-1340.16.

In light of the foregoing conclusions, we hold that defendant received a trial free of prejudicial error, but we remand the case for resentencing.

No error at trial; remanded for resentencing.

Judge HUDSON concurs.

Judge STEELMAN concurs in part and dissents in part.

STEELMAN, Judge concurring in part and dissenting in part.

I fully concur with the majority opinion as to the first two issues discussed. However, I must respectfully dissent as to the third issue.

I. Question Presented

Whether the holdings in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004) and *State v. Allen*, 359 N.C. 425, ––– S.E.2d ––– (2005) apply when the trial judge imposes a sentence from the presumptive range under North Carolina's Structured Sentencing Act (Article 81B of Chapter 15A).

II. Decision in *Blakely v. Washington*

In *Blakely*, the United States Supreme Court held it was a violation of the Sixth Amendment to the United States Constitution for a judge to impose a sentence in excess of the "statutory maximum" sentence based on facts which were neither admitted by the defendant nor found by a jury. 542 U.S. at ––, 159 L. Ed. 2d at 413-15. Writing for the Court, Justice Scalia stated: "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at ––, 159 L. Ed. 2d at 413.

In *Allen*, our Supreme Court stated:

> "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence[s] within statutory limits in the individual case."

Allen, 359 N.C. at 435, —— S.E.2d at —— (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 481, 147 L. Ed. 2d 435, 449 (2000)).

I would hold that neither *Blakely* nor *Allen* are implicated unless the trial judge imposes a sentence in excess of the statutory maximum based upon facts which were neither admitted by defendant nor found by a jury. Since the trial court in this case sentenced defendant from the presumptive range, neither *Blakely* nor *Allen* should be applied to require a new sentencing hearing.

III. North Carolina's Structured Sentencing Scheme

N.C. Gen. Stat. § 15A-1340.16(c) (2005) provides: "The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)." Our courts have consistently held that our General Assembly intended for the trial court to take into account factors in aggravation or mitigation *only* when a presumptive range sentence is not imposed. *State v. Campbell*, 133 N.C. App. 531, 542, 515 S.E.2d 732, 739 (1999) (citing *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997)). The trial judge has the discretion to impose a presumptive range sentence in any case regardless of the number or quality of aggravating or mitigating factors presented. Our appellate courts have consistently refused to review aggravating or mitigating factors when the trial court imposed a presumptive range sentence. *See e.g. Campbell*, 133 N.C. App. at 542, 515 S.E.2d at 739; *State v. Taylor*, 155 N.C. App. 251, 267, 574 S.E.2d 58, 69 (2002). In *State v. Streeter*, this Court specifically rejected the defendant's argument that the imposition of a presumptive range sentence violated his due process and equal protection rights where there were uncontroverted statutory mitigating factors present. 146 N.C. App. 594, 599, 553 S.E.2d 240, 243 (2001).

In this case, after considering all the evidence presented at the sentencing hearing, the trial judge imposed a sentence from the presumptive range. The majority opinion reasons that a jury might not have found an aggravating factor and therefore, there was a "possibility that defendant might be sentenced in the mitigating range due to the absence of aggravating factors." I submit that not only is this mere speculation, but is also irrelevant. The trial judge had discretion to sentence defendant from the presumptive range regardless of whether he found any aggravating factors present. This would be true no matter whether the aggravating factor was presented to

the judge alone or to the jury under the provisions of N.C. Gen. Stat. § 15A-1340.16.[3] In amending this statute to comply with *Blakely*, the General Assembly preserved the trial court's discretion to sentence defendant from the presumptive range. The only changes provided for were a different burden of proof and a different fact finder for aggravating factors. It is solely in the trial court's discretion to depart from the presumptive range.

The majority opinion starts the appellate courts down a slippery slope, which will require appellate review of each aggravating and mitigating factor and their balancing by the trial judge, even in cases where a presumptive sentence is imposed. Such an approach is contrary to the legislative intent of Structured Sentencing and binding case precedent of this state.

I would find no error in both the trial and sentencing of defendant in this matter.

STATE OF NORTH CAROLINA v. BRIAN KEITH MURPHY

No. COA04-344

(Filed 16 August 2005)

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

Defendant's assignments of error that were not argued in his brief are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

2. Evidence— expert opinion testimony—injuries not an accident

The trial court did not err in a first-degree murder case by denying defendant's motion to exclude testimony from medical experts that the minor child's head injuries could not have been the result of an accident, because: (1) a medical expert may testify that the wounds presented are inconsistent with accidental origin; and (2) both experts based their opinions upon their years of experience as pathologists during which they performed and consulted on numerous autopsies.

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3. The General Assembly amended the previous version of the Structured Sentencing Act in order that it conform to the United States Supreme Court's decision in *Blakely v. Washington.* 2005 N.C. Sess. Laws 145.

3. Evidence— character—peacefulness

The trial court did not err in a first-degree murder case by limiting testimony regarding defendant's interaction with other children where defendant attempted to show specific acts of nonviolence toward other children, because: (1) although defendant's allegedly peaceable character was pertinent to the charge of first-degree murder, neither defendant's character nor a trait of his character was an essential element of the charge or defendant's defense; and (2) elicitation of evidence regarding defendant's character during direct testimony must have been accomplished via opinion or reputation testimony rather than specific instance testimony.

4. Homicide— inference of malice—blows to child's head

The trial court did not err by instructing the jury in a homicide case that "malice may be inferred from evidence that the victim's death was done by an attack by hand alone without the use of other weapons, where the attack was made by a mature man upon a defenseless infant" where the evidence at trial tended to show that defendant was a twenty-eight-year-old male and the victim was a three-year-old child who was suffering from a broken collarbone, and that the child received multiple traumatic blows to the head which were intentionally inflicted while the child was in defendant's care.

5. Sentencing— aggravating factors not submitted to jury— *Blakely* error

The trial court erred by sentencing defendant for second-degree murder in the aggravated range because: (1) the aggravating factors that the victim of the crime was very young, that defendant took advantage of a position of trust or confidence to commit the offense, and that defendant was absent without leave from the United States Army at the time of the offense were not submitted to the jury; and (2) harmless error analysis cannot be conducted on *Blakely* Sixth Amendment violations.

Appeal by defendant from judgment entered 28 July 2003 by Judge W. Douglas Albright in Rockingham County Superior Court. Heard in the Court of Appeals 18 November 2004.[1]

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1. By order of this Court, the filing of this opinion was delayed pending our Supreme Court's decision in *State v. Allen*, 359 N.C. 425, —— S.E.2d —— (Filed 1 July 2005) (No. 485PA04).

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for the State.

Megerian & Wells, by Franklin E. Wells, Jr., for defendant-appellant.

TIMMONS-GOODSON, Judge.

Brian Keith Murphy ("defendant") appeals his conviction for second-degree murder. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error, but we remand the case for resentencing.

The State's evidence presented at trial tends to show the following: During November 2002, defendant and Michelle May ("Michelle") shared a residence with Michelle's two children, three-year-old Brian ("Brian") and six-year-old Blair ("Blair"). On 4 November 2002, defendant was babysitting Brian while Michelle was at work. At approximately 1:00 p.m., defendant went to Brian's room and discovered that Brian was wrapped in the covers of his bed and was not moving. Defendant noticed that Brian's lips were blue and that Brian had no pulse and was not breathing. After unsuccessfully attempting to revive Brian via CPR, defendant called 9-1-1 and informed the emergency operator that Brian had suffocated.

At approximately 1:04 p.m., Emergency Medical Technician James Cockrill ("Cockrill") arrived at defendant's residence. Cockrill immediately initiated CPR on Brian and asked defendant "how long he had been down." Defendant responded that Brian had laid down in bed at 9:00 a.m. that morning, and that after defendant had heard "gurgling" coming from Brian's bedroom, he discovered Brian "twisted up in a blanket on the bed." Cockrill noticed that Brian had a large bruise on his left jaw and several bruises on his shoulder. Defendant informed Cockrill that the bruises were from prior injuries. A short time later, several other emergency responders arrived at the scene. Brian was placed in an ambulance and transported to an area hospital, but medical personnel were unable to revive him.

Rockingham Sheriff's Department Deputy Mark Kennon ("Deputy Kennon") was the first law enforcement official to arrive at defendant's residence. Deputy Kennon encountered defendant as he attempted to follow the ambulance to the hospital, and Deputy Kennon informed defendant that he needed to gather some information regarding the incident. Defendant told Deputy Kennon that at

approximately 9:00 a.m., defendant assisted Brian in using the restroom and then followed Brian back into his bedroom, where he watched Brian return to bed. Defendant informed Deputy Kennon that he then returned to the living room of the residence, where he slept until approximately 12:00 p.m. At approximately 12:00 p.m., defendant went to Brian's bedroom and discovered Brian covered in blankets and unresponsive. Defendant told Deputy Kennon that before calling the emergency operator, he tried unsuccessfully to revive Brian via CPR.

After defendant related the story to Deputy Kennon, Rockingham County Sheriff's Department Detective Phillip Smith ("Detective Smith") arrived at defendant's residence. At approximately 4:00 p.m., Detective Smith drove defendant to the Detective Division of the Sheriff's Department, where defendant would be able to provide a formal statement of the events and answer more questions. Following their arrival at the Detective Division, defendant and Detective Smith were joined by Rockingham County Sheriff's Department Lieutenant Perry Brookshire ("Lieutenant Brookshire"), who had questioned defendant earlier at his residence. Lieutenant Brookshire advised defendant of his *Miranda* rights and informed defendant that he was not under arrest and could leave at any time. The officers then began questioning defendant regarding the incident.

During the ensuing interview, defendant initially recounted the version of the incident he provided to the officers at his residence. However, after approximately an hour and a half of questioning, defendant "broke down and started crying[,]" and thereafter provided a second version of the incident. In his second version of the incident, defendant stated that at approximately 7:15 a.m., he heard Brian "call out" from his room. Defendant went into Brian's room and picked Brian up under his arm and around his waist. Defendant stated that he then "dropped [Brian] and tried to catch him [but] [a]ll [he] got was [Brian's] ankles and [he] yanked [Brian], trying to keep him from hitting the floor." Defendant stated that Brian's head "hit the floor twice[,]" and when defendant "tried to catch it, it was like a whipping effect that caused his head to hit the floor." Defendant then "picked [Brian] up by his thighs" and noticed that Brian "looked like he was out of breath." Defendant took Brian into the living room of the residence, where he examined Brian for injuries. After seeing no injuries, defendant "asked [Brian] several times if he was okay and he said unhuh." At approximately 9:00 a.m., defendant took Brian to his room, placed Brian in bed, and covered him up. At approximately 12:45

p.m., defendant returned to Brian's room and "tried [unsuccessfully] to wake Brian up."

In a letter sent to Michelle on 4 December 2002, defendant provided a third version of the incident. In the letter, defendant purported to tell Michelle "[t]he real truth about what happened that day." The letter explains that after he helped Brian use the restroom, defendant started telling Brian "I'm going to get you! [G]oing to get ya!" like he "always" did. However, while he was chasing Brian down the hall, Brian "suddenly stopped, or tr[i]ed to stop and turn around." In the letter, defendant states that when Brian tried to stop, Brian "fell back and fell down." Defendant then provides the following explanation for Brian's injuries:

> I heard him hit his head when he fell back on the floor. Well when he turned and fell I was right on top of him, and I meant to take a short step so I could leap over him but I misjudged where he was because I was worried about me falling forward, and I stepped right on his mid section. I didn't see where because I wasn't looking down but I know it was his mid section. . . . I picked him up [and] held him, and sat down on the couch with him. I didn't think that I had stepped on him that hard. Well I held him until he stopped crying[.] . . . I kept asking him if he was O.K. and he keep telling [me] uh-uh (yes), like he did. So I ask him if he wanted to lay back down, and he said he did so he got back [in bed and] I went back into the living room. . . . Michelle, at no time did I think he was badly injured or he was at any risk when I put him back to bed. Believe me I was as shocked as anyone, but I did do everything I could to save him.

On 3 February 2003, defendant was indicted for the first-degree murder of Brian. Defendant's trial began the week of 21 July 2003. Prior to trial, defendant moved the trial court to suppress the State's medical experts' conclusions and opinions regarding Brian's injuries. Specifically, defendant objected to the experts' statements that Brian's injuries were intentionally inflicted and were not accidental. The trial court denied defendant's motion, and the case proceeded to trial.

At trial, defendant testified that his third version of the incident was a true account of the events, and that he told Detective Smith and Lieutenant Brookshire the second version of the incident after they "kept telling [him] that if it was an accident there would be nothing wrong with that; [he] would be free to go." Following the close of all

the evidence, the trial court instructed the jury regarding both first-degree and second-degree murder. On 28 July 2003, the jury found defendant guilty of second-degree murder. The trial court subsequently found as aggravating factors: (i) that the victim of the crime was very young; (ii) that defendant took advantage of a position of trust or confidence to commit the offense; and (iii) that defendant was absent without leave from the United States Army at the time of the offense. As a mitigating factor, the trial court found that defendant had a good reputation in the community in which he lived. After concluding that the aggravating factors outweighed the mitigating factor, the trial court sentenced defendant to 192 to 240 months imprisonment. 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. 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 assignments of error properly preserved by defendant for appeal.

The issues on appeal are: (I) whether the trial court erred by denying defendant's motion to exclude testimony from medical experts; (II) whether the trial court erred by limiting testimony regarding defendant's interaction with other children; and (III) whether the trial court erred in instructing the jury.

[2] Defendant first argues that the trial court erred by denying his motion to exclude testimony from the State's medical experts. Defendant asserts that the medical experts should have been prohibited from testifying that, in their opinion, Brian's injuries could not have been the result of an accident. We disagree.

The Rules of Evidence allow an expert witness to offer testimony in the form of opinion, even if it embraces the ultimate issue to be decided by the factfinder. N.C. Gen. Stat. § 8C-1, Rules 702, 704 (2003). "Expert testimony as to a legal conclusion or standard is inadmissible, however, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the expert witness." *State v. Jennings*, 333 N.C. 579, 598, 430 S.E.2d 188, 196, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993).

In the instant case, Dr. Deborah Radisch ("Dr. Radisch"), a forensic pathologist who performed an autopsy on Brian, testified to several head injuries sustained by Brian prior to his death. Dr. Radisch testified in pertinent part as follows:

Q: And are either one of these injuries that you described, either one of the three that you said were distinct, alone would have caused the death or a combination of the three?

A: I can't really say which one or a combination. I think that at least two of them have the potential to cause unconsciousness and death. It's difficult just by looking at the contusions to tell how severe the injury was, and I can't tell by the brain examination which one of those or which one of any of them caused the brain injury; but there are indications on the scalp that two of them were severe scalp—at least severe scalp contusions.

Q: Which two are those?

A: The one at the left back of the head and the one over the left side of the head.

Q: And do you have an opinion how long this child could have lived after the onset of the injuries?

A: Well, in this case we know that he was unresponsive and practically dead when he got to the emergency room. It could be several hours until his brain—could be anywhere from—it's always difficult to say. An hour to maybe several hours, he would just eventually lapse into a [coma] and die without any intention.

Q: And are these the type of injuries that a three-year-old could inflict upon himself?

A: I don't think—do I need to have a mechanism for that? Inflicted by himself in what way?

Q: By falling down on the floor?

A: In my opinion this [is] not an accidental injury, none of the head trauma is.

Dr. Aaron Gleckman ("Dr. Gleckman"), a second forensic pathologist who consulted on Brian's autopsy, offered the following pertinent testimony at trial:

Q: In your examination of Baby Brian's brain, were you able to determine how many injuries you were looking at?

A: Well, along with the brain, I took a look at the external photos of the autopsy. I was not present at the autopsy, but Dr.

> Radisch showed me the photographs. In seeing those and seeing the findings, I came to the conclusion—and knowing that there were at least four impact sites on the scalp, I concurred with Dr. Radisch and was clear that the cause of death was from blunt force head trauma.
>
> . . . .
>
> Q: Based on your opportunity to examine Baby Brian Keith May's brain, do you have an opinion about the cause of death?
>
> A: Yes, I do.
>
> Q: What is your opinion?
>
> A: It's blunt force head trauma.
>
> Q: In your opinion is this the kind of—could this injury have been consistent with an accident?
>
> . . . .
>
> A: Absolutely not.
>
> Q: Why?
>
> A: If you all have children, nieces and nephews you take care of, they fall down all the time. Numerous, numerous studies have shown that children, especially age three, don't die from ground-level falls, that type of an accident; and if they did, we probably would have no one grow up past the age of five because children fall all the time. In this case there are several impacts to the head. If he had been in a fall and it was from a significant height, he'd have one, if any; he might have none.

Defendant contends that this evidence should have been suppressed because it "allowed the doctors to tell the jury that the [S]tate had met its burden of proof on one of the elements necessary to the murder charge, that the injuries leading to death were inflicted intentionally." However, N.C. Gen. Stat. § 8C-1, Rule 702(a) provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." Our Supreme Court has recognized that

> in determining whether expert medical opinion is to be admitted into evidence[,] the inquiry should be not whether it invades the

> province of the jury, but whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.

State v. Wilkerson, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978). Thus, "[t]he test is . . . whether the 'opinion required expert skill or knowledge in the medical or pathologic field about which a person of ordinary experience would not be capable of satisfactory conclusions, unaided by expert information from one learned in the medical profession.' " *Id.* at 569, 247 S.E.2d at 911 (quoting *State v. Powell*, 238 N.C. 527, 530, 78 S.E.2d 248, 250 (1953)).

In the instant case, both Dr. Radisch and Dr. Gleckman offered evidence via testimony and opinion consistent with the testimony and opinion previously allowed by this Court. *See State v. McAbee*, 120 N.C. App. 674, 686, 463 S.E.2d 281, 288 (1995) (holding that the trial court did not abuse its discretion by allowing two pathologists to offer their opinion as to whether child's injuries were intentionally or accidentally inflicted), *disc. review denied*, 342 N.C. 662, 467 S.E.2d 730 (1996); *State v. West*, 103 N.C. App. 1, 8, 404 S.E.2d 191, 197 (1991) ("Our appellate courts have held that, based on a child's clinical presentation and history, a medical expert may testify that the wounds presented are inconsistent with accidental origin. The question and answer in this case falls under this general rule." (citations omitted)). Dr. Radisch and Dr. Gleckman both based their opinions upon their years of experience as pathologists, during which they performed and consulted on numerous autopsies. Dr. Radisch explained that she based her determination on the location of Brian's injuries, noting that the curvature of Brian's skull would have prevented the four distinct areas of contact on Brian's scalp from occurring as a result of an accidental fall. Dr. Radisch testified that she believed Brian suffered at least two "separate" injuries, or at least two "impacts," and that the lack of any distinct contrecoup brain contusions led to her conclusion that Brian had not been injured by a fall. As detailed above, Dr. Gleckman based his conclusion on his recognition that children do not die from ground level falls, and that the amount of injuries to Brian's head prevented him from determining that Brian had fallen from a height significant enough to kill him. In light of the foregoing, we conclude that the trial court did not err by allowing the doctors to testify that, in their opinion, Brian suffered intentionally, rather than accidentally, inflicted injuries. Therefore, defendant's first argument is overruled.

[3] Defendant next argues that the trial court erred by limiting testimony from defense witnesses regarding defendant's interaction with other children. At trial, defendant offered testimony from several mothers of other children that defendant babysat. In order to allow defendant to elicit testimony concerning his character for peacefulness, the trial court allowed defendant to question the witnesses regarding his interaction with other children. However, the trial court prohibited defendant from specifically questioning the witnesses regarding whether he had abused other children. Defendant asserts that the trial court erred by restricting the witnesses' testimony, in that such evidence was admissible as competent character evidence. We disagree.

The transcript reveals that the trial court based its decision upon this Court's opinion in *State v. Hoffman*, 95 N.C. App. 647, 383 S.E.2d 458 (1989), *disc. review denied*, 326 N.C. 52, 389 S.E.2d 101 (1990). In *Hoffman*, the defendant argued that the trial court erred by "not allowing [his] witnesses to testify that he had not molested their children and by not allowing several children to testify that he had not molested them." *Id.* at 648, 383 S.E.2d at 459. This Court disagreed with the defendant's argument, holding that "[s]uch testimony was totally irrelevant" to the defendant's trial. *Id.* We conclude that our decision in *Hoffman* is applicable to the instant case.

Rules 404 and 405 of the Rules of Evidence address the admission of character evidence at trial. "While Rule 404 provides for the circumstances in which character evidence is admissible, Rule 405 provides for the form in which it may be presented." *State v. Bogle*, 324 N.C. 190, 200-01, 376 S.E.2d 745, 751 (1989). Although Rule 404(a) "is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character[,]" the Rule permits "the accused to offer evidence of a 'pertinent trait of his character' as circumstantial proof of his innocence." *Id.* at 201, 376 S.E.2d at 751 (quoting N.C. Gen. Stat. § 8C-1, Rule 404(a)(1)). "In criminal cases, in order to be admissible as a 'pertinent' trait of character, the trait must bear *a special relationship to* or *be involved in* the crime charged." *Bogle*, 324 N.C. at 201, 376 S.E.2d at 751 (emphasis in original). "Thus, in the case of a defendant charged with a crime of violence, the peaceable character of the defendant would be 'pertinent[.]' " *Id.*

In the instant case, as discussed above, defendant attempted to elicit testimony during direct examination regarding specific acts of nonviolence towards other children. However, Rule 405 provides

that, where evidence of character or a trait of character is admissible under Rule 404, "proof may be made by testimony as to reputation or by testimony in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 405(a) (2003). Specific incidents of conduct may be explored during cross-examination. *Id.* We note that "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." N.C. Gen. Stat. § 8C-1, Rule 405(b). However, we also note that

> Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion.

N.C. Gen. Stat. § 8C-1, Rule 405 (commentary).

In the instant case, although defendant's allegedly peaceable character was pertinent to the charge of first-degree murder, neither defendant's character nor a trait of his character were essential elements of the charge or defendant's defense. Thus, elicitation of evidence regarding defendant's character during direct testimony must have been accomplished via opinion or reputation testimony rather than specific instance testimony. Therefore, in light of the foregoing, we conclude that the trial court did not err by limiting defendant's witnesses to testimony regarding defendant's reputation for peacefulness. Accordingly, defendant's second argument is overruled.

[4] Defendant next argues that the trial court erred in instructing the jury. At the close of all the evidence, the trial court provided the following pertinent instructions to the jury:

> Malice may be inferred from evidence that the victim's death was done by an attack by hand alone without the use of other weapons, where the attack was made by a mature man upon a defenseless infant.

Defendant asserts that the trial court improperly instructed the jury regarding malice because "unequivocal evidence of severe beating" is necessary for such an instruction. We disagree.

Contrary to defendant's assertion, there is no requirement in our case law that evidence of a "severe beating" exist in order for the trial court to provide a malice-inference instruction. Instead, our Supreme Court has held that "malice may be inferred from the 'willful blow by an adult on the head of an infant.' " *State v. Elliott*, 344 N.C. 242, 268, 475 S.E.2d 202, 213 (1996) (quoting *State v. Perdue*, 320 N.C. 51, 58, 357 S.E.2d 345, 350 (1987)), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). Similarly, in *State v. Huggins*, where the defendant argued that in order to find malice, "there must have been a sustained attack or pattern of abuse," this Court rejected the defendant's argument and held that, while a finding of malice may be supported by evidence of a sustained attack of short duration or sustained abuse that proximately causes a child's death, case law has not "establish[ed] a minimum standard by which malice must be judged." 71 N.C. App. 63, 67-68, 321 S.E.2d 584, 587 (1984), *disc. review denied*, 313 N.C. 333, 327 S.E.2d 895 (1985). Therefore, while malice is not necessarily inferred where death results from an attack upon a strong or mature person, malice may be inferred where death results from an attack made by a strong person and inflicted upon a young child, because "[s]uch an attack is reasonably likely to result in death or serious bodily injury" to the child. *Elliot*, 344 N.C. at 269, 475 S.E.2d at 213.

> Whether an attack made with hands or feet alone which proximately causes death gives rise to either a presumption of malice as a matter of law or to an inference of malice as a matter of fact will depend upon the facts of the particular case. For example, if an assault were committed upon an infant of tender years or upon a person suffering an apparent disability which would make the assault likely to endanger life, the jury could, upon proper instructions by the trial court, find that the defendant's hands or feet were used as deadly weapons. Nothing else appearing, the trial court properly could instruct the jury that, should they find the defendant used his hands or feet as deadly weapons and intentionally inflicted a wound upon the deceased proximately causing his death, the law presumes that the killing was unlawful and done with malice. *See State v. West*, 51 N.C. 505 (1859); *State v. Sallie*, 13 N.C. App. 499, 186 S.E.2d 667, *cert. denied*, 281 N.C. 316, 188 S.E.2d 900 (1972) and cases cited therein. *See generally* Annot. 22 A.L.R. 2d 854 (1952).

State v. Lang, 309 N.C. 512, 525-26, 308 S.E.2d 317, 324 (1983).

In the instant case, defendant was a twenty-eight-year-old male, and Brian was a three-year-old child who was suffering from a broken collarbone. Evidence introduced at trial tended to show that Brian received multiple traumatic blows to the head, which were intentionally inflicted while Brian was in defendant's care. We conclude that this evidence is sufficient to support the trial court's instruction, and accordingly, we overrule defendant's third argument.

[5] In two motions for appropriate relief filed with his appeal, defendant argues that the trial court erred by sentencing him in the aggravated range. Defendant asserts that the trial court was prohibited from sentencing him in the aggravated range because the aggravating factors were not submitted to the jury. We agree.

Our Supreme Court has recently examined the constitutionality of this state's structured sentencing scheme in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). *State v. Allen*, 359 N.C. 425, 359 S.E.2d 437 (2005). In *Allen*, the Court concluded that, when "[a]pplied to North Carolina's structured sentencing scheme, the rule of *Apprendi* and *Blakely* is: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." 359 N.C. at 437, —— S.E.2d at —— (citing *Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 413-14; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455; N.C. Gen. Stat. §§ 15A-1340.13, 15A-1340.14, 15A-1340.16, 15A-1340.17).

In the instant case, following defendant's conviction for second-degree murder, the trial court found as aggravating factors: (i) that the victim of the crime was very young; (ii) that defendant took advantage of a position of trust or confidence to commit the offense; and (iii) that defendant was absent without leave from the United States Army at the time of the offense. The trial court found these factors unilaterally, failing to submit the factors to the jury for proof beyond a reasonable doubt. The State argues that the trial court's errors were harmless and do not require reversal under the circumstances. However, in *Allen*, the Court rejected application of the harmless error doctrine to such sentencing errors, noting that "[b]ecause 'speculat[ion] on what juries would have done if they had been asked to find different facts' is impermissible, the Washington Supreme Court concluded, as do we, that '[h]armless error analysis cannot be conducted on *Blakely* Sixth Amendment violations.' " 359

N.C. at 448, —– S.E.2d at —– (quoting *State v. Hughes*, 154 Wash. 2d 118, 148, 110 P.3d 192, 208 (2005)). Thus, in light of our Supreme Court's decision in *Allen*, we conclude that the trial court committed reversible error by sentencing defendant in the aggravated range.[2] Therefore, we remand the case for resentencing.

No error at trial; remanded for resentencing.

Judges TYSON and GEER concur.

IN THE MATTER OF: J.B.

No. COA04-901

(Filed 16 August 2005)

Juveniles— delinquency—special probationary conditions

The trial court did not abuse its discretion by ordering a juvenile to have twelve months' supervised probation following his adjudication for the offense of involuntary manslaughter with the special probationary conditions that he visit and place flowers on the victim's grave site on the anniversaries of the victim's birth and death dates, that he wear a necklace around his neck with a picture of the victim, and that he not participate in school functions/activities such as football and prom/dances, because: (1) nothing in the probation conditions require publicizing the juvenile's records nor do the conditions present the juvenile with the choice of staying at home or enduring public ridicule; (2) the requirement that the juvenile wear a necklace with the victim's picture does not include any specific location in which it must be

2. In his second motion for appropriate relief, defendant asserts that the trial court was prohibited from sentencing him in the aggravated range because the State failed to allege the pertinent aggravating factors in the indictment. However, our Supreme Court expressly rejected the same assertion by the defendant in *Allen*. 359 N.C. at 438, —– S.E.2d at —– (overruling language in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), "requiring sentencing factors which might lead to a sentencing enhancement to be alleged in an indictment[,]" finding no error in the State's failure to include aggravating factors in the defendant's indictment, and noting that in *State v. Hunt*, "[T]his Court concluded that 'the Fifth Amendment would not require aggravators, even if they were fundamental equivalents of elements of an offense, to be pled in a state-court indictment.' " (quoting *State v. Hunt*, 357 N.C. 257, 272, 582 S.E.2d 593, 603, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003)). Accordingly, defendant's assertion in the instant case is overruled as well.

displayed; (3) the trial court was cognizant of a psychologist's findings concerning the juvenile's below average cognitive functioning and properly considered it; (4) the juvenile cites no authority for the proposition that a trial court is required to consult with a therapist or receive a therapist's permission prior to imposing a probationary condition, and such a prerequisite would violate N.C.G.S. § 7B-2506; and (5) the trial court did not prohibit all opportunities for social interaction, but instead prohibited extracurricular functions and activities involving less structured complex interactions of the type that are most likely to pose the greatest danger for inappropriate or delinquent conduct by the juvenile.

Judge JACKSON dissenting.

Appeal by juvenile from order entered 16 January 2004 by Judge Jim Love, Jr., in Harnett County District Court. Heard in the Court of Appeals 2 February 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M. Manthei, for the State.

Susan J. Hall for juvenile-appellant.

CALABRIA, Judge.

J.B., a juvenile, appeals a disposition order for twelve months' supervised probation following his adjudication for the offense of involuntary manslaughter. We affirm.

On 11 November 2003, J.B., age fifteen, and his cousin (the "victim") were hunting with two teenage friends. J.B., who was armed with a twelve-gauge shotgun, and the victim, who was unarmed, decided to separate from their friends and continue hunting as a pair. When the victim failed to return from the hunting trip, a search started that evening. The victim was found dead the following day with a shotgun wound to his face. Law enforcement officers determined the victim was shot by someone standing upright at a distance of approximately fifteen to eighteen feet. Near the victim's body was a large, white rock that looked out of place.

On 13 November 2003, law enforcement officers interviewed J.B., who told them that, shortly after he and the victim had paired off, the victim left to find their friends. Thereafter, J.B. thought he heard an animal and turned and fired his shotgun. When J.B. dis-

covered he had shot the victim, J.B. panicked, ran back through the woods, and discarded the shotgun along the way. On the evening of 13 November 2003, J.B. returned to the area to help law enforcement officers find his shotgun.

On 14 November 2003, law enforcement officers asked J.B. to accompany them to the scene to re-enact the shooting. When asked about his location relative to the victim when he fired his shotgun, J.B. said he was seated and much further away than eighteen feet. An officer told J.B. that the evidence was inconsistent with J.B.'s version of events, and J.B. began to cry. J.B. then changed his recounting of how he shot the victim.

J.B. stated he and the victim paired off from their friends, entered the woods, and sat down together. While seated, the victim lit a cigarette. When the victim passed the cigarette to J.B., J.B. put it out and broke it, causing the victim to become "a little bit ill." Although the victim initially got up and walked away, he returned and began circling J.B., who was still seated. The victim said something J.B. could not hear or did not recall, although J.B. admitted the two were not "fussing." The victim then picked up a large rock, which J.B. said the victim appeared to be about to throw at him in a "goofing around" manner. J.B. decided to also "goof around" by leveling his shotgun and pulling the trigger. J.B. was surprised when the gun went off, and as soon as he realized the victim had been shot, J.B. panicked and ran away. J.B. soon returned, however, gathered his clothing and shotgun, ran back through the woods, and threw the shotgun in some vines and bushes along the way. As soon as he arrived home, J.B. took a shower, picked pecans with his grandmother outside, and accompanied his father on an errand. J.B. participated in the ensuing search for the victim, but he did not disclose to anyone the victim's fate or whereabouts. At J.B.'s delinquency proceeding, his stepmother testified, in relevant part, that J.B. was a high school student taking a special studies skills class and exhibited learning difficulties since the fifth or sixth grade. J.B.'s high school principal testified that, aside from a two-day suspension for a tobacco-related incident on school property, J.B. was not a problem at school and had an excellent attendance record up until the victim's death.

At the delinquency proceedings, the trial court received into evidence a memo written by Doctor Heather Scheffler ("Dr. Scheffler"), a licensed clinical psychologist specializing in childhood learning disorders, who started treating J.B. in March 2001. According to the memo, the age-equivalents for J.B.'s IQ ranged from seven years, two

months to thirteen years, six months with an average of ten years, eight months, and his IQ was 73. Dr. Scheffler further indicated J.B. had "difficulty in comprehending things, especially complex social interactions, on an age-appropriate level." Dr. Scheffler diagnosed J.B. with the inattentive form of Attention-Deficit/Hyperactivity Disorder. Following the shooting incident, Dr. Scheffler started counseling J.B. weekly.

On 18 November 2003, the State filed a petition alleging J.B. was a delinquent juvenile for the shooting death of the victim. On 19 December 2004, the Harnett County District Attorney's Office filed a motion to transfer the case to superior court upon a finding of probable cause for the charge of involuntary manslaughter. On 16 January 2004, the matter came before the Harnett County District Court as a probable cause hearing on the State's involuntary manslaughter charge and a transfer hearing on the State's motion to have J.B. tried in superior court as an adult. The judge denied the State's transfer motion, and J.B., with the assistance of counsel, signed a transcript of admission for the offense of involuntary manslaughter. The court accepted the admission and proceeded to disposition.

The court placed J.B. on twelve months' probation, under the supervision of a juvenile court counselor, subject to compliance with, *inter alia*, the special probationary conditions that:

(1) J.B. visit and place flowers on the victim's grave site on the anniversaries of the victim's birth and death dates;

(2) J.B. wear a necklace around his neck with a picture of the victim; and

(3) J.B. not participate in school functions/activities such as football, prom/dances.

J.B. appeals, asserting the trial court abused its discretion in ordering these probationary conditions because the evidence was insufficient to indicate these conditions were in his and the State's best interests. We disagree.

When a trial court places a delinquent juvenile on probation pursuant to N.C. Gen. Stat. § 7B-2506(8) (2004), the court has the authority to impose conditions of probation "that are related to the needs of the juvenile and . . . reasonably necessary to ensure that the juvenile will lead a law-abiding life." N.C. Gen. Stat. § 7B-2510(a) (2004). Under this authority, the court may impose specifically enu-

merated conditions, including "[t]hat the juvenile satisfy any other conditions determined appropriate by the court." N.C. Gen. Stat. § 7B-2510(a)(14) (2004). "In deciding the conditions of probation, the trial judge is free to fashion alternatives which are in harmony with the individual child's needs." *In re McDonald*, 133 N.C. App. 433, 434, 515 S.E.2d 719, 721 (1999) (upholding a special probationary condition restricting a juvenile's access to television for a one year period). The trial court's discretion must nevertheless "be exercised within the stated goals and purposes of the Juvenile Code." *In re Schrimpsher*, 143 N.C. App. 461, 466, 546 S.E.2d 407, 412 (2001). That is, "the record must show that the condition [of probation] is fair and reasonable, related to the needs of the child, . . . calculated to promote the best interest of the juvenile in conformity with the avowed policy of the State in its relation with juveniles . . . [and] sufficiently specific to be enforced." *Id.*, 143 N.C. App. at 468, 546 S.E.2d at 412. On appeal, we will not disturb a trial court's ruling regarding a juvenile's disposition absent an abuse of discretion, which occurs "when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re Robinson*, 151 N.C. App. 733, 737-38, 567 S.E.2d 227, 229 (2002) (citations and internal quotation marks omitted). With these principals in mind, we turn to J.B.'s contentions.

Initially, J.B. cites *In re M.E.B.*, 153 N.C. App. 278, 569 S.E.2d 683 (2002), where this Court reversed the trial court's imposition of a special condition of probation requiring the juvenile "to wear a sign around her neck, 12" x 12" with the words—I AM A JUVENILE CRIMINAL—written in large letters" whenever she was outside her residence. *Id.*, 153 N.C. App. at 280, 569 S.E.2d at 279. J.B. fails to include any argument as to how *M.E.B.* offers instruction in the instant case. Moreover, we observe that our holding in *M.E.B.* was predicated on concerns of "open[ing] the juvenile's records to public display" and impermissibly forcing the juvenile to a *de facto* form of house arrest where, in order to evade public ridicule, the juvenile was forced to sequester herself in her residence for the length of her probation. *Id.* at 282, 569 S.E.2d at 686.

None of the instant case's special probationary conditions implicate either of these concerns, which were central to our holding in *M.E.B.* Specifically, nothing in the probation conditions require publicizing J.B.'s records nor do the conditions present J.B. with the choice of staying at home or enduring public ridicule. The requirement that J.B. wear a necklace with the victim's picture does not

include any specific location in which it must be displayed. Notably absent is any requirement for the picture to be displayed publicly as opposed to being enclosed, for example, in a locket that could be worn underneath J.B.'s clothing. Accordingly, our holding in *M.E.B.* does not control the probationary conditions in the instant case.

J.B. next directs this Court's attention to certain statements of the trial court. Specifically, J.B. cites to Dr. Scheffler's evidence regarding his educational development and contrasts it with the following exchange:

> Court:—I've heard all this—I don't consider [J.B.] slow. I mean I've heard what you said about his intellectual—you know, but that has not crossed my mind. What he did afterwards—after this happened doesn't indicate he's intellectually slow. I mean what he did, if you think about it—I mean what he did, if he was an adult in a different fact situation, if we were talking—you know, he could be facing murder charges because of the fact—what he came by, took the weapon, took everything so he wouldn't be implicated and he went off and—
>
> Mr. Harrop: But there's other facts, Judge. I mean—
>
> Court: Oh, I know that. That's what I'm saying.

This colloquy discloses that the trial court was cognizant of Dr. Scheffler's findings concerning J.B.'s below average cognitive functioning; however, when the trial court fashioned J.B.'s probationary conditions, it did not afford this evidence as much weight as the other evidence of J.B.'s actions prior to, during, and after his delinquent act. J.B. does little more than argue the trial court should have accepted his evidence as opposed to the State's evidence. This argument is not supported by the Code, which instead provides that "[t]he court *may consider any evidence* . . . [it] finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-2501(a) (2004) (emphasis added). We, therefore, conclude that the trial court properly considered the evidence before it.

J.B.'s final argument is that the trial court did not take into account his individual needs in determining the conditions of probation. With respect to the first two challenged conditions, that J.B. wear a necklace with a picture of the victim and that J.B. visit the victim's grave site with flowers twice a year, J.B. asserts the trial court could not impose these conditions "unless his therapist concurred

that th[ese conditions] would be therapeutic and not cause further emotional damage to [him]." J.B. cites no authority for the proposition that a trial court is required to consult with a therapist or receive a therapist's permission prior to imposing a probationary condition. Indeed, such a pre-requisite would violate N.C. Gen. Stat. § 7B-2506, which "does not contemplate the court vesting its discretion [to fashion dispositional alternatives] in another person or entity," and instead provides that "the court, and the court alone, must determine which dispositional alternatives to utilize with each delinquent juvenile." *See In re Hartsock*, 158 N.C. App. 287, 292, 580 S.E.2d 395, 399 (2003) (finding that the court unlawfully delegated its authority under this statute when the court conditioned its order placing respondent in residential treatment dependent on a counselor deeming such placement necessary).

With respect to the final condition, that J.B. not participate in school functions or activities such as football or prom dances, J.B. asserts that these activities were his means to interact with individuals his own age. However, J.B. concedes that the evidence before the trial court, both concerning the delinquent act itself and the testimony from Dr. Scheffler, indicates his prior problems with complex social interactions on an age-appropriate level. The trial court did not prohibit all opportunities for social interaction: J.B. is free to interact with individuals his own age in structured environments, such as in school during regular hours or at his family's church where J.B. has been attending youth group functions for several years. The prohibited extracurricular functions and activities involve less-structured, complex interactions of the type that are most likely to pose the greatest danger for inappropriate or delinquent conduct by J.B.

For the foregoing reasons, we affirm the conditions of probation imposed by the trial court in the instant case.

Affirmed.

Judge HUNTER concurs.

Judge JACKSON dissents.

JACKSON, Judge, dissenting.

For the reasons stated below, I must respectfully dissent from the majority's decision to affirm the conditions of probation imposed by the trial court.

Juvenile dispositions in delinquency proceedings are controlled by Chapter 7B, section 2500, of the North Carolina General Statutes. "The purpose of [these] dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." N.C. Gen. Stat. § 7b-2500; *In re Brownlee*, 301 N.C. 532, 551, 272 S.E.2d 861, 872 (1981) (*citing* the current statute's predecessor statute N.C. Gen. Stat. § 7A-646), *distinguished on other grounds by Bailey v. State*, 353 N.C. 142, 158, 540 S.E.2d 313, 323 (2002). Accordingly, the court must select a disposition "designed to protect the public" and "to meet the needs and best interests of the juvenile" based on:

(1) the seriousness of the offense;

(2) the need to hold the juvenile accountable;

(3) the importance of protecting the public safety;

(4) the degree of culpability indicated by circumstances of the particular case; and

(5) the rehabilitative and treatment needs of the juvenile indicated by a risk and needs of the assessment.

N.C. Gen. Stat. § 7B-2501(c). Chapter 7B, section 2510(a)(14) of the North Carolina General Statutes further provides that "[t]he court may impose conditions of probation that are related to the needs of the juvenile and that are reasonably necessary to ensure that the juvenile will lead a law-abiding life, including [requiring] the juvenile to satisfy any other conditions determined appropriate by the court." This Court previously has stated that when the court is determining what conditions of probation are appropriate, the trial judge has authority to "fashion alternatives which are in harmony with the individual child's needs." *In re McDonald*, 133 N.C. App. 433, 434, 515 S.E.2d 719, 721 (1999) (*citing In re Groves*, 93 N.C. App. 34, 376 S.E.2d 481 (1989)). In making its decision concerning the juvenile's disposition, the court also must exercise "its juvenile jurisdiction" in weighing the State's best interests. *In re Brownlee*, 301 N.C. 532, 553, 272 S.E.2d 861, 873-74 (1981) (*citing In re Vinson*, 298 N.C. 640, 260 S.E.2d 591 (1979); *In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd. sub. nom.*, *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976 (1971)).

Although our Juvenile Code has granted broad authority to the courts in fashioning appropriate dispositions for juveniles, that dis-

cretion is not without limitation. *In re Schrimpsher*, 143 N.C. App. 461, 466, 546 S.E.2d 407, 412 (2001). "[T]his discretion must be exercised within the stated goals and purposes of the Juvenile Code." *Id.*

In this case, when balancing J.B.'s needs with the State's best interest, the record tends to show that actually it would be adverse to his needs and not in his best interest to require him to visit the victim's grave site or to wear a necklace with the victim's picture affixed inside. I agree with the State's contention that accountability is one of the goals of the juvenile justice system; however, it also is a goal of the juvenile justice system to "meet the needs of the juvenile" in providing an appropriate plan for rehabilitating the juvenile. N.C. Gen. Stat. § 7B-2500(2005). "[T]he record must show that the condition is fair and reasonable, related to the needs of the child, and calculated to promote the best interest of the juvenile in conformity with the avowed policy of the State in its relation with juveniles." *In re Schrimpsher*, 143 N.C. App. at 468, 546 S.E.2d at 412 (citation omitted). *See also In re Robinson*, 151 N.C. App. 733, 736-37, 567 S.E.2d 227, 229 (2002).

Absent an abuse of discretion on the part of the trial court, its ruling may not be disturbed on appeal. *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002). " ' "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " ' " *In re Robinson*, 151 N.C. App. at 738, 567 S.E.2d at 229(*quoting Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. rev. denied*, 347 N.C. 670, 500 S.E.2d 84 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). It is also well settled that "[t]he dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-2512. *See also In re Ferrell*, 162 N.C. App. 175, 177, 589 S.E.2d 894, 895 (2004).

Here, "the findings of fact in the dispositional order do not support the trial court's decision" to require J.B. to visit the victim's grave site. The evidence further fails to support the court's finding that wearing a necklace with the victim's picture affixed inside would be in J.B.'s best interests. It is, therefore, my opinion that the juvenile court abused its discretion. The record indicates that J.B. (1) was in grief counseling and is continuing to grieve; (2) was the victim's cousin and likely sees the victim's family frequently; (3) has an 82 IQ with a below average functional range; (4) has age-equivalents ranging from 7 years, 2 months, to 13 years, 6 months with an average of

10 years, 8 months; (5) probably will need continued involvement in therapy based on J.B.'s adjustment and the potential of his becoming a risk to himself—rather than to others; (6) has difficulty in comprehension, especially in complex social interactions; (7) is in the clinical range on Hyperactivity, Conduct Problems, Depression, and Withdrawal and is in the borderline range for Anxiety; and (8) has Attention-Deficit/Hyperactivity Disorder and had difficulty in school beginning around the fifth or sixth grade.

In determining J.B.'s conditions for probation, the juvenile court explained to him the seriousness of his actions and the importance of taking responsibility for those actions.

> Court: I've heard ad nauseam about what you've gone through. But what you've gone through compares nothing to what the [victim's] family has gone through. Do you understand that?
>
> Juvenile: Yes, sir.
>
> Court: And what they've gone through is because of your actions and your actions alone . . . . And because of your stupidity—which is what is was—plainly stupidity—[the victim] is not going to graduate from high school, he ain't going to no prom, he ain't going to get married, ain't going to have no children. None of those things. Because of your stupidity . . . . Do you understand that?
>
> Juvenile: Yes, sir.
>
> Court: And I hope you appreciate—truly appreciate what you've done. You call it an accident. I don't. That ain't no accident . . . . And just so you'll know where I'm coming from, the fact that you shot your cousin, then ran away, and then returned to retrieve property so you wouldn't be implicated and did nothing to notify—that's just cold-hearted. That is just absolutely cold-hearted. And I think you forfeit any right to participate in any high school functions because of that behavior. [The victim] has given it up for the rest of his life. He doesn't get to do any of that. So, I think for two years, it wouldn't hurt you at all."

While it was within the juvenile court's authority to consider J.B.'s accountability or lack thereof, the juvenile court also was required to

consider all of his individual needs when "fashioning alternatives" for the conditions of probation. The juvenile court focused on J.B.'s "crime" to the exclusion of his needs; however, both necessarily must be considered pursuant to the requirements of the North Carolina General Statutes. N.C. Gen. Stat. § 7B-2501.

The juvenile court tended to ignore the undisputed evidence directly related to J.B.'s needs in designing a plan to fit this juvenile's best interests, although the judge explicitly acknowledges such evidence exists:

> Court: I think both parties are correct in that I've got to consider the protection of the public and the needs of the juvenile considering all these factors to transfer it. And so I will find that . . . the juvenile falls in the below average range as far as his intellectual functioning. That the evidence that I heard is that he thinks as someone who is two to three years younger than his actual physical age. I didn't hear any direct evidence concerning the maturity of the juvenile . . . . He has no prior record . . . . Been no prior attempts to rehabilitate the juvenile.

After considering the seriousness of the crime, the juvenile court found that out of "all the evidence . . . [J.B.'s] not a danger to society or is not a danger to the public." The juvenile court further stated in direct contradiction of its statements noted *supra*:

> Court: —I've heard all this—I don't consider [the juvenile] slow. I mean I've heard what you said about his intellectual—you know, but that has not crossed my mind. What he did afterwards—after this happened doesn't indicate he's intellectually slow.

The record was clear, however, that J.B.'s IQ was below average functional range and J.B. has had difficulty in school beginning around the fifth or sixth grade. Doctor Heather Scheffler ("Dr. Scheffler"), a clinical psychologist with an emphasis in pediatrics and with experience in conducting assessments, consulting with school systems regarding children with needs, and providing therapy for childhood and adolescent disorders, such as Attention-Deficit/Hyperactivity Disorder, learning disorders, depression, and anxiety, diagnosed J.B. with Attention-Deficit/Hyperactivity Disorder in 2001, a diagnosis which was not made in anticipation of this dispositional hearing, but rather

done after his parents requested a psychological evaluation to complement a planned school-based psycho-educational evaluation. Moreover, the juvenile court gave no consideration to Dr. Sheffler's findings that J.B. had problems with hyperactivity, conduct, depression, withdrawal, and anxiety nor did it give any consideration that he was in grief counseling when it determined that he must wear a necklace around his neck and visit the victim's grave site. The juvenile court should have considered all of the evidence when determining the individualized needs of J.B. and balancing those needs against the objectives of the state.

The record further indicated that the juvenile court compared J.B.'s actions to those of an adult when determining his conditions of probation.

> Court: I mean what he did, if you think about it—I mean what he did, if he was an adult in a different fact situation, if we were talking—you know, he could be facing murder charges because of the fact—what he came by, took the weapon, took everything so he wouldn't be implicated and he went off . . .
>
> Counsel: But there's other facts, Judge. I mean—
>
> Court: Oh, I know that. That's what I'm saying.

"Disposition of a juvenile, however, involves a philosophy far different from adult sentencing . . . . [A] delinquent child is not a 'criminal.' The inference is that a juvenile's disposition is not intended to be a punishment but rather an attempt to rehabilitate him." *In re Vinson*, 298 N.C. 640, 666, 260 S.E.2d 591, 607 (1979). Therefore, it is irrelevant what the court would have done were J.B. an adult and it was inappropriate for the court to take into consideration what it would have done if he were to be punished and treated as an adult.

Based on the record before the court containing the special individualized needs of *this* juvenile, and for the reasons stated above, I would find the court erred in requiring J.B. to visit the victim's grave site and to wear a necklace with the victim's picture affixed inside.

Accordingly, I must dissent from the majority's opinion.

STATE OF NORTH CAROLINA v. TONY WAYNE DORTON

No. COA04-572

(Filed 16 August 2005)

1. Constitutional Law— right to speedy trial—delay not attributable to State—generalized assertions of diminished memory

The trial court did not err by failing to dismiss the charge of second-degree sexual offense as a result of an alleged violation of defendant's right to a speedy trial based on a twenty-month delay, because: (1) the trial court noted the numerous changes in defendant's attorneys and found additional delay was due to a backlog in testing at the SBI not attributable to the District Attorney's Office; (2) the trial court's uncontested finding of fact concerning the trial of cases with dates of offenses preceding that of defendant is an appropriate method of determining the order in which to dispose of cases; and (3) although defendant gave generalized assertions that there was some diminished memory that impaired his defense, the victim was able to testify and be cross-examined about the incident and the medical witnesses produced written records from which they testified.

2. Witnesses— motion to sequester—parental and supporting figure

The trial court did not abuse its discretion in a second-degree sexual offense case by denying defendant's motion to sequester all of the State's witnesses, because: (1) the trial court allowed defendant's motion with respect to all witnesses except for the victim's mother who was permitted to remain with the victim in court; and (2) whether the victim had technically reached the age of majority does not obscure the trial court's reasoning that she was in need of a parental and supporting figure when the victim was sixteen years old at the time she was sexually and physically assaulted by her father.

3. Evidence— victim's previous sexual activity—credibility—Rape Shield Statute

The trial court did not abuse its discretion in a second-degree sexual offense case by denying defendant's request to inquire into the victim's previous sexual activity for the purpose of attacking her credibility as a witness, because the Rape Shield Statute lim-

its the scope of cross-examination by declaring such examination to be irrelevant to any issue in the prosecution except in four narrow situations inapplicable to the instant case.

4. Evidence— letter from defendant to victim while incarcerated—sexual assault

The trial court did not err in a second-degree sexual offense case by admitting into evidence a letter from defendant to the victim following the sexual assault while defendant was incarcerated, because: (1) defendant failed to preserve the evidentiary issue of the prejudicial effect and probative value of the letter for appellate review by failing to object on this ground at the time the evidence was introduced at trial; (2) defendant is not entitled to plain error review based on his failure to allege plain error in his assignments of error or in his brief; and (3) the probative value of the letter was not substantially outweighed by unfair prejudice when the letter could be read as an apology for precisely the events for which defendant was put on trial, and the meaning and intent of the letter were for the jury to determine.

5. Criminal Law— prosecutor's argument—defendant admitted offenses—motion for mistrial

The trial court did not err in a second-degree sexual offense case by denying defendant's motion for a mistrial following the State's opening statement informing the jury that defendant admitted these offenses, because: (1) where a trial court sustains an objection but defendant fails to move to strike that which was objectionable and fails to request a curative instruction, the trial court has taken sufficient action by sustaining defendant's objection and was not required either to strike the testimony or to give a curative jury instruction; and (2) the statement by the prosecutor accurately forecasted the evidence adduced at trial.

6. Discovery— statement—take crime to grave

The trial court did not err in a second-degree sexual offense case by allowing the victim to testify that defendant told the victim after the sexual assault that she needed to take this to the grave with her even though defendant contends the statement had not been disclosed, because: (1) a synopsis of a defendant's oral statements in response to discovery requests complies with the substance requirement under N.C.G.S. § 15A-903(a)(2); (2) the State's report to defendant contained the statement that defendant father told the victim not to tell anyone; and (3) both

the testimony received at trial and the statement contained in the report given to defendant convey that defendant was telling his daughter not to tell anyone of the sexual assault.

7. Evidence— victim's demeanor—speculation

The trial court did not err in a second-degree sexual offense case by allowing the victim's brother to testify that his sister looked like she did not want to talk to the police following the sexual assault but she did so anyway, because assuming arguendo that the trial court erred, defendant failed to show how this testimony affected the outcome of the trial or that a different result would have resulted absent the error.

8. Sexual Offenses— second-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree sexual offense at the close of all the evidence, because: (1) defendant does not specifically attack any of the elements of second-degree sexual offense but merely argues that there were inconsistencies and a lack of physical evidence to bolster the victim's testimony; (2) no case law stands for the proposition that there must be some physical evidence to support court testimony in order for that testimony to be sufficient to withstand a motion to dismiss; and (3) defendant had ample opportunity to cross-examine the victim with respect to any inconsistencies, and inconsistencies are expressly left for the jury.

9. Sentencing— aggravating factor not submitted to jury— *Blakely* error

The trial court erred in a second-degree sexual offense case by sentencing defendant in the aggravating range without submitting to the jury the aggravating factor found by the trial court that defendant took advantage of a position of trust or confidence to commit the offense, and the case is remanded for resentencing.

Appeal by defendant from judgment entered 13 February 2004 by Judge B. Craig Ellis in Scotland County Superior Court. Heard in the Court of Appeals 16 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State.

James M. Bell for defendant-appellant.

CALABRIA, Judge.

Tony Wayne Dorton ("defendant") appeals a judgment entered on a jury verdict of guilty of second-degree sexual offense. Defendant received a sentence in the aggravated range with a minimum term of 92 months and a maximum term of 120 months in the North Carolina Department of Correction. We find no error regarding defendant's trial but remand for resentencing.

The State presented evidence that defendant and Pamela Dorton had two children during the course of their marriage. The eldest child (the "victim"), was sixteen years of age on 30 March 2002. Since school was out of session, the victim and her brother were at home on that date with their father, defendant, who was unemployed. Near midday, the victim checked the computer in her parents' room to see if she had received any e-mail. Defendant was dressed for an appointment with the Employment Security Commission but undressed and returned to bed while the victim was on the computer. After the victim finished on the computer, defendant asked the victim to lay down with him "to help him go back to sleep." Although reluctant, the victim complied. Defendant turned to the victim, began rubbing her on her side, and repeatedly asked her to engage in oral sex with him in increasingly demanding tones. Defendant then pinned the victim down and began to digitally penetrate her. The victim began crying and attempted to stop him. This angered defendant, and he started hitting her. In her distress, the victim urinated on herself. As a result, defendant let the victim go to the restroom.

While the victim was in the restroom, defendant entered and again attempted to force the victim to engage in sexual activity with him. When the victim told defendant that he "would have to kill her first," defendant forced the victim back into the bedroom and removed her clothes, resumed hitting her, and attempted to engage in both oral and vaginal sex with the victim; however, defendant's attempts were hampered due to the fact that he suffered from erectile dysfunction. The victim testified that throughout the event, defendant responded to her attempts to thwart his advances by hitting her with his hands and a shoe and choking her.

After defendant finished, he returned to the bathroom, and the victim retrieved her clothes and dressed. Defendant subsequently left for his appointment. The victim called her mother, who instructed the victim to call the police. The victim complied, and the police obtained a statement from her and took her to the hospital, where a rape kit was performed.

Defendant was arrested and indicted for second-degree rape and second-degree sexual offense. On 17 June 2002, defendant moved for a speedy trial. On 27 October 2003, defendant moved to dismiss the pending charges for denial of a speedy trial. In denying defendant's motion, the trial court noted that between 18 September 2002 and May of 2003, defendant had changed attorneys three times, the SBI lab tests were delayed due to a backlog in testing not attributable to the District Attorney's office, and, between March of 2003 and the following September session of Superior Court, the cases tried by the District Attorney's office predated defendant's case. The jury returned a verdict of guilty for second-degree sexual offense and a verdict of not guilty for second-degree rape. Defendant was sentenced as noted *supra* and appeals.

I. Right to Speedy Trial

[1] In his first assignment of error, defendant asserts the trial court erred in failing to dismiss the charges as a result of the violation of his right to a speedy trial. The right to a speedy trial is guaranteed both by the Sixth Amendment to the United States Constitution, applicable to the states via the Fourteenth Amendment, and Article I, Section 18 of the North Carolina Constitution, and our analysis of each is the same. *State v. Hammonds*, 141 N.C. App. 152, 157-58, 541 S.E.2d 166, 171-72 (2000). Analysis of whether a defendant's right to a speedy trial has been violated is based on a case-by-case balancing of the following four factors: "(1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay." *Id.*, 141 N.C. App. at 158, 541 S.E.2d at 172. Since the length of delay in the instant case was twenty months, it is presumptively prejudicial and triggers examination of the other three factors. *See State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994) (noting that a sixteen-month delay "is clearly enough to cause concern and to trigger examination of the other factors"). In doing so, however, we are mindful that "the length of delay is viewed as a triggering mechanism for the speedy trial issue," and, therefore, " 'its significance in the balance is not

great.' " *Hammonds*, 141 N.C. App. at 159, 541 S.E.2d at 172 (quoting *State v. Hill*, 287 N.C. 207, 211, 214 S.E.2d 67, 71 (1975)).

A. Reason for Delay

In examining the second factor, a "defendant has the burden of showing that the delay was caused by the neglect or wilfulness of the prosecution[,] [which may be rebutted with] evidence fully explaining the reasons for the delay." *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003). Prohibited are delays that are purposeful or oppressive and could have been avoided by reasonable effort, not "good-faith delays which are reasonably necessary for the State to prepare and present its case." *State v. Johnson*, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969) (citations omitted).

In the instant case, the trial court noted the numerous changes in defendant's attorneys between September of 2002 and May of 2003. Moreover, the trial court found additional delay was "due to a backlog in testing at the SBI" not "attributable to the District Attorney's office." Defendant contends "it is immaterial whether the delay was caused by law enforcement or the District Attorney because, in either case, such delay should be attributable to the State." However, our Supreme Court indicated in *Spivey* that this expanded attribution to the State is improper by noting that the defendant's burden was to show prosecutorial neglect or willfulness. *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255. *See also id.*, 357 N.C. at 127, 579 S.E.2d at 260 (Brady, J., dissenting) (focusing the analysis of the second factor on the "elected District Attorney" and noting that "the district attorney's indifference toward defendant is evidence of precisely the type of neglect that reflects a violation of a defendant's right to a speedy trial"). Finally, we note the trial court's uncontested finding of fact (concerning the trial of cases with dates of offenses preceding that of defendant) is an appropriate method of determining the order in which to dispose of cases. *See Spivey*, 357 N.C. at 120, 579 S.E.2d at 255 (observing that the district attorney had "dealt with cases in chronological order, beginning with the oldest [and] [d]efendant's case was tried based on this policy"). These reasons indicate defendant failed to show that the State willfully or neglectfully delayed defendant's trial.

B. Assertion of Right to Speedy Trial

Defendant did assert his right to a speedy trial early in the process; accordingly, this factor balances in favor of defendant's assignment of error. However, we note that the "assertion of the

right, by itself, d[oes] not entitle [a defendant] to relief." *Id.*, 357 N.C. at 121, 579 S.E.2d at 256.

C. Resulting Prejudice

Prejudice to defendant as a result of delay concerns the following three objectives: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker v. Wingo*, 407 U.S. 514, 532, 33 L. Ed. 2d 101, 118 (1972). The test for prejudice is "whether significant evidence or testimony that would have been helpful to the defense was lost due to delay[,]" *see State v. Jones*, 98 N.C. App. 342, 344, 391 S.E.2d 52, 54-55 (1990), as opposed to "claims of faded memory and evidentiary difficulties inherent in any delay." *State v. Goldman*, 311 N.C. 338, 345, 317 S.E.2d 361, 365 (1984). Defendant's assertions are precisely those diminished in *Goldman* in that defendant only gives generalized assertions that there was some "diminished memory" and, therefore, defendant's defense was impaired. Moreover, while defendant cites to certain portions of the testimony of medical witnesses and the victim concerning things they could not remember, we note (1) the victim was able to testify and be cross-examined as to the incident and (2) the medical witnesses produced written records from which they testified. Accordingly, this factor weighs against defendant. In balancing the four factors together, we do not find defendant's constitutional right to a speedy trial was impermissibly transgressed. This assignment of error is overruled.

II. Failure to Sequester the Victim's Mother

[2] Defendant, in his second assignment of error, asserts the trial court erred in denying his motion to sequester all of the State's witnesses. The trial court allowed defendant's motion with respect to all witnesses except for the victim's mother, who was permitted to remain with her in court. Sequestration of witnesses " 'rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 43, 530 S.E.2d 281, 286 (2000) (quoting *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507-08 (1998)).

In allowing the victim's mother to remain with the victim, the trial court stated it thought "it would be appropriate to have her mother" and later noted that because the victim was a minor, it was

"appropriate to have a parent present." Defendant points out that the victim was not a minor at the time of trial since she was eighteen years old; therefore, the trial court's ruling was arbitrary. We are not persuaded.

First, at the time the trial court ruled on defendant's motion, defendant did nothing to bring to the trial court's attention the fact that the victim had, in fact, reached her majority. Independently, and more importantly, whether the victim had technically reached her majority does not obscure the trial court's reasoning. The evidence at trial tends to show the victim was sixteen years old when she was sexually and physically assaulted by her father and remained a teenager of eighteen years at the time she was testifying against her father about the details of that assault. The victim's need, under such circumstances, of a parental and supporting figure cannot be gainsaid. Because the trial court's ruling was the result of a reasoned decision, we perceive no abuse of discretion in allowing the victim's mother to remain with the victim under these circumstances. This assignment of error is overruled.

III. Rule 412

[3] By his next assignment of error, defendant contends the trial court improperly denied him the right to inquire into the victim's previous sexual activity for the purpose of attacking her credibility as a witness. While a defendant clearly is entitled to cross-examine an adverse witness, the scope of that cross-examination lies within the "sound discretion of the trial court, and its rulings thereon will not be disturbed absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 743-44, 370 S.E.2d 363, 370 (1988). When cross-examination involves the sexual behavior of the complainant, our Rape Shield Statute further limits the scope of cross-examination by declaring such examination to be " 'irrelevant to any issue in the prosecution' except in four very narrow situations." *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 412 (2003)).

In the instant case, defendant neither cites to nor argues the substance of any of the four exceptions. Rather, defendant asserts he "simply wanted to attack [the victim's] credibility as a witness . . . ." Defendant's arguments fail to bring the sought testimony within any of the four exceptions to the Rape Shield Statute and appears to be directly in conflict with our Supreme Court's holding in *State v. Autry*, 321 N.C. 392, 398, 364 S.E.2d 341, 345 (1988) (noting that, because a "victim's virginity or lack thereof does not fall

within any of the four exceptions[,]" it is an area "prohibited from cross-examination by Rule 412[,]" and the rule does not violate a defendant's right to confront an adverse witness). This assignment of error is overruled.

IV. Letter

[4] Defendant's fourth assignment of error concerns the trial court's admission into evidence of a letter from defendant to the victim following the sexual assault while defendant was incarcerated. The letter, addressed to "Soccer Babe," indicated defendant's desire that he and the victim "overcome our problems between you and me" and "use this whole thing for something positive." The letter further contained an apology for "everything" and for being such a "dumb father." Prior to trial, defendant objected to the letter on the grounds of authenticity and whether the danger of unfair prejudice substantially outweighed the letter's probative value. The trial court, after hearing arguments as to probative value and prejudicial effect, denied defendant's motion *in limine* and noted defendant's objection. Later, when the State sought to admit the letter into evidence, defendant objected solely on the ground that the letter had not been authenticated. This objection was overruled by the trial court. On appeal, defendant renews his challenge to the letter solely on the grounds that the trial court erroneously balanced the prejudicial effect and probative value of the letter.

Initially, we note the State asserts defendant waived his right to appeal this issue by limiting his objection during trial to authenticity. Effective 1 October 2003, N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2003) was amended to add the following: "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." The effect this Court has given to the amendment, however, is split.

On 5 April 2005, this Court considered whether an evidentiary issue was preserved for appellate review when a party failed to object at the time the evidence was introduced at trial but had unsuccessfully objected in a previous motion *in limine*. *State v. Ayscue*, 169 N.C. App. 548, 553, 610 S.E.2d 389, 394 (2005). In considering the issue, this Court adhered to our Supreme Court's precedent in *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) despite citing and considering the amended N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2003). *Id.* This Court held the defendant had failed to preserve the

evidentiary issue for appellate review and was entitled, therefore, only to plain error review.

A little more than one month later, this Court, relying on the amended N.C. Gen. Stat. § 8C-1, Rule 103(a)(2), held that a defendant had not failed to preserve an issue for appellate review where the trial court denied his motion to suppress and defendant did not review his objection during trial at the time the evidence was offered. *State v. Rose*, 170 N.C. App. 284, 288, 612 S.E.2d 336, 339, appeal dismissed by 359 N.C. 641, —— S.E.2d —— (2005).[1] Our holdings in *Rose* and *Ayscue* cannot be reconciled. Accordingly, we adhere to the initial holding of this Court in *Ayscue* for reasons set forth by our Supreme Court in *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "[w]here 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"). Moreover, defendant is not entitled to plain error review in the instant case due to his failure to allege plain error in his assignments of error or in his brief to this Court. *Accord State v. Truesdale*, 340 N.C. 229, 456 S.E.2d 299 (1995); *State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994).

Nevertheless, we note in passing that the trial court did not err in admitting the letter. A trial court may discretionarily exclude relevant evidence if, *inter alia*, "its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2003); *State v. Anderson*, 350 N.C. 152, 174-75, 513 S.E.2d 296, 310 (1999). Defendant argues that referring to one's daughter as "soccer babe" can be innocuous and the apologies and other language in the letter could refer to other events than those to which the victim testified. However, the letter can also be read as an apology for precisely the events for which defendant was put on trial, and defendant's references to his daughter as "soccer babe" (following the accusations for which defendant was incarcerated) may permissibly be construed as indicative of an inappropriate relationship or desire on defendant's part towards her. The meaning and intent of the letter were for the jury to determine.

1. Still more recently, on 19 July 2005, this Court expressly held that, "[b]ecause N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) is inconsistent with N.C. R. App. P. 10(b)(1) [regarding appellate review of an evidentiary ruling even though a party fails to object at trial,] . . . the statute must fail." *State v. Tutt*, 171 N.C. App. 518, 524, —— S.E.2d ——, —— (2005).

V. Prosecutor's Opening Statement

[5] Defendant assigns as error the trial court's failure to grant his motion for a mistrial following the State's opening statement, in which the State informed the jury that defendant "admitted to these offenses." The trial court sustained defendant's objection; however, defendant neither moved to strike the statement nor asked for a curative instruction to the jury to disregard the statement. Our Supreme Court has held that, where a trial court sustains an objection but a defendant fails to move to strike that which was objectionable and fails to request a curative instruction, "[t]he trial court [has taken] sufficient action by sustaining the defendant's objection and was not required either to strike the testimony or to give a curative jury instruction." *State v. Barton*, 335 N.C. 696, 709-10, 441 S.E.2d 295, 302 (1994). Moreover, the statement by the prosecutor accurately forecasted the evidence adduced at trial in that Jerry Crater testified that defendant confessed to him that he had physically abused his daughter during an incidence when he "forced himself on her[.]" This assignment of error is overruled.

VI. Undisclosed Statements

[6] In his sixth assignment of error, defendant asserts the trial court erred in allowing the victim to testify that defendant told the victim after the sexual assault that she "need[ed] to take this to the grave with [her]." Defendant objected on the grounds that the statement had not been disclosed and moved to strike the statement, which the trial court overruled. A trial court must, upon motion of a defendant, order the prosecutor to "divulge . . . the substance of any oral statement relevant to the subject matter of the case made by the defendant . . . ." N.C. Gen. Stat. § 15A-903(a)(2) (2003). "As used in the statute, 'substance' means: 'Essence; the material or essential part of a thing, as distinguished from "form." That which is essential.' " *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985) (quoting Black's Law Dictionary 1280 (rev. 5th ed. 1979)). Moreover, our Supreme Court has held that "a synopsis of a defendant's oral statements in response to discovery requests complies with the 'substance' requirement of N.C. Gen. Stat. § 15A-903(a)(2)." *State v. Johnson*, 136 N.C. App. 683, 692, 525 S.E.2d 830, 836 (2000) (citing *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988)).

In the instant case, the State's report to defendant contained the following statement: "Father . . . [t]old her not to tell anyone." Both the testimony received at trial and the statement contained in the

report given to defendant convey that defendant was telling his daughter not to tell anyone of the sexual assault. While the form was not identical, they expressed the same substance and, as such, the trial court correctly determined there was no violation of N.C. Gen. Stat. § 15A-903(a)(2). This assignment of error is overruled.

VII. Testimony of the Victim's State of Mind

[7] Defendant asserts, in his seventh assignment of error, that the trial court erred in allowing the victim's brother to testify as follows in response to how his sister looked while talking to the police following the sexual assault: "She was—She looked like she was not wanting to . . . talk about it, really, but she, I guess, told them anyway." Defendant contends this testimony was "clearly speculative in that the witness could not possibly read [the victim's] mind as to what she wanted on this occasion." Defendant's objection was overruled. Assuming, without deciding, defendant's contention has merit, defendant has failed to show that the testimony by the victim's brother that she was reluctant to talk to the police had any effect on the outcome of the trial, much less that there was a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2003). This assignment of error is overruled.

VIII. Motion to Dismiss

[8] Defendant assigns as error the trial court's denial of his motion to dismiss at the close of all the evidence. Specifically, defendant contends "the lack of physical evidence as well as [the victim's] widely varying details of the alleged sexual assault should have resulted in a dismissal of the charges at the conclusion of the trial." We disagree.

In ruling on a motion to dismiss, the trial court considers "the evidence in the light most favorable to the State and gives the State the benefit of every reasonable inference to be drawn therefrom." *State v. Penland*, 343 N.C. 634, 648, 472 S.E.2d 734, 741 (1996). "Contradictions and discrepancies are for the jury to resolve." *Id.* "In deciding whether the trial court's denial of defendant's motion to dismiss violated defendant's due process rights, this Court must determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560,

573 (1979)). Defendant does not specifically attack any of the elements of second-degree sexual offense in the instant case but merely argues that there were inconsistencies and a lack of physical evidence to bolster the victim's testimony. Defendant's arguments are unavailing.

First, we have found, and defendant has cited, no case law that stands for the proposition that there must be some physical evidence to support court testimony in order for that testimony to be sufficient to withstand a motion to dismiss. Second, defendant had ample opportunity to cross-examine the victim with respect to any inconsistencies he perceived existed between the accounts given at trial and those given to medical and police personnel. Third, inconsistencies are expressly left for the jury under well-established precedent. *State v. Rhodes*, 290 N.C. 16, 31, 224 S.E.2d 631, 640 (1976). This assignment of error is overruled.

IX. Motion for Appropriate Relief

[9] Finally, defendant has submitted a motion for appropriate relief, asserting he was sentenced in the aggravated range in violation of the recent holding by the United States Supreme Court in *Blakely v. Washington*, 542 U.S. ——, 159 L. Ed. 2d 403 (2004), which was filed during the time defendant's appeal was pending. The trial court, not the jury, made findings in aggravation not admitted by defendant based on a preponderance of the evidence. Specifically, the trial court found in aggravation that defendant took advantage of a position of trust or confidence to commit the offense. Recently, our Supreme Court considered the applicability of *Blakely* under North Carolina law and held that "those portions of N.C.G.S. § 15A-1340.16 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 are unconstitutional." *State v. Allen*, —— N.C. ——, ——, —— S.E.2d ——, —— (2005). Our Supreme Court further held "that *Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible *per se*." *Id.*, —— N.C. at ——, —— S.E.2d at ——. We hold accordingly and remand for resentencing.

No error in part, remanded for resentencing.

Judges HUNTER and JACKSON concur.

STATE OF NORTH CAROLINA v. GREGORY PAUL WHITELEY

No. COA04-636

(Filed 16 August 2005)

Sexual Offenses— crime against nature—constitutionality of statute—cunnilingus—consent—collateral estoppel

The crime against nature statute, N.C.G.S. § 14-177, is not unconstitutional on its face because it may properly be used to criminalize sexual conduct involving minors, nonconsensual or coercive conduct, public conduct, and prostitution. Although the statute could constitutionally be applied in this case on the basis that an act of cunnilingus was nonconsensual because the victim was physically helpless, it was unconstitutional as applied in that the trial court erroneously refused to instruct the jury that defendant would be guilty of a crime against nature only if the act of cunnilingus was performed without the victim's consent. However, the issue of the victim's consent cannot be relitigated in a new trial, and defendant's conviction of crime against nature is vacated, where defendant was acquitted of second-degree sexual offense based upon the same act of cunnilingus; the trial court had instructed the jury that, in order to find defendant guilty of second-degree sexual offense, it must find beyond a reasonable doubt that the victim was physically helpless; and the jury by its verdict found that the evidence did not show beyond a reasonable doubt that the act of cunnilingus was performed while the victim was physically helpless and, therefore, without her consent.

Appeal by defendant from judgment entered 18 July 2003 by Judge Russell Walker, Jr. in Ashe County Superior Court. Heard in the Court of Appeals 16 February 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Amy C. Kunstling, for the State.

David Childers for defendant-appellant.

HUNTER, Judge.

Gregory Paul Whiteley ("defendant") appeals from a judgment dated 17 July 2003 entered consistent with a jury verdict finding him guilty of a crime against nature. Defendant contends the trial court

erred in denying his motion to dismiss and in submitting the offense of a crime against nature to the jury, on the grounds that the statute creating the offense, N.C. Gen. Stat. § 14-177 (2003), is unconstitutional. Although we do not find section 14-177 unconstitutional on its face, we find the statute unconstitutional as applied to the facts of this case and, therefore, vacate defendant's sentence as to this offense.

The evidence tends to show that on 24 May 2002, defendant attended a party at which Tashah Stevens ("Stevens") was also present. Defendant was twenty-two and Stevens was eighteen years old at that time.

Stevens testified she attended the party with her younger sister ("Kimberly"), her friend Tomie Miller ("Miller"), and others. Conflicting evidence was offered as to whether Stevens ingested alcohol and took a type of drug known as "ladder bars" while traveling to and after reaching the party. Stevens testified she did not knowingly drink alcohol or take drugs at any point during the night. Stevens also stated she believed she left her drink unattended at the party, and that after retrieving the drink, she did not remember the remainder of the evening.

Contradictory evidence as to Stevens' drug and alcohol use, and as to her apparent cognizance, was offered by those who rode to the party with Stevens and by guests at the party. Miller and another occupant of the vehicle testified Stevens drank alcohol and took ladder bars en route to the party. Multiple witnesses testified that drugs and alcohol were present at the party. Defendant stated he took drugs while at the party, including ladder bars, Ecstasy, marijuana, and crack. Guests present at the party testified they observed Stevens drinking alcohol and behaving in an intoxicated manner.

Sometime in the early morning hours of 25 May 2002, Stevens left the party with Kimberly, Kimberly's boyfriend ("Mark"), and defendant, who was Mark's roommate. Stevens testified she had no recollection of leaving the party or any of the events that followed until the next morning. Kimberly stated Stevens was unable to talk and appeared to be unconscious for part of the ride. Defendant testified Stevens appeared to be "stumbling drunk" when they left the party, but was not unconscious. Upon arriving at defendant's apartment where a number of individuals were gathered, Kimberly testified Stevens was carried inside and placed in defendant's bedroom, because she was "passed out." Defendant testified that he and

Stevens walked in together and then went to his bedroom. Matt Stiednam ("Stiednam"), who had also come from the party, testified he observed defendant and Stevens enter defendant's bedroom together upon arrival, and that Stevens was walking by herself.

Defendant explained that as he helped Stevens undress in his room, that she began kissing him, and that he attempted to have sexual intercourse with her. Defendant testified the contact was consensual and that Stevens was an active participant. Defendant also stated he did not give Stevens any drugs. Defendant testified he was physically unable to engage in intercourse, and instead performed cunnilingus upon Stevens and inserted his fingers into her vagina. Defendant stated that following the intimate contact, Stevens asked for a telephone to make a call. After retrieving a phone for her, he left the room. Stiednam testified defendant left the apartment to take another girl home and did not return until the following morning.

Stevens testified that when she awoke on the morning of 25 May 2003, she was naked, alone in defendant's bedroom, and had a sharp pain in her swollen vaginal area. Stevens also reported trouble focusing her vision when she first awoke. Stevens testified she had no memory of how she got to defendant's apartment, of consenting to sexual activity, or of any events that occurred following the party.

Stevens called a friend to pick her up and took a shower after arriving home. She then went to a hair appointment and to a restaurant where a friend, Shannon Miller ("Shannon"), worked. Shannon testified Stevens was upset and told her she had been raped. Shannon convinced Stevens to go to the emergency room. Shannon testified Stevens asked her to tell the nurses, if asked, that Stevens had not been drinking the previous night or that someone had slipped something into her drink.

Stevens was examined by Dr. Elizabeth Bradley ("Dr. Bradley"), who testified at trial that her examination revealed bruises around Stevens's pelvic area and a swollen, red, and bleeding vagina. Dr. Bradley explained a physical examination was not completed due to the abrasions and soreness, but that something had been forcibly inserted into Stevens's vagina, possibly repeatedly. She further stated the vaginal injuries sustained by Stevens could not have been caused by the sexual activity described by defendant, but that the perpetrator's identity could not be determined from the examination.

A toxicology screen was performed on Stevens. The test showed no presence of alcohol, but did reveal the presence of the drug

Benzodiazepine. Benzodiazepine is a prescription drug also known by the street name of ladder bars. Dr. Bradley testified that when ingested, Benzodiazepine can take effect in fifteen to thirty minutes, can result in a person appearing intoxicated, and can cause memory loss, confusion, and loss of consciousness. Dr. Bradley stated Stevens' description of her memory loss was consistent with having ingested ladder bars.

Defendant was charged with first degree rape, first degree sexual offense, and a crime against nature. At trial, defendant moved to dismiss all charges, asserting that Stevens consented to the sexual activity, and contending that the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508 (2003), rendered the North Carolina crime against nature statute unconstitutional. The trial court reduced the first two charges to second degree rape and second degree sexual offense, but due to the conflicting evidence of the consensual nature of the sexual activity, the trial court denied the motion to dismiss the crime against nature charge. The jury subsequently returned verdicts of not guilty on the charges of second degree rape and second degree sexual offense, and guilty as to the charge of a crime against nature. Defendant received a suspended sentence of six to eight months after sixty days in custody, and thirty-six months intensive supervised probation. Defendant appeals.

Defendant contends, in his interrelated assignments of error, that the trial court committed reversible error in both denying defendant's motion to dismiss the charge of crime against nature and in instructing the jury on the offense of a crime against nature. Defendant argues that N.C. Gen. Stat. § 14-177 is unconstitutional in light of the United States Supreme Court's recent decision in *Lawrence v. Texas*. Although we find N.C. Gen. Stat. § 14-177 constitutional on its face, we agree that the statute is unconstitutional as applied in this case in that the trial court erred in its jury instructions.

N.C. Gen. Stat. § 14-177 states: "If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." *Id.* Specific acts which constitute a crime against nature have been defined by case law to include the offense with which defendant was charged in this case, cunnilingus. *See State v. Joyner*, 295 N.C. 55, 66, 243 S.E.2d 367, 374 (1978).

Prior to *Lawrence*, our courts have upheld the constitutionality of section 14-177, finding it neither vague nor overbroad. *See State v. Singleton*, 85 N.C. App. 123, 130, 354 S.E.2d 259, 264 (1987); *see also*

State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980); *State v. Poe*, 40 N.C. App. 385, 252 S.E.2d 843 (1979). In light of the United States Supreme Court's pronouncements in *Lawrence*, however, we must now reconsider the constitutionality of this law. *See State v. Gray*, 268 N.C. 69, 79, 150 S.E.2d 1, 9 (1966) (holding that our courts are bound by the United States Supreme Court's interpretation of the Federal Constitution). Accordingly, we begin with an examination of the United States Supreme Court's holding.

In *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508, the United States Supreme Court held that a Texas law prohibiting "deviate sexual intercourse" with a member of the same sex violated the due process clause, where the individuals charged were adults engaging in consensual, private sexual activity. *Id.* at 578, 156 L. Ed. 2d at 525. The Supreme Court based its holding on the right to privacy in intimate relationships first recognized in *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510 (1965) (invalidating application to married couples of a state law prohibiting the use of contraception and counseling in the use of contraception), and extended to non-marital relationships in *Eisenstadt v. Baird*, 405 U.S. 438, 31 L. Ed. 2d 349 (1972) (invalidating a law prohibiting distribution of contraceptives to unmarried persons as an impairment of personal rights). Although the Texas statute at issue in *Lawrence* prohibited only same-sex sexual conduct, the majority holding explicitly stated that its decision to invalidate the Texas statute was not based on equal protection grounds, but was instead based on the unconstitutional infringement of the liberty interest in private, intimate acts between consenting adults. *Id.* at 574-75, 156 L. Ed. 2d at 523. The Court specifically overruled its prior ruling in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140 (1986), which had upheld the constitutionality of the state of Georgia's sodomy statute prohibiting both heterosexual and homosexual conduct. The Court found that the analysis in Justice Stevens' dissent in *Bowers*, which focused on the "liberty" inherent in individual decisions in the intimacies of physical relationships, should have been controlling in both that case, and in *Lawrence*. *Lawrence*, 538 U.S. at 577-78, 156 L. Ed. 2d at 525.

The Supreme Court, however, did not hold that this Fourteenth Amendment liberty interest in personal relations was without limits. The Court stated that laws which do no more that prohibit a particular sexual act "have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home[,]" and thus "seek to control a personal rela-

tionship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." *Id.* at 567, 156 L. Ed. 2d at 518. Concerns about these far-reaching consequences, therefore, "counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." *Id.* The Supreme Court provided guidance as to those boundaries, however, suggesting four areas where legitimate state interests justified intrusion into the personal and private life of an individual. *Id.* at 578, 156 L. Ed. 2d at 525-26. *Lawrence* stated: "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution." *Id.* at 578, 156 L. Ed. 2d at 525. The inclusion of this language by the United States Supreme Court clearly indicates that state regulation of sexual conduct involving minors, non-consensual or coercive conduct, public conduct, and prostitution falls outside the boundaries of the liberty interest protecting personal relations and is therefore constitutionally permissible. We conclude that our state's regulation of sexual conduct falling outside the narrow liberty interest recognized in *Lawrence* remains constitutional.

Our courts have already recognized the limits of the narrow liberty interest articulated in *Lawrence v. Texas*, and have upheld laws regulating sexual conduct outside those boundaries. *See State v. Pope*, 168 N.C. App. 592, 594, 608 S.E.2d 114, 116 (2005) (holding the state may properly criminalize solicitation of a crime against nature); *State v. Oakley*, 167 N.C. App. 318, 322, 605 S.E.2d 215, 218 (2004) (holding *Lawrence* does not invalidate charges of criminally prohibited sexual activity with minors); *State v. Clark*, 161 N.C. App. 316, 321, 588 S.E.2d 66, 68-69 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 81 (2004) (finding *Lawrence* does not control in statutory rape charge due to the express exceptions relating to minors).

We further note that many of our sister courts have likewise interpreted *Lawrence* to apply to the limited liberty interest of personal relations, and have upheld statutes criminalizing acts outside that boundary. *See State v. Thomas*, 891 So.2d 1233, 1238 (La. 2005), (declining to use *Lawrence* to strike down a Louisiana law criminalizing solicitation of a crime against nature); *People v. Williams*, 811 N.E.2d 1197, 1199 (Ill. App. 2004) (noting *Lawrence* specifically excludes prostitution from its holding); *see also Anderson v. Morrow*,

371 F.3d 1027, 1033 (9th Cir. 2004) (holding *Lawrence's* recognition of right of individuals to engage in fully and mutually consensual private sexual conduct does not affect a state's legitimate interest to interpose when consent is in doubt).

Having considered the United States Supreme Court's holding in *Lawrence*, we now turn to defendant's challenge of N.C. Gen. Stat. § 14-177. Defendant contends section 14-177 is unconstitutional on its face as it prohibits specific sexual conduct, and thus attempts to regulate personal relations protected by the Fourteenth Amendment liberty interest. We disagree.

Our Court has a duty to examine a statute and determine its constitutionality when the issue is properly presented, rather than to assume the role of policy maker, which has been entrusted by our Constitution to the legislature. *See State v. Arnold*, 147 N.C. App. 670, 673, 557 S.E.2d 119, 121 (2001). In reviewing the constitutionality of statutes, "[w]e presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality." *State v. Evans*, 73 N.C. App. 214, 217, 326 S.E.2d 303, 305 (1985). A statute must be held constitutional "unless it is in conflict with some constitutional provision of the State or Federal Constitutions." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978). Our North Carolina Supreme Court has noted the heavy burden inherent in mounting a facial challenge to the constitutionality of a statute.

> "A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully." . . . An individual challenging the facial constitutionality of a legislative act "must establish that no set of circumstances exists under which the act would be valid." The fact that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."

State v. Thompson, 349 N.C. 483, 491, 508 S.E.2d 277, 281-82 (1998) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987)).

As discussed *supra*, *Lawrence* clearly indicates that regulation of particular sexual acts is permissible when legitimate state interests justify intrusion into the personal and private life of the individual, but is not permissible when such regulation intrudes upon personal relations with no legitimate state interest. *See Lawrence*, 539 U.S. at 567, 156 L. Ed. 2d at 518. A legitimate state interest clearly exists in

regulating conduct involving minors, non-consensual or coercive conduct, public conduct, and prostitution. Therefore, as we find that section 14-177 may properly be used to prosecute conduct in which a minor is involved, conduct involving non-consensual or coercive sexual acts, conduct occurring in a public place, or conduct involving prostitution or solicitation, the statute is facially constitutional.

This interpretation is consistent with our Courts prior examination of N.C. Gen. Stat. § 14-177 in light of *Lawrence*. In *State v. Pope*, this Court considered whether *Lawrence v. Texas* rendered the statute unconstitutional when used to prosecute solicitation of a crime against nature. *Pope*, 168 N.C. App. at 594, 608 S.E.2d at 116. *Pope*, noting the limitations of the holding in *Lawrence*, concluded that because acts of prostitution and public conduct were not within the right to private intimate relations recognized by *Lawrence*, the North Carolina statute criminalizing such conduct was not unconstitutional. *Id*. at 594, 608 S.E.2d at 116.

Defendant further contends, however, that N.C. Gen. Stat. § 14-177 is unconstitutional as applied in this case in that the trial court erred in instructing the jury on the offense of crime against nature. After careful review of the facts and law, we agree.

In the wake of the United States Supreme Court's ruling in *Lawrence*, the application of section 14-177, while permissible to prohibit particular sexual acts in which a legitimate state interest in regulation exists, is unconstitutional when used to criminalize acts within private relations protected by the Fourteenth Amendment liberty interest. As noted *supra*, a legitimate state interest exists in prohibiting the conduct proscribed by section 14-177 when such conduct involves minors, public conduct or solicitation. The evidence of record is clear, however, that the act in this case did not involve minors, did not occur in public, and did not involve solicitation.

A legitimate state interest, however, also permits prosecution under section 14-177 in cases involving non-consensual or coercive acts. As the Supreme Court noted in *Lawrence*, historically, laws prohibiting crimes against nature were routinely used to prosecute "predatory acts against those who could not or did not consent[.]" *Lawrence*, 539 U.S. at 569, 156 L. Ed. 2d at 519. Therefore, in order for the application of section 14-177 to be constitutional post-*Lawrence* on the facts of this case, the State must prove beyond a reasonable doubt that defendant committed the sexual act, cunnilingus, and that such an act was non-consensual.

Defendant's request for an instruction that defendant committed a crime against nature without the victim's consent was denied by the trial court. The trial court instead charged the jury that defendant was guilty if he committed the physical act of a crime against nature. The trial court instructed:

> [Defendant] also has been charged with a crime known as crime against nature, which is an unnatural sexual act. For you to find him guilty of this offense, the State must prove beyond a reasonable doubt, that [defendant] committed an unnatural sexual act with Tashah Stevens. One kind of unnatural act is the actual penetration of female sex organ by the tongue of another person.
>
> If you find from the evidence, beyond a reasonable doubt, that on or about the alleged date, [defendant] committed an unnatural sex act, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt, it would be your duty to return a verdict of not guilty.

"A trial judge is required . . . to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). "Failure to instruct upon all substantive or material features of the crime charged is error." *Id.* As the jury was not instructed to consider whether the act was committed without Stevens' consent, the trial court's instruction as to the offense of a crime against nature was in error.

Ordinarily, failure to instruct on each element of a crime is prejudicial error requiring a new trial. *See Bogle*, 324 N.C. at 197, 376 S.E.2d at 748. However, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443, 25 L. Ed. 2d 469, 475 (1970). We, therefore, must determine whether the element of non-consent has been decided and may not be relitigated in a new trial. *See State v. McKenzie*, 292 N.C. 170, 175, 232 S.E.2d 424, 428 (1977) (applying *Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469).

The United States Supreme Court, in *Ashe v. Swenson*, addressed the issue of collateral estoppel in criminal matters, holding

> the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a

> previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Ashe, 397 U.S. at 444, 25 L. Ed. 2d at 475-76 (footnote omitted). In *Ashe*, the defendant was charged with six counts of armed robbery arising from the same transaction, a robbery of six participants of a poker game. *Id.* at 438, 25 L. Ed. 2d at 472. The defendant was tried and acquitted for the robbery of one victim. *Id.* at 439, 25 L. Ed. 2d at 473. Subsequently, the defendant was again brought to trial for the robbery of another victim. The defendant was found guilty at the second trial, and alleged that the second conviction was barred by the Fifth Amendment protection against double jeopardy. *Id.* at 440, 25 L. Ed. 2d at 473. As the Court noted, the evidence of record was

> utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that [the victim] had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The . . . rule of law, therefore, would make a second prosecution for the robbery . . . wholly impermissible.

Id. at 445, 25 L. Ed. 2d at 476.

Here, defendant was also charged with second degree sexual offense. In cases where the alleged victim is not mentally handicapped, second degree sexual offense is defined as a sexual act committed either without consent, that is "[b]y force and against the will" of the victim, or when the victim is "physically helpless." N.C. Gen. Stat. § 14-27.5 (2003), *see also State v. Booher*, 305 N.C. 554, 561, 290 S.E.2d 561, 564 (1982). The trial court, in instructing the jury as to the charge of second degree sexual offense, stated that to find defendant guilty, "the State must prove beyond a reasonable doubt" that defendant engaged in a "sexual act" with Stevens. The trial court defined the sexual act that was the basis for second degree sexual offense as cunnilingus, the same conduct that was the basis for the charge of a crime against nature. The trial court further instructed the jury that to find defendant guilty as to second degree sexual offense, they must

also find beyond a reasonable doubt that Stevens was physically helpless, and that defendant knew or should have reasonably known that Stevens was physically helpless. The jury acquitted defendant of the charge of second degree sexual offense.

The record is utterly devoid of any indication that the jury could rationally have found that the sexual act which was the basis for both crimes did not occur, as defendant testified at trial to the commission of the sexual act. Further, no evidence was offered at trial that the act was committed by force and against the will of Stevens, as is evidenced by the trial court's instruction, without objection by the State, only as to physical helplessness and not as to force for the charge of second degree sexual offense. The single rationally conceivable issue in dispute before the jury was whether the sexual act was committed while Stevens was physically helpless, and, therefore, without her consent. The jury, by its verdict, found that the evidence did not show beyond a reasonable doubt that the act was non-consensual, that is, that Stevens was physically helpless and therefore unable to consent to the sexual act. As the issue of non-consent to the sexual act has previously been determined, the State may not "constitutionally hale him before a new jury to litigate that issue again." *Ashe*, 397 U.S. at 446, 25 L. Ed. 2d at 477.

We find that defendant's conviction for a violation of N.C. Gen. Stat. § 14-177, under the facts of this case, was error. We therefore vacate his conviction for a crime against nature.

Vacated.

Judges CALABRIA and JACKSON concur.

IN RE R.P.M., JUVENILE

No. COA04-1135

(Filed 16 August 2005)

1. Robbery— common law—aiding and abetting—motion to dismiss—sufficiency of evidence

The trial court erred by denying a juvenile's motions to dismiss the charge of common law robbery based on the theory of aiding and abetting, because: (1) the evidence was insufficient to show that the juvenile knew his friends were going to rob the vic-

tim, nor did the State introduce any evidence tending to show that the juvenile encouraged his friends in the commission of the crime or that he by word or deed indicated to them that he stood by prepared to assist; (2) the record shows that the juvenile rendered no assistance to the perpetrators of the crime and instead assisted the victim; and (3) the juvenile ran away before his two friends.

2. Assault— assault with deadly weapon with intent to inflict serious injury—juvenile delinquency—sufficiency of evidence—fatally deficient petition

The trial court erred by denying a juvenile's motions to dismiss the charges of assault with a deadly weapon with intent to inflict serious injury based on the aiding and abetting theory, because: (1) the juvenile petition lists the offense as assault with a deadly weapon with intent to inflict serious injury but does not list a corresponding statute; (2) there is no North Carolina statute for assault with a deadly weapon with intent to inflict serious injury, and thus, there was no crime listed on the juvenile petition; (3) the addition of the words "with intent" when listing the crime are a material addition and not superfluous as they did not give the juvenile proper notice of the alleged misconduct; and (4) even if the petition alleged a proper offense, the trial court erred by denying the motions to dismiss the charge of assault with a deadly weapon with intent to inflict serious injury when there was no evidence of the intent element.

Judge JACKSON concurring in part and dissenting in part.

Appeal by Juvenile from order entered 19 March 2004 by Judge Avril U. Sisk in District Court, Mecklenburg County. Heard in the Court of Appeals 17 May 2005.

Attorney General Roy Cooper, by Assistant Attorney General Donna D. Smith, for the State.

Robert T. Newman, for juvenile-appellant.

WYNN, Judge.

To render a person guilty of a crime by aiding and abetting, the State must present "some evidence tending to show that he, . . . by his conduct made it known to [the] perpetrator that he was standing by to lend assistance when and if it should become necessary." *State v.*

Keeter, 42 N.C. App. 642, 644-45, 257 S.E.2d 480, 482 (1979). In this case, Juvenile contends that the evidence presented was insufficient to support his convictions of common law robbery and assault with a deadly weapon with intent to inflict serious injury based on an aiding and abetting theory. Because the record shows that Juvenile rendered no assistance to the perpetrator of the crime and instead assisted the victim, we reverse the trial court's adjudication and disposition orders with respect to the common law robbery charge. Furthermore, because the Juvenile Petition lists a nonexistent offense—assault with a deadly weapon with intent to inflict serious injury—we must vacate the trial court's orders on that nonexisting offense.

The evidence at the hearing tended to show that: On 11 November 2003, Juvenile and two older friends, G.G. and R.C., were walking home with three pit bull dogs. Each person walked one of the dogs on a leash. On the way home they passed Fernando "Louis" Gonzales standing outside his place of work talking on a cell phone. According to Mr. Gonzales, the three males walked passed him and immediately returned. Mr. Gonzales testified that the three males were dark-skinned and approximately fifteen, seventeen, and nineteen years of age, but he never identified Juvenile as one of the three males.

R.C. asked Mr. Gonzales if he could use his cell phone. Mr. Gonzales said "no," but told him they could use the office phone inside. Mr. Gonzales testified that the "one that looked younger" hit him in the face. Mr. Gonzales testified that another of the men hit him in the face and let go of the two dogs he was holding and the dogs started biting his feet. After he was knocked to the ground, Mr. Gonzales testified that one of the men was hitting him and two of the dogs were biting him. One man then tried to get the dogs off him. He testified that one of the men went through his pockets and took eighty dollars and a necklace. Mr. Gonzales required several stitches for his injuries.

Juvenile testified that after they saw Mr. Gonzales across the street, G.G. said to R.C. "My pockets are feeling empty." The three then crossed the street, and R.C. asked Mr. Gonzales to use his cell phone. Mr. Gonzales called R.C. a "punta," and then R.C. hit Mr. Gonzales. After R.C. and Mr. Gonzales started fighting, R.C. let go of the dog's leash he was holding. The dog attacked Mr. Gonzales. G.G. said to Mr. Gonzales "Why you hit my brother?" and then pushed him down. At this point, the dog G.G. was holding also got loose. R.C. was kicking Mr. Gonzales, and a dog started shaking Mr. Gonzales's pant

leg and then grabbed Mr. Gonzales by the shoulder. Juvenile kicked the dog to get it off of Mr. Gonzales. Juvenile continued to hold the leash of the third dog. Juvenile observed G.G. grab Mr. Gonzales's coveralls, but testified that he did not know G.G. had taken money until the next day. In an earlier statement, Juvenile stated that G.G. ripped open Mr. Gonzales's coverall suit and reached into his pocket and got nineteen dollars in cash. Juvenile then ran home and R.C. and G.G. followed him. R.C. asked Juvenile's guardian if he could leave one of the dogs there, and she allowed that. R.C., G.G., and Juvenile then went to Bojangles where G.G. gave Juvenile one dollar to get food.

At the close of both the State's evidence and all evidence, Juvenile made a motion to dismiss for insufficiency of the evidence; both motions were denied. The trial court adjudicated Juvenile delinquent on the charges of common law robbery and assault with a deadly weapon with intent to inflict serious injury. Juvenile was placed on probation for twelve months along with the conditions of curfew, community service, restitution, and a mental health assessment. Juvenile appealed.

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[1] On appeal, Juvenile first asserts that the trial court erred by denying his motions to dismiss the common law robbery petition, alleging that there was insufficient evidence that he aided and abetted the alleged robbery. We agree.

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. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)). 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. *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)).

"Common law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Parker*, 322 N.C. 559, 566, 369 S.E.2d 596, 600 (1988) (quotation omitted); *State v. Wilson*, 158 N.C. App. 235, 238, 580 S.E.2d 386, 389 (2003) (same). The State charged

Juvenile with the alleged robbery through aiding and abetting. " 'All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty.' " *Keeter*, 42 N.C. App. at 644, 257 S.E.2d at 482 (quoting *State v. Ham*, 238 N.C. 94, 97, 76 S.E.2d 346, 348 (1953)).

> To render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending to show that he, . . . by his conduct made it known to [the] perpetrator that he was standing by to lend assistance when and if it should become necessary.

Id. at 645, 257 S.E.2d at 482; *see also*, *e.g.*, *State v. Penland*, 343 N.C. 634, 650, 472 S.E.2d 734, 743 (1996) (same), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997).

Juvenile cites to *State v. Ikard*, 71 N.C. App. 283, 321 S.E.2d 535 (1984), to support his argument that his mere presence during the alleged robbery was not sufficient to constitute aiding and abetting. In *Ikard*, the defendant was charged with armed robbery, of which the State alleged he should be found guilty because he either acted in concert with or aided and abetted the perpetrators. *Id.* at 284-85, 321 S.E.2d at 536. In *Ikard*, the defendant took the victim's radio, walked away with three other men, and then stood by while two of the men went back and robbed the victim at gun point. *Id.* The defendant then left the scene with the two men. *Id.* This Court found that there was no evidence that the defendant, who stood twenty to twenty-five feet away from the crime scene, knew that the perpetrators of the armed robbery were armed or were going to commit the crime, and that there was no evidence that the defendant encouraged the crime or indicated he stood prepared to render assistance. *Id.* at 285-86, 321 S.E.2d at 537.

Here, the State asserts that because Juvenile heard G.G. say to R.C., "My pockets are feeling empty[,]" after spotting Mr. Gonzales, Juvenile knew G.G. was going to rob Mr. Gonzales. But Juvenile testified that he had no knowledge that this statement indicated G.G. was going to rob Mr. Gonzales. Like in *Ikard*, this is not sufficient evidence to show that Juvenile knew that G.G. was going to rob Mr. Gonzales. Nor did the State introduce any evidence tending to show that Juvenile encouraged G.G. and R.C. in the commission of the crime, or that he by word or deed indicated to them that he stood by prepared to assist. *See Ikard*, 71 N.C. App. at 286, 321 S.E.2d at 537.

In fact, all evidence introduced indicated that Juvenile was not rendering assistance in committing the crime, but instead tried to help stop the attack. Also, Juvenile ran away before G.G. and R.C.

Viewing the evidence in the light most favorable to the State, there was insufficient evidence to take the case to a jury on the charge of common law robbery. The trial court erred in denying the motions to dismiss the charge of common law robbery.

[2] Juvenile next asserts that the trial court erred by denying his motions to dismiss the "assault with a deadly weapon with intent to inflict serious injury" petition.

Section 7B-1802 of the North Carolina General Statutes provides in pertinent part:

> A petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation.

N.C. Gen. Stat. § 7B-1802 (2004). When a petition is fatally deficient, it is inoperative and fails to evoke the jurisdiction of the court. *In re J.F.M.*, 168 N.C. App. 143, 150, 607 S.E.2d 304, 309, *disc. review denied*, 359 N.C. 411, 612 S.E.2d 321 (2005); *In re Green*, 67 N.C. App. 501, 504, 313 S.E.2d 193, 195 (1984). Because juvenile petitions are generally held to the standards of a criminal indictment, we consider the requirements of the indictments of the offenses at issue. *In re J.F.M.*, 168 N.C. App. at 150, 607 S.E.2d at 309; *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004).

An indictment is fatally defective "if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (citation omitted) (internal quotations omitted). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981).

In this case, the Juvenile Petition lists the offense as "Assault w[ith] a Deadly Weapon w[ith] Intent to Inflict Serious Injury" but

does not list a corresponding statute. There is no statute for assault with a deadly weapon *with intent to inflict* serious injury included in the North Carolina General Statutes, therefore, there was no crime listed on the Juvenile Petition.

The State argues that the inclusion of the words "intent to inflict serious injury" are merely superfluous and should be disregarded.[1] *See State v. Pelham*, 164 N.C. App. 70, 79, 595 S.E.2d 197, 203, *appeal dismissed and disc. review denied*, 359 N.C. 195, 608 S.E.2d 63 (2004). The purpose of the Petition is to give notice to the juvenile and his parents. That "notice must be given [to] the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity." *State v. Drummond*, 81 N.C. App. 518, 520, 344 S.E.2d 328, 330 (1986) (quoting *In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969), *aff'd*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971)). The addition of the words "with intent" when listing the crime are a material addition and not superfluous, as they do not give the juvenile proper notice of the alleged misconduct.

The separate opinion[2] argues that this conclusion is a "hyper technical reading" and unneeded. The separate opinion cites to *Pelham*, 164 N.C. App. at 79, 595 S.E.2d at 204, to support the proposition that additional words in an indictment can "be treated as surplusage and disregarded when testing the sufficiency of the indictment." But in *Pelham*, the words at issue were "by shooting at him" as a description of the assault. *Id.*, 595 S.E.2d at 203. In this case, the extra words are "with intent." This was not a mere description of the crime, but an inclusion of what is normally an essential element of a crime. *See State v. Faircloth*, 297 N.C. 388, 395, 255 S.E.2d 366, 370 (1979) (intent an essential element of burglary); *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 306 (2003) (intent an essential element of assault with a deadly weapon with intent to kill inflicting serious injury); *State v. Coble*, 351 N.C. 448, 451, 527 S.E.2d 45, 48 (2000) (intent an essential element of attempted murder).

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1. The State contends that the charge was for assault with a deadly weapon inflicting serious injury, which has no intent element. N.C. Gen. Stat. § 14-32(b) (2004). However, the petition, adjudication order, and disposition order all list the charge as assault with a deadly weapon *with the intent to inflict* serious injury.

2. Since the separate opinion does not disagree with the result, it is actually concurring in the result and not dissenting.

The Juvenile Petition was fatally defective, we therefore vacate the Petition for "Assault with a Deadly Weapon *with Intent* to Inflict Serious Injury."

Moreover, even if we were to find that the petition did allege a proper offense, we would join with the separate concurring opinion's holding that the trial court erred in denying Juvenile's motions to dismiss the charge of assault with a deadly weapon with intent to inflict serious injury.

To withstand a motion to dismiss the charge at issue, the State must present substantial evidence of the following elements: (1) an assault, (2) with a deadly weapon, (3) an intent to inflict a serious injury, and (4) infliction of a serious injury. An intent to inflict serious injury 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. *See State v. Revels*, 227 N.C. 34, 36, 40 S.E.2d 474, 475 (1946); *State v. Nicholson*, 169 N.C. App. 390, 394, 610 S.E.2d 433, 435 (2005) (intent to kill inferred from the victim's attempts to disengage from argument and escape, deadly nature of the weapon used, and the repeated stabbing by the defendant).

The only evidence presented by the State of intent was Mr. Gonzales's testimony that the "one that looked younger" hit him in the face. This was not sufficient evidence that Juvenile was the person who hit Mr. Gonzales or that Juvenile intended to seriously injure him. Instead of intent to injure, the evidence showed that Juvenile helped Mr. Gonzales by kicking the pit bull dog in an attempt to stop the dog when the dog started biting Mr. Gonzales's shoulder and neck.

Viewing the evidence in the light most favorable to the State, there was insufficient evidence to take the case to a fact finder on the charge of assault with a deadly weapon with the intent to inflict serious injury as there was no evidence of the intent element. The trial court erred in denying the motions to dismiss the charge of assault with a deadly weapon with the intent to inflict serious injury.

Reversed in part; Vacated in part.

Judge BRYANT concurs.

Judge JACKSON concurs in part, dissents in part.

JACKSON, Judge concurring in part, dissenting in part.

For the reasons stated below, I must respectfully dissent from the majority's conclusion that the Juvenile Petition is fatally defective and that, therefore, the Petition for "Assault with a Deadly Weapon with Intent to Inflict Serious Injury" must be vacated.

I concur, however, with the majority's conclusions that there was insufficient evidence to take the case to a jury on the charge of common law robbery and that the trial court erred in denying the motions to dismiss the charge of common law robbery. In addition, I would reverse the trial court as to the charge of Assault with a Deadly Weapon with Intent to Inflict Serious Injury [sic] as well.

The majority argues that the Juvenile Petition is fatally deficient because "it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (citation omitted) (internal quotations omitted). Based upon this observation, the majority concludes that the trial court had no jurisdiction initially and that we must vacate the judgment on appeal. Based upon the language included in the Juvenile Petition in the instant case, I believe that this conclusion represents a hyper technical reading of our precedents in which we need not engage.

On its face, the Juvenile Petition charged Juvenile with "Assault w[ith] a Deadly Weapon w[ith] Intent to Inflict Serious Injury." In the body of the petition additional information included alerted Juvenile that he was charged with a Class E felony and that "[t]he Juvenile is a delinquent juvenile as defined by G.S. 7B-1501(7) in that on or about the date of offense shown in the county named above, the juvenile unlawfully, willfully and feloniously, did . . . assault Loius [sic] Gonzales by allowing a pit bulldog to attack him and inflict serious injury." Read together, this was sufficient information to apprise "the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984). Further, at trial, the State specifically asked that the court adjudicate Juvenile "delinquent on . . . assault with a deadly weapon inflicting serious injury" and Juvenile's defense counsel specifically asked the court not to adjudicate him delinquent of the identical offense.

"An indictment must set forth each of the essential elements of the offense." *State v. Pelham*, 164 N.C. App. 70, 79, 595 S.E.2d 197, 204, *disc. rev. denied*, 359 N.C. 195, 608 S.E.2d 63 (2004) (citing *State v. Poole*, 154 N.C. App. 419, 422, 572 S.E.2d 433, 436 (2002), *cert. denied*, 356 N.C. 689, 578 S.E.2d 589 (2003)). "Allegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage and disregarded when testing the sufficiency of the indictment." *Id.* (citing *State v. Taylor*, 280 N.C. 273, 185 S.E.2d 677, 680 (1972)); *see State v. Muskelly*, 6 N.C. App. 174, 176, 169 S.E.2d 530, 532 (1969). Moreover, a "defendant . . . [has] the right to be charged by a lucid prosecutive statement which factually particularizes the essential elements of the specified offense." *State v. Sturdivant*, 304 N.C. 293, 309, 283 S.E.2d 719, 730 (1981) (citing N.C. Gen. Stat. § 15A-924(a)).

> Nevertheless, it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on *reasonable* notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.

Id. at 311, 283 S.E.2d at 731 (emphasis added). Here, such reasonable notice was accomplished, given the totality of the circumstances.

Notwithstanding the fact that I believe the State's Juvenile Petition was sufficient to withstand appellate scrutiny, I believe that Juvenile's conviction in this instance must be reversed here as well. In the petition, Juvenile was charged with assault with a deadly weapon with intent to inflict serious injury; however, several subsequent documents provided as part of the record on appeal properly reference the felony offense as assault with a deadly weapon inflicting serious injury. N.C. Gen. Stat. § 14-32(b).

The elements of assault with a deadly weapon inflicting serious injury are: "(1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, (4) not resulting in death." *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 923 (2000); N.C. Gen. Stat. 14-32(b) (2003). *See State v. McCree*, 160 N.C. App. 200, 205-06, 584 S.E.2d 861, 865 (2003). As noted *supra* in the majority opinion, "all evidence introduced indicated that Juvenile was not rendering assistance in committing the crime, but instead tried to help stop the attack. Also, Juvenile ran away before G.G. and R.C."

Therefore, viewing the evidence in the light most favorable to the State, there was insufficient evidence to present the charge of assault with a deadly weapon inflicting serious injury to the jury as well and the trial court erred in denying the motion to dismiss the charge.

JOANNE H. MURROW AND REBECCA H. MATHIS, PLAINTIFFS v. NANCY HENSON AND BONNIE H. GALLO, DEFENDANTS

No. COA04-1558

(Filed 16 August 2005)

Wills— tortious interference with prospective advantage—testamentary benefits—statement of claim

The trial court erred in a tortious interference with prospective advantage case by granting defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claim that defendants maliciously caused the parties' stepgrandmother to execute a will that left plaintiffs only nominal bequests, because: (1) the allegations from the complaint do not necessarily establish that plaintiffs would be able to obtain adequate relief through a caveat proceeding; (2) the inadequacy of relief in a caveat proceeding would entitle plaintiffs to proceed with a tort claim; and (3) it does not appear beyond doubt that plaintiffs can prove no set of facts in support of a claim entitling them to relief.

Appeal by plaintiffs from order entered 11 October 2004 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 11 May 2005.

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

Bell, Davis & Pitt, P.A., by William K. Davis and Stephen M. Russell, for defendants-appellees.

GEER, Judge.

Plaintiffs Joanne H. Murrow and Rebecca H. Mathis appeal the order of the trial court dismissing their claim that defendants Nancy Henson and Bonnie Gallo maliciously caused their stepgrandmother to execute a will that left plaintiffs only nominal be-

quests. We hold that plaintiffs' complaint sufficiently states a claim for relief under *Johnson v. Stevenson*, 269 N.C. 200, 152 S.E.2d 214 (1967) and *Griffin v. Baucom*, 74 N.C. App. 282, 328 S.E.2d 38, *disc. review denied*, 314 N.C. 115, 332 S.E.2d 481 (1985) and, therefore, reverse the decision below.

Facts

Plaintiffs and defendants are all step-grandchildren of Rebecca Barnhill Hundley, who died on 6 January 2004. On 5 August 2004, plaintiffs filed a complaint for damages against defendants, alleging claims for alienation of affections and for tortious interference with prospective advantage. At the motion to dismiss hearing, plaintiffs conceded that their claim for alienation of affections should be dismissed. This appeal involves only plaintiffs' cause of action for tortious interference with prospective advantage.

Plaintiffs' complaint included the following pertinent allegations:

> 5. For many years it had been the intent and purpose of the deceased [Rebecca Barnhill Hundley] to divide everything she had received from her late husband, George L. Hundley, equally among his grandchildren, the plaintiffs, the defendants, Robert S. Foster, Jr., and Georgette F. Hedrick.
>
> 6. Defendants imposed upon Rebecca Barnhill Hundley, and gave her false and defamatory information about plaintiffs that turned her against them and predisposed her to execute a new will providing for only nominal bequests to plaintiffs. Defendants also by the same process induced and influenced Rebecca Barnhill Hundley to make substantial and favorable inter vivos gifts to them, and to diminish and eventually eliminate inter vivos gifts to plaintiffs from her.
>
> . . . .
>
> 10. By means set forth above, defendants maliciously induced Rebecca Barnhill Hundley to reduce and eventually eliminate gifts that she had making [sic] and would have made to plaintiffs, and to eliminate plaintiffs as substantial beneficiaries under her will.
>
> . . . .
>
> 16. Specifically, plaintiffs had legitimate and bona fide expectations of benefits from Rebecca Barnhill Hundley; and

> defendants knew of these legitimate and bona fide expectations of benefits from Rebecca Barnhill Hundley; defendants intentionally induced Rebecca Barnhill Hundley not to make gifts to plaintiffs and to provide them substantial benefits by her will; defendants acted without justification; and defendants caused actual pecuniary harm to plaintiffs.

Based on these allegations, plaintiffs asserted that defendants' conduct amounted to malicious interference with prospective advantage of plaintiffs to receive gifts and testamentary benefits from Ms. Hundley.

On 3 September 2004, defendants filed a motion to dismiss plaintiffs' complaint pursuant to N.C.R. Civ. P. 12(b)(6). A hearing was held on 4 October 2004 in Guilford County Superior Court and the trial court granted defendants' motion on 11 October 2004. Plaintiffs subsequently filed a notice of appeal to this Court on 27 October 2004.

The purpose of a motion under Rule 12(b)(6) is to test "the legal sufficiency of the pleading." *Sterner v. Penn*, 159 N.C. App. 626, 628, 583 S.E.2d 670, 672 (2003). When determining whether a complaint is sufficient to withstand a motion to dismiss under Rule 12(b)(6), the trial court must discern " 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Shell Island Homeowners Ass'n. v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999) (quoting *Isenhour v. Hutto*, 129 N.C. App. 596, 598, 501 S.E.2d 78, 79, *review allowed*, 349 N.C. 360, 517 S.E.2d 895 (1985)). A complaint should be dismissed if "[1] no law exists to support the claim made, [2] if sufficient facts to make out a good claim are absent, or [3] if facts are disclosed which will necessarily defeat the claim." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

On appeal, plaintiffs do not challenge the trial court's dismissal to the extent that it involves inter vivos gifts as opposed to testamentary benefits. With respect to testamentary benefits, plaintiffs argue that the trial court's dismissal of their claim cannot be reconciled with *Bohannon v. Wachovia Bank & Trust Co.*, 210 N.C. 679, 188 S.E. 390 (1936).

In *Bohannon*, the plaintiff alleged that his grandmother and aunt had by false representations prevailed upon the plaintiff's grandfather to change his "fixed intention" to leave a large share of his

estate to the plaintiff. *Id.* at 681, 188 S.E. at 391. Our Supreme Court held that these allegations supported a cause of action: "If the plaintiff can recover against the defendant for the malicious and wrongful interference with the making of a contract, we see no good reason why he cannot recover for the malicious and wrongful interference with the making of a will." *Id.* at 685, 188 S.E. at 394.

In this appeal, the parties debate the applicability of *Bohannon*, focusing on whether or not the case involved an existing and probated will, as here. Defendants contend that "[t]he Supreme Court [in *Bohannon*] did not deal with an existing will or the effect of an existing will." Plaintiffs, however, state that "it clearly appears in the report of that case that the will in question had been admitted to probate and was under administration at the time the lawsuit for intentional interference with prospective advantage was filed." Neither position is precisely correct. The language referenced by plaintiffs indicates only that one of the defendants, who had passed away prior to filing of the suit, had a will that had been probated. The decision cited by the parties does not, however, indicate anywhere that a will had been admitted to probate. Nevertheless, a subsequent appeal in the case, *Bohannon v. Trotman*, 214 N.C. 706, 708, 200 S.E. 852, 852 (1939) confirms that there was a will and that, at some unspecified time, it was duly probated.

We need not, however, resolve whether *Bohannon* is factually similar or distinguishable from this case since *Bohannon* does not represent the final word in North Carolina on this issue—although the development of the law has been somewhat contradictory. In 1950, the Supreme Court addressed a factual scenario similar to that in *Bohannon*, but never mentioned the *Bohannon* opinion. *See Holt v. Holt*, 232 N.C. 497, 61 S.E.2d 448 (1950). Defendants contend that *Holt* controls rather than *Bohannon*.

The *Holt* plaintiffs sued "to recover damages of defendants for allegedly inducing decedent by fraud or undue influence to convey and will his property to them pursuant to a conspiracy on the part of the defendants and another to defraud plaintiffs of their rights of inheritance." *Id.* at 498, 61 S.E.2d at 450. The decedent's will—which excluded the plaintiffs as beneficiaries—had been admitted to probate. The Supreme Court in *Holt* first held:

> In so far as his children are concerned, a parent has an absolute right to dispose of his property by gift or otherwise as he pleases. He may make an unequal distribution of his property

> among his children with or without reason. *These things being true, a child has no standing at law or in equity either before or after the death of his parent to attack a conveyance by the parent as being without consideration, or in deprivation of his right of inheritance.*

Id. at 500-01, 61 S.E.2d at 451 (emphasis added). The Court added:

> When a person is induced by fraud or undue influence to make a conveyance of his property, a cause of action arises in his favor, entitling him, at his election, either to sue to have the conveyance set aside, or to sue to recover the damages for the pecuniary injury inflicted upon him by the wrong. *But no cause of action arises in such case in favor of the child of the person making the conveyance for the very simple reason that the child has no interest in the property conveyed and consequently suffers no legal wrong as a result of the conveyance.*

Id. at 501, 61 S.E.2d at 452 (emphasis added) (internal citations omitted). The Court then held that if the person making the conveyance should die, the cause of action survives and passes "to those who then succeed to his rights." *Id.* Plaintiffs in this case have argued that *Holt* involved a challenge regarding inter vivos transfers and, at this point in the *Holt* opinion, the Court indeed does proceed to address who may challenge transfers of property made by a decedent in his lifetime and what showing is required. *See id.* at 502, 61 S.E.2d at 452.

In the next paragraph, however, the Court observed that the *Holt* plaintiffs claimed to have succeeded as heirs and next of kin of the decedent to the right to bring the decedent's claim that the defendants had induced the decedent by fraud to deny the plaintiffs their rights of inheritance. In rejecting this claim, the Supreme Court stressed that the will admitted to probate had vested in the defendants all rights existing in the decedent at the time of his death. *Id.*, 61 S.E.2d at 453. The Court then wrote:

> To be sure, the plaintiffs offered [the will] in evidence "for the purpose of attack," and undertake to avoid its legal effect as a testamentary conveyance of the rights of their ancestor to the defendants by asserting that its execution was induced by fraud or undue influence perpetrated on their ancestor by the defendants and their fellow conspirator . . . . But the law does not

> permit the plaintiffs to assail the probated paper writing in this collateral fashion.

Id. After pointing out that by statute, an order of the Clerk admitting a paper writing to probate constitutes conclusive evidence that the paper writing is the valid will of the decedent, *see* N.C. Gen. Stat. § 31-19 (2003), the Court held: "This being true, the plaintiffs have no standing to maintain these suits until the probated paper writing is declared invalid as a testamentary instrument by a competent tribunal in a caveat proceeding; for such paper writing wills all rights existing in [the decedent] at the time of his death to the defendants, with the result that nothing descends to the heirs or next of kin." *Id.* at 503, 61 S.E.2d at 453.

In summary, *Holt* appears to hold (1) that the right to sue for fraud even with regard to the making of a will rests in the maker of the will, (2) that the cause of action will survive the death of the maker of the will, and (3) unless the will is set aside through a caveat proceeding, the right to pursue a claim for fraud (at least as to personalty) rests with the beneficiaries under the will. A commentator has observed that this reasoning in *Holt* is difficult to reconcile with *Bohannon*: "The opinion is openly hostile to the idea that there is any independent right in the disinherited sons, based on loss of an expectancy, even based on the intentional act of another and after the death of the parent." Diane J. Klein, *Revenge of the Disappointed Heir: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fourth Circuit*, 104 W. Va. L. Rev. 259, 276-77 (2002).

Subsequently, in 1967, the Supreme Court issued a third opinion addressing this subject in *Johnson v. Stevenson*, 269 N.C. 200, 152 S.E.2d 214 (1967). The Court relied on both *Bohannon* and *Holt*, but did not resolve the apparent inconsistency between their holdings. In *Johnson*, the joint will of the plaintiff's parents, which had been probated, bequeathed all of the parents' property to the children of the plaintiff's brother. The plaintiff was not mentioned in the will. The plaintiff alleged that by fraudulent acts, her brother and sister-in-law wrongfully denied the plaintiff her rightful inheritance. As relief, she sought a constructive trust on certain property for her benefit.

The Court distinguished *Bohannon* on the grounds that the decedent in *Bohannon* had (a) a "fixed intention" to settle part of his estate on the plaintiff, (b) the plaintiff could not have filed a caveat proceeding, and (c) the plaintiff would not have received anything

from his grandfather's estate in the event that the grandfather died intestate. *Id.* at 203, 152 S.E.2d at 217. The Court found the *Holt* decision "more analogous" and described the opinion as holding that "the will could be attacked only by *caveat*; and that, unless and until the will was declared invalid in a *caveat* proceeding, all rights existing in [the decedent] at the time of his death, to attack conveyances he had made, vested in the defendants as beneficiaries under the will." *Id.* The Court observed that "the thrust of" the *Holt* decision was in accord with its decision, *id.*, but then proceeded to engage in a slightly different analysis.

The *Johnson* Court first pointed out that a constructive trust is an equitable remedy and quoted from the Restatement of Restitution § 184: " 'Where a disposition of property by will or an intestacy is procured by fraud, duress or undue influence, the person acquiring the property holds it upon a constructive trust, *unless adequate relief can otherwise be given in a probate court*.' " *Johnson*, 269 N.C. at 204, 152 S.E.2d at 217 (emphasis in *Johnson*). Based on this principle, the Court held: "The grounds on which plaintiff seeks to establish a constructive trust were equally available as grounds for direct attack on the will by *caveat*. This right of direct attack by *caveat* gave her a full and complete remedy at law. Hence, plaintiff, on the facts alleged, is not entitled to equitable relief." *Id.* The Court then proceeded to also hold that an heir could establish a right to a constructive trust "notwithstanding the probate of a will under which such heir is not a beneficiary" upon a showing of extrinsic fraud. *Id.* at 204-05, 152 S.E.2d at 218.

In sum, the Court in *Johnson* suggested that equitable relief could be available to an heir omitted from a will if: (1) the grounds on which the plaintiff sought relief were not equally available through a caveat proceeding; (2) the caveat proceeding would not give the plaintiff an adequate remedy; (3) fraud was practiced directly upon the plaintiff by the defendants either before or after the death of the decedent; (4) fraud was practiced on the plaintiff or on the probate court in connection with the probate of the will; or (5) defendants interfered with the plaintiff's right to attack the will by caveat. *Id.* at 204-05, 152 S.E.2d at 217-18. Because the *Johnson* complaint established the availability of relief through a caveat proceeding and failed to allege any of the pertinent types of fraud, the Court affirmed the dismissal of the plaintiff's complaint.

This Court addressed *Bohannon* and *Johnson*, but not *Holt*, in *Griffin v. Baucom*, 74 N.C. App. 282, 328 S.E.2d 38, *disc. review*

denied, 314 N.C. 115, 332 S.E.2d 481 (1985). The plaintiffs in *Griffin* offered evidence that the defendants—the deceased's wife and sister-in-law—exercised undue influence over the deceased to cause him to destroy his will, leaving him intestate with the result that all of his property went to his wife to the exclusion of the plaintiffs. *Id.* at 285, 328 S.E.2d at 41. The defendants also destroyed all evidence regarding the contents of the will. *Id.* The plaintiffs sought either (1) a conveyance of real property that they contend they would have received under the will in the absence of interference or (2) a money judgment in an amount equal to the value of that property. *Id.* at 283, 328 S.E.2d at 39.

The *Griffin* Court first recited the rule in *Bohannon*: "North Carolina recognizes the existence of the tort of malicious and wrongful interference with the making of a will. . . . If one maliciously interferes with the making of a will, or maliciously induces one by means of undue influence to revoke a will, to the injury of another, the party injured can maintain an action against the wrongdoer." *Id.* at 285-86, 328 S.E.2d at 41. After concluding that the plaintiffs in *Griffin* had offered sufficient evidence to establish an issue of fact regarding a malicious interference claim, the Court turned to the defendants' argument that the plaintiffs were in effect seeking to prove the will and, therefore, were required to proceed by way of a caveat proceeding.

The Court explained, citing *Johnson*: "While we agree that where a will has been submitted for probate, a plaintiff must avail himself of the statutory remedy of a will contest to prove or set aside the instrument, where no will has been submitted, as in the case *sub judice*, plaintiff may pursue a tort remedy and is not limited to the remedy of a probate proceeding." *Id.* at 287, 328 S.E.2d at 42 (internal citations omitted). The Court noted that "[d]efendants cite cases from other jurisdictions as recognizing the doctrine that an attempt to pursue a remedy in probate proceedings or a showing that a remedy is unavailable or inadequate through probate proceedings is a prerequisite to maintaining an action for damages for interference with an expected inheritance." *Id.* The plaintiffs in *Griffin* had, however, offered "evidence indicative that the relief available in a probate proceeding was inadequate or even nonexistent." *Id.* Accordingly, the Court held "that in the case under review where no will was submitted for probate and where facts exist indicating that inadequate relief was available in a probate proceeding, plaintiffs were not required to first seek to prove the revoked will in a probate proceeding before pursuing their tortious interference claim." *Id.*

Based on *Griffin's* application of *Johnson*, we believe *Johnson's* analysis is equally applicable to cases not involving a request for a constructive trust. *Johnson* and *Griffin* also provide a means by which *Holt* and *Bohannon* may be reconciled. It appears that in *Holt*, the plaintiffs could have obtained an adequate remedy in a caveat proceeding, while in *Bohannon*, the plaintiff could not. Thus, in this case, as in *Griffin*, the question is whether a caveat proceeding was available and, if so, whether such a proceeding would provide an adequate remedy to plaintiffs.[1]

Plaintiffs' complaint alleges that a will exists and their brief on appeal appears to acknowledge that the will has been submitted to probate. The complaint's allegation that Mrs. Hundley's will provided for only nominal bequests to plaintiffs also suggests that plaintiffs could have filed a caveat proceeding. N.C. Gen. Stat. § 31-32 (2003), which governs caveat proceedings, provides that "any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will . . . ." Taking the allegations of the complaint as true, it appears plaintiffs were beneficiaries under Mrs. Hundley's will and thus could be considered persons "entitled under such will," within the meaning of N.C. Gen. Stat. § 31-32. *See In re Will of Joyner*, 35 N.C. App. 666, 668, 242 S.E.2d 213, 214 (holding "under the plain words of the statute" that children who were beneficiaries under their parent's will were persons "entitled under such will, or interested in the estate" as that term is used in the statute), *disc. review denied*, 295 N.C. 261, 245 S.E.2d 777 (1978).

Nevertheless, the allegations of the complaint do not necessarily establish that the plaintiff step-grandchildren would be able to obtain adequate relief through a caveat proceeding. Under both *Johnson* and *Griffin*, the inadequacy of relief in a caveat proceeding entitles a plaintiff to proceed with his or her tort claim. Because it does not " 'appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,' " the trial court erred in granting defendants' motion to dismiss. *Anderson v. Texas Gulf, Inc.*, 83 N.C. App. 634, 638, 351 S.E.2d 109, 111 (1986) (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165-66 (1970)).

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1. Like *Johnson*, the complaint in this case contains no allegations regarding extrinsic fraud and, therefore, fraud cannot be a basis for allowing plaintiffs to proceed.

Reversed.

Judges HUNTER and HUDSON concur.

STATE OF NORTH CAROLINA v. LEON GEORGE BAUBLITZ, JR.

No. COA04-1208

(Filed 16 August 2005)

1. Appeal and Error— preservation of issues—necessity of objection at trial—unconstitutional statute

Although the Court of Appeals is bound by the holding in *State v. Tutt*, 171 N.C. App. 518 (2005), stating that the amendment to N.C.G.S. § 8C-1, Rule 103 is inconsistent with N.C. R. App. P. 10(b)(1), and thus, the amendment is unconstitutional, the Court of Appeals exercised its discretion to review defendant's assignments of error to the admission of seized evidence on the merits because the amendment to Rule 103 went into effect before the present case went to trial. The amendment was thus under a presumption of constitutionality at the time of trial.

2. Search and Seizure— traffic stop—motion to suppress—probable cause

The trial court did not err in a possession of a controlled substance case by denying defendant's motion to suppress the evidence obtained from his vehicle during the search even though defendant contends the officer lacked reasonable and articulable suspicion, because: (1) the probable cause standard applies when the officer observed defendant's vehicle twice cross the center line of the highway in violation of N.C.G.S. § 20-146(a); (2) an officer's subjective motivation for stopping a vehicle is irrelevant as to whether there are other objective criteria justifying the stop; and (3) the fact that the officer did not issue defendant a ticket was irrelevant since the officer's objective observation of defendant's vehicle twice crossing the center line provided the officer with probable cause for the stop regardless of his subjective motivation.

3. Search and Seizure— traffic stop—motion to suppress—scope of consent

The trial court did not err in a possession of a controlled substance case by denying defendant's motion to suppress the evidence obtained from his vehicle during the search even though defendant contends the search of his vehicle that yielded the cocaine exceeded the scope of his consent to a search, because: (1) defendant placed no explicit time limit on his consent to the search, nor did he attempt to revoke his consent at any time; (2) only a few minutes lapsed between the time the officer conducted the initial search and when he recovered the cocaine; (3) the officer was not prohibited from momentarily interrupting his search of defendant's vehicle; and (4) even if defendant had not consented to the search, the officer would have been authorized to search defendant's vehicle based on the automobile exception to the warrant requirement.

4. Drugs— possession of a controlled substance—constructive possession—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a controlled substance even though defendant contends there was insufficient evidence of his possession, because: (1) constructive possession can be inferred when there is evidence that a defendant had the power to control the vehicle where a controlled substance was found, and a situation where a passenger in a vehicle could have moved or hidden the contraband within the vehicle does not contradict a defendant's control of the vehicle; and (2) although defendant was not alone in the vehicle, the location of the crack cocaine between his seat and the center console and the presence of additional suspicious packaging material between his feet on the vehicle's floorboard were sufficient additional circumstances to support a reasonable inference of his constructive possession of the drug.

5. Drugs— possession of a controlled substance—motion for judgment notwithstanding verdict

The trial court did not abuse its discretion in a possession of a controlled substance case by denying defendant's motion for judgment notwithstanding the verdict, because the evidence was sufficient to support the jury's verdict.

Appeal by defendant from judgment entered 7 October 2003 by Judge Paul L. Jones in Superior Court, Pamlico County. Heard in the Court of Appeals 14 June 2005.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

Daniel F. Read for defendant-appellant.

McGEE, Judge.

Leon George Baublitz, Jr. (defendant) was convicted on 7 October 2003 of possession of a controlled substance. He was placed on supervised probation for twenty-four months. Defendant appeals.

The State's evidence at trial tended to show that Investigator Scott Houston (Investigator Houston) of the Pamlico County Sheriff's Department was conducting surveillance at the residence of Gloria Midgette (Midgette), a suspected crack cocaine dealer, on 22 November 2002. Around 8:00 or 8:30 p.m., Investigator Houston saw defendant pull his vehicle into Midgette's driveway. Investigator Houston saw Milton Cornell Davis (Davis), whom Houston knew as a drug runner for Midgette, approach defendant's vehicle from Midgette's home. Davis talked briefly with defendant and then walked back to Midgette's home. Davis soon returned to defendant's vehicle, and Davis and defendant drove off together.

Investigator Houston followed defendant's vehicle and observed the vehicle cross the center line of the highway twice. Investigator Houston stopped defendant's vehicle. When he looked inside the vehicle, Investigator Houston saw a piece of plastic on the floor between defendant's feet. The piece of plastic was the corner of a plastic bag that had been cut and knotted at the top. Investigator Houston noticed that the bag contained an off-white residue and, based on his six-year history of over 300 arrests, believed it to be cocaine. Investigator Houston asked defendant to step out of the vehicle, and defendant complied. Investigator Houston asked defendant if defendant had any contraband in the vehicle. Defendant replied that he did not. Investigator Houston explicitly asked for defendant's permission to search the vehicle. Defendant agreed to the search.

Investigator Houston performed a pat-down search of defendant and Davis, and a quick search of defendant's vehicle to retrieve the plastic bag. Defendant stood at the trunk of his vehicle during this time. Probation Officer Larry Collins (Officer Collins) was passing by

and witnessed the traffic stop. Officer Collins stopped to offer his assistance and informed Investigator Houston that Davis was on probation and subject to warrantless searches. Officer Collins searched Davis and found a crack-smoking device in Davis's shoe. Investigator Houston asked defendant to sit in Investigator Houston's vehicle.

Officer Collins informed Investigator Houston that Davis wished to cooperate with law enforcement by showing them where contraband was located in the vehicle. Davis informed Investigator Houston and Officer Collins that cocaine was located between the driver's seat and the console. Investigator Houston then retrieved what appeared to be crack cocaine from the location in defendant's vehicle as specified by Davis. Investigator Houston arrested defendant and charged him with possession of cocaine.

The State Bureau of Investigation examined the substance found in defendant's vehicle and determined that the substance was 1.1 grams of cocaine.

Defendant filed a motion to suppress evidence gathered as a result of the traffic stop on 1 October 2003. The motion was heard and denied prior to trial. A jury convicted defendant on 7 October 2003 for possession of a controlled substance, cocaine. Defendant moved for a judgment notwithstanding the verdict. The trial court denied the motion. Defendant appeals.

I.

[1] Defendant argues that the trial court erred when it denied his motion to suppress the evidence obtained from his vehicle during the search. The State counters that because defendant did not object to the admission of the evidence at trial, he has failed to preserve for appellate review all issues related to the evidence found in the search of his vehicle. Our Court has held that a pretrial motion to suppress is a type of motion *in limine*, and that "a motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if [a] defendant does not object to that evidence at the time it is offered at trial." *State v. Grooms*, 353 N.C. 50, 65-66, 540 S.E.2d 713, 723 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

The General Assembly recently amended Rule 103 of the Rules of Evidence to provide: "Once the [trial] court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." N.C.R. Evid. 103(a)(2). The amendment

became effective on 1 October 2003 and was meant to be applicable to rulings made on or after that date. Since the trial court heard and ruled on the motion to suppress in defendant's case on 7 October 2003, the amendment is applicable to this case.

The interpretation of the recent amendment to Rule 103 is an unsettled issue, and disagreement exists over whether the amendment to Rule 103 is constitutional. In *State v. Tutt*, 171 N.C. App. 518, 524, 615 S.E.2d 688, 692-93 (2005), the majority opinion held that the amendment to Rule 103 was unconstitutional. The majority opinion stated that "[t]he Constitution of North Carolina vests the Supreme Court of North Carolina with exclusive authority to make rules of practice and procedure for the appellate division of the courts[,]" and found that the amendment was unconstitutional because it is inconsistent with N.C.R. App. P. 10(b)(1). *Tutt*, 171 N.C. App. at 524, 615 S.E.2d at 692-93.

The dissent in *Tutt* argued that the amendment to Rule 103 was a rule of evidence and not of procedure, and thus our Court must defer to the General Assembly. *Tutt*, 171 N.C. App. at 527, 615 S.E.2d at 694 (Tyson, J., dissenting). The dissent pointed out that our Court has previously made rulings consistent with the amendment to Rule 103. *Tutt*, 171 N.C. App. at 532-33, 615 S.E.2d at 697-98. In *State v. Rose*, 170 N.C. App. 284, 612 S.E.2d 336 (2005), *disc. review denied*, 359 N.C. 641, —— S.E.2d —— (June 30, 2005) (No. 296PO5), our Court held that, under the amendment to Rule 103, once the trial court denied the defendant's motion to suppress, the defendant was not also required to object at trial to preserve the argument for appeal. *Rose*, 170 N.C. App. at 288, 612 S.E.2d at 339. Similarly, in *In re S.W.*, 171 N.C. App. 335, 337, 614 S.E.2d 424, 426 (2005), our Court held that the defendant "properly preserved his assignment of error by objecting when the trial court denied his motion to suppress in conformity with the amended North Carolina Rule[] of Evidence 103."

The dissent in *Tutt* argued that this Court is bound by the precedent of *Rose* and *In re S.W.*, citing *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."). However, we do not find *Rose* and *In re S.W.* controlling because these decisions did not consider nor address the constitutionality of the amendment to Rule 103. We are therefore bound by the holding in *Tutt* that,

because the amendment to Rule 103 is inconsistent with N.C.R. App. P. 10(b)(1), the amendment is unconstitutional. *See Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. Despite the holding in *Tutt*, in our discretion we review defendant's assignments of error on the merits, as the amendment to Rule 103 went into effect before the present case went to trial. The amendment was thus under a presumption of constitutionality at the time of trial.

A trial court's findings of fact when ruling on a motion to suppress evidence are binding on appeal when the findings of fact are supported by competent evidence. *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). However, a trial court's conclusions of law as to whether law enforcement had reasonable suspicion or probable cause to detain a defendant are reviewable *de novo*. *State v. Young*, 148 N.C. App. 462, 466, 559 S.E.2d 814, 818, *disc. review denied*, 355 N.C. 500, 564 S.E.2d 233 (2002).

A.

[2] Defendant first contends that his motion to suppress should have been granted because Investigator Houston lacked sufficient reasonable and articulable suspicion to stop defendant's vehicle. We first note that defendant cites an incorrect justification for the traffic stop. This Court has held that "[w]here an officer makes a traffic stop based on a readily observed traffic violation, such as speeding or running a red light, such a stop will be valid if it was supported by *probable cause*." *State v. Barnhill*, 166 N.C. App. 228, 231, 601 S.E.2d 215, 217, *disc. review denied*, 359 N.C. 191, 607 S.E.2d 646 (2004) (emphasis added). In contrast, reasonable and articulable suspicion is required for " 'a traffic stop based on an officer's [reasonable] *suspicion* that a traffic violation is being committed, but which can only be verified by stopping the vehicle, such as drunk driving or driving with a revoked license[.]' " *State v. Wilson*, 155 N.C. App. 89, 94, 574 S.E.2d 93, 98 (2002), *disc. review denied*, 356 N.C. 693, 579 S.E.2d 98, *cert. denied*, 540 U.S. 843, 157 L. Ed. 2d 78 (2003) (alteration in original) (quoting *Young*, 148 N.C. App. at 471, 559 S.E.2d at 820 (Greene, J., concurring)). In the present case, Investigator Houston stopped defendant's vehicle when Investigator Houston observed defendant's vehicle twice cross the center line of the highway, in violation of N.C. Gen. Stat. § 20-146(a). Defendant's traffic violation was readily observable, and therefore the probable cause standard applies.

Probable cause is "suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity." *State v. Schiffer*, 132 N.C. App. 22, 26, 510 S.E.2d 165, 167, *disc. review denied*, 350 N.C. 847, 539 S.E.2d 5 (1999). Investigator Houston's observation of defendant's vehicle twice crossing the center line furnished sufficient circumstances to provide Investigator Houston with probable cause to stop defendant's vehicle for a violation of N.C. Gen. Stat. § 20-146(a). *See Barnhill*, 166 N.C. App. at 233, 601 S.E.2d at 218; *Wilson*, 155 N.C. App. at 95, 574 S.E.2d at 98.

Defendant argues that since Investigator Houston never gave defendant a traffic ticket, Investigator Houston was not acting on probable cause when he stopped defendant's vehicle. Rather, defendant argues, Investigator Houston was acting upon "generalized, unparticularized suspicions that defendant was involved in a drug transaction[.]" We reject this argument. Our Supreme Court has stated that, "[p]rovided objective circumstances justify the action taken, any 'ulterior motive' of the officer is immaterial." *State v. McClendon*, 350 N.C. 630, 635, 517 S.E.2d 128, 131 (1999). Therefore, "an officer's subjective motivation for stopping a vehicle is irrelevant as to whether there are other objective criteria justifying the stop." *Barnhill*, 166 N.C. App. at 233-34, 601 S.E.2d at 219. Investigator Houston's objective observation of defendant's vehicle twice crossing the center line provided Investigator Houston with probable cause for the stop, regardless of his subjective motivation. The fact that Investigator Houston did not issue defendant a ticket is irrelevant.

B.

[3] Defendant next argues that the trial court erred in denying his motion to suppress because the search of defendant's vehicle that yielded the cocaine exceeded the scope of defendant's consent to a search. We have held that "[g]enerally, the Fourth Amendment and article I, § 20 of the North Carolina Constitution require issuance of a warrant based on probable cause for searches. However, our courts recognize an exception to this rule when the search is based on the consent of the detainee." *State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d 217, 222 (1989) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 858 (1973); and *State v. Belk*, 268 N.C. 320, 322, 150 S.E.2d 481, 483 (1966)). When a defendant's consent is given "freely, intelligently, and voluntarily," *State v. Aubin*, 100 N.C. App. 628, 633, 397 S.E.2d 653, 656 (1990), *disc. review denied*, 328 N.C. 334, 402 S.E.2d 433 (1991), and a defendant is not subject to coercion,

a defendant's consent to search a vehicle for contraband entitles the officer to " 'conduct a reasonable search anywhere inside the [vehicle] which reasonably might contain contraband[.]' " *Aubin*, 100 N.C. App. at 634, 397 S.E.2d at 656 (quoting *State v. Morocco*, 99 N.C. App. 421, 430, 393 S.E.2d 545, 550 (1990)).

A warrantless search supported by consent is lawful only to the extent that it is conducted within the spatial and temporal scope of the consent. Absent an express limit to the duration of the consent,

> [t]he temporal scope of a consent to search is a question of fact to be determined in light of all the circumstances. A brief lapse of time between the consent and the search does not require a reaffirmation of the consent as a condition precedent to a lawful search. The length of time a consent lasts depends upon the reasonableness of the lapse of time between the consent and the search in relation to the scope and breadth of the consent given.

State v. Williams, 67 N.C. App. 519, 521, 313 S.E.2d 236, 237, *cert. denied*, 311 N.C. 308, 317 S.E.2d 909 (1984) (internal citations and quotations omitted).

Defendant argues that he only consented to the initial search, and that Investigator Houston's more thorough search after receiving information from Davis exceeded the scope of defendant's consent. We find that the undisputed evidence before the trial court supports a finding that Investigator Houston's second search of the vehicle did not exceed the scope of defendant's consent. Defendant placed no explicit time limit on his consent to the search, nor did he attempt to revoke his consent at any time. *Id.* at 521, 313 S.E.2d at 237. Only a few minutes lapsed between the time Investigator Houston conducted the initial search and when he recovered the cocaine. Investigator Houston was not prohibited from momentarily interrupting his search of defendant's vehicle. Accordingly, we find that the cocaine was admissible evidence found as a result of a consensual search of defendant's vehicle.

Furthermore, even if defendant had not consented to the search, Investigator Houston would have been authorized to search defendant's vehicle because of the " 'automobile exception' to the warrant requirement[.]" *See State v. Isleib*, 319 N.C. 634, 637, 356 S.E.2d 573, 575 (1987). A warrant is not required to perform a lawful search of a vehicle on a public road when there is probable cause for the search. *State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999). " 'Probable cause exists where "the facts and circumstances

within . . . [the officers'] knowledge and of which [the officers] had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' " *Id.* at 133, 516 S.E.2d at 886 (citations omitted). In this case, Investigator Houston observed defendant drive up to Midgette's home, a location that was known for its drug activity. Investigator Houston also observed Davis, a known drug runner, approach defendant's vehicle from Midgette's home, speak with defendant, go back inside Midgette's home, return to defendant's vehicle, and leave with defendant. Investigator Houston testified that this behavior was consistent with drug sales that he had previously observed take place at Midgette's home. After pulling defendant's vehicle over, Investigator Houston saw a piece of plastic that resembled drug paraphernalia in defendant's vehicle. Davis also told Investigator Houston that Davis knew where cocaine was located in defendant's vehicle. These circumstances provided Investigator Houston with probable cause that justified a warrantless search of defendant's vehicle under the automobile exception to the warrant requirement. The trial court did not err by denying defendant's motion to suppress or by admitting evidence obtained as a result of the search of defendant's vehicle.

II.

[4] Defendant argues that the trial court erred in denying defendant's motion to dismiss on the grounds that the evidence presented was insufficient to submit the charge to the jury. Defendant contends that he did not have actual or constructive possession of the cocaine, and thus the evidence related to the essential element of possession was insufficient to submit to the jury. We disagree.

When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference that can be drawn. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (citing *State v. Williams*, 319 N.C. 73, 79, 352 S.E.2d 428, 432 (1987)).

The possession element of the offense charged in the present case "can be proven by showing either actual possession or con-

structive possession." *State v. Siriguanico*, 151 N.C. App. 107, 110, 564 S.E.2d 301, 304 (2002). "[C]onstructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the question will be for the jury." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986). In determining whether a defendant had constructive possession of contraband, this Court has held that:

> [w]here such materials 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. It is not necessary to show that an accused has exclusive control of the premises where [drug] paraphernalia are found, but where possession . . . is nonexclusive, constructive possession . . . may not be inferred without other incriminating circumstances.

State v. McLaurin, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987) (internal quotations and citations omitted). Our Court has also held that constructive possession can be inferred when there is evidence that a defendant had the power to control the vehicle where a controlled substance was found. *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984). A situation where a passenger in a vehicle could have moved or hidden the contraband within the vehicle does not contradict a defendant's control of the vehicle. *State v. Rogers*, 32 N.C. App. 274, 277, 231 S.E.2d 919, 921 (1977). In *Rogers*, where a passenger could have had time to hide the contraband in the vehicle, our Court held that when "the driver is in control of the car . . . and the controlled substance is found in the car . . . such evidence is sufficient to withstand motion for dismissal." *Id.*

Moreover, although defendant was not alone in the vehicle, the location of the crack cocaine between his seat and the center console and the presence of additional suspicious packaging material between his feet on the vehicle's floorboard were sufficient additional circumstances to support a reasonable inference of his constructive possession of the drug. *See State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972), *State v. Tisdale*, 153 N.C. App. 294, 297-98, 569 S.E.2d 680, 682-83 (2002); *State v. Searcy*, 37 N.C. App. 68, 70, 245 S.E.2d 412, 414 (1978).

When viewed in the light most favorable to the State, there is substantial evidence that defendant had constructive possession of

the cocaine. It is clear from the record that defendant was the driver of the vehicle where the cocaine was found. Prior to stopping defendant for a traffic violation, Investigator Houston witnessed defendant arrive at the residence of a known drug dealer and then drive off with a known drug runner. When all reasonable inferences are made in favor of the State, the totality of the circumstances in the present case supports a submission of the charge to the jury. The trial court did not err in denying defendant's motion to dismiss.

III.

[5] Defendant next argues that the trial court erred in denying defendant's post-trial motion to set aside the verdict on the grounds that "the evidence was insufficient to justify the verdict of guilty returned by the jury." However, our Court has held that:

> [t]he decision to grant or deny a motion to set aside the verdict is within the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion. When the evidence at trial is sufficient to support the jury's verdict, there is no abuse of discretion in the trial court's denial of defendant's motion to set aside the verdict.

State v. Serzan, 119 N.C. App. 557, 561-62, 459 S.E.2d 297, 301 (1995) (citations omitted).

There is no evidence to indicate that the trial court committed an abuse of discretion. For the reasons stated above, the evidence was sufficient to support the jury's verdict; therefore, there was no abuse of discretion by the trial court. Defendant's argument is without merit. The trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict.

No error.

Judges HUNTER and LEVINSON concur.

TIMOTHY HAVEY AND MARILYN SOMMERS, PLAINTIFFS V. MARK VALENTINE, YELLOW ROADWAY CORPORATION AND YELLOW TRANSPORTATION, INC., DEFENDANTS AND THIRD-PARTY PLAINTIFFS V. STAHLER FURNITURE COMPANY, THIRD-PARTY DEFENDANT

No. COA04-1298

(Filed 16 August 2005)

Jurisdiction— specific personal—general personal—motion to dismiss—minimum contacts—passive website

The trial court erred in a negligence, negligent misrepresentation, and breach of contract case by denying nonresident third-party defendant's (TPD) motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) based on lack of personal jurisdiction even though defendant contends TPD holds itself out as a seller of furniture to residents of North Carolina (NC) through the use of its website and catalog, because: (1) the website is passive since it does not specifically target NC residents, does not allow viewers to purchase furniture directly from the website, and merely provides information to the viewer; (2) TPD has not purposefully availed itself of the privilege of conducting activities in this state when all of the contract negotiations occurred outside of NC and third-party defendant does not have any significant contacts with NC; (3) a single shipment of goods to a state may not be the basis for personal jurisdiction if the exercise of personal jurisdiction would not be fair, reasonable, and would not comport with traditional notions of fair play and substantial justice; (4) specific jurisdiction does not exist in this case when, although plaintiff was injured in NC and the furniture was shipped to NC, the key facts surrounding the third-party complaint occurred in Vermont, plaintiffs went to Vermont to purchase the furniture, and TPD had essentially no contact with the State of NC over the past ten years; and (5) there was no general personal jurisdiction when TPD was not licensed to do business in NC, does not own any real or personal property located in this state, does not advertise here, has a passive informational website that anyone in the United States may access, and did not solicit any customers in NC but instead NC plaintiffs went to TPD's store in Vermont.

Appeal by third-party defendant from an order entered 24 August 2004 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 20 April 2005.

Smyth & Cioffi, L.L.P., by Andrew P. Cioffi, for plaintiff-appellees.

Teague, Campbell, Dennis & Gorham, L.L.P., by J. Matthew Little and Robert M. Tatum, for defendants/third-party plaintiff-appellees.

Cranfill, Sumner & Hartzog, L.L.P., by F. Marshall Wall and Kari R. Johnson, for third-party defendant-appellant.

HUNTER, Judge.

Third-party defendant, Stahler Furniture Company ("Stahler Furniture"), appeals the trial court's order denying its motion to dismiss for lack of personal jurisdiction. After careful review, we reverse the order below.

The record tends to indicate the following: Stahler Furniture is a Vermont corporation located in Lyndonville, Vermont. Timothy Havey ("Havey") and Marilyn Sommers ("Sommers") (collectively "plaintiffs") are North Carolina residents. On or about 22 July 2003, plaintiffs visited the Stahler Furniture store in Vermont and purchased a corner cabinet and an end table. Stahler Furniture contracted with defendants and third-party plaintiffs, Yellow Transportation, Inc. ("Yellow Transportation"), an Indiana corporation, to transport the furniture to plaintiffs' residence in North Carolina from Stahler Furniture's business facility in Lyndonville, Vermont.

Specifically, on or about 10 November 2003, Stahler Furniture contracted with Yellow Transportation to deliver an end table and corner cabinet to plaintiffs' home in Raleigh, North Carolina. Defendant Mark Valentine ("Valentine") was the truck driver. On 14 November 2003, Valentine arrived at plaintiffs' home. According to plaintiffs' complaint, as Valentine was unloading a crate containing a piece of furniture from the tractor-trailer, Valentine pushed the crate out of the truck "in an unsafe and dangerous manner causing it to fall on and permanently injure" Havey.

On 12 March 2004, Havey and Sommers filed a complaint against Valentine and Yellow Transportation alleging negligence. Defendants answered and filed a third-party complaint against Stahler Furniture alleging negligence, negligent misrepresentation, and breach of contract. Stahler Furniture filed a N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) motion to dismiss the third-party complaint for lack of personal jurisdiction. On 24 August 2004, the trial court denied Stahler Furniture's motion. Stahler Furniture appeals.

" 'The standard of review of an order determining jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.' " *Tejal Vyas, LLC v. Carriage Park Ltd. P'ship*, 166 N.C. App. 34, 37, 600 S.E.2d 881, 884 (2004) (quoting *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995)), *per curiam affirmed*, 359 N.C. 315, 608 S.E.2d 751 (2005). In this case, however, the trial court made no findings of fact. "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18, *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000).

Our Supreme Court has held that

> a two-step analysis must be employed to determine whether a non-resident defendant is subject to the *in personam* jurisdiction of our courts. First, the transaction must fall within the language of the State's "long-arm" statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution.

Tom Togs, Inc. v. Ben Elias Industries Corp., 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (citation omitted). For purposes of this appeal, neither party disputes that North Carolina's long-arm statute applies to the facts of this case. Thus, our inquiry focuses upon whether the exercise of personal jurisdiction would violate the due process clause of the Fourteenth Amendment to the United States Constitution.

To comply with due process, there must be minimum contacts between the non-resident defendant and the forum so that allowing the suit does not offend traditional notions of fair play and substantial justice. *Id.* at 365, 348 S.E.2d at 786 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)).

> [T]here must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice.

Id.

"When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the [United States Supreme] Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction." *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 411 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 53 L. Ed. 2d 683[, 698] (1977)). This type of personal jurisdiction has been characterized as specific jurisdiction. *Id.* at 414 n.8, 80 L. Ed. 2d at 411 n.8. When the suit does not arise out of a defendant's activities in the forum state, personal jurisdiction is present when there are sufficient contacts between the state and the defendant. *Id.* at 414, 80 L. Ed. 2d at 411. This type of personal jurisdiction has been characterized as "general jurisdiction." *Id.* at 414 n.9, 80 L. Ed. 2d at 411 n.9.

A. Specific Jurisdiction

" 'Specific jurisdiction exists if the defendant has purposely directed its activities toward the resident of the forum and the cause of action relates to such activities.' " *Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 165, 565 S.E.2d 705, 710 (2002) (quoting *Frisella v. Transoceanic Cable Ship Co.*, 181 F. Supp. 2d 644, 647 (E.D.La. 2002)). To determine whether it may assert specific jurisdiction over a defendant, the court considers "(1) the extent to which the defendant 'purposefully avail[ed]' itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally 'reasonable.' " *ALS Scan, Inc. v. Digital Service Consultants*, 293 F.3d 707, 712 (4th Cir. 2002) (citation omitted), *cert. denied*, 537 U.S. 1105, 154 L. Ed. 2d 773 (2003). When specific jurisdiction exists, "a defendant has 'fair warning' that he may be sued in a state for injuries arising from activities that he 'purposefully directed' toward that state's residents." *Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786.

(1) Purposeful Availment

Purposeful availment is shown "if the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents." *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). Although contacts that are "isolated" or "sporadic" may support specific jurisdiction if they create a "substantial connection" with the forum, the contacts must be more than random, fortuitous, or attenuated. *Burger King Corp. v. Rudzewicz*, 471 U.S.

462, 472-75, 85 L. Ed. 2d 528, 540-42 (1985). Furthermore, it is not required that a defendant be physically present within the forum, provided its efforts are purposefully directed toward forum residents. *Id.* at 476, 85 L. Ed. 2d at 543.

The record indicates that Stahler Furniture is a Vermont corporation with one retail location in Lyndonville, Vermont. Stahler Furniture is not licensed or registered to do business in North Carolina. Stahler Furniture neither has any employees in North Carolina, nor does it have any real or personal property in this state. Stahler Furniture has not shipped more than one or two other pieces of furniture to North Carolina in the last ten years.

On or about 22 July 2003, plaintiffs went to Stahler Furniture's store in Lyndonville, Vermont, and purchased two pieces of furniture. The furniture was completely paid for by plaintiffs in Vermont on or about 22 July 2003. Stahler Furniture and Yellow Transportation, an Indiana corporation, entered into a contract for Yellow Transportation to deliver plaintiffs' furniture to North Carolina. The contract negotiations and the contract execution between Stahler Furniture and Yellow Transportation did not occur in North Carolina. Yellow Transportation picked up the furniture for delivery in Lyndonville, Vermont. The description and weight of the property to be delivered were given to Yellow Transportation by Stahler Furniture in Vermont. While attempting to deliver the furniture in North Carolina, Valentine, an employee of Yellow Transportation, dropped a furniture crate onto Havey. No employees or representatives of Stahler Furniture were present at the scene of the delivery accident.

Stahler Furniture does not advertise in North Carolina. However, Stahler Furniture does have an Internet website. Yellow Transportation argues that because "Stahler [Furniture], through the use of its website and catalog, holds itself out as a seller of furniture to residents of North Carolina[,] . . . [it has] deliberately availed itself of the privilege of conducting business in North Carolina as well as the protection of the laws of North Carolina."

In *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, the United States Court of Appeals for the Fourth Circuit delineated the following rule for determining whether an Internet website can be the basis of an exercise of personal jurisdiction by a court.

> [A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1)

> directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State.

Id. at 714. "When a website is neither merely passive nor highly interactive, the exercise of jurisdiction is determined 'by examining the level of interactivity and commercial nature of the exchange of information that occurs.' " *Carefirst of Maryland v. Carefirst Pregnancy Ctrs.*, 334 F.3d 390, 400 (4th Cir. 2003) (quoting *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126 (W.D.Pa. 1997)).

Stahler Furniture's website is an informational, passive website. The website provides a history of the store and its owner, a brief description of the type of furniture made by the company (i.e., types of wood), and the number of employees. The website also lists its address, phone number, and an electronic mail address through which a person could request a catalog. The website allows viewers to view samples, and states that Stahler Furniture will deliver within seventy-five miles of the store and will ship furniture throughout the United States. However, viewers cannot purchase furniture via the website and the website does not actively target North Carolina customers.

As the website in this case does not specifically target North Carolina residents, does not allow viewers to purchase furniture directly from the website, and merely provides information to the viewer, we conclude the website is passive and does not, by itself, provide a basis for an exercise of personal jurisdiction by North Carolina courts. Similarly, because (1) all of the contract negotiations occurred outside of North Carolina, and (2) Stahler Furniture does not have any significant contacts with North Carolina, we conclude Stahler Furniture has not purposefully availed itself of the privilege of conducting activities in this state.

(2) Do plaintiffs' claims arise out of activities directed at North Carolina?

Yellow Transportation has alleged Stahler Furniture breached its duty to provide Yellow Transportation with the correct weight of the furniture, and therefore, Yellow Transportation brought a negligence claim against Stahler Furniture. "[A] court may exercise specific personal jurisdiction over a nonresident defendant acting outside of the forum when the defendant has intentionally directed his tortious conduct toward the forum state, knowing that that conduct would cause harm to a forum resident." *Carefirst*, 334 F.3d at 397-98 (footnote omitted). However, as explained by the United States Court of Appeals for the Fourth Circuit, a single shipment of goods to a state may not be the basis for personal jurisdiction if the exercise of personal jurisdiction would not be fair, reasonable, and would not comport with the traditional notions of fair play and substantial justice. *See Chung v. NANA Development Corp.*, 783 F.2d 1124, 1126-27 (4th Cir.), *cert. denied*, 479 U.S. 948, 93 L. Ed. 2d 381 (1986). Moreover, "[i]t is essential that the contract relied upon have a 'substantial connection' with the forum state." *Id.* at 1128. "The significant contacts considered are those actually generated by the defendant." *Id.* at 1127.

In this case, the North Carolina residents visited the Stahler Furniture store in Vermont and purchased furniture. As a result of this purchase, Stahler Furniture shipped the furniture to plaintiffs' residence in North Carolina. All of the negotiations for the purchase of the furniture and its shipment occurred in Vermont. Moreover, Havey and Sommers initiated contact with Stahler Furniture. Nonetheless, Yellow Transportation contends Stahler Furniture was negligent because it failed to provide them with the correct weight of the furniture, and this failure caused the truck driver to use an improper unloading technique, which proximately caused Havey's injuries when the furniture fell on Havey. While Stahler Furniture did make the shipping arrangements to have the furniture shipped to North Carolina, an analysis of the entire transaction between Havey, Sommers, Stahler Furniture, and Yellow Transportation does not reveal a substantial connection to the State of North Carolina.

(3) Would an exercise of personal jurisdiction be constitutionally reasonable?

"[T]he fundamental requirement of personal jurisdiction [is]: 'deliberate action' within the forum state in the form of transactions

between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state." *Millennium Enterprises v. Millennium Music, LP*, 33 F. Supp. 2d 907, 921 (D.Or. 1999).

> In conducting this inquiry, we direct our focus to "the quality and nature of [the nonresident's] contacts." We should not "merely . . . count the contacts and quantitatively compare this case to other preceding cases. . . ."
>
> To decide whether the requisites of specific jurisdiction are satisfied in this case, it is necessary to consider how they apply to the particular circumstance in which, as here, an out-of-state defendant has acted outside of the forum in a manner that injures someone residing in the forum.

Carefirst, 334 F.3d at 397 (citations omitted) (quoting *Nichols v. G.D. Searle & Co.*, 783 F. Supp. 233, 238 (D.Md. 1992)).

Although Havey was injured in North Carolina and the furniture was shipped to North Carolina, the key facts surrounding Yellow Transportation's third-party complaint against Stahler Furniture occurred in Vermont. Moreover, plaintiffs went to Vermont to purchase the furniture. Through the purchase of furniture in Vermont, Stahler Furniture became contractually obligated to ship the furniture to North Carolina. Furthermore, Stahler Furniture has had essentially no contact with the State of North Carolina over the past ten years. And, as previously discussed, a passive Internet website cannot provide the basis for an exercise of personal jurisdiction. Considering the quantity and quality of Stahler Furniture's contacts with the State of North Carolina, we hold that specific personal jurisdiction does not exist in this case.

B. General personal jurisdiction

The test for general jurisdiction is more stringent, as there must be " ' "continuous and systematic" contacts between [the] defendant and the forum state.' " *Bruggeman*, 138 N.C. App. at 617, 532 S.E.2d at 219 (citations omitted).

> The existence of minimum contacts cannot be ascertained by mechanical rules, but rather by consideration of the facts of each case in light of traditional notions of fair play and justice. The factors to be considered are (1) quantity of the contacts, (2) nature

> and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.

Marion v. Long, 72 N.C. App. 585, 587, 325 S.E.2d 300, 302 (1985) (citations omitted).

It is unnecessary to review each of these factors individually as we have already explained that Stahler Furniture does not have minimum contacts with the State of North Carolina. Over the past ten years, Stahler Furniture has sold one or two pieces of furniture to North Carolina residents. It is not registered or licensed to do business in North Carolina. Stahler Furniture does not own any real or personal property located in this state. Stahler Furniture does not advertise here and it has a passive, informational website that anyone in the United States may access. Stahler Furniture did not solicit any customers in North Carolina; rather, the North Carolina plaintiffs in this case went to the Stahler Furniture store in Vermont and purchased the furniture. Accordingly, we conclude general personal jurisdiction does not exist in this case.

In sum, we conclude the trial court erroneously denied Stahler Furniture's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. As we have explained, neither specific personal jurisdiction nor general personal jurisdiction exists in this case. Indeed, the significant facts in this case arose in Vermont and Stahler Furniture does not have continuous and systematic contact with the State of North Carolina. As stated in *Chung*,

> "the defendant's conduct and connection with the forum State [must be] . . . such that he should reasonably anticipate being haled into court there. . . ."
>
> The focus on a defendant's own acts serves the underlying due process objective of fair notice, giving "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

Chung, 783 F.2d at 1127 (citations omitted) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490[, 501] (1980)). Accordingly, we reverse the decision below.

Reversed.

Judges HUDSON and GEER concur.

STATE OF NORTH CAROLINA AND THE JOHNSTON COUNTY BOARD OF EDUCATION v. ANTON DANIEL EDWARDS, DEFENDANT, AND AEGIS SECURITY INSURANCE CO., SURETY

No. COA04-1387

(Filed 16 August 2005)

1. Bail and Pretrial Release— failure to appear—relief from forfeiture—no extraordinary circumstance

The trial court did not abuse its discretion by denying surety's motion under N.C.G.S. § 15A-544.8 for relief from final judgment of a bond forfeiture based on the conclusion that no extraordinary circumstances existed to grant relief, because: (1) the trial court is not required to set aside a judgment of forfeiture where the surety surrenders defendant; (2) in authorizing the trial court to set aside final judgments of forfeiture in limited circumstances, the General Assembly did not expressly provide that a surety's efforts which result in the capture and return of defendant always constitute extraordinary circumstances, but instead mandated that before a final judgment of forfeiture has been entered it shall be set aside where defendant is surrendered; (3) defendant had not been surrendered by the surety prior to the final judgment of forfeiture entered 29 December 2003, but instead defendant was apprehended by surety's agents and surrendered to the sheriff's department on 14 April 2004; (4) surety presented no evidence of any efforts by its agents to secure the presence of defendant in court on 2 July 2003, but instead presented evidence of efforts to apprehend defendant following receipt of the notice of forfeiture; and (5) assuming arguendo that surety's efforts to apprehend defendant could be characterized as diligent, diligence alone will not constitute extraordinary circumstances since due diligence by a surety is expected.

2. Bail and Pretrial Release— failure to appear—relief from forfeiture—findings of fact

The trial court did not err by denying surety's motion to set aside the judgment of forfeiture of a bond based on the trial court's failure to set forth findings of fact enumerated in *State v. Coronel*, 145 N.C. App. 237 (2001), because that case is not controlling when many of the considerations in that case relate to cases where the accused has died.

Judge HUNTER concurring.

Appeal by surety from order entered 20 May 2004 by Judge Knox V. Jenkins in Johnston County Superior Court. Heard in the Court of Appeals 7 June 2005.

Daughtry, Woodard, Lawrence & Starling, by James R. Lawrence, Jr. and Woodruff, Reece & Fortner, by Gordon C. Woodruff and Michael J. Reece, for Johnston County Board of Education.

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

LEVINSON, Judge.

Aegis Security Insurance Co. (surety) appeals from an order entered 20 May 2004 denying its motion for relief from final judgment of forfeiture. We affirm.

On 8 July 2002 defendant was indicted by a grand jury for feloniously transporting marijuana in violation of N.C.G.S. § 90-95(h)(1). On 30 June 2003 surety posted defendant's bond to secure his release. Defendant failed to appear in court 2 July 2003. Notice of bond forfeiture was mailed to surety 1 August 2003. The final judgment of forfeiture was entered 29 December 2003. On 14 April 2004 surety surrendered defendant to the Johnston County Sheriff's Department and, on 19 April 2004, filed a motion under N.C.G.S. § 15A-544.8 for relief from final judgment of forfeiture.

The evidence presented at the hearing is summarized as follows: Surety presented two affidavits of its agent, Timothy Fitzpatrick. According to Fitzpatrick, he received the notice of forfeiture on or about 6 August 2003 and began making inquiries to determine defendant's whereabouts. Fitzpatrick ran a computer check of the Johnston County jail records and spoke with the Johnston County Clerk of

Court by telephone. He mailed correspondence on 7 August 2003 alerting "all indemnitors" that defendant failed to appear in court. Fitzpatrick attempted to locate defendant by searching credit records and checking telephone numbers. Fiztpatrick also worked with two outside recovery agents. In January 2004 Fitzpatrick discovered the address of defendant's mother. In April 2004 a recovery agent learned defendant was staying with his mother and apprehended him in her home. Defendant was returned to the custody of the Johnston County Sheriff's Department on 14 April 2004. Fitzpatrick affirmed that monies were expended in efforts to apprehend defendant, including payments made to the recovery agent and payments for attorneys fees.

On 20 May 2004 the trial court entered an order denying surety's motion for relief from final judgment. The order included, in pertinent part, the following findings of fact:

> 12. That there was no evidence, except speculation and argument of counsel as to the amount of the fees paid by the surety or what they specifically went to pursuant to apprehending the defendant.
>
> 13. That there was no evidence presented by affidavit or present in the file as to what steps the surety took in maintaining contact with the defendant while he was out on bond pending his court appearance in Johnston County, nor was there any evidence presented as to what actions the surety took himself to secure the defendant['s] appearance in court prior to July 2, 2003.
>
> 14. That the only evidence of the defendant['s] whereabouts in the file was noted on the bond forfeiture notice that gave the name and mailing address of the defendant as 487 St. Johns Place, 313, Brooklyn, NY, 11238.
>
> 15. That no where [sic] in the petitioner['s] motion for relief from judgment was there any allegation of extraordinary circumstance under the statute to justify remission of the said bond.
>
> 16. That no witnesses were presented by the petitioner as to any fact or circumstance that would exhibit extraordinary circumstance under North Carolina General Statute 15A-544.8 that would entitle the petitioner to relief.

17. That the court finds as a fact that the defendant was not produced by the surety between July 2, 2003 and December 29, 2003 by surrender or any other means to justify remission prior to a final judgment being entered.

18. That any acts or actions by the petitioner/surety or any of its agents after notice of the Order of Forfeiture were taken or initiated in the course of his duties as a professional bondsman, and that no extraordinary circumstance or efforts were made by the surety that in the court['s] discretion would justify extraordinary circumstances and entitle the surety for remission of the said bond.

19. That after hearing all the arguments of counsel, reviewing case law, and applicable statutes submitted by the parties and after reviewing all documents and evidence presented by the petitioner the court finds no extraordinary circumstances have been presented before the court to justify remission of the said bond.

Based upon these findings, the trial court made the following pertinent conclusion of law:

4. That the Petitioner has failed to show by credible evidence that extraordinary circumstance exists for remission of the bond pursuant to [N.C.G.S. §] 15A-544.8 heretofore paid into the office of the Clerk of Superior Court of Johnston County, and the Court further concludes that notice of the said forfeiture was properly given by the Clerk's Office of the said County with no prejudice to the Petitioners.

From this order, surety appeals.

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[1] On appeal, surety first argues that the trial court erred by concluding that no extraordinary circumstances existed to grant relief from the final judgment of forfeiture pursuant to N.C.G.S. § 15A-544.8 (2003). Surety contends that, where defendant is apprehended and surrendered by surety's agents, this constitutes "extraordinary circumstances" under G.S. § 15A-544.8 as a matter of law. We disagree.

G.S. § 15A-544.8 provides:

(a) Relief Exclusive.—There is no relief from a final judgment of forfeiture except as provided in this section.

(b) Reasons.—The court may grant the defendant or any surety named in the judgment relief from the judgment, for the following reasons, and none other:

(1) The person seeking relief was not given notice as provided in G.S. 15A-544.4.

(2) Other extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief.

" 'Extraordinary circumstances' in the context of bond forfeiture has been defined as 'going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee.' " *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 49, 612 S.E.2d 148, 152 (2005) (quoting *State v. Vikre*, 86 N.C. App. 196, 198, 356 S.E.2d 802, 804 (1987)). Whether the evidence presented rises to the level of showing extraordinary cause, or, under the present statute, extraordinary circumstances, "is a heavily fact-based inquiry" and "should be reviewed on a case by case basis." *State v. Coronel*, 145 N.C. App. 237, 244, 550 S.E.2d 561, 566 (2001). "[W]hether to grant relief pursuant to N.C. Gen. Stat. § 15A-544.8 is entirely within the discretion of the court[.]" *State v. Lopez*, 169 N.C. App. 816, 819, 611 S.E.2d 197, 199 (2005). Therefore, we review the decision of the trial court only for abuse of discretion. *See id.* Abuse of discretion occurs when an act is " 'not done according to reason or judgment, but depending upon the will alone' and 'done without reason.' " *Dare County Bd. of Education v. Sakaria*, 118 N.C. App. 609, 615, 456 S.E.2d 842, 846 (1995) (quoting *In re Housing Authority*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952)).

Relying heavily on this Court's opinions in *State v. Locklear*, 42 N.C. App. 486, 256 S.E.2d 830 (1979), *State v. Fonville*, 72 N.C. App. 527, 325 S.E.2d 258 (1985), and the dissenting opinion in *State v. Evans*, 166 N.C. App. 432, 601 S.E.2d 877 (2004) (Wynn, J.), surety repeatedly states that "the efforts of a surety which result in the capture and return of the defendant on the charge for which the bond was secured constitutes extraordinary [circumstances]" and requires the court to grant relief from the forfeiture judgment. However, neither *Fonville* nor *Locklear* supports surety's argument on appeal that the trial court must set aside a judgment of forfeiture where the surety surrenders the defendant. Moreover, this Court's majority opinion in *Evans* has now been affirmed by our Supreme Court. *State*

v. Evans, 359 N.C. 404, 610 S.E.2d 198 (2005). We agree with appellee that "the common thread linking . . . this Court's prior rulings . . . is the great deference given to the findings of the trial court, rather than the establishment of a principle that return of the defendant constitutes extraordinary cause or extraordinary circumstances as a matter of law."

Furthermore, the relevant statutes themselves do not support surety's argument on appeal. In authorizing the trial court to set aside final judgments of forfeitures in limited circumstances, *see* G.S. § 15A-544.8(b), the General Assembly did not expressly provide that a surety's efforts, which result in the capture and return of the defendant, always constitute "extraordinary circumstances." In contrast, the legislature mandated that, before a final judgment of forfeiture has been entered, a forfeiture "shall" be set aside where the defendant is surrendered. *See* G.S. § 15A-544.5(b)(3). We can safely infer, then, that the legislature consciously chose, in adopting more stringent requirements for setting aside final judgments of forfeiture, that one's surrender of the accused would not, as a matter of law, constitute a basis upon which judgments would automatically be set aside. As we stated in *Evans*, "[a]ccepting [surety's] argument would be tantamount to holding that the trial court, as a matter of law, abuses its discretion by failing to equate the statutory criteria for setting aside a forfeiture listed in N.C. Gen. Stat. § 15A-544.5(b)(1-6) (2003), with 'extraordinary circumstances' for purposes of obtaining relief from final judgment under N.C. Gen. Stat. § 15A-544.8(b)(2)." *Evans*, 166 N.C. App. at 434, 601 S.E.2d at 878.

We next turn to an application of the foregoing legal principles to the facts of this case. Defendant did not appear in court 2 July 2003. Defendant had not been surrendered by surety prior to the final judgment of forfeiture entered 29 December 2003. Defendant was apprehended by surety's agents and surrendered to Johnston County Sheriff's Department on 14 April 2004. Surety presented no evidence of any efforts by its agents to secure the presence of defendant in court on 2 July 2003. Surety did present evidence, in the form of affidavits of its agent Timothy Fitzpatrick, of efforts made on its behalf to apprehend defendant following receipt of the notice of forfeiture. According to Fitzpatrick, he made telephone calls, performed computer searches, sent letters, and coordinated his search with other recovery agents. One of the recovery agents eventually apprehended defendant at defendant's mother's residence in Brooklyn, N.Y., in April 2004, and returned him to North Carolina. Notwithstanding

these efforts, the trial court, as detailed in its order, did not view surety's lackluster efforts as those fitting within the "extraordinary circumstances" contemplated by G.S. § 15A-544.8(b)(2). Assuming *arguendo* that surety's efforts to apprehend defendant could be characterized as diligent, "we caution that diligence alone will not constitute 'extraordinary [circumstances],' for due diligence by a surety is expected." *Coronel*, 145 N.C. App. at 248, 550 S.E.2d at 569.

The trial court did not abuse its discretion in failing to find that extraordinary circumstances existed to allow surety relief from the judgment of forfeiture. This assignment of error is overruled.

[2] Surety argues next that the trial court's order denying its motion to set aside the judgment of forfeiture must be reversed because the trial court failed to set forth findings of fact regarding the factors enumerated in *Coronel*, 145 N.C. App. at 248, 550 S.E.2d at 569. As many of the considerations discussed in *Coronel* relate to cases wherein the accused has died, we easily reject surety's argument. *See id.* ("The fact of the defendant's death must be weighed against certain factors in determining whether a forfeited bond may be remitted for 'extraordinary cause.' "). Accordingly, *Coronel* is not controlling, and this assignment of error is overruled.

Affirmed.

Judge McGEE concurs.

Judge HUNTER concurs with separate opinion.

HUNTER, Judge, concurring.

I agree with the majority's conclusion that the trial court did not abuse its discretion in failing to find that extraordinary circumstances existed to allow surety relief from the judgment of forfeiture in this case.

However, I write separately to suggest that while our past jurisprudence has not established a requirement that the trial court grant relief from a forfeiture judgment when a surety returns a defendant after the judgment has been entered, such a factor should weigh heavily in the trial court's consideration of extraordinary circumstances which entitle the surety to some relief under N.C. Gen. Stat. § 15A-544.8 (2003).

Our courts have long recognized that "[t]he goal of the bonding system is the production of the defendant[.]" *State v. Locklear*, 42 N.C. App. 486, 489, 256 S.E.2d 830, 832 (1979); *see also State v. Pelley*, 222 N.C. 684, 688, 24 S.E.2d 635, 638 (1943) (stating "[t]he very purpose of the bond was . . . to make the sureties responsible for the appearance of the defendant at the proper time"); *State v. Coronel*, 145 N.C. App. 237, 247, 550 S.E.2d 561, 568 (2001) (stating "the court system's paramount concern is ensuring the return of the criminal defendant for prosecution").

Our system of bail bonds places the surety as custodian of the accused, and provides the surety great discretion in regaining custody in the event an accused escapes from such custody, in order to effectuate the purpose of returning the criminal defendant for prosecution. *See State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 50, 612 S.E.2d 148, 152 (2005) (citation omitted) (stating that a surety " 'may pursue [the accused] into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. . . . It is likened to the rearrest by the sheriff of an escaping prisoner' "). Further, our courts have recognized that "[s]ureties must be assured that if they expend money, time, and effort to recover criminal defendants, they have viable remedies for the return of forfeited bond money." *Coronel*, 145 N.C. App. at 247, 550 S.E.2d at 568. Finally, our courts have stated that recovery efforts which result in the principal's detention need not be dramatic to constitute extraordinary circumstances sufficient to grant relief from a forfeiture judgment. *Locklear*, 42 N.C. App. at 489, 256 S.E.2d at 832.

Given these established principles, a trial court should give great weight to the actual return of the accused into custody in considering relief from a forfeiture judgment, as failure to due so may discourage sureties from continued attempts to apprehend the accused and undermine the paramount concern of ensuring the return of the criminal defendant for prosecution. *Pelley*, 222 N.C. at 688, 24 S.E.2d at 638. Return of the accused into custody within the 150 day period after entry of forfeiture is preferable, as recognized by the automatic set aside of a specific forfeiture for a return to custody in that time period. *See* N.C. Gen. Stat. § 15A-544.5(b)(3) (2003). However, in order to effectuate the "foremost goal of the bond system" to produce the defendant in court in order to stand trial, *Gonzalez-Fernandez*, 170 N.C. App. at 50, 612 S.E.2d at 152, there must be some continued incentive to assure sureties (individuals as well as corporate) that a viable remedy for the return of forfeited bond money exists if they

expend money, time, and effort to recover criminal defendants. *Coronel*, 145 N.C. App. at 247, 550 S.E.2d at 568.

STATE OF NORTH CAROLINA v. CRAIG CLIFFORD WISSINK

No. COA04-1081

(Filed 16 August 2005)

1. Constitutional Law— effective assistance of counsel—dismissal of claims without prejudice

Defendant's claims of ineffective assistance of counsel in a first-degree murder, discharging a firearm into occupied property, and misdemeanor larceny of a motor vehicle case are overruled without prejudice where the claims cannot be determined from the face of the record, and defendant may raise these claims in a postconviction motion for appropriate relief.

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

The short-form indictment used to charge defendant with first-degree murder was constitutional under *Blakely v. Washington*, 542 U.S. 296 (2005).

3. Indictment and Information— amendment—date of murder

The trial court did not err by allowing the State to amend a murder indictment on the morning of trial to show that the murder occurred on 27 June 2000 instead of on or about 26 June 2000 as alleged in the original indictment, because: (1) an amendment may properly be made to an indictment to correct the date of the offense since it does not substantially alter the charge set forth in the indictment; and (2) the date of the offense has no bearing on defendant's sentence, nor did it enhance defendant's sentence in any way, so that the *Blakely* decision was not implicated.

4. Homicide— first-degree murder—date of offense—no variance—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder, because: (1) the Court of Appeals already concluded that the indictment was properly amended to allege the correct date; (2) the State may prove that

an offense charged was committed on some date other than the time named in the bill of indictment; and (3) the evidence of defendant's guilt was overwhelming.

5. Sentencing— prior record level—enhancement factor not submitted to jury—no knowing stipulation or waiver— *Blakely* error

The trial court erred in enhancing defendant's sentence by adding a point to defendant's prior record level based upon a finding that defendant was on probation at the time he committed the crime without submitting the issue of defendant's probationary status to the jury for a finding beyond a reasonable doubt. Defendant did not knowingly stipulate his probationary status or waive his right to a jury trial on the issue when his attorney stated at the sentencing hearing that defendant was on probation and thus had a prior record level IV because the decisions of *Blakely v. Washington*, 542 U.S. 296, and *State v. Allen*, 359 N.C. 425, had not been issued at the time of defendant's trial and defendant was thus not aware of his right to have a jury determine the existence of a sentence enhancement.

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

Defendant's assignments of error that were not argued in his brief are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

Appeal by defendant from judgments entered 1 April 2004 by Judge Knox V. Jenkins in Superior Court, Cumberland County. Heard in the Court of Appeals 11 May 2005.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

M. Alexander Charns for defendant.

McGEE, Judge.

Craig Clifford Wissink (defendant) pled not guilty to charges of first degree murder, conspiracy to commit robbery with a dangerous weapon, attempted robbery with a dangerous weapon, discharging a firearm into occupied property, and felonious larceny of a motor vehicle. Prior to trial, the State dismissed the charge of conspiracy to commit robbery with a dangerous weapon. A jury found defendant guilty of first degree murder, attempted robbery with a firearm, discharging a firearm into occupied property, and misdemeanor larceny

of a motor vehicle. The trial court arrested judgment for the charge of attempted robbery with a firearm, since it merged with the first degree murder charge. *See State v. Goldston*, 343 N.C. 501, 504, 471 S.E.2d 412, 414 (1996). The trial court sentenced defendant to life imprisonment without parole for the first degree murder charge, thirty-seven to fifty-four months for the charge of discharging a firearm into occupied property, and sixty days for the charge of misdemeanor larceny of a motor vehicle. Defendant appeals.

The evidence at trial tended to show that around 10:00 p.m. on 27 June 2000, two individuals knocked on the door of a trailer belonging to Jonathan Pruey (Pruey). As Pruey approached the door, the individuals opened the door from outside. Pruey and his roommate, Corrie Cordier (Cordier), attempted to close the door. One of the individuals, who was wearing a Halloween hockey mask, fell in through the door. Cordier "stomped down" on the individual's face and Pruey slammed the door shut, bracing himself against it. A few seconds later, Cordier heard a loud noise, a moan, someone stumbling in the living room, and then the sound of someone hitting the floor. Pruey's wife and another roommate turned on the lights and saw Pruey lying on his back on the kitchen floor. Pruey was losing a large amount of blood from his chest and mouth.

Michael Grimes (Grimes), Pruey's neighbor, heard a gunshot and screaming around 10:30 p.m. on 27 June 2000. Grimes looked out his window and saw at least two individuals speed off in a vehicle. After unsuccessfully chasing the vehicle on foot, Grimes returned home and called 911. Pruey's wife came to Grimes's home and told Grimes that Pruey had been shot. Grimes went to Pruey's home, where Pruey was lying on the kitchen floor. Shortly thereafter, law enforcement and an ambulance arrived at the scene. Pruey died from his wound.

Dr. Kenneth Lidonnici (Dr. Lidonnici) performed an autopsy on Pruey. Dr. Lidonnici testified that he observed a major entrance wound in Pruey's chest about one inch in diameter, and three smaller entrance wounds surrounding the major wound. Dr. Lidonnici found multiple metal pellets in the muscles of Pruey's back, as well as a piece of plastic embedded in one of the chambers of Pruey's heart. Dr. Lidonnici testified that Pruey died from a shotgun wound to the chest, and that Pruey would not have been able to survive very long after sustaining the injury.

Dr. Lidonnici gave the metal pellets and piece of plastic to Samuel Goshorn (Goshorn), a crime scene investigator with the Cumberland

County Sheriff's Department. Goshorn testified that the metal pellets came from a shotgun shell. Goshorn also testified that the piece of plastic found in Pruey's heart was wadding from a shotgun shell.

Catherine Price (Price), testified that she was acquainted with defendant through her children. Price owned a green four-door 1992 Mazda Protegé. Price testified that she had allowed defendant to use the vehicle a few weeks prior to 27 June 2000. Price's children called Price on 27 June 2000 and reported that the vehicle was missing from Price's yard. Price reported the vehicle stolen around midnight.

Brandy Gass (Gass), defendant's girlfriend, testified that she saw defendant and Lawrence Ash (Ash) in Price's car at around 5:00 or 6:00 p.m. on 27 June 2000. Defendant told Gass that "he had some things to go take care of and that he would be back later on" in the evening. Defendant and Ash left together. At around 10:00 p.m., defendant called Gass, who was at a friend's house, and told Gass to come home alone. Gass walked home and when she arrived, she saw some clothes and shoes burning in a pile outside. Gass recognized the clothes and shoes as those that defendant and Ash had been wearing earlier that evening. Gass met defendant inside and noticed that defendant's nose was bleeding and looked as if it had been broken. Defendant told Gass that he was leaving for Arizona. Gass agreed to go with him, and they left in Price's vehicle. Defendant and Gass made a stop, and defendant got out of the vehicle and had a conversation with several individuals. Gass recognized Damion Jackson (Jackson) as one of the individuals.

Jackson testified that he was acquainted with both defendant and Pruey. Jackson stated that he had been to Pruey's home with defendant a few times, the last time being a week or two before Pruey was shot. Jackson stated that he and defendant had seen money and marijuana in Pruey's home.

Jackson testified that on the night of 27 June 2000, he was standing in the middle of the street when defendant pulled up in a vehicle with Gass. Jackson stated that defendant was pale, had "a gash like he had been hit in the nose[,]" was bleeding and was acting panicky. Defendant told Jackson about the shooting and asked Jackson for money. Jackson testified that defendant said, "I shot somebody. I think he's dead."

Defendant returned to the vehicle and he and Gass left for Arizona. Two or three hours later, defendant and Gass stopped at a

rest stop and defendant told Gass he needed to tell her something. They sat down at a picnic table, and defendant told Gass that defendant and Ash had attempted to commit a robbery. Defendant stated that he first knocked on a trailer door, and then kicked in the door. Defendant said that he fell and got kicked in the face. A struggle ensued and the individuals inside the trailer were able to close the door. Defendant stated that Ash then fired a shot through the door from a shotgun.

Defendant and Gass started driving again and made several stops. Gass testified that at one stop, defendant went to the vehicle's trunk to change his clothes. Gass observed a shotgun, taken apart, and wrapped in a sheet inside the trunk. Gass stated that she had seen this shotgun a few weeks earlier when defendant had borrowed the shotgun from a friend.

Defendant and Gass eventually arrived in Arizona and stayed at defendant's mother's home. Approximately a week later, police arrived at the home and arrested defendant and Gass.

Sam Pennica (Pennica), Chief of Detectives at the Cumberland County Sheriff's Office, interviewed defendant on 20 July 2000. Pennica obtained a written waiver of defendant's *Miranda* rights. In his statement to law enforcement, defendant stated that he told Jackson on 27 June 2000 that he needed money and wanted to get out of town because he had violated his probation and was scared he would be put in prison. Jackson told defendant that Pruey had $1,000 to $1,500 and one-half to one pound of marijuana in Pruey's house. Jackson also told defendant that there was no gun in Pruey's house. Defendant agreed to give Jackson half of the money that defendant would steal from Pruey's house. Defendant stated that Ash was present for this conversation.

Defendant stated that he and Ash drove to Pruey's home that night and that the shotgun was in Ash's possession. When they approached the door, a struggle with Pruey ensued. Defendant stated that after Pruey closed and leaned up against the door, defendant began to run off the porch. Defendant then heard a gunshot. Defendant turned around and saw holes in the door. Defendant stated that he kept asking Ash, "why did you do it?" Ash "begg[ed]" defendant not to tell anyone. Defendant then admitted that he stole Price's vehicle to flee to Arizona.

I.

[1] Defendant argues that he received ineffective assistance of counsel at several stages throughout the trial. Defendant contends that it was ineffective assistance of counsel to: (1) fail to move to suppress defendant's statement to police, (2) fail to object to portions of defendant's statement in which he admitted additional, unrelated crimes and misconduct, and (3) withdraw a written request for complete recordation of jury selection, all evidence presented, bench conferences and arguments of counsel. However, defendant admits that he cannot, on direct appeal, prove from the cold record that ineffective assistance of counsel did in fact occur. Therefore, defendant raises these claims for preservation purposes.

Our General Statutes mandate that a defendant raise his claims of ineffective assistance of counsel on direct appeal. N.C. Gen. Stat. § 15A-1419(a)(3) (2003); *State v. Jackson*, 165 N.C. App. 763, 776, 600 S.E.2d 16, 25, *disc. review denied*, 359 N.C. 72, 604 S.E.2d 923 (2004). However, "because of the nature of [these] claims, defendants likely will not be in a position to adequately develop many [ineffective assistance of counsel] claims on direct appeal." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Therefore, a defendant must raise ineffective assistance of counsel claims on direct appeal in order to avoid forfeiting collateral review. *State v. Lawson*, 159 N.C. App. 534, 544, 583 S.E.2d 354, 361 (2003).

As defendant acknowledges, we cannot determine from the face of the record whether defendant received ineffective assistance of counsel. We overrule these assignments of error without prejudice and hold that defendant may raise his ineffective assistance of counsel claims in a postconviction motion for appropriate relief. *See State v. Long*, 354 N.C. 534, 540, 557 S.E.2d 89, 93 (2001).

II.

[2] Defendant next argues that the short form indictment for murder used in this case is constitutionally defective under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). Defendant argues that under *Blakely*, every fact essential to his punishment must have been charged in the indictment. We disagree.

In *State v. Allen*, 359 N.C. 425, 438, 615 S.E.2d 256, 265 (2005), our Supreme Court recently held that "sentencing factors which might lead to a sentencing enhancement" need not be alleged in a North

Carolina state court indictment. The Court also reiterated its holding in *State v. Hunt*, 357 N.C. 257, 272-73, 582 S.E.2d 593, 603-04, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003), wherein the Court stated that "the United States Supreme Court has not applied the Fifth Amendment indictment requirements to the states." As a result, we find that the short-form murder indictment is not unconstitutional under *Blakely*.

Furthermore, our Courts have repeatedly upheld the use of short-form murder indictments. *State v. Squires*, 357 N.C. 529, 537, 591 S.E.2d 837, 842 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004) ("[The North Carolina Supreme Court] has consistently held that the short-form first-degree murder indictment serves to give a defendant sufficient notice of the nature and cause of the charges against him or her."); *Hunt*, 357 N.C. at 278, 582 S.E.2d at 607 ("[The North Carolina Supreme Court] has consistently concluded that [the short-form murder] indictment violates neither the North Carolina nor the United States Constitution."); *State v. Ray*, 149 N.C. App. 137, 143, 560 S.E.2d 211, 216 (2002), *aff'd per curiam*, 356 N.C. 665, 576 S.E.2d 327 (2003) (recognizing that a short-form murder indictment provides a defendant with sufficient notice of the State's theory on which the defendant would be tried). We overrule this assignment of error.

III.

[3] Defendant next argues that it was error for the trial court to allow an amendment to the murder indictment on the morning of trial. The original indictment alleged that the murder occurred "on or about [26 June 2000][.]" The evidence showed that the murder actually occurred on 27 June 2000. The trial court permitted the State to amend the indictment in open court on the morning that trial began.

Defendant acknowledges that an amendment may properly be made to an indictment to correct the date of the offense, since it does not " 'substantially alter the *charge* set forth in the indictment.' " *State v. Price*, 310 N.C. 596, 598-99, 313 S.E.2d 556, 558-59 (1984), (quoting *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478, *disc. review denied*, 294 N.C. 737, 244 S.E.2d 155 (1978)); *see also State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994). However, defendant argues that under *Blakely*, "[i]f factors which aggravate a defendant's sentence must be set out in the indictment and found beyond a reasonable doubt by a jury, the correct date of [the offense] must be alleged in the indictment and found by the jury

beyond a reasonable doubt." As noted above, our Supreme Court in *Allen* directed that aggravating factors need not be alleged in the indictment. *Allen*, 359 N.C. at 438, 615 S.E.2d at 265. Moreover, the date of the offense has no bearing on defendant's sentence, nor did it enhance defendant's sentence in any way. The trial court did not err in permitting the State to amend the indictment.

IV.

[4] Defendant next assigns error to the trial court's denial of defendant's motion to dismiss due to insufficiency of the evidence. Defendant argues that the evidence showed that Pruey was killed on 27 June 2000, but that the murder indictment alleged that the offense occurred on 26 June 2000. Defendant argues that the motion to dismiss should therefore have been granted.

We first note that we have rejected defendant's argument that the indictment was improperly amended. Therefore, the indictment alleged that the offense occurred on 27 June 2000, in accordance with the evidence at trial. In addition, "[t]he State may prove that an offense charged was committed on some date other than the time named in the bill of indictment." *Price*, 310 N.C. at 599, 313 S.E.2d at 559 (citing *State v. Wilson*, 264 N.C. 373, 141 S.E.2d 801 (1965)). We also note that the evidence of defendant's guilt was overwhelming. The trial court did not err in denying defendant's motion to dismiss.

V.

[5] Defendant's final assignment of error contends that the trial court erred at the sentencing hearing by enhancing defendant's prior record level from III to IV. The trial court found that defendant committed the offense of discharging a firearm into occupied property while defendant was on probation. As a result, defendant's prior record level points increased from eight to nine, and his prior record level increased from III to IV. N.C. Gen. Stat. § 15A-1340.14(b)(7) (2003) (if a defendant commits an offense while on probation, the defendant is assigned one point); N.C. Gen. Stat. § 15A-1340.14(c)(4) (2003) (a defendant with nine prior record points has a prior record Level IV).

Defendant first argues that the sentence enhancement that defendant committed the offense while on probation should have been alleged in an indictment. Again, we note that our Supreme Court in *Allen* held that sentencing factors need not be set out in an indict-

ment. *Allen*, 359 N.C. at 438, 615 S.E.2d at 265. Under *Allen*, we find that it was not necessary for the fact that defendant committed the offense while on probation to have been alleged in an indictment.

Defendant next argues that the trial court erred by adding a point to defendant's prior record level when it did not submit to the jury the issue of whether defendant was on probation at the time he committed the offense. We find that this argument has merit.

Under *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), "*[o]ther than the fact of a prior conviction*, *any fact* that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Allen*, 359 N.C. at 437, 615 S.E.2d at 265 (emphasis added). In *Apprendi*, the Supreme Court reasoned that the fact of a prior conviction need not be proven to the jury because of the "certainty that procedural safeguards attached to any 'fact' of prior conviction[.]" *Apprendi*, 530 U.S. at 488, 147 L. Ed. 2d at 454. The Court stated:

> [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Id. at 496, 147 L. Ed. 2d at 458-59.

In this case, a fact other than a prior conviction, defendant's probationary status, that increased defendant's sentence was not submitted to a jury and proved beyond a reasonable doubt. We recognize, as the State argues, that the fact of a defendant's probationary status is analogous to and not far-removed from the fact of a prior conviction. However, we find that we are bound by the language in *Blakely*, *Apprendi* and *Allen* that states that only the fact of a prior conviction is exempt from being proven to a jury beyond a reasonable doubt. Furthermore, we note that the fact of defendant's probationary status did not have the procedural safeguards of a jury trial and proof beyond a reasonable doubt recognized in *Apprendi* as providing the necessary protection for defendants at sentencing. We find that the trial court erred by adding a point to defendant's prior record level without first submitting the issue to a jury to find beyond a reasonable doubt. We remand for resentencing.

The State argues that defendant stipulated to the fact that he was on probation when he committed the offense. At trial, the following colloquy occurred:

> [ATTORNEY FOR THE STATE]: . . . [The prior record level worksheet shows that defendant] has two—eight points plus a one point, that's a—he was on probation at the time of this offense, which gives him nine record level points, and he's a level IV for the—for sentencing, Your Honor. . . .
>
> THE COURT: All right.
>
> [ATTORNEY FOR DEFENDANT]: I think that's correct, Your Honor.

A criminal defendant has a constitutional right to a jury trial on the issue of whether a defendant's sentence should be enhanced. *Blakely*, 542 U.S. at ––, 159 L. Ed. 2d at 414-15; *Allen*, 359 N.C. at 437-38, 615 S.E.2d at 264-65. The waiver of a right to a jury trial "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 25 L. Ed. 2d 747, 756 (1970). At the time of defendant's trial and sentencing hearing, neither *Blakely* nor *Allen* had been decided. Therefore, defendant was not aware of his right to have a jury determine the existence of the sentence enhancement, and his admission to his probationary status was not a "knowing [and] intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 748, 25 L. Ed. at 756. We conclude that defendant did not stipulate to the fact of his probationary status. *See also State v. Everette*, 172 N.C. App. 237, 616 S.E.2d 237 (2005); *State v. Meynardie*, 172 N.C. App. 127, 616 S.E.2d 21 (2005).

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

No error; remanded for resentencing.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. CARL RAY POORE, JR.

No. COA04-1352

(Filed 16 August 2005)

1. Criminal Law— writ of certiorari—guilty plea—factual basis

The Court of Appeals treated defendant's appeal from the trial court's alleged improper acceptance of his guilty plea in a felonious breaking and entering case as a writ of certiorari and found no error, because: (1) the sworn testimony of the arresting officer was sufficient to support the factual basis for defendant's plea; and (2) the testimony of the officer provided an overview of the evidence which would have established the essential elements of felony breaking and entering.

2. Sentencing— aggravating factor not submitted to jury— *Blakely* error

The trial court erred in a felony breaking and entering case by sentencing defendant in the aggravated range without submitting to the jury the aggravating factor that the trial court found that defendant was armed with a deadly weapon at the time of the crime, and the case is remanded for resentencing.

3. Sentencing— prior record level—elements of present offense included in prior offense—finding by trial court— no *Blakely* error

Defendant is not entitled to resentencing in a felony breaking and entering case even though the trial court itself found pursuant to N.C.G.S. § 15A-1340.14(b)(6) that all the elements of the present offense are included in a prior offense, because: (1) neither *Blakely v. Washington*, 542 U.S. 296 (2004), nor *State v. Allen*, 359 N.C. 425 (2005), preclude the trial court from assigning a point in the calculation of one's prior record level where all the elements of the present offense are included in a prior offense; and (2) the exercise of assigning a point for the reason set forth in N.C.G.S. § 15A-1340.14(b)(6) is akin to the trial court's determination that defendant had in fact been convicted of certain prior offenses and is not something that increases the statutory maximum within the meaning of *Blakely* or *Allen*.

STATE v. POORE

[172 N.C. App. 839 (2005)]

Appeal by defendant from judgment entered 30 April 2003 by Judge W. Douglas Albright in Alleghany County Superior Court. Heard in the Court of Appeals 7 June 2005.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn J. Thomas for the State.

Douglas L. Hall, for defendant.

LEVINSON, Judge.

Defendant (Carl Ray Poore, Jr.) appeals from judgment entered upon his plea to one count of felony breaking and entering. Defendant has not appealed from other judgments and commitments related to the events of 26 January 2003. We remand for resentencing.

Defendant pled guilty to breaking and entering pursuant to N.C.G.S. § 14-54(a). The trial court heard the sworn testimony of the arresting officer of the Alleghany County Sheriff's Department. On 26 January 2003, the officer was investigating a burglar alarm call at Meadow Fork Road when a second call came in of a break-in at a residence one mile away. The officer saw a white pickup truck parked on the side of the road near the second residence. A license plate check on the pickup truck revealed that the truck was registered in Cana, Virginia to defendant. The officer observed jewelry and boxes in the truck. Footprints in the snow led up to the residence where a window was broken. During a search of the residence, the officer found defendant underneath a bed with a stolen rifle lying next to him. According to the officer, defendant had "already been through the house and [was] fixing to take the VCR." The officer arrested defendant and "charged him with breaking and entering, second degree burglary because of it [being] dark at this second residence and [he] had to use a flashlight, and charged him with felony possession of stolen property." The trial court found, as an aggravating factor, that the defendant "was armed with a deadly weapon at the time of the crime[,]" and imposed an aggravated sentence of 24 to 29 months imprisonment. From this judgment, defendant appeals.

On appeal defendant argues (1) there was an insufficient factual basis to support the entry of plea, (2) he is entitled to resentencing under *Blakely v. Washington*, because the trial court itself found an aggravating factor, and (3) he is entitled to resentencing under *Blakely* because the trial court itself found, pursuant to N.C.G.S. § 15A-1340.14(b)(6) (2003), that "all the elements of the present offense are included in [a] prior offense[.]"

[1] We first address defendant's argument that there was an insufficient factual basis supporting the entry of his plea. Preliminarily, we note that defendant has no appeal of right as to this issue. *See State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987) ("[A] defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea."). However, according to this Court's analysis in *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731, 732 (2004), we find "[defendant's] arguments may be reviewed pursuant to a petition for writ of certiorari. We choose to treat defendant's appeal as a petition for writ of certiorari, which we now allow." Therefore, we address the merits of defendant's first argument.

The elements of felonious breaking and entering under N.C.G.S. § 14-54(a) are "(1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *State v. Walton*, 90 N.C. App. 532, 533, 369 S.E.2d 101, 103 (1988).

N.C.G.S. § 15A-1022 (2003), governing the requirements for entry of a plea, provides in pertinent part:

> (c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> . . . .
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> In interpreting this statute, our Supreme Court has held:
>
> The statute "does not require the trial judge to elicit evidence from each, any or all of the enumerated sources . . . ."
>
> . . . .
>
> The statute, if it is to be given any meaning at all, must contemplate that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty.

State v. Sinclair, 301 N.C. 193, 198-99, 270 S.E.2d 418, 421-22 (1980) (quoting *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980)).

In the instant case, the sworn testimony of the arresting officer was offered to support the factual basis for defendant's plea. The tes-

timony of the officer provided an overview of the evidence which would have established the essential elements of felony breaking and entering. We conclude this testimony was sufficient to establish a factual basis for the offense of felony breaking and entering. This assignment of error is overruled.

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[2] Defendant next argues that, because the trial court sentenced him in excess of the statutory maximum based on an aggravating factor not found by a jury beyond a reasonable doubt or admitted by defendant, he is entitled to a new sentencing hearing under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, —— U.S. ——, 159 L. Ed. 2d 851 (2004). We agree.

Defendant's sentence was aggravated based on a finding that the defendant "was armed with a deadly weapon at the time of the crime." The trial court sentenced defendant in the aggravated range to a term of 24 to 29 months. The aggravating factor was not found beyond a reasonable doubt by a jury and was not admitted by defendant. Therefore, in conformity with the rulings in *Blakely* and *State v. Allen*, 359 N.C. 425, —— S.E.2d —— (No. 485PA04) (filed 1 July 2005), we must remand for resentencing.

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[3] We address defendant's final argument because it may recur on remand. Defendant contends it was *Blakely* error for the trial court, when determining defendant's prior record level, to assign a point because "all the elements [of the] present offense [are] included in a prior offense[]" as provided in G.S. § 15A-1340.14(b)(6). Defendant argues that, because the jury did not make such a "finding" beyond a reasonable doubt and he did not admit to the same, the trial court committed error. We disagree.

G.S. § 15A-1340.14, pertaining to the calculation of a defendant's prior record level for sentencing, provides in pertinent part:

> (a) Generally.—The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court finds to have been proved in accordance with this section.
>
> (b) Points.—Points are assigned as follows:
>
> . . . .
>
> (6) If all the elements of the present offense are included in any prior offense for which the offender was convicted,

> whether or not the prior offense or offenses were used in determining prior record level, 1 point.

In applying *Blakely* to North Carolina's structured sentencing scheme, our Supreme Court in *Allen* held:

> We emphasize that *Blakely*, which is grounded in the Sixth Amendment right to jury trial, affects only those portions of the Structured Sentencing Act which require the sentencing judge to consider the existence of aggravating factors not admitted to by a defendant or found by a jury and which permit the judge to impose an aggravated sentence after finding such aggravating factors by a preponderance of the evidence.
>
> . . . .
>
> [We] hold that, to the extent N.C.G.S. § 15A-1340.16 (a), (b), and (c) require trial judges to find aggravating factors by a preponderance of the evidence section 15A-1340.16 violates *Blakely*.

Allen, 359 N.C. at ——, —— S.E.2d at ——.

Allen, in applying *Blakely* to North Carolina, did not hold that the functions assigned to the trial court by virtue of G.S. § 15A-1340.14 are constitutionally infirm. *See id.* Moreover, *Blakely* itself specifically excepted from its holding a determination made during sentencing that an individual has certain prior conviction(s). We conclude that neither *Blakely* nor *Allen* preclude the trial court from assigning a point in the calculation of one's prior record level where "all the elements of the present offense are included in [a] prior offense." *See* G.S. § 15A-1340.14(b)(6). This is true even though the same has neither been found by the jury beyond a reasonable doubt nor admitted by the defendant. The exercise of assigning a point for the reason set forth in G.S. § 15A-1340.14(b)(6) is akin to the trial court's determination that defendant had in fact been convicted of certain prior offenses, and is not something that increases the "statutory maximum" within the meaning of *Blakely* or *Allen*. This assignment of error is overruled.

Remanded.

Judges McGEE and HUNTER concur.

CHERYL W. MAYO, PLAINTIFF v. FRANK E. MAYO, DEFENDANT

No. COA04-1334

(Filed 16 August 2005)

1. Appeal and Error— preservation of issues—impermissibly changing theory on appeal

The trial court did not err by permitting defendant husband to seek an annulment even though plaintiff wife contends defendant earlier took the position that the parties were legally married, because: (1) plaintiff has impermissibly sought to change the theory presented in the instant appeal from that which was presented to the trial court for determination; and (2) unlike in *Fungaroli v. Fungaroli*, 53 N.C. App. 270 (1981), this case does not implicate the full faith and credit clause or the public policy in favor of it that would preclude defendant's right to seek an annulment of the marriage.

2. Annulment— fraud—concealment of number of prior marriages—Georgia law

The trial court did not err by annulling the parties' marriage on the ground of fraud even though the only misrepresentation concerned the number of plaintiff wife's prior marriages, because: (1) applying Georgia law, based on the parties being married and living a portion of their married life in Georgia, the nature of consent by the parties required to constitute an actual contract of marriage was voluntary consent without any fraud practiced upon either; (2) the Georgia application for a marriage license required the bride and groom to disclose, upon oath, the number of previous marriages, the method by which those marriages were dissolved, the grounds for dissolution, and the date and place; (3) contrary to plaintiff's assertion, hiding five of seven previous marriages does not fall within a de minimus standard even if that standard existed; and (4) none of the cases from other jurisdictions cited by plaintiff involve a party hiding as many previous marriages as in the instant case.

Appeal by plaintiff from judgment entered 28 May 2004 by Judge Laura Bridges in Transylvania County District Court. Heard in the Court of Appeals 18 May 2005.

H. Paul Averette for plaintiff-appellant.

Charles W. McKeller for defendant-appellee.

CALABRIA, Judge.

Cheryl W. Mayo ("plaintiff") appeals from a judgment of annulment of her marriage to Frank E. Mayo ("defendant"). We affirm.

On 17 February 1999, plaintiff and defendant applied for a marriage license in Georgia. Each of them represented, in the block designated "number of previous marriages," two previous marriages. Plaintiff and defendant married on 9 April 1999. In 2001, defendant learned and later confirmed plaintiff had been previously married seven times rather than two times. Subsequently, defendant accepted employment and moved to California and then communicated to plaintiff that he considered the marital relationship at an end.

Plaintiff filed for a divorce from bed and board, abandonment, indignities, and adultery in Transylvania County on 3 September 2002, seeking post-separation support, alimony, and equitable distribution. In plaintiff's complaint, she alleged the existence of a lawful marriage. Defendant admitted the existence of a valid marriage in his answer. After protracted litigation dealing with, *inter alia*, post-separation support in favor of plaintiff and interim distributions, a separate judgment of absolute divorce was entered on 25 March 2003. Thereafter on 11 March 2004, defendant submitted a motion in the cause for an annulment of the marriage. After conducting a hearing on the issues, the trial court entered a judgment annulling the marriage between the parties. From that judgment, plaintiff appeals, asserting the trial court erred in (1) permitting defendant to seek an annulment after earlier taking the position that the parties were legally married and (2) annulling the marriage on grounds of fraud when the only misrepresentation concerns the number of prior marriages.

I. Contrary Positions

[1] Plaintiff asserts in her first assignment of error that defendant's pleadings include admissions of a lawful marriage, and annulment should not have been allowed in light of these admissions. We disagree.

At the hearing, plaintiff raised two initial challenges to the annulment proceeding: jurisdiction and standing. With respect to the

standing argument, plaintiff argued defendant lacked standing to seek an annulment on the grounds that he was seeking to have the marriage annulled after a judgment of absolute divorce was entered. Specifically, plaintiff argued the following at the hearing:

> So here you have a Movant who is trying to ask the Court for an annulment . . . but has already gotten a divorce from the person he's asking the Court to render the Annulment for. So I think there's a serious issue of standing to even raise that . . . . I've never heard of anyone coming in later after a divorce has been granted and then . . . asking that . . . the prior marriage be declared null . . . . I don't think there is [standing to do that].

In her brief to this Court, however, plaintiff does not argue defendant lacked standing. Rather, plaintiff argues "defendant's ready admission that the parties were lawfully married in his pleadings, coupled with his lengthy silence on his alleged ground for an annulment necessarily demonstrate that the defendant was precluded from seeking an annulment." In so doing, plaintiff has impermissibly sought to change the theory presented in the instant appeal (defendant is bound by the representations in his pleadings) from that which was presented to the trial court for determination (defendant cannot seek an annulment because a judgment of divorce had already been entered). *See Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (noting our courts do not permit the submission of new theories, not previously argued, because "the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]").

Moreover, plaintiff cites and primarily relies on this Court's holding in *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 280 S.E.2d 787 (1981), involving a plaintiff husband who filed a complaint for divorce in North Carolina and, after being ordered by a North Carolina court to pay alimony and transfer custody of the child to the defendant wife, sought a decree of annulment in the courts of Virginia. The Virginia court annulled the parties' marriage, and this Court subsequently declined to give effect to the Virginia decree. Along with other reasons given, this Court noted it would violate North Carolina's public policy to give full faith and credit to the Virginia decree where plaintiff went to another state and sought an annulment in contradiction to his previous representations of a valid marriage solely to extinguish the defendant wife's right to alimony. *Id.*, 53 N.C. App. at 279, 280 S.E.2d at 793. This case does not implicate the full faith and credit clause or the public policy in favor of it;

accordingly, *Fungaroli* does not preclude defendant's right to seek an annulment of the marriage. This assignment of error is overruled.

II. Grounds for Annulment

[2] In her second assignment of error, plaintiff argues the trial court erred in annulling the marriage because "plaintiff's alleged concealment of the number of her prior marriages [does] not rise to the level of fraud that is necessary to sustain an annulment." Initially, we note the parties sought and the trial court applied Georgia law in determining substantively whether an annulment should be granted the parties, who were married and lived a portion of their married life in Georgia.

Under Georgia law, the nature of consent by the parties required to constitute an actual contract of marriage is voluntary consent "without any fraud practiced upon either." Ga. Code Ann. § 19-3-4 (2004). "Marriages of persons . . . fraudulently induced to contract shall be void" unless there occurs by the party so defrauded "a subsequent consent and ratification of the marriage, freely and voluntarily made, accompanied by cohabitation as husband and wife[,]" which renders the marriage valid. Ga. Code Ann. § 19-3-5 (2004). An annulment, under Georgia law, operates in the same manner as "a total divorce between the parties of a void marriage and shall return the parties thereto to their original status before marriage." Ga. Code Ann. § 19-4-5 (2004). The parties have not cited, nor can we find, a Georgia case concerning the effect of a misrepresentation concerning the number of prior marriages on the validity of the marriage. However, we do note that the Georgia application for a marriage license requires the bride and groom to disclose, under oath, the number of previous marriages, the method by which those marriages were dissolved, the grounds for dissolution, and the date and place. We hold plaintiff's argument, that her concealment of five of her seven previous marriages does not "constitute[] sufficient fraud to serve as a basis to annul a marriage," is erroneous for two reasons.

First, the statutory law of Georgia is couched in terms of "any" fraud. The relevant question, therefore, is whether there exists fraud, not whether the existing fraud is sufficient. We do not read the term "any" to mean that there might not exist some *de minimus* standard in Georgia which would not justify annulling a marriage; however, a misrepresentation hiding five previous marriages while disclosing two does not, in our opinion, fall within such a *de minimus* standard.

Second, none of the cases from other jurisdictions cited by plaintiff involve a party hiding as many previous marriages as in the instant case. Certainly, the greater the concealed number of marriages, the more force has the argument of the injured party. The application for a marriage license in Georgia further evinces that state's interest in the circumstances of previous marriages, which are given under oath. In light of the statutory language of Georgia, the requirements of disclosure on the application for a marriage license in Georgia, and the comparison between the number of concealed versus the number of revealed marriages, we perceive no error in the trial court's annulment of the marriage in the instant case. This assignment of error is overruled.

Affirmed.

Judges McGEE and ELMORE concur.

DEPARTMENT OF TRANSPORTATION, Plaintiff-Appellee v. LINDA TURNER OLINGER, Individually and as Executrix under the Will of Emily W. Turner; MARIA FIRE; HENRY CLAY TURNER, III; HARRIET TURNER RABON; and UNION OIL COMPANY OF CALIFORNIA, Defendants

No. COA04-1468

(Filed 16 August 2005)

Appeal and Error— appealability—allowance of motion in limine

Defendants' appeal in a condemnation case from an interlocutory order, which allowed plaintiff's motion in limine estopping defendants from asserting the value of the pertinent property substantially exceeded the value on the pertinent Federal Estate Tax Return and the North Carolina Inheritance Tax Return, is dismissed because: (1) even assuming arguendo that the trial court's order affects some substantial right of defendants, they have not shown how that substantial right will be lost or inadequately addressed absent immediate review; (2) the trial court may, in its discretion, modify or completely change the ruling contained in this order before or during trial; (3) defendants retain the right to appeal the trial court's decision should it refuse to allow the contested evidence at trial; and (4) although the trial court purported to certify this issue for appeal

pursuant to N.C.G.S. § 1A-1, Rule 54(b), there must be a final adjudication of at least one claim in order to permit appeal under Rule 54(b) since that rule requires as a condition precedent that the court enter a final judgment as to one or more but fewer than all the claims or parties.

Appeal by defendants from order entered 28 June 2004 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 16 June 2005.

Attorney General Roy Cooper, by Assistant Attorneys General Hilda Burnett-Baker, James M. Stanley, Jr., and Douglas W. Corkhill, for the Department of Transportation.

Hunter, Higgins, Miles, Elam & Benjamin, PLLC, by Robert N. Hunter, Jr. and John C. Elam, for defendants.

STEELMAN, Judge.

Emily Turner died testate on 12 May 2001, owning a parcel of real estate containing 10.01 acres located in Guilford County, North Carolina. Pursuant to a family settlement agreement dated 10 December 2001, this property was to be distributed equally to Mrs. Turner's children. On 10 June 2002, the North Carolina Department of Transportation (plaintiff) instituted this action pursuant to Chapter 136 of the General Statutes, condemning a portion of the parcel (6.91 acres) for the expansion of Interstate Highway 40. At the time of filing the complaint, plaintiff deposited the sum of $882,990.00 in the office of the Clerk of Superior Court for Guilford County. The individual defendants are the children of Emily Turner, and Linda Turner Olinger is the executrix of the estate. It appears that Union Oil has no interest in the property. Defendants filed an answer requesting that a jury determine the amount of just compensation due.

Plaintiffs appraisal of the property showed that the value of the entire parcel was $1,097,650.00, and that the value of the portion taken and damage to the remainder totaled $882,990.00. During the course of the administration of Emily Turner's estate, Linda Olinger, as executrix, filed an application for letters testamentary and a 90 day inventory with the Clerk of Superior Court of Stanly County (the county of residence of Emily Turner at the time of her death). These documents listed the Guilford County property at the appraised tax value of $501,800.00. Mrs. Olinger also filed a Federal Estate Tax Return and a North Carolina Inheritance Tax Return, both of which

listed the value of the Guilford property at $1,097,650.00, the amount of the DOT appraisal. In the course of the litigation, defendants procured appraisals of the property which valued the property before the taking from $2,100,000.00 to $2,500,000.00.

On 17 June 2004, plaintiff filed a motion *in limine* seeking an order barring defendants from introducing evidence at trial that the fair market value was more than $1,097,650.00, the amount shown as the value on the Federal Estate Tax Return, and the North Carolina Inheritance Tax Return. The basis of this motion was the doctrine of judicial estoppel. On 28 June 2004, the trial court entered an order allowing plaintiff's motion *in limine*, ruling that defendants were "estopped from asserting in this cause that the value of the Chimney Rock Road property substantially exceeds the value placed upon the Chimney Rock Road property by defendants in The Matter of Emily Turner, case No. 01-E-193 and with the Internal Revenue Service in the Estate Tax return." The trial court further held that its order affected a substantial right and certified the matter for immediate appeal pursuant to Rule 54(b) of the Rules of Civil Procedure. From this order, defendants appeal.

The dispositive issue is whether this appeal is properly before us. "[I]f an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980).

> A motion *in limine* seeks "pretrial determination of the admissibility of evidence proposed to be introduced at trial," and is recognized in both civil and criminal trials. The trial court has wide discretion in making this advance ruling and will not be reversed absent an abuse of discretion. *Moreover, the court's ruling is not a final ruling on the admissibility of the evidence in question, but only interlocutory or preliminary in nature. Therefore, the court's ruling on a motion* in limine *is subject to modification during the course of the trial.*

Heatherly v. Industrial Health Council, 130 N.C. App. 616, 619, 504 S.E.2d 102, 105 (1998) (emphasis added) (internal citations omitted).

The issue presented in this case is identical to that of *Barrett v. Hyldburg*, 127 N.C. App. 95, 487 S.E.2d 803 (1997). In that case, the trial court granted defendant's motion to exclude evidence regarding plaintiff's alleged "repressed memories" of sexual abuse. The order of

the trial court expressed the opinion that its ruling affected a substantial right. This court held that the order was not an appealable interlocutory order. "Although the [order] may affect a substantial right of the defendant[s], this possibility does not make the orders appealable unless they 'will work injury to . . . [them] if not corrected before an appeal from the final judgment.' " *Rudder v. Lawton*, 62 N.C. App. 277, 279, 302 S.E.2d 487, 488-89 (1983) (citation omitted).

Even assuming *arguendo* that the trial court's order affects some substantial right of defendants, they have not shown how that substantial right will be lost or inadequately addressed absent immediate review. *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 466, 556 S.E.2d 331, 334 (2001). "[I]t is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal . . . ." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). Because the trial court may, in its discretion, modify or completely change the ruling contained in this order before or during trial, and because defendants retain the right to appeal the trial court's decision should it refuse to allow the contested evidence at trial, we hold that this interlocutory order is not immediately appealable.

We note that although the trial court purported to certify this issue for appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, "there must be a final adjudication of at least one claim in order to permit appeal under Rule 54(b) since that rule requires as a condition precedent that the court 'enter a final judgment as to one or more but fewer than all the claims or parties . . . .' " *Garris v. Garris*, 92 N.C. App. 467, 470, 374 S.E.2d 638, 640 (1988) (citation omitted).

> Rule 54(b) certification by the trial court is reviewable by this Court on appeal in the first instance because the trial court's denomination of its decree "a final . . . judgment does not make it so," if it is not such a judgment. Similarly, the trial court's determination that "there is no just reason to delay the appeal," while accorded great deference, cannot bind the appellate courts because "ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court." (Rule 54(b) certification "is not dispositional when the order appealed from is interlocutory").

First Atl. Mgmt.Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (internal citations omitted).

In this case, the trial court's order did not dispose of any claims; nor did it dispose of any party to the action. The trial court's attempt to certify this issue for appeal pursuant to Rule 54(b) was therefore ineffective. Defendants' appeal is from a non-appealable interlocutory order, and must be dismissed.

APPEAL DISMISSED.

Judges HUDSON and JACKSON concur.

BETTY L. GRANT, EXECUTRIX OF THE ESTATE OF TOMMY J. GRANT, PLAINTIFF v. HIGH POINT REGIONAL HEALTH SYSTEM, DEFENDANT

No. COA04-1439

(Filed 16 August 2005)

Appeal and Error— appealability—interlocutory order—proper place of trial—substantial right not affected

Defendant's appeal from the trial court's denial without prejudice of its motion to transfer the case from one division to another in a county with two divisions of court is dismissed as an appeal from an interlocutory order, because: (1) the subject of the present appeal is the proper place of trial within a county under N.C.G.S. § 7A-4(c), and a trial court's denial of a motion to transfer proceedings to a proper place of trial within a county does not affect a substantial right when venue is proper in the county in which the action was filed; and (2) other than its argument that a venue ruling is immediately appealable, defendant has made no argument that the denial of its motion affected a substantial right.

Appeal by defendant from order entered 14 June 2004 by Judge Anderson Cromer in Guilford County Superior Court. Heard in the Court of Appeals 15 June 2005.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff appellee.

Sharpless & Stavola, P.A., by Joseph P. Booth, III, for defendant appellant.

McCULLOUGH, Judge.

On 6 February 2004, plaintiff filed an action against defendant in Guilford County Superior Court. There are two divisions of the Guilford County Superior Court: the Greensboro Division and the High Point Division. Plaintiff filed her action in the Greensboro Division, and defendant filed a motion to transfer the case to the High Point Division. The trial court denied the motion without prejudice. The court specifically noted that defendant could renew the motion on the basis of justice and the convenience of witnesses pursuant to N.C. Gen. Stat. § 1-83(2) (2003) after the filing of its answer. From the denial of its motion, defendant now appeals. We conclude that the appeal must be dismissed as interlocutory.

An order "is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2003). A final judgment "disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court[,]" while an interlocutory order "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 231 N.C. 744, 59 S.E.2d 429 (1950).

In general, there is no right to appeal from an interlocutory order. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2003); *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). There are two significant exceptions to this rule. First, an interlocutory order is immediately appealable "when the trial court enters 'a final judgment as to one or more but fewer than all of the claims or parties' and the trial court certifies in the judgment that there is no just reason to delay the appeal." *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253 (quoting Rule 54(b)). Second, an interlocutory order may be immediately appealed if "the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Southern Uniform Rentals v. Iowa Nat'l Mutual Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988). Whether an interlocutory appeal affects a substantial right is determined on a case-by-case basis. *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 231, *appeal dismissed, disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). This Court has previously held that:

> A substantial right is "one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." The right to immediate appeal is "reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed." Our courts have generally taken a restrictive view of the substantial right exception. The burden is on the appealing party to establish that a substantial right will be affected.

Turner v. Norfolk S. Corp., 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citations omitted). "When an appeal is interlocutory, the statement [of the grounds for review in an appellant's brief] must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4) (2005).

In the present case, defendant admits that the trial court's order is interlocutory, but insists that a substantial right is involved. Specifically, defendant contends that a venue determination is involved. It is true that the "right to venue established by statute is a substantial right," the denial of which is "immediately appealable." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). The applicable statutory right to **venue** provides that "the action must be tried in the **county** in which the plaintiffs or the defendants, or any of them, reside at its commencement . . . ." N.C. Gen. Stat. § 1-82 (2003) (emphasis added). Quite differently, the subject of the present appeal is the "**proper place of trial**" within a county. *See* N.C. Gen. Stat. § 7A-42(c) (2003) (emphasis added).

The statute which governs the "proper place of trial" within a county states that "[a]ll laws, rules, and regulations . . . in force and effect in determining the proper venue as between the superior courts of the several counties of the State shall apply for the purpose of determining the proper place of trial as between . . . divisions within [a] county . . . ." *Id.* However, the statute does not go so far as to make venue proper only in the "proper place of trial."

We are unpersuaded that a trial court's denial of a motion to transfer proceedings to a "proper place of trial" within a county necessarily affects a substantial right if venue is proper in the county in which the action was filed. Moreover, other than its argument that a venue ruling is immediately appealable, defendant has made no argu-

ment that the denial of its motion affected a substantial right. As such, we conclude that defendant's appeal is interlocutory, does not affect a substantial right, and must be dismissed.

Dismissed as interlocutory.

Judges TYSON and BRYANT concur.

APPENDIX

ORDER ADOPTING AMENDMENTS
TO THE NORTH CAROLINA
RULES OF APPELLATE PROCEDURE

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

I. Rule 3 of the North Carolina Rules of Appellate Procedure is amended as described below:

Rule 3(b) is amended to read:

(b) Special Provisions. Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and appellate rules sections noted:

(1) ~~Termination of Parental Rights, G.S. 7B-1113.~~ Juvenile matters, G.S. 7B-2602.

(2) ~~Juvenile matters, G.S. 7B-1001 or 7B-2602.~~ Appeals pursuant to G.S. 7B-1001 shall be subject to the provisions of N.C. R. App. P. 3A.

For appeals filed pursuant to these provisions and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced by the use of initials only in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). Appeals filed pursuant to these provisions shall specifically comply, if applicable, with Rules 9(b), 9(c), 26(g), 28(d), 28(k), 30, 37, 41 and Appendix B.

II. Rule 3A is added to the North Carolina Rules of Appellate Procedure as described below:

Rule 3A is added to read:

Rule 3A. APPEAL IN QUALIFYING JUVENILE CASES—HOW AND WHEN TAKEN, SPECIAL RULES

(a) Filing the Notice of Appeal. Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal

with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the special provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) Special Provisions. For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(1) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) **Transcripts.** Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcriptionist to the case. Within thirty-five days from the date of the assignment, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the office of the Clerk of the Court of Appeals and provide copies to the respective parties to the appeal at the addresses provided. Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) **Record on Appeal.** Within ~~twenty~~ ten days after ~~the notice of appeal has been filed~~ receipt of the transcript, the

appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. ~~, except there shall be no requirement to set out references to the transcript under the assignments of error.~~ Trial counsel for the appealing party~~, together with~~ shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, ~~shall have joint responsibility for~~ in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties: (1) a notice of approval of the proposed record; (2) specific objections or amendments to the proposed record on appeal, or (3) a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within ~~thirty~~ twenty days after ~~notice of appeal has been filed,~~ receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after ~~notice of appeal has been filed,~~ receipt of the transcript, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement: (1) the appellant shall file his or her proposed record on appeal, and (2) an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals as provided herein.

(3) **Briefs.** Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or

her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(c) Calendaring priority. Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 1st day of ~~March~~ May, 2006, and shall apply to cases appealed on or after that date.

Adopted by the Court in Conference this the ~~3rd~~ ~~26th~~ ~~28th~~ 27th day of ~~November, 2005~~ ~~January~~ ~~February,~~ April, 2006. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

_____

~~Lake~~ Parker, C.J.
For the Court

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WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

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Effective assistance of counsel—failure to stipulate to chain of custody—Defendant did not receive ineffective assistance of counsel in a statutory rape case by his counsel's failure to stipulate to the chain of custody of the products of conception in order to avoid the necessity of introducing them into evidence at trial. **State v. Watts, 58.**

Denial of unanimous verdict—indecent liberties—Defendant was denied his right to a unanimous verdict with respect to convictions on seven counts of indecent liberties with a minor where defendant was charged with ten counts of taking indecent liberties with a minor; more incidents of indecent liberties were presented at trial than the number charged; evidence presented on charges of first-degree sexual offense could also support convictions for indecent liberties; the trial court gave the pattern jury instruction for indecent liberties with no explanation as to which acts by defendant could support a conviction for indecent liberties; and the jury received no guidance from the trial court and no indication from the State as to which offenses were to be considered for which verdict sheets. **State v. Bates, 27.**

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Rape and indecent liberties—not double jeopardy—Defendant was not subjected to double jeopardy by sentences for first-degree rape and indecent liberties. **State v. Jones, 308.**

Referencing defendant's invocation of right to counsel—harmless error—Assuming arguendo that the trial court erred in a trafficking in opium by possessing twenty-eight grams or more and possessing drug paraphernalia case by allowing an officer to testify regarding defendant's request for an attorney, the error was harmless beyond a reasonable doubt where the State made no reference to defendant's invocation of his right to counsel in closing arguments, defendant was not cross-examined about invoking his rights, and these was overwhelming evidence of defendant's guilt. **State v. Rashidi, 628.**

EVIDENCE—Continued

SEARCH AND SEIZURE—Continued

Traffic stop—motion to suppress—probable cause—The trial court did not err in a possession of a controlled substance case by denying defendant's motion to suppress the evidence obtained from his vehicle during the search even though defendant contends the officer lacked reasonable and articulable suspicion, because: (1) the probable cause standard applies when the officer observed defendant's vehicle twice cross the center line of the highway in violation of N.C.G.S. § 20-146(a); (2) an officer's subjective motivation for stopping a vehicle is irrelevant as to whether there are other objective criteria justifying the stop; and (3) the fact that the officer did not issue defendant a ticket was irrelevant since the officer's objective observation of defendant's vehicle twice crossing the center line provided the officer with probable cause for the stop regardless of his subjective motivation. **State v. Baublitz, 801.**

Traffic stop—motion to suppress—scope of consent—The trial court did not err in a possession of a controlled substance case by denying defendant's motion to suppress the evidence obtained from his vehicle during the search even though defendant contends the search of his vehicle that yielded the cocaine exceeded the scope of his consent to a search. **State v. Baublitz, 801.**

SENTENCING

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Aggravating factors—allegation not required—It was not necessary to allege aggravating factors for assault and other crimes in the indictment. **State v. Everette, 237.**

Aggravating factors—*Blakely* error—jury finding required—The trial court erred in a felony breaking and entering case by sentencing defendant in the aggravated range without submitting to the jury the aggravating factor that the trial court found, and the case is remanded for resentencing. **State v. Poore, 839.**

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Aggravating factors—*Blakely* error—jury finding required—The trial court erred in a second-degree sexual offense case by sentencing defendant in the aggravated range without submitting to the jury the aggravating factor found by the trial court, and the case is remanded for resentencing. **State v. Dorton, 759.**

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Aggravating factors—*Blakely* error—jury finding required—The trial court erred by finding aggravating factors and sentencing defendant in the aggravating range for two counts of assault with a deadly weapon inflicting serious injury, because: (1) the aggravating factors that defendant committed the offense

SENTENCING—Continued

SENTENCING—Continued

SENTENCING—Continued

SEXUAL OFFENSES

STATUTES OF LIMITATION AND REPOSE—Continued

origination fee was "fully earned" by the mortgage broker on the closing date, when it was paid in full. **Shepard v. Ocwen Fed. Bank, FSB, 475.**

Usury and unfair trade practices—accrual at closing—In an action decided on other grounds, the trial court did not err by dismissing claims for usury and unfair trade practices arising from a mortgage for expiration of the statute of limitations. The statute of limitations for usury is two years and for unfair trade practices four years, with accrual on closing date. Plaintiffs' complaint was filed over four years from the closing date. **Skinner v. Preferred Credit, 407.**

TAXATION

Refund of sales and use tax—lumber, steel, and materials purchased out of state—A de novo review revealed that the trial court did not err by denying petitioner's request under N.C.G.S. § 105-164.6 for refunds of use tax paid plus interest for lumber, steel, and other materials purchased out of state and assembled in Pennsylvania and Ohio into building components which were incorporated into prefabricated buildings constructed by petitioner in North Carolina. **Morton Bldgs., Inc. v. Tolson, 119.**

TERMINATION OF PARENTAL RIGHTS

Delay in entering order—failure to show prejudice—The trial court did not commit prejudicial error by failing to enter the order terminating respondent mother's parental rights within thirty days as required by N.C.G.S. § 7B-1110(a). **In re J.B., 1.**

Delay in entering order—failure to show prejudice—Failure of the trial court to enter the order terminating respondents' parental rights within thirty days after the hearing was completed as required by N.C.G.S. §§ 7B-1109(e) and 7B-1110(a) was not per se prejudicial, and respondents failed to show they were prejudiced by the thirty-nine day delay in entry of the order. **In re D.R., 300.**

Disposition hearing—separate hearing not required—The trial court did not improperly fail to conduct a dispositional hearing prior to concluding that respondent mother's parental rights should be terminated because there is no requirement that adjudicatory and dispositional stages be conducted in two separate hearings and respondent was given ample opportunity to present evidence and argument regarding disposition. **In re J.B., 1.**

Exclusion of parent from courtroom during child's testimony—*Eldridge* factors—The trial court did not err in a termination of parental rights case by excluding respondent mother from the courtroom during her minor son's testimony without providing specific findings and conclusions regarding the minimum requirements of fundamental fairness and its relation to the trial court's decision to exclude respondent from the courtroom where respondent was placed in an adjacent room with a television monitor and had telephonic access to her attorneys. **In re J.B., 1.**

Motion to continue to gather evidence—recent incarceration—The trial court did not abuse its discretion in a termination of parental rights case by denying respondent mother's third motion to continue the trial based on respondent's recent incarceration in Oregon prior to the hearing and alleged insufficient time

WORKERS' COMPENSATION—Continued

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